



A PRIMER ON LAWS APPLICABLE TO PHOTOGRAPHERS

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Copyright

What is a copyright?

A “copyright” is the artist’s fundamental right to control and profit from his work.

Applies to all forms of artistic works whether written, visual, physical or recorded.

What is it that you own when you have a copyright?

You do not own or control your idea! But, the copyright applies to any expression of an idea.

For example, if you were the photographer that took the first picture of Barack Obama, you do not own or control the idea of taking a picture of Mr. Obama. Other photographers do not have to obtain your permission or pay you a royalty when they want to take his picture. But you do have a copyright in your image of Mr. Obama and, with some exceptions, if others wanted to use it they would need your permission and you could require some type of payment.

In the legal arena, it is part of the specialty referred to as Intellectual Property Law.

This is the field that deals with ownership and protection of ideas and includes patents, copyrights and trademarks.

It is an international right. Through various multi-national treaties, conventions and agreements, your copyright is recognized and can be enforced throughout the world.

Of course, there are some countries such as China where, although they claim to abide by these agreements, the violation of copyrights is big business.

Can any work be copyrighted?

Almost. However, there are some very minimal standards that vary from country to country.

In general, there must be a least some minimal degree of originality, judgment, skill and/or labor.

Example: I could not take a picture of the front page of the *Times-Picayune* and copyright it. Not only is it already copyrighted by the owners of the newspaper, I have done nothing original; I have merely copied the page. But if I do anything original with the image, if I emphasize a particular word to make a point, if I cut something out to say something, if I physically cut out a portion or superimpose something on the image to make an artistic statement.

If I do almost anything, no matter how minor to make an artistic statement, then I can obtain a copyright in the image.

What do I have to do to get a copyright?

In most countries, absolutely nothing! The copyright attaches as soon as a work that meets the originality standards is produced.

You do NOT have to:

Register the copyright

Notify anyone

Pay anything

Sign your work; or,

Put any symbol on it.

What is “most countries?”

All countries that have adopted the Berne Treaty.

Notable exceptions are Taiwan and many of the middle eastern countries.

So why do people use the copyright symbol?

Prior to 1989, US law required some type of symbol or language indicating that a work was copyrighted.

Certain damages may not be recoverable if a notice is not used.

An innocent infringement defense is less likely to be successful.

Why should I register my copyright?

Although obtaining a copyright does not require registration, there are significant legal advantages to registration with the United States Copyright Office:

Before an infringement suit can be filed, the copyright must be registered.

It can be registered after the infringement but as pointed out below, this would have a significant impact on the damages recoverable.

If registered before or within 5 years of publication, registration will constitute prima facie evidence of the validity of the copyright.

If registration is accomplished within 3 months of publication or prior to the infringement, statutory damages and attorneys' fees are recoverable. Otherwise, only actual damages and lost profits are recoverable.

Most infringement of photographic copyrights occurs online when one of your photos is copied and posted to another site. If the copyright is registered, the web hoster can be held liable if it does not remove the material.

How do I register my copyright?

www.copyright.gov

Download the forms or fill them out online and pay \$45.00 per copyright registered.

What rights are conferred by a copyright?

The right to produce and sell copies and reproductions in any format.

The right to import or export the work.

The right to create derivative works (adaptations).

The right to display the work.

The right to sell or assign all or some of these rights.

The right to transmit or display the work by radio or video.

Exceptions to Copyright

First Sale Doctrine – If you have validly acquired a copyrighted work, you are free to re-sell the work without violating the copyright. This does not entitle you to make or distribute additional copies.

Fair Use Doctrine – Four factors to consider:

Purpose and character of the use

The nature of the copyrighted work

The amount and substantiality of the portion of the work used as compared to the whole

The effect of the use on the potential market for the work.

The doctrine specifically applies to copies made for educational, artistic or satirical purposes.

Commercial use does not fall within the doctrine. There is no “bright line” rule as to what is not commercial use. In the right context one copy might be considered commercial use, such as a single billboard made from a copyrighted photograph. However, by statute making 10 or more copies is generally considered commercial use.

Transfer & Licensing

Are the means by which the author of a work can transfer rights to copy and distribute the work to a third person.

Transfer – is essentially the sale or donation of all or some of the rights conferred by the copyright. To be enforceable, the US Copyright office requires that the transfer be in writing but no special form is required.

Licenses – are essentially leases of all or some of the rights conferred by the copyright. Although we often think of licenses granted for payments of royalties, a monetary payment is not required and a license can be granted for no payment at all. In fact, commonly photographic licenses can be given for nothing but attribution. Licenses may be restricted in virtually any manner agreed to by the parties. Common restrictions include:

The duration of the license

How many copies may be made and/or distributed

The form of the copies and the manner of distribution

The use(s) to which the copies can be put.

Should I use a license if I’m not getting paid anything for the image?

Yes. The license lets the licensee know what he can do with the image particularly if any significant restrictions are put on the use of the image. It is also useful to put a time restriction on the license since you may later want to do something else with the image and would not want to infringe on a previously granted license.

Sales of prints – Some unsophisticated purchasers of photographic prints assume that because they have purchased the print, they have the right to copy and use that print on web sites or even to make copies and sell them.

As discussed previously, validly acquiring a copyrighted work does NOT convey any of the copyright rights including the right to copy and distribute.

Some painters and photographers sell their works with a “license” stating that the purchase is only a purchase of the particular print and conveys only the right to noncommercial display and no other rights of the artist including specifically the rights to make and/or distribute copies are conveyed.

This is not really a “license” but simply a restatement of what the effect of the purchase of a print really is – but it doesn’t hurt to use it!

Form License:

Attachment A: Sample Photograph License

Model Releases

Assuming that you are not trespassing or assaulting someone, you do not need a release to *photograph* anyone or anything.

There would be no civil or criminal liability for photographing someone or something.

However, the *publication* of someone’s likeness, particularly in a commercial setting, may result in civil liability to the publisher. For this reason, most publishers require model releases.

Although generally problems arise when someone’s likeness is used for profit, they can also arise when publication negatively impacts someone’s reputation.

Two things the release should cover:

Waive any liability for publication of the image.

Waive any claim by the model to the image.

Technically, this should not be required because the photographer and not the model obtains the copyright but including such language could avoid a costly legal battle.

When is a release necessary?

The prime consideration in whether a release is necessary is whether the image of a person will be used to promote some product or purpose. If the distribution of the image will cause viewers to associate the model with a product or purpose a release is necessary.

Remember: The issue is whether the model will be associated with some product or purpose. Whether any commercial, business or profit motive is involved is irrelevant.

Some factors to consider:

Is there an identifiable person in the photo?

If the person is not identifiable from the image, its use cannot associate the person with any product or purpose.

How is the photo to be used?

How did you take the photo?

If you violated someone's privacy rights to obtain the picture (assuming this is not a public figure) you would need the person to waive any claim against you. Technically, this is not a model release but it may be helpful.

Was adequate compensation given for the release?

Some states require compensation for a release but this does not mean that the compensation must be monetary. Compensation could include providing an aspiring model with prints for her portfolio.

When is a release not necessary?

News

Fair use doctrine

Pictures of property or inanimate objects

Property and inanimate objects have no right to their likeness so releases are not required; however, certain property may be copyrighted (The Golden Gate Bridge) or trademarked (A Coca-Cola Sign) and certain uses may require a license from the owner of the copyright or trademark.

Classic example – The owners of a Ford Mustang club wanted to make and sell a calendar of their cars; however, Ford held the trademark in the design of the car and refused to give the club a license.

Pictures of animals or pets

Similarly, animals and pets have no right to their own likeness and no release is required.

Satire & Humor

Art & Education

Putting photos you took on your own web site

Form Releases

See attachments:

B – Generic Model Release

C – Simplified Model Release

D – Addendum For Children

For a more complete discussion of these topics go to danheller.com.

Orphaned Works Act

An orphaned work is any copyrighted work where it becomes difficult or impossible to contact the copyright holder.

The problem ballooned in 1976 when the US removed the requirement of copyright registration.

The Act seeks to reduce the liability of publishers of orphaned works when they employ the statutory procedure:

Take all reasonable steps and employ all reasonable search procedures to locate the copyright holder before applying to the Copyright Office to use an orphaned work.

An appropriate symbol designating the work as an orphaned work must be used.

If an owner comes forward, reasonable compensation based on the nature of the orphaned work and its use must be paid.

There appears to be a lot of hysteria on the web over this legislation.

People are convinced this is a play by big business to grab the photos they posted to some online photo sharing site and use them to create multi-billion dollar ad campaigns without paying for the images.

But the bottom line is that it appears to be a reasonable mechanism for dealing with the problem of an exploding mass of unregistered works,

If you are one of the paranoid types and want to make sure that your photos are not used without your permission, what can you do?

Register your copyright!

Don't post high resolution photos to photo sharing sites that do not identify the photographer .

A. Sample License

PHOTOGRAPH USE LICENSE

I, William Schuette, am the creator and sole copyright holder of the photographs entitled OP0001 through OP0108. I hereby grant to _____ a nonexclusive license to copy, publish, reprint, post on the internet or otherwise use said photographs for the purposes of marketing and promotion of himself and the group known as "Ordo Procinctus" in return for photographic credit whenever feasible. This license does not transfer any copyright nor authorize the licensee to sell any image or copy thereof. This license will remain in effect for a period of three (3) years from the date of execution.

Folsom, Louisiana; this 7th day of December, 2007.

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B. Generic Model Release

Standard Model Release

For good and valuable consideration received, I

hereby grant to [insert photographer's name here], and his/her legal representatives, licensees and assigns the irrevocable and unrestricted right to publish and use photographs of me and/or photographs in which I am depicted for editorial trade, advertising and any other purpose and in any manner, medium or format, and to alter same without restriction. I hereby release photographer and his/her legal representatives, licensees and assigns from any and all claims, demands, causes of action and liability of any kind or nature relating to said photographs or their distribution and use, and I further relinquish any and all rights in and to said photographs.

Name: _____

Date: _____

Address: _____

Phone: _____

Email: _____

C. Simple Model Release

Model Release

For adequate consideration received, I hereby give permission to
[insert photographer's name here] to use my name and photographic
likeness in all forms and media for advertising, trade and any other lawful
purpose.

Print Name: _____

Signature: _____

Date: _____

D. Addendum For Minors

I _____, am the parent or legal guardian of the minor named above and have read this release and understand and approve of all its terms.

Print Name: _____

Signature: _____

Date: _____