COPYRIGHT LAW BASICS FOR PHOTOGRAPHY---UNITED STATES PERSPECTIVE

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1. Copyright (and usage rights)

The basis for copyright protection in the United States is the Copyright Act ---Title 17 of the United States Code. Section 102 of the Act protects "original works of authorship" that are "fixed in a tangible medium." Photographs and other forms of visual images are protected under Section 102(5) of the Act, which refers to "pictorial, graphic, and sculptural works." A copyright holder in a photograph is afforded a package of exclusive rights under Section 106 including reproduction rights, adaptation (derivative) rights, distribution rights and public performance and display rights.

Yet in order to enjoy these rights, the would---be copyright holder has to first satisfy the "original work of authorship" and "fixed in a tangible medium" requirements. Fixation merely requires the author to create something permanent and dispensable. The originality requirement only calls for independent creation and a *minimal* degree of originality. When the invention of photography was still young, there was question that mechanical reproduction of an object could be original but that speculation was put to rest in 1884 when the Supreme Court, in a case involving a portrait of Oscar Wilde in *Burrow---Giles Lithographic v. Sarony* held that photographs fit within the scope of copyright as writings that could exhibit the requisite originality to be entitled to protection. Since then, it has been generally presumed that any photograph exhibits originality due to the author's choices regarding composition. Despite that, originality is still raised on occasion. One lower court has held that photographs of public domain art were not sufficiently original to be covered, but another court found that photographs of ornate frames met the requirement of minimal originality.

Copyright Notice

Since the United States joined the Berne Convention, effective March 1, 1989, no formal notice requirement or © is mandatory for works to be protected under U.S. law. Prior to that date, published works could fall into the public domain for lack of notice. While failure to use a notice no longer places the work in the public domain, it is still advisable to use a copyright notice with published works to inform users that your work is protected by copyright and to include copyright ownership in the metadata fields of digital photographs.

Duration of Copyright

Because copyright duration in the United States is complex, the following chart adapted from the Cornell Law school chart [http://copyright.cornell.edu/resources/publicdomain.cfmis] is useful to describe the term of protection for works under the different schemes.

Date of Work	Protected From	Term
Created on or after January 1, 1978	Original work fixed in a tangible medium of expression	Life of the author, plus 70 years. For works made for hire, anonymous & pseudonymous works, 95 years from publication, or 120 from creation, whichever is shorter.

Registered between January 1, 1964 and December 31, 1977	Publication with Notice	28 year original term, plus 67---year renewal term, which vests automatically without registering the renewal
Registered between January 1, 1950 and December 31, 1963	Publication with Notice, and works still in the first term had to be renewed in order to be protected for the second term	28---year original term, plus 67 years if properly renewed. Otherwise, no protection after the 28th year (latest date December 31, 1991)
In the second (renewal) term between 1950 and 1978	Properly renewed for second term	Automatic extension for a total of 95 years (28 + 67)

Who is the Copyright Owner?

Since 1978, other than as an employee, the creator of a work owns the copyright, unless the creator transfers the rights to another in writing. If an employee creates a work within the scope of his or her employment, the employer is considered the owner of a "work made for hire." In order for a work to be classified as a work made for hire, the creation must fall into nine enumerated categories under the Copyright Act (*see* Copyright Office Circular 9, available at http://www.copyright.gov/circs/circ9.html for detailed listing) In most instances, a free---lance photographer performing services on an assignment will not qualify as a work made for hire.

What is Protected and What is Not

Idea or Expression

In order to protect works in such a way that doesn't preempt future works, copyright protects the expression of an idea, yet not the idea itself. Many photographers can independently take a photograph of the same subject, for example, a child at play, yet each has an original work, and none infringe upon the exclusive rights of the other. This idea/expression dichotomy may sound simple but like much of copyright, there are nuances and many shades of gray.

For example, if ideas can only be expressed in certain limited ways, the idea and the expression have merged and neither the idea nor the expression will enjoy copyright protection. For example, a photographer who was known for photographing babies against a white background could not prevent other photographers from similarly creating photographs of babies against a white background. Many photographers can take photographs of waves crashing on a beach, or two business people shaking hands.

In general, the more creative a photograph, the more protection it is given from "knock---off copies." In other words, the more original elements in a photograph that result from a photographers selection of poses, models and objects, the more ways the idea underlying the photograph could be expressed, and the more protection it may receive from subsequent purposeful copyright. The less choices a photographer makes, the less protection. That is why you might see many similar photographs of a popular tourist attraction, and each photographer can license their respective works without risk of infringement.

Limitations on Exclusive Rights

Fair Use

The exclusive rights of a copyright owner are limited by the doctrine of fair use under Section 107 of the Copyright Act. Fair use permits the use of copyrighted material without authorization to promote criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research. This list is just an example and the doctrine is very flexible without hard and fast rules. Courts will analyze four factors to determine if the doctrine should apply on a case---by---case basis. The factors considered are: the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work (whether it is creative in nature or more factual); the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. While not a factor in the statute, under the second factor, the nature of the use, courts will look at whether the second use replaces the first use or *adds* something new and is therefore *transformative.* If it transformative, fair use is favored. Fair use is difficult to predict, as the definition of a derivative work, one of the exclusive rights, is the right to transform a work, such as creating a painting from a photograph. In cases where appropriation artist have used a photograph in collages, or have significantly altered the work, the court will find the use transformative and non--- infringing but there are not bright lines.

Symbols, Words, Slogans

While copyright protects the broad subject matter of graphic works, it does not protect mere symbols. Nor does it cover short slogans such as "Have a Nice Day!" since the Act expressly excludes the protection of short words and phrases. However, some shapes and phrases have protection under trademark law.

Government Works

Works created for the United States government by its employees acting within the scope of their employment are not subject to copyright. This places government created work in the public domain, which is why anyone can obtain a government map or copy the circulars from the Copyright Office. WARNING: The subject matter of public domain works may still be subject to personality rights, trademark, or right of privacy e.g., soldiers in a Department of Defense photo.

Licensing

Copyright is separate and distinct from the object itself. A person can buy a photographic print, but will not own any of the exclusive rights under copyright unless those rights are acquired specifically. For example, the owner cannot permit reproductions of the print.

Copyright owners can permit many people to use the same work by creating different licenses with each user. The same image can be used simultaneously as a book cover, a billboard advertisement, and displayed on a website. If a licensee (user) wants to be the exclusive user of a photograph for a period of time, the agreement must be in writing. While non---exclusive license are not required to be in writing, using written agreements for all licensing transactions is recommended. It is important to be clear when specifying rights granted in a license as many disputes are the result of a misunderstanding as to the scope of use. Uses outside the scope of a license are considered an infringement of the owner's rights.

Online terms of use or “click---through” agreements are considered writings and can sufficiently grant exclusive or non---exclusive rights in an image.

In licensing an image, it is also important to examine the subject of the image to determine if any works within the photograph may require other permission for certain uses, in particular stock image licensing, such as a copyrighted object, a recognizable person or products that may invoke trademark or trade dress rights.

More Information

The official website of the United States Copyright Office www.copyright.gov has the full Copyright Act, copyright basics, information circulars, forms and other helpful information, including information on how to register works.