

## Photography

The emphasis of this chapter is upon three legal issues of concern to photographers:

- copyright, in particular the problem of the ownership of copyright in commissioned photographs;
- ownership of the negatives when photographs are commissioned; and
- the question of privacy -- can the photographer photograph anyone or anything?

In Australia at the present time, if a photographer is commissioned to take a photograph (of any subject) it is the person who commissions the photograph, not the photographer who is the owner of copyright in the photograph. The same is true of commissioned portraits and engravings but not for any other type of artistic work. Why photography and engravings have been singled out for this treatment is unclear. It is a situation however that photographers can rectify by the use of a written agreement.

A written agreement can also be used to settle the question of the ownership of negatives for commissioned photographs. Most photographers believe that they are the owners of the negatives when their work is commissioned. Those who commission photographs however often believe that they have acquired ownership of the negatives along with ownership of copyright. If there is no agreement concerning ownership, deciding who owns those negatives may well be difficult.

Australian law recognises no inherent right of privacy thereby creating a situation where photographers are apparently free to photograph whoever and whatever they choose. This is not necessarily correct as there are a number of areas of the law which qualify that situation and which should be understood by photographers.

## COPYRIGHT

This section should be read in conjunction with Chapter 6, "Copyright".

### 1. Definition of Photography

The Copyright Act 1968 (Cth), s. 10 defines a photograph as:

"a product of photography or of a process similar to photography, other than an article or thing in which visual images forming part of a cinematograph film have been embodied, and includes a product of xerography . . .".

This definition is broad and probably encompasses a number of techniques including holography. There is however no reported decision to that effect.

The "photograph" resulting from most photographic processes will be the negative itself and a print made from that negative will be a reproduction of the photograph.

Prior to the 1968 Act there was no separate copyright in cinematograph film and the copyright protection given to photographs included photographs forming part of a cinematograph film. This is no longer the case and the present Act deals separately with cinematograph film (a subject not dealt with in this chapter).

Photographs are included in the definition "artistic work" in the Act along with painting, sculpture, drawing and engraving. As with those other types of work it does not matter whether the photograph is of artistic quality or not.

## 2. Originality

The Copyright Act does however require that artistic works be original. It is clear that for a photograph to be original it need not be novel but it does need to derive from the photographer's own efforts. The threshold of originality is low but it does appear that some degree of skill needs to be exercised. It is generally accepted that if two photographers take separate but identical photographs of the same scene both photographs are "original" even though one photographer may have imitated the other.

## 3. Authorship

The author of a photograph is the person who took the photograph:

s. 10. Before the 1968 Act the author was the person who owned "the material on which the photograph was taken" at the time it was taken: s. 208.

## 4. Duration

Similarly the duration of copyright in photographs varies both before and after the 1968 Act.

- (1) Copyright in photographs taken before 1968 expires 50 years after the end of the year in which the photograph was taken: s. 212.
- (2) Copyright in a photograph taken after 1968 expires 50 years after the end of the year in which the photograph is first published: s. 33(6).

Publication has now been introduced as a requirement. If a photograph is never published copyright will in effect be perpetual. Publication is deemed to have occurred when "reproductions of the work or edition have been supplied (whether by sale or otherwise) to the public": s. 29(1)(a). Exhibition of a photograph is not publication.

## 5. Ownership

The general rule is that the first owner of copyright in a photograph is the author. This rule however is subject to qualification, as follows.

- (1) Where the photograph is taken pursuant to the terms of the photographer's employment by another person under a contract of service (not being the type situation described in (2) below), the employer is the owner: s. 35(6).

- (2) Where a photograph is taken by a photographer employed under a contract of service to take photographs for a newspaper, magazine or similar periodical, the proprietor of the newspaper, magazine or periodical is the owner but only insofar as the copyright relates to publication of the photo in any newspaper, magazine or periodical or the broadcasting of the photograph and not for other purposes: s. 35(4).

Both (1) and (2) are concerned with employment situations which are distinct from the engagement of a self-employed photographer to take photographs, i.e. commissioned photographs. It is also important to realise that the situations in both (1) and (2) can be varied by agreement. For example a photographer employed to take photographs under a contract of service can stipulate that he or she is to own copyright and not the employer. Under such a contract the employer could be granted a licence to reproduce the photographs for the required purposes.

The other qualification to the general rule of ownership is the commissioned photograph.

## **6. Commissioned Photographs**

Where a person commissions a photographer to take a photograph (i.e. there is an agreement between the two for valuable consideration and the photograph is taken pursuant to that agreement), the person who commissioned the work owns copyright in the photograph: s. 35(5).

This situation is subject to an important limitation. If when the agreement was made the person commissioning the photograph "made known, expressly or by implication, to the author of the work the purpose for which the work was required, the author is entitled to restrain the doing, otherwise than for that purpose, of any act comprised in the copyright in the work": s. 35(5). For example, if a photographer is commissioned to photograph a wedding and is told that the photographs are for use only in compiling a wedding album for the bride and groom the photographer can prevent the photographs from being used for commercial purposes such as advertising. If the photographer is not told or fails to ask the purpose for which the photographs are required no right to restrain the use of the photographs can arise unless it is otherwise quite clear from the circumstances what the proposed use was.

This effect of the Copyright Act with regard to commissioned work is unfair to photographers. If a drawing, sculpture or painting (other than a portrait) or a literary or musical work is commissioned the author of the work is the first owner of the copyright. The person who commissions the work undoubtedly has a licence to use the work for the purpose for which it was commissioned but not otherwise.

Section 35(5) can produce some unusual results. If an artist is commissioned to take a photograph which is then combined with other commissioned artwork such as painting to produce the final work the result is that the artist owns copyright in the painting but not the photograph.

Prior to the introduction of the present Copyright Act the Copyright Law Review Committee, 1959 (the Spicer Committee) recommended that the person who commissioned a work for valuable consideration should be the owner of copyright in the work insofar as it related to the purpose for which it was commissioned (unless there was an agreement to the contrary) and in all other respects copyright was to remain with the author. The

recommendation was not adopted. This however, is only one solution. Another would be to remove photography from the ambit of s. 35(5) entirely.

The provisions of s. 35(5) can be excluded or modified by agreement and all photographers who wish to obtain ownership of copyright in any commissioned work should consider the use of a written agreement which provides that the photographer is to be the copyright owner.

If the photographer is to be the owner of copyright the agreement should stipulate what use the commissioner can make of the photographs and in fairness to the commissioner, it should be considered whether any restrictions are to be placed on the photographer's use of those photographs.

If the commissioner owns copyright the photographer should bear in mind that if the commissioner fails to pay the agreed price the photographer cannot prevent the commissioner using the photographs. The photographer can only claim the money owed as a debt to her or him.

The following contract attempts to deal with these issues.

### PHOTOGRAPHIC COMMISSION AGREEMENT

THIS AGREEMENT is made the ..... day of ..... 19..... between

Name .....

Address .....

Telephone ..... (the Photographer)

and

Name .....

Address .....

Telephone ..... (the Commissioner)

by which we agree as follows:

1. Commission. The Photographer agrees to complete on or before the ..... day of ..... 19..... the following photographic work (the Work): .....  
.....(Description of the Work including number, size and type of prints.)

Provided that the time of completion shall be extended in the event of delays caused by force majeure, injury or illness to the Photographer, delays caused by the Commissioner or any cause or condition that is substantially beyond the power of the Photographer to control or avoid.

2. Payment. The Commissioner shall pay to the Photographer the sum of \$..... as follows: .....  
.....(Specify the manner in which payment is to be made e.g. by instalments prior to delivery or in full upon delivery.)

3. Acceptance. It is understood that the Photographer will use his/her aesthetic skill and judgment to create the Work, and the Commissioner agrees to accept the completed Work unless he/she can show that the

Work was not executed substantially in accordance with the description contained in clause 1 of this agreement.

4. Copyright.

\*(a) The Photographer shall be the owner of copyright in the Work.

[But shall not use the Work for any of the following purposes without the consent of the Commissioner  
.....]\*

The Commissioner may use the Work for the following purpose(s):

.....\*(b) Upon payment in full to the Photographer the Commissioner shall be the owner of copyright in the Work but shall use the Work only for the following purpose(s): .....

5. Ownership of Negatives. The Photographer/Commissioner\* shall be the owner of all photographic negatives for the Work.

Signed: .....

Signed: (the Photographer)

Signed: .....

Signed: (the Commissioner)

\*Delete if inapplicable.

## **7. Infringement by Photographing**

Photographers need to bear in mind that if they photograph a substantial part of another artistic work without permission they will infringe copyright in that work.

A photograph of a television broadcast may infringe copyright in that broadcast. Similarly a photograph of a single frame from a film may infringe copyright in that frame, the single frame being within the definition of photograph in s. 10 of the Act.

It is not an infringement to photograph sculptures or works of artistic craftsmanship which are "situated, otherwise than temporarily, in a public place, or in premises open to the public": s. 65(2). Similarly copyright in a building is not infringed by photographing the building: s. 66. Such photographs may also be published: s. 68.

In recent years a number of artists and photographers have appropriated the artistic work of others for use in their own works. These new works, commonly works of pastiche, collage or montage are usually original works in their own right and often qualify for copyright protection. At the same time however they may also infringe the appropriated work by reproducing a substantial part of that work.

This particular style of artistic practice poses an interesting challenge to copyright law.

If a photographer appropriates another's artistic work for inclusion in her or his own work there will be no infringement of copyright in the original work if:

- a substantial part is not used;
- copyright in that work has expired (most commonly 50 years after the death of the author); or
- the permission of the copyright owner is obtained.

It would appear then that a photographer is free to use e.g. a photograph of an old Master painting in a montage. If copyright no longer subsists in the work there can be no infringement. The problem for the photographer however is how to obtain a photograph of the work. If the photographer does not have access to the original work the only practical solution is to reproduce a published edition of that work. This however may infringe copyright in the published edition.

Section 92 of the Copyright Act provides for copyright in a published edition of an artistic work (and of literary, dramatic and musical works). This is a limited type of copyright and has a duration of only 25 years: s. 96. It is "the exclusive right to make, by a means that includes a photographic process, a reproduction of the edition": s. 88. This particular right was introduced by the 1968 Act and pursuant to s. 224, copyright does not subsist in a published edition where the first publication of the edition took place before 1 May 1969.

There is no copyright in a published edition "that reproduces a previous edition of the same work or works": s. 92(2).

Protection is extended to works published in a number of foreign countries by virtue of the provisions of s. 184(1) of the Act and Reg. 4(1) of the Copyright (International Protection) Regulations. The copyright protection offered to works published in such countries "subsists only so long as protection in the nature of copyright subsists in relation to the edition under the law" of that country: Reg. 8. In some cases this is less than 25 years.

The fact that a publisher is unlikely to detect the reproduction of a work from a published edition does not alter the situation that the photographer is infringing copyright and that the publisher can use the remedies available for infringement of copyright against the photographer.

It could be argued that the appropriation of artistic works, whether copyright subsists in those work or not, should be permitted where the inclusion of the other work is only incidental to the principal matters represented in the new work. Copyright law has shown itself to be responsive to changes in technology so why should it not respond to accommodate changes in artistic practice?

Such an argument however may not be so appealing to those artists whose work is appropriated particularly if it is appropriated for use in advertising.

## **OWNERSHIP OF NEGATIVES**

When a photographer is commissioned to take photographs, who owns the negatives? In recent times it has been suggested that the owner is the person who commissioned the work. This issue has not been settled although it is

generally believed that the photographer will retain ownership of the negatives even where the commissioner may be the owner of copyright.

Ownership of the film however appears to be the most important factor. If the client supplies the film then he or she, as the owner of the film, should remain the owner of that film in the form of negatives. It is also likely that the client has a valid claim to ownership of the negatives where the photographer invoices the client with the cost of the film at the completion of the work.

The ownership of negatives is important because ownership controls possession and possession of the negative enables the best quality print to be made. With the advent of increasingly sophisticated means of reproducing photographs however, the possession of the negative is becoming less important as a means of controlling the quality of reproduction.

Photographers should remember that copyright and the negatives are two separate assets and that the same person need not necessarily be the owner of both.

To remove any doubt about the ownership of negatives, photographers entering into contractual arrangements, whether for a commission or otherwise, would be wise to consider the inclusion of a clause similar to clause 5 in the commission agreement above stipulating that they own the negatives.

## CONTRACTS

It is not possible to produce one type of contract suitable for all forms of photographic practice.

Photographers who derive income from their photography need to examine their own particular type of photographic practice and assess the need for a standard form of agreement suitable for their needs. It is also useful to recognise the types of situations where a contract is advisable. The following are some examples:

- commissioned photographs, e.g. commercial work, portrait and wedding assignments, photographs commissioned for exhibition and/or publication;
- stock photographs;
- licence agreements (a permission to use a photograph in exchange for a royalty) -- this would be appropriate where, for instance, a photograph was to be reproduced as a poster;
- publication contracts;
- collaboration agreements (where there is more than one author (photographer) involved and consequently the possibility of joint authorship in the photograph); and
- employment contracts (e.g. where the employer would become owner of the copyright but for the photographer's ability to negotiate contractual provision as to copyright ownership).

## PRIVACY AND PHOTOGRAPHY

Australian and English law has not developed a general right of privacy. However, in 1979 the Australian Law Reform Commission published a report entitled *Unfair Publication: Defamation and Privacy* which contained a proposed Unfair Publication Bill for consideration by the Federal Government. This proposed legislation is limited in scope being principally concerned with commercial appropriations of a person's "name, identity or likeness" rather than with a general right of privacy.

Until the law is altered we are left with a confused position where those who feel that their privacy has been invaded, e.g. by the unauthorised publication of a photograph, must rely on causes of action that are not always appropriate. There are many instances where a person does not have a remedy for unauthorised publication.

In the absence of privacy laws photographers in Australia have a good deal of freedom as to where and what they can photograph.

*The High Court of Australia in Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor* (1937) 58 C.L.R. 479 held that the defendants had not infringed the plaintiff's legal rights by constructing a platform on land adjoining the plaintiff's racecourse and broadcasting the results of the races. The same result would presumably have been reached if the races had been filmed or photographed.

More recently in the case of *Bernstein of Leigh (Baron) v. Skyviews & General Ltd* [1978] 1 Q.B. 479 the English Court of Queens Bench held that the plaintiff's rights had not been infringed when the defendant took an aerial photograph of the plaintiff's country estate.

Other areas of the law such as the law of torts may on occasions protect a person's privacy. For example, Griffiths J. in that case said:

"if the circumstances were such that a plaintiff was subjected to the harassment of constant surveillance of his house from the air, accompanied by the photographing of his every activity, I am far from saying that the court would not regard such a monstrous invasion of his privacy as an actionable nuisance for which they would give relief."

Generally then, a photographer is free to go about photographing whoever he or she pleases and may publish or exhibit such photographs without fear of legal action being taken. However, this freedom to photograph is not unfettered and there are important limitations which should be understood by photographers. These limitations are imposed by the following areas of the law.

### 1. Passing Off

In 1957 Mr and Mrs Henderson who were professional ballroom dancers came to Australia from England and gave public performances, lectures and demonstrations. Radio Corporation Pty Ltd who were in the business of making and distributing records, used a photograph of the Hendersons dancing, for the cover of a record of ballroom dance music, without seeking the permission of the Hendersons.

As the use of the photograph indicated the recommendation or approval of the record by the Hendersons this was a false representation that the business of Radio Corporation Pty Ltd was connected with the Hendersons' business (as ballroom dancers). The New South Wales Full Court held that this constituted the tort of passing off and that an injunction could be granted to prevent the wrongful appropriation of the Hendersons' professional reputation: *Radio Corporation Pty Ltd v. Henderson* [1960] N.S.W.R. 279.

An important feature of this case is that the Hendersons had a "commercially valuable reputation". This type of action could not have been brought by a private person who did not have a saleable reputation.

## 2. Trade Practices Act, Sections 52 and 53

Had Mr and Mrs Henderson brought their action to court today they would most probably claim that there had been a breach of ss 52 and 53 of the Trade Practices Act 1974 (Cth) or the equivalent sections in the States' uniform fair trading legislation.

Section 52 provides:

"A Corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

The Hendersons would have claimed that Radio Corporation Pty Ltd had engaged in misleading conduct by representing a connection between their own business and that of the Hendersons.

More to the point s. 53 provides:

- "A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services --
- ... (c) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits that they do not have;
  - (d) represent that the corporation has a sponsorship, approval or affiliation it does not have; . . ."

## 3. Defamation

In *Tolley v. Fry* [1931] A.C. 333 Tolley, the plaintiff in the action was a well-known amateur golfer. The defendants were a firm of chocolate manufacturers who used, in one of their advertisements, a caricature of the plaintiff playing golf with a packet of their chocolate in his pocket. A caddy was depicted nearby also with a packet of chocolate. The caption compared the excellence of the chocolate to the excellence of the plaintiff's drive. This advertisement was published without the knowledge or consent of the plaintiff and in his action for libel he alleged that there was an innuendo "that he had prostituted his reputation as an amateur golf player for advertising purposes; that he was seeking notoriety and gain by the means of aforesaid; and that he had been guilty of conduct unworthy of his status as an amateur golfer".

The House of Lords held that the advertisement was capable of bearing a defamatory meaning as the plaintiff alleged.

In *Dunlop Rubber Co. Ltd v. Dunlop* [1921] 1 A.C. 367, a case before the House of Lords, the plaintiff was attempting to restrain an advertisement containing pictures of his head placed on "the body of a very tall man dressed in a exaggeratedly foppish manner". The court approved the grant of an injunction restraining publication.

Both of the above cases were concerned with the use of a celebrity's picture in an advertisement. In contrast is the decision of the Supreme Court of New Zealand in *Kirk v. A. H. & A. W. Reed* [1968] N.Z.L.R. 801. The plaintiff, who it seems was not a celebrity, had his photograph published, but not in an advertisement. He claimed that the persons who photographed him had posed as tourists seeking photographs for personal reasons. They asked him to pose as a "typical New Zealander on the booze". The plaintiff had obliged them and the resulting photograph was described by the judge as depicting "the plaintiff dressed in what I might call 'Saturday morning clothes' holding a flagon of beer and a bottle that contains wine or beer leaning against what both counsel have described as a rubbish receptacle in a main street of a typical New Zealand town". The photograph was published with the following caption: "Christmas beer. A reveller with his Christmas beer supply waits for the bus at High Street, Lower Hutt."

The judge hearing the matter stated as follows: "In my opinion, having regard to those circumstances and the nature of the photograph and the caption which, taken together, could well be said to hold the plaintiff up to contempt or ridicule, the publication of this material was quite clearly capable of being regarded as defamatory of the plaintiff."

A similar case was considered by the Ghanaian Court of Appeal. In that case a woman's photograph was published with her consent in a newspaper. The photograph however was later used by another party to make postcards with the inscription "Traditional hair-do in Ghana". The plaintiff claimed that there was defamation by the innuendo that she had lowered herself to use her photograph for gain. The court however did not agree that the photograph bore that innuendo nor was there any indication (as in the case of *Tolley v. Fry*) that her trade or vocation would suffer as a result of the publication.

It is clear from these cases that publication of a person's photograph without that person's consent, by itself, is not enough to amount to libel.

It must be shown that the photograph complained of lowers a person in the estimation of others or exposes that person to hatred or contempt. Defamation therefore only occasionally provides protection against the unauthorised use of a person's photograph.

#### **4. Breach of Confidence and Breach of Contract**

If a photographer is permitted to photograph a particular subject, but under circumstances where it is made known to the photographer that the subject is secret and confidential and is being shown in confidence, the photographer may be liable in an action for breach of confidence if he or she discloses or publishes the photograph.

In 1888 Mrs Pollard went to the premises of the Photographic Co. in Rochester and paid for photographs of herself to be taken. This was done but the photographers used a copy of a photograph of Mrs Pollard on a Christmas card and offered it for sale to the public. An action was brought by Mr and Mrs Pollard. The court held that a photographer who has been employed to take a customer's portrait is not justified in taking off copies for the photographer's own use, and selling or publicly exhibiting them without the express or implied authority of the

customer. The court said that this was both a breach of confidence and a breach of an implied term of the contract between the customer and the photographer: *Pollard v. Photographic Co.* (1888) 40 Ch. D. 345.

## 5. Trespass

The over-enthusiastic photographer venturing onto private property may be liable for damages (even exemplary damages) for trespass.

In some situations a photographer who enters a person's land and remains there without reasonable cause may be liable to criminal prosecution.

A civil action or criminal prosecution for trespass however is unlikely to prevent the publication of any photograph obtained during such an excursion.

## 6. Statutory Prohibitions and Court Orders

The taking of photographs is prohibited by certain statutes or regulations to those statutes. For example, reg. 7A of the National Gallery Regulations provides that a person may be liable for a penalty of \$100 for being in a possession of a camera in the gallery without the consent in writing of the council or a person authorised by the council.

It is also common for courts to make suppression orders encompassing photographs, e.g. to prohibit the publication of a photograph of an accused person.

## 7. Licences to Enter Premises

The organisers of concerts and other events often prohibit photography at the venue. This restriction is contractual in nature, it being a condition of entry that photographs not be taken or that cameras not be taken into the venue.

## 8. Nuisance and Other Wrongs

As indicated in *Bernstein of Leigh (Baron) v. Skyviews & General Ltd* [1978] 1 Q.B. 479 it is possible that the actions of a photographer may amount to a nuisance if it is in the nature of sustained harassment.

## RELEASE FORMS

Because Australia does not have privacy laws as those which exist in the United States of America, the same use has not been made of release forms in this country. It is however becoming more common now for professional photographers to use these forms when photographing models. This is a sensible precaution, particularly to prevent actions such as the one brought by the Hendersons for passing off. Photography libraries and the organisers of photographic competitions now commonly require photographers to obtain a model release for their photographs.

If a release is used it should be in writing, signed and dated by the person giving consent (or the parent or guardian of minors). It should specify what use the photographer may make of the photographs taken and whether the photographs may be used, in part or whole, or in a distorted character or form. Any consent should extend to use by the photographer's agents, assigns and legal representatives.

The following is an example of a model release form.

## MODEL RELEASE

In consideration of the payment of \$..... by .....

(Photographer's name) of ..... (Address)

(hereinafter with his/her heirs, executors, administrators and assigns called the Photographer) the receipt of which sum is hereby acknowledged I ..... (Model's name) of ..... (Address)

irrevocably authorise the Photographer or those acting with his/her permission and authority to publish and use in any manner and for any purpose whatever any photographs of me taken by him/her or at his/her request (hereinafter referred to as the photographs). Without limiting the generality of the foregoing such authority shall include the right to publish or use the photographs:

- (a) in any publication;
- (b) in part or in whole;
- (c) for advertising or marketing purposes;
- (d) without any further authority or prior inspection by me;
- (e) in a distorted or altered form;
- (f) with any caption including my own name or a fictitious name;
- (g) for advertising purposes.

And I hereby release the Photographer from and against all actions, proceedings, claims and demands for damages, loss of profit, loss, cost, interest, injunctive relief or other remedies or other liabilities arising from or in relation to the use of the photographs by the Photographer or by any person with the authority or permission of the Photographer.

Dated the ..... day of ..... 19.....

.....(Model's signature)

Signed: .....

Signed: (the Model)

Signed: .....



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