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What Every Photographer Should Know About Copyrights, Licenses & Releases

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The following is simply a brief overview and introduction into some basic issues concerning copyright and other related rights. It is not intended as legal advice but rather it is only intended as an overview for educational purposes. This information should not be relied on for specific problems which may confront you. Laws frequently change, exceptions exist and state laws can differ. Prior to implementing any information contained in this article you are advised to first consult with an attorney specializing in the laws affecting photographers.

The Concept of Intellectual Property

The basic concept of property law is that the owner of the property can prevent others from using what belongs to him. Intellectual Property law is very similar to the laws governing Tangible Property (such as a desk, a camera or a car) and Real Property (real estate both in terms of land and buildings). Intellectual Property governs those things that cannot be held in your hand (like a camera) or stood upon (like farmland). Intellectual Property is the ownership of thought creations and is divided into Copyright Law, Trademark Law and Patents. Just as Tangible Property (such as camera) or Real Property (such as farmland) can be sold, lent for free or rented for use, so too can Intellectual Property be controlled in a similar manner.

Basically, Patents govern inventions. The law grants the inventor the right to control for a period of time who can use the invention and who must pay the inventor any time his/her invention is used. Trademarks (or Service Marks) control business names and business or brand identifiers, such as words, logos or sounds that help people identify the proper designation of goods and/or services, and prevent others from unfairly trading off the good name established by another. Finally, Copyright protects the expression of ideas, such as a screenplay, a photograph, a picture, a sculpture, or other similar artistic creations. The law grants the "Author of the Work" the right to control for a period of time who can use the work.

When a photographer takes a picture, he controls the copyright. Another person may ultimately come to physically possess the developed photo or even the negative, but unless the copyright is transferred through an agreement in writing, it remains with the photographer. The physical owner of the picture may be able to display the picture in his home or even sell the actual photo to another person, but only the copyright owner has the ability to control the reproduction of the photo. The copyright owner can sell the entire copyright to someone else and lose all ownership in the copyright, or the copyright owner can license the copyright and retain control of the copyright. Licenses can be as limited or as unlimited as the copyright owner desires.

Common Law Copyright v. Statutory Copyright

As soon as the photographer takes the picture, copyright protection is afforded to the photographer. This is known as “Common Law Copyright.” Anyone who violates the common law copyright of another is liable for the actual damages (i.e., lost revenue that occurred to the copyright holder). However, if the copyright holder files a Form VA with the Copyright Office along with a copy of the photograph, then a “Statutory Copyright” is created. A Statutory Copyright holder is also entitled to recover actual damages from an infringer. However, unlike the Common Law Copyright holder, the Statutory Copyright holder can receive (1) Treble Damages (which is three times whatever the actual damages may be) or (2) Statutory Damages in the amount of \$100,000.00, whichever is greater. In addition, the Statutory Copyright holder is permitted to recover all Attorney Fees and Court Costs associated with bringing an infringement action. Thus, any professional photographer who does not regularly file a form VA with the Copyright Office is a fool who is failing to take advantage of the financial rewards the government accords in the event of a future infringement.

A Form VA must be filed with the Copyright Office either 90 days following the creation of the work or prior to the infringing activity in order for the Copyright holder to obtain Treble Damages, Statutory Damages and Attorney Fees.

Finally, note that under the Copyright Act, a transfer of copyright ownership can only occur in writing. Thus, unless a written document says otherwise, the creator of the work will hold the copyright in the eyes of the law (even if the parties may have intended otherwise).

Avoiding Violating The Rights Of Others

Just as every photographer should be aware of how he/she can profit from his/her own copyrights, every photographer should also be aware of how he/she can avoid infringing on the rights of others. Thus, if your photograph captures a separate copyrighted or trademarked work belonging to someone else, that rights holder *may* possibly have an action against you. In addition, someone who assists you in creating the photograph may have an ownership interest in the copyright, unless this issue is clearly sorted out in advance.

Similarly, a number of cases have developed concerning a distinct right known as the Right of Publicity. The Right of Publicity is the right of an individual to control the use of their name and likeness (including voice and signature) in a commercial setting. The Right of Publicity is typically exploited by celebrities who earn fees for endorsing products. If someone violates another's right of publicity, the individual can seek to obtain compensation including certain statutory remedies (depending on the state) and actual damages equal to lost revenue and a disgorgement of profits. Thus, in a case called Comedy III Productions, Inc. v. Saderup, a defendant was liable to the heirs of the Three Stooges when the defendant sold t-shirts depicting the Three Stooges. The defendant tried to argue that the First Amendment protected him, but the California court reasoned that a work is protected by the First Amendment *only if* it contains "significant transformative elements" or if "the value of the work does not derive primarily from the celebrity's fame." Exactly what the court meant by several of the terms it used in this holding remains a debated subject in the legal community. Thus, in the wake of Comedy III, it is best to "play it safe" when dealing with such photos, otherwise, you may run the risk of expensive litigation.

Other potential problems for photographers include legal actions based on the "cousin" of the Right of Publicity action, known as violations of the "Right of Privacy." There are three types of Invasion of Privacy: (1) "Intrusion into Seclusion", which is the intrusion into one's private affairs (this normally involves hidden surveillance and secret photos that are highly offensive to the unknowing subject); (2) the public disclosure of embarrassing private facts which have no newsworthy value; and (3) "False Light", which is an invasion of privacy which publicly places a person in a non-newsworthy, "highly offensive false light".

Tips for how photographers can avoid lawsuits against them:

1. If you think a legal issue may exist then consult with legal counsel.
2. Register your copyrighted works so your ownership is on record.
3. If anyone is assisting you or working for you, you should have a written agreement that clearly states that their work is "work-for-hire" - this means the Employer owns the copyright, not the Employee.
4. Obtain releases from all models (including releases for "right of publicity").
5. Obtain releases from any location owner or owner of a distinctive prop that may have a copyright or trademark interest.
6. Use all encompassing releases for "all technologies." New methods of distribution are constantly being created. Your release should cover film, video tape, discs, DVD, internet and any other technology or means of distribution, whether "currently known or not yet devised."

7. Obtain Errors and Omission Insurance.