

Licensing, and The Value of Copyright.



Licensing & The Value of Copyright
By Jeff Sedlik, past President, Advertising Photographers of America
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Mark Getty gets it. Bill Gates bet the bank on it. And our clients --- the big corporations, the advertising agencies and the publishers – they all benefit significantly from their understanding of this very simple, yet all important concept:

INTELLECTUAL PROPERTY IS THE CURRENCY OF THE 21ST CENTURY

(And by extension: Those who own and/or control intellectual property, control the marketplace)

There has recently been considerable discussion among photographers and their trade organizations on the subject of copyright transfers. Some in our industry have asserted the benefits of owning and retaining copyrights, while others have recommended that photographers transfer their copyrights to their clients. The Advertising Photographers of America (APA) position on copyright ownership is and always has been:

The copyright to your photographs is yours under the law.

You own it.

Register it.

Keep it.

License it.

Re-license it.

You Hold Your Future In Your Hands.

The APA does NOT advise that photographers respond to the wavering economy and evolving marketplace by selling or giving away their copyrights. Your ownership of these rights, together with your clients' acceptance of your right to such ownership will determine your future ability to make a living in this industry.

Clients are not your adversaries. But they aren't your business partners, either. A client's central motivation is to generate profit for the client's business. Your motivation is to generate profit for your business. If both parties treat each other with respect and recognize the value that each brings to the table, those motivations are not mutually exclusive. Both photographer and client can receive equitable benefit from a transaction, with neither taking advantage of the other.

The APA recognizes and respects the right of each photographer to make independent business decisions. But in making decisions regarding the sale of copyright, photographers should consider that each transaction either sets or reinforces a precedent. The cumulative effect of thousands of photographers' transactions with thousands of clients shapes our clients' perspective on copyright and the value of photography --- and with it, the future of our industry.

Some photographers routinely transfer copyright ownership to their clients. As a direct result, many clients have come to believe that they need to own the copyright to all photographs, from all

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photographers, and that in paying for a photographer's time and expenses, they have the right to own the resulting photographs outright. In reality, they have no such need, and no such right.

The business practices of these photographers, if continued, will lead to the standardization of copyright transfer in our industry. These practices have the very real potential to negate all of the work that photographers and their trade organizations have done for decades to move towards the licensing model -- a business model that provides a window of opportunity for photographers at all levels to make a decent living and secure a financial future for themselves and their families.

Most photographers will never face a situation where the sale of a copyright to an image is necessary to win an assignment or to complete a transaction. There is almost always a mutually acceptable alternative to a copyright transfer. The APA suggests that photographers consider other, far less self-destructive paths to financial stability and success. Carefully analyze and control your business overhead. Diversify your business. Rethink your marketing strategies. Hone your negotiating skills. License limited reproduction rights to your images, and maintain ownership of your copyrights.

Photographers should consider selling their copyrights under only the most extreme circumstances, and then, only after having exhausted all other possible alternatives, and then, only in exchange for a very, very large sum – regardless of the nature of the photograph in question.

Responding Effectively To A Request For Copyright Transfer

When a client requests or demands transfer of ownership of the copyright to a photograph, respond by making an attempt to determine what the client believes they will receive by owning the copyright to your photograph. In almost all cases, the client (1) Is concerned that a competitor will use the same photograph at a later date OR, (2) Is concerned about the cost and liability associated with tracking license limitations, OR (3) Is concerned that they will be placed in an unfavorable position should they need to negotiate additional usage rights in the future.

Once you have determined the basis for your client's demand for copyright transfer, provide an alternative that satisfies your client's concerns without requiring the sale of your copyright.

Client: We don't have a lot of money, but we are going to need the copyright to the photograph.

Photographer: I'd like to make sure that you have everything you need. Do you happen to know why you need to own the copyright?

Client: Well...I don't know, exactly, but our legal guy says we need it.

Photographer: I believe that I can provide you with all that you need, AND my solution will make your legal guy happy, while saving you and your client money. Would you mind if I send you a sample license? You can run it by your legal guy and let me know if he needs any revisions.

Client: Well.. okay, send it over.

Photographer (later, in writing): Here is a license that provides your company with the right to use the photograph for anything, forever, anywhere on earth, and that also prohibits any other company from ever using the photograph:

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"License: Acme widgets may reproduce the photograph in unlimited media for unlimited time, worldwide, in association with Acme Widget company and its subsidiaries. Reproduction rights to this photograph are exclusive to Acme Widgets."

By the way, if you don't really need to use the photograph "forever," or you don't need to use the photograph in places like New Guinea, or if you don't plan on using the photograph in all media (tv, calendars, t-shirts, coffee mugs, etc.), or if you don't care if the photograph is used by others after your company is done with it, please let me know, as I may be able to reduce the fee substantially and save your client money.

Client: Looks fine to me. And our legal guy says we don't need the copyright, after all. Hey, we are really just going to use it in the metro DC area, and only in the local newspapers for the next year or so. What's this about saving us more money?

Faced with a demand for copyright transfer vs. losing the assignment, simply determine what the client's concerns are, and provide an alternative that satisfies all of those concerns.

Buyout vs. Copyright Transfer

Many photographers and clients confuse the term "Buyout" with "Copyright Transfer."

Buyout: "Buyout" means nothing. "Buyout" means everything. Everyone thinks that they know what a "buyout" is, but the trouble is, most photographers and clients are not clairvoyant. And the truth is, there is no agreed upon definition of the term "buyout." When a client requests a "buyout," they very well might be requesting any or all of the following:

1. The right to use the photograph in unlimited media AND/OR
2. The right to use the photograph for unlimited time AND/OR
3. The right to use an unlimited number of photographs from a session AND/OR
4. The right to use the photograph exclusively

To further complicate matters, the term "buyout" is often used in combination with other usage terms, like this:

Client: "We want a buyout for use the metro Miami area for six months."

Is this client requesting exclusive use in Miami, or non-exclusive use in unlimited media in Miami, or non-exclusive usage of unlimited photos in limited media in Miami, or ???

Solution: Eliminate the term "buyout" from your business. If a client asks for a "buyout," just inform the client that in an effort to avoid misunderstandings, most photographers and clients are transitioning away from the use of the term "buyout." Explain that you'll be glad to license them unlimited and/or exclusive usage, if that's what they're after. You'll find that the client doesn't really care what terms you use, as long as they get what they need out of the transaction at the right price.

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Copyright Transfer: A "Copyright Transfer" or "Transfer of Copyright" is the sale or gratis transfer of ownership of all or part of your "exclusive rights" to a photograph. As the copyright owner, you have the exclusive ownership and exclusive right to exploit your photograph. Copyright transfers must be made in writing and signed by both the copyright owner and the client. Under a total Copyright Transfer, you no longer own the photograph, and you no longer have the right to reproduce, display or use the photograph for any purpose, including self promotion, unless you license those rights from the new owner.

As a side note, the key to successful licensing is to talk clients out of broad licenses, and talk clients into licensing exactly what they need. Generally, the more specific and restrictive the license, the more favorable to you.

Implementing the Licensing Model

The core concept of licensing is fairly simple. The photographer owns and retains the copyright. The photographer licenses portions of copyright to clients. The photographer's licensing fees are based on many factors, primarily on the extent to which the client will exploit the image – the total that the client is prepared to spend on buying the media space within which/on which the photograph will be reproduced, and the total number of impressions (viewings) of reproductions of the photograph.

By design, a photographer's fees in the licensing model are tied directly to a client's overall media budgets for each project. When the client has a large budget for media, the photographer receives a relatively large licensing fee. When the client has a small budget for media, the photographer receives a relatively smaller licensing fee. The photographer's licensing fees are tied to the client's budgets, for projects large and small. It's a beautiful system, for both photographer and client.

But the system breaks down when photographers allow clients to create budgets for licensing photography with no consideration whatsoever to the client's overall budget for the project. The system breaks down when photographers do not understand the value of their work, or when photographers choose to sell their time instead of licensing their work. A photographer's fees should have everything to do with the media buy, and very little to do with the amount of time consumed in the creation of a photograph.

For example, a photographer might shoot a headshot on white seamless for a limited run brochure on Monday for a licensing fee in the low four figures, then on Tuesday shoot an identical headshot, again on white seamless, but this time for unlimited use in exchange for a licensing fee in the five figures. Same amount of time and effort. Same seamless background. Nearly identical photographs. Drastically different licensing fees.

Your Licensing "Store"

If it helps, mentally separate the creative and sales sides of your business. Think of your business as a licensing "store." Your creative vision and technical skills allow you to create photographs of great value to your clients, building your reputation (your brand), inspiring customer confidence in your abilities, and thereby drawing new and repeat customers to your "store," which of course leads to new assignments and new photographs to license.

But your store shelves are not stocked with creativity or technical expertise. Nor do your photographs themselves have a place on your store shelves. Your store shelves are stocked with

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licenses of photographs that you have taken or that you are currently estimating/producing. A licensing transaction is not a sale of a photograph, or a sale of a copyright. A license is a grant of specific reproduction rights -- you might think of it as a "lease" of a portion of your copyright. When you pull a license off of the shelf to grant to a client, your copyright is not diminished or consumed (unless you license exclusive use). Your copyright remains intact and in full force, reappearing on your shelf to be licensed again, and again, and again. If you carefully license your work, your shelves full of licenses become your business' primary equity. Your copyrights are money in the bank.

As photographers, we are – or should be - in the business of licensing intellectual property – our copyrights. Creating superb photographs is obviously essential to your licensing business. But the transaction between a photographer and customer is, or should be a licensing transaction. If the photograph currently exists, the customer licenses the right to use it. If the photograph does not yet exist, in licensing the image your customer must also pay fees and costs associated with production of the image.

It's The Law

Payment of fees or expenses in no way provides the customer with ownership of the end product. The resulting photographs belong entirely to you, regardless of who pays the expenses, regardless of any creative advice or direction given you during production. This is not a subjective, biased, or one-sided opinion. This is the law. Copyright law was created, in part, to provide you and other creators with the ability to financially support yourselves through your art. The Licensing Model is designed to integrate perfectly with copyright law, allowing you to best benefit from your well-deserved rights.

By law, when you create an image – at the moment that you fix the image on film or in pixels, you own that image outright --- for your life plus 70 years, UNLESS:

1. Both you and your client sign a written agreement transferring copyright ownership to your client. OR
2. You sign a **valid** "Work Made For Hire" purchase order or other contract (note: under copyright law, the "work-made-for-hire" terms included in such agreements may be invalid). OR
3. You create the image not as an independent contractor, but as an employee.

Determining The Value Of Your Photographs

For those photographers who have tried but not succeeded in implementing the licensing model, here are a few of the most common errors:

- o Consideration of time (day rates) as a primary factor in the valuation of their work
- o Under-estimation of the value of licenses
- o Misunderstanding of the principles behind licensing
- o Granting licenses too broad in scope

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- o Hesitancy to suggest or negotiate license terms, for fear of irritating or offending a client.

Client: *"We don't have a lot of money for this, but we need all of the rights. It'll only take you a few hours to shoot...."*

Photographer: *"Yeah, you're right. That'll take me about a half-day to shoot. So just pay my half-day rate, and keep the photograph. Use it for whatever you want. After all, I have no use for it. Take it - keep it -- its yours. So, uh...when can I get my check?"*

That sort of logic might make perfect sense for a house painter, plumber, or other professional operating under a service-based business model, but has little if any relevance to photography and the valuation of intellectual property.

The True Value

The true value of our photographs is the value that we, as photographers, are able to help our clients to perceive in our images. Clients would never have come to expect to receive ownership of copyright for pennies on the dollar if some of your fellow photographers were not holding out the proverbial penny jar in one hand and their copyright certificates in the other.

Think about it -- why is it that a client can easily afford to spend \$5 million, \$10 million, \$20 million, or more in buying the space within which your photograph will be reproduced in advertising, while at the same time that client somehow has a tight budget for photography, and cannot justify spending more than \$500, (or \$1000, or \$5000, or whatever) on licensing the very photograph that will determine the success of their advertisement? Why?

Because our clients know, from experience, that many of your fellow photographers will jump to the front of the line to sacrifice their copyrights (or to provide unlimited usage rights), often for ridiculously low sums. Unfortunately, with those rights go all future earnings potential, and the ability to stabilize cash flow between jobs, and their kids' college education, and any hope of a comfortable retirement, and perhaps --- the future of the industry itself. The industry has changed, and the old day-rate business model is no longer a viable system in the long term.

Photographer with no understanding of the value of his work:

"I shot this portrait of an executive on white seamless for an annual report. The client asked for a copyright transfer for the entire shoot. They didn't have much money to offer, but hey -- I'll never use those shots again, and they definitely weren't headed for my stock library. I didn't even have a model release, so the images were worth nothing to me. So why not give them the copyrights -- what do I need the copyrights for, anyway?"

The photographer in this all too familiar (and hypothetical) example is making a critical and costly business error. He is considering only one factor in determining the value of the image. He is basing his business decision entirely on HIS perceived value of the photographs, when instead, he should be considering the value from the CLIENT'S perspective, and also considering other important factors --- such as his ability to retain copyright in future transactions with this client, involving other photographs.

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Same situation, as seen by a Photographer who understands the value of his work:

"...The client wanted a copyright transfer, but I simply told them that I don't offer copyright transfers, and explained that ownership of the copyright itself would provide them with no more benefit than an unlimited usage license, which I would be happy to provide for a reasonable and appropriate fee. I also let them know that without a model release, I couldn't use the photograph for other purposes. I then sent them a quote for an unlimited usage license, in the 5 figures. Along with that, I provided a quote for what the client really needed --- annual report usage, only one select image, only in their 2003 annual report, only in the US, only 50,000 copies, no larger than 1/8 page, one year distribution, English language only. My quote based on the limited license was attractive, well within the client's budget for the project, and they assigned me the shoot. At that point, the ball was in my court. I knew that if I could create images presenting great value to my client, I would very likely be able to license additional images and additional usage rights, generating substantial additional revenue over time."

At the shoot, this photographer employed his creative vision, his lighting skills, and his directing skills to capture the best-ever image of that executive. He shot several variations, each a great portrait in itself. He sent the work off to the client, and:

"The client loved the work. They decided to run it full-page in the annual report, and they selected a second image for use as an insert near the back. I issued a job change order listing my fees for the license modification from ¼ to full page, and for the license of the additional photograph."

<LICENSE>

"Then, a few months later, I received a call from the client's ad agency. They said they'd like to use the portrait for an insert in a trade advertisement." <LICENSE>

"Then the design firm called – they selected one image for the client's web site." <LICENSE>

"And another image for a direct mail brochure." <LICENSE>

"The next year, the executive published a book, and picked one of my images for the cover."

<LICENSE>

"And for then next several years, various people called to license images for this and that."

<LICENSE><LICENSE><LICENSE>

This example might be hypothetical, but it is business-as-usual for photographers using the licensing model. Happens all the time.

In this example, the client has received something of real value, and minimized their up front risk by licensing only the immediate usage needed. The value of their brand was increased by the improved public image of the executive, driven at least in part by the photograph. This translated into huge dollars for them in terms of investor confidence, public image, etc. ---- far, far more value than the cost of the licensing fees paid to the photographer.

The photographer provided value to the client and was compensated based on the amount of value provided. Admittedly, he also took a risk at the outset. But the photographer was willing to take

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that risk based on his confidence in his ability to produce images of value for the client, and his commitment to ensure that the client continued to perceive value in photography.

Did the client overpay for the photograph? No. Did the photographer unfairly profit from his photograph? No. The photographer employed his photographic and business skills in providing the client with a photograph of great value. The client paid the photographer an amount commensurate with the value received.

Perhaps more importantly, the client was able to avoid unnecessary risk at the outset. It is important that photographers understand this concept and can confidently explain it to their clients. At the estimating stage, a client has no means of determining with certainty whether or not the resulting photographs will meet or exceed their expectations. The client has not yet seen the photographs and has not yet been inspired to conjure a myriad of additional uses. It is a virtual certainty that the client will not use the photograph in all media, forever. By buying the copyright or licensing unlimited rights, the client is wasting money on rights that they will never need or use.

There are many examples of photographers who succeeded in business under the old model in the 20th century - most notably in the 70's and 80's. Heady times in photography. But many don't realize that under the licensing model, they very well might have doubled or tripled their revenue in the long term, without selling a single copyright. In the 21st century, both the business climate and our industry have changed dramatically, and photographers seeking long term success would be well advised to carefully license every photograph, whether assignment or stock.

Conclusion

So how does a client perceive value?

In advertising, the value of a photograph to a client is determined largely by the ability of the photographer to create an image that effectively communicates a desired message about the product, service, or brand. An Art Director might provide the starting point, but ten different photographers working from the same layout would yield ten different photographs. Often, wildly different. It is the skill and creative vision of the photographer that bring the image, and the advertisement, to life --- and can make the difference between an ad that flops miserably, and an ad worth hundreds of millions of dollars in terms of brand building and sales. Do our photographs represent significant value to advertisers? Absolutely.

In magazines, the goal of the publishers is not to communicate ideas or to raise reader consciousness. The primary goal is to generate profit by selling advertising. And to sell advertising, they need to deliver an audience to advertisers. And to build and maintain that audience (the subscribers), the publishers need to a visually attractive front cover, and need to fill the space between the front and back covers with pages of compelling text and images. Remove the photographs and you remove the audience, the advertising, and hundreds of millions of dollars in profit. Do our photographs represent significant value to the publishers? Without images, magazines would not exist.

Unfortunately, a good number of your fellow photographers continue to cling to archaic business models, selling their time and letting their rights and ownership slip through their hands like so many grains of sand. Like it or not, the business practices of all photographers affect the business prospects of all other photographers. If we as photographers fail to take control of our rights and

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our businesses, we will all soon be day laborers, fundamentally disassociated with the commerce surrounding our photographs.

The phrase "CONTENT IS KING" is dead accurate, and is the mantra of the large corporate interests whose profitability depends, at least in part, on their ability to exploit the work of photographers and other creators. Photographers should embrace the value of our work, and make every effort to position ourselves in the market accordingly, rather than allowing ourselves to be relegated to the bottom of the food chain.

Embrace and reinforce the value of your photographs. Recognize that with each transaction, you set a precedent. Don't underestimate the value of your work. Your copyrights are truly, money in the bank.

Respectfully,
Jeff Sedlik
past President, Advertising Photographers of America

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