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ARTICLES:

BEST PRACTICES IN RIGHTS CLEARANCE:

SELECTION OF RESOURCES AND BEST PRACTICES FOR VISUAL ARTISTS
*NANCY WOLFF, JEFF SEDLIK, LATEEF MTIMA PIETER FOLKENS, SEAN
FITZGERALD, JOHN HARRINGTON PETER KROGH, AMANDA REYNOLDS*

BEST PRACTICES IN RIGHTS CLEARANCE SYMPOSIUM: PANEL 1

NANCY WOLFF, JEFF SEDLIK, LATEEF MTIMA

BEST PRACTICES IN RIGHTS CLEARANCE SYMPOSIUM: PANEL 2

*PIETER FOLKENS, SEAN FITZGERALD, JOHN HARRINGTON, PETER KROGH,
AMANDA REYNOLDS*

NOTES:

PRODUCT PLACEMENT IN INTERNATIONAL FILM AND TELEVISION PRODUCTION:

A GLOBAL APPROACH FOR A GLOBAL INDUSTRY

MANDI HART

**ANTIQUITIES, WAR, AND INTERNATIONAL LAW: THE ROLE OF INTERNATIONAL
LAW IN PROTECTING LOOTED ANTIQUITIES DURING ARMED CONFLICT**

KATHERINE NOVAK

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BEST PRACTICES IN RIGHTS CLEARANCE

SELECTION OF RESOURCES AND BEST PRACTICES FOR VISUAL ARTISTS

I. INTRODUCTION

This document summarizes tips and resources for rights clearance and licensing of copyrighted works suggested by participants in the Best Practices in Rights Clearance – Visual Arts Symposium held at Scalia Law School, George Mason University on January 18, 2018. It is not intended as a comprehensive guide, but rather a more user-friendly tool for finding key information shared by participants than the transcripts of the sessions themselves.

A. *What is Copyrightable?*

Copyright law is meant to encourage creativity and the development of new works such as songs, photographs, poems, etc. Facts and ideas are not copyrightable, only the creative expression of the author. Types of works that can be protected are listed in the Copyright Act.¹

- The rights to create derivative works, or works that adapt, modify or transform the original, are also the property of the copyright owner. For example, if an author writes a book, that author is the only person who has the right to permit the book to be adapted into a movie.

There are also limits on the scope of copyright. Therefore not every use needs to be cleared. For instance:

- The “scenes-a-faire” doctrine limits copyrights in commonly used themes or subjects in works. Such elements of works are not copyrightable, because they are the language or building blocks of creative works.
- The “merger” doctrine is the concept that if a copyrightable part of a work and a non-copyrightable part of a work are closely linked together and can’t be separated, they merge and become **non**-copyrightable.

¹ 17 U.S.C. § 102 (2017).

- In photography, creative choices the photographer makes, such as lighting, camera angles, positioning, method for developing the photos, etc. are essential to making a photo copyrightable.

B. Tips on Fair Use

Fair use is another doctrine that limits copyright and allows works to be used without the copyright owner's permission for the purposes of criticism, comment, news reporting, teaching, scholarship, or research. It is a defense to copyright infringement, but is often misunderstood by laypeople. Courts will evaluate four factors to determine whether a use is fair: a) the purpose and character of the use, b) the nature of the copyrighted work, c) the amount and substantiality of the portion taken, and d) the effect of the use upon the potential market for the copyrighted work. More information and a summary of fair use decisions in U.S. court cases can be found on the U.S. Copyright Office website.²

- Errors and omissions (E&O) insurance is often necessary for documentary filmmakers whose films may rely on fair use for some of the content used. If a mistake is made in use of trademark or copyright protected material, the insurance will cover legal costs up to the policy's maximum amount.
 - Many distributors require filmmakers to have this insurance.
 - Many E&O insurers require that a lawyer participate in examining the film's content and confirming fair use applies before issuing a policy.
- There is a three question test, written by Michael Donaldson, that is applicable mainly to non-fiction works and can be useful in making fair use determinations:
 1. Does the asset illustrate or support a point that the creator is trying to make in the new work?
 2. Does the creator of the new work use only as much of the asset as is reasonably appropriate to illustrate or support the point being made?

² U.S. Copyright Office Fair Use Index, COPYRIGHT.GOV, <https://www.copyright.gov/fair-use/index.html> (last visited Aug. 31, 2018).

3. Is the connection between the point being made and the asset being used to illustrate or support the point clear to the average viewer?³

C. *International Issues*

There is no such thing as “International Copyright Law.” Thus artists using and distributing works online need to be aware of variations in laws in jurisdictions where the works may be used. For instance, most countries do not have fair use provisions like the United States, but many have similar “fair dealing” exceptions which tend to be more prescriptive.

- In Canada, there is a fair dealing provision which allows for use of other people’s work for specific purposes: research, private study, education, parody, satire, criticism, review and news reporting.⁴
 - If the use falls within one of these purposes, then you must determine fairness by applying your facts to the following factors⁵:
 - a) the purpose of the dealing
 - b) the character of the dealing
 - c) the amount of the dealing
 - d) alternatives to the dealing
 - e) the nature of the work
 - f) the effect of the dealing on the work; and any other factors that may help a court decide whether the dealing was fair.
- In the United Kingdom, there are various types of situations in which fair dealing is a valid defense⁶:

³ Michael C. Donaldson, *Refuge from the Storm: A Fair Use Safe Harbor for Non-Fiction Works*, 59 J. COPYRIGHT SOC’Y U.S.A. 477, 488-492 (2012).

⁴ Copyright Act, R.S.C. 1985, c C-42, § 29 (Can.).

⁵ CCH Canadian Ltd. v. Law Soc’y of Upper Canada, 2004 S.C.R. 339 (Can.).

⁶ Copyright, Designs and Patents Act 1988, c. 48, §§ 29-30, 32-33 (UK).

- a) where the use is for the purposes of research or private study,
- b) where it is to allow for criticism or review
- c) where it is for the purpose of reporting current events
- d) where it is for illustration in instruction, and
- e) where an excerpt is included in an anthology for educational use.

D. Tips on the Public Domain

Public domain works are works that are not protected by intellectual property laws either because the protection has expired, or because protections never applied (e.g. U.S. government works). Such works may be used freely.

- Many people see photographs and other works online and mistakenly believe that they are part of the public domain.
- It is not safe to assume that old photographs, for instance from the early 1900's are necessarily in the public domain. It is possible that the photo is still protected under copyright law because it may have been unpublished until after 1978, because copyright protection may be for 70 years after the death of the last surviving author, 95 years from the publication date, etc.⁷
- Images should not be copied from online. Image recognition technology searches for images online and can find these infringing uses.
- A good resource for understanding and calculating copyright term lengths is here:
 - <https://copyright.cornell.edu/publicdomain>

⁷ 17 U.S.C. § 302 (2010).

E. Registering your Work

Although copyright subsists in a work from the moment it is recorded in tangible form, regardless of whether it is registered or not, works can be registered with the U.S. Copyright Office, and there are certain benefits to registration. Registration allows an infringement suit to be initiated in court and affects the type of damages that are available to plaintiffs. Works can be registered on the U.S. Copyright Office's website.⁸

- Registering your copyright may likewise provide you with greater leverage when trying to protect your works, as you can use the registration as proof that you own copyright to that work.

F. Tips on Licensing

When you want to use a copyright protected work, or someone else wishes to use your protected work, a license agreement can grant permission to use protected works for certain purposes. It is important to make sure you have a license before using protected works, and to make sure that when you are licensing your work you are tailoring the agreement to the specific needs of the parties.

- Visual artists often want to put their photographs to music. The Panelists recommend a few ways for visual artists to make sure they have permission to use that music. Several commercial software packages exist that pre-package licensed music for use with imagery. Examples include:
 - Triple Scoop Music at <https://triplescoopmusic.com/>
 - Pump Audio at <http://www.pumpaudio.com/>
- When visual artists are giving others permission to use their images through a license agreement, it is important to consider the circumstances and limit how they can use the image.
- License agreements should always be in writing.
- License agreements can also include terms for renegotiation if the circumstances of the agreement change, such as licensing

⁸ *Registration Portal*, COPYRIGHT.GOV, <https://www.copyright.gov/registration> (last visited Aug. 31, 2018).

an image to an independent music publisher and requiring renegotiation if the musician signs with a label.

- With a license to create a derivative work, only the rights to the new added expression belong to the licensee, and the licensor retains the copyright in the original work.
- There is a public copyright license called a Creative Commons license that allows copyright owners to use their work. There are different types of Creative Commons licenses, depending on how the copyright owner wants the work to be used. The licenses can specify whether use can specify if the work is allowed to be used commercially, whether derivatives are permitted, if they want any use to be attributed to them, and if they wish to require that you share your work in the same manner. Information on these licenses can be found on the Creative Commons website at:
 - creativecommons.org
- If you see a work online that claims to be licensed, it is often necessary to investigate further because there are internet users who may falsely claim a use is licensed. Always investigate before deciding to use something that may be copyright protected.

G. Tips for Negotiating

Negotiating can involve an imbalance of negotiation power between the artist and the client and is difficult, but there are a few tips that can help you to ensure the agreements you enter into are solid and fair.

- It is important to make sure you are negotiating with someone who has the authority to make the agreement and carry out the terms. This prevents problems later in the work process.
- It is often a good idea to educate clients early, through online FAQs or other methods, about what you expect when it comes to transfer or licensing of rights and how pricing works for different levels of rights granted.
- Clients may want visual artists to transfer all of their rights to images or sign a work for hire agreement, but there are other options:
 - Negotiate down based on what clients actually need. Determine what rights they actually need based on how they plan to use the images. This will also save them money, because purchasing all of the rights to

images is more expensive than a more limited license.

- One way to make sure the client has all the rights they need is to give the client use of all rights in perpetuity, but the client is not allowed to sell the rights or prevent you from selling them.
 - If the client is not planning to use the images in multiple countries, the agreement can be more specific geographically and allow for broad rights in the countries they plan to use the works in.
- Pay attention to the purchase order sent by the client. Organizations may agree to a specific contract or agreement, but the purchase order may have different terms included in writing that differ from the previous agreement.
 - When negotiating prices, it can be helpful to show your client the market price for photographs using software called fotoQuote.⁹ This program generates market based quotes based on how the images will be used.

H. Tips for Contracting

Contracts are necessary for ensuring that agreements, such as licenses and commissioned work, can be recorded and upheld. Many times one party may have a contract already prepared, but it is always important to look the contract over carefully. There may be areas where the contract needs to be changed in order to make an artist or client comfortable with the agreement.

- Be clear and agree on copyright terms before beginning work or signing a contract that may transfer all rights to the client.
- Rights can only be sold if they are possessed by the artist. For example, if a visual artist does not have model releases for images, they cannot be sold to use in advertising.
- Indemnity clauses are used in contracts to determine who is liable for legal problems that may arise regarding the contract. Often indemnity clauses assign liability to the artist. It is best

⁹ <http://www.cradocfotosoftware.com/fotoquote/>

to request the indemnity clause be reciprocal. This means that if the artist makes a mistake, they will be liable, but the client will be responsible for their own mistakes. Artists want to avoid being held liable for a legal issue that was not their fault.

- If there are certain phrases that client policies require in their contracts, such as work for hire, it may be possible to alter the contract so that it contains these phrases, but it is made clear that they don't apply to this situation. Stating that the images are only work for hire if an additional fee is paid, when the additional fee is not paid by the client, could achieve this. The work for hire term would then not have effect.

I. Tips on Rights Clearance

Rights clearance is the process of checking to ensure someone who is selling a work actually has all of the rights that they are trying to sell. There are law firms that specialize in rights clearance, often for complicated works like movies where there may be many different rights involved.

- Photographers may not be able to publish pictures of certain subjects without clearing the rights to that subject with the rights owner. For example, if a model is wearing a scarf with a trademarked pattern in a shoot, the photographer would need permission from the trademark owner to publish that photo.
- If a law firm is hired to ensure that all rights are cleared in a work, there is rights clearance insurance that will cover costs if a mistake was made and a legal issue develops.

J. Additional Resources

- The Copyright Alliance provides many free resources for artists including FAQs, blog posts, and videos explaining copyright law. (copyrightalliance.org)
- The American Society of Media Photographers (ASMP) provides links to their podcast, blog, and webinars directed towards educating photographers and other visual artists on various topics and current events. (asmp.org)
- The Graphic Artists Guild provides tools & resources on their website that explain everything from business practices to copyright law. (graphicartistsguild.org)
- U.S. Copyright Office website provides instructions and FAQs about registration procedures, as well as a search tool for finding registered works. (copyright.gov)

- Other membership organizations such as the National Press Photographers Association (NPPA) and North American Nature Photography Association (NANPA) provide educational and business resources to their members. (nppa.org, nanpa.org)

1 BEST PRACTICES IN RIGHTS CLEARANCE

2 SYMPOSIUM

3 Panel 1

4 Cosponsored by

5 The Arts & Entertainment Advocacy

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9

10

11 Moderated by

12 Prof. Sandra Aistars

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15

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17 Antonin Scalia Law School

18 George Mason University

1 3301 Fairfax Drive
2 Arlington, Virginia 22201

3

4

5 Reported by: KeVon Congo

6

7

8 A P P E A R A N C E S

9 Introduction

10 **Prof. Sandra Aistars**, Antonin
11 Scalia Law School, George Mason
12 University

13 **Julia Palermo**, Symposium Editor,
14 The Journal of International
15 Commercial Law
16 Moderator

17 **Prof. Sandra Aistars**, Antonin
18 Scalia Law School,

1 George Mason University

2 Panelists

3 **Nancy Wolff**, Digital Media

4 Licensing Association

5 **Jeff Sedlik**, PLUS

6 **Lateef Mtima**, Institute for

7 Intellectual Property

8 and Social Justice

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C O N T E N T S

18

MS. AISTARS: Welcome to what

1 I hope will be the first in a series of
2 Best Practices in Rights Clearance
3 Symposia, cosponsored by the *Journal of*
4 *International Commercial Law* and the
5 Arts and Entertainment Advocacy Clinic
6 here at Scalia Law. I am eager to
7 provide resources to creators from a
8 variety of disciplines, and those who
9 seek to build on or use their work to
10 expand our culture and increase
11 knowledge and social wellbeing. We
12 are beginning with examining the
13 practices of visual artists, but in the
14 coming years we hope to move on to
15 artists from other disciplines as well.

16 The focus of this event today
17 is to explore what issues artists and
18 users of works of visual art need to be

1 aware of when it comes to obtaining and
2 granting rights and permissions to use
3 copyrighted works, and to document the
4 collective wisdom of practitioners,
5 professors, industry experts and
6 artists themselves who have agreed to
7 share their practices, their advice,
8 their knowledge of industry norms, and
9 suggest areas for additional study.

10 The transcript of this
11 discussion will be published in the
12 Symposium issue of the *Journal* this
13 summer. It will be accompanied by a
14 resources guide, which the students of
15 the Arts and Entertainment Advocacy
16 Clinic will assemble based on the
17 discussions here today and further
18 research that they will do this

1 semester. And I am grateful for their
2 efforts and their presence here today
3 as well.

4 We've assembled a very
5 distinguished and a very interesting
6 panel of speakers today, but we've also
7 endeavored to make the invitation to
8 this event open widely to the public,
9 and to ensure that there are a wide
10 variety of artists and those who work
11 in and with the creative community who
12 were aware of this event and could
13 attend today. So, I would urge that
14 everybody take an active role and
15 participate in shaping this discussion.
16 I hope that everyone here will view
17 themselves not as an audience but
18 rather as full participants in the

1 event. And to that end we have several
2 microphones available today, and there
3 will be students standing on either
4 side of the room. And to the extent
5 you have a comment or question you'd
6 like to make, we won't be relying on a
7 a strict panel format, where we wait
8 until the end of a discussion to seek
9 questions or comments from the
10 audience; we'd encourage you to just
11 raise your hand, signal to the students
12 that you'd like to make a comment or
13 ask a question, and we'll get a mic to
14 you. It's important to wait for a mic,
15 because the comments are being
16 transcribed by a court reporter today
17 so that we can have them published in
18 the *Journal*. So, if you don't have a

1 mic it won't be possible for the court
2 reporter to accurately transcribe them.

3 You can also suggest a
4 question or make a comment using our
5 Twitter #VisualArtsGMU. And I know
6 there are a number of you who are
7 active social media users here, so I
8 would encourage you to cover the event
9 on social media so that folks who might
10 be your followers might also
11 participate even if they're not here
12 today.

13 Before I introduce my cohost,
14 Ms. Julia Palermo, who is the symposium
15 editor of the *Journal*, I'd like also to
16 thank our sponsors, the Center for the
17 Protection of Intellectual Property
18 here at the law school, and the

1 Institute for IP and Social Justice. I
2 am very proud to be affiliated with
3 both of these academic centers, and I'm
4 grateful for the thoughtful scholarship
5 that they bring to the area of
6 intellectual property law. I would
7 also like to give special thanks to the
8 visual arts organizations who sponsored
9 speakers so that they could travel to
10 appear here today. And, of course, I
11 can't give enough thanks to the student
12 editors and members of the *Journal of*
13 *International Commercial Law* who helped
14 organize the event and who will be
15 doing the work of editing and
16 publishing the transcript after. And,
17 of course, the students of the clinic
18 who will be doing the work of preparing

1 the resources document and who will
2 also be offering advice to anybody who
3 chooses to seek it this evening in the
4 networking reception in the one-on-one
5 speed lawyering sessions. So, without
6 further ado, I will pass the baton to
7 my colleague, Julia Palermo. Thank
8 you.

9 MS. PALERMO: Good morning,
10 everyone and thank you Professor
11 Aistars for that great introduction. I
12 am the symposium editor for the *Journal*
13 *of International Commercial Law*, and
14 first I want to say thank you all so
15 much for being here today. We are
16 really excited to co-host this event
17 with the Arts and Entertainment
18 Advocacy Clinic and all the other

1 organizations who donated their time
2 and resources. A special thank you to
3 all of the speakers on this panel and
4 on the second panel. This event would
5 not have been possible without their
6 expertise and knowledge, so we really
7 appreciate you traveling far and wide
8 to be with us today.

9 The *Journal of International*
10 *and Commercial Law* is an international
11 law journal run and published by
12 students at the law school. We were
13 established in 2008, and we publish on
14 a wide range of topics dealing with
15 international and commercial law such
16 as tax reform laws, international
17 privacy and consumer protection. We
18 previously co-hosted a moral rights

1 symposium with the Clinic and CPIP,
2 which was published in our Summer 2016
3 issue, and as Prof. Aistars said, we
4 are really excited to publish this
5 symposium in our Summer 2018 issue.
6 Without any further hesitation, I want
7 to pass the mic back over to Prof.
8 Aistars to get the panel started.
9 Thank you again for being here.

10 MS. AISTARS: So, rather than
11 introduce panelists one-by-one with
12 lengthy biographies, I'm actually going
13 to ask each of the panelists to take a
14 few minutes to introduce themselves and
15 what shapes their perspectives on
16 copyright issues so that you have a
17 better perspective of where we come
18 from in having this conversation about

1 copyright, visual arts and rights
2 clearance. I'll Jeff Sedlik, followed
3 by Professor Mtima to start and in
4 telling us about your perspectives,
5 comment also on what you think are the
6 main issues regarding creativity and
7 rights and permissions and fair use,
8 and how you think we as a community of
9 artists and academics and advocates can
10 positively contribute to addressing the
11 issues facing this community.

12 **MR. SEDLIK:** I'm Jeff Sedlik,
13 and I'm a professional photographer for
14 the last 35 years, as well as a
15 professor at the Art Center College of
16 Design in Pasadena, California, where I
17 teach on the topics of licensing and
18 copyright, copyright law, and standards

1 and practices in copyright licensing in
2 visual arts. I'm excited to be here
3 today because this topic is so
4 critical. It's faced every single day
5 by individual artists who have little
6 to no training in the law, little to no
7 training in business. They don't call
8 us starving artists for no reason. So,
9 there is no other profession, actually,
10 where there is a phrase that has
11 starving in front of it. You don't
12 ever hear starving lawyer, although
13 there are some, and starving plumber,
14 but you do hear starving artists, and
15 to some extent that's because people
16 get into the arts out of passion, you
17 know? They're creators; they're driven
18 to create. But they don't get training

1 in business unless they go to school
2 and take business classes and, even so,
3 it's not a complete training in
4 business. They don't get training in
5 the law. They don't understand that
6 their ability to support themselves and
7 enable themselves to create new works
8 is fundamentally dependent on the
9 protections, the rights and the
10 remedies under copyright law. Few
11 artists, even those among my most
12 educated peers, really fully grasp -- I
13 mean, based on my conversations with
14 them -- the fact that the ultimate
15 beneficiary of copyright law is the
16 public. That law is in place to ensure
17 that new works are created, but in
18 order to reach that objective you have

1 to have an incentive for people to
2 create. True, they will create even
3 without revenue, but that only lasts so
4 long; you can't pay your mortgage with
5 nothing, with exposure or what-have-
6 you. So, for that reason, for a
7 limited time, we have certain rights
8 reserved, exclusive rights over our
9 work, and we depend on those rights in
10 order to support ourselves in order to
11 be able to create the new works that we
12 want to create.

13 The challenge is that
14 copyright law has borders. That's one
15 of the biggest challenges. It's an
16 international marketplace. There are
17 no borders in the licensing of visual
18 works. I can't speak for other forms

1 of work, but I expect it's quite
2 similar. In the visual arts, it's a
3 global marketplace. Somebody from
4 Japan or France or Italy is just as
5 likely to license my work as somebody
6 in the United States. There are
7 different laws in the various
8 countries. The European Union is
9 struggling in its attempt to harmonize
10 copyright laws and protections across
11 the European Union, and the UK is
12 leaving the EU. You know, the UK is a
13 thought leader on intellectual property
14 and they're in the process of leaving
15 the European Union. But they did all
16 sorts of work ahead of time to take the
17 European Union forward, and now they
18 have that happening.

1 So, with these borders in
2 copyright law, and without any borders
3 in copyright licensing, or the use of
4 visual works, there is a challenge --
5 different languages, different laws,
6 different business practices. I'm the
7 president of a nonprofit, of which
8 Nancy [Wolff] is the general counsel --
9 thank you, Nancy, for being so
10 supportive for many years -- called the
11 PLUS Coalition, P-L-U-S. It's a
12 nonprofit organization with 156
13 countries worth of creators and users,
14 and the cultural heritage side all
15 cooperating to create a global language
16 for the licensing of image rights. I
17 won't get into the details here, but
18 you can see more at plus.org, P-L-U-

1 S.org. And I'll just cut to some of
2 the main challenges, two of the main
3 challenges that people face when
4 they're seeking visual work or they're
5 offering visual work for use are public
6 domain and fair use.

7 From the average citizen's
8 perspective, when they're looking at a
9 photograph or some other creative work
10 and making a decision whether they're
11 going to use it or not, they just
12 think, is this use fair? They don't
13 think about the four prongs of fair
14 use. They don't think about anything
15 else other than whether it seems fair
16 for them to make use of the work. And,
17 again, here you have international
18 issues. You have fair use here, you

1 have fair dealing overseas, different
2 prongs, if any prongs at all, in other
3 places.

4 So, it's extremely
5 challenging. People believe that if
6 they change an image a certain percent
7 that it's instantly fair use regardless
8 of any other factors or circumstances.
9 They believe that if they simply credit
10 the author, it's instantly fair. They
11 believe that if an image is posted
12 online it's automatically injected into
13 the public domain. They believe if an
14 image appears to be old because it
15 pictures people from the early 1900s,
16 that it's automatically in the public
17 domain. That's not true, because even
18 an image from the late 1800s can still

1 be within its copyright life today if
2 it was not published until after 1978.
3 And if it was published after that, the
4 clock starts ticking, and it has to do
5 with the death of the author or details
6 that I won't need to get into at this
7 moment. But an image of a farmer
8 pulling a wagon in the very late 1800s
9 could still be under copyright
10 protection today, and people will make
11 all sorts of mistakes when they are
12 making that decision. And I think that
13 with symposiums like this and with
14 public discussion and public education
15 efforts, we can go a long way toward
16 helping citizens and creators better
17 understand their rights.

18 **MS. AISTARS:** Thanks, Jeff.

1 And Professor Mtima, I will turn to you
2 and ask you the same question.
3 Introduce yourself by way of answering
4 what shapes your perspective on
5 copyright issues and comment on what
6 you think are some of the main issues
7 regarding creativity and rights and
8 permissions and fair use, and how you
9 think we as a community of artists and
10 academics and advocates can positively
11 contribute to addressing some of these
12 issues.

13 **MR. MTIMA:** Thanks, Sandra.
14 I'm also very happy to be here. I
15 cheated; I wanted Jeff to go first
16 because I knew he'd cover the
17 landscape. Because, in addition to
18 being very much aware of the

1 professional and legal aspects of this,
2 you're a professional artist, right,
3 and so it's a perfect combination of
4 what the balanced perspective ought to
5 be. And it's about balanced
6 perspectives that is really at the core
7 of my work both in the policy and
8 activism space as indicated by being
9 the founder and director of the
10 Institute for Intellectual Property and
11 Social Justice, and I'll speak mainly
12 about that sort of work. But, like
13 Jeff, I also wear another hat and
14 that's where the professor title comes
15 from. I'm on the full-time faculty at
16 the Howard University School of Law,
17 and I direct the Howard intellectual
18 property program there as well. So

1 much of this also spills into both of
2 the courses that I teach as well as the
3 scholarship that I write. And the
4 overarching perspective of that work is
5 in the realm of the theory that we have
6 identified as intellectual property
7 social justice.

8 Basically that's what its all
9 about, it really is. Some folk look at
10 IP law, or look at the social justice
11 obligations of the law, as more of a
12 redistribution of the benefits of the
13 law and the revenues to other parties,
14 other groups, people who have been
15 underserved for many, many years. But
16 we in the field, we look at it more so
17 as IP restoration. In other words,
18 getting the law back to what the law

1 was originally all about, which is a
2 lot of what Jeff was talking about.
3 Because when you think about it, when
4 it comes to creativity and it comes to
5 innovation, human beings have been
6 engaged in those types of activities
7 long before we had law, right? People
8 didn't need law as an incentive to
9 engage in cave paintings or to invent
10 the wheel. But what happens is that
11 there is a distinction between what I
12 call, the nonsecular incentive to
13 create and the secular incentive to
14 create, in addition to the fact that
15 you were just inspired to express
16 yourself and to share your thoughts.
17 Obviously, if you wanted to do that on
18 a full-time basis, as Jeff pointed out,

1 well, you also need to make a living.

2 Before we had copyright law,
3 certainly you had artists engaging in
4 creation -- people told stories, they
5 wrote stories, they painted and wrote
6 poems, etc., but the way in which you
7 made a living was that you relied on
8 wealthy patrons, right? People with
9 wealth who enjoyed your work and who
10 thought you could be helpful either in
11 instructing their children or
12 entertaining their guests, and that was
13 the way in which you supported
14 yourself.

15 With the introduction of mass
16 distribution technology, which sounds
17 like a really intimidating phrase, but
18 at that stage in the world, we're

1 talking about the simple printing
2 press, right? Because the printing
3 press is simply a mass distribution
4 technology, a way in which you can take
5 a story and relay it to the public
6 rather than the story being embodied in
7 the author and the only people the
8 author can share her work with are
9 those people who are right in front of
10 her. With the printing press, you can
11 fix your work, you can produce multiple
12 copies, you can engage in mass
13 production and mass distribution. It
14 sounds like a really good thing for
15 everybody. It sounds like a win-win,
16 right? I get my work out to more
17 people; more people have been exposed
18 to my wonderful ideas, etc. But there

1 is also a potential downside, right?
2 Because once that artist fixes her
3 work, once she writes it down and hands
4 it over to the printer, there is also
5 the possibility that she will lose
6 control over her work. She's not the
7 one running the printing press, so she
8 doesn't necessarily control how many
9 copies are produced. She doesn't get
10 to control where those copies go.
11 She's not sitting there determining who
12 may be making changes to those copies,
13 and giving her credit or not giving her
14 credit. In addition, she's not
15 necessarily in control of how much
16 revenue comes from those copies and
17 where that revenue goes.

18 And so that's really where

1 copyright law comes in. Copyright law
2 encourages, enables and facilitates a
3 creator to engage in the distribution
4 process. Yes, you can go ahead and fix
5 your work in material copies; you can
6 authorize and support the mass
7 distribution of those copies; but
8 because of copyright law, you're not
9 going to lose complete control over
10 your work. You get to say who
11 legitimately makes those copies; you
12 get to control what people can do with
13 those copies in terms of whether or not
14 someone can give you attribution and
15 not give you attribution, or change it
16 up in different ways and still keep
17 your name on it, or not keep your name
18 on it. And you also, obviously, have a

1 say in making certain that you receive
2 a portion of the revenue from those
3 copies.

4 The problem in our society,
5 and this is where the theories of IP
6 social justice come in, is that when it
7 comes to mass distribution, you
8 interject a third party into the
9 artist-audience relationship. When
10 it's just you, you stand up, you give
11 your poem or you do your rap, or
12 whatever it is, and the audience gives
13 you feedback. But when you engage in
14 mass distribution, well, now you need a
15 distributor, be it a publisher for
16 written works, a recording studio or
17 recording company for musical works,
18 and that entity is inserted in the

1 pipeline. And basically what's
2 happened in our society is that
3 gradually what you have is you've got
4 the artist, you've got the audience,
5 and now you've got this distributor in
6 between, who is making certain that the
7 work goes out to a wide variety of
8 people. Gradually what happens is that
9 the publisher, the distributor sort of
10 grows in ascendance. And instead of
11 just being in the middle, the
12 distributor begins to dominate downward
13 to the artist and to the audience what
14 was going to happen. In other words,
15 we're only going to produce the work
16 that we think is commercially viable,
17 right? And by commercially viable, we
18 also mean what we think is going to be

1 commercially profitable at the level of
2 profit that we're most interested in.

3 So, you may want to write
4 books and poems and stories and
5 histories that there are certain
6 segments of the community, of society
7 that you are interested in. And maybe
8 it might be profitable, but it may not
9 be as profitable, as other types of
10 works, things that, as a publisher, I
11 think are more commercial. And as a
12 result, I'm not going to support your
13 work, right? I'm going to dictate to
14 you that if you want me to publish it,
15 well, you know, we need another story
16 about the Kardashians. What we don't
17 need is some sort of history or
18 political analysis of what happened to

1 Native Americans 200 years ago, because
2 that's not going to sell quite as well.
3 And, of course, in addition, you have
4 the publisher dictating down to the
5 public what you're going to receive,
6 right? Because if nothing gets
7 published, if certain music doesn't get
8 recorded, well, then, the public really
9 doesn't have access to it.

10 One of my favorite stories
11 along these lines is that today
12 virtually everybody, whether you were
13 into R&B back in the '60s and '70s or
14 not, or if you were not even born back
15 then, which is the case for me -- no, I
16 obviously was around; the gray is the
17 telltale. But Marvin Gaye is widely
18 regarded. His "What's Going On" album

1 is thought of as one of the most
2 influential pieces of modern pop music.
3 And Marvin Gaye actually had to battle
4 with Barry Gordy to get that music
5 recorded and distributed. Because if
6 you look at what Motown was producing
7 up until that point in time, very good
8 music, very commercial, very pop, but
9 not a lot of commentary, not a lot of
10 political statement, right? So that's
11 an aspect of, hey, the creator wants to
12 do it, the audience wants to receive
13 it, and the audience in our society as
14 a whole will benefit from that type of
15 production. But if it's not perceived
16 as sufficiently commercial by the
17 distributor in the middle, then you end
18 up with copyright not really doing what

1 it's supposed to be doing. Not really
2 promoting and advancing culture and
3 expression and education in the way in
4 which it ought to.

5 So, what IP social justice
6 does is, we try to look at those types
7 of deficiencies. We try to look at the
8 fact that in many instances, corporate
9 distributors and corporate publishers
10 twist the purpose. It enables this sort
11 of vitiation of copyright to those sort
12 of take-it-or-leave-it types of deals,
13 right? You produce what I want you to
14 produce and you take 10 cents per
15 record because that's what the deal is.
16 And either you take it or leave it.

17 In addition, it also enables
18 this sort of twisted application,

1 implementation of copyright law. It
2 allows for the middle entities to
3 exploit certain communities. I mean, I
4 don't even have to waste time going
5 into a lengthy history. For example,
6 the entertainment industry and the way
7 it has exploited all artists, all
8 starving artists. But, of course,
9 there is also a particular notable
10 history in terms of the recording
11 industry and the entertainment -- the
12 African American community, right?

13 This twisted perspective, in
14 addition to depriving artists,
15 particularly artists from underserved
16 communities, of the appropriate control
17 and credit and financial benefit from
18 their creative endeavor, it also

1 enables those entities to ignore
2 certain other social utility needs and
3 social justice needs of expressive
4 endeavor. For example, there are
5 communities that very much need access
6 to histories, to books, to knowledge,
7 to information, and if those
8 communities don't have the resources,
9 if their schools don't have the tax
10 base, etc., in order to obtain the full
11 range of material that is available,
12 again, from what we call an IP or
13 copyright commoditization perspective,
14 well, that's not a problem for the
15 copyright law, right? That's a problem
16 for general welfare. Congress ought to
17 pass a bill and give those communities
18 some extra money, but it has nothing to

1 do with IP. But, of course, we know
2 that's not true, right?

3 If the purpose of copyright
4 protection is to encourage and to
5 promote distribution, dissemination,
6 education and access to knowledge, and
7 to make certain that fantastic ideas
8 get out all across society, not just to
9 educate people, but so those people can
10 in turn, once inspired, take their
11 contributions back to the total
12 copyright pool. Well, if these things
13 aren't happening, it means that
14 copyright isn't working the way that it
15 was intended to work.

16 To wrap it up and to bring it
17 more specific to some of the issues
18 that we're thinking about today, I

1 think that, unfortunately in recent
2 years a way to push back against some
3 of those copyright and other IP social
4 justice deficiencies, there has been a
5 great deal of work, and to some extent
6 an over-emphasis in the area of fair
7 use. Fair use is one of the most
8 appropriate and best mechanisms that we
9 have written into the copyright law to
10 make certain that copyright functions
11 overall the way in which it is supposed
12 to function. But fair use is also not
13 a substitute for all unauthorized uses
14 of copyrighted material. Fair use,
15 there are the specific factors and
16 specific uses fall within that
17 category, but then you have a whole
18 range of uses that arguably fall in the

1 middle. In other words, we kind of
2 find ourselves in a very polarized
3 landscape for the use as well as
4 commercial exploitation of expressive
5 material. On the one hand you have
6 corporate distribution entities saying
7 pay my price, whatever that price is.
8 I don't care what you need to use it
9 for, I don't care how important it is
10 or artistic it is; pay my price or you
11 don't get to use it. And then you have
12 other camps saying, well, you know
13 what? Perhaps fair use means I can do
14 it and I just don't got to pay, right?
15 Obviously, there is a middle
16 ground. Obviously, there are going to
17 be times when you want to use work. It
18 is not something that fits into fair

1 use, but -- and you do want to pay,
2 right? And the problem is that, well,
3 how do you go about doing it?
4 Oftentimes, users as well as other
5 artists, want to legitimately make use
6 of someone else's work. And the first
7 step is trying to find out, well, how
8 do I even find out how do I get in
9 touch with you. How do I negotiate
10 with you? Do we have any parameters?
11 Do we have any standards, you know,
12 whatsoever? The corporate distributor,
13 I think, has placed us in this
14 polarized situation in which it's
15 either pay this and only this, right?
16 And for smaller artists who want their
17 work to be utilized by other people,
18 but they want their fair attribution,

1 they want credit. They also want a
2 fair return. We don't have sufficient
3 mechanisms and opportunities for that
4 to happen. And I think that by
5 bringing users and the public and
6 creators together into symposia of this
7 kind, that perhaps we can move the
8 needle forward in trying to come up
9 with ways in which to facilitate those
10 types of uses such that you don't
11 always have public versus creator, and
12 actually you have work moving up in a
13 way that is more beneficial to society
14 as a whole.

15 **MS. AISTARS:** Thanks. And
16 I'm definitely going to want to explore
17 some of that more when we discuss a
18 little bit more, because I think that

1 there are some interesting things to
2 drill down on there. Because I think
3 some of the corporate folks who you
4 refer to have really been replaced by
5 different sorts of middlemen these
6 days, and there are different
7 corporations, but you see similar types
8 of relationships developing. And I
9 want to put a pin in it, but I think
10 one thing that occurs to me that you
11 might be saying, and think about this
12 and tell me if I'm right or wrong, when
13 we get through hearing from Nancy, is
14 that there should be a focus, perhaps,
15 on ensuring that individual creators
16 have a better ability to retain their
17 copyrights, and that they are in a
18 better negotiating position in the

1 first place. And that people are more
2 empowered in their relationships going
3 into commercial transactions. And that
4 they think about the contracts that
5 they're entering into and don't just
6 kind of blindly sign 360 deals that
7 give away their rights so they can't
8 later grant a permission that they
9 would be prepared to grant. But, as I
10 said, let's put a pin in it, and I
11 would like to introduce my friend and
12 colleague, Nancy Wolff. Nancy is the
13 only active law partner on this panel
14 today. She's also the president of the
15 Copyright Society of the United States,
16 which I urge all of you to join. It's
17 a fantastic organization to get a lot
18 of education and opportunity to talk

1 about issues like this and make
2 connections with people who can assist
3 on issues like this.

4 But I asked Nancy to prepare
5 a more practical presentation about the
6 common issues that come up in her
7 practice, advising photographers and
8 other visual artists regarding rights
9 clearance, and she has done that and
10 we'll all react to some of the things
11 that she raises, after she presents it.

12 But, Nancy, if you could also tell us
13 about your practice and the types of
14 clients you represent. Because I'm
15 always amazed when I go into Nancy's
16 office in New York, the photography and
17 art she has on her office walls from
18 clients who she represented over the

1 years. And any time I mention an
2 interesting photography case she says,
3 "Oh, yeah, that's my client." "Yeah,
4 I'm working on that case," or I'm
5 reading about something in the *New York*
6 *Times*, you can bet that Nancy is
7 representing that photographer.

8 **Nancy Wolff:** I don't have a mic,
9 so I'll stand up here. When I was
10 young I dreamed of being the starving
11 artist, and my father wisely saw my
12 artistic ability and convinced me
13 somehow to be a lawyer. But I did, my
14 first year of practice, go to the Art
15 Students League and paint, and that was
16 evidence why I should be on this side
17 of things. But what it has given me is
18 really the appreciation of working with

1 creative people, and my practice is
2 varied. I work with photographers, I
3 work with artists and sculptors, but I
4 also work with documentary filmmakers,
5 publishers, creative designers. And
6 what I actually see is that everyone in
7 some ways is a user and creator. So,
8 copyright has really become important
9 to everybody. For some examples, I've
10 represented long-time portrait artists
11 such as Arnold Newman, and when you
12 come in my office you'll see an amazing
13 portrait of Picasso and O'Keefe and
14 Kennedy. Then next to my desk I have
15 the cover from Bob Dylan's "National
16 Skyline" that Elliott Landy gave me.
17 I've got a couple of Joyce Tennesons.
18 And then I became known as the peeping

1 tom photographer, because I represented
2 Arne Svenson, who took pictures of his
3 neighbors. But if you see the
4 pictures, they are actually stunning
5 and they're not salacious at all, but
6 describing them that way sold a lot of
7 papers. And I worked with the artist
8 who created Fearless Girl, and made
9 sure she kept her copyright. So, you
10 can see her down at Wall Street facing
11 off the bull, which has also created a
12 little bit of controversy.

13 But I love the idea that
14 we're talking about copyright from many
15 different perspectives -- from the
16 perspective of an artist, from the
17 perspective of social justice, because
18 that's what makes copyright so

1 interesting. It really is about ideas
2 and where these lines are and where
3 these borders are.

4 So, what I've put together is
5 sort of the practical side of things,
6 because as a lawyer you're supposed to
7 give answers to clients when they come
8 to see you. And often with copyright
9 for example fair use, it could be this
10 answer and, it could be that answer.
11 So, often you're really giving advice
12 based on risk and judgment, and the
13 types of questions you get all the
14 time, maybe as a lawyer would seem
15 quite obvious, but, really, the people
16 dealing with copyright all day and who
17 are in the trenches are not lawyers.
18 And even many lawyers and judges don't

1 really grasp the nuances of copyright.

2 So, I was going to give a top
3 10 list, but I'm not sure I counted 10,
4 so we're just going to call it the top
5 questions I get all the time. Jeff has
6 mentioned a few of them, but
7 unfortunately sometimes one of the
8 first questions I do get is, why do I
9 need to clear rights? Why do I even
10 need to license? I mean, there is just
11 so much content out there that anyone
12 can physically get. You can do an
13 incredible image search just by going
14 on Google Images, you can right click,
15 drop, and you just have the image right
16 there. So, what encourages people from
17 going to the source for licensing or
18 going through a representative? And

1 we'll get into some of these issues.

2 But there are risks of just
3 taking anything you want online. You
4 don't know the source; you don't know
5 if you're getting a copyright license.
6 You're not getting any indemnity. I
7 mean, particularly, maybe if you're an
8 artist and you're doing a collage it's
9 one thing; but if you're a company and
10 don't want a lawsuit, there is some
11 value from actually going to the
12 artist, going to the licensing agent.
13 What can come up later with online
14 images, is you don't know anything
15 about third-party clearances. And
16 there are a lot of image recognition
17 technology services out there that are
18 starting to find unauthorized uses, and

1 a lot of people are getting quite
2 surprised when they get a letter
3 demanding to be paid for work that they
4 just found online. So, we'll get into
5 that a little later.

6 And I always get these
7 questions. There are all these sites
8 that are free images. Well, if they're
9 free that means they're free. Well,
10 what it could mean is that it's user-
11 generated content and someone has
12 uploaded content that he or she does
13 not own. So, I recently had a
14 situation where a client of mine saw
15 her recently deceased husband's most
16 famous iconic photograph in a
17 commercial ad trying to sell furniture.
18 It was in the frame where you would put

1 something on a desk to look at a work
2 of art. And the answer was, "Well, we
3 got it from this website and it said it
4 was an Irving Penn." I said, "Oh,
5 that's even better; I'm sure he would
6 have appreciated it." So, sometimes
7 things that are free really don't mean
8 you're going to the source, either.

9 And we've mentioned this
10 question, it's public, so isn't it in
11 the public domain? So, try to explain
12 public domain, particularly under US
13 law. If I don't go to Peter Hurtle's
14 (ph) chart from Cornell Law School my
15 mind goes crazy, because our laws
16 before 1978 were quite different. Lots
17 of requirements, a lot of works fell
18 out of copyright and a lot of

1 formalities. This is just US. And so
2 it really isn't always a black-and-
3 white question, and how you find out if
4 something is in the public domain is
5 never an easy question to answer, and
6 that's often where, as a lawyer, you
7 sort of have to do a risk analysis with
8 clients.

9 Creative Commons, I can't
10 tell you how many times I get questions
11 about the Creative Commons license,
12 which is a way you can share any kind
13 of work. But there's many flavors of
14 the Creative Commons license. There's
15 one type, a CCO, which is similar to
16 public domain. There are some
17 attribution requirements. And there's
18 a lot of freedom with CC licenses, but

1 there's a lot of Creative Common
2 licenses that you can't use for
3 commercial use, or you can't make any
4 changes to the content. A lot of
5 variations I think are subtle and not
6 everyone looks into it. And it's also
7 possible that someone could put a
8 creative license on work that isn't
9 theirs. So, there always is a little
10 bit of digging. The same thing with
11 social media. Just because it's on
12 somebody's particular Twitter account
13 doesn't mean that Twitter owner is
14 necessarily the creator.

15 And we touched on this. I'm
16 often asked, you know, well, isn't it
17 under international copyright law? And
18 there really isn't one giant universe

1 where someone is sitting, adjudicating
2 over international copyright law.
3 Every country -- well, not every
4 country -- countries who have copyright
5 laws enter into treaties with other
6 countries, which has reciprocity. So,
7 if I'm an American artist and my work
8 is infringed in France, the French
9 judiciary system will protect my work.
10 If I'm a French artist and my work is
11 infringed in America, the US courts
12 will, if the work is protectable,
13 protect that work. And that's how
14 these relationships work. But there
15 isn't one universal law. There are
16 variations in term and, as Jeff used
17 the word, harmonization. Nothing is
18 quite harmonized and there is always a

1 lot of little, subtle differences.
2 That's why you have to have friends in
3 many countries.

4 And this is my favorite. We
5 do a lot of documentary film work in my
6 office, and I'm the one who is always
7 brought in, because you can get E&O
8 insurance now, if you're a documentary
9 filmmaker for fair use. And if you
10 can't -- if you don't clear a few
11 items, if you have a lawyer who
12 actually knows copyright, is
13 experienced and can determine whether
14 particular uses are fair use, you can
15 get a fair use letter and you can
16 actually distribute your film so it
17 won't be held up, because there is some
18 material that does rely on the doctrine

1 of fair use, which is really important.
2 There are many documentary films that
3 just could not come out if there wasn't
4 some ability to rely on fair use in the
5 appropriate cases.

6 But it has become a verb, and
7 often I find out that it's for -- I
8 really don't want to pay a license, or
9 I don't have the budget, so "can't I
10 just fair use it?" It's not a verb.
11 You really do need to analyze the
12 context and to see if the use truly is
13 transformative. And if you think
14 judges have a hard time figuring it
15 out, it's very difficult for someone
16 trying to tell a story and believing
17 that they really need certain clips or
18 visual material to tell that story and

1 to explain to them the right way to do
2 it, and when they need a license, and
3 when the work really does fall under
4 fair use.

5 The same thing is really with
6 what's a derivative work under
7 copyright? Not that easy sometimes to
8 see the difference between fair use,
9 which requires something to be
10 transformative, and whether it's
11 derivative. Because part of the
12 definition of what a derivative work is
13 is to modify, adapt or transform. So,
14 again, copyright protection falls on a
15 spectrum, and where is the end line?
16 Where have you changed something so
17 much that it's completely original? Or
18 when is it derivative and the exclusive

1 right of the original creator requires
2 you to obtain permission? And if you
3 create a derivative, what do you own?
4 You own the new part you added but not
5 the underlying part.

6 And with the design community
7 for so long, I would hear "if you
8 change something 10%, you don't need
9 permission." Well, with fair use,
10 there are no absolute guidelines that
11 say you can take three words, you can
12 take three notes, or something that's
13 50 words is not protected, or if you
14 change something 10% is not
15 protectable. But because fair use is
16 so abstract and doesn't have defined
17 boundaries, communities make up
18 guidelines to make it easier, but often

1 a guideline hasn't been tested by court
2 and you really need to look at the
3 context and not rely on the fact that
4 some university or some guideline had
5 said, this amount of words should be
6 okay, or this amount of change should
7 be okay.

8 Graffiti murals. I think
9 there was a time where it was assumed
10 that graffiti artists didn't want to be
11 known, they are all just vandals, and
12 they would never sue. And a lot of
13 images of graffiti are seen in a lot of
14 photographs. Also, you can't
15 authentically document a community
16 without showing building with graffiti.
17 You cannot document Philadelphia, San
18 Francisco, so many communities,

1 Brooklyn, without streets that show the
2 real nature of the environment. And so
3 at what point, should a mural artist
4 prevent someone from illustrating a
5 story about Brooklyn or Philadelphia
6 and the culture if the author could not
7 give some examples of the type of
8 artwork that exists in the community?

9 Tattoo. Can tattoos be
10 protected by copyright? Is it fixed?
11 Is your face the same thing as a
12 canvas? And the answer is yes, your
13 face is a canvas, your arm, your back,
14 your shoulders. So, those questions
15 were answered.

16 Releases. And then this. Any
17 time I even start a discussion on
18 copyright, I always end up in releases.

1 When do I need extra third-party
2 permissions? You never can get away
3 from those questions. And in the US,
4 at least, the answer is generally --
5 that you need releases sometimes for
6 people and sometimes for recognizable
7 objects. And when do you need them and
8 when don't you need them?

9 Often the question arises
10 with anyone publishing a book, doing a
11 documentary film or writing about
12 something, such as a blog. And the
13 answer is, well, is the use commercial
14 or not? Well, what is a commercial
15 use? Some Creative Common license are
16 based on whether a use is commercial or
17 not. And I believe they commissioned a
18 white paper to determine what people

1 thought was commercial, and they spent
2 about a million dollars and didn't
3 really get an answer to that question.

4 Where you don't need releases
5 in the US is for editorial use. Well
6 then, what is really editorial,
7 particularly now, when so much is being
8 shared on social media? Brands want to
9 show pictures of people using their
10 product. It's getting confusing and
11 blurry. You know, the easy answers are
12 illustrations for truthful stories and
13 documentaries, news broadcasts,
14 articles, books. There needs to be a
15 relationship between the image and the
16 content. You can't fake it. You can't
17 call something editorial and have it
18 really be editorial if it is

1 advertising.

2 So, those are my top 10, 11,
3 however many they are, of the issues
4 that come to my desk every day. And
5 I'll turn it back over to Sandra to
6 lead the discussion further.

7 **MS. AISTARS:** Thank you,
8 Nancy. That's incredibly helpful and a
9 very, very good way to start us off
10 into a more substantive analysis of
11 these issues. And I'd like to actually
12 jump right into what I was beginning to
13 talk about with Lateef, because you
14 made me think about it as well, as you
15 talked about releases.

16 I think that fits well with some
17 of the social justice issues Lateef was
18 raising, and my thought that maybe an

1 answer to some of these problems that
2 Lateef identifies is ensuring that
3 artists retain their copyrights as much
4 as possible. I think similar issues
5 apply in the context of releases. And
6 I guess my question to all of you would
7 be how would you balance the interest
8 of the artist or the corporate entity,
9 whoever it may be in a given case, in
10 wanting to have as many rights as
11 possible so that it's easy to either
12 give somebody permission to use a work
13 later or use a work yourself in a way
14 you didn't initially anticipate, on the
15 one hand. And then on the other, being
16 respectful of the rights and interests
17 of others in retaining their rights,
18 whether it's an artist retaining his or

1 her copyright, or a model retaining his
2 or her right of publicity and being
3 able to reject a certain type of use or
4 get additional payment for a certain
5 type of use later on. How do you
6 strike that balance in advising your
7 clients, Nancy?

8 **MS. WOLFF:** Well, I think you
9 have to look at what you are initially
10 creating the work for. I mean, if
11 you're a photojournalist and you're out
12 on assignment and you're getting a lot
13 of great works, you're telling a story,
14 it's really not going to be very
15 convenient for you to have lots of
16 releases in your back pocket and say,
17 "Please sign this because I might want
18 to use this for commercial advertising

1 in the future." I mean, that would
2 just interfere with what you're doing.
3 And I think that's where we really look
4 in the US at where the First Amendment
5 gives you greater latitude to create
6 works which you could use in the future
7 for a bundle of purposes that don't
8 encroach on a quite separate right,
9 which is the right of privacy and
10 publicity and someone's identity and
11 likeness. So, if something fits in
12 that editorial box, you could still use
13 it in the future if you're respectful
14 of that line on whether the image is
15 really promoting goods and services or
16 it's continuing to tell a story and
17 illustrate something that's
18 informational, cultural, and relates to

1 the subject.

2 So, you might have a story
3 that you photographed for, you know, it
4 could have been at the time, you're
5 talking about the '60s, some of the
6 anti-war movements and the peace
7 demonstrations. And then now you want
8 to look at what's going on currently,
9 and you might want to republish some of
10 those works now and show a picture of a
11 march from the '60s versus some, maybe
12 Saturday at another women's march in
13 contrast. You could republish those
14 pictures you took from the '60s because
15 there is still a relationship, there is
16 still a story that is being told by
17 those photos. And you could publish
18 them in your own book of your work; you

1 could have exhibitions; and you can
2 sell them as fine art prints.

3 **MS. AISTARS:** So, that's a nice
4 try, Nancy, but you didn't answer my
5 question. Because what I want you to
6 answer is a much harder question, which
7 is, when you're advising a client who
8 is actually going out and getting
9 releases. So, you're advising an
10 advertising photographer. Let's say
11 Jeff comes to you. He wants you to get
12 him a great release because he doesn't
13 know what he's going to use the work
14 for in the future. But on the other
15 hand, Jeff is an artist, and artist
16 advocate, and wants to be respectful of
17 his model's rights, so what kind of
18 release are you going to advise him to

1 use with Lateef sitting next to him?

2 **MS. WOLFF:** Okay, so Jeff is
3 going to take a great picture of
4 Lateef, and Jeff wants to make the most
5 money from this picture as he can. So,
6 Jeff is going to want to talk to him
7 about this wonderful world called stock
8 photography, where you can use an image
9 for anything you can think of.

10 However, the respectful part is that it
11 can't be used for anything defamatory,
12 and it can't be used for anything that
13 would be illegal. When you mass
14 distribute images online, the problem
15 is you don't have a conversation with
16 your users, so the releases need to be
17 very, very broad, because you are not
18 going to know the context. So, how you

1 protect the model is that the agreement
2 between the one who is going to license
3 the photograph of Lateef in the future
4 is going to have restrictions in it.
5 And it's going to say that you can't
6 use this for anything that's going to
7 endorse a product. You can't use this
8 for anything that is going to create
9 his face into some kind of trademark.
10 You can't use this for anything that
11 would be defamatory, and you can't use
12 it for anything that might be what is
13 called a sensitive subject, that maybe
14 it would look like he, you know, has a
15 disease, has a little psychosis, or
16 anything that might be uncomfortable or
17 insulting to him, unless there is a big
18 label that says, something like "this

1 is a model and it's used for
2 illustrative purposes." Those types of
3 restrictions will be in the agreement.
4 So, that is a very broad use, and
5 Lateef may say, "I don't know if I
6 really want to see my face in a
7 billboard." Then Jeff would have to
8 have a conversation with him as to what
9 he would be comfortable with. But once
10 you do kind of a mass-market
11 distribution, it's very hard to have a
12 narrow release unless it's just limited
13 to what would be editorial use, because
14 there's going to be mistakes made.

15 **MS. AISTARS:** So, Lateef, are
16 you going to sign that release?

17 **MR. MTIMA:** As Lateef,
18 probably not, but that's just because

1 I'm a lawyer, right? I mean, a
2 regular, ordinary, everyday person
3 doesn't recognize that when you model
4 for a photographer, there are at least
5 three different types of intellectual
6 property rights that are going to be
7 implicated in that photograph. And
8 then later on the issues are going to
9 be, well, even though I've signed a
10 release and even though we haven't
11 specified this type or that type, or
12 what-have-you, if we haven't gotten
13 into that great level of detail, what's
14 going to happen is that, okay, I signed
15 the release that says you can take my
16 picture, right? So, that pretty much
17 is going to cover any of the copyright
18 uses. But as you were indicating, it's

1 probably not going to cover trademark
2 uses and it's probably not going to
3 cover publicity right uses, right?

4 And so then what happens is
5 that later on, if you're using the work
6 in such a way that I find
7 objectionable, what I'm going to have
8 to do as a lawyer, okay, I already know
9 to do this. But as a regular, everyday
10 person who is an ordinary model, I'm
11 going to have to go find a lawyer who
12 will have to advise me that the release
13 that you signed, it covered copyright
14 expressive uses but it didn't cover
15 trademark-type uses. And it didn't
16 cover publicity-type uses, meaning the
17 kinds of uses that you were describing
18 in which my image is going to be used

1 to promote or to sell something, as
2 opposed to just simply as an expression
3 of, this is what this person looks
4 like, or this is the context in which
5 I'm photographing them.

6 **MS. AISTARS:** Jeff, what do
7 you typically do in your relationships
8 with models? How much do you ask them
9 to release in terms of rights? And do
10 you get people coming to you later on
11 and saying, hey, I love this image and
12 I'd like to use it in this different
13 context? And do you find yourself
14 having to go back and get further
15 permissions for the models to do so?

16 **MR. SEDLIK:** Okay. So, I am
17 an advertising photographer, but I also
18 make fine artwork, I shoot editorially

1 for magazines. I shoot with the
2 expectation of publishing my own
3 photographs. And whenever I shoot I do
4 so with the expectation that I can
5 exploit, in a good way, my work, the
6 fruits of my creative endeavor over the
7 entire copyright life of the work -- my
8 life plus 70 years at this time. And
9 that means my family can also benefit,
10 my heirs can benefit after my passing
11 from my creative endeavors. But when I
12 create my image I know that creating
13 that image and fixing it, the objects
14 and persons that appear in my work,
15 there can be rights related to those as
16 well. And when I'm shooting people, I
17 want to make sure that I'm respectful
18 of their rights. And their rights, you

1 know, copyright, there is a nexus
2 between copyright law and right of
3 publicity, right of privacy, and it's
4 incredibly complex -- it's different in
5 every state and it's different in every
6 country.

7 So, the answer to one of your
8 questions is, if I'm shooting an
9 advertising job, I ask my client to
10 bring their own release, and I have the
11 model sign it. And I bring my own
12 release that protects me, and I have
13 the model sign it. And that way should
14 something go wrong with the way that my
15 client makes use of my work, I don't
16 get called onto the hotplate. In
17 almost every contract that a
18 photographer might sign with a

1 publisher, with an advertising agency,
2 with a design firm, there is an
3 indemnification clause that says that I
4 guarantee that should anything come up
5 that I will indemnify my client from
6 any liability with respect to the
7 rights of anything that appears in my
8 photograph. And there have been
9 photographers, including some of my
10 friends, who have lost everything by
11 signing a contract like that without
12 modifying the indemnification clause.

13 One photographer was taking
14 portraits of women for a pharmaceutical
15 company and they signed a very detailed
16 model release, each of them, but they
17 did not see how it was going to be
18 used. And in the end it was used

1 nationwide in advertisements for a
2 medication for a certain venereal
3 disease, and under every picture it
4 said, "I have --" and then it had the
5 name of the venereal disease, and just
6 literally a headshot of the person.
7 They all got calls from all their
8 friends and everybody was embarrassed
9 and they all sued the advertising
10 agency and the pharmaceutical company,
11 who then held up the indemnification
12 clause that the photographer had signed
13 and pointed them all back to the
14 photographer, who ultimately had to pay
15 out a very significant sum. His life
16 was changed forever from not
17 understanding that you need to actually
18 read what you sign before you sign it

1 and modify it.

2 But to sum up, whenever I
3 create a work, I know that my rights
4 under copyright law can be limited by
5 other people's rights under state law
6 and laws in other countries, etc., so
7 I'm very careful to make use of a
8 release in my advertising work. I have
9 a lengthy release. If I'm walking
10 around the streets of Spain and taking
11 portraits for a book project, I have a
12 short release in Spanish, and it will
13 say something like, "I can make use of
14 the work for my own promotion or in a
15 book, or/and in a book, and that I can
16 modify it without talking with them."
17 But I know that I can't then take that
18 and upload it to Getty images or a

1 stock agency and start selling it. And
2 I wouldn't feel comfortable in most
3 circumstances doing that without having
4 a release, or at least providing some
5 form of compensation to the model.

6 **MS. AISTARS:** Just out of
7 curiosity, how do you track that? How
8 do you track that with your images?

9 **MR. SEDLIK:** I have a digital
10 asset management system, and I have
11 image numbers, model release numbers,
12 and license numbers, and it's all
13 indexed together. And I have all of my
14 releases going back through all the
15 years ready, so that if I need to make
16 use of any image, I know what rights I
17 have to the image. And it is very
18 important to understand that, as I

1 mentioned earlier, it's different in
2 every state.

3 And in closing, I think I
4 understood part of your original
5 question, but using the word release,
6 there are a couple of facets to that.
7 I thought that you used that term,
8 also, in a way to refer to like a broad
9 grant of rights from the photographer,
10 release the photographer, releasing his
11 or her rights to the client in terms of
12 copyright rights. Was that part of the
13 question or is that a different
14 question?

15 **MS. AISTARS:** No. So, I was
16 basically trying to make a parallel, or
17 make a comparison between, you know,
18 how do you as a photographer deal with

1 your models --

2 **MR. SEDLIK:** Okay.

3 **MS. AISTARS:** -- and respect
4 their rights versus, how a photographer
5 might deal with a corporation who might
6 be seeking lots of rights from the
7 photographer and not to be hypocritical
8 in either situation, essentially. If
9 our advice to photographers or other
10 artists might be, keep all your
11 copyrights so that you can ensure that
12 you can grant licenses to people who
13 come to you later who want to use your
14 work in other projects, or facilitate
15 things that we think are socially
16 beneficial, then you presumably have to
17 get lots of rights from your models to
18 be able to ensure that you can do that.

1 But that kind of puts you in a bad
2 situation, right? Because then you
3 have to act towards your models like we
4 are telling you not to let the
5 corporation act towards you. So, maybe
6 Lateef wants to comment on that,
7 because I think he raised it really in
8 the social justice context.

9 **MR. MTIMA:** Can I just
10 mention one thing?

11 **MS. AISTARS:** Sure.

12 **MR. MTIMA:** There are hybrid
13 solutions. For example, when you take
14 a photograph of somebody, a
15 photographer, you never quite know if
16 you're ever going to make use of that
17 photograph, and you can have a type of
18 release where you offer up to the model

1 a percentage of the revenue that you
2 bring in. You know, as long as that's
3 part of the release, you can do that,
4 and I know many people do. I retained
5 an attorney to help me draft such a
6 release so that over time when a call
7 comes in to make use of an image, I
8 have a release in place and I send
9 payment to the model as a percentage,
10 and it's all covered. So, I didn't
11 have to come up with some very
12 significant amount at the outset, and I
13 didn't know how the image would be used
14 downstream.

15 **MS. AISTARS:** Great
16 suggestion.

17 **MR. MTIMA:** Yeah. I think a
18 lot of it comes down to the question of

1 leverage on each side of the coin.
2 There is the leverage issue vis-à-vis
3 the photographer and the company that
4 may be acquiring the photograph from
5 you. Then, of course, there is the
6 leverage relationship between you, the
7 photographer, and if you have models,
8 the model in the photograph. You know,
9 as opposed to, for example, you could
10 take a picture of a dog or a still
11 life, or something like that.

12 On the artist to corporation
13 side, the big problem is that typically
14 the artist/photographer doesn't have a
15 whole lot of leverage unless you are
16 really very famous, etc. If you don't
17 have a lot of leverage, and I don't
18 know if photographers do this at all,

1 but something that I've been looking at
2 recently is how about if the artist
3 says to the corporate distributor,
4 listen, I'm going to sign your what-
5 have-you. There are some little, tiny,
6 community-type folk not making a lot of
7 money; if people like that come up to
8 me, can I reserve the right to be able
9 to just deal with those folk? We're
10 talking about things that aren't going
11 to make a whole lot of money anyway,
12 maybe make no money, and then it gets
13 into the messy, you know, First
14 Amendment type of stuff. How about if
15 you just let me deal with all that sort
16 of stuff? I mean, it seems to me that
17 in many big corporate cases, you're
18 basically laying out to them, there's

1 an area of stuff that you don't want to
2 be bothered with anyway, and it's not
3 going to cut into your pocket; can I
4 just at least have the ability to deal
5 with those circumstances?

6 Before getting to the other
7 part, just what do you think? I mean,
8 because the two of you have so much
9 more experience in this. How do you
10 think a corporate, entity that wants
11 your work would be after something like
12 that?

13 **MR. SEDLIK:** I think that
14 clients are hypersensitive to any
15 potential use by others of images that
16 have been licensed by them from
17 photographers or stock agencies. And
18 their brand image can be affected if

1 the image is used in a way that is
2 either competitive or derogatory. I
3 think that they're very concerned about
4 that. And that's one of the reasons,
5 along with reasons of competition and
6 liability, that almost every purchase
7 order or service agreement that comes
8 from that corporate client says two
9 things: (1), this will be a work made
10 for hire; and, (2) if it's not a work
11 made for hire, this will be an
12 assignment of copyright, and you agree
13 to execute an assignment of copyright
14 should we request.

15 **MR. MTIMA:** Yeah, so in those
16 cases they're just going to acquire the
17 entire work. How about in those
18 circumstances in which you already

1 created the work, you know, so it
2 couldn't be a work for hire, in
3 general, they're also --

4 **MR. SEDLIK:** Unless I have
5 discussions with them about it possibly
6 being a work for hire, yes.

7 **MR. MTIMA:** Right. And so in
8 those cases in which your work is
9 already created, your experience is
10 that they're going to have you assign
11 us the entire copyright, otherwise
12 we're not going to use it?

13 **MR. SEDLIK:** No. In a stock
14 licensing scenario, it's commonplace
15 for the client not to acquire all the
16 rights, unless you have a situation
17 where Microsoft is buying the copyright
18 to an image, they're going to put it on

1 the desktop of the next release of
2 Windows, they're going to probably
3 acquire the copyright. But in other
4 cases you have hundreds of thousands or
5 millions of transactions with
6 corporations who are licensing limited
7 rights, and they know that others will
8 be using them. And it's a calculated
9 risk: do they go create their own image
10 and acquire the copyright or do they
11 license the rights either through
12 what's called a rights managed license,
13 where they can become aware of who else
14 is using it, or through a royalty-free
15 type license, where they really don't
16 know who is using it and everybody's
17 got a license to use it forever pretty
18 much?

1 But I think I treat each
2 client with respect and also use
3 caution. So, I will include in the
4 agreement special terms maybe that they
5 have requested and also I'll negotiate
6 with them to reserve certain rights for
7 me to be able to use it perhaps in the
8 manner that you're speaking about,
9 where I can allow others to make use of
10 it under a nonexclusive license.

11 **MR. MTIMA:** Right.

12 **MR. SEDLIK:** And that's
13 actually quite common.

14 **MR. MTIMA:** And then when you
15 get to the other piece of it that you
16 were asking about, how does the artist
17 deal with the model? Again, it seems
18 to me that there is a leverage issue,

1 right? As the photographer, I mean,
2 you're a decent guy, so you're probably
3 not going to have a release that says I
4 get to do whatever I want with it in
5 any way, shape or form from now until
6 the end of time. You probably use more
7 judicious language. But I would
8 imagine that there are still many
9 creators out there who don't use
10 judicious language, who just say, hey,
11 I can do whatever I want with it,
12 right? Six pages of boilerplate, a
13 model just signs it, right? And then
14 later on, even in the case that you
15 described, in which the photograph
16 comes up on an ad for venereal disease,
17 the model has a great deal of
18 difficulty objecting to that because

1 they signed a release that said, hey,
2 you can use it in any way, shape or
3 form. It seems to me that the only way
4 you deal with that is that the artist
5 has to -- what Sandra is suggesting --
6 impose upon herself the same level of
7 social consciousness that they would
8 like to see the corporation that
9 they're dealing with, that they would
10 like to impose upon that corporation.
11 Because if they don't, I don't see what
12 the model could do short of what Nancy
13 and I were talking about, dipping into
14 other pots of law.

15 **MS. AISTARS:** Then you're in
16 that catch 22 situation. Everybody is
17 being socially conscious and nobody can
18 license anybody down the line for an

1 unanticipated use. But I think Jeff
2 gave us the answer. Do an agreement on
3 the front end that anticipates a
4 royalty stream for future uses, and
5 then everybody involved in that project
6 can benefit. But sometimes that works,
7 sometimes that doesn't, right?
8 Sometimes you still wouldn't, as a
9 model, want to have your image used in
10 the venereal disease instance, or as an
11 artist you wouldn't want your image
12 commercialized in an unanticipated way,
13 whether it's editorial or not down the
14 line. There's just certain uses that
15 artists are going to say no, I just
16 don't agree with this organization, I
17 don't agree with this political party,
18 I don't agree with this use period.

1 And it doesn't matter how much you pay
2 me, I'm never going to agree and you're
3 never going to use it and go away.

4 I see that there is a
5 question towards the middle there, if
6 we can get a mic to like three, four
7 rows from the back.

8 **SPEAKER 1:** Thanks very much.
9 So, my question goes to protecting, I
10 guess, more the photographer, if you're
11 doing an agreement with a company,
12 corporate client, then it may also be a
13 matter of leverage. But is it
14 practical or is the solution limiting
15 the use saying, yes, I'm licensing it
16 for this campaign, or so forth, to
17 avoid the unexpected, oh, we popped
18 into this venereal disease campaign?

1 Is that something practical for the
2 average photographer or graphic
3 designer, or other, you know, creative?

4 **MR. SEDLIK:** I think both
5 Nancy and I will reply to that. So, as
6 photographers, I mean, we were talking
7 about the possibility earlier of
8 actually being a marketplace or a
9 possibility in the marketplace for
10 artists to support themselves and the
11 challenges that artists have in
12 attempting to do that. So, there's
13 massive competition. Everybody is a
14 photographer now. Everybody is
15 uploading their images to Microstock
16 sites. All the stock photography
17 agencies, which are the middlepersons,
18 have consolidated to a great degree so

1 that there is very large stock agencies
2 and then smaller players and really no
3 middle ground. And so our clients,
4 when they come to use to license, have
5 quite a bit of leverage. If you can't
6 pay your rent that month, you're likely
7 to accept copyright assignment, which
8 is sometimes called a buyout, or you
9 might accept work-for-hire terms for
10 commission work. And when I teach my
11 students at the Art Center about this,
12 I tell them that your success or
13 failure in business lies right there in
14 that moment of the client requesting
15 all of the rights and how do you
16 downsell them? I mean, it's the only
17 profession that I know of where you
18 downsell. Because the client has X

1 amount of money to spend and they want
2 X amount of rights, and there is
3 somebody behind me who will take half
4 of my fee, and somebody behind them who
5 will take half of their fee, and it
6 goes all the way back to the person at
7 the back of the line who will actually
8 pay for the privilege of creating an
9 ad, a photograph that will appear in
10 that Nike campaign, or whatever. And
11 so in that moment you have to be able
12 to explain to the client that you will
13 provide them with all the rights they
14 need and attempt to work within their
15 budget, but perhaps they don't need to
16 own the copyright.

17 I ask them questions, for
18 example, are you going to put this on

1 billboards in the Congo? Do you really
2 need worldwide rights? And they'll
3 say, well, we're really only going to
4 use it in the United States and Canada.
5 Okay, United States and Canada. Do you
6 need to put it on every billboard in
7 the United States and Canada? Well,
8 no, not every billboard; probably a
9 maximum of 100 billboards in each
10 country. Okay, let's make it 200. And
11 you begin to downsell the client, and
12 you say, look, I'll give you a fee, a
13 license fee, for purchasing my
14 copyright, and I'll also give you a
15 second license fee for the actual
16 rights that you really need. And on
17 top of that, I will give you pricing
18 for every possible use that you might

1 have in the future. Just tell me how
2 you might use it and I'll give you
3 pricing and I'll guarantee that
4 pricing. Now, I'm not saying that is
5 the best business practice, but I'm
6 saying that that is, for many emerging
7 photographers and even photographers
8 who have been professionals for a long
9 time, a practice that helps the client
10 understand that you will not hold them
11 over the barrel in the future when they
12 want to make use of an image for
13 something that they didn't license.
14 That's why they're asking for all
15 rights is they've been held over the
16 barrel by other photographers. So, the
17 answer to your question is, yes you
18 attempt to negotiate certain rights

1 that are constrained for a certain fee,
2 with the fee being based on the scope
3 of rights.

4 **MS. WOLFF:** And I'll just
5 jump in. For the example you gave of
6 what we would call a sensitive use in
7 the industry, typically, if a
8 pharmaceutical company knew that they
9 needed images for a particular drug
10 that would have those connotations,
11 they should never, ever use stock.
12 They should never use a generic image.
13 They would do a photo shoot where
14 everyone knows the purpose and the
15 extent of the use, and then gets paid
16 accordingly. Stock is not intended for
17 those situations, that if you were the
18 person photographed, you would not want

1 to be in that picture for that type of
2 use. And that's sort of what I would
3 say to someone who just thought they
4 could go to a Getty Images or a
5 Shutterstock. And for a campaign like
6 that, for an expensive drug they are
7 coming out with, you know, buy an
8 inexpensive, nonexclusive stock photo
9 that's intended for uses that aren't
10 going to embarrass the model. That's
11 something that you organize, you hire a
12 model who knows what's going on, you
13 get a sensitive use release that would
14 cover those kind of rights. And that's
15 why, when you do go and acquire what's
16 known as a broad rights or royalty free
17 image from a number of these image
18 aggregators, you actually need to read

1 the fine print. You need to read what
2 you can do and what you can't do. And
3 some of them really write it in plain
4 English. You can do this, you can put
5 them in ads, you can put them in books,
6 you can put them in here, you can put
7 them in templates, but you cannot do
8 these other things. You might be able
9 to go back and they could contact the
10 model and say, hey, would you agree to
11 this and they'll pay you more money?
12 But that's not the place where you cut
13 corners and try to get an inexpensive
14 generic picture because, frankly, you
15 would be violating all the rules. And
16 if you went to enforce the indemnity,
17 I'm sure that whoever licensed you
18 would say forget it, because you didn't

1 follow the do's and don'ts, and they
2 were clear.

3 And a photographer can do
4 that as well, as Jeff said, to be
5 careful. You know, when I look for a
6 photographer, an agreement, even if
7 they're wanting exclusive rights, it's
8 for a particular purpose, and the
9 indemnities are always limited to the
10 use as authorized here. And if there
11 is any claim that is based on any
12 change or the context or captions, the
13 indemnity doesn't apply.

14 The other thing really good
15 to get if your business is commercial
16 photography, get errors and omissions
17 insurance, because you're always going
18 to have a case where maybe a model said

1 she was 21 and isn't. I mean, there's
2 going to be cases that turn up. I have
3 a whole host of cases I call the
4 remorseful model, where they start out
5 young and they agree to do stock, and
6 then maybe they become, a real model,
7 you know, and could get a Chanel job.
8 All of a sudden, that's not my
9 signature; I never agreed to do that;
10 that wasn't me, and they try to get out
11 of it. So, you do want to do like what
12 Jeff does and really keep good track of
13 everything.

14 **MS. AISTARS:** Do you have a
15 question yourself? Go ahead.

16 **SPEAKER 2:** Thank you. How
17 would you advise like a small, like
18 startup production company in going

1 into negotiations regarding their
2 rights in protecting themselves
3 without, you know -- because they're
4 obviously going to be in a lower
5 bargaining position -- but how would
6 you advise them on how to approach
7 pricing in rights allocation?

8 **MS. WOLFF:** Well, you're
9 going to, unfortunately, to be faced
10 with a contract they're giving you and
11 not one you've made, particularly if
12 it's a large company. And a large
13 company will want to have enough rights
14 that they know a competitor is never
15 going to be using that image. So, it
16 will probably start out very, very
17 broad and want either work for hire or
18 exclusive rights. And sometimes you

1 even need to negotiate to be able to
2 use it for your own self-promotion
3 portfolio and personal use. And it's
4 going to depend. If you're doing
5 branding for a large company, you will
6 have very little negotiating power,
7 because they're going to want to own
8 everything because it gets associated
9 with their brand. And, yes, you
10 probably could keep rights if you ever
11 wanted to do a book on your work. It
12 may be difficult to even get fine art
13 use, particularly if there is some
14 celebrity in that image, unless you're
15 going to get extra permission as well.
16 But if you're dealing with something
17 that's not as brand-oriented and maybe
18 it's more of a documentary, even though

1 it's commercial type shoot, and they
2 don't have as big a budget and it
3 really could -- they should be paying
4 more, that could be part of your
5 negotiation. The rights that you keep,
6 they maybe get rights for two years and
7 then it's not going to be relevant and
8 you can get some rights back. And you
9 can try to hold those rights that you
10 know you could use in the future. And
11 it will all depend. Are there models
12 in it that would have a problem? Or
13 are they beautifully scenic where you
14 would have a lot of future use, so
15 there is more than incentive to
16 negotiate to have rights after a
17 particular time. Magazines, in
18 particular, will have a short embargo.

1 For example, I deal with the *National*
2 *Geographic* photographers. There's an
3 embargo for a period, but then they do
4 get a lot of their rights back and
5 there's a lot of negotiations about,
6 you know, doing joint books or
7 exhibitions. But they can do their own
8 books and exhibitions and use these
9 works after a period of time.

10 **MS. AISTARS:** Right. And I
11 think what Jeff said is very important,
12 talking it through with your client and
13 making sure that they actually need the
14 rights that they're asking for. And,
15 also, not just that they need the
16 rights, but that they are prepared to
17 use them as best possible, especially
18 if you're going to have a continuing

1 relationship with the client and if you
2 have any sort of royalty relationship
3 with them based on the deal that you
4 sign. Because if they're not prepared
5 to exploit those rights and you grant
6 them to them, and there is somebody
7 else who is prepared to exploit those
8 rights better and you can get an
9 additional income stream from those
10 rights internationally, for instance,
11 why are you granting them to somebody
12 who neither needs them nor can exploit
13 them well. I see that there is another
14 question.

15 **SPEAKER 3:** I'm an art writer
16 and I came to this symposium because I
17 want to find out when is the right time
18 to get a lawyer onboard? I don't know

1 if it's different for visual artists or
2 for writers who want to start their own
3 website, but when is a good time to
4 bring a lawyer onboard?

5 **MS. AISTARS:** Onboard for
6 what in particular?

7 **SPEAKER 3:** What could I need
8 a lawyer for if I'm starting a website
9 about art? I know that there's lawyers
10 for the arts and, you know, something
11 like that might be good. But I know
12 you're talking about rights and the
13 rights of a photographer, the models,
14 and things like that. When should
15 models and writers and artists, should
16 they like immediately get a lawyer or
17 should they wait until something
18 happens?

1 **MS. AISTARS:** Well,
2 definitely don't wait until something
3 happens. That's my first piece of
4 advice. What I will suggest to you is
5 that we have a one-on-one speed
6 lawyering session set up from 5:00 to
7 7:00 this evening, and we'll have our
8 Arts and Entertainment Advocacy Clinic
9 students and lawyers present there.
10 And you should come and talk to us and
11 we can explore your issue in greater
12 depth, and also sign you up and get you
13 into the Washington Area Lawyers for
14 the Arts (WALA) stream to get advice
15 also from WALA lawyers. And that will
16 be the most efficient way, I think, to
17 deal with your question.

18 **MR. MTIMA:** And, actually, I

1 could give you a little bit of a
2 general threshold. As long as you are
3 sticking with your stuff and yourself,
4 in other words, if you write a poem and
5 that's the only thing you put up on the
6 website, you're not at the level at
7 which you're going to need any legal
8 advice, because it's you. It's
9 everything that you own, right? Now,
10 let's say you start the website and you
11 give other people the opportunity to
12 post their material. You're not going
13 to do anything but they're going to
14 post; now you really do need some legal
15 advice.

16 So, just like sort of a
17 practical threshold, as long as you're
18 only going to be using your words, your

1 art, your face, okay, you're probably
2 on safe ground. When you start to pull
3 in other people, other people as
4 models, other people's verbiage, other
5 people's images that you find on other
6 websites or photographs taken by other
7 people; the minute you begin
8 incorporating the endeavor of other
9 people, that's the point in which you
10 really begin to need to think about,
11 hey, wait a minute, I might need some
12 legal advice. But from there, I think
13 what Sandra said, at that point is very
14 apropos, because it's not just because
15 you're pulling in other people. You
16 may not need a lawyer at that point,
17 but that's the excellent point in time
18 to have that conversation that Sandra

1 is pointing out, to say, now, here are
2 some particular things I'm about to do.
3 These things involve other people and
4 other people's endeavors, and then you
5 get some more specific guidance.

6 **MS. WOLFF:** I'll be very
7 fast, because I know there are probably
8 other questions. The other thing is,
9 if you have a website and you're going
10 to allow users to post things, there
11 may be even some books and online
12 resources, but there are some things
13 you should do if you're allowing user-
14 generated content so you would never be
15 liable for money damages if you file a
16 registered agent form with the
17 copyright office and have a copyright
18 policy and have an email address, where

1 if someone thinks that a user posted
2 something that didn't belong to them,
3 that if you took it down, you wouldn't
4 be liable for money damages. So, once
5 you become a publisher and it's not
6 just you, it would be helpful for you,
7 even if you don't go right to a lawyer,
8 read some things and get a little bit
9 of advice to protect yourself. Because
10 I've been brought into cases with small
11 bloggers where I've had to come in and
12 train them, because they got hit with
13 copyright suits because they just had
14 sort of street knowledge of copyright.
15 Like, if you link back and you give
16 attribution and if you just have a
17 small image, and you're telling someone
18 else to go to your friend's blog,

1 that's all okay. These blog publishers
2 have gotten in trouble just from having
3 their own, copyright 101 from friends.

4 **MS. AISTARS:** Yeah, copyright
5 101 from friends, bad idea, unless your
6 friends are copyright lawyers. So, we
7 have like two minutes left, and I want
8 to ask one quick question from all of
9 you to sort of wrap things up, and that
10 may also be something that I think the
11 second panel may take up further, and
12 that is whether there are any industry
13 norms with respect to seeking or
14 granting rights and permissions you
15 think exist that fall into a gray area,
16 where industry practice is to presume
17 that permission is assumed to be
18 granted. You mentioned use of your own

1 work in your portfolio even in a work
2 for hire setting in our prep session,
3 that was one thing, but maybe there are
4 others.

5 **MS. WOLFF:** There are, I
6 guess, gray areas. For example,
7 artists will, whether they're an
8 illustrator, fine artist, photographer,
9 will maintain a portfolio of their work
10 and they'll have it online. Wedding
11 photographers do. Do they have a model
12 release for every single image on their
13 portfolio? Probably not, particularly
14 if it's a photojournalist, you're not
15 going to have model releases. If
16 saying I took that work and this is in
17 my portfolio, is that really
18 commercial? There is really no good

1 concrete law on that, but the practice
2 generally is, as an artist, you can
3 show examples of your work and say you
4 took them. Those are some kind of
5 practices that turn up.

6 Different artists have
7 different practices with respect to
8 permission from people that appear in
9 their pictures. So, you could be a
10 street photographer and your whole idea
11 is that you don't want someone to know
12 that you took the picture, because then
13 it's not a natural moment. In a way,
14 yeah, like you're sort of stealing in
15 some way something from them. It's
16 their face, but you can do a book on
17 street photography and you can sell
18 fine art prints without technically

1 violating the law.

2 **MS. AISTARS:** Jeff or Lateef,
3 do you want to comment on any nuance
4 you've noticed?

5 **MR. SEDLIK:** Sure, I'll
6 comment. So, what we're doing at the
7 PLUS Coalition is trying to create a
8 means by which anybody who encounters a
9 visual artwork can learn more
10 information about that artwork, such as
11 what the copyright owner would or would
12 not like people to use the image for,
13 whether advanced specific permission is
14 required. Maybe there's a Creative
15 Commons license. Maybe the
16 photographer or painter wants to be
17 contacted and the license requested.
18 For usages that fall into that gray

1 area, there are many artists who are
2 very pleased to see everyone make use
3 of their work. I mean, we all stand on
4 the shoulders of artists who came
5 before us in a certain way, and yet at
6 the same time we need to be able to
7 protect our rights and grant rights
8 where we feel it's appropriate. And
9 you don't need a registry of rights to
10 support fair use, but at the same time
11 it's great to have a registry of rights
12 so that it eliminates much of that gray
13 area.

14 **MS. AISTARS:** Thanks. And
15 Lateef, wrap us up.

16 **MR. MTIMA:** For scholarly
17 stuff, generally speaking, universities
18 will keep rights like patent rights

1 with stuff that you do, but they
2 generally will not keep copyrights.
3 So, if you're a student or a professor
4 or an administrator, generally
5 speaking, whatever you write, the IP
6 policies at most universities say we
7 don't own it, you own it. So, you
8 should do your stuff in that context is
9 where you get to keep it.

10 **MS. AISTARS:** Thank you. So,
11 I would like to ask everybody to help
12 me thank the panel for their generous
13 contributions of time and knowledge.
14 And I will invite everyone to join us
15 outside for a 15-minute break, which is
16 generously sponsored by the Institute
17 for Intellectual Property and Social
18 Justice. So, a special thanks to

1 Lateef for that. [Applause]

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1 BEST PRACTICES IN RIGHTS CLEARANCE

2 SYMPOSIUM

3 Panel 2

4 Cosponsored by

5 The Arts and Entertainment Advocacy

6 Clinic and

7 The Journal of International Commercial

8 Law and

9

10

11 Moderated by

12 Mickey Osterreicher

13 Thursday, January 18, 2018

14 3:15 p.m.

15

16

17 Antonin Scalia Law School

18 George Mason University

1 3301 Fairfax Drive
2 Arlington, Virginia 22201

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8 A P P E A R A N C E S

9 Introduction

10 **Prof. Sandra Aistars**, Antonin

11 Scalia Law School,

12 George Mason University

13 Moderator

14 **Mickey Osterreicher**, National

15 Press Photographers

16 Association

17 Panelists

18 **Pieter Folkens**, Graphic Artists

1 Guild

2 **Sean Fitzgerald**, North American

3 Nature Photography

4 Association

5 **John Harrington**, National Press

6 Photographers

7 Association

8 **Peter Krogh**, American Society of

9 Media

10 Photographers

11 **Amanda Reynolds**, Plume Photography

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C O N T E N T S

1 **MS. AISTARS:** Welcome back,
2 everybody. I personally learned a lot
3 from the panel that just spoke, and I'm
4 looking forward to the second panel
5 equally. I will not make any long
6 introductions. I will simply introduce
7 my long-time friend, Mickey
8 Osterreicher, who will be moderating
9 the panel and ask him to get us
10 started. I'm very pleased, though,
11 that everyone on this panel is here.
12 They are a fantastic and diverse group
13 of artists, and I'll let Mickey do the
14 honors. But thank you, Mickey, and
15 thank you, panelists.

16 **MR. OSTERREICHER:** Thanks for
17 having me, Sandra. So, my name is
18 Mickey Osterreicher. I am the general

1 counsel of the National Press
2 Photographers Association. Before I
3 went to law school late in life, back
4 in the '90s, I was a photojournalist in
5 both print and broadcast for about 40
6 years. Again, following that same
7 format, I'm going to let our panelists
8 introduce themselves. Since we have a
9 few more of them than the last panel,
10 if you could just introduce yourselves
11 and then we'll get into the substantive
12 issues, that would be great. But just
13 kind of to set an overview. When I
14 give presentations on copyright, the
15 first slide that I have up there is
16 it's complicated, and truly it is just
17 as you've seen from the brief panel and
18 discussion that we had up there before.

1 But, you know, we can follow a couple
2 of simple rules, and a lot of them are
3 not in the copyright law. It's do unto
4 others as you would have them do unto
5 you, both as creators and users.
6 Trying to develop best practices but
7 best practices that take into
8 consideration, again, both sides of the
9 issue. I've heard the term character
10 been described as doing the right thing
11 even when nobody is looking. And that
12 was a lot easier said than done. These
13 days, pretty much everybody with the
14 Internet is looking. So, if you think
15 you can post something and nobody will
16 ever find it, or actually have images
17 up somewhere in another part of the
18 world, don't be surprised if somebody

1 Tweets them and say, hey, I just saw
2 such-and-such.

3 And then the last, you know,
4 real gem is everything I ever learned I
5 learned in kindergarten. And if you
6 can kind of keep those things to put
7 all of this into perspective, I think
8 we're going to have a great discussion.

9 So, I will start first with Sean
10 Fitzgerald from the North American
11 Nature Photography Society --
12 Association, I'm sorry.

13 **MR. FITZGERALD:** Do you want
14 a couple minutes?

15 **MR. OSTERREICHER:** If you can
16 just introduce yourself, talk about
17 your work, and I think I'd like to just
18 go down the panel briefly and then

1 we'll get back to some questions. And,
2 again, we want questions from the
3 audience. Hopefully, we'll get some
4 questions from the Internet, and we'd
5 really like it to be a dialogue with
6 everyone.

7 **MR. FITZGERALD:** Okay. I am
8 kind of a weird mutt, I suppose. I am
9 a reformed lawyer, is what I call
10 myself. I practiced for 10 years, and
11 somewhere along the way I kind of
12 realized I had a little bit of a
13 mismatch, that I had this side of my
14 brain, I guess it's the right side
15 that's creative, that was kind of,
16 like, jingling. I didn't understand
17 what was going on with me, because, I'm
18 in this sort of left brain legal world

1 and somewhere along the line I realized
2 that once I picked up a camera and once
3 I went out into nature, which was my
4 passion at that point anyway, that
5 suddenly the skies parted and it's
6 like, okay, this is actually what I
7 want to do with my life. I want to go
8 out and take pictures that maybe tell a
9 story. I want to go out and find ways
10 to advocate a cause, to protect an
11 ecosystem, or to make art. In my world,
12 nature photography, we don't get much
13 credit to being an art form. It's
14 always just sort of this documentary,
15 like making furniture. It's not an
16 art, and I resent that and don't
17 believe that's the case.

18 Now, all those sort of

1 things, for me, are integral to who I
2 am as a photographer. At the same
3 time, I will be the first to say up
4 here that I am probably the dumbest one
5 on this panel. I am probably the one
6 who has made the most mistakes, so if
7 you want to understand best practices,
8 I think you have to understand why
9 people do some of the worst practices.
10 And there is no area, I think, that
11 confuses the average photographer --
12 the average photographer isn't working
13 for National Geographic or Conde Nast
14 and that sort of stuff. They're out
15 there trying to support a family,
16 taking pictures at weddings and
17 hustling up their friends, and they may
18 make \$35,000 a year. They may be, like

1 in my area, where they are part-time
2 now, because -- we'll talk about this
3 later -- how this digital age has
4 decimated nature photography as a
5 profession. But, you know, we're out
6 there struggling to make a dollar
7 because the landscape has changed and
8 we can no longer afford to go out and
9 try to, in our little way, make the
10 world a better place with our images.

11 And, so, when you look at
12 that struggle and try to understand why
13 they don't understand the copyright
14 system and all of the issues like fair
15 use, and they don't engage with it and
16 they don't see any way to benefit from
17 it. To have it be part of the solution
18 to the problems they're experiencing as

1 professionals rather than just another
2 irritant, which for most of us it's
3 just like, oh, God, you know, I don't
4 even want to deal with that, and move
5 on. So, I figured I'd kind of give
6 that as sort of a background.

7 I am a nature photographer.
8 Primarily work for conservation groups,
9 work with Ted Turner Enterprises
10 documenting and developing ecotourism
11 for their properties. I focus largely
12 on Texas, Midwest and desert
13 ecosystems, and prairie ecosystems, and
14 kind of done the whole spectrum, from
15 stock to commercial fine art to
16 assignments, and all that sort of
17 stuff.

18 **MR. OSTERREICHER:** So, I

1 didn't preface this but we asked all
2 the panelists to give us at least three
3 of their works, and so the images that
4 I just had up were those that Sean
5 Fitzgerald had given and that he has
6 shot over the years. Our next panelist
7 is Pieter Folkens of the Graphic
8 Artists Guild.

9 **MR. FOLKENS:** I'm a large
10 whale disentangler for National Marine
11 Fisheries Service, West Coast Region,
12 and you can tell I'm dressed quite a
13 bit differently than everybody else up
14 here, so I think I'm in the wrong
15 meeting. I'm a biomedical illustrator
16 by trade, published natural science
17 subjects. I'm also a creature effects
18 designer for feature films. I imagine

1 most of you in the room have never
2 heard of me before, but a good chance
3 many of you have seen my work. It's
4 been in films like Star Trek IV: The
5 Voyage Home, the Free Willy series,
6 Flipper, the movie, White Squall, 18
7 feature films I've worked in and eight
8 documentaries, including an IMAX film
9 that came out about a year and a half
10 ago on humpback whales. I'm also a
11 former assistant professor of science
12 communication, division of natural
13 sciences at University of California,
14 where we created a humanities track for
15 scientists. They had trouble taking
16 your basic fine art classes and so we
17 created a humanities track for them
18 that focused on scientific illustration

1 and science communication to try to
2 make them better at getting their
3 message out. I've been at this since
4 probably mid-1970s. And because I
5 specialize in a particular type of
6 subject that is very popular in the
7 public, at the time when I first got
8 started, there was an immense amount of
9 interest in a subject for which there
10 was very little imagery. I'm a charter
11 member of the Society for Marine
12 Mammalogy and so I had access to a lot
13 of good reference material. I've
14 traveled the world, from Greenland to
15 Madagascar to get images of species in
16 the wild, and consequently I developed
17 a reputation for being very accurate in
18 my representations of the animals.

1 Also getting unique photographs in
2 these exotic locations of rare species.
3 Consequently, there was a lot of
4 infringement on my work. There was a
5 few years in there where it was
6 happening at the rate of nine times a
7 month that I actually became aware of,
8 and I got the entire gamut of
9 infringement, from the ignorant who
10 said, oh, I didn't realize that it was
11 not right to copy somebody else's
12 images, all the way up to the
13 nefarious, the fine artists that like
14 to take the lazy route, where they
15 would find the work from a nature
16 photographer who spends weeks, if not
17 months, and thousands of dollars to put
18 themselves into a position to get the

1 perfect shot, and then you get these
2 lazy nefarious fine artists grab that
3 and simply trace it, and then come up
4 with an apocryphal story of their
5 wonderful insights into the subject,
6 and then proceed to make millions of
7 dollars selling reproductions.

8 I've also had to deal with
9 the really big players, where -- I hate
10 to use the term ethical problems, but
11 it's probably the best word -- dealing
12 with large operators, like the United
13 Nations, FAO, Disney. Disney is a very
14 interesting creature to deal with.
15 That mouse is not very friendly. Even
16 *National Geographic*, I had some very
17 interesting experiences with
18 *Geographic*. I worked on the remote

1 imaging team at *Geographic*, and we were
2 the first ones to get images of
3 humpback whales underwater by sneaking
4 up on them and putting a camera on
5 their back and swimming around and
6 catching their behaviors and so on.

7 And so I've seen this very
8 broad gamut of what happens when you
9 come up with unique images, accurate
10 images, and then lazy people just rip
11 you off and claim it as their own and,
12 also, large corporations that don't
13 care nor do they appreciate how much
14 effort goes into creating good,
15 important images.

16 Right now I have a case that
17 is in the Ninth Circuit, a copyright
18 infringement case, which is creating a

1 bit of a buzz because it attacks what
2 appears to be a doctrine that is
3 developing in the 9th Circuit called
4 the "first expressed by nature"
5 doctrine that came out of the *Satava-*
6 *Lowry* 9th Circuit decision. The
7 problem there is that with the
8 reductive analysis in the 9th Circuit
9 between the extrinsic and intrinsic
10 test, what happens is the judge is
11 given the opportunity to kick the case
12 based strictly on the copyrightability
13 of the subject matter, meaning the
14 idea, with no opportunity to address
15 the expression question, which is
16 supposed to go to the trier of fact.
17 And the problem is, we're now getting
18 several decisions coming out of

1 district courts in the 9th Circuit that
2 are taking that lazy route and kicking
3 very valid copyright infringement cases
4 on the basis that the subject matter is
5 not copyrightable, which just that
6 statement alone expresses a rank
7 misunderstanding of what copyright is.

8 And what we're seeing
9 happening is, I'm sure many of you are
10 familiar with the *Rogers v. Koons* case
11 in "String of Puppies," where Rogers
12 had staged a situation with some dogs
13 and Koons took the photograph and went
14 to a foundry in Italy and said make a
15 sculpture that looks like this and add
16 a few flowers here, and so on and so
17 forth. Koons lost the case. But
18 another case that happened six, eight

1 years ago, I think, was *Dyer v. Napier*,
2 in which Dyer spent several weeks
3 capturing a very unique image of a
4 mountain lion and cub, and published
5 posters and cards of it, and Napier
6 took one of those posters to a foundry
7 in Arizona and said make up a sculpture
8 that looks like this. And he lost in
9 the 9th on the premise that mountain
10 lions are first expressed in nature,
11 therefore, he has no protection. And
12 so that is a scary premise in the 9th
13 Circuit. And I've been talking to Sean
14 about it and he said how in the world
15 can they come to that conclusion? And
16 that's because of the way the 9th
17 Circuit splits it between the intrinsic
18 and the extrinsic and give the judge

1 the opportunity --

2 **MR. HARRINGTON:** Aren't
3 humans expressed in nature, too?

4 **MR. FOLKENS:** Well, that's
5 one of my arguments. You know, a photo
6 of Marilyn Monroe, she was first
7 expressed in nature, and so does she
8 have any rights in the derivative? But
9 one of our arguments, and I'm sure
10 you're familiar with --

11 **MR. OSTERREICHER:** Pieter, I
12 don't want to interrupt --

13 **MR. FOLKENS:** Okay.

14 **MR. OSTERREICHER:** But I want
15 to just get through the introductions
16 before we get into the substance, and
17 I'm sure we could be here, and as we'll
18 find out when we get to the end, for

1 days discussing this. But let me move
2 on to John Harrington, who is one of
3 our members of the National Press
4 Photographers Association. John?

5 **MR. HARRINGTON:** Hi. So, I'm
6 John Harrington. I've been making a
7 living taking pictures for almost 30
8 years. It's been my pleasure to be a
9 photojournalist, kind of a fly on the
10 wall in a number of different places
11 around the world, mostly based here in
12 Washington DC. I'm a proud, long-time
13 member of the NPPA. I'm past-president
14 of the White House News Photographers
15 Association. In fact, I was at the
16 White House this morning making some
17 pictures, trying to do something a
18 little different. And I will probably

1 be back there tomorrow for another
2 assignment.

3 I also have the good fortune
4 of having methodically over the last
5 decade or two registered, I think last
6 I checked, just shy of a million images
7 with the copyright office. These are
8 some of them, so don't infringe them if
9 you see them. Well, actually, go ahead
10 and do maybe, because I've got them
11 registered. But I've also had the
12 pleasure of traveling around the
13 country, not just for NPPA, which I've
14 done on a number of occasions, but also
15 for the ASMP and the APA, and the
16 Professional Photographers of America,
17 also talking about copyright, trying to
18 help photographers understand the

1 importance of registration, what it
2 means, what it doesn't mean, and how
3 they can leverage it to protect their
4 work. And so I am a very fierce
5 advocate for photographers. Oh,
6 author, I almost forgot, the author of
7 a book called *Best Business Practices*
8 *for Photographers*, which has been out
9 for about 10 years. And so that's my
10 intro, I guess, in a nutshell.

11 **MR. OSTERREICHER:** Great,
12 thank you. And next is Peter Krogh
13 with the American Society of Media
14 Photographers.

15 **MR. KROGH:** Hi. Glad to be
16 here and, as you can see here, I'm also
17 a publisher. So, we'll start with the
18 photographer. I have 35 years of

1 photography experience primarily for
2 corporate advertising use. For the
3 last 15 or so years it's primarily been
4 focused on photographs of people who
5 are the staff, executives and
6 stakeholders of organizations. So, my
7 work is not really all that relatable,
8 or is not particularly appropriate for
9 stock photography because it really is
10 about the people who work for a
11 company. I do have some small amount
12 of images in stock photography, but
13 primarily the use of my photography is
14 by a business for business
15 communications. The licensing that's
16 attached to it and the relevance of
17 copyright is slightly less than the
18 relevance of contract law, because I

1 have an agreement with the company when
2 I'm making these pictures, and they are
3 primarily the ones who are going to be
4 using those pictures.

5 In addition to being a
6 photographer, I've been deeply involved
7 with imaging technology in a bunch of
8 different ways. I started as ASMP
9 digital standards and practices chair
10 right when we all started going
11 digital. And the organization came to
12 me and said can you help us figure out
13 -- you know, can you lead this
14 committee and help us figure out how we
15 can adapt our business practices to the
16 digital age? And that launched a
17 career that has included publishing a
18 whole bunch of books, and now creating

1 my own publishing company as part of
2 that. And it's primarily centered
3 around digital photography technology
4 and where it's going. I spent a couple
5 of years as a cloud services product
6 designer for a company called
7 PhotoShelter, helping to build cloud
8 repositories for companies and
9 institutions. And so I have a lot of
10 experience there, which actually brings
11 me in contact with both the
12 commissioners of work as well as the
13 creators of the work.

14 I'm very interested, and I
15 don't know whether we'll get to it
16 today, but I'm very interested in how
17 the changes in technology are changing
18 the effective use of copyright,

1 Instagram now being the largest holder
2 of fully licensed, fully indemnified,
3 fully paid images in the history of the
4 world. What's that going to do? And
5 also how does the independent creator
6 survive in a world where our value is
7 no longer pegged to the cost of ink,
8 paper and diesel fuel?

9 **MR. OSTERREICHER:** Great.

10 And last but certainly not least,
11 Amanda Reynolds with Plume Photography.

12 **MS. REYNOLDS:** Hello. I
13 moved to DC in 2004 on a one-year
14 deferral from law school, and now I'm a
15 wedding photographer. I think we
16 started with the complicated. I did a
17 quick stint on the Hill for about four
18 years where I did policy and press, and

1 then I was a communications consultant
2 for a public affairs firm, where the
3 Copyright Alliance was one of my
4 clients. And I went in-house for them
5 for a year before I realized that there
6 was just something else I needed to do
7 with my life than communications. And
8 being surrounded by all these amazing
9 creators every day and telling their
10 story, I decided to become a
11 photographer with my eyes wide open to
12 their struggles every day.

13 So, in 2014, I packed up all
14 of my stuff and I moved to London and
15 Paris for six months, and did what
16 Sandra calls my midlife retirement.
17 And I came home and I started working
18 almost immediately as the official

1 photographer for the Library of
2 Congress, because I'm the luckiest
3 person in the world. And then I
4 transitioned back into my own
5 portraiture and wedding photography
6 business, which is what I do now. And
7 instead of having to respond to
8 people's worst days on Capitol Hill,
9 now I get to be there to document
10 everyone's best days of their life.
11 I'm primarily a fine art wedding and
12 newborn photographer. And also
13 slightly different than a few people on
14 this panel, I actually shoot film. So,
15 it's still in the digital world, but I
16 shoot medium format film on a very old
17 camera I had to buy on EBay from Japan.
18 **MR. OSTERREICHER:** Thank you.

1 So, we're going to delve into a lot of
2 things, but I think we heard from the
3 earlier panel and maybe a couple of
4 references here, we've got legal
5 issues, which are kind of defined as
6 what you can do and what you can't do;
7 then we have ethical issues, in terms
8 of what you should do. And I think
9 we're going to see a real mix of that
10 as we go forward. And one of the
11 complicating factors is that as
12 creators, we create things, but we also
13 use the works of others. One of the
14 things that didn't really get touched
15 on in the earlier panel was music, and
16 the fact that lots of photographers put
17 their images to music. And while
18 they're very fiercely protective of

1 their IP rights in terms of their
2 images, they don't often let that drift
3 to whose music am I using and do I have
4 a right to use that? So, kind of in
5 that framework, who wants to take the
6 first shot at what do you do in terms
7 of when you need or want to use someone
8 else's work, whether they are an image,
9 music or something else? John, you
10 raised your hand?

11 **MR. HARRINGTON:** Sure. It's
12 been something that's been really
13 troubling to me since kind of the
14 invention of the slideshow. Soundslides
15 was one of the early software
16 applications that would let you put
17 music to photos. And, boy, I used to
18 see photographers using audio that was

1 like top 40 music all the time to sing
2 to their songs, and I really got
3 offended by it. And I actually had a
4 number of conversations with people
5 who, I basically said, you don't want
6 someone to steal your work but you're
7 stealing someone else's work. I know
8 that you can't license that top 40 song
9 because I've tried licensing top 40
10 songs before and it's just next to
11 impossible. And I think that -- I
12 mean, I can tell you that my resource
13 that I go to for that kind of service
14 is a company called Triple Scoop Music,
15 but there are several other ones. Pump
16 Audio is another one. I really like
17 the way that Triple Scoop does it, and
18 the fees and the costs that are

1 associated with it. But the key thing
2 to do is to respect the work of others.
3 If you don't respect someone else's
4 work, then how can you possibly expect
5 someone to respect yours? And I've
6 seen it time and time again. When I
7 see it, I try to call it out. A lot of
8 times you'll see public performances of
9 the work at a venue where they might
10 have a venue license so that they
11 actually have an ASCAP license to be
12 able to use music in that. But
13 generally speaking, if you hear a
14 commercial or a very popular song
15 accompanying a photographer's slides or
16 photographs -- sorry, I'm going back to
17 slides, Amanda, thinking about filming,
18 you know, from back in the day -- the

1 thing is it's more than likely not
2 licensed. And I think that we all have
3 an obligation when it's someone who is
4 a friend of ours, someone we know, as
5 people in the industry, to say, look,
6 you know, go for \$60 or \$75 or \$100 to
7 find a three-minute song that you
8 actually have permission to use that
9 for. But it's really a big problem and
10 it's been around for at least 15 years.

11 **MR. OSTERREICHER:** Anybody
12 else want to take a crack at that?

13 **MS. REYNOLDS:** So, all of my
14 film negatives are digital. They're
15 digitally scanned in, so I can deliver
16 everything digitally, and I do make a
17 slideshow for my couples as a preview
18 for them. And one of the biggest

1 things, when I was finding the slide
2 software that I wanted to use was
3 making sure that all of the music that
4 they offered was licensed to be used
5 for that purpose. And it made a big
6 difference to me that there were a lot
7 of companies that were going the extra
8 mile. And the one that I wound up
9 using, and I can't think of it off the
10 top of my head, actually explained why
11 they did that, which I thought was
12 really nice, from someone whose friends
13 used to call her the copyright police.
14 So, yeah, there's a million
15 opportunities out there to find a well-
16 priced product that does some of that
17 legwork for you, and I just don't see
18 why people don't get it.

1 **MR. OSTERREICHER:** So, in
2 getting these permissions, how about
3 some personal stories either seeking
4 permission, John talked a little bit
5 about music, or in having somebody come
6 to you when they're good enough to ask
7 permission. Unfortunately, we find
8 that the reason we're all here is that
9 we find works that are up there where
10 there was no permission sought, there
11 was no credit given, and there is no
12 compensation for the work that's being
13 used. So, I'd like to try and keep
14 this in terms of personalizing stories,
15 maybe the worst case and best case
16 you've had for somebody asking
17 permission or not asking permission,
18 and, Sean, I'll go back to you to begin

1 here.

2 **MR. FITZGERALD:** You kind of
3 get a breakdown, I think, between the
4 sophisticated and the unsophisticated.
5 And the unsophisticated, like we kind
6 of touched on earlier, of sort of this
7 post-digital, post-social media era
8 have just wild ideas about what they
9 can do and what images they can take.
10 And I've had people -- I've had artists
11 come up to me and tell me, "I love that
12 image of yours so much that I painted
13 it." And it's supposed to be a
14 compliment and it ends up being sort
15 of, like, okay, let's talk about this a
16 little bit. And the thing is, you
17 know, it's not like most of us who got
18 images that you might want to paint,

1 they're going to charge you a billion
2 dollars to do it, you know? A lot of
3 it is just a matter of respect and
4 controlling and knowing what's
5 happening with our stuff. You know,
6 that's as important as anything. In
7 the old days, there used to be a little
8 market where we -- in the analog days,
9 if you can remember that, they used to
10 have these little, you know, take a
11 picture and it would come out on this
12 little slide thing, and you put it in
13 the projector. It's really crazy. And
14 we would shoot lots and then we'd have
15 some extras, you know. Like, take 10
16 pictures of an elk and only use one;
17 the other ones were a little different
18 and they're never going to see the

1 light of day. But artists need them to
2 do form studies, and that sort of
3 thing. And I would sell to them pretty
4 regularly. It was, what was it, like
5 50 bucks? It was very cheap.

6 **MR. HARRINGTON:** Or
7 reference.

8 **MR. FITZGERALD:** Or
9 reference.

10 **MR. HARRINGTON:** A 100 bucks,
11 50 --

12 **MR. FITZGERALD:** Yeah, 150,
13 100 bucks. But it was fair, because I
14 wasn't going to use that particular
15 pose. It was -- you know, something
16 might have been wrong with the picture,
17 and it was a very good symbiotic
18 relationship. Well, now with the

1 artist having the ability to go on the
2 Internet and see all these pictures and
3 just simply say, all right, that's what
4 I'm going to do, let's start painting
5 it, their canvas is next to the 30-inch
6 monitor, it's really changed that
7 dynamic tremendously. I can't remember
8 the last time I got an artist reference
9 request. It just doesn't happen so
10 much anymore.

11 **MR. OSTERREICHER:** So, one
12 thought when you just said that. So, I
13 have these outtakes and I gave it to
14 them, or I sold it to them.

15 **MR. FITZGERALD:** Yeah.

16 **MR. OSTERREICHER:** Did that
17 come along with some type of written
18 agreement? I mean, a lot of people

1 think they possess the image,
2 therefore, they can do whatever they
3 want with it. But was there in your
4 mind or was there something formal
5 about what could be done with that
6 transparency that you were given or
7 sold to a person?

8 **MR. FITZGERALD:** Oh,
9 definitely. I mean, rule one is always
10 put it in writing.

11 **MR. HARRINGTON:** Worth the
12 paper they printed it on.

13 **MR. FITZGERALD:** Yeah. I
14 mean, that's how friends become
15 enemies, when -- after that and they
16 take it and do something with it and
17 you didn't think it would. So, it
18 would always be with kind of a

1 restrictive license that you may use
2 this for this artwork, blah, blah,
3 blah, so that someone then is not
4 taking the image I shot and making
5 photographic prints for it, which would
6 much more directly compete against me,
7 you know. And you can -- and if you're
8 smart, you limit it to that and then it
9 becomes, you know, a good commercial
10 exchange. It becomes where it's fair
11 for both of you. And now that's out of
12 whack. You know, it's just digitally,
13 you see it, you clip it, they're off to
14 the races with art and you have to see,
15 like Pieter was talking about, can you
16 catch them or not?

17 **MR. OSTERREICHER:** Speaking
18 of Pieter, do you have any stories to

1 relate?

2 **MR. FOLKENS:** Well, sitting
3 up here when Sean made the comment
4 about somebody painting one of his
5 photographs and it's supposed to be a
6 compliment, I could hear the smiles
7 down the line here that I think it's
8 happened to all of us. And I'm in kind
9 of a different situation where I do a
10 painting and then somebody copies the
11 painting and thinks that by copying it
12 they're trying to show some sort of
13 homage to what I have done, when that's
14 just an excuse for being lazy and not
15 doing the research themselves. And so
16 I second everything that Sean said,
17 that is a very, very big problem.

18 And I think that goes to

1 somewhat the difference between the
2 ignorant, who does not understand that
3 they're not supposed to copy somebody
4 else's work. You know, whether they
5 attribute it or what, you're just not
6 supposed to do it. And then the other
7 extreme, where they don't care because
8 they know they can get away with it.
9 And so I think there is a lot of energy
10 out there where large publishers, large
11 entities feel that there is no problem
12 just copying the little artists out
13 there that aren't heavily published
14 because they know that those artists
15 cannot afford to bring a copyright
16 infringement suit against them. And so
17 they just with impunity just copy the
18 work.

1 **MR. OSTERREICHER:** The other
2 Peter?

3 **MR. KROGH:** So, I have a more
4 positive story. I occasionally will
5 get musicians who see some of my work
6 and they call me up and they say I'm
7 self-producing an album and I'd like to
8 put this picture on the cover. I had a
9 guy call me and saw a picture I had
10 done for *Smithsonian* magazine, and he
11 said, you know, this just illustrates,
12 this tapestry in this picture just
13 really illustrates my music. And so
14 what we did was, we came up with an
15 agreement that as long as it was a
16 self-published album -- I think it was
17 200 bucks, something like that, you
18 know. So, if he was going to just make

1 the CD, print it himself and distribute
2 it himself, I was very inclined to give
3 him a good deal and work with him, and
4 he sent me a copy of his music. And
5 then we also put in the contract,
6 should you place this with a major
7 label and get a major distribution
8 deal, then we must renegotiate. Sadly,
9 he did not get a major distribution
10 deal, but I felt good that I was able
11 to help another artist who liked my
12 work and for whom it resonated, and got
13 a modest amount of money, and he felt
14 good about it and I felt good about it.

15 **MR. OSTERREICHER:** Amanda?

16 **MS. REYNOLDS:** So, there are
17 a lot of different people that go into
18 making a wedding day look like it looks

1 and, guess what, they all want photos
2 of what their work looks like. And so
3 for me I would say the hardest part is
4 sharing all the images of the
5 photographer, which is expected, and
6 sometimes demanded rather rudely and
7 very quickly. I tell them don't take
8 your time, but then they don't credit
9 you, which is frustrating. To the
10 extent that I've had large companies
11 want to use my photos of a wedding that
12 happened at their venue and not credit
13 me in the marketing, it happens.
14 Sometimes you get some of these
15 outrageous releases that, what am I
16 supposed to say to this Fortune 500
17 hotel chain? But that's what it comes
18 down to. It's more sad that it's other

1 creatives not respecting the creative
2 process.

3 **MR. KROGH:** I have one other
4 thing to say about that, and that is
5 that sometimes there is a possibility
6 to have a win-win. You know, in a
7 situation like what you were talking
8 about, is it possible that that venue
9 could actually put your name out front?
10 Usually, photo credit is not a thing
11 you can take to the bank in any way.
12 However, people shop for weddings, they
13 shop for venue as one of the main
14 things, and there really is advertising
15 value there. And if you can make that
16 work, then this sharing of the photos
17 can be good for both parties.

18 **MS. REYNOLDS:** Yes, and that

1 is primarily how I get my business.
2 It's just frustrating when there is no
3 way for them to find me because no one
4 credited me. So it's a bit of a tricky
5 slope, but, yes, there is a definitely
6 win-win when it all works and everybody
7 follows the rule and does unto others.

8 **MR. HARRINGTON:** We can talk
9 later. I have an idea for you on how
10 to do that.

11 **MS. REYNOLDS:** I mean, I
12 netted that all in my work.

13 **MR. OSTERREICHER:** So, we all
14 kind of know that copyright vests when,
15 at least here, an image is fixed. And
16 even though you haven't registered yet,
17 the copyright rests with the creator,
18 except now we're back to it's

1 complicated -- except there are other
2 situations where it doesn't necessarily
3 do that, you know, work for hire, as
4 we've heard talked about before. So,
5 how do you deal with clients either
6 that want to do something and add it as
7 a work for hire, that sliding scale, or
8 we'd like a transfer of copyright when
9 they just really need a license. How
10 do you educate users in terms of down-
11 selling yourself, where you're trying
12 to explain to them that they might be
13 able to get away with less than they're
14 asking for, which would save them money
15 and not give up your rights? So, I'll
16 start at the other end again with
17 Amanda.

18 **MS. REYNOLDS:** Sure. So,

1 it's definitely the most talked about
2 clause in my contract, other than the
3 clause where they have to pay me, or
4 pay me to eat. They do have to feed me
5 during the wedding. But the IP clause
6 in my contract is almost always
7 discussed. I actually put it in the
8 frequently asked questions of my
9 pricing guide. They all say, well,
10 we're paying you X thousands of dollars
11 to take our wedding photos, they are
12 photos of us, so why do you retain the
13 copyright? And I explain to them that
14 they're perfectly happy to and welcome
15 to buy the copyright, and I give them a
16 price tag and they say, nope, that's
17 fine, you can keep it.

18 I have done some work for

1 hire for large companies, because
2 weddings are only on Saturdays,
3 usually, so I have a lot of Monday
4 through Friday work that is not wedding
5 related. But I've only done one where
6 we were too far down the negotiating
7 process and I was doing it for a
8 friend, and corporate came back to me
9 with this thick contract and demanded
10 my copyright and work for hire, and I
11 just said goodbye. It wasn't worth it
12 to me, so they were headshots.

13 **MR. KROGH:** So, rather than
14 trying to narrow things down, as Jeff
15 was talking about, I actually like to
16 include everything that the client
17 needs. I really sort of approach it
18 that way, like, what do you really

1 need? Because I don't want to get into
2 a situation where somebody made an
3 inadvertent mistake or just wasn't
4 really thinking about what they were
5 going to do with the picture and
6 they're going to end up in hot water,
7 or we're going to end up with me having
8 to call and ask for payment that isn't
9 budgeted, or potentially even get into
10 a legal argument. And so I do like to
11 include everything. Like, I'm doing
12 something good for you, that's why
13 you're paying me, and that's the value
14 of getting a professional photographer
15 to do this. And I think I'll leave it
16 there and let it go down the line here.
17 Maybe some different opinions?

18 **MR. HARRINGTON:** So, I see

1 far more than my fair share, I think,
2 of work for hire, expectations out of
3 contracts. A lot of times they'll show
4 up in a purchase order after we've
5 already executed a rights managed
6 contract, which is specific, and that's
7 kind of an easy solution, because you
8 explain to them, and I've had countless
9 times where I've explained to them it's
10 not applicable; I need you to change
11 the purchase order, and we solve that
12 problem. One of the easiest ways to
13 work around or to at least mitigate the
14 damages of work for hire, and I use
15 damage as kind of colloquially, is to
16 specify that you are providing to that
17 particular organization for that
18 particular organization's sole use all

1 rights in perpetuity. And that means
2 that they get to use it for what they
3 want to do with it, but they don't get
4 to turn around and sell it, and they
5 don't get to turn around and preclude
6 you from selling it to other people.
7 That's kind of like a half step away
8 from work for hire, because generally
9 speaking, those clients are looking for
10 the ability to use that photograph in
11 any way they decide that they want to
12 use it for in perpetuity without having
13 to come back and pay you, as Jeff was
14 outlining earlier. And so you can also
15 provide a schedule to them of the
16 different prices. Because, whereas,
17 Jeff used the example of billboards in
18 the Congo, I typically say billboards

1 in Russia, and it becomes kind of a
2 joke and they go, well, of course not.
3 Well, how about stuff in Europe? Then
4 we start paring it down to used by your
5 corporation for the perpetuity of
6 copyright in the United States. All of
7 a sudden we're not talking about work
8 for hire anymore; we're talking about
9 in the United States you can do with it
10 what you want.

11 That's part of the
12 negotiating process in explaining to
13 them that, look, I'm trying to help you
14 not pay for things that you don't need
15 to pay for, and none of these pictures
16 -- a lot of times, a lot of work I do,
17 no model releases. So, I can't sell
18 you a right I don't have. If I sell

1 you the right to use these pictures in
2 advertising, then kind of indirectly
3 I'm warranting that I've secured the
4 rights for you to use them in
5 advertising. And so by doing that I
6 say, look, I'll give you all the rights
7 for which no model release is required.
8 That's another solution. It becomes a
9 negotiation back-and-forth, but it is a
10 bit of a dance in trying to dance
11 around from work made for hire.

12 Sometimes when I write
13 contracts, the client has to see the
14 words "work deemed to be work made for
15 hire" in the contract or it's not
16 signable. So, you say, okay, the
17 language specifies that all performed
18 under work made for hire will be deemed

1 to be work made for hire and an
2 additional fee paid. And then since no
3 additional fee was paid, work made for
4 hire doesn't apply. It is -- it really
5 does apply to your it's complicated.
6 It is a very complicated way in which
7 to negotiate.

8 **MR. OSTERREICHER:** And as
9 we're hearing, we're not just talking
10 about copyright law anymore; we're now
11 talking about contract law, which has
12 three elements -- offer, consideration
13 and acceptance. And John has
14 identified some of the back-and-forth
15 offers and counteroffers until, you
16 know, and what's the consent? And as
17 the offers change, the consideration
18 changes until you have a meeting of the

1 minds, and I think people need to be
2 aware of that.

3 **MR. HARRINGTON:**

4 Consideration being a fancy word for
5 money.

6 **MR. OSTERREICHER:** It could
7 be something else.

8 **MR. HARRINGTON:** Sure, it
9 could be.

10 **MR. OSTERREICHER:** It's
11 usually money.

12 **MR. HARRINGTON:** Right. You
13 get paid for doing this? That is how I
14 pay my bills.

15 **MR. FOLKENS:** Up here I'm
16 outnumbered. I'm an artist-illustrator
17 and these guys are photographers. I
18 think most of them are attorneys, too.

1 But Jeff brought up something in the
2 earlier panel about why give away
3 rights for something that the client
4 has no intention or opportunity to use?
5 Why do you want world rights if you're
6 only publishing an English language
7 edition for nudibranchs in San
8 Francisco Bay kind of deal?

9 The problem that I've come
10 across in this kind of notion is that
11 they come to me very late in the
12 process, where they have this wonderful
13 budget for creating a website that has
14 all of the marine mammals in the world.
15 Or they're doing a book or an
16 encyclopedia and they've paid the
17 writers, they've paid the designers,
18 they've even paid photographers, but

1 they realized they don't have images
2 for that special unique animal that has
3 never been seen alive and they want a
4 live representation of it. And this
5 has happened enough with me that I
6 think it might be deliberate more than
7 accidental, and I might be very
8 gullible, but they show up on my
9 doorstep saying we really like your
10 work, we really want it to be a part of
11 this publication because it's going to
12 be the best, but we don't have any
13 money to pay you.

14 **MR. HARRINGTON:**

15 Photographers hear that all the time,
16 all the time.

17 **MR. FOLKENS:** Duke University
18 pulled that on me when they wanted to

1 make a website that had all these
2 marine mammals and everybody was well
3 paid. They had a grant and they came
4 to me for those special images and they
5 said, ah, we don't have any money. And
6 I said, tell you what, you go to the
7 writer, you go to the web designer, and
8 you go the administration and ask each
9 one of them to give up 2% of their
10 compensation so that I will get
11 something for what I was doing. And
12 not one of them was willing to give up
13 2% to get my images. And I said, well,
14 if that's the kind of lack of respect
15 you're going to show me, then I don't
16 want to -- oh, but we respect you,
17 you're the best in the world at what
18 you do, and I said you've got a very

1 odd way of showing it.

2 **MR. HARRINGTON:** Cuba

3 Gooding, Jr. said, "Show me the money."

4 **MR. FOLKENS:** Show me the
5 money, yeah. So, in the context of the
6 initial question, I find myself in a
7 situation where they come to me late in
8 the negotiations with a level of
9 desperation saying, oh, we've got to
10 have your work because nobody else can
11 do it, and they're unwilling to pay.

12 **MR. FITZGERALD:** In my
13 experience, you get a lot of
14 opportunities to educate your client, I
15 think. You know, they have these
16 notions in their head but they don't
17 really understand what the mean. They
18 come to you thinking they need to have

1 a work for hire agreement when they
2 just need a license that covers them.
3 And oftentimes I find these all the
4 time, is a chance to educate them a
5 little bit about what it is they need
6 in terms of the license. And also with
7 that, what the value is of license
8 terms that are broader than that, and
9 that allows me oftentimes to use a
10 software called fotoQuote, which has
11 been around forever. It's pretty good,
12 pretty good, and they do surveys on
13 various uses. And so the uses are, you
14 know, might be for X kind of use at
15 this kind of a distribution, 1,000 to
16 2,000, 2,000 to 3,000 worldwide.
17 Here's how it's going to run, quarter
18 page, half page, full page; here's how

1 long it's going to run. We could go
2 through all these examples that create
3 added value from us as the licensor,
4 the creators licensing the image that
5 makes the image more valuable as a
6 licensed image, right?

7 Well, when we get into these
8 kind of discussions, I'll just take my
9 fotoQuote, I'll show what the average-
10 ish, you know, photo for this use that
11 you're asking for is getting out there.
12 It has a low range to a high range, and
13 I'll screen cap it and send it to them,
14 and then they go, oh, now I'm kind of
15 understanding how unrealistic it is for
16 me to be asking you to pay this much
17 when the market really is this much.
18 And now I understand that I don't need

1 all these broad license terms; I'm okay
2 with less. And so it's very much a
3 dance. You kind of go back and forth,
4 and sometimes they're sophisticated and
5 so it's a real swordfight by two
6 equally matched, you know, negotiators.
7 A lot of times I'm trying to get
8 something fair and then they may or may
9 not have any sense of what it is and
10 you almost have to put your arm around
11 them and educate them about why this is
12 what we need; otherwise, I'm giving it
13 away and then I can't go out and afford
14 to take the next picture. It's a crazy
15 process, to me, but it takes effort.
16 It takes effort for photographers to
17 understand what it is they need to do
18 and have a good dialogue with the

1 potential buyer.

2 **MR. OSTERREICHER:** You've all
3 talked about users that are
4 unsophisticated and users that have a
5 business model of infringing with what
6 they believe is impunity. And then
7 more recently and growing is fair use
8 and the fact that whether you think
9 it's an exception, the copyright or a
10 doctrine, whatever that is, it's become
11 a buzzword, where rather than somehow
12 being an exception to copyright, it's
13 now copyright is almost an exception to
14 fair use. Can you talk a little bit,
15 and whoever wants to take it first,
16 about how that has affected you, the
17 fair use stories you've received, or
18 somebody quoting the term fair use? I

1 call it the FU defense usually just
2 before they hang up. But at any rate,
3 go ahead, talk about that a little.

4 **MR. FOLKENS:** Don't get me
5 started.

6 **MR. OSTERREICHER:** Well, I'm
7 trying to get you started.

8 **MR. FOLKENS:** Well, this
9 whole thing is happening in the 9th,
10 this notion of first expressed in
11 nature, is the premise of fair use
12 under the *scenes a faire* or merger
13 doctrine in which, under *scenes a*
14 *faire*, you can't take a picture of
15 Notre Dame and then claim copyright to
16 Notre Dame. In the case that we have,
17 we're using the argument that the
18 iconic photograph of Ansel Adams of

1 "Moon and Half Dome," that in the 9th
2 Circuit right now there are no
3 derivative rights in that image because
4 Half Dome was a big rock first
5 expressed in nature, and the moon is
6 just a bigger rock farther away with no
7 consideration whatsoever for the
8 several days that Ansel put into
9 developing that picture and calculating
10 the exposure, knowing exactly when the
11 moon was going to be there and hiking
12 up to the base of El Cap to take the
13 picture.

14 When I was in college I used
15 to housesit for him and we talked about
16 copyright in the context of the 1970s.
17 And I was told by one of my attorneys,
18 one of the most valuable things I own

1 right now are those letters that went
2 between Ansel and myself about those
3 copyright issues. And this is one of
4 the things that had come up, is that
5 this whole effort that he put into
6 capturing that image. And he
7 contrasted the days that he took to
8 capture that image. And then the one,
9 "Moonrise over Hernandez, New Mexico,"
10 in which he saw it happening, he jumped
11 out, took the picture immediately. And
12 he says there was a huge contrast
13 between capturing that immediate moment
14 and then actually designing the picture
15 that he wanted that would take a lot of
16 effort.

17 And so that's an issue that
18 is happening with wildlife

1 photographers and wildlife painters
2 right now, is that simply because the
3 subject matter may have been first
4 expressed by nature, a term that came
5 out in *Satava*, that suddenly you do not
6 have derivative rights in that simply
7 because of subject with no
8 consideration for the expression. And
9 that's a major concern of mine,
10 although you've got some very nice
11 photographs.

12 **MR. OSTERREICHER:** So, maybe
13 before we get to the fair use since,
14 Pieter, you brought it up, this whole
15 idea of copyrightability. And if
16 something is not copyrightable, then
17 the courts don't have to get to any of
18 the other considerations at that point.

1 **MR. FOLKENS:** Well, one of
2 the problems that we have is a lot of
3 the black letter case law was developed
4 using nonvisual imagery, like *Feist* is
5 something that everybody quotes in
6 copyright issues. I see a lot of heads
7 going like this, and that has nothing
8 to do with visual rights. And I was
9 talking with some people earlier today
10 about that issue, where actually Murray
11 in *Baylor Law Review* did an article
12 that merger and *scenes a faire* has no
13 place in visual rights, that those were
14 all concepts that were developed in
15 literary and music copyright, but not
16 in visual. That where I think we need
17 to get to is that in visual works, you
18 have to focus on the expression. But

1 where a photograph is intrinsically
2 copyrightable simply by the fact that
3 the photographer captured a moment in
4 time and had a choice of camera, lens,
5 developing, type of film and lighting,
6 and so on and so forth. That doesn't
7 work in the 9th Circuit anymore, simply
8 because what you took a photograph of,
9 the subject, is not copyrightable. And
10 I think it's a dangerous area right
11 now.

12 **MR. OSTERREICHER:** I think
13 something that you mentioned while you
14 were talking is the difference between
15 Ansel Adams doing those two photographs
16 -- the one he had in his head, just
17 like an artist might paint something on
18 a canvas from what he has in his head,

1 versus I saw it, I jumped out, I
2 captured it. And yet a lot of the same
3 things, processes that went into this
4 long thought-out one went into this
5 instantaneous moment, but arguments
6 would be made of, well, there is really
7 no creativity there; all you did was
8 push the button. So, how do you talk
9 about that and counter it? All right,
10 John, go ahead.

11 **MR. FITZGERALD:** Well, two
12 points. One, with "Moonrise over
13 Hernandez," which is Ansel Adams most
14 sold image. He sold 300-something
15 copies. It's the most he's ever sold
16 of the originals, is my understanding.
17 If you look at the original image, it's
18 kind of a bleached out -- that's the

1 one I'm talking about, right,
2 "Moonrise?" It's sort of a daylight
3 thing, you can barely see the moon, and
4 the image is New Mexico, it's mountains
5 in the background, the moon is in the
6 sky, there's kind of a nice cloud, and
7 there's an idyllic little New Mexican
8 town with a cemetery, and then it's a
9 long, perspective shot. Well, for one
10 to print 300, that print evolved
11 tremendously. And if you look at print
12 1, or the straight negative image
13 versus the one that was in his head
14 when he shot it and the one that took
15 him his whole career in dodging and
16 burning and, you know, playing in all
17 the funky chemicals, and he's lucky he
18 didn't have fingers growing out of his

1 elbows by the end of his career, it's a
2 totally different image. It's the
3 image that he had in his mind's eye.
4 And so not to disagree with you here,
5 but it wasn't the snapshot that he did;
6 it was just the first part of the
7 creative process for him that took a
8 lifetime of ability and vision and
9 expertise to execute, and it took him
10 300 prints to get to the point where it
11 was what he saw.

12 **MR. FOLKENS:** It's
13 interesting. I'm just going to add,
14 this is an aside, when you said mind's
15 eye. I've seen that negative and I've
16 seen him print it, and you might
17 remember that the old boxes of seal
18 mounting material had a lady's picture

1 on it?

2 **MR. FITZGERALD:** Uh-huh.

3 **MR. FOLKENS:** And what he did
4 is he cut out the eye and he used that
5 to burn in the areas of the picture.
6 And the negative itself is scratched up
7 and it's got dust marks on it, and it's
8 really not in very good shape. But
9 he's got the rheostat thing, where he's
10 got 24 rheostats on it for different
11 intensity of lamp. But when you say
12 mind's eye, he dodged it using the
13 lady's picture with her eye cut out.

14 **MR. FITZGERALD:** Yeah. So,
15 the other point, and you asked about
16 copyrightability. To me, and I wasn't
17 sure if I could squeeze this in here on
18 fair use, but it does get into fair

1 use, but it definitely gets into
2 copyrightability, is that selfie, the
3 monkey selfie. Have you seen the
4 monkey selfie? I mean, does that
5 disturb you? I don't know if there is
6 anything binding on it, but at the end
7 of the day it was a ruling that the
8 copyright office has an opinion that a
9 monkey is not a copyrightable image
10 because the monkey took the picture.

11 Well, okay. As a wildlife
12 photographer and a nature photographer,
13 it disturbs me for a couple reasons.
14 One of them is that they are totally
15 minimizing the artistic aspect of
16 photography, that it takes planning and
17 vision and hard work to even create
18 these opportunities where you may have

1 a chance for that happenstance, for
2 that serendipitous moment, which is
3 what that was. The image itself, yeah,
4 the monkey took its picture, right?
5 The macaque took its own picture, and
6 it could have been this or that way.
7 And so everybody seemed to denigrate
8 that in terms of the photographer's
9 input.

10 But at the end of the day,
11 that was really an inspired, long-term
12 thing that that photographer had to do.
13 He had to go befriend -- he was
14 following these troops as a
15 conservation photographer trying to
16 save these endangered macaques,
17 spending years. He's living on
18 nickels. He's not making money on

1 this. He's doing it out of a passion
2 for a conservation project. It took
3 him -- he had to hire a guide, get out
4 there; he had to get those macaques
5 used to him. I don't want to drone on
6 on this, but it's just nuts to me. And
7 finally he, holding the tripod, hands
8 then the monkey the cable release to
9 let them play with it, and yet the
10 courts and a lot of people in the
11 press, the copyright office, calls that
12 the monkey taking the picture.

13 **MR. OSTERREICHER:** I'd like to
14 get some audience feedback. I think
15 the story got spun, as opposed to a
16 nature photographer who possibly sets
17 up blinds, and, yes, it's the animal
18 that trips a remote or trips a sensor

1 and takes its own picture. But in this
2 case it was that the camera was just
3 laying around in the camp and the
4 monkey happened to pick it up. It's
5 kind of like if you put a typewriter in
6 front of a monkey and he sits there
7 going like this, eventually some words
8 will form. I think that's part of
9 that. How do you address that?

10 **MR. OSTERREICHER:** Maybe you
11 can chime in on, you know, was this was
12 more of a thought out thing trying to
13 get a monkey to do something, where the
14 photographer as human had input, or was
15 this just an automatic thing?

16 **MR. HARRINGTON:** I'll chime
17 in while the mic's going. I will just
18 say this is going to be a really big

1 problem because who is responsible for
2 fixing it in the tangible form? If
3 it's a camera trap, it's the animal,
4 and that's going to be a big problem.

5 **MR. FITZGERALD:** That's the
6 problem.

7 **SPEAKER 1:** I think the
8 issue, also, is part of being trapped
9 by the statute and the Constitution,
10 that authors are entitled to copyright
11 and it's not a human author.

12 **MS. WOLFF:** There is no
13 definition of author.

14 **MR. OSTERREICHER:** Wait,
15 Nancy. We need a mic so she can make
16 up the transcript.

17 **MS. WOLFF:** So, there is no
18 definition of authorship in the

1 Copyright Act. I do know the licensing
2 representative for the photographer
3 Slater, Slater?

4 **MR. FITZGERALD:** Yeah, it's
5 Slater, yeah.

6 **MS. WOLFF:** Well, I think it
7 bankrupt him, this case?

8 **MR. FITZGERALD:** Yep, he was
9 bankrupt.

10 **MS. WOLFF:** Which was
11 unfortunate. But I also didn't think
12 that they didn't look at what human
13 work made it possible that the camera
14 was in that place and whether the lens
15 was in a certain way so that when the
16 camera took the picture that it would
17 be clear, and also the editing and in
18 some way the eye of the photographer to

1 pick the one that actually worked.
2 Even I get lucky sometimes and take a
3 good picture.

4 But I think we're going to
5 have trouble going in with computer-
6 generated work in the future. *National*
7 *Geographic* and, you know, nature
8 photographers have always used nature
9 tracks, but they still set up the
10 camera, they set up the lens. And
11 fashion photographers always had their
12 assistants. They do all the setup and
13 then the assistant might actually push
14 the button. So, I don't think
15 authorship is generally ever really
16 only been about pushing the button. I
17 think that got missed in this case.

18 **MR. FOLKENS:** Maybe there's a

1 work for hire agreement between the
2 photographer and the monkey.

3 **MS. AISTARS:** Well, I was
4 actually going to comment on that
5 aspect a little bit, because you were
6 talking about Ansel Adams and how over
7 the years his development of the
8 negatives improved and the final image
9 was completely different than the
10 original image. But photographers
11 often work with assistants who do their
12 developing work for them and their
13 printing work for them. Ultimately,
14 somebody prints their images for the
15 estate after their death, so you don't
16 want to get to a situation where you're
17 suggesting that the person who does the
18 printing is ultimately the author of

1 the image, if they are two different
2 people.

3 **MR. FOLKENS:** Adams actually
4 did that. On that image, Adams took
5 the photograph and then did the dodging
6 and burning on the exposure of the
7 paper. The paper was actually
8 developed by his lab assistant. And
9 then he had somebody else that went
10 into it and did the retouching to cover
11 up all of the dust spots and scratches
12 and stuff that ended up in the print.
13 So, Ansel did have people in the
14 process.

15 **MS. AISTARS:** Right, right.

16 **SPEAKER 2:** As far as I know,
17 I've been in touch with David Slater
18 and read his accounts, and to my

1 knowledge the photo in question he
2 actually did take. The monkey was in
3 the, not *The Guardian* but, what is that
4 terrible English newspaper?

5 **MR. KROGH:** *The Mirror?*

6 **SPEAKER 2:** No. It was
7 another one.

8 **MR. KROGH:** *Daily Mail?*

9 **SPEAKER 2:** Yeah. They ran
10 the initial story, and as far as I
11 know, unless Slater's account has
12 changed after-the-fact, he set up the
13 photo, he actually was holding the
14 camera. You don't easily get a photo
15 that looks that good and that sharp
16 just by waving it in front of your
17 face, especially if you're a monkey.
18 So he actually took that photo and as

1 much as any photographer has taken any
2 photo. And that what happened was, he
3 told a story to the *Daily Mail* about
4 the monkey's grabbing his photographs,
5 or his cameras and running around with
6 them. And then that story got spun
7 into the monkey selfie tale. And then,
8 of course, the Internet got involved
9 and stripped him of his copyrights
10 without there being any discussion as
11 to who took what photograph. And so
12 the story is now kind of out there that
13 the monkey took the photograph. But to
14 my knowledge she actually didn't. So,
15 adding that for what it's worth. In
16 fact, the case that's nearly bankrupt
17 to David Slater is in fact PETA's case
18 alleging on behalf of the monkey, which

1 adds a whole layer of silliness to the
2 entire process.

3 **SPEAKER 3:** Hi. I'm an
4 artist and I'm a lawyer, and I felt a
5 little bit of maybe animosity or
6 something towards people copying your
7 works.

8 **MR. FOLKENS:** Yeah, just a
9 little.

10 **SPEAKER 3:** It's not like
11 it's your livelihood or anything. But
12 this is actually kind of rare to have a
13 legal forum and everybody on the podium
14 is an actual artist. And my question,
15 being an artist myself, and most of you
16 all being photographers, and the
17 gentleman who painted those whales,
18 that was really good.

1 **MR. FOLKENS:** Thank you.

2 **SPEAKER 3:** Yeah. So, you
3 can get around copyright by doing
4 something that's transformative, and
5 you guys as artists might look at a
6 painter or someone who has come up and
7 said, "I loved your photo so much that
8 I repainted it." As an individual, I'm
9 not trying to hold you guys to a legal
10 standard or anything like that, but as
11 an artist looking at your work, what is
12 transformative to you? How far does
13 another artist have to go to change
14 your work to make it sufficiently
15 theirs?

16 **MR. FOLKENS:** They should
17 start from the beginning. They
18 shouldn't start with our work and then

1 change it to make their own; they
2 should create their own from scratch,
3 is my feeling. I mean, there are other
4 marine mammal artists out there and if
5 they start with their own reference
6 material, if they put their own time
7 into being out in the wild and
8 capturing their images, and base their
9 work on their own images, I got no
10 problem. We're good friends, Larry
11 Foster and I, who illustrated one of
12 the *National Geographic* books was a
13 whale painter, and he and I exchanged
14 originals, we shared reference
15 material. We got some reference
16 material from the Smithsonian on a very
17 rare species, and his image ended up
18 looking a lot like mine, and I didn't

1 care because we're working from the
2 same original out of copyright
3 photograph from 1905, is what it was.
4 And so we got along really well. But
5 we know the people who then copied
6 Larry's work and my work, and then
7 claimed it as their own as being some
8 expert in marine mammal morphology.
9 That's when I get pissed off.

10 **MR. OSTERREICHER:** So, are we
11 continuing with copyrightability or do
12 we want to get to fair use?

13 **MR. KROGH:** Well, I'll just
14 say about the copyrightability. I
15 think what we're about to hit right now
16 with AI and CG stuff, it makes this
17 argument about who owns the monkey
18 picture like a tiny little speck of

1 dust given how transformative visual
2 communication is about to be and how
3 much of it is going to be created by
4 multiple people in multiple devices.
5 Plenty of automatic stuff, plenty of
6 algorithmic stuff, and it's going to
7 entirely change our understanding. I
8 would say that there is an interesting
9 imbalance between the ability of big
10 companies to assert and leverage
11 copyright and the individual creator.
12 And I think that's part of the whole,
13 what's making us uneasy up here or in
14 general as individual creators is that
15 the people who can actually do
16 something about it are these big
17 organizations, you know, Disney, and
18 individual creators who do whale

1 paintings don't have the same ability
2 to enforce or be powerful in that
3 situation. And I think that's a huge
4 issue, but this mess of how visual
5 imagery is going to be created is going
6 to overwhelm this entire argument, in
7 my view.

8 **MR. FOLKENS:** We can ramp
9 that up a level. This may show up a
10 little bit later, but I was going to
11 raise a question for all of you, and
12 they're going to try to load up a
13 little 30-second video that I have in
14 which there was a sculpture that was
15 created that moved, and if that animal
16 is moving through space and is intended
17 to be an accurate representation, is
18 there copyright in that if you apply it

1 in a feature film?

2 **MR. HARRINGTON:** As a matter
3 of fact there is.

4 **MR. FOLKENS:** So, watch this
5 for 30 seconds and tell me if there are
6 copyrights in this sculpture, or if
7 they were used in a movie. On the
8 lower left is the sculpture; in the
9 upper right is the sculpture when it
10 came out of the mold and we put
11 actuators on the inside. And what
12 you're seeing swimming around is the
13 animatronic robot. So, the question
14 is, if we choreographed the movement of
15 that animal, is there copyright in that
16 choreography if not in the original
17 sculpture, or my interpretation of what
18 a bottle-nosed dolphin is supposed to

1 look like?

2 **MR. HARRINGTON:** I would say
3 that there are multiple copyrights
4 there. There's the sculpture
5 copyright, and then there is the
6 choreography copyright, and there is
7 the painting on the unsculpture. I
8 mean, you could do the sculpture and
9 then you could do the painting. And
10 then you have the motion -- the
11 capturing of it as a motion picture in
12 this 42-second clip, there is another
13 copyright. So, you have multiple
14 copyrights in this particular
15 situation. And any one of those are
16 individually registerable and any one
17 of those are also individually
18 infringeable.

1 **MR. KROGH:** But not in the
2 9th Circuit. It's a collective board.

3 **MR. OSTERREICHER:** One of the
4 things I'd really like to accomplish,
5 which is kind of the goal of getting
6 all of you up here, and we've got about
7 45 minutes left of our two hours, is on
8 these subjects, but in particular,
9 rights clearances. If you can provide
10 some resources, some helpful ideas,
11 some things that you have used on your
12 own to try and get the rights that you
13 need that address these issues, or what
14 you've used to counter some of the fair
15 use arguments possibly, things like
16 that. So, I'm going to try and keep
17 you focused on that through the last 45
18 minutes of the panel, if you wouldn't

1 mind. John, I'll start with you just
2 because you've done a lot of work and a
3 lot of writing in this area.

4 **MR. HARRINGTON:** Sure. So,
5 rights clearances, there's a whole kind
6 of cottage industry that characterizes
7 it that way as almost a misnomer.
8 Anyway, there are law firms whose sole
9 and complete role and existence in the
10 world is rights clearances. Typically
11 and largely rights clearances are done
12 and used in movies, because everything
13 that's in the movie, from a branded T-
14 shirt to a shape or a sculpture piece
15 of art. I've had my work used in
16 motion pictures before and I get phone
17 calls from the rights clearances people
18 for the film saying, look, your image

1 appears in the distance as art décor in
2 this room; can we get permission to use
3 that? And so sometimes that permission
4 is, yeah, sure, no problem. Because
5 it's such a small, almost out of focus
6 part of a room, I may or may not charge
7 a fee for that. But more often than
8 not, if it's a predominant or primary
9 presence in an image or if it's a full
10 screen, I'm getting asked about rights
11 clearance. And what's crazy is I'll
12 get someone who will call me and I will
13 use something like fotoQuote to
14 identify the rate. I have great
15 respect for Cradoc and the folks who
16 produced fotoQuote and who constantly
17 work on that as a resource for
18 photographers to identify pricing.

1 What's crazy when you think about
2 fotoQuote is a lot of people say, oh,
3 gosh, the rates that are out in
4 fotoQuote are too high; I couldn't
5 possibly ask for that. And the reality
6 is, that it's not only based upon
7 surveys, but in many cases I would
8 argue that some of those rates are
9 actually too low. But when you have
10 those prices and those rates and you
11 can feedback to them and say what I
12 would charge you for rights clearances
13 for my photo to show on your screen in
14 your documentary for 6 or 12 seconds is
15 \$750, then you get someone that
16 pushback kind of what you said earlier,
17 Pieter, about how, well, we don't have
18 any money for that, or we only pay \$50,

1 or everyone else we're using has paid
2 \$50 or \$100. And it's like, I'm not
3 even going to sit down at my computer
4 and send you an invoice for \$50.

5 **MR. FOLKENS:** I was going to
6 say, one of the things I ask for when
7 they say we can only give you \$25 for
8 the use, I say, okay, I want 50 copies
9 of the final publication. And all you
10 got to do is keep the button on the
11 printing press going for an extra 30
12 seconds and you got your extra 50
13 copies, and sometimes I get that.

14 **MR. HARRINGTON:** I also find
15 that when I'm working on commercial
16 work, I have to be really cognizant
17 that even though -- like, for example,
18 I'm pretty sure, off the top of my

1 head, that Burberry's, the pattern in
2 that fabric, is actually a trademark
3 pattern. I can't have a subject in a
4 commercial shoot wearing that Burberry
5 scarf unless I have clearance from
6 Burberry. That is why you see in a lot
7 of music videos and other documentaries
8 that things will be blurred out,
9 because someone hasn't gone through the
10 rights clearance process through a law
11 firm. Also, and a lot of people don't
12 know this, there is also rights and
13 clearances insurance. So, if you go
14 through a rights clearance law firm and
15 do your best to get clearances on all
16 the various other copyrights that are
17 in what you're doing, especially in a
18 motion picture or complicated still

1 photo with lots of elements, you can
2 get insurance that will, provided
3 you've used a rights clearance firm,
4 protect you or the user of the
5 photograph if you are sued for an
6 infringement of trademark or copyright.
7 And so that's something that a lot of
8 people are not aware of, and it's
9 fairly inexpensive.

10 **MR. OSTERREICHER:** Amanda,
11 you talked a little bit about this
12 before with taking photos in different
13 venues and everybody wants your images
14 for different purposes aside from the
15 couple that are enjoying their happy
16 day. Can you talk a little bit about
17 what you do to get that done?

18 **MS. REYNOLDS:** Sure. So,

1 primarily I find that I get the most
2 requests from the dressmaker or the
3 dress store, the florist, obviously,
4 and usually the planner, who styled and
5 designed the event. I send everyone a
6 vendor gallery with a license that
7 explains what they're allowed to use
8 the images for. I haven't really had
9 too many examples of them not honoring
10 that. I've never had anyone try to
11 turn around and use my work
12 commercially, which has been great,
13 knock on wood. But whenever I've done
14 editorial or style shoots, I've made
15 sure to get model releases and I pass
16 that along to -- but, again, we need
17 the dress to get the shoot, so they
18 loan you the dress with the expectation

1 that you will give them rights to use
2 the images. So, there's a lot of
3 understood agreements, but I like to
4 get it all in writing.

5 **MR. FOLKENS:** Smart.

6 **MR. KROGH:** Yeah. My pet
7 peeve here, since I'm speaking to a
8 room full of lawyers, is the lazy
9 lawyering that is related to those
10 indemnification clauses. And Jeff's
11 story notwithstanding, the idea that
12 you put the photographer on the line
13 between the person in the photograph,
14 when it's somebody that you have set
15 up, you know, a model or somebody from
16 your company. And you make the
17 photographer be the person who gets
18 sued if the usage is objectionable to

1 that person is, to me, is -- it's more
2 than unfair, but it's super-lazy
3 lawyering because I don't think in many
4 cases you're protecting yourself all
5 that well. What you really need to do
6 is make sure that the company
7 representative actually gets a good
8 model release so that indemnification
9 against anything that results out of
10 usage, I think, is a real problem.

11 Now, I sign indemnification
12 clauses all the time, and I'm happy to
13 indemnify and warrant my own work. But
14 I cannot sign an indemnification clause
15 that indemnifies the client against any
16 use of the work, because I don't have
17 any control over what that use is and I
18 really hate to see that in any

1 contract.

2 **MR. HARRINGTON:** And I'll add
3 to that. I can tell you that when I
4 see the indemnification clause, as
5 Pieter said, it's -- I'll indemnify you
6 for the integrity of the work that I
7 produced, and so they have this one-
8 sided indemnification clause. And
9 during the contract negotiation
10 process, I will say to them, look,
11 that's fine, but I need a parity
12 indemnification clause in there that
13 says that should you use the work
14 outside of the scope of the license or
15 that you will indemnify me in the event
16 of litigation. Sometimes lawyers don't
17 like to see a parity clause like that,
18 they just want to be protected

1 themselves. But when you really try to
2 explain it to them, look, I'll
3 indemnify you for any mistakes I make,
4 but you have to indemnify me if you do
5 things with it that you're not supposed
6 to. And more often than not, that
7 conversation actually does work.

8 **MS. AISTARS:** Sean?

9 **MR. FITZGERALD:** You know,
10 it's kind of a two-way street because,
11 as a photographer I'll have people come
12 to me or declare the rights to
13 something, and then sometimes I have to
14 do it, because I take pictures with
15 copyrightable stuff in it as well,
16 which gets into fair use issues, and I
17 have to make those determinations.
18 It's great when it's a nice, easy

1 process. I mean, it doesn't have to be
2 an ordeal.

3 I had an image this past
4 year, the one with the monarch
5 butterflies, the dead ones being held
6 in the hand. Barbara Streisand's right
7 clearance company came to me, said they
8 wanted to run it in her concert, I
9 guess she did six shows, and then they
10 wanted to have this behind her, and
11 then also have the worldwide rights for
12 Netflix, because it was on Netflix.
13 And the thing was, it was like a 1-1/2-
14 page request that they had, really
15 narrowly tailored, and she ended up
16 paying a very fair price. And it was
17 one of those things where this can be
18 done right. This can be, when it's not

1 a bunch of crazy boilerplate or unfair
2 indemnity terms. If that was more a
3 model of the best practices, then,
4 gosh, it would be easier for all of us.

5 At the same time, and I find
6 this, too, they talk about our
7 hypocrisy sometimes, where as creators
8 we sometimes use others' music, we
9 don't know what's good for the goose
10 isn't good for the gander kind of
11 thing. It's incumbent on us to go out
12 and ask. I think as a creator, if
13 there is a close call, I should go out
14 and ask whoever it is.

15 I'll give an example. Years
16 ago I photographed at the Heidelberg
17 Project. Anybody here from Detroit?
18 Nobody knows? It's an amazing grass

1 roots street art project. I'm also
2 involved with fostering murals and
3 trying to support street artists, and
4 have gotten into it, but that gets into
5 it when you take pictures of that
6 stuff, you know. And I've done, for
7 example, murals of hundreds of street
8 artists pulled together that have their
9 own theme with all the images, but I
10 refuse. Personally, I draw that line.
11 I'm not going to sell those and make
12 money off those. I'll sell those and
13 contribute it back into street art on
14 that one, because I thought it was
15 pretty clearly fair use.

16 For others, like this
17 Heidelberg Project, it's pictures of
18 street art that helps keep this

1 neighborhood in Detroit functioning and
2 give kids a place to have outlets. I
3 just went to them and said, look, I got
4 these pictures. My conscience won't
5 let me sell them, particularly. I
6 don't feel right, even though I'm
7 probably good on fair use. Because
8 there's more stuff in the scene, you
9 know? You have the artwork and then
10 you have a lot of other elements, and
11 that's kind of on the line where it
12 could probably be for noncommercial
13 use, editorials, that kind of thing.
14 But I think it's probably fair, but I
15 didn't want to do that. So I ended up
16 doing a deal with them where, hey, I
17 want to sell these, I'll donate every
18 penny of profit back to the Heidelberg

1 Project, so you can keep this going,
2 which gets into what we talked about
3 consideration. Sometimes consideration
4 is not cold cash; sometimes it's doing
5 a thing for somebody you believe in.
6 Sometimes it's having a real
7 retribution back to you, having my name
8 now associated with the Heidelberg
9 Project. It's valuable to me as an
10 artist.

11 There's all kinds of ways
12 that this can work. But when it's just
13 players out there just going, gosh, I
14 think I can get away with this. I
15 don't think this is fair use; I'm going
16 to go ahead and take a picture and sell
17 it. Or, I think I can take Pieter's
18 dolphin and I can tweak it 11%, not

1 just 10%. But I'm going to tweak it
2 11% and I can use it. There are moral
3 and ethical issues in there, too. What
4 is your thought process when you decide
5 to do that? And I think that's
6 something that we, as creators should,
7 need to do some gut checks sometimes.

8 **MR. HARRINGTON:** Well, Sean,
9 I would honestly caution you when
10 you're contemplating that and I'm going
11 to be clear in conscience, I'm going to
12 donate my money, donate every penny,
13 the thing --

14 **MR. FITZGERALD:** Not
15 everything.

16 **MR. HARRINGTON:** But then the
17 thing --

18 **MR. FITZGERALD:** My costs

1 came back to me.

2 **MR. HARRINGTON:** But, see,
3 then, the thing is you then said but I
4 get a benefit by being associated with
5 the Heidelberg Project. And so you
6 actually did get a benefit that wasn't
7 monetary. In the same vein, there was
8 that issue with Shepard Fairey where
9 using the concept of transformation,
10 which was his argument, I didn't make
11 any money off of it, but Shepard Fairey
12 received an incredible amount of
13 notoriety from it. And so in talking
14 about fair use, the issue is the claim,
15 oh, this is fair use because it's
16 transformative and it was settled so we
17 don't have a definitive case from it.
18 But I think you've got to be careful

1 when you're making the suggestion that,
2 you know, my hands are clean because I
3 donated it.

4 **MR. FITZGERALD:** Oh, yeah, I
5 should say that once, like with the
6 Heidelberg Project, we worked out a
7 contract and we licensed this, and we
8 did a proper licensing deal, in the
9 licensing deal I retained copyright,
10 but I'm going to use these images and
11 give you the net and donate them back.
12 So that's a good point. I appreciate
13 that.

14 **MR. OSTERREICHER:** So, I'd
15 like to get some tips from all of you
16 for people, once we put all this
17 together, to use as a resource. I
18 mean, one of the things, Amanda, that I

1 heard you say is on your website you've
2 got frequently asked questions, where
3 you actually want to use those to give
4 the answers to questions that you've
5 experienced, but also as a way of
6 putting it out there in kind of a
7 Question form for people to look at.
8 What kinds of things do you think are
9 important for you as a creator to have
10 out there for people to understand that
11 are going to be trying to contract with
12 you?

13 **MS. REYNOLDS:** So, for me,
14 since I didn't actually go to law
15 school, I find that using the plainest
16 terms possible always helps, and
17 understanding that if I just explain
18 very clearly why I expect the respect

1 of my copyright and of my works, it
2 makes sense to people immediately, and
3 95% of the time, they do the right
4 thing. So, I will say that explaining
5 it from the get-go instead of coming at
6 it from the backend. Just like we've
7 all gotten the contract, we've gotten
8 the purchase order that completely
9 changed what you thought you were
10 doing, like, no, that's not what we
11 agreed to. So, I always try to make
12 sure that before any work is done, any
13 contract is signed, there is a very
14 clear-cut understanding, and just a
15 very plainspoken understanding of why
16 it's important. And exposure doesn't
17 pay my mortgage; exposure helps a lot.
18 It helps me get clients, but it doesn't

1 pay my mortgage. When people are,
2 like, well, you should just do this for
3 free or you should let me use the image
4 because it will be great exposure for
5 you. Yes and no. It goes so far. So,
6 I think just being as away from the
7 legal jargon and into the plainspoken
8 ability to make it make sense to your
9 client has helped me a lot.

10 **MR. OSTERREICHER:** Well, in
11 that same vein, what happens when you,
12 as John talked about what he does, have
13 you ever been in a situation where you
14 entered into an agreement with somebody
15 and then later on, after you've done
16 the work, whatever, they're trying to
17 say, no, we had a different agreement?
18 How do you deal with those kinds of

1 claims?

2 **MS. REYNOLDS:** I haven't had
3 that exact situation happen. I agreed
4 to do something for a certain price. I
5 sent an official quote, it was
6 accepted. Then they found out that
7 they were expanding the scope of work
8 and their corporate office had to get
9 involved, and then I wound up having
10 about 15 different calls with their
11 corporate attorneys, because I was
12 proposing to retain my copyright and
13 they countered back that this is a work
14 for hire. And there was apparently no
15 budget wiggle room despite the expanded
16 scope of work. So, it hasn't been a
17 huge problem for me, but that's the
18 only time it's happened and that was a

1 little bit of naiveté on my part as
2 well as the initial person that I was
3 working with.

4 **MR. OSTERREICHER:** So, how do
5 you guard against that now?

6 **MS. REYNOLDS:** Well, now I
7 make sure that before I give someone a
8 quote, I ask to speak to the person who
9 is actually going to be authorizing the
10 check, whether that's the people paying
11 for the wedding. It truly comes down
12 to, I need to make sure that I am on
13 the same page as the people that are
14 going to be issuing my payment before
15 we get to any contract being signed.

16 **MR. OSTERREICHER:** So, it's
17 like John said, he can't give away
18 rights that he doesn't actually have;

1 you want to make sure you're dealing
2 with a person that has the authority to
3 say or do what it is you think you're
4 agreeing to.

5 **MS. REYNOLDS:** Yeah.

6 **MR. OSTERREICHER:** So, that
7 might be something really important for
8 people to realize, that dealing
9 possibly with somebody lower down on
10 the food chain at the end of the day
11 might come back to haunt you. It's a
12 learning experience.

13 **MS. REYNOLDS:** It is. And
14 having been in a position where I've
15 contracted photographers for an event,
16 I can appreciate that, because I've
17 been on sort of the PR and the
18 marketing side of things, too, and I do

1 appreciate that the buck doesn't always
2 stop with the marketing manager;
3 sometimes it has to go a little further
4 up the food chain.

5 **MR. FOLKENS:** That's a very
6 important point. It's happened to me a
7 number of times, where you argue the
8 rights agreement with a line producer.

9 **MS. REYNOLDS:** That's the
10 wrong person.

11 **MR. FOLKENS:** Well, they
12 thought that they were the right
13 person.

14 **MS. REYNOLDS:** Yeah.

15 **MR. FOLKENS:** And then you
16 finally get down to signing the
17 contract and all of a sudden an
18 attorney gets involved. I had this

1 situation with "Star Trek IV" on the
2 20th anniversary DVD. They wanted to
3 have a "making of" video. And this
4 goes back to the previous comment, too,
5 where I had all these accumulated
6 images of the making of the
7 animatronics for that film. And so we
8 had an agreement with the producer, an
9 independent producer of that segment
10 for the DVD, and so I gave them all the
11 stuff. Then all of a sudden the
12 contract comes down from the attorney
13 and they wanted not only the stuff that
14 was there, but also the outcuts and all
15 the reference materials that were used,
16 and all the rest of it. I can't give
17 that up because I didn't take those
18 pictures, and I don't have the rights

1 to give it to you, and it ended up not
2 being in the DVD. They had to destroy
3 a few hundred thousand DVDs because I
4 would not agree to give up -- or, I
5 asked for indemnity from it, going back
6 to the previous question, and they
7 wouldn't give it to me, and I said,
8 okay, I'm not going to sign the
9 contract. But that point is so
10 impairment. You've got to know who
11 writes the check and who has the
12 authority to make the agreement.

13 **MS. REYNOLDS:** I also always
14 opt to be there for a wedding, the
15 couples contract with the venue,
16 because sometimes the venue will have
17 it, then, they get certain rights to
18 images. Even though I'm not the one

1 signing that contract, there are
2 certain venues that even the exteriors
3 it's considered -- if you butter up on
4 their property -- in Washington DC, I
5 know a few. And there are a lot of
6 very naive photographers in the world
7 that think they can photograph anywhere
8 as long as it's outside because they
9 think it's fair use. But it's private
10 property and they don't understand that
11 their work is either not permitted or
12 they retain the right that it shows the
13 specific building, or at least they
14 think they can.

15 **MR. OSTERREICHER:** Peter, do
16 you have some tips for those of us who
17 like to learn to avoid some of these
18 pitfalls?

1 **MR. KROGH:** Sure. And
2 actually avoiding pitfalls is exactly
3 what I was going to talk about. If
4 you're going to end up being an artist
5 representative, God bless you. But if
6 you're an attorney, you're probably
7 thinking about going where the actual
8 money is, which is on the other side of
9 things. And I think it's extremely
10 important and I believe it is growing
11 in importance that there is an actual
12 connectivity between the visual asset
13 within a company and the actual
14 agreement. And I've done a lot of work
15 with companies in their asset
16 management systems. And even places
17 where the legal department has
18 everything locked down and, you know,

1 oh, yes, we have every single contract
2 we've ever signed, and there is zero
3 connectivity between that and the
4 actual images, and you're just asking
5 for a huge amount of trouble. And as
6 we are moving into a world where visual
7 communication is more important, there
8 is going to be more and more visual
9 assets coming in from huge numbers of
10 sources. Some will be work for hire,
11 employee images straight off their
12 phone; some will be acquired through
13 stock photography, and some will be
14 commissioned photography. It really is
15 essential to be putting these things in
16 place and to have very clear
17 agreements. This is a problem we have
18 with visual media that we do not have

1 with textual information, and very few
2 corporate systems are set up to
3 actually have a connected rights
4 agreement in database form in some kind
5 of programmatic way.

6 The other thing that
7 companies really need to do is simplify
8 the kinds of rights structures that
9 they have so that it is not a gigantic
10 long clause that a lawyer has to read
11 to understand, but to actually turn it
12 into programmatic kind of rights,
13 something that can actually be
14 leveraged by computers.

15 **MR. OSTERREICHER:** John, I'll
16 ask you. I know the answer might be
17 read my book, but if you could give us
18 a few tips, we'd appreciate it.

1 **MR. HARRINGTON:** So, to talk
2 to people who might be kind of working
3 in Amanda's field with weddings,
4 because I've done weddings from time to
5 time over the many years. And a tip
6 that you really need to be cognizant of
7 is when the couple is signing your
8 contract, typically six months or a
9 year out, those are two individual
10 people, they are not a couple. They
11 can't contract on behalf of the other
12 person. So, arguably, both the bride
13 and the groom have to sign that
14 contract, especially if they are giving
15 you permission to use their likeness
16 for your own marketing. A lot of times
17 you'll have parents source the
18 photographer, because they pay for the

1 photographer, the parents signs the
2 contract. Well, that's a problem
3 because the parent doesn't have the
4 authority to sign away the rights to
5 the inevitable brother-in-law, sister-
6 in-law and their child. So, in a
7 situation like that, one of my tips
8 would be make sure that the people that
9 are signing are the people that can
10 give the rights. And when it's a
11 corporate situation, one of the clauses
12 that you can have in your contract
13 right below the signature block for the
14 client side is to say, you know, I
15 hereby agree and I hereby acknowledge
16 that I am authorized to engage in this,
17 signed John Smith, so that you're
18 making certain that that person is able

1 to sign on behalf of corporation X. A
2 lot of times those are attorneys, which
3 is why an attorney will get involved,
4 because the attorney can execute that
5 on behalf of the corporation. A line
6 producer can't, and so you run into
7 that kind of a problem.

8 A lot of times I'll start
9 getting pushback from the intern or the
10 associate assistant art buyer to the
11 third degree, and I say, look, this
12 might be an easier conversation if I
13 just talk to counsel; it's a
14 conversation I have all the time and we
15 can talk about the language. You want
16 me to do this project, I want to do
17 this project, but, you know, there are
18 a few things I need to explain. And

1 sometimes they hem and haw at it and
2 sometimes they go, oh, sure, well, I've
3 already been talking to my attorney,
4 it's John Smith; here's Mr. Smith's
5 direct dial or email, and we start a
6 dialogue. More often than not, that
7 solves the problem.

8 **MS. AISTARS:** Pieter?

9 **MR. FOLKENS:** Tips. I tend
10 to be the lost child in the wilderness
11 a lot, and I bump my head against the
12 big corporate lawyers and the big
13 contracts. I think as an artist I'm
14 fairly sophisticated in the copyright
15 law because of having to deal with
16 infringing. And so when we're talking
17 in the context of tips and things like
18 that, I just need to reiterate what was

1 said about talking to the people who
2 have the authority and getting it done
3 ahead of time.

4 Now, I had one experience
5 with Disney, what was it, Fantasia 3,
6 and I came down and did a teaching
7 session for all of their digital
8 animators, and you'll actually see my
9 influence in the film, where they're
10 animating the whales swimming around.
11 And after it was all done, I get a 29-
12 page contract from Disney saying that
13 everything I ever did in marine mammal
14 illustration now became the property of
15 Disney. And so being a small player,
16 you get the big corporations and
17 unfortunately they take advantage of
18 the little guy way too often. And so

1 there has to be a level of
2 sophistication by the artist. I mean,
3 in the art schools, San Francisco
4 Academy of Art, they really need to
5 have a business/copyright course
6 section. Not to take anything away
7 from the attorneys, but we need to
8 increase the sophistication of the
9 artist so that they can ask those
10 questions and avoid those pitfalls.
11 Because so many of them, the vast
12 majority of them, they've got no idea
13 about how to protect themselves or
14 making the mistakes of when they were -
15 - infringing other people's work. And
16 so, I really don't have many tips,
17 because all my experience is butting my
18 head against a big nasty legal wall.

1 **MR. HARRINGTON:** But that
2 makes three tried and true tips.

3 **MR. FOLKENS:** Yeah, find
4 another profession.

5 **MR. OSTERREICHER:** Sean?

6 **MR. FITZGERALD:** I guess I'll
7 give a tip for artists who may be
8 incorporating others' work in their
9 own. I kind of keep thinking about
10 this, in kind of trying to bone up for
11 this table a little bit, reading some
12 fair use stuff is. I keep reminding
13 myself -- it reminds me of the Pablo
14 Picasso quote, where bad artists copy;
15 great artists steal. And to some
16 degree it sort of ties into what's
17 going to make me angry if somebody does
18 use my work. If you simply take what

1 I'm doing and copy it, like Pieter was
2 talking about, just take my image, the
3 situation I've worked my tail off for,
4 I'm lucky to make any money on it.

5 It's hard out there sometimes. And you
6 copy it almost corner-to-corner, I'm
7 going to be very disrespected and I'm
8 going to be very angry, and if I can
9 come after you, I probably will.

10 Whereas, if bad artists copy, if you're
11 a great artist, you steal, to me, I am
12 not offended at all, if you look at my
13 stuff and you get inspired by it. But
14 you look at a hundred other artists'
15 stuff and other photographers' stuff,
16 and you incorporate that into yours so
17 that what comes out of you becomes your
18 own, then you tell me I'm so inspired

1 by you. If I can look at that and even
2 if there is some similarity, I'm like,
3 dude, that means a lot to me, because
4 I've helped. You know, part of our
5 duty is to help other artists. We
6 don't pull up the ladder; we pass it
7 on. And when we get into this sort of
8 society where, oh, we can just take
9 this, we tweak it 10% to 11%, in our
10 mind -- I know that's not the legal
11 standard, but that's kind of the
12 thought that's out there, then now it's
13 mine and I can run with it. That's
14 just messed up. And so my tip would be
15 for a lot of us, we've just got to look
16 inwards and say it doesn't have to be
17 this way. These are conscious choices
18 that people make and they do not need

1 to be that way.

2 **MR. OSTERREICHER:** So, we've
3 been talking about rights clearances,
4 but what about the situations where the
5 rights weren't clear and you just said
6 now I'm going to come after you. What
7 has been your experience in trying to
8 deal with copyright infringement
9 itself? I mean, have you gone to
10 court? Have you tried to negotiate
11 settlements? And what have you found
12 to be the best practice? You know, at
13 the end of the day, even if you bring a
14 lawsuit, most lawsuits settle. They
15 don't usually go to a verdict, so how
16 do you deal with that? We'll go back
17 down this way. I'll start with you
18 again, Sean.

1 **MR. FITZGERALD:** Oh, you
2 know, for the most part for me it's
3 been a matter of, all right, let's talk
4 and knock on wood. I've not had the
5 really intentional infringers who are
6 doing something where I'm just
7 determined to go after them. Because
8 I'm a small businessman, and I've got
9 to look at this as a business even at
10 the end of the day, too. I can't do
11 this out of vengeance. And one of the
12 things that I learned practicing law is
13 that those people who can't let it go
14 are the worst clients, because they
15 won't settle for decent reasons,
16 they're not rational. They're insane
17 and it becomes a vendetta. And if I
18 let that become me, then I as a

1 business owner have made a really dumb
2 choice. And on top of that, the system
3 is messed up. I mean, when it costs
4 \$10,000 to get a retainer, costs
5 \$350,000 or something, to take one of
6 these things all the way through, going
7 to federal court? You've got out-of-
8 pocket expenses, which usually your
9 attorney is going to make you pay,
10 which is another thirty, forty, fifty.
11 There's going to be depositions and all
12 that stuff gets added in. It's just a
13 bad business decision. So, I'd do
14 anything I can to avoid that. I
15 haven't had to go down that road, but
16 I'm sure the guys down here obviously
17 have traveled it more than I have.

18 **MR. OSTERREICHER:** Pieter,

1 what's been your experience, and then
2 reflecting on that, what advise could
3 you give to people who are possibly
4 inclined, all right, we're going to
5 court, I'm suing. Do you actually get
6 your pound of flesh?

7 **MR. FOLKENS:** I thought Sean
8 and I were getting to be really good
9 friends until he described me as that
10 client, you know, who couldn't let it
11 go. Let's talk about the vast majority
12 of the time. I find that if somebody
13 infringes on the work or duplicates the
14 work and didn't pay use fee for it, I
15 just invoice them and maybe double the
16 fee, because -- late payment, let's
17 call it -- and send out an invoice and
18 tell them I expect payment because you

1 used it. And, surprisingly, most of
2 the time they go, oops, yeah, we'd
3 better pay this.

4 I have had to go to court
5 only twice. It was the same guy over
6 the same issue and the same image. And
7 I am here speaking with you today on
8 behalf of the Graphic Artists Guild
9 because of my tenacity going after this
10 guy. And so there's kind of an ego
11 benefit for me that has nothing to do
12 with what we're talking about today,
13 but I really enjoy meeting new people
14 and making new friends, and stuff like
15 that. But I'm not sure that, to use
16 your words, it's a good business
17 decision. And this is why we put
18 effort earlier in the day looking at

1 the small claims copyright solution. I
2 think that is so immensely important
3 for independent, small business artists
4 and photographers to have a venue that
5 doesn't require having to go the big
6 dollar route, when you put your
7 retirement at risk, and all the rest of
8 it. When I was hunting for an attorney
9 the first time around, one guy said
10 that \$0.5 million retainer and we'll
11 take it. You know, and my total net
12 worth was maybe 10% of that.

13 And so when you're talking
14 about tips and stuff like that, the
15 thing that I've learned is there's a
16 distinction between goodwill and
17 badwill, and the vast majority of
18 people out there, even the people who

1 infringe upon your copyrights, really
2 have goodwill. But it's those few guys
3 who just really piss you off and it's
4 tough to let it go.

5 And a quick little anecdote.

6 I had one guy who used like 16 or 17 of
7 my images in a promotional brochure for
8 a whale-watching company. And he heard
9 about my reputation after it was
10 published, and he went through a
11 tremendous amount of anxiety trying to
12 track me down because he didn't want me
13 to come after him because it was an
14 obvious infringement. And he looked up
15 my name and thought I was from Holland,
16 and so he had people searching all over
17 the Netherlands trying to find this
18 guy. And he finally tracked me down

1 and he was in his office with his
2 attorney saying I'm really, really
3 sorry, we got this thing, don't sue us;
4 what can we do to settle? And right
5 there, the message to me was, he had
6 goodwill. And what we did was, we
7 figured out what the use rights would
8 have been, we doubled it, and it all
9 became a donation for large whale
10 disentangling. And so I didn't take
11 any of it and it all went to a charity
12 of my preference, and I was impressed
13 by his goodwill.

14 On the other hand, the guy
15 that I'm suing that's in the 9th
16 Circuit right now showed no goodwill at
17 all. Oh, I can count on one hand the
18 total number of people I hate in the

1 world and still have room for
2 prehensibility, and he and his
3 attorneys populate the rest of the
4 fingers, but enough about me.

5 **MR. HARRINGTON:** I hope that
6 you at least got that donation in your
7 name so it was a tax write-off for you
8 and not anyone else.

9 **MR. FOLKENS:** Look, I got to
10 use the tools. They were special
11 cutting tools and I got to use the
12 tools.

13 **MR. HARRINGTON:** Okay. I
14 have to say, just as you said about
15 Sean, you thought you were doing well
16 with each other until he said something
17 to you, I thought we were doing well
18 together until you told me you just

1 invoice it and double it. Boy, I have
2 to say with all due respect, I think
3 that's probably one of the worst
4 practices you can engage in, because
5 your net worth at whatever it was, one-
6 tenth of the 500, probably could have
7 your own house in Tesla right now if
8 you had done that a little differently.

9 **MR. FOLKENS:** Well, let me
10 say I married well.

11 **MR. HARRINGTON:** I had a
12 horrible situation where I had a client
13 signed a contract and utilized the
14 images. They were an organization
15 regarding a memorial being built in
16 Washington, and it was for a group of
17 people really in the world that had
18 been disenfranchised. And they had

1 hired me for doing a bit work, so it's
2 what Amanda and I have done together
3 from time to time. And when the
4 groundbreaking event occurred, they had
5 published an entire book of my work,
6 unbeknownst to me, and was completely
7 out of scope. And when the woman who
8 had hired me saw me looking at the
9 book, I was in shock, but she asked me
10 if I wanted to buy a copy of the book
11 because it was a wonderful book and
12 they truly set a few aside for me to
13 buy, if I wanted to. Because the group
14 had been so disenfranchised, I just let
15 it go at that point. I was, like, I'm
16 just not going to deal with this. This
17 is my karmic contribution to the world.
18 But then fortunately they came back to

1 me about three years later and asked to
2 license my pictures for use in a video
3 documentary they were doing about the
4 memorial. I said, boy, I'm happy to do
5 that but we need to really resolve this
6 issue from a few years ago. And
7 talking about the goodwill, I don't
8 encounter a lot of intentional and
9 willful infringers; I encounter people
10 who exceeded the scope of the license
11 or I really don't like the innocent
12 infringer, quote, unquote, concept,
13 where they go, well, I thought I could
14 use it because it was on the Internet.
15 Now, that's not really an innocent
16 infringer; that's an ignorant
17 infringer. But the person who made a
18 good mistake and really wants to make

1 amends, in my situation, that was the
2 case. They were very apologetic,
3 didn't know, and we worked it out, and
4 we worked it out fairly reasonably. I
5 was happy and they were happy, and they
6 got the extended licenses for the
7 videos. But I encounter all the time
8 people who are exceeding their license
9 probably more than I encounter people
10 who have outright stolen my work. So,
11 my goal, even if I haven't worked with
12 that client since that particular
13 project, is to try to approach it from
14 amicable standpoint. My goal is not to
15 file a lawsuit and end up in court; it
16 is to settle. But at the same time,
17 I'm not going to settle for, well, we
18 could have bought your photo for \$100,

1 or a photo similar to this for \$100;
2 we're not paying you \$15,000 or
3 \$27,000. No, I think you are, but
4 let's work that out and let me explain
5 to you why it is and why this is really
6 the case.

7 And I think that if I was to
8 offer a tip, I would say, assume
9 goodwill but in the words, in more
10 words of Ronald Reagan, trust but
11 verify. That would be my suggestion.

12 **MR. OSTERREICHER:** Peter?

13 **MR. KROGH:** Yeah. Primarily
14 the infringements that I've run into
15 are people exceeding a license, so they
16 are people who are my clients or were
17 my clients and I typically don't go
18 after them very hard. I have never

1 taken \$100 use and asked for \$27,000.
2 Maybe I'd be doing better if I did.
3 But, you know, a lot of it depends on
4 this whole goodwill thing. And I will
5 also say that I have run into very few,
6 like, just total people of badwill.

7 **MR. HARRINGTON:** You're
8 worried about the transcript, aren't
9 you?

10 **MR. KROGH:** But I had the
11 same reaction as Sean, and I actually
12 went and looked, and this guy is still
13 infringing an image. And he was such a
14 jerk. And he took one of my pictures,
15 he's a moving company, kind of a fly-
16 by-night in California. It's got my
17 watermark on the whole thing. And
18 somebody wrote me who was in a dispute

1 with him and said, by the way, did you
2 know this person is using your picture?
3 And I called him up and I said you're
4 not allowed to do this and I'm going to
5 send you an invoice, and he said, you
6 know what? I'm suing you.

7 **MR. HARRINGTON:** Did he say
8 it just like that?

9 **MR. KROGH:** Pretty much like
10 that. And I was like, you know what,
11 there is no way this is worth the
12 aggravation this is undoubtedly going
13 to cause me, and so I let it slide.
14 Fortunately, that hasn't been a huge
15 thing.

16 I will say the other thing
17 that happens to me a lot. The first
18 time my book showed up on a darknet.

1 So, I published this book, it took me
2 forever to write it, and it was
3 published by O'Reilly, and I started
4 getting all these notifications to
5 download it for free. And I just
6 absolutely flipped out. You know, I
7 was on the phone with the O'Reilly
8 attorneys and I'm like, get these
9 people. And then it started happening;
10 it was like every other day these
11 things were happening. And finally the
12 guy who was my publisher said, you
13 know, there's these fetishists out
14 there that, like, want every single
15 book O'Reilly publishes. They don't
16 even read it and you can drive yourself
17 crazy, or you can just pass it along to
18 our attorney and try not to worry about

1 it. Now that I'm my own publisher,
2 this happens a lot. And I'll shame
3 people publicly. Occasionally at a
4 photographer forum, a guy was like, oh,
5 yeah, anybody know where I can get a
6 free download of Peter Krogh's book?
7 And I went on the forum and I'm like,
8 you know, I sell this and you're a
9 photographer, and he was absolutely
10 tail between his legs and just
11 completely contrite at having done
12 that. But, that's how I've approached
13 it.

14 **MR. OSTERREICHER:** Amanda,
15 it's the two-minute warning; you get
16 the last word.

17 **MS. REYNOLDS:** Okay, sure.
18 So, because I started this in 2014, I

1 went into it really with my eyes open
2 knowing that Instagram, Pinterest and
3 Facebook were going to be my main
4 method of getting clients. And I knew
5 from my previous job in my previous
6 life that that meant my work was going
7 to get passed around. It was going to
8 get screenshoted. I could do
9 everything to my website to prevent
10 people from being able to right click
11 and download, but I just had to sort of
12 factor in a little bit of a loss and
13 what was worth my time.

14 When I see my work being
15 misrepresented, perhaps by another
16 photographer saying that they took it
17 so that they could get more clients,
18 when it's populating their portfolio, I

1 certainly send them an email and just
2 say, hey, that's absolutely
3 unacceptable; you need to take down.
4 But at the same time, do I hope that
5 Martha Stewart is going to repost my
6 Instagram? Yes. So, it's a little bit
7 of a balance - I want the right people
8 in the right spaces to share my work
9 and acknowledge my work, but when other
10 people try to pass it off as their own,
11 or they profit off the unfair blog that
12 isn't to my personal liking, it's not
13 representing my work the way I want it
14 to, then I usually just send them a
15 note and let it go. I've said my piece
16 and I let it go.

17 **MR. OSTERREICHER:** On that
18 not, it's 5:15. We could probably, as

1 I noted at the beginning, go on for
2 hours, but I hope you've gotten a lot
3 of information. I appreciate the
4 participation from the audience and I
5 appreciate being asked to moderate, but
6 I'd just like you all to help me thank
7 our panelists for their contribution.

8 [Applause]

9 **MS. AISTARS:** Thank you,
10 Mickey, and thank you to the panel.
11 And thank you to those of you in the
12 audience participating along with us.
13 I am going to invite all of you to join
14 us out in what we call the art gallery
15 outside the auditorium. We have a wine
16 and cheese tasting out there, and it is
17 actually a tasting. We've got a
18 variety of wines that we can compare.

1 Those who know me know that wine is my
2 thing, so hopefully you won't be
3 disappointed. It's not stuff from a
4 box; it's stuff from a case, and that
5 is brought to you by CPIP.

6 And, also, while this is
7 going on and you're networking, we'll
8 have two things set up out by where you
9 came into register. One will be a
10 table where you can go by and chat with
11 the Arts and Entertainment Advocacy
12 Clinic folks. I will be circulating
13 around there, as well, to answer
14 questions. Use this as your
15 opportunity to ask the question you
16 would otherwise ask your brother-in-
17 law, the lawyer who is really a trust
18 and estates guy and shouldn't be giving

1 you copyright advice. And if we can't,
2 you know, answer it there, which
3 typically is the case, because you
4 probably won't have the documents we
5 need, and so forth, to give you real
6 legal advice, we'll help you formulate
7 it in a way that we can get you real
8 legal advice through Washington Area
9 Lawyers for the Arts, and Washington
10 Area Lawyers for the Arts will be
11 sitting right next to us. And we'll
12 put all the information in an intake
13 form and help you sign up with them as
14 well, if you are interested in doing
15 so. So, thank you very much and please
16 join us outside. [Applause]

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1/27/2018

Sandra Teller

DATE SANDRA TELLER

PRODUCT PLACEMENT IN INTERNATIONAL FILM AND TELEVISION PRODUCTION: A GLOBAL APPROACH FOR A GLOBAL INDUSTRY

Mandi Hart¹

I. INTRODUCTION

Product placement, defined as the integration of a branded product into entertainment content² for the purpose of heightening brand awareness and boosting sales,³ has exploded as a marketing technique and critical source of funding for film and television in the last few decades.⁴ The practice was born out of changes in the film, television, and marketing industries, largely in response to consumer preferences, and then spurred on by subsequent technological developments.⁵ Part of the overall shift from information-based to image-based advertising, product placement has been critical to the concept of brand identity, whereby a particular brand, identified by its trademark, develops a persona that is independent of the products to which it is attached.⁶ Trademark has itself become a product, with its own market value.⁷ Thus product placement might more properly be called “trademark placement,” as it is really the trademark, whether a logo, symbol or slogan, and not just the product, which is placed in media content.

Product placement has contributed to the evolution of trademark from a tool identifying the source of a good to a standalone product which is bought and sold, both by consumers and media producers. Because trademark has become a product all its own, with associated property rights, mark holders now assert protections for their marks based on the independent value of the mark as a signifier, and not just based on the mark’s ability to identify the source of the product to which it is attached. As a result, the traditional definition of trademark and grounds for its protection are increasingly irrelevant. However, while a paradigmatic shift has occurred in trademark practice, trademark law has failed to adapt.⁸ Additionally, while trademark first developed as a consumer protection

¹ Mandi Hart, George Mason University School of Law, J.D. Candidate, May 2018. Many thanks to Ellen Feldman for research assistance and to Brian, Terrie and Carolyn Hart for feedback.

² Brittany Robbins, *Quiet on Set! We Have a Trademark to Sell*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 585, 600 (2014).

³ Mark Litwak, *When Products Become Stars*, 23 DEL. LAW. 8, 8 (2005-2006).

⁴ Steven N. Lewis, *Branded Entertainment and Product Integration: A Revolution in its Infancy*, 23 ENT. & SPORTS LAW. 9 (2006).

⁵ *Id.* at 11.

⁶ Lesli Harris, *The New Old Spice: Business Identities, Trademarks, and Social Media*, 31 MISS. C. L. REV. 309, 310 (2012).

⁷ Daniel E. Newman, *Portraying a Branded World*, 2008 U. ILL. J.L. TECH. & POL’Y 357, 374 (2008).

⁸ Sandra Lee, *Product Placement in the United States: A Revolution in Need of Regulation*, 26 CARDOZO ARTS & ENT. L. J. 203, 208 (2008).

measure, the explosion of “trademark placement” in film and television has raised concerns about manipulative marketing and threats to consumer autonomy by subtle advertising techniques.⁹

The question of how to classify trademark use via product placement and the practice of product placement itself has been a thorn in the side of American scholars, legislators, and regulators for decades. There is virtually no jurisprudence regarding product placement because, inevitably, any trademark-related litigation concerns unauthorized and/or defamatory use of a mark, and, even then, cases are generally settled out of court.¹⁰

This lack of clarity and consistency is made more complicated by the increasing globalization of film and television production and distribution.¹¹ The differing approaches taken by the United States and several Western European countries,¹² and the absence of any legal definition or regulatory classification in many South American, African, and Asian countries,¹³ creates uncertainty as to the legal and regulatory status of product placement. Such uncertainty jeopardizes content creation, given the lack of clarity regarding how product placement is treated as a financing mechanism, marketing technique, and creative choice.

This article will examine the practice of product placement, its rise and how it should be characterized from a legal and regulatory standpoint, particularly in light of the expansion of international film and television production and distribution. Part II will provide an overview of product placement in film and television; its emergence in response to changes in consumer preferences, production financing and technological capabilities; and its position in the relationship between marketers and producers. Because product placement by definition involves trademark, Part III will focus on trademark, its history and evolution, as well as its treatment in American law and jurisprudence. This section will also analyze the practice of product placement in light of standards and tests set forth by American courts to balance the competing claims of mark holders asserting exclusive rights, and creators of expression who may be eligible for First Amendment protections.

⁹ Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497, 522 (March 2015).

¹⁰ Litwak, *supra* note 3, at 10.

¹¹ Jody Simon and Arnold Peter, *Facing Reality: A New Era of Deal Making Requires Strong Negotiating Pressure by Attorneys Representing Talent in the Television Industry*, 28 L.A. LAW. 44, 46 (May 2005).

¹² Lee, *supra* note 8, at 221.

¹³ See Global Advertising Lawyers Alliance, *Advertising Law: A Global Legal Perspective*, 2015; see also Lily Han, *Regulation of Product Placement in China*, Lehman, Lee & Xu, http://www.lehmanlaw.com/fileadmin/lehmanlaw_com/Publications/The_Regulatory_System_on_Product_Placement_in_China_LH_.pdf (2007); Sharad Vadehra, *Sponsored Content - The Indian Perspective*, Kan & Krishme, <http://galalaw.com/india-sponsored-content-the-indian-perspective>.

Part IV will discuss how product placement should be understood from a legal and regulatory standpoint, given the competing interests of content producers, marketers, and consumers, with a particular focus on concerns that product placement amounts to manipulative marketing which should be subject to consumer protection regulation. This section argues that, following the jurisprudential standards outlined in Part III, the practice of product placement should be legally defined as sponsored content rather than fraudulent or deceitful advertising. Such a definition would recognize and reflect how product placement is a hybridization of expressive activity undergirded by commercial sponsorship.

Part V expands the analysis to consider product placement in the arena of global film and television production. It contrasts the United States' approach with that of the European Union and specific countries in Africa, Asia, and South America. The article then examines the implications of each approach for individual autonomy, which is typically invoked as the motivation for consumer protection laws. Lastly, Part VI proposes that product placement be recognized internationally as sponsored creative content subject to harmonized disclosure rules. This section urges international consensus in order to respond to the reality of globalized film and television production and distribution, and to facilitate further collaboration between content producers in various countries. Such an effort at international dialogue and accord should be spearheaded by the World Intellectual Property Organization (WIPO), which has experience streamlining countries' varied approaches to intellectual property and a permanent standing Committee on Development and Intellectual Property.¹⁴

II. DEFINING PRODUCT PLACEMENT: ITS HISTORY AND EVOLUTION

Product placement is a long-standing practice in American film and television. The practice represents the latest stage of the relationship between film and television producers and marketers. Also referred to as “product integration,” product placement takes place when marketers negotiate a deal with content producers to include a branded product or service within their programming.¹⁵ A trademarked good or service is integrated into the film or television show in hopes that the audience will associate the brand with the entertainment content.¹⁶ By so doing, “commercial messages of various kinds are made an intrinsic part of programs.”¹⁷ Advertisers seek product placements in order to increase the visibility and awareness of their brands, and ostensibly to boost sales.¹⁸

¹⁴ World Intellectual Property Organization: Policy, <http://www.wipo.int/policy/en/index.html#bodies> (last visited Nov. 4, 2016).

¹⁵ Lee, *supra* note 8, at 204.

¹⁶ Robbins, *supra* note 2, at 600.

¹⁷ Simon & Peter, *supra* note 11, at 47.

¹⁸ Litwak, *supra* note 3, at 8.

Although branded products have been included in American film and television content for decades, the method and means of inclusion have varied due to the different historical relationships between marketers and producers of film and television content.¹⁹ Broadcast television has relied principally upon advertisers to finance their content,²⁰ and, in the early days, corporate sponsors footed the bill for particular shows and episodes, allowing them great influence over a sponsored program's content.²¹ In many instances, sponsors included their names in the show titles, making their involvement unmistakable.²² Even more often, sponsors would have their products visibly featured in show content.²³ For example, Philip Morris and Macy's sponsored various episodes of "I Love Lucy;" with Phillip Morris cigarettes displayed in the Ricardos' apartment and Macy's shopping excursions discussed by Lucy and Ethel. Both represent early instances of product placement.²⁴

Over time, however, these traditional forms of product placement lost their efficacy, as consumers became disillusioned with such blatant promotional messaging.²⁵ Television producers were therefore compelled to alter their practice to accommodate the change in consumer taste.²⁶ Simultaneously, several technological developments encouraged broadcasters to seek out new marketing opportunities.²⁷ As cable television grew in popularity, viewership fragmented, making it more difficult for marketers to reach their intended audience. This fragmentation has been heightened by the rise of the Internet and the ability to watch television content online.²⁸ Marketers have therefore been forced to communicate more messages to an increasingly disparate audience while remaining within budgetary constraints.²⁹ Product placement has provided a low-cost method of reaching audiences with the subtle marketing messages viewers prefer.³⁰

¹⁹ See generally Simon & Peter, *supra* note 11, at 47.

²⁰ Indeed, in some cases, programming was created specifically to gather an audience for a particular marketer, as was the case with soap operas, which functioned as vehicles for advertising by cementing a targeted audience at a given time every day for the purpose of communicating marketing messages to a consistent audience. See ROBERT C. ALLEN, *SPEAKING OF SOAP OPERAS* 101 (1985).

²¹ Simon & Peter, *supra* note 11, at 47.

²² Litwak, *supra* note 3, at 8-9.

²³ Lee, *supra* note 8, at 207.

²⁴ Harris, *supra* note 6, at 311.

²⁵ Cindy Tsai, *Starring Brand X: When the Product Becomes More Important than the Plot*, 19 *LOY. CONSUMER L. REV.* 289, 293 (2007).

²⁶ Berman, *supra* note 9, at 501.

²⁷ Lee, *supra* note 8, at 204; Michael Zimbalist, *Fragmentation, Data and the Future of Television Advertising*, *ANA MAGAZINE*, Sept. 2016, at 10, <http://www.ana.net/magazines/show/id/ana-2016-september-the-future-of-tv-advertising>.

²⁸ Zimbalist, *supra* note 27.

²⁹ Lee *supra* note 8, at 208.

³⁰ Litwak, *supra* note 3, at 9.

Beyond its cost-efficiency and alignment with consumer tastes, product placement has also enabled marketers to overcome the thwarting of their communication by DVR technology.³¹ After all, “product integration cannot . . . be fast forwarded, zapped or ignored.”³² Consequently, MillerCoors has negotiated deals with TNT and TBS to ensure that characters would drink only their beer, *The Apprentice* has built entire storylines around competitions to craft the best marketing strategy for integrated sponsored brands, and the winner of the spring 2003 season of *American Idol* was paid by a sponsor to wear its clothing on air.³³ Indeed, entire networks exist to partner with brands and provide content focused on particular industries.³⁴

Although product placement has always been common in American television, marketers used to view film as a poor investment for advertising dollars.³⁵ As mentioned previously, marketers were already on the hunt for new, subtler advertising channels, as the traditional “hard-sell” approach had lost both credibility and effectiveness.³⁶ Thus, when sales of Reese’s Pieces jumped following the 1982 premiere of *E.T.*, marketers took note of the correlation between product integration and real-world profits.³⁷ As a result, they began making concerted attempts to place their products in films, with hopes that such placement would translate to increased sales.³⁸

At the same time that marketers were waking up to the potential of product placement in films, producers of film content were in search of new funding sources. The demise of the studio system and decline of other traditional financing strategies, such as presales, coincided with marketers’ discovery of product integration as an advertising method.³⁹ Consequently, product placement in film expanded as producers and marketers developed a symbiotic relationship.⁴⁰ Not only did the two sides benefit, with producers gaining access to funds up-front and marketers tapping into a whole new world of communicative potential, but content authenticity also

³¹ Schuyler M. Moore, *Financing Drama: The Challenges of Film Financing Can Product as Much Drama as Takes Place on the Screen*, 31 LOS ANGELES LAWYER 26, 29 (May 2008).

³² Lewis, *supra* note 4, at 10.

³³ Berman, *supra* note 9, at 529; Benjamin R. Mulcahy, *That’s Advertainment!*, 29 LOS ANGELES LAWYER 44, 46 (May 2006); Kristen E. Riccard, *Product Placement or Pure Entertainment? Critiquing a Copyright Preemption Proposal*, 59 AM. U.L. REV. 427, 455 (Dec. 2009); Melissa Cheung, *Co.: We Paid Ruben to Wear Shirt*, ASSOCIATED PRESS (Aug. 1, 2003, 11:27 PM), <https://www.cbsnews.com/news/co-we-paid-ruben-to-wear-shirt/>.

³⁴ Litwak, *supra* note 3, at 9. For example, the Food Channel and TLC are specialized networks which provide programming focused on a particular industry sector. More specifically, shows like *Trading Spaces* have joined with corporate sponsors (Home Depot in this case) to incorporate shopping excursions into the show’s content.

³⁵ Tsai, *supra* note 25, at 289.

³⁶ *Id.*

³⁷ Lee, *supra* note 8, at 207.

³⁸ Litwak, *supra* note 3, at 9.

³⁹ Moore, *supra* note 31, at 29; *see also* Mulcahy, *supra* note, 33 at 44.

⁴⁰ *See* Lewis, *supra* note 4, at 11.

seemed to benefit, as recognizable brands made the on-screen world familiar to audiences who used those same brands in their daily lives.⁴¹ Product placement in American film thus arose at the convergence of changes in production financing and shifting consumer preferences.

This trend has not been limited to the United States, however. Chinese films have increasingly featured product placement, particularly as state funding has decreased following the implementation of the Open Door Policy and the decline of the Communist state's studio system.⁴² The practice has enabled the expansion of Chinese film production in the face of liberalization, while also inculcating a new culture of post-socialist cosmopolitanism.⁴³ Additionally, as the middle class in China has grown, giving rise to a consumerist culture interested in global products, product placement has fostered the brand identities both marketers and their purchasing audiences desire.⁴⁴ Thus product placement in Chinese films serves "as a means to explore market and identity" while also financing the very content production that is part of this cultural dialogue.⁴⁵

Product placement has therefore arisen in film and television in response to changing consumer tastes, evolving technology, and shifts in product financing.⁴⁶ The practice is now considered sacrosanct: "[there is] nothing more compelling for brand owners than to have their brands positively portrayed in a hit movie."⁴⁷ At root, product placement is the integration of a trademark into entertainment content. Placement may be visual, in which a good or service is simply visible on screen; spoken, involving verbal mention by an actor either on or off screen; or functional, wherein an actor actually utilizes the good or service on screen.⁴⁸ Thus James Bond wears an Omega watch and drives an Aston Martin,⁴⁹ Carrie Bradshaw wears Manolo Blahnik,⁵⁰ FedEx plays a prominent role in *Castaway*,⁵¹ and Ford is the car of choice in *Are We There Yet?*, *Alias*, *24* and *Die Another Day*.⁵²

⁴¹ Kai Falkenberg & Elizabeth McNamara, *Using Trademarked Products in Entertainment Programming*, 24 Comm. Lawyer 1 (2007), available at https://www.americanbar.org/content/dam/aba/publishing/communications_lawyer/commlawyer.authcheckdam.pdf.

⁴² Leung Wing-Fai, *Product Placement with 'Chinese characteristics': Feng Xiaogang's films and Go Lala Go!* 9, J. OF CHINESE CINEMAS, 125, 126-27 (2015).

⁴³ *Id.* at 126, 135.

⁴⁴ *Id.* at 127.

⁴⁵ *Id.* at 129.

⁴⁶ Lee, *supra* note 8, at 204.

⁴⁷ Samrawi Araia, *Fight Or 'Flight': Testing Trademark iPower in Film*, LAW360, (December 17, 2012).

⁴⁸ Tsai, *supra* note 25, at 291-92.

⁴⁹ Riccard, *supra* note 33, at 428.

⁵⁰ Robert M. Schwartz, Jennifer Glad and Jordan Raphael, *16 Entertainment Law & Litigation* § 6.13, Matthew Bender & Company, Inc. (2014).

⁵¹ Mulcahy, *supra* note 33 at 46.

⁵² Litwak, *supra* note 3, at 9.

III. TRADEMARK: ITS HISTORY AND EVOLUTION

A. *The Origins and Development of Trademark*

Trademark protection is available for any word, phrase, symbol, design or combination thereof that distinguishes the mark user's product or service from products or services offered by others.⁵³ While trademark arose in the United States as the result of specific market developments, the utility of trademarks is recognized around the world and protected by international cooperative efforts, such as WIPO's global trademark registration system.⁵⁴

In the United States, consumer autonomy and the ability to make informed decisions in the marketplace based on accurate information were the predicates for recognizing trademark as a legally protectable form of commercial speech.⁵⁵ From the beginning of their use, trademarks have performed a source-identifying function, communicating to consumers the origin of a particular product, which both protected the integrity of consumers' choices in the marketplace and reduced search and transaction costs.⁵⁶ Marks provide information and protect consumers from confusion or deception as to the source of a product or service while also guarding the reputation merchants have developed for their trademarks based on the quality of their products.⁵⁷ Thus trademarks "brand" a company's product or service and distinguish its offerings from those of competitors.⁵⁸

However, as mass production resulted in the manufacture of nearly identical goods, products had to be differentiated by more than information concerning their components or functions; such "parity products" are distinguishable only by their brand identification and associated qualities.⁵⁹ At the same time that the Industrial Revolution mechanized production processes and enabled more products in greater varieties to become available, advertisers shifted their focus to mass audiences. They began fostering "product personalities" that would draw connections between a product, a particular setting, and an associated meaning.⁶⁰

As a result, goods became distinguished by image rather than product facts,⁶¹ and advertising became less about communicating

⁵³ United States Patent and Trademark Office, Trademark, Copyright or Patent?, http://www.uspto.gov/trademarks/basics/trade_defin.jsp (last updated Jan. 11, 2010).

⁵⁴ See World Intellectual Property Organization, *Madrid - The International Trademark System*, <http://www.wipo.int/madrid/en/> (last visited Nov. 18, 2016).

⁵⁵ See Berman, *supra* note 9, at 537-38.

⁵⁶ See Newman, *supra* note 7, at 361.

⁵⁷ See Araia, *supra* note 47.

⁵⁸ Harris, *supra* note 6, at 310.

⁵⁹ Ronald K.L. Collins and David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 704 (Mar. 1993).

⁶⁰ *Id.* at 701-02.

⁶¹ *Id.* at 704.

information. Instead, it focused on drawing connections between a particular lifestyle and the product necessary to achieve it.⁶² The increasing reliance upon image and association has led to the rise of branding and caused a shift in trademark over time to become a property right which allows the mark holder to protect investment in their brand by preventing unauthorized use.⁶³ Therefore, though trademark was originally focused on consumer protection, in recent decades it has expanded to also safeguard brand identity,⁶⁴ prohibiting the exploitation of a competitor's mark, and hence its reputation, for the purpose of profit.⁶⁵

B. Trademark Jurisprudence

Given the shift in emphasis from trademark being primarily a consumer protection device to its status as a property right, much of trademark jurisprudence is based on mark holders' allegations of unauthorized use,⁶⁶ as trademark owners seek to preserve the symbols and images they have developed in association with their products and services.⁶⁷ Liability for unauthorized use of another's trademark is grounded in a violation of the Lanham Act, whereby the unconsented-to, deceptive or misleading use of another's mark in commerce,⁶⁸ such that the mark's economic value is appropriated, is considered an infringement of that trademark.⁶⁹ Under the Lanham Act, liability is based on either an explicitly misleading unauthorized use, a threat of confusion, or a mistake arising from an unauthorized use.⁷⁰

American courts have often accommodated unauthorized uses of trademarks in creative works by either refusing to find a Lanham Act violation when neither deception nor confusion is threatened, or by recognizing a fair use defense.⁷¹ Courts generally permit expressive use of another's mark so long as the use is neither expressly misleading nor likely to confuse consumers.⁷² By so doing, the courts have given wide latitude to

⁶² See *id.* at 699.

⁶³ See Harris, *supra* note 6, at 310-11.

⁶⁴ See William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 51 (2008).

⁶⁵ See *Films of Distinction v. Allegro Film Prods.*, 12 F. Supp. 2d 1068, 1074 (C.D. Cal. 1998).

⁶⁶ There is very little litigation regarding authorized use, as most disputes are settled out of court. See Litwak, *supra* note 3, at 10.

⁶⁷ See Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 491 (2006).

⁶⁸ Lanham Act, 15 U.S.C. § 1125 (2012).

⁶⁹ See *Brookfield Comms. v. West Coast Entm't Corp.*, 174 F. 3d 1036, 1046 (9th Cir. 1999).

⁷⁰ See Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105, 107 (2005).

⁷¹ Cf. *Wham-O, Inc. v. Paramount Pictures, Corp.*, 286 F. Supp. 2d 1254, 1263-64 (N.D. Cal. 2003).

⁷² Cf. *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2nd Cir. 1989); *No Fear, Inc. v. Imagine Films, Inc.*, 930 F. Supp. 1381, 1384 (C.D. Cal. 1995).

creators of expressive content while also preserving the consumer protection and mark holder investment interests which have been at the core of trademark since its inception.

The Second Circuit in *Rogers v. Grimaldi* articulated a balancing test which sought to avoid public confusion while also protecting free expression.⁷³ In *Rogers*, famed actress Ginger Rogers sued an Italian director for violations of the Lanham Act stemming from his choice of *Ginger and Fred* as the title for his film.⁷⁴ The court held that, in order to avoid public confusion, the Lanham Act applied to prevent unauthorized uses of marks which have acquired secondary meaning. Here an unauthorized use of trademark in a title amounts to artistic expression rather than commercial speech, with the title bearing some relevance to the underlying work, the Lanham Act does not apply.⁷⁵ Thus, the court gauged infringement based on whether the unauthorized use in a title was artistically related to the underlying work and, if so, whether the use was explicitly misleading.⁷⁶

Mere months after the *Rogers* decision, the Second Circuit described the *Rogers* test as a mechanism by which to account for the “likelihood of confusion” arising from an unauthorized use, such confusion being the primary ill which trademark law seeks to avoid.⁷⁷ Accordingly, later courts which invoked the *Rogers* test to assess trademark infringement claims also referenced factors related to the risk of confusion caused by the unauthorized use, distinguishing the “explicitly misleading” approach of *Rogers* from other cases which lay out various methods of determining “likelihood of confusion.”⁷⁸ Thus “likelihood of confusion” appeared to be a supplement to the *Rogers* test,⁷⁹ allowing courts to rely upon their own schematics to evaluate the risk of confusion stemming from a challenged use.⁸⁰

The twin tests of *Rogers* and “likelihood of confusion” guided the court in *No Fear, Inc. v. Imagine Films, Inc.*, when it adjudicated a trademark infringement claim against a film studio’s use of “No Fear” as a movie title.⁸¹ The plaintiff sportswear company had trademarked “No Fear” and sought to enjoin the studio from utilizing it as its title.⁸² In evaluating

⁷³ *Rogers*, 875 F.2d at 999.

⁷⁴ *Id.* at 996-97.

⁷⁵ *Id.* at 999.

⁷⁶ *Id.*

⁷⁷ *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490, 495 (2nd Cir. 1989).

⁷⁸ *No Fear, Inc.*, 930 F. Supp. at 1382-83.

⁷⁹ *Id.* at 1382.

⁸⁰ See, e.g., *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979) (where the 9th Circuit laid out eight factors relevant to whether confusion was likely in a case of unauthorized trademark use).

⁸¹ *No Fear, Inc.*, 930 F. Supp. at 1382.

⁸² *Id.*

the question of infringement, the court relied on the *Rogers* test to determine the relevance of the film's title to its underlying content, finding "No Fear" was artistically relevant to the film's content.⁸³ It then invoked "likelihood of confusion" factors from two prior cases (*Twin Peaks* and *Sleekcraft*), but found the evidence on record insufficient to determine how likely it was that confusion would arise from the defendant's unauthorized use of the plaintiff's trademark.⁸⁴ Consequently, both the concept of "artistic relevance" from *Rogers* and "likelihood of confusion" factors are brought to bear when evaluating whether an unauthorized use of another's trademark constitutes infringement under the Lanham Act.

Though initially only applied to unauthorized uses in titles, the *Rogers* test has subsequently been expanded and applied to other expressive activity.⁸⁵ In the case of *Warner Bros. Entm't v. Global Asylum, Inc.*, a film studio that produced "mockbusters" was subject to a temporary restraining order and preliminary injunction against its use of Warner Brothers' trademarks in the *Lord of the Rings* trilogy.⁸⁶ The court found infringement arising from both the title of the defendant's film, *Age of Hobbits*, and its promotional poster, which used similar individual elements and the same overall aesthetic as Warner Brothers' film advertising for their Tolkien-based series.⁸⁷ Because the Hobbit marks had acquired strong secondary meaning, the defendant used a mark identical to Warner Brothers' mark and the use was in no way related to the trademarked term, the court denied the defendant any defense based on the *Rogers* test.⁸⁸

Beyond a defense based on artistic relevance and low risk of confusion, the court has also recognized the fair use defense in the context of unauthorized trademark use. *Wham-O v. Paramount Pictures* presented the question of whether the plaintiff's trademark "Slip-N-Slide" was infringed when the mark was used without authorization in a brief scene showing a film's main character, an adult, misusing the slide while attempting to relive his boyhood.⁸⁹ Weighing the four fair use factors in the

⁸³ *Id.* at 1384.

⁸⁴ *Id.*; see also *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d at 348-49. (The factors from *Twin Peaks* and *Sleekcraft* include the strength and similarity of the marks at issue; the proximity of the goods represented by the marks; the degree of care purchasers of the goods could be expected to exercise; the defendant's intent; artistic relevance of the disputed use; and evidence of actual confusion); Cf. *Twin Peaks Prods. v. Publications Int'l. Ltd.*, 996 F.2d 1366, 1379 (2nd Cir. 1993).

⁸⁵ See, e.g., *E.S.S. Ent. v. Rock Star Videos*, 444 F. Supp. 2d 1012, 1044 (C.D. Cal. 2006) (in which the court explicitly applied the *Rogers* test to find no infringement when the unauthorized use of a strip club's trademark and trade dress as sources for the independent design of a virtual strip club in a video game was relevant to the underlying work and not likely to mislead players as to the source or content of the game).

⁸⁶ *Warner Bros. Ent. v. Global Asylum, Inc.*, 2012 U.S. Dist. LEXIS 185695 at *2, 4-5 (C.D. Cal. 2012).

⁸⁷ *Id.* at *23-24, 35-36.

⁸⁸ *Id.* at *50.

⁸⁹ *Wham-O, Inc. v. Paramount Pictures, Corp.*, 286 F. Supp. 2d 1254, 1257-58 (N.D. Cal. 2003).

context of a film's use of a child's water slide, the court granted fair use given that the use was limited to only what was necessary and was unlikely to cause confusion as to endorsement.⁹⁰

Likelihood of confusion as to source or sponsorship has remained central to questions of what trademark uses are permissible or not. Unauthorized uses which are likely to result in confusion are generally held to be infringements, validating the consumer protection purpose which gave rise to trademark recognition originally while also ensuring that mark holders can protect the value of their marks as brand identifiers. At the same time, the fair use defense accommodates expressive activity that neither threatens the mark's value nor imperils consumer understanding by restricting permissive use to only that which is limited to what is necessary and referential to the product itself.

IV. PRODUCT PLACEMENT AND THE LAW

The aforementioned cases, while validating the mark holder's property interest in its mark, also give wide latitude to unauthorized uses which pose little to no threat to the mark's value or effectiveness. This rationale recognizes the shift of trademark from a source identification device to a standalone product. Because trademarks are now ubiquitous and have been invested with meaning beyond simply pointing to a product's origin, such marks have value apart from the good or service to which they have traditionally been affixed.⁹¹ Trademarks are now social signifiers, communicating values and allowing consumers to convey information about themselves by virtue of the trademarks they display.⁹² Therefore, product placement is really "trademark placement", with marketers seeking to associate their brands (and not just products or services), with particular content or specific stars.

Not only do brands benefit from the associations fostered by product placement, but consumers also derive utility from the image a brand develops through such placements.⁹³ Consumers often utilize trademarks in their own identity formation and communication,⁹⁴ and may pay more for a

⁹⁰ *Id.* at 1263-64. The four fair use factors are the purpose and character of the disputed use, including whether it is of a commercial or nonprofit nature; the nature of the copyrighted work, including whether it is fictional or factual; the amount and substantiality of the disputed use; and the degree of market harm from the disputed use. 17 U.S.C. §107; *Sony Corp. Of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-51 (1984).

⁹¹ Newman, *supra* note 7, at 361-62. The fact that trademarks now have standalone value is further underscored by the practice of merchandising, whereby brands may license use of their trademarks on other goods, entirely contrary to the traditional function of trademark as a source identifier. *See, e.g., Id.* at 357-58.

⁹² *Id.* at 375-76.

⁹³ *Id.* at 360-61.

⁹⁴ Robbins, *supra* note 2, at 625.

particular brand based on the value they place upon that brand's image and reputation.⁹⁵

As has been discussed, consumers prefer the subtlety of product placement to traditional hard-sell advertising, which has driven in part the evolution of trademark into a product all its own.⁹⁶ Given this preference for more image-based and less information-driven marketing, the information content in advertising has been steadily decreasing.⁹⁷ Instead, advertising now appeals to consumer emotions and fosters "lifestyle associations" rather than providing information about a product.⁹⁸

Consequently, contemporary advertising tends to be non-rational, more focused upon conveying meaning and image than facts; the economic exchange is therefore converted into a trade of money for reputation, values, and personality.⁹⁹ Such "lifestyle advertising" appears increasingly like artistic expression, as it fosters associations between products and particular settings and seeks to elicit specific emotional responses from its audience.¹⁰⁰

Product placement is thus a creative choice, as producers seek to enhance the authenticity of their works by including recognizable brands in their programming.¹⁰¹ Incorporating familiar brands also augments the audience's experience by making the content more realistic.¹⁰² Therefore, product placement is not a purely commercial practice, but is quasi-expressive, a hybrid of entertainment and advertising.¹⁰³ Additionally, product placement is part of the social dialogue about brand and consumer identities; as brands foster particular associations, consumers either accept, reject or appropriate those associations, and brands then respond.¹⁰⁴ As a result, the trademarks which represent a particular brand and symbolize the values and lifestyle associated with that brand are also social signifiers, communicating information about individual identity and personality.¹⁰⁵ Nor can it be forgotten that, as a funding source, product placement enables expression which would otherwise be precluded.¹⁰⁶ In a way, mass-marketing practices such as product placement subsidize content creation.¹⁰⁷

⁹⁵ Newman, *supra* note 7, at 360.

⁹⁶ *Id.* at 361.

⁹⁷ Berman, *supra* note 9, at 516.

⁹⁸ *Id.*

⁹⁹ Collins & Skover, *supra* note 59, at 702-03.

¹⁰⁰ Neel U. Sukhatme, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2855 (2005).

¹⁰¹ Lee, *supra* note 8, at 208.

¹⁰² Tsai, *supra* note 25, at 305.

¹⁰³ See Mulcahy, *supra* note 33, at 46.

¹⁰⁴ Sukhatme, *supra* note 100, at 2855.

¹⁰⁵ See Newman, *supra* note 7, at 375-76.

¹⁰⁶ Edward L. Ong, *An Embedded Solution: Improving the Advertising Disclosure Rules for Television*, 18 UCLA ENT. L. REV. 114, 130-31 (2011).

¹⁰⁷ Collins & Skover, *supra* note 59, at 740-41.

Given the multifaceted nature of product placement, determining how to situate the practice legally is a challenge. Because product placement does not convey information in a proposal for a monetary transaction, contrary to traditional advertising, it does not fall into the historic definition of commercial speech.¹⁰⁸ Likewise, unlike the substantiation requirement for commercial speech, wherein any claims asserted have to be demonstrably accurate,¹⁰⁹ product placement conveys images, not information, and makes claims concerning values and lifestyles which cannot be substantiated in the traditional sense.¹¹⁰ Consequently, product placement blurs the line between entertainment and marketing.¹¹¹ The practice, as a form of “advertainment,”¹¹² is therefore best considered hybridized commercial-noncommercial speech.

This blurring between commercial and noncommercial speech, between entertainment content and marketing messages, raises questions regarding whether product placement should qualify as a form of protected expression and what misleading means in an era of non-informational advertising.¹¹³ These questions reach the heart of contemporary concerns among consumer advocates who fear that product placement is a form of manipulative marketing.¹¹⁴ In theory, advertising communicates product information to consumers so that they can make rational choices, limiting the effect of advertising to commercial transactions.¹¹⁵ However, as previously observed, product placement does not make any material claims about a good or service.¹¹⁶

Communicating ideals rather than facts, product placement runs contrary to the conventional model of advertising as a vehicle for conveying information to rational consumers, whose reasoned decisions in the marketplace are thereby empowered.¹¹⁷ This model of the consumer as a rational problem-solver does not reflect reality, as consumers are motivated by emotion, image, and values.¹¹⁸ The very rise of product placement as a tool to communicate brand values and associations is reflective of this alternate reality, that modern consumers prefer image to information.

This contemporary preference flies in the face of traditional information-based models of and approaches to marketing and other forms

¹⁰⁸ Berman, *supra* note 9, at 500.

¹⁰⁹ Mulcahy, *supra* note 33, at 46.

¹¹⁰ Collins & Skover, *supra* note 59, at 700. Given this reality, product placement has never been subject to the substantiation requirement, as the practice does not make any direct claims about a particular good or service. See Tsai, *supra* note 25, at 298.

¹¹¹ Riccard, *supra* note 33, at 428.

¹¹² Mulcahy, *supra* note 33, at 44.

¹¹³ Berman, *supra* 9, at 515.

¹¹⁴ Mulcahy, *supra* note 33, at 44.

¹¹⁵ Collins & Skover, *supra* note 59, at 708.

¹¹⁶ *Id.* at 700.

¹¹⁷ *Id.* at 700, 727.

¹¹⁸ *Id.* at 708, 737–38.

of commercial speech. Advertising regulation and sponsorship disclosure requirements have been undergirded for decades by the concept of the public's right to know when they are being presented with a promotional message.¹¹⁹ However, this right to know is compromised by the shift towards non-informational advertising, making it difficult, if not irrelevant, to distinguish between truth and falsity in such advertising content.¹²⁰ In reality, "[t]here is no right to know" in terms of the public's claim upon information in order to make rational decisions, because in contemporary commercial culture decisions are not made based on reason or information.¹²¹

This is the state of affairs that most concerns consumer advocates, who maintain the public should be made aware of when they are being exposed to advertising, particularly in light of the explosion of advertising appealing to emotion rather than reason.¹²² Nor are these concerns limited to the American context. Critics evaluating product placement in Chinese films have voiced concern about the elevation of conspicuous consumption through such practices and the equation of consumption with identity.¹²³ Similarly, the integration of branded products into media content in India has raised worries about how democratic culture could be impacted by the growing nexus between corporations and media.¹²⁴ Europe has also had long-standing suspicion of incorporating sponsored products into content, largely due to experiences with political propaganda disseminated through state-run media.¹²⁵

Consumer advocates voice fears that hidden marketing messages manipulate consumers and undermine their autonomy.¹²⁶ Undisclosed sponsored messaging, also called "stealth marketing," is considered problematic because of the lack of consumer awareness of the advertising intentions behind the message¹²⁷ and the fact that the producer's voice is appropriated for the marketer's purpose without the audience realizing it.¹²⁸ Consumer advocates worry that undisclosed sponsorship undermines trust in media institutions and damages public discourse.¹²⁹

As a result, these advocates are voicing concerns over practices that have been partially driven by consumer preferences: the rise of product

¹¹⁹ Lee, *supra* note 8, at 232.

¹²⁰ Collins & Skover, *supra* note 59, at 739.

¹²¹ *Id.* at 740.

¹²² Lee, *supra* note 8, at 205.

¹²³ Wing-Fai, *supra* note 42, at 134.

¹²⁴ Vadehra et al., *supra* note 13.

¹²⁵ Lee, *supra* note 8, at 221.

¹²⁶ Ong, *supra* note 106, at 124; *see also* Lee, *supra* note 8, at 230 (quoting Jonathan Adelstein interview); Litwak, *supra* note 3, at 9.

¹²⁷ Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 83-84 (2006).

¹²⁸ *Id.* at 87.

¹²⁹ *Id.* at 86.

placement occurred in part because consumers tired of traditional information-based, direct-sell advertising.¹³⁰ At the same time, trademarks became increasingly associated with a brand image and identity rather than a physical product, investing the marks with independent value as social signifiers.¹³¹

Hence, personal identity is negotiated based on one's relationship to products and services.¹³² Because images have come to replace ideas, the marketplace has become one of "commercial symbols,"¹³³ which consumers appropriate, and at times transform, as part of their own identity formation and communication.¹³⁴ Trademarks are used as much, if not more, by consumers as they are by content producers to communicate values, personality, and identity.¹³⁵

Consequently, product placement and other forms of subtle advertising that convey associational rather than informational messages are a response to consumer preferences, and have utility for consumers who either incorporate the association into their own identity or else challenge the association in public discourse. Product placement exists in the nexus between content production and financing, mass marketing and public discourse. It is difficult to classify legally because of the many functions it serves and its position at the convergence of commercial and noncommercial speech. As a result, there is ongoing debate as to whether the practice should be considered commercial speech, manipulative marketing or expressive activity.¹³⁶

However, the principle of consumer autonomy underscores all three categories and should continue to guide legal and regulatory approaches to the practice. Commercial speech doctrine is rooted in the provision of information to consumers so that they can make rational decisions in the marketplace.¹³⁷ Disclosure requirements further this informational purpose by protecting consumers from fraud and preventing their manipulation by putting them on notice as to sponsors' influence so that they demand only what is in their interest.¹³⁸ Such requirements ensure consumers have complete information as to the monetary incentives behind a particular product's inclusion in content¹³⁹ and therefore advance consumer autonomy.¹⁴⁰

¹³⁰ Berman, *supra* note 9, at 501.

¹³¹ Robbins, *supra* note 2, at 624.

¹³² Collins & Skover, *supra* note 59, at 716.

¹³³ *Id.* at 698.

¹³⁴ See Newman, *supra* note 7, at 376.

¹³⁵ *Id.* at 375-76.

¹³⁶ See generally Berman, *supra* note 9, at 497.

¹³⁷ Collins & Skover, *supra* note 59, at 708.

¹³⁸ Ong, *supra* note 106, at 126.

¹³⁹ Lee, *supra* note 8, at 205.

¹⁴⁰ Goodman, *supra* note 127, at 87.

It is concern for consumer autonomy that animates advocates opposed to manipulative marketing based on fears that undisclosed sponsored messages insinuate desires and preferences into consumers' minds without their awareness.¹⁴¹ Likewise, the right to free speech and expression is rooted in concepts of individual autonomy and the role such expression plays in self-realization.¹⁴² Consequently, autonomy provides the foundation for expressive freedoms as well as consumer protection from manipulative marketing and commercial speech doctrine. Given its centrality, the principle of autonomy must be kept in mind as legal and regulatory categories are negotiated, particularly as relates to practices, such as product placement, which defy traditional classifications.

Thus, defining product placement in law and regulation must account for the interests of consumers, content producers, and mark holders, as all three parties have a stake in the practice. Product placement must be permitted for producers to continue financing content creation, for consumer preferences to be satisfied, and for marketers to foster the associations which define their brands while also contributing to social discourse. However, any regulation of product placement must allow producers to retain creative control¹⁴³ and should be subject to some form of disclosure so that consumers are aware how their preferences for subtler marketing techniques are being catered to.

Negotiating a legal and regulatory definition of and approach to product placement would be best achieved utilizing the same principles and factors at play in the "likelihood of confusion" and *Rogers* tests. While these tests, and the principles undergirding them, have been developed in response to claims of unauthorized trademark use, they are relevant to the authorized usage which product placement, by definition, is. The courts crafted balancing tests for cases of unauthorized use in order to protect mark holders' investments in their trademarks. In instances of product placement, the use is authorized and the mark holder has contracted and paid for a certain quality and quantity of use. If a producer goes beyond the authorized use, the mark holder may bring a breach of contract action.

Thus, a product placement agreement authorizing particular usage of a trademark provides protection for the mark, satisfying one of the three core interests which courts have sought to protect via their balancing tests. The remaining interests, those of the content producer and of the audience, may be protected when product placement is at issue by applying the principles of the "likelihood of confusion" and *Rogers* tests as well as the fair use defense. These three jurisprudential lodestars encourage more, not less, speech and allow producers to utilize marks so long as the usage does not jeopardize consumers' autonomy via confusion or deception. As such,

¹⁴¹ Berman, *supra* note 9, at 522.

¹⁴² See Collins & Skover, *supra* note 59, at 734-35.

¹⁴³ Moore, *supra* note 31, at 29.

all three seek to ensure that consumers have maximum access to creative content and to information regarding who paid for or sponsored the content.

These tests account for consumer interests in being informed of sponsorship arrangements, thereby avoiding confusion as to who is behind a particular message: the producer or marketer. Additionally, the *Rogers* test recognizes producers' interests in utilizing trademarks that are artistically relevant to their content.¹⁴⁴ The one caveat with such use is that it not be misleading,¹⁴⁵ which both protects consumers from deception while also preserving the value of a mark to its holder by ensuring the mark will not be misappropriated.

The principles of the "likelihood of confusion" and *Rogers* tests, coupled with disclosure, serve the interests of all the actors involved with product placement. They provide guidance to producers and marketers seeking to integrate products into content without running afoul of consumer protection concerns. Additionally, they reflect the standards that make product placement effective as a communicative tool,¹⁴⁶ and which elevates the practice as a consumer preference. Placements that are artistically relevant foster the associations from which both brands and consumers benefit and, so long as the placement is subtle, in keeping with consumer preferences, there is little risk of confusion and no threat of consumers being explicitly misled.

V. PRODUCT PLACEMENT AND GLOBAL FILM AND TELEVISION PRODUCTION

Combining the three core principles of American trademark jurisprudence (not explicitly misleading, low likelihood of confusion and artistic relevance) with disclosure requirements balances the interests of producers, marketers, and consumers. These elements should guide the formation of industry standards and guidelines for increasingly globalized film and television production and distribution. As production expands internationally, in part due to tax incentives to film in foreign countries,¹⁴⁷ producers operating in a global space need harmonized standards concerning product placement as both a financing mechanism and a creative choice. Additionally, distributors need unified guidelines so that exhibition of works can take place in multiple territories without having to edit a different version of the program for every jurisdiction.

Countries have diverged in their approaches to product placement and many have yet to address the practice specifically, leaving producers and distributors uncertain as to how the practice may be defined and

¹⁴⁴ *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2nd Cir. 1989).

¹⁴⁵ *Id.*

¹⁴⁶ Ong, *supra* note 106, at 124.

¹⁴⁷ Lewis, *supra* note 4, at 9.

regulated in any given territory. Historically the United States has been much more permissive of product placement, in contrast to Europe's approach, which is generally much more suspicious of the practice given the decades of state ownership of television.¹⁴⁸ The United States has tended to focus on disclosure requirements and avoid regulation¹⁴⁹ while Europe has taken the opposite approach, heavily regulating if not categorically prohibiting product placement.¹⁵⁰ Both Germany and Britain have imposed bans on the practice¹⁵¹ and the latest Directive from the European Commission specifies the parameters within which product placements may be allowed while also allowing individual countries to implement additional restrictions.¹⁵²

Beyond the United States and Europe, few other countries have dealt specifically with product placement in their laws and regulations, despite the growing use of the practice. Israel classifies as "misleading" any advertisement which is "incidental, masked or unconscious," such that the consumer does not recognize it as an advertisement, and prohibits blending marketing messages with editorial content.¹⁵³ In South Africa, product placement within news content is prohibited, while the use of the practice in any other broadcast content is subject to regulation requiring the advertisements be clearly recognizable.¹⁵⁴ However, neither Kenya nor Nigeria, both hubs for African film production (particularly Nigeria, with its Nollywood industry), have any rules specifically pertaining to product placement.¹⁵⁵ Turkey permits product placement in film and television content, so long as accompanied by disclosures at the beginning and end of the program as well as immediately following any commercial break.¹⁵⁶ Additionally, the placed product must not be misused or overemphasized, such that the integrity of the creative content might be compromised.¹⁵⁷ Venezuela only permits product placement in sports programming, requiring that the advertiser disclose its sponsorship and prohibiting certain goods (alcohol, tobacco, etc.) from being promoted in product placement.¹⁵⁸

Although China's domestic film industry has grown rapidly in the past few decades as a result of the Open Door Policy and product placement has become commonplace,¹⁵⁹ there are no laws or regulations in China

¹⁴⁸ Lee, *supra* note 8, at 221.

¹⁴⁹ *Id.* at 229-30.

¹⁵⁰ Chuck Cosson & Andrew M. Mar, *EC, Product Placement and the Web*, 24 COMM. LAWYER 16, 15-16, 21 (2007); Lee, *supra* note 8, at 221-24.

¹⁵¹ Litwak, *supra* note 3, at 11.

¹⁵² Cosson & Mar, *supra* note 150, at 21.

¹⁵³ GLOBAL ADVERTISING LAWYERS' ALLIANCE, *Advertising Law: A Global Legal Perspective*, 379 (2015).

¹⁵⁴ *Id.* at 674.

¹⁵⁵ *Id.* at 438, 532.

¹⁵⁶ *Id.* at 739.

¹⁵⁷ *Id.* at 739.

¹⁵⁸ GLOBAL ADVERTISING LAWYERS' ALLIANCE, *supra* note 153, at 822.

¹⁵⁹ Wing-Fai, *supra* note 42, at 126.

which address the practice directly.¹⁶⁰ Likewise, in India, where film production has grown so substantially that the domestic industry has been dubbed “Bollywood,” there are a handful of regulations pertaining to advertising and sponsored content, but nothing that focuses on product placement specifically.¹⁶¹ Consequently, outside of the United States, product placement is either severely restricted if not banned outright, or it occupies a grey area under the umbrella of general advertising law.

Categorical bans fail to take into account the pivotal role that product placement may play in production financing, and do not reflect the consumer preference for and utility from the use of product placement. Indeed, imposing heavy restrictions and outright prohibitions actually threatens the very autonomy which is purportedly at stake in the practice: government regulation may be paternalistic in trying to limit choices and keep information from the public, purportedly for the public’s own good.¹⁶² Additionally, product placement enables the creation of content which would otherwise never be produced, increasing consumer choice and access.¹⁶³ Consequently, consumers might accept product placement and other hidden marketing messages as a “trade-off for other benefits.”¹⁶⁴

Whereas regulation and prohibition might threaten autonomy, disclosure requirements enhance autonomy by informing consumers “when and by whom [they are] being persuaded.”¹⁶⁵ Autonomy is furthered when individuals have more complete information upon which they may make decisions, not the least of which is deciding what lifestyle and identity one prefers.¹⁶⁶ Product placement, and trademarks more generally, is part of social discourse concerning brand and personal identity.¹⁶⁷ Because individuals utilize trademarks to communicate information about themselves, creating an association between their own personality and the trademarks they use, such “emotional investiture” may be harmed by “disassociating people from their prepared social images.”¹⁶⁸ Additionally, consumers purchase particular brands based on their personal valuation of the brand’s utility as a social signifier, often paying a premium for that value.¹⁶⁹ Consumers contribute just as much, if not more, to the public discourse concerning brand identity and reputation,¹⁷⁰ while also using

¹⁶⁰ See Han, *supra* note 13.

¹⁶¹ Vadehra et al., *supra* note 13.

¹⁶² Berman, *supra* note 9, at 500.

¹⁶³ *Id.* at 536.

¹⁶⁴ *Id.* at 535-36.

¹⁶⁵ Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 329, 332 (2004).

¹⁶⁶ See Collins & Skover, *supra* note 59, at 742.

¹⁶⁷ Newman, *supra* note 7, at 362.

¹⁶⁸ *Id.* at 362-64.

¹⁶⁹ *Id.* at 379.

¹⁷⁰ *Id.* at 376.

brands for their own communicative and identification purposes,¹⁷¹ making any ban on product placement an intrusion into this public dialogue.

Product placement has value and benefits for consumers, which is unsurprising given the role of consumer preference in the expansion of product placement to begin with. To properly safeguard consumer autonomy (not to mention producers and marketers), any legal and regulatory approach to product placement should focus on more speech, not less. Disclosure requirements serve this end by empowering consumers with more information and facilitating content creation by informing producers, distributors, and marketers of the standards they must meet for the use of product placement.¹⁷²

VI. DEFINING PRODUCT PLACEMENT INTERNATIONALLY

Given the reality of globalized film production and distribution, the industry needs a streamlined approach to product placement to ensure content is financed, created, and exhibited without unnecessary obstacles. The World Intellectual Property Organization (WIPO) would be most effective in facilitating discussion and drafting a standard for product placement. WIPO has been in existence for decades and has developed expertise about intellectual property worldwide.¹⁷³ It has standing committees on Copyright and Related Rights and on Development, and Intellectual Property, both of which could provide a viable forum for discussions and drafting of an international product placement standard.¹⁷⁴

The standard should clearly articulate disclosure requirements and avoid the “hard sell” trap of discredited advertising from decades ago,¹⁷⁵ lest disclosure wind up as ineffective and disliked as old-school marketing. Disclosure which is too aggressive or disruptive, such as Commercial Alert’s suggestion of in-program popups, are likely to frustrate consumers and be avoided by advertisers, which would compromise content financing.¹⁷⁶ Placing disclosures before or after a program may not reach the intended audience, as many viewers do not watch opening and closing credits.¹⁷⁷

A possible solution to this disclosure conundrum, at least for television, might be to integrate disclosure into the program via an ad spot

¹⁷¹ Robbins, *supra* note 2, at 624.

¹⁷² Goodman, *supra* note 127, at 86.

¹⁷³ *Inside WIPO*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/about-wipo/en/> (last visited Jan. 19, 2018).

¹⁷⁴ *See Standing Committee on Copyright and Related Rights (SCCR)*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/policy/en/sccr/> (last visited Jan. 19, 2018); *Committee on Development and Intellectual Property (CDIP)*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/policy/en/cdip/> (last visited Jan. 19, 2018).

¹⁷⁵ Tsai, *supra* note 25, at 293, 304.

¹⁷⁶ Ong, *supra* note 106, at 134-35.

¹⁷⁷ *Id.* at 133.

occurring immediately before or after a given program segment. Producers could create a 15-second disclosure message that meshes well with the program at hand, perhaps by having one of the show's actors deliver it, or even creating a mini-scene in which the disclosure message is creatively communicated. These disclosure messages need not be long to be effective, as demonstrated by countless viral videos of very brief duration and the entire enterprise of Vine videos, which by definition are limited to six seconds.¹⁷⁸ Additionally, utilizing the already familiar on-screen talent would likely increase consumer awareness, as the audience would recognize the actor(s) and setting and pay attention.

Such inventive messaging would be short, keeping costs down, and would rely upon cast and crew already employed for the production, which would also help to keep the price low. The costs of producing these short messages could be distributed across the overall supply of traditional ad spots and/or be incorporated into the price tag of product placement itself, requiring the marketers who benefit from product placement to bear responsibility for consumer education.

A similar approach could be taken with film, wherein producers would be required to incorporate a disclosure message as either part of the opening or closing credit sequence, in exchange for government refraining from further regulation of the practice. Industry standards, rather than government rules, could be developed to guide disclosures, allowing producers to exercise their creativity and craft messages which integrate well into their content.

Credits are increasingly a form of art all their own, often including elements of the film in the sequence. Opening credits might provide an introduction to the characters, setting, and storyline of a film, while closing credits may include an epilogue, blooper reel or teaser for a subsequent sequel or spin-off. Integrating a disclosure message into this format would be creatively appropriate and likely more effective in raising audience awareness, particularly if included at the beginning of a film. Producers would have discretion to craft a disclosure which is apropos for the film and integrates well with the genre, theme, tone, and overall storyline.

In addition to encouraging producers to create disclosures tailored to their content, WIPO could invite governments, advocates, nonprofits, and individual consumers to get into the act by contributing their own "disclosure" messages, whether about a specific program or film or regarding the practice of product placement in general. These entities could run competitions to garner consumer-created disclosure messages, leveraging the power of social media to engage viewers and expand the reach of such awareness campaigns. Schools and universities could

¹⁷⁸ See VINE, <https://vine.co> (last visited Jan. 19, 2018); Mike Isaac, *Vine, the Six-Second Video App, Is Not Quite Shutting Down*, THE N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/technology/vine-app-twitter.html>.

contribute to public education by also creating disclosures, which would simultaneously increase media literacy amongst adolescents and college students while multiplying the information concerning product placement available in the marketplace.

As the public becomes more aware of product placement as both a financing tool and a marketing strategy, they can formulate their own preferences as to the practice. Those who dislike product placement may be willing to contribute funding to content production in other ways, perhaps through crowd-sourced financing or increased ticket sales. At the very least, consumers could engage in a frank discussion as to whether they want government attempting to regulate neurology and, if so, the potential for regulatory capture.¹⁷⁹

In the end, the goal for an international standard concerning product placement should be more speech, not less. Consumers should be involved in increasing awareness and the very technology which has helped drive product placement ought to be leveraged to facilitate disclosure and more discourse about film and television production, financing, and content and the participation of marketers in this process.

VII. CONCLUSION

Rather than undermine autonomy, any legal or regulatory response to product placement ought to focus on enhancing autonomy, which is furthered by informed decision making. Thus, more speech, rather than less, should be encouraged. Expanding speech via disclosure requirements would allow consumers to assess the involvement of a sponsor in a particular film or television show and determine for themselves their perspective on the sponsorship. Indeed, because there is such a history of disclosure in the United States, consumers are generally aware of the practice of product placement and often recognize when it takes place. A similar approach in other countries could educate consumers as to the role sponsors play in financing the films and television shows of which they are fans. Then the consumers could decide how they feel about the sponsor's involvement and whether they want to continue viewing the content. Given that consumer preferences have been a central driver behind the rise of product placement, deference ought to be given to their informed choices.

Beyond disclosures in individual works, the government could undertake public service campaigns aimed at informing consumers of the research regarding the subconscious effects of product placement. Increasing public awareness would permit consumers to reach their own conclusions about the practice of product placement more generally, then signal their preferences to producers and marketers by the choices they make in the marketplace. Indeed, part of the discussion must include

¹⁷⁹ See Lee, *supra* note 8, at 228.

whether consumers want the government to regulate in the interest of protecting them from their own neurology. If product placement influences consumers at an unconscious level, then those consumers should have a say in whether and how they want the government to intervene. Additionally, the vital role that product placement plays in financing content development cannot be ignored and consumers should grapple with whether they prefer content paid for by sponsoring marketers or whether they would be willing to pay more for sponsorship to be unnecessary.

The most effective way to harmonize the approach to product placement would be through WIPO, situated under the UN. WIPO has already instituted an international trademark registration system, whereby mark holders can file a single application for trademark recognition in multiple countries. Thus, WIPO has expertise in the field of trademark and its conceptualization around the world. Additionally, WIPO has a Permanent Committee on Development and Intellectual Property which could take the lead in discussions and in drafting an international standard for disclosure of product placement practices. Such a standard would facilitate content creation by providing producers and marketers with clear guidelines regarding product placement while advancing autonomy by ensuring that consumers are informed when the practice is included in the content they are viewing.

WIPO can also encourage countries to engage citizens with public awareness campaigns and advocacy competitions, leveraging the Internet and social media to enhance consumer understanding of film and television production, financing, and content creation. Overall, the goal should be more speech, more dialogue, and more citizen engagement, fostered by an international coalition.

ANTIQUITIES, WAR, AND INTERNATIONAL LAW: THE ROLE OF INTERNATIONAL LAW IN PROTECTING LOOTED ANTIQUITIES DURING ARMED CONFLICT

*Katherine Novak**

I. INTRODUCTION

Prior to the post-World War II international agreements which remain in force today, there are few examples of agreements for the protection of cultural property during armed conflicts.¹ Dating back to the Renaissance, scholars have recognized the “universal value of cultural heritage” and the importance of preserving that history for future study and enjoyment, not only for the cultures to which that history belongs, but for all mankind.² These values became particularly poignant following Napoleon Bonaparte’s military campaigns in Italy and Egypt, when the French either destroyed antiquities or looted, and brought them back to Europe, “inspired by the vision of a pan-European artistic and scholarly culture.”³ This demonstrates not only the widespread European interest in preserving the legacies of these ancient civilizations, but also the risks these antiquities are exposed to during armed conflict. It would not be until the American Civil War that values such as preserving and protecting cultural history were codified for military usage.⁴

During the American Civil War the Union Army incorporated certain provisions into the military code requiring that important historic sites be marked with a specific type of flag and that armies take steps to actively avoid the destruction or damage of those sites.⁵ The first multi-

* J.D. Candidate, 2018, Antonin Scalia Law School at George Mason University. I would like to dedicate this note to my parents, Robert and Sandra Novak, for their endless love and support. Without them, I would not be where I am today.

¹ Please note that the treaties and agreements listed prior to The Hague Convention of 1954 are by no means exhaustive. The agreements described are illustrative of the premise that those agreements which were in place prior to World War II were limited in scope, and often ineffectual at protecting cultural property. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, S. TREATY DOCUMENT. NO. 106-1 (1999), 249 U.N.T.S. 215 (entered into force Aug. 7, 1956), *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%20249/volume-249-I-3511-English.pdf>.

² CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 11, 12 (2010).

³ *Id.*

⁴ General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863) [hereinafter Lieber Code] § II, VI (1863), *reprinted in* INTERNATIONAL COMMITTEE OF THE RED CROSS, *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, *available at* <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/A25AA5871A04919BC12563CD002D65C5/FULLTEXT/IHL-L-Code-EN.pdf>.

⁵ *Id.* at § IV. Articles 35 and 36 of the *Lieber Code* address affirmative actions the army must take to avoid destroying cultural property. Articles 111-118 describe the placement of a certain type of flag to point out the presence of cultural property to advancing armies.

property present during armed conflicts.¹⁵ Broadly speaking, these goals are echoed throughout all of the treaties discussed in this paper.¹⁶ However, not all of these treaties were ratified by the same nations and not all of them provide mechanisms for reclaiming cultural property that was stolen or damaged during these armed conflicts.

In the late 20th century and early 21st century, many armed conflicts, particularly in the Middle East, involve the intentional destruction of cultural property.¹⁷ As of 2015, the Islamic State of Iraq and Syria (“ISIS”) forces in Syria and Iraq intentionally damaged or destroyed several historic sites for “religiously motivated” reasons, “target[ing] well-known ancient sites along with more modern graves and shrines belonging to other Muslim sects, citing idol worship to justify their actions.”¹⁸ Unlike previous armed conflicts, where historical sites and artifacts were often destroyed as a secondary consequence of military campaigns, ISIS has specifically targeted these sites, contrary to international practice and custom.¹⁹

The purpose of this paper is to examine how courts in different nations have applied these treaties and to examine the inconsistencies that arise between parties – particularly the conflicts that exist between previous owners (often the victims of illegal smuggling) and bona-fide purchasers in other countries. Cultural property is often sold through intermediaries who connect smugglers and bona-fide purchasers. First, the background section of this note examines several of the international treaties enacted at the end of World War II. Comparing and contrasting several of these treaties demonstrates some of the overarching themes that the international community has identified as important to the preservation of cultural property during armed conflicts.²⁰ This note then looks at how responses to these themes have changed and evolved over time. Next, this note

¹⁵ *Id.* at 192–97.

¹⁶ According to The Hague Convention of 1954, “cultural property belong[s] to any people whatsoever [and is] the cultural heritage of all mankind.” The 1970 UNESCO preamble states, “the interchange of cultural property among nations...increases the knowledge of the civilization of man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations.” JOHN HENRY MERRYMAN, *IMPERIALISM, ART AND RESTITUTION* 106 (John Henry Merryman ed., 2006) (quoting the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, pmbl., Nov. 14, 1970, 823 U.N.T.S. 231). According to a 1976 Recommendation by UNESCO, “cultural property is a powerful means of promoting mutual understanding and appreciation among all nations.” JOHN HENRY MERRYMAN, *IMPERIALISM, ART AND RESTITUTION* 106 (John Henry Merryman ed., 2006) (quoting UNESCO Recommendation Concerning the International Exchange of Cultural Property, pmbl., Nov. 26, 1976, available at http://portal.unesco.org/en/ev.php-URL_ID=13132&URL_DO=DO_TOPIC&URL_SECTION=201.html).

¹⁷ See Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, NATIONAL GEOGRAPHIC (Sept. 1, 2015), <http://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/>.

¹⁸ *Id.*

¹⁹ ISIS is not party to any of the later mentioned international treaties; however, their actions have inspired widespread condemnation by the international community.

²⁰ Please note that the treaties examined is by no means an exhaustive list.

examines American customs law and case law to demonstrate how the U.S. has implemented some of these treaties and its response to the illegal import of cultural property taken during armed conflicts. This note then compares the American response with judicial opinions from other Western nations where looted cultural property is often sold. The purpose of these separate examinations is to demonstrate that there is no uniform method for repatriating this stolen property and no single way of applying the important overarching themes identified as crucial to the protection of cultural property.

The solution proposed for these issues is a self-executing treaty that addresses specific methods for identifying and returning looted cultural property, and holding military forces accountable for their conduct. As a response, the best way to eliminate the judicial inconsistencies that result is three-fold: (1) enforcing stricter customs regulations in market nations where cultural property is often sold; (2) establishing harsher criminal sanctions for those who facilitate the sale of illegally appropriated cultural property; and (3) ensuring that those nations which are most at risk for losing cultural heritage during armed conflicts (usually under-developed nations) have access to internet resources and documentation to make the process of reclamation easier.

II. BACKGROUND

In order to examine the inconsistencies in the application of international treaties protecting cultural property during armed conflicts, it is necessary to examine the inconsistencies in the application of international treaties protecting cultural property during armed conflicts to understand the motives behind some of the relevant international treaties. An examination of how these treaties have been interpreted and implemented is possible with an understanding of the basic tenets of international law, which governs cultural property in the context of armed conflict.

The three international agreements examined in this comment are: (1) the 1954 Hague Convention (including both the First and Second Protocols); (2) UNESCO 1970; and (3) UNIDROIT 1995.²¹ However, before examining these treaties, it is important to understand that all of these treaties are non-self executing, meaning that they do not have the effect of enforceable domestic law (at least in regards to the United States) until Congress passes legislation to that effect.²² Although some of the statutes regarding implementation will be addressed in this section, they will be given further analysis in a later section of this note. Additionally, all of these treaties refer broadly to “customary international law” in regards to current practices regarding the repatriation of cultural property as a method

²¹ This is not an extensive list of international agreements. *See supra* note 1.

²² *See* *Medellin v. Texas*, 552 U.S. 491, 504-05 (2008).

of appealing to a broader sense of responsibility that nations began feeling towards cultural property in the aftermath of World War II. However, none of these treaties clarify what exactly is meant by "customary international law" or what that entails.²³ What is clear is that there are two standards which must be met in order for a practice to be deemed "customary international law": "First, [...] consistent State practice in support of the particular rule, and, second, this State practice must be accompanied by a sense of legal obligation or legal entitlement to so act."²⁴ Only then can a practice be deemed "customary" by the international community.

Considering that there was no real international codification of the principles regarding the protection of cultural property until the 1899 and 1907 Hague Conventions, and those were completely ignored during the Second World War, only the 1954 Hague Convention could possibly be considered "customary" in the sense that most nations agree on its guiding principles and to enforce those principles. Although the protection of cultural property seems to be a subject of growing concern amongst nations, there is no uniform method for protecting that property and several nations still do not have legislation (or the means of enforcing that legislation) to provide adequate protection.

A. *The Hague Convention of 1954*

It is generally agreed that the 1954 Hague Convention was created in response to the devastating effect the Nazi regime had on Europe's cultural treasures.²⁵ The 1899 and 1907 Hague Conventions were essentially ignored by the Axis powers as they forcibly collected and destroyed countless objects of historical and artistic significance.²⁶

²³ The idea of customary international law dates back to the Roman Emperor Justinian, whose Institutes were comprised of "[u]nwritten law consisting[ing] of rules approved by usage; for long-continued custom approved by the consent of those who use it imitates a statute." See The Institutes of Justinian, THE ELEMENTS OF ROMAN LAW 45 (bk. I, tit. II, § 9) (4th ed. Lee 1956). In the 17th century, Dutch writer Hugo Grotius, considered the inventor of modern international law, described customary international law as "unbroken custom and the testimony of those who are skilled in it." See Hugo Grotius, HUGO GROTIUS ON THE LAW OF WAR AND PEACE: STUDENT EDITION 32 (Stephen C. Neff, ed., Cambridge University Press 2012). Emer de Vattel, an eighteenth century writer and another founder of the modern understanding of international law, described customary international law as "certain maxims and customs consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law." See Emer de Vattel, THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS xv (1797).

²⁴ See generally FORREST, *supra* note 2, 52 (citing Richard Shaw, *The 1989 Salvage Convention and English Law*, LLOYD'S MAR. COM. LAW Q., 202 (1996)).

²⁵ The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 19, 1954, Hein's No. KAV 9-10; see Anthi Helleni Poulos, *The 1954 Hague Convention for the Protection of Cultural Property in the Even of Armed Conflict: An Historic Analysis*, 28 INT' J. LEGAL INFO. 1, 36 (2000) (citing MERRYMAN, *supra* note 16, at 76).

²⁶ See generally FORREST, *supra* note 2, at 75-76.

Estimates regarding the amount of cultural heritage lost as a result of World War II number in the hundreds of thousands, many of which have yet to be identified or recovered.²⁷ At the first meeting of UNESCO in April 1954, all forty-five nations present signed the Hague Convention, recognizing the importance of preventing another situation in which cultural heritage “belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.”²⁸

One of the most important features of the 1954 Hague Convention, distinguishing it from previous attempts to protect cultural heritage during armed conflicts, is its definition of “cultural property”:

moveable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archeological sites; groups of buildings, which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.²⁹

Note that this definition specifically alludes to “moveable” property, an important category of cultural heritage not mentioned in previous international agreements.³⁰ The advantage of enumerating such specific parameters for the identification of cultural property is that belligerent nations on either side of a conflict are made constructively and actually aware of those items not to be damaged or destroyed. According to Anthi Helleni Poulos, there are at least four primary innovations introduced by the 1954 Hague Convention, three of which are relevant to international law: “equal application to occupation forces, applicability to the various parameters of armed conflict (by including civil wars and wars of liberation), and responsibilities of states in peacetime.”³¹ These terms differ from previous international understanding of cultural heritage, which were limited to vague terms such as “booty,” “pillage,” or “spoils.”³² Although the list of enumerated items provided for in The Hague Convention is not exhaustive, it attempts to ensure that those types of property which were specifically targeted by the Nazi army would be protected.

²⁷ ROBERT M. EDSSEL, *THE MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES, AND THE GREATEST TREASURE HUNT IN HISTORY* 400 (2009).

²⁸ Hague Convention, *supra* note 25.

²⁹ Hague Convention, *supra* note 25, at Art. I(a).

³⁰ See Friedrich T. Shipper & Erich Frank, *A Concise Legal History of the Protection of Cultural History in the Even of Armed Conflict and a Comparative Analysis of the 1935 Roerich Pact and the 1954 Hague Convention in the Context of the Law of War*, *ARCHEOLOGIES* 13, 18 (Apr. 2013).

³¹ Poulos, *supra* note 25, at 39.

³² *Id.* at 3.

In addition to the greatly expanded definitions of cultural property, the Hague Convention provides guidelines for military forces to follow.³³ Article 5 begins with the proposition that any occupying force or military engaged in active operations take “necessary” measures “[to] support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.”³⁴ And even then, a belligerent or occupying military is required to protect cultural property “as far as possible,” suggesting that even in the most dire circumstances of a military operation, cultural heritage is to be given the highest priority protection.³⁵

Finally, Article 7 of the Convention stipulates that the militaries of contracting parties are to be educated regarding the protection of cultural property, including recognition of the designated flag indicating the presence of cultural property and special forces equipped to protect that property.³⁶

The remainder of the Convention establishes general guidelines for implementing these measures.³⁷ For example, military personnel identified as working to protect cultural property, regardless of which side they are fighting for, are to be left to complete their missions without interference; areas designated as cultural heritage or as containing moveable cultural property are to be marked with a special flag of the Convention;³⁸ and the transport of cultural heritage is permitted when military conflict threatens that property.³⁹

The First Protocol of the Hague Convention provides some general guidelines for the return of cultural property in the event that it is removed from its nation of origin.⁴⁰ Any cultural property taken from its place of origin must be returned at the end of the hostilities, and failure to do so triggers an indemnity payment to the proper owners of the property.⁴¹ The First Protocol makes it clear that even if cultural property is retained by a belligerent nation at the end of hostilities, that property “shall never be retained as war reparations.”⁴²

The Second Protocol reaffirms the goals and guidelines set out in the original Convention and First Protocol, but seeks to clarify the protections to be put in place by all participating military forces.⁴³ For example, Chapter 2 Art. 6 restates the idea from the original Convention

³³ FORREST, *supra* note 2, at 76.

³⁴ Hague Convention, *supra* note 25, at KAV 11.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *See generally id.*

³⁸ *Id.*

³⁹ *Id.* at 14-15.

⁴⁰ *Id.* at 39.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 45.

that steps are to be taken to prevent the destruction or damage of cultural property during military operations, but it qualifies that statement with exceptions that distinguish cultural property that has itself become a military target or in the case of no other alternative.⁴⁴ Note that none of the above Articles or examples addresses the ways in which nations are to implement this Agreement; the Agreement only establishes that the signing parties acknowledge that the world's cultural heritage requires protection. Implementation is left to individual states. The Convention only establishes a minimum level of protection for cultural property upon which the signing parties agree to.

B. UNESCO 1970

In 1970, UNESCO established a convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.⁴⁵ The U.S. ratified and implemented UNESCO 1970 through the Cultural Property Implementation Act (CPIA), despite its failure to ratify the 1954 Hague Convention.⁴⁶ Even though the CPIA was not passed until thirteen years after UNESCO was ratified, it demonstrates the U.S.'s commitment to implementing the Convention's measures.⁴⁷ Like the prior Hague Convention, UNESCO 1970 emphasizes the importance of allowing party nations to implement legislation to prohibit the export of cultural property following armed conflict.⁴⁸ However, it is more specific than the Hague Convention as to the types of protected cultural property. Rather than the broad grant of protection issued under the Hague Convention, UNESCO 1970 specifies:

- (1) rare flora, fauna, minerals, and fossils;
- (2) property relating to history, history of science, military, and leaders;
- (3) products of archeological excavations;
- (4) elements of monuments and archeological sites;
- (5) antiquities over 100 years old, e.g., coins and engraved seals;
- (6) objects of ethnological interest;
- (7) property of artistic interest, paintings, drawings, designs by hand, and statues;
- (8) rare manuscripts;
- (9) postage and revenue stamps;
- (10) archives, including sound, photo, and cinema recordings; and
- (11) articles of furniture over 100 years old, and musical instruments.⁴⁹

⁴⁴ *Id.* at 47-48.

⁴⁵ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

⁴⁶ See generally HUTT, *supra* note 7, at 193.

⁴⁷ BARBARA T. HOFFMAN, *International Art Transactions and the Resolution of Art and Cultural Property Disputes: A United States Perspective*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 159, 160 (Barbara T. Hoffman ed., 2006).

⁴⁸ United Nations Educational, Scientific and Cultural Organization, *Text of the Convention*, UNESCO, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/text-of-the-convention/> (last visited Mar. 17, 2018).

⁴⁹ HUTT, *supra* note 7, at 194-95.

Compared to Article 1 of the 1954 Hague Convention, UNESCO 1970 places much greater importance on the types of cultural property which exist.⁵⁰ It is not limited to moveable versus non-moveable historic or artistic pieces.⁵¹

Because of all the similarities between the 1954 Hague Convention and UNESCO 1970, the U.S. is a signatory to both agreements. Neither agreement specifies how the agreed upon measures are to be implemented in any given country. Thus, signatories are given a wide degree of latitude in the implementation of the agreements.

C. UNIDROIT 1995

Signed and entered in 1995, United Nations International Institute for the Unification of Private Law (UNIDROIT) created the Convention on the International Return of Stolen or Illegally Exported Objects to further the objectives laid out by UNESCO in 1970.⁵² UNESCO 1970 failed to substantively address issues regarding the repatriation of illegally stolen or sold cultural property.⁵³ Although UNIDROIT 1995 has only been ratified by 18 nations, it provides guidance as to what the international organization deems appropriate as to “issues of ownership, limitation periods, the position of the *bona-fide* purchaser and the payment of compensation in some cases.”⁵⁴ Therefore, unlike its predecessors, UNIDROIT 1995 takes on more of the characteristics of a self-executing treaty because it establishes the conditions for protecting cultural property,

[a]s it provides a mechanism for direct access to the court of a State Party by private individuals (or States) it is essentially a private law instrument. That is, once a State becomes a party to the Convention and implements its provisions nationally, private individuals will be directly affected through the ability to take action and have action taken against them.⁵⁵

These mechanisms were not adopted by the vast majority of nations, but are still recognized as a minimum standard to measure processes for repatriation of cultural property.⁵⁶ However, as suggested by the only eighteen member nations who have ratified this treaty, UNIDROIT is

⁵⁰ See United Nations, *supra* note 48.

⁵¹ *Id.*

⁵² International Institute For The Unification of Private Law, *Unidroit Convention on Stolen or Illegally Exported Cultural Objects*, International Institute for the Unification of Private Law, UNIDRIOT (June 24, 1995), available at <https://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.pdf>.

⁵³ See FORREST, *supra* note 2, at 196.

⁵⁴ *Id.*

⁵⁵ *Id.* at 197.

⁵⁶ *Id.*

somewhat unpopular because it has more similarities to a self-executing treaty and would require signing parties to conform to certain regulations.⁵⁷

In addition to its self-executing qualities, UNIDROIT is more generally concerned with requiring signatories to repatriate stolen cultural property to its country of origin.⁵⁸ It is generally under-developed nations or indigenous communities which suffer the most from the illegal export of cultural property.⁵⁹ This is recognized in the preamble to the UNIDROIT 1970:

[State parties were] deeply concerned by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural property of national, tribal, indigenous or other communities, and also to the property of all peoples, and in particular by the pillage of archeological sites and the resulting loss of irreplaceable archeological, historical and scientific information.⁶⁰

This disparity in the impact from illegal export of cultural property leads to conflicts between under-developed or developing nations, which most often lose their cultural property and heritage during armed conflict, and developed nations, which are often importers of cultural property (both legally and illegally). Not only are there legal questions about implementing the laws of one state in the courts of another, but importing nations are understandably reluctant to pass laws outlawing the import stolen or looted cultural property.⁶¹

As a result of this conflict, UNIDROIT has been criticized as inhibiting museums and collectors in developed nations from acquiring cultural heritage, while at the same time, making it difficult for under-developed and recently war-torn regions to make claims requesting the return of cultural property.⁶² Although UNIDROIT provides a judicial remedy for nations seeking to reclaim stolen cultural property following an armed conflict, the fact that the nation making the claim to the cultural property has to pay for its return places an extremely high financial burden on under-developed nations.⁶³ Under-developed nations are also

⁵⁷HUTT, *supra* note 7, at 194-195.

⁵⁸ See 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

⁵⁹ See generally MANUS BRINKMAN, *Reflexions on the Causes of Illicit Traffic in Cultural Property and Some Potential Cures*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 64 (Barbara T. Hoffman ed., 2006).

⁶⁰ FORREST, *supra* note 2, at 198 (citing the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects).

⁶¹ *Id.* at 208. This point will be further examined in the following section, where American courts are often forced to interpret foreign laws in regards to US *bona-fide* purchasers.

⁶² *Id.* at 219.

⁶³ Adrian Parkhouse, *The Illicit Trade in Cultural Objects: Recent Developments in the United Kingdom*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 178, 179 (Barbara T. Hoffman ed., 2006).

disproportionately affected as they are most often the ones making claims for the return of cultural property.⁶⁴

D. American Understandings of International Treaties

Although Congress has not ratified all of these treaties, many of their ideas and principles have been enacted through legislation.⁶⁵ An understanding of that legislation is necessary to an examination of how American courts have interpreted international law in this area as well as how the courts deal with interpreting issues of the laws of foreign nations.

First, there is the National Stolen Property Act, which was not originally intended to address the illegal import of cultural property, but has since proved beneficial in prosecuting parties for illegal importation.⁶⁶ Second, there is the Cultural Property Implementation Act, which was enacted to implement the UNESCO 1970 treaty.⁶⁷ Finally, there are several American customs regulations which play a role in determining at which point antiquities looting becomes a crime in the U.S. and the degree to which offenders may be punished. In regards to case law, there is some inconsistency as to the implementation of these particular acts, but the actual inconsistencies which are relevant to this note involve the additional examinations of foreign legislation and unequal application of treaty principles across international borders.

1. The National Stolen Property Act

Enacted in 1948, The National Stolen Property Act (NSPA) provides, “[w]hoever transports, transmits or transfers in interstate or foreign commerce, any goods etc. of value of \$5000 or more, knowing the same to have been stolen, converted or taken by fraud...[s]hall be fined...or imprisoned.”⁶⁸ Although not originally intended to aid the federal government in seizing and returning stolen cultural property being imported into the U.S.,⁶⁹ the NSPA has given the U.S. government the authority to seize stolen cultural property after it has already gone through the U.S.

⁶⁴ *Id.*

⁶⁵ See *infra* pp. 14-17.

⁶⁶ See Transportation of Stolen Goods, Securities, Moneys, Fraudulent State Tax Stamps, or Articles Used in Counterfeiting, 18 U.S.C. § 2314 (1948); HOFFMAN, *supra*, note 47, at 165 (Hoffman provides an excellent summary of the legislation and case law directing the seizure of cultural property in the United States based on the National Stolen Property Act of 1948, 18 U.S.C. §§ 2314-15).

⁶⁷ *Convention on Cultural Property Implementation Act (CPIA) of 1983; Fact Sheet*, Archaeological Institute of America (April 1, 2010) <https://www.archaeological.org/news/sitepreservation/75>; Cultural Property Implementation Act, 19 USC §§ 2601-13 (1983).

⁶⁸ 18 U.S.C. § 2314.

⁶⁹ Hoffman, *supra* note 47, at 165 (describing how the NSPA was originally enacted to help the federal government recover stolen vehicles).

customs process.⁷⁰ The NSPA was not enacted for the purpose of implementing one of the multilateral treaties regarding the protection of cultural property during armed conflicts, but rather has had the effect of supporting efforts to return that property to the rightful owners.⁷¹

It is argued that the NSPA is effective at helping the government return stolen cultural property because it “respects not only the common law property rights of another nation, but it also recognizes a national ownership of the patrimony of another country.”⁷² A general export control law is insufficient for the government to return stolen property; that instead “[t]he NSPA accepts the law of other nations as an indicia of ownership that form the basis of the concept of theft of items removed from a country in violation of its patrimony laws.”⁷³

2. The Cultural Property Implementation Act

Unlike the NSPA, which was enacted independent of any international agreements or obligations, and only subsequently applied to cultural property repatriation, the Cultural Property Implementation Act (CPIA) was enacted in 1983 to implement UNESCO 1970 in the U.S.⁷⁴ It represents “attempts to balance the competing goals of archeologists, anthropologists, academics, art collectors and museums, and relevant government agencies.”⁷⁵ CPIA provides:

[w]hoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law is subject to forfeiture of the property.⁷⁶

Note that unlike the NSPA, CPIA refers merely to forfeiture of the property, not to any form of criminal punishment.⁷⁷

It is argued that the CPIA actually limits the authority customs officers have under the NSPA because they are prohibited from seizing any object going through customs that some foreign party claims is stolen.⁷⁸ The purpose of this is to protect the legitimate interests of groups within the

⁷⁰ See HOFFMAN, *supra* note 47, at 165; see also 18 U.S.C. § 2314.

⁷¹ See 18 U.S.C. § 2314; HOFFMAN, *supra* note 47, at 165.

⁷² HUTT, *supra*, note 7, at 197.

⁷³ *Id.*

⁷⁴ HOFFMAN, *supra* note 47, at 160.

⁷⁵ *Id.*

⁷⁶ HUTT, *supra* note 7, at 198-99 (citing 18 U.S.C. § 545).

⁷⁷ *Id.* at 199.

⁷⁸ HOFFMAN, *supra* note 47, at 160.

U.S. attempting to acquire these objects, and it protects the American market for these objects.⁷⁹

3. U.S. Customs Law

There are several statutes governing American customs law in regards to the importation of cultural property.⁸⁰ For the most part, these statutes allow for the seizure of property believed to be stolen; however, some provide for civil or criminal liability. Instead of the government having to prove that the object in question was stolen property, “the burden is...on the owner, to show that, in fact, the property was not stolen.”⁸¹ Further,

[c]laimants satisfy this burden by proving that the predicate crime never occurred, or that the property lacks sufficient nexus to the predicate crime to warrant forfeiture under the applicable statute. In addition claimants often assert the innocent owner defense, arguing that because they have a legitimate interest in the property and did not participate in the predicate offense, the property should not be forfeited to the U.S. government.⁸²

Unfortunately for potential owners, most courts have not accepted this argument unless that defense is explicitly provided for in the relevant statute.⁸³ Therefore it is necessary to examine some of the existing federal statutes governing the importation of cultural property.

First, 18 U.S.C. §545 “prohibits the importing of merchandise ‘contrary to law’ and allows the government to forfeit merchandise that has been determined as imported contrary to law.”⁸⁴ Next, 18 U.S.C. §542 “prohibits the import of merchandise by means of a [materially] false statement and allows for seizure of the object.”⁸⁵ Finally, there is 19 U.S.C. §1595(a), which “permits the seizure or forfeiture of objects known to be stolen at the time of import.”⁸⁶ Although not exhaustive, these statutes demonstrate how potentially difficult it is for bona fide purchasers to disprove the U.S. government’s investigation into the transport of stolen goods. Once the government forfeits items believed to be stolen, the burden shifts to the purchaser to prove the government incorrect.⁸⁷

⁷⁹ *Id.*

⁸⁰ Although not specifically mentioned with some of the statutes in this section, both the National Stolen Property Act and the Cultural Property Implementation Act both affect U.S. Customs law. *See generally* 18 U.S.C. § 2314; 19 U.S.C. §§ 2601-13.

⁸¹ HOFFMAN, *supra* note 47, at 163.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 164 (citing 18 U.S.C. § 542 (1994); *see also* United States v. An Antique Platter of Gold, 184 F.3d 131, 135 (2d Cir. 1999)).

⁸⁶ *Id.* (citing 19 U.S.C. § 1595(a) (1999)).

⁸⁷ *Id.* at 163.

III. PROBLEM

While many nations have signed and ratified (per their own international agreements about the protection of cultural property during armed conflict, not every nation has agreed to abide by the guidelines.⁸⁸ Additionally, several of the agreements, as well as academic commentaries about the agreements, refer to general “customary international law,” a term never well defined.⁸⁹ Thus inconsistency exists as to the implementation of these agreements, not only within the courts of the U.S., but also within the courts of other sovereign parties. Treaties in the U.S. are presumably non-self executing, meaning that they do not become enforceable domestic law within the U.S. until Congress passes legislation to that effect. And even then, courts interpret these statutes to mean different things. Finally, these American interpretations of international agreements must be compared with several foreign decisions, particularly in Western nations where cultural property is more likely to be illegally sold.

Given the extent of the inconsistencies within purely domestic application of these principles in American courts, those courts are often then required to interpret the laws of those nations requesting the return of cultural property. Unfortunately, as is often the case during armed conflicts, the nations losing cultural heritage often do not have the resources to sustain a claim, or even a government stable enough to make a claim.

A. *International Struggles to Implement Treaties and Agreements*

Beginning in 2001, the Taliban instituted a deliberate policy of targeting cultural heritage that in any way contradicted their interpretation of Islamic teachings.⁹⁰ Shortly after the announcement of this policy, the Taliban destroyed two ancient Buddha statues in Bamiyan near Kabul in modern Afghanistan, two of the Afghan culture’s most prized possessions.⁹¹ Unfortunately, Afghanistan was not party to most international treaties specifically addressing the destruction of cultural property during armed conflict.⁹² However, “the absence of specific treaty obligations...does not relieve the Taliban regime from international responsibility deriving from the destruction of the Buddhas of Bamiyan, under general norms of customary international law.”⁹³ First, it is a well-established principle of international law that the protection of cultural heritage during armed

⁸⁸ For instance, the United States is not a party to the Second Protocol of the Hague Convention.

⁸⁹ See *supra* Part II.

⁹⁰ FRANCESCO FRANCONI & FEDERICO LENZERINI, *The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 28, 31 (Barbara T. Hoffman ed., 2006).

⁹¹ *Id.*

⁹² *Id.* at 34.

⁹³ *Id.*

conflict is a high priority for all nations.⁹⁴ Second, that there is a general “prohibition of acts of violence against cultural heritage in the event of armed conflicts.”⁹⁵

Although it may appear from these statements that members of the Taliban could be held liable for the destruction of the Bamiyan Buddhas, it is unlikely due to the lack of enforcement measures within the treaties regulating this area. Not only is there the obstacle that Afghanistan was not party to several of these agreements when the destruction occurred, but several acts of the Taliban took place within Afghanistan with the support of the State, and thus fall outside the realm of international law.⁹⁶

In the aftermath of the destruction caused by the Taliban, the world is now facing the devastating effect ISIS has had on the historic sites of the Middle East and the international community is forced to find out how to implement existing agreements as to the repatriation of cultural property.⁹⁷ According to Article 8 of the Rome Statute of the International Criminal Court, adopted in 1998, “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives” are categorized as “war crimes.”⁹⁸ Additionally, the U.S. “recognizes cultural cleansing as a risk factor for impending crimes against humanity, genocide, and war crimes.”⁹⁹ Not only has ISIS taken to destroying such important sites, but also it actively encourages looting and illegal sales as a method of funding its activities.¹⁰⁰ As the war against ISIS continues, the international community is responding by attempting to protect and restore cultural heritage as territory is reclaimed. For instance, UNESCO leaders are continuing to meet with Syrian leaders regarding the shared priority of protecting what heritage remains from further violence.¹⁰¹ Additionally, Russian President Vladimir Putin has pledged “material support for preservation and reconstruction

⁹⁴ *Id.*

⁹⁵ *Id.* at 35.

⁹⁶ *Id.* at 36-37 (noting that there is the additional problem that the Taliban is not a state actor, and that it remains to be seen whether such an organization can be held liable for its actions in an international court, which is a discussion for another note).

⁹⁷ Euan McKirdy, *Which Ancient Treasures Did ISIS Destroy in Palmyra?* CNN (last updated Mar. 28, 2016, 10:34 AM), <http://www.cnn.com/2016/03/28/middleeast/isis-palmyra-treasures-destroyed/>.

⁹⁸ Rome Statute of the International Criminal Court, art. 8 § (2)(b)(ix), *adopted on July 17, 1998*, U.N. Doc. A/CONF.183.9 (entered into force July 1, 2002).

⁹⁹ Jamie B. Perry, *Cultural Carnage: Considering the Destruction of Antiquities through the Lens of International Laws Governing War Crimes*, 64 U.S. ATT'YS BULL. 57, 60 (2016) (citing *Framework of Analysis for Atrocity Crimes: A Tool for Prevention*, UN (2014), available at http://www.un.org/en/genocideprevention/documents/publications-and-resources/Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf).

¹⁰⁰ Perhaps the most shocking ISIS's destruction is of the Syrian city of Palmyra, once an oasis along the famed Silk Road and part of the Roman Empire. Curry, *supra* note 17.

¹⁰¹ McKirdy, *supra* note 97.

work in Palmyra.”¹⁰² While the widespread condemnation of the international community against these acts of violence is encouraging, it highlights one of the key failings of this system of international law: all the international treaties in place to protect cultural property, there is no way to enforce those measures against non-member states, even when there is a violation of customary international law.

Another instance where the international community has attempted to implement these principles is in the International Criminal Tribunal for the former Yugoslavia (ICTY). Established in 1993 to address the war crimes and crimes against humanity,¹⁰³ the ICTY claims to have “laid the foundations for what is now the accepted norm for conflict resolution and post-conflict development across the globe, specifically that leaders suspected of mass crimes will face justice.”¹⁰⁴ While the Tribunal submits that it possesses the authority to bring those guilty of such crimes into court, the reality is that most of these criminals are never actually prosecuted.

For example, in the case of *Prosecutor v. Dario Kordic and Mario Cerkez*, the convictions of two Serbian politicians for genocide and the intentional destruction of property were upheld, but in a Press Release issued by the United Nations, the Appellate Court noted the problems that arise in most instances of prosecution because:

[c]hambers of the International Tribunal can only hear a case regarding a person against whom an Indictment has been filed and confirmed and who is present in the The Hague... a case against an alleged serious offender may not be heard before this International Tribunal... [because] the Prosecution had not enough evidence and/or that there was insufficient co-operation between the International Tribunal and a State.¹⁰⁵

This is only one example of the difference between the expectation and the reality of international prosecution for war crimes and crimes against cultural property. Because there are no enforcement measures for these international treaties, very little can be done about bringing these criminals to justice. Comparing the apparent effectiveness of the ICTY with the lack of prosecution following the 2003 looting of the Iraqi Museum in Baghdad and ISIS’ destruction of cultural property throughout the Middle East, it becomes obvious that the availability of judicial remedies relies on where the theft or damage occurs.

¹⁰² *Id.*

¹⁰³ In this case, I am referring to the destruction of cultural property during these conflicts, which, as demonstrated earlier in this article, is often listed in international treaties amongst other types of war crimes.

¹⁰⁴ *About the ICTY*, U.N. INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about> (last visited Mar. 23, 2018).

¹⁰⁵ Press Release, Int’l Crim. Tribunal for the Former Yugoslavia, Appeals Chamber Judgment in the Case the Prosecutor v. Dario Kordic and Mario Cerkez, ICTY Press Release CT/P/I.S./926e (Dec. 17, 2004).

Contrast the situation in the Middle East and the goals of the ICTY with the case of the Elgin Marbles, originally part of the Parthenon in Athens, Greece, but now resident in the British Museum in London, England.¹⁰⁶ The Elgin Marbles were removed from Greece in 1812 while the Parthenon was part of an Ottoman military fort, and subsequently sold to the British government and put on permanent display at the British Museum in 1817, where they remain today. Greece renewed its efforts for the repatriation of the Marbles in 2004, when Athens hosted the Olympic Games.¹⁰⁷ According to John Tierney, international interest in this case derives from the preamble to the 1954 Hague Convention, which states “that cultural property is ‘the cultural heritage of all mankind.’”¹⁰⁸ Tierney suggests that Greece may actually have standing to sue the United Kingdom in an American Court under the Foreign Sovereign Immunities Act of 1976.¹⁰⁹ Under that statute, an American court might have the authority to examine the legal question at issue when the property in question was “taken in violation of international law...and that agency...is engaged in a commercial activity in the United States.”¹¹⁰ Compare Greece’s claim with England’s claims, that the people of the world, to whom the Elgin Marbles actually belong under the theory that history belongs to everyone, have better access to the Marbles at the British Museum than in Athens.¹¹¹ Additionally, there are concerns about preservation and conservation capabilities in Greece.¹¹² Thus there is no clear-cut solution to this dilemma and no indication that it will be resolved in the near future.

The comparison between instances where there is no legal remedy for the destruction of cultural property (i.e., the Middle East) to diplomatic and adjudicated cases (i.e., ICTY and the Elgin Marbles) illustrates that there is no uniform method of applying international treaties to cases of looted cultural property. The lack of uniformity makes treaty interpretation particularly difficult and leads to a lack of continuity when it comes to the

¹⁰⁶ While the case of the Elgin Marbles does not fall strictly within the scope of this paper (i.e., looting during armed conflict in violation of international treaties), it provides a useful case study because it addresses some of the potential legal remedies for nations seeking the return of their cultural property as well as the arguments as to why that would be detrimental to the property’s preservation.

¹⁰⁷ MERRYMAN, *supra* note 16, at 99.

¹⁰⁸ *Id.* at 100; see John Tierney, *Ideas and Trends: Did Lord Elgin Do Something Right?* N.Y. TIMES (Apr. 20, 2003), <https://www.nytimes.com/2003/04/20/weekinreview/ideas-trends-did-lord-elgin-do-something-right.html> (arguing that there is merit to taking a “Lord Elgin” approach in war zones in the Middle East. It has the benefit of putting professional archeologists in charge of museums and dig sites, it helps eliminate the black market in such goods, and it gets cultural property out of war zones, thus upholding the principle that cultural property is valuable and worth preserving).

¹⁰⁹ MERRYMAN, *supra* note 16, at 101 (referencing *Austria v. Altmann*, 541 U.S. 677 (2004), where the case came up on an act of replevin, but was ultimately settled privately after the case was remanded to the federal district court in Los Angeles, California).

¹¹⁰ General Exceptions to the Jurisdictional Immunity of a Foreign State, 28 U.S.C. § 1605(a)(3) (2016).

¹¹¹ MERRYMAN, *supra* note 16, at 106.

¹¹² *Id.* at 106-07.

recovery of cultural property or reparations for its destruction during armed conflicts.

B. American Case Law

As a result of the various methods by which nations interpret and implement all treaties protecting cultural property, courts are left with the daunting task of sifting through all of that information and applying both foreign and domestic law to a number of cases. As with the previous sections, this list of cases is by no means exhaustive, but illustrative of the ways different courts apply these principles.¹¹³

The seminal case for interpreting the NSPA¹¹⁴ is *United States v. McClain*, where a jury convicted the defendants of “conspiring to transport, receive, and sell assorted stolen pre-Columbian artifacts in interstate commerce, in violation of 18 U.S.C. §§2314, 2315, and 371.”¹¹⁵

In interpreting the NSPA in *McClain*, the Fifth Circuit relied on an interpretation of whether “the pre-Columbian antiquities in question, exported from Mexico in contravention of that country’s law, were knowingly “stolen” within the meaning of the [NSPA].”¹¹⁶ The Mexican government claimed that all pre-Columbian artifacts were the property of the Mexican government and were therefore “stolen” within the meaning of the NSPA as soon as they were removed from their archeological sites.¹¹⁷ However, the court rejected the view that this had always been the state of Mexican law, and the Fifth Circuit instead ruled that the relevant statute was not enacted until 1934, and stated, “all immovable archeological monuments belong to the nation.¹¹⁸ Objects which are found (in or on) immovable archeological monuments are considered as immovable property, and they therefore belong to the [n]ation.”¹¹⁹

In sum, the court held that the term “stolen” as read in the NSPA has a broad, wide range of meaning and, thus the court could award the artifacts to the Mexican government, even if the government never physically possessed the artifacts (or indeed knew they existed) before they were stolen.¹²⁰ Perhaps another broad take-away from this case is the principle (seen throughout all of the case law surrounding this topic), that foreign courts are very likely to recognize state ownership over a piece of

¹¹³ See *supra* note 1.

¹¹⁴ See *supra* Section II.D.1.

¹¹⁵ *United States v. McClain*, 545 F.2d 988, 992 (5th Cir. 1977).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 997-99.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 998.

¹²⁰ *Id.* at 992; HOFFMAN, *supra* note 47, at 165.

cultural property when that foreign state has very clear legislation explaining that intent.¹²¹

Inconsistencies in such cases arise because there is no clear way for courts to define when foreign legislation meets the vague standard of “very clear,” and courts seem to simply meet that standard to achieve a “fair result” when a foreign state has an explicit interest a piece of cultural property. Unless, as examined in *Peru v. Johnson*, the foreign legislation in question is just so much of a stretch that the Court cannot plausibly return cultural property.¹²² Thus all of the cases examined within this section show different reasons for why each of the courts did or did not find the foreign legislation adequate for a judgment directing the return of the cultural property in question.

In *United States v. Hollinshead*, the Ninth Circuit was also faced with the challenge of interpreting the NSPA in regards to a foreign nation’s domestic law.¹²³ In that case, archeological pieces discovered at the Machaquila archeological site in Guatemala were smuggled by the defendants into the U.S.¹²⁴ However, the defendants only acquired the pieces after they had been smuggled into Belize.¹²⁵ The defendants were only arrested when they tried to sell the pieces to the Brooklyn Museum and a curator contacted the archeologist in charge of the site in Guatemala.¹²⁶ The defendants argued that they had no specific knowledge of Guatemala’s laws prohibiting the theft and smuggling of cultural property, but the Ninth Circuit ruled that constructive knowledge that theft is likely illegal in Guatemala was sufficient to affirm the defendants’ convictions.¹²⁷

Compare that case to *United States v. Pre-Columbian Artifacts*, where the Northern District Court of Illinois interpreted the NSPA in light of a Guatemalan law which provided, “[f]or the purposes of this motion...the law of Guatemala...that upon export without authorization, the artifacts are confiscated in favor of the Republic of Guatemala, and become the property of Guatemala.”¹²⁸ Interestingly enough, the court then refused to examine the accuracy of Guatemala’s claims, stating, “no attempt will presently be made to parse the specific language of the Guatemalan legislation...it is also assumed that the artifacts were illegally exported from Guatemala.”¹²⁹ In terms of the NSPA, the court merely found that in order for property to fall within the broad definition of “stolen,” it must first

¹²¹ *McClain*, 545 F.2d at 992; see also FORREST, *supra* note 2, at 152.

¹²² See generally *Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal 1989); see *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 546 (N.D. Ill. 1993).

¹²³ *United States v. Hollinshead*, 495 F.2d 1154, 1155 (9th Cir. 1974).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Pre-Columbian Artifacts*, 845 F. Supp. at 546.

¹²⁹ *Id.*

belong to someone else.¹³⁰ Thus the NSPA and Guatemalan law were reconciled by “assum[ing]” the truth of the Guatemalan legislation.¹³¹

While *Hollinshead* was a criminal case, *Peru v. Johnson* dealt with a civil matter, where Peru was unable to establish ownership over eighty-nine pre-Columbian artifacts which had been seized by the U.S. Customs Service.¹³² The Central District Court of California held that because Peru’s laws regarding the export of pre-Columbian artifacts were so imprecise and subject to such frequent change that they were not able to sufficiently prove where in Peru the object were discovered.¹³³ The Court in fact suggested that the artifacts could have been discovered in several South American nations.¹³⁴ Thus, this case is anomalous among the NSPA cases in that the foreign nation claiming ownership did not present sufficient evidence to support a claim; however, the court did not establish a clear test for determining when there is not clear enough legislation to support a claim.¹³⁵

In *United States v. Schultz*, a New York art dealer was charged with conspiring to receive and possess stolen property under the NSPA.¹³⁶ Following a general statement of good faith in a foreign nation’s laws¹³⁷ the District Court in New York laid out criteria for determining whether to enforce foreign legislation in the United States:

[W]hether the law declared the state’s ownership in clear and unambiguous language; whether the law explicitly or implicitly recognized the right to private ownership; whether the nation actually sought to exercise its ownership rights such that, in practice, the statute acted as an export restriction; whether private citizens who possessed objects could transfer them by gift, bequest, or intestate succession; and whether a designated government department had to make a determination of the object’s artistic, archeological or historical value in deciding the government’s ownership interest.¹³⁸

In *Schultz*, the court ruled that Egyptian law, which states that all antiquities “‘are considered to be public property’ essentially means that all antiquities are property of the state.”¹³⁹ However, the court ultimately held

¹³⁰ *Id.* at 547.

¹³¹ *Id.* at 546.

¹³² *Johnson*, 720 F. Supp. at 812.; HOFFMAN, *supra* note 47, at 166.

¹³³ HOFFMAN, *supra* note 47, at 166 (citing *Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal 1989)).

¹³⁴ *Id.*

¹³⁵ *Contra* *United States v. Hollinshead*, 495 F.2d 1154, 1155 (9th Cir. 1974); *Pre-Columbian Artifacts*, 845 F. Supp. at 546; *McClain*, 545 F.2d at 992.

¹³⁶ *United States v. Schultz*, 178 F. Supp. 2d 445, 446 (S.D.N.Y. 2002).

¹³⁷ *Pre-Columbian Artifacts*, 845 F. Supp. at 546.

¹³⁸ HOFFMAN, *supra* note 47, at 167 (citing Schultz’s brief, prior to the ruling in *United States v. Schultz*, 178 F. Supp. 2d 445, 446 (S.D.N.Y. 2002)).

¹³⁹ *Schultz*, 178 F. Supp. 2d at 446 (citing Law No. 117 of 1983 (Law on the Protection of Antiquities), *al Jaridah al-Rasmiyah*, vol.32 bis, 11 Aug. 1983, art. 6 (Egypt)).

that the importation of smuggled artifacts is not in itself contrary to U.S. Customs law. The government now faced a high standard of proof in demonstrating that the defendant had actual knowledge that the Egyptian artifacts were stolen.¹⁴⁰ It is argued that *Schultz* demonstrates the United States' commitment to return stolen cultural property, however as a result of this ruling, there is potentially a higher burden of proof on foreign states wishing to reclaim stolen cultural property and also on bona fide purchasers seeking to protect an investment.¹⁴¹

As to judicial implementation of the CPIA, *United States v. An Antique Platter of Gold, Known as a Gold Phiale Mesomphalos, c. 400 B.C.* is a leading case. In that case, the U.S. government sought civil forfeiture for an Italian Phiale, which the Italian government had tracked to Switzerland and then to a New York art dealer.¹⁴² Like the cases mentioned above, this case involved the application of a foreign law which declared a certain category of artifacts to be state property, regardless of whether they had already been discovered or not.¹⁴³

IV. SOLUTION

The above analysis makes clear that stronger international treaties which speak specifically to the remedies for states that commit violations of established customary international law would greatly aid in preventing the destruction of cultural artifacts. Since the 1954 Hague Convention, most international treaties on this subject state that the international community is opposed to this violence against cultural property and that signing parties agree to take affirmative steps to prevent their militaries from committing such atrocities during armed conflicts. However, given that the effect of such violence has a largely international effect, none of the examined treaties provide any potential remedies for those nations that violate these principles, especially against those nations which are not signing parties. Thus, an international treaty which provides a standard for nations to air grievances against each other, whether that be through arbitration or an international court would solve this issue.¹⁴⁴

¹⁴⁰ *Id.*

¹⁴¹ HOFFMAN, *supra* note 47, at 166.

¹⁴² *United States v. An Antique Platter of Gold*, 184 F.3d 131, 133 (2d Cir. 1999); *see also* FORREST, *supra* note 2, at 152.

¹⁴³ *See* FORREST, *supra* note 2, at 152.

¹⁴⁴ While some form of international treaty or agreement would be the best way of ensuring international participation in such a scheme, there are several inherent problems with that solution. As this Note examines, international treaties and agreements are notoriously difficult to implement and enforce. Additionally, there is the concern that by entering into such treaties and agreements, nations are "giving up" some degree of their inherent sovereignty. In the United States, most treaties signed by the Executive are never ratified by the Senate. And an even smaller amount are legislated into domestic law. However, I would still maintain that some form of international consensus is necessary, particularly when cultural property is destroyed during armed conflict between states.

In response to the varying inconsistencies which sometimes inhibit the return and protection of cultural property, there should be a three-fold policy solution: (1) enforcing stricter customs regulations in market nations where valuable pieces of cultural property are often sold; (2) establishing harsher criminal sanctions for those who facilitate the sale of illegally appropriated cultural property; and (3) ensuring that those nations which are most at risk for losing their cultural heritage during armed conflicts (usually under-developed nations) have access to Internet resources and documentation to make the process of reclamation easier.¹⁴⁵

Developed nations such as the United States, the United Kingdom, and France do have customs regulations and criminal sanctions in place in an effort to prevent the growth of the black market for cultural property. However, as demonstrated by the case study of the Elgin Marbles, there is little certainty as to which nations laws might apply in any given case. Therefore, this note proposes that, in future international treaties and agreements, specific regulations and sanctions should be proposed and adopted to afford greater continuity between cases.¹⁴⁶ Making such regulations and sanctions widely accepted has the further effect of improving the reclamation process for under-developed nations, or indeed, any nation that finds itself the victim of such a crime, because it standardizes the way in which such cases are adjudicated – laying out what standards of proof a nation must meet in order to reclaim its property and what remedies it has available. In a word, the solution to this problem is specificity. Specificity with regards to the types of crimes that will be prosecuted, judicial remedies, and regulations supposedly preventing this activity.

V. CONCLUSION

Although many nations have agreed upon the principles laid out by the international community condemning acts of theft and destruction of cultural property, there is as yet no agreed upon standard process for nations seeking to reclaim stolen cultural property or recompense when such property is destroyed. The primary benefit of standardizing the judicial remedies for the recovery of stolen and smuggled cultural property is that nations or individuals filing actions in the U.S. (or indeed, in any country that also regularizes this process) have an understanding of the process for

¹⁴⁵ MANUS BRINKMAN, *Reflexions on the Causes of Illicit Traffic in Cultural Property and Some Potential Cures*, ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 65-66 (Barbara T. Hoffman ed., 2006).

¹⁴⁶ This sort of proposal is perhaps best effectuated in an international system such as that established by the European Union, where decisions by certain courts and bodies automatically take legislative effect within member states, sometimes overriding domestic law. The effect of that action though, is that the same laws are applicable throughout Europe. Uniform criminal and civil penalties, for instance, could provide strong incentives for compliance.

making a claim. The goal of setting out a specific, standardized system of rules for all nations is that all nations which find themselves the victims of armed conflicts have an easily-understood remedy for reclaiming their cultural heritage.