

8 :: Photos & other images

Common permissions issues

People in photos & portraits

As indicated in Part 3, the subject of a photo or portrait doesn't have any rights simply because they are in the image. There is no copyright in people.

In some cases, people are wearing clothes that bear logos or badges. You will need to consider the legal issues for these separately. Generally, the more high profile the logos or badges – and the more closely associated with a celebrity performer or sports person or with a sporting code – the more zealously the copyrights in badges and logos they are associated with may be guarded.

Outside the flags

A recent case in Australia involved a company's unauthorised use of the name and image of surfer Terry Fitzgerald on a T-shirt. The court ordered that the company be restrained from "reproducing or authorising the reproduction of the whole or a substantial part of any photograph" of Mr Fitzgerald, and awarded significant damages and costs to be paid by the company.⁶⁷

Other areas of the law may also be relevant when using a photograph, particularly if the photograph is of a famous person. The use of such a photograph could give rise to an action for passing off or misleading or deceptive conduct, for example, if it gives the impression that the person pictured endorses your product when in fact they do not.

In certain situations, a photograph of a person, object or event can be a breach of privacy or a breach of confidence. Also, in some countries, but not in Australia,

celebrities have "personality rights" that can be breached through any unauthorised uses of their images.

Using photos as a basis for illustrations

Copying something by hand is still copying for the purposes of the Copyright Act. The issue is always whether or not you have reproduced an important, essential or distinctive part of the work you are copying: see Part 3, under the heading *Are you using "enough" to raise a copyright issue?*

Using a photo just to gain information about what something looks like is far less likely to raise a copyright issue than taking the design of the photo, including the distribution of objects or people or shadows within the frame of that photo. If you are just using a photo to gain information, you're likely to minimise possible problems if you make sure you use several photos of the relevant subject, rather than relying on just one.

Setting up a scene to photograph in order to recreate an existing photo

The idea underlying a photograph isn't protected by copyright, but the more you recreate the look and feel of a particular photo, the more likely it is that you are taking something important or distinctive from that photo. We would generally recommend getting a clearance if you want to recreate someone else's photo.

There are also restrictions attaching to particular places and cultures that make getting permission both necessary and practical: see *Restrictions on taking or using photos taken in particular places* in Part 3.

Taking photos of out-of-copyright works in a gallery

There are no copyright issues here, but that does not mean that the gallery can't impose access terms or restrictions that restrict taking photos. Failing to abide by entry conditions, including conditions that prohibit photography, may leave you liable for breach of contract.

Using other people's photos of artworks

It is not clear under Australian law whether, as a general proposition, a photo of an artwork such as a painting or drawing is separately protected by copyright in its own right, quite separately from the copyright in the artwork.

Arguably, where the photo depicts nothing but the artistic work, there are strong arguments that you do not need to get a separate permission. This is because there may not be anything "original" in the image, even though creating it may have required some skill and effort.⁶⁸ Note, however, that there are also arguments to the contrary⁶⁹ and that, in light of the legal uncertainty, whether or not you will clear rights in the photo as well as the rights in the two-dimensional artwork is an issue you should address in an in-house risk management policy.

A couple of points to note:

- in light of the uncertainty, if you are relying on one of the fair dealing provisions to use the image, make sure you give "sufficient acknowledgement" to both the artist and the photographer; and
- get a clearance for the photo where the photo is distinguishable in some way from the artwork (for example, where the artwork is a sculpture or some other three-dimensional item, or where the artwork is photographed from an interesting angle, or where the photographer has clearly played around with the colouring or the perspective or other aspects of the artwork in the photo).

Images of artworks owned by museums & galleries

Any person or organisation can impose restrictions on access to or use of items they own, even if they are not the copyright owner or copyright has expired. For example, art galleries may restrict access to items in their collection, or require visitors to pay an entry fee; they are not obliged to allow visitors to take photographs or make copies.

Organisations such as galleries and museums often charge fees for making and using images of items in their collections, and set terms and conditions on use of the images. It's important to be clear about the basis on which such terms and conditions are set.⁷⁰

Whether or not copyright has expired, you may agree to the terms and conditions set by the owner (for example, if this is the only way of getting a good quality image of the item). If copyright in the material has expired, you would not infringe copyright by breaching the agreed terms and conditions – but doing so would almost certainly breach the contract. If you could get an image of the item from another source, however, you would not need permission from the organisation that owned the item to use it, although (as discussed above) you would need to consider how copyright applies to the image of the item that you want to use.

Logos & trademarks

In some cases, using a logo or trademark may raise issues under trade practices or trade marks law as well as copyright. This is most likely to be the case where your use of the logo might confuse consumers – for example, they might be misled into thinking there is an association between you or your product and the business that owns the logo or trademark.

Signs & symbols

Even common, generic-looking signs such as tourist information signs, road signs and men's and ladies' room signs might be "artistic works" and protected by copyright. In many cases, the decision whether to get permission to use them is a matter of risk assessment. Here are some rules of thumb that may help you decide.

Many symbols, such as the peace symbol and the recycling symbol, are protected by copyright.⁷¹ Some of these are freely licensed while others will require permission. You may need to do some research to identify the copyright owners. Often you will be able to get relevant information by doing an internet search, or from sources such as Wikipedia (although this is not, of course, always reliable).

- scientific symbols such as the infinity sign are not protected by copyright although there can be issues if you are using a particular font to create these (see the comments below on fonts);
- if the sign is identified with a particular organisation – such as the National Heart Foundation tick – you will need permission unless, for example, you can rely on a fair dealing defence (using such symbols in some contexts may have implications for trade practices or trade mark laws as well as copyright); and
- if the sign is a generic one, not identified with a particular organisation (such as a slippery-floor sign), get permission if you are using a particular company's version or, alternatively, have someone draw up a specific version for you based on the idea in the sign (beware, however, of reproducing any "substantial part" of someone else's version).

Note also that some symbols – such as the Olympic rings and the Red Cross symbol – are protected by specific legislation.⁷²

Indigenous art and cultural material

The use of Indigenous artworks and other cultural material, other than by people entitled to use that material under traditional law, is highly sensitive.

Indigenous material is protected by copyright to the same extent as material created by any Australian. However, there are large gaps between what is protected under traditional Indigenous laws and what is protected by Australian mainstream law.

If you are using any Indigenous art or cultural material, acquaint yourself with the protocols and best practice guidelines developed by organisations such as the Australia Council and the National Association for the Visual Arts.⁷³ The Arts Law Centre of Australia has also published information that will help you navigate these issues: www.artslaw.com.au.

Restrictions on taking or using photos taken in particular places

See the information on *Restrictions on taking or using photos in particular places*, at the end of Part 3.

Who to contact

See also:

- tips on identifying & contacting copyright owners, at the end of Part 6; and
- Part 11, for information on where a government is the copyright owner.

Photos

The rules for ownership of copyright in photos are complex, and often involve questions such as when the photo was taken, whether or not it was commissioned, and whether or not it was taken by a photographer as part of his or her employment with a publisher such as a newspaper or magazine: see Part 6 for details.

In some cases, as a result of these complex rules, you may need to clear rights both with the photographer and with the relevant newspaper or person who commissioned the photo.

Where the photo has been published in a book, look for information on both the imprint page and in the acknowledgements. Where you need to contact the photographer, the publisher is likely to have contact details or may be able to pass on a request.

In some cases, the photographer may be a member of CAL or an affiliated collecting society, in which case CAL may be able to pass on requests.

In the case of “art” photographers, check with VISCOPY to see whether the photographer is a member or a member of an affiliated collecting society.

Professional photographers’ bodies such as the Australian Institute of Professional Photography (AIPP) and the Australian Commercial and Magazine Photographers (ACMP) may also be able to assist: both of their websites have a “find a photographer” search tool.

Alternative sources of photos include photo image libraries: see the *Yellow Pages* under “Libraries–Photograph & Film”. Most offer images for a one-off fee (often referred to as “royalty-free”, meaning you don’t pay for each use you make), which is usually for a limited, non-exclusive use, or under a “rights-managed” licence (meaning the fee is negotiated according to factors such as the period of use, exclusivity, print run, size of image and territory).

Also, large media companies often operate their own image libraries that license photos and other material they have published (see, for example, www.newsphotos.com.au and www.fairfaxphotos.com).

Drawings, illustrations, fine artworks & craft items

If an artistic work has been published (for example, as an illustration in a book or magazine), the publisher may be able to grant permission or direct you to the copyright owner. The publication itself may provide copyright information – look on the imprint page or in the acknowledgments.

A licence may be available from VISCOPY for the reproduction of works of fine art, craft and photography (the creator may be a member either of VISCOPY or of an affiliated collecting society overseas). In particular, note that the VISCOPY Image Gallery provides online licensing and a collection of digital images that can be purchased and downloaded on demand for a fee: viscopy.me.com.au.