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Fax

To:	Jerry Greenberg	**From:**	Jim Pickerell
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Phone:		**Pages:**	5
Re:		**CC:**	

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

Jerry:

The attached story went up on-line at my web site, www.pickphoto.com/sso today. The printed newsletter won't be out until July.

Thanks for your help.

Story 142

GETTING "FAIR" COMPENSATION FROM PUBLISHERS

MAY 20, 1998

If you sell pictures to a magazine or newspaper you should expect that they will be published on-line as well as in the printed version of the publication. Most publications will not tell you they intend to do this -- unless you ask specifically. And, the publications expect to get this additional distribution at no additional cost. Most publications are claiming that the "Tasini" (Jonathan Tasini et al vs The New York Times et al) decision last year gives them the right to make such extra uses without any additional compensation.

In most cases, your images will stay on-line in an archive indefinitely, not just for the week, or month, that the printed version of the publication is in circulation. This archive may also be put on CD-ROM discs and may be a total re-edit of the way it appeared in the original printed version. While not all publications are to the point of putting everything they publish on-line, YET, most are moving rapidly in this direction.

Relying on copyright law to protect you is simply not good enough, anymore. If you want fair compensation you must pay careful attention to contracts and make sure there is a written agreement for all transactions. You can get additional compensation for electronic uses, but in order to do this you must be very specific in the written terms you send with every delivery of your images to any publication. Also, be prepared to track uses and fight for the additional compensation.

Paula Borchardt learned recently that even the New York Times (winner in the Tasini vs. The New York Times case) will pay for on-line use when your contract with them is clear and in writing. Paula is a lifestyle and location shooter working in the Southwest. In February, she was asked to submit images for a NYT Sunday section article. One picture was used in the printed newspaper, and also used on The NYT web site.

Paula's delivery memo to the Times had specificed that the images were being offered for the print version "only" and that electronic/digital, advertising, and reprint rights were only available for an additional fee.

After the picture was used Paula sent the editor she was working with an invoice for both the print and electronic use. Her fee for electronic uses was 50% of her normal fee for print use. The editor called and informed her that The NYT "does not pay for electronic use," and said they consider the print use and the electronic use as "one use."

Paula replied, "Well, I CHARGE for electronic use." She pointed out that she had never granted rights to use her image electronically, and that the NYT was in copyright violation until they pay for the electronic usage.

The NYT editor claimed that she could only pay for the print usage, and that Paula must now mail a separate bill to the person in charge of the web site, to get paid for the electronic use.

As an interesting side note, Paula contacted two other photographers who also had images in the same printed article. The images of one had been returned, but there was no indication that anything had been used. All his images were in plastic mounts and they appeared to have been unopened. Neither photographer was aware of the possibility that their images would be used electronically.

Now The "Fun" Of Collecting

A couple weeks later Paula received two phone calls from the web site department at the Times:

Phone Call #1: She was told by the person at NYT web site that The Times' policy is that once they use a photo for one section (like the print edition) it is available for all other sections (like the web site). She pointed out that this was not HER policy per her Delivery Memo terms. The web site person also said they try not to

use stock for the on-line version of NYT, just assignment.

The web site person said Paula would now have to take the matter (of getting paid for electronic use) up with the NYT legal department. Paula informed the web site person that she would be passing that persons name, the original editor's name, and the NYT's lawyer's name on to her "own" lawyer, as this is a case of copyright infringement, a FEDERAL offense, and she thought it best the lawyers handle it from this point. (By the way, if anyone is wondering, the image in question had been registered with the US copyright office).

The web site person had not seen her Delivery Memo terms which stated print use only, and asked that she fax over a copy of the Memo for them to review. Paula emphasized a few times that this is a serious matter of copyright infringement and she would recommend they just end the matter now by paying for the web use rather than getting lawyers involved.

The web site person also mentioned that NYT would not be interested in working with Paula in the future after this situation. [This threat probably works very well for the Times when they are dealing with many stock agencies because the stock agency may be afraid of alienating a potenial large customer over one sale. Photographers, whose stock agency has made sales for them to the New York Times, or any publication, can easily check to see if this is your agency's practice. First ask your agency if the fee you were paid included web use rights. Then check the publication's web site and see if the picture is there.] In this case, Paula replied that she had no interest in ever working with NYT again, not only because of the problem with payment for electronic use, but because of problems in getting her images returned (see insert at the bottom of this story.)

Phone Call #2 (20 minutes later): The web site person looked at her Delivery Memo and called to inform her that the invoice was being put through to Accounts Payable and that she should be receiving a check for the electronic use soon.

In May, two months after the original use, Paula finally received payment for the electronic/web site use of her image.

Greenberg vs. Audubon Magazine

Just so you don't think Paula's is an isolated situation that this only happens with major newspapers, let me tell you about Jerry Greenberg's recent experience with Audubon Magazine.

In September 1996 Jerry Greenberg contacted Audubon Magazine with a set of photos on the Florida mangroves. He had been shooting this subject for several years with the hopes of producing a book. Audubon liked the images and made plans to publish a story entitled "The Magic of the Mangroves" in the March/April 1997 issue of the magazine.

Jerry negotiated a contract with Audubon that specified that the use was to be "one-time print rights only", that no other use was allowed, that Audubon would pay a base fee against space for this use, and that all pictures would be copyrighted in his and the name of his son, Michael.

When it came time to go to press Audubon called and said that they would not copyright the pictures in the Greenberg's names because it "was not their policy." They tried to agrue that Greenberg would be covered under their collective works copyright of the magazine.

Jerry insisted that either they copyright the pictures in his and Michael's names, or they not publish the pictures. He was prepared to return the advance. Audubon backed down and listed copyright credit to the Greenbergs. As soon as the publication was released Jerry sent copies to the copyright office and registered the copyright.

Later in 1997 Jerry discovered that for $11.00 he could buy an electronic copy of the article through UMI, a reprint service in Michigan. When he recevied the UMI printout it included B&W reproductions of each of his photographs and a label on the printout that said, "reproduced with permission of the copyright owner." Of course, Jerry had given no such permission, and in the normal course of things would receive no portion of

the $11.00 paid for this copy. Audubon, however, would receive payment for this use.

Audubon claims that their "collective works" copyright gives them the right to make this use, irregardless of the fact that they signed a contract agreeing to the opposite. Their lawyer cites last year's Tasini decision as justification.

Jerry has offered to settle the dispute. He asked, first, that they should remove his photographs from the UMI reprint service and any other electronic databases in which they might have been placed, and that they pay him an additional 100% of the original fee as compensation for any uses already made by the reprint service.

Audubon made a minimal and totally unacceptable counter offer that Jerry rejected. It appears that Audubon would rather fight than settle. Maybe their lawyer should talk to the New York Times lawyer and find out why the Times believed they needed to pay Paula Borchardt in spite of the Tasini decision.

Jerry Greenberg has turned this matter over to his lawyer.

Lessons Learned

- Ask every editor, up front, if there is any likelihood that the article will be used on-line.
- When someone tells you that you are covered under their "collective works copyright," what they are really saying is, "we want to rip you off." You may be covered if someone else attempts to use the image, but given the interpretation many publishers are putting on the Tasini decision they can do anything they want with your pictures under their "collective works copyright". Be sure to register your images.
- Have a rock solid delivery memo. Be as specific as possible about the use in the delivery memo and invoice. Use ASMP etc. publications for reference on what to include. Do not worry about your terms and conditions scaring off clients. It will just make you look more professional.
- Do not back down when you really feel you are in the right. Of course there may be some negotiating with the price sometimes, but remember "you" are the seller and they came to you because you have something (images) they need.
- Be professional but firm.
- Invoke the "L" word (lawyer), if necessary.

If you know your pictures are going to be used in a certain issue of a newspaper it is a good idea to check the newspaper's web site that day. Not all the images they put up initially will be kept on the site for more than a few days, or a week.

The Other Problem - Getting Your Images Returned

There was also a problem with the way the New York Times handled the return of Paula's images. During the initial conversation Paula asked when they were going to return her images. The editor replied that the images were sent back to her 2 weeks earlier via registered mail/return receipt. Paula says, "I almost blew a gasket, because my Delivery Memo specifically says (in bold, underlined, italicized print) that all images "must" be returned by Federal Express."

The editor did not have an answer, but promised to get more information and get back to her. A few days later a second employee from NYT called Paula and said that according to his records, her images were shipped back via Registered Mail/Return Receipt.

One month after The NYT employees first indicated the images had been returned by U.S. mail, Paula did receive her images, by -- surprise -- priority overnight Federal Express!!!!!!!! Evidently the images were NOT