

ASMP Copyright Guide for Photographers

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Copyrights can be valuable intangible assets. The Copyright Act of 1976 made clear that photographers are the copyright owners of their images, except when those images were made as an employee, or when the photographer has conveyed the copyright to another party in a written and signed agreement.

In an effort to enhance understanding of copyright, ASMP has developed this mini-guide on the subject. This pamphlet is not a legal guide to the subject. Instead it is intended to give you a fundamental understanding of the subject of copyright and how it applies in your profession.

COPYRIGHT BASICS

Copyright is a right, granted to you by law, to control the copying, reproduction, distribution, derivative use, and public display of your photographs, and to sue for unauthorized use (infringement) of your work.

This right begins at the moment you fix your photographic expression in a tangible form, that is, when you create the latent image, whether on film or digital media. Copyright ownership, bestowed automatically when you make an image, does not depend upon registration with the copyright office or placement of a copyright notice on the image.

Although most images are copyrightable, some are not. To be copyrightable, images must be original. Originality is essential to copyright. If you exactly copy a photograph, the copy can not be copyrighted, since it has no originality. (In fact if the first photograph is copyrighted, you would need the original photographer's permission to copy it.)

Making a substantially similar copy of someone else's copyrighted image without authorization constitutes copyright infringement. It is usually necessary to show that the alleged infringer had access to the original work-but the images may be so closely identical that no explanation other than copying is possible.

Ideas, themes and concepts are not copyrightable, only the original expression of those ideas, themes and concepts in some tangible form, like a photograph, can be copyrighted. You might have an idea for a great photograph, but you get no copyright

until you make the actual photograph. An art director might have a great concept, but that concept cannot be copyrighted.

Having an idea or concept does not entitle one to a share of the copyright of the photograph. The copyright belongs to the one who makes the tangible expression of the concept or idea.

COPYRIGHT REGISTRATION

Copyrights can be registered with the Copyright Office in Washington, D.C. Although registration is not required to own the copyright, there is one instance in which you must have a registration and another when there is a definite advantage to registration.

When legal action is necessary to remedy a copyright infringement, the image must be registered before the legal action can be started. This registration can be made after the infringement occurs. However, unless you register before the infringement (or within three months after the first publication, even if after infringement), you will not be able to sue for statutory damages, which are up to \$150,000 per infringement, plus your legal fees. When statutory damages are unavailable to the copyright owner a claim can still be made for actual damages, that is, the amount of money lost as a result of the infringement, plus the amount of profits realized by the infringer. But actual damages can be difficult and expensive to prove, and legal fees can be an additional burden.

A photographer should always seek legal advice from a qualified attorney before threatening a copyright infringement action.

COPYRIGHT NOTICE

ASMP recommends that all photographs carry a copyright notice, even though it is no longer required by law. The lack of notice could provide an infringer with a defense of "innocent infringement". This defense could seriously limit the recovery of damages in an infringement claim.

Copyright notice is a way of saying: This is my work - if you want to use it, come to me. This stance reinforces the asset value to your work and alerts everyone that you are prepared to protect that value.

Copyright notice consists of the letter "c" in a circle © followed by the date of first

publication and the photographer's name. For example, © 2001 (Creator's Name). The word "Copyright" or "Copr." can be substituted for the © symbol. Either form is recognized, but use of the © symbol can give additional international protection. Although all three are acceptable it is generally thought that © 2001, (Creator's Name) is the most widely recognized in the international community. The words "All Rights Reserved" can also give further international protection.

A word of caution is called for on the subject of notice. Some persons when typing or word processing and some computer programs use a "c" in parenthesis [(c)] as a substitute for a © . To the best of our knowledge this form of notice has never been rejected by a court, but there is no guarantee that a court would uphold a (c) as proper notice. The law calls for a © or the word "Copyright" or "Copr."

LICENSING THE RIGHT TO USE YOUR PHOTOGRAPHS

As the copyright owner, you have to grant a license to someone in order to legally use your image. A license is simply a permission to use the photograph with certain limitations.

A non-exclusive license does not have to be granted in writing-although ASMP strongly urges all photographers to grant licenses in written form. This avoids subsequent disagreements about the terms of the license. In the absence of a written license, the photographer and client are in an awkward position. If a dispute over usage arises, differing recollections of rights granted can only be resolved by negotiation or legal action. Legal action is certainly costly and to be avoided if possible. Negotiation, while suitable to resolve disagreements, is best done before use begins, not after the fact. Negotiate the license, then confirm the usage rights in a written copyright license.

Under the copyright law, an "exclusive" grant of rights means a transfer of all or part of copyright. Avoid these words, unless you intend to transfer copyright ownership to the client.

If a client insists or you wish to offer exclusive rights, consider limiting the rights as you would limit any other grant of rights. That is, you should properly grant the exclusive rights for a certain time period, a certain geographic area, and a certain media, such as advertising, books, etc. By applying limitations to the exclusive license you are narrowing the transfer of copyright. By setting a time period you are assuring the expiration of the transfer.

More information on copyright licensing, and samples of copyright licenses can be found in the ASMP Professional Business Practices in Photography book, 6th Edition.

The rights which you license should be based upon the outcome of the negotiations which you have conducted with your client. Generally, you will grant rights to meet the particular uses for which the client wants the work. The fee will usually increase as the bundle of rights granted increases.

TRANSFER OF COPYRIGHT

You can transfer copyright ownership to another party. Copyright, like any asset, can be bought and sold. The only requirement in the law is that a transfer of copyright ownership be in writing and signed by the copyright owner. Photographers should exercise care in signing client purchase orders. ASMP has seen many examples of purchase orders which have a copyright transfer included in the terms and conditions. Signing such a purchase order would result in the loss of your copyright.

There is no law that says you have to transfer copyright to a client. Remember, even though the client might be the originator of the concept or idea this does not entitle them to the copyright of the photograph which you, the photographer, originate.

WORK FOR HIRE

Work for hire is another way the client can become the copyright owner. The difference between work for hire and a copyright transfer is rather simple. In the case of a copyright transfer you own the copyright until you transfer it. In a work for hire situation you never own the copyright. It is owned by the client from the moment the work is created, and the client is by law the author of the photograph. The photographer is denied authorship and is treated as a tool of the client.

Work for hire exists automatically in the case of an employee taking photographs for the employer. As provided in the copyright law, no agreements are required.

An independent contractor ("freelancer") can do a work for hire only in certain circumstances. First, the work must be commissioned-that is specifically ordered by someone, and if it is commissioned, it can be a work for hire only if the photograph comes within one of the nine specific categories enumerated in the copyright act as qualifying for a work for hire: as a contribution to a collective work, as a contribution to a motion picture or audio-visual work, as a translation, as a supplementary work, as

a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas.

The category most frequently involving photographers is a contribution to a collective work such as a magazine or other periodical.

WORK FOR HIRE AND COPYRIGHT TRANSFER DIFFERENCES

Although many see work for hire and copyright transfer as the same thing, they are not.

Under the law, if you transfer the copyright you can get it back after thirty five years. This "recapture" provision of the law was designed to allow photographers the eventual control over their body of work. Also, when negotiating a copyright transfer you have the ownership and can bargain for the price of the copyright.

In a work for hire situation you never have the copyright. You have no recapture right at any time. You are simply selling your services for a fee. That fee should reflect the present and the future value of the copyright. If you signed a work for hire and later want the copyright to the work, the only way you can get it is to negotiate with the copyright owner to transfer it to you.

Finally, a work for hire will apply to all photographs taken on the assignment, not just to those used by the client. A transfer of copyright can be customized and apply to all the photographs or some portion thereof, such as only those used by the client.

FAIR USE

The copyright law allows someone to copy your work without penalty in certain cases. This is called "fair use". In order to qualify for "fair use" the photograph would usually have to be copied for educational, classroom, news reporting or other educational or public interest purposes. Fair use is always subject to interpretation. There is no simple rule to apply to determine when an unauthorized use is "fair use."

Each case has specific facts that must be examined before such a determination can be made. This is one reason why it is important to consult with a knowledgeable copyright attorney before jumping to conclusions about infringement.

COPYRIGHT AND COLLECTIONS

In recent years the trend has been to invoice the client with terms stating that the grant of rights to use the photograph is not in force until the invoice is paid in full. It should be understood that under this provision nonpayment may be both a breach of the client's contractual obligation and infringement of the copyright. This can create a legal question about the best way to enforce your rights - a question best answered by competent legal counsel.

BUYOUTS AND ALL RIGHTS

"Buyout" and "all rights" are confusing terms and are thought by some to mean a transfer of copyright. However, these terms have inconsistent trade definitions, depending upon personal understanding, and consequently are not reliable in licensing terminology.

We urge you not to use such terms in licensing clients the rights to your photographs. It is better to clearly state whether or not the copyright is being transferred.

An all rights agreement without a transfer of copyright is a permission to a client to use your image as desired, while the copyright remains with you. This gives the client the widest range of rights for the time allowed in the license without a transfer of copyright ownership.

DEFINITIONS FROM THE COPYRIGHT ACT OF 1976

"Audio visual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole. A contribution to a collective work can itself be copyrightable.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation " includes collective works.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which the underlying work may be recast, transformed or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. Each joint copyright owner can grant non-exclusive licenses to third parties subject to a duty to account to the other joint owners for their share and profits.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a non-exclusive license.

FOR INFORMATION ON REGISTERING YOUR COPYRIGHT

Registration is handled through the Register of Copyrights, Library of Congress, Copyright Office, 101 Independence Avenue, Washington, DC 20559-6000. Telephone: (202) 707-3000. A 24-hour "hotline" for obtaining registration forms is (202) 707-9100. You can also obtain forms on-line from the Copyright Office at: [<http://lcweb.loc.gov/copyright/>].

Photographs are normally registered in class VA (Visual Arts). The procedure for filing is quite simple. Complete Form VA, enclose your deposit materials and a check for the \$30 filing fee. See ASMP's "Registration Primer" for details on the deposit materials required, tips for completing Form VA properly, and a brief discussion on

how often to register your work. For registration purposes, every photograph should have a title, which can be a simple descriptive caption. However, it is not required.

Form VA is the basic form for registering all works in the visual arts. In addition to photographs as such, it should also be used for registering the following items when they are primarily or exclusively photographic in nature: books, advertising materials, and most single contributions to periodicals. When these items consist primarily of text, they should be registered in class TX.

If first publication occurs in a separately copyrighted work, such as a magazine, you can still register the copyright in class VA as a contribution to a collective work, thus securing the advantages of statutory damages and legal fees in an infringement case as mentioned above. This procedure is safer than relying upon the registration of the collective work itself.

NOTICE

The Copyright Act is an ever changing document. Every effort has been made to make this paper as up to date as possible. This document is not intended to be legal reference material.

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