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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.

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?

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?

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

   o 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:

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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.).
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:

  o https://copyright.cornell.edu/publicdomain

E. Registering your Work

Although copyright subsists in a work form 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:

  o Triple Scoop Music at https://triplescoopmusic.com/
  o 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

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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. 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

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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)
BEST PRACTICES IN RIGHTS CLEARANCE

SYMPOSIUM

Panel 1

Cosponsored by

The Arts & Entertainment Advocacy
Clinic and
The Journal of International
Commercial Law

Moderated by

Prof. Sandra Aistars

Thursday, January 18, 2018
1:30 p.m.

Antonin Scalia Law School

George Mason University
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Reported by: KeVon Congo

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Introduction

Prof. Sandra Aistars, Antonin
Scalia Law School, George Mason University

Julia Palermo, Symposium Editor,
The Journal of International Commercial Law

Moderator

Prof. Sandra Aistars, Antonin
Scalia Law School,
George Mason University

Panelists

Nancy Wolff, Digital Media Licensing Association

Jeff Sedlik, PLUS

Lateef Mtima, Institute for Intellectual Property and Social Justice

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MS. AISTARS: Welcome to what
I hope will be the first in a series of Best Practices in Rights Clearance Symposia, cosponsored by the Journal of International Commercial Law and the Arts and Entertainment Advocacy Clinic here at Scalia Law. I am eager to provide resources to creators from a variety of disciplines, and those who seek to build on or use their work to expand our culture and increase knowledge and social wellbeing. We are beginning with examining the practices of visual artists, but in the coming years we hope to move on to artists from other disciplines as well. The focus of this event today is to explore what issues artists and users of works of visual art need to be
aware of when it comes to obtaining and granting rights and permissions to use copyrighted works, and to document the collective wisdom of practitioners, professors, industry experts and artists themselves who have agreed to share their practices, their advice, their knowledge of industry norms, and suggest areas for additional study.

The transcript of this discussion will be published in the Symposium issue of the Journal this summer. It will be accompanied by a resources guide, which the students of the Arts and Entertainment Advocacy Clinic will assemble based on the discussions here today and further research that they will do this
semester. And I am grateful for their efforts and their presence here today as well.

We've assembled a very distinguished and a very interesting panel of speakers today, but we've also endeavored to make the invitation to this event open widely to the public, and to ensure that there are a wide variety of artists and those who work in and with the creative community who were aware of this event and could attend today. So, I would urge that everybody take an active role and participate in shaping this discussion. I hope that everyone here will view themselves not as an audience but rather as full participants in the
event. And to that end we have several
microphones available today, and there
will be students standing on either
side of the room. And to the extent
you have a comment or question you'd
like to make, we won't be relying on a
strict panel format, where we wait
until the end of a discussion to seek
questions or comments from the
audience; we'd encourage you to just
raise your hand, signal to the students
that you'd like to make a comment or
ask a question, and we'll get a mic to
you. It's important to wait for a mic,
because the comments are being
transcribed by a court reporter today
so that we can have them published in
the Journal. So, if you don't have a
mic it won't be possible for the court reporter to accurately transcribe them.

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

Before I introduce my cohost, Ms. Julia Palermo, who is the symposium editor of the Journal, I'd like also to thank our sponsors, the Center for the Protection of Intellectual Property here at the law school, and the
Institute for IP and Social Justice. I am very proud to be affiliated with both of these academic centers, and I'm grateful for the thoughtful scholarship that they bring to the area of intellectual property law. I would also like to give special thanks to the visual arts organizations who sponsored speakers so that they could travel to appear here today. And, of course, I can't give enough thanks to the student editors and members of the Journal of International Commercial Law who helped organize the event and who will be doing the work of editing and publishing the transcript after. And, of course, the students of the clinic who will be doing the work of preparing
the resources document and who will also be offering advice to anybody who chooses to seek it this evening in the networking reception in the one-on-one speed lawyering sessions. So, without further ado, I will pass the baton to my colleague, Julia Palermo. Thank you.

MS. PALERMO: Good morning, everyone and thank you Professor Aistars for that great introduction. I am the symposium editor for the Journal of International Commercial Law, and first I want to say thank you all so much for being here today. We are really excited to co-host this event with the Arts and Entertainment Advocacy Clinic and all the other
organizations who donated their time and resources. A special thank you to all of the speakers on this panel and on the second panel. This event would not have been possible without their expertise and knowledge, so we really appreciate you traveling far and wide to be with us today.

The Journal of International and Commercial Law is an international law journal run and published by students at the law school. We were established in 2008, and we publish on a wide range of topics dealing with international and commercial law such as tax reform laws, international privacy and consumer protection. We previously co-hosted a moral rights
symposium with the Clinic and CPIP, which was published in our Summer 2016 issue, and as Prof. Aistars said, we are really excited to publish this symposium in our Summer 2018 issue. Without any further hesitation, I want to pass the mic back over to Prof. Aistars to get the panel started. Thank you again for being here.

MS. AISTARS: So, rather than introduce panelists one-by-one with lengthy biographies, I'm actually going to ask each of the panelists to take a few minutes to introduce themselves and what shapes their perspectives on copyright issues so that you have a better perspective of where we come from in having this conversation about
copyright, visual arts and rights clearance. I'll Jeff Sedlik, followed by Professor Mtima to start and in telling us about your perspectives, comment also on what you think are the main issues regarding creativity and rights and permissions and fair use, and how you think we as a community of artists and academics and advocates can positively contribute to addressing the issues facing this community.

MR. SEDLIK: I'm Jeff Sedlik, and I'm a professional photographer for the last 35 years, as well as a professor at the Art Center College of Design in Pasadena, California, where I teach on the topics of licensing and copyright, copyright law, and standards
and practices in copyright licensing in visual arts. I'm excited to be here today because this topic is so critical. It's faced every single day by individual artists who have little to no training in the law, little to no training in business. They don't call us starving artists for no reason. So, there is no other profession, actually, where there is a phrase that has starving in front of it. You don't ever hear starving lawyer, although there are some, and starving plumber, but you do hear starving artists, and to some extent that's because people get into the arts out of passion, you know? They're creators; they're driven to create. But they don't get training
in business unless they go to school and take business classes and, even so, it's not a complete training in business. They don't get training in the law. They don't understand that their ability to support themselves and enable themselves to create new works is fundamentally dependent on the protections, the rights and the remedies under copyright law. Few artists, even those among my most educated peers, really fully grasp -- I mean, based on my conversations with them -- the fact that the ultimate beneficiary of copyright law is the public. That law is in place to ensure that new works are created, but in order to reach that objective you have
to have an incentive for people to create. True, they will create even without revenue, but that only lasts so long; you can't pay your mortgage with nothing, with exposure or what-have-you. So, for that reason, for a limited time, we have certain rights reserved, exclusive rights over our work, and we depend on those rights in order to support ourselves in order to be able to create the new works that we want to create.

The challenge is that copyright law has borders. That's one of the biggest challenges. It's an international marketplace. There are no borders in the licensing of visual works. I can't speak for other forms
of work, but I expect it's quite similar. In the visual arts, it's a global marketplace. Somebody from Japan or France or Italy is just as likely to license my work as somebody in the United States. There are different laws in the various countries. The European Union is struggling in its attempt to harmonize copyright laws and protections across the European Union, and the UK is leaving the EU. You know, the UK is a thought leader on intellectual property and they're in the process of leaving the European Union. But they did all sorts of work ahead of time to take the European Union forward, and now they have that happening.
So, with these borders in copyright law, and without any borders in copyright licensing, or the use of visual works, there is a challenge -- different languages, different laws, different business practices. I'm the president of a nonprofit, of which Nancy [Wolff] is the general counsel -- thank you, Nancy, for being so supportive for many years -- called the PLUS Coalition, P-L-U-S. It's a nonprofit organization with 156 countries worth of creators and users, and the cultural heritage side all cooperating to create a global language for the licensing of image rights. I won't get into the details here, but you can see more at plus.org, P-L-U-
S.org. And I'll just cut to some of the main challenges, two of the main challenges that people face when they're seeking visual work or they're offering visual work for use are public domain and fair use.

From the average citizen's perspective, when they're looking at a photograph or some other creative work and making a decision whether they're going to use it or not, they just think, is this use fair? They don't think about the four prongs of fair use. They don't think about anything else other than whether it seems fair for them to make use of the work. And, again, here you have international issues. You have fair use here, you
have fair dealing overseas, different prongs, if any prongs at all, in other places.

So, it's extremely challenging. People believe that if they change an image a certain percent that it's instantly fair use regardless of any other factors or circumstances. They believe that if they simply credit the author, it's instantly fair. They believe that if an image is posted online it's automatically injected into the public domain. They believe if an image appears to be old because it pictures people from the early 1900s, that it's automatically in the public domain. That's not true, because even an image from the late 1800s can still
be within its copyright life today if it was not published until after 1978. And if it was published after that, the clock starts ticking, and it has to do with the death of the author or details that I won't need to get into at this moment. But an image of a farmer pulling a wagon in the very late 1800s could still be under copyright protection today, and people will make all sorts of mistakes when they are making that decision. And I think that with symposiums like this and with public discussion and public education efforts, we can go a long way toward helping citizens and creators better understand their rights.

**MS. AISTARS:** Thanks, Jeff.
And Professor Mtima, I will turn to you and ask you the same question. Introduce yourself by way of answering what shapes your perspective on copyright issues and comment on what you think are some of the main issues regarding creativity and rights and permissions and fair use, and how you think we as a community of artists and academics and advocates can positively contribute to addressing some of these issues.

MR. MTIMA: Thanks, Sandra. I'm also very happy to be here. I cheated; I wanted Jeff to go first because I knew he'd cover the landscape. Because, in addition to being very much aware of the
professional and legal aspects of this, you're a professional artist, right, and so it's a perfect combination of what the balanced perspective ought to be. And it's about balanced perspectives that is really at the core of my work both in the policy and activism space as indicated by being the founder and director of the Institute for Intellectual Property and Social Justice, and I'll speak mainly about that sort of work. But, like Jeff, I also wear another hat and that's where the professor title comes from. I'm on the full-time faculty at the Howard University School of Law, and I direct the Howard intellectual property program there as well. So
much of this also spills into both of
the courses that I teach as well as the
scholarship that I write. And the
overarching perspective of that work is
in the realm of the theory that we have
identified as intellectual property
social justice.

Basically that’s what its all
about, it really is. Some folk look at
IP law, or look at the social justice
obligations of the law, as more of a
redistribution of the benefits of the
law and the revenues to other parties,
other groups, people who have been
underserved for many, many years. But
we in the field, we look at it more so
as IP restoration. In other words,
getting the law back to what the law
was originally all about, which is a lot of what Jeff was talking about. Because when you think about it, when it comes to creativity and it comes to innovation, human beings have been engaged in those types of activities long before we had law, right? People didn't need law as an incentive to engage in cave paintings or to invent the wheel. But what happens is that there is a distinction between what I call, the nonsecular incentive to create and the secular incentive to create, in addition to the fact that you were just inspired to express yourself and to share your thoughts. Obviously, if you wanted to do that on a full-time basis, as Jeff pointed out,
well, you also need to make a living.

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

With the introduction of mass distribution technology, which sounds like a really intimidating phrase, but at that stage in the world, we're
talking about the simple printing press, right? Because the printing press is simply a mass distribution technology, a way in which you can take a story and relay it to the public rather than the story being embodied in the author and the only people the author can share her work with are those people who are right in front of her. With the printing press, you can fix your work, you can produce multiple copies, you can engage in mass production and mass distribution. It sounds like a really good thing for everybody. It sounds like a win-win, right? I get my work out to more people; more people have been exposed to my wonderful ideas, etc. But there
is also a potential downside, right? Because once that artist fixes her work, once she writes it down and hands it over to the printer, there is also the possibility that she will lose control over her work. She’s not the one running the printing press, so she doesn't necessarily control how many copies are produced. She doesn't get to control where those copies go. She's not sitting there determining who may be making changes to those copies, and giving her credit or not giving her credit. In addition, she's not necessarily in control of how much revenue comes from those copies and where that revenue goes. And so that's really where
Copyright law comes in. Copyright law encourages, enables and facilitates a creator to engage in the distribution process. Yes, you can go ahead and fix your work in material copies; you can authorize and support the mass distribution of those copies; but because of copyright law, you're not going to lose complete control over your work. You get to say who legitimately makes those copies; you get to control what people can do with those copies in terms of whether or not someone can give you attribution and not give you attribution, or change it up in different ways and still keep your name on it, or not keep your name on it. And you also, obviously, have a
say in making certain that you receive a portion of the revenue from those copies.

The problem in our society, and this is where the theories of IP social justice come in, is that when it comes to mass distribution, you interject a third party into the artist-audience relationship. When it's just you, you stand up, you give your poem or you do your rap, or whatever it is, and the audience gives you feedback. But when you engage in mass distribution, well, now you need a distributor, be it a publisher for written works, a recording studio or recording company for musical works, and that entity is inserted in the
pipeline. And basically what's happened in our society is that gradually what you have is you've got the artist, you've got the audience, and now you've got this distributor in between, who is making certain that the work goes out to a wide variety of people. Gradually what happens is that the publisher, the distributor sort of grows in ascendance. And instead of just being in the middle, the distributor begins to dominate downward to the artist and to the audience what was going to happen. In other words, we're only going to produce the work that we think is commercially viable, right? And by commercially viable, we also mean what we think is going to be
commercially profitable at the level of profit that we're most interested in. So, you may want to write books and poems and stories and histories that there are certain segments of the community, of society that you are interested in. And maybe it might be profitable, but it may not be as profitable, as other types of works, things that, as a publisher, I think are more commercial. And as a result, I'm not going to support your work, right? I'm going to dictate to you that if you want me to publish it, well, you know, we need another story about the Kardashians. What we don't need is some sort of history or political analysis of what happened to
Native Americans 200 years ago, because that's not going to sell quite as well. And, of course, in addition, you have the publisher dictating down to the public what you're going to receive, right? Because if nothing gets published, if certain music doesn't get recorded, well, then, the public really doesn't have access to it.

One of my favorite stories along these lines is that today virtually everybody, whether you were into R&B back in the '60s and '70s or not, or if you were not even born back then, which is the case for me -- no, I obviously was around; the gray is the telltale. But Marvin Gaye is widely regarded. His "What's Going On" album
is thought of as one of the most influential pieces of modern pop music. And Marvin Gaye actually had to battle with Barry Gordy to get that music recorded and distributed. Because if you look at what Motown was producing up until that point in time, very good music, very commercial, very pop, but not a lot of commentary, not a lot of political statement, right? So that's an aspect of, hey, the creator wants to do it, the audience wants to receive it, and the audience in our society as a whole will benefit from that type of production. But if it's not perceived as sufficiently commercial by the distributor in the middle, then you end up with copyright not really doing what
it's supposed to be doing. Not really promoting and advancing culture and expression and education in the way in which it ought to.

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

In addition, it also enables this sort of twisted application,
implementation of copyright law. It allows for the middle entities to exploit certain communities. I mean, I don't even have to waste time going into a lengthy history. For example, the entertainment industry and the way it has exploited all artists, all starving artists. But, of course, there is also a particular notable history in terms of the recording industry and the entertainment -- the African American community, right? This twisted perspective, in addition to depriving artists, particularly artists from underserved communities, of the appropriate control and credit and financial benefit from their creative endeavor, it also
enables those entities to ignore certain other social utility needs and social justice needs of expressive endeavor. For example, there are communities that very much need access to histories, to books, to knowledge, to information, and if those communities don't have the resources, if their schools don't have the tax base, etc., in order to obtain the full range of material that is available, again, from what we call an IP or copyright commoditization perspective, well, that's not a problem for the copyright law, right? That's a problem for general welfare. Congress ought to pass a bill and give those communities some extra money, but it has nothing to
do with IP. But, of course, we know
that's not true, right?

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

To wrap it up and to bring it
more specific to some of the issues
that we're thinking about today, I
think that, unfortunately in recent years a way to push back against some of those copyright and other IP social justice deficiencies, there has been a great deal of work, and to some extent an over-emphasis in the area of fair use. Fair use is one of the most appropriate and best mechanisms that we have written into the copyright law to make certain that copyright functions overall the way in which it is supposed to function. But fair use is also not a substitute for all unauthorized uses of copyrighted material. Fair use, there are the specific factors and specific uses fall within that category, but then you have a whole range of uses that arguably fall in the
middle. In other words, we kind of find ourselves in a very polarized landscape for the use as well as commercial exploitation of expressive material. On the one hand you have corporate distribution entities saying pay my price, whatever that price is. I don't care what you need to use it for, I don't care how important it is or artistic it is; pay my price or you don't get to use it. And then you have other camps saying, well, you know what? Perhaps fair use means I can do it and I just don't got to pay, right? Obviously, there is a middle ground. Obviously, there are going to be times when you want to use work. It is not something that fits into fair
use, but -- and you do want to pay, right? And the problem is that, well, how do you go about doing it? Oftentimes, users as well as other artists, want to legitimately make use of someone else's work. And the first step is trying to find out, well, how do I even find out how do I get in touch with you. How do I negotiate with you? Do we have any parameters? Do we have any standards, you know, whatsoever? The corporate distributor, I think, has placed us in this polarized situation in which it's either pay this and only this, right? And for smaller artists who want their work to be utilized by other people, but they want their fair attribution,
they want credit. They also want a fair return. We don't have sufficient mechanisms and opportunities for that to happen. And I think that by bringing users and the public and creators together into symposia of this kind, that perhaps we can move the needle forward in trying to come up with ways in which to facilitate those types of uses such that you don't always have public versus creator, and actually you have work moving up in a way that is more beneficial to society as a whole.

**MS. AISTARS:** Thanks. And I'm definitely going to want to explore some of that more when we discuss a little bit more, because I think that
there are some interesting things to drill down on there. Because I think some of the corporate folks who you refer to have really been replaced by different sorts of middlemen these days, and there are different corporations, but you see similar types of relationships developing. And I want to put a pin in it, but I think one thing that occurs to me that you might be saying, and think about this and tell me if I'm right or wrong, when we get through hearing from Nancy, is that there should be a focus, perhaps, on ensuring that individual creators have a better ability to retain their copyrights, and that they are in a better negotiating position in the
first place. And that people are more empowered in their relationships going into commercial transactions. And that they think about the contracts that they're entering into and don't just kind of blindly sign 360 deals that give away their rights so they can't later grant a permission that they would be prepared to grant. But, as I said, let's put a pin in it, and I would like to introduce my friend and colleague, Nancy Wolff. Nancy is the only active law partner on this panel today. She's also the president of the Copyright Society of the United States, which I urge all of you to join. It's a fantastic organization to get a lot of education and opportunity to talk
about issues like this and make connections with people who can assist on issues like this.

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

But, Nancy, if you could also tell us about your practice and the types of clients you represent. Because I'm always amazed when I go into Nancy's office in New York, the photography and art she has on her office walls from clients who she represented over the
years. And any time I mention an
interesting photography case she says,
"Oh, yeah, that's my client." "Yeah,
I'm working on that case," or I'm
reading about something in the New York
Times, you can bet that Nancy is
representing that photographer.

Nancy Wolff: I don't have a mic,
so I'll stand up here. When I was
young I dreamed of being the starving
artist, and my father wisely saw my
artistic ability and convinced me
somehow to be a lawyer. But I did, my
first year of practice, go to the Art
Students League and paint, and that was
evidence why I should be on this side
of things. But what it has given me is
really the appreciation of working with
creative people, and my practice is varied. I work with photographers, I work with artists and sculptors, but I also work with documentary filmmakers, publishers, creative designers. And what I actually see is that everyone in some ways is a user and creator. So, copyright has really become important to everybody. For some examples, I've represented long-time portrait artists such as Arnold Newman, and when you come in my office you'll see an amazing portrait of Picasso and O'Keefe and Kennedy. Then next to my desk I have the cover from Bob Dylan's "National Skyline" that Elliott Landy gave me. I've got a couple of Joyce Tennesons. And then I became known as the peeping
tom photographer, because I represented Arne Svenson, who took pictures of his neighbors. But if you see the pictures, they are actually stunning and they're not salacious at all, but describing them that way sold a lot of papers. And I worked with the artist who created Fearless Girl, and made sure she kept her copyright. So, you can see her down at Wall Street facing off the bull, which has also created a little bit of controversy. But I love the idea that we're talking about copyright from many different perspectives -- from the perspective of an artist, from the perspective of social justice, because that's what makes copyright so
interesting. It really is about ideas
and where these lines are and where
these borders are.

So, what I've put together is
sort of the practical side of things,
because as a lawyer you're supposed to
give answers to clients when they come
to see you. And often with copyright
for example fair use, it could be this
answer and, it could be that answer.

So, often you're really giving advice
based on risk and judgment, and the
types of questions you get all the
time, maybe as a lawyer would seem
quite obvious, but, really, the people
dealing with copyright all day and who
are in the trenches are not lawyers.

And even many lawyers and judges don't
really grasp the nuances of copyright. So, I was going to give a top 10 list, but I'm not sure I counted 10, so we're just going to call it the top questions I get all the time. Jeff has mentioned a few of them, but unfortunately sometimes one of the first questions I do get is, why do I need to clear rights? Why do I even need to license? I mean, there is just so much content out there that anyone can physically get. You can do an incredible image search just by going on Google Images, you can right click, drop, and you just have the image right there. So, what encourages people from going to the source for licensing or going through a representative? And
we'll get into some of these issues. But there are risks of just taking anything you want online. You don't know the source; you don't know if you're getting a copyright license. You're not getting any indemnity. I mean, particularly, maybe if you're an artist and you're doing a collage it's one thing; but if you're a company and don't want a lawsuit, there is some value from actually going to the artist, going to the licensing agent. What can come up later with online images, is you don't know anything about third-party clearances. And there are a lot of image recognition technology services out there that are starting to find unauthorized uses, and
a lot of people are getting quite surprised when they get a letter demanding to be paid for work that they just found online. So, we'll get into that a little later. And I always get these questions. There are all these sites that are free images. Well, if they're free that means they're free. Well, what it could mean is that it's user-generated content and someone has uploaded content that he or she does not own. So, I recently had a situation where a client of mine saw her recently deceased husband's most famous iconic photograph in a commercial ad trying to sell furniture. It was in the frame where you would put
something on a desk to look at a work of art. And the answer was, "Well, we got it from this website and it said it was an Irving Penn." I said, "Oh, that's even better; I'm sure he would have appreciated it." So, sometimes things that are free really don't mean you're going to the source, either.

And we've mentioned this question, it's public, so isn't it in the public domain? So, try to explain public domain, particularly under US law. If I don't go to Peter Hurtle's (ph) chart from Cornell Law School my mind goes crazy, because our laws before 1978 were quite different. Lots of requirements, a lot of works fell out of copyright and a lot of
formalities. This is just US. And so
it really isn't always a black-and-
white question, and how you find out if
something is in the public domain is
never an easy question to answer, and
that's often where, as a lawyer, you
sort of have to do a risk analysis with
clients.

Creative Commons, I can't
tell you how many times I get questions
about the Creative Commons license,
which is a way you can share any kind
of work. But there's many flavors of
the Creative Commons license. There's
one type, a CCO, which is similar to
public domain. There are some
attribution requirements. And there's
a lot of freedom with CC licenses, but
there's a lot of Creative Common licenses that you can't use for commercial use, or you can't make any changes to the content. A lot of variations I think are subtle and not everyone looks into it. And it's also possible that someone could put a creative license on work that isn't theirs. So, there always is a little bit of digging. The same thing with social media. Just because it's on somebody's particular Twitter account doesn't mean that Twitter owner is necessarily the creator.

And we touched on this. I'm often asked, you know, well, isn't it under international copyright law? And there really isn't one giant universe
where someone is sitting, adjudicating over international copyright law.

Every country -- well, not every country -- countries who have copyright laws enter into treaties with other countries, which has reciprocity. So, if I'm an American artist and my work is infringed in France, the French judiciary system will protect my work. If I'm a French artist and my work is infringed in America, the US courts will, if the work is protectable, protect that work. And that's how these relationships work. But there isn't one universal law. There are variations in term and, as Jeff used the word, harmonization. Nothing is quite harmonized and there is always a
lot of little, subtle differences.

That's why you have to have friends in many countries.

And this is my favorite. We do a lot of documentary film work in my office, and I'm the one who is always brought in, because you can get E&O insurance now, if you're a documentary filmmaker for fair use. And if you can't -- if you don't clear a few items, if you have a lawyer who actually knows copyright, is experienced and can determine whether particular uses are fair use, you can get a fair use letter and you can actually distribute your film so it won't be held up, because there is some material that does rely on the doctrine
of fair use, which is really important. There are many documentary films that just could not come out if there wasn't some ability to rely on fair use in the appropriate cases.

But it has become a verb, and often I find out that it's for -- I really don't want to pay a license, or I don't have the budget, so “can't I just fair use it?” It's not a verb. You really do need to analyze the context and to see if the use truly is transformative. And if you think judges have a hard time figuring it out, it's very difficult for someone trying to tell a story and believing that they really need certain clips or visual material to tell that story and
to explain to them the right way to do it, and when they need a license, and when the work really does fall under fair use.

The same thing is really with what's a derivative work under copyright? Not that easy sometimes to see the difference between fair use, which requires something to be transformative, and whether it's derivative. Because part of the definition of what a derivative work is is to modify, adapt or transform. So, again, copyright protection falls on a spectrum, and where is the end line? Where have you changed something so much that it's completely original? Or when is it derivative and the exclusive
right of the original creator requires you to obtain permission? And if you create a derivative, what do you own? You own the new part you added but not the underlying part.

And with the design community for so long, I would hear “if you change something 10%, you don't need permission.” Well, with fair use, there are no absolute guidelines that say you can take three words, you can take three notes, or something that's 50 words is not protected, or if you change something 10% is not protectable. But because fair use is so abstract and doesn't have defined boundaries, communities make up guidelines to make it easier, but often
a guideline hasn't been tested by court and you really need to look at the context and not rely on the fact that some university or some guideline had said, this amount of words should be okay, or this amount of change should be okay.

Graffiti murals. I think there was a time where it was assumed that graffiti artists didn’t want to be known, they are all just vandals, and they would never sue. And a lot of images of graffiti are seen in a lot of photographs. Also, you can't authentically document a community without showing building with graffiti. You cannot document Philadelphia, San Francisco, so many communities,
Brooklyn, without streets that show the real nature of the environment. And so at what point, should a mural artist prevent someone from illustrating a story about Brooklyn or Philadelphia and the culture if the author could not give some examples of the type of artwork that exists in the community?

Tattoo. Can tattoos be protected by copyright? Is it fixed?

Is your face the same thing as a canvas? And the answer is yes, your face is a canvas, your arm, your back, your shoulders. So, those questions were answered.

Releases. And then this. Any time I even start a discussion on copyright, I always end up in releases.
When do I need extra third-party permissions? You never can get away from those questions. And in the US, at least, the answer is generally -- that you need releases sometimes for people and sometimes for recognizable objects. And when do you need them and when don't you need them?

Often the question arises with anyone publishing a book, doing a documentary film or writing about something, such as a blog. And the answer is, well, is the use commercial or not? Well, what is a commercial use? Some Creative Common license are based on whether a use is commercial or not. And I believe they commissioned a white paper to determine what people
thought was commercial, and they spent about a million dollars and didn't really get an answer to that question. Where you don't need releases in the US is for editorial use. Well then, what is really editorial, particularly now, when so much is being shared on social media? Brands want to show pictures of people using their product. It's getting confusing and blurry. You know, the easy answers are illustrations for truthful stories and documentaries, news broadcasts, articles, books. There needs to be a relationship between the image and the content. You can't fake it. You can't call something editorial and have it really be editorial if it is
So, those are my top 10, 11, however many they are, of the issues that come to my desk every day. And I'll turn it back over to Sandra to lead the discussion further.

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

I think that fits well with some of the social justice issues Lateef was raising, and my thought that maybe an
answer to some of these problems that Lateef identifies is ensuring that artists retain their copyrights as much as possible. I think similar issues apply in the context of releases. And I guess my question to all of you would be how would you balance the interest of the artist or the corporate entity, whoever it may be in a given case, in wanting to have as many rights as possible so that it's easy to either give somebody permission to use a work later or use a work yourself in a way you didn’t initially anticipate, on the one hand. And then on the other, being respectful of the rights and interests of others in retaining their rights, whether it's an artist retaining his or
her copyright, or a model retaining his
or her right of publicity and being
able to reject a certain type of use or
get additional payment for a certain
type of use later on. How do you
strike that balance in advising your
clients, Nancy?

**MS. WOLFF:** Well, I think you
have to look at what you are initially
creating the work for. I mean, if
you're a photojournalist and you're out
on assignment and you're getting a lot
of great works, you're telling a story,
it's really not going to be very
convenient for you to have lots of
releases in your back pocket and say,
"Please sign this because I might want
to use this for commercial advertising
"in the future." I mean, that would just interfere with what you're doing. And I think that's where we really look in the US at where the First Amendment gives you greater latitude to create works which you could use in the future for a bundle of purposes that don't encroach on a quite separate right, which is the right of privacy and publicity and someone's identity and likeness. So, if something fits in that editorial box, you could still use it in the future if you're respectful of that line on whether the image is really promoting goods and services or it's continuing to tell a story and illustrate something that's informational, cultural, and relates to
the subject.

So, you might have a story

that you photographed for, you know, it
could have been at the time, you're
talking about the '60s, some of the
anti-war movements and the peace
demonstrations. And then now you want
to look at what's going on currently,
and you might want to republish some of
those works now and show a picture of a
march from the '60s versus some, maybe
Saturday at another women's march in
contrast. You could republish those
pictures you took from the '60s because
there is still a relationship, there is
still a story that is being told by
those photos. And you could publish
them in your own book of your work; you
could have exhibitions; and you can
sell them as fine art prints.

MS. AISTARS: So, that's a nice
try, Nancy, but you didn't answer my
question. Because what I want you to
answer is a much harder question, which
is, when you're advising a client who
is actually going out and getting
releases. So, you're advising an
advertising photographer. Let's say
Jeff comes to you. He wants you to get
him a great release because he doesn't
know what he's going to use the work
for in the future. But on the other
hand, Jeff is an artist, and artist
advocate, and wants to be respectful of
his model's rights, so what kind of
release are you going to advise him to
use with Lateef sitting next to him?

MS. WOLFF: Okay, so Jeff is going to take a great picture of Lateef, and Jeff wants to make the most money from this picture as he can. So, Jeff is going to want to talk to him about this wonderful world called stock photography, where you can use an image for anything you can think of. However, the respectful part is that it can't be used for anything defamatory, and it can't be used for anything that would be illegal. When you mass distribute images online, the problem is you don't have a conversation with your users, so the releases need to be very, very broad, because you are not going to know the context. So, how you
protect the model is that the agreement between the one who is going to license the photograph of Lateef in the future is going to have restrictions in it. And it's going to say that you can't use this for anything that's going to endorse a product. You can't use this for anything that is going to create his face into some kind of trademark. You can't use this for anything that would be defamatory, and you can't use it for anything that might be what is called a sensitive subject, that maybe it would look like he, you know, has a disease, has a little psychosis, or anything that might be uncomfortable or insulting to him, unless there is a big label that says, something like “this
is a model and it's used for illustrative purposes." Those types of restrictions will be in the agreement. So, that is a very broad use, and Lateef may say, "I don't know if I really want to see my face in a billboard." Then Jeff would have to have a conversation with him as to what he would be comfortable with. But once you do kind of a mass-market distribution, it's very hard to have a narrow release unless it's just limited to what would be editorial use, because there's going to be mistakes made.

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

MR. MTIMA: As Lateef, probably not, but that's just because
I'm a lawyer, right? I mean, a regular, ordinary, everyday person doesn't recognize that when you model for a photographer, there are at least three different types of intellectual property rights that are going to be implicated in that photograph. And then later on the issues are going to be, well, even though I've signed a release and even though we haven't specified this type or that type, or what-have-you, if we haven't gotten into that great level of detail, what's going to happen is that, okay, I signed the release that says you can take my picture, right? So, that pretty much is going to cover any of the copyright uses. But as you were indicating, it's
probably not going to cover trademark uses and it's probably not going to cover publicity right uses, right?

And so then what happens is that later on, if you're using the work in such a way that I find objectionable, what I'm going to have to do as a lawyer, okay, I already know to do this. But as a regular, everyday person who is an ordinary model, I'm going to have to go find a lawyer who will have to advise me that the release that you signed, it covered copyright expressive uses but it didn't cover trademark-type uses. And it didn't cover publicity-type uses, meaning the kinds of uses that you were describing in which my image is going to be used
to promote or to sell something, as opposed to just simply as an expression of, this is what this person looks like, or this is the context in which I'm photographing them.

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

**MR. SEDLIK:** Okay. So, I am an advertising photographer, but I also make fine artwork, I shoot editorially
for magazines. I shoot with the expectation of publishing my own photographs. And whenever I shoot I do so with the expectation that I can exploit, in a good way, my work, the fruits of my creative endeavor over the entire copyright life of the work -- my life plus 70 years at this time. And that means my family can also benefit, my heirs can benefit after my passing from my creative endeavors. But when I create my image I know that creating that image and fixing it, the objects and persons that appear in my work, there can be rights related to those as well. And when I'm shooting people, I want to make sure that I'm respectful of their rights. And their rights, you
know, copyright, there is a nexus between copyright law and right of publicity, right of privacy, and it's incredibly complex -- it's different in every state and it's different in every country.

So, the answer to one of your questions is, if I'm shooting an advertising job, I ask my client to bring their own release, and I have the model sign it. And I bring my own release that protects me, and I have the model sign it. And that way should something go wrong with the way that my client makes use of my work, I don't get called onto the hotplate. In almost every contract that a photographer might sign with a
publisher, with an advertising agency, with a design firm, there is an indemnification clause that says that I guarantee that should anything come up that I will indemnify my client from any liability with respect to the rights of anything that appears in my photograph. And there have been photographers, including some of my friends, who have lost everything by signing a contract like that without modifying the indemnification clause. One photographer was taking portraits of women for a pharmaceutical company and they signed a very detailed model release, each of them, but they did not see how it was going to be used. And in the end it was used
nationwide in advertisements for a medication for a certain venereal disease, and under every picture it said, "I have --" and then it had the name of the venereal disease, and just literally a headshot of the person. They all got calls from all their friends and everybody was embarrassed and they all sued the advertising agency and the pharmaceutical company, who then held up the indemnification clause that the photographer had signed and pointed them all back to the photographer, who ultimately had to pay out a very significant sum. His life was changed forever from not understanding that you need to actually read what you sign before you sign it
and modify it.

But to sum up, whenever I create a work, I know that my rights under copyright law can be limited by other people's rights under state law and laws in other countries, etc., so I'm very careful to make use of a release in my advertising work. I have a lengthy release. If I'm walking around the streets of Spain and taking portraits for a book project, I have a short release in Spanish, and it will say something like, “I can make use of the work for my own promotion or in a book, or/and in a book, and that I can modify it without talking with them.” But I know that I can't then take that and upload it to Getty images or a
stock agency and start selling it. And I wouldn’t feel comfortable in most circumstances doing that without having a release, or at least providing some form of compensation to the model.

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

MR. SEDLIK: I have a digital asset management system, and I have image numbers, model release numbers, and license numbers, and it’s all indexed together. And I have all of my releases going back through all the years ready, so that if I need to make use of any image, I know what rights I have to the image. And it is very important to understand that, as I
mentioned earlier, it's different in every state.

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

MS. AISTARS: No. So, I was basically trying to make a parallel, or make a comparison between, you know, how do you as a photographer deal with
your models --

**MR. SEDLIK:** Okay.

**MS. AISTARS:** -- and respect their rights versus, how a photographer might deal with a corporation who might be seeking lots of rights from the photographer and not to be hypocritical in either situation, essentially. If our advice to photographers or other artists might be, keep all your copyrights so that you can ensure that you can grant licenses to people who come to you later who want to use your work in other projects, or facilitate things that we think are socially beneficial, then you presumably have to get lots of rights from your models to be able to ensure that you can do that.
But that kind of puts you in a bad situation, right? Because then you have to act towards your models like we are telling you not to let the corporation act towards you. So, maybe Lateef wants to comment on that, because I think he raised it really in the social justice context.

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

**MS. AISTARS:** Sure.

**MR. MTIMA:** There are hybrid solutions. For example, when you take a photograph of somebody, a photographer, you never quite know if you're ever going to make use of that photograph, and you can have a type of release where you offer up to the model
a percentage of the revenue that you bring in. You know, as long as that's part of the release, you can do that, and I know many people do. I retained an attorney to help me draft such a release so that over time when a call comes in to make use of an image, I have a release in place and I send payment to the model as a percentage, and it's all covered. So, I didn't have to come up with some very significant amount at the outset, and I didn't know how the image would be used downstream.

**MS. AISTARS:** Great suggestion.

**MR. MTIMA:** Yeah. I think a lot of it comes down to the question of
There is the leverage issue vis-à-vis the photographer and the company that may be acquiring the photograph from you. Then, of course, there is the leverage relationship between you, the photographer, and if you have models, the model in the photograph. You know, as opposed to, for example, you could take a picture of a dog or a still life, or something like that.

On the artist to corporation side, the big problem is that typically the artist/photographer doesn't have a whole lot of leverage unless you are really very famous, etc. If you don't have a lot of leverage, and I don't know if photographers do this at all,
but something that I've been looking at recently is how about if the artist says to the corporate distributor, listen, I'm going to sign your what-have-you. There are some little, tiny, community-type folk not making a lot of money; if people like that come up to me, can I reserve the right to be able to just deal with those folk? We're talking about things that aren't going to make a whole lot of money anyway, maybe make no money, and then it gets into the messy, you know, First Amendment type of stuff. How about if you just let me deal with all that sort of stuff? I mean, it seems to me that in many big corporate cases, you're basically laying out to them, there's
an area of stuff that you don't want to
be bothered with anyway, and it's not
going to cut into your pocket; can I
just at least have the ability to deal
with those circumstances?

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

MR. SEDLIK: I think that
clients are hypersensitive to any
potential use by others of images that
have been licensed by them from
photographers or stock agencies. And
their brand image can be affected if
the image is used in a way that is
either competitive or derogatory. I
think that they're very concerned about
that. And that's one of the reasons,
along with reasons of competition and
liability, that almost every purchase
order or service agreement that comes
from that corporate client says two
things: (1), this will be a work made
for hire; and, (2) if it's not a work
made for hire, this will be an
assignment of copyright, and you agree
to execute an assignment of copyright
should we request.

MR. MTIMA: Yeah, so in those
cases they're just going to acquire the
entire work. How about in those
circumstances in which you already
created the work, you know, so it
couldn't be a work for hire, in
general, they're also --

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

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

MR. SEDLIK: No. In a stock
licensing scenario, it's commonplace
for the client not to acquire all the
rights, unless you have a situation
where Microsoft is buying the copyright
to an image, they're going to put it on
the desktop of the next release of Windows, they're going to probably acquire the copyright. But in other cases you have hundreds of thousands or millions of transactions with corporations who are licensing limited rights, and they know that others will be using them. And it's a calculated risk: do they go create their own image and acquire the copyright or do they license the rights either through what's called a rights managed license, where they can become aware of who else is using it, or through a royalty-free type license, where they really don't know who is using it and everybody's got a license to use it forever pretty much?
But I think I treat each client with respect and also use caution. So, I will include in the agreement special terms maybe that they have requested and also I'll negotiate with them to reserve certain rights for me to be able to use it perhaps in the manner that you're speaking about, where I can allow others to make use of it under a nonexclusive license.

MR. MTIMA: Right.

MR. SEDLIK: And that's actually quite common.

MR. MTIMA: And then when you get to the other piece of it that you were asking about, how does the artist deal with the model? Again, it seems to me that there is a leverage issue,
right? As the photographer, I mean, you're a decent guy, so you're probably not going to have a release that says I get to do whatever I want with it in any way, shape or form from now until the end of time. You probably use more judicious language. But I would imagine that there are still many creators out there who don't use judicious language, who just say, hey, I can do whatever I want with it, right? Six pages of boilerplate, a model just signs it, right? And then later on, even in the case that you described, in which the photograph comes up on an ad for venereal disease, the model has a great deal of difficulty objecting to that because
they signed a release that said, hey, you can use it in any way, shape or form. It seems to me that the only way you deal with that is that the artist has to -- what Sandra is suggesting -- impose upon herself the same level of social consciousness that they would like to see the corporation that they're dealing with, that they would like to impose upon that corporation. Because if they don't, I don't see what the model could do short of what Nancy and I were talking about, dipping into other pots of law.

MS. AISTARS: Then you're in that catch 22 situation. Everybody is being socially conscious and nobody can license anybody down the line for an
unanticipated use. But I think Jeff gave us the answer. Do an agreement on the front end that anticipates a royalty stream for future uses, and then everybody involved in that project can benefit. But sometimes that works, sometimes that doesn't, right?

Sometimes you still wouldn't, as a model, want to have your image used in the venereal disease instance, or as an artist you wouldn't want your image commercialized in an unanticipated way, whether it's editorial or not down the line. There's just certain uses that artists are going to say no, I just don't agree with this organization, I don't agree with this political party, I don't agree with this use period.
And it doesn't matter how much you pay me, I'm never going to agree and you're never going to use it and go away.

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

SPEAKER 1: Thanks very much.

So, my question goes to protecting, I guess, more the photographer, if you're doing an agreement with a company, corporate client, then it may also be a matter of leverage. But is it practical or is the solution limiting the use saying, yes, I'm licensing it for this campaign, or so forth, to avoid the unexpected, oh, we popped into this venereal disease campaign?
Is that something practical for the average photographer or graphic designer, or other, you know, creative?

MR. SEDLIK: I think both Nancy and I will reply to that. So, as photographers, I mean, we were talking about the possibility earlier of actually being a marketplace or a possibility in the marketplace for artists to support themselves and the challenges that artists have in attempting to do that. So, there's massive competition. Everybody is a photographer now. Everybody is uploading their images to Microstock sites. All the stock photography agencies, which are the middlepersons, have consolidated to a great degree so
that there is very large stock agencies
and then smaller players and really no
middle ground. And so our clients,
when they come to use to license, have
quite a bit of leverage. If you can't
pay your rent that month, you're likely
to accept copyright assignment, which
is sometimes called a buyout, or you
might accept work-for-hire terms for
commission work. And when I teach my
students at the Art Center about this,
I tell them that your success or
failure in business lies right there in
that moment of the client requesting
all of the rights and how do you
downsell them? I mean, it's the only
profession that I know of where you
downsell. Because the client has X
amount of money to spend and they want X amount of rights, and there is somebody behind me who will take half of my fee, and somebody behind them who will take half of their fee, and it goes all the way back to the person at the back of the line who will actually pay for the privilege of creating an ad, a photograph that will appear in that Nike campaign, or whatever. And so in that moment you have to be able to explain to the client that you will provide them with all the rights they need and attempt to work within their budget, but perhaps they don't need to own the copyright.

I ask them questions, for example, are you going to put this on
billboards in the Congo? Do you really need worldwide rights? And they'll say, well, we're really only going to use it in the United States and Canada. Okay, United States and Canada. Do you need to put it on every billboard in the United States and Canada? Well, no, not every billboard; probably a maximum of 100 billboards in each country. Okay, let's make it 200. And you begin to downsell the client, and you say, look, I'll give you a fee, a license fee, for purchasing my copyright, and I'll also give you a second license fee for the actual rights that you really need. And on top of that, I will give you pricing for every possible use that you might
have in the future. Just tell me how
you might use it and I'll give you
pricing and I'll guarantee that
pricing. Now, I'm not saying that is
the best business practice, but I'm
saying that that is, for many emerging
photographers and even photographers
who have been professionals for a long
time, a practice that helps the client
understand that you will not hold them
over the barrel in the future when they
want to make use of an image for
something that they didn't license.
That's why they're asking for all
rights is they've been held over the
barrel by other photographers. So, the
answer to your question is, yes you
attempt to negotiate certain rights
that are constrained for a certain fee,
with the fee being based on the scope
of rights.

**MS. WOLFF:** And I'll just
jump in. For the example you gave of
what we would call a sensitive use in
the industry, typically, if a
pharmaceutical company knew that they
needed images for a particular drug
that would have those connotations,
they should never, ever use stock.
They should never use a generic image.
They would do a photo shoot where
everyone knows the purpose and the
extent of the use, and then gets paid
accordingly. Stock is not intended for
those situations, that if you were the
person photographed, you would not want
to be in that picture for that type of use. And that's sort of what I would say to someone who just thought they could go to a Getty Images or a Shutterstock. And for a campaign like that, for an expensive drug they are coming out with, you know, buy an inexpensive, nonexclusive stock photo that's intended for uses that aren't going to embarrass the model. That's something that you organize, you hire a model who knows what's going on, you get a sensitive use release that would cover those kind of rights. And that's why, when you do go and acquire what's known as a broad rights or royalty free image from a number of these image aggregators, you actually need to read
the fine print. You need to read what you can do and what you can't do. And some of them really write it in plain English. You can do this, you can put them in ads, you can put them in books, you can put them in here, you can put them in templates, but you cannot do these other things. You might be able to go back and they could contact the model and say, hey, would you agree to this and they'll pay you more money? But that's not the place where you cut corners and try to get an inexpensive generic picture because, frankly, you would be violating all the rules. And if you went to enforce the indemnity, I'm sure that whoever licensed you would say forget it, because you didn't
follow the do's and don'ts, and they were clear.

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

The other thing really good to get if your business is commercial photography, get errors and omissions insurance, because you're always going to have a case where maybe a model said
she was 21 and isn't. I mean, there's going to be cases that turn up. I have a whole host of cases I call the remorseful model, where they start out young and they agree to do stock, and then maybe they become, a real model, you know, and could get a Chanel job. All of a sudden, that's not my signature; I never agreed to do that; that wasn't me, and they try to get out of it. So, you do want to do like what Jeff does and really keep good track of everything.

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

SPEAKER 2: Thank you. How would you advise like a small, like startup production company in going
into negotiations regarding their
rights in protecting themselves
without, you know -- because they're
obviously going to be in a lower
bargaining position -- but how would
you advise them on how to approach
pricing in rights allocation?

MS. WOLFF: Well, you're
going to, unfortunately, to be faced
with a contract they're giving you and
not one you've made, particularly if
it's a large company. And a large
company will want to have enough rights
that they know a competitor is never
going to be using that image. So, it
will probably start out very, very
broad and want either work for hire or
exclusive rights. And sometimes you
even need to negotiate to be able to use it for your own self-promotion portfolio and personal use. And it's going to depend. If you're doing branding for a large company, you will have very little negotiating power, because they're going to want to own everything because it gets associated with their brand. And, yes, you probably could keep rights if you ever wanted to do a book on your work. It may be difficult to even get fine art use, particularly if there is some celebrity in that image, unless you're going to get extra permission as well. But if you're dealing with something that's not as brand-oriented and maybe it's more of a documentary, even though
it's commercial type shoot, and they don't have as big a budget and it really could -- they should be paying more, that could be part of your negotiation. The rights that you keep, they maybe get rights for two years and then it's not going to be relevant and you can get some rights back. And you can try to hold those rights that you know you could use in the future. And it will all depend. Are there models in it that would have a problem? Or are they beautifully scenic where you would have a lot of future use, so there is more than incentive to negotiate to have rights after a particular time. Magazines, in particular, will have a short embargo.
For example, I deal with the National Geographic photographers. There's an embargo for a period, but then they do get a lot of their rights back and there's a lot of negotiations about, you know, doing joint books or exhibitions. But they can do their own books and exhibitions and use these works after a period of time.

MS. AISTARS: Right. And I think what Jeff said is very important, talking it through with your client and making sure that they actually need the rights that they're asking for. And, also, not just that they need the rights, but that they are prepared to use them as best possible, especially if you're going to have a continuing
relationship with the client and if you have any sort of royalty relationship with them based on the deal that you sign. Because if they're not prepared to exploit those rights and you grant them to them, and there is somebody else who is prepared to exploit those rights better and you can get an additional income stream from those rights internationally, for instance, why are you granting them to somebody who neither needs them nor can exploit them well. I see that there is another question.

SPEAKER 3: I'm an art writer and I came to this symposium because I want to find out when is the right time to get a lawyer onboard? I don't know
if it's different for visual artists or for writers who want to start their own website, but when is a good time to bring a lawyer onboard?

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

**SPEAKER 3:** What could I need a lawyer for if I'm starting a website about art? I know that there's lawyers for the arts and, you know, something like that might be good. But I know you're talking about rights and the rights of a photographer, the models, and things like that. When should models and writers and artists, should they like immediately get a lawyer or should they wait until something happens?
MS. AISTARS: Well,
definitely don't wait until something
happens. That's my first piece of
advice. What I will suggest to you is
that we have a one-on-one speed
lawyering session set up from 5:00 to
7:00 this evening, and we'll have our
Arts and Entertainment Advocacy Clinic
students and lawyers present there.
And you should come and talk to us and
we can explore your issue in greater
depth, and also sign you up and get you
into the Washington Area Lawyers for
the Arts (WALA) stream to get advice
also from WALA lawyers. And that will
be the most efficient way, I think, to
deal with your question.

MR. MTIMA: And, actually, I
could give you a little bit of a
general threshold. As long as you are
sticking with your stuff and yourself,
in other words, if you write a poem and
that's the only thing you put up on the
website, you're not at the level at
which you're going to need any legal
advice, because it's you. It's
everything that you own, right? Now,
let's say you start the website and you
give other people the opportunity to
post their material. You're not going
to do anything but they're going to
post; now you really do need some legal
advice.

So, just like sort of a
practical threshold, as long as you're
only going to be using your words, your
art, your face, okay, you're probably
on safe ground. When you start to pull
in other people, other people as
models, other people's verbiage, other
people's images that you find on other
websites or photographs taken by other
people; the minute you begin
incorporating the endeavor of other
people, that's the point in which you
really begin to need to think about,
hey, wait a minute, I might need some
legal advice. But from there, I think
what Sandra said, at that point is very
apropos, because it's not just because
you're pulling in other people. You
may not need a lawyer at that point,
but that's the excellent point in time
to have that conversation that Sandra
is pointing out, to say, now, here are some particular things I'm about to do. These things involve other people and other people's endeavors, and then you get some more specific guidance.

**MS. WOLFF:** I'll be very fast, because I know there are probably other questions. The other thing is, if you have a website and you're going to allow users to post things, there may be even some books and online resources, but there are some things you should do if you're allowing user-generated content so you would never be liable for money damages if you file a registered agent form with the copyright office and have a copyright policy and have an email address, where
if someone thinks that a user posted
something that didn't belong to them,
that if you took it down, you wouldn't
be liable for money damages. So, once
you become a publisher and it's not
just you, it would be helpful for you,
even if you don't go right to a lawyer,
read some things and get a little bit
of advice to protect yourself. Because
I've been brought into cases with small
bloggers where I've had to come in and
train them, because they got hit with
copyright suits because they just had
sort of street knowledge of copyright.
Like, if you link back and you give
attribution and if you just have a
small image, and you're telling someone
else to go to your friend's blog,
that's all okay. These blog publishers have gotten in trouble just from having their own, copyright 101 from friends.

**MS. AISTARS:** Yeah, copyright 101 from friends, bad idea, unless your friends are copyright lawyers. So, we have like two minutes left, and I want to ask one quick question from all of you to sort of wrap things up, and that may also be something that I think the second panel may take up further, and that is whether there are any industry norms with respect to seeking or granting rights and permissions you think exist that fall into a gray area, where industry practice is to presume that permission is assumed to be granted. You mentioned use of your own
work in your portfolio even in a work
for hire setting in our prep session,
that was one thing, but maybe there are
others.

MS. WOLFF: There are, I
guess, gray areas. For example,
artists will, whether they're an
illustrator, fine artist, photographer,
will maintain a portfolio of their work
and they'll have it online. Wedding
photographers do. Do they have a model
release for every single image on their
portfolio? Probably not, particularly
if it's a photojournalist, you're not
going to have model releases. If
saying I took that work and this is in
my portfolio, is that really
commercial? There is really no good
concrete law on that, but the practice generally is, as an artist, you can show examples of your work and say you took them. Those are some kind of practices that turn up.

Different artists have different practices with respect to permission from people that appear in their pictures. So, you could be a street photographer and your whole idea is that you don't want someone to know that you took the picture, because then it's not a natural moment. In a way, yeah, like you're sort of stealing in some way something from them. It's their face, but you can do a book on street photography and you can sell fine art prints without technically
MS. AISTARS: Jeff or Lateef, do you want to comment on any nuance you've noticed?

MR. SEDLIK: Sure, I'll comment. So, what we're doing at the PLUS Coalition is trying to create a means by which anybody who encounters a visual artwork can learn more information about that artwork, such as what the copyright owner would or would not like people to use the image for, whether advanced specific permission is required. Maybe there's a Creative Commons license. Maybe the photographer or painter wants to be contacted and the license requested. For usages that fall into that gray
area, there are many artists who are very pleased to see everyone make use of their work. I mean, we all stand on the shoulders of artists who came before us in a certain way, and yet at the same time we need to be able to protect our rights and grant rights where we feel it's appropriate. And you don't need a registry of rights to support fair use, but at the same time it's great to have a registry of rights so that it eliminates much of that gray area.

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

**MR. MTIMA:** For scholarly stuff, generally speaking, universities will keep rights like patent rights
1 with stuff that you do, but they
generally will not keep copyrights.
So, if you're a student or a professor
or an administrator, generally
speaking, whatever you write, the IP
policies at most universities say we
don't own it, you own it. So, you
should do your stuff in that context is
where you get to keep it.

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

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1/27/2018

SANDRA TELLER
BEST PRACTICES IN RIGHTS CLEARANCE

SYMPOSIUM

Panel 2

Cosponsored by

The Arts and Entertainment Advocacy Clinic and

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Moderated by

Mickey Osterreicher

Thursday, January 18, 2018

3:15 p.m.

Antonin Scalia Law School

George Mason University
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Arlington, Virginia 22201

Reported by: KeVon Congo

APPAREANCES

Introduction

Prof. Sandra Aistars, Antonin Scalia Law School,
George Mason University

Moderator

Mickey Osterreicher, National Press Photographers

Panelists

Pieter Folkens, Graphic Artists
1 Guild
2 Sean Fitzgerald, North American Nature Photography Association
3
4 John Harrington, National Press Photographers Association
5
6 Peter Krogh, American Society of Media Photographers
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8 Amanda Reynolds, Plume Photography
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MS. AISTARS: Welcome back, everybody. I personally learned a lot from the panel that just spoke, and I'm looking forward to the second panel equally. I will not make any long introductions. I will simply introduce my long-time friend, Mickey Osterreicher, who will be moderating the panel and ask him to get us started. I'm very pleased, though, that everyone on this panel is here. They are a fantastic and diverse group of artists, and I'll let Mickey do the honors. But thank you, Mickey, and thank you, panelists.

MR. OSTERREICHER: Thanks for having me, Sandra. So, my name is Mickey Osterreicher. I am the general
counsel of the National Press Photographers Association. Before I went to law school late in life, back in the '90s, I was a photojournalist in both print and broadcast for about 40 years. Again, following that same format, I'm going to let our panelists introduce themselves. Since we have a few more of them than the last panel, if you could just introduce yourselves and then we'll get into the substantive issues, that would be great. But just kind of to set an overview. When I give presentations on copyright, the first slide that I have up there is it's complicated, and truly it is just as you've seen from the brief panel and discussion that we had up there before.
But, you know, we can follow a couple of simple rules, and a lot of them are not in the copyright law. It's do unto others as you would have them do unto you, both as creators and users. Trying to develop best practices but best practices that take into consideration, again, both sides of the issue. I've heard the term character been described as doing the right thing even when nobody is looking. And that was a lot easier said than done. These days, pretty much everybody with the Internet is looking. So, if you think you can post something and nobody will ever find it, or actually have images up somewhere in another part of the world, don't be surprised if somebody
Tweets them and say, hey, I just saw such-and-such.

And then the last, you know, real gem is everything I ever learned I learned in kindergarten. And if you can kind of keep those things to put all of this into perspective, I think we're going to have a great discussion. So, I will start first with Sean Fitzgerald from the North American Nature Photography Society -- Association, I'm sorry.

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

**MR. OSTERREICHER:** If you can just introduce yourself, talk about your work, and I think I'd like to just go down the panel briefly and then
we'll get back to some questions. And, again, we want questions from the audience. Hopefully, we'll get some questions from the Internet, and we'd really like it to be a dialogue with everyone.

**MR. FITZGERALD:** Okay. I am kind of a weird mutt, I suppose. I am a reformed lawyer, is what I call myself. I practiced for 10 years, and somewhere along the way I kind of realized I had a little bit of a mismatch, that I had this side of my brain, I guess it's the right side that's creative, that was kind of, like, jingling. I didn't understand what was going on with me, because, I'm in this sort of left brain legal world
and somewhere along the line I realized
that once I picked up a camera and once
I went out into nature, which was my
passion at that point anyway, that
suddenly the skies parted and it's
like, okay, this is actually what I
want to do with my life. I want to go
out and take pictures that maybe tell a
story. I want to go out and find ways
to advocate a cause, to protect an
ecosystem, or to make art. In my world,
nature photography, we don't get much
credit to being an art form. It's
always just sort of this documentary,
like making furniture. It's not an
art, and I resent that and don't
believe that's the case.

Now, all those sort of
things, for me, are integral to who I am as a photographer. At the same time, I will be the first to say up here that I am probably the dumbest one on this panel. I am probably the one who has made the most mistakes, so if you want to understand best practices, I think you have to understand why people do some of the worst practices. And there is no area, I think, that confuses the average photographer -- the average photographer isn't working for National Geographic or Conde Nast and that sort of stuff. They're out there trying to support a family, taking pictures at weddings and hustling up their friends, and they may make $35,000 a year. They may be, like
in my area, where they are part-time now, because -- we'll talk about this later -- how this digital age has decimated nature photography as a profession. But, you know, we're out there struggling to make a dollar because the landscape has changed and we can no longer afford to go out and try to, in our little way, make the world a better place with our images.

And, so, when you look at that struggle and try to understand why they don't understand the copyright system and all of the issues like fair use, and they don't engage with it and they don't see any way to benefit from it. To have it be part of the solution to the problems they're experiencing as
professionals rather than just another irritant, which for most of us it's just like, oh, God, you know, I don't even want to deal with that, and move on. So, I figured I'd kind of give that as sort of a background.

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

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

MR. FOLKEN: I'm a large
whale disentangler for National Marine
Fisheries Service, West Coast Region,
and you can tell I'm dressed quite a
bit differently than everybody else up
here, so I think I'm in the wrong
meeting. I'm a biomedical illustrator
by trade, published natural science
subjects. I'm also a creature effects
designer for feature films. I imagine
most of you in the room have never
heard of me before, but a good chance
many of you have seen my work. It's
been in films like Star Trek IV: The
Voyage Home, the Free Willy series,
Flipper, the movie, White Squall, 18
feature films I've worked in and eight
documentaries, including an IMAX film
that came out about a year and a half
ago on humpback whales. I'm also a
former assistant professor of science
communication, division of natural
sciences at University of California,
where we created a humanities track for
scientists. They had trouble taking
your basic fine art classes and so we
created a humanities track for them
that focused on scientific illustration
and science communication to try to
make them better at getting their
message out. I've been at this since
probably mid-1970s. And because I
specialize in a particular type of
subject that is very popular in the
public, at the time when I first got
started, there was an immense amount of
interest in a subject for which there
was very little imagery. I'm a charter
member of the Society for Marine
Mammalogy and so I had access to a lot
of good reference material. I've
traveled the world, from Greenland to
Madagascar to get images of species in
the wild, and consequently I developed
a reputation for being very accurate in
my representations of the animals.
Also getting unique photographs in these exotic locations of rare species. Consequently, there was a lot of infringement on my work. There was a few years in there where it was happening at the rate of nine times a month that I actually became aware of, and I got the entire gamut of infringement, from the ignorant who said, oh, I didn't realize that it was not right to copy somebody else's images, all the way up to the nefarious, the fine artists that like to take the lazy route, where they would find the work from a nature photographer who spends weeks, if not months, and thousands of dollars to put themselves into a position to get the
perfect shot, and then you get these lazy nefarious fine artists grab that and simply trace it, and then come up with an apocryphal story of their wonderful insights into the subject, and then proceed to make millions of dollars selling reproductions.

I've also had to deal with the really big players, where -- I hate to use the term ethical problems, but it's probably the best word -- dealing with large operators, like the United Nations, FAO, Disney. Disney is a very interesting creature to deal with. That mouse is not very friendly. Even National Geographic, I had some very interesting experiences with Geographic. I worked on the remote
imaging team at Geographic, and we were
the first ones to get images of
humpback whales underwater by sneaking
up on them and putting a camera on
their back and swimming around and
catching their behaviors and so on.

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

Right now I have a case that
is in the Ninth Circuit, a copyright
infringement case, which is creating a
bit of a buzz because it attacks what appears to be a doctrine that is developing in the 9th Circuit called the "first expressed by nature" doctrine that came out of the Satava-Lowry 9th Circuit decision. The problem there is that with the reductive analysis in the 9th Circuit between the extrinsic and intrinsic test, what happens is the judge is given the opportunity to kick the case based strictly on the copyrightability of the subject matter, meaning the idea, with no opportunity to address the expression question, which is supposed to go to the trier of fact. And the problem is, we're now getting several decisions coming out of
district courts in the 9th Circuit that are taking that lazy route and kicking very valid copyright infringement cases on the basis that the subject matter is not copyrightable, which just that statement alone expresses a rank misunderstanding of what copyright is.

And what we're seeing happening is, I'm sure many of you are familiar with the Rogers v. Koons case in "String of Puppies," where Rogers had staged a situation with some dogs and Koons took the photograph and went to a foundry in Italy and said make a sculpture that looks like this and add a few flowers here, and so on and so forth. Koons lost the case. But another case that happened six, eight
years ago, I think, was Dyer v. Napier, in which Dyer spent several weeks capturing a very unique image of a mountain lion and cub, and published posters and cards of it, and Napier took one of those posters to a foundry in Arizona and said make up a sculpture that looks like this. And he lost in the 9th on the premise that mountain lions are first expressed in nature, therefore, he has no protection. And so that is a scary premise in the 9th Circuit. And I've been talking to Sean about it and he said how in the world can they come to that conclusion? And that's because of the way the 9th Circuit splits it between the intrinsic and the extrinsic and give the judge
the opportunity --

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

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

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

MR. FOLKENS: Okay.

MR. OSTERREICHER: But I want to just get through the introductions before we get into the substance, and I'm sure we could be here, and as we'll find out when we get to the end, for
days discussing this. But let me move
on to John Harrington, who is one of
our members of the National Press
Photographers Association. John?

MR. HARRINGTON: Hi. So, I'm
John Harrington. I've been making a
living taking pictures for almost 30
years. It's been my pleasure to be a
photojournalist, kind of a fly on the
wall in a number of different places
around the world, mostly based here in
Washington DC. I'm a proud, long-time
member of the NPPA. I'm past-president
of the White House News Photographers
Association. In fact, I was at the
White House this morning making some
pictures, trying to do something a
little different. And I will probably
be back there tomorrow for another assignment.

I also have the good fortune of having methodically over the last decade or two registered, I think last I checked, just shy of a million images with the copyright office. These are some of them, so don't infringe them if you see them. Well, actually, go ahead and do maybe, because I've got them registered. But I've also had the pleasure of traveling around the country, not just for NPPA, which I've done on a number of occasions, but also for the ASMP and the APA, and the Professional Photographers of America, also talking about copyright, trying to help photographers understand the
importance of registration, what it means, what it doesn't mean, and how they can leverage it to protect their work. And so I am a very fierce advocate for photographers. Oh, author, I almost forgot, the author of a book called *Best Business Practices for Photographers*, which has been out for about 10 years. And so that's my intro, I guess, in a nutshell.

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

**MR. KROGH:** Hi. Glad to be here and, as you can see here, I'm also a publisher. So, we'll start with the photographer. I have 35 years of
photography experience primarily for corporate advertising use. For the last 15 or so years it's primarily been focused on photographs of people who are the staff, executives and stakeholders of organizations. So, my work is not really all that relatable, or is not particularly appropriate for stock photography because it really is about the people who work for a company. I do have some small amount of images in stock photography, but primarily the use of my photography is by a business for business communications. The licensing that's attached to it and the relevance of copyright is slightly less than the relevance of contract law, because I
have an agreement with the company when I'm making these pictures, and they are primarily the ones who are going to be using those pictures.

In addition to being a photographer, I've been deeply involved with imaging technology in a bunch of different ways. I started as ASMP digital standards and practices chair right when we all started going digital. And the organization came to me and said can you help us figure out -- you know, can you lead this committee and help us figure out how we can adapt our business practices to the digital age? And that launched a career that has included publishing a whole bunch of books, and now creating
my own publishing company as part of that. And it's primarily centered around digital photography technology and where it's going. I spent a couple of years as a cloud services product designer for a company called PhotoShelter, helping to build cloud repositories for companies and institutions. And so I have a lot of experience there, which actually brings me in contact with both the commissioners of work as well as the creators of the work.

I'm very interested, and I don't know whether we'll get to it today, but I'm very interested in how the changes in technology are changing the effective use of copyright,
Instagram now being the largest holder of fully licensed, fully indemnified, fully paid images in the history of the world. What's that going to do? And also how does the independent creator survive in a world where our value is no longer pegged to the cost of ink, paper and diesel fuel?

MR. OSTERREICHER: Great.

And last but certainly not least,

Amanda Reynolds with Plume Photography.

MS. REYNOLDS: Hello. I moved to DC in 2004 on a one-year deferral from law school, and now I'm a wedding photographer. I think we started with the complicated. I did a quick stint on the Hill for about four years where I did policy and press, and
then I was a communications consultant for a public affairs firm, where the Copyright Alliance was one of my clients. And I went in-house for them for a year before I realized that there was just something else I needed to do with my life than communications. And being surrounded by all these amazing creators every day and telling their story, I decided to become a photographer with my eyes wide open to their struggles every day.

So, in 2014, I packed up all of my stuff and I moved to London and Paris for six months, and did what Sandra calls my midlife retirement. And I came home and I started working almost immediately as the official
photographer for the Library of Congress, because I'm the luckiest person in the world. And then I transitioned back into my own portraiture and wedding photography business, which is what I do now. And instead of having to respond to people's worst days on Capitol Hill, now I get to be there to document everyone's best days of their life. I'm primarily a fine art wedding and newborn photographer. And also slightly different than a few people on this panel, I actually shoot film. So, it's still in the digital world, but I shoot medium format film on a very old camera I had to buy on EBay from Japan.

MR. OSTERREICHER: Thank you.
So, we're going to delve into a lot of things, but I think we heard from the earlier panel and maybe a couple of references here, we've got legal issues, which are kind of defined as what you can do and what you can't do; then we have ethical issues, in terms of what you should do. And I think we're going to see a real mix of that as we go forward. And one of the complicating factors is that as creators, we create things, but we also use the works of others. One of the things that didn't really get touched on in the earlier panel was music, and the fact that lots of photographers put their images to music. And while they're very fiercely protective of
their IP rights in terms of their images, they don't often let that drift to whose music am I using and do I have a right to use that? So, kind of in that framework, who wants to take the first shot at what do you do in terms of when you need or want to use someone else's work, whether they are an image, music or something else? John, you raised your hand?

**MR. HARRINGTON:** Sure. It's been something that's been really troubling to me since kind of the invention of the slideshow. Soundslides was one of the early software applications that would let you put music to photos. And, boy, I used to see photographers using audio that was
like top 40 music all the time to sing to their songs, and I really got offended by it. And I actually had a number of conversations with people who, I basically said, you don't want someone to steal your work but you're stealing someone else's work. I know that you can't license that top 40 song because I've tried licensing top 40 songs before and it's just next to impossible. And I think that -- I mean, I can tell you that my resource that I go to for that kind of service is a company called Triple Scoop Music, but there are several other ones. Pump Audio is another one. I really like the way that Triple Scoop does it, and the fees and the costs that are
associated with it. But the key thing to do is to respect the work of others. If you don't respect someone else's work, then how can you possibly expect someone to respect yours? And I've seen it time and time again. When I see it, I try to call it out. A lot of times you'll see public performances of the work at a venue where they might have a venue license so that they actually have an ASCAP license to be able to use music in that. But generally speaking, if you hear a commercial or a very popular song accompanying a photographer's slides or photographs -- sorry, I'm going back to slides, Amanda, thinking about filming, you know, from back in the day -- the
thing is it's more than likely not licensed. And I think that we all have an obligation when it's someone who is a friend of ours, someone we know, as people in the industry, to say, look, you know, go for $60 or $75 or $100 to find a three-minute song that you actually have permission to use that for. But it's really a big problem and it's been around for at least 15 years.

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

**MS. REYNOLDS:** So, all of my film negatives are digital. They're digitally scanned in, so I can deliver everything digitally, and I do make a slideshow for my couples as a preview for them. And one of the biggest
things, when I was finding the slide software that I wanted to use was making sure that all of the music that they offered was licensed to be used for that purpose. And it made a big difference to me that there were a lot of companies that were going the extra mile. And the one that I wound up using, and I can't think of it off the top of my head, actually explained why they did that, which I thought was really nice, from someone whose friends used to call her the copyright police. So, yeah, there's a million opportunities out there to find a well-priced product that does some of that legwork for you, and I just don't see why people don't get it.
MR. OSTERREICHER: So, in getting these permissions, how about some personal stories either seeking permission, John talked a little bit about music, or in having somebody come to you when they're good enough to ask permission. Unfortunately, we find that the reason we're all here is that we find works that are up there where there was no permission sought, there was no credit given, and there is no compensation for the work that's being used. So, I'd like to try and keep this in terms of personalizing stories, maybe the worst case and best case you've had for somebody asking permission or not asking permission, and, Sean, I'll go back to you to begin
MR. FITZGERALD: You kind of get a breakdown, I think, between the sophisticated and the unsophisticated. And the unsophisticated, like we kind of touched on earlier, of sort of this post-digital, post-social media era have just wild ideas about what they can do and what images they can take. And I've had people -- I've had artists come up to me and tell me, "I love that image of yours so much that I painted it." And it's supposed to be a compliment and it ends up being sort of, like, okay, let's talk about this a little bit. And the thing is, you know, it's not like most of us who got images that you might want to paint,
they're going to charge you a billion dollars to do it, you know? A lot of it is just a matter of respect and controlling and knowing what's happening with our stuff. You know, that's as important as anything. In the old days, there used to be a little market where we -- in the analog days, if you can remember that, they used to have these little, you know, take a picture and it would come out on this little slide thing, and you put it in the projector. It's really crazy. And we would shoot lots and then we'd have some extras, you know. Like, take 10 pictures of an elk and only use one; the other ones were a little different and they're never going to see the
light of day. But artists need them to
do form studies, and that sort of
thing. And I would sell to them pretty
regularly. It was, what was it, like
50 bucks? It was very cheap.

MR. HARRINGTON: Or

reference.

MR. FITZGERALD: Or

reference.

MR. HARRINGTON: A 100 bucks,

50 --

MR. FITZGERALD: Yeah, 150,

100 bucks. But it was fair, because I
wasn't going to use that particular
pose. It was -- you know, something
might have been wrong with the picture,
and it was a very good symbiotic
relationship. Well, now with the
artist having the ability to go on the Internet and see all these pictures and just simply say, all right, that's what I'm going to do, let's start painting it, their canvas is next to the 30-inch monitor, it's really changed that dynamic tremendously. I can't remember the last time I got an artist reference request. It just doesn't happen so much anymore.

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

**MR. FITZGERALD:** Yeah.

**MR. OSTERREICHER:** Did that come along with some type of written agreement? I mean, a lot of people
think they possess the image,
therefore, they can do whatever they want with it. But was there in your mind or was there something formal about what could be done with that transparency that you were given or sold to a person?

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

MR. HARRINGTON: Worth the paper they printed it on.

MR. FITZGERALD: Yeah. I mean, that's how friends become enemies, when -- after that and they take it and do something with it and you didn't think it would. So, it would always be with kind of a
restrictive license that you may use this for this artwork, blah, blah, blah, so that someone then is not taking the image I shot and making photographic prints for it, which would much more directly compete against me, you know. And you can -- and if you're smart, you limit it to that and then it becomes, you know, a good commercial exchange. It becomes where it's fair for both of you. And now that's out of whack. You know, it's just digitally, you see it, you clip it, they're off to the races with art and you have to see, like Pieter was talking about, can you catch them or not?

MR. OSTERREICHER: Speaking of Pieter, do you have any stories to
relate?

**MR. FOLKENS:** Well, sitting up here when Sean made the comment about somebody painting one of his photographs and it's supposed to be a compliment, I could hear the smiles down the line here that I think it's happened to all of us. And I'm in kind of a different situation where I do a painting and then somebody copies the painting and thinks that by copying it they're trying to show some sort of homage to what I have done, when that's just an excuse for being lazy and not doing the research themselves. And so I second everything that Sean said, that is a very, very big problem. And I think that goes to
somewhat the difference between the ignorant, who does not understand that they're not supposed to copy somebody else's work. You know, whether they attribute it or what, you're just not supposed to do it. And then the other extreme, where they don't care because they know they can get away with it. And so I think there is a lot of energy out there where large publishers, large entities feel that there is no problem just copying the little artists out there that aren't heavily published because they know that those artists cannot afford to bring a copyright infringement suit against them. And so they just with impunity just copy the work.
MR. OSTERREICHER: The other Peter?

MR. KROGH: So, I have a more positive story. I occasionally will get musicians who see some of my work and they call me up and they say I'm self-producing an album and I'd like to put this picture on the cover. I had a guy call me and saw a picture I had done for Smithsonian magazine, and he said, you know, this just illustrates, this tapestry in this picture just really illustrates my music. And so what we did was, we came up with an agreement that as long as it was a self-published album -- I think it was 200 bucks, something like that, you know. So, if he was going to just make
the CD, print it himself and distribute it himself, I was very inclined to give him a good deal and work with him, and he sent me a copy of his music. And then we also put in the contract, should you place this with a major label and get a major distribution deal, then we must renegotiate. Sadly, he did not get a major distribution deal, but I felt good that I was able to help another artist who liked my work and for whom it resonated, and got a modest amount of money, and he felt good about it and I felt good about it.

MR. OSTERREICHER: Amanda?

MS. REYNOLDS: So, there are a lot of different people that go into making a wedding day look like it looks
and, guess what, they all want photos of what their work looks like. And so for me I would say the hardest part is sharing all the images of the photographer, which is expected, and sometimes demanded rather rudely and very quickly. I tell them don't take your time, but then they don't credit you, which is frustrating. To the extent that I've had large companies want to use my photos of a wedding that happened at their venue and not credit me in the marketing, it happens. Sometimes you get some of these outrageous releases that, what am I supposed to say to this Fortune 500 hotel chain? But that's what it comes down to. It's more sad that it's other
creatives not respecting the creative process.

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

**MS. REYNOLDS:** Yes, and that
is primarily how I get my business. It's just frustrating when there is no way for them to find me because no one credited me. So it's a bit of a tricky slope, but, yes, there is a definitely win-win when it all works and everybody follows the rule and does unto others.

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

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

MR. OSTERREICHER: So, we all kind of know that copyright vests when, at least here, an image is fixed. And even though you haven't registered yet, the copyright rests with the creator, except now we're back to it's
complicated -- except there are other situations where it doesn't necessarily do that, you know, work for hire, as we've heard talked about before. So, how do you deal with clients either that want to do something and add it as a work for hire, that sliding scale, or we'd like a transfer of copyright when they just really need a license. How do you educate users in terms of down-selling yourself, where you're trying to explain to them that they might be able to get away with less than they're asking for, which would save them money and not give up your rights? So, I'll start at the other end again with Amanda.

MS. REYNOLDS: Sure. So,
it's definitely the most talked about clause in my contract, other than the clause where they have to pay me, or pay me to eat. They do have to feed me during the wedding. But the IP clause in my contract is almost always discussed. I actually put it in the frequently asked questions of my pricing guide. They all say, well, we're paying you X thousands of dollars to take our wedding photos, they are photos of us, so why do you retain the copyright? And I explain to them that they're perfectly happy to and welcome to buy the copyright, and I give them a price tag and they say, nope, that's fine, you can keep it.

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

MR. KROGH: So, rather than trying to narrow things down, as Jeff was talking about, I actually like to include everything that the client needs. I really sort of approach it that way, like, what do you really
need? Because I don't want to get into a situation where somebody made an inadvertent mistake or just wasn't really thinking about what they were going to do with the picture and they're going to end up in hot water, or we're going to end up with me having to call and ask for payment that isn't budgeted, or potentially even get into a legal argument. And so I do like to include everything. Like, I'm doing something good for you, that's why you're paying me, and that's the value of getting a professional photographer to do this. And I think I'll leave it there and let it go down the line here. Maybe some different opinions?

MR. HARRINGTON: So, I see
far more than my fair share, I think, of work for hire, expectations out of contracts. A lot of times they'll show up in a purchase order after we've already executed a rights managed contract, which is specific, and that's kind of an easy solution, because you explain to them, and I've had countless times where I've explained to them it's not applicable; I need you to change the purchase order, and we solve that problem. One of the easiest ways to work around or to at least mitigate the damages of work for hire, and I use damage as kind of colloquially, is to specify that you are providing to that particular organization for that particular organization's sole use all
rights in perpetuity. And that means that they get to use it for what they want to do with it, but they don't get to turn around and sell it, and they don't get to turn around and preclude you from selling it to other people. That's kind of like a half step away from work for hire, because generally speaking, those clients are looking for the ability to use that photograph in any way they decide that they want to use it for in perpetuity without having to come back and pay you, as Jeff was outlining earlier. And so you can also provide a schedule to them of the different prices. Because, whereas, Jeff used the example of billboards in the Congo, I typically say billboards
in Russia, and it becomes kind of a joke and they go, well, of course not. Well, how about stuff in Europe? Then we start paring it down to used by your corporation for the perpetuity of copyright in the United States. All of a sudden we're not talking about work for hire anymore; we're talking about in the United States you can do with it what you want.

That's part of the negotiating process in explaining to them that, look, I'm trying to help you not pay for things that you don't need to pay for, and none of these pictures -- a lot of times, a lot of work I do, no model releases. So, I can't sell you a right I don't have. If I sell
you the right to use these pictures in advertising, then kind of indirectly I'm warranting that I've secured the rights for you to use them in advertising. And so by doing that I say, look, I'll give you all the rights for which no model release is required. That's another solution. It becomes a negotiation back-and-forth, but it is a bit of a dance in trying to dance around from work made for hire. Sometimes when I write contracts, the client has to see the words "work deemed to be work made for hire" in the contract or it's not signable. So, you say, okay, the language specifies that all performed under work made for hire will be deemed
to be work made for hire and an additional fee paid. And then since no additional fee was paid, work made for hire doesn't apply. It is -- it really does apply to your it's complicated. It is a very complicated way in which to negotiate.

MR. OSTERREICHER: And as we're hearing, we're not just talking about copyright law anymore; we're now talking about contract law, which has three elements -- offer, consideration and acceptance. And John has identified some of the back-and-forth offers and counteroffers until, you know, and what's the consent? And as the offers change, the consideration changes until you have a meeting of the
minds, and I think people need to be 

aware of that.

MR. HARRINGTON:

Consideration being a fancy word for 

money.

MR. OSTERREICHER: It could 

be something else.

MR. HARRINGTON: Sure, it 

could be.

MR. OSTERREICHER: It's 

usually money.

MR. HARRINGTON: Right. You 

get paid for doing this? That is how I 

pay my bills.

MR. FOLKENS: Up here I'm 

outnumbered. I'm an artist-illustrator 

and these guys are photographers. I 

think most of them are attorneys, too.
But Jeff brought up something in the earlier panel about why give away rights for something that the client has no intention or opportunity to use? Why do you want world rights if you're only publishing an English language edition for nudibranchs in San Francisco Bay kind of deal?

The problem that I've come across in this kind of notion is that they come to me very late in the process, where they have this wonderful budget for creating a website that has all of the marine mammals in the world. Or they're doing a book or an encyclopedia and they've paid the writers, they've paid the designers, they've even paid photographers, but
they realized they don't have images for that special unique animal that has never been seen alive and they want a live representation of it. And this has happened enough with me that I think it might be deliberate more than accidental, and I might be very gullible, but they show up on my doorstep saying we really like your work, we really want it to be a part of this publication because it's going to be the best, but we don't have any money to pay you.

MR. HARRINGTON:

Photographers hear that all the time, all the time.

MR. FOLKENS: Duke University pulled that on me when they wanted to
make a website that had all these marine mammals and everybody was well paid. They had a grant and they came to me for those special images and they said, ah, we don't have any money. And I said, tell you what, you go to the writer, you go to the web designer, and you go the administration and ask each one of them to give up 2% of their compensation so that I will get something for what I was doing. And not one of them was willing to give up 2% to get my images. And I said, well, if that's the kind of lack of respect you're going to show me, then I don't want to -- oh, but we respect you, you're the best in the world at what you do, and I said you've got a very
odd way of showing it.

MR. HARRINGTON: Cuba Gooding, Jr. said, "Show me the money."

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

MR. FITZGERALD: In my experience, you get a lot of opportunities to educate your client, I think. You know, they have these notions in their head but they don't really understand what the mean. They come to you thinking they need to have
a work for hire agreement when they just need a license that covers them. And oftentimes I find these all the time, is a chance to educate them a little bit about what it is they need in terms of the license. And also with that, what the value is of license terms that are broader than that, and that allows me oftentimes to use a software called fotoQuote, which has been around forever. It's pretty good, pretty good, and they do surveys on various uses. And so the uses are, you know, might be for X kind of use at this kind of a distribution, 1,000 to 2,000, 2,000 to 3,000 worldwide. Here's how it's going to run, quarter page, half page, full page; here's how
long it's going to run. We could go through all these examples that create added value from us as the licensor, the creators licensing the image that makes the image more valuable as a licensed image, right?

Well, when we get into these kind of discussions, I'll just take my fotoQuote, I'll show what the average-ish, you know, photo for this use that you're asking for is getting out there. It has a low range to a high range, and I'll screen cap it and send it to them, and then they go, oh, now I'm kind of understanding how unrealistic it is for me to be asking you to pay this much when the market really is this much. And now I understand that I don't need
all these broad license terms; I'm okay with less. And so it's very much a dance. You kind of go back and forth, and sometimes they're sophisticated and so it's a real swordfight by two equally matched, you know, negotiators. A lot of times I'm trying to get something fair and then they may or may not have any sense of what it is and you almost have to put your arm around them and educate them about why this is what we need; otherwise, I'm giving it away and then I can't go out and afford to take the next picture. It's a crazy process, to me, but it takes effort. It takes effort for photographers to understand what it is they need to do and have a good dialogue with the
potential buyer.

MR. OSTERREICHER: You've all talked about users that are unsophisticated and users that have a business model of infringing with what they believe is impunity. And then more recently and growing is fair use and the fact that whether you think it's an exception, the copyright or a doctrine, whatever that is, it's become a buzzword, where rather than somehow being an exception to copyright, it's now copyright is almost an exception to fair use. Can you talk a little bit, and whoever wants to take it first, about how that has affected you, the fair use stories you've received, or somebody quoting the term fair use? I
call it the FU defense usually just before they hang up. But at any rate,
go ahead, talk about that a little.

MR. FOLKENS: Don't get me started.

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

MR. FOLKENS: Well, this whole thing is happening in the 9th,
this notion of first expressed in nature, is the premise of fair use under the scenes a faire or merger doctrine in which, under scenes a faire, you can't take a picture of Notre Dame and then claim copyright to Notre Dame. In the case that we have,
we're using the argument that the iconic photograph of Ansel Adams of
"Moon and Half Dome," that in the 9th
Circuit right now there are no
derivative rights in that image because
Half Dome was a big rock first
expressed in nature, and the moon is
just a bigger rock farther away with no
consideration whatsoever for the
several days that Ansel put into
developing that picture and calculating
the exposure, knowing exactly when the
moon was going to be there and hiking
up to the base of El Cap to take the
picture.

When I was in college I used
to housesit for him and we talked about
copyright in the context of the 1970s.
And I was told by one of my attorneys,
one of the most valuable things I own
right now are those letters that went between Ansel and myself about those copyright issues. And this is one of the things that had come up, is that this whole effort that he put into capturing that image. And he contrasted the days that he took to capture that image. And then the one, "Moonrise over Hernandez, New Mexico," in which he saw it happening, he jumped out, took the picture immediately. And he says there was a huge contrast between capturing that immediate moment and then actually designing the picture that he wanted that would take a lot of effort.

And so that's an issue that is happening with wildlife
photographers and wildlife painters right now, is that simply because the subject matter may have been first expressed by nature, a term that came out in Satava, that suddenly you do not have derivative rights in that simply because of subject with no consideration for the expression. And that's a major concern of mine, although you've got some very nice photographs.

MR. OSTERREICHER: So, maybe before we get to the fair use since, Pieter, you brought it up, this whole idea of copyrightability. And if something is not copyrightable, then the courts don't have to get to any of the other considerations at that point.
MR. FOLKENS: Well, one of
the problems that we have is a lot of
the black letter case law was developed
using nonvisual imagery, like Feist is
something that everybody quotes in
copyright issues. I see a lot of heads
going like this, and that has nothing
to do with visual rights. And I was
talking with some people earlier today
about that issue, where actually Murray
in Baylor Law Review did an article
that merger and scenes a faire has no
place in visual rights, that those were
all concepts that were developed in
literary and music copyright, but not
in visual. That where I think we need
to get to is that in visual works, you
have to focus on the expression. But
where a photograph is intrinsically

copyrightable simply by the fact that

the photographer captured a moment in
time and had a choice of camera, lens,
developing, type of film and lighting,
and so on and so forth. That doesn't
work in the 9th Circuit anymore, simply
because what you took a photograph of,
the subject, is not copyrightable. And
I think it's a dangerous area right
now.

    MR. OSTERREICHER: I think

something that you mentioned while you
were talking is the difference between
Ansel Adams doing those two photographs
-- the one he had in his head, just
like an artist might paint something on
a canvas from what he has in his head,
versus I saw it, I jumped out, I captured it. And yet a lot of the same things, processes that went into this long thought-out one went into this instantaneous moment, but arguments would be made of, well, there is really no creativity there; all you did was push the button. So, how do you talk about that and counter it? All right, John, go ahead.

MR. FITZGERALD: Well, two points. One, with "Moonrise over Hernandez," which is Ansel Adams most sold image. He sold 300-something copies. It's the most he's ever sold of the originals, is my understanding. If you look at the original image, it's kind of a bleached out -- that's the
one I'm talking about, right,
"Moonrise?" It's sort of a daylight thing, you can barely see the moon, and the image is New Mexico, it's mountains in the background, the moon is in the sky, there's kind of a nice cloud, and there's an idyllic little New Mexican town with a cemetery, and then it's a long, perspective shot. Well, for one to print 300, that print evolved tremendously. And if you look at print 1, or the straight negative image versus the one that was in his head when he shot it and the one that took him his whole career in dodging and burning and, you know, playing in all the funky chemicals, and he's lucky he didn't have fingers growing out of his
elbows by the end of his career, it's a totally different image. It's the image that he had in his mind's eye. And so not to disagree with you here, but it wasn't the snapshot that he did; it was just the first part of the creative process for him that took a lifetime of ability and vision and expertise to execute, and it took him 300 prints to get to the point where it was what he saw.

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

MR. FITZGERALD: Uh-huh.

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

MR. FITZGERALD: Yeah. So, the other point, and you asked about copyrightability. To me, and I wasn't sure if I could squeeze this in here on fair use, but it does get into fair
use, but it definitely gets into copyrightability, is that selfie, the monkey selfie. Have you seen the monkey selfie? I mean, does that disturb you? I don't know if there is anything binding on it, but at the end of the day it was a ruling that the copyright office has an opinion that a monkey is not a copyrightable image because the monkey took the picture.

Well, okay. As a wildlife photographer and a nature photographer, it disturbs me for a couple reasons. One of them is that they are totally minimizing the artistic aspect of photography, that it takes planning and vision and hard work to even create these opportunities where you may have
a chance for that happenstance, for that serendipitous moment, which is what that was. The image itself, yeah, the monkey took its picture, right? The macaque took its own picture, and it could have been this or that way. And so everybody seemed to denigrate that in terms of the photographer's input. But at the end of the day, that was really an inspired, long-term thing that that photographer had to do. He had to go befriend -- he was following these troops as a conservation photographer trying to save these endangered macaques, spending years. He's living on nickels. He's not making money on
this. He's doing it out of a passion for a conservation project. It took him -- he had to hire a guide, get out there; he had to get those macaques used to him. I don't want to drone on on this, but it's just nuts to me. And finally he, holding the tripod, hands then the monkey the cable release to let them play with it, and yet the courts and a lot of people in the press, the copyright office, calls that the monkey taking the picture.

**MR. OSTERREICHER:** I'd like to get some audience feedback. I think the story got spun, as opposed to a nature photographer who possibly sets up blinds, and, yes, it's the animal that trips a remote or trips a sensor
and takes its own picture. But in this case it was that the camera was just laying around in the camp and the monkey happened to pick it up. It's kind of like if you put a typewriter in front of a monkey and he sits there going like this, eventually some words will form. I think that's part of that. How do you address that?

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

MR. HARRINGTON: I'll chime in while the mic's going. I will just say this is going to be a really big
problem because who is responsible for fixing it in the tangible form? If it's a camera trap, it's the animal, and that's going to be a big problem.

MR. FITZGERALD: That's the problem.

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

MS. WOLFF: There is no definition of author.

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

MS. WOLFF: So, there is no definition of authorship in the
Copyright Act. I do know the licensing representative for the photographer Slater, Slater?

MR. FITZGERALD: Yeah, it's Slater, yeah.

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

MR. FITZGERALD: Yep, he was bankrupt.

MS. WOLFF: Which was unfortunate. But I also didn't think that they didn't look at what human work made it possible that the camera was in that place and whether the lens was in a certain way so that when the camera took the picture that it would be clear, and also the editing and in some way the eye of the photographer to
pick the one that actually worked.

Even I get lucky sometimes and take a
good picture.

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

MR. FOLKENS: Maybe there's a
work for hire agreement between the
photographer and the monkey.

**MS. AISTARS:** Well, I was
actually going to comment on that
aspect a little bit, because you were
talking about Ansel Adams and how over
the years his development of the
negatives improved and the final image
was completely different than the
original image. But photographers
often work with assistants who do their
developing work for them and their
printing work for them. Ultimately,
somebody prints their images for the
estate after their death, so you don't
want to get to a situation where you're
suggesting that the person who does the
printing is ultimately the author of
the image, if they are two different people.

**MR. FOLKEN**S: Adams actually did that. On that image, Adams took the photograph and then did the dodging and burning on the exposure of the paper. The paper was actually developed by his lab assistant. And then he had somebody else that went into it and did the retouching to cover up all of the dust spots and scratches and stuff that ended up in the print. So, Ansel did have people in the process.

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

**SPEAKER 2:** As far as I know, I've been in touch with David Slater and read his accounts, and to my
knowledge the photo in question he actually did take. The monkey was in the, not *The Guardian* but, what is that terrible English newspaper?

**MR. KROGH:** The Mirror?

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

**MR. KROGH:** Daily Mail?

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

So he actually took that photo and as
much as any photographer has taken any photo. And that what happened was, he told a story to the Daily Mail about the monkey's grabbing his photographs, or his cameras and running around with them. And then that story got spun into the monkey selfie tale. And then, of course, the Internet got involved and stripped him of his copyrights without there being any discussion as to who took what photograph. And so the story is now kind of out there that the monkey took the photograph. But to my knowledge she actually didn't. So, adding that for what it's worth. In fact, the case that's nearly bankrupt to David Slater is in fact PETA's case alleging on behalf of the monkey, which
adds a whole layer of silliness to the entire process.

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

MR. FOLKENS: Yeah, just a little.

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

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

MR. FOLKENS: They should start from the beginning. They shouldn't start with our work and then
change it to make their own; they
should create their own from scratch,
is my feeling. I mean, there are other
marine mammal artists out there and if
they start with their own reference
material, if they put their own time
into being out in the wild and
capturing their images, and base their
work on their own images, I got no
problem. We're good friends, Larry
Foster and I, who illustrated one of
the National Geographic books was a
whale painter, and he and I exchanged
originals, we shared reference
material. We got some reference
material from the Smithsonian on a very
rare species, and his image ended up
looking a lot like mine, and I didn't
care because we're working from the same original out of copyright photograph from 1905, is what it was. And so we got along really well. But we know the people who then copied Larry's work and my work, and then claimed it as their own as being some expert in marine mammal morphology. That's when I get pissed off.

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

**MR. KROGH:** Well, I'll just say about the copyrightability. I think what we're about to hit right now with AI and CG stuff, it makes this argument about who owns the monkey picture like a tiny little speck of
dust given how transformative visual communication is about to be and how much of it is going to be created by multiple people in multiple devices. Plenty of automatic stuff, plenty of algorithmic stuff, and it's going to entirely change our understanding. I would say that there is an interesting imbalance between the ability of big companies to assert and leverage copyright and the individual creator. And I think that's part of the whole, what's making us uneasy up here or in general as individual creators is that the people who can actually do something about it are these big organizations, you know, Disney, and individual creators who do whale
paintings don't have the same ability to enforce or be powerful in that situation. And I think that's a huge issue, but this mess of how visual imagery is going to be created is going to overwhelm this entire argument, in my view.

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

MR. HARRINGTON: As a matter of fact there is.

MR. FOLKENS: So, watch this for 30 seconds and tell me if there are copyrights in this sculpture, or if they were used in a movie. On the lower left is the sculpture; in the upper right is the sculpture when it came out of the mold and we put actuators on the inside. And what you're seeing swimming around is the animatronic robot. So, the question is, if we choreographed the movement of that animal, is there copyright in that choreography if not in the original sculpture, or my interpretation of what a bottle-nosed dolphin is supposed to
look like?

MR. HARRINGTON: I would say that there are multiple copyrights there. There's the sculpture copyright, and then there is the choreography copyright, and there is the painting on the unsculpture. I mean, you could do the sculpture and then you could do the painting. And then you have the motion -- the capturing of it as a motion picture in this 42-second clip, there is another copyright. So, you have multiple copyrights in this particular situation. And any one of those are individually registerable and any one of those are also individually infringeable.
MR. KROGH: But not in the 9th Circuit. It's a collective board.

MR. OSTERREICHER: One of the things I'd really like to accomplish, which is kind of the goal of getting all of you up here, and we've got about 45 minutes left of our two hours, is on these subjects, but in particular, rights clearances. If you can provide some resources, some helpful ideas, some things that you have used on your own to try and get the rights that you need that address these issues, or what you've used to counter some of the fair use arguments possibly, things like that. So, I'm going to try and keep you focused on that through the last 45 minutes of the panel, if you wouldn't
mind. John, I'll start with you just because you've done a lot of work and a lot of writing in this area.

MR. HARRINGTON: Sure. So, rights clearances, there's a whole kind of cottage industry that characterizes it that way as almost a misnomer. Anyway, there are law firms whose sole and complete role and existence in the world is rights clearances. Typically and largely rights clearances are done and used in movies, because everything that's in the movie, from a branded T-shirt to a shape or a sculpture piece of art. I've had my work used in motion pictures before and I get phone calls from the rights clearances people for the film saying, look, your image
appears in the distance as art décor in this room; can we get permission to use that? And so sometimes that permission is, yeah, sure, no problem. Because it's such a small, almost out of focus part of a room, I may or may not charge a fee for that. But more often than not, if it's a predominant or primary presence in an image or if it's a full screen, I'm getting asked about rights clearance. And what's crazy is I'll get someone who will call me and I will use something like fotoQuote to identify the rate. I have great respect for Cradoc and the folks who produced fotoQuote and who constantly work on that as a resource for photographers to identify pricing.
What's crazy when you think about fotoQuote is a lot of people say, oh, gosh, the rates that are out in fotoQuote are too high; I couldn't possibly ask for that. And the reality is, that it's not only based upon surveys, but in many cases I would argue that some of those rates are actually too low. But when you have those prices and those rates and you can feedback to them and say what I would charge you for rights clearances for my photo to show on your screen in your documentary for 6 or 12 seconds is $750, then you get someone that pushback kind of what you said earlier, Pieter, about how, well, we don't have any money for that, or we only pay $50,
or everyone else we're using has paid $50 or $100. And it's like, I'm not even going to sit down at my computer and send you an invoice for $50.

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

**MR. HARRINGTON:** I also find that when I'm working on commercial work, I have to be really cognizant that even though -- like, for example,
head, that Burberry's, the pattern in that fabric, is actually a trademark pattern. I can't have a subject in a commercial shoot wearing that Burberry scarf unless I have clearance from Burberry. That is why you see in a lot of music videos and other documentaries that things will be blurred out, because someone hasn't gone through the rights clearance process through a law firm. Also, and a lot of people don't know this, there is also rights and clearances insurance. So, if you go through a rights clearance law firm and do your best to get clearances on all the various other copyrights that are in what you're doing, especially in a motion picture or complicated still
photo with lots of elements, you can get insurance that will, provided you've used a rights clearance firm, protect you or the user of the photograph if you are sued for an infringement of trademark or copyright. And so that's something that a lot of people are not aware of, and it's fairly inexpensive.

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

MS. REYNOLDS: Sure. So,
primarily I find that I get the most requests from the dressmaker or the dress store, the florist, obviously, and usually the planner, who styled and designed the event. I send everyone a vendor gallery with a license that explains what they're allowed to use the images for. I haven't really had too many examples of them not honoring that. I've never had anyone try to turn around and use my work commercially, which has been great, knock on wood. But whenever I've done editorial or style shoots, I've made sure to get model releases and I pass that along to -- but, again, we need the dress to get the shoot, so they loan you the dress with the expectation
that you will give them rights to use the images. So, there's a lot of understood agreements, but I like to get it all in writing.

MR. FOLKENS: Smart.

MR. KROGH: Yeah. My pet peeve here, since I'm speaking to a room full of lawyers, is the lazy lawyering that is related to those indemnification clauses. And Jeff's story notwithstanding, the idea that you put the photographer on the line between the person in the photograph, when it's somebody that you have set up, you know, a model or somebody from your company. And you make the photographer be the person who gets sued if the usage is objectionable to
that person is, to me, is -- it's more than unfair, but it's super-lazy lawyering because I don't think in many cases you're protecting yourself all that well. What you really need to do is make sure that the company representative actually gets a good model release so that indemnification against anything that results out of usage, I think, is a real problem.

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

**MR. HARRINGTON:** And I'll add to that. I can tell you that when I see the indemnification clause, as Pieter said, it's -- I'll indemnify you for the integrity of the work that I produced, and so they have this one-sided indemnification clause. And during the contract negotiation process, I will say to them, look, that's fine, but I need a parity indemnification clause in there that says that should you use the work outside of the scope of the license or that you will indemnify me in the event of litigation. Sometimes lawyers don't like to see a parity clause like that, they just want to be protected
themselves. But when you really try to explain it to them, look, I'll indemnify you for any mistakes I make, but you have to indemnify me if you do things with it that you're not supposed to. And more often than not, that conversation actually does work.

**MS. AISTARS:** Sean?

**MR. FITZGERALD:** You know, it's kind of a two-way street because, as a photographer I'll have people come to me or declare the rights to something, and then sometimes I have to do it, because I take pictures with copyrightable stuff in it as well, which gets into fair use issues, and I have to make those determinations. It's great when it's a nice, easy
process. I mean, it doesn't have to be an ordeal.

I had an image this past year, the one with the monarch butterflies, the dead ones being held in the hand. Barbara Streisand's right clearance company came to me, said they wanted to run it in her concert, I guess she did six shows, and then they wanted to have this behind her, and then also have the worldwide rights for Netflix, because it was on Netflix. And the thing was, it was like a 1-1/2-page request that they had, really narrowly tailored, and she ended up paying a very fair price. And it was one of those things where this can be done right. This can be, when it's not
a bunch of crazy boilerplate or unfair indemnity terms. If that was more a model of the best practices, then, gosh, it would be easier for all of us. At the same time, and I find this, too, they talk about our hypocrisy sometimes, where as creators we sometimes use others' music, we don't know what's good for the goose isn't good for the gander kind of thing. It's incumbent on us to go out and ask. I think as a creator, if there is a close call, I should go out and ask whoever it is. I'll give an example. Years ago I photographed at the Heidelberg Project. Anybody here from Detroit? Nobody knows? It's an amazing grass
roots street art project. I'm also involved with fostering murals and trying to support street artists, and have gotten into it, but that gets into it when you take pictures of that stuff, you know. And I've done, for example, murals of hundreds of street artists pulled together that have their own theme with all the images, but I refuse. Personally, I draw that line. I'm not going to sell those and make money off those. I'll sell those and contribute it back into street art on that one, because I thought it was pretty clearly fair use.

For others, like this Heidelberg Project, it's pictures of street art that helps keep this
neighborhood in Detroit functioning and
give kids a place to have outlets. I
just went to them and said, look, I got
these pictures. My conscience won't
let me sell them, particularly. I
don't feel right, even though I'm
probably good on fair use. Because
there's more stuff in the scene, you
know? You have the artwork and then
you have a lot of other elements, and
that's kind of on the line where it
could probably be for noncommercial
use, editorials, that kind of thing.
But I think it's probably fair, but I
didn't want to do that. So I ended up
doing a deal with them where, hey, I
want to sell these, I'll donate every
penny of profit back to the Heidelberg
Project, so you can keep this going, which gets into what we talked about consideration. Sometimes consideration is not cold cash; sometimes it's doing a thing for somebody you believe in. Sometimes it's having a real retribution back to you, having my name now associated with the Heidelberg Project. It's valuable to me as an artist.

There's all kinds of ways that this can work. But when it's just players out there just going, gosh, I think I can get away with this. I don't think this is fair use; I'm going to go ahead and take a picture and sell it. Or, I think I can take Pieter's dolphin and I can tweak it 11%, not
just 10%. But I'm going to tweak it
11% and I can use it. There are moral
and ethical issues in there, too. What
is your thought process when you decide
to do that? And I think that's
something that we, as creators should,
need to do some gut checks sometimes.

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

MR. FITZGERALD: Not
everything.

MR. HARRINGTON: But then the
thing --

MR. FITZGERALD: My costs
came back to me.

MR. HARRINGTON: But, see,

then, the thing is you then said but I
get a benefit by being associated with
the Heidelberg Project. And so you
actually did get a benefit that wasn't
monetary. In the same vein, there was
that issue with Shepard Fairey where
using the concept of transformation,
which was his argument, I didn't make
any money off of it, but Shepard Fairey
received an incredible amount of
notoriety from it. And so in talking
about fair use, the issue is the claim,
oh, this is fair use because it's
transformative and it was settled so we
don't have a definitive case from it.
But I think you've got to be careful
when you're making the suggestion that,
you know, my hands are clean because I
donated it.

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

MR. OSTERREICHER: So, I'd
like to get some tips from all of you
for people, once we put all this
together, to use as a resource. I
mean, one of the things, Amanda, that I
heard you say is on your website you've

got frequently asked questions, where

you actually want to use those to give

the answers to questions that you've

experienced, but also as a way of

putting it out there in kind of a

Question form for people to look at.

What kinds of things do you think are

important for you as a creator to have

out there for people to understand that

are going to be trying to contract with

you?

**MS. REYNOLDS:** So, for me,

since I didn't actually go to law

school, I find that using the plainest

terms possible always helps, and

understanding that if I just explain

very clearly why I expect the respect
of my copyright and of my works, it makes sense to people immediately, and 95% of the time, they do the right thing. So, I will say that explaining it from the get-go instead of coming at it from the backend. Just like we've all gotten the contract, we've gotten the purchase order that completely changed what you thought you were doing, like, no, that's not what we agreed to. So, I always try to make sure that before any work is done, any contract is signed, there is a very clear-cut understanding, and just a very plainspoken understanding of why it's important. And exposure doesn't pay my mortgage; exposure helps a lot. It helps me get clients, but it doesn't
pay my mortgage. When people are, like, well, you should just do this for free or you should let me use the image because it will be great exposure for you. Yes and no. It goes so far. So, I think just being as away from the legal jargon and into the plainspoken ability to make it make sense to your client has helped me a lot.

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

MS. REYNOLDS: I haven't had that exact situation happen. I agreed to do something for a certain price. I sent an official quote, it was accepted. Then they found out that they were expanding the scope of work and their corporate office had to get involved, and then I wound up having about 15 different calls with their corporate attorneys, because I was proposing to retain my copyright and they countered back that this is a work for hire. And there was apparently no budget wiggle room despite the expanded scope of work. So, it hasn't been a huge problem for me, but that's the only time it's happened and that was a
little bit of naïveté on my part as well as the initial person that I was working with.

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

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

MR. OSTERREICHER: So, it's like John said, he can't give away rights that he doesn't actually have;
you want to make sure you're dealing with a person that has the authority to say or do what it is you think you're agreeing to.

**MS. REYNOLDS:** Yeah.

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

**MS. REYNOLDS:** It is. And having been in a position where I've contracted photographers for an event, I can appreciate that, because I've been on sort of the PR and the marketing side of things, too, and I do
appreciate that the buck doesn't always stop with the marketing manager; sometimes it has to go a little further up the food chain.

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

MS. REYNOLDS: That's the wrong person.

MR. FOLKENS: Well, they thought that they were the right person.

MS. REYNOLDS: Yeah.

MR. FOLKENS: And then you finally get down to signing the contract and all of a sudden an attorney gets involved. I had this
situation with "Star Trek IV" on the 20th anniversary DVD. They wanted to have a "making of" video. And this goes back to the previous comment, too, where I had all these accumulated images of the making of the animatronics for that film. And so we had an agreement with the producer, an independent producer of that segment for the DVD, and so I gave them all the stuff. Then all of a sudden the contract comes down from the attorney and they wanted not only the stuff that was there, but also the outcuts and all the reference materials that were used, and all the rest of it. I can't give that up because I didn't take those pictures, and I don't have the rights
to give it to you, and it ended up not being in the DVD. They had to destroy a few hundred thousand DVDs because I would not agree to give up -- or, I asked for indemnity from it, going back to the previous question, and they wouldn't give it to me, and I said, okay, I'm not going to sign the contract. But that point is so impairment. You've got to know who writes the check and who has the authority to make the agreement.

MS. REYNOLDS: I also always opt to be there for a wedding, the couples contract with the venue, because sometimes the venue will have it, then, they get certain rights to images. Even though I'm not the one
signing that contract, there are
certain venues that even the exteriors
it's considered -- if you butter up on
their property -- in Washington DC, I
know a few. And there are a lot of
very naive photographers in the world
that think they can photograph anywhere
as long as it's outside because they
think it's fair use. But it's private
property and they don't understand that
their work is either not permitted or
they retain the right that it shows the
specific building, or at least they
think they can.

**MR. OSTERREICHER:** Peter, do
you have some tips for those of us who
like to learn to avoid some of these
pitfalls?
MR. KROGH: Sure. And actually avoiding pitfalls is exactly what I was going to talk about. If you're going to end up being an artist representative, God bless you. But if you're an attorney, you're probably thinking about going where the actual money is, which is on the other side of things. And I think it's extremely important and I believe it is growing in importance that there is an actual connectivity between the visual asset within a company and the actual agreement. And I've done a lot of work with companies in their asset management systems. And even places where the legal department has everything locked down and, you know,
oh, yes, we have every single contract we've ever signed, and there is zero connectivity between that and the actual images, and you're just asking for a huge amount of trouble. And as we are moving into a world where visual communication is more important, there is going to be more and more visual assets coming in from huge numbers of sources. Some will be work for hire, employee images straight off their phone; some will be acquired through stock photography, and some will be commissioned photography. It really is essential to be putting these things in place and to have very clear agreements. This is a problem we have with visual media that we do not have
with textual information, and very few corporate systems are set up to actually have a connected rights agreement in database form in some kind of programmatic way.

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

**MR. OSTERREICHER:** John, I'll ask you. I know the answer might be read my book, but if you could give us a few tips, we'd appreciate it.
MR. HARRINGTON: So, to talk to people who might be kind of working in Amanda's field with weddings, because I've done weddings from time to time over the many years. And a tip that you really need to be cognizant of is when the couple is signing your contract, typically six months or a year out, those are two individual people, they are not a couple. They can't contract on behalf of the other person. So, arguably, both the bride and the groom have to sign that contract, especially if they are giving you permission to use their likeness for your own marketing. A lot of times you'll have parents source the photographer, because they pay for the
photographer, the parents signs the contract. Well, that's a problem because the parent doesn't have the authority to sign away the rights to the inevitable brother-in-law, sister-in-law and their child. So, in a situation like that, one of my tips would be make sure that the people that are signing are the people that can give the rights. And when it's a corporate situation, one of the clauses that you can have in your contract right below the signature block for the client side is to say, you know, I hereby agree and I hereby acknowledge that I am authorized to engage in this, signed John Smith, so that you're making certain that that person is able
to sign on behalf of corporation X. A lot of times those are attorneys, which is why an attorney will get involved, because the attorney can execute that on behalf of the corporation. A line producer can't, and so you run into that kind of a problem.

A lot of times I'll start getting pushback from the intern or the associate assistant art buyer to the third degree, and I say, look, this might be an easier conversation if I just talk to counsel; it's a conversation I have all the time and we can talk about the language. You want me to do this project, I want to do this project, but, you know, there are a few things I need to explain. And
sometimes they hem and haw at it and
sometimes they go, oh, sure, well, I've
already been talking to my attorney,
it's John Smith; here's Mr. Smith's
direct dial or email, and we start a
dialogue. More often than not, that
solves the problem.

**MS. AISTARS:** Pieter?

**MR. FOLKENS:** Tips. I tend
to be the lost child in the wilderness
a lot, and I bump my head against the
big corporate lawyers and the big
contracts. I think as an artist I'm
fairly sophisticated in the copyright
law because of having to deal with
infringing. And so when we're talking
in the context of tips and things like
that, I just need to reiterate what was
said about talking to the people who have the authority and getting it done ahead of time.

Now, I had one experience with Disney, what was it, Fantasia 3, and I came down and did a teaching session for all of their digital animators, and you'll actually see my influence in the film, where they're animating the whales swimming around. And after it was all done, I get a 29-page contract from Disney saying that everything I ever did in marine mammal illustration now became the property of Disney. And so being a small player, you get the big corporations and unfortunately they take advantage of the little guy way too often. And so
there has to be a level of sophistication by the artist. I mean, in the art schools, San Francisco Academy of Art, they really need to have a business/copyright course section. Not to take anything away from the attorneys, but we need to increase the sophistication of the artist so that they can ask those questions and avoid those pitfalls. Because so many of them, the vast majority of them, they've got no idea about how to protect themselves or making the mistakes of when they were -- infringing other people's work. And so, I really don't have many tips, because all my experience is butting my head against a big nasty legal wall.
MR. HARRINGTON: But that makes three tried and true tips.

MR. FOLKENS: Yeah, find another profession.

MR. OSTERREICHER: Sean?

MR. FITZGERALD: I guess I'll give a tip for artists who may be incorporating others' work in their own. I kind of keep thinking about this, in kind of trying to bone up for this table a little bit, reading some fair use stuff is. I keep reminding myself -- it reminds me of the Pablo Picasso quote, where bad artists copy; great artists steal. And to some degree it sort of ties into what's going to make me angry if somebody does use my work. If you simply take what
I'm doing and copy it, like Pieter was talking about, just take my image, the situation I've worked my tail off for, I'm lucky to make any money on it. It's hard out there sometimes. And you copy it almost corner-to-corner, I'm going to be very disrespected and I'm going to be very angry, and if I can come after you, I probably will. Whereas, if bad artists copy, if you're a great artist, you steal, to me, I am not offended at all, if you look at my stuff and you get inspired by it. But you look at a hundred other artists' stuff and other photographers' stuff, and you incorporate that into yours so that what comes out of you becomes your own, then you tell me I'm so inspired
by you. If I can look at that and even
if there is some similarity, I'm like,
dude, that means a lot to me, because
I've helped. You know, part of our
duty is to help other artists. We
don't pull up the ladder; we pass it
on. And when we get into this sort of
society where, oh, we can just take
this, we tweak it 10% to 11%, in our
mind -- I know that's not the legal
standard, but that's kind of the
thought that's out there, then now it's
mine and I can run with it. That's
just messed up. And so my tip would be
for a lot of us, we've just got to look
inwards and say it doesn't have to be
this way. These are conscious choices
that people make and they do not need
MR. OSTERREICHER: So, we've been talking about rights clearances, but what about the situations where the rights weren't clear and you just said now I'm going to come after you. What has been your experience in trying to deal with copyright infringement itself? I mean, have you gone to court? Have you tried to negotiate settlements? And what have you found to be the best practice? You know, at the end of the day, even if you bring a lawsuit, most lawsuits settle. They don't usually go to a verdict, so how do you deal with that? We'll go back down this way. I'll start with you again, Sean.
MR. FITZGERALD: Oh, you know, for the most part for me it's been a matter of, all right, let's talk and knock on wood. I've not had the really intentional infringers who are doing something where I'm just determined to go after them. Because I'm a small businessman, and I've got to look at this as a business even at the end of the day, too. I can't do this out of vengeancy. And one of the things that I learned practicing law is that those people who can't let it go are the worst clients, because they won't settle for decent reasons, they're not rational. They're insane and it becomes a vendetta. And if I let that become me, then I as a
business owner have made a really dumb choice. And on top of that, the system is messed up. I mean, when it costs $10,000 to get a retainer, costs $350,000 or something, to take one of these things all the way through, going to federal court? You've got out-of-pocket expenses, which usually your attorney is going to make you pay, which is another thirty, forty, fifty. There's going to be depositions and all that stuff gets added in. It's just a bad business decision. So, I'd do anything I can to avoid that. I haven't had to go down that road, but I'm sure the guys down here obviously have traveled it more than I have.

MR. OSTERREICHER: Pieter,
what's been your experience, and then reflecting on that, what advise could you give to people who are possibly inclined, all right, we're going to court, I'm suing. Do you actually get your pound of flesh?

**MR. FOLKENS:** I thought Sean and I were getting to be really good friends until he described me as that client, you know, who couldn't let it go. Let's talk about the vast majority of the time. I find that if somebody infringes on the work or duplicates the work and didn't pay use fee for it, I just invoice them and maybe double the fee, because -- late payment, let's call it -- and send out an invoice and tell them I expect payment because you
used it. And, surprisingly, most of the time they go, oops, yeah, we'd better pay this. I have had to go to court only twice. It was the same guy over the same issue and the same image. And I am here speaking with you today on behalf of the Graphic Artists Guild because of my tenacity going after this guy. And so there's kind of an ego benefit for me that has nothing to do with what we're talking about today, but I really enjoy meeting new people and making new friends, and stuff like that. But I'm not sure that, to use your words, it's a good business decision. And this is why we put effort earlier in the day looking at
the small claims copyright solution. I think that is so immensely important for independent, small business artists and photographers to have a venue that doesn't require having to go the big dollar route, when you put your retirement at risk, and all the rest of it. When I was hunting for an attorney the first time around, one guy said that $0.5 million retainer and we'll take it. You know, and my total net worth was maybe 10% of that. And so when you're talking about tips and stuff like that, the thing that I've learned is there's a distinction between goodwill and badwill, and the vast majority of people out there, even the people who
infringe upon your copyrights, really
have goodwill. But it's those few guys
who just really piss you off and it's
tough to let it go.

And a quick little anecdote.

I had one guy who used like 16 or 17 of
my images in a promotional brochure for
a whale-watching company. And he heard
about my reputation after it was
published, and he went through a
tremendous amount of anxiety trying to
track me down because he didn't want me
to come after him because it was an
obvious infringement. And he looked up
my name and thought I was from Holland,
and so he had people searching all over
the Netherlands trying to find this
guy. And he finally tracked me down
and he was in his office with his attorney saying I'm really, really sorry, we got this thing, don't sue us; what can we do to settle? And right there, the message to me was, he had goodwill. And what we did was, we figured out what the use rights would have been, we doubled it, and it all became a donation for large whale disentangling. And so I didn't take any of it and it all went to a charity of my preference, and I was impressed by his goodwill.

On the other hand, the guy that I'm suing that's in the 9th Circuit right now showed no goodwill at all. Oh, I can count on one hand the total number of people I hate in the
world and still have room for prehensibility, and he and his attorneys populate the rest of the fingers, but enough about me.

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

    MR. FOLKENS: Look, I got to use the tools. They were special cutting tools and I got to use the tools.

    MR. HARRINGTON: Okay. I have to say, just as you said about Sean, you thought you were doing well with each other until he said something to you, I thought we were doing well together until you told me you just
invoice it and double it. Boy, I have
to say with all due respect, I think
that's probably one of the worst
practices you can engage in, because
your net worth at whatever it was, one-
tenth of the 500, probably could have
your own house in Tesla right now if
you had done that a little differently.

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

MR. HARRINGTON: I had a
horrible situation where I had a client
signed a contract and utilized the
images. They were an organization
regarding a memorial being built in
Washington, and it was for a group of
people really in the world that had
been disenfranchised. And they had
hired me for doing a bit work, so it's what Amanda and I have done together from time to time. And when the groundbreaking event occurred, they had published an entire book of my work, unbeknownst to me, and was completely out of scope. And when the woman who had hired me saw me looking at the book, I was in shock, but she asked me if I wanted to buy a copy of the book because it was a wonderful book and they truly set a few aside for me to buy, if I wanted to. Because the group had been so disenfranchised, I just let it go at that point. I was, like, I'm just not going to deal with this. This is my karmic contribution to the world. But then fortunately they came back to
me about three years later and asked to license my pictures for use in a video documentary they were doing about the memorial. I said, boy, I'm happy to do that but we need to really resolve this issue from a few years ago. And talking about the goodwill, I don't encounter a lot of intentional and willful infringers; I encounter people who exceeded the scope of the license or I really don't like the innocent infringer, quote, unquote, concept, where they go, well, I thought I could use it because it was on the Internet. Now, that's not really an innocent infringer; that's an ignorant infringer. But the person who made a good mistake and really wants to make
amends, in my situation, that was the case. They were very apologetic, didn't know, and we worked it out, and we worked it out fairly reasonably. I was happy and they were happy, and they got the extended licenses for the videos. But I encounter all the time people who are exceeding their license probably more than I encounter people who have outright stolen my work. So, my goal, even if I haven't worked with that client since that particular project, is to try to approach it from amicable standpoint. My goal is not to file a lawsuit and end up in court; it is to settle. But at the same time, I'm not going to settle for, well, we could have bought your photo for $100,
or a photo similar to this for $100;
we're not paying you $15,000 or
$27,000. No, I think you are, but
let's work that out and let me explain
to you why it is and why this is really
the case.

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

MR. OSTERREICHER: Peter?

MR. KROGH: Yeah. Primarily
the infringements that I've run into
are people exceeding a license, so they
are people who are my clients or were
my clients and I typically don't go
after them very hard. I have never
taken $100 use and asked for $27,000.

Maybe I'd be doing better if I did.

But, you know, a lot of it depends on this whole goodwill thing. And I will also say that I have run into very few, like, just total people of badwill.

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

**MR. KROGH:** But I had the same reaction as Sean, and I actually went and looked, and this guy is still infringing an image. And he was such a jerk. And he took one of my pictures, he's a moving company, kind of a fly-by-night in California. It's got my watermark on the whole thing. And somebody wrote me who was in a dispute
with him and said, by the way, did you know this person is using your picture?
And I called him up and I said you're not allowed to do this and I'm going to send you an invoice, and he said, you know what? I'm suing you.

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

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

I will say the other thing that happens to me a lot. The first time my book showed up on a darknet.
So, I published this book, it took me forever to write it, and it was published by O'Reilly, and I started getting all these notifications to download it for free. And I just absolutely flipped out. You know, I was on the phone with the O'Reilly attorneys and I'm like, get these people. And then it started happening; it was like every other day these things were happening. And finally the guy who was my publisher said, you know, there's these fetishists out there that, like, want every single book O'Reilly publishes. They don't even read it and you can drive yourself crazy, or you can just pass it along to our attorney and try not to worry about
it. Now that I'm my own publisher, this happens a lot. And I'll shame people publicly. Occasionally at a photographer forum, a guy was like, oh, yeah, anybody know where I can get a free download of Peter Krogh's book? And I went on the forum and I'm like, you know, I sell this and you're a photographer, and he was absolutely tail between his legs and just completely contrite at having done that. But, that's how I've approached it.

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

MS. REYNOLDS: Okay, sure. So, because I started this in 2014, I
went into it really with my eyes open knowing that Instagram, Pinterest and Facebook were going to be my main method of getting clients. And I knew from my previous job in my previous life that that meant my work was going to get passed around. It was going to get screenshoted. I could do everything to my website to prevent people from being able to right click and download, but I just had to sort of factor in a little bit of a loss and what was worth my time.

When I see my work being misrepresented, perhaps by another photographer saying that they took it so that they could get more clients, when it's populating their portfolio, I
certainly send them an email and just
say, hey, that's absolutely
unacceptable; you need to take down.
But at the same time, do I hope that
Martha Stewart is going to repost my
Instagram? Yes. So, it's a little bit
of a balance - I want the right people
in the right spaces to share my work
and acknowledge my work, but when other
people try to pass it off as their own,
or they profit off the unfair blog that
isn't to my personal liking, it's not
representing my work the way I want it
to, then I usually just send them a
note and let it go. I've said my piece
and I let it go.

MR. OSTERREICHER: On that
not, it's 5:15. We could probably, as
I noted at the beginning, go on for hours, but I hope you've gotten a lot of information. I appreciate the participation from the audience and I appreciate being asked to moderate, but I'd just like you all to help me thank our panelists for their contribution.

[Applause]

**MS. AISTARS:** Thank you, Mickey, and thank you to the panel. And thank you to those of you in the audience participating along with us. I am going to invite all of you to join us out in what we call the art gallery outside the auditorium. We have a wine and cheese tasting out there, and it is actually a tasting. We've got a variety of wines that we can compare.
Those who know me know that wine is my thing, so hopefully you won't be disappointed. It's not stuff from a box; it's stuff from a case, and that is brought to you by CPIP.

And, also, while this is going on and you're networking, we'll have two things set up out by where you came into register. One will be a table where you can go by and chat with the Arts and Entertainment Advocacy Clinic folks. I will be circulating around there, as well, to answer questions. Use this as your opportunity to ask the question you would otherwise ask your brother-in-law, the lawyer who is really a trust and estates guy and shouldn't be giving
you copyright advice. And if we can't, you know, answer it there, which typically is the case, because you probably won't have the documents we need, and so forth, to give you real legal advice, we'll help you formulate it in a way that we can get you real legal advice through Washington Area Lawyers for the Arts, and Washington Area Lawyers for the Arts will be sitting right next to us. And we'll put all the information in an intake form and help you sign up with them as well, if you are interested in doing so. So, thank you very much and please join us outside. [Applause]
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1/27/2018

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).
⁵ Id. at 11.
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.
12 Lee, supra note 8, at 221.
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

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.\textsuperscript{19} Broadcast television has relied principally upon advertisers to finance their content,\textsuperscript{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.\textsuperscript{21} In many instances, sponsors included their names in the show titles, making their involvement unmistakable.\textsuperscript{22} Even more often, sponsors would have their products visibly featured in show content.\textsuperscript{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.\textsuperscript{24}

Over time, however, these traditional forms of product placement lost their efficacy, as consumers became disillusioned with such blatant promotional messaging.\textsuperscript{25} Television producers were therefore compelled to alter their practice to accommodate the change in consumer taste.\textsuperscript{26} Simultaneously, several technological developments encouraged broadcasters to seek out new marketing opportunities.\textsuperscript{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.\textsuperscript{28} Marketers have therefore been forced to communicate more messages to an increasingly disparate audience while remaining within budgetary constraints.\textsuperscript{29} Product placement has provided a low-cost method of reaching audiences with the subtle marketing messages viewers prefer.\textsuperscript{30}

\textsuperscript{19}See generally Simon & Peter, \textit{supra} note 11, at 47.
\textsuperscript{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, \textit{Speaking of Soap Operas} 101 (1985).
\textsuperscript{21}Simon & Peter, \textit{supra} note 11, at 47.
\textsuperscript{22}Litwak, \textit{supra} note 3, at 8-9.
\textsuperscript{23}Lee, \textit{supra} note 8, at 207.
\textsuperscript{24}Harris, \textit{supra} note 6, at 311.
\textsuperscript{26}Berman, \textit{supra} note 9, at 501.
\textsuperscript{28}Zimbalist, \textit{supra} note 27.
\textsuperscript{29}Lee \textit{supra} note 8, at 208.
\textsuperscript{30}Litwak, \textit{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. After all, “product integration cannot . . . be fast forwarded, zapped or ignored.” 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. Indeed, entire networks exist to partner with brands and provide content focused on particular industries.

Although product placement has always been common in American television, marketers used to view film as a poor investment for advertising dollars. 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. 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. As a result, they began making concerted attempts to place their products in films, with hopes that such placement would translate to increased sales.

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. Consequently, product placement in film expanded as producers and marketers developed a symbiotic relationship. 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

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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.


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.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{45}

Product placement has therefore arisen in film and television in response to changing consumer tastes, evolving technology, and shifts in product financing.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{48} Thus James Bond wears an Omega watch and drives an Aston Martin,\textsuperscript{49} Carrie Bradshaw wears Manolo Blahnik,\textsuperscript{50} FedEx plays a prominent role in \textit{Castaway},\textsuperscript{51} and Ford is the car of choice in \textit{Are We There Yet?}, \textit{Alias}, \textit{24} and \textit{Die Another Day}.\textsuperscript{52}

\textsuperscript{43} Id. at 126, 135.
\textsuperscript{44} Id. at 127.
\textsuperscript{45} Id. at 129.
\textsuperscript{46} Id. at 126, 135.
\textsuperscript{47} Id. at 127.
\textsuperscript{48} Id. at 129.
\textsuperscript{49} Id. at 126, 135.
\textsuperscript{50} Id. at 127.
\textsuperscript{51} Id. at 129.
\textsuperscript{52} Id. at 126, 135.
\textsuperscript{53} Id. at 127.
\textsuperscript{54} Id. at 129.
\textsuperscript{55} Lee, supra note 8, at 204.
\textsuperscript{56} Samrawi Araia, \textit{Fight Or ‘Flight’: Testing Trademark iPower in Film}, LAW360, (December 17, 2012).
\textsuperscript{57} Tsai, supra note 25, at 291-92.
\textsuperscript{58} Riccard, supra note 33, at 428.
\textsuperscript{60} Mulcahy, supra note 33 at 46.
\textsuperscript{61} 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. 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.

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. 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. 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. Thus trademarks “brand” a company’s product or service and distinguish its offerings from those of competitors.

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. 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.

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

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.
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

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\(^62\) See id. at 699.
\(^63\) See Harris, supra note 6, at 310-11.
\(^66\) There is very little litigation regarding authorized use, as most disputes are settled out of court. See Litwak, supra note 3, at 10.
\(^69\) See Brookfield Cmms. v. West Coast Entm’t Corp., 174 F. 3d 1036, 1046 (9th Cir. 1999).
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. 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. 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. 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.

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. 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.” Thus “likelihood of confusion” appeared to be a supplement to the *Rogers* test, allowing courts to rely upon their own schematics to evaluate the risk of confusion stemming from a challenged use.

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. The plaintiff sportswear company had trademarked “No Fear” and sought to enjoin the studio from utilizing it as its title. In evaluating

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73 *Rogers*, 875 F.2d at 999.
74 *Id.* at 996-97.
75 *Id.* at 999.
76 *Id.*
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. 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. 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. 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. 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. 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.

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. 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 issues; 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).
87 Id. at *23-24, 35-36.
88 Id. at *50.
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.
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.
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. Likewise, unlike the substantiation requirement for commercial speech, wherein any claims asserted have to be demonstrably accurate, product placement conveys images, not information, and makes claims concerning values and lifestyles which cannot be substantiated in the traditional sense. Consequently, product placement blurs the line between entertainment and marketing. The practice, as a form of “advertainment,” 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. These questions reach the heart of contemporary concerns among consumer advocates who fear that product placement is a form of manipulative marketing. In theory, advertising communicates product information to consumers so that they can make rational choices, limiting the effect of advertising to commercial transactions. However, as previously observed, product placement does not make any material claims about a good or service.

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. This model of the consumer as a rational problem-solver does not reflect reality, as consumers are motivated by emotion, image, and values. 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. 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. 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.

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. 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. 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. 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.

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

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

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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.
128 Id. at 87.
129 Id. at 86.
placement occurred in part because consumers tired of traditional information-based, direct-sell advertising.\textsuperscript{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.\textsuperscript{131}

Hence, personal identity is negotiated based on one’s relationship to products and services.\textsuperscript{132} Because images have come to replace ideas, the marketplace has become one of “commercial symbols,”\textsuperscript{133} which consumers appropriate, and at times transform, as part of their own identity formation and communication.\textsuperscript{134} Trademarks are used as much, if not more, by consumers as they are by content producers to communicate values, personality, and identity.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{138} Such requirements ensure consumers have complete information as to the monetary incentives behind a particular product’s inclusion in content\textsuperscript{139} and therefore advance consumer autonomy.\textsuperscript{140}

\textsuperscript{130} Berman, \textit{supra} note 9, at 501.
\textsuperscript{131} Robbins, \textit{supra} note 2, at 624.
\textsuperscript{132} Collins & Skover, \textit{supra} note 59, at 716.
\textsuperscript{133} \textit{Id.} at 698.
\textsuperscript{134} See Newman, \textit{supra} note 7, at 376.
\textsuperscript{135} \textit{Id.} at 375-76.
\textsuperscript{136} See \textit{generally} Berman, \textit{supra} note 9, at 497.
\textsuperscript{137} Collins & Skover, \textit{supra} note 59, at 708.
\textsuperscript{138} Ong, \textit{supra} note 106, at 126.
\textsuperscript{139} Lee, \textit{supra} note 8, at 205.
\textsuperscript{140} Goodman, \textit{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.\textsuperscript{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.\textsuperscript{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 control\textsuperscript{143} 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,

\textsuperscript{141} Berman, supra note 9, at 522.
\textsuperscript{142} See Collins & Skover, supra note 59, at 734-35.
\textsuperscript{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.\textsuperscript{144} The one caveat with such use is that it not be misleading,\textsuperscript{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,\textsuperscript{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,\textsuperscript{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

\textsuperscript{144} Rogers v. Grimaldi, 875 F.2d 994, 999 (2nd Cir. 1989).
\textsuperscript{145} Id.
\textsuperscript{146} Ong, supra note 106, at 124.
\textsuperscript{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

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148 Lee, supra note 8, at 221.
149 Id. at 229-30.
151 Litwak, supra note 3, at 11.
152 Cosson & Mar, supra note 150, at 21.
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. 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. 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. Additionally, product placement enables the creation of content which would otherwise never be produced, increasing consumer choice and access. Consequently, consumers might accept product placement and other hidden marketing messages as a “trade-off for other benefits.”

Whereas regulation and prohibition might threaten autonomy, disclosure requirements enhance autonomy by informing consumers “when and by whom [they are] being persuaded.” 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. Product placement, and trademarks more generally, is part of social discourse concerning brand and personal identity. 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.” 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. Consumers contribute just as much, if not more, to the public discourse concerning brand identity and reputation, 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.
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, 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.

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. 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.

The standard should clearly articulate disclosure requirements and avoid the “hard sell” trap of discredited advertising from decades ago, 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. Placing disclosures before or after a program may not reach the intended audience, as many viewers do not watch opening and closing credits.

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.
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

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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.
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 cites.\(^5\) The first multi-


\(^{3}\) Id.


\(^{5}\) 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.
lateral agreements effecting the protection of cultural property were The Hague Conventions of 1899 and 1907.\(^6\) The Hague Convention of 1907 was in place and ratified by most of the European powers, but did not adequately prevent the destruction of cultural property during the First World War.\(^7\) Further, following World War I, the United States entered into an agreement with ten other American states, exclusively designed to protect cultural property during armed conflicts.\(^8\)

Prior to and during World War II, the Nazi Party confiscated historic treasures from Jewish families living throughout German-controlled territory.\(^9\) As the German army retreated at the end of the war, many of these pieces of art were intentionally destroyed or hidden.\(^10\) As the Allied armies advanced, General Dwight D. Eisenhower made concerted efforts to protect Europe’s cultural heritage.\(^11\) These efforts are best seen through the work of the Monuments, Fine Arts and Archives Teams, better known as the “Monuments Men.”\(^12\) Although these teams were largely successful in finding and returning cultural property to the countries of origin, many pieces could not be returned or were completely destroyed.\(^13\)

As a result of these atrocities, one of the first acts of the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) was the passage of The Hague Convention of 1954.\(^14\) This Convention, and subsequent treaties and agreements, aspired to create rules for the parties’ militaries to avoid harming, and, in some instances, to protect cultural

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\(^6\) Hague Convention II with Respect to the Laws and Customs of War on Land and its annex: Regulation Concerning the Laws and Customs of War on Land, July 29, 1803, 1 Bevans 247; Hague Convention IV, Declaration, Oct. 18, 1907, 1 Bevans 631.

\(^7\) SHERRY HUTT ET AL., CULTURAL PROPERTY LAW: A PRACTITIONER’S GUIDE TO THE MANAGEMENT, PROTECTION, AND PRESERVATION OF HERITAGE RESOURCES 191 (1st ed. 2004).


\(^13\) See generally Hatch, supra note 9.

\(^14\) HUTT, supra note 7, at 192.
property present during armed conflicts.\textsuperscript{15} Broadly speaking, these goals are echoed throughout all of the treaties discussed in this paper.\textsuperscript{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 20\textsuperscript{th} century and early 21\textsuperscript{st} century, many armed conflicts, particularly in the Middle East, involve the intentional destruction of cultural property.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{20} This note then looks at how responses to these themes have changed and evolved over time. Next, this note

\textsuperscript{15} Id. at 192–97.
\textsuperscript{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/.
\textsuperscript{18} Id.
\textsuperscript{19} ISIS is not party to any of the later mentioned international treaties; however, their actions have inspired widespread condemnation by the international community.
\textsuperscript{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 were 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 loosing 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. 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. 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

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

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)).


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. 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.”

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 while, 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.

Note that this definition specifically alludes to “moveable” property, an important category of cultural heritage not mentioned in previous international agreements. 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.” These terms differ from previous international understanding of cultural heritage, which were limited to vague terms such as “booty,” “pillage,” or “spoils.” 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.
In addition to the greatly expanded definitions of cultural property, the Hague Convention provides guidelines for military forces to follow.\textsuperscript{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.” \textsuperscript{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.\textsuperscript{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.\textsuperscript{36}

The remainder of the Convention establishes general guidelines for implementing these measures.\textsuperscript{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;\textsuperscript{38} and the transport of cultural heritage is permitted when military conflict threatens that property.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{43} For example, Chapter 2 Art. 6 restates the idea from the original Convention

\textsuperscript{33} FORREST, supra note 2, at 76.
\textsuperscript{34} Hague Convention, supra note 25, at KAV 11.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} See generally id.
\textsuperscript{38} Id.
\textsuperscript{39} Id. at 14-15.
\textsuperscript{40} Id. at 39.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{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.\textsuperscript{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 or protection for cultural property upon which the signing parties agree to.

\textbf{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{49}

\textsuperscript{44} Id. at 47-48.
\textsuperscript{46} See generally HUTT, supra note 7, at 193.
\textsuperscript{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.

\section*{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 \textit{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,

\begin{quote}
[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.\(^{55}\)
\end{quote}

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

\footnotesize
\begin{itemize}
\item \(^{50}\) See United Nations, \textit{supra} note 48.
\item \(^{51}\) \textit{Id.}
\item \(^{53}\) See FORREST, \textit{supra} note 2, at 196.
\item \(^{54}\) \textit{Id.}
\item \(^{55}\) \textit{Id.} at 197.
\item \(^{56}\) \textit{Id.}
\end{itemize}
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

57 HUTT, supra note 7, at 194-195.
58 See 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.
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.
69 Hoffman, supra note 47, at 165 (describing how the NSPA was originally enacted to help the federal government recover stolen vehicles).
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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{74} It represents “attempts to balance the competing goals of archeologists, anthropologists, academics, art collectors and museums, and relevant government agencies.”\textsuperscript{75} CPIA provides:

\begin{quote}[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.\textsuperscript{76}
\end{quote}

Note that unlike the NSPA, CPIA refers merely to forfeiture of the property, not to any form of criminal punishment.\textsuperscript{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.\textsuperscript{78} The purpose of this is to protect the legitimate interests of groups within the

\begin{flushleft}\textsuperscript{70} See HOFFMAN, supra note 47, at 165; see also 18 U.S.C. § 2314. \\
\textsuperscript{71} See 18 U.S.C. § 2314; HOFFMAN, supra note 47, at 165. \\
\textsuperscript{72} HUTT, supra, note 7, at 197. \\
\textsuperscript{73} Id. \\
\textsuperscript{74} HOFFMAN, supra note 47, at 160. \\
\textsuperscript{75} Id. \\
\textsuperscript{76} HUTT, supra note 7, at 199-99 (citing 18 U.S.C. § 545). \\
\textsuperscript{77} Id. at 199. \\
\textsuperscript{78} HOFFMAN, supra note 47, at 160.\end{flushleft}
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{91} Unfortunately, Afghanistan was not party to most international treaties specifically addressing the destruction of cultural property during armed conflict.\textsuperscript{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.”\textsuperscript{93} First, it is a well-established principle of international law that the protection of cultural heritage during armed

\textsuperscript{88} For instance, the United States is not a party to the Second Protocol of the Hague Convention.

\textsuperscript{89} See supra Part II.

\textsuperscript{90} FRANCESCO FRANCIONI & 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).

\textsuperscript{91} Id.

\textsuperscript{92} Id. at 34.

\textsuperscript{93} Id.
conflict is a high priority for all nations.\textsuperscript{94} Second, that there is a general “prohibition of acts of violence against cultural heritage in the event of armed conflicts.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{98} Additionally, the U.S. “recognizes cultural cleansing as a risk factor for impending crimes against humanity, genocide, and war crimes.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{101} Additionally, Russian President Vladimir Putin has pledged “material support for preservation and reconstruction

\textsuperscript{94} Id.
\textsuperscript{95} Id. at 35.
\textsuperscript{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).
\textsuperscript{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.
\textsuperscript{101} McKiridy, 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.
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.\textsuperscript{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.\textsuperscript{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.’”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{111} Additionally, there are concerns about preservation and conservation capabilities in Greece.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{107} MERRYMAN, supra note 16, at 99.

\textsuperscript{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).

\textsuperscript{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).


\textsuperscript{111} MERRYMAN, supra note 16, at 106.

\textsuperscript{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 NSPA\(^{114}\) 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.\textsuperscript{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 \textit{Peru v. Johnson}, the foreign legislation in question is just so much of a stretch that the Court cannot plausibly return cultural property.\textsuperscript{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 \textit{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.\textsuperscript{123} In that case, archeological pieces discovered at the Machaquila archeological site in Guatemala were smuggled by the defendants into the U.S.\textsuperscript{124} However, the defendants only acquired the pieces after they had been smuggled into Belize.\textsuperscript{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.\textsuperscript{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.\textsuperscript{127}

Compare that case to \textit{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.”\textsuperscript{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.”\textsuperscript{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

\begin{footnotes}
\item[121] McClain, 545 F.2d at 992; \textit{see also} FORREST, \textit{supra} note 2, at 152.
\item[123] United States v. Hollinshead, 495 F.2d 1154, 1155 (9th Cir. 1974).
\item[124] Id.
\item[125] Id.
\item[126] Id.
\item[127] Id.
\item[128] Pre-Columbian Artifacts, 845 F. Supp. at 546.
\item[129] Id.
\end{footnotes}
belong to someone else. Thus the NSPA and Guatemalan law were reconciled by “assum[ing]” the truth of the Guatemalan legislation.

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. 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. The Court in fact suggested that the artifacts could have been discovered in several South American nations. 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.

In United States v. Schultz, a New York art dealer was charged with conspiring to receive and possess stolen property under the NSPA. Following a general statement of good faith in a foreign nation’s laws 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.

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.” 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.
137 Pre-Columbian Artifacts, 845 F. Supp. at 546.
139 Schultz, 178 F. Supp. 2d at 446 (citing Law No. 117 of 1983 (Law on the Protection of Antiquities), al Jarīdah al-Rasmīyah, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{144}

\textsuperscript{140} Id.

\textsuperscript{141} HOFFMAN, supra note 47, at 166.

\textsuperscript{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.

\textsuperscript{143} See FORREST, supra note 2, at 152.

\textsuperscript{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

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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.