

A Proposal for Independent Creators



Every so often civilization seems to work itself into a corner from which further progress is virtually impossible along the lines then apparent; yet if new ideas are to have a chance the old systems must be so severely shaken that they lose their dominance.

—Chester G. Starr, *A History of the Ancient World*

Introduction

A Proposal for Independent Creators is a white paper that argues for the existence of a collective licensing institution that is controlled by photographers. It is a researched academic look at a course of action photographers could choose to regain control of the value of their copyrights. It contains an explanation of the advantages of a photographer-owned system to collectively license their copyrights through the formation of a cooperative enterprise.

Since some early readers of this paper took it for a business plan or an operational model for such an institution, we offer this word of caution: *this is not a business plan, in whole or in part, for a licensing institution. It is not a description of the details of the operational practices and policies of such an institution, or an attempt to set those practices and policies.*

The paper *is* an explanation of the need for such an institution as well as a description of some general principles that the authors believe should guide it if it is to succeed. It recommends an institutional solution to an old problem: photographers' lack of power in the marketplace. At its heart, it is a proposal to create market force.

The final section of this paper is called *The Beginning*. That accurately expresses where we are in the creation of such an institution. The operational details are not described here because they do not yet exist. An operational plan, let alone the construction of licensing systems, will require more resources than ASMP has.

For this reason, ASMP cannot build or control such an institution or its licensing systems. What ASMP can and does offer are its help and support. It can offer suggestions based on nearly six decades of its successes and failures. It can work to gather photographer support for such an institution and it can help to find organizational and financial resources for startup. And it can pass along comments and suggestions to those who actually build the licensing systems. ASMP has already made progress in each of these steps.

Ultimately, the success of this venture will depend on photographers' willingness to work together to advance their common interests.

Executive Summary

At a time when their work has its greatest potential in history for widespread distribution, publications photographers are struggling to maintain both profitability and independence. To maintain the ability to create independently, individual photographers must find the economic power they need to protect their work and benefit fairly from it. An analysis of the efforts that have been made in the past to correct the problem reveals this: collective action succeeds, individual action fails. A means of building collective economic clout for independent creators is proposed here.

When ASMP lost the right to set rates and working conditions for its members in 1976, it adopted methods it hoped might substitute for collective action. It worked to preserve economic clout among its members by teaching business practices, providing information about business trends, and advocating for independent creators' rights in legislatures and the courts. It encouraged photographers to act individually in their own best interests and in the best interest of the profession.

Those methods have failed. The lesson learned from their failure is this: there is no substitute for collective action. Education, information, and advocacy do not create economic clout or protection for independent creators. Urging independent creators to act alone does not strengthen their position in the marketplace or improve the value of their work. It weakens them and leaves them exposed to abuses from clients and from each other.

Collective action can be legally established and permanently sustained through the formation of a creators' cooperative. The cooperative is a time-tested organizational model. They have been founded in commercial marketplaces for over a hundred and fifty years. They allow producers to act collectively while remaining independent. In the past, when independent producers have felt their interests being outweighed by buyers or middlemen, they have created cooperatives to balance the scales and take control of their economic future. Thousands and thousands of individuals in hundreds of commercial communities have used cooperatives to correct the same sort of inequities that independent artists and authors have been hurt by for so long.

A cooperative can be formed when independent producers with similar interests are willing to give their individual control of pricing and other transactional terms to a central organization which they own and control. The cooperative sets prices and terms for all of its member-owners. It enforces those prices and terms. In this way, it creates a market force which no individual could create or sustain alone. The cooperative uses its clout in the market to get higher prices for its members' products. All of these same advantages are available to independent artists and authors if they are willing to place their economic fortunes into each other's hands through a creators' cooperative.

A creators' cooperative would benefit its members by acting as the centralized licensing organization for the use of their copyrighted works. It would standardize and, to the degree possible, automate use, pricing, licensing, and fee collection, and it would distribute fees back to copyright owners. It would enforce their copyrights and pursue infringements. The cooperative would be owned by its members and controlled through elections. It would be open to all independent creators and accessible to all users. It would equalize the balance of power between independent creators and those who use their work.

Where We Are

- Carol is a college student studying photography. She was paid \$50 when one of her photographs was published by a magazine with a weekly circulation of 4.5 million copies.
- Cynthia is an experienced illustrator. The conglomerate that bought out a long-standing client of hers told her she'll get no more work until she signs over the copyright to any new work and all of the work she created in the past.
- Joel is an assignment photographer. An estimate he submitted was returned to him with a note from the client saying they hired another photographer for 30% less than Joel's price with no restriction on their use of the photographs.
- Markus writes for travel magazines. The invoices for the last three assignments he did and over \$4,000 in expenses are being held up until the managing editors decide whether or not to run the articles.
- Gerry is a stock photographer. His stock agency hired a staff shooter to imitate his best selling images. They are substituting the knock-offs with photo-buyers and keeping his share of sales.

Carol, Cynthia, Joel, Markus, and Gerry's stories aren't fictitious, exaggerated, or unusual. They're true-to-life and all too familiar to most independent artists and authors in the world today.

Independent creators are placed under enormous pressure when their work is reproduced, published, displayed, distributed, commissioned, or otherwise pulled across the boundary between art and commerce. The pressure comes from forces as basic as stockholder influence on corporate culture and as complex as technology which allows effortless image capture. The pressure comes from independent creators competing against each other too. It affects everyone who creates original work and wants to profit when it is used by others. Novice or veteran, the individual creator is always just that, an individual. They begin and end with that disadvantage in every dealing they have about their work. Some are paid well but some are hardly paid at all. Some hold on to their rights but some give them up. Some pursue infringements, some let them go. Some hold onto their pride, some swallow it. Each makes a private decision about what's best for them in every instance—that's all they can do.

The one advantage that individual creators do have is the one they do not use. Money, technology, and power do not create. Individuals do. No corporation ever made a photograph, wrote a story, or created a work of art. Creating is the exclusive province of individuals. The world needs what independent artists and authors have. It can't be gotten elsewhere.

The unique value of an individual's work becomes an advantage in the marketplace only when it is bundled together with the value of the work of many, many others. Only then can it be used to alleviate the pressures on them. Only then can it be harnessed to build economic clout for them, protect their copyrights, and bring them full financial rewards. When independent creators give up a piece of their independence to do all of those things they will have power.

Only one segment of independent creators, the song writers and music composers, has done that, and they did it long ago. They gave up their independence, where their copyrights are concerned, and bundled the value of their work together to build an enormous force in the marketplace for music. Today they have clout, their work is protected, and they benefit from it fairly when it is used. The other segments—photographers, illustrators, fine artists, and writers—have allowed themselves to be deprived of economic power. How and why they missed out on their rightful share of power is a complicated story. It is spun from threads connected to the fields of law and economics, art and technology, psychology and commerce. At the heart of the story is the epic struggle between the demands of society and the needs of the individual.

This paper attempts to simplify that complex history and draw lessons from it. It also proposes a means to unify the value of individual creators' work, build economic clout, protect their copyrights, establish usage-based licensing, and collect fees for the use of their work for them. In the end you'll see that we're only just beginning to get to the part of the story in which independent creators learn to cooperate, become powerful, and thrive.

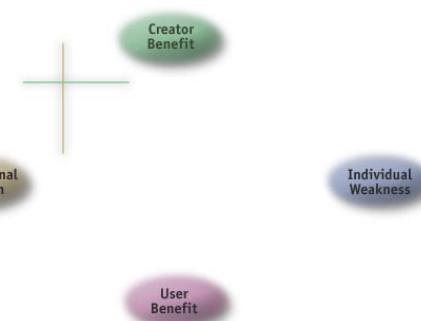
The Impossible Jigsaw Puzzle

Take a look at this jigsaw puzzle and see if it doesn't remind you of something.

The picture on the box is beautiful—a lovely, peaceful, and prosperous scene, not unlike most jigsaw puzzle pictures. But open the box, spread the pieces out on the table, and you'll see that this is no ordinary jigsaw puzzle. As hard as you try, you won't find a single piece that will link with any other piece. Every one is cut in a different way. Aren't jigsaw puzzle pieces supposed to interlock solidly to the others and present the picture complete and unbroken? That beautiful scene is never going to come together unless some dramatic changes are made. The pieces must be standardized before they'll fit together into an intelligible whole.

The jigsaw puzzle is a metaphor. It highlights one fundamental aspect of the problem we independent creators face: we have no standards. Like the pieces of the broken puzzle, each of us has taken on a highly individualized shape in the way in which we relate to our customers for the commercialization of our work. We have bastardized our business behavior to such a degree that any resemblance to standards has been lost. And we are the unwitting victims of the chaos we've created. It has left us powerless and cut off from each other. It has made us suspicious—even fearful—of each other. It has de-legitimized us as professionals. Our clients use our weakness and isolation against us and the picture for the vast majority of independent creators gets more chaotic every day.

Work-for-hire and royalty-free are two standards that challenge the basis of what it means to be an independent creator. The standards we're looking for allow independent creators to prosper by backing them with the strength of an institution.



Standards, Connections, and Power

Nothing in this world hangs together without standards and the connections they make possible. Begin at the most basic level, the atomic, and move all the way up to the most complex, our modern lives, and you'll see that standards are what allow everything and everyone to work and work together.

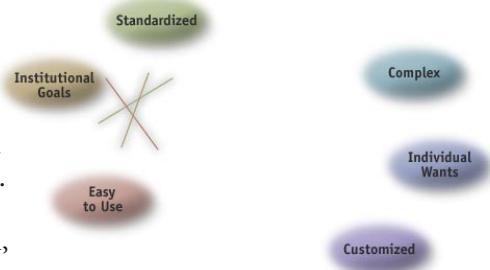
In a shareholders speech recently, Lou Gerstner, the president of IBM, had this to say about standards:

The second aspect of infrastructure that's really important is standards. I'm not going to say very much about standards because if you understand "end to end" and what it really means, the need for standards-based computing is very easy to understand. The infrastructure must be open, and it must be based on cross-industry standards so you can connect to those millions of people and businesses wherever they are and connect to those billions of devices whatever they are.

Standards allow a collection of parts to be connected together to form a functional whole. Most standards operate unnoticed in the background. But in Mr. Gerstner's world, they are so important that he simply assumes everyone knows how essential they are. When they break down, things stop working. For instance, when two competing modem manufacturers jumped the gun on common standards for 56k modems in the mid-1990's, things fell apart fast. Millions of computers began having trouble talking to each other. When a set of communication protocols for fast modems was finally introduced in 1998, things got worse: the new protocols weren't compatible with the two earlier protocols. The computing public, their internet providers, and the modem manufacturers are still suffering from the consequences of a lapse in standards that occurred behind the scenes four years ago.

When individuals create and use standards great things become possible. When they are formalized they become a source of power. Mr. Gerstner knows that without the kind of institutionalized standards that straddle competitive lines and make connections "end to end," his little company would be out of business. On the other end of the scale, the weakest classes of individuals in the world today are those who have no institutions to unite them and enforce their rights. Their prospects for social, civil, and economic advancement are nil. Independent creators are such a class.

If each of us is willing to surrender some of our independence, adopt standards, and accept solid, interlocking connections to each other in the marketplace, we can have economic clout, protection for our work, economic rewards, and more.



Acceptance is the difference between a good idea and a standard. Along with the other reasons for setting a standard, ease of use and simplicity go a long way to encourage acceptance.

How We Got Here

A Time When All the Pieces Fit Together

In 1973, the American Society of Magazine Photographers (ASMP) published a forty-page booklet which gave the competent publications photographer of the day the means to thrive. It was the culmination of almost thirty years of effort by ASMP to improve and standardize working conditions for photographers. ASMP's efforts succeeded because it was able to focus the efforts of a small, elite group of photographers who were all working for the same clients in New York in the late forties. Those photographers saw that they were being abused by their clients because they had no cohesiveness or standards. They formed ASMP to institutionalize prices and working conditions standards, and protect photographers from their clients and each other.

The forty-page booklet proscribed all aspects of assignment and reuse pricing. It gave straightforward definitions for every type of commercial photography (specified use) and detailed the fees that were associated with each type of work and client (determined fee). And it provided the invoicing forms and contractual terms to accompany each situation a photographer might encounter (to license, bill, and record the transaction). It did all this in fewer pages than a present-day camera manual. Its purpose was *not* to educate. Its purpose was to standardize and unify. And because every ASMP member used it, it gave photographers legitimacy, power, and shelter from abuse.

ASMP put the power of the entire profession behind each individual. If a client sought to bend the terms or reduce the fees, the photographer simply stood firm. He or she couldn't change the standards because they hadn't established them in the first place—ASMP and the profession had. If the client called on another, competing photographer, they found that everyone was using the same standards. The only real choice to be made was which photographer had the skill and experience to produce the images the client needed. Those photographers did not compete on price. Price had been taken care of—it had been institutionalized and no one, including ASMP, felt the need to hide, defend, justify, or apologize for the contents of that booklet or its members' use of it.

The working conditions and fees that came to such a state of standardization in the 1973 *ASMP Business Guide* predated the modern copyright law. The law under which those earlier photographers worked gave the copyrights to the photographs they created on assignment to the magazine or company that was paying the bill. But because of the standardization of fair practices which ASMP put into force, those photographers were paid again and again if their photographs were used beyond a single, agreed upon instance. *That is the benefit of collective action—with it you can get what you deserve without the need for laws. Without it, all the laws in the world won't help you.*

How Things Came Apart

This situation took a turn for the worst when ASMP's application for National Trade Guild status was refused by the National Labor Relations Board in 1976. Had it been granted, ASMP's right to set standards for working conditions and fees for its members would have become sanctioned throughout the country, and all publications photographers could have been protected and empowered economically. Had it been granted, other guilds might have been formed by other creators such

There are five steps to licensing a piece of creative work.



In 1973, the *ASMP Business Guide* did what individuals could not do—it specified uses and it determined fees. The standard estimates and invoices included in that guide provided a consistent way to issue a license and record the transaction. All that was left was to collect the fee.

as illustrators and writers. The damage which that defeat caused to the rights of independent creators cannot be overstated. We are all feeling its impact today.

Because of ASMP'S collective bargaining activities, the Federal Trade Commission conducted two intensive investigations in a ten year period. They were looking for evidence that ASMP had been violating antitrust laws. As a result, ASMP became hypersensitive to giving even a hint of price fixing and it sensitized its members to avoid this too. It was forced to take a different and very conservative approach to its mission. It substituted its direct method—publishing straightforward pricing and usage standards for photographers—with a handful of roundabout methods.

- It began to publish educational materials for photographers, and actively train photographers to be business people, and to understand business management, contract negotiation, and complex copyright issues.
- It began to act as an advocate for photographers, both by assisting photographers directly with business and legal problems, and by lobbying for photographers' rights in the courts, in the offices of legislators, and with photographers' clients, the magazines, and other large standard-setting corporations.
- It worked to collect up-to-date information about trends and technological developments that would affect the profession and feed it to photographers. Through the *Bulletin*, then *Members Only*, and now the web site and email, this activity is referred to simply as communications.

ASMP hoped that the combined effects of its efforts in these three areas would allow each individual to triangulate towards their own set of reasonable terms and fees. And it placed a lot of faith in the new copyright law when it arrived in 1978. It felt that, coupled with its new approaches, the new law would give photographers the potential to wield enormous power with their clients. No one seems to have worried that unless all those new and individually-owned copyrights were harnessed, legitimized, and enforced collectively, their value would slowly dissipate.

For years it appeared that the new approach and the new law were working. Through the late seventies and into the eighties, things were pretty good for photographers. The new copyright law appeared to give force to photographers' demands that clients pay for photography based on how it was used. And ASMP taught them that their clients should treat them with respect as legitimate business people. But what appeared to be the successful effects of ASMP's new approach were more likely the residual effects of the standards that had been so widely used prior to 1976. It is certain that, for a time anyway, photographers continued to use them. Today, photographers are still using the terminology of pricing and usage developed in the fifties and sixties, even though the standards out of which the terminology grew have slipped away entirely.

When the blush went off the economic rose in the late eighties, corporate America started getting smarter about the cost of everything it purchased, including photography, and conditions began to change

The concentration on business education produced one subtle but significant change. Prior to that time, photographers didn't think of themselves as business people. They thought of themselves as, well... photographers.

for photographers. It was subtle at first, but soon it was clear that the photo-buyers were getting instructions from their bosses that their businesses weren't interested in paying for photography if they weren't going to be its owners. Clients large and small began to probe photographers' positions and press for more control of their rights. Little by little, they began to learn what pushovers we were. Although we are many in number, we have no institutionalized collective strength. By finding and using photographers who surrendered copyrights without payment, clients put enormous pressure on everyone else who needed to work. By 1993 it was clear that conditions for these photographers were deteriorating badly.

ASMP responded by redoubling its educational efforts. It launched a series of intensive seminars that traveled to every part of the country. The seminars presented those who attended with a whole curriculum of subjects: how to manage a business, negotiate sophisticated contracts, understand the copyright law, and do marketing, promotion, and make sales. And it taught photographers that they had to teach their clients to respect their copyrights. A more subtle message was also delivered. ASMP lectures began to take on a moral tone. Photographers were admonished that they must not use unscrupulous practices to undermine their competitors because it would harm the profession. In so many words, they were told they must not compete on price. Messages of this sort came in response to widespread reports of lowballing and much worse. Photographers were not only feeling the pinch from their clients, they were feeling it from each other.

Those who attended the seminars experienced a real sense of solidarity with the other participants. They told the instructors that if every local photographer could just attend such a seminar, the destructive competition and client abuses in their area would be corrected. However, once again, what seemed to be the beneficial effects of ASMP's educational activity was only the faint echo of standards being impressed on local communities of photographers indirectly, one at a time. Within a few weeks of the seminar, those who attended admitted that all of the problems, all of the client and competitor abuses, remained unchanged. The full-blown traveling seminars were called off in 1996 because the heavy financial support they required had evaporated. A scaled-back version is now given only infrequently.

Since then, attacks on creators' rights have entered high season. ASMP's financial resources have been tapped out simply trying to hold a last line of defense in the courts. Its human resources are stretched beyond limits by high demand for its one-on-one advocacy work from photographers on the front line. The situation is so intense that ASMP's general counsel remarked recently that ASMP is now engaged in "a cold war." It is attempting to support dozens of drawn-out law suits against publishers and corporations while its members are being preyed upon by enormous corporations openly hostile to independent creators' rights, to ASMP, and to its mission.

The information which ASMP collects and provides to photographers in an effort to keep them abreast of changes in the business is hardly news of great prosperity and opportunities in a thriving profession. Instead it has come to resemble reports from a battle in which all the blood being spilled is ours.

Lessons Learned

Perhaps it would be fair to say that the approach that ASMP adopted in 1976 was a necessary improvisation or a prolonged experiment. Perhaps it would be fair to say that ASMP fought the good fight against much stronger forces and lost. However one reckons it, it is clear now that the methods on which ASMP has relied for so long have failed. Failure and success both offer valuable lessons to those who make the effort to find them. Learning the lessons in failure isn't pleasant but it is worthwhile. Here's what can be learned from the 55 years that ASMP has spent trying to get and keep economic power for photographers.

Well intended as the education, information, and advocacy methods were, their success was based on assumptions that have turned out to be flawed. ASMP assumed that photographers would be able to act on the information they were given, to take advantage of the legal rights they had won, and make business decisions that would improve the general level of the profession. It assumed that the uneducated members of the profession would see the example set by the educated and rise to meet them. It underestimated the power that a 40 page book of standards gave to independent photographers.

ASMP asked individuals to do alone what it as an organization was now powerless to do collectively. Without setting standards, it asked them to set their own individual conditions for licensing their work. It asked them to try to get their large corporate clients to adopt those conditions. It asked them to hold the line when those clients pushed back. And it asked them to stand by and watch as accommodating competitors traded their rights for the opportunity to work, while it consoled them with the assurance that those competitors will soon go out of business.

ASMP wished for an army of Davids, patted them on their backs as they stepped onto the field one at a time. It hoped that, armed with knowledge, each would find the soft spot on Goliath's skull. We've been disappointed to learn that few of us have David's aim, that Goliath is bigger than we imagined, and that when we're facing Goliath alone, our own market chaos makes us vulnerable from all sides. ASMP assumed that, like they did when it was able to set standards, photographers would stick together to protect their mutual interest. We've learned that an individual's "standards" are anything that it takes to get the next job, and that market prices and conditions are determined by the lowest common denominator, not the highest.

The lack of education, information, and legal support is not the problem. The problem is the disadvantage at which independent creators are placed when they must act alone to protect their rights. That disadvantage appears during every creator-user interaction in which the monetary value and ownership of the creator's copyrights are at stake. The inequity in the interaction and the plight of individual creators can only be corrected by taking the value and ownership issues off of the table and putting them into the hands of a powerful institution which administers them fairly and forcefully.

Now, here's what has worked:

1. *When individual creators give up some of their independence to act collectively, they succeed like nothing else.*
2. *Standards for license fees and terms are absolute necessities.*
3. *A legal means of institutionalizing and enforcing standards is essential.*

These three lessons learned from our success must be at the core of any solution to the problem, and, as you'll see, they are the essence of the proposals presented here.

One last thought about the effects of ASMP's education, information and advocacy approach. *If our educational efforts succeeded in teaching photographers anything, it was that they must act alone. That is exactly the message that must now be reversed.* Individual creators must be convinced that if they continue to act alone their rights will be lost and their professions will be deformed beyond recognition. They must also be presented with a viable alternative and convinced to adopt it. Proposing an alternative is one of the fundamental purposes of this paper and the subject of these last two sections. How we will go about convincing creators to adopt it once it's built must be the subject of much determined study and expert consultation, as well as the long-term commitment of ASMP's board of directors.

If the educational model succeeded in teaching photographers anything, it was that they must act alone. That is exactly the message that must now be reversed.

Where We Need To Go

Uprising in California

In the Spring of 1999 photographers in the San Francisco Bay area became aware that for several years a magazine had been reusing their assignment photographs without permission. Some of these photographers were outraged by this discovery. Their magazine client had been paying its photographers the same low day rate for a dozen years, adding to their anger. These photographers—later known as the SF9—decided to do something about the magazine's treatment.

The solution they arrived at was this: independently, of their own free will, one at a time before an attorney who acted as a witness, they chose a common set of fees and usage definitions that they would use in their dealings with the magazine. Without getting these fees and conditions, they stated that they would not work.

Word of their uprising spread quickly. Their action seemed to give hope, showing that individual photographers could act together for improvement in the profession. The Editorial Photographers Group, now known as EP, was created on the strength of that hope. EP is a vigorous online discussion and information forum of professional publications photographers. Although it is using a different medium and has generated its own excitement, it has settled into ASMP's approach to solving the problems of the profession—education, advocacy, and communication. Although EP now has 2500 members, all of them are still bargaining as individuals.

We have become so conditioned to the belief that standardizing prices and conditions is improper that we have failed to notice this: Nine photographers built an atomic bomb in their garage, and we continue to arm individuals with slingshots. The SF9 understood what independent creators need. They squeezed through a legal crack, and they showed photographers the daylight of possibility on the other side. The *possibility* they showed us was that collective action is still alive when, for twenty five years, we believed it was dead.

It's still illegal for individuals to conspire to fix prices, but that doesn't mean that individuals can't agree to standardized prices and conditions. The formal way to do this is through membership in a cooperative.

Cooperatives

In the 1860's, farmers were being victimized by the railroad companies who, in addition to owning the only means of transporting their goods to market, owned the storage facilities, the loading docks, and the wholesale middlemen the farmers were forced to sell their produce to. The railroad barons charged the farmers exorbitant prices for storage, handling, transportation, and access to the markets. Because they owned everything but the produce itself, they got away with paying the farmers next to nothing for their crops. The farmers rebelled against all of this by creating cooperatives which then built grain elevators and docks, and handled and sold its members' produce at prices set by the cooperatives—not by the railroads. Because cooperatives gained nearly universal acceptance among farmers, they forced the railroads to back off and mind their own business. The farmers saw that if they gave up a small portion of their independence they could get out from under the tyranny of economic weakness. By doing that, they gained economic

independence. In a real way, that is exactly what the thirteen colonies did when they formed the United States of America almost a hundred years before the first farm cooperatives were devised in the Midwest. Our *Declaration of Independence* was really this: a Declaration of *Interdependence*.

A cooperative is a form of business designed to provide economic protection and empowerment to independent producers. It does this in two ways—by ensuring that members have control of its management and ownership, and by giving its independent members a legal means to exert their collective economic clout in the market.

A cooperative is owned by members who use its services. The members share in the control of the organization, and its charter may prevent it from being sold to outside interests. Members purchase or earn shares in the cooperative, providing capital to operate the business. They elect directors, and the directors hire managers to run the day-to-day activities of the cooperative. The cooperative may deduct fees for the services it provides its members and its members may share in operating surpluses the cooperative may generate.

Independent producers establish cooperatives primarily to build the market force that allows them to get higher prices for their products and protect themselves against unreasonable demands from large wholesale buyers and distributors. Its interdependent members agree to sell their products at the price that is set by the cooperative. The effectiveness of the cooperative depends entirely on this agreement, for without the assurance that members will not undercut the cooperative's price, it would always be swamped by the same market chaos independent creators are experiencing today. And, in fact, without such agreements between the cooperative and its members, it ceases to be a legal entity.

Sunkist is the trademark of a California citrus growers' cooperative. Other well-known cooperative brands include Land-O-Lakes dairy products, Ocean Spray cranberries, and Sun-Maid raisins. If you look closely you'll find other examples, from antique dealers to law firms. Magnum Photographers and Associated Press are examples familiar to photographers, but since Magnum is closed to all but a small group of photographers, and AP was not formed to benefit its photographers, neither is the right model for what we need to do.

The licensing organizations in the music business provide protection and economic empowerment to independent creators and although they're not structured as cooperatives, the service they provide to music composers is a good model for how a creators' cooperative would best serve its members.

The Music Model

The licensing organization proposed here does for visual creators what licensing organizations in the music business do for songwriters and composers. To understand that function, it's important to understand that songwriters and composers do not handle the licensing of their own work. They learned long ago that it is impossible to place the fate of a profession in the hands of individuals and expect a mutually beneficial outcome. Music licensing is handled entirely by powerful institutions that act behind the scenes to protect creators' rights and collect their royalties. Not even the most obscure songwriter is prevented from entering the systems. As soon as one of their compositions is recorded,

And for the Support of this Declaration, with a firm Reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honour.

—Declaration of Independence, 1776

The establishment of a Photographers' Licensing Cooperative will require a firm reliance on economic interdependence and a legal commitment to the prices set by the cooperative.

performed, or used in any way, the systems take over to license their work and collect their royalties.

In 1998 the Harry Fox Agency, ASCAP, and BMI collected over \$1,600,000,000 in the United States. Because of their inter-affiliation with other licensing organizations in other countries, the total collected world-wide that year was \$6,542,000,000. In all, the three licensing agencies retained about 6% of revenues to cover the cost of operations. The balance, 94%, was returned to the copyright owners.

Here are the main functions that the three central music licensing organizations perform. They:

1. Determine the use that is going to be made by the user
2. Match the use with the standardized fee associated with it
3. Issue the license and collect the fee
4. Record the transaction
5. Distribute the fee to the copyright owner

One last thing about music: anyone can sign a contract to have their rights licensed through the Harry Fox Agency, ASCAP, or BMI without any fear of violating anti-trust laws. All they need is original music.

A Photographers' Licensing Cooperative

A licensing cooperative for independent photographers is the means by which they can legally institutionalize the licensing of their work. Its purpose is to preserve the value of their copyrights and return as much of that value as possible by licensing those copyrights at a fair price. The cooperative structure gives photographers a voice in the standards that are set and ownership of the means for applying those standards. It is not subject to corporate buyouts or the influence of stockholders' interests. From the music model it inherits the goal of operating entirely for the benefit of the creator.

Once established, a photographers' cooperative is governed by a board of directors that is appointed by its members. The board will be subject to regular elections, and is responsible for the oversight of operations, the hiring of staff, and the creation and maintenance of the standards the cooperative will adopt. Initially, this will be a monumental task. Because of the many market segments that photographers occupy and the fact that nobody has a thorough knowledge of them all, it will be useful to identify these segments and formally acknowledge them. Whether they are treated as committees, divisions, or some other form of specialty group, they are valuable sources of information and critical to the task of gaining widespread acceptance.

Here are three principles that should guide a photographers' licensing cooperative. Hard experience has made them easy to state.

1. Its primary function must be to license the use of creators' work.

A licensing cooperative does not store and deliver images, and it does not market creators' work. Although every creator needs some form of marketing and image management, whether it be do-it-yourself or a more elaborate, far-reaching approach, their decisions about how to market themselves and deliver their work to their clients should not affect the value of their copyrights. Likewise, variations in the difficulty,

Several market segments have shown the solidarity required for cooperative representation. EP has made great strides in getting editorial photographers to see the benefits of unified action. Stock photographers who have seen the potential of the MIRA/MP[®]A system show the same cohesiveness. And the *Architectural Photography Specialty Group* within ASMP has focused the attention of its members on common problems and the need for solidarity. These groups and others could set the example by stepping forward to be part of a photographers' licensing cooperative.

complexity, hazard, equipment, and skill required by different types of work and subject matter, and the varying amounts of time (days) the creator must dedicate to different assignments will always produce a wide range in the overhead and production costs associated with the creation of work in different media and specialties.

The cooperative has no interest in standardizing these sorts of unique costs, nor would creators benefit if they were. By standardizing only the value of an image's use, the licensing cooperative removes this issue from the bargaining table. It leaves matters of marketing, promotion, sales, image delivery, production costs, and days on the job for the creator to work out with his client.

An image's licensability is determined when a licensor steps forward. Both the novice and veteran deserve protection and payment when their work is used. A fair and standardized system of usage-based licensing is the one need that all independent creators have in common because it preserves and institutionalizes the value of all creators' copyrights. It provides equal benefit to everyone who creates original work. It's the tide that lifts all ships.

2. It must be open to all creators.

There are no souls to squander when the goal is to build a market force. At different times in its history ASMP has wrestled with the question of exclusivity. Other organizations have done the same. The goals of a trade association are not the same as the goals for a licensing cooperative. Armed with acute hindsight and a clear goal for the future, we will not make this mistake again. If it is going to succeed, it must be open to all creators with licensable material.

There's no doubt that some creators will find it easier to adapt to the licensing of the use of their work. Our goal is to find ways to accommodate where possible, to provide workarounds when necessary, and when all else fails, to change the rules so the game is fair.

3. It must not favor one type of creator over another, or one individual creator over another.

This is a lesson learned from a decade of defending MP@A. All creators need some form of marketing, but certain kinds of marketing benefits some creators more than others. When marketing is done, it competes with those who don't need it. They will resist being part of a service that competes against them. Likewise, those who have invested large sums on digital image delivery and management don't appreciate losing their competitive advantage to those who have not—especially if they are paying for that advantage with their membership dollars. Involvement in image management competes with those who have no need for it.

To be trusted, the cooperative must be neutral in all its activities and services. The cooperative must identify the parts of creators' businesses that provide benefit to one creator at the expense of another and remain neutral to these functions. To remain neutral it must apply its services to the common licensing needs of creators, leaving the cost of all specialized services to the creators who require them. Licensing is the one common need of all photographers. It is the one service that does not offer harmful competition. Cooperative licensing is the only service that, by definition, cannot be done alone.

Remaining neutral on other aspects of creators' business does not mean that those aspects are ignored. It means that the cooperative and



Traditional stock agencies combine image licensing with agency marketing and image management. Just as individual marketing is not the domain of a stock agency, agency marketing and image management are not the domain of cooperative licensing. These are functions that must be paid for by those who need them.

its licensing core are designed so that it does not prefer one solution to creators' needs over another. It does not insist on one marketing path, it does not insist on one image format, it does not insist on one means or supplier of image management services. In short, it acknowledges the diversity of creators and their businesses and works to build multiple open pathways of access to the licensing system.

There are other functions a creators' cooperative could offer that would benefit creators uniformly. There are also functions it must perform to exist. For now it's enough to say that the cooperative must communicate with both creators and purchasers, (the owner/members and their customers.) It must perform the tasks required for recruitment and maintenance of its members. It must, if it is to be taken seriously, take on the task of enforcing licensing violations and copyright infringements. Aside from its actual licensing function, the cooperative's most important task is to build, maintain, operate, and update the methods and standards used to perform its central function, licensing. Since these methods and standards are at the center of the licensing function, and since the licensing function is the heart of the cooperative's purpose, we've called this the Licensing Core.

The Licensing Core

The licensing core proposed here performs the basic functions of licensing—the same ones the music systems perform for musicians, the ones that the 40 page *ASMP Business Guide* performed in its day. They are the same functions that individuals have been taught they must perform in their own businesses, with this exception: they will be executed in a uniform way, and they will be enforced from a position of strength.

The Licensing Core is a function of the cooperative. It is not software or hardware, although both may be employed to help perform that function. As a function, it is defined by the needs of the cooperative and shaped by the common interests of creators. The Licensing Core inherits the principles of the cooperative—openness and neutrality. By necessity it is dynamic and malleable. It will evolve toward common interests.

Earlier in this paper Lou Gerstner, the president of IBM, was quoted as saying:

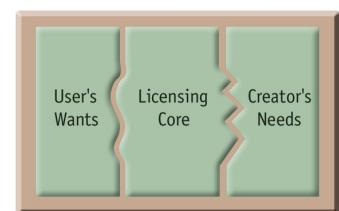
The infrastructure must be open, and it must be based on cross-industry standards so you can connect to those millions of people and businesses wherever they are and connect to those billions of devices whatever they are.

There really is no better description than this. The licensing of images will inevitably depend on tools and technology that will change over time. Compatibility with change must be built into the system. Abiding by the openness and neutrality principles will mean that the Licensing Core is technologically independent and that it will provide an open interface to all sources of licensable material.

Think of the Licensing Core as the standard adapter needed to connect buyers and sellers. It does not try to be all things to all creators. It doesn't try to be all things to a small group of creators. It tries to do one task that all creators need, and do it in a way that can't be done by any of those creators individually.



Photographers' Licensing Cooperative



Just as it *is* one of the cooperative's functions, the Licensing Core *has* several functions. They are our old friends:



Here are some notes on those functions, as they are applied to the creation of a system that embodies the principles and goals above.

1. Specify Use: gather all of the relevant information about the use that will be made of the work by the User and specify the use precisely.

The first step in the licensing process illuminates the need for standards. Before any prices are set for the use of visual work, the uses themselves must be defined. What, exactly, is *trade use*? What, exactly, is *collateral*? Every use must be defined. Each definition must include the parameters of that use. And each parameter must be spelled out in detail.

Compiling the list of uses and their definitions is the responsibility of the cooperative. Each market segment has uses that are unfamiliar in others, and few creators have expertise in more than one or two of these segments. One of our profession's long standing problems is the complication that arises when creators work in an unfamiliar market segment. (This becomes clear when an editorial photographer prices an advertising job.) By necessity, the cooperative must draw on those with specific market segment expertise. Doing so makes practical sense and helps give validity to the definitions. The master list of definitions will be a composite of the definitions from each market segment.

Inevitably, there will be duplications and conflicts. The cooperative will be responsible for resolving them.

2. Determine the Fee that will be charged for the use, based on standardized prices for each use.

Once defined, each use requires a standardized fee. Again, determining that fee is the responsibility of the cooperative. It should draw on the same expertise that is used for compiling the usage definitions, but with one difference. The help of an outside expert could be extremely valuable in this process. Although our current *norm* for prices comes from a market of weak individuals, we are hoping to change this. We won't go through the effort of building a market force just to get the same prices we're getting now. There will be strategies for making this change, and none of us are experts in those strategies. A market economist could help.

Here's one more thing worth pointing out. If the idea of establishing standardized pricing doesn't scare you, it should. It's an enormous and complicated job. On the other hand, since we have no accepted standards, there is no *right* price. Everyone involved in the process should understand the principle we're working on: that agreement to a standard

is more important than the precision of the standard itself. We must agree to agree.

3. Issue a License for use in exchange for the collection of the license fee.
We are tempted to see this as two steps because we are used to it being that way. We are also used to being our clients' bank. We've done this because we've had no choice.

As long as we're creating a new model, let's start with the goal of eliminating practices that have never been fair. We don't pay our mortgages late without cost, we don't take groceries home on a handshake. There are several options available for instant payment of license fees. If we become a market force, we no longer need to loan money to our clients.

4. Record the pertinent information about the transaction.
The license contains the information a client needs to understand how an image may be used. There are other uses for this information. It becomes part of a sales report to the creator. It becomes part of the usage history for an image. It becomes part of any restrictions placed on a future purchaser. It becomes data for sales analysis. Institutionalized licensing provides an opportunity to use information in ways we haven't imagined because it was never possible to get that information. These uses can benefit buyers as well as sellers.

5. Distribute the license fee.
Although it's the last step, returning money to creators is the first purpose of the process. Whether it is wired to a bank account or mailed as a check, the distribution of license fees happens without intervention, phone calls, invoices or ulcers. It is only possible if individuals are willing to exchange their individual weakness for cooperative independence.

How it Looks

Here is an idea of how the Licensing Core might look to users. We've mentioned that the Licensing Core is a function, and not hardware or software. That it is malleable, and will evolve with creators' needs. And that it is both open and neutral. This leaves room for lots of possibilities. Here are a few of them. The licensing core may work like:

This tag embedded in an image file, which opens to an instant license.
<http://www.plc.coop/license>

This button beneath an image on a creators' web site.

License Me

The licensing engine for a group of underwater photographers selling their images as stock.

The link from this check box on the online confirmation form an assignment shooter uses to initiate the download of hi-resolution images.

Agree

The phone call made by a lab before producing a poster-size print for a customer.

The lock on an editorial photographer's server that gives his magazine client access to this afternoon's images.

Unlock To License

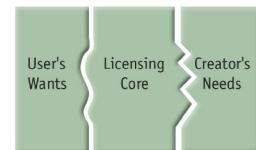
This image link printed beside an illustration in a book:

/ca23580121011337

The Licensing Core is not an address or place to go to buy pictures. It is not a service that helps you find pictures. It is an interface between creators who have images to license and users who have found those images.

Finally, here is how the Licensing Core will look to creators:

It is a positive entry on your bank statement.



Some Stories

Laying out the workings of a system which institutionalizes licensing for independent creators is a bit like describing how the parts of an automobile work together to make it run. Few people are interested in knowing such detail. What they want to know instead is what the car can do for them. The best way to know that is by going out for a ride.

These imaginary journeys will give you some experience with how independent creators will use the system, how it will benefit them, how the system functions and what its internal workings are like. Along the way you'll begin to connect these simple illustrations to your own livelihood and your need for a new way of doing business.

Jack's Story

Jack Lumen sits down at his desk and plugs in his camera to download the day's shoot at his client's manufacturing facility. He edits the images, enters a description of each shot, and verifies the image and creator ID that was automatically added to each file. When he's done, he drags the images to his server and drops a note to his client to tell her that they're ready to download. Then he prepares an invoice. Although he and the art director did discuss some of the initial uses and the need for exclusivity, Jack bills for his time and expenses only. He doesn't include the fees for usage on his invoice. These fees will be collected by the licensing cooperative whenever the images are used. Two days later, Jack

gets a notice from the cooperative detailing the uses licensed so far. The fees have been credited to his bank account.

Corrine's Story

Corrine is a college senior in the photography curriculum. Her professors always told her, "When someone wants to use your work, join the licensing cooperative, let them handle it. Business and art don't mix."

Toward the end of the semester, Corrine gets a call from a senior editor at Time Life asking to see the images she created for her senior photography thesis. She said that a friend who had seen the thesis show thought they'd work for a story she was working on. When Corrine hears her say that she may want to use them in the story, her teachers' words ring in her ears.

As soon as she gets off the phone she looks up the URL for the licensing cooperative in her class notes, signs on, fills out a form on-line, and clicks on the Agree button. An applet downloads to her computer and appears on her desktop. She uses it to ID and caption her images, then attaches them to an email that she sends to her new client. She's now a member of the licensing cooperative and excited about her first publication possibility.

On the same day that classes end for the year she gets her monthly bank statement. A sizable chunk of money has been deposited into it. She goes directly to the student union and buys a copy of Life Magazine. Pages 47, 48, and 50 carry three of her images full page.

Christine's Story

Christine is the only child of Charles Deardorf, an architectural photographer. Before he died, he placed all of his most important photographs with an archiving service. His licensing ID number and the catalog captions to the image files allow his work to be searched and licensed on-line through the archive. Christine inherited his estate, comprised entirely of the rights to his photographs.

Through the cooperative they are licensed frequently by book publishers, architectural trade magazines, and his former clients. And just as her father did for her, she will leave this valuable asset to her son and daughter when she dies. If interest in Charles Deardorf's work continues, the income from it will continue until the year 2077.

Costs and Benefits

Cooperative licensing of photographers' work could have far-reaching benefits to photographers. The primary cost to making these benefits possible will be the relinquishing of control of the value of their copyrights to the cooperative. If we refuse to give up this independence there is no hope for collective success.

Here are some of the benefits an accepted cooperative licensing system could have for photographers.

Fairness

A transaction is fair when the value received comes close to the value that is given. All photographers hope for money in exchange for the right to use their photography. The primary purpose of cooperative licensing is to make sure the money received is comparable to the value given. By standardizing both prices and the definitions of use, the cooperative seeks to promote agreements that both creator and user understand and agree to.

Institutionalized cooperative licensing is an effort to change the rules of the game for independent creators. Because of the relative size and economic power of our clients and agents, we are playing our game on a steeply slanted field. Cooperative licensing is an effort to level that field by balancing the relative size of the players.

Convenience and Efficiency

By delegating the licensing function to the cooperative, photographers eliminate the need for a part of their business that produces no income and which, in some cases, is destructive to the relationship they have with their clients. Taking usage off the bargaining table allows creators to concentrate on the images they produce, unburdening them of the details of copyright law and adversarial negotiations.

A system that licenses, collects, and enforces their copyrights allows photographers to be hopeful about the distribution of their work, with the understanding that when it is seen, appreciated, and used by others it will also bring them income. It allows for multiple routes of distribution, offering the possibility of selling exclusive use to a client from several outlets—a possibility that currently keeps stock photographers anchored to their present agencies.

Economic Power

There is a long list of conditions that independent creators tolerate with the understanding that they are not fair. Beginning with the terms we accept and ending with the time it takes to get paid, we swallow individually what we are powerless to change. Economic power could change many of these things.

Cooperative licensing creates value for creators. Even without raising prices, the immediate benefit to photographers could be the end of the current practice of selling unlimited use, and the bundling, discounting, and donating of usage for the privilege of working. By combining economic power, central cooperative licensing, instant communications, and online payment, payment-for-use could become the standard way of using photography.

Economic power gives the cooperative the ability to charge reasonable prices, and to raise prices when necessary. It gives the ability to

Takes the issue of usage off the bargaining table.

Competition is based on the quality of work.

Removes an individual's ability to undermine the value of copyrights

Cost or Benefit?

Perspective will influence the way some photographers see the benefits of cooperative licensing. We believe that by protecting the value of copyrights the interests of all publications photographers are served.

collect payments when they are due. It provides collection services when payment is not made, and enforcement when work is used without permission—all without the intervention of the photographer.

Financial Stability

Whether young or old, novice or mentor, institutionalized licensing of copyrights offers financial stability to those with quality work. That stability begins with the first licensing of copyrighted material and extends past the life of creators to the benefit of their heirs. By preserving the value of copyrights and providing a means for collecting that value, cooperative licensing provides a better return on creative investment in both the short term and the long haul.

Control

Institutional backing and standards give photographers real control over their work, allowing them to gain the full benefit of their efforts. The ability to charge a fair fee and be paid for each use will cause users to buy only for their needs, leaving all other rights available for additional sales. Institutionalized enforcement will put teeth into the legal concept of copyright. Along with standardized terms and definitions, it will minimize misunderstandings, speed settlements, and reduce the frequency of infringements.

Other Benefits

Not all benefits will be measured in dollars and cents. Institutionalized cooperative licensing could change the way photographers relate to each other. No longer would a competitor's credit line bring with it the mixture of envy and suspicion that it sometimes does in markets where even the ownership of copyright is up for grabs. Creators will compete on talent, skill, and persistence—all qualities that enhance the level of quality and service within the profession. They will not compete on their willingness to degrade the value of copyright.

Users of photography will undoubtedly pay more for the use of images. But along with this comes the ability to make creative decisions based on the skill of the photographer. Standardizing terms makes the purchasing of rights more efficient. Standardized fees for usage allow budgets that are predictable.

By acknowledging ownership and the right to continued payment for use, institutionalized cooperative licensing provides one more benefit to independent photographers and the users of their work. It provides the practical fulfilment of what the copyright law intended to do legally. It provides the incentive for the best creators to keep on creating.

Our generation of photographers is the last one that can remember how it's supposed to be, so we are our last chance.

—Mark Richards, *one of the SF9, Founders of EP*, 1999

The Beginning

That time when the puzzle fit together and photographers thrived seems light years away now. Independent creators have been denied power for so long that they seem resigned to their situations. They seem to accept the chaos. Some have turned it to their personal gain, trading their copyrights for their clients' favor, their future for volumes of work now. Weak creators can prosper, the strong are at their mercy, and both must give up their rights just to stay in the puzzle. Such an upside down world will be very difficult to put right.

A means to put it right has been found. This is the door we've been looking for. It can be opened to let independent creators through the solid wall that's had them penned in all this time. It is a legal means of restoring their rights and recovering economic power for them. Finding the door through the wall is a truly extraordinary event. It will be years before we know the significance of the breakthrough. Opening the door will be far easier than convincing independent creators to leave the chaotic confines they're so accustomed to and walk through it.

It will not be possible to accomplish such a dramatic rehabilitation of individual rights without the determination of many, many people. No single organization or group of authors and artists can undertake the job alone or without the help of experts from many disciplines.

The success of any joint effort is judged by the enthusiasm with which people bring ingenuity, cooperation, leadership, good faith, and perseverance to the goal. No effort on behalf of independent artists and authors will succeed without human relationships that cultivate and honor those virtues.

Tom Guidera III
Woody Packard

February 15, 2001