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KENNEALLY: Welcome again to Beyond the Book. My name is Chris Kenneally. I'm Director of Author and Creator Relations for the non-profit Copyright Clearance Center and as always very happy to have you for another one of our regular podcasts, taking a look at the dynamic business of publishing, writing, and creating all sorts of content for the web and elsewhere. Joining me today to preview a special program that Copyright Clearance Center is proud to co-sponsor is Nancy Wolff. Nancy, welcome to the program.

WOLFF: Hi, Chris. It's nice to be here and thank you for inviting me.

KENNEALLY: Well, it's a pleasure to have you, Nancy. You're an attorney in New York and I'll tell people about your background in just a moment but what concerns us today is a program you're going to be presenting in Los Angeles. It's a copyright seminar and you call it Copyright/Copywrong in Image Licensing and CCC is co-sponsoring this with ASPP which is the American Society of Picture Professionals and something called PACA, the Picture Archive Council of America. It's on Saturday, April 4th in Culver City, California. It starts at 9:00 in the morning with a breakfast, an opportunity for people to network at the Lew Robertson Studio and there's information about all of this online at ASPP.com. We'll link to that from our Beyond the Book site but Copyright/Copywrong in Image Licensing, that sounds like an opportunity to really go into what must be unfortunately for photographers and anyone involved in creation or the licensing of imaging, very troublesome these days. The web just makes copyrights and copywrongs so much easier than ever, wouldn't you say?

WOLFF: Yes, I would agree and that was the genesis of this educational program that I started with the organization, PACA, that you mentioned. We realized that for years we'd been dealing with professional image licensers in publishing and advertising that knew more or less when you needed to license a photograph for use, when you needed additional permissions but with the web and the internet, the use of images exploded because every website needs to be enhanced with illustrations and images to make it more interesting and so many people who had never had any experience with licensing were now using images and there seemed to be so many misunderstandings and just really a lack of knowledge about the right way to obtain images for use that we started this education program and I've gone around the country to a number of cities and I've put together sort of the key points of copyright law and when you can use an image, when you can't, and what additional rights may or may not be necessary if you're going to use something for a commercial purpose.



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KENNEALLY: Right, and we're going to sort of briefly cover sort of protected, not protected case study examples that you will speak about in depth in your program but you really are absolutely qualified to talk about this subject. You have published a book called *The Professional Photographer's Legal Handbook* from Allworth Press. You were named a Picture Professional of the Year by ASPP in 2007. As an attorney in New York, you've practiced primarily in intellectual law and the digital media. Your clients include PACA and PLUS, which is a picture licensing organization itself and you worked with stock photo libraries as you say and digital photographers, just everybody who's really involved in this actively. So I think the audience should feel reassured that the information you're providing them today and at the program on April 4th is really the most current and frankly something they can rely upon.

So much – apart from the fact that the web makes the infringement piece easier, it also seems to me to make the dissemination of truths and half-truths and misunderstandings all that much easier too. So there's a lot of misconceptions, innocent I think but still people think they understand what fair use is. They think they can use a certain amount of an image or a certain amount of text that's prescribed by law, none of which is true.

WOLFF: Right. I sort of start the presentation with some of the great myths under copyright and one of them is fair use because fair use is really a doctrine that evolved out of case law and then became part of our copyright statute. There are no black and white answers. It is really a set of guidelines. When you want to determine whether you can use something without permission under the Fair Use Doctrine, you have to look at a number of factors and see whether a court in looking at the facts of your particular situation, would come on the side of fair use or not fair use and the purpose of fair use was to maintain the balance that copyright law has which is to promote the arts and sciences and encourage creativity and that incentive is primarily through the rights of the creator but then there's also sometimes when the public would benefit from the use of a work without permission from the creator and those areas would be for criticism, news reporting, some use in teaching and scholarship and research.

So if you're writing a biography about Abraham Lincoln, for example, and you wanted to quote another scholar, you might be able to use a small portion of that work but it isn't meant for wholesale listing of large portions and because it's so grey, a lot of design studios and advertising agencies try to come up with black and white rules, like if you change something 10%, it's OK or if you only use a part of an image it's all right or if you found it on the internet, it's OK. It's in the public domain. Because they don't really know the answers and they're looking for rules but there's really no cases that say 10% of an image is OK or 20 words are OK.



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It's all a case by case basis which makes copyright difficult for a lot of people to grasp if they're not dealing with it on a daily basis.

KENNEALLY: Right, and I think a good way to understand fair use is to think of it first of all as a defense rather than a right. Almost as self defense can be an acceptable defense in a court of law for killing somebody.

WOLFF: Yes, so usually copyright isn't as severe as death –

KENNEALLY: Oh, I didn't mean that but –

WOLFF: But sometimes photographers feel that way when their works have been taken.

KENNEALLY: I suppose they do, right?

WOLFF: They do. They feel like these are – it's their creation, their children and when you take it without permission, they're not so happy about it usually. It's a doctrine that is a defense to copyright so you've made a use that would normally be infringing because you have not asked for permission but because of the circumstances that this use will not be considered infringing for liability purpose. So again if there is a gallery opening and the newspaper wants to review the photography work of the artist, you may be able to reproduce one of the photographs so you could critique it and explain why this is a good photograph or not a good photograph. So that would be a perfect example or in a classroom setting it's meant for being spontaneous. If a teacher sees something in the paper on that day and thinks it's appropriate for the content of what's going on in the classroom, that teacher could bring that article in and may include a photograph and distribute it to the classroom but then if he or she thinks it's such a good article that it should be part of the yearly curriculum then it would be more appropriate to try to get a reuse permission from the newspaper.

KENNEALLY: Sure, it goes –

WOLFF: That would be sort of a good example of the right way to consider fair use.

KENNEALLY: Sure, it goes from being spontaneous as you said to systematic and that makes a difference. Absolutely. Well, in your presentation which is focused on photography, you take a look at some case studies I'll call them where you propose to sort of investigate whether an infringement has happened and whether the particular photograph, the original photograph is protected. It's hard to talk about this without actually showing people the photos. That's what they have to go to the conference or the seminar in Los Angeles for or go online at ASPP.com to see your



presentation but maybe you can describe for us one or two of those examples because I found them quite fascinating myself.

WOLFF: Well, in the fair use area there's been a whole line of cases that involved the Barbie doll and there was an artist, Tom Forsythe, whose body of photography included Barbie dolls in retro kitchen appliances, some in blenders, some in martini glasses, some dressed as enchiladas going in the oven and it was a statement on how society views beauty and women and how commercial it is and it appears the most active purchaser of his artwork was Mattel's investigators. They brought a copyright infringement lawsuit against him for using their Barbie and it included trademark and he ultimately won. It was a long battle. So I have a number of fun pictures of Barbie being attacked by blenders. So that was an example where you could use something within a photograph that's subject to copyright, such as a Barbie doll, but use it for social commentary.

Then there is another interesting case involving the Vanity Fair portrait that Annie Leibovitz took of Demi Moore where she's pregnant and one hand is covering her breasts with a large ring and the other hand is holding her belly and then the movie, *Naked Gun 33 1/3*, did a parody of that photograph for their movie poster and the court also in that situation found that it was fair use even though that would be what would be called a commercial use because it was to promote a movie. So those are some of the fun pictures.

KENNEALLY: Right. There are also examples in there where photographs appear eerily alike and so alike in fact that you might suspect that the second photographer was intentionally copying, imitating the first. Tell us about where those kinds of questions – how to explore them. If you're a photographer and you see a work and you think to yourself – wait a minute, that looks very much like my own photograph. What should you do? What are the things you need to consider if you want to really seriously pursue infringement?

WOLFF: Well, those types of cases I call myself the copycat cases, where one photograph looks so startlingly inspired by another and with copyright, as an owner you have the right to control reproductions of your work. You have that exclusive right as well as the right to create derivatives or adaptations of your work and that's in another exclusive right. So this is a little outside of the area of fair use and into the area of whether there has been an infringement and to succeed in an infringement claim you have to show two things. First is that the second artist had to have access to your work in order to make the similar copy and the second issue is you have to show that there is substantial similarity between what are known as the copyrightable elements. There is a phrase that says copyright doesn't protect an idea, only the expression of an idea.



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So the courts look at the choices a photographer makes when a photographer takes a picture: the angle, the composition, the subject matter, the equipment used, the lighting. Those types of questions. So one example is a photograph of a woman standing in a sunset which was a famous Ernst Haas photograph. So that was a very well known picture and you could assume that anyone who really understood photography would have seen that picture and then the second one next to it was an album cover and which was more of a close-up of a starburst going through a woman's legs who's silhouetted against the ocean and the artist who created admitted that he was inspired by Ernst Haas but argued that only took the idea of the starburst behind the woman who was sort of shot through the leg and it was the idea and not the – as we would say in court, the expression of the idea.

And with copyright, a lot of cases end up settling and so you don't know what a court would do and in that case, things did settle but in future printings of that album there was going to be a reference to the original artist, Ernst Haas and a lot of these types of images come to my desk because of all the different photo libraries I represent and part of the presentation are ones that have come to the desk so you have to look at them side by side just like a court would do and say what has been taken and is it too much? Is it just the idea or is it more than that? The eye of a white stallion cropped in a corner of an image. A pregnant woman with a black and white striped shirt on which is posed and cropped a certain way. They're so similar that sometimes I call it the stomach test. If you were to show these two pictures to a judge, the court would say they just look too much, I can't believe you could have created it without trying to copy the original.

And then I have some examples of showing the right way to do it where you would actually ask permission to make the derivative work. For example, you might really like a photograph and think it would be great for your advertising campaign but the woman maybe is dressed too formally and you want a different clothing outfit but you like the entire structure of the photograph and how it's all set up.

KENNEALLY: Right. You know, I was thinking as you were describing that and this is something that we really do urge people to come and see in Los Angeles April 4th. Saturday, April 4th starting at noon, a program sponsored by ASPP, PACA, and with some support from Copyright Clearance Center as well that Nancy is going to be presenting and the fun part as you say is to look at these examples side by side and come to a conclusion yourself and then find out how a judge really did decide because it's not always obvious and frankly other copyright education seminars I have seen present the theory but very rarely show examples that make explicit what's behind all of this and for that I think it's a really valuable presentation and appreciate your previewing it with us today, Nancy. Nancy Wolff is an attorney in New York. She's the author of *The Professional Photographer's Legal Handbook*. She was named Picture Professional of the Year in 2007 by the American Society



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of Picture Professionals and it's been a pleasure speaking with you today. Thank you for being on Beyond the Book.

WOLFF: Oh, thank you for having me and I look forward to seeing anyone who's in the Los Angeles area on April 4th.

KENNEALLY: Great. Well, we also encourage people to join you there. Information about the program and how to participate will be online at beyondthebook.com as well as at ASPP.com. My name is Chris Kenneally, your host for Beyond the Book. Thank you for joining us and we look forward to having you back again very soon.