

What You Sell

Introduction

What photographers and illustrators should sell - in addition to their time and expertise - are licences to their work, rather than the actual work or images themselves. Thanks to copyright laws, creators are able to license the rights to their work for specific uses. This is like renting a photo or illustration for use in a magazine, in an advertisement, or by an organization. Copyright laws also give photographers and illustrators certain rights that, if enforced, can pay long-term benefits.

The following copyright information can help protect your professional and financial interests. This information is provided as a general guide and doesn't replace professional advice. Note that copyright law is constantly changing and subject to ongoing revision and court interpretation. International treaties also affect Canadian law. Keeping up with all these legal changes is extremely complex. For general information on copyright issues that relate to photographers/illustrators, contact CAPIC. For specific legal information contact a lawyer who specializes in copyright issues.

The Importance of Copyright

Copyright legislation protects a creator's work and protects a creator's professional reputation. Copyright is increasingly important to professional photographers and illustrators because it affects how you negotiate with clients, the fees you charge and, ultimately, the long-term success of your business.

Other creative professions give an idea of the importance of copyright. Thanks to controlling the copyright to their work, musicians earn money when their songs are played. Copyright also ensures that authors, producers and many performers earn money when their works are read or viewed.

Copyright and photos

Canada's copyright law treats photographs differently from other types of artistic work. Photographers need to take extra steps to ensure they own the copyright to the work they do for clients. If you neglect these steps:

- you will be ineligible to obtain copyright protection for that work; and
- your client, not you, will be the legitimate owner of your work.

What is copyright?

Copyright literally means 'having the right to copy, which extends to all types of reproduction, publication, public presentation and other specified uses.' Copyright is part of international law that deals with 'intellectual property.' These laws, which vary between countries, also apply to patents, trademarks, industrial design and trade secrets.

In very broad terms, copyright protects the expression of original ideas but not the information itself. This expression is often called 'the work' or, in the case of photos and illustrations, 'the artistic work.' Copyright consists of a 'bundle' of different rights that covers how that work is used. The copyright of a work can be divided into a number of rights, and each right dealt with separately.

Take a simple example of a photograph showing an apple at sunset. Copyright law does not protect the

idea behind an illustration or a photograph. The idea of taking a photo of an apple at sunset is not protected by copyright as there are no restrictions on creating such an image. But the expression of a specific image - the way the photography is taken, the positioning, the lighting etc. is protected through copyright. Even if the photograph includes elements, such as a building or object, that are not yours, the work itself is yours. (Note: in certain cases, you do need permission to include other people and/or their property in your work, see section on model releases).

Copyright is based on a simple principle: whoever creates or owns a work controls how that work is used. To qualify for copyright, a work must be:

Original

Not a copy of an existing work.

Fixed

Exist in some identifiable (i.e. physical, visual, electronic) form. Also, the work must be created by a person who is a citizen or resident of Canada, or connected with another country that adheres to the Berne Convention or a similar international copyright treaty, or is first published in such a country. Canadian copyright law applies to works in Canada. If a work created in Canada is used in another country, then that country's copyright law applies.

Copyright on photos and other commissioned work

Unlike other Canadian independent creators (creators who are not employees), photographers are NOT automatically the first owners of copyright in their work. Canada's copyright law singles out photographs and some other types of commissioned artistic works for different treatment.

Section 13(2) of the Canadian Copyright Act states that the copyright owner is the one who commissions and pays for the engraving, photograph or portrait. In other words, provided a client or buyer commissions the production of a photograph and pays for such a work, the client/buyer automatically holds the copyright on the photograph and/or engraving - not the photographer or person who created the engraving - (unless the buyer and photographer/creator have an agreement to the contrary). The Copyright Act applies this provision to a portrait or other original created on a commission basis, but doesn't specifically define what types of commissioned illustrations this includes..

Here are some general guidelines about who owns copyright on photographs and illustrations in the absence of written agreements to the contrary. When photographers/illustrators create photos, portraits or engravings (in the case of illustrators, portraits only):

When creators produce a work for themselves, they own the copyright.

When creators produce a work as part of their employment, including apprenticeships, the employer owns the copyright.

When created on a commissioned basis, the person or company that commissions the work owns the copyright once they have paid for it in full. If the client who commissions the work fails to pay for it, the copyright remains with the creator.

Illustrators benefit from the same copyright principles that apply to other creators, except when a portrait is commissioned.

Photographers/illustrators can arrange to own the copyright on work they do for employers and clients. To do that, photographers/illustrators must have the employer or client sign a written agreement that clearly states the photographer/illustrator is the first owner of the copyright to the work and the copyright remains with the photographer/illustrator. This agreement should be made in advance of every

job, project and/or assignment.

Canadian copyright law states that any contract that specifically addresses copyright issues is valid only when in writing and properly signed.

CAPIC's Photographic Production and Licensing Agreement deals with copyright issues and clients who commission work. This agreement includes the following condition between photographer and client (referred to as the 'licensee'):

"Licensee acknowledges that Photographer is the first and sole owner of all 'copyright' in all Photograph(s), and that Photographer shall remain the sole owner of any and all Photographs or any and all materials used in relation to production or reproduction of said Photographs, as well as all copyright (s) therein."

If the client signs, the photographer is the legal owner of the copyright to the photography covered by the agreement.

If you have a valid signed agreement, no other documentation is required for photographs, illustrations or any other work that are your original creations. The international notice for copyright includes the © symbol, followed by the year and the name of the copyright owner. Using a copyright notice is optional in Canada, but is the best way to establish copyright protection when work is used outside Canada. The CAPIC Photographic Production and Licensing Agreement requires identification of the photographer when his/her work is used.

Copyright basics

The value of copyright is easily lost if you don't know the law and fail to enforce your copyright. Today's technology allows easy re-use, and misuse, of images and other copyright material especially in electronic, or digital, form. Understanding copyright principles gives you a better opportunity to benefit whenever your work is used, in any format.

The good news about copyright:

Canadian copyright law gives the copyright owner of a work the exclusive right to reproduce, publish, publicly present that work, or any substantial portion of that work, or make certain other uses of that work.

To comply with copyright law, reproduction of a copyright work in most cases requires permission from the copyright owner. That permission must be put in writing and may involve a fee negotiated with the user.

Copyright law gives the copyright owner the right to set a fee and conditions for every use of the work. These fees and conditions are important ways for creators increase their earnings and gain recognition for their work. By controlling copyright, you can also ensure that your creative work continues to generate revenue for your estate and your heirs for 50 years after your death.

This is why it is critical for photographers/illustrators, and other professional creators, to ensure that they are either:

- The sole copyright owners of their work, or
- Fairly compensated if someone else is to own the copyright of their work.

The bad news about copyright:

- Enforcing the law is up to the copyright owner and doing that effectively requires significant time and may involve substantial legal costs.
- To ensure that photographers/illustrators own the copyright to their photos, illustrations and other creative work, they need to have written agreements to that effect with all of their clients.
- Copyright issues affecting the Internet, CD-ROM, electronic databases and other electronic formats are just beginning to be recognized. Until effective ways to deal with copyright issues are in place, many clients, producers of electronic media and others will continue to ignore creators' copyright.

Whether the copyright owner of a photo/illustration is the creator, the employer or the client, copyright law gives original illustrations and photographs similar protection to that available for music, books, computer software and other types of original work. Work created in electronic or digital formats, such as computer-created files and images, also qualifies for full copyright protection.

The joy of licensing

Creators do not need to sell their copyright work. Instead, creators are able to license the rights to their work for specific uses. Copyright can be bought and sold, much like a tangible asset. However, it is usually better for creators to retain ownership of the copyright in their works and then to license specific rights to clients and other users. When copyright owners transfer or grant all their rights unconditionally, it is generally called an assignment of rights or a buy-out. When only some rights are transferred, it is usually called a licence. The terms of a copyright licence are negotiable. As will all copyright contracts, Canada's copyright act recognizes as valid only those assignments or licences that are in writing. The copyright owner can license very specific rights to a work and retain all other rights that are not specified under that licence.

A copyright licence for a photograph/illustration should be negotiated by specifying all of the following five terms:

1. Type of media

A licence for a corporate brochure is different from a licence for a book cover or magazine feature. The licence fee depends on the individual licensee and how the licensee values the photo/illustration.

2. Geographical territory

Licences may be defined by a market, such as English- or French-language North America, a specific country or the world. The larger the territory in which a work appears, the more valuable the licence.

3. Timing and/or duration of use

Work can be licensed as a first-time or secondary use. First-time use is generally at a higher licensing fee. Work can also be used for a specific time frame, such as a three-month advertising campaign or one year for an annual report. The longer the use, the more expensive the licence.

4. Circulation and/or visibility

A photo/illustration used in a mass-market newspaper ad may have higher circulation than if used for a targeted direct marketing campaign. The higher the visibility, the more valuable the licence.

5. Exclusivity

An exclusive licence gives the licensee the sole right to use that work as defined by the licence. A non-exclusive licence lets the same photograph/illustration be licensed to different clients and/or for different uses at the same time.

Here's an example of an effective copyright licence (Note: the number in brackets refers to the number of the licence term described above):

The non-exclusive(5) right of reproduction for 5000(4) posters(1) for the greater Toronto area(2) for 6 months(3).

There is no requirement to register copyright work in Canada. Purchasing a certificate of registration can provide proof that the work is protected by copyright and that the registered owner is the owner of the copyright in that work. For the latest information on copyright registration and current fees contact the following federal government office:

Copyright Office
Canadian Intellectual Property Office (CIPO)
Industry Canada
50 Victoria Street
Place du Portage, Phase I
Hull, Quebec
K1A 0C9
Ph: (819) 997-1836
Web: cipo.gc.ca

Moral rights

Copyright allows creators to:

- Prevent unauthorized changes to a creator's work, and
- Protect the creator's reputation.

These provisions are known as 'moral rights.' Moral rights, which are part of copyright, give the creator the right to be identified with the work and the ability to protect the integrity of that work.

With moral rights, creators can decide whether or not to include their name with their work. They also get a veto on any changes to their work that would harm their reputation.

In Canada, moral rights always remain with the creator (or the creator's heirs), even if someone else, say a client or a publisher, becomes the copyright owner. Unlike other rights, moral rights cannot be sold or transferred. Creators can waive their moral rights. This means the creator agrees not to enforce his/her moral rights. Such a waiver can apply to all uses or be restricted to specified circumstances.

Any request to waive moral rights should be considered carefully in advance because it means surrendering critical protection to your reputation as a professional creator.

Duration of copyright

For most works, including artistic works, copyright begins when a work is created, continues until the end of the calendar year in which the creator dies and then remains in force for the next 50 years.

Special rules exist for photographs. Thanks to work of two professional photography groups, CAPIC and PPOC, in 1997 Canada amended its law covering the length of copyright protection on photographs. As of 2000, the copyright term on photographs depends on the copyright owner.

- If the copyright owner of a photo is an individual, usually the photographer who took the photo, the copyright term begins when the photograph is made, continues during that individual's

lifetime, and remains in force for another 50 years, until the end of that calendar year. This is the same term for illustrations and other copyright works.

- If the copyright owner is a corporation, the copyright term begins when the photograph is made or printed, and continues for another 50 years, until the end of that calendar year. The lifetime of the photographer is not a factor. Note that this rule applies only to corporations with many shareholders. If an individual photographer incorporates his/her own business and is its majority shareholder when the photograph is made, the copyright term for that photo is the same as for an individual photographer who operates an unincorporated business.

The term of copyright protection that Canada provides for photographs is likely to be further amended because having two different terms for one type of copyright work is unusual.

Also, the person who owns the initial negative (or the original photo if no negative or plate exists) is considered to be the 'author' of that photo. The 'author' can be an individual or a corporation (with differing consequences for measuring the term of copyright protection).

After copyright expires, the work falls into the public domain and can be copied or altered without permission from either the creator or copyright owner. Such copying or alterations do not violate the rights of the creator or the copyright owner.

Beware of work-for-hire

Independent professionals who are contracted to provide photography or illustration services must also be aware of the pitfalls of 'work-for-hire.' This is an American contractual term that often appears in Canadian agreements. Whether the contract is used in Canada or the U.S., the effect is the same. Under 'work-for-hire' terms, the client gains the copyright to your creative work as if you were a regular employee, yet does not provide you with any of the usual employee benefits.

Some clients and organizations may want you to agree to a 'work-for-hire' contract. If you sign such an agreement, you automatically lose copyright on the work you create for the client. This is an unfair 'heads-I-win-tails-you-lose' situation. Once a work-for-hire contract is in place, photographers/illustrators lose their ability to license their work, as recommended under CAPIC's Photographic Production and Licence Agreement.

In cases where the client wishes to acquire copyright ownership to the work you do, the fee you negotiate should fairly compensate you for the full value of the copyright work, since you will have no rights left to license to future potential users of that work.

Photocopying and electronic rights issues

In addition to conventional copyright issues, the technological advances in photocopiers, computers, the Internet and digital technology raise still more issues and concerns about copyright. Using, distributing, copying and selling creative work in digital or electronic form is now commonplace. Whether these digital works are pictures, photos, other images, words, sounds or some other expression of creativity, copyright laws also apply.

Copyright owners around the world now recognize that specialized organizations are often the most effective way to manage certain copyright licences, including photocopying and electronic rights. Such organizations, commonly known as collective societies, operate by:

- Gathering/obtaining specific rights from the copyright owners they represent.

- Negotiating licences with those who use those rights.
- Collecting the licensing fees and distributing royalties to the appropriate copyright owners.
- Enforcing copyright as necessary.

The Canadian Copyright Licensing Agency, better known as CANCOPY, began in 1988 to administer the photocopying rights for its affiliated rights-holders. In 2000, CANCOPY collected licensing fees of about \$20 million on behalf of the rights-holders it represents - individual creators and print publishers. In that year every member in good standing received a minimum payment of \$500. CANCOPY now represents its members' rights in digital/electronic formats.

CAPIC officially joined CANCOPY in 1999, and encourages its individual members to work with this agency. CAPIC strongly recommends that its members convey the photocopy rights of their photos and illustrations to CANCOPY. Enforcement of copyright in the digital domain is a challenge for freelance creators, independent rights-holders and collective societies. Various users and providers of digital content in Canada and other countries sell or distribute digital material while ignoring the copyright issues of independent creators, such as freelance writers, photographers and illustrators.

Recent court rulings around the world, including a major U.S. legal decision, *Tasini vs. The New York Times*, continue to uphold the principle that digital content providers cannot include the work of freelance creators in electronic databases without the freelancers' express permission.

How to protect the electronic rights of your work

Instead of dealing fairly with copyright issues, it is likely that many publishers, clients and other users of photos and illustrations will continue pressuring CAPIC members and other professional creators to sign away their electronic rights for little or no additional compensation.

CAPIC recommends the following negotiating strategies:

1. License specific uses of your work. Do not assign or transfer your copyright.
2. License only non-exclusive rights to users, unless a substantial premium is paid for exclusive rights.
3. Avoid signing 'work-for-hire' contracts.
4. Do not waive your moral rights.
5. Keep written and signed contracts for all photography and commissioned assignments.
6. Photographers should use CAPIC's Photographic Production and Licence Agreement to ensure they own the copyright to their work.
7. Agree to terms that are fair for you, minimize clients' rights to your creative work, and provide fair additional compensation for additional uses of your work by the client.
8. Clearly state that all rights not expressly granted in a contract remain your property.
9. Be sure to require appropriate credit for your work in all formats that you authorize.
10. When licensing electronic rights, make sure to license different types of electronic rights separately. Website rights are separate and distinct from electronic database rights. Other electronic media, such as CD-ROMs, should be licensed separately.
11. Try negotiating non-exclusive licences and/or setting time limits on each electronic licence.
12. Because of the complexity of electronic rights issues, grant the electronic rights to your work to CANCOPY and help the agency license your work for you.

Sources of copyright information are listed below:

- Canadian Copyright Law, 3rd Edition, by Lesley Ellen Harris LLB, McGraw, Hill Ryerson, 2000. A good general background to copyright issues.
- Digital Property: Currency of the 21st Century, by Lesley Ellen Harris LL.B, McGraw, Hill Ryerson, 1998.
- Canada's Copyright Act (unofficial version) available at the website: www.laws.justice.gc.ca
www.strategis.ic.gc.ca

Moral Rights in Action

To kick off one Christmas shopping season around the necks of the 60 Canada geese models that make up the original sculpture. The sculpture's creator, artist Michael Snow, used his moral rights to take legal action against the sculpture owner for adding unauthorized 'decorations' to his work.

The court agreed with Snow. It found the ribbons were prejudicial to Snow's reputation as an artist and ordered the decorations removed immediately. The court ruling noted that Snow was 'adamant in his belief that his naturalistic composition has been made to look ridiculous by the addition of ribbons and suggests it is not unlike dangling earrings from the Venus de Milo.'