

St. John's University School of Law

St. John's Law Scholarship Repository

Faculty Publications

2019

Existential Copyright and Professional Photography

Jessica Silbey

Eva E. Subotnik

St. John's University School of Law

Peter DiCola

Follow this and additional works at: https://scholarship.law.stjohns.edu/faculty_publications



Part of the [Intellectual Property Law Commons](#)

This Article is brought to you for free and open access by St. John's Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

EXISTENTIAL COPYRIGHT AND PROFESSIONAL PHOTOGRAPHY

*Jessica Silbey, Eva E. Subotnik & Peter DiCola**

Intellectual property law has intended benefits, but it also carries certain costs—deliberately so. Skeptics have asked: Why should intellectual property law exist at all? To get traction on that overly broad but still important inquiry, we decided to ask a new, preliminary question: What do creators in a particular industry actually use intellectual property for? In this first-of-its-kind study, we conducted thirty-two in-depth qualitative interviews of photographers about how copyright law functions within their creative and business practices. By learning the actual functions of copyright law on the ground, we can evaluate and contextualize existing theories of intellectual property. More importantly, our data call for an expansion of the set of possible justifications for intellectual property. Contrary to accepted wisdom, we find that copyright provides photographers with economic leverage in up-front negotiations with clients but not much benefit in anticopying protection afterwards. Beyond that, copyright also serves as part of photog-

© 2019 Jessica Silbey, Eva E. Subotnik & Peter DiCola. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

* Silbey is Professor of Law, Northeastern University School of Law and 2018 Guggenheim Fellow; A.B., Stanford University; J.D., Ph.D. (Comparative Literature), University of Michigan. Subotnik is Associate Professor of Law, St. John's University School of Law; B.A., Columbia College; J.D., Columbia University. DiCola is Professor of Law and Searle Research Fellow, Northwestern University Pritzker School of Law; A.B., Princeton University; J.D., Ph.D. (Economics), University of Michigan. Research for this paper was supported by a grant from the Spangenberg Center for Law, Technology and the Arts at Case Western Reserve University School of Law. This paper has benefited from feedback at workshops hosted by Spangenberg Center for Law, Technology and the Arts at Case Western Reserve University School of Law; Engelberg Center on Innovation Law & Policy at NYU School of Law; Works-in-Progress Intellectual Property Colloquium (WIPIP) at Boston University School of Law; Roundtable on Empirical Methods in Intellectual Property at Cardozo School of Law; International Society for the History and Theory of Intellectual Property (ISHTIP) at Toronto University School of Law; Intellectual Property Scholars Conference (IPSC) at Cardozo School of Law; UC Irvine School of Law; the American Bar Foundation; the Munich Summer Institute; the Third Copyright Scholarship Roundtable at the University of Pennsylvania Law School; and Chicago-Kent College of Law. Many thanks also to Barton Beebe, Christopher Buccafusco, Dan Burk, Stacey Dogan, Brett Frischmann, Jeanne Fromer, Brian Frye, Kristelia Garcia, Stuart Graham, Laura Heymann, Erik Hovenkamp, Ray Ku, Ed Lee, Mark Lemley, Mark McKenna, Michael Meurer, Aaron Perzanowski, Betsy Rosenblatt, Jason Schultz, David Schwartz, Christopher Sprigman, Zahr Said, and Rebecca Tushnet for helpful guidance on the project.

raphers' multifaceted sense of professionalism to protect the integrity of their art and business. Identifying these unrecognized and surprising functions of copyright in creators' accounts is separate from evaluating their desirability. But we argue that the real-world functions of copyright are better candidates for justification and better subjects for policy discussion than chalkboard theories. In this way, our study of photographers moves the longstanding debate over intellectual property law's purpose to a new and more informed place.

INTRODUCTION	264
I. INTERVIEW METHODOLOGY	271
A. <i>Qualitative Methodology and Its Advantages</i>	272
B. <i>Interview Data Collection</i>	275
II. COPYRIGHT AND THE BUSINESS OF PROFESSIONAL PHOTOGRAPHY	277
A. <i>Bilateral Bargaining: Copyright as Initial Leverage</i>	279
B. <i>Asserting Distinctiveness: Genres, Venues, and Client Types</i> .	289
C. <i>Preserving Scarcity: Quantities or Versions</i>	294
D. <i>The Royalty Jackpot: Downstream Licenses or Sales to Third Parties</i>	301
III. PROFESSIONALISM (ANOTHER EXPLANATION FOR VALUE)	305
A. <i>Photographic Work as Personal Work</i>	307
B. <i>Reputational Value</i>	312
C. <i>Relational Value</i>	317
D. <i>Integrity of the Field</i>	320
CONCLUSION: HOW COPYRIGHT MATTERS	324

INTRODUCTION

Photographs proliferate in today's culture, which now produces more than a trillion photographs each year.¹ Smartphones feature cameras, allowing users to take and share photographs just as easily as they call or text. Images saturate media, including internet platforms, through which so much popular discourse occurs. The immensely popular Instagram, for example, is both a playground for sharing snapshots with friends and a jungle of fierce competition among marketers relying on the expressive power of photography.² Any technology as pervasive as digital photography will present challenges for law, some of them unexpected. New phenomena, such as editing software used to doctor evidence or facial-recognition software used to profile consumers, are putting pressure on the law to adapt.³ In this Article, we

1 See TOM ANG, PHOTOGRAPHY 382 (2014) (citing a 2012 estimate by Fujifilm that people take 1.5 trillion images per year globally).

2 See Jayson DeMers, *Why Instagram Is the Top Social Platform for Engagement (and How to Use It)*, FORBES (Mar. 28, 2017), <https://web.archive.org/web/20170328221441/https://www.forbes.com/sites/jaysondemers/2017/03/28/why-instagram-is-the-top-social-platform-for-engagement-and-how-to-use-it/#79d4baca1cc0>.

3 For the most current discussion of these new technologies and the legal and social problems they raise, see Robert Chesney & Danielle Keats Citron, *Deep Fakes: A Looming*

explore the perennial problem of law's responsiveness to technological change at the intersection of law and photography.⁴

Our particular interest is in copyright policy toward photographs. The debate in recent years concerns how the law should respond to the tension between the pervasiveness of photographs and the pervasiveness of unauthorized copying.⁵ Copyright law is the field ostensibly most applicable to the regulation of creative work, including photography. Although it regulates publishers, consumers, and other groups,⁶ some argue that copyright has a special focus on creators.⁷ Thus, we designed a qualitative, empirical study of professional photographers to investigate how they are adapting their creative and business practices in the twenty-first century and how law (specifically copyright law) affects their work. The broader aim of our project is to document the effects of technological change and copyright's place in that change in order to understand the law's adaptive functions in the digital communication ecosystem.

Photographers' working lives have changed as a result of digital technology and the internet. This is of course common to many professions over the last two decades.⁸ For photographers in particular, the changes in their experiences have to do with—to name a few examples—the transition from film to digital,⁹ the development of the internet into the photograph-intensive medium it is today,¹⁰ and the rise of online stock-photography services.¹¹ As they undergo these transitions in technology and business models, we

Challenge for Privacy, Democracy, and National Security, 107 CALIF. L. REV. (forthcoming 2019), <https://ssrn.com/abstract=3213954>.

4 See, e.g., LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999) (characterizing law's response to new technology as requiring translation of old values to the modern context); JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001) (describing the history of 1990s-era copyright legislation as the commercial internet emerged).

5 See generally Jessica Silbey, *Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers*, 9 U.C. IRVINE L. REV. 405 (2019); Eva E. Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOK. L. REV. 1487 (2011).

6 See Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173 (2012); Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 279 (2004) ("Since its inception, copyright [law] has set important baselines upon which *publishers and their modern equivalents* do business." (emphasis added)).

7 See Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613 (2014).

8 See, e.g., ERIK BRYNJOLFSSON & ANDREW MCAFEE, *RACE AGAINST THE MACHINE* (2011).

9 See ANG, *supra* note 1, at 344–45 (describing the development of digital cameras).

10 See, e.g., Rachel Gillett, *Why We're More Likely to Remember Content with Images and Video*, FAST CO. (Sept. 18, 2014), <https://www.fastcompany.com/3035856/why-were-more-likely-to-remember-content-with-images-and-video-infogr> (citing study by online marketing company HubSpot that found "tweets with images are 94% more likely to be retweeted than tweets without"); Noah Kagan, *Why Content Goes Viral: What Analyzing 100 Million Articles Taught Us*, HUFFPOST (June 13, 2014), https://www.huffpost.com/entry/why-content-goes-viral-wh_b_5492767 ("[T]wice as many people, on average[,] share posts with at least one image in the post.").

11 See Jim Pickerell, *History of the Stock Photo Industry*, SELLING STOCK (Aug. 7, 2006), <http://www.selling-stock.com/Article/history-of-the-stock-photo-industry-0> (providing a

learned that photographers pay attention to and attempt to make use of copyright.¹² Photographers assert copyright by providing notice through watermarks, metadata, or both.¹³ Professional freelance photographers insist on retaining copyright when negotiating with clients who purchase their services. Moreover, professional photographers have had vocal and organized representation when lobbying for copyright reform measures.¹⁴ And in some cases photographers engage in cease-and-desist practice against digital platforms, publishers, and others.¹⁵

Photographers' experience of technological change and views about copyright, taken together, compel the following questions: How are photographers managing and responding to the technological shift to digital, internet-based communication? In what ways are photographers looking to law, specifically to copyright law, to help them navigate the changing technological landscape? What does this law mean for them and their work? Over the past three years, we have conducted an in-depth qualitative investigation to answer these questions. We have done thirty-two long-form interviews with photographers, agents, and businesses. We have also observed at studios, galleries, and international photo exhibitions. This Article reports our findings and analysis, and is the first such study of digital photography and copyright in the internet era.

A reason photographers might care about copyright comes from traditional law-and-economics theory, which posits that copyright infringement lawsuits, and the threat of them, deter copyists to some degree and protect creators' profits.¹⁶ But this theory does not end up fitting with the facts on

brief history of the stock-photo industry and discussing the movement toward online stock photography as technology improved).

12 See JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INVENTORS, AND EVERYDAY INTELLECTUAL PROPERTY* 294 (2015) (finding that, other than professional photographers, many creators and innovators do not attribute their successes or failures to intellectual property—and many do not pay much attention to it at all—and instead maximize opportunities for creative or innovative autonomy and the sharing of their work to produce more and better).

13 See *infra* note 189 and accompanying text.

14 See, e.g., Michael Zhang, *Why Photographers Need a Copyright Small Claims System*, PETAPIXEL, (June 11, 2016), <https://petapixel.com/2016/06/11/photographers-need-copyright-small-claims-system/> (describing the copyright-policy views of the Professional Photographers of America).

15 See *infra* text accompanying notes 122–23; cf. *Erickson Prods., Inc. v. Kast*, 921 F.3d 822 (9th Cir. 2019); *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723 (9th Cir. 2019).

16 This is the standard price-theory, expressive-work-as-a-public-good, dynamic-static-tradeoff model described in WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 71–84 (2003), and YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 35–58 (2006). There are other economic models of intellectual property, such as Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969). But the price-theory model is the traditional one that goes back to the founding. See JAMES BOYLE, *THE PUBLIC DOMAIN* 17–41 (2008) (discussing Jefferson's views on copyright); see also Jeremy N. Sheff, *Jefferson's Taper*, 73 SMU L. REV. (forthcoming 2020), <https://ssrn.com/abstract=3332477> (based on a new historical archeology of Jeffer-

the ground. Unlawful uses of photographs are, of course, hard to combat in today's world.¹⁷ The current, online environment makes infringements too numerous to fight exhaustively. Unlawful uses can also occur offline, making them hard to detect. Detection requires time, effort, software, third-party assistance, and money. Demand letters and lawsuits require know-how, legal representation, and money. The photographers we studied, who come from a wide variety of working photographers, told us that copyright enforcement is a losing battle and largely not worth their time.¹⁸ Yet they continue to work, produce images, and sell them. That the traditional economic account of copyright fails to explain photographers' behavior is an important finding of this study. But, perhaps even more surprisingly, photographers continue to appreciate and declare allegiance to copyright law despite its lack of deterrent effect.

This presents a puzzle. If copyright enforcement is costly, difficult, and in many instances ineffectual, why, exactly, do photographers care about copyright? In our data, we identify three explanations.

One explanation is a slight modification of the traditional law-and-economics theory. Perhaps copyright is not currently operating as the theory predicts, but photographers believe it could do so with modifications. This is the "perfect enforcement" scenario in which photographers care about copyright because they wish enforcement were more effective.¹⁹ Photographers experience more competition than ever from amateurs.²⁰ And some tell a story about declining revenue from certain aspects of their business from this competition. One reaction to that account is to resolve that copyright simply needs to do better: if copyright deterred more copyists or if more photographers sued infringers, more profits would be protected and low-end competition would not hurt as much. As we will describe in more detail below, this explanation is one way that photographers interpret the law's possible effect on their work, but it is not the only or predominant way.

The other two explanations for why photographers care about copyright are underappreciated and together represent the most substantial contribu-

son's taper metaphor and situating Jefferson's views on intellectual property within a natural law theory of property but consistent with a broad view of obligations toward growing the public domain).

17 Not all unauthorized uses are unlawful; some are fair use, and some fit into some other valid exception to copyright protection. But this only makes the unlawful copying even more costly to detect, since it must be distinguished from fair uses and the like.

18 See *infra* Section I.B (describing the types of photographers we interviewed); *infra* Section II.D (explaining how pursuing infringements is not worth the time).

19 Cf. Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 726–28 (2013) (describing the legal background of and policy rationale for improved copyright enforcement, before complicating and rejecting this perspective).

20 See, e.g., Mikael Cho, *The Future of Photography: Thoughts on the Impact of Free Photos*, PETAPIXEL (Aug. 7, 2017), <https://petapixel.com/2017/08/07/future-photography-thoughts-impact-free-photos/> (explaining that programs like "Unsplash . . . where anyone can share high-resolution photos for anyone to use freely" have allowed amateurs to compete with professionals).

tions of this Article. And, as we will explain, an interesting connection exists between these other two explanations.

First, our research reveals that photographers care about copyright for its role in contracting with clients. The market for photographs divides into two categories: clients who hire photographers for a specific service and anonymous customers who purchase the rights to use existing photographs. The traditional economic story about copyright enforcement mainly calls to mind anonymous customers—strangers—who might buy a copy of an expressive work—a commodity in a mass market—from copyists rather than the original creators.²¹ But this aspirational goal of reselling to anonymous third parties is rarely achieved among the photographers we interviewed. Many more photographers describe copyright as providing leverage in their direct negotiations with clients because it endows photographers with a standardized bundle of rights with which to bargain. Copyright also provides opportunities to collect extra fees for uses outside the scope of a license. We learned that in these ways copyright is important in the scope of the fee-for-services bargain struck between photographers and clients.

This “copyright as leverage” explanation is drawn from our data. Our analysis of it relies on economic pricing theory and offers an alternative to the traditional incentive- and deterrence-based theory of copyright. The phenomenon of photographers, supported by copyright, seeking leverage in negotiations with clients amounts to photographers seeking control over how they price products and services. Pricing in bilateral negotiations with clients is individualized; it does not resemble pricing for a mass market. Photographers celebrate the opportunity to negotiate one-on-one as it accords with the bespoke services they describe themselves as providing to clients. Other photography pricing strategies that we learned are part of these negotiations rely on bundling, versioning, and maintaining separate prices for distinct genres or client types.²² A critical insight of this Article is that these pricing strategies are distinct from, but not mutually exclusive of, the business strategy of enforcing copyrights directly to protect and maintain profits.²³ We are thus augmenting and even challenging the standard economic theory of copyright as enforcement. The photographers’ accounts teach us that other economic forces are at work. Copyright as leverage for pricing client services could be as or more important than copyright enforcement for earning a living from producing and distributing expressive work.

Second, our data also take us beyond economics toward a set of other accounts that photographers provide to explain copyright’s importance to them. Throughout the interviews, photographers describe caring about copyright for nonfinancial reasons as well. For example, some photographers

21 See *supra* text accompanying notes 16–18.

22 We will describe each of these pricing strategies below alongside detailed illustrations from the interview data. See *infra* Part II.

23 In fact, the business strategy posited in the traditional law-and-economics theory of copyright presumes that creators aim to charge a pricing markup over marginal cost (the existence of profits implies a price greater than the marginal costs).

describe copyright as representing the personal connection between them and their work—a form of signature and critical attachment. Relatedly, photographers described copyright as the mechanism for preventing alterations and uses in undesired contexts—to maintain the integrity of the images they produced. Maintaining the integrity of their images, in turn, has several perceived desirable effects: protecting their own professional reputation, protecting the subjects in the photographs, maintaining a relationship of trust with their subjects and their audience, and protecting photography itself as an artistic and valuable expressive medium and professional field.

When photographers appeal to concepts like attachment, belonging, reputation, and control in their discussion of copyright, we interpret them as appreciating photography as a profession defined by specific skills and expertise. Just as lawyers, doctors, and accountants have traditionally seen themselves as members of professions cultivating and elevating distinct expertise, photographers understand themselves in an analogous way. The sociological study of professions is vast, and we draw only on its contours to make several points about how copyright as a legal concept structures professional boundaries for the photographers facing the difficulties of the internet age.²⁴ The boundary between professional and amateur photographers that has preserved the importance of skill and expertise is today eroding with the proliferation of digital camera equipment and broad access to photographs. Professions often respond strategically, albeit informally, to this sort of boundary erosion.²⁵ We propose, as an interpretation of the interview data, that copyright functions as a link connecting photographers to their work as professionals—the making of photographs and the photographs themselves.²⁶ This function is separate from copyright's role in combatting unlawful copying or providing bargaining leverage. We argue that copyright is experienced by photographers as a demarcation of control and a symbol of status that can protect the profession and its claim to expertise and market

24 We rely mostly on the influential work of Andrew Abbott for this part of the paper. See generally ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS* (1988).

25 Examples of strategic reinforcement of professional boundaries include developing educational programs that certify the skills and abstract learning needed to produce the professional work and developing professional organizations that evaluate and inform the professional practice. See *id.* at 56–57.

26 For a historical argument about copyright's role in developing and defining photographic authors as professionals in terms of contested copyright ownership, see ELENA COOPER, *ART AND MODERN COPYRIGHT* 77–105 (2018) (focusing on the period of 1850–1911). For a contemporary analysis of challenges freelance authors face in the digital area in light of expanding publisher power and the strain both put on the objects of copyright law, see GIUSEPPINA D'AGOSTINO, *COPYRIGHT, CONTRACTS, CREATORS* (2010) (focusing mostly on the European Union and United Kingdom law). For an analysis of professional identity and authorship in a comparative setting, see CATHERINE L. FISK, *WRITING FOR HIRE* (2016) (providing a historical study comparing the Writers Guild in Hollywood and its protection of author attribution and professional status with copywriters in advertising agencies on Madison Avenue who lacked authorship rights but sought professional recognition through compensation and client loyalty).

privilege. Copyright signals photographers' knowledge and skill that, to the photographers we interviewed, should garner both respect and supracompetitive prices.

The common thread between copyright's role in imparting photographers with leverage in client negotiations and copyright's role in marking photographers as professionals is that both understandings of copyright lead to an elevated socioeconomic status for photographers. Moreover, these two roles for copyright intertwine and reinforce each other. Top professionals in various fields, such as lawyers and accountants, have some degree of market power to name their price as individuals, instead of relying only on market rates (which still constrain prices to some extent). Our findings about photographers' pricing strategies suggest that copyright is used to support that market power, however ineffectively. But having power to price one's goods and services is not only a measure of economic power; it is also a measure of social prestige. For photographers, the ability to uphold quality norms and ethical standards derives, in part, from their understandings and use of copyright.²⁷ Being part of a profession with norms and standards indicates a particular social status, but also has economic value. Thus, both pricing power and professional norms explain copyright's social and economic importance to photographers. These findings in this Article deepen our understanding of how law functions in the working lives of creative professionals.

Copyright law, like all forms of law, takes on competing and often contradictory roles as a matter of the everyday experience of the people subject to it. The law's predominant functions may be quite separate from its rule-enforcement function in courts and law offices.²⁸ That copyright law can serve as both a source of economic leverage and a noneconomic status marker for professional photographers illustrates law's constitutive and malleable role in everyday life.²⁹ The law's shifting function is especially significant for professional photographers as the digital age challenges the distinction between professional and amateur photography and enables low-end competition in the field.

This Article proceeds as follows. In Part I, we discuss the qualitative methodology employed by this study, its valuable insights, and its limitations. In Part II, we discuss the business strategies used by photographers. Specifically, we identify ways in which photographers use copyright, one-to-one contracting, and powerful but shifting industry norms as leverage to yield financial rewards and structure their professional practices. In Part III, we

27 Whether photographers are "correct" in their understanding of copyright—how it would predictably work in court or as a lawyer would advise—is beside the point. Our project is to evaluate how copyright is appreciated and used by photographers as a measure of law's evolving function in everyday life.

28 See ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* (1998).

29 See, e.g., Austin Sarat & Thomas R. Kearns, *Editorial Introduction*, in *LAW IN EVERYDAY LIFE* 1, 9–11 (Austin Sarat & Thomas R. Kearns eds., 1995) (describing the instrumentalist and constitutive views of law in the everyday).

discuss the noneconomic roles copyright serves within the activities of professional photographers to delineate and defend professional photography as a valuable expert service, especially in the digital age. Finally, we conclude by offering thoughts on law's responsiveness to technological change; the future of professional photography as an economic, aesthetic, and civic practice; and copyright's unexpected role in supporting expertise.

I. INTERVIEW METHODOLOGY

This Article focuses on understanding the working situations of photographers as creative professionals.³⁰ This is one important lens through which to evaluate copyright law and other policies that aim to affect creativity. We hypothesize that the digital age distinctly affects photographers as they seek to continue earning a living and differentiating their skills in an increasingly competitive marketplace. Photographers face competition from a wider variety of business types, skill levels, and product offerings. In an earlier qualitative study of intellectual property law's relationship to creativity across multiple fields, photographers stood out as more attuned to copyright and less willing to share their work in the new digital age because of the varied risks of unauthorized uses.³¹ This finding in particular provided the motivation for this project. We sought to discover how photographers might face different incentives and constraints than, say, musicians, filmmakers, and writers. We also wanted to identify and explain differences among photographers.

We know from prior research that people create for a myriad of reasons across many fields.³² The role of law among other incentives and constraints can be hard to bring to the surface. Studying the complex motivations and varied practices of a particular yet diverse population of skilled creators calls for qualitative interview research.³³ Our methodology for this Article, described in detail below, consists primarily of long-form interviews, which allow us to understand the dimensions, parameters, vocabulary, and concerns of photographers and their business partners. This approach allows us to elicit photographers' attitudes and perceptions about technological change, copyright law, and the relationship between the two. It also allows us

30 In addition to photographers, we also interviewed a photographers' agent, a lawyer who works with photographers, and a photographer who now primarily runs a business helping other photographers manage their photographs online.

31 SILBEY, *supra* note 12 (finding that many creators and innovators do not attribute their successes or failures to intellectual property—and many do not pay much attention to it at all—and instead maximize opportunities for creative or innovative autonomy and the sharing of their work to produce more and better).

32 See TERESA M. AMABILE, *CREATIVITY IN CONTEXT* (1996); MIHALY CSIKSZENTMIHALYI, *CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION* (1996); DANIEL H. PINK, *DRIVE: THE SURPRISING TRUTH ABOUT WHAT MOTIVATES US* (2009); SILBEY, *supra* note 12, at 25–80.

33 We discuss results from our qualitative interview research below. See *infra* Parts II–III.

to learn about photographers' actual behaviors in the new digital environment, through license agreements and accounts of their business practices.³⁴ Interviews are the core of our methodology, but our data also include our field notes from photography trade shows and gallery visits. The rich and nuanced information that we collected provides the necessary foundation for understanding copyright's role in the full context of how contemporary photographers create their art and make a living.

A. *Qualitative Methodology and Its Advantages*

Qualitative research identifies the relevant variations in lived experiences of individuals. In this context, the term "variation" does not refer to variation from a standard or ideal; instead, a variation means one from the set of possible types of experiences people might have of a particular phenomenon.³⁵ For example, one photographer might describe the copyright registration process as streamlined and efficient—one variation—whereas another photographer might experience the process as cumbersome and daunting—another variation. Under the qualitative approach used in this study, the researcher discerns when the differences in individuals' experiences are significant enough to consider them distinct from each other so as to demand separate explanations in terms of the phenomena being studied. Based on literature from the field and inductive analysis of the interview data, the researcher identifies categories of variations (e.g., copyright registration) and distinctions within those categories (e.g., whether and why copyright registration occurs) that are meaningful for the research question at hand. In general, one identifies the variations by collecting, comparing, and juxtaposing accounts and observations of experiences of multiple individuals.³⁶

Qualitative research seeks to understand the structures—institutions, social norms, and common practices—that explain individual and collective behavior. Interview research gathers individual accounts of those structures and studies the way people justify and explain particular attitudes and behavior. One can then learn about the variations in how people interact with institutions, norms, and practices, as well as the variations in what the institutions, norms, and practices mean to people. Qualitative analysis can also identify irregularities within the studied experiences. Identifying the possible reasons that may explain behavior and practices—for example, why a photographer might assert a copyright claim in one instance and not

34 Interviews are by no means equivalent to field observation. But our interviews do allow us to question our subjects about what they actually do, and what choices they actually make. Often these responses are independently verifiable through their public-facing work or through their websites.

35 Our usage of "variation" is not intended to connote any sense of how frequently each type of experience occurs.

36 Analysis of accounts and observations optimally occurs within a research group for interpretive validity purposes—sometimes called intercoder reliability when using codes to analyze the data—and with qualitative analytic software such as Atlas.ti. For discussion of intercoder reliability and coding practices, see SILBEY, *supra* note 12, app. A.

another—is critical to understanding the actual mechanisms through which law operates in the real world. Interviews facilitate a broad and deep understanding of the many factors involved in a social phenomenon such as the creation and sale of photographs.

Instead of looking for how *A* causes *B* and isolating one particular mechanism behind that effect, qualitative work identifies commonalities in and distinctions between subjects' accounts to understand better certain situations and mechanisms of interaction. For example, in this project we sought to learn about the ways digital equipment, internet marketing, and changing client needs have changed the way photographers work. Critically, studying such a complex tangle of social, economic, and technological changes requires a method that can accommodate consideration of individuals and groups in a diverse range of situations. Qualitative work does not rely on the individual as the sole unit of analysis. And, it need not restrict itself to using the aggregation of individual behavior as a proxy for group behavior. Instead, qualitative work has the flexibility to learn about social structures, institutions, and relationships between people and organizations from the accounts elicited in structured interviews. This orientation toward explanation instead of causation and toward institutions (formal or informal) in addition to individuals demands data collection methods like in-depth interviews and observational field work and greatly enhances our understanding of complex social phenomena.³⁷

The advantages of qualitative interview research are therefore substantial. But it is also important to acknowledge what the method does not aim to accomplish.³⁸ In contrast to quantitative methods, interview research does not use a random or representative sample, nor does it provide a measure of the frequency that variations appear. Instead, the qualitative researcher aims to identify a comprehensive set of relevant variations in the studied experience or practice. To get there, the researcher identifies the population to be studied and the key dimensions that are hypothesized to generate distinctions in the experience under analysis, “stratifying” the population into relevant subgroups within those dimensions.³⁹ Talking to people across many subgroups increases the chances of identifying relevant variations and achieving comprehensiveness in the explanation of the phenomena. Having a complete set of variations may be impossible, but the goal is to discern as full a set as possible. The signal that a researcher has identified as full a set as possible is known as “saturation”—the point when the most recent interviewees are providing accounts that align with previous accounts.⁴⁰ Another

37 Ultimately, this research project will involve multiple methods, but here we are explaining our rationale for beginning with in-depth interviews. We hope to follow our interviews with a survey of photographers.

38 See Mario Luis Small, *How Many Cases Do I Need?*, 10 ETHNOGRAPHY 5 (2009); see also SILBEY, *supra* note 12, app. A (describing limitations to this approach).

39 In the next section, we explain the stratification we used to seek out interview participants. See *infra* Section I.B.

40 See Small, *supra* note 38, at 25–28 (explaining the concept of saturation).

major contrast between quantitative and qualitative work is that the latter will not lead to a statistical measure of correlations among variables or a mathematical test of causal inference. But a core benefit of interviews, and the key reason qualitative methods are superior for the questions we ask in this Article, is the ability to generate multifaceted and nuanced explanations for complex social phenomena.

Although our interviewing and field observations are as broad and open ended as possible,⁴¹ we nonetheless started this project with certain hypotheses. These hypotheses are based on trends in the field of photography rooted in the rapid evolution of digital photography and photographic equipment. Digitization, internet connectivity, and innovations in devices have democratized—expanded access to—photography as an aesthetic practice and professional business opportunity. For example, anyone with a smartphone can take and upload photographs with ease. In addition, the quality of photographs using relatively inexpensive equipment has grown exponentially as consumer demand for such equipment continues to rise. Previously elite and professional equipment, such as lenses and motion-picture applications, are now available for everyday photographers. Photo-sharing and stock-photography platforms are ubiquitous and increasingly differentiated to serve particular markets. These new business models for marketing and distributing photographs threaten to depress the price of once-expensive corporate and editorial photography. At the same time, the consolidation of these aggregation sites (for example, into Getty Images) may reduce choice and control of content and price by photographers, clients, and consumers.

From these trends, we generated several questions about the relationship between digital-age equipment and platforms and the aesthetics and business practices of professional photography. We asked (1) how expanded access to and participation in photography as a technical and communicative medium are shifting the markets for photographic services and products; (2) how these shifts are changing the opportunities for professional photographers; (3) how professional photographers are adapting to these changes in a digital and networked environment; and (4) what role, if any, copyright law is playing in the field's changes and adaptations. We do not ask about these topics directly but instead by eliciting grounded, particularized accounts of work and professional life through specific questions of each photographer. Our template for interview questions is available for those interested in more detail about how we broached these subjects.⁴²

41 Institutional Review Board protocols at our universities present some constraints on the open-endedness of interviews.

42 Our interview template allows for changing the order of questions when appropriate and also allows for follow-up questions. For interview questions, please email any of the authors.

B. *Interview Data Collection*

After developing and gaining Institutional Review Board (IRB) approval for an interview protocol designed for photographers, photography businesses, and business partners (such as agents and lawyers), we sent letters to a range of potential interviewees. We targeted five groups of photographers based on the organization of the photography business into different genres, which we derived from the literature on the history and business of photography: event photographers, commercial/corporate photographers, editorial/photojournalists, portrait photographers, and fine-art photographers.⁴³ Within those categories, we sought to interview both established and emerging photographers, as well as freelance and staff photographers. (These are the population subgroups based on key dimensions mentioned above.) We also sought interviews with agents or lawyers for these photographers.

We chose to focus our attention on professional photographers, as distinguished from amateur photographers. We define professionals as those who aim to make a living by selling their services and photo products. Amateurs are those who take pictures incidental to their other work. A core dynamic we explore in this study is the latent, structural, and economic conflict between these two groups. Amateur photography has been growing and spreading in recent decades, a commendable trend in terms of diversifying communication and creative practices and making those practices more accessible. But this trend may also be reducing the distinctiveness of and, as a result, the opportunities for professional photographers. Professionals are keenly aware of this possibility.⁴⁴ In this light, copyright, we hypothesized, if it has an important function in the photography industry, might operate through its support of professionals in various, and perhaps surprising, ways. Our research methods focus only on the accounts of professional photographers (or aspiring professional photographers)⁴⁵ as a measure of their changing working environment and in particular how copyright relates to it. That said, we also hope to further define what it means to be a working photographer through our analysis of the interviews.

Below is a visual representation of the stratification of the population of professional photographers that we used to seek interviews.

43 See, e.g., GRANT SCOTT, *THE ESSENTIAL STUDENT GUIDE TO PROFESSIONAL PHOTOGRAPHY* 90–126 (2016) (discussing a similar list of categories).

44 Copyright does not deny amateurs, who are as entitled to copyrights as professionals, and professional photographers tell us they understand this. Thus, one puzzle of copyright's role in professional photography is discerning whether and how copyright might protect professionals from competition by amateurs and stock-photo sites when both provide less expensive photographic products.

45 We also spoke with several business and legal advisors to professional photographers.

TABLE 1: TYPES OF PHOTOGRAPHERS INTERVIEWED

Freelance / Independent (F)			Staff / Employed by Other (S)		
Established (E)		Aspiring (A)	Established (E)		Aspiring (A)
Photo J (1)	Event (2)	Portrait (3)	Photo J (1)	Event (2)	Portrait (3)
Commercial (4)		Art (5)	Commercial (4)		Art (5)

We kept track of the interviews we conducted in a chart that corresponds to the key dimensions and subgroups. For example, we interviewed an established freelance photojournalist (FE1) on September 12, 2016, and an aspiring staff fine-art photographer (SA5) on September 29, 2016. We completed thirty-two interviews spread among the twenty possible categories. Many photographers work across two or more categories (e.g., are both commercial photographers and photojournalists). Although the five categories are confirmed as relevant by the interview data, we learned from the photographers that the genres of and markets for the particular forms of photography blur.⁴⁶

Most interviews ranged from one to two hours in length. We used the approved IRB protocol for the semistructured interview, which allowed us to standardize all the interviews. But the protocol also allowed us to deviate and follow up when necessary to clarify potential contradictions or dig deeper into apparent idiosyncrasies or parallels. Our interviewees could elect to be on or off the record. Most interviews were not confidential, which means we could attribute quotes and accounts to the particular photographers. Some interviews are off the record, which means the interviewees agreed to the interview on the condition that we make their responses anonymous by providing them with pseudonyms. All of the interviews were recorded and transcribed by a professional transcriber.⁴⁷

As we conducted interviews and read transcripts, then reread and analyzed them, we revised our understandings and interpretations of the phenomena under study. We analyzed the interviews in various steps. First, after each interview, we wrote a memo summarizing it in two to three pages. This included any notes made during the interview, a description of notable sto-

46 Some photographers work across these subgroups (they work as both event photographers and portrait photographers), and also within one subgroup photographers make further distinctions (e.g., editorial photography includes concert photography and celebrity photography; fine-art photography includes travel photography and landscape photography). It is common for photographers to develop expertise in more than one field but, as described more fully below, to keep them professionally separate.

47 For biographies of the photographers we interviewed, properly made anonymous where required, please email any of the authors.

ries related by or quotations from the interviewee, and a list of overarching themes from the interview. Memos were codrafted and shared to produce a common framework of the ongoing analysis.

Second, after the interviews were completed, we read the transcripts closely. We studied the interviews at the level of language (word choice, narrative structure, and content) and conceptual themes, which are drawn from reading across the transcripts and from the literature on photography and intellectual property. We then generated a list of code words developed deductively from preliminary findings and inductively from the emergent language, repetitions, narrative structure, and conceptual themes contained in the interviews.

Third, we read the transcripts again to code them, first by hand and then using a qualitative software system called Atlas.ti, with which we attached codes to particular parts of the transcripts that we chose. (The Atlas.ti software records the users' coding; the assignment of codes to transcript language is not automated.) Coding allows us to search and sort the data by code or any other category we establish. Atlas.ti also allows users to connect transcripts (or parts of them) to each other and to other documents within the database adding depth and relations to the dataset for yet further analysis. Coding together and interpreting the interviews as a research group enhances intercoder reliability, which is critical to the descriptive and interpretive validity of qualitative empirical analysis.⁴⁸ To ensure we understand the codes in the same way, we had regular meetings to review the transcripts and compare our analysis and the coding. Where there were differences in interpretation, we discussed and resolved them. By its very nature, working with qualitative data is an interpretive process. Nonetheless, strong consensus can be achieved by regularly sharing coding on a common text and thus collectively developing common parameters for interpretation.

II. COPYRIGHT AND THE BUSINESS OF PROFESSIONAL PHOTOGRAPHY

Photographers earn a living making photographs for employers or clients. They are paid for both their labor and their output. The ubiquity and affordability of cameras, the abundance of photographs in today's culture, and the ease of copying and distribution present a complex and evolving landscape for photographers who seek to maintain a commercial demand for their professional work in a manner that provides them sufficient income. What mechanisms do photographers employ to maintain market demand for their work? What roles does copyright play in this landscape?⁴⁹ This Part

48 See Joseph A. Maxwell, *Understanding and Validity in Qualitative Research*, 62 HARV. EDUC. REV. 279, 287–91 (1992) (discussing the importance of group research showing multiple people agree in establishing reliability, and that reliability is the key to validity).

49 This Article has proceeded on the assumption that most photographs produced by our interview subjects—and by professional photographers generally—are protected by copyright. See, e.g., Subotnik, *supra* note 5, at 1493 (noting the “tradition of near-presumptive copyright protection” for photographs). However, Justin Hughes has thoughtfully argued for caution “as we enter a period in which our daily lives are ubiquitously recorded

describes the various professional and business strategies on which the photographers we interviewed rely.

Although photographers sell photographs, which suggests that copyright could provide their primary leverage for making money, in fact copyright predominantly plays an initial rather than ongoing role in a photographer's businesses.⁵⁰ One core feature of the freelance photography business is one-to-one negotiation with clients, rather than an anonymous market that offers wares to all comers at once. Like many business proprietors, photographers seek to price discriminate to maximize their profits. The leverage for the price discrimination in these negotiations is sometimes copyright as a right of control over the images created. And sometimes the leverage is longstanding, photography-specific industry standards (e.g., skill, experience, photographic genre, complexity of shoot) that are currently in flux from shifting aesthetics and consumption patterns in the digital age. In other words, copyright is one source of leverage among others in the service of the overarching goal of making a living as a professional photographer.

As business models diversify to adapt to the new digital-age platforms and practices, photographers' leverage in negotiating one-to-one contracts for services and products wanes. This is not because copyright law has changed (the last major revision occurred twenty years ago)⁵¹ or is less effective when asserted (in fact, the contrary might be true).⁵² Our interview data describe a situation in which professional photographers face more competition than in decades past. Today there are more photographs available to make, use, and license, making it harder for photographers to charge the prices they used to. And in view of that competition, they seek ways to highlight their professional status as skilled creators in a field that is growing in importance but also in access. Eroding leverage in negotiations for photographic services and products means losing autonomy over one's profession

in photography and videography." Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 339, 342 (2012). Specifically, he argues that "probably most of the world's photographs and video—made only to record information—do not qualify for copyright protection under a reasonably administered originality standard. That includes identification photographs, security camera videos, industrial product photographs, satellite imagery, crime scene photographs, and Google Maps Street View." *Id.* at 425. To the extent that courts come to hew closer to Hughes's view, that would present yet another variable to study.

50 This discussion applies largely to freelance photographers and not to staff photographers. Insofar as the photographers' employers, such as news or media companies, also produce or license photographs for sale as a business model, the discussion herein may apply to them as well. Moreover, many of our interviewees had worked as both staff and freelance photographers and so could speak from both perspectives. Most relevant for this Part's discussion is that freelance photography is the majority of photographers today. Thus how they earn a living making photographs on behalf of clients is most relevant to the research questions presented.

51 Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

52 Cf. Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 538–44 (2017) (discussing automated copyright enforcement systems).

and business, decreased power in the ability to set prices, and reduction in the enjoyment of supracompetitive profits. In an effort to maintain a professional status, which distinguishes the photographer in the field as worthy of higher prices and a quality reputation, photographers emphasize copyright ownership as both critical to leverage in client negotiations and to norms of professional photographic practice.⁵³ And yet, despite maintaining copyright ownership, photographers' market power has diminished nonetheless.

We learn about the erosion of market power from diverse accounts across all photographic genres. Professional photographers describe copyright and contract as forms of control (which they are). But these legal tools serve less to protect investments in property and more to protect professional status and a praiseworthy reputation. Copyright and contract, foundations of a photographer's business practice, are frameworks for professional norms that credentialize photographers as skilled and rarified. However, both copyright and contract are undergoing significant change in the digital age with the proliferation of copyrighted works and boilerplate contracting. Ironically, photographers worry about declining prestige even though their field has become more central to socioeconomic and political culture in the digital age. The accounts below describe evolving trends for professional photographic business practices that photographers point to as evidence of their threatened professional status.

A. *Bilateral Bargaining: Copyright as Initial Leverage*

Freelance photographers (excluding fine-art photographers) earn a living from client fees or "session" work. They charge a day rate or creative fee and for equipment rental, assistant compensation, darkroom, and editing costs.⁵⁴ Photographers negotiate contracts for these fees, which also include a limited license for use of the photograph. Primarily, photographers' earnings derive from this initial contract for services. Although some interviewees describe clients returning to relicense the photograph for additional print runs or displays, mostly photographers' revenue derives from repeat business

53 As will be discussed below, in the context of staff photographers who rarely own their own copyright to their photographs, control over the initial image making and input into its placement is described by them as critical to job satisfaction and evidence of professional respect.

54 One photographer told us that while these terms are interchangeable, he much preferred "creative fee" because "day rate" appeared to diminish what a photographer's time is worth. See Interview with Dan (pseudonym), in Bos., Mass., (July 18, 2017) (transcript on file with authors) ("Yeah, we don't like the word 'day rate' anymore, that's a word we don't like anymore, because it looks like your day is only worth [so much] . . . So we call that the 'creative fee.'"). Another photographer confirmed this sentiment: "I try not to have a discussion about time, because I always say that it's not a good gauge . . . My creativity is the gauge. Something that takes me a bigger effort to make an image, I mean, at the end of the day, if you look at time, you're looking at one-twenty-fifth of a second. That's the actual time it takes to take the picture, right?" Interview with Ashok Sinha, in N.Y.C., N.Y. (July 10, 2017) (transcript on file with authors).

from old clients with new projects, not additional licensing fees for photographs previously made.

A New York commercial photographer explains the fee structure:

In the commercial space . . . there might be a flat day rate, let's say five thousand dollars a day, and . . . let's say they want rights for just billboards in Florida for one year, then they might pay five thousand dollars for that, and then if they come back later [and say], . . . "Oh we wanna use it on billboards nationwide," then that's a separate thing.⁵⁵

What determines the price—the day rate and initial usage fee—in these contracts? Photographers vary in their responses, but all agree that the contract is a personalized negotiation between the photographer and the client based on a combination of factors including complexity of project, equipment and assistants, time for turnaround, reputation and experience of the photographer, and prior relationship with the client. In other words, the photographer and client appear to be engaging in a unique fee-for-services arrangement with a specific deliverable (use of an image) that is unique to the client but only *licensed* (rather than transferred).⁵⁶ All the established freelance photographers we interviewed enjoy the independence of freelance work (many were staff at one point in their careers). Despite its risks, they appear to relish the independence freelancing provides, emphasizing the professional autonomy and skills clients demand in the work they perform and produce.⁵⁷

Almost all freelance photographers we interviewed rely heavily for revenue on an up-front, fee-for-service agreement. This kind of transaction with customized prices suggests that freelance photographers pursue a business strategy reliant on successful bilateral bargaining.⁵⁸ A photographer may have information about a given client that enables the photographer to esti-

55 Interview with Steve Giralt, in N.Y.C., N.Y. (June 27, 2016) (transcript on file with authors).

56 The license, as opposed to a transfer via sale, is unusual in other service and product areas. Contract for services or goods do not usually contain residual rights of control in the seller. A book purchase at the store or sale of a manicure at the salon has no subsequent ability to reap future financial rewards from the initial commercial transaction. By licensing their work and selling their initial services, photographers retain the theoretical option of later revenue from that initial service by future licenses of the work. This kind of consumer transaction may be becoming more common in the case of digital copyrighted goods, such as music, software, and e-books. See AARON PERZANOWSKI & JASON SCHULTZ, *THE END OF OWNERSHIP* 57–59 (2016).

57 We have interviewed staff photographers who produce works-for-hire and photographers who work on commission and transfer their copyright under the terms of that agreement. Even for these photographers, however, the preference is to freelance because of the autonomy it provides, both monetarily and aesthetically. Testing this preference and behavior-in-fact will be one aspect of the survey that we hope will follow this qualitative study.

58 In bilateral bargaining, the prices are negotiated between the two parties rather than dictated by a market price. Prices, although they may be informed by business norms and knowledge of prices negotiated in other deals, are specific to each client. The seller and the buyer split the surplus depending on their relative bargaining power.

mate a tailored price that the client might be willing to pay.⁵⁹ Adding to their leverage, photographers can use copyright and contract to keep buyers from reusing or reselling the goods. One might compare contracts for photographic work with contracts for architectural services and drawings, which typically are provided for a specific client and space and cannot be resold, even though the drawings themselves are tangible property and alienable.⁶⁰ Intellectual property regimes purposely facilitate this practice of charging different, tailored prices, which the law justifies as a necessary incentive mechanism for producing the inventive or creative goods in the first instance. Many of our findings about the business strategies of professional photographers can be construed as ways that photographers aim for greater negotiating leverage in their professional practice.

What is copyright's role in photographers' pricing? For starters, we learned that photographers rarely transfer copyrights in any contract. Most photographers we interviewed were legally unsophisticated in terms of their knowledge about copyright law's complicated structure and nuanced distinctions (including with respect to fair use, statutory exemptions, and the lack of rights of integrity or attribution). Nonetheless, most described retaining copyright as having paramount importance.⁶¹ In addition to the perceived uniqueness of the photographer's skill, aesthetic practice, and client relationships—all of which are explained as driving demand for the work and justifying the negotiated price—copyright provides another form of leverage in the initial contract negotiation. Being able to withhold a complete copyright transfer to the client and charge per requested use or selected print, which is usually time-sensitive and audience-specific (a "usage fee" as they call it, or a "license" in copyright parlance), gives photographers a unique leveraged edge in the negotiation and requires the client to return for future uses (and payment).

Photographers describe showing clients a range of photographs from the designated shoot (sometimes a very limited range, depending on the photographer) from which clients will select those to license for the designated purpose. The unlicensed images remain part of the photographer's portfolio, and the client may only use the licensed images under the terms of

59 Theoretically, in a one-time bilateral negotiation, photographers would seek the highest price possible, up to the limit of their clients' maximum willingness to pay. But they can only approximate that goal by charging different customers based on their knowledge. And the dynamics would differ for repeat clients.

60 For an extended discussion of how copyright applies to customized architectural services, see generally Kevin Emerson Collins, *The Irrelevance of Copyright in Customized Creativity* (May 8, 2018) (unpublished manuscript), <https://www.law.berkeley.edu/wp-content/uploads/2018/08/Kevin-Collins-Paper.pdf>.

61 As explained more fully below, copyright retention was common across all interviews with freelance photographers, and even with staff photographers who sometimes did freelance work on the side. This was true even for the commercial photographers making photographs for corporate clients and for advertising campaigns (for which subsequent reuse may be unlikely).

the contract.⁶² The practice of editing and curating the set of photographs from the shoot to show clients varies among photographers. Some withhold all but a few photos they deem the best, others give clients more choices. But the image selection, in concert with the client's preferences, further highlights the bespoke nature of the transaction and appears to explain the customized pricing scheme.

Most photographers appear to be unfamiliar with the complexity of copyright exclusivity and limitations, and thus are not fully aware of copyright's full potential. Nonetheless, photographers describe copyright as a critical element of the transaction they can withhold in order to maximize their compensation and control over the transaction. Usage fee—the fee for the license to use the images they make—is a line item in their contracts. Other line items include their own time, their assistants' time, space, and equipment. Photographers describe these latter line items as costs (sometimes significant costs) to pass on to the client, perhaps with a small additional percentage.⁶³ The photographs themselves and their use produces additional revenue for the photographer above and beyond the time and expenses. For many photographers, usage rights are the good that is conveyed whereas other costs are simply passed through to the client. As one photographer described the contract model, emphasizing the importance of usage fees to the business of photography: “Usage rights are the unit of currency in photography . . . [W]e want an audience, but the ticket to see the show is the usage fee.”⁶⁴

A difficulty that photographers describe when demanding usage fees is that clients sometimes think they are paying twice—once for the cost of making the photograph and then again for using it. A fine-art and editorial photographer described what she thought was one source of this confusion. Photography, like other goods and services, produces spillover benefits that are free to third parties (especially in the internet age). She says that:

[T]his new generation that grew up on Flickr think[s] that every photograph [is for the taking] . . . [a]s long as you give attribution, and you don't make any money on it. . . . [W]here photography fits into people's idea, it's like well, [photographs are] almost like perfume, like why are you wearing that perfume if you don't want anyone to smell it? . . . Like, are you gonna charge [*laughs*] me to smell it? It's just there. . . . [P]hotography is like that.⁶⁵

She describes a central aspect of the photographer's business model as the usage fee or “unit of currency,” which generates materially and symbolically

62 In addition to reserving the unlicensed images, the photographer retains the unlicensed rights of the licensed images as well.

63 See Interview with Steve Giralt, *supra* note 55 (“[M]y studio is a line item on my invoice, I mean, we literally rent my studio back to my clients, and, you know, it doesn't make money at the end of the year, but it doesn't really, you know, considering how much work I get from it, it doesn't necessarily lose money.”)

64 Interview with Linda (pseudonym), in N.Y.C., N.Y. (Nov. 30, 2016) (transcript on file with authors).

65 *Id.*

critical income for photographers.⁶⁶ This is different from money recuperated by the photographer for the costs of production, for which clients should also pay. And this is also different from the value experienced by audiences of the lawfully published photograph for which no one pays the photographer (like the smell of perfume bought and worn by another).

Copyright may be leverage in contract negotiations for commissioned work, but its financial significance beyond the initial contract is less predictable. One indication of copyright's role for photographers may be copyright registration. Few photographers appear to register their copyrights, describing the registration process as time consuming and pointless. In fact, other than one of the fine-art photographers we interviewed (who still only works with film, not digital), few of the photographers we interviewed routinely register their photographs. This suggests that these photographers do not consider bringing a lawsuit critical for protecting their long-term financial investments.⁶⁷ The principal examples of routine registration were in situations when commercial photographers were worried about a particular client's behavior and registered copyright for the particular commissioned images as a form of insurance against breach of the initial contract. Here is one such example from a commercial, freelance photographer in New York City:

Steve: I have registered only work that I feel is high risk of being infringed on. . . . [T]here're certain jobs where, when I'm shooting the job, I'm like, "I don't really trust this client," or . . . in the negotiation . . . at first they ask for something very specific, and then . . . suddenly . . . they're like, "We want rights to everything" at first, and then then I'm like, "You can't afford everything," and they're like, "Oh, OK, no, no, I just wanna use it for this," . . . so just to protect myself, on those specific jobs, I'll go to do the whole registration process . . . [A]nd I'll try to do that before it's published, or before I even hand over the client's . . . imagery

Interviewer: How many images, or how many times per year would you say you do that kinda thing?

Steve: [*sighs*] Maybe at most like two or three times a year.⁶⁸

This example resonates with many others shared with us. Clients may seek to relicense the image in the future, but they only do so on an unpredictable and infrequent basis. This example portrays the combination of copyright and contract as being a critical feature of the photographer-client relationship rather than as providing protection for the capital investment represented by a particular photograph.

66 *Id.*

67 It is not unusual for ordinary people to consider law less as a system of rules to enforce—for which hiring a lawyer and possibly also filing suit is necessary—and instead as a set of norms to which they adhere. See, e.g., Sarat & Kearns, *supra* note 29. Here, the analogy would be that copyright is not a legal rule against copying for which registration would be required to reap financial benefits, but a norm of respect among professionals that requires payment of fees for subsequent uses.

68 Interview with Steve Giralt, *supra* note 55.

Copyright thus primarily influences the price of the initial contract, enabling a personalized transaction that maximizes the fee for the photographer. The role of copyright in this way signals an element of autonomy over the price that the photographer may charge, which autonomy may indicate the relative skill and status of the photographer. But when pressed for a fuller explanation of copyright's role beyond the initial personalized service and fee, photographers waffle, suggesting that this pricing scheme was approximate and insecure. Here is Carl Tremblay, a commercial photographer who specializes in food photography, describing a negotiation over photos for a cookbook and his back-and-forth with the publisher over the cost of transferring the copyright (rather than licensing photos for the particular use). The detailed negotiations focused his attention on precisely the function of copyright for him and the benefits of retaining it for future reuse, which is potential but often rare for photographers.

Carl: I did another project for the American Association of Pediatrics, we did a cookbook for them. . . . And they wanted copyright, and unlimited, and everything. And I steered them towards various [other] options And I had created a price structure that I thought was fair for what they wanted to do. . . . And those numbers were on the table, and they didn't go for any of [th]em. Just the one, . . . the book, the website, and some marketing for it. . . . And it made me think, because . . . there was a point where I was close to going, like, "OK, what's the copyright piece of it that I'm fighting for?"

Interviewer: Right. I wanna know what you think you're losing.

Carl: It's hard to pinpoint. . . . Because [*pause*] the option that I was offering them was unlimited use for an unlimited amount of time . . . [w]ith the ability that after a year, . . . after publication of this work, I would have the ability to resell this work . . . [a]s a stock image. . . . So the copyright question to me was just like . . . if I do unlimited, then I have the ability to resell it, but it's pretty specific, I don't know if I'll ever have the ability to resell it, but I like to know that's possible. . . .

Interviewer: [H]ave you ever done that before? Have you ever transferred the copyright entirely?

Carl: No. Unless I've done it without knowing about it.⁶⁹

We will say more below about how copyright shapes the professional and artistic identity of photographers.⁷⁰ But the function of copyright that Carl alludes to here is affecting the initial contract price, with perhaps a dwindling economic role thereafter.⁷¹

69 Interview with Carl Tremblay, in Bos., Mass. (July 8, 2016) (transcript on file with authors).

70 See *infra* Section III.A.

71 Copyright may be entirely irrelevant for pricing of fine-art photographs, especially by well-known artists. See Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313 (2018) (arguing that copyright is irrelevant for establishing value of contemporary art).

When a producer possesses sufficient leverage, bilateral bargaining provides strong power to set and tailor prices. So it makes sense that it serves as the primary business strategy for many photographers. Changes to the photography industry—such as the democratization of equipment; digitization of production and distribution mechanisms; and the rise of centralized, low-cost repositories of images—present challenges to this strategy. Photographers described these changes as negatively affecting the bargaining power of the photographer in the initial contract negotiations, because they provide clients with opportunities to push back against photographers’ demands for high session and license fees and production cost pass-throughs. Because clients often do not return to relicense work and many photographs do not have a robust commercial life beyond the initial use as commissioned by the client, the initial contract fee is frequently photographers’ bread and butter. Thus, any reduction in that initial fee cuts into their expected earnings and symbolically diminishes their status as a professional who commands a high price for their work.

Photographers describe current trends of clients resisting both charges for additional photographs and the usual fees associated with production—rental and staging equipment, assistant time, editing, and postproduction labor.⁷² Freelance photographers lament clients restricting these budget items. Creative lighting and elaborate staging facilitate high-quality and distinctive photographs, distinguishing the professional and experienced photographers from amateur or hobby photographers, of which there are many more today.⁷³ Photographers describe the limitation on these budget items stemming from reduced photography budgets in advertising and editorial markets in particular.⁷⁴ In addition, they experience in the culture at large a (to them) misguided sense that digital photography is less valuable because of its instantaneousness and its accessibility to a wider range of photographers. Below are interview excerpts from two active, successful commercial

72 This data is confirmed by current articles from professional photography journals, such as David Walker, *Quick Tip: How (and Why) to Push Clients for a Bigger Budget*, ASMP (Sept. 10, 2018), <https://www.asmp.org/current-news/quick-tip-how-and-why-to-push-clients-for-a-bigger-budget> (“Clients are notorious for tight budgets and high expectations for photo shoots, or as art producer Karen Meenaghan says, ‘It’s beer budgets and champagne tastes.’”).

73 See Marita Sturken, Essay, *Advertising and the Rise of Amateur Photography: From Kodak and Polaroid to the Digital Image*, 18 ADVERT. & SOC’Y Q., no. 3, 2017, <http://muse.jhu.edu/article/671206> (discussing the increase in amateur photography from the times of Kodak and Polaroid to the development of smart phones); Dennis Yang, *If Amateur Photographers Are as Good as Professionals, Then We Can All Be Professional Photographers*, TECHDIRT (Mar. 31, 2010), <https://www.techdirt.com/articles/20100330/0343498785.shtml> (explaining that even though previously “[t]he divide between the quality of amateur and professional [photography] was distinct . . . [a]dvances in technology create new opportunities” for amateur photographers).

74 See, e.g., Interview with Michael Grecco, in Brooklyn, N.Y. (Dec. 1, 2017) (transcript on file with authors).

photographers describing and explaining the shrinking budgets and the consequences for photography.

[W]hatever the budget they have, they've been getting smaller, . . . and I think advertising agencies have become mindful of their relationship with their clients, the same that we are with them, so they are willing to cede a little more control to the client, instead of saying, you know, "You hired us. We're the creative agency." . . . The digital realm I think has brought "I believe that it's good enough." . . . [T]here's so much more content out there, and people are satisfied with less, I think. . . . And that directly impacts budget, and why they'll pay less. . . . And I've seen budgets just decrease and decrease, and, you know, once they pay less, why would they pay more, for something . . . ?⁷⁵

Here, Carl Tremblay combines in his account an understanding of how photographers lose control over aesthetics in the digital age with the reduction in budgets for producing photographic images. He describes a vicious circle where: budgets reduce, clients are more rigid in their demands, control over aesthetics transfer from photographer or advertising agency to client, the quality and nature of images change as photographers bring less personalized skill and attention to the deliverable images, and then expectations for photographers' deliverables shift (he says downgrade), reducing the prices people will pay, further shrinking budgets.

In the next example, Carl describes how this vicious circle might work in practice when competing for a job.

There was a client recently [and] . . . a project they wanted us to bid on, and it was for packaging. . . . There [were] images for the packaging. There [were] images that already existed in the back of the box they had produced, that I felt the quality was so-so, and it would not really match what I would be creating. So we put a bid together, and the only way they would work with the photographer, is if it's a buyout. There's a copyright transfer. They own the full copyright. Not pay unlimited use for unlimited time. [Normally the] [p]hotographer retains copyright[,] [but] . . . [m]ore and more[,] [c]lients don't wanna come back to you "Oh, we wanna use this again for this" . . . out of convenience. So we put an estimate together that in our opinion was worthy of that copyright and unlimited buyout. . . . Because it has value. That's, that's our product. Photographers, it's the image. . . . And [*pause*] the client gave us feedback that another photographer could do it for half the cost. They had a creative fee, they were not charging for the bigger buyout of copyright transfer, and they were not hiring a producer, because we needed to do, find models, find a house, and had production value to create the scene we needed. So this photographer was gonna do it I believe all himself, reducing that day rate they had agreed to, it would be spread amongst all the running around to get all this other stuff. So we reduced our rates a little bit, but we stayed at a certain value, adding money for the licensing type they wanted. And then the client eventually came back and . . . the project was cancelled. Nobody got it⁷⁶

75 Interview with Carl Tremblay, *supra* note 69.

76 *Id.*

In the Section below, we will say more about genre and brand distinctions that regulate different prices (e.g., advertising versus editorial). For present purposes, Carl's account is most relevant for the story he tells of emerging competition between photographers who, on the one hand, produce perceived lower-quality work with a small budget and transfer the entire copyright to the client and, on the other hand, those photographers who believe high-quality production value and a limited transfer of copyright are worth the price they charge commercial clients. This kind of competition between different approaches to negotiating with commercial clients and designing individualized photography services puts pressure on the leverage that professional photographers previously had in bilateral negotiations.

It may seem ironic that in the internet age when demand for photographs grows across the multiplying platforms—for social media, websites, mailings, buildings, packaging, and print—photography budgets are not growing.⁷⁷ In the digital age, prioritizing skilled use of equipment and post-production editing (akin to darkroom and printing skills in the film era) permits one to distinguish oneself as a photographer. Photographers expend this time and labor as a measure of quality production, and yet they are having difficulty passing the costs on to the client. Below, Steve Giralt reiterates some of what Carl describes and further accounts for the cost differences clients demand between web-based uses for images (low cost) and other more traditional uses in print (higher costs). For the photographer, these uses are no different in terms of labor and skill to produce and thus should cost the same.

I would consider myself a high-end image maker. You know, I'm not the cheap guy that does the little jobs, . . . and with high-end image making comes a high level of production value, and the amount of people we need, and the amount of equipment, and all that stuff. And then, . . . that the brands . . . buy usage rights, [that] . . . determines my fee, with like global print advertising being the greatest fee that I'd probably charge for, other than unlimited. And the fact that they now want to pay, "Oh we just want to pay you the fee for, you know, Snapchat," which can't possibly be that much,

77 As will be explained more fully below, *infra* at note 94 and accompanying text, budgets for photography on social media and websites are smaller than for print, billboards, and more traditional advertising avenues, and yet these are the growing digital markets. Moreover, resolution and quality for online photos is often less high, arguably requiring fewer technical skills. These photos are also often less permanent and clients therefore seek to pay less for them. As Michael Grecco (a celebrity and commercial photographer based in Los Angeles explained):

Photoshop has been around for 20, 25 years, but it wasn't heavily used, and it was very limited in what it could do. And if you did an ad that needed retouching, before, your client would have to take it to a Sitex machine, which was very expensive[,] . . . like 500 bucks an hour. A professional had to operate the machine. . . . [B]ut as Photoshop became more prevalent, if you sucked with a camera, you would just fix it in Photoshop. . . . And at the same time, those pictures became good enough for social media.

Interview with Michael Grecco, *supra* note 74.

[be]cause the image is gonna be living in such a tiny little world for a second of time, like “We want eight-second rights, we just wanna show it to each person for eight seconds” . . . and, but with that, the production fee, the cost of making that imagery is still the same to me. . . . And that’s the fight that the industry’s having, too . . . , so many companies need, feel that they need to make all this content, like[,] “Oh we need a new image to put on Facebook every day.” . . . [W]hat’s happening even more and more is that same client, that’s like, “Oh this is just for social,” even though it’s just for social, they’re like, “Oh, but we want all rights to it.” . . . And I’m saying it’s just a downward spiral, and they don’t wanna pay for production costs, they don’t wanna pay properly for usage, and suddenly what are they paying for[?] [A]nd then also suddenly what do their images look like[?]⁷⁸

Many photographers echo this idea that despite digital consumption of images growing in volume and pace, the photographers’ time, labor, and equipment costs have not appreciably decreased. In fact, for many photographers, time, labor, and equipment investments have increased with the need to curate so many more photographs and the reduced durability of digital equipment. Thus, in negotiations over session fees, day rates, usage fees, and production costs, with budgets shrinking and clients nevertheless demanding more usage, photographers’ fees decline relative to the costs associated with production, resulting in an apparent devaluation of each good that photographers license. Steve Giralt calls it a downward spiral, whereas Carl Tremblay describes the problem more as a vicious circle. Whatever the causal relationships between revenue, image quality, and volume of images produced and consumed across multiplying platforms, the leverage photographers exercise in this particular kind of one-to-one negotiation with clients is waning. Moreover, the copyright dimension of this leverage is insufficient to protect photographers against the shrinking budgets despite growing demands for images.

One way to understand the pressures on professional photographers’ business model is that their attempts to negotiate prices are experiencing low-end competition from a flood of photographs taken by more, inexperienced, and less expensive photographers. The specific client relationship, the specific nature of the images created, and the specific reputation of the photographer previously drove the negotiation.⁷⁹ But now photographers’ ability to use those factors to charge higher prices may be lessening with the abundance of photographs online. Explaining the relationship between the price charged and the burgeoning of photographs and photographers, established commercial photographer Dan said:

78 Interview with Steve Giralt, *supra* note 55.

79 This is unlike an auction setting in which prospective customers compete based on their willingness to pay. By contrast, here, prices approximate a combination of individual willingness to pay; the monopolistic leverage of the copyright; and the specific relationship, services, and product. Compare R. PRESTON McAfee & TRACY R. LEWIS, INTRODUCTION TO ECONOMIC ANALYSIS 95–97 (2009) (describing various types of auctions), *with id.* at 199–201 (describing price discrimination).

[Y]ou started to realize that this opening was getting bigger, . . . now it was like a million photographs out there, and the difference between the stuff that's sorta good, and the stuff that's real good is a very, very small range. And . . . your photographs are less valuable because of that.⁸⁰

This is one hypothesis that arises from the data. And it may explain the complaints regarding perceived reduction of professional status among working photographers. The professional photographers we interviewed with long-standing clients and strong reputations describe their businesses as robust although they work long hours and hustle for jobs. This suggests that many professional photographers still earn sufficient income but work harder and longer to do so. The above quotes also describe the commercial photographers' difficulty recuperating financial losses that result from reduced budgets and the diminished return on time value of labor, which redounds to their self-perception as skilled artists justified in charging supracompetitive prices.

B. *Asserting Distinctiveness: Genres, Venues, and Client Types*

Different genres of photography and different venues garner different prices. For example, photographers can demand the highest price for commercial photography—advertising, annual reports, and commercial brochures. Event and commercial portrait photography pay less than other commercial work per session. But for those who do this work it is bread-and-butter kind of revenue: steady and dependable. Editorial and media photography—long-form journalism and freelance news photojournalism—pay less but are described by photographers as highly desirable genres in which to work. Several photographers lamented that this latter type of photography is dying as publications will not pay the production costs needed for freelance photojournalism. They point to shrinking pages of *National Geographic*, *Time*, and *Sports Illustrated*. Dan, a veteran sports photographer with global networks in the industry, described long-form or documentary photography as at a

scary level . . . , like almost to go away. . . . [T]he great Gene Richards, for example, he's teaching in a junior college I think, in Philadelphia. . . . [D]ocumentary photography will live because of people like Eli Reed from Magnum, who's teaching at Texas, but he's spending four or five months out every year trying to do projects [T]here's always gonna be a need for photographs to illustrate stories, there's no question about that. Long-form documentary photojournalism is gonna struggle unless you know, the grant writers and those people step forward⁸¹

The photographers we interviewed who continue doing long-form editorial work describe spending significant time on their pitches to photo editors and negotiating rates that are fractions of the price for a commercial shoot, or

80 Interview with Dan, *supra* note 54.

81 *Id.*

even funding the photojournalism themselves through other commercial work.⁸²

Photographers who work across genres—and many photographers do—are in one sense providing a line of distinct products. The equipment used and the work involved may differ between, say, portrait photography and event photography.⁸³ But the photographer's labor is a common denominator across these distinct products. And in that sense, one can also think of genre-based pricing as a type of price discrimination. Third-degree price discrimination involves the ability to charge a different price for identical or very similar goods to different groups of customers characterized by stable characteristics, such as geography, time (e.g., early-bird specials), age (e.g., senior or student discounts), or other forms of identifiable market segmentation.⁸⁴ This business model is not as desirable to the photographer as charging fully individualized prices as described above,⁸⁵ but it provides a rough way to approximate the same goal. Third-degree price discrimination depends on secure or established classifications and the ability of the producer or seller to prevent resale that distorts the classifications.⁸⁶ For photographers, this form of price discrimination also relies on copyright as a background control feature, but copyright does not generate or sustain the distinctions in the photographic industry. Prices differ across genres because the clients and the audiences differ, generating divergence in the industry-standard rates for each genre.

In keeping with their attempts at third-degree price discrimination, photographers prefer to keep photographic genres separate in their client-facing marketing. Many photographers we interviewed keep separate website identities for different kinds of photography. For example, a wedding photography company in Boston, Lovely Valentine, is the same company as a

82 It appears that on most newspapers, staff photojournalists have shrunk in number over the past two decades as well. See Monica Anderson, *At Newspapers, Photographers Feel the Brunt of Job Cuts*, PEW RES. CTR. (Nov. 11, 2013), <http://www.pewresearch.org/fact-tank/2013/11/11/at-newspapers-photographers-feel-the-brunt-of-job-cuts/> (describing the “growing ranks of newspapers that are shrinking or eliminating their photography staffs”). Freelance photojournalists on the roster of the Associated Press (AP) and Getty who produce much of the photojournalism for newspapers have had fixed rates for more than a decade. Prices for freelance photojournalism are regulated by news agencies' market control over photographers for the AP and Getty. We learned that the day rate for photojournalists through the AP has not changed in a decade. Today it is \$500–\$550 per day, which is only up from \$350 per day in 1980.

83 To the extent that the products differ, even if only slightly, this strategy amounts to a form of second-degree price discrimination, which we define in the next Section. See *infra* Section II.C.

84 See, e.g., LUÍS M.B. CABRAL, *INTRODUCTION TO INDUSTRIAL ORGANIZATION* 170 (2000) (defining third-degree price discrimination as “market segmentation”). The first-, second-, and third-degree taxonomy of price discrimination comes from A.C. PIGOU, *THE ECONOMICS OF WELFARE* 73 (1920).

85 See *supra* Section II.A.

86 See, e.g., WALTER NICHOLSON, *MICROECONOMIC THEORY* 562–65 (7th ed. 1998) (explaining third-degree price discrimination in terms of “market separation”).

commercial aerial photography company (same people, same equipment, same office), although their websites and marketing for each (their branding, website, and marketing material) differ dramatically.⁸⁷ The separation reflects a concern that if commercial clients understand that the same skill and labor used to produce photos for them (including aerial photography) also produces wedding albums but at a fraction of the price, they will demand lower rates. Stan Rowin, a long-time commercial photographer in the Boston area, describes his successful efforts at genre discrimination. He amplified this strategy by using highly generic URLs, likening the tactic to obtaining prime “shelf space” in a store. The web addresses delineate categories that attract clients and establish prices for the different kinds of images and their venues. Stan said:

I have a product photography website. I have a lawyer’s photography website. I have a magazine photography website. I have a corporate— . . . And they all have different names. They have a lot of different [URLs:] Attorneyphotos.com, . . . Photosforweb.com And [*pause*] twenty, fifteen years ago, when I was starting to do this, they were all in the top of Google’s top ten searches. So that’s what it was about. It’s all about shelf space.⁸⁸

Other than genre distinctions, photographers price discriminate regarding venue and client type. A photo licensed to a national magazine costs more than the same photo when licensed to an educational institution for their marketing materials. Some photographers expect that even educational uses in the classroom or research uses in academic presentations require license fees, albeit much smaller than those charged to for-profit enterprises. Linda, a fine-art and editorial photographer based in New York City, explains this kind of price discrimination:

I have an architect acquaintance . . . who was teaching a . . . graduate course at [an Ivy League University] . . . , and all of my images were basically like the base for the course. . . . So they used the images—. . . [a]nd so, I thought it was curious that this was happening at like an Ivy League school on the East Coast [*laughs*], where you would think they would know better, and they would’ve emailed me and asked me if they could use the images on the lecture course. Because there is a fee [for lecture usage]. . . . There’s a breakdown of fees. There’[re] fees for [*pause*] educational, for books[;] even if it’s for educational . . . there’s a standard, . . . it’s a nominal fee, it’s like fifty dollars per image. It’s very . . . low. . . . [B]ut it’s not that I only charge fifty dollars, if your . . . images were used by a magazine, like a magazine that’s . . . like [*National Geographic*], I don’t know, a thousand dollars for one full page. . . . But [an academic] who’s giving a lecture . . . who’s [going] to use ten images for a lecture— . . . [i]t’s a graded scale.⁸⁹

87 Interview with Lovely Valentine, in Bos., Mass. (June 15, 2016) (transcript on file with authors).

88 Interview with Stan Rowin, in Bos., Mass. (Jun. 28, 2016) (transcript on file with authors).

89 Interview with Linda, *supra* note 64.

This photographer's pricing scheme turns on publishing venue and client identity. Typically, national magazines do pay more for licensed use of photographs, presumably because those photos produce significant value for their publications. Generally, teachers and scholars do not pay for the use of photographs in their classroom materials or research presentations, although it appears many photographers expect to be paid.⁹⁰ In fact, several photographers we interviewed describe a past practice of demanding and receiving substantial licensing fees for photographs used regularly by educational institutions and scientific publications. This practice no longer exists to the same degree, apparently because in the digital age users can easily copy the same photographs from the internet. The uses remain robust (a simple search for their images proves the photographers correct),⁹¹ but the licensing stream has substantially shrunk. Thus, one side of the price discrimination—the small per-use fee for educational use (for research and scholarship and by educational institutions and publications)—has collapsed with the ease of search on the World Wide Web.⁹²

Another form of pressure on the third-degree price discrimination model stems from clients who blur previously established photography genres—and request the fee for the lower-priced form. Third-degree price discrimination requires segmented customer groups stay separate. But clients may switch to a lower-priced segment or request services that cut across previously distinct categories. For example, whereas advertising and commercial photography pay more than editorial and news, advertising and commercial clients will contract for editorial photography to justify a lower price when the end product is a combination of advertisement and editorial, which they call “advertorial.”⁹³ (The goal is to leave the reader unclear as to whether they are reading a review or seeing a paid advertisement.) What was previously a \$20,000 advertising campaign for shampoo is now a \$5000–\$10,000 editorial job if accompanied by a paragraph of text and short narrative. Photographers can resist these new, disadvantageous blurred-genre categories. But as freelancers rely on repeat clients for steady income, insisting on contract terms that systematically maintain higher prices for clients is a challenge. This is especially true when clients have substantial market power, as do the dominant media and publishing companies such as Hearst and Condé Nast. Photographers are losing leverage in these negotiations that blur genres and reduce prices, which erodes the control and equal status photographers feel they used to have when bargaining with clients.

90 Textbooks and monographs tend to license use of photographs unless the use is fair and sometimes even do so despite the pertinence of fair use. See SUSAN M. BIELSTEIN, PERMISSIONS, A SURVIVAL GUIDE 79–100 (2006) (discussing fair use and academic publishing).

91 See *infra* Part II.D (discussing the practice of reverse-image searching).

92 One may wonder why photographers do not pursue the putative infringers and send takedown notices and demand licenses for retroactive use fees. See *infra* Part II.D.

93 John Ellerbach, *The Advertorial as Information Pollution*, J. INFO. ETHICS, Spring 2004, at 61, 62–63 (defining “advertorial”).

Patti, a photography agent for twenty-five years, describes how a client who needs services for different categories may question the differential pricing of those categories. She also explains how she is rethinking her photographer-clients' business structures to respond to the pressure on the photographers' pricing schemes that come from genre blurring:

[F]ast-forward to social media, and content, and content production, and people were feeling, "Well if it's only gonna be on the internet, I'm not gonna pay you anything." And then the market's going down, pricing's going down, everybody's worried about survival, and it's just crashing. . . . [And this produces the] very high end or the very low end, and a lot of people are falling out in the middle, unless they have multiple streams of revenue sources. . . . [A] photographer who was a very high-level print . . . better be shooting motion, too. . . . And you might think about bringing someone in to work for you, to produce content at a lesser price point so that you don't destroy your own brand.⁹⁴

Patti is a business partner for photographers working to preserve the distinctions between genres and venues that have maintained prices for photography products and services. In doing so, she also implicitly comments on the differential skills she believes are required for the higher-priced content as opposed to the lower-priced content. She describes establishing a minifirm that reinserts the distinctions in quality and genre (and thus in price) as a way of pushing back against clients' attempts to flatten contract fees. The minifirm includes a head photographer with an expensive "brand" and an assistant who works to generate social media content at a lower price. This division of responsibilities preserves the differential prices by offering photographs for different audiences made by differently skilled photographers.⁹⁵ Patti's clients' strategy of charging lower rates for the work of photographers of lesser seniority resembles billing legal associates and paralegals at lower rates than law partners. But photography differs from law practice because attribution to each photographer for the different images produced is customary to maintain brand (and price) differentiation.

The ability to charge different prices for similar goods to different categories of clients becomes more difficult as venues converge for the goods and services (social media, advertising, magazine, editorial) and as the people producing those goods lack market power. As such, business models evolve to produce new distinctions (or revive old ones) to justify price differentials. Patti explains:

[S]ocial media and social content is king right now. So people are throwing a lot of money at it, but they want a huge quantity of imagery ongoing, regularly, on demand, in an immediate manner. So the production schedules have condensed insanely. . . . I guess . . . my challenge is to help educate

94 Interview with Patti Schumann, in Evanston, Ill. (Oct. 27, 2016) (transcript on file with authors).

95 One might think of this as a form of "versioning" or second-degree price discrimination described in the following subsection. "Versioning" refers to a seller "offering a number of 'packages' of price and quality level." CABRAL, *supra* note 84, at 176.

both sides of the market as to what this new model looks like [C]lients wanna spend money, and they need pictures. And there [are] a lot of kids coming out of photo schools, there's assistants, there's high-level, mid-level, there's a lot of people who wanna take pictures. So something there can work. It's sort of trying to educate the end client that for the social media that lives [*clicks fingers*] for a nanosecond, you . . . should be able to pay very little money. You also don't need really high-level talent for that stuff.⁹⁶

Patti's proposal to distinguish among photographers and their fees (high-level, mid-level, and assistants) provides one example of evolving business strategies responsive to market pressures and new digital platforms and consumption patterns. Her approach, similar to other photographers who rely on reputation and client relationships to build and sustain business, depends in a background way on copyright as a baseline right against copying and distribution. But this business model hinges even more on variations in skill, professional expertise, and identity, instantiated by a firm hierarchy. Whether photographers can maintain these differentiations through new business organizations to keep prices high for certain genres of and venues for photography services may depend upon client responses and effective organization of professional, freelance photographers.⁹⁷

C. *Preserving Scarcity: Quantities or Versions*

Photographers also price different quantities or different versions of photographs, for example, a print version in a single run versus a web version for unlimited time. These choices present both challenges and opportunities. Steve Giralt, quoted above, lamented a false distinction clients draw between prices for web-displayed images and print images.⁹⁸ Certainly, different uses in time (one or five years), in number (a print run of ten thousand versus one hundred thousand), and in space (only in Florida or nationwide) will garner different prices as an industry norm. But Steve complains that if the production value for the photo is the same for the web or print there should be no difference in price if the uses follow the same time, number, and space dimensions. In his opinion, a one-time use on the web for a period of time, like a one-time use on a billboard for that same period of time, should garner the same price.⁹⁹ Like many photographers, he resists

96 Interview with Patti Schumann, *supra* note 94. For a differing view of the cost and value of images produced for social media, see *supra* text accompanying note 78 (quoting Interview with Steve Giralt, *supra* note 55).

97 The American Society of Media Photographers (ASMP) and the National Press Photographers Association (NPPA) may serve such a function. Staff photographers may have union representation. Photographers and other freelance authors do not, however, have a successful history at maintaining beneficial contract or license terms as industries evolve and distributors and publishers merge. See, e.g., Maureen A. O'Rourke, *Bargaining in the Shadow of Copyright Law After Tasini*, 53 CASE W. RES. L. REV. 605 (2003); see also *New York Times Co. v. Tasini*, 533 U.S. 483 (2001); *infra* text accompanying note 111 (describing Condé Nast contract, and Time and AOL merger).

98 See *supra* text accompanying note 78.

99 See *supra* text accompanying note 78.

lowering his price when the internet is the distribution platform. But, also like many photographers, he tries to price discriminate as to time, number, and geography. Moreover, most photographers have a price floor below which they will not go. The price reflects the cost of producing the images and aims to sustain their business with a profit reflecting a supracompetitive status as bespoke service and product providers. It also represents high quality and reputation no matter the venue.

Second-degree price discrimination involves setting prices based on quantity sold (e.g., purchasing in bulk) or particular versions or characteristics of the product (e.g., paperback versus hardcover).¹⁰⁰ This form of price discrimination does not rely on known characteristics of customers but instead on their self-selection into a particular price level. It assumes different customers have different preferences and purchasing power; for example, some would prefer a hardback copy immediately to a paperback book in a few months. Encouraging buyers to sort themselves into different price levels helps sellers collect some profit from a larger group of buyers. Digital markets put pressure on second-degree price discrimination because differentiation between goods, especially photographs, is weaker: as we have already noted, digitization and the internet threaten to reduce client preferences for high-end and higher-priced photographs.¹⁰¹ Moreover, the justification for larger bundles costing more disappears when the marginal cost of copying approaches zero.

Most third-party purchases of photographs (that is, not purchases or licenses negotiated between photographer and the original client) are in the form of second-degree price discrimination. These third-party purchases are analogous to buying the paperback version later. Photographers may sell their images on their website or through a third-party service (such as Getty or a syndication service).¹⁰² The prices they charge vary depending on the amount sold, the size of the intended audience, and the quality and size of the photograph (high or low resolution and print size). As described more below, these kinds of nonclient, third-party purchases are infrequent and for many not a reliable source of revenue today.

When dealing with clients directly, photographers describe an analogous strategy to bundle photography packages and vary the price depending on quality of the photograph (print or digital, resolution for the web or a bill-

100 See, e.g., CABRAL, *supra* note 84, at 169; cf. McAfee & Lewis, *supra* note 79, at 200, 206 n.5 (arguing second-degree price discrimination is properly understood as “indirect price discrimination”).

101 See *supra* notes 72–80 and accompanying text (discussing reduced budgets and the squeeze from the perceived abundance of low-end competition).

102 Syndication is the term for reselling photojournalistic and editorial photographs through an agent who personally represents the photographer and negotiates sales and publications. Stock photography is the term that photographers use to describe making multiple photographs often for the purpose of licensing them to an aggregation site that makes the photos available for third-party licensing. Syndication uses are usually higher priced than stock photographs, but that may be because syndicators are more like agents, whereas stock houses are more like bookstores.

board). Photographers explain that clients and customers may balk at the distinctions that generate differential prices. For example, the principals of the wedding photography company Lovely Valentine credit the company's success in its particular niche to not bundling its services into different packages and instead offering a one-size-fits-all model to its customers. Below they describe the difference between their service and other wedding photographers:

Principal 1: [A]n interesting thing [a competitor's client was told] . . . was [that] the other photographer held the digital rights over her photos, saying that she could only have . . . these very low-resolution proofs, and in order to get the full-resolution copies, that she would be able to print, she'd have to pay an extra \$500 on top of the \$3,000 she had already paid him. That was a big shock to [the client], and—

Principal 2: It was non-transparent, so I think that's partly why we started our business, was to, A, be able to provide a creative service that's more transparent, that's more straightforward. I think a lot of studios have gone that route, even before we started, in terms of providing digital rights in their packages, without any kinda asterisk of you have to pay an extra fee, it's just folded into the pricing. I think a lot of our clients expect that from most studios for wedding-related stuff. . . .

Principal 1: No hidden fees included, all sorts of things like that. It's just, . . . here's the cost, everything's up front, this is exactly what you're gonna get, and we try to make it . . . a more personal experience, and no surprises for bride and groom.¹⁰³

Lovely Valentine will charge more for special prints and personalized albums because of the time it takes them to make, but they also discovered a robust market for couples who choose an all-inclusive digital photography package to enjoy as they wish. This all-inclusive pricing practice puts pressure on traditional wedding photographers who will not transfer high-resolution digital files for print and display except by the piece and for a higher fee—as distinct from selected prints, which they provide as part of the wedding photography contract.

We heard frequent complaints about the evolution of contract terms that elide the distinctions between different kinds of copyrights (e.g., copy, distribute, and display) and the standardized distinctions between services and deliverables, making second-degree price discrimination hard to maintain. In general, the bespoke nature of the original contract negotiation—in which the photographer had significant leverage with the client—is giving way to standardized contracts pushed by the clients and consumers. In the new standardized contracts, clients demand more from the photographers for the same amount of money or less.¹⁰⁴ Stock-photography sites appear to be one driver of this change, as consumers can go to Getty, Adobe, or Shut-

103 Interview with Lovely Valentine, *supra* note 87.

104 Several established photographers with robust businesses in the 1980s and 1990s dated the problem with contract term accretion benefiting clients (and hurting photographers) to the Time and AOL merger in 2000. *See, e.g., infra* text accompanying note 111.

terstock, for example, to find subscription pricing for a variety of bulk uses of images. Much like music services today provide a variety of options for on-demand streaming (e.g., PC access versus both mobile and PC access), photography services are providing to customers analogous forms of licenses for different levels of access to the photography collections.

Photographers report that media companies and corporate clients are another driver of this change. Some clients now insist on the transfer of copyright as part of the contract in order to maximize usage across the multiplying platforms without returning to the photographer for permission to avoid liability for infringements that may originate from their online uses but that they cannot control. This is a distinct motivation for requesting a copyright transfer. Patti, a photo agent, said “[clients] just want [the rights] all up front, so that they don’t have to worry about improper usage down the road.”¹⁰⁵ Further explaining she said:

[T]hey’re really worried about it. Because you take a client like, let’s say [a big corporate client]. Let’s say I’m shooting a brand . . . [of toothpaste], right? And it’s like a happy woman’s holding the toothpaste, right? And we know we’re shooting a lot of times for . . . one day, with different models, this is for the Middle East market, this is for Europe, this is for Asia, and basically once they take these things, they get distributed, and they really, truly cannot control once they get to the hands of whoever it is that’s managing those markets [I]t’s very hard to truly monitor that.¹⁰⁶

The slipperiness of photographs on the internet can lead to liability for photography clients who do not own the copyright but may be held responsible for a photograph’s improper use.¹⁰⁷ Thus, clients seek more rights across more venues but not for more money.

Several photographers described how some clients may ask for an outright copyright transfer, or “buyout” in the vernacular. Instead, photographers often steer them to generous licensing terms. We heard Carl Tremblay mention this in his discussion above of the negotiation with the cookbook client for the American Pediatric Association in which the client asked for the copyright but decided it was too expensive (because Carl priced it according to the value of the leverage and scope of rights he thought he was giving up).

And they wanted copyright, and unlimited, and everything. And I [steered] them towards various options . . . and then they came back, and they said no, so right now they have a license only for one-time use for the book. And I had created a price structure that I thought was fair for what they wanted to do.¹⁰⁸

105 Interview with Patti Schumann, *supra* note 94.

106 *Id.*

107 See *infra* text accompanying note 109.

108 Interview with Carl Tremblay, *supra* note 69. Patti Schumann, the photography agent, is happy to help her photography clients negotiate to transfer rights for unlimited uses of the photographs but retain the copyright, or instead negotiate to transfer the copyright outright but for what she calls “ridiculous” (high) prices. She says: “I’m always ridicu-

Ashok Sinha, a commercial photographer, describes his negotiation with clients in a manner similar to Carl in which he pushes clients to an unlimited use license rather than a buyout because a buyout would be too expensive for the client.

[T]he trouble that I have for clients to understand is that sometimes they want copyright. I'm like, you don't want copyright, you want, whatever, I can give you a license in perpetuity, you can use it for whatever you want, the reason why you don't want a copyright is because it's too expensive for you, and you don't need it, right?¹⁰⁹

Ashok goes on to say that he is willing to grant a license that allows for almost all uses of the image, except for the lucrative advertising buy, and even then clients want more.

And that's my standard license to my commercial clients, saying, "Look, my price includes, so that you don't have to worry about me ever again, my price includes using these images in perpetuity for x, y, z purposes. The only thing I don't have, don't include, is for paid advertising. So if you took my images and ran a full-page ad in the *New York Times*, that's separate pricing. Other than that, you can do anything you want."¹¹⁰

Photographers describe explaining to clients why they seek to retain certain rights to their photographs. Clients and photographers see the internet's virality as a liability in a negotiation but dispute who absorbs its risks through ownership.

Stan Rowin is a commercial photographer who started in the 1970s and who was a leader of the American Society for Media Photographers (ASMP). He dates the shift in clients' demands and the negotiation around contract terms to the mid-2000s just after the Time Warner and America Online (AOL) merger. He told us:

That was the first time that Condé Nast came up with a contract that said, basically, we can use [the photograph] for whatever we want in perpetuity online or in print. . . . That's the first generation of [such a] contract. I gave it to my attorney . . . and he said, "Well, you can't sign this contract." I said, "I know I can't sign this contract, but . . . what am I gonna do, call them back and say . . . , 'I can't do this, I can't do this?'" And he said, "Yeah. That's what you're gonna do. That's what you paid me for, and that's what you're gonna do." So I was dealing with the legal department now, as opposed to the art department. . . . [A]nd then I faxed [Condé Nast] back the crossed-out things, and I got a phone call back, and he says, "I think we can work with you on this." And I'm saying, "This is too . . . odd. There's somethin' wrong here." So [Condé Nast] wrote me a new contract, without those

lous on [the copyright transfer price]. . . . But if they wanna pay, fine. I mean, I have one photographer who'll say \$200,000. That's his number, you know. . . . He's like, 'Fine.' And I'll be happy, too." Interview with Patti Schumann, *supra* note 94.

109 Interview with Ashok Sinha, *supra* note 54.

110 *Id.*

terms in it. . . . [R]ight after I signed the contract, I never got work from them again.¹¹¹

Patti, the photography agent, described a similar situation working with national and multinational clients on behalf of commercial photographers in which clients seek to own all the photographic work, not just a license to it:

[O]ne of the things that I have seen, actually starting about . . . maybe 2010, 2005, it was between that There are all sorts of companies that decided that they just wanted to have work-for-hire agreements, period. . . . [B]ut what happens . . . is many clients try to present that after the shoot, or after . . . you have everything in writing as to what the terms are, and then you'll have a producer, or an agency, or the client say, you know, "Oh, I forgot to mention, we have a photographer's agreement," . . . they'll call it a photographer's agreement, but it'll literally in there say work-for-hire, and I'll be like, "You do? . . . Why don't you share it with me?" . . . And then they'll say, you know, "Well this is part of a standard for us." And I'm like, "Well no, it's not." [*laughs*] And a lotta times . . . they basically say, "Just sign it, or we don't work with you again." Literally.¹¹²

As already mentioned above, Patti confirmed that sometimes the client's desire for the copyright transfer, either as a work-for-hire (which is very unusual for freelance photographers)¹¹³ or as an assignment, is to mitigate risk related to uncontrolled uses down the road (including uses by the photographer).¹¹⁴ Clients used to buy rights for a couple of years in a few geographical markets or print runs, but given the leakiness of the internet, the companies now seek all the rights in perpetuity. But they resist paying for the copyright buyout.

Photographers appear to say that clients should bear the cost when licensed photographs are used beyond the scope of the license online, and only a full buyout of the copyright will protect clients from liability. And yet photographers' descriptions of clients' resistance to the cost of the full buyout suggests that clients believe the cost of policing unlawful uses, assuming that is what photographers seek, should be shared. A license for unlimited rights may solve the problem, but the price to clients is still high (although not as high as a copyright assignment).

Stock-photo pricing also puts pressure on second-degree price discrimination in freelance photography contracts. Patti explains that stock-photo pricing in combination with the stock company's requirement of a transfer of copyright drives down the price clients are willing to pay photographers.

[The Stock companies] would basically hire a photographer, especially those who were young, looking for work, and not yet making a business, and say, "I'll pay you, you know, 1200 bucks a day," which was great money to a guy like that. "But we get the rights." Hence, they were able to start to build

111 Interview with Stan Rowin, *supra* note 88.

112 Interview with Patti Schumann, *supra* note 94.

113 See 17 U.S.C. § 101 (2012) (omitting photography as a commissionable work under the work for hire standard).

114 See *supra* text accompanying notes 105–06.

royalty-free collections. Which, in the end, is what really started devastating the value of the picture first.¹¹⁵

Compare this description with a commercial photographer's semisanguine account of how he navigates the varied pricing schemes with clients.

I don't worry about the lower-cost stuff [like stock], [be]cause for the most part, so much of it is crap. What I worry about is when suddenly high-end stock is sold really cheaply, [be]cause then now, those are images that a client might not hire me to shoot anymore, that they might go to stock for. But for the most part, most clients aren't gonna buy a Shutterstock image . . . for anything important [A]lso a lotta things I shoot are specific to a client, so it's not like, you know, if it's a Victoria's Secret bra, they're not gonna find that on stock¹¹⁶

Either way, the stock-photography prices challenge the second-degree price discrimination models on which photographers we interviewed build their business strategies, pushing them to further differentiate the work they do from the low-cost images. For some that means they have begun to include motion in their repertoire, either gifs or short video.¹¹⁷ (However, the licensing standards for motion tend to follow the film industry in which work-for-hire contracts dominate.)¹¹⁸ Others describe developing particular aesthetic niches or focusing on photographic subjects (science or food photography) that take skill and expertise to develop and for which clients will pay. This is true not only of commercial photographers but also those with a fine-art dimension to their practice.¹¹⁹

Notably, many photographers describe contributing to stock sites as not worth their effort in light of dwindling payouts and busy client schedules. They also work from a relative perspective. In the first decade of the stock companies, photographers were paid very well to build up inventory. When

115 Interview with Patti Schumann, *supra* note 94; *see also supra* text accompanying notes 105–06.

116 Interview with Steve Giralt, *supra* note 55. *See generally* Collins, *supra* note 60 (giving an analogous description of client demand for customized architectural works).

117 *See* Interview with Stephanie Gomez, in N.Y.C., N.Y. (June 29, 2017) (transcript on file with authors) (“I wanna make sure that I’m not just working on my photography, but also video-making . . .”).

118 *See, e.g.,* Garcia v. Google, Inc., 786 F.3d 733, 743 (9th Cir. 2015) (en banc).

119 For example, Andy Levine, an emerging photographer (with a previous career as a television producer) who started as a fine-art landscape photographer but has a goal of building a commercial practice, describes aspiring to the niche of stock video for food images. He said:

I think stock photography, you know, if I can, and I’ve been buying some equipment and backdrops Like if I’m gonna start doing food, taking food photography, I’m gonna go to the grocery store, and I’m gonna do some video, some stock video, and some different stills with mushrooms, and lettuce, and try to like put that online, and see if that can [generate some income].

Interview with Andy Levine, in Norwood, Mass. (June 20, 2017) (transcript on file with authors); *see also infra* text accompanying notes 210–13 (discussing quality metrics for photography).

stock sites had smaller collections, featured photographers made more money on third-party licensing and garnered generous day rates to fill the stock portfolios. Now, with the inventories in the millions of images, photographers compete for attention on the sites and receive decreasing royalties. What may have been many thousands of dollars a month is now for many photographers only hundreds, and they still need to feed the stock sites with fresh images. There appears to be no consideration of stock photography as bread-and-butter income for most photographers with whom we spoke. Instead, these photographers perceive any income from stock as a surprise and an unreliable benefit.

It is a wonder, then, that photographers fight to retain their copyright for potential future use by third parties. Fighting risks scuttling a contract for a shoot or future jobs with that client. Undoubtedly, copyright provides leverage during initial contract negotiations. Yet because of elided distinctions between quantity and image characteristics, stock competition, and evolution of standard contract terms to broader licensing terms, that leverage is waning. Looking only at short-term financial considerations, one might expect that photographers would be willing to transfer copyrights in order to capture as much value as possible in the initial negotiation. But we have not observed such a shift. Section II.D and Part III address this puzzle.

D. The Royalty Jackpot: Downstream Licenses or Sales to Third Parties

Despite earning most of their revenue from commissions and session work, professional photographers hope for three primary venues for downstream licenses and sales of their photographs.¹²⁰ As already mentioned, photographers anticipate that some of their images will be licensed for use from stock-image sites or from their own website. Some photographers also describe publishing books of their images, either in collaboration with writers or on their own. (This is true of established photographers as well as emerging photographers, for whom self-publishing a photo book is relatively easy.) Photographers also describe hoped-for sales of photographs through exhibitions and galleries. These downstream uses—stock, books, and gallery sales—are revenues most photographers would like to see grow but struggle to achieve.

Suing for unauthorized use is considered by most to be too time consuming and distracting in the context of a busy photography practice. In fact, most of the photographers we interviewed did not employ reverse-image searches to police unauthorized use online and did not appear to consider it

120 Very few interviewees described, as part of their revenue stream calculation, the interests of their post-death successors in their work. *But see* Interview with Dan, *supra* note 54 (“I’m far, far less interested in the legal end of things than a lot of people are, . . . but I try to stay up on things that I think . . . from a legal standpoint . . . could potentially damage my future life, or my heir’s . . . life.”). For an extended discussion of this general topic, see Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 HARV. J.L. & TECH. 77 (2015).

a dimension of their practice (although some asked us questions wanting to know more).

Those who had thought about reverse-image searching and policing unauthorized online uses spoke about the trouble with making it worth their while. Some describe it as a waste of time because, as a practical matter, the current copyright law guarantees only a takedown without royalties.¹²¹ Veteran photojournalist and commercial photographer Lou Jones said outright: “[A]ll you’re gonna get . . . if you pay somebody to chase them, all they’re gonna do is take it down. You’re not gonna get a payment out of it.”¹²² Nonetheless, another veteran photographer, Stan Rowin, explained that he still submits takedown notices routinely despite not collecting money from them: “I got a system down,” he said, with “boilerprint [sic] to Google,” and that “when they fight me, I write to the internet provider and say, ‘[Y]ou’re the provider for this service You have to take it down.’ And they always take it down.”¹²³ Then he explains of the platforms that “then they go their way, so you can’t sue them for the year . . . before I found it.”¹²⁴

When businesses or individuals agree to pay, the negotiated license is usually not worth the time it takes to find, contact, and negotiate with the infringer especially given the friction it can cause. Again, veteran photographer Lou said the acrimony that would be produced by chasing is not worth it “if you’re gonna get \$150 for a photograph Like we lost a client that was probably worth fifty grand a year to me” for disputing a use of a photograph.¹²⁵ A few photographers also describe being so disheartened by the number of unauthorized uses online that searching for them as a matter of business practice only made them feel worse.

Sometimes the lack of permission and lost revenues is upsetting, as with Stan and Lou above. But sometimes the photographers hope to avoid unwanted association with the photos that continue to circulate unauthorized. Mark Ostow said:

[I]f you search my name, there’s like so much junk, and so much other things, and it goes on for . . . ten thousand notations I used to think, “Oh, I’m gonna bring in an intern and have them search my name, and see if we can make some money.” And it’s like . . . I can’t even get major client[s] [to return my calls], and you see things that you hated that are online, unauthorized [Y]ou wanna write to them, . . . “You use it, but just take my name off of it.” . . . You do a search “Mark Ostow images,” and you see so much crap, it’s embarrassing.¹²⁶

121 See 17 U.S.C. § 512 (2012).

122 Interview with Lou Jones, in Bos., Mass. (Nov. 10, 2016) (transcript on file with authors).

123 Interview with Stan Rowin, *supra* note 88.

124 *Id.*

125 Interview with Lou Jones, *supra* note 122.

126 Interview with Mark Ostow, in Bos., Mass. (June 15, 2016) (transcript on file with authors).

Only one of the photographers we interviewed, Michael Grecco, based in Los Angeles and New York, has developed a lucrative business from suing online infringers. He earns substantial downstream revenue suing entities for unauthorized online use of his photos using reverse-image search services.¹²⁷ He does that more than focusing on making photographs. Indeed, Michael describes this new pursuit as a nearly full-time endeavor, and he anticipates building a business around helping other photographers enforce their copyrights and collecting fees from unauthorized online infringement.

The most attractive downstream revenue models depend on an afterlife of already-made photographs and the ability to relicense them for other uses to third parties. Ideally, for most photographers, this would be a healthy portion of their revenue. By producing residuals or ongoing royalties, the initial work is an investment that can pay dividends into the future. But in fact, for most photographers, ongoing royalties from all these downstream opportunities are very small. This appears to disappoint photographers because a photograph's reuse and afterlife are evidence to them of its quality and resonance. Reuse by third parties or sales of books or fine-art prints to them signal a shift from service-based work to fine art that has enduring value.

Revenue from after-use licensing by third parties for images hosted by stock houses or personal websites ranged, among the photographers we interviewed, from significant (in past decades) to unreliable and small (today). Established photographers described the 1980s and 1990s as decades when revenue from original stock houses (such as Magnum) and the new digital image resellers (Getty) was a large portion of their salaries.¹²⁸ But today, these residuals are very small—Carl Tremblay describes it as enough to pay professional insurance but not more¹²⁹—and only a lucky few photographers have substantial syndication fees. Those photographers who still make money on after-use licensing have hard-working agents or active syndication partners (such as a magazine or newspaper that previously employed them).¹³⁰ For the most part, however, photographers wish they knew more about this part of the business and had time to build it out.¹³¹

127 Grecco has intentionally slowed down his photography business—but not because he can't earn a living making photographs. He's a celebrity photographer and could continue to earn a high salary from clients. He has refocused his business into one that protects photographs online, earning revenue from demanding license fees for unauthorized uses of his (and others') photographs. See Interview with Michael Grecco, *supra* note 74.

128 See Interview with Lou Jones, *supra* note 122 ("We used to be with Image Bank And so we used to . . . make six figures with . . . them selling stock. . . . So they made a lot of money from using our pictures. . . . [But there's] nothin' for the last ten years. . . . Image Bank doesn't exist anymore. They sold to Getty.")

129 Interview with Carl Tremblay, *supra* note 69 ("It's not something that I'm kinda expecting, 'OK, you know, I'm gonna get this by next quarter, so we can replace the gutters.' . . . But it, it helps, you know, maybe it covers my insurance for the year.")

130 See *supra* note 102.

131 See Interview with Felice Frankel, in Bos., Mass. (June 23, 2016) (transcript on file with authors) (musing about licensing scientific photographs for use in products like

The failure to do so by most photographers may signal their relative satisfaction with their current situation or the lack of institutional structures and services that can effectively market work of particular photographers among the millions of photographs already online.

Some photographers insist that the book form is an ideal medium through which to disseminate and sell their images. In book form, photographers can maintain quality of image production by attending to paper and ink choices. The order and context of images remain static, so they have more control over the stories the photographs tell. Moreover, the book is a tangible, affordable object which, theoretically, can be sold widely to earn substantial royalties in partnership with publishers. And yet none of the photographers we interviewed described earning sustainable revenue from books, despite pursuing them as desirable projects. Many of the photographers produced books—some exquisite fine-art books, others to accompany gallery shows, and yet others that are passion projects devoted to a particular subject or theme. One of the photographers who has published ten books had one that sold sixty thousand copies and went into a second printing. But she still describes earning a living from books as “totally impossible. Beyond impossible.”¹³² She is primarily a fine-art and portrait photographer, and she sells her photographs through a gallery. She appears to rely on other sources of income to maintain her studio.

Gallery and fine-art sales are even less likely an avenue for sustainable revenue. Most of the photographers we interviewed produced fine-art prints of their favorite photographs; some even had photographs in museum collections. The price of the fine art prints varied significantly among the photographers from \$300 to \$20,000. But even the most famous photographers we interviewed did not earn sustainable revenue from fine-art print sales. This is not surprising, of course, as fine artists of all kinds struggle to make a living simply by selling their art. The lucky few become celebrity artists with sales in the millions of dollars that sustain their life and work over decades. Other fine artists seek grants, commissions, or teaching jobs, piecing together fellowships and funding opportunities to focus on their fine art exclusively. The photographers who sought to sell their work as fine art as a complement to their commercial work hoped for a robust fine-art dimension to their business but did not count on it. And the photographers who are primarily fine artists seemed resigned to the likely possibility that their work would be subsidized by others.

If photographers succeeded at developing the three attractive revenue opportunities (books, fine art prints, and stock), the erosion of autonomy and control over commercial price setting with clients might be less worrisome financially and professionally. There is some evidence that the fine-art market for photographs is growing, but the photographers we interviewed

“placemats . . . [o]r scarves . . . [w]ith a tag that will describe the science”); Interview with Mark Ostow, *supra* note 126 (expressing interest in “selling to individuals, or . . . for republication” more effectively over the web).

132 Interview with Anonymous (Sept. 19, 2016) (transcript on file with authors).

did not describe benefiting from that growth.¹³³ As already indicated, contemporary stock sites and websites produce disappointing returns compared to the selective stock houses of the predigital era, like Magnum and Aperture.¹³⁴ There are some new stock houses, such as Stocksy and Noor, that are trying to recapture the cooperative, photographer-owned, and highly selective aspects of the earlier syndicates.¹³⁵ But the competition for photographs from the diversity of online sites appears unrelenting. Photographers are reluctant to quit opportunities for the exhibition and sale of their photographic work, especially because licenses and sales reflect direct audience appreciation of the photographs' aesthetic value. All of the photographers described choosing to become photographers because of the pleasure that picture making brought them. And downstream licenses and sales reinforce that choice and its successes.

Copyright's background role in these transactions is foundational—syndication, books, and fine art sales are all grounded in copyright principles. But without sufficient revenue from these opportunities, copyright's importance as an economic mechanism for these photographers largely rests in the initial negotiation with clients—a negotiation which is increasingly fraught in the digital age.¹³⁶ This calls for expanding our understanding of copyright beyond traditional economic conceptions to its shaping of professional identity, as Part III describes in detail.

III. PROFESSIONALISM (ANOTHER EXPLANATION FOR VALUE)

In the interviews, we sought explanations and motivations for photographers' widely expressed interest in copyright retention.¹³⁷ Several themes

133 See Stephen Heyman, *Photography's Place in the Global Art Market*, N.Y. TIMES (May 6, 2015) (describing growth in the market for fine art photography), <https://www.nytimes.com/2015/05/07/arts/international/photographys-place-in-the-global-art-market.html>.

134 Indeed, many of these older stock houses, which were cooperatives, have substantially evolved or gone out of business. *Compare Lens Modern Has Closed Its Doors. . .*, LENS MODERN, <http://www.lensmodern.com/> (last visited Dec. 17, 2018) (announcing closure on Dec. 12, 2017), *with About Aperture*, APERTURE, <https://aperture.org/about/> (last visited Dec. 17, 2018) ("Aperture, a not-for-profit foundation, connects the photo community and its audiences with the most inspiring work, the sharpest ideas, and with each other—in print, in person, and *online*." (emphasis added)), *and* MAGNUM PHOTOS, <https://www.magnumphotos.com/> (last visited Mar. 7, 2018) (boasting a modern online presence).

135 See generally STOCKSY, <https://www.stocksy.com/service/about> (last visited Mar. 7, 2018); NOOR, <https://www.noorimages.com/> (last visited July 2, 2019); see also Thomas Hawk, *Why I'm Ditching Getty Images in Favor of Stocksy for My Stock Photo Sales*, PETAPIXEL (Mar. 25, 2013), <https://petapixel.com/2013/03/25/why-im-ditching-getty-images-in-favor-of-stocksy-for-my-stock-photo-sales/>.

136 See *supra* Section II.A.

137 In some cases, photographers described the basis for legal actions they actually pursued. In other instances, photographers described how they would theoretically wield their copyright-based control in the face of circumstances that troubled them.

arose, all of which coalesce around copyright's apparent (albeit often symbolic) role in relation to the means of being a professional photographer.¹³⁸ By symbolic we do not imply a hierarchy of importance. To the contrary, the symbolic role of law—its cultural embodiment in the photographers' explanations of its purposes—can be often more critical than copyright's economic force in regulating and structuring behavior.¹³⁹ In this section we highlight the various ways copyrights function as cultural-legal devices with moral, personal, and collective purposes for photographers. These purposes hold regardless of whether copyright is effective copy protection. As described more fully below, these explanations of copyright's function reflect that, for photographers, copyright demarcates their apparent authority and symbolizes the knowledge and skill defining them as professionals.¹⁴⁰

The photographers' explanations of copyright's importance to them describe and justify the knowledge and skill that professionals (and not others) rely upon to address particular problems. Here, the problem is producing extraordinary photographs for particular clients and general audiences. Copyright may be ineffective to protect professional photographers' domain from competition. Photography skills are more widely practiced and accessible given cheaper equipment and the ease of editing and fixing images with digital technology. Moreover, copyright is indiscriminate and attaches to nearly every expressive work no matter the status of the author or quality of the work.¹⁴¹ This leaves the conceptual and evaluative knowledge of photography as an aesthetic and business practice (what professional theory calls the "subjective" dimension of professional practice)¹⁴² to be redefined and justified by existing professional photographers. Copyright may not be able to defend the professional jurisdiction of photographers by linking the photographer to her work and convincing the public that high quality photographs are worth higher prices. But photographers nonetheless describe copyright as marking the boundaries of the formal and informal

138 See, e.g., ABBOTT, *supra* note 24. One of our interviewees, although highly accomplished and successful, underscored this core principle to the extent of saying, "From a professionalism perspective . . . , when it's all said and done, . . . I don't ever think I'll be remembered as like some kind of amazing photographer, I don't think I'll have a *New York Times* obituary[.] But I'll damn sure be known as somebody who knew how to run a business" Interview with Dan, *supra* note 54.

139 Susan S. Silbey, *A Sociological Interpretation of the Relationship between Law and Society*, in *LAW AND THE ORDERING OF OUR LIFE TOGETHER* 1, 20 (Richard John Neuhaus ed., 1989) ("This activity, whereby law becomes a tool that shapes social situations, feeds back upon the law so that the uses to which it is put eventually come to shape the content and substance of the tool, the law itself. It is a dialectical process in which the law is the raw material that legal actors create and work upon at the same time they use it to handle whatever matters demand."); Hayden White, *The Value of Narrativity in the Representation of Reality*, 7 *CRITICAL INQUIRY* 5, 16 (1980) (describing the value of narrative explanation as the conflict between desire for meaning on the one hand and the law on the other).

140 ABBOTT, *supra* note 24, at 177–94.

141 See 17 U.S.C. § 102(a) (2012); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

142 See ABBOTT, *supra* note 24, at 57.

structures of their photographic practice that defines them and fosters their success as professionals.

Although it is possible to understand the photographers' accounts of copyright's importance as providing emotional benefits and indirectly motivating photographers,¹⁴³ we think the role and desired function of copyright as domain sustaining for professional photographers is most salient in the data. The symbolic function of copyright may do more than serve photographers individually; it may operate to support professional photographers as a group. Toward that end, copyright appears to help establish and strengthen the following: expertise, meaning both knowledge and skill; mentorship; and the development of, and demand for, high quality work within creative and commercial communities. Assuming these are social benefits, our findings may encourage discussion about whether current legal frameworks are appropriately tailored to foster them in support of professional photography.

A. *Photographic Work as Personal Work*

At a fundamental—and even formal—level, photographers' comments on the importance of copyright appear to emanate from the deep-seated view that their photographs originate from them. The photographers are the “but for” cause of their creations, whatever may be true about reliance on preexisting works, public domain material, or other influences and materials. In this way, photographers rehearse the classic view of photographs as solely authored, “superintended,” or “rendered” by them.¹⁴⁴ As Carl put it, when discussing why he cared about retaining copyright ownership:

What's the importance of it to me? . . . [I]t was a hard one to [*pause*] define. It was a hard one to go, what the additional value of that term, and that retention of copyright, since I'm the author of the work. It's almost as if it was more of a reason that, I made it, so it's mine. Why would I give it away? I authored it. And if I let go of that authorship, and that copyright component in a legal way—what am I losing? . . . I think that was the, the thought process that got me to pause, and also to look at both sides, and then say, “OK, I understand, but in the big picture of it, you know—how is it impacting me?” It was more for pride, or for ownership¹⁴⁵

This expression of origin, authorship, and control as emanating from their person explains photographers' desire for sole ownership and copyright protection.

In property terms, this resembles the origin story of first-in-time justifying ownership, which is not without its critiques.¹⁴⁶ But for many photogra-

143 See SILBEY, *supra* note 12, at 156–57; Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745 (2012).

144 *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 61 (1884); *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 452, 462 (S.D.N.Y. 2005).

145 Interview with Carl Tremblay, *supra* note 69.

146 See Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1990); see also Jill M. Fraley, *Finding Possession: Labor, Waste, and the Evolution of Property*, 39 CAP. U. L. REV. 51 (2011).

phers, the control they assert as owners over the final work is in fact partial and diffuse. As described above, photographers relinquish substantial rights and control over their photographs to clients and retain in many cases only the nonexclusive use of their photographs.¹⁴⁷ The retention of copyright even in the face of such transfers of unlimited uses to clients is not only a symbol of a photograph's origin; it is also a reflection of photographers' independence and autonomy over the creative process and its output, which are primary draws to the profession for most photographers we interviewed. For example, a fine-art photographer, distinguishing photography from film production, noted that in the case of the latter, with "[s]uch a huge production, you can't be all on top of it, . . . [yet] it's very easy to accomplish that full authorship of something."¹⁴⁸ By contrast, "in photography, I realized that I could do it alone and not depend on anyone's hierarchy It's more independent. . . . [Y]ou have a finished product that is all your own."¹⁴⁹ This viewpoint dovetails with long-established caselaw deeming the photograph to be the original creation of the photographer, the creative "master mind."¹⁵⁰ Whether or not they control ultimate uses of their work, photographers are the originators of that work and the copyright stands for that principle.

Even when photographers work in creative teams in the context of photo shoots,¹⁵¹ the default expectation is that the photograph produced is the product of and thus the intellectual property of the photographer. A commercial photographer based in New York, when answering a question about relationships between photographers and their assistants regarding authorship and ownership of a photograph, conveys the notion of photographers as directors producing the photographic composition. She said:

[T]here's instances where an assistant might press the button for the photographer. But the photographer has directed everything to that point, and they might make their assistant sign that [work-for-hire] agreement. . . . I personally never had a problem with that concept because I think taking pictures is not just about pushing a button. It's like all the stuff that happens

147 See *supra* notes 61–71 and accompanying text.

148 Interview with Linda, *supra* note 64.

149 *Id.*

150 *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 61 (1884).

151 Some interviewees were more inclined to depict photographic activity as a team effort.

Again, we're working with, an art director [as] a client, so it's not all your own creation, so it's a collaboration that's wonderful. I think photography's a big, it's a big team effort. You know, everybody brings their expertise to the project. And if, you hear stories of photographers that can be pretty arrogant about it, you know, "I'm gonna do it blue, and that's all it is[;] if you don't like it, go home." More power to them, I guess. That's not my personality, I'm more of a, you know, collaborator

Interview with Carl Tremblay, *supra* note 69.

beforehand . . . [I]f I [were] handicapped, and couldn't push the button[,] and I directed a technician to do it for me[,] . . . that's still my photo.¹⁵²

In fact, most photographers we interviewed shared some version of the “photographer as director” concept. The photographer is not only the actuator of the image but produces an intended or deliberate vision. Copyright indicates the source of this actuation and aesthetic control even when produced through teamwork.¹⁵³

Photographers' expectations of attribution or credit follow from their strong belief that photographs belong to them as a preliminary matter and remain personal to them no matter the subsequent business agreements. The idea that credit, and therefore copyright, should be shared among their assistants or other collaborators—or where relevant, the human subjects of the photographs—was not expressed by any interviewee.¹⁵⁴ Photographers appeared to have adopted their approach to ownership from the beginnings of their careers as mentors and teachers passed it down. They did not expect to receive any copyright interest when they were initially apprenticing themselves to more senior photographers. As explained by Stan, a commercial photographer in his fourth decade of professional practice, “Even if the [more senior] photographer didn't take the picture . . . [and] I was taking the picture— . . . they were directing me, it was always assumed work for hire [authored and owned by the senior photographer].”¹⁵⁵ Built into the mentoring and apprenticeship of up-and-coming photographers is this idea of attribution and attachment: copyright designates both, and thus structures relationships within photography studios between lead photographers and assistants. Those relationships are passed on as a matter of professional practice and identity, strengthening both.¹⁵⁶

152 Interview with Esther (pseudonym), in N.Y.C., N.Y. (July 17, 2017) (transcript on file with authors); *see also* Interview with Andy Levine, *supra* note 119 (“[P]hotography to me is not just . . . snapping the shutter, it's the whole process of planning, and learning, and editing, and backing up the photos”); *cf.* Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 434 (2004) (noting that the Supreme Court declined to locate photographic authorship in the “work of the cameraman, that is the person who actually looks through the viewfinder and clicks the shutter”).

153 *See, e.g.,* *Lindsay v. Wrecked & Abandoned Vessel R.M.S. Titanic*, No. 97 Civ. 9248, 1999 WL 816163, at *5 (S.D.N.Y. Oct. 13, 1999) (“The fact that [plaintiff] did not literally perform the filming, i.e. by diving to the wreck and operating the cameras, will not defeat his claims of having ‘authored’ the illuminated footage.”).

154 This is not surprising to the extent it reflects longstanding legal understandings. *See generally* *Burrow-Giles Lithographic Co.*, 111 U.S. 53; Eva E. Subotnik, *The Author Was Not an Author: The Copyright Interests of Photographic Subjects from Wilde to Garcia*, 39 COLUM. J.L. & ARTS 449 (2016) (detailing long-held view that photographic subjects do not have colorable copyright interests in photographs).

155 Interview with Stan Rowin, *supra* note 88.

156 It does not have to be this way, of course. It is a practice that has evolved over time, like naming children with father's names, which is culturally specific but not universal. But the practice is nonetheless meaningful insofar as compliance indicates belonging to a culture and is a clear rule on which people can rely. Deviation from the rule (e.g., asserting

Photographers' occasional desire to dissociate from photographs they produce further reveals their personal connection to their work. Mark Ostow, primarily a portrait photographer who has also worked in editorial journalism since the 1980s, explains how dissociating himself from certain forms of commercial work helps maintain his identity and business as a portrait photographer. He describes going as far as not caring about whether he retains copyright in certain contexts.

Generally, . . . on my corporate work, I don't care about my copyright. . . . [E]ven though I try hard on those photographs, I don't feel like I own them, it's like, "[K]nock yourself out," it's like I'm photographing an executive of the biotech—I mean, I'd rather not even get a call asking me if they could use it for something, or what to do. I'm like, it's done[.]¹⁵⁷

Mark's practice of dissociating by relinquishing copyright and credit was an outlier in the interviews, but the principle underlying his reasons for doing so was not. Across the interviews, photographers connect copyright retention with personality and authorship. Mark sought to dissociate because he did not want to be connected with that kind of photography, even if the photographs were excellent for their genre. Ongoing monitoring of the photographs' use by the client was not worth his effort. But in the main, both copyright and attribution were central to that personal and professional connection.

Photographers, even in the context of photographic genres for which there is little obvious afterlife, related copyright ownership (or retention) to the origin of the photograph.¹⁵⁸ Separating copyright from origination is dissonant and uncomfortable given how they conceive of their identity as photographers and their photographic work as being intertwined. Here is event photographer Josh Silk, describing his personal, almost bodily, connection to his work that explains his interest in retaining copyright even in the context of wedding photography:

Josh: [Our contract] specifies in terms of the event work that the copyright is owned by us, but we grant permission for the client to use the images for certain purposes. . . . Usually public relations type stuff, or for an organization, and for bride and groom, personal. . . . Facebook, . . . [s]ocial media, or making prints.

Interviewer: And why is it . . . important that you retain the copyright?

Josh: It's important because it's just always, it's the school I come from. I come out of that school of thought of like, once you create, you created that image. If you weren't there with your camera, you know, making something happen, or documenting that moment, it wouldn't exist. So therefore,

joint authorship or giving copyright to assistants) generates confusion that may weaken ownership claims between photographers, clients, and third parties.

157 Interview with Mark Ostow, *supra* note 126.

158 The usual afterlife of these photographs is either on the photographer's website for marketing purposes or, in the case of event photography that may capture celebrities, images that can be exploited in media publications.

it becomes that photographer's image, from the second the shutter is pressed.

Interviewer: So is it kind of the symbolic meaning that's associated with it, or is it for practical uses that you want to make with these images that . . . means retaining the copyright is important?

Josh: In the instance of event photography, I think it's symbolic. . . . It's just what it stands for. . . . I'm not gonna give you this for free, and you can say it's yours. That has value in terms of not only monetarily, but has value in terms of being the creator, you know? If . . . you're the creator, that's what being an artist is all about, is being the person that's creating stuff, and when somebody takes your creation and puts their name on it, and says it's their creation, that kinda takes the creator aspect out of the equation, which is kind of futile, I guess.¹⁵⁹

This view connects the professional with the personal and emotional valences of copyright—"it's the school I come from"—signaling an organizational culture knitting together these elements of copyrights' function. Photographers resist the separation of the work from their identity, and thus expect to retain copyright as a matter of belonging to the professional community. This is so even if, practically speaking, the myriad uses for the photograph are beyond their control.

Beyond retention of copyright, the motivation to pursue a legal claim is similarly mixed but weighted toward the personal. Carl Tremblay once initiated legal action when his photographs pertaining to a museum exhibit were used by an in-flight magazine to promote the exhibition after it had already closed:

Carl: What made me decide to take action?

Interviewer: Yeah. What made you decide to take action? It takes time to do that. Get a lawyer, all that stuff, like that's just time out of your day. I'm just wondering.

Carl: That my images were being used without my consent. . . . Or without my authorization. So, it was my sense of authorship. "This is my work." . . . "It's being used, and I'm not being compensated for it . . ." ¹⁶⁰

Even though the motivating factors are blended here, it is telling that Carl mentions a sense of violated authorship status before the complaint about not being paid. Some photographers explicitly called this a "principle" of their practice—they "don't do work for hire."¹⁶¹ Others described it as "about respect."¹⁶²

To many photographers, retention of copyright is epiphenomenal. It arises out of the primary relationships with clients and other photography

¹⁵⁹ Interview with Josh Silk, in N.Y.C., N.Y. (June 29, 2016) (transcript on file with authors).

¹⁶⁰ Interview with Carl Tremblay, *supra* note 69.

¹⁶¹ Interview with Bill (pseudonym), in N.Y.C., N.Y. (June 22, 2017) (transcript on file with authors).

¹⁶² Interview with Felice Frankel, *supra* note 131.

users that practically distance the photographers from their work through licensing and transfers. Copyright bridges that distance. The retained copyright in and credit for the photograph fuse the photograph, originating from the photographer, with her person and professional practice. Copyright is retained in the same way one's identity and work as an artist is always entwined.¹⁶³ These sentiments reflect natural- and moral-rights theories of property ownership from the eighteenth and nineteenth centuries, which justify copyright based on creativity's connection to personhood.¹⁶⁴ But photographers espouse these views in a highly mediated and digitally fragmented field of artistic practice. Even under (or perhaps because of) today's internet-age conditions, in which photographers in their practice embrace the proliferation of image culture and the "platformification" of business strategies, photographers rehearse the tenets of enduring philosophies as fundamental. They attach such meaning to copyright in order to sustain their identity and status as professional photographic artists.¹⁶⁵

B. *Reputational Value*

In the interviews, we heard other explanations for copyright ownership or retention. Photographers use—or attempt to use—copyright as a tool by which to preserve or advance their reputations as artists. While this purpose is not fully separate from the use of copyright as an economic lever, it is analytically distinct (under U.S. legal principles) insofar as control over image circulation relates to something other than direct revenue collection. Indeed, this use of copyright manifests itself in ways that mimic rights afforded to certain visual artists under the Visual Artists Rights Act of 1990 and other moral-rights regimes, which focus on rights of attribution and of integrity.¹⁶⁶ As already mentioned, many photographers expressed concern about their images being circulated without attribution.¹⁶⁷ Proper attribution appears to be a key—and sometimes primary—concern of photographers regardless of their professional stature or the income generated from the image.¹⁶⁸ For example, in response to the question of "What kind of behavior with your photos, without your permission, would cause you to

163 Karen Littleton & Dorothy Miell, *Collaborative Creativity: Contemporary Perspectives*, in *COLLABORATIVE CREATIVITY* 1, 3 (Dorothy Miell & Karen Littleton eds., 2004) ("[I]nherent in creative work is identity work involving the continual negotiation and re-negotiation of subjectivities.").

164 See, e.g., G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* §§ 34–71, at 67–103 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 8th prt. 2003) (1821); IMMANUEL KANT, *On the Wrongfulness of Unauthorized Publication of Books*, in *PRACTICAL PHILOSOPHY* 23 (Paul Guyer & Allen W. Wood eds., Mary J. Gregor trans., Cambridge Univ. Press 1996) (1785).

165 See generally MARGARET JANE RADIN, *REINTERPRETING PROPERTY* (1993) (drawing on Hegel to reinterpret property rights for the twentieth century, especially chapters 1 and 2).

166 See 17 U.S.C. § 106A(a) (2012).

167 See *supra* Section III.A.

168 But see Interview with Linda, *supra* note 64 (saying attribution without payment is meaningless, as "[c]redit . . . means money").

reach out to that person and say, ‘Hey, like don’t do that?’” an aspiring fine-art photographer stated, first and foremost, that “somebody claiming credit for one of my images, I would have an issue with.”¹⁶⁹

Concerns about credit and copyright can also work the other way. Consider the experience of Mark Ostow, an established portrait photographer who sometimes wields his copyright to avoid being credited¹⁷⁰:

“We wanna hire you for an event[.]” I say, “As long as you don’t credit me.” . . . [T]hey said . . . “[W]e want you to come and photograph this,” and then they got upset when I said, “I just don’t wanna be credited at all,” and they said, “What, . . . , everybody always wants to be credited, why do you not wanna be credited?” And I said, “Because I do portraits, and this does nothing to help, this is on the web in some way, and . . . this does nothing to help my career. It actually hurts my career.” . . . [I]f the, if the art director, . . . the photo editor of *New York Times Sunday Magazine* . . . sees that I’m shooting an event for the JFK School of Government . . . [be]cause she has this vision of she’d like to hire fine artists, at galleries, . . . that sort of devalues my stock tremendously.¹⁷¹

Transactional convenience and lack of attachment might explain dissociation from one’s photograph, but here Mark describes dissociation as a feature of his artistic reputation in the community. The photograph with his name attached is not only an extension of his person (as in the previous category) but may also represent his interests, skills, and identity as a photographer that have communicative value to others.

Reputation is, as Laura Heymann has written, “fundamentally a social concept” that does not exist until a community has formed a judgment about the person that guides future interactions.¹⁷² Wielding copyright as a mechanism of reputational control transforms the property interest, often “held” by a person and “devalued” by others, into a community interest with informational and other public-good characteristics. To be sure, Mark is concerned with his reputation in the community as it affects the future work he may be hired to do and the public perception of the kind of photographer he is (demonstrating his preference for subject matter and status within the photography field). But this use of copyright as a reputational marker does more—and less—than is traditionally understood about copyright’s function.¹⁷³ Mark’s dissociation from his copyrighted works exemplifies how eve-

169 Interview with Lee Crosson, in Arrowsic, Me. (Dec. 24, 2016) (transcript on file with authors).

170 The desire to distance oneself from attribution finds resonance even under U.S. law. See, e.g., 17 U.S.C. §§ 101, 302(c) (defining and providing the copyright term for “pseudonymous work[s]”). Section 106(a) also provides a basis for distancing, but in that provision, it is the right “to prevent the use of [one’s] name as the author of any work of visual art which he or she did *not* create” that is secured. *Id.* § 106A(a)(1)(B) (emphasis added).

171 Interview with Mark Ostow, *supra* note 126.

172 Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1341 (2011).

173 SILBEY, *supra* note 12, at 81–149.

ryday creators remake copyright for their own purposes. This illustrates copyright's overinclusivity and underinclusivity as a formal matter and its malleability as a social construct through commonplace instantiation and daily practice.¹⁷⁴

A related issue that frequently arose in the interviews concerns the integrity of the work as it reflects on the photographers themselves.¹⁷⁵ For example, science photographer Felice Frankel relayed an incident in which she granted to a publisher "permission . . . for North American English rights, English-speaking rights."¹⁷⁶ She elaborates:

And I thought that was it. What happened was the publisher . . . distributed all the material for translation to other countries, including my image. So not only did the other foreign publishers print it . . . [b]ut a couple of them deleted the color, and made it black and white, . . . [w]hich completely changes the whole picture. . . . And my name is still on it. . . . [W]e really got serious about this. And I paid . . . a significant amount of research money to see if we have a case. . . . [T]he reason why I bring this up is because, I then wrote back to [a person involved], I said, "Do you understand, it's as if when you delete the color from one of my pictures, it's as if I'm rewriting your sentences. . . . I mean, you are changing my work." . . . And, I had to educate.¹⁷⁷

Felice relates that, as upset as she was about the creation and use of a compromised version of her photograph, "I did make a decision. . . . I'm letting it go. . . . It's killing me."¹⁷⁸

This example reflects how, even if photographers choose not to assert their copyright for monetary purposes, they view copyright as a tool to redress reputational harms related to their specific skill and craft. Felice is a photographer of science, and her reputation is based on the accuracy of the science she represents in her photographs. Changing the photograph changes the scientific statement or illustration contained in the photograph, which in her mind is like altering laboratory results. When pressed to further characterize the nature of the harm Felice experienced from this incident, she underscored, "The work is being degraded. . . . After all, this is a picture that I didn't make. . . . And my name is on it."¹⁷⁹

In addition to controlling image integrity, photographers also seek to control the context in which their photographs are displayed.¹⁸⁰ Context

174 *Id.* (describing the misalignment of intellectual property as a formal legal matter to its regular use by everyday actors).

175 Discussed below in Sections III.C and III.D is a different concern over the information in and care for the subject of the photograph, which relates to the reputation of the photograph as such. Here, the point is that the quality of the image reflects on the photographer.

176 Interview with Felice Frankel, *supra* note 131.

177 *Id.*

178 *Id.*

179 *Id.*

180 Some photographers object to the notion of stock photography as being, at its core, a collection of decontextualized images.

matters because where and how photographs are published may change what the photograph means and the public's perception of the photographer. Interviewees repeatedly invoked the concepts of context and contextualization. They worried that unlicensed reuse, especially by third-parties downstream, would permit an image to appear outside of its intended context in ways that were undesirable for professional or ethical reasons.

Up-and-coming photojournalist Alison Campbell characterized her aesthetic goals as highlighting and focusing on certain underappreciated aspects of the world for her audiences. For example, she photographs former war zones and children in developing countries to display the beauty and hope in these places. She described her ability to “take an image that looks a certain way, and [to] provide context and background . . . and here's a moment and here's what you should think about it.”¹⁸¹ But, she noted, “if that photo's lifted, . . . all that context is removed.”¹⁸² The way she makes photographs imagines retaining some control over their context to tell a particular story. Accordingly, “worst case scenario, I'd like to at least have work that . . . on its own, decontextualized, can't be extremely damaging.”¹⁸³ She is not talking about damaging the subjects of her photographs. (That is described in more detail below).¹⁸⁴ She is describing damage to her own vision and thus to her goals and identity as a photographer.

Asked to identify with particularity what sort of copying from the web would bother her, Alison stated:

I think . . . if someone were to lift my photos and use [th]em in . . . a Breitbart news article, I'd be livid, . . . right? Because I'd be like, “I don't want to have any association with that.” Or if someone were to do something that was . . . really . . . disparaging, or really bigoted, I'd be really, really upset, whereas if someone's like, “I included this in a painting,” or like “I drew somebody from one of your photos,” . . . it doesn't really bother me, [be]cause I'm like . . . [t]humbs up. . . . [B]ecause I think . . . if it's encouraging other people to do creative work, that's good, that's, you know, that's fine with me.¹⁸⁵

Here, she describes a critical line between having control over her own vision, for which copyright is useful, and the freedom for others to emulate and build off of her work as a matter of homage, inspiration, or artistic conversation. Artistic reputation (and the ability to develop a reputation in one's field) relies on both control and freedom. The line between the two can be the difference between the exclusive right to prepare derivative works and fair use.¹⁸⁶ Like Alison, many photographers we spoke with supported the need and ability to build on earlier works, implicitly supporting the con-

181 Interview with Alison Campbell, in Bos., Mass. (Feb. 4, 2017) (transcript on file with authors).

182 *Id.*

183 *Id.*

184 *See infra* Section III.C.

185 Interview with Alison Campbell, *supra* note 181.

186 *Compare* 17 U.S.C. § 106(2) (2012), *with id.* § 107.

cept of fair use and aesthetic freedom as part of artistic practice.¹⁸⁷ And yet, when asked about a specific instance of usage in which the underlying work was perceivable as whole (even if arguably transformed), most defaulted to favoring a permission regime. Specifically, many were of the view that Shepard Fairey should have asked the Associated Press for permission to use its photograph of then-Senator Obama.¹⁸⁸ A precise line was unclear between uses that required permission and uses that were fair. But given photographers' personal attachment to their photographs, and their professional reputation imbued in the photographic work, exact copying in which an entire photograph is perceivable, even if transformed, is an objectionable change of context.

The desire to protect one's artistic and professional reputation by controlling the integrity or contextual use of an image can run headfirst into a disdain for the use of mechanisms that would promote such outcomes. Specifically, many photographers affirmatively eschew watermarks that would, while perhaps deterring copying, sully the perception and reception of the image.¹⁸⁹ As aspiring photographer Lee Crosson describes, he does not put watermarks or his name on any of his photographs:

Lee: Safeguarding [is important], but at the same time, it is damaging to an image[.] . . . [W]hen I see a watermark, . . . it takes something away from it

Interviewer: Even like if it was just your . . . name on the bottom?

Lee: Yeah. It always . . . ends up just lookin' a little too wedding photo to me.¹⁹⁰

Lee is building a reputation as a fine-art photographer, and this statement indicates that he understands watermarks not only change the photographic

187 See Interview with Alison Campbell, *supra* note 181; Interview with Ashok Sinha, *supra* note 54 (“[T]hey were good artists, . . . and . . . they took one image of mine and they made it, they said, you know, they were inspired by this image, and they took some other image, and they, I’m like, ‘All right, you know, they’re not selling it per se.’”).

188 Interview with Ashok Sinha, *supra* note 54 (“[T]here’s gotta be a nod at, there’s gotta be something to the artist, or the original work that was, I would call it appropriated from. . . . Seek the permission. Yeah. Seek the permission . . .”). On the Fairey controversy, see, for example, Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 597–98 (2016); see also Subotnik, *supra* note 5, at 1487–90.

189 See Interview with Alison Campbell, *supra* note 181 (“Aesthetically I find them really tacky”); Interview with Andy Levine, *supra* note 119 (“I don’t [watermark] because I don’t like to take away from the image.”). But see Interview with Stan Rowin, *supra* note 88 (“[A]ctually most of the infringements have my copyright right on the guy’s nose.”). Stan has also used techniques, in trying to secure credit for online uses, of “sen[ding] them the picture with a white space, and [his] name under it, so it’s embedded in the picture.” *Id.* at 88; see also Interview with Danielle Guenther, in Bos., Mass. (Sept. 16, 2018) (transcript on file with authors) (describing using watermarks only for her uncommissioned, creative work “[be]cause that stuff I keep my watermark on, [be]cause I’m very protective of it”).

190 Interview with Lee Crosson, *supra* note 169; see also Interview with Andy Levine, *supra* note 119 (“[If] you see ‘Andy Levine Photography,’ even if it’s very faint on the bottom, . . . it just takes away visually from it, it’s distracting to me.”).

aesthetic he worked hard to produce, but also may erroneously signal to his audience the kind of photographer he is. His reputation as a fine-art photographer appears in part to turn on the integrity of the image including his nonuse of watermarks.

Alison Campbell describes watermarks as “[a]esthetically . . . tacky,” so she uses mechanisms on her website to deactivate the copy command, although she says, “people can still screenshot,” which is “so easy to do.”¹⁹¹ Another young photographer reported employing metadata attribution techniques as the preferred method for securing continued association with one’s work among the teachers in her photography program.

[W]e had a whole class about it [Y]ou’re able to tag your name and your information on the image. . . . [T]hen regardless of whether you have to put up your actual . . . name on the image, like it looks tacky to me, but I learned how to protect my work and definitely ensure that . . . credit is where it should be¹⁹²

Among established and aspiring photographers alike, image integrity and professional reputation are entwined.

C. *Relational Value*

Interviewees described an important part of their work as developing relationships of trust with the subjects of their photographs as well as with their audiences. Decontextualization or alteration of the images could degrade trust in both subjects and audiences—and, in some situations, may violate professional standards. If photographs are altered or decontextualized, they may communicate different meanings than originally intended or contracted for. As a result, subjects or clients could feel disappointed or violated and may refuse to engage with the photographer in the future. The relationships photographers build with their subjects and audiences is a vital part of their professional practice, and they describe the control offered by copyright as important for maintaining those relations. This is a view of copyright as governing relationships between people with respect to a thing (the photograph), which is a basic formulation of how property works.¹⁹³

We heard several examples of photographers caring for and building relationships with their subjects to produce truthful and compelling photographs. For example, Noreen, a veteran photojournalist, discusses this aspect of her work—in particular her concern about distorting the truth and a photojournalist’s obligation to her audience.

You take an image of someone that you took months to gain trust from. Where you feel completely empathetic and compassionate to their story. And then someone, because that image is in the archive, and they couldn’t

191 Interview with Alison Campbell, *supra* note 181; *see also id.* (referring to deploying this mechanism as having her images “copyrighted” through her website).

192 Interview with Stephanie Gomez, *supra* note 117.

193 The literature on this view of property is vast. *See, e.g.*, JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 6 (2000).

care less [about] the context of that image, says, “She’s hot looking. Let’s use her to sell this.” . . . That’s my problem.¹⁹⁴

Expressing a similar sentiment, Linda withheld permission to use her documentary photographs because she feared their derogatory use “[b]ecause people wanted to use it in the context of ‘Look at these wacky midgets.’”¹⁹⁵

To be sure, photojournalism in particular aims to instill a formal code of ethics in its practitioners concerning the reuse and recontextualization of documentary photographs.¹⁹⁶ But across all genres, the photographers we interviewed considered themselves fiduciaries of the subjects they shoot and the messages they convey through photographs. Even young photographers just starting their practice express this sentiment. Stephanie Gomez was headed to college to develop a photography and video career:

I think the only thing that would actually bother me is . . . my subjects . . . when I take portraits. . . . That’s when I would feel [bothered], if they put it in a context in which I wouldn’t, or my subjects wouldn’t like. . . . [W]hen I shoot, it’s really personal, I have to . . . sit down and talk with my subjects a lotta the time, and get to know them as people. . . . And if . . . use[d] in a context that I wouldn’t like, like if they like say something bad about like the individual . . . , then that’s when I would be really defensive of my work¹⁹⁷

Photographers described a binding commitment—a sense of stewardship—to protect their subjects from future uses of the images.

Photographers describe themselves as sometimes the only defense against unauthorized reuses that could injure the subject. This suggests that as authors and copyright owners, they feel responsibilities that publishers or internet intermediaries may not feel. The professional aspect of trust and reliance that inheres in the relationship between the subject and the photographer is a problem that copyright may address for photographers by helping maintain those important relationships. Lack of control over the circulation of photographs would make this trust harder to build, creating hurdles for the production of future photographs. Lou described his distress at the unauthorized use of his photos of death-row inmates, and for which he would not give permission to reuse, except in very narrow circumstances, saying that “these people entrusted me with their lives.”¹⁹⁸ In this way, the professional dimension of being a trusted fiduciary facilitates the production of extraordinary photographs for which special access is needed (such as to death row).

194 Interview with Noreen (pseudonym), in N.Y.C., N.Y. (July 21, 2017) (transcript on file with authors).

195 Interview with Linda, *supra* note 64.

196 See, e.g., Conor Risch, *Do the Right Thing: Victor J. Blue on Ethical Choices*, PHOTO DIST. NEWS (July 12, 2017), <https://www.pdnonline.com/features/photographer-interviews/right-thing-victor-j-blue-ethical-choices/> (describing with specifics how one photographer learned ethics from various individuals and organizations).

197 Interview with Stephanie Gomez, *supra* note 117.

198 Interview with Lou Jones, *supra* note 122.

When photographers are granted access through trusted relationships, they may use copyright to protect those relationships and the access they provide.

Protecting relationships with subjects was also a matter of dignity and reciprocity. Alison Campbell described how her awareness of the documentary-portraiture nature of her work made her careful about circulating her work online. With respect to her subjects, she said:

[I]t's not just, "Oh it's like my particular art form." . . . [T]hese are people with whom I have relationships and interactions, and I feel really lucky to be able to interact with people, and to be able to take their photos . . . I think it's such an intimate thing, right, to . . . take portraits, and have people let you do that, right?¹⁹⁹

Indeed, Campbell went so far as to say:

[W]henever I'm shooting photos I always give people the opportunity to see things on the other side of my camera. . . . I'm coming into these places, I'm this foreigner, with this camera, there's already all these dynamics of like class, and power involved [I]t seems really like unethical to me to be like, "Well, I'm gonna actually decide how you get to be shown to the rest of the world."²⁰⁰

She likens this to the way in which "we get to, through social media, . . . curate how we're portrayed, and how we're shown, and I think to not offer the same opportunity to other people . . . [is not] fair."²⁰¹ Alison describes control over the photograph as "unethical" under these circumstances.²⁰² In the way people might take care of other people's precious objects—homes or jewelry, for example, as a matter of respecting the person who owns the home or jewelry—photographers take care of copyright as a matter of respect for the photographic subject in order to protect their identity and the relationship that produced the image.²⁰³

The problem of reuse and recontextualization, experienced as violating subjects and relationships with subjects, arises from the way people circulate and store photographs in the internet age. In our research the problem of photo editors pulling photos from archives without due diligence was described as increasingly frequent. Future photo editors, even those who are well intentioned, lose track of the purpose and context of the image, and use it in connection with later unrelated stories. This problem could be addressed with more accurate and tenacious metatagging and built-in restrictions for use, like viral licensing (or some would say blockchain contracting). But this requires institutional practices and professional standards that align, increasingly a challenge when freelance photography and the proliferation

199 Interview with Alison Campbell, *supra* note 181.

200 *Id.*

201 *Id.*

202 *Id.*

203 *Cf.* RADIN, *supra* note 165 at 41, 44–45 (explaining that law protects property because personhood inheres in it, and thus destroying or alienating property is a dignity harm). Here the photograph and its subject combine to form a copyrighted work, which the photographer may control to protect the person (as part of the copyrighted work).

of independent amateurs predominates. And some criticize viral licensing and legal protection of copyright management information (CMI) as problematically limiting fair use.²⁰⁴ Publishing photographs online is not a license to indiscriminately use them, although that is how photographers describe what happens. The perception of photographic promiscuity threatens their relationships with subjects, with whom photographers must collaborate to make the photograph, and thus also threatens the field of photography itself.

D. *Integrity of the Field*

Beyond the particular photographer and her career, beyond her relationship with the subject, copyright control may help prevent degradation of the status of the image in culture and of the reputation of news as fresh, authentic, and truthful.

The integrity of professional photography may be harmed in several ways. With the lack of control of photographs diminishing the trust of subjects, photographers may be denied access to certain venues or people, making candid photography harder to produce. In addition, the more frequently professional photographers are dissociated from their photographs and alterations to the photographs become common or permitted, the quality of the images and the expectation for those images may shift.²⁰⁵ Martha explained that the newspaper she worked for attempted to cultivate an expectation of accuracy and authenticity in the digital age with a “rule” “in terms of editing, cropping” of photographs, especially in the context of social media and online enhancements, that “we can only do things that you could do in the darkroom.”²⁰⁶ This means no Instagram filters or overlays. For photojournalists, tying the photographic image to the capacity of people, not computer programs, was important for the field’s integrity.

When the same photographs circulate widely and repetitively, diverse or original content becomes rare. As Dan, a veteran sports and news photographer, explained:

[Today] the level of the photographs [in news and general media] isn’t as high. Bear in mind that they’re reaching into a pool that everyone else is reaching into, so a lotta times you’re seeing pictures you’ve already seen in other publications. Because they’re not careful about having unique content. The death of every publication . . . *Saturday Evening Post*, *Life* magazine, . . . whatever the publication is, . . . has always been lack of original content. Original content always drives the wagon, . . . [e]ven in commercial [photography]. . . . I think one thing that’s happened is that first off, their resources are not as great, so they’re relying on subscription services That mate-

204 See, e.g., Timothy K. Armstrong, *Digital Rights Management and the Process of Fair Use*, 20 HARV. J.L. & TECH. 49, 116–17 (2006) (critiquing anticircumvention measures). See generally Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

205 See generally FRED RITCHIN, AFTER PHOTOGRAPHY (2009).

206 Interview with Martha (pseudonym), in Bos., Mass. (July 10, 2017) (transcript on file with authors).

rial is, when you're a weekly, you're waiting . . . x number of days until the publication comes out, and that material has often been regurgitated in the newspapers, or websites²⁰⁷

Even worse than repetitive content is the distrust lax photographic standards generate. Audiences who learn that photographs of real places and people were changed or “faked” for whatever reason (aesthetic, error, or lax journalistic ethics) may be forgiven for distrusting all photographs and disputing the skill and labor that photographers expend to make extraordinary photographs.²⁰⁸

Overall, photographers with whom we spoke are increasingly aware of, and coming to terms with, the notion that they are competing with images that could be created by a sixteen-year-old. This may be because more and younger photographers exist, and the equipment enables more amateurs and emerging photographers to distribute their work widely. Or it could be because the quality of the photographs is in fact improving despite the diverse range of photographers' skills. As one photographer put it, “I completely agree that [the quality of photography today is] higher than it's ever been.”²⁰⁹ In this context, photographers appear to connect copyright ownership to the professionalism they bring to their projects, hoping to cultivate an expectation for image diversity and quality as well as access to future projects. Photographers view themselves as skilled professionals with an ethic to uphold vis-à-vis their subjects, audience expectations to satisfy, and aesthetic standards to meet. All these requirements are important for maintaining the status and standards of the profession but are threatened by lack of control in an online world.²¹⁰

What are these quality metrics of professional photography? As mentioned above, the photographers we interviewed discussed the importance of access to the subject (be it a person or a place), which is fostered through relationships of trust based on repeated interactions and a history working in the field.²¹¹ Lou Jones described a time when access to a shot during the Olympics required climbing through snow with heavy equipment with an assistant. “I remember . . . [in] Albertville, . . . Winter Olympics, . . . I was standin' there, and I was like knee deep, and it was freezing, me and my assistant had to literally dig out a ladder up the hill to be able to get [the shot]”²¹²

207 Interview with Dan, *supra* note 54.

208 See Fiona Macdonald, *Altered Images: Is This Real or Faked?*, BBC (July 8, 2015), <http://www.bbc.com/culture/story/20150708-altered-images-is-this-real-or-faked> (“How do we know if what we're looking at is real? . . . How can we know that [it] hasn't been tampered with?”).

209 Interview with Dan, *supra* note 54 (describing the quality of the photographs whereas in the above quote about original content we understood him to be describing the amount of diverse content).

210 This is so even if many interviewees did not obtain formal training—or only a limited amount—in photography.

211 See *supra* Section III.C.

212 Interview with Lou Jones, *supra* note 122.

We also heard photographers describe the importance of unique and diverse content, and of learning how to make a picture that stands apart from the many on the internet and from those that are frequently reused. Some photographers describe cultivating distinctive styles—such as Mark Ostow, who combines portraiture lighting with photojournalism with help from assistants.

[W]e . . . move the light constantly . . . [to make] a mixture of photojournalism and portraiture. . . . I think I came up with this hybrid thing. And I'm the only person at these events who [has] an assistant with them I think it's unusual . . . [bec]ause most people are using light [that] comes from the camera, or they're using available light in these situations, but I was trying to create a portrait versus a reportage.²¹³

Developing particular skills with equipment, team building, and cultivating hard-to-access subjects and places takes time and is frequently taught to assistants.

Photographers also describe making photographs with emotional impact and that are accurate and authentic.

[W]e always try to . . . delve [into] what real photos [are], so the photos that you get are . . . so emotional, you . . . really see the person's pain or whatever, and then hopefully the reader can connect at a higher level to the story. . . . We can't ask people to do anything ever. You have to find out what they do, and then kind of be there, when they're doing it.²¹⁴

Thus, authenticity is a measure of quality.

These quality metrics of photographs, reliably met by professional photographers, are described as a matter of domain specificity. Photographers describe the professional work they do (their domain) as important because these quality standards are produced through skill and knowledge acquired by doing the activity. Maintaining this domain by claiming expertise about what makes a photograph extraordinary is paradigmatic of professional boundary management.²¹⁵ And as the quality of photographs diversifies and erodes through sheer internet volume and lowered expectations more generally, challenges to the professional domain arise. This is nothing less than an existential threat to the photography profession.²¹⁶

We heard concerns about the status of the profession from several interviewees, all focusing on what they described as the “good enough” problem, which has lowered what (paying or viewing) audiences may expect from pho-

213 Interview with Mark Ostow, *supra* note 126.

214 Interview with Martha, *supra* note 206.

215 See ABBOTT, *supra* note 24, at 57 (discussing how academic knowledge and legitimacy contribute to professionalism).

216 This threat can be analogized to legal software that prepares tax returns and wills, challenging the need for a lawyer to be paid for these services. When the skills, knowledge, and judgment a lawyer brings to the client's situation is questioned because a computer program (or a computer program and a paralegal) can prepare a tax return or will, the job of the lawyer may have to change, or the professional skills that justify the professional rates and client-specific work may require better articulation.

tographs. Below are two accounts from different kinds of photographers. Each expresses the same worry about the ease of making photographs and the ease of distributing and altering them in the digital age. Their concern is degradation of the quality of what people have come to expect from photographs and from the expertise and skill of photography professionals.²¹⁷ Here is photojournalist and editorial photographer Rick Friedman:

[P]eople seem to have a lot less respect for a photograph, [be]cause everybody runs around with their iPhone and does it. . . . I've actually had people say this to me. "I don't see what the big deal is. It's only a photograph." I've actually had people say that to me. And I have also had people say to me, when we've done a job, "Well your pictures seem to come out better than our staff photographer." Actually[,] . . . we shot a job actually at a hospital. And the head [of] communications called me and said, "Your pictures look a lot better than our staff photographer's. Can you explain to him how you do it?"²¹⁸

And here is fine-art photographer Felice Frankel on the same topic:

[I'm] now . . . making pictures on my phone. . . . Because . . . what it does, is it takes three pictures, of different exposures, and puts them together And so I now see that making pictures is democratic, you know? But . . . what I'd like to think is that [*pause*] you could tell the difference between a good picture, a good-enough picture[,] and a terrific picture. I mean, that's why I'm making this book. I want to raise the standards of what should be demanded [of images].²¹⁹

Photographers working in different genres discuss how the ubiquity of digital photographs contributes to the lower expectation of quality, but also how professional skill and practice may help raise those expectations. In other words, the professionalization of the craft—the hard work, the time invested, and the developed expertise and teamwork—can produce better-quality images that audiences can appreciate. Copyright cannot (and should not) control the ubiquity of photography as a hobby or profession. But insofar as copyright can serve as a bulwark against the degradation of the photograph in the minds of the photographers, their subjects, and audiences, it may help professional photographs maintain the level of image quality that supports photographic genres central to culture and public debate. The difficult question is whether copyright can help a professional class of photographers endure and raise the standard of what is expected of professional photographs without undermining the opportunities that the expansion of the photography field to amateurs now provides.

217 See also *supra* note 77 (for a similar articulation of this phenomenon).

218 Interview with Rick Friedman, in Bos., Mass. (Sept. 12, 2016) (transcript on file with authors).

219 Interview with Felice Frankel, *supra* note 131. Carl Tremblay, a commercial photographer, says the same thing in connection with budgets: "The digital realm I think has brought 'I believe that it's good enough.' . . . [T]here's so much more content out there, and people are satisfied with less" Interview with Carl Tremblay, *supra* note 69.

CONCLUSION: HOW COPYRIGHT MATTERS

Our interview data, by covering a broad range of photographers' practices, reveal nuanced roles that copyright law plays in photographers' livelihoods and creative work. Enforcement is but one occasional function of copyright. There are other, subtler, and yet more important, roles for copyright as well. Copyright plays a crucial role in photographers' initial contractual negotiations with clients. Copyright supports their effort to tailor their pricing to particular clients. Photographers use copyright as contractual leverage to charge varying fees in relation to the preparation and execution of a photo shoot as a measure of professional status and skills. Copyright even provides a bargaining chip to raise the contractual price for the shoot if the client wishes to own the copyright rather than license certain uses of the photographs. This stands contrary to the usual economic explanation of copyright as an essential anticopying protection for generating revenue from sales to third parties. Copyright thus matters at multiple points and in multiple ways within photographers' business processes. Observing this enriches our understanding of how copyright law operates in actual business practice.

The factual accounts in this Article provide a crucial foundation for any potential copyright reforms aiming to benefit photographers or other digital authors, a frequent topic for the U.S. Copyright Office and Congress. We learned that media and news companies have smaller budgets devoted to photography, despite photography's ubiquity in both domains. This may explain the strategic squeezing of photographers' revenue through one-sided contracts, stagnated day rates, and genre blurring described in the interviews. Furthermore, corporate consolidation in the media marketplace, including those that serve that market (stock-photo sites and advertising intermediaries), weakens photographers' negotiating leverage. Most photographers are freelance, not staff or union, without organizational power. And the rise of amateurs and emerging professionals who will work for reduced wages and freely alienate their copyright weakens the effect of photographic copyright for established professional photographers. Importantly, more perfect copyright enforcement or broader copyright protection, a frequent call among intellectual property legislative advocates,²²⁰ will not fix these problems to the benefit of professional photographers.

This Article also explains how copyright supports various business strategies of professional photographers beyond revenue generation. For example, photographers describe how, to them, copyright bolsters professionalism in the field. Copyright serves to attach the author to her work and protects the reputation of both the photographer and the photograph in terms of expectations of quality. Copyright also sustains and protects relationships

220 See, e.g., *Advocacy & Copyright Protection*, PROF. PHOTOGRAPHERS AM., <https://www.ppa.com/benefits/advocacy-copyright-protection> (last visited Mar. 7, 2018) ("Sometimes small business owners get overlooked by policymakers. Whether they are a member or not, PPA ensures small photographic business owners are heard. As a nonprofit, we're in this fight for the better of the industry!").

with the subject as an ethical obligation as well as facilitates producing future work of high quality on which clients and photographic audiences of accurate and authentic photographs rely.

In sum, this Article elaborates on the functions of copyright as a feature of pricing and professionalism with copyright conceived by these photographers as supporting critical features of their business and artistic profession. Sustaining their working lives as professional photographers, with attributable and appreciable skills for making extraordinary photographs for which people are willing to pay, is increasingly difficult in the digital age. Professional photographers experience the institutional, economic, and political pressures of the digital age in terms of the devaluation of photographs as commodities, despite the photograph's centrality to digital communication and business today. Although copyright's function may be weakening as initial contractual leverage for professional photography services, photographers describe copyright as central to their professional identity and status.

For professional photographers, copyright plays important roles in demarcating and defending their domain. Whether copyright can or should facilitate the work of professional photographers in this way, and whether it could do so in a more targeted fashion, is a subject for further study. That it does, according to those we interviewed, is a novel finding from within the study of intellectual property law. As such, this Article provides a new perspective in longstanding debates about the purposes and direction of copyright in terms of its evolving scope and limitations. It also explains how legal doctrine, such as copyright law, evolves to frame cultural constructs, such as professionalism and authorship, in the digital age.

