

- **PHOTOGRAPHERS & COPYRIGHT**

- **STANDARD CONDITIONS OF ENGAGEMENT FOR PHOTOGRAPHERS**

COPYRIGHT

Copyright is the right to reproduce and use a wide variety of artistic and other kinds of “works”, including photographs. More importantly, it is the right to exclude all others from using the work. In other words it is the “exclusive right” to reproduce the work.

Copyright is a property right. Like any other piece of property it can be bought and sold, leased, and divided up in any way. Be warned however that a sale (known as an “assignment”) of copyright, and an exclusive licence to use it, must be in writing and signed.

How copyright comes into existence

Copyright “exists” in every original artistic work, including photographs. There is no registration requirement, at least not for New Zealand purposes. Copyright comes into being automatically when the work is made, provided it is original (means: not copied), and provided it is made in some solid (or “material”) form.

To attract copyright protection, the work must also be made by a “qualified person”, namely a New Zealander or New Zealand resident. However by virtue of international copyright agreements (“conventions”) nationals of most countries are also in effect “qualified persons”.

Although you do not have to, you should mark the internationally recognised copyright claim symbol on any work of yours in which you own copyright, eg “© *John McBride 2007*”. Use the date you took the photograph. You should also assert your “moral rights” (see below), so that the combined notice would say: “© *John McBride 2007, all moral rights asserted*”.

Who owns copyright in a photograph?

The basic rule is that the artist (the person who takes the photograph) is the “first owner of copyright”.

However there are important exceptions to that rule. Under our New Zealand Copyright Act 1994 the exceptions as they affect photographers are:

- If you take the photograph in the course of your “employment”, your employer is the “first owner” of the copyright. However, “employment” in this sense only means a regular employment agreement, eg if you are a staff photographer for the Herald. It does not include an independent or freelance contract.

- Probably more important, where somebody “commissions” you, and pays (or even just agrees to pay) for the taking of a photograph, the person who commissions the photographer (ie the customer) is the “first owner” of the copyright. This does deprive the photographer of “first ownership” of copyright in the usual independent/freelance contract situation.

But these rules are only “presumptions” as to ownership of copyright. They can be reversed by specific agreement, often referred to as an “excluding agreement”. That agreement could be written and signed, or written and unsigned, or verbal only, or could even be “implied” from the circumstances. However, to avoid uncertainty, photographers should ensure that the “excluding agreement” is in writing and signed by the customer, and that it reserves copyright to the photographer, and that it asserts Moral Rights.

Period of copyright under the Copyright Act 1994

Photographs enjoy the same period of protection as any other artistic works, ie 50 years from the end of the year in which the artist died.

Moral Rights

Our Copyright Act 1994 protects artists’ “Moral Rights”. Moral Rights are: the right to be identified (clearly and reasonably prominently) as the photographer but note that this right cannot be enforced unless it has been “*asserted*”; the right not to have the photograph falsely attributed to you; and the right to object to “derogatory treatments” of your work (eg to prevent a badly cropped version of your photo appearing). Moral Rights apply regardless of who gets to own the copyright, but obviously they are most important for photographers who have lost their copyright, because if you still own the copyright you have the right to control reproduction of your work anyway.

You “assert” the Moral Rights “by instrument in writing and signed” by you (for example in a contract assigning your copyright to a customer, or in a licence) in which case anybody who has notice of that assertion is bound by it. As well, you need to ensure that, whenever you issue examples or copies of your photographs to others (or publicly) you can attach an assertion of Moral Rights, eg the “© *John McBride 2007, all moral rights asserted*” format if you still own copyright. If you have lost ownership of copyright: “© *reserved, all moral rights asserted, John McBride 2007*”.

Privacy restrictions relating to photographs

Section 105 of the Copyright Act 1994 says that any person who commissions the taking of a photograph for private or domestic purposes has certain rights to stop that photograph being issued publicly or exhibited or transmitted (ie by TV, cable broadcast, internet etc). This is in fact the 4th “Moral Right”. It is however the subject’s right, not the photographer’s.

Photographers have similar obligations under the Privacy Act 1993 anyway. Basically, under that Act, where you are gathering “personal information” (and taking a person’s photograph will amount to that), you must draw to the subject’s attention the purpose for which you are going to use that information and the people (or classes of people) you are going to disclose it to.

Model Releases

The Privacy Act restrictions are - for New Zealand purposes - the main reason you should obtain a Model Release from your subjects, which is simply a form of consent which sets out the ways in which the photograph might be used, and who it might be disclosed to.

The other reasons for obtaining Model Releases are:

- To avoid defamation claims. Eg you photograph a person (or place) in a way that might be said to defame that person/place when the photograph is published; and
- To avoid the risk of the person (or owner of the place) asserting “character merchandising” type rights, using the misleading/deceptive conduct provisions of our Fair Trading Act 1986. Eg if you photograph a group of people including a prominent All Black, and sell that photo for a commercial use such as an advertisement, and the All Black (or worse, the NZRU) then claims to have been “misleadingly associated” with the advertiser, who is your customer and who seeks to pass the claim on to you the photographer.
- The subject asserts some kind of contractual right (typically claiming a “verbal” or “implied” contractual promise by you) that you would only use the image in a certain way, and that you have used it beyond that purpose.

There are a number of good Model Releases down-loadable from www.aipa.co.nz.

Property Releases

These are like Model Releases but they relate to property, not people.

Starting point here is that you can lawfully photograph a building or object that can be seen from a public place, without infringing copyright in that subject. However the law can quickly lead you into murky territory. A photograph of a painting would usually infringe the copyright of the artist. If your photo includes as part of the subject matter a registered trade mark, then publication of the photo may amount to trade mark infringement. As well, if your photo of (say) an iconic building or place is used commercially in a way that might mislead people into thinking that your customer is “associated with” or “authorised by” the building/object owner, there could be a breach of the Fair Trading Act, or even defamation-in-trade. For example, a photograph of Huka Lodge used in an advertisement for a chain of backpacker hostels.

You are therefore recommended to also obtain a Property Release. These are also down-loadable from www.aipa.co.nz.

Copyright in digital images

The same Copyright law applies. A digital image is simply a “work” for purposes of the Copyright Act 1994. However there are some specific provisions, in particular section 226 which gives real teeth against people who attempt to circumvent the electronic copy protection devices which many photographers are now using when they display their images publicly, eg on their websites. This section gives you additional rights against anyone who makes (or imports, sells etc) any device or process that is specifically designed or adapted to circumvent the copy protection, or who publishes information intended to assist circumvention of that protection.

Dealing with publishers, commissioners/customers

Most photographers are in the same disadvantaged position as all other artists, as regards ownership of copyright in works commissioned by commercial customers.

Excluding agreements

Photographers who want to retain ownership of copyright in commissioned works need to make sure their customers sign an “excluding agreement” which specifically reverses the presumptions contained in the Copyright Act 1994. All that is required is an

acknowledgment, signed by the person commissioning the photographer, recording the terms of the commission (payment etc) and going on to state that: "*The first owner of copyright in any photograph made pursuant to this commission is the photographer, namely "[photographer's full name]".* The document should also be dated: that is not a legal requirement, but the date may be needed to prove the agreement was made before the commission was carried out.

Standard conditions

However, the best place to put that excluding agreement is in the photographer's own Standard Conditions of Engagement.

3 important general points to note here are:

- Don't be intimidated by your commercial customer's Standard Conditions of Engagement. Do not follow the advice of my old contract law lecturer, who said: "*Never read anyone's standard conditions, you will only ruin your eyes, you won't be able to change them, so if you just sign them and file them you won't have to lose a whole lot of sleep worrying about all the rights you have just thrown away*". Publishers (in particular) are likely to tell you that their conditions are reasonable and that you have no option but to sign them. Treat those claims very critically. It is certainly important to read their conditions and get advice before being tempted to sign them.
- Use and stand behind your own Standard Conditions of Engagement, and encourage your colleagues to do the same. You can use the same strategy as the publishers, ie say: "*This is not just my choice, my contract is simply based on conditions recommended by our association, most good photographers would stipulate just the same as I do*".
- It makes sense to use a more "user friendly" version of your Conditions of Engagement for your domestic/non-commercial customers.

I understand that when New Zealand photographers started to put their own Standard Conditions of Engagement in front of the bigger publishers, many of them faced heavy resistance, including along the lines of "*you will never work for ... again*". However I also understand that, after a period of time, the publishers started to realise that they had to accept these conditions, if they wanted access to the best work.

STANDARD CONDITIONS OF ENGAGEMENT FOR PHOTOGRAPHERS

This section of the paper includes information about copyright but goes wider: it deals with your overall business relationship with your customer.

The AIPA Standard Terms and Conditions of Engagement (down-loadable from www.aipa.co.nz) are particularly comprehensive. However, if you think these are too comprehensive to be "commercially acceptable" for your customers, it is not that difficult to tailor-make your own terms and conditions which nevertheless cover the essential points needed to protect the photographer in the vast majority of situations.

Essential matters to be covered in a photographer's Standard Conditions of Engagement?

Front page - specific provisions

This should be a "fill in the boxes section" that includes:

- Photographer's name and address
- Client's name and address and contact person
- Date of agreement
- Description of the work being commissioned
- The engagement fee, how it is calculated, "plus GST". Avoid "payment when customer is paid" and similar provisions, which put all the risk on you
- Set out any royalty provisions
- If you are being tied down to delivery date(s), make sure they are dates you can safely accommodate
- You should strive to ensure you are "first owner of copyright" (see below under "General conditions") but if you are losing first ownership, or assigning copyright to client, make sure you state:
 - What rights of copyright are being assigned? (eg "limited to use in hardcover book to be titled ...")
 - For what territory? (eg "Australia and NZ only.")
 - Any provisions for re-assignment of copyright to the photographer? (eg "If the book titled ... is not published by ... then copyright reverts to photographer ...")
- If photographer is retaining copyright, but granting a licence to client to use it, then reserve first ownership of copyright and specify:
 - What rights of copyright does the licence include, eg "press (news)"; "billboard", "internet"; "editorial".?
 - Is it an exclusive or non-exclusive licence? Exclusive: you agree that you will not allow anyone else to use the copyright, and that you will not use it yourself. Non-exclusive: you give the client a bare permission to use the copyright but reserve the right to use it yourself, or to grant licences to anyone else.
 - What territory does it cover, eg "NZ", "Australasia", "Worldwide", "European Union"? You can specify it any way you want.
 - How long does the licence last, ie "term" or "period" of licence? Eg "one year"; or "until publication of book, provided that publication occurs before 1 July 1996"; or perhaps "for the full term of copyright protection" (ie 50 years from death of photographer).
 - Whether client has right to alter the image.
- Specific provisions as to credits. Eg photographer waives Moral Right to attribution; and/or inserts an alternative requirement of attribution.
- Model releases - whose responsibility? (See suggested standard forms mentioned below)

- If your client will use the photographs for purposes of a business, get a signed acknowledgment of that, and an acknowledgment that the Consumer Guarantees Act does not apply (and see the “Limitation and Exclusion of Liability” section below)
- A section at the foot which states the client requests photographer to supply goods/services on the conditions printed overleaf, and signs the order.

Back page - General conditions

These are the “small print”. Essential points to cover in your “small print”:

- **Copyright ownership:**

Ensure that photographer becomes the “first owner of copyright”, ie reverse the presumption in section 21(3) Copyright Act 1994 that client (as commissioning party) becomes first owner of copyright in your photograph. This is very important.

- **Copyright licence provisions:**

If Photographer is retaining copyright, client needs to be granted a right to use that copyright to an agreed extent. The right to “use” copyright is known as a “licence”. In most cases, the licence terms will have to be set out in the “specific” provisions of contract (see above). These terms are of critical importance to the photographer: a wide, long exclusive licence is tantamount to an assignment of copyright. A narrow, short, non-exclusive licence leaves the photographer in control of most of the “basket” of copyright rights. www.aipa.co.nz has downloadable licences.

- **Copyright assignment:**

There are situations where it is reasonable for the client to insist on taking full ownership of copyright. However, if so you at least need to ensure that there is no assignment of copyright until the photographer has been paid in full.

If the photographer is assigning copyright the payment should be greater, because you are losing control of your work.

Also, by assigning copyright, you are in effect promising your client that you have full copyright in the work, ie that you are selling to the client the effective right to use and reproduce that work. Consider whether you should limit your risk of adverse claims here, ie insert a condition which states that claims by a third party will be the responsibility of your client, and that it is up to your client to obtain any necessary Model and/or Property Releases, Privacy Act consents, and any permissions to use any other parties’ intellectual property rights. See the “3rd party rights” section below. And if you have to sign your commercial customer’s Standard Conditions, cross out any general “guarantee/warranty as to “3rd party claims” - the farthest you should go is to warrant that your photo is original.

- **Copyright notice/credit line/assertion of moral rights:**

Copyright notice: if you retain copyright in the work, you need to ensure that your client inserts a proper copyright notice on all uses of the work. A simple copyright and Moral Rights notice is sufficient, ie: “© reserved, all moral rights asserted, John McBride November 2007”. Consider whether there should be a pre-agreed penalty fee payable if client fails to ensure that the notice appears.

Assertion of **Moral Rights:** is most important where you have assigned or lost copyright. Therefore if you are assigning copyright to your client, the standard

conditions should include a provision that, if client on-assigns to somebody else, there must be a statement in writing that the photographer has asserted Moral Rights.

Credit line: in many cases, you will want more than just a copyright notice and attribution of Moral Rights, ie you will want a full and prominent “credit line”. You may wish to stipulate in the standard conditions exactly what credit lines are to appear in different kinds of publications, or leave that matter to the “specific provisions” section of the order form.

- **Copyright infringement provisions**

This is a clause that states what happens if it comes to your or the client’s attention that copyright in the work has been infringed. A fair provision would be:

- You are each obliged to notify the other.
- You are then obliged to meet and decide whether to take infringement action.
- If you decide to sue, then you share the costs and the damages recovery equally. But if one of you does not wish to sue, the other one can go ahead, pay all the costs, and get all the benefit, in which case the one which does not wish to sue is still obliged to complete all the necessary legal documents and give appropriate support.

- **Uses to be reserved to Photographer:**

Whether you are assigning copyright to client, or only giving a licence to client, you will probably want to reserve the right to do certain things. Eg to exhibit in galleries; enter competitions; reproduce the work in your folio for promotional purposes, including on your website. There are no doubt other uses you would wish to reserve.

- **The engagement fee:**

The fee itself will be set out in the “specific” part of the order, but there are certain standard conditions that should be included ie:

- All prices are GST exclusive.
- Is the price a quote, or only an estimate? If it is an estimate, the basis on which the final price will be charged.
- What the price does/does not include?
- Scope for changes, extras, increases due to matters beyond your control.
- Are expenses in the price, or are they extra?
- Payment stages. Try to get a good portion “upfront”

- **Royalties:**

On top of the engagement fee, you may be entitled to royalties. You sell yourself short if you simply take an engagement fee on the basis that the client will use the work for one purpose, and the client uses it for other purposes, eg subsidiaries, repeats, online photo libraries.

If you have retained copyright and given the client only a limited licence (eg to use the photographs in a hard cover book) then your position is protected anyway, because it would be infringement for the client to use the photographs in (eg) a soft cover book, an anthology, or online. But if you are assigning ownership of copyright, or giving a very wide licence, there should be a royalties provision.

All royalties clauses should include an enforcement clause, ie allowing you to audit the client's records to ensure that you have received all the royalties due to you.

- **Privacy:**

We have noted that, by section 105 Copyright Act 1994, where somebody commissions you to take a photograph for private and domestic purposes, you must not issue or exhibit or broadcast the work publicly. If you wish to be at liberty to do any of these things, you would have to obtain the person's consent, in writing. Consider inserting a standard consent in your Conditions of Engagement.

As we have noted, the Privacy Act 1993 places obligations on all persons collecting personal information. By taking somebody's photograph, you are collecting "personal information" about them. You are limited to using or disclosing that information only in ways the person has authorised. Photographers must expect problems here, eg where your subject later asserts that s/he did not authorise publication of his/her photograph in that best selling book or in an online photo library, or cropped to put the focus on a particular part of the photo.

A well-drafted Model Release would amount to an effective "authorisation" for Privacy Act purposes. But you can't always get Model Releases. The Standard Conditions should therefore set out what are/not the photographer's obligations (to the client) to obtain Privacy Act authorisations/Model Releases. A reasonable compromise may be, that photographer will use "reasonable endeavours" to obtain Privacy Act authorisations/Model Releases from subjects, but that you are not bound to obtain these, thus the risk is to be carried by the client.

- **Act of God / delay / weather permitting provisions:**

Many contracts include a condition stating what happens if performance of the contract is "frustrated" by act of God. If you prefer a short and simple form of standard conditions, you would probably leave this one out. However, photographers are often delayed by weather and the like, so there should be a condition giving you an out if delivery of the photos was delayed or entirely prevented by bad weather or similar (a "weather permitting" clause).

- **Breach of 3rd parties' intellectual property rights**

What happens if, eg, you are commissioned to take a photograph of something which includes a prominent company's trade mark, and when the photograph is published you get sued for infringing their trade mark. It should be up to the client to decide whether or not it is safe to use the photograph. Thus there should be a condition by which client agrees to "indemnify" you against any claims by 3rd parties asserting that publication of your photo infringed their intellectual property rights, defamed them or caused a breach of the "misleading/deceptive conduct" provisions of the Fair Trading Act.

- **Limitation and exclusion of liability**

It is usual in a commercial contract for the supplier to exclude or limit its liability to claims which might be made by the other contracting party, ie in this case by your client against you. Whatever liability you can't exclude you should consider insuring

for, and the better your Conditions of Engagement the cheaper the insurance. Usual ways to limit liability are:

- Limit any claim to a particular figure, eg to refunding the invoiced price.
- Say that you do not promise that the work will be suitable for any particular purpose.
- Say that in no circumstances will you be liable for any loss or damages, and in particular consequential loss and/or loss of profits.
- Under the Consumer Guarantees Act 1993, it is unlawful for suppliers to seek to exclude liability under the so-called “statutory warranties”, except where they are supplying “for business purposes”. Therefore there needs to be a provision that the exclusion and limitation of liability clauses apply only where you are supplying for client’s business purposes and (where you are) an acknowledgment from the client that the Consumer Guarantees Act’s so-called “statutory warranties” do not apply. There should be a backup provision that nothing in your Conditions of Engagement overrides the statutory rights the client may have under the Consumer Guarantees Act or the Fair Trading Act.

- **Termination:**

A short form of conditions might omit a “termination” clause. The purpose of the clause is:

- You may want to reserve the right to terminate the engagement, without having to give any reason, eg if it simply becomes inconvenient for you to complete. If so, you would need some kind of early-termination-by-notice provision. But you would have to expect that client would want the like right against you.
- Even if there is no early termination provision, it may be necessary to provide what happens if the contract is terminated by one party’s breach. Eg if you have assigned copyright to client, but client then failed to pay you the royalties. You would want the right to terminate, and as a condition of that termination you would want the copyright to revert to you.

Dispute resolution:

If there is no dispute resolution clause you can still negotiate and, if that does not resolve it, sue. But you may want to include a mediation clause or an arbitration clause or both. A mediation clause requires both parties to try to achieve a mediated settlement to any dispute, ie to attend mediation. An arbitration clause requires them to appoint an independent person(s) to rule in a dispute, ie to avoid having to resort to Court proceedings.

CONCLUSIONS

If you have memory space for only 2 points from this paper, they should be:

1. Go to great lengths to retain ownership of copyright in your photographs.
2. Win the “battle of the forms”: do not lightly sign your commercial customers’ Standard Conditions. Do get customers to sign your own Standard Conditions of Engagement.

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Important note: This paper contains general information and opinions, and should not be used or relied on in the absence of specific legal advice.