



What You Need to Know about Your Business Client's Use of Third Party Photos



By Steve Gillen

Your business clients know it, instinctively if not empirically — there are many good reasons to use photos in their ads and catalogs and on their web pages — photos capture attention better than bold headlines, they add visual interest, and, as they say, a picture is worth a thousand words and is efficient at conveying the message where space is limited and expensive.

But as effective as photos can be, today's business models for licensing third party photography are sufficiently complex enough that it's worth taking a few minutes to review the basics and get familiar with the terminology so you can best advise your business clients.

Categories of Use: Editorial vs. Commercial

Professional photographers and stock agencies group their work into three broad categories based not on the nature of the photos but instead on the use to which they will be put: editorial, commercial, and retail. Retail use concerns photography commissioned for personal use and thus is of little consequence to your business clients. Editorial use concerns photography which will be used in a client service or product information piece or in a presentation or video that is educational or expository in nature. Commercial use, conversely, concerns photography that will be used in advertising and promotion to sell or market a product, person, company, or service.

The distinction between editorial and commercial is particularly important because commercial uses typically carry a significantly higher price tag than editorial uses. And it is not always easy to draw the line between the two. While the use of a photo in the interior pages of a product safety brochure is almost certainly editorial, the use of a photo on your client's web page may be editorial if it is associated with content being presented there . . . or it may be commercial if it is associated with a sales message. And if there is both editorial and promotional content on the same web page, it may not be easy to tell which predominates.

Categories of Assets: Royalty Free vs. Rights Managed vs. Commissioned Work

"Royalty Free" and "Rights Managed" are terms that refer to the general scope of the license granted. First understand that Royalty Free doesn't mean *free*. Instead it is a term used to describe a license that provides for an up front, one-time payment in return for which your client gets relatively broad, non-exclusive usage rights. The obvious advantage to a Royalty Free image is that your client pays a relatively small fee one time in return for the right to make multiple uses of the image. Be aware, however, that license terms vary from vendor to vendor and so even with a "Royalty Free" license there will often be some sort of limit on the use that your client can make of that image, either in terms of

number of copies or in terms of length of time, or in terms of medium or purpose. The disadvantage to Royalty Free images is that the rights you get are non-exclusive and so the same image you select is also simultaneously available to others. Indeed, the others who also find it may have used some of the same search terms you used and so the odds that the same image will show up in an ad for a related product or service are better than you might think.

Commissioned work is the most expensive, because it is work staged or shot just for your client and so the photographer's price to your client will have to cover 100 percent of the value/cost of producing that work. Your client can pay this entire price up front in return for an assignment of the copyrights to the work, or pay it one use at a time for a series of exclusive licenses as their needs arise.

Rights Managed photos represent a compromise between Royalty Free images and commissioned work. Rights Managed images are selectively licensed for a limited exclusive use, by market, by length of time, by geographic territory, by medium, and so on). The photographer or agency expects to spread the cost over several separate licenses over the life of the image and so the price is substantially less than comparable commissioned work at the same time that the likelihood of encountering a competing use of the same image is all but non-existent.

Limitations on Use

So we have a spectrum of expense and associated rights from commissioned commercial work to Royalty Free work for editorial uses, but between the two ends of this spectrum the devil is in the details. The limitations on use can take a variety of forms from one vendor to the next. Here, then is a non-exhaustive list of the possible restrictions your client may encounter.

LOCATION/PLACEMENT — like in real estate, location is important. Where an image will be used will have an impact on its price.

SIZE — the size in which an image will be reproduced also often affects price. Size can be measured in terms of portion of a page (e.g., quarter page), or in inches (e.g., 5 x 4 inches), or in pixels (e.g., 2,000 x

3,500 pixels). Be sure that any size limitation encompasses the maximum size your client's use might require.

MEDIUM — the medium in which your client will distribute its work makes a difference. Digital is more susceptible to unauthorized harvest and use than is print and photographers understand this and charge accordingly.

QUANTITY — be sure that any quantity specified comfortably covers at least your client's expected needs and be equally sure to go back for license extensions *before* going to a reprint

TERRITORY — specifying world rights will certainly cover every use, but your client may end up paying for rights they don't need. Advise your client to price the difference and make a decision accordingly.

DURATION — many licenses will be described as perpetual or unlimited in time, but Rights Managed licenses will have finite durations and even some Royalty Free licenses will have long but finite terms (e.g., seven or ten years or more) just to avoid open ended commitments. Watch for these and be sure to calendar them in a way that reminders are certain to pop up in sufficient time to remind your client to get an extension or replace the image.

LANGUAGE — a photograph may be worth a thousand, language-neutral words, but look for limitations on language of the text used in the piece in which the image will be incorporated and think not just about the print collateral but also about the websites on which it may be featured.

EXCLUSIVITY — there is rarely any confusion about the meaning of "non-exclusive," but "exclusive" can be defined by any number of metrics. Be sure to confirm that any exclusivity is clearly and unambiguously described.

Where to Find These Limitations

So now that you know to carefully examine any limitations on your client's license rights, where must you look to

find these limitations? It would be terrific if there were one, universal place to go, but more often than not efficiencies of business communication have resulted in dispersion of the terms of the deal. They may appear in a pre-transaction document (in print or online form) that might be called a bid, a quote, an estimate, an assignment confirmation or the like. Although such a document, in and of itself, is merely an invitation to negotiate and not a binding contract, your client's acceptance of the offer, either by issuing a purchase order or simply making payment, will have the effect of incorporating the proposed terms, as well as any terms that might have been contained in any set of "Standard Terms" or "Terms and Conditions" attached to the offer document.

Sometimes there is a formal license document. This is especially likely if your client's transaction is effected online. In this event, in all likelihood your client will be asked to click their assent as a part of completing the online purchase. Tell them not to do this without closely examining (and printing for their records) the terms of that license that just flashed by.

Sometimes the terms appear in a post-transaction document, like a delivery memo, change order, or invoice. Although your client can't be forced to accept these terms if they were not disclosed prior to commitment, if your client pays the invoice without examining it they will likely have assented to those after-the-fact restrictions.

It's said that you get what you pay for. When it comes to photography, that doesn't necessarily mean that low price equals low quality. Instead, a low price for a photograph probably means sharply limited rights. So let your clients look for a good price, but warn them to keep an eye out for the license terms and make certain they cover what your client needs lest they end up on the wrong end of a cease and desist demand.

Gillen is a partner at Wood Herron & Evans, where he concentrates his practice in publishing, media, and copyrights. He is also chair of the Books Editorial Board of the Intellectual Property Law Section of the American Bar Association. Write or call him if you have an idea for a book at sgillen@whe-law.com or (513) 707-0470.