

# Durie Tangri

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November 2, 2011

VIA FAX TO 212-857-2346

Hon. Denny Chin  
United States District Court for the Southern District of New York  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl St.  
New York, NY 10007-1312

Re: *American Society of Media Photographers, et al. v. Google Inc.*, No. 10-CV-2977 (DC)

Your Honor:

This office represents defendant Google Inc. in the above action.

I write, pursuant to Paragraph 2(A) of Your Honor's Individual Practices, to arrange a pre-motion conference on Google's anticipated motion to dismiss the complaint for failure to state a claim upon which relief can be granted. Google's response to the Complaint is currently due November 7, 2011. We understand that plaintiffs have, by letter today, requested leave to file an amended complaint on November 18, 2011. We do not oppose this request, and we understand that plaintiffs intend to amend to remedy some or all of the issues identified below. In an abundance of caution, and in the event the Court does not grant plaintiffs' request, Google submits this pre-motion conference letter.

The basis for the anticipated motion is as follows.

There are two groups of plaintiffs in this Action: associations and individuals. The Complaint, ECF No. 1, fails to plead facts showing that either group has a copyright claim—though for different reasons.

## 1. The Associations Lack Standing.

The plaintiffs in this action include five associations: the American Society of Media Photographers (freelance photographers), the Graphic Artists Guild (freelance illustrators), Picture Archive Council of America, Inc. (stock photo houses), North American Nature Photography Association (amateur and professional nature photographers), and Professional Photographers of America (wedding and portrait photographers). These associations do not own copyrights alleged to have been infringed, and thus do not have standing to assert claims on their own behalf under the Copyright Act, which confers standing only on "[t]he legal or beneficial owner of an exclusive right under a copyright." 17 U.S.C. § 501(b).

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Thus, the associations are suing not on their own behalf, but on behalf of their members, on an “associational standing” theory. “Associational standing carves only a narrow exception from the ordinary rule that a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *Bano v. Union Carbide Corp.*, 361 F.3d 696, 715 (2d Cir. 2004) (internal quotation omitted).

Associational standing requires, among other things, that “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977). But “[i]n order to establish a claim for copyright infringement, individual copyrights owners’ participation is necessary.” *Assn. for Info. Media and Equip. v. Regents of the Univ. of Cal.*, No. CV 10-9378 CBM (MANx) (C.D. Cal. Oct. 3, 2011). “This is because having the rights over a copyright is essential to establishing a copyright infringement claim.” *Id.* See *Nat’l Assoc. of Freelance Photographers v. Associated Press*, No. 97 Civ. 2267, 1997 WL 759456, \*7 (S.D.N.Y. Dec. 10, 1997) (dismissing for lack of associational standing because the claims “all depend at root on proof of copyright ownership in the subject materials” and “proof of copyright ownership cannot be adduced without the participation of individual photographers”).

Thus, because both the claim asserted and the relief requested requires the participation of individual association members, the associations lack standing to sue for copyright infringement.

## **2. The Individuals Have Not Adequately Pleaded a Copyright Claim.**

The individuals’ claims are also subject to dismissal, since they have not adequately pleaded copyright registration or identified the works at issue.

“Rule 8 requires that plaintiff state in his infringement claim which specific original works are the subject of the claim, that plaintiff owns the copyright, that the works have been registered in compliance with the copyright statute and by what acts and during what time defendant has infringed the copyright.” *Franklin Elec. Publishers, Inc. v. Unisonic Products Corp.*, 763 F. Supp. 1, 4 (S.D.N.Y. 1991). The Complaint in this Action does not plead the elements of a copyright infringement claim sufficiently under Rule 8(a), because it does not identify “which specific original works are the subject of the copyright claim” and does not allege that those “copyrights have been registered in accordance with the statute.”

As to the identification of works, it alleges only that “Google has reproduced, distributed, and displayed [the individual’s] photographs,” Compl. ¶ 23, without identifying any particular photograph or any particular book or periodical whose copyright is alleged to have been infringed. Such allegations do not meet the requirements of Rule 8. See *DiMaggio v. Int’l Sports Ltd.*, 97 CIV. 7767 (HB), 1998 WL 549690 (S.D.N.Y. Aug. 31, 1998) (dismissing because “plaintiff fails to specify which original works are the subject of the copyright claim” but instead “refers to nebulous multiple images”).

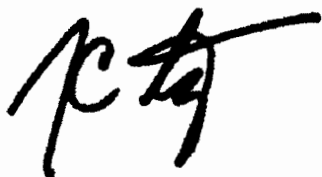
As to registration, it alleges only that the individuals “created Visual Works published in books and periodicals for which a certificate of registration has issued from the United States Copyright Office or

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the deposit, application, and fee required for registration have been properly submitted to the Copyright Office, and/or the owners of the exclusive rights in the Visual Works.” Compl. ¶ 22. There are at least three respects in which this allegation is insufficient. *First*, it does not allege that a certificate of registration has issued, but only that a proper application has been made. “Although the Second Circuit has not addressed this specific question, courts in both the Eastern District of New York and the Southern District of New York have held that submission of an application for copyright registration does not satisfy the registration precondition of § 411(a).” *K-Beech, Inc. v. Does 1-29*, CV 11-3331 JTB ETB, 2011 WL 4401933 (E.D.N.Y. Sept. 19, 2011). *Second*, it alleges only that the individuals are “the owners of the exclusive rights” in certain works, not that those works are registered. *Third*, it alleges only that the individual plaintiffs created works which were in turn “*published in books and periodicals*” which were themselves registered, not that plaintiffs’ works themselves were registered. But registration of the book in which a photograph appears does not operate as a registration of the photograph itself, unless the copyright owner in the book and the copyright owner in the photograph are one and the same. *Morris v. Business Concepts, Inc.*, 259 F.3d 65, *on reh’g*, 283 F.3d 502 (2d Cir. 2002) (“unless the copyright owner of a collective work also owns all the rights in a constituent part, a collective work registration will not extend to a constituent part”).

For these reasons, unless it is amended to remedy these issues, the Complaint should be dismissed. We are available for a pre-motion conference at Your Honor’s convenience.

Very truly yours,



Joseph C. Gratz

cc: James J. McGuire, Esq. (via email)  
Mark A. Berube, Esq. (via email)  
Vincent Filardo, Jr., Esq. (via email)