BEST PRACTICES IN RIGHTS CLEARANCE

SYMPOSIUM

Panel 2

Cosponsored by
The Arts and Entertainment Advocacy Clinic and
The Journal of International Commercial Law and

Moderated by
Mickey Osterreicher

Thursday, January 18, 2018
3:15 p.m.

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Introduction

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Panelists

Pieter Folkens, Graphic Artists
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MS. AISTARS: Welcome back, everybody. I personally learned a lot from the panel that just spoke, and I'm looking forward to the second panel equally. I will not make any long introductions. I will simply introduce my long-time friend, Mickey Osterreicher, who will be moderating the panel and ask him to get us started. I'm very pleased, though, that everyone on this panel is here. They are a fantastic and diverse group of artists, and I'll let Mickey do the honors. But thank you, Mickey, and thank you, panelists.

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

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

MR. FITZGERALD: Do you want a couple minutes?

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

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

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

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

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

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

MR. FOLKENS: I'm a large
whale disentangler for National Marine
Fisheries Service, West Coast Region,
and you can tell I'm dressed quite a
bit differently than everybody else up
here, so I think I'm in the wrong
meeting. I'm a biomedical illustrator
by trade, published natural science
subjects. I'm also a creature effects
designer for feature films. I imagine
most of you in the room have never
heard of me before, but a good chance
many of you have seen my work. It's
been in films like Star Trek IV: The
Voyage Home, the Free Willy series,
Flipper, the movie, White Squall, 18
feature films I've worked in and eight
documentaries, including an IMAX film
that came out about a year and a half
ago on humpback whales. I'm also a
former assistant professor of science
communication, division of natural
sciences at University of California,
where we created a humanities track for
scientists. They had trouble taking
your basic fine art classes and so we
created a humanities track for them
that focused on scientific illustration
and science communication to try to make them better at getting their message out. I've been at this since probably mid-1970s. And because I specialize in a particular type of subject that is very popular in the public, at the time when I first got started, there was an immense amount of interest in a subject for which there was very little imagery. I'm a charter member of the Society for Marine Mammalogy and so I had access to a lot of good reference material. I've traveled the world, from Greenland to Madagascar to get images of species in the wild, and consequently I developed a reputation for being very accurate in my representations of the animals.
Also getting unique photographs in these exotic locations of rare species.

Consequently, there was a lot of infringement on my work. There was a few years in there where it was happening at the rate of nine times a month that I actually became aware of, and I got the entire gamut of infringement, from the ignorant who said, oh, I didn't realize that it was not right to copy somebody else's images, all the way up to the nefarious, the fine artists that like to take the lazy route, where they would find the work from a nature photographer who spends weeks, if not months, and thousands of dollars to put themselves into a position to get the
perfect shot, and then you get these
lazy nefarious fine artists grab that
and simply trace it, and then come up
with an apocryphal story of their
wonderful insights into the subject,
and then proceed to make millions of
dollars selling reproductions.

I've also had to deal with
the really big players, where -- I hate
to use the term ethical problems, but
it's probably the best word -- dealing
with large operators, like the United
Nations, FAO, Disney. Disney is a very
interesting creature to deal with.
That mouse is not very friendly. Even
National Geographic, I had some very
interesting experiences with
Geographic. I worked on the remote
imaging team at Geographic, and we were the first ones to get images of humpback whales underwater by sneaking up on them and putting a camera on their back and swimming around and catching their behaviors and so on. And so I've seen this very broad gamut of what happens when you come up with unique images, accurate images, and then lazy people just rip you off and claim it as their own and, also, large corporations that don't care nor do they appreciate how much effort goes into creating good, important images.

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

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

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

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

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

MR. FOLKENS: Okay.

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

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

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

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

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

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

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

**MR. OSTERREICHER:** Great.

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

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

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

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

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

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

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

MR. HARRINGTON: Or reference.

MR. FITZGERALD: Or reference.

MR. HARRINGTON: A 100 bucks, 50 --

MR. FITZGERALD: Yeah, 150, 100 bucks. But it was fair, because I wasn't going to use that particular pose. It was -- you know, something might have been wrong with the picture, and it was a very good symbiotic relationship. Well, now with the
artist having the ability to go on the
Internet and see all these pictures and
just simply say, all right, that's what
I'm going to do, let's start painting
it, their canvas is next to the 30-inch
monitor, it's really changed that
dynamic tremendously. I can't remember
the last time I got an artist reference
request. It just doesn't happen so
much anymore.

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

MR. FITZGERALD: Yeah.

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

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

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

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

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

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

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

**MR. OSTERREICHER:** Amanda?

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

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

**MS. REYNOLDS:** Yes, and that
is primarily how I get my business.

It's just frustrating when there is no way for them to find me because no one credited me. So it's a bit of a tricky slope, but, yes, there is a definitely win-win when it all works and everybody follows the rule and does unto others.

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

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

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

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

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

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

MR. HARRINGTON: So, I see
far more than my fair share, I think, of work for hire, expectations out of contracts. A lot of times they'll show up in a purchase order after we've already executed a rights managed contract, which is specific, and that's kind of an easy solution, because you explain to them, and I've had countless times where I've explained to them it's not applicable; I need you to change the purchase order, and we solve that problem. One of the easiest ways to work around or to at least mitigate the damages of work for hire, and I use damage as kind of colloquially, is to specify that you are providing to that particular organization for that particular organization's sole use all
rights in perpetuity. And that means that they get to use it for what they want to do with it, but they don't get to turn around and sell it, and they don't get to turn around and preclude you from selling it to other people. That's kind of like a half step away from work for hire, because generally speaking, those clients are looking for the ability to use that photograph in any way they decide that they want to use it for in perpetuity without having to come back and pay you, as Jeff was outlining earlier. And so you can also provide a schedule to them of the different prices. Because, whereas, Jeff used the example of billboards in the Congo, I typically say billboards
in Russia, and it becomes kind of a
joke and they go, well, of course not.
Well, how about stuff in Europe? Then
we start paring it down to used by your
corporation for the perpetuity of
copyright in the United States. All of
a sudden we're not talking about work
for hire anymore; we're talking about
in the United States you can do with it
what you want.
That's part of the
negotiating process in explaining to
them that, look, I'm trying to help you
not pay for things that you don't need
to pay for, and none of these pictures
-- a lot of times, a lot of work I do,
no model releases. So, I can't sell
you a right I don't have. If I sell
you the right to use these pictures in advertising, then kind of indirectly I'm warranting that I've secured the rights for you to use them in advertising. And so by doing that I say, look, I'll give you all the rights for which no model release is required. That's another solution. It becomes a negotiation back-and-forth, but it is a bit of a dance in trying to dance around from work made for hire. Sometimes when I write contracts, the client has to see the words "work deemed to be work made for hire" in the contract or it's not signable. So, you say, okay, the language specifies that all performed under work made for hire will be deemed
to be work made for hire and an additional fee paid. And then since no additional fee was paid, work made for hire doesn't apply. It is -- it really does apply to your it's complicated. It is a very complicated way in which to negotiate.

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

MR. HARRINGTON:

Consideration being a fancy word for money.

MR. OSTERREICHER: It could be something else.

MR. HARRINGTON: Sure, it could be.

MR. OSTERREICHER: It's usually money.

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

MR. FOLKENS: Up here I'm outnumbered. I'm an artist-illustrator and these guys are photographers. I think most of them are attorneys, too.
But Jeff brought up something in the earlier panel about why give away rights for something that the client has no intention or opportunity to use? Why do you want world rights if you're only publishing an English language edition for nudibranchs in San Francisco Bay kind of deal?

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

MR. HARRINGTON:

Photographers hear that all the time, all the time.

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

MR. HARRINGTON: Cuba

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

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

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

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

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

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

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

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

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

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

MR. OSTERREICHER: So, maybe before we get to the fair use since, Pieter, you brought it up, this whole idea of copyrightability. And if something is not copyrightable, then the courts don't have to get to any of the other considerations at that point.
MR. FOLKENS: Well, one of the problems that we have is a lot of the black letter case law was developed using nonvisual imagery, like *Feist* is something that everybody quotes in copyright issues. I see a lot of heads going like this, and that has nothing to do with visual rights. And I was talking with some people earlier today about that issue, where actually Murray in *Baylor Law Review* did an article that merger and *scenes a faire* has no place in visual rights, that those were all concepts that were developed in literary and music copyright, but not in visual. That where I think we need to get to is that in visual works, you have to focus on the expression. But
where a photograph is intrinsically copyrightable simply by the fact that the photographer captured a moment in time and had a choice of camera, lens, developing, type of film and lighting, and so on and so forth. That doesn't work in the 9th Circuit anymore, simply because what you took a photograph of, the subject, is not copyrightable. And I think it's a dangerous area right now.

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

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

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

MR. FITZGERALD: Uh-huh.

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

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

Well, okay. As a wildlife
photographer and a nature photographer,
it disturbs me for a couple reasons.
One of them is that they are totally
minimizing the artistic aspect of
photography, that it takes planning and
vision and hard work to even create
these opportunities where you may have
a chance for that happenstance, for that serendipitous moment, which is what that was. The image itself, yeah, the monkey took its picture, right? The macaque took its own picture, and it could have been this or that way. And so everybody seemed to denigrate that in terms of the photographer's input.

But at the end of the day, that was really an inspired, long-term thing that that photographer had to do. He had to go befriend -- he was following these troops as a conservation photographer trying to save these endangered macaques, spending years. He's living on nickels. He's not making money on
this. He's doing it out of a passion for a conservation project. It took him -- he had to hire a guide, get out there; he had to get those macaques used to him. I don't want to drone on on this, but it's just nuts to me. And finally he, holding the tripod, hands then the monkey the cable release to let them play with it, and yet the courts and a lot of people in the press, the copyright office, calls that the monkey taking the picture.

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

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

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

MR. FITZGERALD: That's the problem.

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

MS. WOLFF: There is no definition of author.

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

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

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

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

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

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

Even I get lucky sometimes and take a good picture.

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

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

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

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

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

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

MR. KROGH: The Mirror?

SPEAKER 2: No. It was another one.

MR. KROGH: Daily Mail?

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

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

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

MR. FOLKENS: Yeah, just a little.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. FOLKENS: Smart.

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

Now, I sign indemnification clauses all the time, and I'm happy to indemnify and warrant my own work. But I cannot sign an indemnification clause that indemnifies the client against any use of the work, because I don't have any control over what that use is and I really hate to see that in any
1 contract.
2  
3 MR. HARRINGTON: And I'll add to that. I can tell you that when I see the indemnification clause, as Pieter said, it's -- I'll indemnify you for the integrity of the work that I produced, and so they have this one-sided indemnification clause. And during the contract negotiation process, I will say to them, look, that's fine, but I need a parity indemnification clause in there that says that should you use the work outside of the scope of the license or that you will indemnify me in the event of litigation. Sometimes lawyers don't like to see a parity clause like that, they just want to be protected
themselves. But when you really try to explain it to them, look, I'll indemnify you for any mistakes I make, but you have to indemnify me if you do things with it that you're not supposed to. And more often than not, that conversation actually does work.

**MS. AISTARS:** Sean?

**MR. FITZGERALD:** You know, it's kind of a two-way street because, as a photographer I'll have people come to me or declare the rights to something, and then sometimes I have to do it, because I take pictures with copyrightable stuff in it as well, which gets into fair use issues, and I have to make those determinations.

It's great when it's a nice, easy
process. I mean, it doesn't have to be an ordeal.

I had an image this past year, the one with the monarch butterflies, the dead ones being held in the hand. Barbara Streisand's right clearance company came to me, said they wanted to run it in her concert, I guess she did six shows, and then they wanted to have this behind her, and then also have the worldwide rights for Netflix, because it was on Netflix. And the thing was, it was like a 1-1/2-page request that they had, really narrowly tailored, and she ended up paying a very fair price. And it was one of those things where this can be done right. This can be, when it's not
a bunch of crazy boilerplate or unfair indemnity terms. If that was more a model of the best practices, then, gosh, it would be easier for all of us.

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

I'll give an example. Years ago I photographed at the Heidelberg Project. Anybody here from Detroit? Nobody knows? It's an amazing grass
roots street art project. I'm also involved with fostering murals and trying to support street artists, and have gotten into it, but that gets into it when you take pictures of that stuff, you know. And I've done, for example, murals of hundreds of street artists pulled together that have their own theme with all the images, but I refuse. Personally, I draw that line. I'm not going to sell those and make money off those. I'll sell those and contribute it back into street art on that one, because I thought it was pretty clearly fair use.

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

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

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

MR. FITZGERALD: Not
everything.

MR. HARRINGTON: But then the
thing --

MR. FITZGERALD: My costs
came back to me.

MR. HARRINGTON: But, see,

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

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

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

got frequently asked questions, where

you actually want to use those to give

the answers to questions that you've

experienced, but also as a way of

putting it out there in kind of a

Question form for people to look at.

What kinds of things do you think are

important for you as a creator to have

out there for people to understand that

are going to be trying to contract with

you?

MS. REYNOLDS: So, for me,

since I didn't actually go to law

school, I find that using the plainest

terms possible always helps, and

understanding that if I just explain

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

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

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

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

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

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

**MS. REYNOLDS:** Yeah.

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

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

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

MS. REYNOLDS: That's the wrong person.

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

MS. REYNOLDS: Yeah.

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

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

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

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

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

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

MS. AISTARS: Pieter?

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

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

MR. FOLKENS: Yeah, find another profession.

MR. OSTERREICHER: Sean?

MR. FITZGERALD: I guess I'll give a tip for artists who may be incorporating others' work in their own. I kind of keep thinking about this, in kind of trying to bone up for this table a little bit, reading some fair use stuff is. I keep reminding myself -- it reminds me of the Pablo Picasso quote, where bad artists copy; great artists steal. And to some degree it sort of ties into what's going to make me angry if somebody does use my work. If you simply take what
I'm doing and copy it, like Pieter was
talking about, just take my image, the
situation I've worked my tail off for,
I'm lucky to make any money on it.
It's hard out there sometimes. And you
copy it almost corner-to-corner, I'm
going to be very disrespected and I'm
going to be very angry, and if I can
come after you, I probably will.
Whereas, if bad artists copy, if you're
a great artist, you steal, to me, I am
not offended at all, if you look at my
stuff and you get inspired by it. But
you look at a hundred other artists'
stuff and other photographers' stuff,
and you incorporate that into yours so
that what comes out of you becomes your
own, then you tell me I'm so inspired
by you. If I can look at that and even
if there is some similarity, I'm like,
dude, that means a lot to me, because
I've helped. You know, part of our
duty is to help other artists. We
don't pull up the ladder; we pass it
on. And when we get into this sort of
society where, oh, we can just take
this, we tweak it 10% to 11%, in our
mind -- I know that's not the legal
standard, but that's kind of the
thought that's out there, then now it's
mine and I can run with it. That's
just messed up. And so my tip would be
for a lot of us, we've just got to look
inwards and say it doesn't have to be
this way. These are conscious choices
that people make and they do not need
to be that way.

MR. OSTERREICHER: So, we've been talking about rights clearances, but what about the situations where the rights weren't clear and you just said now I'm going to come after you. What has been your experience in trying to deal with copyright infringement itself? I mean, have you gone to court? Have you tried to negotiate settlements? And what have you found to be the best practice? You know, at the end of the day, even if you bring a lawsuit, most lawsuits settle. They don't usually go to a verdict, so how do you deal with that? We'll go back down this way. I'll start with you again, Sean.
MR. FITZGERALD: Oh, you know, for the most part for me it's been a matter of, all right, let's talk and knock on wood. I've not had the really intentional infringers who are doing something where I'm just determined to go after them. Because I'm a small businessman, and I've got to look at this as a business even at the end of the day, too. I can't do this out of vengeancy. And one of the things that I learned practicing law is that those people who can't let it go are the worst clients, because they won't settle for decent reasons, they're not rational. They're insane and it becomes a vendetta. And if I let that become me, then I as a
business owner have made a really dumb choice. And on top of that, the system is messed up. I mean, when it costs $10,000 to get a retainer, costs $350,000 or something, to take one of these things all the way through, going to federal court? You've got out-of-pocket expenses, which usually your attorney is going to make you pay, which is another thirty, forty, fifty. There's going to be depositions and all that stuff gets added in. It's just a bad business decision. So, I'd do anything I can to avoid that. I haven't had to go down that road, but I'm sure the guys down here obviously have traveled it more than I have.

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

**MR. FOLKENS:** I thought Sean and I were getting to be really good friends until he described me as that client, you know, who couldn't let it go. Let's talk about the vast majority of the time. I find that if somebody infringes on the work or duplicates the work and didn't pay use fee for it, I just invoice them and maybe double the fee, because -- late payment, let's call it -- and send out an invoice and tell them I expect payment because you
used it. And, surprisingly, most of the time they go, oops, yeah, we'd better pay this.

I have had to go to court only twice. It was the same guy over the same issue and the same image. And I am here speaking with you today on behalf of the Graphic Artists Guild because of my tenacity going after this guy. And so there's kind of an ego benefit for me that has nothing to do with what we're talking about today, but I really enjoy meeting new people and making new friends, and stuff like that. But I'm not sure that, to use your words, it's a good business decision. And this is why we put effort earlier in the day looking at
the small claims copyright solution. I think that is so immensely important for independent, small business artists and photographers to have a venue that doesn't require having to go the big dollar route, when you put your retirement at risk, and all the rest of it. When I was hunting for an attorney the first time around, one guy said that $0.5 million retainer and we'll take it. You know, and my total net worth was maybe 10% of that. And so when you're talking about tips and stuff like that, the thing that I've learned is there's a distinction between goodwill and badwill, and the vast majority of people out there, even the people who
infringe upon your copyrights, really
have goodwill. But it's those few guys
who just really piss you off and it's
tough to let it go.

And a quick little anecdote.

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

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

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

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

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

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

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

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

**MR. OSTERREICHER:** Peter?

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

Maybe I'd be doing better if I did.

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

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

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

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

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

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

MR. OSTERREICHER: Amanda,

it's the two-minute warning; you get the last word.

MS. REYNOLDS: Okay, sure.

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

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

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

[Applause]

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

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