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
3301 Fairfax Drive
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Reported by: KeVon Congo

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

C O N T E N T S

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 it’s 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
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
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
leverage on each side of the coin.

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
violating the law.

**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
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

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