

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

Rules re: Taking Photos

“Ten” Commandments

- Photographer in public place can take pictures of public, and into private property
 - Photographer cannot pierce seclusion (reasonable expectation of privacy)
 - Criminal Laws to be aware of: disorderly conduct (annoying/alarming conduct), loitering (hanging around without legal purpose), stalking (repeated contact that would reasonably instill fear) and pornography
 - Government can preclude in interest of national security, emergency, law enforcement
- 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
- Some laws apply to photographing currency, stamps, securities

Publishing Photos

Individual's Rights of Privacy

- Right to Take \neq Right to Publish
- Privacy rights may preclude publication
 - “Intruding upon seclusion”
 - Depicting private moments in a way that would be highly offensive to a person with reasonable sensibilities can violate a person's right of privacy
 - False light
 - Right of Publicity - using likeness to sell a product
 - Tiger Woods case - selling “art” not a violation when art transformative;
 - Three Stooges case - selling reproductions is a violation



“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”

APPENDIX



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



Applicable Copyright Concepts

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

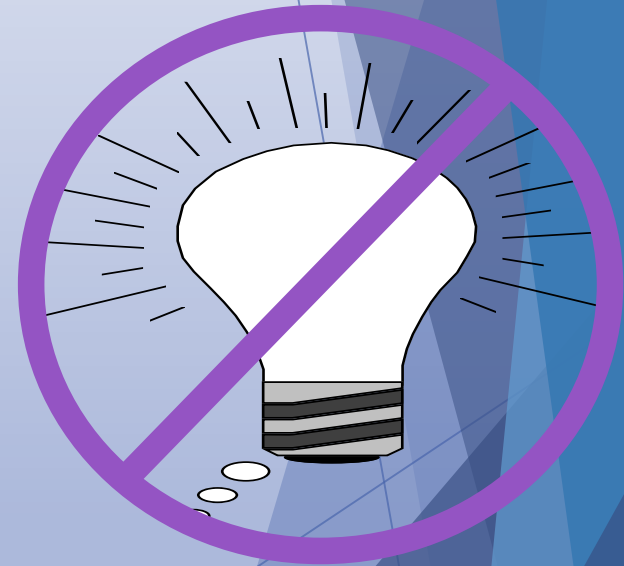
Copyrightable Content

COPYRIGHT PROTECTS:

- “Original works of authorship fixed in a tangible medium of expression”
- Pictures specifically included in exemplary list of “works of authorship”
- Other “visual arts”: drawings, paintings, stained glass, jewelry designs, sculptures

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

Copyright does not protect the utilitarian aspects of a work



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
- Assignments subject to termination right

“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>



Copyright Term

- Creator-Owner - life of last surviving author plus 70 years
- Work-Made-For-Hire - shorter of 95 years from publication or 120 years from creation
 - Same for anonymous and pseudonymous works
- Works published before 1923 = public domain
- Works published between 1923 and 1977 with notice (and renewed if pre-1964) - 95 years

Exclusive Rights of Copyright Owners

EXCLUSIVE RIGHT TO:

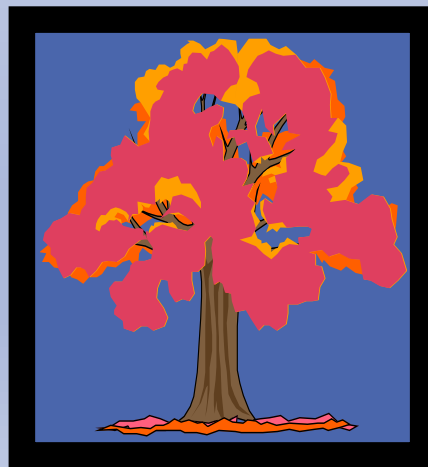
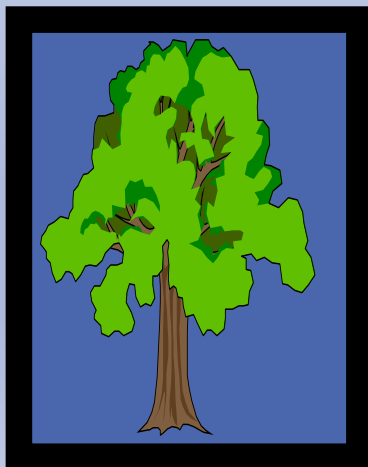
- Copy and Distribute
- Publicly Display
- Prepare Derivative Works

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

Infringement and Defenses

COPYRIGHT INFRINGEMENT

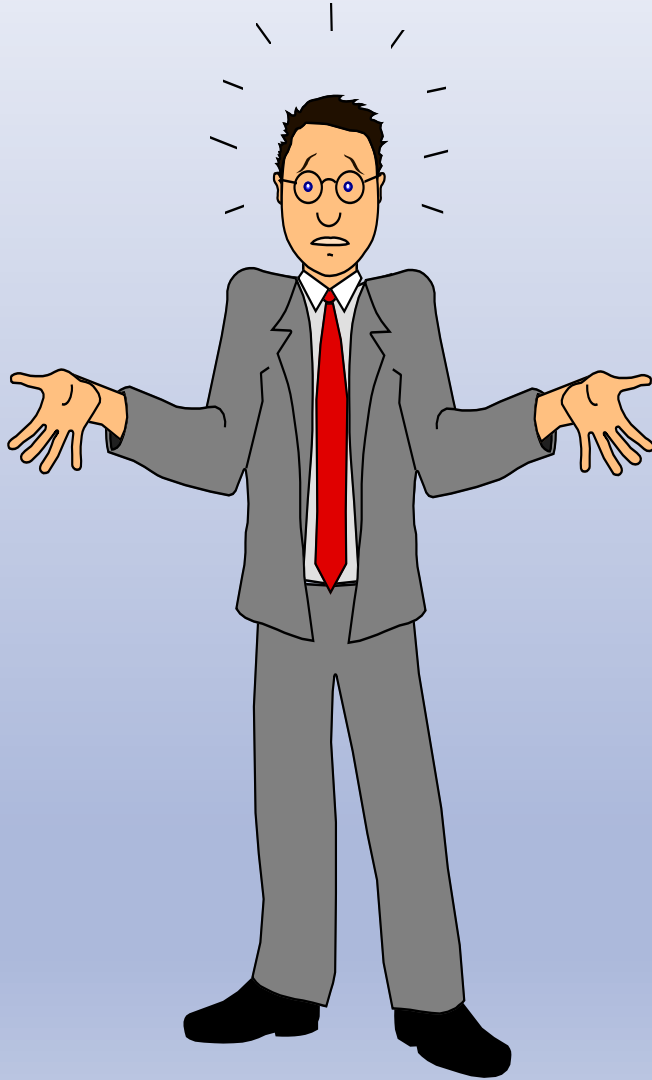
Direct Evidence of Copying
or
Access + Substantial Similarity



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”?



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

***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



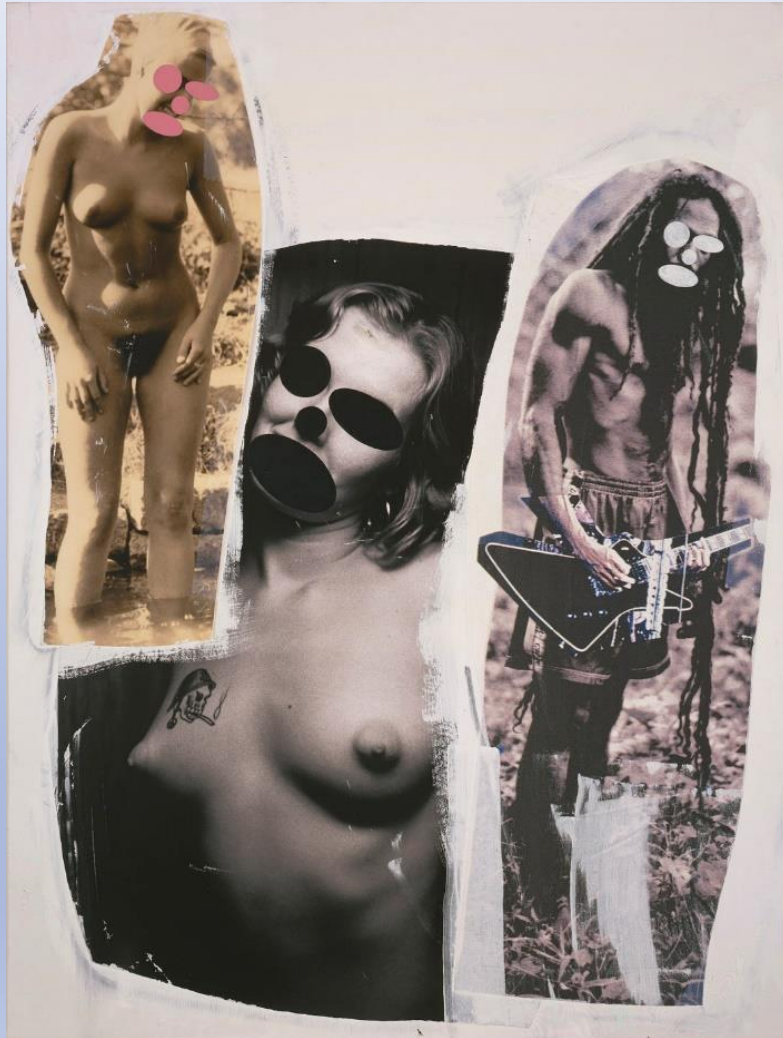
Canal Zone 2007



Prince Fair Use Example

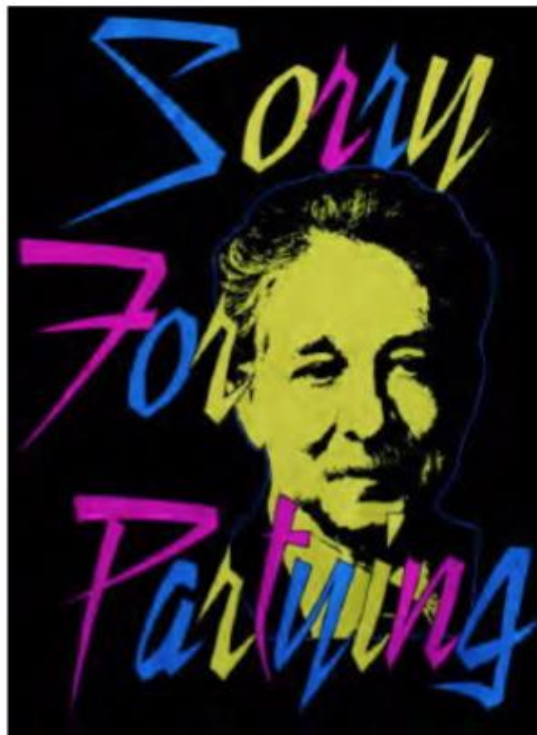


Prince Fair Use Example



Kienitz v. Sconnie 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:



Copyright Registration and Notice

REGISTRATION/NOTICE

- Registration: Not Necessary, But Helpful
 - 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, or **for photos**, in the same year (Form GR/PPh/CON)
- Notice
 - Optional since 1989
 - Eliminates Innocent Infringement



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
- Prevailing party in VARA receives attorney fees
- “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.

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

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

Take Down Notice Requirements

- Elements of Take Down Notice
 - *Written communication provided to the designated agent:*
 - *Signed by owner/agent*
 - *Identify work(s)*
 - *Identify infringing material*
 - *Provide contact info*
 - *A statement of good faith belief of infringement*
 - *A statement of accuracy, under penalty of perjury, and authorization*
- Many websites have their own Take Down Notice Form

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?

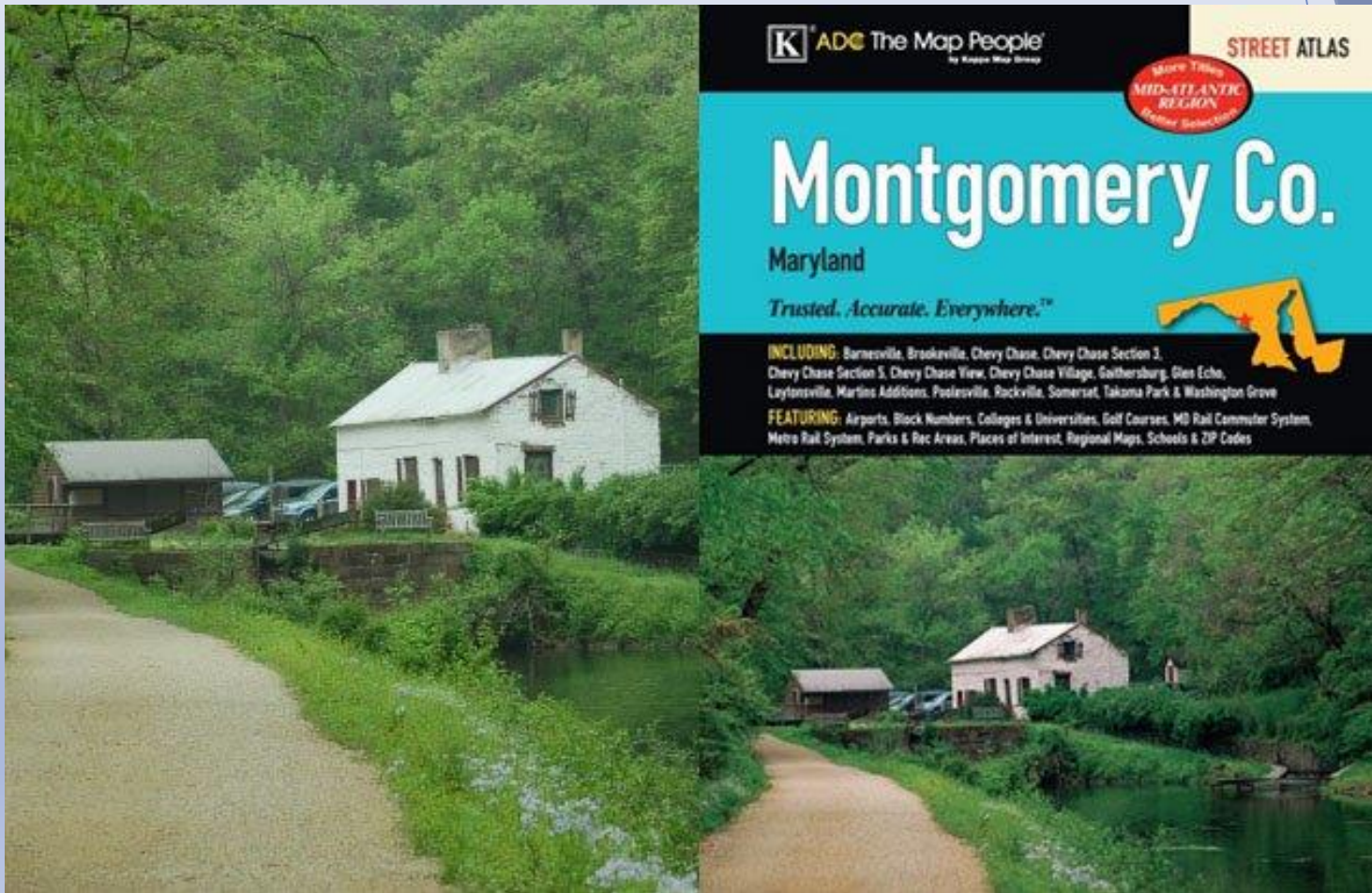
Sample “Social Media” Terms of Service

- Yahoo (Flickr)
 - Yahoo does not claim ownership of Content you submit or make available for inclusion on the Yahoo Services. However, ...
 - With respect to photos, graphics, audio or video you submit or make available for inclusion on publicly accessible areas of the Yahoo Services other than Yahoo Groups, [you grant Yahoo] the license to use, distribute, reproduce, modify, adapt, publicly perform and publicly display such Content on the Yahoo Services solely for the purpose for which such Content was submitted or made available. This license exists only for as long as you elect to continue to include such Content on the Yahoo Services and will terminate at the time you remove or Yahoo removes such Content from the Yahoo Services.

Other Implications of Social Media Posts

- Rights of Privacy
- Creative Commons License
 - Flickr Case
 - *Drauglis v. Kappa Map Group, LLC* (D.C. 2015)
 - Photographer uploaded photo w/ commercial CCL to Flickr
 - Third party atlas used photo
 - Photographer sued

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



Attribution
CC BY



Attribution-NonCommercial
CC BY-NC



Attribution-ShareAlike
CC BY-SA



Attribution-NonCommercial-ShareAlike
CC BY-NC-SA



Attribution-NoDerivs
CC BY-ND



Attribution-NonCommercial-NoDerivs
CC BY-NC-ND

Other Implications of Social Media Posts - Instagram Case



“People in the Instagram community own their photos, period. On the platform, if someone feels that their copyright has been violated, they can report it to us and we will take appropriate action. Off the platform, content owners can enforce their legal rights.”

Thank You for listening!

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