



INFORMATION SHEET

G035

Copying photographs you have paid for

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In this information sheet, we give a brief overview of the law of copyright as it relates to photographs. It is for people who have paid a photographer and want a copy of the photograph.

We give more detailed information in our book *Photographers & Copyright: A Practical Guide*.

For information about our other information sheets, other publications and training program, see our website <http://www.copyright.org.au> or contact us.

We update our information sheets from time to time. Check our website to make sure this is the most recent version.

The purpose of this information sheet is to give general introductory information about copyright. If you need to know how the law applies in a particular situation, please get advice from a lawyer.

Key points

- Generally, the owner of copyright in a photograph is the photographer, unless it is taken for private or domestic purposes.
- Even if you own copyright in a photograph, this may not give you the right to be given reproductions or digital files.
- If you pay a photographer to take photographs, you should carefully read any written agreement to determine your rights to copy photographs.
- Paying someone to take a photograph for you does not necessarily make you the copyright owner.

What does copyright protect?

In Australia, copyright law is contained in the Copyright Act 1968 (Cth) and decisions of courts.

Copyright protects a range of materials, including **photographs**. Other things protected by copyright include other **artistic works** (such as paintings, drawings and maps), **written material** (such as journal articles, novels and reports), **musical works** and **films**.

Protection is automatic

A photograph is protected automatically from the moment it is taken. There is no system of registration for copyright protection in Australia. Copyright protection does not depend on publication, a copyright notice, or any other procedure.

The copyright notice

The copyright notice is not required for protection in Australia. It notifies people that the work is protected and identifies the person claiming the rights. Copyright owners can put the notice on their work themselves; there is no formal procedure. The notice consists of the symbol ©, the name of the copyright owner and the year of first publication; for example: © Cam Era 2005.

Only the copyright owner is entitled to put the copyright notice on a work. A person who does not own copyright in a photograph cannot acquire the copyright merely by stamping the copyright notice on the back of the photograph. As we discuss below, it is necessary to look at the circumstances in which the photograph was taken, and whether there was any agreement about copyright between the photographer and the client, to work out who owns copyright.

Who owns copyright?

If there is an agreement about copyright between the photographer and the client, this may state who owns copyright and what right each person has to use the photographs. If you have such an agreement, this is where you should look first. The provisions in the Copyright Act will be relevant if there is no agreement, or it does not cover these issues.

Generally, the owner of copyright in a photograph is the photographer. This general rule is subject to several exceptions and variations.

If a photographer was paid to take a photograph before 30 July 1998, the person who paid for the photograph to be taken is the owner of copyright in the photograph unless there was an agreement to the contrary.

If a photographer was paid to take a photograph after 30 July 1998, the photographer owns copyright unless:

- there was an agreement to the contrary; or
- the photograph was taken for a “private or domestic purpose” (such as wedding photographs or family portraits); or
- the photographer was paid as an employee and the photograph was taken as part of his or her job.

(If photos are taken under the direction or control of a State, Territory or the Commonwealth government, that government will generally own copyright: see our information sheet *Governments (Commonwealth, State and Territory)* available from <http://www.copyright.org.au/government>.)

Agreements about copyright

It is common for professional photographers to require clients to sign an agreement, and it is common for such an agreement to deal with ownership of copyright. If you are not sure whether you or the photographer owns copyright, you will need to check any terms or documents the photographer asked you to accept or sign. You may need legal advice about your position.

Right of restraint

Even where a client owns copyright in photographs (such as wedding photographs or family portraits) the photographer may have a “right of restraint”, and be able to stop anyone using the photographs for any purpose other than the purposes made known to him or her at the time the photographs were taken. For example, if you own copyright in your wedding photographs, the photographer might be able to prevent the photographs being used in an advertisement and may be able to seek compensation for that use, unless the photographer was made aware at the time when the photographs were taken, that they might be used in this way.

Copyright owner has exclusive right to make copies

If you own copyright in a photograph, you are generally the only person entitled to make copies of the photograph – for example, by making new prints from a negative, making colour photocopies or scanning the photograph into computer memory.

Permission is not needed if:

- copyright has expired (see our information sheet *Duration of copyright*, available at <http://www.copyright.org.au/introductory>); or
- a special exception applies.

There is a new exception which allows the owner of a photograph to make a copy of the photograph in a different format for private use.

Making a copy of a photograph you own, in a different format, for private use

It is now legal to make a copy, for private and domestic use, of a photograph you own. The requirements are:

- you **own** the photograph in hardcopy or electronic form;
- the photograph is **not** an infringing copy (for example, it was not illegally downloaded from the Internet);
- the copy is in a different format from the photograph you own (if the photograph is in hardcopy form, the copy must be in electronic form; if the photograph is in electronic form, the copy must be in hardcopy form);
- the copy is for your private and domestic use.

The legislation says that the copy must be made to use instead of the original, but the government has said that “instead of”

indicates that the owner may view a work by using the original photograph and by means of a ... copy; that is, the owner is not required to store the original.

Once you have made a copy from a photograph, there are restrictions on what you can do with the copy **and** with the photograph. The copy become an infringing copy if you:

- sell it offer it for sale;
- rent it or offer it for rent;
- distribute it (for example, give it to someone); or
- dispose of the photograph to someone (for example, if you sell it or give it away or donate it).

You can **lend** the copy to:

- people you are living with; and
- members of your family.

You cannot, however, lend the copy to anyone else.

Once you have made a copy, you cannot make another copy in form which is “substantially identical”. The legislation allows you to make one or more additional copies of a photograph you own provided each is in a different form, but it is not clear when a copy will be in a “substantially identical” form to another copy.

If making the copy involves the incidental making of temporary copies of the photograph, you must destroy the temporary copies as soon as practicable. If you do not, it is an infringing copy.

The government is required to carry out a review of this new provision by 31 March 2008.

The new private use exception and your agreement with a photographer

The new private use exception in the Copyright Act does not override any legal obligations you may have as a result of an agreement with a photographer. For example, if you have signed an agreement with a photographer, and as part of that agreement you have undertaken not to make digital copies of photographs supplied by the photographer, that obligation is not affected by the new exception in the Copyright Act. If you make digital copies of the photographs supplied by the photographer, you may not infringe copyright but you may breach your agreement with the photographer.

Moral rights

A person dealing with another person’s photograph has a legal obligation to:

- attribute the photographer;
- not falsely attribute the photograph to someone other than the photographer; and
- not treat the photograph in a manner that is prejudicial to the photographer’s reputation or honour.

These obligations may not apply to a person whose actions are “reasonable”, or which have the photographer’s consent. For more information, see our information sheet *Moral rights*, available at <http://www.copyright.org.au/introductory>.

Common questions

I have paid for a photograph—am I entitled to the negative?

Ownership of a negative or transparency is determined by general property law and not copyright law. The owner of a negative will usually be the person who paid for the film on which the negative image appears. If the photographer is the owner of the negative, he or she is unlikely to be obliged to give it to you, even if you are the owner of copyright in the image. Again, you may need to check your agreement with the photographer.

If you are the owner of copyright, you may make copies from prints in your possession if you are unable to get access to the negatives. On the other hand, a photographer may own the negative but is not thereby entitled to make prints for display in the studio or for any other purpose without your consent.

In some situations a person may have possession of prints or film without being the owner. For example, a photographer may charge a client for materials but retain possession of the negatives. In this situation, the client may be the owner of the negatives, and the photographer may be a “bailee” with a duty to keep the client’s property safe. The client may be entitled to request return of his or her property at any time and the photographer may be obliged to return it if requested.

How can I get extra copies where there is a copyright notice on the back of the photograph and the photographer has long since gone out of business?

If you own the copyright in the photograph, you may get copies made even if a copyright notice with the photographer’s name is on the back of the photograph.

You may also get extra copies made if the copyright in the photograph has expired.

If you do not the copyright, but you own the photograph, you can make a copy in electronic form provided you meet the requirements explained above under the heading *Making a copy of a photograph you own, in a different format, for private use*.

You may also be entitled to make a copy in a different hardcopy form than the form of the photograph you own, but it is not clear what this means. It also seems that you can make a hardcopy copy from the electronic copy you have made – for example, you can scan the original, and then print a copy from the electronic file.

Note that you can lend the copies you make to members of your family or household, but you are not entitled to give them, or the original photograph, to anyone.

If the copyright has expired and you want to make more than one copy in the same form, or you want to do something with the copies that is not allowed by the private use exception (such as give them away), you need permission from the copyright owner. This may be an individual photographer, or it may be a company. If an individual photographer is the copyright owner, but no longer operating the same business, you may be able to track him or her through a professional organisation such as the Australian Institute of Professional Photography. If copyright was owned by a company, and the company has gone out of business, you may be able to get information from the Australian Securities and Investments Commission about what happened to the company’s assets (which include copyrights).

Does the photographer have the right to charge for subsequent prints made from the negatives?

You will need to check your agreement with the photographer, and what the photographer agreed to do in return for the fee you paid. If the photographer agreed to take certain photographs and supply you with one set of prints, then the photographer is unlikely to be obliged to give you further prints for free.

May the photographer copy my photograph without my permission?

If you own the copyright in the photograph, the photographer generally needs your permission to make a copy of it. You may need to check your agreement with the photographer, and whether you gave any such permission in that agreement.

If the photographer owns the copyright, then he or she may make a copy of the photograph. Again, check your agreement with the photographer in relation to this.

Who owns copyright in school photographs?

As noted above, who owns copyright in a photograph is usually determined by the agreement between the photographer and the client. If the issue is not covered by an agreement, then copyright is usually owned by the photographer unless the photograph was taken in return for a fee or other “valuable consideration”. If the photograph was commissioned before 30 July 1998, the client owns copyright only if the photograph was taken for a “private or domestic purpose”. If the photograph was taken for a student to take home, it is likely it was taken for a “private or domestic purpose”.

If a photographer takes photographs in a school “on spec”, without an agreed payment but in the expectation that students will buy prints, it is likely that copyright is owned by the photographer.

How long does copyright in a photograph last?

If the photograph was taken before 1955, the copyright has expired.

If the photograph was taken after 1954, copyright usually lasts for 70 years from the year the photographer died if the photograph was published in the photographer’s lifetime.

If the photograph was first published anonymously or under a pseudonym, however, copyright lasts for 70 years from the year of first publication.

If the photograph was first published *after* the photographer’s death, copyright lasts for 70 years from the year of publication.

If the photograph has never been published, copyright can last indefinitely.

For further information, see our information sheet *Duration of copyright*, available at <http://www.copyright.org.au/introductory>.

The shop where I want to have some photos copied has asked me to sign a form. What is this form for?

Many copy shops are wary about copying photographs for clients, particularly if it looks like the photographs were taken by a professional. To protect themselves, copy shops will often ask customers to “warrant” (that is, legally promise) that the copy shop will not infringe copyright by copying the photo. Generally, this warranty will be backed up by an indemnity. This means that if the copy shop infringes copyright, it can take action against you for any damage it suffers as a result of the infringement. If you sign such a form, you may be liable to pay for these losses, which can include the cost of legal advice.

Generally, therefore, you should not sign any form (and not ask for a copy centre to copy photos for you) unless:

- you own copyright in the photos; or
- you have been given permission by the copyright owner to have the copies made; or
- copyright in the photos has expired.

Forms will differ from shop to shop, and if you are uncertain what a form means, or what you are being asked to warrant, you should ask to have it explained to you.

The new private use exception only applies to copies you make of photographs you own. It does not apply to copies made for you by someone else.

Further information

For further information about copyright, and about our other publications and training program, see our website – <http://www.copyright.org.au>.

Information from the Arts Law Centre of Australia may also be of interest to you: see <http://www.artslaw.com.au> or telephone (02) 9356 2566.

Reproducing this information sheet

You may download and print one copy of this information sheet from our website for your reference, or you may purchase a printed copy from our online shop – <http://shop.copyright.org.au> – or direct from us.

Australian Copyright Council

The Australian Copyright Council is a non-profit organisation whose objectives are to:

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community about the importance of copyright;
- identify and research areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright;
- foster co-operation amongst bodies representing creators and owners of copyright.



Australian Government



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