

Photography & Copyright Law

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*Intellectual Property &
Technology Law*

Copyright Basics

- Protects ORIGINAL works of authorship (photographs, artwork, songs)
 - NOT facts, ideas, systems, or methods of operation
- Arises when the work is created
- Generally, the authors of the work own the copyright

Copyright grants a “bundle” of rights:

- Copy or reproduce the work
- Make “derivative works”
- Distribute the work by sale
- Perform the work, in the case of literary, musical, dramatic, choreographed works, motion pictures, etc.
- Publicly display the work

Term

- Basic term – life of the author + 70 years
- Work for hire – 95 years from publication, or 120 years from creation, whichever comes first.

What is copyrightable?

- COPYRIGHTABLE:
 - Original photographs
 - Any creative elements expressing an idea, e.g., cropping, lighting, etc.
- ARE NOT COPYRIGHTABLE:
 - Ideas
 - Natural occurrences

The © Symbol

- Legally, it is not necessary to use the © symbol on your works.
- It is best practice to use it.

Preferred format:

©, Carrie A. Johnson, 2014, All Rights Reserved

In other words:

©, Copyright Owner's Name, year first published, "all rights reserved"

What constitutes publication?

- Why do we care? A number of reasons, including:
 - Term for work for hire is calculated based upon first publishing.
 - Registration application requires a publication date, or confirmation that publication has not occurred yet.
 - Whether photos are published or unpublished impacts registration strategy.
- Copyright Act defines publishing as:
 - "...The distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance or public display constitutes publication." It also indicates that "**A public performance or display of a work does not itself constitute publication.** Generally, publication occurs on the date on which copies of the work are first distributed to the public."

Published or Unpublished?

If in dispute, courts interpret the facts to confirm when and/or whether publishing occurred.

However, the following probably constitute PUBLISHING:

- Photos displayed on a public website, blog, social media, or if delivered to a stock agency for distribution.

The following probably is NOT PUBLISHING:

- Photos displayed in your portfolio, prints on display at a gallery, and password protected client-only online galleries might not be publishing.

Who Owns Copyright in a Photograph?

- Generally, copyright ownership belongs to the creator, i.e., the person who takes the picture.
 - Tip: Know the difference between the legal terms “author” and “claimant”. In a © application, you must specify who is the author and claimant. The “author” created the work. Often, the “author” is the owner and the “claimant” to the copyright.
- When is the “author” not the “claimant”?
 - If the author assigns the copyright to another.
 - Work for hire...

Work Made For Hire

- WORK FOR HIRE SCENARIO #1: If the photographer takes pictures **within the scope of employment** - e.g., a newspaper's staff photographer- the resulting photos will be a "work made for hire". The owner of the copyright (the claimant) is the corporation.
- WORK FOR HIRE SCENARIO #2: If the hiring party specially orders or commissions a photograph, the parties expressly agree in writing that the photograph is a "work made for hire" **and** the work fits into one of the categories defined by Section 101 of the Copyright Act...

The Categories

- Motion picture
- Translation
- Instructional text (test, answers)
- Atlas
- **Collective work** (e.g., contribution of photos to a magazine or newspaper)
- Supplemental work- e.g., a foreword, afterward, chart, illustration, editorial note, bibliography, appendix and index

Get It In Writing!

Before The Work Begins:

- Independent Contractor Agreement
 -all works created...shall be deemed to be works made for hire **and shall be the sole property of the Company**. The Contractor hereby certifies that all such works will be original works and will not infringe the rights of any third parties.
 - In the event that any works created... are not deemed to be works for hire, Contractor hereby assigns, and/or agrees to assign, or cause to be assigned, all right, title, and interest in and to such materials to the Company.

Joint Authors

- Photographers who work collaboratively on photo shoots might be surprised to learn that they are not the sole copyright owner of the resulting images. A person may become a joint author in the copyright in a photo -- not only by taking the picture -- but also by selecting and arranging the photo's subject matter, making decisions about composition and camera angles, or by determining the lighting.
- The law concerning co-ownership of copyright is fact specific and varies in different jurisdictions, but photographers can avoid this result by entering into appropriate agreements that specify ownership and royalty rates with their collaborators.

Joint Authors- rights, term

- Cannot sue a joint-author for infringement
- Own an equal, undivided interest
- May NOT assign/exclusively license the work
- MAY license the work on a non-exclusive basis, but:
 - Accountable to other joint authors for pro-rata share of profits realized from exploitation of the work
- Term: **70 years** from the last living author

Why register with the U.S. Copyright Office?

- Prerequisite for jurisdiction in Federal Court
- Only works that are **registered prior to the time that the infringement begins** are eligible for statutory damages and attorney's fees in successful litigation.
See 17 U.S.C. § 504
 - Statutory damages: \$750-\$30,000 “per work”; up to \$150,000 for wilful infringement. More later...
- Consider registering your work as soon as possible, preferably prior to publication.
- Register online via the U.S. Copyright Office’s electronic Copyright Office (“eCO”) at **<http://copyright.gov/>**

Registration Basics

1. Complete the online application
 - Author
 - Claimant
 - Work for Hire?
2. Pay the registration fee
 - \$35 fee for electronic filing
 - Via U.S. Mail on paper forms is possible, but is discouraged
 - Longer processing time
 - \$65 fee for paper filing without a bar code
3. Provide the “deposit materials”, which are the photographs being registered...

The Deposit Materials

- Submit 2 complete copies for published works
- Submit 1 copy if unpublished

Upload or mail copies of the “deposit materials”:

- Electronically uploaded files:
 - Best result if files are compressed into a zipped folder.
 - Per the ASMP (American Society of Media Photographers), another option is to put photos into a pdf proof sheet format; however, metadata can be lost for individual images.
- OR, ship physical copies to the Copyright Office - physical prints or copies of the files on CD-ROM. If you go this route, the eCO software will prompt you to print a shipping label.

Registering photos in groups

- Published and unpublished photographs cannot be registered on the same application.
- A note of caution: Registering photos in groups via a single application, resulting in a single registration number is convenient and practical. However, keep in mind that when granted, statutory damages are awarded “per work”, which has been interpreted by courts to mean “per registration”. Thus, if five photos that are registered on a single registration are infringed, expect the infringer to argue that statutory damages are x1, *not* x5.

Registering groups of unpublished photographs

- Groups of unpublished photographs may be registered in a single registration.
Requirements:
 - the photographs must be neatly assembled;
 - a collection title must be provided;
 - the **same** party must be the copyright **claimant** for all the photos; and
 - **one author** must have either created or contributed to all the photos.

Registering groups of published photographs

- Groups of published photographs may be registered in a single registration with a single fee:
 1. If all of the photos are by the same photographer, published in the same calendar year, and all have the same copyright claimant; or
 2. If they are from the “same unit of publication”
 - It is not entirely clear what “same unit of publication” means. Likely, inclusion of multiple photos in a book, magazine, calendar, or in a set of baseball cards would constitute publication in the same unit. Publishing works on the same website might not be found to be publication in the same unit.

Misc. Registration-

- When is a work officially registered?
 - Effective date of registration is when the Copyright Office receives your complete and correct application and all required deposit copies or other materials, not when you receive your certificate.
- Safari Web browser does not work with eCO. Try MS Internet Explorer, Firefox, or others.
- If you do business as a photographer through your LLC or Inc., then when you take photos, you are an employee of the business. You personally are the “author” of the photo. However, your company is the “claimant” and you must select “work for hire” in the copyright registration application.

Copyright Office Website Resources

<http://www.copyright.gov/fls/fl124.html>:

- Information about how to register groups of published photographs, including contributions to periodicals.

<http://www.copyright.gov/fls/fl107.html>

- Describes the methods available for applying to register single published and unpublished photographs, collections of unpublished photographs, and photographs published together in a unit, such as in a calendar or a book.

<http://copyright.gov/circs/sl39.pdf>

- Provides information on the Copyright Office's pilot program for electronic registration of groups of published photographs and databases consisting predominantly of photographs.

<http://www.copyright.gov/eco/help-file-types.html>

- Provides a list of the acceptable file types for deposit materials.

http://www.copyright.gov/eco/faq.html#eCO_1.6

- FAQ's about the registration process with answers and links.

Copyright Infringement

- Test-

- **Valid copyright**

- Copying, which is proven by-

- Access to the protected work (direct or circumstantial evidence)
 - “Substantial similarity” to the protected work

Remedies for © infringement

- **Criminal** – practically speaking, it is tough to get attention for a © infringement case in the criminal arena
- **Civil**
 - Injunction
 - “Full recovery of costs”- which includes actual damages
 - Prevailing party may also be awarded attorney’s as part of the costs, but generally only available if © registered prior to the infringement
 - Statutory Damages – if applicable, \$750-\$30,000 per work infringed; up to \$150,000 for willful infringement

Fair Use Defense to Infringement

- U.S. Copyright Act Section 107: the factors to be considered in determining fair use:
 1. The purpose and character of the use;
 - *Commercial or noncommercial use?*
 - *Has the material from the original work been transformed by adding new expression or meaning?*
 2. The nature of the copyrighted work;
 3. The amount and substantiality of the portion used; and
 4. The effect of the use upon the potential market for, or value of, the copyrighted work.

Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992)

Art Rogers, professional photographer, took a black-and-white photo of a man and woman holding puppies, entitled *Puppies*, which was used on greeting cards and other merchandise. Jeff Koons, internationally known artist, found a postcard of the picture. He removed the copyright label from the postcard and gave it to his assistants with instructions on how to model the sculpture. The resulting sculpture, entitled *String of Puppies*, was a success. Four sculptures were made, three of which sold for \$367,000 total. In the suit for copyright infringement filed by Rogers, Koons claimed that his sculpture was a parody of society, a fair social criticism of mass production of commodities and media images.



Art Rogers' *Puppies*



Jeff Koons' *String of Puppies*

Rogers v. Koons...

- The court found that the sculpture was a copy of Rogers' photograph, but due to the "substantial similarity" of it to the photo, and because Koons had access to the photograph.
- The court rejected Koons' parody argument, because a successful parody defense must be based upon criticism of the underlying work copied. The court found that Koons could have constructed his parody without copying Rogers' specific work.
- Rogers was awarded a large monetary settlement from Koons, and Koons was required to ship the fourth sculpture, which remained in Koons' collection, to Rogers in Germany.

Online Infringement

- Tip: To determine whether there are unauthorized uses of your photo, go to www.images.google.com. Click on the camera icon and select “search by image”. This will bring up a dialog box that will take you through uploading your image or providing a URL link to your image and searching Google with it.

Digital Millennium © Act ("DMCA")

- If infringement occurs online, the copyright owner may send a DMCA Takedown Notice to the website host requesting removal of infringing content. (More on the content of the notice later...)
- Governs **U.S.** internet hosting providers.
 - If your photo is used without authorization on a website that is hosted outside of the U.S., the DMCA does not apply.
- Internet Service Providers (ISPs) – safe-harbor from infringement claims so long as they follow DMCA procedures.

Tip: Host vs. Registrar: To have a website, you must have a web address – i.e. a domain name. Reservation of domain names is via a domain registrar. The website host is the place where the actual content (pages, pictures, etc.) is saved and served up to the World Wide Web. Sometimes, the registrar is also the host of the site. Not always. Thus, you need to find the "nameserver" to locate the host.

Finding the Host

1. Use a company that performs nameserver queries, such as:
 - www.kloth.net - type domain name of interest in the field, select **NS records** or **Any records**. Results list the nameserver for the domain entered.
E.g.: phogographyisfun.com nameserver = **ns1.everydns.net**
 - **Tip:** Sometimes the nameserver reveals the name of the host. The nameserver of the (the fictional) domain name photographyisfun.com in the results above, for example, show that **EveryDNS** is the domain host.
 - **Tip:** if the name is not obvious, copy the nameserver results into a web browser. Search results will likely mention the company who owns the server.
2. Another option: use a DNS (domain nameserver) lookup site, such as <http://www.domaintools.com/research/dns/>

I found the Host. Who do I send the notice to?

To find the name and address of the agent for the ISP host:

1. Check the Copyright Office's Directory of Service Provider Agents for Notification of Claims of Infringement
 - http://www.copyright.gov/onlinesp/list/x_agents.html
 - Complaint → list is often out of date
2. Visit the website for the host ISP. Look for links entitled "abuse", "copyright policy", "DMCA" etc. If all else fails, email using one of their general email addresses and ask for the specific contact for receipt of DMCA takedown notices.

Contents of the DMCA Notice

MUST:

- Be in writing;
- Be signed by you, as the © owner, or your agent (electronic signature is sufficient);
- Specify the content alleged to be infringed (or a list of infringements from the same site);
- Identify the material on the site that is infringing your work;
- Include your contact information;
- State that you are complaining in “good faith”;
- State, “under penalty of perjury, that the information contained in the notification is accurate;” and
- State that you have the right to proceed (because you are the copyright owner or the owner’s agent).

A GOOD IDEA TO INCLUDE:

- This letter is official notification under the provisions of Section 512(c) of the Digital Millennium Copyright Act (“DMCA”).

Counter Notice

- Upon receipt of a DMCA Takedown Notice, the ISP will remove the complained of content and “promptly” notify the alleged infringer of the removal and DMCA notice.
- A counter notice may be sent to the ISP declaring that the alleged infringer “has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled” and other requirements of Section 512 (g) of the DMCA must be met for a proper counter notice.
- At that point, the ISP is legally obligated to repost the infringing material.
- Unfortunately, the only option then to stop the infringement is to file a lawsuit asking the court to enter an injunction stopping the use of the copyright material.

Licensing & Damages

Have a system, and keep good records.

- What do you charge for different types of uses of your photos? Try to be consistent, have a system
- If you discover an unauthorized use of your photo, you might resolve the issue by offering a retroactive license for the past use. What do you charge for such a retroactive license? It should be more than you would have negotiated had the infringer requested prior permission and paid an ordinary license fee.

Why do we care? In many copyright infringement suits involving the unauthorized use of photographs, it is clear that a defendant used photos without permission. The disputed issues are: (a) whether the infringement was wilful; and (b) what the defendant should pay the photographer for the unauthorized uses. As for the latter, a judge, mediator, and the defendant will look to your past license and retroactive license history as a starting point to determine what you should be paid by the defendant.

Misc. License Tools

Cradoc “fotoQuote” software - www.cradocfotosoftware.com

- fotoQuote claims to be the industry standard pricing guide for stock and assignment photography. (Is it?)
- fotoQuote has been relied upon in infringement litigation to establish a baseline for the photographer’s damages. → problem: if the photographer did not use fotoQuote before regularly before the suit, damages based upon fotoQuote can be quickly discounted by the defendant, a judge, mediator, etc.
→ My two cents: I think if fotoQuote was consistently used by the photographer, it would be a persuasive guide for damages in litigation.

Creative Commons www.us.creativecommons.org

- Creative Commons (CC) is a non-profit organization that developed a set of standardized licenses for creative works.
- The Creative Commons license can be recognized by a set of symbols or icons.
 - CAUTION: these symbols can be misinterpreted as an indication that the images are in the public domain.
 - CAUTION: Creative Commons licenses are irrevocable.

Statutory damages – a reality check

- As noted earlier, only works that are registered prior to the time that the infringement begins are eligible for statutory damages and attorney's fees in successful litigation. 17 U.S.C. § 412, 504
 - Statutory damages are available if registered: \$750-\$30,000 “per work”; up to \$150,000 for wilful infringement.
 - *Question*: Twenty of my photos, all of which are separately registered with the U.S. Copyright Office, are wilfully infringed. What are the odds that I will receive \$150,000 x 20 in litigation?

Questions?

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