

The War Against Photographers

a panel discussion

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Note: This text has been transcribed from an audio recording and has been edited for clarity. We apologize in advance for any typos or phonetic errors.

October 30, 2003

Javits Center

Michael Grecco: This is an event that EP and APA put together. And we wanted to make it a free event so that people can enjoy it. They're both non-profits and they both love donations. There's a gentleman back there, Steve I forgot your name already, Thornton. Steve Thornton, with his wonderful cowboy hat.

Paula Lerner: We're actually passing the hat or holding the hat.

Grecco: He said he ain't passing his \$900 hat. There's no way. He's gonna hold his hat, anyone who can contribute, the proceeds will be split between the two organizations. Gil Smith behind you, will write you a receipt. And for anyone who contributes \$50 or more, there are four \$200 grid spots for the Chimera that Light Tools makes back there. So, "SUCH A DEAL!".

Ed Greenberg: You come to New York and you're Jewish all of a sudden?
And special thanks to CALUMET Photographic for sponsoring the event.

Greenberg: Photo Journalist Allen Tannenbaum once told me that, "Photographers are the kind of people who can calmly lie in a foxhole with bullets flying past their ears, but they are petrified to call a lawyer or an accountant". If you are an assignment or freelance photographer, congratulations because you are on the road to extinction. Photographers, such as yourselves, have lost a

war that they didn't fight. Many of you don't even realize that you've lost it. Photographers are perceived as afraid to sue, afraid to be blackballed, or worse -- fear not being liked. You're perceived as being afraid to assert yourself -- that you are willing to be ripped off repeatedly and continually. Now that's how your clients and *their* lawyers and *their* IP people look at you. They may not *tell* you that, but that's what they say when they're in negotiations, in lawsuits and when they are amongst themselves.

You are all facing issues like rights grabs, non payment from clients, non payment from stock agencies, large and small. Lost images, unscrupulous reps, bankruptcy filings, tight budgets, both real and imagined. We are going to try to deal with as many of these issues as possible. Those of us on the panel believe that the biggest problem that you guys face, is a fundamental refusal to accept the mind set that you're in *business*. That you treat your business like any other business. It's no different than if you were a carpenter, a carpet layer, an accountant. You are a service provider. You do the work. If it's done right, you're entitled to get paid. You have the right to insist upon your right to get paid. You have the right to assert that right to get paid. There is no force out there that's gonna help you. There's no benevolent force out there. There's no magic hand out there that's gonna help you. The only thing and the only person that's gonna help you is you.

Now, while this war against you guys I believe is over, there is still plenty of money to be made. You can still prosper during what I like to call the mop up situation. If other people depend on

your career for tuition, for mortgage payments, for food on the table, it's our hope that the lawyers and the photographers up here can help you survive and even prosper. Photographers can shoot for fun or for profit. Not for both. If there are those of you out there who have achieved both -- you are really, really lucky. Go ye forth guilt free. Enjoy it, but consider yourself extremely lucky. As unsettling as it may be clients and agents attempt on a daily basis to extract out of you as much as they can. They go out and they try to *screw you*. You may not want to believe it, it's distasteful, but its true. And they *will screw you to the extent that you permit it*. They have their interest at heart. They have their own commercial and their own business interest at heart. And that's the way it should be. Their financial interests are only rarely parallel to yours.

The greatest example that I can think of, of the concept of, "its business, its not personal" is Hyman Roth, Godfather Part II when he says: "Its not personal, its just business." And if you want to continue with the Godfather analogy it was Michael Corleone who said, "Keep your friends close, and your enemies closer."

So have to ask yourself, "who's going to be with me in the foxhole? Who am I going to rely on? Is it going to be art buyers?" Well their job is to secure as many uses for your images as possible for the lowest cost. Its really simple. They hold your future in their hands, right? No, only if you let them. They know the way you feel about your work. They know your weaknesses. They play on your weaknesses -- very well! Because all of you wear your emotions on your sleeve. So they know it! They have you speaking

their language. And once someone has you speaking *their* language, in *their* terms, you're done. Ok.

Those of you who saw a lecture given earlier today, where your images were called and I quote, "**commodities**", in 12 inch letters, is a classic example. Once you start talking about your images as "*commodities*", you're done. Your finished.

Reps -- are reps going to be your protection? Your negotiator? Since your rep makes money only when you make money, their interest is always parallel to yours. Right? No! Not right.

Stock agencies. They lose or refuse to return your images. They send you incomprehensible statements. They charge low rates. And then they may defy you -- at the risk or penalty of being unable to make your mortgage or tuition payments -- to complain or God forbid, sue. Do you think there are other industries and other independent contractors that would put up with that? If there are I'm not aware of them.

Other photographers. They bid against you they undercut you. And often they have no incentive to help you. They have no interest in your survival, most of the time, although there are exceptions.

Judges, arbitrators, juries, they're going to help you? Individually and collectively they are often absolutely aghast and incredulous, when they see how you guys do business, your lack of paperwork and lack of forms. Because, they know that whatever profession they're in, they don't see anybody dropping things off

claiming its worth \$10,000, \$20,000, \$30,000 dollars, without, God forbid, a piece of paper. No one does that! So even when an attorney, who has a brain in his head, is trying to help you, you have to give the attorney the tools to help you.

Trade organizations can obviously can be of great help but they have little or no financial resources, hence, the passing of the hat, and they have large constituencies to serve.

Government agencies are not going to help you. And not until this industry and each of you convinces your local politician that you vote, that you pay taxes, and most importantly, that you provide jobs. You don't tell politicians that peoples' livelihoods are based upon your livelihoods. Until you do this, you're insignificant, you don't count.

That leaves us with the most important person in your business and that's you. It's all on your shoulders. and you're the one who has to pay all the bills. And you're the one responsible for everything. At the risk of sounding like some pop psychologist, only you can help you. And unfortunately, in this particular case, its true. You're going to listen to people on our panel and then it is our intention to take as may questions from you as possible, as rapid fire as possible. And it is our intention to help you survive and prosper.

But you're going to see that the photographers up here and the photographers who survive and prosper, they share certain traits, in my humble opinion, much more important than their obvious talent and their vision. And that's they have run their

businesses like **businesses**. They use forms. None of you, would go to Sunoco to have your brakes tightened for fifty nine bucks and walk out without a receipt. But many of you deliver film which when lost, you claim its worth thousands of dollars, and you don't even have a piece of paper.

Photographers who prosper, collect the monies owed them. They register their work. They are professional. Their reputations among the advertising, modeling and stock communities are of *normalcy*. Their clients know what to expect. Its just like McDonalds. Its like Wal-Mart. Its like a great surgeon. Or its just like FedEx. They deliver what a client needs with no surprises.

So we picked some key issues and some key questions. And we're going to leave it to you guys. I'm going to assault these characters with some key questions. We're going to leave time for you to ask questions. We are going to leave time. No politics please. No philosophy. No speeches.

We are trying to be blunt and direct. Now, you can think that one or more of us are crazy. And that's OK. But at the end of the day say to yourself, what if they're right? We believe that the advice that you're going to get, from everybody up here, is going to serve your interest, even if our world view of this industry, you think is dead wrong. We're here to give you some ammunition. None of us here has any other agenda.

Briefly, I want to introduce Jeff Sedlik former APA President. We also have Paula Lerner who is the current EP Vice President; Los Angeles advertising and editorial photographer, Michael

Grecco; lawyer Arie Kopelman, also a former ASMP Executive Director; lawyer Erica Galinski, my associate; and me, I'm Ed Greenberg from the law firm of Greenberg and Reicher. We are going to try to do this real quick. Please no speeches. Real fast.

So, I have taken questions that we have all collectively received. I've turned them into a little bit of a composite to the extent possible to try to hit the major issues. First question, Jeff - what are some of the dumbest business mistakes that photographers make?

Jeff Sedlik:

Okay, so I tried to come up with a list and when I got to page ten, I decided that I had to prioritize --- so I narrowed it down due to the time constraints only. Stupid mistakes that photographers make - I'd put at the very top of the list - sloppy paperwork. I'll get into that in a little more detail in just a moment but that's at the top of the list. Second, letting a client dictate the terms of the transaction, and the photographers' business practices. We're all in business, and we have to accept that fact. For some reason, photographers don't seem to accept the fact that they are business people as well as artists. Debra Weiss, the consultant, pointed out to me the other day that there is only one profession where the word "starving" is used in front of it -- and that is: "artists". I don't view this as a war on photographers. You know those booths at the carnival where you can throw a ball, and hit the paddle, and the person drops in the dunk tank? Well we, the photographers, built the dunk tank. And we're sitting up there handing out the balls to our clients. It's a recurring thing -- like Prometheus, we're out there getting our livers

pecked out, over and over and over again, and you know what -- we're doing it to ourselves. So the war on photographers is really more of a war on ourselves, and you know what? -- the vultures are circling, and they are market-driven vultures, and they can spot opportunity like you wouldn't believe. If we, as an industry, are not able to work together to educate our peers and protect ourselves, then the vultures will come in and do what they may. Actually, we've all got a few vulture scars already. We've got to get our collective business acts together.

Our first and perhaps greatest error has been basing our fees on time, like the day rate. Big mistake! There is no reason for a photographer to base fees on the amount of time that it takes to produce a job. Congress gave us ownership of every photograph that we create from the moment we create it. You've got to recognize that fact, and accept the power that Congress, in their wisdom, has given you. Your copyright!. Pay very close attention to the way you dole out usage rights. Unfortunately a lot of photographers just let their rights slip away, like yesterday's newspaper. Or they base their fees on the amount of time that it takes to create an image, which makes no sense whatsoever. Why should a photographer who can shoot faster get paid *less*? You should base your fees on the client's usage of your photographs.

The license. If they are going to spend multiple millions of dollars reproducing your photograph to get it out in front of the public and exploit it for commercial gain, you should be paid a commensurate licensing fee. If they are not going to be spending a

lot of money getting it out there to the public, you should get paid a lesser license fee. I used in my seminars today two examples: shoot a portrait on a white background on one day for a brochure of 500 copies and your fee might be in the low four figures. The next day, shoot the same portrait, same head shot on a white background, but this time for unlimited usage for unlimited time, and the usage license fee could easily be in the mid five figures. It's the same portrait, it's the same amount of time, but a different usage license, and therefore a different fee.

You can transition any client to a licensing model.

Photographers complain that they can't get off the day rate, that their clients ask for the day rate. Well, just say, "I don't have a day rate, but tell me about the media license that you need, and I'll send you an estimate." And if you've been working for a day rate in the past for that client, just say "I base my fees on usage now," and wean them onto it, work for a similar rate as you wean them onto it. Pay attention to the usage but work for a similar rate when you first wean them onto it and then take the usage more into account as you go on. I don't want to hog the mike, but I will. That mistake, not considering the size of the media buy when you determine your fees, is a major mistake.

Another mistake photographers make is using ambiguous terms to word their license descriptions, or wording their descriptions too simply. Even the simplest description can serve to protect your rights under copyright law, but to avoid misunderstandings, take the time to write out, in clear terms,

exactly what the usage license includes. If it takes a full page to describe the usage rights for one photograph, you're ahead of the game. The more specific you can be, the more limiting that license can be. Your client does not receive any rights that you do not transfer to them in writing with a signature after you've created the photograph. So you need to be very careful about how you work your license agreements.

Greenberg:

On that note, any of you who have service contracts with any kind of company, I don't care what company it is, you take a look at those contracts and the sales rep hand writes nothing. There are boxes to check. There are model vouchers in use that are used by a lot of modeling agencies that we've drafted, there are similar forms put out by EP and others, they have boxes - check them, it's really easy. That's what corporate America uses. Once you start writing sentences -- there's a story I won't go into, where the client put a comma in the wrong place - cost him a lot of money and me a new car because the comma was in the wrong place. I don't want to disparage all of you, but I'm going to guess that not very many of you have ever worked as editors where your grammar is perfect. I know mine isn't, just a comma in the wrong place and you could be done.

One thing that we scream and yell (but nobody listens to lawyers which is understandable, especially my wife), about is copyright registrations. Michael I want to direct this to you, what's the easiest way to do group registrations since we're always screaming at you people about doing them.

Michael Grecco: I'm going to have them bring up the screen, I have my little copyright slide show. I've told Erica this story, or Erica has heard me tell it before. I'm a client of Ed and Erica's, I learned to register my stuff and I routinely started registering it about four years ago after the third time that I was infringed -- it only took three times.

Can we get the projection going, it's there on my machine. It only took three times. I think this was shot in like maybe 1993, '94 and it had won a photo design award and it had won a couple of contests, I think it was in CA and everyone loved this picture. An art director called up and said you know, I'm doing a little ad campaign for this company, it's sort of a new company, it's called [large client] and the little agency's out of Burlington and we don't have a lot of money, and I said, "Well, it's a signature piece and it's going to be dependant on usage, at least \$5,000 or \$10,000 for print alone. You are going to have to check it out with him (this is an image of actor Michael Richards a/k/a Kramer)." So they said, "Ah well, we can't afford it."

So they hired a Boston photographer, paid him \$2500 including for the models, shot it with a lookalike, and that was the ad, [shown on screen was Michael's original image, then the copycat ad]. They claimed the whole time it didn't have any resemblance at all, although the photographer told me he had my picture in his hand all the time --, "Oh yeah, we had the comp there all the time, just held it up and shot it". He wasn't too bright.

So the first question out of my LA's attorneys mouth was, "Did you register it?" Daaaaa what? "Did you register the image?" I

didn't even know what that meant. What I find is that my infringements rarely come from someone who has actually hired me, because the people who have hired me have established a pattern of purchasing that if a mistake happens or someone uses it there's a pattern that has been established, they've paid \$10,000 for it, they're going to pay \$10,000 for the second year. Rather, I find that I have a tremendous amount of third party infringers. Third party infringers that will find the image and copy the image.

So the second time this happened (because we never learn once!), was with an image with (actress) Terry Hatcher. I had shot a Movieline cover, and my agent was making a deal with FHM in England, to use the pictures of her as an exclusive. The Movieline hadn't come out, and they're working on the exclusive rights, when I get this fax from FHM, "Deal blown -- sorry you sold the pictures to the Sun." We're dumbfounded! We say, "What do you mean we sold pictures to the Sun? What are you talking about?" They had taken the Movieline cover put it in Photoshop, stripped all the type out and used it on page 6 in the Sun, full color. The attorney asked, "Did you register it?" And I said, "Oh yeah, I remember you mentioned that the last time."

It took me and my LA attorney a couple of years to figure out how to do a routine, something easy we can always do - we sent it to the copyright office to make sure that it would always work, but I developed a very simple system - I put a speed rail into my ceiling and made a copy stand basically over my light box. And I set that up and now every job I do goes through the system before it goes

out. We do this instead of worrying about what was published where when it came out getting a copy of the magazine, registering the magazine as a published work, etc. Instead, we're routinely batch registering everything every few weeks as unpublished. And not only does it help me, it helps my clients.

For instance, I have television clients where I'll do television advertising and people swipe the photographs. There are agencies that steal the pictures. And the clients' lawyers are asking me, "Did you register it?" and I say "Yeah," and they say, "I'm so happy to hear that!"

This is what I'm doing: I'm basically shooting and handing in a 4 x 6 copy print and I'm very routinely and very quickly doing it with this method, because I can put four images up on a page, with this method. If I shot 200 rolls of film we can make the registration deposit material in 10-15 minutes and it doesn't slow down my work at all. Even my deliver memo - as we're processing the delivery memo a box automatically comes up with a big caution sign that says remember to copy the images for registration. Because we can forget, because we're human, we put in a system that helps figure out the issue and fix the problem. That works very effectively for me.

Greenberg: What do you do with it at that point?

Grecco: In my head I time my magazines: if I do something for Time magazine and I know it's going to come out next week, I take everything out of the camera and make sure I get it to the Library of Congress by Friday before Time comes out. I fill out the form and I

pay the \$30.00 check.

Greenberg: Michael does anyone out there need an attorney to fill out the form?

Grecco: No, it's idiot proof. We just make this part and parcel of everything we do,

Greenberg: It's one of the very few things that the federal government has actually done well, it is a form that is acutely idiot proof.

Grecco: Because I'm a corporation and the way I have to fill out the form, I had an attorney look at it the *first* time and the attorney looked at it and it's very easy to fill out

Greenberg: Is there anything about the form that you think you should tell the group or that is complicated or tricky?

Grecco: No. It's the same form, it's how you fill it out, in clause 3A if you put a creation, it becomes totally unpublished. If you put something in line 3B, your telling them that it's a published work. And I will also go to section 1, see this last line. If the published photo is on a page, I'll tell them what publication it was in and what the issue was and what page it is on. But, just for the published ones. But that's a pain, the busier I am the easier it is because there is so much stuff moving through, when I'm slow, when I decide to leave the film in the camera, you always get caught with something coming up to be published, so it's just great to do it routinely. Maybe you keep a log when a magazine is going to come out and if I miss something and I've registered something as unpublished, and it comes out published, I just go ahead and supplementing the magazine also.

Greenberg: Michael let me follow that up with Erica.

Grecco: Wait can I say one thing - I'm the only guy that gets interrupted - if

anyone has a lot of technical questions about copyright registration, how it's done, I wrote a copyright primer, that's on the EP site.

Paula Lerner: The URL for it is editorialphoto.com/copyright - there's a link to the primer

Grecco: The primer's there and it talks about my methods and goes into depth.

Greenberg: Let me follow up on something Michael said and I'm going to ask it the way photographers ask us - they ask, "Why should I file a registration for an unpublished image which I may never sell?"

Erica Galinski: Yeah, my favorite word - **sell**. You don't *sell* your image, you *license* it. And I sit in these lectures all day that the agencies are giving and they are saying, "We'll sell this and the sales of the images is up this year" - NO. And if they say it, how can I blame you guys if you say it. But you guys have got to start calling it a *license*. It's something you can license over and over again. If you sell something it's gone. If you license something then you can license it again and again.

Greenberg: So why file it if it's unpublished and I may never license it?

Galinski: So what if you do, why not have that little bit of extra insurance? Or, what if it gets into somebody else's hands. Maybe an assistant steals it out of your office - if you're going to tell me it's sitting in a drawer and you tell me nobody is ever going to see it. Why not have that little bit of extra insurance? Now you can do a group registration, it's unpublished works, it's \$30.00 anything unpublished in a year's time, even if you just send them in every January 1st, or December 31st every year. Easy simple cheapest

business insurance out there.

Greenberg: We get at least one case a year, from a model or photographer that concerns an unauthorized use of an image that is 15 - 20 years old. That happens because art directors and people who work at agencies - they take these images, and put them in their pockets and they leave with them. One of our clients was in Sports Illustrated - 15 years later she's on a bottle because the company says she'll never see it and she won't recognize herself. That's another reason.

Michael Grecco: Just conceptually, I want people to understand that I'm bulk registering unpublished images that I am shooting for assignment. They are getting registered as unpublished before they get published and before they go out the door. So if some of them get published, great they were registered before they were published. If they don't, that means that everything in my file cabinet is covered. I'm registering the stuff that's going out there meant to be published and they are all of my assignments that I'm registering. I also register my snapshots, I register pictures of my kids, who knows, it's just much easier, the contact sheets the chromes, I put it all in the registration. It's just much easier.

Jeff Sedlik: The APA, ASMP, the PPA and other organizations worked very hard to change the copyright regulations so that you could file group registrations of published works easily. Not a lot of people are taking advantage of the new regulations. We lobbied the copyright office and convinced them to eliminate the requirement for two tear sheets. When you visit the Copyright Office website you

won't really find that clearly stated. In fact, the website says all over the place that when you register a published work you have to turn in two copies of the "best edition" which means two copies of the work as published, like tearsheets. But the fact is that you no longer need to submit any tearsheets when you are registering multiple published photographs. When I need to register one image that is published, I'll always register two, because if it's a group registration, no tear sheet is required. That "best edition" requirement was holding up photographers for years, because we couldn't get tear sheets because the clients wouldn't send them to us. Well, those days are over. When filling out a copyright registration, keep in mind that the first thing an attorney is going to do when you file an infringement lawsuit is to ask you if your copyright is registered with the Copyright Office. And if it is registered, they are going to attack everything that you've written on that application. And it is such a simple application that it's hard to attack things, but if you make a simple mistake like a typo or not putting the date in space 3b if it's published, they will make every attempt to invalidate the application, and they just might succeed..

Greenberg: Let's follow that, Erica - if you haven't done a registration and the image is being used without your consent or authorization, what should they do?

Erica Galinski: Well the first issue with that is whether the image has already been published prior to it's being infringed. For instance, you see it now on a billboard that it's not supposed to be on, and you know that it was the cover of Movieline three years ago. Alternatively, you have

the situation where it's never been used and it's an unpublished image. You're better off in the second scenario. You can register it now, as published if you are within your 90 day window since first publication, and you can go back and get statutory damages for the infringement. My best advice if you're not so lucky and it's already been published and now you have somebody ripping it off and you've never registered it, register it any way. Because you've got a hot property there, you've got something that somebody already wanted to infringe, it may happen again.

You can't pursue any legal action without the registration. But if you pursue legal action and you register it at this point, you cannot get certain benefits that are created to encourage registration.

The 90-day issue: essentially in plain language, the law says if something is published you have 90-days from first publication to register it as a published work and your registration is retroactive to that publication date. This applies only if it's the first publication. If it's been published before, it's not going to help you there.

Arie Kopelman: I think a lot of people here may not understand what the benefit of registration is.

Greenberg: Money.

Kopelman: We really need to address that

Greenberg: Money!?

Michael Grecco: In the "Kramer" case registration was the difference between a car and a house. The value was the difference between getting the van that I drive now or buying a new house. This is because the

benefit of registration is that it provides statutory damages. This means you don't have to prove the value that this particular image brought to [the infringer] and it also pays your legal fees. Without the benefit of statutory damages and legal fees it becomes a deterrent for people to even fight the case.

Kopelman: And how high can statutory damages go?

Grecco: \$150,000.00

Greenberg & Galinski: Plus your attorney fees and court costs

Galinski: Let me clarify a misconception about the \$150,000.00. This is another pet peeve of mine. People have this idea that if I'm infringed and I've got my registration, I've got \$150,000 coming to me. That is a maximum, that is a ceiling. You are likely to recover a higher number than if you were just getting a licensing fee, but you are not guaranteed \$150,000.00 It's not automatic.

Greenberg: I was asked a question earlier today, a photographer was approached by a very well known rep who wanted to rep him and this rep is known to bring in money for his photographers and the rep wants to do his billing. And the photographer asked me, "should I let him"?

This is one of the simplest answers I give all year, the answer is NO. NEVER, DON'T CONSIDER IT, it's your money, why should somebody else get your money? Now, if it's your spouse and you're not in the midst of say, a divorce, that's someone who you -- hopefully -- can trust. Maybe it's your mother or father, unless of course, they have a gambling problem. If the rep wants to send out bills and you are physically there to see what

those bills say and those bills are approved by you - as long as you get the money. Do you know any business where somebody other than the service provider in an individual contract situation gets the money?

You guys are willing to give away your money, or at least have someone else collect that money, who doesn't pay rent to the extent that you guys do, who probably has zero to maybe _ of a part time employee, who doesn't have your overhead. But you gleefully let these people receive 25% of your money. If I said to any of you that you could retain our firm based upon 25% of your gross, how many takers do I get?

Now, I have a license, I can lose the license - so presumably if I steal from you basically have "some protection", I have malpractice insurance, whatever. Some reps are known to steal - we have sued many of them. And there are reps in this town and I'm going to assume elsewhere, we have sued more than once. There are reps who have stolen money from photographers over ten, twenty and thirty year careers. They steal, no one gets your money except you.

(New Question) Paula, how do I know that if I take a job I'm going to make money?

Paula Lerner: There are some critical things about pricing your work that are important to mention. One is to know what your costs of doing business are. Anything like this is something that photographers seem loathe to do. But calculating your Cost of Doing Business is something that is not hard. You basically take all the things you spend money on: your rent/mortgage, your computers, your

cameras, your car, your health insurance - everything - your office supplies, your staff, and total them up. There are good resources for what to add up - there's one on the EP website and a new one on the NPPA website which is more geared to photo journalists, but it works and it's a good calculator. You plug in the numbers and you get this large sum at the end, and you divide that by the number of days that you work. You can do it different ways, by the days or by the month, whatever works for you. In my particular case my cost for doing business is right around \$220 per day. I don't have a staff or the overhead like those who have a studio but my CDB (cost of doing business) is not an insignificant amount of money. Now I spent the first 15 years of my career doing mostly editorial so it's easy to see how the numbers get eroded overtime. The same \$400 fee I was working for in 1985 has a vastly different value today. The fees have not increased. So if I take that \$400 shoot fee that I get for doing an editorial shoot and subtract out my cost of doing business, that leaves me with \$180. My assistants are getting paid more than that.

Greenberg: So are you ever going to do a job that you don't make money on?

Lerner: There's no black and white here, and in general I would say no. I regularly turn down work for this very reason and I will be very clear about this, but I will say to my clients, "Gee I'm sorry but this really doesn't leave me with wiggle room to make a living here and I really can't afford to subsidize AOL/Time Warner."

But there are exceptions to every rule. I do pro bono work. I'm subsidizing those jobs. But I have committed personal reasons

for doing so.

There might also be the occasion where the exposure from doing a low paying job might make it worth doing, but you have to be careful doing those. I hear so often from photo editors, "This will be great exposure for you." Well it's great exposure if they're giving you a 10 page spread in Vanity Fair and the cover. But if you are getting a quarter page in the back of some middle circulation book, that little credit line is not going to help you very much.

Greenberg: And when pitching to photographers, instead of saying charitable, (they say) "It's non-profit". Non-profit does not mean that people are not making money.

Lerner: Or that they are not getting paid. I do a lot of work for non profit institutions and I have a rate which reflects that. The rate I charge hospitals and universities is not the same rate I charge software companies. So you have to take all of that into consideration.

The other thing I wanted to say, if you are trying to figure out how to price a job, you need to know what your minimum is so that you don't lose money and so you're not subsidizing your clients. But like Jeff already pointed out, in some of the things that he was talking about at the beginning was that what is critical, is your fee has to be commensurate with the use. You are not going to charge the same thing for a one time PR release in a handout that somebody is doing at a lecture, as you are going to charge for a major ad campaign. It could even be the very same picture that you're licensing. And you have to figure the value of what you are licensing into the equation when you are trying to price a job. And,

yes, you could, this is where people who do photojournalism get into trouble. If they don't often work in an ad arena.

Greenberg: Tell the story about Elian Gonzalez

Lerner: Yeah, I was speaking at the Atlanta Photo Journalism Seminar about 3 years ago. It was the year that Alan Diaz shot that photograph that won all those major awards. It was a picture of Elian Gonzalez - the kid was hiding in the closet, when they opened the door and there was a gun pointed at him. And this photographer, Alan Diaz, was there - he had done excellent photo journalism work - he was there at the right moment at the right place. He was working for AP at the time and the AP contract is work for hire. And he had this incredible valuable image that he did not own the copyright to because he had signed the AP contract which is work-for-hire. He was speaking at the seminar when someone asked him about the business side of this deal and his only comment was, "I don't know any photo journalist that have any money." And to my chagrin, the room *cheered*.

I was absolutely appalled. When it was my turn to speak (I was speaking about business issues), I got up and said, "I'm really sorry to hear that poverty is something to which the photo journalists present aspire. Because if I don't have the money to buy my next compact flash card, or my next brick of film, or I can't pay to put gas in my car, I can't go out and cover those important stories."

Greenberg: In this room today, I'm quite sure, and every place that I have ever spoken, and I dare say in any business oriented seminar that

anybody on this panel have spoken at, there are people from media companies, there are clients, art directors, there are art buyers. When they see that, what do you think they take back with them? There are people in the large media companies, that are specifically told by their attorneys to "go out screw 'em". Musicians and photographers, in particular as they are notorious for doing nothing. Go out and screw them they are told by their attorneys. At a very public seminar given for attorneys someone who works in a major documentary got up there and said, "We do everything we can to find the copyright holder of an image but if we can't find the holder we use it anyway and we wait for a lawyer's letter to come because we know we're never going to get it".

Erica Galinski: And they are better than most because they are least make the effort to find you guys.

Greenberg: Let me change to the area of stock. Arie comes from a legal background as well as stock. Arie, we've had questions of whether or not it's better to deal with just one stock agency, with all the aggravation that people have had with stock or more than one stock agency?

Arie Kopelman: You don't have a choice today because so many of your images get returned to you after you have submitted them to stock agencies the amount of material that any one agency will take is probably minuscule. Which is kind of interesting, because Ed was describing an event this morning, where they talked largely about the commoditization of the photographic imagery field and if you're a follower of Jim Pickerell's newsletter or if you happen to read the

10k reports of Getty you know that the encouragement of royalty free is growing rapidly, it's the bulk of Getty's sales today although not the bulk of their income. It's outstripping rights managed by a fair margin and the margin seems to be growing. So you are looking at what appears to be a commoditization of what you do.

So what I would like to talk about, is why that trend doesn't necessarily have to continue. It's something that is defensively happening, you can't avoid it, but there may be some things that you can do about. And this is going to require some experimentation on your part.

I have a licensing company other than the Solus Images part of my life and I'm kind of the business guy in the law firm, so I kind of experiment with techniques for what we call licensing. I took and I find, what I'm trying to do is almost antithetical to everything that is going on in the photographic field which tends to be kind of a perverse field, as you may all know, it's very perverse in a lot of ways.

I'm just going to digress for a second. It's the only field I know where the better you get the more experience you get and the longer that you're at it the less likely you are to work. That's a very unusual profession. It's the only one like it. And the reason is obvious, because the younger art directors come in and they work in print, they work with their contemporaries and you get bounced.

So what do you do about that? It's a real issue. You create bodies of work that represent you as an artist. Remember you are still an artist, there's still that little component of that last vestige of

artistry that you got into the field to begin with.

Greenberg: Can you go to agency with a body of work or a portion of the body of work?

Kopelman: Yes you can and I find it very interesting - I have tried to represent some people and it may or may not work, I'll have to see, this has happened a couple of times, primarily from European stock agencies that I work with, and I've said look, I have a body of work here and you can have it and put it on your website, but there's a proviso, I don't want you to just throw it in your collection, I want you to do a special promotion on this guy's work. And if you don't want to do the promotion, you don't get the work. And we'll pay for some part of it and you can deduct it from the earnings over the next year or six quarters or eight quarters, so we've been able to make arrangements like that with a couple of bodies of work. Now whether they are going to generate income, I don't know because this is the first time that this has ever been done. Where we've actually got a major agency, just in one country, it's the only one that will probably - it's the best test case because it's the German market and that's the largest one and there are enough competing agencies still in the German market that Getty doesn't own the whole thing. And we've been able to get them to do special promotions on these couple of guys. We'll see what happens. It's very interesting work, it's very popular work, it's the kind of work that's been infringed upon a couple of times in the United States.

And I want to point this about infringement since Ed and Erica have touched upon it. Infringement is not something big

companies do in quite the way you think. That [large client] thing that we talked about, I noticed it came from a small design firm in Burlington. I've had that experience too. I've had a couple of infringement matters that dealt with companies as big as Nestle and as big a company as Coca-Cola now owns the marketing rights to - Coca Cola was not involved at the time - in both of these cases, when the national brand heard that their nationally distributed product in every supermarket in the county had a label on it that was infringing my guy's image, they were absolutely apoplectic themselves. It's absolutely unheard of to Nestle, and Dannon in one case, they're just out of their minds astounded that that would happen. And it happened very simply.

In both cases the product manager hired a design firm and the design firm hired a young guy or girl out of school, literally, as a freelance art director working on the job, who grabbed the image off of a web site, manipulated the image in Photoshop and it ends up on a nationally distributed product. And let me tell you, these guys pay through the nose to get rid of those kind of infringement matters. So this stuff is not as astounding as you might think. It happens a lot.

So anyway, getting back to the perversity, you take bodies of work, you treat them like bodies of art and you try to figure out where the market is. There are a few agencies around, notably in Europe, but there's Photonica here, although Photonica is getting into the commodity business with Ikonica, but there's a few places out there that are experimenting with highly original looks and

succeeding.

Greenberg: Arie, Michael needs to make an announcement.

Michael Grecco: There's one more soap box grid. This event was put together with EP, APA, and Greenberg & Reicher. EP and APA are non profit organizations and they need dough. APA charges membership, but has a good overhead, and EP has no real revenue stream, so \$50.00 gets you the thing. It's a \$200 light tools grid for Sameri and any one else who wants to donate would be appreciated.

Arie Kopelman: I'll just finish up with one little sidebar - a lot of folks that I've observed in this business do get to the point where the work slows down and have found the one smart thing they did in photography had nothing to do with photography and had everything to do with real estate. Almost every photographer I know - if they need a studio tend to buy them, build them or create them in somewhat fringe areas of the cities they're in - I've seen in Dallas, Boston, Los Angeles, New York and those properties over 10-15 years don't double or triple they grow by a factor of 10 or 20 times, just to give you a couple of simple examples. Just one quick example, a photographer friend of mine bought a loft in lower Fifth Avenue years ago when nothing existed on Fifth Avenue. He bought it for \$250,000.00, it's almost 3,000 square feet, you could figure out what it's worth today.

Greenberg: That's not only a New York thing by the way. We've had clients that are doing it in Dallas, Los Angeles, all over. In recognition of the fact that a lot of you are not assignment photographers but are doing portraits, weddings, bar mitzvahs, we get questions, not only

with advertising photographers but wedding, bar mitzvah photographers, like, “I gave the client my form and they won’t sign it”. Jeff, take that from ad agencies not signing forms to Sally wedding photographer.

Jeff Sedlik:

That goes back to copyright. When you create a photograph, you own the copyright, from the moment that the shutter closes. You get significant additional protection by registering your copyrights, but whether or not you register them, the only way that the client can get rights is if you put it in writing and sign it. If you sign one of the client’s documents, like a purchase order, that has work for hire terms on the back, then they own it, outright, from the moment your shutter closes. Work for hire is a back door that publishers built into copyright law that gives them ownership from the moment you create a photograph. So you definitely don’t want to shoot under those terms, unless you are being paid an exorbitant sum, plus employee benefits, and even in that case I wouldn’t work under work for hire terms. I would just transfer them the rights that they need.

Getting them to sign your estimate, if a client doesn’t want to sign your estimate and they are adamant about that then you should be suspicious. There’s no reason for them not to sign something that has been negotiated and agreed upon. If it comes right down to it, on the day of the shot, you’re not shooting until they sign the contract. So, on the occasions that they say, sorry for the delay, go ahead and shoot and we’ll sign it later, say NO. We have the estimate, we sign it right there, and then I begin shooting. As a

backup, you can send a client a confirmation letter indicating that you have delivered the estimate to them, and that they have given you the approval to proceed, and that the usage is X and the fee is Y and the total is Z. That is NOT ideal, but in an emergency, it is better than nothing.

Also, on the purchase order if I do sign it, I always write in that in the event of a conflict, if the terms of the purchase order and the terms of my estimate number blah, dated blah blah blah, the terms of my estimate will be the controlling terms, or the terms of my estimate will prevail. That way if you end up with conflicting terms on a purchase order, you haven't given up the store.

Greenberg: With deference to Nancy Reagan. The fact that you own the copyright means that you can say NO. I hope that you all know that. But you really have to understand as these photographers will tell you, when you should say no from a business standpoint. Again, art directors, art buyers, clients, they know you guys can't say no. Because you look at your calendar and say I'm really not doing anything that week so I might as well do it.

Another thing that Jeff brought upon that I rant and rave about all the time, those of you who cook know that if you take a piece of fish and it has an odor to it, there is nothing that you are going to do that will make that fish right. You can put all the sauce in the world on it, you will still get sick the next day. We have photographers say all the time, "Well you know, I had a feeling there was something not right about it". If you have a feeling and somebody has a intuition, it doesn't matter whether or not you can

articulate exactly what it is, if you get a bad feeling because the client chews gum the wrong way, you have to trust in your instincts, your brains, your experience, something is wrong. Doesn't matter, *something* is wrong.

I'm going to go back to the Godfather analogy, we have our staff and I make them watch all of the Godfather movies. Picture a mob hit. A hit man walks into a room, if something is not right, he turns around and walks out. You guys go right in and get your brains blown out, but the *gavone* off the street with a third grade education, is smart enough to know that something is not right.

Trust your instincts. If you think it's not right, odds are 99% of the time that you are going to be right and you know what – if you're wrong, you'll never know.

Erica Galinski: Much of the time you guys DO know (something is not right).

Greenberg: Now lets take questions. No philosophy. No politics. Please short direct questions.

Michael Grecco: You cut me off - I was relating the story of [the large client] and Michael Richards, I had bumped into him at dinner and I asked him whatever happened to you guys with that infringement?

Jeff Sedlik: You are so L A, Michael.

Grecco: No it was here in NYC at Café' Luxembourg

Greenberg: Are they paying you to say that?

Grecco: (continuing) he said, "Well they paid me X million bucks for my image." Think big actors with CAA agents know how to take care of themselves?

Greenberg: We do a lot of work with models, it's the easiest money we make.

Use the damn vouchers, fill them out and keep them *forever*. Die with them. If your accountant says throw them out in six years, ignore him/her.

Erica Galinski: And if you think you agent has them, don't trust them to keep them.

Greenberg: If we get a model big or not, a celebrity (and we've had a few) or even a regular person and you guys don't have your paperwork, we will own you. It's the easiest thing in the world - no excuses, never. We see these questions on the boards all the time, "Do I really need a release it..." Just shut up and get the release, it takes twenty seconds. Have the release, keep a copy forever. Don't worry about it, don't think about it, don't ask your friends, don't spend any time on it. Just do it.

When you go into a Sears store and buy a washing machine for \$250 they stick a form in front of you, you sign it, you don't read it. You don't say "Gee do I really need this form to buy this Sears Kenmore washer". No you just sign it. You just do it. That's how business is done.

Keep the copy forever. These infringement cases when there are photographs and photographer is the plaintiff or it's a model and the model is the plaintiff happen many, many years after the images appear. Keep invoices forever. Your tax accountant tells you to keep records for six years, that's for income tax purposes. That has nothing to do with models claiming that you didn't have a release.

Michael Grecco: I throw out my receipts. I keep a smaller box with my delivery memos, film, and invoices. I keep the invoices because with the

invoices are the contracts, the paperwork the license, the rights granted, what I was paid, what my expenses were.

Greenberg: I had a case a couple of years ago where (my) models came in to the courtroom with boxes and boxes of paperwork. They were literally out of central casting and the jury loved them. Each came in with boxes of papers, every voucher they ever had. The jury looked at these two very likable people, they saw the paperwork, that's it.

Erica Galinski: Photographers should be so well organized.

Greenberg: Alina Hernandez had done maybe a thousand print ads and 125 TV commercials. The other, Susee Kilbanks, had done a zillion ads and some 75 TV commercials. Jury sees and hears these two well spoken and likable people, saw the paperwork - that's it. If you don't have your paperwork, the jury says, "wait a minute, you hired an attorney, you want all this money, but you don't have any paperwork"?, You're done, you're toast, the jury doesn't care.

Paula Lerner: So the fact that I'm a natural pack rat helps, because I have every invoice for every job I ever shot.

Greenberg: Yes. Yes. OK lets take questions from the audience. Step up to the mike please – short to the point, no speeches please. Speeches are for when everybody is drunk. If you don't direct your question to a panel member I'll quarterback your question to a panelist.

Q: Mr. Sedlik, how does a good interaction happen from the time you got the job until the time that all the signatures are on all the papers, 'cause it could go back and forth many times.

Sedlik: The interaction between me, a rep and/or a client?

Q: Yes, is it constant faxing back and forth?

Sedlik: Faxes were definitely on my list of mistakes photographers make. If you ever fax an estimate to a client with the terms and conditions - let's say the APA or the ASMP terms and conditions - as the second page, and have the client sign and fax them back, make sure that you number each page, like 1 of 3, 2 of 3, 3 of 3, and make sure that your client not only signs the front page of the estimate, but also initials the terms and conditions page. And if you don't get the terms page faxed back to you, call the client and ask for it, and don't shoot until you get it. If you don't get a signed or initialed terms and conditions page, you're bound to have problems with clients down the road. Clients, under pressure of a copyright infringement lawsuit, might choose to bend the truth a bit. In court, if you put a client's employee on the stand who is afraid of losing her job, and you might just get: "We never received that terms and condition page. Never saw it. Uh-uh."

Greenberg: If you take nothing else away, this is one of the most common problems, and then we'll have the client will say, "well it's on my computer".

Sedlik: What you want at this point is to skip the fax machine entirely. If you have to communicate with a client and don't have time to send a hard copy, make a PDF, with numbered pages --- 1 of 4, 2 of 4, etc. and then put a little client initial or signature line on every page and do not shoot the job until they initial or sign every single page. Because when there are hundreds of thousands of dollars at stake

in an infringement lawsuit, they are going to say they never received those additional pages, even if they did.

Michael Grecco: You can lock a pdf too.

Sedlik: Your interaction with your client in getting an estimate approved and signed is not about being confrontational at all, you're not fighting with them, it's just that you are both doing business. The problem is that photographers don't act like they're not doing business. At least act – that's a good start. You have your forms and business policies, they have their forms and business policies. So your attitude should be -- Let's see how we can negotiate and make our policies work together. It's about hey, let's look at your form and adjust it so it correctly reflects the license, and then sign my form too.

Q: Just quickly look at registering your work. Is that within the year or calendar year in terms of time.

Grecco: I do it regularly, but if you're not, then I would take all of my unpublished images and I would register each year of creation individually. And I would do the same for the published images. In fact for the published images that's the only way to do it. But the safest and cleanest way to do it is to do the unpublished by year created, and the published by year published. That's the cleanest way. But I'm doing them every two, three weeks.

{Editor's note: remember also that published and unpublished images may not be combined in the same registration, they must be registered separately from each other}

Sedlik: For group registrations of published images, all of the images in the

group had to have been first published within the same calendar year. On that registration where the line says “alternative title,” you have to write in “group of photographs”, and also indicate the total number of photographs that are in the group.

Paula Lerner: There’s good resources on the web on APA, on the EP site, it’s out there, just look it up and read through it.

Q: How far can you go back?

Grecco: 1978 - that form covers you from 1978 up.

Erica Galinski: Yes.

Greenberg: The federal website, www.copyright.gov is really good. One of the few things the federal government does well.

Grecco: If you can get to the EP site, there’s a copyright link in the lower left hand, it’s all there.

Paula Lerner: www.editorialphoto.com

Q: Could we talk for a minute about - I’m an editorial photographer - and over the years the editorial contracts are getting more and more like rape every year and like for instance I’m facing a situation now where I’ve had a job that was published then they send me the contracts, I don’t want to sign the contract because the terms are unacceptable, and they tell me they can’t process payment until I sign the contract. (Job has been shot already) How can a single photographer without a lawyer on retainer fight say a Conde Nast?

Paula Lerner: First of all, for every job you do, you should have sent out your paperwork in advance and have them sign off on your paperwork. That’s one thing. Second they cannot send you a contract after the fact, and insist that you sign it and make it a condition of payment.

This is illegal.

Greenberg & Galinski: Yes.

Lerner: You call up the publication's legal department and say this is not OK, its illegal. We know what the problem is and this is not OK. They will know what you're talking about.

Greenberg: They do it because you let them. This is not brain surgery.

Michael Grecco: You're the copyright holder, it's as simple as that. You have the license. First of all my license always starts, "upon payment in full, the one time blah, blah, blah..." So my first words to the attorney are, "You know those images were registered before they ran, by the way, whether they signed my contract or not, I'm the copyright holder". I set the terms, my signature sets the licensing agreement of the copyright. They don't need to sign that part.

Greenberg: They expect passivity.

Grecco: The words are "Did you know that you're in a Federal copyright infringement situation right now, my next call will be to my attorney. What day will the check be cut?"

Paula Lerner: The main argument that is very strong for registering your copyright, is to use it as leverage for getting paid. In my paperwork, it says, (essentially) that any work of mine that is published without payment is considered an unauthorized use. You don't have to be confrontational, militant, or mean, just present yourself in a professional way. So much depends on how you say what you say. For example I just had some email correspondence with somebody about registering copyrights. And they said, "You get repeat business from these people?" And I say, "Yes". It need not be

presented as a confrontational thing.

Say... payment will be late and I'll call up not the editor who gave me the job, but the accounts payable people because they are the ones responsible, and I'll say, this is late, when can I expect payment? If they give me the run around, then I say well you know those images are registered with the U.S. copyright office and this does constitute an infringement, we don't want to get into a copyright dispute do we? And I get checks FedEx'd the next day. "Where do I send this to you..."

Michael Grecco: I have that conversation with the attorney who gets it. I never have that conversation with the creative people and I have a rep who deals with calling, even though I do the billing, he has to call because I don't get involved in those. My relationship with my clients themselves is always creative, positive, it's the lawyer who says, "well our contract is not negotiable".

Greenberg: Understand something, you have to feel comfortable. Michael, as he has told you, is comfortable because he has been burned several times. He has been involved in various pieces of litigation and is a very sophisticated litigant who is not typical. You have to feel comfortable using the language you are comfortable with. If you're not, and if your rep is good then you might be comfortable using the rep. The most important thing is to find a local attorney, if you're not comfortable doing it, have the attorney do it. If you are comfortable (fine) but Michael is atypical, in a lot of ways.

Q: What do you do when you come up to one of these unyielding situations short of hiring an attorney?

Paula Lerner: You can be proactive. You take a deep breath and you make the phone calls and you stand up for yourself. And if you have done business well and if you have taken care of your paperwork before hand you have all the tools you need to take care of yourself.

Michael Grecco: Any first year law student, and they laugh when I tell them about our business, anybody who does business says “a contract is supposed to be a meeting of the minds”. They are playing with you.

Q: (inaudible in part) ...what if someone says their contract is non-negotiable?

Lerner, Grecco & Greenberg: Then you say too bad (and say no).

Greenberg: Please from the mike only.

Q: My stock agency sold a photograph...

Greenberg: Excuse me can you repeat that?

Q: My stock agency sold a photograph

Greenberg: Sold? Sold? There it is again. Thank you

Q: My stock agency *licensed a photograph* that had special instructions not to sell it. I got sued by three models for \$60 million dollars.

Michael Grecco: Ed was the attorney on it?

Greenberg: I'd be in Vegas now.

Q: The stock agency said that they would not represent me because it wasn't in their interest to include me in the lawsuit. Luckily I had the releases and unfortunately, I told the stock agency that I had the releases and that made the stock agency very happy because it got *them* off the hook.

Greenberg: I must interrupt. At what point did you speak to a lawyer to represent you for the first time?

Questioner: The second my cousin called me and said that the New York Post said I was being sued.

Greenberg: Do you know any other business where someone who is getting sued for \$60 million or even \$50,000 dollars wouldn't run to a lawyer?

Questioner: No.

Ed Greenberg. Good. Neither do I.

Questioner: I had to fight it by myself. I got out of it because we had the releases and we dragged it out and the models realized that they had no case so it was dropped.

Greenberg: The agency is not your friend. Once they are out of the case they will let you hang out to dry. Whether you are the biggest shot in the world or a *pischer* (a nobody) who bills three cents a year.

Q: You shoot the job, you register, how do you prove that you registered the job?

Paula Lerner: You take out your certificate.

Michael Grecco: You keep duplicate file forever of those 4 x 6 pictures that you sent in, with your copy of the application. When I get the certificates back, I keep them in a fireproof safe but I keep the applications with all of the pictures. So I can show here's what went in, here's my deposit. They can go to the Library of Congress and check and look up that registration – then they can say, “oh yeah, there's the shot”.

Q: How do you prove...the registration?

Paula Lerner: You are responsible for keeping your records.

Grecco: I'll (tell) them this is what was registered on that date, they can go to the Library of Congress. If you lie you will get caught. I mean you gotta' keep records and do good business.

Q: I understand that you can protect a body of work back to 1978. My confusion comes in where the body of work that has not been registered and you are not sure which ones out of all of those thousands of pictures which were published over the years, and a lot of them are similars and travel pictures and what not, is there any hope of protecting those ones that were published?

Lerner: There is no simple answer –this is a big problem with editorial photographers because they send stuff into their agencies and they don't know which stuff was published and which wasn't. You just have to do the best job you can. If you are trying the register from that date forward, you can – and Ed tell me if I have this straight -- put everything on your own web page and publish it yourself and register the web publication as published from that date. But the problem is that it won't be the first publication date for some of those that have been published previously.

Erica Galinski: That's risky. An attorney can argue that you should have known, at least as to certain images, that they were already published and can start attacking your registration. The question you are asking is a very complex question. My first instinct would be to sit down with an attorney and go over the individual situation– people come in with problems like that -- and you sort it out the best you can.

Q: What's the repercussions of registering everything as either

published or unpublished? What happens, they have to prove that something was published before they infringed it?

Jeff Sedlik: There's something called Form CA, which is a supplementary registration, if after you register the work and there's any clerical errors, or mistakes that, because you didn't have knowledge (innocent errors), you can say "I didn't know. I didn't inhale". Form CA allows you to take a work that was registered as published, and change it to unpublished. You can't do the reverse.

Q: I think you already answered my question – today what constitutes publication? If you put a sample quality, small preview image on your own site, is that considered publication? That's never been published anywhere...

Michael Grecco: Publication means published in a magazine – for circulation. That's the sturdiest.

Q: So putting it on a website can (or can't) be considered publication?

Sedlik: The law states that mere public performance of a work or photograph does not constitute a publication of that work. It has to be an "offering" of the work.

Various: It can...depends

Grecco: Or commercial use. In other words, if you have a stock site and you're putting your work up, that has more weight than just showing your work.

Q: Then a personal portfolio on line is not considered publication?

Paula Lerner: I do know photographers that put their work on their own websites publicly less than every 90 days, every two and half months, and then register everything they've put every two and a half months,

up as published. That has not been tested in court to my knowledge.

Q: But maybe based on what you were saying before, the better strategy if the work has never been on-line or published in print then get it done before that as “unpublished” ...

Grecco: I spent two years with the national APA attorney coming up with a plan to do just that myself and to ultimately pass that information around to get people to register, I think it's the best plan. Trust me I spent enough money... I guess I shouldn't say (trust me).

Lerner: The easiest, quickest, cheapest way is to register everything as unpublished before it leaves your hands and goes out into the world. It's the simplest, cleanest way to do it.

Jeff Sedlik: You need to put a date on it (publication). And what we managed to get the copyright office to accept is that if you don't know the exact date, you can fill in “not before” or “approximately,” or “no earlier than,” “not later than,” or “circa,” and they will accept that. ... there is no simple answer to what is or is not published.

Greenberg: I hate to be rude but lets move on there are other people...

Q: There's a backlog of when you submit for the copyright office to register your work, it takes time for them to process it, and there's a little bit of limbo. So the first part of my question is when does the copyright...

Grecco: When it's received. The copyright starts the day it's received by the copyright office. I always FedEx it and the date it's actually signed for and I check that little box that says “email me” when received and print out who signed for it, I print that and attach that

to the application, with a copy of the check with the set of the pictures with the original air bill and the notification of who signed for. I know the day it was received, I know that's the effective registration date.

Greenberg: Regardless of when they process it.

Michael Grecco: The date they signed for it, that's the date it was in their hands. That becomes the copyright date, yes.

Q: Second part of the question: I'm publishing a book, there are a number of the photographs in the book that were copyrighted many years ago.

Greenberg: By you or others?

Q: By me, registered. Subsequent to that, I took more pictures that are not copyrighted. Now the book is coming out. Is the book a group registration or do you register the book? How does that work?

Paula Lerner: Why don't you just take everything that hasn't been published yet and register them as unpublished prior to your book publication and then you'll be clean and safe. That's the simple answer.

Grecco: I went through the same thing with my web site - you know with the various mixed (use) that everyone is talking about - and what I did is register the entire web site, not the photographs, you know the design, the text and I had an individual attorney sit down with me and he had to feel comfortable in that method and what we were going to do. In a lot of these individual cases of mixed published / unpublished your attorney has to feel comfortable in representing that if there was ever a problem.

Q: I have been fighting for licensing and copyrighting for the 24 years that I've been an assignment photographer and been very successful at it myself. The war on photography - I want to ask how are we supposed to demand the respect and licensing and keeping the money and respect at a high level when all of the agencies are using royalty free discs now and we're getting it free, so why should we go to a photographer who is asking us to sign this and I'm finding that I'm losing assignments everyday when they are getting the royalty free discs.

Greenberg: I'm going to defer to the photographers because that is a pure business question. But I will say that if they were using as much royalty free as is perceived you guys wouldn't be here – you'd be gone already. It's a business condition, and a bad one...

Q: It is a perception because if they can get a hundred images for \$400, why should they (call us)?

Greenberg: There may come a point at which when you are offered a job you are just going to have to say no and go to the beach that day or work on something else...

Q: But many people don't do that and we need to get the word out or its going to get worse and worse...

Paula Lerner: At some point the clients actually start to see the down side. A friend of mine recently had a client come back from some convention, and the client was not very pleased to see that all of the other institutions were using the same royalty free discs and had all the same pictures and the same images on all of their literature. So at some point royalty free does come back to bite

them.

Michael Grecco: They are paying for exclusivity. If the imagery is of value, they are going to pay for it. I think that photographers that do royalty free are putting themselves and everyone else out of the industry.

Greenberg: Now I get a chance to shut Michael up because they are throwing us out. If you want to come up to us as they are throwing everyone out of the room – we can't take any more questions (from the mike).

THANK YOU