Memorandum

To: Redacted
From: Leigh Blomgren, Women and Justice Fellow, Avon Global Center for Women and Justice
CC: Elizabeth Brundige, Executive Director, Avon Global Center for Women and Justice; Sital Kalantry, Faculty Director, Avon Global Center for Women and Justice
Date: August 26, 2012
Re: Journalistic Rights to Photography

Introduction

This memorandum responds to your request for information regarding the intellectual property rights of a journalist to the photos he has taken outside of the course of his employment. It discusses the relevant international law on intellectual property, specifically copyright issues, highlights particular copyright laws and cases from several countries,¹ and briefly considers how copyright protection would apply to the facts surrounding your request.

International Law

According to the World Intellectual Property Organization (WIPO), “Copyright is a legal term describing rights given the creators for their literary and artistic works.”² Copyrighted material, as defined by the WIPO, includes “literary works such as novels, poems, plays,

¹ For some of the countries we considered, we were unable to find applicable caselaw addressing copyright and photojournalism. Hence, we rely on statutory provisions and secondary sources for these jurisdictions.
reference works, newspapers and computer programs; databases; films, musical compositions, and choreography; artistic works such as paintings, drawings photographs and sculpture; architecture; and advertisements, maps and technical drawings.”

There is no globally recognized “international copyright” that grants automatic worldwide protection to the works of an author. International treaties establish the basic principles of internationally applicable authors’ rights – the minimum levels of protection that state parties must offer. While the standards set forth in international conventions and treaties are applicable across jurisdictions, these agreements allow countries some flexibility in how they express these rights in national law, including the option of offering stronger protection. As a result, authors’ rights legislation varies from country to country.

The most noteworthy international instrument governing copyright today is the Berne Convention for the Protection of Literary and Artistic Works. The Berne Convention was adopted in Switzerland in 1886, and presently has approximately 170 members. It remains the foundation of intellectual property law for WIPO member-nations around the globe today. The Berne Convention first established recognition of copyrights among sovereign nations. The Convention is based on the principle of “national treatment,” obligating each member-state to extend the same treatment to the works of nationals from other member-states as are enjoyed by its own nationals. Additionally, the Convention obliges member countries to adopt minimum standards for copyright protection.

Under the Berne Convention, copyrights for creative works do not have to be asserted or declared, as they are automatically in force at creation and are not subject to any “formalities”

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3 Id.
5 Id.
7 Id.
such as registration or application in countries adhering to the Convention.\(^8\) As soon as a work is written or recorded on some physical medium, the author is automatically entitled to all copyrights in the work, as well as any derivative works. Such protection remains until the author explicitly disclaims them or the copyright expires.\(^9\)

With regard to photographic works, the Berne Convention protects a photographer as the sole owner of copyright in a work upon its creation, insofar as the image was not made under the conditions of an agreement to the contrary, in which case the ownership of the copyright would vest in the employer, client, or other contracting party.\(^10\)

The Universal Copyright Convention (UCC Agreement) is the other principal international convention protecting copyright. Adopted in Geneva in 1952, the UCC Agreement was developed as an alternative to the Berne Convention.\(^11\) Because it provides fewer substantive requirements than the Berne Convention, the UCC Agreement is an option for countries that disagree with aspects of the Berne Convention but still desire some form of

\(^8\) Berne Convention, supra note 4, art. 5, Rights Guaranteed:
(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

\(^9\) Id. art. 2, Protected Works:
(1) The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatic-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.
(2) It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.
(3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

\(^10\) In such cases, the exact treatment of rights in the work is determined by the laws of individual states. The terminology and application of the principles set forth in the Berne Convention provide the foundation for those laws.

multilateral copyright protection.\textsuperscript{12} For those countries that are members of both conventions, the Berne Convention prevails in cases of conflict between the two.\textsuperscript{13}

In addition to the two major international copyright agreements above, there are several other noteworthy treaties and conventions affecting copyright,\textsuperscript{14} including the WIPO Copyright Treaty,\textsuperscript{15} the WIPO Performances and Phonograms Treaty,\textsuperscript{16} the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),\textsuperscript{17} and the Paris Convention.\textsuperscript{18}

**United States**

Title 17 of the U.S. Code sets forth the provisions of the United States Copyright Act.\textsuperscript{19} Under the statute, the creator of the work is the “author” and therefore has authors’ rights to that work. The Act protects “original works of authorship fixed in any tangible medium of expression,” including, among others, photographic works.\textsuperscript{20} The owner has rights to the copyright that are exclusive and non-transferable.\textsuperscript{21}

In some instances, the creator of the work may not be deemed the author of the work.

When a work is created by an employee within the regular course of employment that work will be a “work for hire” and the employer is considered the author/owner of the work.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{12} Copyright Basics, Artists Rights Society, \textit{available at} http://www.arsny.com/basics.html.
\item \textsuperscript{13} \textit{Id.}
\item \textsuperscript{14} For comprehensive information regarding national membership to the major international intellectual property agreements, see the Summary Table of Membership of the World Intellectual Property Organization (WIPO) and the Treaties, \textit{available at} http://www.wipo.int/treaties/en/summary.jsp.
\item \textsuperscript{20} \textit{Id.} 17 U.S.C. § 102.
\item \textsuperscript{21} \textit{Id.} 17 U.S.C. § 106.
\item \textsuperscript{22} \textit{Id.} 17 U.S.C. §101.
\end{itemize}
Section 101 of the Copyright Act provides that a given work is a work for hire when it is:

(1) A work prepared by an employee within the scope of her employment; or

(2) A work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work . . .if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.\(^\text{23}\)

In the second circumstance, where the creator is clearly an independent contractor, the question of whether a given work is a work for hire becomes relatively clear-cut. Here, in order for an independent contractor, such as a freelance photographer, to fall within the work-for-hire category, the employer must explicitly order or commission an assignment to be used as part of nine specific items set forth in § 101 of the Act.\(^\text{24}\) A freelance photographer will also fall within this category when the commission agreement, signed by both the employer and the photographer, states explicitly in writing that a work is intended to be one made for hire.\(^\text{25}\)

U.S. courts, however, have had more difficulty recognizing a clear differentiation between employees and independent contractors where the employer-employee relationship determines whether a work is regarded as a “work made for hire” or not.

In 1989, the U.S. Supreme Court established in Comm. For Creative Non-Violence v. Reid that whether an individual is an employee or not under the terms of § 101(1) should be determined by common law agency principles.\(^\text{26}\) In applying these principles, the Court in Reid enumerated nearly fifteen additional non-exhaustive relevant factors for a court to consider in deciding whether the hired party is an employee; the Court determined that Reid was an independent contractor, not an employee. Two years later, the Second Circuit, in Aymes v. Bonelli, endeavored to refine and simplify the test set forth in Reid, and narrowed the analysis,

\(^{23}\) Id.  
\(^{25}\) Id.  
identifying five decisive factors applicable to work-for-hire determinations.\textsuperscript{27} These factors are: 
(1) whether the purported employee had a right to control the work and the manner of its 
creation; (2) the level of skill required to produce the work; (3) the tax treatment of the purported 
employee; (4) whether or not the claimed employee received employee benefits; and (5) whether 
the employer held the right to assign further projects beyond the work in question.\textsuperscript{28} The Sixth 
Circuit, in \textit{Hi-Tech Video Prods. v. Capital Cities/ABC, Inc.}, followed suit, narrowing the 
scope of analysis for determining the outcome of such cases.\textsuperscript{29}

\textbf{Canada}

According to Canada’s Copyright Act of 1985, “the author of a work shall be the first 
owner of the copyright therein.”\textsuperscript{30} The Act sets forth special provisions for the copyright 
ownership of photographs, which differ from the provisions guiding other artistic works. In 
particular, unless a contract exists to the contrary, the copyright of any photograph is owned by 
the person who ordered the work, provided the commission fee has been paid.\textsuperscript{31} This only 
applies to works that were “made for valuable consideration,” as provided under section 13(2):

Where, in the case of an engraving, photograph or portrait, the plate or other 
original was ordered by some other person and was made for valuable 
consideration, and the consideration was paid, in pursuance of that order, in the 
absence of any agreement to the contrary, the person by whom the plate or other 
original was ordered shall be the first owner of the copyright.\textsuperscript{32}

With respect to work made in the course of employment, section 13(3) states:

Where the author of a work was in the employment of some other person under a 
contract of service or apprenticeship and the work was made in the course of his 
employment by that person, the person by whom the author was employed shall,
in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.\textsuperscript{33}

**United Kingdom**

In the United Kingdom, copyright is automatic upon creation of an original work. Generally, the creator of the work (the “author”) is the copyright owner. Photographs are protected by copyright as “artistic works,” but with special rules in comparison to other artistic works such as paintings, drawings or diagrams, because the substance of copyright for photographs does not depend on artistic merit.\textsuperscript{34}

An exception to this rule exists where a photograph is taken by an employee in the course of employment. In this case, the first owner of the copyright is the employer, unless there is an agreement to the contrary.\textsuperscript{35} Typically, a freelance photographer paid to create a work is not an “employee” of the person or organization commissioning the work, and thus will usually retain ownership of the copyright. In order for the person commissioning the work to make further use of the work for themselves, they must obtain a letter from the freelance photographer assigning all rights to them.\textsuperscript{36}

Only the copyright owner is legally allowed to make copies of the work, issue copies of the work to the public, or show the work in public.\textsuperscript{37}

\textsuperscript{33} Id. at s. 13(3).
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} WIPO, \textit{supra} note 2.
protects the photographer not only from direct copying of the work, but also from indirect copying to reproduce his work, where a substantial part of his work has been copied.\textsuperscript{38}

Certain photographs, however, may not be protected by copyright. Section 171(3) of the Copyright, Designs and Patents Act 1988 gives courts jurisdiction to refrain from enforcing the copyright that subsists in works on the grounds of public interest.\textsuperscript{39}

**Approach of Continental European States**

Most European countries take a different approach to authors’ rights than that of the Anglo-American jurisdictions, including the U.S., the U.K., and Ireland. Under the European “authors’ rights” tradition, and in contrast to the Anglo-America copyright laws, only individuals and not corporations may hold authors’ rights in works.\textsuperscript{40}

Moreover, the creator of a work owns original authors’ rights in that work even if it is made within the course of employment.\textsuperscript{41} Authors can only license usage rights to their employers by contract, or in other words, employers must purchase the usage rights from the author through an agreement. Authors retain any such rights not specifically included in the contract.\textsuperscript{42} Hence, in the continental systems, a photographer will always have control over the use of his photographs, even when taken in the course of employment, independent of a contract in which the usage rights in those photographs are licensed to his employer. Under the continental system, the law takes precedence over contract, and the laws of many continental countries apply the principle of *in dubio pro autore* – “in case of doubt rule for author.”\textsuperscript{43}

The difference between the two legal systems has a significant impact on freelance photographers. The Anglo-American system considerably limits the power a freelance

\textsuperscript{38} Id.  
\textsuperscript{39} Copyright, Designs and Patents Act, *supra* note 34, at 171(3).  
\textsuperscript{41} Id. at 8.  
\textsuperscript{42} Id.  
\textsuperscript{43} Id.
photographer has to his works, and photographers are frequently advised to draw up detailed contracts in order to avoid losing their rights to works without being paid for them.⁴⁴ Freelance photographers in continental Europe, on the other hand, do not have to rely on legal or contractual provisions defining the license to use a work, since the law regulates everything not explicitly stated.⁴⁵

India

India’s Copyright Act of 1957 governs copyright law in India today, including provisions established in its amendments made in 1983, 1984, 1992, 1994, and 1999. Section 14 of the Act defines copyright as “the exclusive right subject to the provisions of this Act, to do or authorize the doing of [certain enumerated acts] in respect of a work or any substantial part thereof.”⁴⁶ Furthermore, in accordance with obligations under the Berne Convention and the UCC Agreement, the Indian Government passed the Universal Copyright Order, 1991, as it was authorized to do by Section 40 of the Copyright Act, which empowers the Central Government to extend copyright protection to foreign works.⁴⁷

The provisions for acquiring copyright ownership are defined under Section 17 of the Act, which establishes that the author or creator of the work is the first owner of copyright.⁴⁸

Section 2(d) defines the “author” of a work as:

(i) in relation to a literary or dramatic work, the author of the work;
(ii) in relation to a music work, the composer;
(iii) in relation to artistic work other than a photograph, the artist;
(iv) in relation to photograph, the person taking the photograph, the artist;
(v) in relation to a cinematograph film or sound recording, the producer; and

⁴⁴ Id. at 9.
⁴⁵ Id. at 8.
⁴⁸ The Copyright Act, 1957, supra note 46 at s. 17.
(vi) in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created.49

This general provision, however, is subject to certain exceptions. One exception to the rule, set out in Section 17(a), arises where an employee creates a work in the course of and scope of employment; in that case, the employer becomes the owner of copyright.50 However, the employee retains copyright ownership of any works created outside the course and scope of employment. In *Thomas v. Manorama*,51 the Kerala High Court held that in the case of termination of employment, the former employee is entitled to the ownership of copyright in the works created subsequently and the former employer has no copyright over the subsequent work so created.52 Additionally, the employee need not register the copyright in order to preserve rights in a work. In *Ushodaya Enterprises Ltd v T.V. Venugopal*, the Andhara Pradesh High Court held that even though the defendant company registered the work under the Trademark Act, the defendant company did not have any rights in the work, because the plaintiff company, with rights to the copyright of a work made by an employee during the course of employment, remained the owner of the copyright of the artistic work under the Copyright Act, which does not require a copyright owner to register artistic works. Therefore the Court held that the plaintiff company was justified in alleging infringement of his artistic work.53

Section 17(b) provides that where a photograph is taken for valuable consideration by a person, in the absence of any agreement to the contrary, that person is the first owner of the

49 *Id.* at 2(d).
50 A work made by the author in the course of his employment under a contract of service or apprenticeship for the purpose of publication, in the absence of any agreement to the contrary, the proprietor of the work will be the first owner of the copyright in the work in so far as it relates to the publication of the work. See Mahendra Kumar Sunkar, Copyright Law in India, Legal Service India, *available at* http://www.legalserviceindia.com/article/195-Copyright-Law-in-India.html.
52 *Id.*
Section 17(c) provides that in the case of work made in course of the authors’ employment under a contract, to which neither clause (a) nor clause (b) apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright.\textsuperscript{55}

Much like U.S. law, the “works made for hire” doctrine in India, granting an employer ownership rights to any works created by an employee in the course of employment, does not extend to works created by an independent contractor.\textsuperscript{56} The line of differentiation between an employee and an independent contractor is thin and often depends on whether the work arrangement is a contract of service or a contract for service. Where an employer employs another to do work for him under his control, so that the employer can direct the timing, the means to be adopted, and the method of doing the work, then the contract is contract of service. If, however, an employer hires another to do certain work but in the execution of the job that individual is not under the order or control of the employer and is free to use his discretion for how the work shall be done, then the individual is an independent contractor commissioned under a contract for service.\textsuperscript{57}

The demarcation between an independent contractor and an employee is determined by the unique facts presented in each individual case, with courts considering factors such as who the parties to the contract are, who pays the wages, who has the power to dismiss or terminate, what the nature of the job is, the location of where the job is executed, and a myriad of other contexts.\textsuperscript{58} Of the many tests employed by India law, the foremost test utilized to differentiate an independent contractor from and employee is the “control” test.\textsuperscript{59} As explained by the Indian

\textsuperscript{54} The Copyright Act, 1957, supra note 46 at s. 17(b).
\textsuperscript{55} Id. at s. 17(c).
\textsuperscript{57} Id.
\textsuperscript{59} Id.
Supreme Court in the 1955 decision *Shivnandan Sharma v. The Punjab National Bank, Ltd.* “the test is the existence of a right of control over the agent in respect of the manner in which his work is to be done.”60 The more control that a company has over the individual performing the service for the employer, the more likely it is that the individual will be deemed to be an employee of the company.61

**Conclusion**

This memorandum surveys the international laws governing copyright and discusses the specific copyright laws of several countries, particularly relating to the treatment of ownership rights in a work and the ownership implications that arise from employer-employee relationships. While it is impossible to make a strict comparison between the world’s intellectual property regimes, most national copyright laws comply with the Berne Convention and share many similarities to each other. Thus, the national copyright laws detailed above may serve as a useful tool for evaluating the legal paradigms of other countries with regard to copyright.

The facts of the case prompting this judicial request are as follows: A journalist in Sri Lanka took great risks to obtain photos of the ethnic violence occurring during the 1983 Civil War. In the course of doing this, the photographer was assaulted and his camera was broken. The photographer could not publish his pictures immediately, as there was a ban on such photos being published because the government feared even worse communal clashes. By some means, his employer acquired these photos, which were not taken in course of employment as the journalist was never deployed to cover the conflict, and published them. The photographer lost the money he would have made by selling them personally.

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The photographer, being the author, is the first owner of the copyright in his photographs, and because his ownership was never transferred, he continued to retain those rights. Although the laws discussed above provide for occasions where the creator of the work may not be considered the author of the work (i.e. when the work created by the employee is within the regular course of employment, and consequently the copyright ownership belongs to the employer), the facts of this case do not fall within those provisions.

The employer here has no right to the photographs taken. The rule that an employer owns copyright does not cover photographs taken outside the course of employment. Thus, when photographs are taken for personal interest or investigation, outside of working hours, not in furtherance of a work assignment or the objectives set by his employer, at the risk of personal safety, and with one’s own camera and film, the rights to the photographic works are owned exclusively by the photographer. Accordingly, the employer’s actions amount to copyright infringement, and the photographer can seek legal remedies, which may include injunction, damages, and/or lost profits, and in some jurisdictions even filing criminal charges against the employer.62

Additional Sources:

Analysis of International Work-for-Hire Laws
- Memorandum addressing the concept of works made for hire in the international arena.

Circular 9: Works Made for Hire Under the 1976 Copyright Act
- General information covering the “works for hire” doctrine under U.S. copyright law. Simple explanations clarify potentially confusing aspects of this convoluted doctrine.

Collection of National Copyright Laws (UNESCO)
- Collection of national copyright laws.

Copyright Advisory Office, International Copyright
- Columbia University Libraries/Information Services database providing general overview of copyright topics containing links to relevant articles, agreements, organizations, and other resources relating to international copyright.
- http://copyright.columbia.edu/copyright/special-topics/international-copyright/

Database of International Copyright Law
- Search system that enables users to browse copyright law by country, or alternatively compare copyright laws and specific copyright criterion between countries.
- http://digital.lampdev.columbia.edu/cmc/

Intellectual Property Rights: National Legislation
- Citations and links to national laws from the Organization of American States (OAS).
- http://www.sice.oas.org/int_prop/ipnale.asp#table

International Intellectual Property Guide
- From the American Society of International Law, this electronic resource guide compiles numerous sources for researching international intellectual property, including research guides and bibliographies, primary national legislation and decisions, secondary sources, recommended link sites, electronic newsletters and blogs, among several other options.
- http://www.asil.org/erg/?page=iipl
Understanding Copyright and Related Rights
- WIPO publication intended to provide an introduction for non-specialists or newcomers to the subject of copyright and related rights.

WIPO-Administered Treaties
- Detailed information on all treaties administered by WIPO, including summary table of membership to WIPO and WIPO treaties

WIPO Gold
- Gateway to the World Intellectual Property Organization’s collection of intellectual property information.