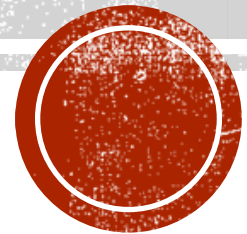


# LEGAL ISSUES IN PHOTOGRAPHY

Tatsuya Adachi

Leichtman Law PLLC // VLA Associate Board



# WHY PHOTOGRAPHERS?

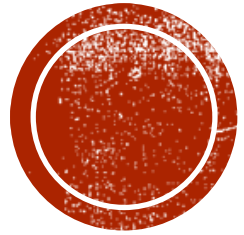
- Ease of exchange
- Smart Phones
- Social Media
- “Death by a Thousand Cuts”
- Common misperceptions
  - “I am doing the photographer a favor”
  - If it’s on the web, it’s in the public domain



# AGENDA

- Today's class will focus on
  - Copyright Basics and the Scope of Your Rights
  - Enforcing Your Copyrights
  - Publishing Your Works on Social Media
  - Right of Privacy
  - Model Releases





# COPYRIGHT BASICS & THE SCOPE OF YOUR RIGHTS



# WHAT IS COPYRIGHT?

- Copyright is a form of protection provided by the laws of the United States to the authors of **original works of authorship that are fixed in a tangible form**.
- Ideas and facts are **not** copyrightable.
- The owner of the copyright has certain **exclusive rights** to use the work, though the scope of Copyright protection is not unlimited.
- Protection attaches **immediately** to fixed works, but registration provides definite benefits.
- No such thing as “poor man’s copyright.”



# A “BUNDLE OF RIGHTS”

- The Copyright Act of 1976 grants the creator a bundle of intangible, exclusive rights over their work, including:
  - Reproduction
  - Distribution
  - Derivative Works
  - Public Performance
  - Public Display
  - For Sound Recordings, Public Performance by Means of Digital Audio Transmission



# SCOPE OF COPYRIGHT IN PHOTOGRAPHS

*BURROW-GILES LITHOGRAPHIC CO. V. SARONY, 111 U.S. 53 (1884).*

- “Originality” requirement
  - Original to the author
  - Elements of artistic expression:
    - Pose
    - Lighting
    - Background
    - Angle
    - Type of film and camera
    - Expression of subject
    - Processing techniques



Oscar Wilde No. 18



# SCOPE OF COPYRIGHT IN PHOTOGRAPHS

*RENTMEESTER V. NIKE, INC.* (9TH CIR. FEB. 27, 2018).



Rentmeester's Photo

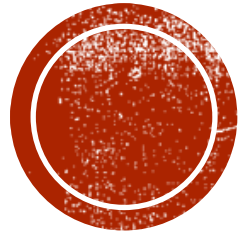


Nike's Photo



Nike's Jumpman Logo





# ENFORCING YOUR RIGHTS: COPYRIGHT INFRINGEMENT LITIGATION

Anyone who violates any of the exclusive rights of the copyright owner, or who imports unauthorized copies into the U.S., is an infringer of the copyright.

# BENEFITS OF COPYRIGHT REGISTRATION

- Why?
  - Ability to file an infringement lawsuit
    - Proof of ownership
    - Statutory damages
    - Attorneys' fees
  - Leverage in settlement negotiations
- When?
  - Within 3 months of publication for statutory damages and attorneys' fees
  - Within 5 years of first publication for presumption of valid copyright registration
- Group registration available



# REGISTRATION REQUIRED TO FILE AN INFRINGEMENT CLAIM

- “[N]o civil action for infringement of the copyright in any United States work shall be instituted **until . . . registration of the copyright** claim has been made in accordance with this title.” 17 U.S.C. § 411(a).
- “©” is not enough.



# ACTUAL DAMAGES V. STATUTORY DAMAGES

- Actual damages = \$ amount of any loss suffered by photographer as a result of the infringing activity
- Factors for statutory damages:
  - Nature of the infringement (e.g., viral or not?)
  - Defendant's purpose and intent
  - Profit defendant reaped
  - Expense the defendant saved
  - Revenue lost by plaintiff
  - Value of the copyright (i.e., scarcity)
  - Duration of infringement



# TIMING OF REGISTRATION

- “In any action under this title, . . . no award of **statutory damages** or of **attorney's fees**, as provided by sections 504 and 505, shall be made for . . . any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made **within three months after the first publication of the work.**” 17 U.S.C. § 412.
- Effective date of copyright registration must be **before infringement began**, unless infringement occurred within 3 month grace period
- Statutory damages (17 U.S.C. § 504(c)(1)) = \$750 - \$30,000, *per work, at plaintiff's election*
- Willful infringement (17 U.S.C. § 504(c)(2)) = Up to \$150,000 per work
- Attorney fees for the prevailing party (17 U.S.C. § 505)



# TIMING OF REGISTRATION: 3 MONTH GRACE PERIOD FOR PRE-REGISTRATION INFRINGEMENT



# TIMING OF REGISTRATION

- “In any action under this title, . . . **no award of statutory damages or of attorney's fees**, as provided by sections 504 and 505, shall be made for . . . any infringement of copyright commenced after first publication of the work and before the effective date of its registration, **unless such registration is made within three months after the first publication of the work.**” 17 U.S.C. § 412.
- Effective date of copyright registration must be **before infringement began**, unless infringement occurred within 3 month grace period
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  - Willful infringement (17 U.S.C. § 504(c)(2)) = Up to \$150,000 per work
- Attorney fees for the prevailing party (17 U.S.C. § 505)





# TIMING OF REGISTRATION – 5 YEAR WINDOW FOR PRESUMPTION OF VALIDITY

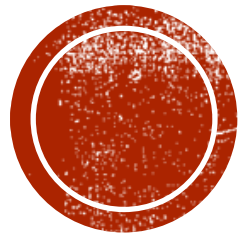
- “In any judicial proceedings the **certificate of a registration made before or within five years after first publication** of the work shall constitute **prima facie evidence of the validity of the copyright** and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.” 17 U.S.C. § 410(c).



# BENEFITS OF COPYRIGHT REGISTRATION

- Why?
  - Ability to file an infringement lawsuit
    - Proof of ownership
    - Statutory damages
    - Attorneys' fees
- When?
  - Within 3 months of publication for statutory damages and attorneys' fees
  - Within 5 years of first publication for presumption of valid copyright registration





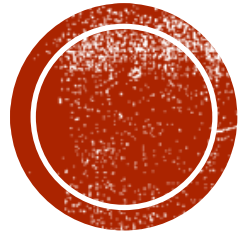
# ENFORCING YOUR RIGHTS: COPYRIGHT MANAGEMENT INFORMATION

How the “©” notice can help you further enforce your rights.

# SECTION 1202 – CMI REMOVAL

- “**No person shall**, without the authority of the copyright owner or the law . . . **intentionally remove or alter any copyright management information.**” 17 U.S.C. § 1202(b)(1).
- **Types of CMI** (17 U.S.C. § 1202(c))
  - (1) The **title** and other information identifying the work, including the information set forth on a notice of copyright.
  - (2) The name of, and other identifying information about, the **author** of a work.
  - (3) The name of, and other identifying information about, the **copyright owner** of the work, including the information set forth in a notice of copyright.
  - (6) **Terms and conditions** for use of the work.
- “At any time before final judgment is entered, a complaining party may elect to recover an award of **statutory damages** for **each violation of section 1202** in the sum of **not less than \$ 2,500 or more than \$ 25,000.**” 17 U.S.C. § 1203(c)(3)(B).





# **PUBLISHING YOUR WORKS ON SOCIAL MEDIA**



# WHO OWNS A PHOTO THAT IS UPLOADED TO SOCIAL MEDIA?



# INSTAGRAM

## Terms of Use

- “We do not claim ownership of your content that you post on or through the Service. Instead, when you share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Service, **you hereby grant to us a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content** (consistent with your privacy and application settings). You can end this license anytime by deleting your content or account. However, **content will continue to appear if you shared it with others and they have not deleted it.**”





# FLICKR

## Terms of Service

- “You retain all intellectual property rights in and to any User Content you post, upload or otherwise make available through the Services, including the copyright in and to your photos and videos. SmugMug does not claim any ownership, right, title or interest in and to your User Content.”
- “Notwithstanding the foregoing, by uploading and/or posting any User Content to the Services, **you request, and grant SmugMug a perpetual, nonexclusive and royalty-free right to use the User Content (and the user name that is submitted in connection with such User Content) as is reasonably necessary in order to enable SmugMug to . . . display the User Content on the Services.**”



# 500PX

## Terms of Service

- You further represent and warrant that:
  - 1) You are the sole and exclusive owner, or you are the authorized representative of the owner(s) of all rights, including all copyrights in and to all Visual Content you submit to the Site;
  - 2) **You have the full and complete authority and right to enter into this agreement** and to grant to 500px the rights in the Visual Content that you have granted, and that no further permissions from, or payments to, any other party are required;
  - 3) **You are not violating or breaching any agreement with any other party** by submitting Visual Content to 500px;
  - 4) The Visual Content is original and it does not infringe the copyright of any third party, and will not contain any matter which violates any applicable law, rule or regulation and will not defame, violate the right or privacy or publicity, or infringe the trademark, intellectual property rights or proprietary rights, of any third party;



# PHOTOBUCKET

## Terms of Service:

- “When you upload content marked “public,” **you grant us a worldwide, non-exclusive, royalty-free, right and license to: copy, convey, distribute, stream, post, publicly display (e.g. post it elsewhere), reproduce and create derivative works from it** (meaning things based on it), whether in print or any kind of electronic version that exists now or is later developed, **for any purpose, including a commercial purpose with the right to sublicense such rights to others.**”
- “By making your content public, **you are also giving all other Site users the right to copy, distribute, publicly perform, publicly display, reproduce and create derivative works from it via the Site**, third party websites or applications (for example, via services allowing Members to order prints of Content or t-shirts and similar items containing Content, and via social media websites), **provided such use is not for a commercial purpose.**”



# TWITTER

## Terms of Service

- “By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed) . . . . **This license authorizes us to make your Content available to the rest of the world and to let others do the same.**”



# T.O.S. COMMON PROVISIONS

- Upload = automatic grant of non-exclusive license; representation that you have the authority to grant said license
- Right to sub-license
- Right to create derivative works
- Right to use uploaded works for a commercial purpose
- Royalty-free license



# AFP V. MOREL

- Daniel Morel creates exclusive photos of 2010 Haiti disaster.
- Lisandro Suero copied the photographs and posted them on his own Twitpic page; no credit to Morel.
- AFP distributed eight photos to Getty Images, credit AFP/Getty/Lisandro Suero
- Getty licensed to multiple news outlets.
- January 13, 2010: AFP sent numerous tweets to Morel asking about the photos
- AFP issued instruction to change credit from Suero to Morel. Getty variously credited Suero and Morel as the photographer
- February 23, 2010: AFP and Getty continue licensing photos crediting Suero, despite letters from Corbis & Morel's counsel



# AFP V. MOREL



THIS IMAGES FROM LISANDRO SUERO ON TWITTER SHOW THE AFTERMATH OF THE HAITI QUAKE.



# AFP V. MOREL



Survivors assist a woman in the wake of the earthquake that rocked Haiti on 12 January 2010.  
Copyright © Lisandro Suero

◀ Prev 10 Photos Next ▶

Posted January 22, 2010



VOLUNTEER LAWYERS  
FOR THE ARTS



# AFP V. MOREL

## Twitter's TOS:

- “You retain your rights to any Content you submit, post or display on or through the Services...You agree [to allow] Twitter to make such Content available to other companies...who partner with Twitter for the syndication, broadcast, distribution or publication of such Content...Such...uses by Twitter, or other companies...who partner with Twitter, may be made with no compensation paid to you with respect to the Content that you submit...through our Services.”

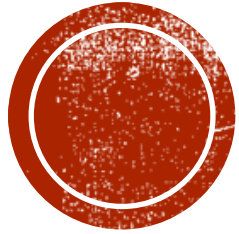


# AFP V. MOREL

## Holding:

- “even if some re-uses of content posted on Twitter may be permissible, this does not necessarily require a general license to use this content as AFP has.”
  - Court found that the TOS expressly states that licenses are granted only to Twitter and its partners, and AFP does not contend that it was one of Twitter’s partners.
  - Court finds that Twitter was granted a license for rebroadcast (re-tweet), but does not receive a license for other uses.





# HOW DO PRIVACY RIGHTS AFFECT PHOTOGRAPHERS?

New York Human Rights Law Section 50 and Section 51

# NY RIGHT OF PRIVACY LAWS

- **NY Civil Rights Law § 50:** A person, firm or corporation that uses for **advertising purposes, or for the purposes of trade**, the name, portrait or picture of any living person without having first obtained the written consent of such person...is **guilty of a misdemeanor**.
- **NY Civil Rights Law § 51:** Any person whose name, portrait, picture or voice is used within this state...for the **purposes of trade without the written consent first obtained as above provided** may maintain an equitable action in the supreme court of this state against the person... so using his name, portrait, picture or voice, **to prevent and restrain the use thereof**... But... nothing contained in this article shall be so construed as to prevent any person, firm or corporations practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed.



# COHEN V. HERBAL CONCEPTS

## HOW MUCH IDENTIFICATION IS NEEDED?

- Photographer, James Krieger took a photo of a mother and daughter bathing nude in a stream
- Their faces were not exposed, but one could clearly see the mother's breast, hair, bone structure, body contour stature and posture
- Photo was used in an advertisement for a product designed to treat cellulite - "Those fatty lumps and bumps that won't go away"
- The husband immediately recognized his wife and daughter in the photo and sued





# FOSTER V. SVENSON





# FOSTER V. SVENSON

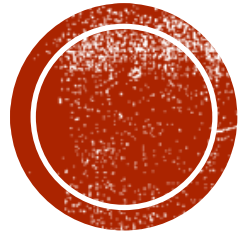
- “Defendant’s photos are protected by the First Amendment in the form of art and therefore shielded from New York’s Civil Rights Law Sections 50 and 51.”
- “Through the photos, Defendant is communicating . . . thoughts and ideas to the public.”
- “While it makes Plaintiffs cringe to think their private lives and images of their small children can find their way into the public forum of an art exhibition, there is no redress under the current laws of the State of New York.”



# RIGHT OF PRIVACY DEFENSES

- First Amendment – Expression as in Svenson
- Newsworthiness
- Consent – as in a release





# MODEL RELEASES

# WHAT IS A MODEL RELEASE?

- Definition: a written agreement between an artist and a subject in which the subject gives consent to be the subject and for the artist to use images of the subject
- Protects photographers from future lawsuits that subject might bring:
  - Invasion of privacy
  - Right of publicity
  - Defamation



# WHEN IS A MODEL RELEASE REQUIRED?

- Required:
  - Advertising
  - Trade
- Not required:
  - First Amendment speech / artistic expression
  - News reporting



# STREET PHOTOGRAPHY

- Reasonable expectation of privacy
- Art v. commercial purpose
- Freedom of expression v. right of privacy
- MTA Rule 1050.9 – Photography on NYC subways is permitted
- Absent obstruction of governmental administration, photos of police subject to normal street photography rules



# THANK YOU

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