



INFORMATION SHEET G11

Photographers and copyright

May 2005

In this information sheet, we outline the copyright issues most relevant to photographers, and respond to some common questions. For a detailed discussion, see our practical guide, also entitled *Photographers & Copyright*.

For information about our other information sheets, other publications and training program, see our website <http://www.copyright.org.au/>.

The purpose of this information sheet is to give general introductory information about copyright. If you need to know about how the law applies in a particular situation, please get advice from a lawyer.

A Copyright Council lawyer may be able to give you free preliminary legal advice about an issue not addressed in an information sheet. This service is primarily for professional creators and arts organisations. For further information about the service, see <http://www.copyright.org.au/>.

We update our information sheets from time to time. Check our website to make sure this is the most recent version.

Key points

- Generally, the copyright in photographs lasts for the life of the creator plus 70 years.
- If photographs were taken prior to 1 January 1955, copyright has now expired.
- Ownership of photographs varies depending on the circumstances under which they were taken.
- Photographers also have moral rights in relation to their works.

What does copyright protect?

Copyright protects a range of materials, including photographs. Other things protected by copyright include other **artistic works** (such as paintings, drawings and maps), **written material** (such as journal articles, novels, and reports), **musical works and films**. Copyright does not protect information, ideas, styles or techniques.

For more information on what copyright protects, see our information sheet *An introduction to copyright law in Australia*.

Protection is free and automatic

There is no system of registration for copyright protection in Australia. Copyright protection does not depend upon registration, publication, a copyright notice, or any other procedure—the protection is free and automatic.

A photograph is protected by copyright automatically from the moment it is taken.

As a result of international treaties such as the Berne Convention, most foreign copyright owners are protected in Australia, and Australian copyright owners are protected in most other countries. For more information, see our information sheet *Copyright protection in other countries*.

If you need to take legal action for infringement under Australian law you may get some procedural advantages from having registered the copyright in another country. You will also get the same advantages from having a copyright notice, in your name, on your work.

The copyright notice

The copyright notice is not required for protection in Australia and in most other countries, but it notifies people that the work is protected and identifies the person claiming the rights. Copyright owners can put the notice on their work themselves since there is no formal procedure. The notice consists of the symbol ©, followed by the name of the copyright owner and the year the work was first made or published, for example: © John Citizen 2005.

Who owns copyright?

For photographs, unless there is an agreement to the contrary, the general rule is that the photographer is the first owner of copyright. There are, however, a number of exceptions to this general rule, set out in the following paragraphs.

If more than one person is involved in the creation of copyright material, or the material is created under an agreement or by commission, it is a good idea to have a written agreement stating who will own copyright.

Note that in many cases a person who is not the copyright owner will have rights to use the photographs in various ways (for example, as a result of an express or implied licence).

Photographs taken in the course of employment

If an employee takes a photograph as part of his or her job, the first owner of copyright will be the employer, unless they have made an agreement to the contrary. This general rule is subject to two major exceptions, set out in the following paragraphs.

Photographs taken by employees of newspaper and magazine publishers

For photographs taken by employees of newspaper or magazine publishers, different rules apply, depending on when the photograph was taken.

- For photographs taken **before 1 May 1969**, the publisher owns copyright.
- For photographs taken **on or after 1 May 1969 and before 30 July 1998**, the publisher owns the rights for newspaper and magazine publication and for broadcasting, and the photographer owns all other rights (including the right to put the photographs online or in a book).
- For photographs taken **on or after 30 July 1998**, the photographer owns the rights to photocopy the photographs and include them in books; the publisher owns all other rights.

These rules do not apply to freelance photographers, who are covered by the general rule that the person who takes the photograph owns copyright in it (unless they make an agreement to the contrary).

Photographs taken for the government

Unless there is an agreement to the contrary, a Commonwealth, State or Territory government is the first owner of copyright in material created, or first published, under its direction or control. Note that these provisions do not apply to local governments. For more information, see our information sheet *Governments (Commonwealth, State and Territory)*.

Commissioned photographs

Specific provisions set out the general rules on ownership of copyright where a person who is not the photographer's employer (a client) pays a photographer to take a photograph.

- For photographs taken **before 1 May 1969**, the person who paid for them to be taken owns the copyright, unless the photographer and client agreed otherwise.
- For photographs taken **on or after 1 May 1969 and before 30 July 1998**, the first owner of copyright in a commissioned photograph is the commissioning client, unless the photographer and client agreed otherwise.
- For photographs taken **on or after 30 July 1998**, the general rule on ownership depends on the purpose for which the photographs were taken:

- if the photographs were taken for “private or domestic purposes” (such as family portraits, or wedding photographs), the first owner of copyright in them is the **client**, unless the photographer and client agree otherwise; however
- if they were taken for any other purpose (e.g. commercial shots), the **photographer** will be the first owner of copyright, unless the photographer and client agree otherwise.

If someone owns copyright in a photograph as a result of having commissioned it (without having reached any other agreement about ownership), the photographer has the right to **restrain** the use of the photograph for purposes other than those for which it was commissioned (provided these purposes were made known at the time of the arrangement). This rule applies to any photograph taken **on or after 1 May 1969**. Even though the client is the owner of copyright, the photographer can rely on his/her right of restraint to negotiate further payment for uses that were not contemplated at the outset.

Rights of copyright owners

Owners of copyright in photographs have the exclusive right to:

- **reproduce** the photographs—for example, by making prints, photocopying, and digitising;
- **publish** the photograph (make copies of the photographs available to the public for the first time); and
- **communicate** the photograph to the public—for example, by putting the photographs onto a website, broadcasting or faxing them or emailing digital files of them.

Dealings with copyright

Copyright owners can **assign** (sell) or **license** (permit others to use) their rights, with or without limitations (such as the type of use, or period of time), and with or without conditions (such as payment). For further information see our information sheet *Assigning and licensing rights*.

All agreements and transactions with clients relating to copyright should be in writing. Assignments and exclusive licences **must** be in writing and signed by or on behalf of the copyright owner to be fully effective. Agreements that are not in writing may still be enforceable. However, if a dispute arises, it can be difficult to work out what rights the parties have.

Your solicitor should be able to draft a standard agreement setting out the rights granted, and other terms and conditions, covering most or all of the commissions you normally undertake. You can also obtain information and standard clauses for professional photographers from professional photographers’ organisations, whose contact details are provided below under the heading “Further information for photographers”.

Moral Rights

Creators of copyright works, including photographers, have “moral rights” in relation to their works. These are separate from copyright. Moral rights impose certain obligations on people who use a copyright work. As a photographer you have the right to:

- be attributed as creator of your photographs;
- take action if your work is falsely attributed; and
- take action if your work is distorted or treated in a way that is prejudicial to your honour or reputation.

See our information sheet *Moral rights* for more information.

How long does copyright in photographs last?

The duration of copyright in photographs has changed significantly as a result of Australia implementing its obligations under the Australia-US Free Trade Agreement (AUSFTA).

New rules have been introduced to determine the duration of photographs that were still protected by copyright on 1 January 2005 or that were taken after that date. These rules came into effect on 1 January 2005:

- For photographs which were still in copyright on 1 January 2005, or which were created on or after that date, copyright now lasts until 70 years from the end of the year the photographer died.

- If the photographer is unknown or used a pseudonym, duration continues indefinitely until the photograph is published. Once it is published, duration will then last until 70 years from the end of the year in which it was published.

All photographs taken before 1 January 1955 are now out of copyright and do not benefit from the new rules.

Where a Commonwealth, State or Territory Government owns copyright, the rules in relation to duration, have **not** changed. If the Government owns copyright in a photograph, the work is protected by copyright for 50 years from the end of the year in which it was first published. If the work has not been published, the copyright protection lasts indefinitely.

For further information, see our information sheet *Duration of copyright*.

When is copyright infringed?

It is generally an infringement of copyright to deal with a photograph in any of the ways exclusively reserved to the copyright owner without the copyright owner's permission, unless copyright has expired. Using part of a photograph in one of these ways may also infringe copyright, if that part is important or distinctive, even if it is a relatively small proportion of the photograph.

Copyright may also be infringed by "authorising" infringement, by importing articles containing copyright material, and by selling infringing articles.

The Copyright Act sets out some defences, or exceptions to infringement, which allow some uses of copyright material without permission—for example by reviewers and students. There are also special provisions for copying by libraries, educational institutions and government bodies. In some cases, certain procedures must be followed, and in some cases, fees must be paid. For further information on these special provisions, see our information sheets *Fair Dealing; Research or study; Libraries; Education institutions; and Government*.

Note that, VISCOPY licences photographs (<http://viscopy.me.com.au/>) and you can also get licences to use photographs from photo libraries (for example, the Fairfax photo library).

Technological Protection

The Copyright Act allows copyright owners to take action against people who make, sell, import or rent devices which are used to circumvent "technological protection measures" (which are used to protect digital material or encoded broadcasts). Further provisions allow copyright owners to take action if "electronic rights management information" embedded in digital copies of their material is removed or altered. In some cases, it is an offence to deal with circumvention or decoding devices, offer decoding or circumvention services, alter or remove electronic rights management information or knowingly deal with copyright material from which rights management information has been removed.

Under its obligations under the AUSFTA, Australia has until 1 January 2007 to implement further provisions in relation to the circumvention of technological protection measures. For more information, see our information sheet *Free Trade Agreement amendments*.

Restrictions on commercial photography

Photographers also need to be aware of provisions in other legislation which restrict commercial photography of Indigenous, environmental and heritage sites. These provisions are not related to copyright law. The following paragraphs describe some of these provisions.

Photographs taken in Commonwealth reserves

The *Environment Protection and Biodiversity Conservation Regulations 2000 (Cth)* introduced important procedures and restrictions on photographers to take and commercialise photographs of Commonwealth reserves.

A Commonwealth reserve is defined as one proclaimed by the Governor-General and includes places such as Kakadu National Park, Uluru-Kata Tjuta National Park, Booderee National Park, Australian National Botanic Gardens, Christmas Island National Park, Pulu Keeling National Park, Norfolk Island National Park and Commonwealth Marine Parks and Reserves.

To take photographs in a Commonwealth reserve for commercial purposes, a photographer should:

- Contact the Commonwealth reserve and obtain a permit to take photographs for commercial purposes by paying the specified fee and entering into a Location Agreement; and
- Abide by the conditions imposed upon commercial photographers in the reserve by the Director.

If a photographer breaches a Location Agreement (or does not enter into one), a ranger or warden may require him or her to hand over all copies of any photographs taken and any camera or other device used to take them.

For further information, contact the National Park you wish to visit. You can also contact the Commonwealth Department of Environment and Heritage by phone 02 6274 1111 or see the website: <http://www.deh.gov.au/parks/index.html>.

Photographs taken of the Sydney Harbour Foreshore

The *Sydney Harbour Foreshore Authority Regulations 1999 (NSW)* restrict the taking and subsequent use of photographs for commercial purposes. The Regulations prohibit any use of a camera for commercial purposes in a public area unless authorised by the Sydney Harbour Foreshore Authority.

“Public areas” are defined as any part of the Sydney Harbour foreshore that the public is entitled to use and include Luna Park, the Rocks and Circular Quay, Darling Harbour, Woolloomooloo, Pyrmont, White Bay, Rozelle Bay and the Australian Technology Park.

For further information, contact the Sydney Harbour Foreshore Authority by phone 02 9240 8500 or see the website: <http://www.shfa.nsw.gov.au/>.

Some common questions

Where do I register my copyright and how much does it cost?

There is no system of registration for copyright protection in Australia. Copyright protection does not depend upon publication, a copyright notice, or any other procedure. See above, under the heading “Protection is free and automatic”.

Does copyright protect ideas for photographs?

No. Copyright protects the expression or form that the ideas take. The idea of photographing the Sydney Opera House at dawn, for example, is not protected. A person who photographs that scene can take action against others reproducing his or her photographs, but cannot prevent others from taking their own shot of that scene.

How do I prove that I am the copyright owner if there is no system of registration?

A dispute about who took a photograph, or who is the owner of copyright in a photograph, may need to be resolved by a court if the parties cannot agree. A court considers all the relevant evidence presented to it. The most important evidence is usually the oral evidence of the parties and of relevant witnesses. Other evidence may include a copy of an agreement between a photographer and his or her client, negatives and proof sheets. A copyright notice on the photograph may be relevant to the question of ownership, but it is not conclusive.

Such cases are rare; someone else claiming to own copyright without any basis, generally runs large financial risks in bringing such a case.

Can people scan and alter my photographs without my permission? Who owns copyright in the altered photograph?

Scanning a photograph to make a digitised version, or making a copy of an existing digital file, reproduces the photograph and therefore generally requires the permission of the copyright owner (unless an exception to infringement applies).

If the other person creates a new artistic work using the scanned photograph, he or she will own copyright in the new work. However, if the new work incorporates an important, distinctive or recognisable part of the original

photograph, the owner of copyright in the new work will need the original photographer's permission to reproduce and communicate it to the public. The original photographer still owns copyright in the original photograph.

Alteration of photos may, in some cases, infringe your moral rights in the work (the rights to be attributed as creator of a work, right not to be falsely attributed as the creator and the right of integrity against derogatory treatment of the work).

Do I need permission to photograph a building?

Generally, no. Although a building is protected by copyright, a special exception in the Copyright Act allows buildings to be photographed without permission. Be aware though, that the owner of a property may impose restrictions regarding entry onto the property. It may sometimes be the case, as with photographs of people, that certain unauthorised uses of a photograph of a particular building may raise issues under other laws, such as trade practices legislation.

Do I need permission to photograph artworks displayed in public places?

The generally accepted interpretation of the relevant provision in the Copyright Act is that you may photograph a "sculpture or work of artistic craftsmanship" which is publicly displayed "other than temporarily" without permission. There is, however, a technical argument that neither underlying works in such sculptures and craft works nor pre-existing design drawings are covered under that provision, and that permission is still required for the indirect reproduction of these works in a photograph of the sculpture or craft work. We are not aware of any cases in which this argument has been raised in court.

You will generally need permission to photograph other public art, such as murals.

The *Myer Report of Contemporary Visual Arts and Craft* (2002) recommended repealing provisions which deal with copyright in sculptures and craft works on public display.

Do I have a right to be attributed for my photographs—for example, if my photograph is reproduced in a magazine?

Photographers have moral rights over photographs they have taken. Generally anyone reproducing a photograph that is protected by copyright has an obligation to attribute the photographer as well as to get permission from the copyright owner. For further information, see our information sheet *Moral rights*.

A client has not paid me. Who owns copyright in the photographs?

If the photograph was taken **before 30 July 1998**, and no agreement about copyright ownership has been made, the client owns copyright, even if the payment has not actually been made.

If the photograph was taken **on or after 30 July 1998**, the photographer generally owns copyright unless there is an agreement to the contrary. However, if the photograph was commissioned for a private or domestic purpose, the client owns copyright unless there was an agreement to the contrary.

If the client owns the copyright, the photographer is entitled to recover the debt, but not to prevent the client using the photograph for the purposes for which it was taken.

Your solicitor should be able to draft a contract in such a way as to give you rights under copyright law as well as under the contract. Such a contract may assist you in the event that a client uses a photograph before paying you.

Who owns the negatives of photographs I took for a client?

Ownership of a physical negative, transparency or CD-ROM is determined by general property law and not copyright law. The owner of a negative is usually the person who paid for the film on which the negative image appears. Ownership of **copyright** in the photographs is separate from the ownership of physical **items**, such as the prints, negatives or digital files. Your agreement with the client should cover these issues.

If the client owns copyright in the photographs, he or she may make copies from prints in his or her possession. A photographer may own negatives but this does not entitle him or her to make further prints without the copyright owner's consent.

In some situations a person who does not own prints or film may have possession of them. For example, a photographer may charge a client for materials but retain possession of the negatives. In this situation, the client may own the negatives, and the photographer may have a duty to keep the negatives safe and return them if requested by the client.

A client owns copyright in a photograph and I own the negative. Do I have to give the client access to the negative so that they can make a copy?

Generally, no. Although the copyright owner has the exclusive right to make reproductions of the photograph, he or she may not be able to exercise these rights in practice if he or she does not have access. The Act does not require a person who controls the physical item to give access to the copyright owner. However, a photographer may have an express or implied contractual obligation to give the client access to the negatives or digital file.

Can proofs of wedding photographs I took be copied without my permission?

If you were commissioned to take photographs for a wedding, or any other private or domestic use, your client will own copyright, unless you reached an agreement to the contrary. This means that your client, as the copyright owner, has the right to reproduce the photographs whether from negatives, prints or proofs.

Can a client reproduce a photograph if the photographer owns the copyright?

Even if the photographer owns copyright, the client may be entitled to make copies, since the client has an implied licence to reproduce the photograph for the purposes for which it was commissioned.

Does a purchaser of a print have an automatic right to make copies of it?

Generally, no. One person may own copyright in an image (and thus have the right to reproduce the image), and another person may own a negative, transparency or print in which the image is embodied. The purchaser of a print (or negative or transparency) does not generally acquire the copyright as well.

Of course, if a person commissions a photograph and owns the copyright, they will have a right to make copies of the photograph. In other cases, someone who commissions a photograph may have either express or implicit permission to use the photograph in certain ways. Each case depends on the circumstances.

I was commissioned to take a photograph for one commercial purpose, and I have recently seen the photograph reproduced in another context. Do I have any rights?

If the photograph was taken **before 30 July 1998**, your client owns the copyright in the photograph, unless there is an agreement to the contrary. However, if at the time you were commissioned, the client made known to you the purpose for which the photograph was required, you have the right to **restrain** the use of the photograph for any other purpose.

If you had an agreement with the client that you would own the copyright, you are entitled to stop the client using the photograph in any way that was not covered in the agreement, since such uses would require your permission.

If the photograph was taken for commercial purposes **on or after 30 July 1998**, you own the copyright unless you and your client had an agreement to the contrary. You would therefore be entitled to stop the client using the photograph in a way that was not covered by the agreement.

Each case depends on its facts, and you may need legal advice on your rights in your particular situation.

Do I need permission from the client who commissioned photographs before I can include them in my portfolio?

This will depend on who owns copyright in the photographs. If the client owns the copyright, you will need the client's permission to reproduce the photographs to include in your portfolio. However, if you own copyright, you do not need permission to reproduce them.

If your clients will own copyright in photographs you take, you may wish to include a clause in the agreement allowing you to copy and communicate the photographs for your self-promotion purposes.

Is my work protected overseas?

Australia is a party to a number of international treaties dealing with copyright protection. Member states agree to extend the same copyright protection to works first published or created by nationals of other member states as they do to works first published in their own country or created by their own nationals. Most countries grant copyright protection to Australian material. This means that if copyright in your work is infringed in, for example, Japan, you will generally be able to take action against the infringer in Japan.

If your work is to be published or widely distributed overseas, you may need to get advice from a lawyer with experience in the copyright law of the relevant country.

Do I need permission from people I photograph?

A person's image is not protected by copyright. However, in some cases, using a person's image without permission may be prevented under other laws, such as the law of passing off, the Trade Practices Act 1974 and State and Territory fair trading laws. These areas of law concern conduct which may mislead or deceive the public and may particularly come into play if the photograph you are taking is of a well-known person, and is to be used, for example, as a poster or as a postcard or in advertising. In some cases, uses of photographs may be defamatory of people in them.

If you are commissioned to take photographs, it should not generally be your job to check these issues. However, it may be a good idea to alert clients to the fact that they may need to seek advice from a solicitor with the relevant expertise (note that the Copyright Council does not advise on these other areas of law).

Generally, if you have asked somebody to sit for you, you should get a "model release" from that person which will allow you (and others) to use that person's image for purposes which will generally include commercial uses. (For a sample photographer's model release, with explanatory notes, see the Arts Law Centre of Australia website <http://www.artslaw.com.au/>).

In other cases, photographers may take more casual shots—for example, photographs of people in the street or at markets, or playing sports. If you know that you might later be using such a photograph commercially, it's generally a good idea to get a model release from the people you have photographed. If it's impractical to get the people in your shots to sign model releases, or if they refuse to do so, your ability to use or license the use of the photograph in certain ways might be limited because of the laws discussed above.

Privacy

It is generally not an invasion of privacy to take another person's photograph. However, in some circumstances, you may be required to comply with the National Privacy Principles in the Privacy Act 1992 (Cth).

For further information on this issue, contact the Office of the Federal Privacy Commissioner or see the website <http://www.privacy.gov.au/>. The Copyright Council cannot advise on this area of law.

Further information about copyright

We publish a large range of information sheets which you print from <http://www.copyright.org.au/> or buy from us in printed form. We also publish a range of book titles: see <http://www.copyright.org.au/>.

Further information for photographers

The Australian Institute of Professional Photography (AIPP) and Advertising, Commercial and Magazine Photographers (ACMP) are representative bodies for professional photographers. Their websites are at <http://www.aipp.com.au/> and <http://www.acmp.com.au/>. The two organisations jointly publish a guide to contracts for professional photographers called *The Better Business Bible*, which includes recommended standard contract clauses.

Further information

For further information about copyright, see our website: <http://www.copyright.org.au/>. or contact us.

Information from the Arts Law Centre of Australia may also be of interest to you: see <http://www.artslaw.com.au/>; phone: 02 9356 2566.

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Australian Copyright Council

The Australian Copyright Council is a non-profit organisation whose objectives are to:

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community about the importance of copyright;
- identify and research areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright;
- foster co-operation amongst bodies representing creators and owners of copyright.



Australian Government



The Australian Copyright Council has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body, through its Policy, Communication and Planning Division.

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