

1 BEST PRACTICES IN RIGHTS CLEARANCE

2 SYMPOSIUM

3 Panel 2

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9

10

11 Moderated by

12 Mickey Osterreicher

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17 Antonin Scalia Law School

18 George Mason University

1 3301 Fairfax Drive
2 Arlington, Virginia 22201

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5 Reported by: KeVon Congo

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

9 Introduction

10 **Prof. Sandra Aistars**, Antonin

11 Scalia Law School,

12 George Mason University

13 Moderator

14 **Mickey Osterreicher**, National

15 Press Photographers

16 Association

17 Panelists

18 **Pieter Folkens**, Graphic Artists

1 Guild

2 **Sean Fitzgerald**, North American

3 Nature Photography

4 Association

5 **John Harrington**, National Press

6 Photographers

7 Association

8 **Peter Krogh**, American Society of

9 Media

10 Photographers

11 **Amanda Reynolds**, Plume Photography

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C O N T E N T S

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

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

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

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

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

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

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

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

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

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

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

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

18 Now, all those sort of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 the opportunity --

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

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

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

13 **MR. FOLKENS:** Okay.

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

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

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

1 be back there tomorrow for another
2 assignment.

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

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

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

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

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

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

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

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

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

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

9 **MR. OSTERREICHER:** Great.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 here.

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

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

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

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

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

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

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

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

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

15 **MR. FITZGERALD:** Yeah.

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

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

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

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

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

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

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

1 relate?

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

18 And I think that goes to

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

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

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

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

15 **MR. OSTERREICHER:** Amanda?

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

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

1 creatives not respecting the creative
2 process.

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

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

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

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

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

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

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

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

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

18 I have done some work for

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

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

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

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

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

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

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

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

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

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

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

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

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

3 **MR. HARRINGTON:**

4 Consideration being a fancy word for
5 money.

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

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

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

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

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

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

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

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

14 **MR. HARRINGTON:**

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

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

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

1 odd way of showing it.

2 **MR. HARRINGTON:** Cuba

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

4 **MR. FOLKENS:** Show me the

5 money, yeah. So, in the context of the

6 initial question, I find myself in a

7 situation where they come to me late in

8 the negotiations with a level of

9 desperation saying, oh, we've got to

10 have your work because nobody else can

11 do it, and they're unwilling to pay.

12 **MR. FITZGERALD:** In my

13 experience, you get a lot of

14 opportunities to educate your client, I

15 think. You know, they have these

16 notions in their head but they don't

17 really understand what the mean. They

18 come to you thinking they need to have

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

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

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

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

1 potential buyer.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 on it?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 in a feature film?

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

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

1 look like?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 **MR. FOLKENS:** Smart.

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

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

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

1 contract.

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

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

8 **MS. AISTARS:** Sean?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 **MR. FITZGERALD:** My costs

1 came back to me.

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

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

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

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

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

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

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

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

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

1 claims?

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

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

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

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

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

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

5 **MS. REYNOLDS:** Yeah.

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

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

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

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

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

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

14 **MS. REYNOLDS:** Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 **MS. AISTARS:** Pieter?

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

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

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

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

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

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

5 **MR. OSTERREICHER:** Sean?

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

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

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

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

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

1 to be that way.

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

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

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

18 **MR. OSTERREICHER:** Pieter,

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

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

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

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

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

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

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

5 And a quick little anecdote.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 **MR. OSTERREICHER:** Peter?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 [Applause]

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

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

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

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

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CERTIFICATE OF NOTARY PUBLIC

I, KEVON CONGO, the officer
before whom the foregoing proceeding
was taken, do hereby certify that the
proceedings were recorded by me and
thereafter reduced to typewriting under
my direction; that said proceedings are

1 a true and accurate record to the best
2 of my knowledge, skills, and ability;
3 that I am neither counsel for, related
4 to, nor employed by any of the parties
5 to the action in which this was taken;
6 and, further, that I am not a relative
7 or employee of any counsel or attorney
8 employed by the parties hereto, nor
9 financially or otherwise interested in
10 the outcome of this action.

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Commonwealth of Virginia

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CERTIFICATE OF TRANSCRIBER

I, SANDRA TELLER, do hereby
certify that this transcript was
prepared from audio to the best of my
ability.

I am neither counsel for,
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parties to this action, nor financially
or otherwise interested in the outcome
of this action.

1/27/2018

Sandra Teller

DATE

SANDRA TELLER