

Control over Contemporary Photography: A Tangle of Copyright, Right of Publicity, and the First Amendment

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Professional photographers who make photographs of people negotiate a tense relationship between their own creative freedoms and the right of their subjects to control their images. This negotiation formally takes place over the terrain of copyright, right of publicity, and the First Amendment. Informally, photographers describe implied understandings and practice norms guiding their relationship with subjects, infrequently memorialized in short, boilerplate contractual releases. This short essay explores these formal and informal practices described by contemporary professional photographers. Although the evidence for this essay comes from professional photographic practice culled from interviews with contemporary photographers, the analysis of the evidence speaks to the more general challenge of balancing privacy and freedom of expression in the digital age.

At the outset of this essay, I describe the scope of the empirical project and the process of collecting data. Then, in three parts, I describe how photographers simultaneously collaborate with and control the subjects of the photographs they make in order to assert themselves as civic storytellers with broad free speech rights in our digital age. I identify a conflict between photographers and their subjects, which serves to maximize the aesthetic freedom of photographers at the expense of their subjects. This conflict resolves in the photographers' accounts through their caretaking role over their photographs on behalf of the subjects themselves. I conclude with a brief explanation of why it matters to better understand these professional photographic norms in our Internet age when free speech and privacy are increasingly in conflict.

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I. COLLECTING AND ANALYZING INTERVIEW DATA

A. DATA COLLECTION PROCESS

For the past two years, collaborators and I have conducted thirty interviews with contemporary photographers ranging in age and expertise.¹ The aim of the qualitative empirical research is to learn how aesthetic and business practices of contemporary photographers are adapting in the digital age. Today, photographic equipment is more accessible; photography is a necessary component of most businesses; photography itself fuels industrious digital photography platforms as diverse as Instagram, Pinterest, Flickr, and Getty. Fundamental to this evolution is the Internet's capacity for instantaneous copying and distribution of information and images. How are photographers adapting their creative practices and business models to compete in a crowded field, when photography is more important than ever to public discourse and to business and access to low-cost photographs is more widespread?

Our interviews with photographers are far reaching and range between sixty and ninety minutes. We ask the same questions of each photographer, regardless of the subject's particular expertise or genre. The long-form interview enable us to ask follow-up questions to probe with specificity the particular photographer's answers in order to understand better the complexity of the accounts each provides of their practice. The goal is to understand how photographers succeed at their work, especially as the digital age presents unparalleled pressures of unauthorized copying, democratized access to photographs and cameras, and an increased urgency of both free expression and personal privacy.²

We interviewed a wide range of photographers, including photojournalists, event photographers, commercial and editorial photographers, portrait photographers, and fine art photographers. We interviewed digital natives as well as photographers who began with film cameras in the 1980s. Many photographers are well-established—even famous; some are still developing their career and building reputations in the field. All support themselves, or hope to, by making photographs.³

B. DATA ANALYSIS SUMMARY

The richness and diversity of the interview data provide a choice of focus for scholarly analysis. In other writing, we investigate photographers' pricing strategies as well as their non-economic interests in controlling photographs.⁴ During the interviews, we investigate their copyright registration practices, their understanding

1. To date, we have conducted thirty-two interviews. Thirty are with photographers and two are with business partners (a lawyer and an agent).

2. For a more in-depth description of the qualitative method, its justifications, and its process, see Jessica Silbey, Eva Subotnik, & Peter DiCola, *Existential Copyright and Professional Photography*, 95 NOTRE DAME L. REV. (forthcoming 2019) (manuscript at 2-9) (on file with authors) [hereinafter *Existential Copyright*].

3. *Id.* (manuscript at 9-18).

4. *Id.* (manuscript at 55-80).

of copyright generally, and whether (or how) social media and digital platforms figure in their work. We also ask about their relationship with clients, employers, their anticipated audiences, and the subjects of their photographs. For wedding photographers and portrait photographers, for example, subjects and clients may be the same. For photojournalists and editorial photographers, photographic subjects and the person or entity purchasing the photograph or licensing its use often diverge.

We learned that photographers care deeply about copyright as a measure of professional and artistic status, whether or not copyright functions as they wish in terms of producing desired revenue and maintaining aesthetic control.⁵ And despite claiming copyright's centrality to their identities as professionals, copyright registration and legal enforcement are rare among photographers.⁶ Copyright is nonetheless a fulcrum on which potentially competing interests of subjects' right of privacy and publicity and photographers' free expression are balanced. The remainder of this essay discusses the relationship among photographers' copyright, their subjects' right of publicity, and the First Amendment's guarantee of freedom of speech. Few photographers describe the legal foundations of the relationship with their photographic subjects, of course. But in accounting for their aesthetic and business practices, the photographers articulate and enact the political and social values that constitute and reinforce the central principles of copyright, rights of privacy and publicity, and free speech.

Photographers understand that copyright provides them with control over others' use of their photographs. As will be described more fully below, most photographers we interviewed are copyright maximalists, resisting broad fair use exceptions to copyright control especially relating to unauthorized exact copying of whole or parts of photographs. Describing themselves as originators or creators of their photograph, recounting the "photographer as director" concept deeply embedded in copyright authorship doctrine, most photographers explain that they believe they do (or should have) primary legal and moral authority over the photograph's circulation and subsequent uses.⁷ Photographers nonetheless express sympathy toward their subjects, who consensually or coincidentally become the focus of the photograph, and thus may have significant interest in its composition, use, and circulation. How photographers describe the tension between authorial and subject control of the photograph resonates with First Amendment values of liberty and self-determination,

5. *Id.* (manuscript at 8, 57).

6. *Id.* (manuscript at 25) (describing infrequent copyright registration practices), (manuscript at 50-51) (describing infrequent copyright enforcement practices).

7. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 54, 61 (1884) (describing photographic authors as "superintend[ing] the arrangement . . . form[ing] the picture"); ROBERT HIRSCH, *SEIZING THE LIGHT: A SOCIAL AND AESTHETIC HISTORY OF PHOTOGRAPHY* 87-88 (3d ed. 2017) (describing Napoleon Sarony as a "modern-day director"). Eva Subotnik's essay in this journal several years ago addresses copyright interests of photographic subjects in the case law as a "legally relevant hierarchy" where the photographer is the only author either by law or contract. Eva Subotnik, *The Author Was Not an Author: The Copyright Interests of Photograph Subjects from Wilde to Garcia*, 39 COLUM. J.L. & ARTS 449 (2016). For an analysis of accounts from the interviews describing this kind of authorship as the photographer's original expression, see Jessica Silbey, *Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers*, 9 U.C. IRVINE L. REV. 405, 413-20 (2019).

as well as of aesthetic and expressive diversity. But photographers locate these values in copyright and copyright authors, not in rights of all individuals. And thus, according to photographers' practice, the rights of subjects of the photographers are limited or taken over by the aesthetic and business practices of the photographer.

Of course, copyright law incorporates the First Amendment into its doctrine by excluding facts and ideas from protection and through flexible fair use.⁸ But these limitations are for any user of the expression, without specific consolation for photographic subjects. Moreover, most photographers do not understand copyright law at this level of specificity, and they resist the breadth of fair use especially as it applies to purpose and character of the use, the first factor in the fair use doctrine.⁹ When photographers describe making pictures of other people and building their own aesthetic and business practice from those photographs of people, they do not claim that right to make and control photographs of other people based on a "fair use" exception to the subject's privacy or their right of publicity. In other words, they are not assuming the existence of flexibility or a carve out in the subject's right of privacy or publicity, just like they do not think there should be significant flexibility or limitations in copyright. Instead, when asserting control over their photographs that depict other people, photographers appear both to claim a strong form of copyright in their photograph (a stronger form than the law would provide, in fact) and to explain the basis for doing so as a matter of earning a living and of their own free speech that inheres in their authorial copyright. So saying, they seem to understand the interest they have in the photograph as not only a property interest to license or sell, but a matter of their own identity and personality as expressive artists with something to say.

What, then, of the rights of the photographic subjects? Through a process of relationship-building, combining skilled photographic practice with collaboration and stewardship of subjects, the photographers describe the subject's submission to the supremacy of the photographer's aesthetic vision. In other words, either through implied norms or explicit consent, the subject's privacy interests submit to the photographer's speech. I see three aspects of this process in the interview data, which I describe below.

II. PHOTOGRAPHERS AND THEIR SUBJECTS

A. PHOTOGRAPHER AS COLLABORATOR

Photographers describe working with subjects as collaborative and based on consent, dignity, and independence of the subject. The collaboration takes time, and sometimes photographers describe developing deep attachments to their subjects.

For example, a veteran photojournalist described a practice of sitting with some people for hours or even days to make the necessary photos for a story on which she

8. *See, e.g.*, 17 U.S.C. §§ 102(b), 107 (1976); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

9. *Existential Copyright*, *supra* note 2 (manuscript at 22-23).

was reporting.¹⁰ Her goal is to build trust in order to produce photographs that are as authentic and accurate as possible. For one story on adult survivors of child abuse, the photojournalists's boss at the newspaper told her, "we want real people, we want . . . to show real people" emphasizing the importance of representing realistic, unstaged emotions in the photographs. To this, the photojournalist explained:

I think the obvious thing would be to go around and do portraits of these people that were named in the story, but I would go and meet them and talk to them, [and it was challenging. Then one woman said], 'Well, you know, it's really difficult for me, this is what I do. I go to this therapy, and I end up like tearing up stuffed animals, and I tear up the couches,' and [so I asked], 'Is there any way I can go to this therapy with you,' and . . . then I could only stay for a few minutes, but . . . you get these intimate photos that you normally wouldn't get.¹¹

Many photographers described a similarly intense relationship with their subjects in which they work together physically and intellectually to be comfortable with the picture-making.

Notably, this collaboration is not often memorialized in writing in the form of explicit intention or consent beyond an invoice for services producing the photograph and its subsequent use. Photojournalists and documentary photographers rarely, if ever, get releases. Indeed, most describe confidently (and sometimes indignantly) how making pictures of the public and of public people and events does not require permission. Yunghi Kim, an award-winning photojournalist and advocate for photographers in the digital age explains:

So, first amendment, freedom of press, you can, using it as reporting, you're protected, so that's what you use, you don't need a model release . . . If I take a picture on the street now, . . . people are always like, 'Don't take my picture, don't take my picture.' So I spend a lotta [sic] time Googling . . . First Amendment, freedom of the press . . . This is all legal. It's what you do with the picture that's another matter. . . So this is where the social media is a little blurry, because, you know, my generation, we use photographs to report, for publications, whatever. Even if when you did the personal project, it was in the context of journalism or editorial, right? So you're protected.¹²

Meanwhile, wedding and portrait photographers invoice their clients for a range of items, including equipment costs, travel and assistant time, and particular uses for and forms of the delivered photographs. But rarely did they describe including in the contracting or invoicing receiving an explicit release to make a photograph of a person with right to control their image.¹³ Instead, photographers describe having

10. Some of the photographers we interviewed requested anonymity, which is why this photographer is unnamed.

11. Interview with anon. photojournalist, in Bos., Mass. (July 10, 2017).

12. Interview with Yunghi Kim, in N.Y.C., N.Y. (Sept. 18, 2018).

13. Some photographers described having a form release long-ago drafted by a friend or lawyer, or that exists on their phone, for quick signature by the subject. This was a typical explanation from a professional event photographer: "I forget how we got our initial contract. I think we might have used a form or something that we got, or we borrowed from other photographers' contracts. We were part of an initial, my wife ran a wedding photography group for many years, in which we all kinda [sic] shared

an implied understanding with the subjects with whom they are working that use of their image is broadly allowed.

In fact, most photographers who work closely with subjects to make photographs for editorial uses or personal uses such as weddings or portraits celebrate the collaboration produced by working with the subject. Mark Ostow, an editorial and portrait photographer with over thirty years of experience, says even when making portraits of biotech executives, he is “always aspiring, . . . [so that] every photograph, . . . I just work really hard to engage whoever it is, engage with them, and to make that photograph something where I [think], ‘Wow, I don’t even know how I got that.’”¹⁴ But when probing the meaning of the collaboration, the photographers describe shared intentionality and mutual respect for the respective contributions to the photograph-making. They are not talking about joint authorship, however. As Ostow says,

[E]vent photography is such a different thing . . . [I]f I shot a portrait of you, I own that in my mind, creatively. [But] . . . I go shoot an event [and] someone [says] [in exaggerated accent], ‘Hey, over here, can you shoot me?’ And, [I’m] like—‘OK, sure.’ And you know that’s not [my] photo.¹⁵

Mark Ostow emphasizes that photographers are the authors (or “directors”) of the photograph and the shoot. As one photographer stated, reporting in a professional journal article about “authenticity” in contemporary photography, “constant feedback is important with real people. Even if you want someone to be natural, you still have to guide them.”¹⁶ This guidance and direction has deep roots in copyright case law justifying the originality of photographs and photographers as copyright authors.¹⁷ Further, photographer’s superintendence of the photographic process reaffirms that even in the age of hyperreality and immediacy of Internet communication, photographs and video are made—crafted and shaped—by people using expressive tools such as cameras, lenses, filters, who are exercising choices regarding guidance and direction.¹⁸ For this guidance to be successful, subjects must willingly submit to the photographer’s encouragement and control. As one fine art and portrait photographer confessed, “I know [that when a potential client is] going to be incredibly controlling . . . they’re really the wrong client for me. [This is why]

information freely. So I’m sure some of it came out of that.” Interview with Josh Silk, in N.Y.C., N.Y. (June 29, 2016).

14. Interview with Mark Ostow, in Cambridge, Mass. (June 15, 2016).

15. *Id.*

16. Holly Stuart Hughes, *Photographers and Casting Directors on the Pros and Cons of using “Real People” for Advertising Shoots*, PHOTO DISTRICT NEWS, Sept. 12, 2018.

17. Eva Subotnik, *The Author Was Not an Author: The Copyright Interests of Photograph Subjects from Wilde to Garcia*, 39 COLUM. J. L. & ARTS 449 (2016). See also Jessica Silbey, *Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers*, 9 U.C. IRVINE L. REV. 405, 411–12 (2019).

18. Hughes, *supra* note 16 (“The push to cast non-professionals in the lifestyle and portrait-driven campaigns . . . is part of a trend to be more authentic. That’s become a buzzword. . . . [A] younger group of art directors and creative directors [who] come from a world of social media want their advertising to blend with the images people share daily. They can see through the stocky lifestyle photography that features models.”) (citation omitted).

I haven't built up much of a commission business [T]here are very few people who are willing to give up that kind of control [to me]."¹⁹ In a successful collaboration subjects give themselves over to the process in an intimate and vulnerable way.

B. PHOTOGRAPHER AS CUSTODIAN

Sole authorship, or "director" of the photographic image, does not mean the photographers lack responsibility to the subject or believe themselves to be the only master of the image. To the contrary, photographers describe themselves having significant duties to subjects and the photographs they make of them.

Once the photograph is made, the photographers describe caring for the photograph and controlling its use as a matter of stewardship, a concept Eva Subotnik develops in her recent scholarship.²⁰ Photographers describe this stewardship in terms of three overlapping functions: protecting the subject, protecting their relationship with the subject, and protecting the photograph itself. Alison Campbell, a young portrait photographer and photojournalist, describes her awareness of this sensitive and complex relationship, saying:

It's not just, "Oh it's like my particular art form," . . . These 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?²¹

Campbell goes on to describe how she accepts the hierarchy and power present in the relationship between photographer, while respecting the subject whose photograph she is making. "[W]henever I'm shooting photos I always give people the opportunity to see things on the other side of my camera." As she describes it, "I'm coming into these places, I'm this foreigner, with this camera, there's already all these dynamics of class and power involved . . . it seems really [] unethical to me to be like, 'Well, I'm gonna [sic] actually decide how you get to be shown to the rest of the world.'"²²

The power photographers have over their subjects may arise from the foreign intrusion of the photographer, as Campbell mentions. Or, it may arise from the situation of the subjects themselves. Lou Jones, a photographer with forty years of experience in commercial and documentary photography, describes his asserted control over his photographs of death row inmates and his distress at any unauthorized use of them. Only in very narrow circumstances would he give

19. Interview with anon. portrait photographer, in N.Y.C., N.Y. (Sept. 19, 2016).

20. Eva E. Subotnik, *Artistic Control After Death*, 92 WASH. L. REV. 253 (2017). Professor Subotnik describes successors in interest as kinds of copyright stewards, but this concept applies equally well to photographers in terms of their subjects.

21. Interview with Alison Campbell, in Bos., Mass. (Feb. 4, 2017).

22. *Id.*

permission for those photographs to be copied and reused. He says about the photographs and their subjects: “these people entrusted me with their lives.”²³

This was a common refrain among photographers who took pictures of people and whose skill and expertise focused on making people comfortable in front of a camera and building trust to have the picture taken in the first place. Stephanie Gomez, a young and up-and-coming photographer in New York City, expressed sentiments similar to the more seasoned photographers. She describes aiming to protect her subjects and her relationship with her subjects by controlling the context of her portraiture and documentary work through authorial control. In light of her youth and relative inexperience—a current college student with only a few years of experience as a photographer—her consistency regarding professional expectations and photographic practice is remarkable.

I think the only thing that would actually bother me is, you know my subjects . . . when I take portraits . . . That’s when I would feel . . . , if [unauthorized copiers] 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 [sic] the time, and get to know them as people When I’m comfortable, I can shoot really good work. And if they use it in a context that I wouldn’t like, [] if they like say something bad about like the individual . . . then that’s when I would be really defensive of my work, because you know, it’s almost like defaming art.²⁴

In this account, Gomez relates the experience of photography as a process that builds relationships with her subjects and enriches our understanding of lived experience through the production of art. She links effective relationship building with a defensive element of the use of the photograph manifesting as aesthetic integrity and authorship.

Many photographers explain the skill and pleasure of making pictures as a process of forming relationships with subjects (and audiences) and revealing aspects of identity and experience they would not otherwise be able to see or understand. And thus, the injury of unauthorized copying of the photographs is that it demeans the human aspects of the photographic process in the first place. This was certainly true of the photojournalists and portrait photographers. A veteran and award-winning photojournalist explains this insult, describing her distress at unauthorized reuses of her photographs of people:

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 care less the context of that image, says, ‘She’s hot looking. Let’s use her to sell this.’ . . . That’s my problem.²⁵

Contemporary photographers emphatically lack tolerance for unauthorized uses when the subject of the photograph and the relationship the photograph helped

23. Interview with Lou Jones, in Bos., Mass. (Nov. 10, 2016). He says further: “I wouldn’t let ‘em [sic] use [the photograph] at all . . . I don’t know what you’re advertising here, I don’t know what you’re representing, . . . I don’t want my name on it, I don’t want my photograph in it.” *Id.*

24. Interview with Stephanie Gomez in N.Y.C., N.Y. (June 29, 2017).

25. Interview with anon. photojournalist, in N.Y.C., N.Y. (July 21, 2017).

establish is perceived to be injured through decontextualization or reuse. Moreover, photographers describe themselves as sometimes the only defense against unauthorized reuses that could injure the subject. This suggests that as authors they feel responsibilities that publishers or Internet intermediaries may not. Indeed, in the age of the Internet archive and the millions of photographs that circulate without attachment to photographer or original context, photographers are reasonable to worry that the digital age default is to reuse without attention to attribution, context, or veracity.

Interestingly, however, few of the photographers we interviewed describe feeling obligated to return to their subjects for consent to reuse the photograph, be it on a webpage, social media, in a gallery show, or a book. Some photographers who invoiced (e.g., for events or portraits) might have included in the invoice explicit permission for use on the photographer's personal webpage, but few described being explicit about or even considering the need for permission for future artistic or expressive uses. That is, it appears from the interview data that photographers expect they have nearly exclusive control over their photograph of a person by virtue of the initial collaboration in which the subject submits to the photographer for picture making.²⁶

One interpretation of the photographers' accounts describing the importance of control over the photograph is to protect and honor the relationship with the subject. Injury to the subject and to the professional relationship with the photographer is a subjective perception and may in fact be inconsequential to the photographer's future as a working professional. But the photographers describe the injury as a desecration, and it is personal to them. Like parents protecting children, artists protect their work and the subjects of their work with ferocity and a strong belief in their morally righteous control.²⁷ Under copyright and publicity law, however, many of the reuses offensive to the photographer or the subject may be critical, parodic, transformative or otherwise in the public interest and thus fair under copyright law and permitted under the First Amendment.²⁸

26. This is not true of commercial photographers making photographs for advertisers and other brand clients. Photographers describe these kinds of photographs as being subject to tighter reuse control because of their primary commercial nature and because these clients have stronger and more explicit contract provisions delineating exclusivity. And some fine art and portrait photographers did describe returning to the subject to tell them about the photograph's reuse in a book, but this return to the subject was rare in the interviews.

27. See, e.g., JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS AND EVERYDAY INTELLECTUAL PROPERTY* 156–57 (Stan. Univ. Press 2015) (describing artists' and inventors' relationship to their work in terms of family relations and their children).

28. *Campbell v. Acuff Rose Music*, 510 U.S. 569 (1994). Compare *Katz v. Google Inc.*, 802 F.3d 1178 (11th Cir. 2015) (holding that when photographer assigns copyright to subject to enable suit, this use is critical and thus fair and there is no privacy violation because subject is a public figure) with *Hill v. Public Advocate of the U.S.*, 35 F. Supp. 3d 1347 (D. Colo. 2014) (determining that when photographer and subjects sue together as plaintiffs for reuse by political organization, there is a question of fact regarding fair use but no privacy violation because of the public interest in the subject matter).

C. PHOTOGRAPHER AS CITIZEN

Despite photographers believing in their exclusive control over their photographs to safeguard them and the relationship with their subjects, not all subjects concur with that hierarchy of control. Sometimes, the relationship between the photographer and subject degenerates or was never strong. Sometimes there is no initial meeting of the minds or the implied consent for fiduciary control through copyright exclusivity was illusory. In these instances of conflict or absence of relationship, photographers describe their authorial prerogatives as superior to their subject's interests.

Photographers described subjects resisting subsequent reuses of their portraits or images for diverse reasons. Some were unhappy with the way the portrait looks—what it emphasizes about their image or reveals about their personality or relationships with others. Photographers recounted subjects who rejected their portraits that made them appear older or distant from their spouse, for example. Other photographers told us about celebrities who sought control over subsequent uses as a matter of quid pro quo for initial access in order to curate their on-going professional personality. Some photographers described their subjects balking at the photographer making subsequent uses of the photographs for books and gallery shows because of the widened audience those new uses entailed.

During the interviews when depicting these kinds of tensions, photographers sound wounded, as if to say: *why don't my subjects trust me?* At the same, the photographers sound slightly defiant, as if to say: *I have the freedom to make this additional work and to express myself through these new uses this way.* As one photographer said, once the initial portrait was made and became part of her oeuvre, the story it told—of its making and its subject—was her “stor[y] . . . to tell.”²⁹

I interpret the photographers' explanations of their ultimate control over the photograph to be a matter of professional ethics that instantiate standards that produce authentic and aesthetically appealing photographs.³⁰ Despite consensual collaborations and a fiduciary relationship, photographers expect they have aesthetic and expressive freedom to make further uses of their photographs as a measure of protecting their professional domain and the ethics of photographic practice. These explanations resonate with self-determination and autonomy, as well as with deference to experts (the photographers) and their professional status.³¹ Further, if we consider photographers to be civic story tellers, these explanations also resonate with a sense of the importance of self-government and a marketplace of expression and ideas. These values form a strong foundation for free speech rights when

29. Email from anon. photographer, to author (Sept. 21, 2017, 4:40 PM) (on file with author).

30. See *Existential Copyright*, *supra* note 2 (manuscript at 75-80).

31. ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 2-3, 8-9 (Univ. Chi. Press 1988) (conceiving of professions as having an ecology, turfs and in need of cultural mapping with boundary conflicts). See also Andrew Abbott, *Things of Boundaries*, 62 *SOCIAL RESEARCH* 857, 882 (Winter 1995) (asserting that boundary building and connecting is proper starting place for investigating to stable and shifting social entities, such as professions).

interpreting the breadth and limits of the First Amendment as well as its interaction with other legal and social regimes (such as copyright and privacy law).³²

Specifically, photographers describe how unauthorized reuse of their photographs or the assertion of control by others is like compelled speech. Photographers seek assurance that, as authors, they are not seen to be saying something they did not intend with their own photos. Sarah Newman, a photographer and visual artist, explains:

I think I generally tend to be in a pretty liberal camp [regarding reuse], but I think that there could be definitely situations, especially if I disliked the person, or people that were using them, or what they stood for. . . [F]or example, if there was a right-wing political campaign . . . that was using it, then I would certainly have a problem with it.³³

Photographers also describe the freedom to reuse their own photographs without limitation and restriction by others, including their subjects, as essential to producing critical content and advancing aesthetic and expressive diversity. This was especially true of photographers who sought to convey messages about the world through their subjects that their subjects might reject. For example, an editorial and fine art photographer explained how it can be difficult to make pictures that challenge stereotypes and show uncomfortable aspects of culture:

So if I take the example of . . . wanting to make pictures that don't fall into stereotypical standards of beauty, or it's . . . not the traditional selfie picture that's [] coming from a high angle, you know, [] the lighting is perfect, everyone looks like a model, it's all great. And you think about how these images are being [] perpetuated and spread around Instagram. [W]ell, if you want to take a different type of picture of a girl or a woman, that picture might not be as welcome to be dispersed around the [I]nternet. . . . Is it good that only a certain type of photograph is allowed to be shared over and over and over, isn't that [] perpetuating a certain way of thinking or seeing? . . . And if that's [] what we're comfortable with, that's a pretty controlling thing, I guess . . . it's like controlling people's behavior, and how they're comfortable seeing themselves . . .³⁴

These are just two examples of many in the interviews reflecting free speech values embraced by professional photographers and their practices. In these assertions of aesthetic freedom, which override their subjects' speech or identity, are the First Amendment's liberty and autonomy values, a marketplace of ideas, and self-determination. As with the promise of free speech, however, its strength in application often depends on the identity of the person asserting it and the nature and context of the speech itself. Photographers do not make such nuanced distinctions, but their assertions of aesthetic freedom include several familiar but challenging tensions in the law.

First, photographers make photos from facts and events in the world, and most of what they photograph is "free" to make into pictures, even without permission, especially when shooting in public but even sometimes when in private. This

32. See, e.g., NEIL RICHARDS, *INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE* (Oxford Univ. Press 2015).

33. Interview with Sarah Newman, in Bos., Mass. (Sept. 29, 2016).

34. Interview with anon. photographer, in N.Y.C., N.Y. (July 17, 2018).

resembles the idea-expression dichotomy in copyright law and the statutory limitation on the copyrightability of facts.³⁵ Photographers rely on these principles—that they are free to make photographs of facts and things in the world—as a matter of mechanical necessity rooted in camera technology and developed through their practice. Photography, after all, mechanically reproduces the world and photographic art is a making sense of the relationship between the representation of reality and its alteration through the camera apparatus and photographer’s vision. Were photographers unable to make art by reproducing what they see without permission, their essential voice would be silenced. As Sarah Newman explains,

[P]hotography’s different than other media because it requires something to be existing in the world to base the photograph on, and in photography’s history, it was kind of about copying the world But photography’s relationship, in my opinion, to those objects in the world is that they’re just more closely tied than, for example, in drawing. Because it’s a causal relationship, and I think that’s different, and important, in that the object is required in order for the subject to be depicted . . . the light has to reflect off of it . . . [P]eople often mistake . . . [and] see past the surface of the photograph. A lot of people see the subject, they don’t see the photograph. They see, if there’s a picture of a tree, they see the tree. They just kinda [sic] see past the sort of mediation of the world. It’s like the Magritte paintings [Ceci n’est pas une pipe]. It’s kind of like that. It’s a tree. No, it’s a photograph. It’s the same kind of thing, but it’s even harder with photography.³⁶

So, photographers are first and foremost copyists. They make copies of the world they see and rely on the ability to make copies in order to share their vision with audiences.

Second, photographers vary their practice of seeking consent to make photographs of people, places, or things. Photographers sometimes obtain releases or seek permission to make copies (of people or buildings, especially when for advertisements, for example). In advertising and direct commercial work, photographers seek releases because clients demand them. In other genres, photographers may seek releases out of courtesy and relationship development, or sometimes even to make a better photograph. But most of the time, photographers do not get releases of their subjects, especially when the work is classified as fine art, photojournalism, or documentary, and even when the photographs are portraits and taken during events. In these circumstances, photographers rely on their relationship with the subject (when there one exists) or their practice norms (that liberates photographers as free speakers). Asking permission to make or reuse the photograph is not a first order default for most photographers.

Thus, I understand the photographers we interviewed as adhering to a narrow view of privacy—for their subjects or any subject—in order to make the work they do. Under privacy and right of publicity law, the photographic subjects might have more control over subsequent uses of their images absent an explicit contract limiting those

35. 17 U.S.C. § 102(b) (2018).

36. Interview with Sarah Newman, in Cambridge, Mass. (Sept. 29, 2016).

uses, especially if the photograph was made in private, the subject is not a public figure, or the use is in the public interest.³⁷ I further understand photographers to instantiate a stronger view of copyright control than the fair use regime would recognize (e.g., permitting less fair uses, even or especially when uses are critical or transformative). This stronger copyright control may fill the gap in the subject's weaker privacy rights. But if so, the control shifts from the subject to the photographer, who might nonetheless seek control over the photograph for the subjects' sake as well as for their own. In the end, according to the photographers' accounts of their practice, photographers' speech succeeds over their subjects' privacy. And this is a matter of aesthetic practice that relies on a hierarchy of speakers as well as an assiduous attentiveness, a trusteeship of a kind, with regard to the subject.

Whether law on the books will reflect these norms of contemporary professional photographers that embed a tension rooted in trusteeship and hierarchy between photographers and their subjects remains to be seen. But recent court decisions deciding overlapping privacy, right of publicity, and copyright claims, brought by photographers and sometimes also their subjects, suggest a trend in this direction. Indeed, it appears that in most cases, the photographer (or an assignment of the photographer's copyright) is necessary for the suit protecting a subject's privacy to succeed.³⁸

III. CONCLUSION

Photography must realize its destiny as the 'language' of the twentieth century.

– Berenice Abbott (1944)³⁹

The practice of photography is no longer for recording reality. Instead it has become reality itself.

– Ai Weiwei (2006)⁴⁰

It is reasonable to wonder whether we should care about the norms of professional photography as related to copyright, the First Amendment, and privacy law. In addition to better understanding how civic storytellers conceive the breadth and

37. JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 37 (Harvard Univ. Press 2018).

38. See, e.g., *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (plaintiff failed to prove copyright ownership in order to proceed with lawsuit seeking to take down film she was defrauded to make); *Balsley v. LFP, Inc.*, 691 F.3d 747 (6th Cir. 2012) (subject of photo received assignment of photographer's copyright in order to sue to enjoin further distribution of photo of her in a wet t-shirt contest); *Monge v. Maya Mags., Inc.*, 688 F.3d 1164 (9th Cir. 2012) (subjects of the wedding photos registered copyright in their name in order to sue to enjoin their publication); *Hill v. Public Advocate of the US*, 35 F. Supp. 3d 1347 (D. Colo. 2014) (photographer joined with photographic subjects to sue to control use of engagement photo).

39. *THE COMING WORLD OF PHOTOGRAPHY*, <https://perma.cc/AA7R-TKJG> (last visited Nov. 13, 2018).

40. AI WEIWEI, *AI WEIWEI'S BLOG: WRITINGS, INTERVIEWS AND DIGITAL RANT, 2006–2009* 9 (Lee Amrbozy, ed. & trans., 2011).

boundaries of their expressive practice, photographic storytelling and information transmission is at its apex in the Internet age. How photographs are made and circulate and how law and professional norms regulate both the making and circulation of photographs are critical to the reality of free speech and worldwide communication today.

Photographs are the most viral data packets on the Internet.⁴¹ They travel the fastest and the farthest. And for most people, photographs act on us, arresting or moving us to do or say something with an urgency that does not compare to the effect of words.⁴² Be they true or fake, photographs are powerful. Photography is the fuel of the digital age. And thus, how photographers assert control over their work and their subjects, how photographers cultivate and sustain standards of authenticity when filters and photoshopping are at our fingertips, is about the distribution of that aesthetic power.

As it turns out, however, photographers consider themselves insignificant and relatively powerless in the age of the Internet because of the frequency and agility of digital copying and distribution. But, interestingly enough, they also describe themselves as shouldering significant fiduciary responsibilities to their subjects and audiences. With this responsibility, photographers exercise control over the stories told and the manner in which the subjects are treated. They act as both gatekeepers and caretakers. We should pay attention to these roles and the relationships between photographers and their subjects if, as the audience, we care to experience and encourage truthful and remarkable photographs of our world and understand the processes by which they are made.

41. See, e.g., Rachel Gillett, *Why We're More Likely to Remember Content with Images and Video*, FAST CO. (Sept. 18, 2014), <https://perma.cc/FR4E-EJTR> (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*, HUFFINGTON POST (June 13, 2014, 6:51 PM), <https://perma.cc/J2KM-JYC8> ("[T]wice as many people, on average[,] share posts with at least one image in the post . . .").

42. W. J. T. MITCHELL, *WHAT DO PICTURES WANT: THE LIVES AND LOVES OF IMAGES* 9 (Univ. Chi. Press 2004).