

Court of Appeals Docket Nos 10-56311 and 10-56400

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ANNA MARIA ALBERGHETTI and
BONNIE POINTER, on Behalf of Themselves
and All Others Similarly Situated,

Appellant-Cross Appellees,

vs.

CORBIS CORPORATION,

Appellee-Cross Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA, HON. STEPHEN V. WILSON
USDC NO. CV 09-05735-SVW

**BRIEF OF *AMICI CURIAE* PICTURE ARCHIVE COUNCIL OF
AMERICA, INC. AND AMERICAN SOCIETY OF MEDIA
PHOTOGRAPHERS, INC. IN SUPPORT OF CORBIS CORPORATIONS'
CROSS APPEAL SEEKING REVERSAL OF THE DISTRICT COURT'S
DENIAL OF ITS MOTION TO DISMISS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* Picture Archive Council of America, Inc. and the American Society of Media Photographers, Inc. hereby state that neither has a parent corporation, and that no publically held corporation owns 10% or more of their respective stock.

Dated: New York, New York
June 10, 2011

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Pursuant to Federal Rule of Appellate Procedure 29(b), the Picture Archive Council of America, Inc. and the American Society of Media Photographers, Inc. are concurrently requesting leave to file this *Amicus Curiae* Brief in the above-entitled case in support of Defendant/Cross-Appellant Corbis Corporation (“Corbis”)’s cross-appeal. Corbis consents to *Amici’s* filing of the brief. Plaintiffs/Appellants do not consent.

IDENTITY AND INTEREST OF THE AMICI CURIAE

The Picture Archive Council of America, Inc. (“PACA”) is a not-for-profit trade association which represents the interests of entities who license images (still and motion) to editorial and commercial users. Founded in 1951, its membership currently includes over 100 image libraries in North America and internationally that are engaged in licensing millions of images, illustrations, film clips and other content on behalf of thousands of individual creators. Members include large general libraries, such as the Appellant Corbis Corporation (“Corbis”), and smaller specialty libraries that provide the media and commercial users with access to in-depth collections of images on nature, science, art, architecture, history, culture among others.

The American Society of Media Photographers, Inc. (“ASMP”) represents the interests of professional photographers whose photographs are created for

publication and has approximately 7,000 members. It is the oldest and largest organization of its kind in the world.

Together, *Amici* possess practical insights on the stock image industry and the business of licensing photographs. Accordingly, *Amici* respectfully submit this brief in support of Corbis' appeal of the District Court's October 27, 2009 decision denying Corbis' motion to dismiss (the "Decision") in order to inform this Court of the serious and damaging effects the Decision will have on the stock photography industry and the photographers who directly license or provide images to the stock photography industry if it is affirmed. The Decision jeopardizes the ability of stock agencies, large and small, and photographers to make the contents of their collections available and known to potential licensees; thus, PACA and ASMP have an immediate interest in this appeal.

Indeed, the trial court's refusal to dismiss Plaintiffs' right of publicity claims sends a message to photographers and stock photography libraries that they act at their peril simply by offering newsworthy and culturally important images to the publishing, news broadcasting, documentary filmmaking, and educational industries, among others. Likewise, the Decision chills the ability of photographers to take photographs of people for fear that any attempt to license such photographs will subject them to right of publicity lawsuits. It is squarely against long-standing industry practice to determine that a photographer or a stock

photography agency's display of a copyrighted image requires the subject's prior approval before the copyrighted image even can be offered to prospective licensees.

For the reasons explained below, no stock photography agency or photographer should be susceptible to suit for doing nothing more than displaying photographic images on its website for legitimate licensing purposes or exercising his rights under the Copyright Act to license his copyrighted photographs. The Decision thus should be reversed.

ARGUMENT

Corbis' brief to this Court explains why, as a matter of law, Plaintiffs' right of publicity claims based upon the mere display of an image for purposes of offering a copyright license are preempted by the Copyright Act and/or the doctrine of conflict preemption. Rather than repeat those arguments, PACA and ASMP will explain why, as a practical matter, the Decision would impair legitimate uses of copyrighted images in a way that is contrary to long-standing industry practice and exposes stock photography agencies and photographers to liability for merely attempting to exert their right under the Copyright Act to license their copyrighted images to others. Nor will we repeat the arguments presented by the numerous *amici* from the media industry, who rely on

photographers and stock photo libraries as the source of imagery in their broadcasts and publications.

I. HISTORY OF THE STOCK PHOTOGRAPHY INDUSTRY

A. The Industry Generally

Stock photography is a term of art that describes existing images licensed to users in exchange for a fee. Aside from images created specifically for a client by a photographer on an assignment, published images either in print or on-line generally have been licensed for use from either a stock photography company or a photographer's "stock." Stock libraries run the gamut from large collections with tens of thousands of images covering myriad subjects, such as the library maintained by Corbis, to niche libraries specializing subjects such as nature, science, history, or entertainment.

Regardless of size or subject matter, however, stock libraries and photographers serve the same essential function: they offer to textbook and other publishers, broadcasters, documentary filmmakers, media companies and others images that illustrate and illuminate our society, both historically and culturally. Instead of having to hire staff photographers around the country or around the world to capture every event, publishers can obtain professional photographs and footage directly from photographers and stock sources that license previously created content for a fee.

In order to provide these images, PACA members and photographers have made significant investments in archiving, scanning and uploading digital images onto databases accessible by websites in a searchable format to easily find images on any subject by merely typing in keywords. And, PACA members and photographers invest additional time and resources to continually update and maintain their databases. Thus, media companies and others can access and license the best images documenting arts, science, nature, history and cultural events throughout the world on a 24/7 basis.

B. Stock Libraries and Photographers Historically Have Been Able to Display Images for Licensing Purposes Without Any Risk of Liability.

Although the Internet has changed the medium by which copyrighted images are displayed, photographers and stock photo companies have displayed and made their images available to potential publishers for more than seventy years. Before the advent of the Internet, stock agencies aggregated or organized physical transparencies and prints by subject matter in file cabinets. In-house or freelance researchers would search the files of individual photographers or stock libraries in response to requests by publishers and other users, and then deliver to publishers or users samples of relevant images for possible use. Stock libraries also published large glossy catalogs containing a sampling of their image inventory, which they sent to publishers and creative directors throughout the country and the world.

The Internet has merely offered efficiencies in displaying and delivering samples of images to prospective clients, while increasing the burdens on the stock libraries and photographers by requiring them to create searchable databases of images through scanning, keywording and specialized search functions. Now, stock companies as well as some photographers maintain databases of images, stored in a digital format, which can be searched online using keywords to find appropriate images. Photographers can display and offer digital images via image aggregators, such as those provided by PACA member Alamy. These image sources permit publishers and users to select a desired image, purchase a license to use the image within the terms of the license agreement, and download a high-resolution digital file of the image to their computer, all within minutes.

No one, including the Plaintiffs herein, ever challenged the industry's use of hard copy files and catalogs to display their images and make them available to potential users, subject to whatever publicity rights may attach to the end user's intended use. Current images are now created in digital format, and can only be displayed and presented by means of a digital display. That stock libraries and photographers now must display images on the Internet in order to offer them to the media should not lead to a different result.

C. The Mere Fact That Stock Photography Agencies or Photographers License Images for a Fee Has Not Changed the Analysis or Result.

Likewise, the mere fact that stock photography agencies and photographers may earn a profit from licensing an image has historically not opened them to liability. Courts have long accorded First Amendment protection to material published in books, newspapers and magazines, even though all of those media earn profits from transactions involving the depiction of personal identity. *See, e.g., Joseph Burstyn v. Wilson*, 343 U.S. 495, 501-02 (1952). Presumably for that reason, California Civil Code § 3344 exempts uses “in connection with any news, public affairs, or sports broadcast or account, or any political campaign.” Cal. Civ. Code § 3344(d). This provision focuses not on whether the transaction earns a profit, but on the nature of the end use. Thus, neither the common law nor California’s right of publicity statute suggests that the provider of the image content used to illustrate books, newspapers and magazines should be prevented from displaying and offering its copyrighted images for license, solely because it earns a fee.

II. EFFECT OF THE DECISION ON THE STOCK PHOTOGRAPHY INDUSTRY AND ON MEDIA PHOTOGRAPHERS

A. Permitting Subjects to Bring Right of Publicity Actions Will Have a Severe Impact on the Stock Industry and Photographers and Their Ability to Provide Images for First Amendment Purposes.

Regardless of the ultimate success or failure of Plaintiffs' claims, affirming the Decision denying Corbis' motion to dismiss will have a chilling effect on the stock photography industry. Even if the decision granting summary judgment in favor of Corbis on statute of limitations grounds and denying Plaintiffs' motion for class certification is affirmed, the Decision still permits a right of publicity claim against Corbis, and Corbis will need to spend significant sums to defend itself against future right of publicity claims. The message to the industry will be clear. While Corbis may be an industry leader in size and volume, many of PACA's members, and certainly the individual photographers, have small photography archives. The costs of defending a right of publicity claim brought by anyone depicted in a photograph based on the display of the image would bankrupt these small companies and individuals. Even in the absence of litigation, smaller companies and individuals cannot afford the costs of paying permission fees to every subject. These PACA members and individual photographers may have little choice but to limit, or even forbid, access to images depicting people.

The loss of these images being available for licensing would be a blow to the preservation of our national and historical heritage. We use images to tell our

history and to educate our children. If the Decision is upheld, we would lose access to the images that inspire or incense us; images of our favorite sports teams' victories and defeats; images of ticker tape parades and red carpet dresses; images of war and of peace—all because these images depict people.

Moreover, the Decision will greatly impact the licensing of images for editorial use. Under federal law, a copyright holder such as a photographer, or the stock library authorized on his or her behalf, has a statutory right to exploit the exclusive rights granted under copyright. *See* 17 U.S.C. §106. Neither custom nor case law has ever conditioned this federal right on a copyright holder obtaining prior permission from a subject depicted, based on how a future licensee might use a photograph. Further, under First Amendment principles, rights of publicity never have extended to “editorial” uses in publishing, news broadcasting, documentary filmmaking, or educational materials; thus, for these uses, media company licensees need not seek the subject’s consent or pay the subject depicted in a photograph. *See* 2 J. Thomas McCarthy, *THE RIGHTS OF PUBLICITY AND PRIVACY*, §§ 8.46, *et seq.* (2d Ed. 2011). The Decision turns this long-standing body of law on its head.

B. The Decision Below Will Affect How Images Are Licensed Nationwide.

Eighteen states have right of publicity statutes, and twenty-one have recognized a common law right of publicity. 1 J. Thomas McCarthy, *THE*

RIGHTS OF PUBLICITY AND PRIVACY §§ 6:3 (2d Ed. 2011). While all states that recognize a right of publicity address the use of an individual's likeness for a commercial purpose without permission, *see generally id.* at §§ 6.3 and 6.4, we are aware of no holding which held that the mere display of an image for the purpose of copyright licensing violates a right of publicity in and of itself.

Nationwide licensing provides the major revenue source for stock photo companies and photographers. A decision holding that, in California, a stock agency or a photographer can violate a person's right of publicity merely by displaying an image for licensing purposes would frustrate the photography industry's efforts to offer its images for licensing. The questionable status of an image in California would discourage the display of images in all states. In effect, because stock or individual photographers' websites must cater to the "lowest common denominator" when offering images for licensing, a question as to licensing in California or any other state would jeopardize the nationwide market for copyrighted images.

In other words, holding that the mere display of an image depicting a person on a website for licensing purposes violates a right of publicity would cripple the photography industry's ability to offer for license images that depict people. It is simply not possible to license images without a right to display them because a textual description is no substitute for a visual image. For example, merely

describing Joe Rosenthal's 1945 photograph of soldiers raising the flag on Iwo Jima as "U.S. soldiers raising a flag" fails to capture the emotion and patriotic sentiment that looking at the photograph provides. Media publishers simply cannot possibly rely upon textual descriptions of images because they need to see whether the image is appropriate, and they should not be forced to license first and look later.

Moreover, the legal status of the display of large portions of photography archives depicting the nation's cultural heritage would be thrown into a legal grey area, jeopardizing the display of those archives on photography websites. The lack of public availability would, in turn, mean fewer users of the images, making it more likely that important historical records would vanish from public view. Likewise, as the demand for images depicting people decreases, so too does the demand for photographers to take such images.

It is no answer to say that the stock photography industry or photographers could revert to industry practices in place before the advent of the Internet, for that would ignore the digital and new media environment and lead to absurd results. Clients, including publishers, news broadcasters and others, expect to be able to search and select images from anywhere at any time, and they require that instant access to meet tight publishing deadlines. Nothing about the display of the likenesses of individuals on a website, among the many thousands or millions of

images available in any stock library's database of images, justifies requiring consent of the subjects of the photos before the display can be made.

According to the Decision below, however, merely offering a client the ability to review a large quantity of images via a website, simply to determine whether the images would be suitable for licensing, amounts to a violation of a person's right of publicity. If stock photography companies and photographers have to remove all images depicting people from their databases, all of the time and money invested in archiving, scanning and uploading images and in creating their websites and databases will be wasted. Moreover, if the Decision stands, any publicly identifiable person will be able to thwart the use of his or her image, even for lawful purposes that do not require consent. Indeed, both publicly known personalities, ranging from politicians to rock 'n' roll stars, as well as individuals could stifle media or academic access to any images of them (whether flattering or not), simply by claiming that stock photo agencies are violating their right of publicity by displaying their images for licensing purposes. There is no legal basis for such an absurd result. Accordingly, the *Amici* herein ask this Court to reaffirm the time-honored understanding that the mere act of displaying an image for licensing purposes does not violate an individual's right of publicity.

C. The Decision Improperly Shifts Liability onto Photographers and Their Representatives and Away From the End User.

Finally, the Decision creates an untenable situation for photographers and stock libraries because it imposes primary liability upon Corbis for its own display of images on its website, without regard to the end use of the licensed image by a customer of Corbis. Historically, end users bear the responsibility to comply with the stock industry's licensing terms and to obtain additional permission if necessary. Where an licensed image is released, the end user may publish the image without seeking additional permission; however, where the image is non-released, the end user is responsible for determining whether or not the intended use requires an additional release from the subject. Placing the responsibility and liability for obtaining the proper consent for all planned uses upon the end user—and only upon those users—satisfies the privacy and economic concerns underlying the right of publicity without placing an impossible practical and financial burden on the stock photo industry and photographers.

Under the Decision, stock photo libraries and photographers cannot even avoid liability by policing their customers because their liability arises from the mere display of photos on their own websites for the purpose of licensing copyrights to those photos. Realistically, permissions cannot be obtained from subjects during the filming of newsworthy or current events, and they certainly cannot be obtained from past events for these types of images. In essence, the

lower court's ruling punishes copyright holders and their representatives merely for exploiting their own legitimate federal copyright rights. Thus, the "parade of horrors" that the District Court referred to, but did not find persuasive, is real, and the Decision poses a very serious threat to the stock photography industry and the photographers who provide images to the industry.

CONCLUSION

For the reasons set forth above, PACA and ASMP respectfully request that this Court reverse the October 27, 2009 Order denying Corbis' motion for summary judgment on preemption grounds.

Dated: New York, New York
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**CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 32(a)(7)(C)
AND CIRCUIT RULE 32-1**

U.S. COURT OF APPEALS CASE NO. 10-16771

Pursuant to Fed. R. Civ. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points and contains 3,028 words.

Dated: New York, New York
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CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 29(c)(5)

U.S. COURT OF APPEALS CASE NO. 10-16771

Pursuant to FRAP 29(c)(5), *amicus curiae* confirms that no counsel for any party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person, other than the *amicus curiae*, its members or its counsel, contributed money that was intended to fund preparing or submitting this brief.

Dated: New York, New York
June 10, 2011

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CERTIFICATE OF SERVICE

I, Matthew A. Kaplan, declare under penalty of perjury as follows:

1. I am now and at all times herein mentioned, a citizen of the United States and resident of the State of New York, over the age of eighteen years, not a party to the above-captioned action, and competent to testify as a witness.

2. I am an attorney with the law firm of Cowan DeBaets Abrahams & Sheppard, LLP, 41 Madison Avenue, 34th Floor, New York, New York, 10010.

3. On June 10, 2011, I caused the BRIEF OF AMICI CURIAE PICTURE ARCHIVE COUNCIL OF AMERICA, INC. AND AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC. IN SUPPORT OF CORBIS CORPORATIONS' CROSS APPEAL SEEKING REVERSAL OF THE DISTRICT COURT'S DENIAL OF ITS MOTION TO DISMISS to be electronically filed with the United States Court of Appeals for the Ninth Circuit.

4. On June 10, 2011, I also caused to be served a true copy of the BRIEF OF AMICI CURIAE PICTURE ARCHIVE COUNCIL OF AMERICA, INC. AND AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC. IN SUPPORT OF CORBIS CORPORATIONS' CROSS APPEAL SEEKING REVERSAL OF THE DISTRICT COURT'S DENIAL OF ITS MOTION TO DISMISS on the following:

