

Legal Issues of Using Images in Research

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INTRODUCTION

Photographs and other visual materials have become important and essential resources for researchers. Images are drawn from many sources and are interpreted, analyzed, used to augment text, and stand on their own as portfolios and in exhibitions. Moreover, researchers create their own original visual resources as they document interviews or record events. Subjects, their relatives or communities often provide photographs to researchers. Museums, libraries, archives and institutional collections are heavily used resources and invaluable sources for photographs. As increasing numbers of important collections are digitized, and as websites like Flickr and YouTube continue to grow, the Internet has become an important source for images of all kinds.

Regardless of the source, each image has associated contextual information, and embedded rights, which may, in fact, be very complex. This complexity increases as promises are made to subjects and sources, and as images are acquired during the course of the research. As analysis and interpretation lead

to publication and dissemination, each step of these processes involves acquisition and transfer of a number of rights and permissions. Included are many associated responsibilities and liabilities that become increasingly important and complicated for both the researcher and the publisher.

Each step of the research process involves building and maintaining relationships while determining and creating the appropriate balance between diverse needs and incentives that vary across the parties involved. Commitments are made to sources of the photographs as permissions are obtained and transferred. As they write, ethnographers and other visual researchers create subtle, intricate interrelationships between text and visual materials that are highly contextual. These relationships are important to maintain as the work is published and as extracts, digests and collateral uses have the potential to deconstruct and alter the meanings and relationships embedded within the work. Understanding the process and potential implications of decisions as the process progresses can help researchers better curate these resources, minimize potential problems

with subjects and image sources, and empower authors in discussing contracts with publishers.

This overview will help provide a framework for planning and making decisions about the rights and uses of photographs and other visual resources. Included will be general background discussions about copyright and ownership, permissions and rights, as images progress from original sources through collection, research and interpretation to publication. Also included is a discussion of issues that arise in publication contracts and the implications of contract and associated ancillary rights, which are often included in such documents on the publication and subsequent uses of visual resources provided by the author.

Today, photographs permeate our lives in print, in exhibitions, in film and television and online. Individuals are exposed to and consume thousands of images each day. The circumstances of their creation and use, their social context and cultural meaning, and the stories they convey are studied by many disciplines in the social sciences and humanities, and have generated unique languages and literacies for visual analysis. Photographs have become essential data sources for analysis and interpretation and are increasingly seen as valuable personal and cultural resources, ripe for research and analysis.

The process of acquiring and disseminating photographs has become increasingly complicated. Researchers interacting with subject populations must build and maintain relationships that can be either fostered or fractured by uses of photographs and interpretations of their subjects in print or online. As collections of photographs are assembled over time, the management and use of these materials become vital issues for both private and public collections and for the authors that access and use them.

Questions and issues related to who 'owns' the rights to use and reproduce photographs are complex and can vary significantly depending on acquisition circumstances, prior assignment of primary and ancillary

rights, age of the image, provenance, status of the previous 'owner' and a number of other variables. Physical ownership, copyright and reproduction rights coexist in a continually shifting legal and technological environment. As the market for, and traffic in, images continues to grow, and publishers push the envelope of digital distribution to generate a return on their investments, it is important to understand the rapidly changing environment in which researchers, collectors, curators and publishers must work.

For years, authors and publishers have used libraries and archives as sources of images to illustrate articles and texts. Typically, the author would visit an institution, browse and select photographs, and then order copies for publication. Sometimes, researchers were permitted to bring in cameras and make their own negatives or slides; other institutions required researchers to pay the cost of creating negatives, prints or scans.

Associated use fees were based on variables involved in the potential uses of the image, such as whether the publication was commercial or non-commercial, size of intended distribution or publication run, placement (cover, internal illustration), size of reproduction, etc.

Credit lines to acknowledge the source of the image were almost universally required. Many institutions also required a copy of the article or book after publication for verification or to help build collections. While some institutions limited image modification or cropping and required users to reproduce imaged 'full frame', rarely was any attention paid to the context of the intended use or accuracy of presentation of the image, and few controls were in place to follow up on the proposed or future uses of the images.

Whether you are a photographic researcher seeking primary sources, a historian looking to augment textual research, collecting and interpreting visual resources, or an institution preparing an exhibition and catalog, you interact with multiple interconnected systems of laws, rights and potential consequences.

The scope and impact of copyright laws and the interaction between these laws and academic publishing use for the web and in social media, or as a component of other outreach efforts are increasingly important for visual researchers to understand.

Today, researchers and authors face a daunting task when seeking illustrations, and must address challenging questions such as:

- What rights do you obtain when you purchase or acquire a photograph?
- What responsibilities do you have to the subject, source, or creator of the image?
- If you have a physical copy in hand (or a negative), can you copy it and use it for your own private or commercial uses?
- Can you restrict others from reproducing the image from their original copies?
- Can you permit or restrict other uses of the photograph for other purposes?
- Can you post a scanned copy of your work and the associated photographs on your web page or use them as part of an electronic publication?
- What responsibility do you have to insure that future uses comply with any agreements that you have made?
- What liability do you have for any unintended or inappropriate uses?

Copyright laws and publication contracts and their impact on the acquisition and use of visual materials such as photographs are constantly evolving. In addition, most decisions are not simply binary – there are few simple yes or no answers. Most answers involve assessing risk along a continuum from low to high risk. Incentives and priorities may vary significantly among those involved in the process. Individuals, publishers and their attorneys each make their own determinations about potential uses and acceptable levels of risk for a given situation. The more the researcher and author know about rights and permissions, the better they can communicate and negotiate to insure that intended uses are accurately described, potential risks are moderated and the decisions made are as reasonable as possible.

Several factors are involved in ownership, permissions and potential use of a photograph,

including copyright law, the ownership status of the seller or donor and the permissions that are transferred as a result of sale, or transfer of rights in a publication contract. Copyright and intellectual property law has a significant potential impact, and is important to understanding ownership and use of photographs.

An exhaustive analysis and interpretation of copyright and permissions is beyond the scope of this discussion. A primary focus will be US copyright, but some references to international and non-US contexts will be made as appropriate.

COPYRIGHT OVERVIEW

United States copyright laws apply to tangible, fixed works, such as photographs, and assigns ownership to the creator, in the general tradition of *droit d'auteur*. However, in addition, copyright law in the United States also follows the Anglo-Saxon tradition of assignment of copyright to employers or to the hiring agent in specific cases defined as 'work for hire.' US copyright protection is automatically extended when the work is created, if it meets the following four criteria. It must be:

- a work of authorship created through human effort
- original with at least a minimal level of creativity
- fixed in a tangible form
- created by a US citizen or person living in the United States and/or published in countries that share copyright treaties with the United States.

Once a work is protected under US copyright law, several very important rights are assigned to the copyright holder. The copyright holder may permit or restrict:

- copying or reproducing the work (such as print or electronic reproduction of a photograph)
- preparing derivative works (such as scanning to create a digital copy of a photograph)
- distributing or marketing copies of the work (such as posting digital copy on the Internet,

- selling posters or postcards, or copy prints of the image)
- publicly displaying the work (such as in a museum or gallery).

Each of these four rights is separate and the copyright holder or designee may permit or restrict others from using the material in any or all of these ways. In addition, the copyright holder may retain, assign, or license each of the rights in whole or part, to another party, such as:

- licensing a single right, such as reproduction for publication, or involve all aspects of copyright ownership for a given work
- restricting use to a single instance, such as one print edition, or unlimited use, such as permitting unlimited print and electronic reproduction
- granting rights for a finite period of time, or for unrestricted use.

Researching the copyright and obtaining permissions or verifying ability to publish requires identification of the copyright holder for the work, and includes reviewing information, for example:

- type of work
- authorship (sole or joint)
- date created and potential duration of copyright protection
- creation circumstances (i.e. contract service, work for hire, etc.)
- status as published or unpublished
- any transfers, assignments, or licenses that have occurred
- potential duration of copyright protection (based on creation date)
- compliance with copyright registration and renewal (for work created before January 1, 1978) to determine whether the work is now in the public domain

Determining the creation date and identifying the length of time a work is protected and whether it has passed into the public domain is an important step in deciding whether it is necessary to obtain permission for use.

The duration of ownership depends on the age of the image and the copyright laws that were in effect when the image was created.

After the time specified under copyright law, ownership control lapses, and the item enters the public domain. At this point the original creator or copyright holder has little or no legal ability to control subsequent use.

Copyright law originally assigned ownership for a finite time that has progressively expanded over time with each revision of the copyright law. Barring unusual circumstances, protection lasted for a maximum of 75 years for items created and published before the 1976 revision of the copyright law. For material originally created and published after March 1, 1978 (the effective date of the 1976 revision), copyright protection is for the life of the creator plus 50 years. Unpublished materials, such as diaries and family snapshots, were protected for the life of the creator plus 50 years.

Currently, copyright is assigned automatically at the time of creation, and © notices are no longer required for protection. Before 1986, failure to include a copyright notice, or use of an incorrect notice potentially shortened the duration of copyright protection. Materials that can be verified as meeting either of these two criteria may have fallen out of the control of the photographer of copyright holder and into the public domain.

The Digital Millennium Copyright Act (DMCA), passed in October 1998, significantly changed public domain timelines. The act (strongly supported by businesses with valuable intellectual property about to enter the public domain, such as Disney, and the estates of creative individuals such as the Gershwins) placed a 20-year moratorium on materials entering the public domain. This froze January 1, 1923 as the date for copyright protection to lapse, and for the works entered the public domain. The net effect is that no new material will automatically enter the public domain until 2018. Unfortunately, the impact on unpublished materials is unclear, as they were not specifically addressed in the act.

An interesting exclusion under copyright law is works created 'by an officer or employee of the United States Government

as part of that person's official duties.' This potentially simplifies the process of obtaining permissions for such resources, but it is still important to look a bit further before proceeding. The US government employs many contract workers and subcontractors that do not fall under this exclusion. The exclusion covers works created by federal employees only, not state, local, or other governmental entities. Publications by the federal government can include material from other sources licensed for specific use but with the copyright retained by the creator. Finally, it is important to note that US government publications are excluded from US copyright protection; these works are protected by copyright in other countries.

Once copyright protection lapses, the image passes into the public domain, and the copyright holder no longer controls its use. However, it is still possible to limit access to the original image for copying and reproduction to provide some level of control for public domain images. Libraries, archives and others collections control access to their originals and can place requirements on reproduction, and charge use fees (not copyright fees) for providing that access. Following this model, many researchers have become collectors and acquire original public domain images to simplify access and permissions for publication.

For researchers interested in images produced in the United States before 1976 it is possible to review records to help determine the level of risk in using a particular image. Prior to 1976, the US Copyright Office published semi-annual application and renewal information that can be used to begin to determine whether the original copyright was ever filed, and, if filed, was correctly renewed. Though some of these reports are being digitized, locating hard copies in a government documents collection may be required. It is interesting to note how few photographs actually appear in these listings. Even if the images do not appear in the listing, if they were published, they are potentially protected if the copyright for the publication was filed and appropriately renewed.

When photographs are protected by copyright it is usually the responsibility of the author to identify the copyright holder and obtain the appropriate permission for publication. Efforts to obtain permission for publication can be a complex and frustrating process, particularly if the copyright holder cannot be identified or located, or if any or all of the rights have been transferred to other parties. There is no central repository of information about the rights held or transferred, and in many cases significant research is required to locate the owner of the copyright. In addition, there is no requirement for the copyright holder to grant permissions or to respond to requests. A final frustration arises from the fact that once located they are not compelled to respond, and their failure to do so does not imply permission.

There is one exception to the requirement to obtain prior permission of the copyright holder for any of the four categories of uses outlined above, defined as 'fair use'. The fair use exemption permits some types of educational, reporting, critical uses of materials still protected under copyright law (for additional information on 'fair use', see 17 USC Sec. 107). One of the key factors in 'fair use' is the potential impact of the use on the marketability of the item in question.

Commercial publication is seen as clearly impacting the potential market for the work, both in terms of fees for use and as a potential source for additional reproduction. In the digital environment, building a case for 'fair use' is troublesome for several reasons:

- the ease of duplication of digital files
- the difficulty in controlling duplication of digital files
- the commercial nature of the Internet has made the market impact test of 'fair use' difficult for any materials that have been made available online.

Digitizing a photograph protected by copyright creates a derivative work, a right not addressed under fair use that requires permission of the copyright holder under the law. Also, a compelling case can be made that any

digital posting has the potential to significantly affect the market for a given image. It would be difficult to show that posting a digital copy, particularly a high-resolution digital copy, of a photograph available online would not have an effect on the potential market for the work and thereby fail that fair-use criteria.

Understanding the range of potential uses and clearly communicating to all parties throughout the process remains a vital part of preparing for print or electronic publication. Currently, the process of obtaining permissions is usually less complex for print than for electronic publication, where these processes are still evolving. Evaluation of potential uses of visual materials include a number of possible steps:

- Identify the intended uses as completely as possible – Will the material see print or electronic distribution, use an academic journal or for-profit publisher, what is the size of print run, etc.? Also, will supplemental materials such as video, DVD, or online presentation be a component of the project?
- Identify the warranties and permissions made by the source or collection. Do they provide access to the image, copyright permissions, or both? Also, for materials still protected by copyright, such as published photographs created after January 1, 1923 or unpublished images, any donor or gift stipulations that may limit use should be noted. If necessary, obtain contact information for, and permissions from, parties who may have an ownership claim to the images before publication.
- Note whether the image is from an original print or a copy print. Many collections have been built with copy prints from other collections: reproduction rights are rarely transferred along with these copy prints. Reproduction from published material may also involve the additional copyright permissions from the publisher or copyright holder. Whenever possible, for reasons of both ownership and reproduction quality, locate and work with an original print rather than a copy.
- Determine if a well-known photographer or publisher created the work. If so, the photographer, estate, or designee may retain or imply ownership of some or all rights needed for publication. Also, moral rights, potentially limiting

some uses without additional permissions, may more heavily influence materials created in other countries.

- Identify any duplication or reproduction fees that are associated with the intended use. Also, note whether copies of the publication are required by the collection. Identify necessary credits and insure that they are included throughout the reproduction and publication process and as ancillary rights are executed.
- Get all model releases, agreements and stipulations in writing from collections and copyright holders. Many publishers now require verification of permissions, such as reproduction, display or other rights that are involved in a given project.
- For your protection, maintain a file of correspondence related to your research, including written permissions and fees paid.

Government collections, such as the National Archives and Library of Congress, have long been popular sources of visual resources since materials produced under federal grants and contracts typically include assignment of rights to government entities. Obtaining rights for print reproduction from these sources is relatively straightforward, and other than reusing many of the same frequently reproduced images, raise few concerns as a source for older, public domain material. Recently, however, some subcontractors have begun to grant to government agency permissions for specific use only, and retain other ownership rights. This practice will necessitate obtaining permissions from the copyright holder for such material, adding a new layer of complexity for researchers and publishers, but providing additional control to the copyright holder.

Use of images in electronic government collections, such as the Library of Congress American Memory project may involve addressing the ownership claims of the subcontractors who created the digital derivative works by scanning and structuring the image collections and retain at least some ownership rights. The issue of ownership of derivative works has yet to play out in the courts, but appears to hinge on the level of creative input in digitizing projects as well as project contracts. This is yet another facet

of copyright ownership and control that researchers should attend to in the future.

LICENSES

A number of online photo-hosting/posting services have been popular and ebb and flow in terms of popularity: current examples include Facebook, Photobucket, YouTube, ImageShack, sites hosted by camera manufacturers like Nikon and Kodak, and many more. The contracts for many of these image-hosting/posting sites permit them to redistribute and reuse the images that have been posted to their sites. The ability to reuse the images as they see fit provides the sites with another potential source of revenue. Once posted to these sites, control of the use of the image and associated captions and source credits slips away from the researcher.

The Creative Commons is a non-profit corporation that has developed a series of licenses that can be associated with the images to indicate the potential uses intended by the creator of the image. These licenses permit the creator to openly publish permissions or restrictions to use an image commercially, to allow modification or derivative works, and define any geographic restrictions (worldwide or limited to the United States or other country only). Since current US copyright law automatically assigns copyright to the creator with no process described to release the image to the public domain, the Creative Commons license provides for such assignment. The licenses also permit the creator to embed title, attribution, source URL, and contact information to discuss obtaining additional permissions. They offer four license conditions, which can be combined to specifically define a variety of uses, including Attribution; Attribution Share Alike; Attribution No Derivatives; Attribution Non-Commercial; Attribution Non-Commercial Share Alike; and Attribution Non-Commercial No Derivatives.

The license can be embedded in individual web pages, and published to the Internet Archive (<http://www.archive.org>). Unlike many other image posting sites, Flickr works with the Creative Commons licenses to post, host and associate license information with the images. Google and Yahoo also support the Creative Commons licenses and can restrict searches to identify Creative Commons licensed content.

MORAL RIGHTS

There are several definitions of moral rights that are relevant to the discussion of ownership and use of photographs and visual materials. The term moral right, derived from the French *droit morale*, typically refers to the right of authors to prevent revision, alteration, or distortion of their work, regardless of who owns the work. The application to integration of photographs and text in publication has not yet been addressed in court, but the concept is important in following the path of photographs as they are licensed for publication.

Moral rights cover three aspects of uses of photographic images, giving the author/owner/license holder the ability to:

- Have the name of the photographer/creator associated with the reproduction of the image during display or publication.
- Control changes that would impact the reputation of the creator, or that distort, mutilate or change the intent or meaning of the photograph.
- Limit the association of the photograph with a product, service, cause or institution without permission of the creator.

These rights, and similar issues of control, such as approval of publication venue, are critical to insuring continuity of use and to honoring the commitments made, and relationships with the subjects of the research and sources of related visual materials.

Moral rights extend beyond the life of the creator and are becoming a more important

factor in use of photographs, as the United States and other countries coordinate their copyright policies under the World International Property Organization (WIPO). The concept of moral rights varies significantly across countries and cultures. In the United States moral rights are defined in the Visual Artists Rights Act of 1990 (VARA) and apply to visual art such as photographs. In general, they transcend the assignable copyrights and address the ability of the author or creator to claim ownership and object to distortion, mutilation, modification, or derogatory action related to their honor or reputation. Some countries, such as France, include the additional right of retraction – the authority for the creator to remove the work from public view. For example, the estate of John Huston blocked a colorized version of ‘Asphalt Jungle’ from being shown in France, on the grounds that colorizing violated Huston’s moral right of integrity by modifying the original film without his permission.

Another related issue that impacts the relationships between researchers, subjects and publishers is the right of publicity, which addresses the use of the likeness of recognizable personalities such as Charlie Chaplin, W. C. Fields, or James Dean, as well as unauthorized pictures of private individuals. Strong lobbying, particularly by the entertainment industry and estates of prominent public figures, has led to increasing ability to control the use of photographs by individuals and their estates. Again, even though you own an original copy of a photograph, the right of publicity may limit your ability to use the image without obtaining permission from the subject.

An interesting variation of individual control of likenesses in a cultural context has arisen in Hopi Tribal Resolution H-70-94 (adopted May 23, 1994) and policy documents from the Hopi Cultural Preservation Office. Under the Native American Graves Protection and Repatriation Act (NAGPRA), the Hopi demanded that they retain the rights to any cultural property collected through field notes, photographs, audio tapes, etc.

The Hopi people seek to limit exploitation of their culture and beliefs by controlling access to collateral materials such as photographs. The tribe has worked for years with local museums and public collections, educating archivists and assisting in identifying sensitive materials whose access and use should, in their view, be restricted. The interesting factor in this approach is the claim of a broader moral right to control access, instead of the trail of ownership upon which copyright is based.

In addition to the legal definition, there are moral and social responsibilities for researchers to remain consistent with the agreements made with their subjects and sources of the photographs that they acquire for research and publication.

Written agreements, such as model releases and reproduction releases from libraries, museums and archives are essential in documenting and communicating the rights associated with, and uses permitted for visual material controlled by the author. Examples of Personal Use Agreements that can be used by researchers are available on the Stanford University Libraries site at: http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter12/12-c.html.

Reproduction releases from libraries, museums and archives should be reviewed to insure that they accurately address all of the future potential uses of the images involved: e.g. single or multiple print editions, online access, etc.

The ancillary licenses, typically in publication contract boilerplate, permit a broad range of possible uses, with a variety of potential consequences. At one end of the spectrum, the publisher could license images from the work for other educational uses. Concerns for such uses typically involve potential conflicts, such as possible appearance of your images in work by other academics that may or may not be consistent with your analysis and interpretation, or with the agreements made with your subjects and sources.

Potentially more problematic are editorial use, typically involving illustration to augment

a story in a newspaper or news magazine. The author and publisher have little or no control over the use, or whether it is consistent with the original commitments made by the author. Of greatest concern is licensing of images from the work for commercial use. Such uses associate the photograph with commercial products and imply relationships between the image and subjects depicted and the products or campaign.

For example, consider a case where an archive is approached by a company to license what is believed to be a unique image of a Native American prominent in local history for commercial use in the logo of a new bar. The request is declined due to issues of sensitivity regarding alcohol use by local tribes and in respect for a slowly developing and budding relationship between the tribe and the archive. The same image is then licensed to an author for use in a regional history text. The bar owner learns that the publisher has access to the image and submits a request for its use. Under the ancillary rights provisions of the contract with the author, the publisher subsequently licenses use of the image to the bar, whose advertising campaign includes billboards and print ads that blanket the community, including the reservation. Tribal leaders become incensed at the use and hold the archive accountable. The archive explores taking legal action against the author for exceeding the use license granted for print publication of the regional history.

When making photographs in the field, there is a balance between the free-expression rights of the photographer and the privacy rights of the subject. Implicit and explicit commitments are made by the researcher about the scope of the project and potential future uses of the images produced. Obtaining written model releases can be uncomfortable and the discussion of rights and permissions can change the dynamic between researcher and subjects. It is safe to assume that most researchers focus these discussions on the use of images related to their specific project. If mentioned at all,

licensing these rights to the publisher and discussion of other potential uses under the ancillary rights portions of the contract are handled delicately and understated, since they have the greatest potential for disrupting the relationship between researcher and subject.

The contract documents assign responsibility for obtaining releases and permissions and potential liability for misuse to the author. At the same time, these documents typically include permissions for the publisher to license the material for a variety of uses, including educational, editorial and commercial use. Where the uses become commercial, the burden of permissions and documentation shifts to the author. Most publishers require a written model releases that document permission of the subjects for such use, since commercial use of the likeness of an individual without permission can be seen as violating their right of publicity and lead to a claim of commercial exploitation.

Since the contract documents typically hold the publisher harmless and assign responsibility and liability to the author, the publisher is free to verify permission for virtually any type of editorial or commercial use unless specifically restricted in the contract documents. It is important that authors understand the commitments that they have made during preparation of their manuscript. It is also important for authors to understand the expectations of the publisher for ancillary uses as potential revenue streams. It is critically important to discuss and reflect in the contract documents specific permissions obtained, any limitations to potential uses, notification or prior review/approval for ancillary use and permissions obtained. The author is responsible for accurately and comprehensively conveying the potential uses to the subjects and sources of visual materials as the project evolves. Model releases and permissions obtained by the author should be consistent with the full range of potential uses permitted in the publication contract and associated documents that address ancillary uses of the work and its components.

Visual researchers create linkages between text and images that construct new meaning. The relationships are defined by the author and rely on sometimes-subtle interactions between such things as captions, tense, structure and metaphors. The author determines the importance of maintaining these relationships for the reader. As the publication process progresses, a number of challenges arise as ancillary rights are executed. Attending to quotation, digest and other uses where the work is extracted are particularly important.

The reputations of researchers and the relationships that they build with their subjects, their peers and source collections in libraries, archives and museums are slow to develop and hard won. They build on a series of small successes that rely on trust and impressions. This trust can be eroded by misuse, misinterpretation, or misattribution. Even if successful, rebuilding it can be a long and painful process of identifying images, obtaining permissions and transferring these permissions to others, such as publishers. Loss of control or assignment of rights with unintended consequences can create awkward situations for the author and jeopardize these relationships.

In their efforts to market the work of authors and generate a return on their investment, publishers seek to minimize their overheads in terms of recordkeeping and locating and communicating with the author for permissions when opportunities arise for ancillary uses and opportunities to generate revenue. Unless specifically stated in the contract documents, the overall assumption of rights absorbs many aspects of control, including these moral rights, giving the publisher the autonomous ability to license uses and assigning responsibility and liability to the author.

Restating the theme of this piece, the greater the understanding of ownership, permissions and the publication process and of the potential implications of contracts and agreements, the more effectively one can interact with others throughout the process to identify potential problems that could impact reputations and relationships.

THE DIALOG BETWEEN 'THE AUTHOR' AND 'THE PUBLISHER'

A critical part of the chain of responsibility for visual researchers is interaction with publishers through contracts and agreements. Typically, identified components include Author, Publisher and Work and specification of rights and responsibilities. 'Standard' agreements include boilerplate, which may include rights and potential uses that may not necessarily be consistent with the needs and intent of the Author. Though there are incentives that are shared by both parties, Publishers are responsible for investing in production, marketing, sales and accounting and must generate a return on their investment to remain viable.

Authors should understand that the contract presented by the Publisher is a starting point, and typically subject to discussion and some modification. As Authors understand more about the implications of the contract and supplemental documents, they increase their ability to raise and discuss important issues with the Publisher.

An important area for discussion is the intellectual property rights associated with visual materials that are incorporated in the Work. The Author typically is responsible for providing the visual materials and assuring that the appropriate rights and permissions can be transferred to the Publisher. In assembling these materials, the Author makes commitments and signs agreements, with the primary focus on gaining access and on meeting submission deadlines. Typically, the focus is on print publication, but Publishers' contracts and agreements often include a number of other potential uses that should be understood and discussed.

Publishers seeking additional revenue sources include broader potential uses than just the print version, such as rights for database and electronic distribution, mechanical reproduction, merchandise and commercial use. Unless specifically described or limited in the contract and associated documents, these uses can expand the possible uses of

the component photographs and visual materials, often without requirements to retain captions or credit sources. Such uses potentially place publishers and sources such as libraries and archives in competition, marketing and using the images. Unfortunately, since the Author has signed agreements with the sources, unless the agreements are aligned in terms of permissions and uses, the Author is responsible for any conflicts that arise.

The contract should also specify whether the Publisher will be solely responsible for marketing and print and electronic distribution, or if the Publisher can license these activities to third parties. If third-party licensing is to be permitted, issues related to the requisite loss of control and accountability may be moderated if the Author includes a contractual right to review and approve/deny prior to execution of the agreement.

This brief summary begins to address some of the issues and potential concerns related to the photographs and visual materials raised by a hypothetical sample contract. Authors are strongly encouraged to further research these issues to help inform their attorney and dialog with their Publisher as they review and refine the contract.

Granted Rights

Publication contracts typically begin with an assignment of right to publish the work by the Author, including all photographs, illustrations, graphics and text. To provide maximum flexibility and to create opportunities for generating additional revenue, the generic contracts sent to the Author begin with extremely broad rights. The hope is that the Author will sign as presented and not offer alternatives.

An example of the breadth might be a statement such as:

The Author hereby grants to the Publisher the sole and exclusive right and license to print, reproduce, publish, sell, lease, display, transmit and to further license the Work, and revisions or derivative works, in all forms, including but not limited to, digital or electronic media and any other media not yet known or recognized, in all languages within the

United States and in all other countries throughout the world for the full legal term of copyright in the United States and each other applicable jurisdiction, along with the ancillary rights specified in Exhibits X...

This statement would transfer the Author's rights for that work to virtually all print and electronic content to the Publisher. It is important for the Author to read and understand the entire document, including any exhibits and supplemental documents. Each portion can refine or broaden the rights and permissions and the potential uses of the Work by the Author and Publisher.

When signed, the example of assignment of rights will require the Author to obtain permission from the publisher for any use not justifiable under the 'fair use' exemption of copyright law. This would include uses such as posting extracts on websites, submitting extracts of the work for conference publication, in anthologies, etc.

If these issues are of concern, it is possible for the Author to propose a less broad license that still provides the Publisher with the opportunity to recover his investment, but provides access of interest to the Author. An example might be to limit the license to a one-time license to publish the work in printed form, but to eliminate the verbiage licensing derivative works and digital and electronic transmission. Some Publishers generate additional revenue licensing digital rights to libraries and other entities through subscription services. If so, the Author and Publisher will need to discuss implications and decide on the viability of the project under the proposed circumstances.

Non-Compete Clause

For Publishers to obtain a return on their investment, they often seek assurance that Author will not create other books or articles that directly compete with the ability to market the Work. For example:

During the term of this Agreement, the Author agrees not to prepare any work, or publish or

authorize the publication of any work which may be an expansion or an abridgement of or of a nature similar to the Work, or that is likely to affect prejudicially the sales of the Work or to otherwise adversely affect the value of the rights granted to the Publisher hereunder.

If the Author is actively publishing in the discipline or subject, it may be helpful to disclose and discuss with the Publisher specific limitations that meet the intent of not competing, but protect the ability of the Author to publish. Examples of possible alternative descriptions to a generic non-compete clause might include description of page number, style or format, price range, or specific subject and market for the Work and agreement not to compete in these specific markets.

Duties of the Author and Publisher

Contracts typically include requirements that the Author meet a defined schedule for the original manuscript, often including requirements for number of words, illustrations, etc., and response times for any revisions or corrections. Also addressed are clarification of the responsibility of the Author to produce or supply the photos, graphs, illustrations and other collateral material associated with the Work. The Publisher needs such assurances to plan for production and promotion of the Work.

If there has been a delay by the Author or if costs are incurred for changes once the layout and proofs for the Work have been completed, the contract clarifies responsibilities, determination of costs and reimbursement process, such as repayment to the Publisher by billing the Author, or deduction from future royalties.

The Author may also be required by the Publisher to update the Work when and as appropriate, or to permit the Publisher to do so if the Author can or will not do so.

Publishers accept responsibility for publication, registration for copyright and inclusion of appropriate credits and also seek to

limit liability for any damage to materials while in their possession, such as photographs or illustrations.

The discussion of duties and responsibilities for permissions is linked with the other sections of the contract and should be reviewed to make certain they are consistent in scope and intent throughout.

Indemnification

The Publisher needs assurance that the Author is the owner and creator of the Work, and that they have or have obtained the ability to transfer appropriate licenses and permissions to the Publisher. In addition, many contracts contain boilerplate to protect the Publisher by assigning liability for legal action against the Publisher for libelous, defamatory, or otherwise illegal content. In addition, the contract may seek protection from action by requiring the Author to indemnify and hold harmless the Publisher and its employees from legal action regarding claims or editorial changes to the Work prior to publication.

Other General Contract Issues

- **Royalties and Accounting:** typically addresses verification of the royalty rate agreed upon by Author and Publisher for the original and any ancillary Works, and processes for payment and challenges of the accounting.
- **Purchases and Complimentary Copies of the Work** and any limitations to resale or distribution by the Author.
- **Discontinuance of Publication and Remainder Sales:** clarification of Publisher's responsibility to keep the Work in active distribution, and how remaining copies will be dispersed if and when the publication is remaindered.
- **Ability of the Author to Appoint an Agent** for dealing with the Publisher.
- **Successors and Assignments:** inures the benefit of the contract and binds heirs and successors to abide by the contract.
- **Conditions for Termination and Default:** clarifies triggers for action and process to be followed.

- Jurisdiction for Claims and any Legal Action: specifies jurisdiction for any legal challenges.
- Reservation of Rights by the Author: typically states that any rights not specifically stated and enumerated in the agreement (such as moral rights outlined above) revert to the Publisher.

In addition to the base contract, most agreements between Author and Publisher include additional exhibits and supplemental materials. These documents can have a significant impact on the use and distribution of not only the Work but also of the photographs, illustrations and text from which it is composed. As a result, it is extremely important for the Author to understand and assess the potential implications of the rights and uses of the Work, and on the understanding and expectations of those depicted, or the subjects or sources of any of the component visual materials. Often these are addressed as Ancillary Rights.

In addition to print sales, many Publishers plan to augment revenue by some form of electronic distribution. Though there are hundreds of years of history of agreements for print publications, and at least a reasonable understanding of the general markets and parameters for print publication, the understanding of electronic markets is still emerging. As a result many contracts tend to be overly broad in their assertion of digital rights. Digital rights have the potential to significantly impact the use and interpretation of the visual materials within the Work, and offer the highest likelihood that they are reused and potentially reinterpreted in ways that can cause problems. These components of the contract should be carefully read and compared with other sections that address copyright and intellectual property rights.

Database and Companion Rights

These rights are described in a manner such as:

Electronic Storage, Retrieval, and Digital Media Rights (i.e. the right to use, produce or reproduce, distribute, perform, display, transmit or broadcast the Work or any portion thereof in which the Author has secured rights or to license such uses of

the Work or any portion thereof in which the Author has secured rights by any and all methods of copying, recording, storage, retrieval, broadcast or transmission of the Work or any portion thereof, alone or in combination with other works, including in any multimedia work or electronic book, Web site or database, by any electronic, electromagnetic or other means now known or hereafter devised including, without limitation, by analog or digital signal, whether in sequential or non-sequential order, on any and all physical media now known or hereafter devised including without limitation, magnetic tape, floppy disks, interactive CD, CD-ROM, laser disk, optical disk, integrated circuit card or chip and any other human or machine readable medium, whether or not permanently affixed in such media, and the broadcast or transmission thereof by any means now known or hereafter devised, but excluding audio recording rights, video recording rights and all uses encompassed in motion picture, television, radio and allied rights).

Obviously, this wording is extremely broad and includes a tremendous range of potential uses from tangible media (CD, DVD, etc.) to online distribution to any potential future media. Included is the ability to use, and potentially repurpose, portions of the Work such as photographs and illustrations that have been included by the Author. Also included are rights to reformat into other media, and a final catch-all – ‘allied rights.’

It is incumbent on the Author to understand these potential uses early in the research and creative process. When obtaining rights for publication, the Author is responsible for conveying these potential uses to any contributors that are supplying visual materials. Under the contract, failure to do so places the liability with the Author.

In addition, since the exhibit outlines use of portions of the Work, there is a potential for uses that can reinterpret or change the meaning of the visual material. At best, such uses can be disconcerting for the Author; at worst, they can jeopardize the relationships with subject populations and clients.

Companion Products

Companion products such as postcards, notebooks and other merchandise are potential

sources of revenue to augment print sales. Such uses can benefit both Author and Publisher. They can also compete directly with sources such as museums and archives. Unless the publication agreement with these sources includes these potential uses, and any additional fees that might be involved, the Author will be potentially liable if such competition arises. Even so, such competition can strain or destroy carefully built relationships between the Author and his sources.

An additional concern is that the Author is rarely contacted for approval of collateral uses that are frequently driven by marketing and promotion departments and emphasize marketability over intellectual accuracy.

Understanding the potential implications for these rights empower the Author to discuss with the Publisher limitations that will provide economic incentives and potential revenue, but will limit or control uses that are potentially problematic.

Unless specifically stated in the agreement with the Publisher, there is not a requirement to include captions or sources of the images. Though most Publishers do request caption or credits for ancillary uses they are rarely specifically required in the license. Also, Publishers typically do little to follow up on whether the subsequent publication accurately includes the captions or credits. When reproduction occurs without appropriate captions or credits it places an additional strain on the relationships between the Author and their sources and, as stated earlier, is a potential source of liability for the Author.

Example

The Researcher approaches a liberal activist family on the board of the Researcher's university and makes a portrait of their daughter working at her computer as an example of innovative and effective home schooling for use in a textbook. After publication, the Publisher is approached by a fundamentalist charter school looking for an image of educational computer use for an advertising campaign. Since the Author has assigned such ancillary rights to the Publisher and did not require retaining associated credits, the image is licensed for the advertising use. A local news expose on the creationist curriculum of the school is picked up by

national news as a lead story and the image is used prominently as an illustration of a charter school student during discussion about the tension between creationism and evolution in school curricula. The family holds the Author personally responsible for the bad publicity and damage to their reputation and that of their minor daughter.

Ancillary Rights

Publishers attempt to obtain the broadest ancillary rights to assist in marketing and to generate potential publicity and revenue. Each of these rights has potential benefits to both Author and Publisher, but each raises potential concerns that should be discussed and addressed. Examples of ancillary rights with a brief description of benefits and potential issues include:

Quotation and Anthology Rights

These rights address the right of the Publisher to reproduce text or visual materials from the Work in other publication venues. Concerns related to these rights involve the scope of the extracts, as well as the ability to maintain the contextual relationships between text and images, or captions and source credits if the images are reproduced separately. Such issues should be discussed and any limitations or ability for prior review by the Author should be specified in the agreement.

- **Digest Rights:** the right to publish an abridgement of the Work in a single issue of a journal, periodical or newspaper.
- **One-Shot Periodical Rights:** the right to publish the complete Work or any extract from it in a single issue of a journal, periodical or newspaper.
- **Digest Book Condensation Rights:** the right to publish a shortened form of the Work in volume form.
- **Strip Cartoon Book Rights/Picturization Book Rights and First Serial Rights, Second and Subsequent Serial Rights:** the right to publish one or more extracts from the Work in successive issues of a periodical or newspaper following publication of the Work in volume form.

The ability of the Publisher to distribute digests is a significant promotional and

marketing tool. Unfortunately, unless specified in the agreement, there is no:

- review by the Author for accuracy, continuity of relationships between text and images or intent prior to publication
- requirement to include citations for the text reproduction
- requirement to include captions and sources for visual materials
- limitation to the scope of the extracts published
- limit to the number of images that can be reproduced for a given use.

Also, unless specified, there is no restriction regarding the type of venue or relationship of the publication to the Work. If these issues are a concern to the Author, or to the sources or subjects of the visual materials, they should each be discussed with the Publisher, agreed upon, and specified in the agreement.

- **Mechanical Reproduction Rights:** the right to produce or reproduce the Work or any portion thereof or to license the reproduction of the Work or any portion thereof by film micrography, reprographic reproduction, gramophone records or tapes, cassettes and compact disks, film strip, video cassettes, or by any other means or methods now or hereafter known or invented, except insofar as reproduction is for use as part of or in conjunction with a commercial cinematographic film.
- **Television Rights:** readings from the text or showing of illustrations or photographs from the Work.
- **Sound Broadcasting Rights:** readings from the text of the Work.
- **Dramatization and Documentary Rights:** on stage, film, radio, television or any other medium.

Unless specified in the agreement, assignment of such rights can further separate control of the component materials in the Work from the Author, sources and subjects, and even Publisher. At best there will be discussion and coordination of the component text and visual materials as they are licensed for these ancillary uses. At the other end of the spectrum, such verbiage permits the Publisher and its assignees to use and reuse the visual materials in virtually any type of production activity that may or may not be consistent

with the original Work, and with no requirement for inclusion of captions, credit, or source.

Once again, a case can be made for the potential marketing and outreach benefits to both the Author and Publisher, but if attribution and intellectual control are issues, they should be discussed and specified in the agreement.

- **Merchandise and Commercial Rights:** the right to create and sell products based upon, containing or using the text, illustrations or photographs from the Work, other than those rights granted as Digital Database and Companion Rights.

Such boilerplate attempts to transfer any and all rights that have not been specifically included in the remaining contract or exhibits. Merchandise and Commercial activity has the potential to promote and generate revenue, but unless specifically outlined in the agreement, such uses can be overly broad and potentially problematic.

SUMMARY

For each issue related to use of visual materials in research and publication, there is a continuum of benefit and risk, from minimal at the one end to significant at the other. Publishers rightly want to minimize record-keeping and overheads that result from dozens of individual contracts with potentially varied permissions and requirements, and eliminate the need to track and obtain permission from the author for each new use. They also seek as much flexibility as possible to take advantage of new markets and distribution opportunities.

From the perspective of the Author, it is important to maintain the intellectual integrity of the work and its citations, credits, and interrelationships between images and text. The Author has responsibility to the sources and subjects that are incorporated into the Work. Releases and permissions to reproduce have been signed and the Author assures

the Publisher that these rights and permissions are sufficient for the publication. It is incumbent on the Author to understand the commitments that they make during the creative process, and work with the Publisher to insure that as the contract is executed, it is done so responsibly.

photographs. Laws governing ownership and use vary by, and within, nations and are in a constant state of flux due to changing technologies as well as changing political interpretations of those laws. It is intended as a broad overview and introduction to topics for consideration by authors; individual visual researchers should make sure they follow the laws and best practices in their individual.

NOTE

¹ This chapter is based on my long experience collecting and publishing historic and current