

# U.S. Copyright Law – Recent Developments for Photographers (and some other legal issues)

Presentation for CAPIC (June 9, 2015)

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# Overview of U.S. Copyright Law

- **National Treatment:** U.S. a party to the Berne Convention – works originating in a signatory country (such as Canada) get the same treatment as U.S. works.
- **Copyright Registration:**
  - Registration with the U.S. Copyright Office – registration required for a “U.S. work” to bring infringement claim. U.S. work = first published in the U.S. or published simultaneously in U.S. and Berne Convention signatory country.

# Overview of U.S. Copyright Law

## Damages

- **Statutory Damages:** U.S. copyright registration required to obtain statutory damages and attorneys' fees and costs – even for non-U.S. works.
  - Statutory damages range from \$750 to \$30,000 per infringement and up to \$150,000 if the infringement is willful.
  - Can be reduced to \$200 per infringement if Defendant satisfies burden that infringement is “innocent” – objective standard. Heavy burden on defendant – prove it didn't know or should not have known that conduct was infringing.
  - Need to register before infringement or within 3 months of publication to obtain statutory damages. If not timely registered, only entitled to actual damages.

# Overview of U.S. Copyright Law

## DMCA (Digital Millennium Copyright Act)

- **Notice and Takedown:** service provider required to remove infringing work. List of service providers and contact info at Copyright Office website: <http://www.copyright.gov/onlinesp/>
- **Removal of CMI Claims:** can also bring claim for removing or falsifying copyright management information (CMI) under the DMCA.
  - CMI includes copyright notice, title and information identifying the work (metadata), author / copyright owner's name.
  - Up to \$25,000 per violation.
  - Doesn't require registration, but requires intentional removal.
  - Canada: Copyright Act now includes provision for removal of RMI – know or should know removal will facilitate or conceal infringement (Section 41.22) – watermarks, metadata, © notice.

# Overview of U.S. Copyright Law

- **Term:** Life of author + 70 years; 95 years from publication or 120 years from creation for “work-for-hire”. (Canada +50 years)
- **Moral Rights:** no moral rights in photographs unless they are only produced for exhibition and exist in single copies or limited signed and numbered editions (VARA – Visual Artists Rights Act). VARA doesn’t refer to “moral rights”, but includes rights of attribution and integrity of the work. (Canada – moral rights / attribution)

# Important U.S. Cases for Photographers

## *Kienitz v. Sconnie Nation LLC (2014)*

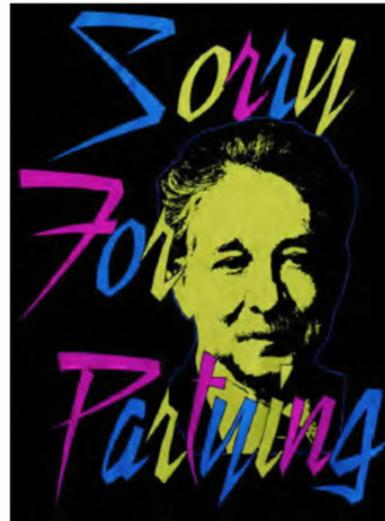
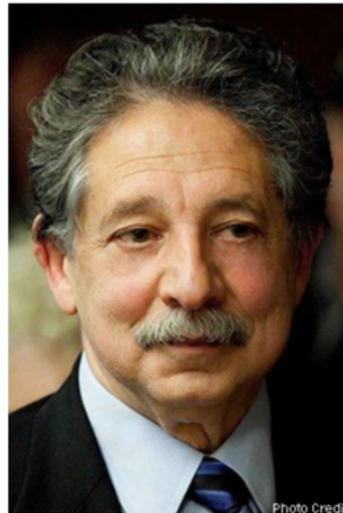
**Facts:** Michael Kienitz (photographer) took picture of mayor of Madison, WI. Mayor used the image on his website with Kienitz's permission. Mayor wanted to shut down annual block party and defendant created T-shirts using the image with phrase "Sorry for Partying". Defendant acknowledged using low-res copy of the image from the mayor's website. Image was altered by adding wording, removing the background and changing colour. Kienitz sued for copyright infringement and defendant claimed fair use. Trial court dismissed case based on fair use (transformative based on *Cariou*) and Kienitz appealed.

**Law:** Court of Appeal agreed that it was fair use, but disagreed with *Cariou v. Prince* decision – transformative use (i.e., gives new meaning to the work) alone not enough to determine fair use. Go back to original test set out in the statute: (1) purpose and character of the use; (2) nature of the copyrighted work; (3) amount of work used; and (4) effect on the market for the copyrighted work.

- Key factors in finding fair use were market effect (#4) – Kienitz had no plans to license the image, allowed mayor to use it for free and defendant only sold 54 shirts (complement not substitute); and amount of work used (#3) – original photo barely recognizable in the T-shirt.
- **Key Points:** return to more balanced analysis of fair use and not putting all weight on whether use is transformative, but now there is split in courts without any Supreme Court input.

# Important U.S. Cases for Photographers

*Kienitz v. Sconnie Nation*



# Important U.S. Cases for Photographers

## *Foster v. Svenson* (2015)

- **Facts:** Arne Svenson took surreptitious photos from his apartment of people living in building across from him with telephoto lens, including identifiable children. Exhibited show called “The Neighbors” in NYC and LA with media coverage. Plaintiffs (whose kids were in photos) sued for invasion of privacy based on NY state law and infliction of emotional distress. Defendant claimed protected speech under 1<sup>st</sup> Amendment.
- **Law:** Claim dismissed – defendant’s conduct may be “disturbing” and facts “troubling”, but the informational value of ideas conveyed by art work are a matter of public interest and are generally exempt from the privacy law. Statute limited to works used for advertising or trade and construed narrowly in view of 1<sup>st</sup> Amendment – gallery show doesn’t fit. Court invites legislature to draft broader privacy law not limited to “advertising or trade” purposes.
- **Key takeaways** – reaffirms strong protection for artistic work under 1<sup>st</sup> Amendment, but probably different outcome in Canada or Europe and leaves door open for broader U.S. privacy laws.

# Important U.S. Cases for Photographers



One of the images from “The Neighbors” (© Arne Svenson)

# Important U.S. Cases for Photographers

## *North Jersey Media Group v. Fox News (2015)*

- **Facts:** Fox News used iconic 9/11 image created by Thomas E. Franklin, photojournalist who works for plaintiff, on Facebook page for “Justice with Judge Jeanine” combined with iconic Iwo Jima flag image with caption “#neverforget”. No attribution and no license obtained. Plaintiff sued for copyright infringement and defendant moved to dismiss based on fair use.
- **Law:** Court denied the defendant’s motion. The most critical factor in denying motion was effect on the market – high editorial demand for this image and this kind of use represents the primary market for the image. Combining images, adding hashtag and cropping image not transformative.
- **Takeaways:** not a final decision, but shows that small changes do not mean fair use and social media is not a free-for-all.

# Important U.S. Cases for Photographers



© Associated Press/Joe Rosenthal (left) © North Jersey Media Group / Thomas E. Franklin (right)

# Important U.S. Cases for Photographers

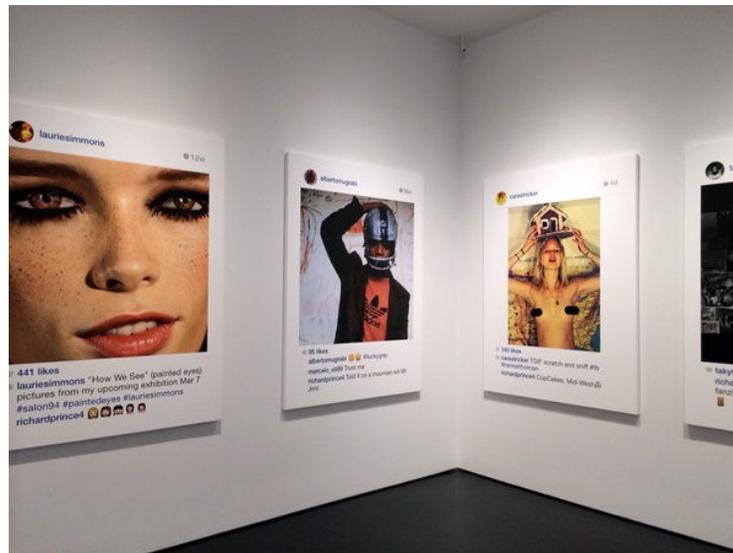
## Other important decisions:

- ***Morel v. AFP and Getty Images***: Images of Haiti earthquake licensed by AFP and Getty without permission. Jury awarded verdict of \$1.2 million for 8 images (maximum statutory damages). Verdict upheld by the court: “There was evidence from which the jury could have concluded that the defendant’s infringement (and particularly AFP’s) was not just willful but reflected a gross disregard for the rights of copyright holders.”
- ***Wolk v. Photobucket.com***: Internet photo-sharing service shielded from liability under DMCA. Only required to remove infringing works if they become aware of infringement. Consistent with other decisions, but “whack-a-mole” for photographers.
- ***Cariou v. Prince***: Key fair use decision involving “re-appropriation” artist Richard Prince’s use of Patrick Cariou’s images of Rastafarians. Parties settled case regarding 5 images still at issue. Speaking of Richard Prince ...

# Important U.S. Cases for Photographers

## Richard Prince Instagram “New Portraits” gallery show

- Richard Prince taking content from Instagram, adding posts and selling posters of screenshots for \$90,000.



# Important U.S. Cases for Photographers

- **Is it fair use?** Richard Prince probably doesn't care if it is or not, but he would argue that it's transformative under *Carion v. Prince*. Probably not transformative (just adding comments), but nobody has sued yet.
- If Prince is adding comments in Instagram it would weigh further against being transformative – just printing comments that are actually owned by Instagram.

# Important U.S. Cases for Photographers

➤ Probably the best way to counter Richard Prince:

**\$90,000**

SOLD BY FAT CAT ARTISTS  
AND MILLIONAIRE GALLERY OWNERS

suicidegirls 20h



Based on people you follow  
24991 likes  
bigtimo123 I like her toungue  
kashimmi @kalypsoskitz basically 🍑 she's obviously  
my purrfect sister from another mister! 🍑🍑  
richardprince1234 Private Lives, mind if I sneeze on

size: 67x55  
materials: ink jet on canvas  
profits go to rich gallery  
owner and millionaire "artist"

**\$90**

SOLD BY SUICIDEGIRLS

suicidegirls 20h



Based on people you follow  
24991 likes  
bigtimo123 I like her toungue  
kashimmi @kalypsoskitz basically 🍑 she's obviously  
my purrfect sister from another mister! 🍑🍑  
richardprince1234 Private Lives, mind if I sneeze on  
suicidegirls true art

size: 67x55  
materials: ink jet on canvas  
sold by the actual people who created  
the image and profits go to charity

# Other Important Legal Points

- **Contracts:** get it in writing with your clients, but remember that you own the copyright in the image unless it says otherwise in your written agreement.
- **Model releases:** required if you plan on licensing your work for commercial use. Editorial use – probably okay to not get a release if it’s “newsworthy”, but watch out for privacy issues and defamation. If in doubt, speak with a lawyer and get a good template to use.
- **Social media:** in general, you don’t lose your rights if you post your images to social media sites, but read the terms. Use watermarks and © notice.

# Questions?

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