



THE PHOTOGRAPHER'S GUIDE TO **COPYRIGHT**

an educational guide from



PHOTOSHELTER



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Nepal Maoist Revolution



JAY GOODRICH

HOME PORTFOLIO ABOUT STOCK TRIPS BLOG CONTACT



WHO AM I

Formerly trained as an architect, now utilizing my knowledge of design to produce compositions with strong graphic elements.

ADVENTURE

Searching out some of the greatest locations our world has to offer via planes, trains, automobiles, and more.

PHOTO

Looking for new approaches and angles to produce images for editorial and commercial clients that attempt to rise above the mundane.

JOURNALIST

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craig stephen
photography

ABOUT WEDDINGS PORTRAITS BLOG CONTACT



LET ME TELL YOU A
LITTLE BIT ABOUT ME



PORTRAIT & FAMILY
PHOTOGRAPHY

I have photography portraits & family groups. I approach them much like my wedding photography, using available light wherever possible and shooting on

FILM WEDDING
PHOTOGRAPHY

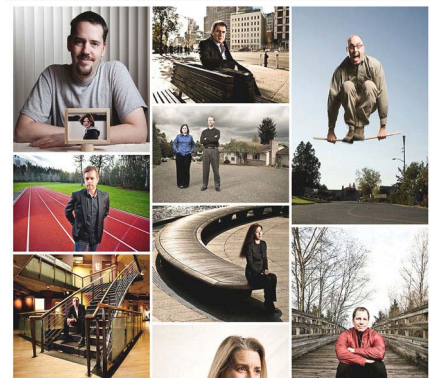
I'm one of a relatively small number of photographers in the UK photographing weddings & civil partnerships on traditional film. Photographing on film allows

Let's make
something beautiful

Let's make something beautiful with a little bit of love. Let's make something beautiful with a little bit of love. Let's make something beautiful with a little bit of love.

brian smale

HOME PORTFOLIO GALLERY SEARCH ABOUT WEDDINGS CONTACT



MY ACCOUNT CART

MOTT MOTT MOTT

COMMERCIAL WEDDINGS EDITORIAL

HOME GALLERIES SEARCH ABOUT MOTT VISUALS CONTACT MOTT VISUALS WEDDINGS CONTACT BLOG LIFESTYLES



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Professional Business Practices in Photography

Digital Photography Best Practices and Workflow Handbook

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COMMUNITY

Strictly Business Blog

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Social Networking

The screenshot shows the ASMP website homepage. At the top is the ASMP logo and the text "AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS". Below this is a navigation bar with links: "Find a Photographer", "Join ASMP", "Member Login", and "Quick links" with a dropdown menu. The main content area features several sections: "Why Join ASMP?" with links to Business Resources, ASMP Fundamentals, Chapters & Groups, ASMP Seminars, Video Library, Event Calendar, News, About ASMP, and Contact; "ASMP Store" with links to Information For Members, Photographers, Creative Community, Legal Community, and Media; "FEATURE" section with "ASMP's Member Benefits" and "ASMP Free Webinar Series"; "EVENTS" section with "ASMP Free Webinar Series"; "NEWS" section with "ASMP Advocates for You"; and another "FEATURE" section with "Connect With The Best". On the right side, there are three featured images: a pair of green high-heeled shoes, a still life with fruit, and a collage of people's faces. Below these images are captions: "© Richard Pierce Photo", "© Mary Ellen Bartley", and "Photography © Shawn G. Henry". At the bottom, there is a footer with social media links, contact information, and copyright notice.

Find a Photographer Join ASMP Member Login Quick links Choose

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Business Resources
ASMP Fundamentals
Chapters & Groups
ASMP Seminars
Video Library
Event Calendar
News
About ASMP
Contact

Search ASMP Go

ASMP Store
Information For
Members
Photographers
Creative Community
Legal Community
Media

Affiliated Sites
CameraCake.com
dpBestflow.org

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Connect With The Best
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Best practices for registering your photographs
ASMP TUTORIAL

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Think Tank Photos Hertz PDN
Dailymotion Zipcar
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Best Practices and Workflow

Cameracake.com resource sharing site



AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS

Introduction

If you're like many (many!) photographers out there, then United States copyright law—from its benefits to its drawbacks—is probably pretty daunting. Maybe you have a decent grasp on copyright, you've written a few licenses, you might have even registered an image once. But getting to know copyright the way you know f-stops and shutter speeds? Impossible. In fact, it's a relationship you're not even sure you want.

That's ok.

But here's the thing: Understanding the ins and outs of copyright is an asset to your business. As the world of professional photography continues to move online and photographers delve into motion or multi-media projects, it will become increasingly important to understand what rights your creations are granted and what options you have in defending those rights.

You have nothing to lose by educating yourself on U.S. copyright. And it's not too late to start—you won't be intimidated by the work of registering the images in your personal archive once you know what's at stake. As commercial and editorial photographer Luke Copping says, "The way to approach registering a backlog of images is like the old saying 'How do you eat a whale? One bite at a time.'"

To start, let us give you a snapshot of what copyright for photographers is all about. You should use this guide as a reference to help navigate resources or to determine which aspects of copyright are important and relevant to your photo business needs.

Let's get started.

What is Copyright?

When we refer to copyright, what we're actually talking about are the rights granted by Congress under the Constitution and that come from [Copyright Law](#), or more specifically, the Copyright Act of 1976. The Copyright Act of 1976 was a copyright law statute revision. This act gave the photographer, not an employer or client (except for works made for hire), the copyright ownership, as well as six exclusive rights. This act, under a later amendment in 1998, also extended the copyright to last the author's lifetime plus 70 years.

Copyright Act history

The term “copyright” is pretty literal. Let's break it down, and to do that we have to go back in time.

As Richard Kelly, Pittsburgh-based photographer and former president of the ASMP says, artists might be surprised to learn that “copyright wasn't necessarily originally designed for them. Copyright was designed to control copying.” He means copying in the sense of duplication, not using work without the creator's permission. “It really had nothing to do with compensation to authors in the very beginning,” said Richard. In fact, copyright protection was originally created with book printers in mind. In the U.S., [copyright law dates back to 1790](#). However, the date that most people will refer to as beginning the modern era of copyright is 1909.

Since then, advancements in technology have necessitated that changes be made to the Copyright Act. Copyright originated in an era when copying something was about as tough as making the original. Enter the [Xerox machine \(1959\)](#), say hello to Sony's [video cassette recorder \(1975\)](#), and modern concerns start to take shape. The most current Copyright Act that governs our interactions with copyright is that of 1976. Considering all that's happened since then (the personal computer and the internet to name a couple), you start to understand why you've flipped through some 60-odd pages before signing a software license agreement; there are many types of copying to account for these days. For more information, check out [The ASMP Guide to New Markets in Photography](#).

What rights does copyright provide?

So what exactly does copyright mean for you, the photographer? Copyright law is a way to incentivize people (you) to make creative works by giving legal authorship to creators (you again). Copyright grants what is referred to as a “limited monopoly” on the work (and when we say “work,” let's assume for the sake of this guide that we're talking about a still photograph) that you've created, which gives you the ability to profit from the fruits of your labor. As the creator of a copyrighted work, you have in fact [six exclusive rights](#).

Your 6 exclusive copyright rights allow you to:

- ❶ Reproduce your work.
- ❷ Make derivatives of your work.
- ❸ Distribute your work.
- ❹ Perform, [in the case of literary](#), musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works.
- ❺ Publicly display your work.
- ❻ Perform, [in the case of sound recordings](#), by means of a digital audio transmission.

So how do you get a copyright?

The Copyright Act states that, as soon as a work has been set, fixed, written, typed, or recorded in a tangible medium, then it has an automatic copyright attached to it. So as soon as you've snapped a picture—the moment light was captured and imprinted in the mechanism of the camera—you've created an original work and become its “author.” (There are, of course, a few exceptions that you will read about later on in this guide.)

What is copyrightable?

COPYRIGHTABLE	NOT COPY RIGHTABLE
Original photographs*	Ideas
A creative expression of an idea	Natural occurrences
The creative elements expressing an idea, such as lighting, posing, cropping, etc. **	Unoriginal photographs*

*What constitutes originality: Originality is not defined by the Copyright Act. Basically, if brought to court, this will be decided by a judge through precedent and legal interpretation based on the situation at hand.

**Copyright can protect personal creativity by distinguishing between ideas (or concepts) and the way artists interpret (or express) an idea. A lamp next to a window is different than a photograph of a lamp next to a window because a photographer using his or her “eye” captured the scene, and it is therefore a unique (original) expression.

DID YOU KNOW?

- **Displaying the © symbol is not necessary.** However (as per the saying), you can help keep “honest people honest” by displaying the © symbol along with your name, the year the work was first published, and even an, “all rights reserved” warning so that those who don’t know won’t make the mistake of thinking your photos are free for their use.
- **You don’t need to renew a copyright.** However, there are actions to be taken when considering your images’ legacy in estate after you’re gone. More on that can be found on the [ASMP’s website](#).
- **Though all current copyrights last life plus 70 years,** if you’ve been taking pictures for a while, since before 1978 for example, you should refer to this guide on the [American Society of Media Photographer’s website](#) for information regarding the varying lifespans of older copyrights.
- **Copyright held by corporations lasts 95 years from the publication date or 120 years from when it was first made,** whichever happens to be shorter.

The Digital Millennium Copyright Act (1998)

The Digital Millennium Copyright Act (DMCA) makes it possible for online social sharing services to exist without being held liable as a “secondary copyright infringer” should an individual post a copyrighted work not his own and the author wants it removed. The DMCA created a protocol for officially asking that images be removed from a site (a “takedown notice”).

“Since much of our work ends up online, photographers should be familiar with the DMCA (Digital Millennium Copyright Act),” says [Liz Ordonez](#). “If an online service provider meets the requirements set by the Act, Title II creates a safe harbor for them against the liability of infringement. Initiating a legal claim against an online service provider without first going through the resolution process dictated by DMCA could turn the tables against you. Consider first if the use of your image is protected under “Fair Use”. If it is not, find the ISP of the host website displaying your work and seek advice on drafting a proper “Takedown Notice”.”

What should every photographer know about the Digital Millennium Copyright Act?

[Chris Reese](#), attorney and author of [ASMP Social Media Terms of Service Recommendations](#) elaborates: “[The DMCA] allows social sharing services (e.g., Facebook, Flickr, etc.) to exist in a way that they wouldn’t be able to if they didn’t have that safe haven. In my mind, the DMCA simply provides a mechanism for you to complain. To a large degree it’s not about protecting the copyright, it’s about protecting the services.”

He continues, “It’s sort of a bargain between the copyright owner and the services that allow people to post things without having to research every single posting. It’s kind of an opt-out plan—the copyrighted works get posted until someone says ‘no,’ and then they yank it.”

Licensing and copyright

Because there are many ways to slice the six part copyright pie, you can license any combination of rights imaginable. Licenses can be written using everyday language and following any format. There isn’t even a requirement that they be in written form at all. However, your licenses are more likely to hold up in court if you use the industry accepted terms and definitions provided in the [PLUS glossary](#) and follow the bullet point format recommended in the ASMP/CCC webinar, [How to Write \(and Read\) Licenses](#).

And there are of course exceptions to almost every rule. One very important exception to the rule about not needing a signed, paper license agreement is “work made for hire.”

Work made for hire (WMFH)

Established in the 1976 Copyright Act; Section 101, “[Work Made for Hire](#)” (WMFH) is a technical and very inescapable copyright caveat. WMFH applies to two different categories of relationships: employer/employee and client/ independent contractor.

If you are hired as an employee (let’s say, a staff photographer)—not an independent contractor—and your job description includes taking photos, then the copyrights to the images you make do not belong to you. Your employer is considered the creator of the images you took, and you have no rights to the images unless your employer voluntarily gives some to you. No signed document is necessary; WMFH kicks in automatically. However, if you make photographs as an independent contractor for a client and those photographs are to be used as part of a collective work, Work Made for Hire can be created if:

1. you and the client agree before you start the assignment that the images are to be considered works made for hire, and
2. that agreement is confirmed in writing signed by both you and your client. In the client/independent contractor relationship, the signed agreement serves to assign the independent contractor’s copyrights to the client as though he were an employee, even though the independent contractor receives no employee-related benefits.

NOTE: The written agreement itself does not have to be signed before work commences. This is why some unscrupulous clients will try to slip a WMFH agreement into the endorsement area of their payment check.

Check out more on WMFH on copyright.gov.

When does work made for hire benefit the photographer?

Richard Kelly, Pittsburgh-based photographer and past president of the ASMP, weighs in:

1 FOR WEDDING PHOTOGRAPHERS (or photographers who are in a position of hiring other people to create copyrightable works): Many times, the wedding photographer who has been hired by a bride and groom plans to hire a second or maybe third shooter to work with her. The collective work that they create is going to be licensed to the bride and groom. It would be very complicated for the bride and groom if they had to negotiate with each of those three photographers. They want to work directly with the person they hired.

It’s not uncommon for the primary photographer to get the other photographers to sign a WMFH agreement. That may involve commissions, and it may involve additional royalties paid to them if their pictures are licensed to the couple. There are all sorts of ways it could be carved up, but it’s important because otherwise those other photographers could have copyright claims against either the primary photographer or the bride and groom if the paperwork isn’t handled correctly.

2 FOR PHOTOGRAPHERS PRACTICING MULTI-MEDIA OR VIDEO PRODUCTION: Another area where WMFH comes up is in multi-media or video production. You have multiple creatives who are all creating copyrightable works: an audio person creating audio tracks, a director of photography capturing video or film footage, etc. If you don’t have an arrangement up front, which often includes a WMFH agreement, ownership of the resulting work gets really complicated really quickly, and to undo it later is very complex.

3 IF YOU ARE HIRED FOR AN EMPLOYED POSITION, for instance in a web company or newspaper, and your job description, for which you are paid a salary, as a photographer or includes photography, then, yes, that work is owned and under the copyright of the employer.

4 IF AN INDEPENDENT PHOTOGRAPHER IS HIRED FOR AN ASSIGNMENT, that is a different situation, and the photographer would retain copyright unless an agreement to assign the copyright or to treat the assignment as work made for hire is made prior to starting the photography.

A note on Creative Commons

[Creative Commons](#) (CC) is a non-profit organization that developed a set of standardized licenses for creative works. Creative Commons licenses are built on top of copyright, and Creative Commons recommends that those using the license register the copyright with the Copyright office. The Creative Commons license can be recognized by a set of symbols or icons. Most people misinterpret the Creative Commons symbols, thinking they mean that the images are in the public domain; that it's a way to spread the love. But that's not the whole picture.

There are [six CC licenses](#) that range from requiring someone to attribute the work to you, all the way to restricting the way your image can be used.

Professional photographers who want to share images under a Creative Commons license need to understand that these licenses are irrevocable.

A note on PLUS

The [Picture Licensing Universal System Coalition](#), or PLUS, was created to deal with the potential for human error in writing licenses by establishing internationally accepted licensing standards, as their [website states](#):

“Through standardized language and a machine-readable coding architecture, image licenses become more transparent, more fair, and much simpler for everyone.”

One of the PLUS Coalition's goals is to help photographers and their clients track licenses. This is a huge problem in the digital age as the license information, which is usually delivered as text on an invoice, cannot be permanently embedded in the image data. Even if it were possible to lock metadata, the moment a license was renewed or modified, the embedded information would be obsolete.

Future plans of PLUS include a searchable license registry or database of images and their corresponding licenses. Photographers and clients will be able to go to one place, the PLUS registry, to update all information associated with an image including modified licenses and the photographer's contact information. Not only will this mitigate the risk of orphaned works (works whose owners are unknown or can't be located) but it will make it much easier for potential clients to track down the creator of images found on the web and license them legally.



TIP

HOW TO AVOID BECOMING AN ORPHAN: ADD CONTACT INFO TO YOUR METADATA

- Don't forget to include identification information in your image files. There are many reasons to do this not least of which is infringement. If someone wants to license an image but can't locate you as the owner of the copyright then everyone misses out. There is also something called “[orphan works](#),” which are works whose owners are unknown or are known but cannot be located. Orphan works are photo pariahs—galleries, archivists, movie-makers, etc. who don't want to risk using them for fear of being sued if the image owner suddenly appears. This means that potential clients can't license the images either, so no one wins.



Photo Credit: Richard Kelly

Registering Copyrights

By James Cavanaugh, ASMP Past President



While copyright is automatic, registration of your photographs with the United States Copyright Office is necessary to receive the full benefits and protection contained in the current copyright laws.

Registration is required before any legal remedies may be sought in federal court. Remember that registration not only protects you as the photographer, it also protects your clients' interests in the case of an infringement.

ASMP recommends that all photographers register their work in a timely manner and, if practical, before the work is published.

Today, the easiest way to accomplish this is using the Copyright Office's online registration system, eCO (Electronic Copyright Office). You can find eCO registration information by visiting www.copyright.gov. eCO allows photographers to register individual photographs as well as groups of unpublished photographs and certain groups of published photographs.

There are three components that must be completed in a copyright registration:

- ① The application
- ② The registration fee payment
- ③ Upload or delivery of copies of the photographs being registered (eCO allows you to immediately upload digital copies of your photographs for the registration.)

Workflow integration

One roadblock for many photographers is assembling the copies of the work to be registered. Making registration part of your normal workflow is the best way to assure this can be accomplished.

As part of your normal workflow, batch process copies of your files and put them in a folder for copyright registration. These images can be jpeg files that are 600 pixels wide. This should be done after files are renamed, metadata added, and basic corrections and editing are complete. This way when you're ready to complete a registration, all of your images are in one place, ready to be uploaded.

UPLOADING IMAGE FILES TO REGISTER: To electronically upload the files, they must be put into a zipped folder using software like [WinZip](#), [Stuffit](#), or the compression software built into Apple's Operating System.

UPLOADING PROOF SHEETS: Photographs can also be put into a PDF proof sheet format. This can easily be accomplished in programs like Lightroom or Bridge. However, the metadata will be lost for individual images.

SHIPPING PHYSICAL COPIES TO BE REGISTERED: If you cannot or do not wish to electronically upload your images, you can ship physical copies to the Copyright Office. These can be physical prints or copies of the files on CD-ROM. The registration software will prompt you to print a shipping label if you select this method.

Registering in batches: What to know

While current registration regulations allow groups of photographs to be registered

on a single application, the Copyright Law prohibits the registration of published and unpublished photographs together in the same application. This is another roadblock that often stops photographers dead in their tracks when considering registering work. But really, all you need to know is: What does “published” mean?

Registering published and unpublished work: What constitutes publication?

The current copyright laws, drafted in the mid 1970s, define publication 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 goes on to say, “A public performance or display of a work does not of itself constitute publication. Generally, publication occurs on the date on which copies of the work are first distributed to the public.”

This nearly 40-year-old statute does little to address or clarify the myriad publication options in our digital era. It’s clear that distribution of a traditional print publication like a book, magazine, newspaper, or calendar constitutes publication. But what about a website, blog or social media platform?

Though ultimately up to the interpretation of the courts, there are guidelines you can follow, based on past court cases and ASMP recommendations, when choosing to register as published or unpublished:

PUBLISHED	UNPUBLISHED
Website available to the general public	Password-protected web site or section of a site (client galleries, etc.)
Blog available to the general public	Your portfolio
Social media sites	Images delivered to clients
Images delivered to a stock agency for distribution	Prints on public display (e.g. a gallery show)

Register ASAP

Compounding the issues for photographers is the fact that clients rarely inform photographers when they “publish” their images or which images from an assignment were used and which were not. For some business-to-business applications, the lag from

delivery to publication may be months. For photojournalists, the time between delivery and publication can sometimes be measured in minutes.

This is why it is so critical to register your work in a timely manner, and if possible, before publication takes place.

REGISTERING LARGE BATCHES OF UNPUBLISHED WORK: Large groups of unpublished works may be registered in a single registration. In fact, the regulations allow for registering images from various years, going back to March 1989 (the date the United States adopted the Berne Convention for the Protection of Literary and Artistic Works).

REGISTERING BATCHES OF PUBLISHED IMAGES: Groups of published images may also be registered on a single claim if they are from the “same unit of publication.”

Unfortunately, we do not have a clear definition of what constitutes a single unit of publication. The Copyright Office has been reluctant to offer solid guidance on this question. The unofficial opinion is that traditional print publications, a book or magazine, likely meet this definition, but a website may not constitute a single unit of publication. However, as of publication of this guide, this has not yet been addressed by the courts.

Groups of published images can also be registered in a single claim even if they are not from the same unit of publication “if (a) all the photographs are by the same photographer (if an employer for hire is named as author, only one photographer’s work can be included); (b) all the photographs are published in the same calendar year; and (c) all the photographs have the same copyright claimant,” says Vic Perlman.



TIPS

- Keep all of the images for a registration within a single calendar year.
- Limit the number of total images being registered to prevent a court from equalizing (reducing) damages based upon the total number of images in a given registration. This is based on a few recent court cases. Registering 500 images is better than 5,000.

See the U.S. Copyright Office's "[Group Registration of Published Photographs](#)".

The Copyright Office is also running a pilot project that allows photographers to register groups of unrelated published images on a single registration. You need to contact the Copyright Office for permission and guidance before making this type of registration. Again, ASMP recommends that the date of first publication of each image fall within the same calendar year. Note that the current eCO application only provides for a single date of first publication and not a range of dates.

REGISTERING A SINGLE PUBLISHED OR UNPUBLISHED IMAGE: Single published or unpublished images may also be registered using eCO. This may be applicable for a single important image.

Registration fees

ELECTRONIC PAYMENT: Fees for a registration using the eCO system are currently \$35 per registration. You may pay via credit card or by a direct debit to your bank account. Currently, using eCO, the time to receive your certificate is about 100 days.

PAYING BY MAIL: You have the option of using the old paper forms for registration. However, the fee is \$65 and the time to receive your registration certificate may be a year or more.

NOTE: The Copyright Office is currently reviewing its fee structure with the goal of making the office's budget 100% self-sustaining from the fees it collects. So increases in fees in the near future are likely. A [complete list of current fees](#) for the Copyright Office can be found on their [website](#).

When is your work officially registered?

It's important to note that the 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.

Using the eCo registration website

The eCO registration website is a bit less than user-friendly. ASMP recommends that you review their [Step-by-Step Tutorial For Online Registration](#) for your first few registrations. However, after you have gone through the process a few times, it should take no more than 10 minutes to complete a registration.



TIPS

WHAT TO KNOW BEFORE YOU REGISTER WITH eCO

- The Safari Web browser does not work with eCO. You need to use a browser like MS Internet Explorer or Firefox to register.
- On your first visit to the eCo registration website, you will be required to set up your account along with a user name and password. This only takes a few minutes.
- If you upload your images electronically, you must now also close the upload. This is a new step added in the past few months. Failure to click this box will leave your registration in limbo and it will be closed 90 days later without completing your registration or giving any notice to you.

Registering a backlog of images

A final roadblock for many photographers who have never or infrequently registered any of their work is the daunting task of registering years or even decades of work. ASMP recommends that you start a regular regime of registration today with all new work created. And as time and budget permits, go back through your legacy work and register your important published work.

Detailed information on frequently asked questions on registering your photos can be found on the [Copyright Office's website](#).



DID YOU KNOW

- Publishing a book with new works included doesn't automatically register the photos.
- The U.S. is the only country in the world that requires works be registered once they are created in order to receive full economic as well as legal protection given by a copyright.

Protecting Yourself: What Else Can You Do?

Equipping your images with metadata

[Metadata](#) is the information included in your photo's digital file when it's downloaded from your camera. The standard is the file name, but the more information you can add to this, the better—your contact information, copyright registration, website, keywords, etc. By including metadata, your images are essentially equipped with a tracking device. It will help potential clients locate you when they run across your images out of context, and it will help you prove what's yours is yours. Think of it like sewing digital tags into the collar of your photographs' sweaters before they go off to play with the rest of the photos on the playground.

There are a few different ways to access and edit metadata, and they are all software-based.

A note on IPTC

[The International Press Telecommunications Council](#) created a standard set of information to be embedded in text and image files—essentially a good set of guidelines for what to include in metadata and a method for doing it.



DID YOU KNOW?

METADATA ISN'T A FAIL SAFE.

- Unfortunately, metadata can be wiped from your files by the savvy scammer. But, it's not always a scammer that can wipe metadata. This is one reason to read a terms of service agreement before posting your images to websites not owned by you, because you might be allowing them to clear your metadata. Some social sharing sites claim that, as an issue of storage space, the data has to go. There's a lot of debate over the validity of the practice.

Watermarking your images

Watermarking means stamping your name or brand across an image. A watermark can be likened to branding cattle before they make their way un-shepherded across the Internet.

It can certainly be a good practice, but don't rely on watermarking to protect your images.

Tin Eye

[Tin Eye](#) is a program that lets you do a “reverse search”—you start with one of your photos and then Tin Eye will retrieve likenesses posted anywhere online. Tin Eye is not free; it requires a monthly subscription. The plans start at \$200 a month (plus a \$500 set-up fee and \$.01 per image search) and go up to \$1,500 (plus a \$500 set-up fee), which includes up to 50 million searches.

PicScout

[PicScout](#) is similar to Tin Eye; however, PicScout is a free Internet browser app add-on. It works two ways: by helping photographers keep track of their images, and by helping buyers, researchers, etc., identify images and locate the contact info of the copyright owners.

Disable “Right Click”

One quick and easy thing you can do to help protect your images online is [disable right-click](#). This means that when someone goes to “[right-click < save image](#)” there is no “save image” option. PhotoShelter has a built-in “image theft guard” function that automatically disables right-click downloads.

Additional Resources:

[Digital Photography Best Practices & Workflows \(dpBestflow\)](#)

[How to Embed Metadata: Tutorial](#)

[Embedding Metadata Using PhotoShelter](#)

[PhotoShop](#)

[Lightroom](#)

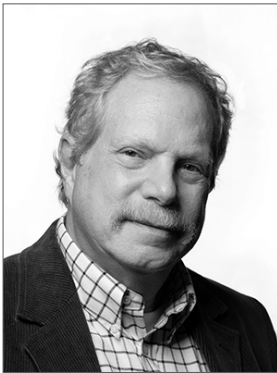
[Aperture](#)

[Photomechanic](#)

[PhotoShelter](#)

Fair Use

By Eugene H. Mopsik, ASMP Executive Director (left) and Victor S. Perlman, ASMP General Counsel and Managing Director (right)



Fair use is one of the grayest of gray areas, and possibly the most misunderstood, in copyright law. It's not a right (as commonly believed) but a defense that is raised when there is an infringement claim.

Ultimately, whether a particular unauthorized use of copyrighted materials qualifies as

fair use can be determined only by the courts—everything else is just guesswork and opinion. Sometimes, though, even the court decisions seem to come down to guesswork and opinion. There's probably no better example than Supreme Court Justice Potter Stewart's famous quote—when expressing frustration trying to define obscenity he said, "I know it when I see it."

Fair use exists in the U.S. because of §107 of the [U.S. Copyright Act of 1976](#).

In the introductory section of the Act are some examples of the types of purposes that the fair use provision is intended to support: "... criticism, comment, news reporting, teaching, scholarship, or research..."

This list is not exclusive or comprehensive, so uses for other purposes may qualify for fair use. We know this because that list is preceded by the word "including." Conversely, just because a use is for one of the listed purposes does not mean that it is automatically fair use.

For example, if uses for teaching purposes were automatically considered fair uses, there would be no textbook publishers left in business, since most of the buyers of textbooks would simply make unauthorized copies of desired books rather than buying copies, and the infringers would be protected by fair use.

The statute goes on to make it clear that each claim of fair use has to be determined on a case-by-case basis ("...determining whether the use made of a work in any particular case is a fair use..."). This means that, where fair use is concerned, there are no absolutes or black and white rules.

If you ever hear a statement to the effect that "ABC is always fair use" or "XYZ is never fair use," you can be pretty certain that the statement is not true or accurate.

What is considered Fair use?

The language of §107 then goes on to provide some guidance in how to determine whether a particular use is a fair use by providing a list of four factors to take into account when analyzing the situation:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Again, the statute uses the word “including” to show that the list is not comprehensive or exclusive, so other factors may be considered. Similarly, no single factor is determinative, and all must be considered.

The courts have varied from time to time in their opinions as to which of the four factors is the most important. Since the statute requires a consideration and discussion of each of the four factors, that is the approach that we are taking here.

Breaking down these four factors

① THE PURPOSE AND CHARACTER OF THE USE, INCLUDING WHETHER SUCH USE IS OF A COMMERCIAL NATURE OR IS FOR NONPROFIT EDUCATIONAL PURPOSES

The goal of the first factor is to consider the public benefit versus the private benefit of the use. Under the first factor, a number of myths have evolved, including:

MYTH #1: Absolute statements (referred to above), such as “no commercial use can ever be fair use;” “nonprofit educational uses are always fair uses,” etc. are true.

MYTH #2: Originating from a [1990 Harvard Law Review](#) article that was cited with approval by the [U.S. Supreme Court in 1994](#) where the concept of a “transformative” use was a fair use.

Unfortunately, over the years, the concept of what “transformative” really means has become misunderstood and misinterpreted, especially by the public, so that many people believe incorrectly that any change made to a copyrighted work, no matter how slight or insignificant, is enough to qualify as a fair use.

Case Study: What counts as “transformative”

A great way to judge the impact of the “transformative” concept is to compare the different results in two cases claiming infringement of photographs by sculptor Jeff Koons. In [Rogers v. Koons](#), which was decided by the Supreme Court in 1994, a sculpture closely resembling, and based on, a photograph of a couple holding a group of puppies was found to be an infringement, not a fair use.

However, in [Blanch v. Koons](#), which was decided in 2006, a mural-size painting that incorporated a photograph of a model’s legs and shoes as only one of its elements was found to be a fair use.

ROGERS V. KOONS: FOUND TO BE AN INFRINGEMENT, NOT FAIR USE



Rogers' original photograph



Koons' sculpture based on Rogers' photograph

② THE NATURE OF THE COPYRIGHTED WORK

The second factor is important because one cannot own a copyright for an idea or concept, only for one’s personal expression of that idea or concept. Because of this, works that are fictional or highly creative tend to be heavily protected by copyright, while factual and scientific works tend to have very thin protection. In other words, the second factor is more likely to be found in favor of fair use where a work is factual or scientific and less likely where it is fictional.

Case study: What is considered factual or scientific?

A good example of this is the decision in [Dyer v. Napier](#), (see page 16) where a photographer set up a scene in which a mountain lion cub was placed on a dangerous outcropping of rock and the mother lion was then released to retrieve the cub and move him to safety. This photograph was used as the basis for a very similar statue, which was found to be a fair use.

DYER V. NAPIER: FOUND TO BE FAIR USE

Dyer's original photograph



Napier's sculpture based on Dyer's photograph

3 THE AMOUNT AND SUBSTANTIALITY OF THE PORTION USED IN RELATION TO THE COPYRIGHTED WORK AS A WHOLE

The third factor takes into account the quantity and quality of the original work used in the unauthorized one. As one would logically expect, generally, the more of a work that is used without authorization, the less likely the use is to be found fair under this factor. Similarly, the more significant the portion of the work that is used is, the less likely the use is to be found to be a fair use under the third factor. Once again, though, remember that no single factor will determine a finding for or against fair use.

Case Study: Determining quantity and quality

The decision in [Bill Graham Archives v. Dorling Kindersley](#) in which a book showing copyrighted Grateful Dead posters reproduced in their entirety, but reduced in size and combined with other material, was found to be a fair use.

4 THE EFFECT OF THE USE UPON THE POTENTIAL MARKET FOR OR VALUE OF THE COPYRIGHTED WORK

The fourth factor takes into account the potential financial impact of the unauthorized use on the copyright owner. This factor is one of the reasons why almost every infringer

tries to claim that the unauthorized use benefited the copyright owner in some way, often by way of “free advertising.” An important thing to remember is that, under the decision in the Grateful Dead poster case mentioned above, the loss of a licensing fee that the copyright owner would have charged the unauthorized user who is claiming fair use does not count. Otherwise, the fourth factor would have to be found in favor of the copyright owner in every case.

Remember, there are no absolute rules regarding fair use. When in doubt (which is just about every situation involving fair use), talk to a competent copyright lawyer.

Additional Resources:

ASMP/CCC webinar: [“The Future of Art & Commerce: Understanding Fair Use”](#)

ASMP's [Copyright Tutorial](#)

Stanford University's [Summary of Fair Use Cases](#)

You've Been Infringed: Now What?

So what happens when you've been hunting for your images online and have found one being used illegally? Richard Kelly says that if you haven't asked yourself what you'd do in that situation then you shouldn't go looking. "We are all emotionally attached to our babies," he said. "We get so connected to that emotion, that when we find out that our creation has been taken by somebody without our permission, the emotional reaction is probably greater and more visceral than the actual commercial value that you've lost."

There are a few actions you can take before Googling lawyers who specialize in copy-right infringement for photographers.

ASK FRIENDS AND OTHER PHOTOGRAPHERS FOR ADVICE: Sometimes diffusing the emotion of having been infringed is far more valuable than you would realize. Don't dig yourself into a potentially expensive and deep legal hole before understanding the gravity of what's happened.

GET A RECOMMENDATION: Googling is great, but not all legal counsel is created equal. It's very important to find someone with your best interests in mind. Some lawyers might have ulterior motives, like getting you into court when you'd be much better served settling on your own.

MAKE FRIENDLY CONTACT: [Liz Ordoñez](#), a Florida-based photographer with experience dealing with infringements, strongly advises reaching out to the person who has used your image without permission (in a non-threatening way, of course!) after you have completed your research and formulated an action plan. How does she go about it? She says, "First I introduce myself and let them know that I've come across the unauthorized use of my images under their company name. I explain that I own the copyright and per copyright law, all use has to be authorized by the copyright owner. The written use authorizations I provide, called a Use License, require payment of a Use Fee and it's how I earn a living. I then ask that the use stops immediately since it harms my business and

request a complete list of all uses to date so that I may calculate a fair use fee for all past use. I'm willing to assume that they did not intend to harm my company and say, if you'd like to continue using the images in the future, I will gladly & without a penalty, provide a quote that is commensurate with the use needed." Be sure to keep a verifiable trail of all contact or attempts to reach the infringer.

MOVE FORWARD WITH LEGAL PROCEDURE FOR REGISTERED PHOTOGRAPHS: If you found one of your images that you think has been used in a way that violates any of your rights, there are two things you'll need to prove:

1. That someone had "access" to your image.
2. That the image shows "substantial similarity" to yours.

This is where things get really murky. Having access could mean all sorts of things (a photo editor who received the infringed photographer's work had access; a photographer's client's associates, etc.). A good practice is to provide a [delivery memo](#) and require a signed receipt for any work that you send—this is proof that someone did in fact have real access. Ultimately however, keep in mind that factors of "substantial similarity" and "access" will be determined by a judge (sometimes with the aid of expert witnesses).

WHAT WILL HAPPEN: You can file an injunction, which is a court order delivered to the infringer (individual, company, etc.), asking for the unlawful use to end. In court you can ask for damages. For statutory damages and attorneys fees to be awarded, the images must be registered prior to the infringement (or within the three month grace period allowed after the image is first published).

DAMAGES: If your infringed images have been registered, then you can ask the infringing party to pay damages. That includes whatever money you lost due to the use of your

images (a licensing fee, for example) and whatever money the infringing party made from the use of your images. Of course these numbers are very difficult to estimate, which is why the term “statutory damages” exists. Statutory damages is determined by the courts and is a sum that takes into account the context of the image use and the profit of the user and awards the copyright owner accordingly.

For statutory damages and attorneys fees to be awarded, the images must be registered prior to the infringement.

If the images are registered after the infringement but within the 3-month grace period after first publication, statutory damages and attorneys fees can still be awarded. Images registered after the infringement occurred and after the three month grace period has expired are not eligible for statutory damages or attorneys fees. You can read more about that [here](#).

DID YOU KNOW?

- **Statutory damages can be up to \$150,000 for each image.** That means that if one person or “entity” infringes on your copyright one time, but with more than one image, the award is based on each image rather than the act. This number can also be as low as \$200.
- Punitive damages are not awarded for copyright infringement cases.
- The length of a typical case of copyright infringement varies. Copyright cases are determined in federal court; there is no small-claims court where cases of infringement can be handled.

Additional Resources:

[A Photo Attorney](#)

[Plagiarism Today](#)

[The ASMP Social Media tutorial for photographers](#)

[“Should photographers use Instagram?”](#)

[“Why Instagram is terrible for photographers and why you should use it”](#)

[Reporting claims of copyright infringement on Facebook](#)

[Controlled Vocabulary Survey of Metadata Preservation on social media sites](#)

[World intellectual property organization: WIPO](#)

Copyright for Motion and Video

By [Gail Mooney](#), photographer, filmmaker and storyteller



Motion pictures are audiovisual works consisting of a series of related images that, when shown in succession, impart an impression of motion, together with any accompanying sounds. Motion pictures are typically embodied in film videotape, or videodisk.

Copyright in a motion picture is automatically secured when the work is created and “fixed” in a copy. Only the expression fixed in a motion picture (camera work, dialogue, sounds, and so on) is protected under a copyright. Copyright does not cover the idea or concept behind a

work or any characters portrayed in it.

Live telecasts that are not fixed in copies and screenplays or treatments of future motion pictures do not constitute fixations of motion pictures.

What constitutes “publication” of a motion picture

Publication of a motion picture takes place when one or more copies are distributed to the public by sale, rental, lease, or lending or when an offering is made to distribute copies to a group (wholesalers, retailers, broadcasters, motion picture distributors, and the like) for purposes of further distribution or public performance. Offering to distribute a copy of a motion picture for exhibition during a film festival may be considered publication of that work.

For an offering to constitute publication, copies must be made and be ready for distribution. The performance itself of a motion picture (for example, showing it in a theater, on television, or in a school room) does not constitute publication.

There are two different copyright registration forms that most likely you will use when registering your “complete” video as well as the individual assets (still images, motion clips, music etc.) contained within the “whole”:

PERFORMING ARTS: FORM PA: Direct from the U.S. copyright office: “Use Form PA for registration of published or unpublished works of the performing arts. This class includes works prepared for the purpose of being “performed” directly before an audience or indirectly “by means of any device or process.” Works of the performing arts include: (1) musical works, including any accompanying works, including any accompanying words; (2) dramatic works, including any accompanying music; (3) pantomimes and choreographic works; and (4) motion pictures and other audiovisual works.”

In other words: Use form PA for published or unpublished works of the performing arts, complete movies, regardless of length.

VISUAL ARTS: FORM VA: Direct from the U.S. copyright office: “Use Form VA for copyright registration of published or unpublished works of the visual arts. This category consists of “pictorial, graphic, or sculptural works,” including two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams and models.”

In other words: Published or unpublished works of the visual arts, photos or three dimensional works of art like sculpture; both still images and motion clips.

Case Study—Registering the copyright for Opening Our Eyes

When I created a documentary with my daughter, I registered not only the completed film in its entirety, but the individual assets that we had created within the film, as well. It was a typical motion picture scenario where the production company, in this case, Nola Productions, owned the film—the completed movie. Nola Productions is an LLC that I had established for the production of a particular project or movie and I was the sole owner. But I also wanted to make sure that the individual assets that we had created for the film—the still images, footage and sound recordings were registered under our own individual names and that we maintained ownership of that content independent from the film.

As individual creators and artists, we each registered our still images and moving images (video footage clips) using the VA (visual arts) form under our own names. So therefore my daughter holds the copyright to all the imagery that she created while working on the film, as do I for the content that I created.

I registered the film to Nola Productions using the PA form (performing arts), LLC and Nola Productions holds copyright to the film as a whole.

As independent creators, and holders of the copyright to our work that appeared in the film, my daughter and I then licensed these images, footage and sound recordings to Nola Productions for use in the film *Opening Our Eyes*, in perpetuity, worldwide. It's a small but important distinction but we wanted to make sure that we both held ownership to the content we created, for future licensing considerations outside the context of the film.

We registered our individual assets online using the VA form and the film offline using the PA form. In our PA application we included a written description or synopsis of the film as well as a physical copy (DVD) of the completed film. We also registered the trailer of the film and have registered other versions of the film as it has been revised and re-cut for various lengths.

Additional Resources

Review of the TOS for the top video publishers: [YouTube](#) & [Vimeo](#)



Photo Credit: ©2010 Erin Kelly



Photo Credit: ©2010 Gail Mooney

Before Clicking OK: What You Should Know About Social Media

Featuring Chris Reese, Attorney and author of the [ASMP Social Media Terms of Service Recommendations](#)

Chris Reese served as General Counsel and Executive Vice President of SightSound Technologies, a tech company that developed technologies to sell audio and video files online. Chris has watched the market for creative goods buck the waves of technology that has both expanded the way artists can distribute their work and made monetizing it (and maintaining value) incredibly difficult.

These days social media is too often regarded as a sure win, when the truth is there is a lot to take into consideration before accepting the risks of participating. Chris took the time to talk us through what a photographer needs to know before sharing images online and using social media as a marketing tool.



Chris Reese, Attorney

What should a photographer consider before posting photos online?

The thing to realize is that anything that you can see or hear on the web, you can copy. At the absolute minimum you can take out your iPhone and take a picture of the monitor.

You really need to read the Terms of Service before you give a website access to your creative work. If you can imagine something being done that would make you angry after the fact, you need to understand whether you're actually giving them the right to do that very thing.

I had a professor in law school who used to repeat about civil procedure, 'You have to read the rules. You have to read the rules.' Those are your first commandments. It sounds obvious, but we don't often read the rules. It's not in our nature to wade through stuff that's unpleasant and boring. So typically we just don't.

What should a photographer be on the lookout for in any Terms of Service (TOS)?

The one thing to keep in mind is that almost every single terms of service will say that it has the right to change the terms of service. And typically it's without notifying you.

The primary thing to look for is whether or not they allow for the commercial usage of what you're posting. Most of them don't. Surprisingly, some do. Some say that anyone can take a picture, copy it, put it on a t-shirt and start selling it. You need to read the rules to see if you are permitting that kind of use.

What should a photographer take into consideration before using social media to market?

Anything that you put online is up for grabs and can be stolen. You have to keep that in mind. If you have the greatest song in the history of the world and you post that on YouTube for free, you might dramatically undercut your ability to commercialize it. On the other hand, it might not.

It's very easy for us to imagine that something we've created will all of a sudden catch fire and everybody will want it—that's the nature of creation. Is that likely to happen? Not often. When we decide to use the tools available to us through the Internet, being overly concerned about the potential for bad things to happen is probably just as much of a concern as overstating the potential for good things to happen.

What did your history with the music industry teach you in regards to how images are being shared online?

I started with SightSound at the very end of 1997. That was before the internet bubble kicked into gear. Not long after that, we were seeing the very beginning of music copying and sharing of bootleg copies of music.

In many ways it dramatically harmed the music industry and the lesson that I think the music industry learned, way too late, was that if you have a valuable copyright you have to offer somebody a high value copy at a reasonable price if the alternative is to have it for free.

What the music industry was saying year in and year out was, 'do not steal, but we will not sell it to you.' That just didn't work. The notion of selling a whole CD for \$16 versus a bootlegged version of the one song you want for free—that wasn't a competition.

At SightSound, we sent letters to all the heads of the labels, prior to Napster, that said 'the second most searched for word on the internet behind sex is MP3. You guys are in trouble.'

Why is stealing so rampant online and over social media?

There's a big difference between legal rights and technical ability. The technical ability to copy any kind of digital works these days is so much stronger than whatever legal rights you have to tell people not to copy it.

If, for example, you find somebody that just didn't read the TOS and they think they're allowed to take your photos and use your photos for a brochure—it's a careless mistake. They're not purposefully trying to steal. They think that they're allowed to take this nice picture of a bridge and put it on the cover of a brochure.

What can you do about it?

First of all, the chances of you finding out about it are very slim. But let's say you do. You send them a letter and if it's a company trying to do the right thing they'll say, 'Oops, sorry. It was a mistake.' They might pay a little money and not include it in their next brochure. But the more likely scenario is that you'll never find out about it and that's the nature of it. It's very complicated and time consuming to enforce legal rights.

How should a photographer approach an international Terms of Service?

I'm sure that international issues complicate matters a great deal. Again, it really comes down to enforceability. Do they enforce those rights the same way in all countries? The answer is no.

So are you bound by what you've agreed to when you click 'OK,' even if you didn't read all the tiny type?

The general answer is, yes. The reason for that is you couldn't really have commerce online if you had to show that somebody actually read the terms of purchase.

Most people think that when they sign something there must be a way to get out of it. That's really not true. It's incredibly expensive to get out of it. If you tell somebody they can have your picture forever and use it for whatever they want, and then it ends up in some horror flick that horrifies you...tough." An agreement is an agreement and the courts have generally said that agreeing to TOS is a valid and enforceable contract.

"The one thing to keep in mind is that every single terms of service will say that it has the right to change the terms of service. And typically it's without notifying you."

How to Address Infringement and Stay Out of Court

Featuring Liz Ordoñez, an architectural and interior-design photographer based in Florida

As a member of ASMP for over a dozen years, Liz has spoken and lectured on protecting image rights, what it takes to bring an infringement case to court and the best way to avoid it. Her own experience includes a major win as well as a significant loss. She says, “No artist in their right mind wakes up wanting to sue a client out of existence” or likewise pay “hard-cold-cash” when a case decision favors the other party. And yet, she says, given the chance, she would do it all again, “because it is a stake in the ground for photographers, our rights, and the value of our work.”



Liz Ordoñez, Photographer
www.lizphotos.net

What do you know now that you wished you'd known before making an infringement claim?

You should do everything within your power to stay out of court. I would say that out of all the infringements that I have found, very few of them deserved to go to that extreme.

If you want a judge to decide your case, you have to do it in federal court because the Copyright Act is a piece of federal, not state or local, legislation. Not all attorneys handle this, and you really have to do your research when it comes to whom you're going to hire.

In today's marketplace, everything lives online, and our lives are pretty much ruled by online markets. The fact is that your work is going to be used without your permission.

If I was to park my car in someone's driveway and they said, “Well, this is my driveway so now your car belongs to me,” you would think I'm crazy. But in fact that's what happens online when someone puts an image up on a website. The website owner says, “That image is here so now it belongs to me.”

That was what happened in the case that I lost. It was very painful. There were a lot of things that I could have done before my attorney filed that lawsuit. Examine every avenue. Filing a case should be the absolute last thing that you do.

Before it happens [your images are used without your permission], you need to realize that it probably will, and you need to have a strategy.

How can photographers develop a strategy, or prepare emotionally, for dealing with an infringement?

What I have come to learn after being across the table from someone whom originally I was very angry with, is that nine out of ten times these people didn't really understand what they were doing. Part of it is ignorance; part of it is laziness. But certainly most are not intentionally trying to harm you and your business.

We have to realize that we have a business decision to make, and even though we may get angry, the emotion is only going to hurt us. You might do things that you will regret later. You may make phone calls or send emails that are not going to help you.

What I suggest is to talk to a copyright attorney beforehand, but also talk to other people like myself who have gone through the process and who can tell you this is not what you think.

What should all photographers be doing on a regular basis to protect their images?

Many times when people call me and I say, "Well, what did your agreements say?" They say, "We didn't have an agreement." When I hear that I'm shocked.

Make sure that when you deliver images there is a written agreement included, and also that your files have metadata in them.

What should photographers do before filing a lawsuit?

Don't give up after the first time you talk to somebody. When it comes to the diplomatic recourse, before calling anybody I would go back and look at your written agreements—whom you licensed it to, how you delivered the files, and who had access to them. Because often photographers have left loopholes open.

How do people react when you confront them regarding an infringement?

Many times they'll tell you to go take a hike. Sometimes they'll insult you, tell you you're a greedy bastard. I've been told that. I've been told, "You already got paid for this, why do you want to get paid again?"

In those cases I have to be very patient and explain to them how this works. Most photographers don't understand copyright law, their rights and responsibilities. If they don't know, why would we expect the guy down the street to know?

"Protect your images while at the same time disseminating them in a responsible, strategic way using the technology that's available to you."

How do you approach someone who is using an image online without your permission?

Do it by phone, follow up with an email, send a certified letter. Do everything you can to connect with people because it humanizes the situation on both sides.

I look at the extent of the usage and how long they've been using it. If it's for a commercial usage, I have absolutely no problem asking for them to pay for the use. There's no way for me or anybody to quantify the benefits of the usage. But the fact that they wanted it to begin with tells me that my images have value.

I'm also very clear in saying, "I hope you're going to be forthcoming with a complete list of all the uses, all the media, and a calendar showing how long this has been used." And I will go out and do my own research first. I don't play poker, but you know what they say: "Don't show your hand."

If you're decent about it, chances are that some of these people may pay you. They may say, "You know what, I get it. And I'm sorry." That happened to me once. They did continue using the image, and they licensed the past use, and then they licensed it going forward.

What was the experience like for you?

It's unsettling. The first time that this happened I had a very emotional reaction. I felt like someone was stealing from me, and I took that very personally.

I didn't want it to appear like I would try to extort money out of somebody. I struggled with that, with the whole idea of filing a lawsuit. I battled with myself for a whole year before I filed this one lawsuit, and I did everything. I begged my client to come to the table and have a conversation with me. He totally blew me off. I said, "Listen, if you want I will license you the rights, but you have to pay more. You can't continue to profit from distributing my images thinking that you don't owe me anything. He refused. And having done that I said, "Well, in this case, I am washing my hands. You no longer want to negotiate with me, you're choosing to deal with a judge." [And so 12 million dollars later...](#)

It's very sad to me that there's someone out there who will have a judgment in their file for the next 20 years. That's not what we asked for; we weren't asking for anywhere near a million dollars. But the facts were the facts, the judge ruled, and it is what it is.

At the same time, I'm also very pleased with the result. It's a win for the industry as a whole and for individual photographers like myself. Personally? I haven't seen a penny.

On the other hand, for the case that I lost I had to pay some hard, cold cash. As a matter of principle, I appealed. The judge said that I appealed without merit so he doubled my cost. It was like a slap and then being told to turn the other cheek to get slapped again.

But I thought, it is what it is, and I'm going to pay, and I'm going to move on. And that's what I did.

"What I have come to learn after being across the table from someone who originally I was very angry with, is that nine out ten times these people didn't really understand what they were doing."

How do you feel about putting your work online now?

Right after my last loss I just wanted to dig a hole and crawl in. But I got my second wind, and I'm moving on. My glass is always half-full.

Forget about locking your images away so that nobody can get to them. Protecting your intellectual property is not about filing lawsuits. It's about putting amazing images out there, broadening the market as much as possible. Protect your images while at the same time disseminating them in a responsible, strategic way using the technology that's available to you. I have a great deal of excitement for the future. I'm realizing that I have options, I have choices. I can choose to put stuff out there.



Photo Credit: Liz Ordoñez



Photo Credit: Liz Ordoñez



Photo Credit: Liz Ordoñez



Photo Credit: Liz Ordoñez

The Word on the Street: Current Trends in Copyright

Featuring Richard Kelly, Pittsburgh-based photographer, professor, and past ASMP President

Previously serving as the president of the ASMP, Richard lectures on the issues of copyright and other business matters that currently face photographers. Richard received the 2011 United Nations' International Photographic Council's Leadership Award as well as a 2009 Fellowship from the Pennsylvania Council on the Arts. There are few better resources on contemporary copyright concerns than Richard.



Richard Kelly, Former ASMP President
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How are photographers likely to interact with copyright these days?

Today, many photographers take copyright for granted. We're into maybe the fourth generation of people who really don't give thought to copyright in terms of when they make a photocopy or open a browser to make a copy of something. In essence, copying is just so easy. And yet it's in conflict with the current Copyright Act.

How does fair use come into play for a photographer?

Fair use is an often misunderstood doctrine of copyright law. Although it has been part of common law for hundreds of years, it wasn't really part of copyright until 1976.

Why is photography so much a part of the fair use discussion, much more than text, much more than sculpture or so much more than other visual arts? I think it's because photography is everywhere and it can be utilized or sourced for many things. A number of fair use cases start with photography.

Fair use is a very hot area of copyright law, and it is the most litigious. As photographers and artists, it's good to pay attention to what's going on in that space.

It's also safe to say that if you are in fact relying on fair use for the work that you do, you might want to make sure that you take as many safeguards as possible to do the due diligence, and make sure that what you're doing won't interfere with someone else's work.

People ask me, "What percent of a picture can I take and use as my own?" Unfortunately, there is no percent. There is no formula.

What is the difference between "copyleft" and "copyright"?

The "copyleft" probably isn't a great name but it's the name that stuck. It includes not only libraries and cultural institutions like museums and galleries that display copyrighted works, especially historical works, but also technology companies as well as, to a certain degree, consumers, that see an advantage in having free access to copyrighted materials.

"Copyright" includes traditional rights holders in addition to artists, publishers, record companies, movie studios and the associations that represent them; the heirs to the estate of major artists, photographers, painters, etc.

Photographers, most visual artists, and writers are stuck between these two sides. On the one hand we are copyright creators—we own copyrights and therefore we should align ourselves with the "copyright" industries. At the same time there are many artists who want to allow more access to their creations. We aren't making work just for the money, sometimes it's about changing the world or making a difference and sharing beauty. So we're torn between these two sides of copyright.

The ASMP has said that there is a "copyright war," which is essentially tension between "copyright" and "copyleft" [since the '80s and '90s the ASMP has done a very good job teaching photographers to fight "to the death" over copyright, but things are going to change and photographers might need to seek alternatives in order to continue sharing work as well as making money.]

Today, in 2013 photographers are consumers as well as creators of copyrighted work. That makes everything a little more challenging. ASMP was very involved in passing the 1976 Copyright Act and for most of the last 30 years ASMP has been very "copyright." And rightfully so.

The modern copyright war is between the right and left, between the interests of the rights holders and those who want access to this material. Before the '76 copyright Act and the later extensions works routinely went into the public domain. That was, I believe, what the founders intended when they wrote the original Copyright Act in the constitution. They wanted to encourage the artists and scientists to produce new creative works, that there would be a benefit to society at large when the works went into the public domain. The change to the '76 Act gave authors more control over their copyright. In the last five or six years there has been tremendous pressure, mostly in reaction to the [Copyright Term Extension Act](#) (which is famously known as the Disney Act, or the Sonny Bono Act) where the term of copyright went from 50 to 70 years after the death of the author.

"The safest thing to do is to put your photos in a black box in your office and never show them to anyone. But that's not why we're photographers. There's a balancing act between how much protection you take to how much you want to share your photographs with the world."

How does this tension come into play for the photographer?

I feel that there are literally arrows being shot at me from both sides. The “copyleft”—the technology industry and consumers—expects more and more for free, and on the “copy-right” side of things—publishers and major rights holders—there is pressure for artists to turn over more rights in contracts for less and less money. On the one hand they both praise the creative individual while penalizing that same individual for trying to make a living. We’re stuck in the middle.

I think though that there are some opportunities in that middle. It’s an interesting time. As I’ve said before, it’s a great time for photography and it’s a challenging time to be a professional.

The same technology that brought on this challenge, however, will be the same that enables us to track and monetize copyright. That’s what will bring these sides together. PhotoShelter is a part of that—they offer a platform for licensing and selling a product that photographers control.



Photo Credit: Richard Kelly



Photo Credit: Richard Kelly

Making Copyright Registration Part of Your Workflow

Featuring Luke Copping, an editorial and commercial portrait photographer based in Buffalo, New York

A quick glance at his website will show you that Luke Copping has embraced the social world online—you can check out his images on [Instagram](#), [Vimeo](#), [Facebook](#), and others. Luke understands the risks and benefits, and he has made it his business to stay up to to date on copyright and photographers' rights. Luke is also the president of the Western New York chapter of ASMP and something of a master of incorporating copyright registration into his business practices.



Luke Copping, Photographer
lukecopping.com

What is the first step to breaking down the mental barrier to getting registered?

A lot of it is simply walking people through the process. In the Western NY ASMP chapter, we have regular workshops for first time registrants. We ask them to bring their laptops, and we will take them through the process of setting up templates and actually registering there on the spot. So when they've left they know how to do it.

It's one of those classic knowledge things. It seems daunting but the first time you do it, all of a sudden it's not this epic, frightening thing. It's just a few simple forms and some payment processes and uploading some images. A few weeks later you get a certificate from the copyright office saying these works are protected. That's a great feeling, actually.

How long does it take to get a certificate of copyright these days?

It does shift, and it's gotten much faster. Now I think depending on the size of the batch you're registering and where it fits into their queue it could be anywhere from a few weeks to ninety days.

How do you register your own images?

I have two separate workflows for how I work, depending on the nature of the work. Copyright can be split into two categories: unpublished and published works. The easiest, most straightforward way is to register your work as unpublished before you publish it.

There's two ways I go about that:

For all my personal work and for work where I'm taking a longer view—we know it's not going to be published until next month or the month after—we do a monthly registration of all our unpublished work. Broken down into however many projects that might be, since you can do bulk uploads (as many unpublished works as you want, for one flat fee), that makes sense. That way I have twelve dates of registration a year.

Because I also shoot a lot of editorial work, some stuff that can be incredibly time sensitive and doesn't really work within that month timeframe, I will also make separate registrations throughout the month for specific projects. I make my registration immediately after the work is shot. It's just part of my workflow. It goes right from upload to Lightroom, I do my tags and metadata, then I export files to the Copyright office for registration, and finally I get into retouching.

How much time does it take?

Everything I shoot gets imported into Lightroom and I have a folder in there for every month. As soon as I upload something I put it in a folder. I have all these images in a collection and when it's time to register all I have to do is set that to export. When I log onto the Copyright registration website I already have templates in place from doing it so many times that I only need to update them about once a year. To go through the entire registration process, excluding the upload process, takes me about five minutes.

Practically speaking my registration workflow takes me about 10-15 minutes a month.

It's such an easy thing to implement into your workflow. I'm to the point now where everything gets registered. Shots for professional jobs, stuff I take on my iPhone. I just put everything into my registration folder and register it.

Does this make you feel better about putting your work on social media?

Well it does mitigate the risk somewhat but I'm also a firm believer that there is an inherent tradeoff with using certain marketing channels. The marketing benefits can often outweigh the risks. But with copyright registration it's one less thing to worry about.

I do not post professional finished images on Instagram, only personal adventure stuff, BTS, and an occasional on-set phone portrait I create specifically for social media to tease projects. I use Instagram more for fun and community building independent of my professional images. Instagram's terms aren't great, so it works better for more casual sharing and social engagement. I'm working on moving over to Pheed, another similar service with better terms for photographers.

“Registration is such an easy thing to implement into your workflow. I’m to the point now where everything gets registered. Shots for professional jobs, stuff I take on my iPhone. I just put everything into my folder and register it.”

Have you registered any multi-media or motion pieces?

Not yet. For the most part my motion and multi-media work are derivatives of things that I have already shot still. For example, I have a motion graphics still reel that I use to market my work. The copyright office doesn't really make a distinction, the system is the same.

Have you ever had to worry about getting permission to use someone else's work, etc., before you registered?

I haven't for the most part. Shooting fashion I worried about designers. But clothing designs aren't copyrightable. If I was to take a picture of someone standing in front of famous painting or a very iconic sign, then I'm sure I would have to have permission granted and get copyright releases from those parties to feature that work.

How does licensing fit into your workflow?

I use [BlinkBid](#), which is a software solution for photographers and handles everything from invoicing to finance tracking to writing licenses using a format similar to the PLUS system.

What I've found is that most clients license for web. But "web" isn't a use it's a media, and I think that's where we get a lot of breakdown in communication. There is some language for web use that people get tripped up on. For one, anything that you license for web is a world-wide license—there's no control geographically.

I find that these days people are looking for broader licenses with longer web exclusivity than they would want for print. One reason is that clients are concerned with their brand and want exclusive, unlimited licenses. They want brand control if for example they have to change their image. They will want to be able to pull images and not have them licensed elsewhere. I have had some clients that want to keep images archived internally, not public or on view on their site, in order to look back on past work and control image continuity. I'm finding that more clients understand that there is an increased value in being able to include these uses in a license and they are willing to pay more.

If you license an image for online use and your agreement has an expiration, how do you keep track of the license terms and follow up with a client when the license expires?

Built into that system is a way to include expiration dates in any license. I can set a specific date or base the expiration date on an invoice date to remind me that a client's license is about to expire. Then I can reach out in a polite amount of time to let them know that they have an option to relicense.

How long did it take you to develop such a solid copyright workflow?

I started registering all of my images about four years ago. Up until then I did a few sporadic ones here and there, mainly for large commercial jobs where I thought the images had a higher risk of being misappropriated. The fact was that I didn't understand how easy it was to maintain it as a part of a workflow. It's almost shockingly easy.

Resources

Image Rights: [Copy Registration](#)

American Photographic Artists: [Copyright news you can use](#)

Cornell University: [Copyright term Public domain](#)

Copyright.gov: [Renewal of Copyright](#)

Cornell University: [Copyright Information Center](#)

American Society of Media Photographers: [Licensing Guide](#)

The Law Offices of Lloyd J. Jassin: [Copyright Termination: How Authors \(and Their Heirs\) Can Recapture Their Pre-1978](#)

American Society of Media Photographers: [Property and Model Releases](#)

Plagiarism Today: [Stock Letters](#)

American Society of Media Photographers: [Copyright Tutorial](#)

American Society of Media Photographers: [Video library](#)

Book by William Patry: [Moral Panics and the Copyright Wars](#)

Stay up-to-date:

[Public Knowledge](#)

[Copyright Alliance](#)

[Copyright Clearance Center](#)

American Society of Media Photographers: [Social Media Tutorial](#)

British Journal of Photography: [Should photographers use Instagram?](#)

PhotoShelter Blog: [Why Instagram is terrible for photographers and why you should use it](#)

Facebook: [Reporting claims of copyright infringement](#)

Controlled Vocabulary: [Survey of Metadata Preservation on social media sites](#)

World Intellectual Property Organization: [Directory of Intellectual Property Services](#)

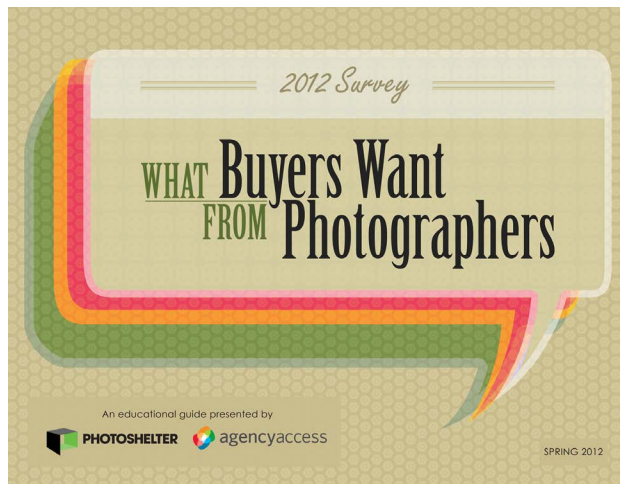
Terms of Service samplings:

Instagram: [Report a violation](#)

Facebook: [Statement of Rights and Responsibilities](#)

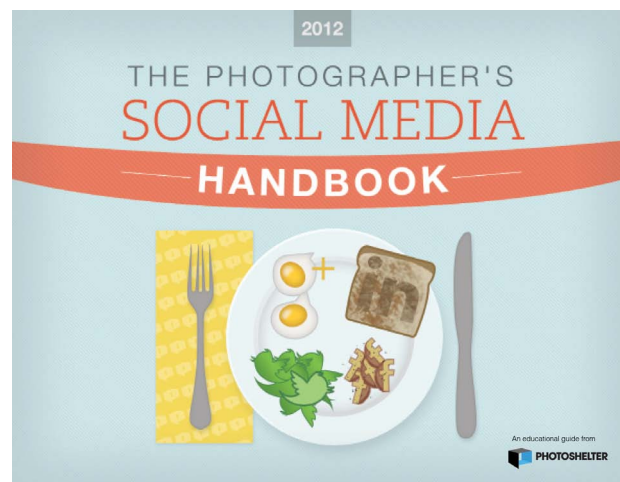
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