

Use of Photography

*American Institute
of Graphic Arts*

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Use of Photography

Use of photography in design work involves choice and responsibilities. With the growth of digital libraries of images, stock photography has become far more accessible to every designer, although there are also strong reasons to commission photography specifically for a project. This brochure reviews the options available to designers, considerations in contracting for the rights for use of photographic images and the means of using photography while fully respecting the intellectual property rights of the photographer.

Contracting with a photographer.

It is important to decide whether the designer or the client will contract with the photographer, since the contracting party will be liable for any money owed to the photographer. If the client contracts directly, many of the points made in this booklet would be relevant to the client instead of the designer. The designer's willingness to be the contracting party will depend on such factors as whether the photography budget is relatively small compared to the total design budget and whether the client has proven to be reliable with respect to paying the designer in the past. Certainly the designer should not take the risk of paying for photography if there is any risk the client won't reimburse the designer.

Specifications and deadlines.

To begin with, specifications for the images should be as clear and detailed as possible. What is the subject to be photographed? Will the art director or designer give a sketch to the photographer or be present during the shoot for approvals? Are the images to be in black and white or in color? How many images are to be delivered? What form—positive, negative, digital file—is the delivery to take?

The photographer must work on schedule. Failure to do this should be a reason for the designer to terminate the contract. If the designer's schedule allows some flexibility with respect to the photographer's deadline, then illness or other unavoidable delays might extend the photographer's deadline. However, there must be a time when the work has to be delivered or the designer is free to use another photographer. If even a short delay would be damaging, the designer might consider making "time of the essence" in the contract, in which case the deadline will have no leeway. The designer will want the contract to require that the assignment satisfy the designer, while the photographer will want to include that the satisfaction be "reasonable" to avoid having to do endless work to accommodate an unreasonable designer.

At the same time, the designer needs protection against the situation in which the designer is satisfied with the photography but the client is not. Client, designer and photographer all have to be make certain that each party will be fairly treated and benefit from the project. One way to do this is to involve the client in the decision-making process with respect to the photography.

Any changes in the assignment should be documented in writing. Even in the rush of meeting deadlines and finishing work, the careful practice is always to have a written confirmation of any changes. This helps avoid disagreements as to whether the assignment as delivered meets the specifications. If the changes aren't written down, it is easier to forget exactly what was discussed or misinterpret what was intended.

Fees and rights.

There must be agreement as to the fee and what is purchased for the fee. Most photographers seek to sell only limited rights. If greater rights are purchased, they ask for a higher fee. If the designer is sensitive to this, the best approach may be to ask for limited rights. This should avoid paying for usage rights that are never exploited.

On the other hand, the designer must obtain all of the rights that his or her client needs. In the first instance, the designer must consider what rights will be transferred to the client. Rights can be limited in many ways, including the duration of use, geographic area of use, type of product or publication, title of the product or publication, and whether the use is exclusive or nonexclusive. An important aspect of the grant of rights is whether the work may be used in electronic media (such as on a website or a CD-ROM) as well as in traditional media.

A photographer working on assignment will expect reimbursement for expenses. The designer should carefully review the expenses to be reimbursed to avoid the possibility of a dispute arising. Whether a cap can be placed on expenses, such as stating that expenses shall not exceed the estimate by 10 percent, will have to be negotiated along with whether a markup is to be charged by the photographer on some or all of the expenses. (The designer will face the same issues of cap and markups when billing the client.) If the designer requires changes and this causes reshoots, expenses will increase dramatically. The designer has to be careful not to be caught in a squeeze between a client with a limited budget and an image cost which exceeds that budget because of changes. When expenses will be very substantial, an advance against expenses may become part of the contract (in which case the designer would want an advance from the client sufficient to cover what is being paid on account to the photographer). Whether or not sales tax will have to be paid, and who will be expected to pay it, should also be resolved in the contract.

All rights and work-for-hire.

A client may want all rights or work-for-hire contracts. Having all rights would mean the client could use the work in any conceivable way. However, on questioning the client, it often develops that the client does not need all rights. Rather, the client wants to prevent competitors from using the photography (and, of course, the design). One approach would be for the designer to promise by contract that no use will be made of the design in certain markets without first obtaining the written consent of the client. Another might be to agree that the client has exclusive rights in those markets where the client faces competitors, but that the client will not unreasonably withhold from the designer (or photographer) the right to resell the image or design in a noncompetitive way.

The designer may sometimes act as an intermediary—and, perhaps, as a mediator of sorts—between the demands of the client and the desire of the photographer to retain rights and earn more money for greater usage. Designers must be careful to make certain that their contracts for rights with photographers and illustrators conform to the rights that the designers have contractually agreed to give their clients. Ideally, therefore, designers will resist clients that demand all rights or work-for-hire—both for themselves and for

the allied creative professionals who will be asked to work on the design project. Work-for-hire vests the copyright in the client who is treated as the creator of the work and gains all the copyright benefits that would normally belong to the creator. This type of contract lowers standards protective of artists' rights, has a negative impact on the ability of creators to earn a livelihood and can have a demoralizing effect with respect to creativity.

In all cases, the designer would be wise to use a written limited rights contract so that both parties know exactly what deal is being agreed to.

Payments and cancellations.

Standard practices should be documented in a written agreement and should call for payment to the photographer within a certain number of days after delivery of the assignment (not publication or printing of the images in the designer's final work). This time period is often set at 30 days. Any advances are subtracted from the total bill, which should then be paid in a timely manner to the photographer.

Provision should also be made for what will happen if the assignment is cancelled. The designer should be able to terminate the assignment without liability unless the photographer will be damaged in some way.

This would be the case if work has commenced or if, due to the short notice of the cancellation, the photographer will be unable to find other assignments for the days that had been set aside for the designer.

A different cancellation issue arises if work is unsatisfactory. Should the photographer be given the first opportunity to do a reshoot? Will there be any additional fee in that case? If the designer uses another photographer, should the first photographer be paid anything for the unsatisfactory work? These can be difficult situations to resolve, even when both parties make their best efforts to be fair.

Authorship credit and copyright notice.

There should be agreement as to whether the photographer will receive authorship credit for the photography that appears in the final design. This would be expected in editorial or nonprofit work, but is less likely for advertising or corporate assignments. The same holds true for copyright notice, which would be much more likely for editorial or nonprofit usages than for advertising or corporate assignments. Again, the designer will have to ensure that the client and the photographer share the understanding as to what will be done with respect to authorship credit and copyright notice.

A typical photo credit would appear as: "Photograph by Sarah Photographer." If the photographer is to receive a copyright notice, this could take the form of "© Sarah Photographer 2003." Other forms of copyright notice are also possible, such as "copyright" or "copr." The photo credit and copyright notice would ideally be placed adjacent to the image, whether horizontal or vertical, but can also be placed elsewhere as long as the reader will be able to relate them to the image. If copyright notice is not adjacent to the image, it might be wise to add the word "photograph" in front of the copyright notice.

Releases, warranties and stock photography.

Assignments often require photographing people. If these images are used for advertising or trade purposes (such as on a product or for product packaging), a release must be obtained from the person. This is true whether or not the person is a professional model. The release should be in writing. Although the photographer will obtain the release, the release should protect the client and the designer as well as the photographer. If either the designer or client is uncomfortable with the language in the photographer's release, it would be wise to ask for a second release to be signed for the designer or client (or both).

The client or the designer may also want the photographer to give a warranty that the work is original and not an infringement of copyright, an invasion of privacy, libelous or otherwise unlawful. If the photographer gives such a warranty, the photographer will be subject to damages if any of the warranties are found not to be true.

The use of pre-existing images is another possibility for the designer. Use of stock images avoids the many contractual issues that may arise when photography is done on assignment. In using stock images the designer has to be careful not to exceed the license from the stock agency. If additional usage is needed, the designer has to go back to the agency and clear the rights by paying an additional fee. In some cases the stock agency may limit use of photographs because releases have not been obtained from models. Ignoring the agency's restrictions as to use for advertising or trade in such a case is inviting an invasion of privacy lawsuit against the designer and the client.

Ownership.

Unless there is a special reason to obtain ownership of preliminary materials used to create the photograph, these would remain the property of the photographer. The photographer would also keep ownership of any physical

materials submitted to the designer and expect these to be returned, including not only valuable original transparencies but also storage media that contained digital versions of the work. If any physical object is to be transferred in addition to the transfer of rights, the contract should specify the ownership transfer.

Assignment of money and duties.

The designer will need to be able to assign rights to the client. Since the photographer has been hired based on his or her unique style, it won't be acceptable for the photographer to assign the work under the contract to another photographer. Whether the designer would be willing to allow the photographer to assign money due under the contract to another party (such as a factor) would depend on whether the money is being paid for work completed (in which case assignment of money shouldn't be a problem) or advanced on trust (in which case assignment would be more questionable).

A creative relationship.

The relationship between designer and photographer can be highly creative. It can lead to visual solutions that are stunning and exceed the client's expectations. For creative

relationships to thrive, however, there must be a basic business understanding. A careful discussion of the creative goals and the business issues should be followed by the signing of a written contract. Such a contract grounds both parties by resolving ambiguities and clarifying expectations. It is an important step in the shaping of a harmonious partnership that leads to the creation of work of the highest excellence.

Resources.

Legal Guide for the Visual Artist (Tad Crawford) and *Business and Legal Forms for Graphic Designers* (Eva Doman Bruck, Tad Crawford) both offer sample contracts accompanied by extensive discussion. *Pricing Photography* (Michal Heron) gives instruction with respect to negotiation and includes pricing charts for different usages. *The Graphic Designer's Guide to Pricing, Estimating and Budgeting* (Theo Stephan Williams) discusses how to create a successful relationship with suppliers such as photographers. *AIGA Professional Practices in Graphic Design* (AIGA, Tad Crawford) gives information on setting fees, negotiating and dealing with suppliers. For more information and sources, please go to AIGA's website at www.aiga.org.

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Aquent is proud to be Presenting Sponsor of the AIGA Design Business and Ethics series. Aquent works with AIGA to help independent designers serve business with integrity.

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As the Official Talent Agency of AIGA, Aquent supports designers in their pursuit of professional success through generous financial support of AIGA activities, including the AIGA Design Business and Ethics series. Aquent was also the first company to offer benefits to freelancers and is a strong advocate for appropriate levels of compensation for design professionals and respect for their contribution to effective business solutions.

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"Use of Photography" is one topic in the AIGA Design Business and Ethics series, a range of publications dealing with ethical standards and practices for designers and their clients. New topics will be added to the series regularly. Additional copies can be downloaded from www.aiga.org. For more information on solving communications design problems or hiring a professional designer, visit www.aiga.org.

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