AUSTRALIAN COPYRIGHT COUNCIL

INFORMATION SHEET G011v17

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Photographers & Copyright

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 seminar program see our website: 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.

Key points

- Generally, copyright in photos lasts for the life of the creator plus 70 years.
- Copyright has expired in photos taken prior to 1 January 1955.
- Ownership of a photo varies depending on the circumstances under which it was taken.
- You will not own copyright just because you own the camera.
- Photographers also have moral rights in relation to their works.

What does copyright protect?

Copyright protects a range of materials, including photos. 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 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 photo 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.

The copyright notice

The copyright notice is not required for protection in Australia or 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 2019.

Who owns copyright?

For photos, unless there is an agreement to the contrary, the general rule is that the **photographer** is the first owner of copyright. (Note that you will not own copyright just because you own the camera).

There are, however, a number of exceptions to this general rule, set out below.

Also, 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).

Photos taken in the course of employment

If an employee takes a photo 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.

Photos taken by employees of newspaper and magazine publishers

For photos taken by employees of newspaper or magazine publishers, different rules apply, depending on when the photo was taken:

- For photos taken **before 1 May 1969**, the publisher owns copyright.
- For photos 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 photos online or in a book).
- For photos taken **on or after 30 July 1998**, the photographer owns the rights to photocopy the photos 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 photo owns copyright in it (unless they make an agreement to the contrary).

Photos taken for 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 Government: Commonwealth, State & Territory.

Commissioned photos

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 photo:

- For photos 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 photos taken **on or after 1 May 1969** and **before 30 July 1998**, the first owner of copyright in a commissioned photo is the commissioning client, unless the photographer and client agreed otherwise.
- For photos taken **on or after 30 July 1998**, the general rule on ownership depends on the purpose for which the photographs were taken:
- if the photos were taken for "private or domestic purposes" (such as family portraits, or wedding photos), 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 photo 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 photo 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 photo 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 photos have the exclusive right to:

- **reproduce** the photos—for example, by making prints, photocopying, and digitising;
- **publish** the photo (make copies of the photos available to the public for the first time); and
- **communicate** the photo to the public—for example, by putting the photos 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 & 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 photos;
- 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 photos last

Generally speaking, copyright 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.

However, because the rules of duration used to be different, photographs **taken before** 1 January 1955 are now out of copyright.

Where a Commonwealth, State or Territory Government owns copyright in a photo, 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 photo 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 photo 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 photo.

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 about Fair Dealing: What Can I Use Without Permission; Libraries: Introduction to Copyright; Education: Copyright Basics and Government: Commonwealth, State, Territory.

Note that Copyright Agency | Viscopy licences photos (https://www.copyright.com.au/licences-permission) and you can also get licences to use photos from photo libraries (for example, the Fairfax photo library). Viscopy's business is now managed by Copyright Agency.

Technological Protection and Electronic Rights Management Information

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" (these measures are used to protect digital material or encoded broadcasts). Further provisions allow copyright owners to take action if "electronic rights management information" (such as a watermark) 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.

Peoples' likenesses

People and people's likenesses are not protected by copyright. Sometimes, however, other areas of law, such as defamation, can affect the circumstances in which a person's likeness can be used. See the question below entitled *Do I need permission from people I photograph?*

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.

Photos taken in Commonwealth reserves

The *Environment Protection and Biodiversity Conservation Regulations 2000 (Cth)* introduced important procedures and restrictions on commercial activities in Commonwealth reserves including still photography and commercial filming.

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 photos 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 photos taken and any camera or other device used to take them.

For further information, contact the National Park you wish to visit. For general information, see: www.environment.gov.au/parks/.

Photos taken of the Sydney Harbour Foreshore

The *Sydney Harbour Foreshore Authority Regulations 2011 (NSW)* restrict the taking and subsequent use of photos 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.

For further information, see the Sydney Harbour Foreshore Authority website at: 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 photos?

No. Copyright protects the expression or form that the ideas take. The idea of photographing a person on the beach at dawn, for example, is not protected. A person who photographs that same scene can take action against others reproducing his or her photos, 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 photo, or who is the owner of copyright in a photo, 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 photo 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 photos without my permission? Who owns copyright in the altered photo?

Scanning a photo to make a digitised version, or making a copy of an existing digital file, reproduces the photo 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 photo, 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 photo, 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 photo.

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 photos of people, that certain unauthorised uses of a photo of a particular building may raise issues under other laws, such as competition and consumer 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. Although, 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.

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 photos they have taken. Generally anyone reproducing a photo 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 photos?

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

If the client owns 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.

If the client does not own copyright, the photographer is entitled to recover the debt. Whether or not the photographer can prevent the client using the photo will depend on the exact nature of the agreement between the parties and the circumstances of the situation.

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 (for example, if you own copyright, by making any licence to use the photographs conditional on payment being received).

Who owns the negatives or digital files of photos I took for a client?

Ownership of a physical negative, transparency or digital files 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. The owner of a digital file is likely to be the person who created it.

Ownership of **copyright** in the photos 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 photos, 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. If a photographer owns digital files and the client owns copyright, then you should get an agreement about what you can do with the digital files, as most uses will require the copyright owner's permission.

A client owns copyright in a photo 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 photo, 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. This will depend on what the parties agreed.

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

If you were commissioned to take photos 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 copy the photos whether from negatives, prints or proofs.

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

Even if the photographer owns copyright, the client may be entitled to make copies, if the client has an implied licence to do so. The client will only have an implied licence if it is clear from all the circumstances. For example, if a client commissions a photographer to take photos for use in a brochure, the client will be entitled to use the photographs for that purpose, even if the photographer has not expressly stated that she or he gives permission for this use.

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

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

If the photo was taken **before 30 July 1998,** your client owns the copyright in the photo, 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 photo was required, you have the right to **restrain** the use of the photo 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 photo in any way that was not covered in the agreement, since such uses would require your permission.

If the photo 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 photo 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 photos before I can include them in my portfolio?

This will depend on who owns copyright in the photos. If the client owns the copyright, you will need the client's permission to reproduce the photos 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 photos you take, you may wish to include a clause in the agreement allowing you to copy and communicate the photos 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.

Are my photos protected if I upload them to a website or blog?

The mere act of uploading your photos to a website or blog does not mean that you lose copyright protection. However, given that it is easy for people to reproduce photos they find on the internet, it is a good idea to take some practical measures to help protect against this, in addition to relying on your legal rights. For example, you should consider watermarking your photos with your name and the copyright notice (this may also give you an additional right of action if someone removes the watermark). You should also put a clear statement on your website about copyright and how people can get permission if they want to use your work. For more information see our information sheet Websites & Copyright.

You should be careful to read any relevant terms and conditions if you want to upload your photos to websites and social media sites that are not controlled by you. This is because, in order to use many of these sites, you have to grant certain rights in your work to the organisation. You'll need to ensure you are comfortable with the terms and that any rights granted are in line with what you want to do with your photos later. For example, if you know you may want to sell copyright in your photos to someone else at a later date, you should not upload them to social media sites that take rights in the photos.

Do I need permission from people I photograph?

A person's likeness is not protected by copyright. However, in some cases, using a person's likeness without permission may be prevented under other laws, such as the law of passing off, competition and consumer legislation, 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 photo 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 photos may be defamatory of people in them.

If you are commissioned to take photos, 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, it's a good idea to get a "model release" from that person so you won't have to worry later about whether or not your use of resulting photos will raise issues under areas of law such as passing off. For a sample photographer's model release, with explanatory notes, see the Arts Law Centre of Australia website: www.artslaw.com.au.

In other cases, photographers may take more casual shots, for example, photos of people in the street or at markets, or playing sports. If you know that you might later be using such a photo 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 photo 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 Australian Privacy Principles in the Privacy Act 1988 (Cth).

For example, if you are an organisation that has an annual turnover of more than $3 million, the Privacy Act will apply to you.

If you are covered by the Privacy Act, then you may be subject to additional obligations when it comes to the photography of people that others may not be subject to. For more information, see the following FAQ on the Office of Australian Information Commissioner's website:

http://www.privacy.gov.au/faq/business/gen-q5

For further information on this issue, contact the Office of Australian Information Commissioner or see its website: http://www.oaic.gov.au. The Copyright Council cannot advise on this area of law.

Further information for photographers

The Australian Institute of Professional Photography (AIPP) is the representative body for professional photographers. Its website is at www.aipp.com.au.

Further information

For further information about copyright, see our website: www.copyright.org.au

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 www.copyright.org.au

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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.



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

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