

Copyright Law for Photographers

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Overview

- Rules re: Taking Photos
- Laws re: Publishing Photos
- Applicable Copyright Concepts
- Copyright Infringement and Defenses
- Copyright Registration and Notice
- Post Sale Rights - VARA
- Rules re: Original and Ltd. Editions
- Use of Photography Online
 - Service provider immunity -- DMCA
 - Social Media
- Registration Best Practices

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Rules re: Taking Photos

“Ten” Commandments

- Photographer in public place can take pictures of public, and into private property
- On private property, must honor request of property owner
- No requirement to explain why you are taking pictures, you have right to not be harassed and threatened
- Private parties cannot detain you; camera cannot be confiscated without court order
- Cannot harass, stalk, loiter, or “intrude on seclusion”

Individual's Rights of Privacy - "Intruding upon seclusion"

- Photographing someone in a situation when they would reasonably expect privacy

Shulman v. Group W Productions, Inc., 18 Cal.4th 200 (Cal. 1998)

- Cameraman's presence at scene of accident not invasive of right of privacy
- But victim had reasonable expectation of privacy in the rescue helicopter

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Publishing Photos

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Individual's Rights of Privacy

- Right to Take ≠ Right to Publish
- Privacy rights may preclude publication
 - Private Facts - highly offensive
 - False light
 - Think about photo captions
 - Right of Publicity

Individual's Rights of Privacy - Private Facts

Green v. Chicago Tribune, 675 N.E.2d 249 (Ill. App. Ct. 1996)

- A newspaper's publication of photographs of a woman's son as he was treated for a gunshot wound, and as he appeared after his death from that wound, supported a private facts claim brought by the woman. The photographs may have been highly offensive to the reasonable person. No private facts claim on the son's behalf could survive, however, because a dead person's privacy cannot be invaded.

Individual's Rights of Privacy - False light

Peoples Bank and Trust Co. of Mountain Home v. Globe Inter. Publ., Inc., 978 F.2d 1065 (8th Cir. 1992)

- Plaintiff was a ninety-seven-year-old woman who had become a well-recognized figure in her community and something of a local legend
- *Globe* used photo to publish accurate account
- Ten years later, *Globe* used same photo along headline "Pregnancy forces granny to quit work at age 101."
- Even though pregnancy claim was absurd, rest of story was reasonably believable

Individual's Rights of Privacy - Right of Publicity

Tellado v. Time-Life Books, Inc., 643 F.Supp. 904 (D.N.J. 1986)

- Use of veteran's image from Vietnam war in promotional flyer in book on Vietnam constituted violation
- "The text and message of the [flyer] is simply not an attempt to convey historical facts or political opinion, or even an attempt to entertain the reader. The [flyer]'s goal is to get the reader to open the book itself and to want to order future volumes."



“depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment”



“Rush's work [contains] significant transformative elements which make it especially worthy of First Amendment protection and also less likely to interfere with the economic interest protected by Woods' right of publicity”

Model Releases

- Irrevocable license to use name and likeness
- Describe nature of photographs
- Require model (not agent) signature
 - initial authorized uses and media
 - initial authorized territories
- Include release of claims against photographer

Applicable Copyright Concepts

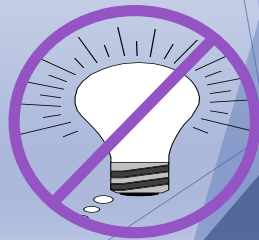
- Copyrightable Content
- Copyright Ownership
- Exclusive Rights of Copyright Owners
- Copyright Registration and Notice

Copyrightable Content

COPYRIGHT PROTECTS:

- “Original works of authorship fixed in any tangible medium of expression”
- Pictures specifically included in exemplary list of “works of authorship”

**Copyright Law Does Not Protect
Ideas Or Discoveries, But The
EXPRESSION Of Those Ideas**





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Copyright Ownership

General Rule

AUTHOR is Owner, but

CREATOR not always the
AUTHOR

Creator not Author when:

- When Creator is an Employee, the *Employer is considered the Author*
 - Employer-Employee relationship determined by factual analysis, not agreement between parties
- When Creator is an Independent Contractor hired to create the work, *Commissioning Party is Author only if*
 - Pre-existing written agreement, and
 - One of nine categories of works: contribution to collective work, part of movie/AV work, translation, supplement, compilation, instructional text, test, answer material, atlas

Commissioned Work/Photographic Services Contracts

- Is a photographer an employee?
- Can photography be a work made for hire?
- Can author use the photograph after termination?
- Must the subject execute an assignment?

- How do you transfer rights when Creator is Not Employee and when Work is not Work Made For Hire?

Assignments

- Must be in writing
- Subject to termination right under § 203
- Available even if work characterized as WMFH
- Characterization impacts copyright term

“Joint Works”

- Authors intend contributions be merged into **inseparable and interdependent parts** of a unitary whole
- Each have right to independently exploit subject to a duty to account

Roadies video clip

<http://www.showtimeanytime.com/#/episode/3428452>



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Copyright Term

- Since 1989 (regardless of notice or registration):
 - Creator-Owner - life of last surviving author plus 70 years
 - Work-Made-For-Hire/Anonymous Works - shorter of 95 years from publication or 120 years from creation
- Works published before 1923 = public domain
- Works published between 1923 and 1977 with notice (and renewed if pre-1964) - 95 years
 - Published before 1977 without notice = public domain
- Works published between 1978 and 1989 with notice or registration within 5 years of publication - life plus 70, or 95 years
 - Published before 1989 w/o notice or timely registration = public domain

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Exclusive Rights of Copyright Owners

EXCLUSIVE RIGHT TO:

- Copy and Distribute
- Publicly Display
- Prepare Derivative Works

**SELLING A COPY OF YOUR
WORK DOES NOT TRANSFER
ANY OF THESE RIGHTS**

Infringement and Defenses

COPYRIGHT INFRINGEMENT

Direct Evidence of Copying
or
Access + Substantial Similarity



REMEDIES

- **CIVIL**
 - Injunction
 - Seizure and Destruction
 - Money
 - Owner's Actual Damages
 - Infringer's Profits
 - Statutory Damages
 - Costs and Attorneys Fees
- **CRIMINAL PENALTIES**
 - Fines
 - Imprisonment
 - Seizure and Destruction

COMMON DEFENSES



- Use of Idea, Not Expression
- Public Domain
 - Term expired
 - No © notice
- “I Created it Myself”
- Fair Use


Fair Use Analysis

- Transformative
 - New expression, meaning or message
- Four-Factor Balancing Test, considering:
 - Purpose and character of use
 - Commercial/educational
 - Nature of Copyrighted Work
 - Fictional/Factual
 - Portion Used
 - Uses Effect on Original

Sex Pistols

Johnny Rotten
Sid Vicious





New expression, meaning or message?
Should this be a "fair use"?

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New expression, meaning or message?
Should it be a fair use?

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***Cariou v. Prince*, 714 F. 3d 694 (2d Cir. 2013)**

- [W]e hold that all except five (Graduation, Meditation, Canal Zone (2007), Canal Zone (2008), and Charlie Company) of Prince's artworks make fair use of Cariou's photographs. We express no view as to whether the five are also entitled to a fair use defense. We REMAND with respect to those ...
- Serene and natural beauty v. crude and provocative

Graduation



Canal Zone 2007



Prince Fair Use Example



Prince Fair Use Example



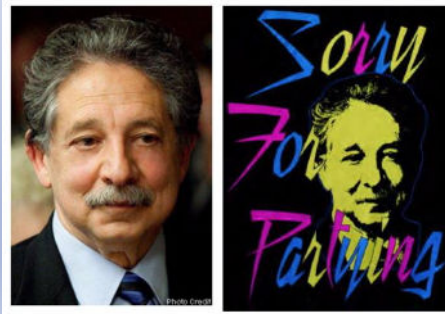
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Kienitz v. Scornie Nation, LLC, No. 13-3004 (7th Cir. 2014)

- Rejects transformative use test: applies standard fair use analysis: nature of work, purpose of use, amount used, effect on market
- Still found fair use:



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Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, (S.D.N.Y. 2019)

- Goldsmith licensed black-and-white studio portrait of Prince to Condé Nast “for use as an artist’s reference in connection with an article to be published in Vanity Fair Magazine.”
- Goldsmith’s photography agency, through its staff, submitted the Goldsmith Prince Photograph to Vanity Fair; Goldsmith herself did not know at the time that the photograph had been licensed for use as an artist’s reference.
- Vanity Fair commissioned Warhol to create an illustration of Prince for an article
- Warhol created the “Prince Series,” comprised of sixteen distinct works - including the one used in Vanity Fair magazine

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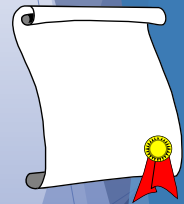
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Copyright Registration and Notice

REGISTRATION

- Registration: Not Absolutely Required, But Critical
 - Needed to Sue, Obtain Statutory Damages, and Attorneys' Fees
- Registration: Easy and Cheap
 - Can use a single registration for multiple works if the owner is the same, and:
 - Unpublished and common author, or
 - Published at the same time
 - Specific rules for group registrations of photos



NOTICE

- Optional since 1989
- Eliminates Innocent Infringement
- © Year Name
- Location should give reasonable notice



Visual Artist Rights Act

- “Visual Art” includes photographs if:
 - created for exhibition purposes only;
 - limited editions of 200 copies or less; and
 - signed and consecutively numbered by the author.
- VARA rights are not transferable
- Waiver of VARA rights must be in writing
- Prevailing party in VARA receives attorney fees

Visual Artist Rights Act

- Subject to fair use, authors of “visual art,” have right to:
 - Receive or decline attribution
 - Prevent use of name on modified or distorted art if it could harm reputation
 - Prevent intentional, prejudicial modification of any work, and prevent destruction of work of recognized stature

Cohen v. G&M Realty L.P., (E.D.N.Y. June 13, 2018)



Licensing Visual Arts

- Don't forget the VARA rights
- Do not authorize uses that could destroy VARA rights, i.e. use of VARA protected work beyond the commercialization limitations

Originals and Limited Editions

- Cannot sell replicas as an Original (Lanham Act, FTC Act, various state laws)
 - Each must have an independent spark of creativity to constitute an original
- Statement regarding the size of a limited edition is an express warranty, you expressly guarantee that no additional multiples of the same image, including proofs have been produced or are in any other limited edition
 - Same laws apply
 - Some states require a Certificate of Authenticity

Best Practices

- Include different spark of creativity in each original
- Document your editions and proofs
- Destroy the negative or plate after the edition is completed
- Sign the print - not the plate
- Know the law of multiples for the states you do business

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Online Usage

- Finding your work on Pinterest, Facebook, Twitter, Flickr, LinkedIn
- These are Online Service Providers, which have conditional immunity for copyright infringement liability
 - Must provide for take down notices

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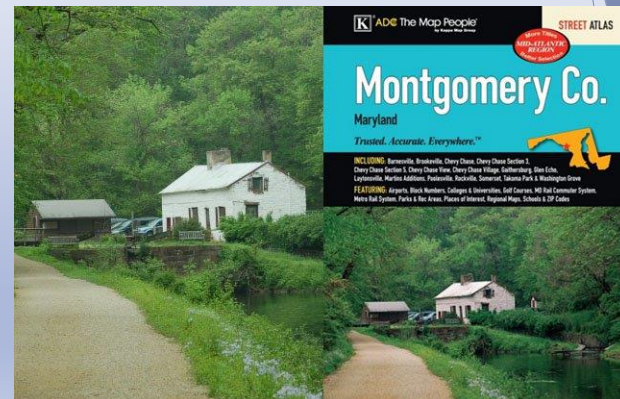
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Impact of Social Media Posts

- Who owns the work you post to social media?
- What can the social media platform do with that work?
- Other implications?

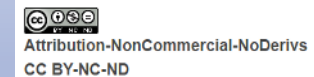
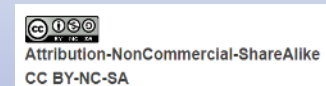
Other Implications of Social Media Posts - Flickr Case



Other Implications of Social Media Posts - Flickr Case

- *Drauglis v. Kappa Map Group, LLC* (D.C. 2015)
 - “[Dragulis] uploaded the photograph to a public photo-sharing website, where he did not assert exclusive rights to his copyrighted image, and he instead opted to license the work and make it available for use by others without compensation. ... Plaintiff repeatedly voices consternation in his pleadings about defendant’s distribution of the publication that displayed his work on its cover for profit, but of the many licenses available to choose from, plaintiff selected the one that specifically authorized commercial use.”

Creative Commons Licenses



GROUP REGISTRATION OF PHOTOS

- Must use online-only form from Copyright Office (may be waived in exceptional case)
- Must provide title for the group as a whole
- 750 photo maximum, must specify the number of photographs
- Must have same author, claimant, and published in same year (if published)
 - Cannot register published and unpublished on same application
 - Must specify the earliest and latest dates of publication
- Can only register as work-made-for-hire if all the photographs in that application are WFH
- Must submit one copy of each photograph, preferably in a .zip file
- Must be accompanied by a “sequentially numbered list containing the title, file name, and month and year of publication for each photograph in the group” - template available from Copyright Office

GROUP REGISTRATION OF PHOTOS

The screenshot shows a Microsoft Excel spreadsheet titled "Group Registration of Published Photographs Title Template". The spreadsheet is in Protected View. The main content area contains instructions and a table with the following columns:

Photograph Number	REQUIRED: Title of Photograph	REQUIRED: File Name of Photograph	REQUIRED: Month/Year of Publication	List of All Group Titles	Missing Information (if any)
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					

<https://www.copyright.gov/eco/help/group/grpph-title-list-template.xlsx>

GROUP REGISTRATION OF PHOTOS

group-title-list-template.xlsx (Protected View) - Excel

PROTECTED VIEW Be careful—files from the Internet can contain viruses. Unless you need to edit, it's safer to stay in Protected View. Enable Editing

AI

Group Registration of Unpublished Photographs

Title Template

This is the Complete List of Photographs for: **Insert Case Number Here (Required)**

Column Instruction You must enter your case number in the space above labelled "Insert Case Number Here." If you need help finding your case number, click the tab below labelled "Where to Find My Case Number."

The Copyright Office strongly encourages you to provide the title of each photo in the application itself. To do so, copy the contents of this column (including the commas) and paste that information into the application in the "Photograph Titles" field on the "Titles" screen. (For more info, click the tab below labelled "Where to Insert Titles".)

If information is missing, this column will identify the spaces that need to be completed.

Photograph Number	REQUIRED: Title of Photograph	REQUIRED: File Name of Photograph	List of All Group Titles	Missing Information (if any)
1				
2				
3				
4				
5				
6				
7				
8				
9				
10				

<https://www.copyright.gov/eco/help/group/gruph-title-list-template.xlsx>

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REGISTRATION - ASMP Best Practices

- Register your work before it is “published.”
 - Best to register after each project
 - Next best is by date range - year maximum
- Create a thumbnail size digital file of each image you want to register.
 - Jpeg; 600px x 600px
- Put the thumbnails in a folder and create a Zip file.
- Name the folder of images you are registering.
 - Should match the title chosen for group registration
 - Date and specific project name, e.g., “January 2016, ABC Company Annual Report”

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REGISTRATION - Steps

1. Begin process after each project
2. Create a thumbnail size digital file of each image you want to register (Jpeg; 600px x 600px)
3. Put the thumbnails in a folder
4. Name the folder
5. Create a Zip file
6. Download and complete the Copyright Office template
7. Complete the Copyright Office Application
8. Upload Zip file of photos

REGISTRATION - Tutorials

<https://www.youtube.com/watch?v=xyMNlzkYAoQ>

<https://www.youtube.com/watch?v=vgEDW-RBSCY>

Thank You for
listening!

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