

BZ/Brief

PHOTOGRAPHS ONE PICTURE CAN HOLD A HOST OF RIGHTS

The impact of using photographs is equaled only by the number of thorny rights issues you may encounter along the way. Here, the essential is to think about each photo twice—first about who owns the copyright in the photograph, and second about any rights attached to the people or objects it pictures. This thinking should be done *before you are committed* to using a particular photo.

Photographers' Copyright

Begin with the assumption that the place or publication where you first saw the photograph does not own it. The photographer who took the picture almost always retains its copyright, selling to the publication or corporation only the right to use it once or in specific ways. There are some exceptions to this rule—newspapers, magazines and museums may own some of their photos, but not many. Further, since the United States signed the international Berne Convention, copyrights are protected even if a photo is not marked as copyrighted. Thus, the ability to locate the photographer-owner is often the first consideration in deciding to use a particular photo. The best-known and most successful photographers are usually well-organized and relatively easy to find.

Photographers are often represented by photo stock agencies or agents. The trade organization for photo stock agencies is the Picture Archive Council of America (PACA). Lists of members and a lot of other valuable information may be found at their website www.pacaoffice.org.

Given the brave new worlds of scanners and electronic manipulation of images, it should be mentioned that photographers own and control not just the whole photo, but also the details of the image. Artist Robert Rauschenberg discovered this fact to his cost some years ago when the courts forced him to pay for the many pieces of other peoples' work he had included in a collage. *There is no "safe" percentage of recombination or new work that can destroy the original copyright protection of images used in another work.*

This warning also applies to fine art images that have become cultural icons. Works like Botticelli's "Birth of Venus," the Unicorn Tapestries and Michelangelo's statue of David are in public domain but the photographs/color transparencies you use to reproduce them from may be in copyright.

Photo agencies have begun negotiating what could be called "recombination" rights, but in a way that makes sure that the photographer retains control of the piece of his image used in another work.

Other Rights in the Photographs

Celebrity Rights: If the photograph is of a well-known person, permission from the photographer is not enough. Control of the use of celebrity likenesses is retained by celebrities/public figures or their estates for up to 100 years after their deaths. This applies to well-known people in any field. Celebrities can grant permission to use their likenesses, but not the right to use the photographs in which these likenesses are embodied. If you are making "commercial" use of a photo, celebrity rights have to be cleared.

Privacy Rights: Ordinary people also have rights in the use of their images (and homes). The classic case is of the supposedly anonymous tennis tournament official who sued and won, although the stars and the photographer had been cleared. The commercial user of photos is legally obliged to be sure that the necessary release has been granted by any private person whose image or home appears in photograph. In other works, get assurances of these releases from photographers and photo agencies, in advance.

Trademarks and "recognizables": Names like "Kleenex™", "Coke™", and "Exxon™" are protected by trademarks owned by corporations. These companies are always concerned about whether the use of their trademarks remains appropriate and specific to their products. Very distinctive and recognizable products – a Rolls Royce, the Concorde, even the original Coke bottle – are also protected. So are sports team uniforms and emblems. If the protected item is essential to the purpose for which the photo is being used, then the necessary permission may be worth obtaining. Otherwise, choose another photograph.

Who Needs to Think About It?

The more widespread, visible and commercial the use of a photograph, obviously, the less likely that a user can get away with failure to clear the use. When a user also is *worth* suing, improper uses become enormously expensive. Advertisers, for example, must clear absolutely everything.

But the law books are full of cases where quite small and obscure misuses of photographs have been noticed. Consider this: Paying after you have been caught is always much more costly than clearing the photograph properly to begin with.

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