

# TWO CENTS WORTH

*Jury verdict is a victory for rights holders* BY PETER SKINNER

First, let's get one thing straight. Houston photographer and ASMP member John Blackmer is not a litigious person—he does not go looking for legal fights. In fact, and in this probably he is like the majority of ASMP members, Blackmer would be very happy to be known as a competent professional photographer who does his job well and has a stable of satisfied, well-paying clients.

Blackmer, a 1981 graduate of Syracuse University (photojournalism) and an ASMP member since 1991 is from a newspaper background. He worked on papers from 1979-1991 in Syracuse, New York; Boise, Idaho; Orange County, Calif.; and Phoenix, Ariz., and is a former National Press Photographer of the Year. On becoming a freelancer in 1991, he sought advice on the business from a friend from college days, Seth Resnick. And then he embarked on a freelance career, based in Houston, carving a niche in making lifestyle and product images for developers and builders. His photographs in the Houston market have helped many of his clients win awards for their projects. One thing he has aggressively protected is his copyright in those images and he has been very strict and specific about re-use rights. It has paid off, as Blackmer has generated many sales from re-use of images made in the 1990s.

"I have adopted the approach that you never get what you don't ask for so when I am negotiating an assignment I ask a lot of questions and negotiate in a way that is understandable to clients. I am concerned about doing the best job, getting paid for it, and also about my reputation in this market," he said. In the field in which Blackmer specializes, unauthorized usage is fairly common. Images used in one builder's

brochure might be scanned by another company for their collateral; a photograph made of an estate site for a development company becomes fair game for some other entity involved in the development. As a freelance/contract photographer, Blackmer said all he would like is the courtesy of a phone call and the opportunity to negotiate the resale and use of his work. Not much to ask, is it?

However, like most photographers who find work being used without authorization or compensation, Blackmer's standard procedure is to contact the other party seeking payment without legal recourse. He politely points out that he makes a certain portion of his income from licensing re-usage rights and follows up with an invoice. Invariably, and unfortunately, the invoice is ignored until legal documents which convey the threat of a suit are waved in front of the offending party. At that stage, payment is usually forthcoming. It's not a pleasant situation for either party and Blackmer knows that he may have lost a client. Still, who wants clients that rip off images and refuse to pay until a lawyer is hired?

Most of Blackmer's infringement matters have been settled out of court, thanks to the emphasis with which his attorney Dana LeJune of LeJune & Singer, Houston, has issued the threat of further legal action. But one infringer, a Texas builder and developer, took the fight through the legal system until finally a jury had to decide who was right.

Without going into all the nuances, the matter revolved around Monarch Developments of Texas, Inc., a wholly-owned subsidiary of the giant British holding company, Taylor-Woodrow, LLC, infringing two of Blackmer's copyrighted

images which he originally shot for a custom builder. Of seven custom builders constructing homes in a Monarch development, Blackmer had done work for six of them and the president of Monarch was well aware of that. However, that didn't stop Monarch from purloining one of those images and using it on a billboard.

Subsequently, Blackmer sent an invoice for a year's usage, an action that triggered an abusive phone call from Monarch's president, including a threat "to be taken from Monarch's list of photographers." However, after a lengthy and contentious discussion, the retroactive license fee and duration of usage were negotiated and a fee for that usage paid. But that was not the end of it.

Attorney LeJune explained that the company's CEO later testified that he "shoved the letter (of agreement) into the file and didn't read it, then paid the bill." A few months later, LeJune said, the company again used Blackmer's work, this time, in eight consecutive monthly issues of builder magazine ads, and left the billboard up four months longer than the previously negotiated term of the license. Enough is enough, Blackmer figured, and initiated legal action against Monarch and the ad

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agency involved. Monarch then sued the builder, but dismissed it from the suit after only a short time—after reaching an agreement on how it would testify.

Monarch dug its heels in and, according to LeJune, “They (Monarch Developments) fought like hell, and tried some very underhanded tactics to prejudice the jury.” Fortunately, Blackmer had done everything right: his copyrights were registered, making him eligible for statutory damages, and all agreements were in writing—his paperwork was in order. Ultimately, justice was done. Not only did Monarch Developments pay for its blatant disregard of photographers’ rights—to the tune of more than \$130,000—the judge also slammed others of the same ilk.

Monarch’s taking it to the jury really backfired; actual damage verdict, \$5,500; statutory damage verdict, \$60,000.02; attorney fees, \$66,000.” And why the two cents? After the verdict, the jury foreman explained that was their “two cents;” they wanted to “send a message” to the company’s management that it is not the photog-

rapher’s job to police his copyrights, it’s the company’s job.

Blackmer said it was very satisfying having the jury throw in their “two cents” in their ruling for damages. “In addition, I’m grateful for the opportunity of having a no nonsense federal judge hear the case. There were some underhanded tactics the defendant’s counsel tried, and the judge did not let any of it fly,” he said.

All photographers can take heart in part of the final order by US District Court judge David Hittner, Southern District of Texas: “The evidence produced at trial, which was relied upon by the jury in assessing statutory damages against Defendants, demonstrated that Defendants used Plaintiff’s copyrighted images without authorization and only ceased doing so when suit was filed. The evidence showed that the problem of developers engaging in such tactics was widespread. Therefore, the Court finds that an award of attorney’s fees is warranted in order to advance the principles of appropriate compensation and deterrence

from future misconduct.”

And how does John Blackmer feel after this long, drawn-out, and stressful—but ultimately satisfying—process. Well, he’s glad he went the distance and fought for his rights; is delighted that the laws which were written to protect creators were upheld by a jury and judge who saw through the legal smokescreen thrown up by Monarch’s lawyers; is grateful for having a truly zealous attorney in Dana LeJune; is appreciative of the “well done and congratulatory messages from colleagues and supportive clients;” and is relieved it’s all over. But, in his own words, he really feels like “a grape that had been sucked through the trunk of an elephant, and dropped out the tail end as a raisin.”

“It was, however, a really valuable educational experience for me, and I’d do it again in a heartbeat. I’d also encourage every other photographer/author/artist to stand up for their work. If we don’t, and there are no consequences for people taking our work, our markets will be only suffer and be shaped by this,” said Blackmer .∞

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