

## Whose Rights?

“We must not let these global corporations destroy this rich chain of creativity, which has taken centuries to achieve, by circumventing the intent of national laws in a feeding frenzy of greed. We need to achieve a balanced and fair system where all can benefit from the fruits of our artistic works, and artists are protected from these manifestly unfair contracts.

We must not allow greed to destroy what has taken centuries for our culture to develop”

Martin Beckett - photographer

This is an extract from the foreword of a book we have just published under our European arm – Pyramide Europe. It's called Whose Rights? and contains sample contracts, explains the clauses and looks at the legislation copyright/contract of some of the EU countries. The foreword is by Martin Beckett and as you can see, photographers are worried and unhappy at how they are being treated and the future of creativity.

## LIFE BEFORE CDPA 1988

- Digital
- Editorial
- Advertising

I'd like to start by giving you a potted history of life before the Act – as you will know photographers only gained rights to their commissioned work for the 1<sup>st</sup> time under the Act – so we're relative newcomers.

And whilst it was the best thing that Margaret Thatcher gave us it started a rollercoaster we weren't quite prepared for:

Around this time digital photography was still new, the technology wasn't good enough for major advertising and only a few photographers could afford the equipment. Many didn't believe this new technology would ever catch on and film would always be the media they worked in. There was no www so online magazines were just a twinkle in the eye of the publishing houses.

Editorial photographers working for weekly and monthly magazines earned extra money from their commissions. Accepted images were published once and any unpublished transparencies and negatives, were returned to the photographer who put them in a stock library where they continued to earn money from re-licensing.

Prior to 1989 contracts & paperwork were unknown, huge advertising jobs were agreed over a bottle or two of wine. Many photographers would do a deal with the agency and have a verbal agreement that the work would only be used for the particular campaign it was shot for. Which the agencies and their clients stuck to

Then the CDPA came into force and on the morning of the 1<sup>st</sup> August 1989., a letter, from one of the major advertising agencies, hit the doormat of hundreds of advertising photographers all over the country. The letter introduced a contract – an assignment of copyright for all future commissions and a waiver of moral rights – and, just to seal the deal, the letter had a £1 coin stuck to it!

A flurry of contracts from other agencies followed – many asking for © throughout the universe in true belt and braces style – which at the time we scoffed at. Of course we hadn't reckoned on Richard Branson and Virgin Galactic.

## HOW WE LICENSE

- Advertising
  - 2 media
  - 1 country
  - 1 year
  - Re-usage guidelines
- Editorial
  - Shoot rates
  - First British Rights

What agencies hadn't reckoned on was the indignation the photographers who received the letters felt, that the rights to their work was only worth a £1- including many advertising photographers who had previously thought owning copyright wouldn't change their lives.

Photographers and the AOP, got together with photographic agents and advertising agency art buyers and started negotiating a way through.

The group produced and agreed licensing paperwork, terms and conditions of business and method of charging for re-use of images, which are still being used and have now been adopted by many other EU countries and as far afield as Australia.

For advertising commissions, a photographer's day rate will normally include 2 media, 1 territory for 1 year – exclusive to the client for an agreed period. This will of course depend on the clients needs and is a moveable feast – many clients now want web use as a basic, so photographers will work with them often giving more than 2 media – and often working on a higher day rate to include the clients immediate needs.

### **Re-Use**

Particularly in advertising, when a campaign is launched agencies and their clients will test the waters – sometimes by launching in the UK only or in a limited number of media. If the campaign is successful it will often have an extended life – new media, new territories and extra years.

One of the tools we agreed with agencies after 1989, was a method of pricing any extra licences the client might need – enabling a fair price for the photographer and allowing the client to budget for extra use. Obviously competition legislation prevented us from agreeing a pricing structure – so each media and territory was given a percentage.

Photographers use what is called a base usage rate – or BUR – which is stated at estimate stage – this figure tends to be the photographers usual day rate for the type of job they are being commissioned for. - the relevant percentage on the chart is then applied to this day rate, or BUR, by the photographer, to calculate the cost of any extra use.

### **Editorial**

Editorial however has always been different - shoot rates (payment per job) have always been set by the magazine and, in an ideal world the right to use once in one British magazine is included in that rate. Depending on the magazine this rate can range from £100 - £750

Sometimes fashion magazines will pay a page rate, so photographers shoot a complete feature but will only be paid by the number of pages of images published. Re-use licence requests or payments are rare.

## WHAT'S HAPPENING NOW?

### **Advertising**

- Back to the late '80's
- Client power
- Money crunchers

### **Editorial**

- Contracts
- Future and past
- Sign or no cheque
- Whose problem?
- Online v print

### **Advertising**

In many instances, licencing still goes on as I've just described - however In recent years, advertising contracts have started to revert back to those seen in the late 80's. Not so much from the larger agencies, but smaller ones who are being leant on by their clients to get them more for their money.

Agencies are being squeezed by their clients, who in some instances employ "overseers" to count the pennies and question what is being paid for and can it not be got cheaper'?

As digital photography and software has improved, more photographers have emerged – many without much experience but able to 'fix' any problems from the shoot by manipulating images in Photoshop.

– and for every photographer who refuses to assign their copyright, there's a queue of less established and experienced photographers willing to give the client anything they want at a fraction of the price.

### **Magazines**

In the editorial world, publishing houses – not previously known for issuing paperwork – have in the past few years sent out all encompassing contract - often for all future AND past commissions

Many are sent out post-contractual by the accounts department, issuing an edict that payment cannot be made without a signature.

The magazine editors blame their bosses in the publishing house and many publishers claim this isn't true, each magazine editor works in their way for their particular magazine.

On those occasions when a contract is not sent, and the work has been shot for a printed magazine, there is an automatic assumption that online use is included.

A number of years ago IPC were taken to task on this issue by BAPLA – the stock libraries trade association – and actually agreed (in writing) that online use had to be paid for separately.

## Jumping on the bandwagon

- Government departments
- Financial Institutions
- Competition organisers

**Government bodies** want a copyright assignment **and financial institutions** issue huge contracts – most of which is irrelevant to the commissioning of photography and impossible for anyone without a legal background to understand. Many use the same contracts they would use to buy stationary or other goods – so IPR and retention of title are grabbed in one swoop.

### **Competitions**

Additionally competitions have risen in number – aimed at anyone with a camera – offering less than lucrative prizes, but with terms of entry that either ask for a copyright assignment or want broad use of all submitted images (not just the winners) enabling them, and their sponsors, to get free images for their marketing or advertising campaigns.

# THE CLAUSES

- Assignment
- Wide Licensing
- Warranty
- Indemnification
- Waivers
- Derogatory treatment
- Right to a credit

Photographers commissioning contracts have the same clauses as illustrators and writers which you heard about this morning: **Copyright assignments**, for the full length of copyright and any extensions or **wide licensing** which is worldwide, for all media in perpetuity. Neither of these are acceptable – the commissioning company will invariably make more money than they pay the photographer. With an assignment they can also sell the images on.

There are always a couple of other worrying clauses - **Indemnification and Warranty** – which are grossly unreasonable and I would bet, impossible to enforce

These clauses are a real problem for photographers who have to warrant that the images:

Don't infringe any third party rights –IPR, privacy, celebrity rights. No photographer could possibly know every law in every country, and as many commissions are published worldwide, whether it's on the internet or other media, there is every chance that a problem may arise.

The photographer has to indemnify the client against any legal action if the clause is breached.

If copyright contracts were covered by the unfair contract term legislation I doubt these terms would be acceptable.

**Moral Rights waivers** always accompany an assignment contract – in fact, many lawyers writing these contracts, don't actually understand the concept of moral rights and have even been known to ask for an assignment!

Waiving moral rights, in particular the right to object to **derogatory treatment** and the **right to a credit** is problematic for a photographer.

**Manipulation of images or extreme cropping** is easy for anyone with a computer and Photoshop This particular moral right is of great importance to visual artists in the digital age. Images are the perfect medium for the Internet and are widely accessible, they can easily be downloaded, copied, altered and mutilated. Should an image be manipulated and distributed, it may not be just the photographer's integrity that is abused or compromised, if the image contains people they may also be shown in a light which not only reflects badly on them but may cause untold damage to their personal lives.

**No credit** not only impinges on the photographers right to be associated with the work – but is a major problem in light of the various moves to introduce orphan works legislation. However, because photographic images are the perfect medium for the internet, and are easily copied and distributed worldwide in digital form, publishing work on the internet can be problematic if the work is not credited to the creator. If work is 'lifted' any credit is usually automatically removed, Data is often stripped from images either during the process of publishing or purposefully.

## Conclusion

- Europe-wide
- Balance of Power

### Conclusion

I'd like to say that unfair contracts are only happening in the UK – but it's Europe wide. Where countries legislation doesn't allow for copyright assignments, then the licence requests are wide – with no additional remuneration. The Warranty and indemnity clauses are also standard.

The balance of power is certainly not in the individual creators favour. I've lost count of the times I've been told there is no problem and photographers should negotiate - accept what we give you or someone else gets the job is not a negotiation.

As a German publisher on a panel once said to me – JK Rowlings doesn't have a problem, she negotiates!