

# **Paper for PMA: Melbourne 22 May 1999**

## ***Copyright – Avoiding the Pitfalls***

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For many businesses, copyright is an asset. However, for businesses which are built on copying material for other people, copyright is a risk to be *managed*.

The good news is that the risks can be managed. What it takes is a combination of knowledge and strategies. The *knowledge* required is of relevant parts of both copyright and contract law. The *strategies* are the steps you can take to minimise both the risk of infringing copyright, and the consequences of any infringement.

### **Why is copyright a pitfall?**

Copyright is a legal framework which defines property. Today, there is an increasing preparedness to police copyright, and to take action where copyright is seen to have been infringed. In addition, the subject of copyright can be an emotional issue for your clients and for third party photographers whose work your business might be copying.

Copyright is also a pitfall because there are often misunderstandings in the wider community *and* amongst professional photographers as to how copyright works.

### **What do you need to know about copyright?**

For businesses which rely on copying material for clients, copyright law can basically be boiled down into the following essential points:

- copyright protects *certain types of material*, including photographs, drawings and diagrams;
- copyright owners *have certain rights*, including the right to reproduce all or any important or distinctive part of a work; and
- copyright is automatic - there is no registration of copyright, and not need for a photo to have any indication on it (for example, the symbol “©”) to be protected.

The two most important things you need to know, however, are that, firstly, these rights only last *a certain period of time*, after which anyone can deal with the work. Secondly, you need to know the rules concerning ownership of copyright.

### **How long does copyright last?**

Generally, copyright lasts for the life of the person who creates the work, plus fifty years. For photos, however, any photograph taken more than fifty years before the

beginning of this year is no longer protected, and therefore any photo taken before 1 January 1949 may now be copied.<sup>1</sup>

## **Who owns copyright?**

### **The general rule**

The general rule is that whoever creates the work, such as a photo, will be the first owner of copyright.

There are, however, a number of exceptions to this. For example, a government will own copyright if it directs or controls the taking of a photo (for example, a State school engaging a photographer to come to a school to take photos). In the case of other commissioned photos, the question of who owns copyright can be boiled down to some relevant dates.

Both the general rule and the exceptions may be changed by agreement.

### ***Pre-1 May 1969***

The person who took the photo owns copyright, but if the photo was commissioned, then the person who commissioned the photo owns copyright.

### ***Between 1 May 1969 and 30 July 1998.***

The person who took the photo owns copyright, but if the photo was commissioned, then the person who commissioned the photo owns copyright. However, where the photo was commissioned, then the commissioning party may only be able to use the photo for the purposes for which it was commissioned.

### ***30 July 1998 onwards***

The person taking the photo owns copyright, even if the photo is commissioned, except if the photo is commissioned for a private or domestic purpose.

In other words, the changes in the law which took effect from 30 July 1998 made changes to ownership in relation to commercial commissions (the photographer own copyright), but leaves in place the prior rule for photos such as wedding and family photos (the commissioning party - such as the bride or groom - owns copyright). The changes also left in place the rule for domestic and private commissioned photos that the photographer may have the right to restrain their use for any purpose other than the commissioned purpose.

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<sup>1</sup> Note, however, that there may be changes to the duration rule for photos within the next year or two

## **What do you need to know about contracts?**

As noted, any of the above ownership rules can be changed by agreement.

It is important to note in this context that contracts can be oral, and that the terms and conditions of an agreement are worked out by referring to what was agreed to at the time agreement was reached. This means that someone can't later change the terms and conditions without the other party agreeing to the change. In the context of copyright, this means that a photographer who puts a copyright stamp on a wedding photo doesn't thereby own copyright – if the commissioning agreement didn't transfer copying to the photographer, then the photographer is wrong to have put the copyright stamp on the negative or proof sheet.

Agreements which change the general rules about who owns copyright in a photo are not only possible, but increasingly likely. Many private and domestic photographers nowadays *do* have terms and conditions in their commissioning agreements which state that they retain ownership of copying in photos they take.

## **What happens if you get caught infringing copyright?**

Generally, if someone such as a professional photographer thinks that your business has infringed copyright, then it is more likely than not that you will be informally approached by them to try to settle the matter amicably. In other cases, the first you know about it may be a letter from a solicitor which sets out all the circumstances, and which also sets out what the person wants to settle the matter. Negotiations with the person will usually follow at this point, and it will generally only be in the event that the negotiations break down that the person whose copyright is alleged to have been infringed will consider taking the matter to court.

If someone succeeds in a copyright infringement action against you, a court can order you or your company to pay compensation to the copyright owner, including additional payment if your conduct and circumstances of the infringement are "obviously deserving of censure".<sup>2</sup> Alternatively, a court can make you hand over whatever profits you've made to the other party. In either case, a court can order that you not infringe again, and can order you to hand over infringing material.

In some cases, criminal actions are available, although it is generally unlikely that the police will be interested in most run-or-the-mill copyright infringements. You should, however, be aware that the possibility always exists of a particularly incensed copyright owner, taking private criminal action against your business.

## **How do you best manage the risks?**

One way of managing the risk is to *never* touch anything done by a professional, or not taken by the person asking you to make the copy, no matter *how* old the photo appears to be.

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<sup>2</sup> This phrase comes from a recent case involving project home builders.

However, it is **not** my advice for copy shops **never** to copy photos. In my view, such an approach is too cautious, as photographers have not and do not always negotiate to own copyright in commissioned domestic photos, and in the commercial context clients often can own copyright, even after 30 July 1998, because that is part of the terms and conditions on which they have commissioned the photos.

Rather, I suggest the following system be put in place to minimise not only the risk that copyright will be infringed in the first place, but also to minimise the financial consequences of an infringement.

**Firstly**, all jobs should be subject to an agreement with the client which includes an undertaking from them that by copying the relevant material your business will not be infringing copyright (in legal terms this type of undertaking is referred to as a "warranty").

**Secondly**, the same agreement should include an undertaking from the client that if the warranty is not true, then the client will cover you financially for any consequent damage, loss or injury you suffer (in legal terms this type of undertaking is referred to as an "indemnity"). An indemnity provides some level protection against the financial consequences of an infringement.

(The PMA has forms which can be used for walk-in clients; if you have a standing account with a client, then both the warranty and indemnity can form part of the terms and conditions of the account agreement.)

**Thirdly**, make sure there are clearly visible signs about copyright in areas where clients can see them. Again, the PMA has signs which are available.

**Fourthly**, make sure your staff are sufficiently aware of the issues so they know when to exercise extra care (for example, when photos have a copyright stamp on them, or when they come from a photographer or organisation, such as Pixie photos, which is known to have agreements with clients under which the photographer or photographer retains copyright). In these cases, a "script" needs to be in place, whereby the staff are prompted to ask further questions about the circumstances in which the photos were commissioned, and, in particular, whether there was any talk about who would own copyright, or any agreement they signed. The "script" needs to be able to deal with a perhaps-disgruntled client in a professional manner.

**Fifthly**, if a claim is made that your business has infringed copyright, have a strategy in place to deal with the claim. For example:

- make sure that all staff are aware of how any infringement claim is to be handled, and to whom it is to be referred within your business;
- appoint someone in your business to deal with the claim. That person must;
- have a good working knowledge of copyright so they can assess the likely validity of the claim;
- be able to handle the person making the claim (such as the professional photographer) calmly and professionally;
- not be either overly defensive or aggressive; and

- have the ability to get further legal advice if necessary at the right moment.

**Finally**, monitor the situation, and be ready to identify what went wrong with the system in the event that you are "bitten" for copyright infringement, and to assess in what ways similar problems can be avoided in the future.

### **What are the advantages of a system like this?**

No system in a copying business can really eliminate all possibility of running into problems by infringing copyright. However, a system such as that outlined above may both minimise the risk that an infringement will occur in the first place and then minimise the "fall-out" from any infringement which does occur.

In particular, such a system is likely to minimise the financial consequence of an infringement by endeavouring to ensure a number of things:

- that the risk of infringement is minimised;
- that any complaints are expeditiously handled;
- that the risk of an infringement being "fragrant" and thereby deserving of additional damages being paid, is minimised; and
- that if your business copies as a result of what a client has wrongly told you, that you will be able to consider recovering losses from the client.

### **So what should we have on hand?**

As noted, the PMA has a number of forms and other material which I recommend you use in your business to minimise any copyright risks.

The Copyright Council publishes a number of free information sheets which are relevant to copying and imaging businesses. For example, see "Copying Services", and "Photographs: copying photographs you paid for". These are available free from our website (at <http://www.copyright.org.au>). We also have detailed publication which can be ordered from the Council, including *Photographers and Copyright* which will be of general interest to businesses dealing with photographs.

The Copyright Council also operates a free legal service if a situation arises where you are uncertain as to how copyright law should be applied. This service usually operates between 9 am and noon, and 2 pm and 5 pm Monday to Thursday. You can also post, fax or email an enquiry - please include your telephone number. Our contact details are:

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