

1 BEST PRACTICES IN RIGHTS CLEARANCE

2 SYMPOSIUM

3 Panel 1

4 Cosponsored by

5 The Arts & Entertainment Advocacy

6 Clinic and

7 The Journal of International

8 Commercial Law

9

10

11 Moderated by

12 Prof. Sandra Aistars

13 Thursday, January 18, 2018

14 1:30 p.m.

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17 Antonin Scalia Law School

18 George Mason University

1 3301 Fairfax Drive
2 Arlington, Virginia 22201

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5 Reported by: KeVon Congo

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

9 Introduction

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

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

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

1 George Mason University

2 Panelists

3 **Nancy Wolff**, Digital Media

4 Licensing Association

5 **Jeff Sedlik**, PLUS

6 **Lateef Mtima**, Institute for

7 Intellectual Property

8 and Social Justice

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C O N T E N T S

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MS. AISTARS: Welcome to what

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 well, you also need to make a living.

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

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

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

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

18 And so that's really where

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 Obviously, there is a middle
16 ground. Obviously, there are going to
17 be times when you want to use work. It
18 is not something that fits into fair

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 really grasp the nuances of copyright.

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

1 we'll get into some of these issues.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 advertising.

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

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

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

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

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

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

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

1 the subject.

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

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

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

1 use with Lateef sitting next to him?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 and modify it.

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

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

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

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

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

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

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

1 your models --

2 **MR. SEDLIK:** Okay.

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

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

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

11 **MS. AISTARS:** Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 **MR. MTIMA:** Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 violating the law.

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

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

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

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

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

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

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

1 Lateef for that. [Applause]

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