

# COPYRIGHT

for stock photographers

The advantage of registering an image...

## A SMALL OVERSIGHT, A LARGE LOSS

In last month's column I wrote that registration is required to recover attorney's fees and statutory damages. Without registration, actual damages or profit must be proven. Actual damages are often the fair market value of a license of the image; and profits, especially if the work was used in advertising, are difficult to prove.

A case that illustrates this is Jack Mackie v. Connie Rieser and Seattle Symphony Orchestra Public Benefit Corporation, 296 F.3d 909 (9th Circuit, 2002). Mackie created a figurative work entitled "The Tango." The Seattle Symphony used an unauthorized scanned image of "The Tango" in a photomontage as part of a 24-page promotional brochure for its 1996-1997 season, that was mailed to 150,000 individuals.

Mackie sued for infringement. The work had not been registered, so Mackie sought actual damages, including a hypothetical royalty payment. The Court ruled that Mackie was only entitled to \$1,000 in damages - representing "what a willing buyer would have been reasonably required to pay a willing seller for [the] work" — and disregarded Mackie's allegation that he would have licensed the work pre-infringement for \$85,000.

The Court also rejected Mackie's claim for the "in-

direct profits" that the Symphony generated from subscription sales arising from its use of "The Tango" in the brochure.

If "The Tango" has been used "directly" in a product sold by the Symphony — a t-shirt, say — Mackie could have recovered damages by establishing the Symphony's "direct profits" from gross sales of the product. The defendants then could show what portion of the gross was not attributable to the infringing work.

However, since "The Tango" was used in a promotional brochure to sell subscriptions, Mackie was required to establish a sufficient causal link between the use of "The Tango," and the Symphony's "indirect profits" in its subscription sales. Here, there were so many reasons that an individual might subscribe having nothing to do with the infringing work—the Symphony's reputation, the conductor, the musicians, the concert dates, other components of the brochure — that the Court found that there was no sufficient causal link between the use of the image and the Symphony's sales.

This case is an excellent example of the importance of registration. Even though there was a clear copyright infringement, Mackie received only a \$1,000 award, which made a small dent in the tens of thousands of dollars in legal fees that were likely expended in the litigation.

Copyright © 2003. Stephen Filler is an attorney in New York City ([www.nylawline.com](http://www.nylawline.com)) whose practice focuses on intellectual property, copyright, trademark, technology, media, contracts, corporate and photography law. His office is located at 400 Madison Avenue, Suite 14D, New York, NY 10017, 212-204-3508, [sfiller@nylawline.com](mailto:sfiller@nylawline.com). This column is to be used for informational purposes only; it is not to be considered legal advice. For legal advice, please consult an attorney.

## Find It Fast?

Travel photographers, when they reach a destination new-to-them, even those photographers from the National Geographic, are fond of getting inspired at a local tourist shop or drug store that features picture post cards from the locale. Why? Because it saves them time figuring out lighting and shooting angles.

If you plan on photographing in a new location, you can often get new ideas and angles by using an image search engine. A popular one is Google.com.

Not only can you search for typical photos and drawings of the area you will be visiting, but gain valuable background information as well.

The Google Toolbar increases your ability to find information from anywhere on the web and takes only seconds. This means you can quickly use the popular Google search system from any website location.

For example, if you are a PhotoSourceBANK or FOLIO member, you can type in a highly specific photo description that is on your psBANK page to see if you get a hit. One way to insure that photobuyers will find you in a search is to include your

PhotoSourceBANK or FOLIO address on your own webpage. Search engines will pick up this link and include your psBANK and psFOLIO listings in their database - a sure way of getting your photography recognized by researchers.

### LIMITING THE SEARCH

You can limit your search to either the entire web, or just the site you are visiting. Photobuyers find this valuable when they want to limit their search to only persons who are the source of a highly specific picture. The Word Find feature will find your search term(s) wherever they appear on a page. If you have 3,000 words up on your site, the researcher will find that particular word in seconds.

You can also find the page rank of the current page you're visiting, find out who owns the website, how long they've had it up, and other pages similar to one you're currently visiting. You can install this toolbar yourself onto your browser. One drawback is that it's only available for Internet Explorer/Windows users.

Google is considering designing the system for others browsers in the future. <<http://toolbar.google.com>> .-RE

## Business NotePad

"DON'T COME IN HERE, processing operation going on." Those negative greetings of the wet-film darkroom system will soon be disappearing. Taking its place is the digital approach to photography pioneered by major magazines and newspapers. The legacy of expensive, dark, smelly chemical processing of the last century for the wide open, bright and exciting digital era of photography is making itself known at events such as the Super Bowl. Not a single roll of film was processed in the photo work area. Cable lines (hardwire) and satellite antennas (wireless) were the technology replacing the usual mobile darkrooms and the multi-member wet-film processing team. The digital replacement workflow was picture editors, imaging techs, and a network of PC laptops to digest and clear the PC cards, who then edited the pictures provided by a team of a dozen or so sports photographers. The result: A wide selection of images and speedier publication of their work. -RE

**PERMANENT E-MAIL ADDRESS SOLUTION.** If you find that your ISP changes its business name on you, or worse, goes out of business, here's a solution. If you are a college graduate, your school's alumni office may have a forwarding feature available to you. It typically consists of a suffix with the school's name, that you can use as your official e-mail address. Examples of schools offering this service: @alumni.MIT.edu; @alumni.Tufts.edu; @alumni.UCON.edu. No matter whether you change or lose your home or office e-mail address, your official alumni (edu) address remains permanent and forwards all your e-mail to whatever personal e-mail address you notify them to use. It's a lot easier sending one notice out, than hundreds or thousands. -RE The service is free, but you can expect a pledge request from your college at the annual giving time.

**PREMIER 2003 WORLD PRESS PHOTO EXHIBITION IN AMSTERDAM.** April 28 - June 23, 2003. The exhibition shows the results of the World Press Photo contest, the largest international competition in the field of photojournalism, which will be held for the 46th time. The exhibition will visit more than 80 cities. Contact: World Press Photo, Jacob Obrechtstraat 26, 1071 KM Amsterdam, The Netherlands. Phone: +31 (20) 676 6096. E-mail: [office@worldpressphoto.nl](mailto:office@worldpressphoto.nl) . Web: <http://www.worldpressphoto.nl>