

# Whose Rights?

An examination of the restrictive contracts increasingly being forced upon artists, showing examples from many countries, and posing questions about the viability of Europe's creative future in light of these unfair practices and the unequal balance between individual artists and global media empires.

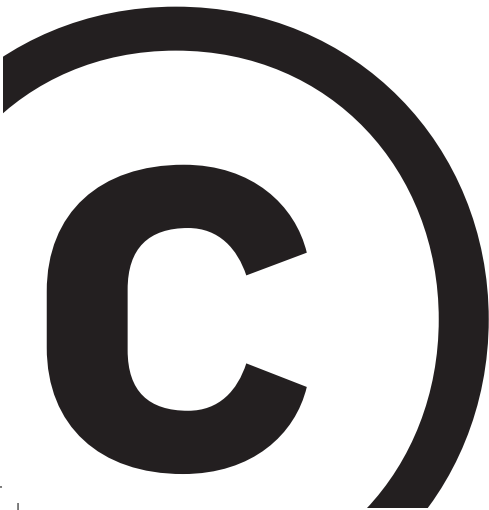








# Whose Rights?



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## Foreword

**Creativity only flourishes** in the right environment and history has shown us that social, economic and legal issues can damage a flourishing artistic community, sometimes fatally. With the increasing globalization of the media industries that we are now experiencing, there are many challenges to be faced if we are to maintain the current level of excellence we enjoy from our artists in Europe. Education and promotion are, of course, vital components in a healthy creative environment, but the single issue concerning creators the most, is the lack of protection offered to them by the legal framework.

As more and more media outlets open, the opportunities for artists should increase but instead, the development is in a “rights grabbing” culture, where global companies force individual creators to sign away all their economic and moral rights with a no sign – no work ethos. This is a manifestly unfair and unsustainable situation for a number of reasons.

As an example of fair negotiation, to compare the strengths of a multi-national corporation and an individual artist is ridiculous. It is obviously not a level playing field, and many corporations refuse to even speak to creators’ representatives or representative groups, let alone negotiate with them.

These practices are against most treaties and agreements on the basis of dealing with artistic endeavour including The Berne Convention;

The International Declaration of Human Rights; and of course the Aquis of the European Union.

Although most copyright legislation within Europe naturally expects the rights within a work, both moral and economic, to be vested in the creator, client groups, such as the multi-national media agencies, circumvent this, by forcing the artist to sign contracts, which take away these rights. This is using contract not as a tool of free negotiation, but as a method of avoiding both the statutory rights of individual artists and the accepted and agreed national law.

We all believe that the creative community in Europe should be promoted and developed, but allowing this loophole to continue is a disaster, not waiting to happen ,but actually happening now. Increasingly creators are unable to make a living and are disheartened as their economic and moral rights are stripped from them. And this situation is gathering pace.



Artistic endeavour is a major part of the European economy, in some member states reaching 12% of the gdp, but perhaps even more importantly it is the heart of Europe, a unique expression of our diverse and rich cultures and the basis of our future development. We must not let these global corporations destroy this rich chain of creativity, which has taken centuries to achieve, by circumventing the intent of national laws in a feeding frenzy of greed. We need to achieve a balanced and fair system where all can benefit from the fruits of our artistic works, and artists are protected from these manifestly unfair contracts.

This publication is intended to bring this matter to the forefront of public attention and provides all the evidence that these practices are both widespread and wrong and demands immediate action. We must not allow corporate greed to destroy what has taken centuries for our culture to develop.

**Martin Beckett**

Photographer



## About the publisher

**Pyramide Europe** is the organisation representing groups of photographers, graphic designers, illustrators and other visual artists in the European Union. Pyramide's name comes from the site of its first meeting in 1989, the Pyramide of the Louvre in Paris, where the founding members signed a declaration of ten items of fundamental legislative importance to photographers and artists – the Manifesto of the Pyramide. This manifesto binds Pyramide and encompasses the rights of creators with regard to their copyright and moral rights.

As a European Economic Interest Group, Pyramide Europe represents most of the 15 member states and is constantly establishing contacts with new groups of nations. The organisation is voluntary both in its membership and workers and has no paid staff, relying on the power of argument rather than the might of the euro to get its message across.

### Structure

The organisation structure could also be described as a pyramid. Pyramide Europe is at the sharp end as a lobbying and debating vehicle on a EU wide basis as well as developing ideas and strategy whilst dealing with organisations with similar interests. The head office is currently held

in Finland and from this central point spread the national Pyramides, each is comprised of various organisations in their own country some only representing photographers and others a mixture of photographers and artists of other mediums. These national organisations work internally to lobby, educate, inform and organise.

## Activities

Pyramide Europe has long provided one of the few voices speaking on behalf of, and in favour of, photographers' rights in debates that have led to unified laws in the EU such as the term directive, and enforcement directive. We have played a full part in presenting evidence in all relevant enquires from the European Commission since 1992 and have been involved in the wider debates taking place in conferences, meetings, television and radio programmes putting forward the views and needs of practising photographers and artists.

Our campaigning extends beyond responding to initiatives as we have been pushing for much needed legislation to curb the practice of unfair contracts being forced upon artists with a 'don't sign, don't work' threat. As media companies become increasingly larger in size and smaller in numbers, the pressure on individual artists to sign these onerous contracts increases, with many artists who refuse to sign being stopped from working.

Our aim is to create an environment where artists of all mediums can continue to create in a market that is open and fair – an aim which should be consensus driven to the benefit of all parties. Unfortunately, in the face of greed, ignorance and globalisation this is not the case and Pyramide faces a great battle on behalf of its members. At stake is the creative future of much of Europe.

## Overview

**Although some of** the laws in continental Europe contain provisions that aim to counterbalance the difference in bargaining power between artists and their commissioners, in practise there are contractual ways around the provisions that were intended to protect the weaker party. Only in rare cases are courts enabled to examine these contract clauses and amend the respective contracts which exploit the artist for the benefit of a prosperous trade in copyright protected works. The reason for this anomaly is the difference in those national laws and jurisdictions that value the freedom of contract over protection of artists. The cost to the individual artist to challenge a multinational company in a court of law constitutes a further barrier.

In the field of photography the contracts photographers are faced with contain numerous 'unfair' clauses. In photography, which by its very nature is a fast moving branch of the creative industry and became even more transient in the digital age, companies try to secure all embracing rights. Photographers can either sign these contracts or lose the commission.

The following points out the most significant and common clauses, explains their meaning, and assesses their impact in the field of photography.

## Assignment of rights

**A provision to assign copyright** is the most regular, the most drastic, and the most 'unfair' provision included in contracts commissioning photographers. The provision is often worded in a way that disguises the far reaching and permanent effect of the assignment. The photographer, who might be aware of the term 'assignment', often has not the time to determine the true sense of the clause and more often a lack of legal understanding to see the consequences when signing the contract.

Broadly speaking, the assignment of rights/copyright stands for the transfer of the author's rights onto the commissioning party to the complete exclusion of the author.

Commissioning companies try to secure the rights in the works to control the exploitation of the work whenever and wherever they wish. The commissioned party receives a relatively small amount for the 'services' delivered and is excluded from the following exploitation of the work.

Contracts simply state that the photographer assigns the copyright in the work to the commissioning party by signing the contract and delivering the work.

Although numerous contracts still contain this provision, for example in the U.K., where the law allows for the assignment of copyright as a property right, others now try to disguise an assignment by providing for the grant of an exclusive licence either for an excessively



long fixed term, no fixed term or in perpetuity. This way of securing rights in a commissioned work is particularly used in jurisdictions where the law and understanding of copyright forbids the assignment of copyright as a personal right to the author as in France and Germany.

To circumnavigate their own jurisdiction, some countries outsource the commissioning of photographers to daughter or sister companies domiciled in jurisdictions whose laws allow the assignment of copyright, irrespective of the nationality of the photographer. The contract from 'Berlitz Pocket Guide Sardinia' is an example of this practice. A German publishing house commissioned an English photographer through their branch APA Publications GmbH & Co Verlag, domiciled in Singapore. The commission was for photography for a travel guide to Sardinia, Italy. Clause 2b of the contract states that the contract is governed by the laws of Singapore, which allows for an assignment of copyright.

Other contracts put the photographer under an obligation to assign not only his rights, but also the rights of others involved in the production or creation of the work - employees, or subcontractors.

Many contracts also demand a waiver of moral rights in addition to the copyright assignment. All control of the work is removed from the creator, financial recompense when the work is re-used and control as to how and where the image is used. Use of the work by the creator for self promotion is often forbidden by contract and if allowed is regulated by the contract with the permission of the commissioner having to be sought. The protection of the artist provided for by the Term Directive, which provides for a protection period of the life of the author plus 70 years, runs empty, as they can no longer exploit or protect the work

Assignment by contract or a perpetual exclusive licence stands against the very nature of copyright. The creator receives a one off payment, which rarely reflects the worth of the rights bought, and which is smaller the greater the bargaining power or reputation of the commissioning party.

# Sample Copyright clauses

## Denmark: Bonnier Publications

### 4. Rights

The Supplier shall transfer the rights to the Editorial Material to Bonnier, and Bonnier shall be entitled to use the Editorial Material in any such way and using any such manner of reproduction as may be desired by Bonnier, including, but not limited to, printed media, including Bo Bedre and similar magazines, and electronic media, including, but not limited to, the Internet, WAP, CD, CD-ROM and other existing and future forms of distribution.

Bonnier shall be entitled to sell the rights to the Editorial Material thus transferred to Bonnier to any third party, however, a fee calculated on the basis of the net sales price being payable to the Supplier in the event of sales to companies outside the Bonnier Group.

The net sales price shall be calculated as the amount invoiced by Bonnier (the gross sales price) less actual costs of sale, marketing, handling incurred by Bonnier in connection therewith. Alternatively, Bonnier can, however, elect, at its own discretion, to deduct 25% from the gross sales price to cover its costs.

The fee payable to the Supplier shall be 50% of the net sales price. Settlement with the Supplier shall take place once annually on 1 Janu-

ary, the fee payable being calculated on the basis of the sales of rights to Editorial Material submitted by the Supplier to Bonnier in the preceding calendar year.

The distribution by Bonnier of Editorial Material jointly with a third party, be it in the form of e.g. Inserts in third-party magazines or distribution via third-party Internet portals, shall neither wholly or partially be considered a sale of rights, and the Supplier shall thus not be entitled to share any income generated as a result thereof.

The rights transferred to Bonnier shall not be subject to any time or geographical limitations, and Bonnier shall, at its own discretion, be entitled to make whole or partial use of any such rights.

**Explanation:** By signing this contract the photographer transfers his copyright onto the commissioning party in its entirety. Bonnier however, provides for the photographer to have a percentage of subsequent sales.

The provisions shown in bold leave the photographer in the following situation:

If Bonnier decides to sell the rights to a third party, outside the Bonnier Group and not classified as a third party cooperative distribution, one year after the photographer submitted the work to Bonnier, the photographer is entitled to a fee that at a maximum amounts to 35% of the net sales price.

### **Finland: SEK & GREY Oy :**

#### **Rights to be relinquished**

With this agreement The Supplier relinquishes the following to SEK & Grey Oy for the payment agreed:.

- (1) All the present and future copyright and other immaterial rights to The Work belonging to itself, a person in its employ, and third parties used by it as subcontractors. SEK & GREY Oy also have the right, without The Supplier separately agreeing to such, to alter The Work and to relinquish The Work and the rights associated with this to a third party.

*The same contract further provides:*

SEK & GREY Oy has the right to use the commissioned Work for its own sales promotions e.g. on its own website and in printed materials, without any time constraint or limitations concerning areas of use.

## **France: VIVENDI UNIVERSAL**

### Assignment of rights

The delivery of photographic work, entirely or in unity, means for the photographer the express acceptance of an exclusive assignment of his patrimonial rights in the images to Vivendi Universal, including in particular:

i) The right to reproduce and represent images, to adapt, for remuneration or for free, in all forms and means, by any means and process whether known or unknown at present ( including printing, reprography, impress, photography, duplication, enlargement, reductions, arts graphics, in two or in three dimensions, sculpture, painting, drawing, lithography, photogram, photography, scanning, magnetic recording, optical, numerical, cinematographic, video, computing), and in any medium by any process, whether known at present or to be discovered in the future (including: paper, cardboard, oilskin, tank, plastic, mineral, solid or liquid, metal, gas, atmosphere, sky, planet, electricity, reflector, virtual, recording, magnetic or optical support, disc, slide show, compiling, catalogue, strip, film, or all compact and video support, projection, video and retro projection, laser projection, all projection by light process or others, computing file, network, network of network, web, intranet and internet, distribution, by analogical terrestrial television system, television, satellite, distribution per telephone, modem, cable, fibre optics, without limitation of this list).

## Germany: Airbus

### 2 PRICE AND PAYMENT

- 2.1 For the performance of the delivery of the Images and the assignment of unlimited and exclusive rights of use, Airbus will pay the price included in the proposal [...]

### 3 INTELLECTUAL PROPERTY (IP) RIGHTS AND USER RIGHTS

- 3.2.1 In accordance with the terms of this Contract, and in consideration for the payments made by Airbus as indicated in Article 2.1 above, the Photographer shall assign to Airbus, on an exclusive, worldwide basis, and for the complete duration of the intellectual property rights, all User Rights in respect of the Work and Services carried out by the Photographer for Airbus, in pursuance of the Contract and as and when they are created.
- 3.2.3 In the event that the Photographer is not, on the date of their creation, the original owner of the Copyrights in the Work and Services produced for Airbus's account in pursuance of the Contract, the Photographer hereby guarantees the assignment by its employees, agents, suppliers, subcontractors, its affiliated companies and their agents, employees, suppliers and subcontractors, of all User Rights in respect of the Work and Services, upon their creation and in consideration for an appropriate remuneration, on an exclusive, worldwide basis, and for the complete duration of the protection (including and legal extension, regardless of the reason thereof).

3.2.4 Notwithstanding the provisions of Article 3.2.2, and within the limits set in Article 3.2.3, the <<User Rights>> assigned to Airbus shall include all patrimonial rights protected by the Copyright in the Work and Services, including in particular:

- the right to reproduce, including the rights to digitize, duplicate in whole or in part, the Work and Services in all forms and formats (whether known at present or to be discovered in the future), on any analogical or digital media (including CD, CD-Rom, CDI, DVD, DVD-Rom, hard disks, server sites, mirror sites, etc.) by any process, whether known at present or to be discovered in the future, in any language, and to produce or have produced any original or copies;
- the right to represent and use worldwide the Work and Services, in whole or in part, in all languages, through any process inherent to said User Rights;
- the right to distribute the Work and Services, in whole or in part, including the right to grant user licenses, to sell, lend, lease, distribute, download or permit downloading of the images on Internet, in all languages, and by all means, whether known at present or to be discovered in the future (including CD, CD-Rom, CDI, DVD, DVD-Rom, hard disks, server sites, mirror sites, etc.);
- the right to modify, adapt, improve, correct, translate, in any form and presentation and in all languages, the images, in whole or in part, including the right to further develop such Work and Services by addition or deletion.

3.3 The Photographer may use the taken images for the sole

purpose of his own promotion but only with prior given permission by Airbus communication department

- 7 Except as otherwise herein provided, the Agreement shall be binding upon the change of ownership, successors, assigns, heirs of the Parties.

### **Spain: Prenatal**

1. PRENATAL acquires the exclusive usage rights of the photographs from all photography sessions and THE PHOTOGRAPHER exclusively transfers all usage rights of the photographs, rights of publication, public communication, dissemination, reproduction and distribution in any type of document, electronic, digital or magnetic medium, or of any other type for press, radio, television, mailings, catalogues, computers or in general, communication media that is oral, written, audiovisual, electronic or of any other type as many times as considered appropriate without further limitations than those stipulated that are established by law and through the present contract.
- 3.. THE PHOTOGRAPHER authorises and transfers to PRENATAL each and every one of the rights related to the photographs taken of the models and PRENATAL shall be able to use these photographs in the manner set forth in the present contract for a period of fifteen years from the date of the signing of the same, as well as transferring their reproduction or dissemination to any media or company.
- 4.. Therefore, with the payment of the corresponding invoices, PRENATAL acquires all rights to the images related to the photography session and the photographs that are taken. This transfer is exclusive and world-wide, with PRENATAL being able to transfer usage to any third party.

- 5.. If the group of companies that PRENATAL belongs to decide to adopt the aforementioned work for any of their shops, or in magazines or catalogues in any country, it shall be able to freely do so without any compensation or fee.
6. The present transfer is exclusive to PRENATAL, expressly stating that THE PHOTOGRAPHER shall not be able to commercially use the work either for him or herself or for third parties.
8. PRENATAL is the sole and exclusive owner of all the rights arising from the studies, projects and models of the work as well as those corresponding to its usage and commercialisation throughout the world, with the company PRENATAL being able to delegate the commercialisation and sale of the work to third parties.
10. The present agreement shall have an annual validity and shall be automatically renewed for identical yearly periods, except when either of the parties notifies the other party by certified letter with acknowledgement of receipt with a minimum advance notice of one month at any time during the validity of his or her wish to not renew or to cancel the contract.

**Spain: G y J ESPA A EDICIONES, S.L. S. en C.**

The aforementioned Artist/Grantor transfers exclusive usage rights (including reproduction, transformation, distribution, public communication, access to databases, transfer, rental and loan until these rights are moved to public domain) to the company [...]; for their reproduction throughout the world, at any magazine that is published and the transfer to third parties of the work(s) that are detailed below.



Likewise, and through the present contract, the Grantor of the usage rights grants the Assignee the right to carry out subsequent publications of his or her work(s) not only through traditional graphic media (magazines, books, etc.) but also through any dissemination medium. For informational purposes only, which are not limited, dissemination could take place by CD-Rom or on media using the CD-Rom format, DVD (Digital Video Disc), Compact Disk, videos, cassettes or any electronic medium that exists or is known, as well as dissemination means over the World Wide Web.

Explanation: These provisions state that the photographer assigns all his rights stemming from the copyright in his/her work to the company for the duration of these rights, as only after expiry of the copyright, his/her work falls within the public domain. This assignment, which is not named as such, is emphasised by the fact that the contract addresses the photographer as “the Artist-Grantor”, while the commissioning company is called the “Assignee”.

The enumeration at the end of the provision seems to somehow limit the usage of the work(s) to existing and known media. However, introducing this list of uses, the contract states that these listed uses are merely exemplary, which in effect widens the usage rights to unknown and not yet existing uses and media.

## **UK: Waitrose**

### 2. Payment

As full consideration for the services of the Contributor under this Agreement and for all rights assigned by this Agreement, the Publisher shall pay to the Contributor the sum of £ [ ]

### 3. Assignment

- 3.1 In consideration of the price, the Contributor, with full title assigns the copyright and all rights to the Publisher absolutely throughout the world.
- 3.2 The Contributor agrees to do all such things and assign and execute all such documents and deeds as may reasonably be required in order to perfect, protect or enforce any of the rights assigned and granted to the Publisher pursuant to this Agreement.

## **UK: BAA plc**

### Copyright Assignment Deed

#### 2. Assignment

In consideration of the sum of £1.00 (one pound) now paid by the Assignee to the Assignor, the Assignor hereby assigns with full title guarantee the Rights to the Assignee absolutely for the whole term of such rights including and extensions or renewals.

Explanation: The Definition section under number 1. defines “Rights” under number 1.1:

“Rights” means

- (a) all copyright in the Photographs anywhere in the world;  
and
- (b) all rights in the Photographs of a similar or corresponding nature to copyright anywhere in the world; including in each case all the Assignor’s rights and interests in such rights and all rights of action and remedies in relation to past infringements;

## **UK: BBC**

### *From Clause 17 of the BBC Freelance Terms of Trade Intellectual Property Rights*

17.1 In consideration of the payment of the Fee, the Freelance hereby assigns to the extent which they are able, and otherwise agrees to assign to the BBC absolutely and with full title guarantee, and warrants that any individual, agent or sub-contractor engaged by the Freelance to assist in providing the Product(s) and/or Services have assigned and/or agreed to assign to the Freelance absolutely and with full title guarantee all IPRs (both existing at the date hereof and in the future) in any Product(s) in all languages throughout the Universe for the full period of such rights (including all rights to renewals and extensions thereof).

17.3 The Freelance hereby grants the BBC, a non-exclusive, royalty free, irrevocable licence to use and sub-licence any IPRs in any Product(s) under the Contract which have not, for whatsoever reasons, been assigned under this Clause 17.

## Waiver of Moral Rights

**The author of** a copyright protected work is also the beneficiary of a number of moral rights. This is recognized on an international level with the provision in TRIPS that refers to the relevant provisions of the Berne Convention, which introduced a certain minimum standard of moral rights recognition. These are the Paternity Right and the Integrity Right. Moral rights are granted to the author of a work irrespective of the approach of the respective jurisdiction towards copyright, be it the economic or the moral rights approach.

Moral rights are personal to the author of the work and are not linked to the ownership of the copyright, from which follows that they are not assignable. In essence moral rights enable the author to build up a reputation, to establish him/herself as the author of certain works that are presented in the way that he/she wishes. However some laws provide that moral rights have to be asserted before they can unfold their effect, which is not provided for in the Berne Convention and which is contrary to their very nature, as they are personal rights which therefore either exist or don't exist.

Some laws further provide for the possibility of a waiver of moral rights. This possibility of a waiver of moral rights has found its way into contracts as a standard clause, where the law allows. But even in jurisdictions, where the law does not provide for the possibility

of a waiver, trade practice has developed, forcing the commissioned party to commit to not exercising their moral rights. These provisions deprive the author of the right to be named as the author of his work. There are no apparent feasible reasons why the author of a work should not be named and earn credit for their work. Additionally, a waiver may enable commissioners to credit the work as their own.

A further question arises when examining the integrity right. The Berne Convention provides for the right of the author to '[...] object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation'. In combination with the waiver of the paternity right, as a standard business practice, it is questionable as to how the author can build up a reputation and protect their work.

There are no apparent reasons why the commissioning party would have an interest in distorting, mutilating or modifying a work that has been carried out according to the commission and thereby be prejudicial to the honour or reputation of the creator. Every contract provides for the right of the commissioning party to refuse the work delivered if it does not fulfil the requirements as set out by the commission brief. The standard waiver of the integrity right is therefore dispensable, unless the commissioning party intends to secure the possibility of distorting the work for future use, which not only has a negative impact on the creative industry, but must also be considered 'unfair' to the artist, who is trying to earn a reputation and make an income.

# Sample Moral Rights clauses

## **Denmark: Bonnier Publications:**

### 4. Rights

Subject to the provision contained in Section 3 of the Danish Copyright Act (Ophavsretsloven), Bonnier shall be entitled to edit and make editorial changes to Editorial Material to the extent that this, at the discretion of Bonnier, is deemed necessary for the purpose of using the rights transferred.

## **Finland: SEK & GREY Oy:**

### Rights to be relinquished

(1) All the present and future copyright and other immaterial rights to The Work belonging to itself, a person in its employ, and third parties used by it as subcontractors. SEK & GREY Oy also have the right, without The Supplier separately agreeing to such, to alter The Work and to relinquish The Work and the rights associated with this to a third party.

[...]

**France: LABORATOIRE GARNIER**

This assignment is granted with an exemption from citing the name of the photographer, during the exploitation of the work.

**France: PALAIS DES THES**

The society Palais des thés will be free, in particular,

- to use the work, as it seems fit, not only in the initial context, and not only in its original form,
- to reproduce the work, as it seems fit, unlimited in the number of copies
- to modify or to adapt, as it seems fit, to change it more or less radically

**Spain: Prenatal**

3. THE PHOTOGRAPHER authorises and transfers to PRENATAL each and every one of the rights related to the photographs [...]
8. PRENATAL is the only owner of all rights arising [...]

**Spain: G y J ESPA A EDICIONES, S.L. S. en C.**

The aforementioned artist transfers exclusive usage rights (including reproduction, transformation {Integrity Right}, ...) [...]

## **UK: Waitrose**

### 7. Waiver of moral rights

The Contributor irrevocably and unconditionally waives all moral rights in respect of the contribution to which he may now or at any time in the future be entitled under the provisions of the Copyright Designs and Patents Act 1988 (section 80) and under any similar laws enforced from time to time during the term of this Agreement in any territory worldwide. The Contributor declares that the waiver shall operate in favour of the Publisher, its agents, licensees, assignees and successors in title.

## **UK: BAA plc**

### 4. Assignor's Warranties

4.2 The Assignor irrevocably and unconditionally waives its rights [, and has obtained from the authors of the Photographs irrevocable and unconditional waivers of their rights,] to be identified as the author of the Photographs granted by section 77 of the Copyright, Design and Patents Act 1988 (the "Act") and his [or their] rights to object to derogatory treatment thereof granted by section 80 of the Act.

## **UK: BBC**

*From Clause 17 of the BBC Freelance Terms of Trade*

### Intellectual Property Rights

17.2 The Freelance hereby to the extent permissible by law, waives irrevocably and warrants that any individual, agent or sub-contractor



engaged by the Freelance to assist in providing the Product(s) and/or Services have to the extent permissible by law waived irrevocably the benefits of any provision of law known as “moral rights” (including without limitation any right of the Freelance, the individual, agent or sub-contractor under section 77 to 85 inclusive of the Copyright, Design and Patents Act 1988 and under any resale right arising from EU law) or any similar laws of any jurisdiction in which waiver is permissible

## Indemnification and Warranty

**Standard clauses in** contracts oblige the photographer to indemnify the commissioning party from claims arising from the creation and publication of the work or even the work itself, while requiring the author to guarantee that they are the holder of all the rights in the work.

The photographer has to provide model release forms, clear third party copyright, trademarks and other property rights required to fulfil the commission, he/she will be made liable if the commissioned work is found to be infringing somebody else's rights. Paired with the provision of the assignment of rights, and therefore the loss of control of where or how the work is used, the photographer might find themselves in a position where the use of the work, infringes other's intellectual property rights or rights of privacy in countries whose legislation was unknown.

The artist, who is forced to sign the contract in order to keep the commission, cannot know the laws in all countries and so cannot assess their liability. The clauses regularly use legal terminology, without any explanation, and the artist might find him/herself faced with infringement claims that go beyond his/her financial abilities.

These clauses are all embracing and drafted in a way that does not limit the liability of the artist. There is rarely time, or finance, for them to get a knowledgeable professional to explain the clauses. The artist is forced to guarantee, and be liable for, consequences that are outside the scope of their control.

# Sample Indemnification & Warranty clauses

## Denmark: **Bonnier Publications:**

### 5. Warranty

Subject to liability, the Supplier warrants that he has acquired all such rights as are necessary for the due performance of his obligations under the present General Terms.

The Supplier warrants that all information contained in the Editorial Material is correct and does not constitute an infringement of the rights or an invasion of the privacy of sources or other persons who may be portrayed or in any other way mentioned in such Editorial Material.

## Finland: **SEK & GREY Oy:**

(2) The rights to The Work for which payment has been agreed on in this agreement and connected with its use, as follows,

The Supplier guarantees, and is responsible for, the fact that it owns all the copyright and other material rights to The Work referred to above

and assures that these can be relinquished without constraint to the agreed extent. The Supplier shall be responsible for ensuring that The Work it supplies does not infringe copyright or other material rights. The Supplier shall be responsible for all demands as may be levelled at SEK & GREY Oy as a consequence of the aforementioned copyright and other material rights.

**France: MAIF**

The photographer expressly warrants that MAIF shall enjoy total, unrestricted and free of any constraints of the rights held free of any confusions, demands or other claims emanating from third parties, in particular:

- the photographer warrants to have full powers and rights to enter into this agreement for the respective rights assigned, and that these rights have not been previously assigned, mortgaged, burdened nor in any way devolved in favour of third parties
- the photographer warrants that he has not and will not, with an assignment to a third party, or by any others means, undertaken anything that can infringe the present assignment, or can complicate the use of these rights through MAIF
- the photographer warrants that these photographs do not incorporate any contribution of any work protected by copyright, or any element burdened with any rights, in particular, copyright related rights, trademarks, industrial designs, databases, models, sportsmen, or any loan that could cause a liability to MAIF
- the photographer holds MAIF free against any appeal or complaint from photographed persons, like parents of minors or legal guardians of protected persons of full

age and owners of real estate and of personal property, and from owners of animals, from whom he expressly obtained the agreement for publication and diffusion, within the requirements of this contract

(...) In case of any breach of the above-mentioned engagements, the photographer is liable with regard to MAIF and to third parties, and shall indemnify the entire economic and moral damages of MAIF and third parties, and this, including in particular, condemnation against MAIF and third parties, and any fees for legal cost, bailiff, legal counsel, attorney engaged in the pre-litigation and litigation environment.

### **Germany: Airbus**

#### **4 NON INFRINGEMENT WARRANTY**

4.1 The Photographer warrants that, for the complete duration of the rights assigned, Airbus shall have full and unrestricted use of the Work and Services and shall be free to exercise fully and unrestrictedly the rights vested in Airbus in accordance with Article 3.2. More specifically, the Photographer warrants that:

- the complete Work and Services, including musical compositions and sound recordings, constitute or will constitute original creations; and
- he have not and shall not use in his work any reminiscence likely to infringe third party rights.

4.1.1 As of the effective date of the Contract and for the complete duration of the User Rights protection (including any legal extension, regardless of the reason thereof), the Photographer shall indemnify and hold

harmless Airbus, its agents, representatives and employees, as well as its affiliates, co-contractors, sub licensees, their agents, successors and assigns, from and against any third party claims in connection with an alleged or actual infringement by the Photographer and/or Airbus, of Intellectual Property Rights, at the exclusion of the works provided by Airbus. Pursuant to the above, the Photographer agrees to bear the full cost of all consequences, including any financial convictions as well as any settlement made in connection with an alleged or actual infringement, attorney fees and any other legal fees that may be incurred by Airbus as a consequence thereof. Notwithstanding anything to the contrary contained in this Contract, no limitation of the Supplier's liability shall be applicable to this provision.  
[...]

- 4.1.3 As part of the warranty granted to Airbus under the Contract, Airbus may, at its sole discretion:
- Require from the Photographer that the latter conducts all claims and defends any suit or proceedings brought against Airbus by any third party in relation with the use of the Work and Services, on the grounds that they infringe third party intellectual property rights. [...]
  - Decide to conduct the claim and/or defend the suit, in which case the Photographer shall provide Airbus with any information and assistance requested by Airbus.
- 4.1.4 In case one or more Services are held or are likely to be held, in Airbus's reasonable opinion, to infringe any Intellectual Property Rights of a third party, the Photographer shall, at its own costs, and within a timeframe compatible with Airbus business needs either: (i) obtain the right for Purchaser, co-contractors,

sub-licensees or agents, to continue using and exploiting the Work and Services in accordance with the terms of this Contract and associated Orders, or (ii) replace the infringing Work or Services so they cease to infringe, while fulfilling all requirements set forth in the Contract. These provisions shall apply without prejudice to Airbus's rights to claim for compensation for all costs, damages and losses incurred as a result of said infringement.

[...]

## 5 LIABILITY

The Photographer shall hold and indemnify Airbus and its affiliates, agents, representatives harmless against any claims and actions, proceedings, demands, costs (including without prejudice to the generality of this provision reasonable legal costs) awards, damages howsoever arising directly or indirectly as a result of any delay, breach or non-performance of the obligations of this Contract by the Photographer, its subcontractors, agents, representatives.

## **Spain: Prenatal**

### AGREEMENT

7.- THE PHOTOGRAPHER expressly states that there are no encumbrances or taxes existing on the usage rights being transferred through the present contract.

9.- THE PHOTOGRAPHER expressly states that s/he is not subject to any exclusion or limitation that would hinder the execution of the present work. S/he shall thus respond with joint responsibility to any claims or disputes that could be presented to PRENATAL by any third party.

## **UK: Waitrose**

### 5. Warranties

The Contributor warrants to the Publisher that

- 5.1 The Contributor is the sole owner of the rights and has the full power to enter into this Agreement and to give the warranties and indemnities contained in this Agreement.
- 5.2 The Contributor will at all material times during the writing of the contribution be a qualifying person within the meaning of the Copyright Designs and Patents Act 1988, section 154 and is the sole author of the contribution which is original and has not previously been published anywhere worldwide.
- 5.3 The contribution contains nothing which is obscene, blasphemous, libellous or otherwise unlawful and the exploitation of the rights by the Publisher will not infringe the copyright or any other intellectual property rights of any third party wherever located.
- 5.4 The Contributor will keep the Publisher fully indemnified against all losses and all actions, claims, proceedings, costs and damages (including any damages or compensation paid by the Publisher on the advice of its legal advisor to comprise or settle any claim) and all legal costs or other expenses arising out of any breach of the above warranties.

## **UK: BAA plc**

### 4. Assignor's Warranties

- 4.1 The Assignor warrants that:



- (a) the Assignor is the sole, legal and beneficial owner of the Rights and has full power to enter into this Assignment;
- (b) there are no existing licences under the Rights and the Rights are not subject to any security interests or other encumbrances;
- (c) the Photographs are the original works of the Assignor [and/or the Assignor's employees] alone [(created in the course of such employees' employment) not prepared jointly with any non-employee] and are not derived or copied from any other source save to the extent that instructions and specifications for the Photographs may have been supplied by or on behalf of the Assignee;
- (d) there has been no infringement or threatened infringement of the Rights by any third party and use or copying of the Photographs does not infringe any copyright or other rights of any third party.

## 5. Indemnity

The Assignor shall keep the Assignee indemnified from and against all loss, costs, demands, damages and expenses arising out of any breach or alleged breach of any of the warranties in clause 4 above.

## **UK: BBC**

## 7. Warranties

You warrant that (i) the Photographs shall be original and shall not have been published or exploited in any form prior to Delivery; and (ii) you shall be the sole author of the Photographs, and (iii) you are fully entitled to agree to these Special Conditions and accompanying Terms of Trade, and (iv) exploitation of the Photographs by the BBC pursuant to these

Special Conditions and the Terms of Trade shall not infringe the rights of any third party.

8. Indemnity

You agree to indemnify the BBC if the BBC suffers any loss or damage or if any action is taken against the BBC because of a breach by you of the Terms of Trade or these Special Conditions.

*From the BBC Freelance Terms of Trade*

6. Warranties

The Freelance undertakes warranties and represents that:

- 6.1 except as otherwise agreed prior to performance of the Contract, they shall obtain for the BBC all necessary consents, permissions and/or clearances of third party rights (including IPR's) with respect to the Products and Services;
- 6.2 They shall not, by reason of any other contract or engagement or otherwise, be precluded from entering into and fulfilling their obligations under the Contract, throughout the Contract Period<
- 6.3 they are a self/employed individual and as such are not an employee of the BBC. (...)
- 6.4 they are registered with the Inland Revenue as self-employed, and are taxable under Schedule D of the Income and Corporation Taxes Act 1988 as amended, and agrees to indemnify the BBC against any claims by the Inland Revenue resulting from a breach of this warranty.
- 6.5 they shall be competent to fulfil their obligations under the Contract (which includes having relevant experience, training

and/or qualifications), and shall use due care, skill and diligence as would reasonably be expected of a competent provider of the Products and Services, perform the Contract in a timely and professional manner and hold any licence, permit and/or certificate required by law for the performance of the Contract.

13. Liability/Insurance/Indemnity

13.6 The Freelance shall indemnify the BBC against all costs and expenses (including legal costs), losses and liabilities which the BBC may incur as a result of:

13.6.1 The Freelance's breach of or non-compliance with its obligations or warranties under the Contract;

13.6.2 The Freelance's negligence of wilful default;

13.6.3 any claims from third parties made as a result of its acts or omissions (including relating to infringement of any IPR supplied under or used in connection with the Contract).

## Further Standard Provisions

There are numerous other standard clauses artists face in commissioning contracts, complex and unlimited confidentiality agreements; penalty clauses; extension clauses that extend the commission and therefore the contract to all other works that are in any way related to the commission; provisions that exclude the resale right of the artist and/or exclude the artist from any re-use of the work; provisions that require the artist to pay fees to the commissioner for the use of the work for self-promotion. Commissioners do not always provide a firm brief, leaving much of the interpretation to the photographer. It is generally at the sole discretion of the commissioner to decide if the delivered work fulfils the requirements of the commission or is of publishable standard without providing for any remuneration or repayment of expenses to the artist if the work is rejected, with no right for the artist to challenge the decision to rejection.

## **Finland: SEK & GREY Oy:**

### Delay

In the case that The Work is delayed for reasons other than those due to SEK & GREY Oy

- \_ (1) The Supplier is committed to pay compensation to SEK & GREY Oy amounting to \_\_\_\_\_ euros, (or)
- \_ (2) to compensating SEK & GREY Oy for the harm caused in its entirety.

### Commitment to confidentiality

The parties to this agreement commit themselves to confidentiality in relation to this agreement and all the technical, economic or commercial information that shall be construed as a business secret affecting the other party and customer/advertiser and which has come to the party's knowledge in any way whatsoever. The commitment to confidentiality shall continue after the expiration of this agreement for as long as the information to be kept secret is of any economic or other importance, or the information has been made public in a legal way.

A party to the agreement shall have the right, without hindrance from the confidentiality obligation, to pass on confidential information to its subcontractor or employee to the extent necessary to satisfy this agreement. A party to the agreement must ensure that its subcontractor/employee commits itself to the confidentiality obligation in the same way as the party to the agreement.

## **Germany: Airbus**

- 6 The Parties have signed a non disclosure agreement attached as Annex 2 to the present contract.

## **UK: Waitrose**

### 4. The Work

- 4.1 The completed work[s] shall conform to the brief which is set out in the Schedule to this Agreement and shall be of a quality acceptable to the Publisher which shall be decided at the Publisher's absolute discretion.
- 4.2 For the avoidance of doubt, the Publisher reserves the right to store all published materials in its archives in any format whether printed, electronic or otherwise during and after the terms of this Agreement.
- 4.3 The Publisher shall be under no obligation to publish the work within any specified time or at all.

Explanation: It is important to note that the Agreement does not contain any provision about the duration or term of the Agreement.

### 6. Delivery and Acceptance of the Contribution

- 6.2 The Contributor shall at his own expense (unless otherwise agreed by the Publisher) obtain from the copy right owner or owners written permission (which the Contributor shall supply to the Publisher) to include and reproduce within the contribution any part of the contribution or illustrative material, the copyright of which is not his own in all languages, additions and formats of which the Publisher notifies the Contributor of its intention to produce, publish or license under this Agreement.

Explanation: It is important to note that clause10 of the Agreement states: 'The Agreement contains the whole agreement between the parties and supersedes any prior written or oral agreement between them in relation to its subject matter.'

This leaves the photographer in a difficult situation to judge whose financial responsibility it is to obtain the copyright from other contributors.

## 15. Confidentiality

- 15.1 The terms and existence of this Agreement are confidential to the parties hereto.
- 15.2 Both of the parties agree to maintain secret and confidential, all confidential information obtained by the other party pursuant to this Agreement and prior to and in contemplation of it, (including, but not limited to information concerning the terms of this Agreement) and all other information that it may acquire from the other in the course of this Agreement. [...]

## **UK: BAA plc**

### 3. Further Assurance

The Assignor shall at the request (and expense) of the Assignee at any time:

- (a) do all acts and execute and swear all documents that are necessary or desirable to vest absolute legal and beneficial ownership of the Rights in the Assignee (or the Assignee's nominee) or to perfect the Assignee's (or the Assignee's nominee's) title to the Rights anywhere in the world; and
- (b) give to the Assignee such reasonable assistance as the Assignee may request in evidencing the Assignee's (or the Assignee's nominee's) title to the Rights anywhere in the world.

## **UK: BBC**

9. Security/Confidentiality
  - (a) You will at all times ensure the security and confidentiality of the Photographs and prevent the Photographs being seen or exploited by any unauthorised person.
  - (b) You agree that you are not entitled to take any photographs (other than those which you are obliged to take pursuant to the Commission) which you would not normally have been able to take due to lack of access or otherwise if you had not been carrying out the Commission. If you do take any photographs other than those specified in the Commission then those photographs will be treated as Photographs and the provisions of the Terms of Trade and these Special Conditions will apply to them.

*From the BBC Freelance Terms of Trade*

18. Confidentiality
  - 18.1 Except to the extent required for the purposes of performing its obligations under the Contract, the Freelance will not use or make available at any time during or after the Contract to any third party any information relating to the business or affairs of the BBC which is disclosed or otherwise is in the Freelances possession under or in respect of the Contract and its subject matter except in relation to information which
    - 18.1.1 is or later comes into the public domain otherwise than through an act or omission of the Freelance or



- 18.1.2 was already known to the Freelance at the time of disclosure otherwise by an unauthorised disclosure by a third party or
- 18.1.3 disclosure is required by law, order of court, the requirements of any regulatory authority or the rules of any stock exchange or
- 18.1.4 the Freelance has the prior written consent of the BBC to do so.
- 18.2 Notwithstanding Clause 18.1, the Freelance can disclose information to its professional advisors, agents and sub/contractors solely on a need to know basis provided that the Freelance procures that the person to whom such disclosure is made complies with the obligations under this Clause 18 as if they were a party to the Contract.

**Summary:**

Artists regularly face contracts that deprive them of legally granted rights. Remuneration for commissioned works in the publishing industry are low, this loss of rights paired with the legal and financial consequences that can result from the transferred liabilities, are unreasonable and disproportionate. A law that was intended to protect the artist and to secure and promote creator rights is overridden by the stronger law of contracts, which benefits the party with the stronger bargaining power. The missing, or inapplicable, unfair contract law and the reluctance of courts and judges to interfere with freedom of contract principles, deprives the artist of his statutory guaranteed rights and benefits in favour of the stronger commissioning party.

## Current legislation

### Belgium: Copyright & Moral Rights

#### What is protected

The Belgian Copyright Act (The Law on Copyright and Neighbouring rights, Loi relative au droit d'auteur et aux droits voisins) from 1994 as last amended in 2005 does not contain a definition of the term of photography, but includes it in Article 2 § 5 under the heading of 'term of protection granted under copyright'. In this article it also states that only original photographs attract copyright protection and limits it therefore to photographic works.

However, according to SOFAM, non-original photographs also attract protection. The Belgian Copyright Act requires copyright protected works to be original in the sense of an own intellectual creation. The Supreme Court interpreted this definition as the expression of the intellectual effort of the one who realised it, which implies a relatively low threshold. Maybe this interpretation can be seen as the reason for SOFAM's allegation that even practically non-original photographs can be copyright protected.

Further is required the creation of a form – there is no copyright in an idea.

### **Ownership**

Article 6 (Sentence 1) states that only natural persons can be the owner of copyright. But there are presumptions in Article 6 (Sentence 2 and 3) about the author of a work, which does not differentiate between natural persons or legal entities.

### **Duration**

Article 2 § 1 provides for a term of protection of 70 years after the author's death.

### **Rights conferred**

The Belgian Copyright Act provides for economic rights as well as moral rights conferred on the author of the work.

### **Economic rights**

The economic rights include the reproduction right, the distribution, the communication right and the right to publicly exhibit the work. It further provides for a resale royalty (artist's resale right) as well as for an access right.

### **Moral Rights**

The moral rights in the Belgian Copyright Act are specified in Article 1 § 2 of the Act and entail the right of first disclosure, the paternity, and the integrity right.

Moral rights have the same duration as the economic right and are un-assignable, although a renunciation is allowed, as well as limited waiver clauses. An overall renunciation however will be presumed as null and void by law. This follows from the concept that copyright law is not seen as a discretionary right and can therefore fall under the 'abuse of rights' doctrine.

## **Photography specific exceptions**

The Belgian Copyright Act contains exceptions to copyright in Articles 21 to 23.

Article 22 § 1 of the Copyright Act contains photography specific exceptions:

Article 22 § 1 (Sentence 1) contains an exception for the reporting of current events and declares the reproduction and communication right as not applicable.

Article 22 § 1 (Sentence 2) declares the taking of a photograph is allowed if the work is shown in a place accessible to the public and where the aim of the photograph or its communication to the public is not about the photographed work.

## **Contracts**

The Copyright Act 1994 was seen as strengthening the regulatory framework for contracts considerably. General rules on contracts were introduced into the Act. Rules on commissioning and employment contracts became more flexible, publishing and performance contracts were restricted.

## **General Rules**

Under Belgium copyright law the author's economic rights can be assigned, while moral rights are inalienable. Article 3 § 1 of the Copyright Act 1994 codifies rules that govern contracts regarding the assignment and transfer of economic rights.

These contracts are not subject to formal requirements other than that they must be in written form, this is contrary to the provisions in the Civil Code.

Article 3 § 1 now also codifies the rule of restrictive interpretation which was developed in jurisprudence (Cour de Cassation, 1941 and 1944). According to this rule, doubts regarding the scope of the as-

signment have to be interpreted in favour of the author, which benefits the photographer [ (Moulaert v. Uitgeverij Marc van de Wiele), (SO-FAM v. Pentagroep), (Delforge v. SOFAM) ].

Article 3 § 1 (Sentence 3) of the Copyright Act 1994 provides that the transfer of ownership in materials containing the copyright work does not presume the assignment of the economic rights in the work. The provision further requires that the contracts need to specify the author's remuneration for each and every mode of exploitation of the work, as well as the geographical scope of the assignment and its duration (Sentence 4).

However, the provision does not define the term 'exploitation of the work', so an indication can only be drawn from the type of right, the technical process used and the intended use of the product. The provision does not lay down particulars about the remuneration. This can be a lump sum or it can be specified that nothing will be paid, as long as a specification of the 'remuneration' is determined in the contract. An additional remuneration for the photographer can be agreed on if the photographer transfers the personal property in the negatives of his work.

Article 3 § 1 (Sentence 5) requires the assignee to exploit the work in accordance with fair practice of the profession, which means that the assignee can be forced to exploit the work only in the context foreseen in the contract.

### **Exceptions – employment and commission contracts**

Article 3 § 1 (Sentences 4 and 5) do not apply to employment or commission contracts. Employed and commissioned photographers are therefore not protected by the provisions regarding the geographical scope and duration of the assignment, or by the remuneration clause and the obligation to exploit.

Although Belgium copyright law provides that copyright in their

works is retained by employees, the Act also allows that employment contracts can contain provisions in which employees assign their copyright to their employers, if the work falls within the scope of the contract or service relationship. Commission contracts follow the same rules if three conditions, as set out by Article 3 § 3 (Sentence 2), are met cumulatively:

- the activities of the commissioning party belong to the ‘non-cultural field’ or to advertising;
- the work is intended for such activity; and
- the assignment of rights is explicitly laid down.

In all other cases the assignment of the economic rights remains possible and the general rules of Article 3 § 1 as outlined above applies.

## France

### **What is protected**

The Intellectual Property Code of France 199, as last amended 2006, established a very broad concept of copyright and therefore recognises numerous works as being eligible for protection.

Article L.111-1 of the Code establishes that each author enjoys protection by the mere fact of creating a work. According to Article L.111-2 a work shall be deemed created, independently of any public disclosure, by the mere fact of the author’s conception being implemented, even incompletely. Thus copyright arises by reason of the author’s creative act, without being subject to the any formality (with the exception of purely administrative formalities).

Accordingly French copyright law does not contain the requirement of the work being in a fixed form, but the creation has to be perceptible. According to French jurisprudence the work has to be presented in an original form.

Article L.111-1 requires the creation to be a work of the mind, without defining 'oeuvre de l'esprit' further. When assessing copyright protectability Article L.112-1 states that courts are not to take into account the kind of work; the form of expression; nor its merit or purpose. For clarification, Article L.112-2 contains a non-exhaustive list of categories of works that shall attract copyright protection as they are considered to be works of the mind. Number 9 lists 'photographic works and other works produced by techniques analogous to photography'.

The French Intellectual Property Code requires the work to be original.

Traditionally, courts defined this criterion by stating that the work must show the imprint of the author's personality. In practice, this means that the author's exercise of creative choice in making a work must be perceptible in the creation. As originality is, in principle, independent of the kind of work at issue, its existence must be judged on a case-by-case basis - French courts usually presume originality or examine the work for its indications, like for example an 'intellectual input'.

The language of Article L.112-2 was introduced in 1985. The Act previously stated that only 'photographic works of an artistic or documentary character' shall attract copyright protection. Through the new formulation, the Act now applies the originality criteria to all photographs. As mentioned previously, originality is traditionally thought to arise when an author puts a personal imprint on a work by exercising creative choice, irrespective of the mechanics of the art. Courts found this choice in the selection of shots to optimize the impact of resulting photographs, in the adjustment of the camera angles and lighting to produce desired effects and in the creation of a décor to be shot, even in photographing a painting.

## Ownership

The French copyright system is dominated by the moral rights approach, better known as *droit d'auteur*. This fundamental principle in French copyright law determines ownership as only natural persons who create works may qualify as authors. L.111-1 establishes the cardinal principle that copyright vests in the author, and as only human beings can exercise a creative choice, authors have to be human beings. There are, however, exceptions in French copyright law when legal entities may hold copyright, but only by virtue of express transfer by the author or authors.

One of these exceptions under French copyright law is the collective work.

Article L.113-1 provides that the authorship in a work shall belong to the person under whose name the work is disclosed.

Article L.113-2 contains regulations and definitions for works of joint authorship, namely collaborative works, composite works and collective works. In the case of collective works the law presumes that the person (natural or legal) who edits, produces, and discloses the work shall own the authorship under certain conditions. The principal who initiated the work, and under whose name the work is released, is even said to exercise the moral rights in the collective work, if the individual contributions fused together. However, the individual authors will still retain rights in their individual contributions, which they cannot exercise in competition with the work as a whole.

When it comes to works made during the term of employment, the dominant principle is that only a natural person can be an author. Following from Article L.111-1, which provides that the existence of a 'service contract' (applied to an employment contract) shall imply no exception to the enjoyment of the copyright; the general rule is that copyright vests initially in an employed author, even if the work was created on the instructions of the employer. However, the employee can transfer copyright to the employer, through contract.



Practice usually circumvents this problem by writing into employment contracts the pre-assignment of rights onto the employer, at least to the extent that the employer can conduct his business. However, this practice contradicts the core principle laid down in L.111-1 and faces strong criticism.

To safeguard this principle, by outlawing the wholesale transfer of copyright in future works, these transfers have to be expressly stated in the contracts and have to comply with specific formal requirements.

Pursuant to Article L.111-1 the author of a commissioned work is originally vested with all author's rights. As the French Civil Code generally governs agreements for personal services, including those commissioning an author to create a work (Article 1787 et seq.), the content of the agreement under which an author renders his creative services would then determine whether the author transfers exploitation rights to the commissioning party. The Intellectual Property Code only contains specific provisions for works created on commission in the advertising sector. Article L.132-31 provides for an assignment to the producer of the exploitation rights in the work if the author is, through a contract, commissioned to produce a work used in advertising, unless the contract states otherwise.

### **Duration**

The copyright lasts for the lifetime of the author plus 70 years, pursuant to Article L.123-1. However, this duration only applies to the author's economic rights as the law follows a dualist approach, the author's moral rights do not have a statutory limited term of duration, existing independently of economic rights.

It is noted that the Duration Directive led to a re-protection of photographic works in France, the term of protection for photographic works was only 50 years after the author's death prior to the Directive.

## **Rights conferred**

In line with French tradition and understanding of copyright law as the moral right of the author, the French Intellectual Property Code lists the moral rights of the author in Article L.121-1 to L.121-9 and only then lays down the economic rights of the author in a second chapter, Articles L.122-1 to L.122-12.

## **Economic Rights**

Article L.122-1 contains two broad economic rights of the author, which are further refined in following Articles. The Code grants the author the right to reproduce and perform the work.

Article L.122-2 defines the performance right and grants the author the right to exploit the work in immaterial forms and to communicate it to the public in any form, which encompasses broadcasting, digital transmissions within networks, cable-casting, public presentation and projection, etc.

Article L.122-3 deals with the material forms of exploitation and embraces any and all methods of material fixation that allow the work to be communicated to the public in an indirect fashion.

Article L.122-4 further grants the author the right to control the complete and/or partial performance and reproduction as well as the translation, adaptation, transformation, arrangement or reproduction by any technique or process whatsoever.

The distribution and the rental and lending right are, although not explicitly listed in the Code, indirectly contained in Article L.131-3, which lays down the right of the author to control the aim of exploitation and the place and time of marketing as well as the right to determine to whom copies of the work may be addressed and to limit the use of copies of the work.

## **Moral Rights**

Article L.121-1 contains a summary of the moral rights of the author. The author shall enjoy the right to respect for his name, his authorship and his work, while this right is part of his personality. The moral rights are perpetual, inalienable (except a transmission *mortis causa*) and imprescriptible.

The moral rights of the author include the right of divulgation, the right to decide when and how the work is disclosed or not to disclose (it is noted that the right of divulgation overrides the distribution right if in conflict by reason of the emphasis on the moral rights in French law); the right of attribution of authorship, which also covers the right to object to false attribution; the integrity right, to assure that the integrity of the author's work is maintained (this right is very broad as the author stakes out the scope of this right - evidence for prejudice to honour and reputation is not necessary; a case by case application exercised and the scope of the right can only be limited when in conflict with other rights).

A further right is the right of correction or retraction in Article L.121-4, which can be seen as entailing the right to access and/or information. This right is seen to be limited to the lifetime of the author as it is considered to be personal to the author, who is the only person to judge if the work needs to be retraced or corrected. The integrity right, although perpetual, is seen as a right which gradually weakens after considerable time, not least because of its' rather broad scope.

## **Photography specific exceptions**

The French copyright law did not contain any photography specific exceptions until 1 August 2006; it did however specify that an exception can only apply once the work has been disclosed, Article L.122-5. It contains provisions about private reproductions and communications as long as they are not interfering with the intended use of the work, as well as the use for analysis, press reviews, reporting current events, sales catalogues (only for a public auction) and parody, pastiche or caricature.

The French copyright law of 1st August 2006 introduced a new exception to economic and moral rights in point 9) of Article L.122-5. At present, “any graphics, statue and architectural work” can be reproduced in the written press, television and the internet, as long as its objective is the immediate information of the public and was made for these purposes. The requirement to state the author’s name subsists.

Further in the case of an exhibition of a photographer’s work for example, works can be used for information purposes, under the condition that the reproduction of the works is in strict proportion to the information given. However, there is an exception to this exception, if the work is by a press photographer whose mission it is to inform and to illustrate the article.

As moral rights are inalienable under French law, waiver of moral rights or exceptions to those rights are therefore not possible. However, it is accepted that the attribution right may be renounced temporarily and the right of integrity in one’s work may by reason of its’ broad and individual scope subject to limitations resulting from contractual agreements.

### **Contracts**

Article L.122-7 of the French Intellectual Property Code provides for the possibility of transfer of the rights of performance and the right of reproduction, which is further specified in Articles L.131-1 to L.131-8. The Code further provides for special regulations of publishing (L.132-1 to -17), performance (L.132-18 to -22), audiovisual production (L.132-23 to -30), commissioned advertising (L.132-31 to -33) and software contracts (L.132-34).

While the general rules on authors’ contracts also apply to photographers, two more specific regulations are particularly relevant for the field of photography, the publication in the press media and the commissioned for advertising, see above.

Article L.122-7 further lays down rules of interpretation by clarifying that the transfer of one right (performance or reproduction) does not imply the transfer of the other right and vice versa; above that the transfer is always limited to the exploitation modes specified in the agreement.

According to Article L.131-1 the total transfer of future works shall be null and void. This, however, allows for the future transfer of single works or a certain number of works as specified, for example in the provisions for publishing contracts, Article L.132-1 ff.

Article L.131-3 further requires that each right that shall be assigned is specifically mentioned, as well as a definition of the field of exploitation regarding scope and purpose, place and duration. Use in an unforeseen manner or in a manner which is not envisaged at the time of the contract, must be expressly provided for. This means in general that everything which is not provided for in the contract remains within the author's, and therefore the photographer's, control.

The Code requires a written contract only for the transfer for some areas, while other areas are valid if the contract is verbal. In many instances, the user of a photograph would therefore not be under the obligation to provide a written agreement to the photographer. However, to use a photograph, consent of the author must always be specifically given. This is of particular importance as French copyright law vests the ownership of copyright always with the author, employers and commissioning parties have to ensure their right to use the work contractually.

In the case of newspapers or periodicals Article L.121-8 provides that if the author consented to the use of the work in newspapers or periodicals, the author retains all the rights, but cannot use the works in competition to the newspaper or periodical. As discussed above in Article L.132-31 the law presumes that the economic rights in works created on commission for advertising are assigned on the commissioner. The same article further requires the commissioning contract to

provide for remuneration of the author for each mode of exploitation of the work, in particular, for the geographical area; the duration of exploitation; the size of reproduction and the media. In case the requirements of Article L.132-31 are not met, the commissioned author remains the owner of the rights.

Related to the issue of consent is the problem of the ownership of the negatives, as a transfer of the rights in the negatives could contain an implied transfer of the exploitation rights. The opinions on this point are split, but considering the general principle under French copyright law it is more likely that the author retains the copyright independent of the property rights in the negatives.

A further speciality under French copyright law is the provision of remuneration for the author in certain cases. As a general rule, the French copyright law favours proportional remuneration, Article L.131-4. The author shall be entitled to a proportional share in the revenue from the exploitation of the work, when transferring the rights.

If explicitly provided for, an unforeseen exploitation shall be allowed, see above, but triggers another proportionate participation of the author in the revenues, Article L.131-6.

Article L.131-4 further provide for special cases where a lump-sum remuneration shall be permitted. The photographer can also require an additional amount, when giving up the right to ownership in the negatives. In these cases, where lump-sum payments are permitted, the author can even demand a review of the price conditions if the contract is burdensome and the author suffers a prejudice of more than 7/12 of the value of the rights.

Commissioning contracts in advertising follows in general, the principle of proportionate remuneration as do the publishing contracts, Article L.132-5.

## Germany

### What is protected

The German Copyright Act (Urheberrechtsgesetz) 1965 as last amended 2006 differentiates between two categories of photographs and only renders fully automated photographs as non-protectable (satellite photographs, speed cameras, etc.).

According to § 1 UrhG literary, scientific and artistic works enjoy protection under the Act. § 2 (1) UrhG contains an illustrative, but not exhaustive, list of categories of works that attract copyright protection. Number 5 explicitly lists photographic works and works that are created by similar processes.

§ 2 (2) UrhG provides a general clause that personal intellectual creations alone shall constitute works within the meaning of this Law. The Act does not contain any further protection requirements, in particular, no formal requirements.

The German copyright law thus follows the creation principle and therefore requires a work to be created, in order to be classified as a work in the sense of the Act. In order to be created the works have to show a certain level of creativity, they have to be a personal intellectual creation. According to the principle of the small change (kleine Münze), as developed by the courts, the threshold for protection is rather low as long as the work shows some creative freedom/artistic leeway.

This creativity however, is decisive, particularly in the field of photography, as the German Copyright Act differentiates between photographic works (§ 2 (1) lit 5 UrhG) and simple photographs (§ 72 UrhG), which are protected by neighbouring rights. For a photograph to qualify as a photographic work, the work has to display the artistic leeway and creative power of the artist, which has, according to the principle of small change, a rather low threshold. Evidence of a pho-

tographical work is the choice of the object; the work with light and shadow; retouching or similar artistic uses of creative means.

As a result the line between photographic works and simple photographs is a difficult one to draw. However, simple photographs are treated like photographic works in most ways and the provisions for photographic works apply analogously. The only difference lies in the term of protection, see below.

### **Ownership**

The German copyright law is based on the creation principle, see above, and protects works because of their individuality, so that the person who gives the work their individuality, is regarded as the author of the work, § 7 UrhG. The creating author owns the copyright in the work, which excludes legal persons from qualification as the author, as only human beings can qualify. The law considers the work as an expression of the author's intellect and therefore qualifies it as a part of the personality of the author. This understanding prohibits any *cessio legis* so that the notion of works-for-hire or the transfer of ownership of copyright onto the employer for works created by employees is alien to German copyright law.

The Act does contain a number of arguable presumptions, like for the person who is attributed as the author of the work (§ 10 (1) UrhG) or anonymous works (§ 10 (2) UrhG). There is only one real exception in the case of audio recordings, § 85 (1) UrhG, where the producer has the exclusive right of reproduction and distribution.

This principle guarantees a high level of protection for the artist but, particularly in the area of the employed artist, it poses practical difficulties for the employer who obtains the rights in the material in which the work is created by the employee (§ 950 of the German Civil Code), but has otherwise no rights to use the works. The German Copyright Act therefore provides for certain duties of the employee to grant exploitation rights to the employer, § 43 UrhG and §§ 31-42 UrhG, while retaining all the author's rights as provided for in the Act.



The freelance creator, however, is seen as the initial owner of the intellectual property right and of the material on which it is created.

The Act contains similar provisions and presumptions about exploitation rights, but leaves the ownership of the author's rights untouched. The only real transfer of the author's rights is by reason of death onto the heirs of the author, § 28 UrhG.

According to § 72 (2) UrhG the person taking a simple photograph shall enjoy the same rights as the author of a photographic work.

### **Duration**

According to § 64 UrhG the copyright lasts for 70 years after the authors death.

As mentioned above the difference between simple photographs and photographic works is decisive for the term of protection. § 72 (3) UrhG provides for a protection of 50 years only for photographs and products manufactured in a similar way to photographs. The term of protection runs from the end of the year of publication or its first lawful communication to the public, whichever took place first. Protection expires 50 years after manufacture of the photograph or similar product, if it has not been published or communicated within that period. In theory the term of protection can therefore add up to 100 years after manufacture of the photograph.

German copyright law follows the monistic theory and therefore economic rights and moral rights have the same duration.

### **Rights conferred**

The rights the German Copyright Act confers onto the author of photographic works and the manufacturer of simple photographs are the same, as the provisions about photographic works shall apply analogously for simple photographs and can therefore be dealt with together.

The German copyright law is based on the creation principle and

therefore strongly emphasises the moral rights aspect of copyright law. § 11 UrhG pinpoints the monistic approach of the German copyright law by recognising copyright as a whole, by stating that the author shall be protected in respect of his intellectual and personal relations to the work as well as with respect to the utilisation of the work.

### **Economic Rights**

German copyright law divides the economic rights into two categories and provides in § 15 (1) UrhG a list of the rights to exploit the work in material form, like the reproduction right (§16 UrhG), the distribution (§17 UrhG) and the exhibition right (§ 18 UrhG).

§ 15 (2) UrhG lists the rights to exploit and communicate the work in its immaterial form, including the right of recitation, performance and presentation (§ 19 UrhG), to make it publicly available (§ 19 a UrhG), the right of transmission (§§ 20, 20a, 20b UrhG), the right of communication by video or audio recordings (§ 21 UrhG) and the right of communication of broadcast (§ 22 UrhG).

The author shall further have the right to control adaptations and transformations of the work, § 23 UrhG.

### **Moral rights**

The German Copyright Act provides for three main moral rights protection in §§ 12, 13 and 14 UrhG and contains several additional moral aspects throughout the Act.

The author shall have the right to control disclosure of his work, § 12 UrhG, which gives the author the right to decide whether and how the work is made available to the public.

The paternity right is provided for in §13 UrhG and gives the author the right to decide whether the work is to bear the author's name, signature or other designation. It is interesting to note that the negative aspect of the right, the right to object to false attribution, is not contained in this provision as German law (§12 Civil code in combination

with constitutional personality rights) provides for a right in one's own name, which covers the false attribution right for everybody and not only for authors.

§ 14 UrhG contains the integrity right, which gives the author the right to prohibit any distortion or any other impairment of the work, which would prejudice the author's lawful intellectual or personal interests in the work. By this formulation the Act introduces the requirement of an objective and provable injury that threatens or harms the author's honour or reputation, this is confirmed by § 39 (2) UrhG which introduces the principle of good faith for alterations to the work through the exploiter. It is interesting to note that German copyright law not only protects the internal integrity of the work, but also the external. This means that the integrity right can also be infringed if the work is placed in a context that is detrimental to the author's reputation.

As mentioned above, the German Copyright Act contains numerous other rights throughout the Act, like the right to retract the work, § 42 UrhG, the right of access to the work, § 25 UrhG, the right to object to alterations to the work, its title or the attribution of the author by the exploiter, § 39 UrhG, applies even if the use of the work was an exempted use, § 62 UrhG, *droit de suite*, § 26 UrhG, and the right to remuneration for rental and lending, § 27 UrhG.

### **Photography specific exceptions**

The German Copyright Act contains a number of exceptions of which some are of particular interest for the field of photography.

§ 24 UrhG provides for a general free use of copyright protected works for the creation of a new copyright work. Considering the rather low threshold of required creativity for a copyright protected work, makes this exception seem rather broad. However, German courts limited the scope of this exception by clarifying that works can only be freely used as a basis for new works and their character has to fade into

the background under the creative integrity of the newly created work. The §§ 44a ff UrhG contains further exceptions to the rights of authors.

Of particular interest for the field of photography is § 49 UrhG, which allows the use of articles taken from newspapers and similar periodicals. However, the same provision contains the requirement of appropriate remuneration to the author, whose works have been used. § 50 UrhG provides for the exception of reporting current events, § 58 UrhG which explicitly lists the allowed reproduction of artistic works and photographic works to advertise the public exhibition and/or public sale of the work if useful for the promotion of the event. The same exception also allows for the reproduction of these works in exhibition catalogues or library catalogues if the use is entirely non-commercial. Excluded are productions that appear to be promotional or advertising material for the respective museum and/or auction house.

§ 60 UrhG entitles the commissioner of a portrait to reproduce the work and to distribute it for non-commercial purposes. The right also applies to the commissioner's successor in title.

German copyright law further provides for a number of compulsory exploitation rights the author has to grant, which are necessary for the proper functioning of the system in which the author is always the owner of all the rights, and which are always accompanied by a statutory remuneration provision for the author.

There are no real exceptions to moral rights and German copyright law does not allow for a waiver of moral rights. However, the author cannot object against certain alterations by the lawful exploiter (either through licensing or through exempted uses) if this was contrary to the principle of good faith, see above.

### **Contracts**

§ 29 UrhG provides that copyright law is non transferable, except upon the death of the author to the heirs. Contracts can, therefore, only be negotiated for the granting of exploitation rights (licences, § 31 UrhG), the granting of the utilisation right to collecting societies

and the consent to alterations of the work, its title and designation of its author (§39 UrhG).

The most relevant of those areas listed is the granting of exploitation rights, licences in the sense of § 31 UrhG. Contracts in this field do not have to follow any formal process and don't have to be in writing, if they do not concern future works, § 40 UrhG.

German copyright law, in addition to the general civil law which generally governs the validity of contracts, contains very specific provisions for contracts concerning copyright.

German contract law is usually governed by the principle of freedom to contract. To protect the weaker party, usually the artist, German copyright law contains certain provisions contrary to this general principle.

§ 40 UrhG provides, in addition to the formal requirements, for specific regulations about the termination of contracts about future works. § 31 UrhG allows for exclusive and non-exclusive licences and provides for the limitation of licences regarding place, time and purpose.

According to § 31 (5) UrhG copyright contracts have to explicitly determine the purpose and scope of the licence and will otherwise be interpreted on the basis of the purpose-of-contract-doctrine, which takes the interests of both parties into account. This has wide implications as contracts which are silent on the point of purpose and/or scope of the licence, will be interpreted accordingly.

§ 31 (4) UrhG further prohibits the granting of exploitation rights for future, unknown ways of exploitation in order to secure the author's future rights. The author has the right to object to future exploitation if he believes such use would not be commercially significant or exploitable when the contract is negotiated.

In addition, there are certain provisions which contain presumptions and interpretation rules for contracts granting exploitation rights, § 37 scope of grant of certain exploitation rights, and the rights remaining with the author if in doubt, § 38 contributions to collections, eg

encyclopedias, usually implies an exclusive licence, although the author will remain entitled to utilise the work after one year from the date of release, § 44 the sale of the original usually encompasses the right of the acquirer to exhibit the work.

§§ 32, 32a, 32b UrhG contain provisions about the remuneration of the author and the scope of these provisions.

§ 32 (1) UrhG provides for the right of the author to remuneration and clarifies, for cases in which the contract does not contain a remuneration provision, that an adequate remuneration will apply. In cases where the agreed remuneration is not adequate § 32 (1) UrhG prescribes that the author can demand the consent of the other party to change the contract in a way that grants the author an adequate remuneration.

§ 32 (2) UrhG provides interpretation guidelines for the determination of an adequate remuneration and states that agreements between trade unions shall be adequate. If no such agreements exist, the remuneration shall be adequate if the sum payable equals the remuneration which would typically be paid in similar business (period and scope of exploitation, etc). The author cannot waive these rights and these provisions shall also apply if circumvented in any other way; however, the author shall be entitled to grant non-exclusive exploitation rights free of charge.

§ 32 a UrhG contains a provision which entitles the author to further participation in the revenue and profits of the exploitation and utilisation of the work through a third party. If the revenues of this exploitation are disproportionate to the remuneration agreed upon, the author can demand a change to the contract of the other party, even if the success of the exploitation was not foreseeable at the time of conclusion of the contract. This right of the author also extends to a third party if the exploitation right was transferred to them by the author's initial contractual partner. Again the author cannot waive these rights

and can not be forced to give up these rights contractually.

In order for these provisions to capture contracts for which German law should apply, § 32 b UrhG contains the regulation that §§ 32 and 32 a UrhG, shall apply to all contracts which would be governed by German law and where a choice of law has not taken place (1) or if relevant acts of exploitation take place within the realm of this law.

The German Copyright Act contains further provisions about adequate remuneration of the author in particular where the Act provides for exceptions to the author's rights. § 63a UrhG provides that the author cannot waive these rights to remuneration for certain uses in advance, but they can be transferred to a collecting society in advance.

## Italy

### **What is protected**

The Italian Copyright Law establishes three different categories of photographs: Photographs that attract copyright protection, photographs that are protected by related rights and photographs that are not protected.

This rather unusual division in the current Italian Copyright Statute of April 22, 1941, as last amended by Legislative Decree No. 68 of April 9 2003, stems from a changing understanding of the art of photography and is structured as follows:

As a work of the mind which has a creative character (Art 1 Copyright Act), photographs are listed as a specific category of work which attract copyright protection, Art 2 Number 7. The law defines these photographs as photographic art, without giving a further definition, as opposed to simple photographs which are protected under related rights in Art 87 ff.

Art 87 defines simple photographs as images of persons, or of aspects, elements or events of natural or social life obtained by photographic or analogous processes, including reproductions of works of figurative art and stills of cinematographic film.

Art 87 also specifies the third group of photographs, by stating that photographs, writings, documents, business papers, material objects, technical drawings and similar products (eg documentary photographs) are not to be protected under this provision.

This distinction has important implications on the scope of protection of a photograph as it is often not clear and, because of the lack of further definition in the Act, subject to interpretation through the courts. In summary, the courts established that a photograph can qualify as photographic art, if it shows creative character through the preparatory work - by enhancing, selecting and combining the effects the equipment makes possible (by camera or computer), or by acting on the composition of the subject or creating the subject itself. The photographic work must reach a particular level of creativity, which courts defined as something besides mere technical expertise; the author's personal contribution, which is the characteristic of the work; the photographer transmits an emotion that goes beyond the subject portrayed; the work represents an artistic accomplishment; is of undeniable artistic value; the imprint of the author's personality derives from more than one element, etc.

If a photograph does not fulfil these criteria it might be protected by related rights protection as long as the photograph does not serve a mere documentary purpose but rather a figurative purpose as enumerated in Art 87 (1). (Supreme Court 16 April 1975).

### **Owner**

According to Art 6 copyright is acquired by the person who created the work. In the case of photographic art, the photographer is considered to be the owner of the copyright, as it is his/her personal input which can be classified as creative.



However, in the case of non-creative photographs, the criteria of Art 6 cannot apply and the related rights protection follows different rules. If the photograph is taken by an autonomous person, the related rights belong to the photographer, Art 88 (1). If the photograph is taken by an employee during the course of employment, Art 88 (2), the related rights belong to the employer. The law states this explicitly for non-creative photographs only, while it leaves it open for creative photographs. Art 12 bis/ter, however, provides that economic rights of computer programs/industrial designs, created by an employee in the execution of his/her duties, are exercised by the employer. It can, therefore, be argued that by not containing a similar provision for all other categories of works, the copyright remains with the author. Other authors however argue that the intellectual property law shall always vest with the employer as Italian intellectual property law provides accordingly in the case of inventions.

If the non-creative photograph is made on commission, Italian copyright law provides for a further speciality: Subject to contrary stipulation the same rule, Art 88 (2), shall apply to commissioned photographs, when the photograph is of things in the commissioner's possession, provided that the person commercially using the photograph pays the photographer an equitable remuneration. In the case of a commissioned portrait, Art 98 provides that, subject to an agreement to the contrary, the person photographed or his successor or assignees may publish, reproduce or order the reproduction of a photographic portrait taken on commission without the photographer's consent, provided an equitable remuneration is paid to the photographer by the person commercially using the photograph.

### **Duration**

The duration for creative photographs lasts for 70 years after the death of the author (Art 25), while according to Art 92 the exclusive rights protection in non-creative photographs subsists only for 20 years after the making of the photograph.

## **Rights conferred**

### **Economic Rights**

The author of a photographic work shall have the exclusive rights of (first) publication, reproduction, communication, distribution, renting and lending as well as of modification, Section 12 ff.

According to Section 88 (1) the author of a non-creative photograph is limited to the exclusive rights of reproduction, dissemination and marketing of the photograph.

### **Moral Rights**

While Art 20 ff provides for the moral rights of paternity and integrity of photographic works protected by copyright, there is no provision for moral right protection for the author of non-creative photographs. However, in the case of free use of a non-creative photograph, Section 91, the name of the photographer shall be given.

### **Photography specific exceptions**

The Italian Copyright Act provides for exceptions and limitations in chapter 5 sections 65 to 71 decies. The Act, however, contains additional provisions in the section for neighbouring rights. Of particular interest, is section 91 regarding non-creative photographs.

Sections 65 to 71 decies, list other copyright protected works explicitly, but do not contain a photography specific exception, Section 91 is only applicable to photographs. As part of the non-creative photographs regulations, it can be assumed that the exception only applies to non-creative photographs. This leads to the somewhat astringent situation that non-creative photographs benefit from a stronger protection than creative photographs. Section 91 provides for an equitable remuneration in the case of free use of the photograph, while sections 65 to 71 decies do not contain this provision. This leaves the author of creative photographic works in a weaker position than the author of a non-creative photograph in the case, for example, of free use of the photograph to report current events in newspapers and/or periodicals.

Some argue that the exceptions in Sections 65 ff shall, for this reason, not be applicable to creative photographic works, while others argue that Section 91 shall not be applicable at all. Whilst it seems that the general provisions in Sections 65, 66 and 70 (2) do not exclude creative photographic works. Section 91 (1) could not apply to those works, as authors of creative photographic works would be favoured in contrast to authors of other copyright protected works.

However, considering the difference in protection with regards to duration and applicable rights, this differentiation between creative and non-creative photographs may be justified.

### **Contracts**

Section 107ff of the Act provides for the transfer of economic rights of copyright protected works. While Section 109 establishes that, through the transfer of a copy of the work, the ownership of the copyright in the work shall remain unaffected, Section 89 sets out a rule that through the transfer of the negative, or similar means of a photograph, the transfer of the economic rights in non-creative photographs is implied if there is no agreement to the contrary. Section 130 provides for an adequate remuneration for the author through participation in the turnover, and the following Section sets out how the turnover shall be calculated. It also contains the right of the author of the work to participate in decisions the publisher might make during the duration of the contract.

Although the Italian Copyright Act does allow for the transfer of rights, the law provides for certain regulations that act as safety measures for the uneducated copyright owner. The transfer of rights in photographic works shall be in writing, in particular for publishing contracts (Section 18 to 135); rights in modifications are not included in the transfer of the rights; the transfer of economic rights leaves the other economic rights unaffected. Section 127, 128 provides for a maximum period of time during which the publisher can exploit the work (two years) after which, the author will be entitled to require the termination of the contract.

However, these regulations are specific to a publishing contract and can be circumvented through different types of contracts for which no provisions are in place.

## Netherlands

### What is protected

The Copyright Act of the Netherlands from 1912 (Auteurswet 1912), as last amended in 2006, contains a non-exhaustive list in Art 10 (1) of works that attract copyright protection. Under Number 9 the law explicitly lists photographic works (fotografische werken). The Act however, does not provide for a definition of photographic works.

To attract copyright protection a work has to be original, which the Dutch copyright law defines as an intellectual creation subject to sensory perception.

The Supreme Court (1991) defined this requirement further and stated that a work must have an individual, original character and must bear the personal mark of the maker, it has to be the perceivable form of the intellectual activity of the author.

By limiting the copyright protection to photographic works, the law makes clear that photographs are only protected if they have sufficient individual character and bear the mark of their creator, so a combination of choices must lead to an original photograph.

### Owner

#### General

Pursuant to §2 Article 4 Subsection 1 the Dutch Copyright Act presumes that the creator of a work is the initial owner of the copyright in the work.

However, Dutch copyright law allows for an assignment of parts of

copyright or of copyright as a whole, § 1 Article 2 Subsection 1. With regards to photographs the Court of Appeal (1990) followed a primarily technical understanding of the wording of the law and followed that the author of a photograph is the person who captures the object on film, unless the picture has no individual character. The Supreme Court in *Kluwer v. Lamoth* specified that the person who made the intellectual creation is to be considered the author of the photograph.

According to Art 7 of the Copyright Act the works of an employee are owned by the employer. This, however, does not include the works of commissioned photographers. A special case is provided for by Art 8 of the Act, which states that the legal person that publishes the work, is presumed to be the owner of the copyright unless a private individual is mentioned as its maker.

With this the law clarifies that legal persons can be the owners of copyright and so copyright can be transferred as an asset. However, Art. 2 of the Act requires a deed for this transfer of rights.

### **Duration**

Art. 37 Subsection 1 provides for a general duration of copyright for 70 years after the author's death.

### **Rights conferred**

The Dutch Copyright Act provides for economic rights as well as moral rights conferred on the author of the work.

### **Economic rights**

The economic rights include the reproduction right and the publication right.

### **Moral Rights**

The moral rights in the Dutch Copyright Act are specified as the right to the statement of the author's name and the right to the integrity of the work.

Moral rights have the same duration as the economic right and are un-assignable, although a waiver is allowed. This waiver however, does not include the integrity right, the right to object to distortions, mutilations or other modifications of the work prejudicial to their honour, reputation or value. In this context the Dutch Copyright Act expressly states that an infringement of the integrity right is subject to a test of reasonableness, which opens the gateway for national traditions as applied by the court.

### **Photography specific exceptions**

There are no photography specific exceptions provided for in the Dutch copyright law. However, Articles 15 to 24 provide for cases that might be more applicable to photography than other copyright protected works, like the right to quote, which embraces photographs. Unlike literary works which should always only be quoted partially, in the case of photographs it is accepted that always the whole work will be quoted. The source of first publication and the name of the maker are obligatory. Case law has further provided for a balancing act between the amount taken and the accompanying text, which has to discuss either the photograph itself or the work of the photographer. Here a court will take into account the size of the reproduction to differentiate between quotation and normal illustration.

### **Contracts**

As stated above, Dutch copyright law allows for an assignment of parts of, or the whole of, copyright in addition to the granting of exclusive or non-exclusive rights in works through licences. The transfer can either take place through inheritance or through contract and can for instance be limited to the transfer of copyright in a work for a specified territory (Netherlands, Europe, etc.) or for a specified industry (academic journals, architectural magazines, etc.). Here it is up to the photographer to negotiate suitable limitations as once the copyright is transferred there is no proviso assisting the photographer to reverse the transfer.

The act does not provide for formal requirements for a contractual transfer of the copyright, only that the transfer takes place through an act of delivery by means of a deed, Article 2 Subsection 2. By stating that the scope of the transfer has to be laid down in the certificate of the transfer or that it is determined by the nature or the purpose of the transfer, the Copyright Act leaves space for interpretation and for ambiguous contract drafting. The word 'copyright' or 'assignment' does not have to be contained in the wording of the contract. If the nature of the transfer indicates that the copyright in a work is necessary to achieve a certain goal, the copyright in the work is automatically made part of the contract. This gap was interpreted further in such a way that the transfer is not limited to the intention of the parties at the time of the initial transfer. The transfer of the entire copyright can include future rights and forms of exploitation even if unknown at the time of contract.

Future copyright is also transferable, as long as the content of the transfer certificate is sufficiently specific regarding the work in which copyright is transferred. This means that in the case of commissioning contracts it is possible to transfer the copyright in all the works done within this commission to the commissioner.

However, Article 27 limits the scope of the full transfer of copyright; it restricts the transfer of personality rights in the works of the author. By their very nature these rights are connected to the personality of the author and are therefore not transferable.

Not regulated by the Copyright Act itself are licences with which certain ways of exploitation are transferred to the licensee to make use of the work in a limited way as determined by agreement. As licences are not mentioned in the Act there are no formal requirements for such an agreement. However, the Dutch Federation of Photographers developed General Conditions for licence agreements, to be used in the industry, but which are usually disrespected in an environment where the content of the commissioning contract is dictated by the party with the stronger bargaining power, regularly the commissioner.

## Sweden

### **What is protected**

The Swedish Act on Copyright in Literary and Artistic Works from 1960, as last amended in 2005, protects in Article 1 literary and artistic works. Article 1 Number 5 protects a photographic work and groups it together with other works of fine art.

Following from Article 49 a of the Copyright Act, the Swedish copyright law recognises in Chapter 5 'certain rights neighbouring to copyright', a related right in photographic pictures, which have been prepared by means of photography or analogous process.

This distinction makes clear that besides photographic works which require their creation pursuant to Article 1, the Swedish copyright law also protects the preparation of a photograph. It is to note that this photograph can also attract copyright protection under Article 1, when it is created.

Article 1 number 7, also clarifies that the works listed in the numbers above are forms of expressions, this is required to attract copyright protection.

### **Owner**

Article 1 states that the person who creates the work shall own the copyright in the work. The Swedish Copyright Act contains further provisions on ownership, Article 6 - joint ownership and Article 7 which entails a rebuttable presumption that the copyright owner shall be deemed to be the person whose name, etc appears on copies of the work. Should the author's name not appear on copies of the work, the editor or finally the producer, shall be deemed owner of the copyright. The Swedish Copyright Act thus makes an exception from the creation principle, that only the person who created the work is seen as the author and owner of the copyright as Article 7 provides for a presumption on ownership of a legal person.



The Swedish Copyright Act does not contain the general presumption that copyright in works created by employees in the course of employment automatically vests with the employer. Article 40a of the Act provides for a transfer of copyright onto the employer only in the case of computer programmes created during employment.

In the case of photographic pictures anyone who has prepared the picture shall be the owner of the neighbouring right.

### **Duration**

According to Article 43 copyright lasts for the life of the author plus 70 years. In the case of photographs this can however only apply to photographic works, as Article 49a provides a duration of 50 years from the year when the picture was prepared for photographic pictures.

### **Rights conferred**

Article 2 and 3 contain the economic and moral rights conferred on the author of photographic works while Article 49a refers to Article 2, second to fourth paragraph and Article 3 and declares them applicable for photographic pictures.

### **Economic Rights**

The economic rights, pursuant to Art 2 paragraph 1, comprise the reproduction right and the right to make the work available.

The reproduction right gives the copyright owner the right to the directly or indirectly, temporarily or permanently, preparing of copies; regardless of the form or the method in which those copies are made. Further comprised are translations and adaptations, or the reproduction in a different form.

The right to make the work available entails the right to communicate the work to the public; the right to publicly perform the work or exhibit copies of the work; the right to sell copies of the work; to lend or otherwise distribute them to the public.

### **Moral Rights.**

Article 3 paragraph 1, contains the paternity right, the right to be named as the author of the work. Article 3 paragraph 2, lays down the integrity right which protects the author's reputation and individuality.

Article 3 also provides for the possibility of a waiver of these moral rights, although only in a limited way, as the uses have to be limited in character and scope.

### **Photography specific exceptions**

The Swedish copyright law does not provide for photography specific exceptions although some of the exceptions in the Act are more relevant to the field of photography.

Article 11 clarifies that the limitations contained in the following provisions are not limiting the author's moral rights; the source shall always be stated in an appropriate manner and the work shall not be altered other than necessary for a particular and exempted use.

Article 11a allows the making of temporary copies; Article 12 allows the copying for private uses, not limited to research and study purposes, but in the case of fine art it does not cover the copying by means of artistic reproductions; Article 23 states certain exempted uses of works of fine art, including photographic works, the inclusion in scientific, non-commercial presentations, for criticism, and in the case of reporting current events in newspapers and similar periodicals, if and to the extent the information purpose calls for this use. However, if the work has been created specifically for reproduction in a newspaper or similar periodical the use is not exempted.

### **Contracts**

The Swedish copyright law allows for the transfer of copyright as a whole or in part. However, when transferring copyright, the moral rights in Article 3 remain with the author according to Article 27 paragraph 1. The Act provides, in Article 30-40, for certain kinds of

contracts if there is no agreement to the contrary. Article 31-38, for example, contains provisions for publishing contracts.

Article 28 further provides that copyright cannot be transferred further than to the person the author transferred it to, without the author's approval. The transferee is not allowed to alter the work in any way, maintaining the integrity right of the author. Article 29 singles out the case of sound recordings or recordings of moving images and provides for an equitable remuneration for their authors.

It is interesting to note that the former Swedish copyright law, in accordance with other copyright laws of the Nordic countries, formerly provided for an automated transfer of copyright onto the commissioning party. This general clause has been repealed and the position of commissioned photographers has been strengthened through the new copyright laws in the Nordic countries.

However, transfer of copyright remains possible under Swedish copyright law and although the Act does not contain a general provision regarding the works created by employees as stated above, courts often accept an implied transfer of copyright onto the employer particularly if the work was created in an employment situation and under the direction of the employer.

One of these implied transfers is recognised by the Act in Articles 31 ff, which states that the economic rights are transferred onto the publisher by means of the publishing contract. However, according to Article 31 the property in the originals remains with the author.

Article 32 gives the publisher the right to produce 200 copies of the work in the case of fine arts, which includes photographs.

The following provisions give authors the right to rescind from the contract if the publisher does not fulfil the obligations to publish the work within a certain time, as well as the right to information about the copies produced, and additional rights regarding new editions of the same publication.

Swedish law further provides for regulations about contracts in general and contract terms, which entails the right for organisations of free-lancers to test and verify in court if certain terms and conditions are considered to be unfair.

## Finland

### What is protected

In the Finnish Copyright Act from 1961, as last amended in 1998, photographic works are explicitly listed in Article 1 as being part of the protected work category 'fine art'. Similar to the Swedish Copyright Act, the photographic work is seen as a subcategory of artistic works and requires to be created. The form of a photograph further fulfils the criterion of being a work expressed in a certain form, Article 1, first paragraph. Also similar to the Swedish Copyright Act, Finnish copyright law differentiates between photographic works which are protected by copyright and photographic pictures, which are protected by neighbouring rights to copyright, Article 10 second paragraph, Article 49a. Here as well, the photographic picture might also attract copyright if it fulfils the criterion of being created. Otherwise a lot of the provisions applicable to copyright protected works are to be applied analogously to photographic pictures. The Finnish definition on works of art is vague, "a piece that has arisen from a creative works process...."

It is for the court to define between works and ordinary photographs. There is only one court case in Finland (1997) which gives a hint on the terminus; in the case an ordinary landscape photograph was used without permission on the label of a wine bottle. The primary court in Finland considered it a photography work, and a secondary court level made a decision that it is an ordinary photograph. The sentence was not changed.

The Copyright Act in Finland is part of the Criminal Code and a

violation of a photographers copyright can therefore be a criminal offence according to the Finnish Criminal Act. Photographers can make a complaint to the police against someone who has discredited their copyright. It is for the Police to investigate and give an evaluation for the prosecutor for further actions. The maximum sentence for a crime against the Copyright Act is 2 years imprisonment. In the few cases that have gone to court the result was a penalty fine (related to how much the convicted party earned, meaning the normal licence fee); charges for misuse usually doubled this fee; and the costs of both sides' solicitors' fees.

As from 1st June 2006 photographic works are included in the resale right.

### **Owner**

Article 1 of the Finnish Copyright Act generally declares the person who created the work the owner of the copyright in the work. Article 6 contains provisions about works of joint authorship, while Article 7 provides for the presumption that the person who is named on copies of the work, in a regular manner, shall be deemed to be the author of the work; if nobody is credited on the copies the editor or ultimately the producer is considered to be the author. Finnish copyright law therefore provides for the possibility of legal persons being authors and owners of copyright in works.

Article 40b provides that the copyright in a computer program created by an employee, shall automatically pass to the employer. The same shall apply in the case of databases, which clarifies that only in those two scenarios specially provided for in the Act the employer by law owns the copyright, while in all other cases the copyright initially vests with the employed creator.

Although the copyright in a commissioned photograph generally vests with the author, the commissioning party shall have certain rights in the work, similar to the owner of the copyright, Article 40c, see below.

In the case of photographic pictures it is the photographer who owns the neighbouring rights according to Article 49a.

## **Duration**

Generally copyright in Finland lasts for the life of the author plus 70 years, Article 43. In the case of photographic pictures, the neighbouring right only lasts for 50 years after the end of the year in which the photographic picture was taken.

## **Rights conferred**

As in the Swedish Copyright Act, Article 2 provides for the economic rights of the author, while Article 3 contains the moral rights provisions. Article 49a entails rights of the photographer in the case of photographic pictures and a referral to provisions in Article 2 and 3.

## **Economic Rights**

Article 2, first paragraph, provides for the right to control the work by making copies of it (reproduction right) and by making it available to the public, which entails the performance of the work; the offering of copies of the work for sale; the rental or lending of copies of the work or any other form of distribution or exhibition. The right comprises the work in its original or altered form, adaptations, translations, or any other transformation of the work.

Article 2, second paragraph, clarifies the situation that in case a work is recorded on a device, which enables its reproduction, this shall be regarded to be the making of a copy.

## **Moral Rights**

Article 3, first paragraph, contains the paternity right, which guarantees the author the right to be credited on his work.

Article 3, second paragraph, provides for the integrity right, which forbids the work to be altered in any way which is prejudicial to the author's professional (literary or artistic) reputation or the author's individuality.

However, Article 3 third paragraph, contains the possibility of waiver of these rights as long as the waiver is limited in character and extent.

According to Article 49a, the photographer shall have the rights to make copies of the photographic picture in its altered or unaltered form as well as exhibiting it; Article 2 second paragraph and Article 3, first and second paragraph, shall apply accordingly to photographic pictures.

### **Photography specific exceptions**

Articles 11 to 26 of the Finnish Copyright Act contain exceptions to the rights as provided for by the copyright in a work.

Article 11 first paragraph, provides that the moral rights in Article 3 can only be limited as provided for in Article 25e, which contains the provision for buildings and useful articles that might require an alteration prejudicial to the author's reputation.

Article 12 provides for a private use exception, which gives everybody the right to reproduce the work for private purposes only.

Article 20 allows for the public exhibition of a copy of the work if the author lawfully disposed of the copy. Article 22 provides for the exception that a work can be quoted in accordance with proper usage, which in the case of a photographic work means that the whole work can be reproduced as a quote to an extent necessary for the purpose.

Article 25 provides for the criticism and review exception, including a scientific presentation in a newspaper, as well as the incidental inclusion of an artwork in a photographic picture, once the work has been sold or otherwise permanently transferred.

Article 25a further provides that a work of art can be freely reproduced in exhibition and/or sales catalogues.

Finnish copyright law provides in its Articles 26a - h for a levy system, which guarantees remuneration for authors that have to tolerate exempted uses of their works under the above stated exception. In line with European law the former Article 26i which excluded photo-

graphic works from the resale right, those are now included under Finnish law from the 1 June 2006.

### **Contracts**

Chapter 3 of the Finnish Copyright Act contains provisions about the transfer of copyright. Article 27 to 29a contain general provisions, whilst the following provisions contain more specific regulations of certain contracts, like publishing contracts; public performance contracts; or a commissioning contract for a portrait by photographic means.

According to Article 27 copyright is transferable, but limited by the moral rights provision in Article 3.

Article 29 contains a gateway for the verification of certain contract clauses through the Contracts Act, which allows for the adjustment of unfair clauses in copyright contracts. Article 27 clarifies that the transfer of a copy of the work does not imply the transfer of the copyright in the work, which can be of importance in the field of photography where the transfer of the negatives is often required in commissioning contracts.

Article 28 gives the author the right to retain some control over the copyright in the work, by rendering the further transfer of the copyright, as well as the alteration of the work, as an exception which has to be explicitly agreed.

Article 40c provides for the commissioning contract for a portrait made by photographic means. Although the author of the work retains copyright, the person in the portrait has the right to control certain reproductions of the work. The author of the work needs the permission of the person portrayed, to transfer the copyright in the work according to Article 27 second paragraph.



## Denmark

### What is protected

The Danish Consolidated Act on Copyright 2003 protects, in Article 1, literary and artistic works under copyright and lists photographic works as a subcategory.

In Article 70 of the act, Danish copyright law recognises neighbouring rights in photographic pictures, similar to Finland and Sweden, according to Article 91 (5) made on or after the 1st January 1970.

This distinction makes clear that besides photographic works, which are required to be created pursuant to Article 1, the Danish copyright law also protects mere photographic pictures. It is to note that a photographic picture can also attract copyright protection under Article 1, if it fulfils the criterion of being created.

Article 1 also clarifies that the works listed are forms of expressions, which is required to attract copyright protection.

### Owner

Article 1 states that the person who creates the work is the owner of the copyright in the work. The Danish Copyright Act contains further provisions on ownership, Article 6, joint ownership and Article 7 which like the Finnish and the Swedish Act contains the rebuttable presumption that the copyright owner shall be deemed the person whose name, etc appears on copies of the work. Should the author's name not appear on copies of the work, the editor or finally the producer shall be deemed owner of the copyright. The Danish copyright law also contains an exception from the creation principle, that only the person who created the work can be the author and owner of the copyright as Article 7 provides for a presumption of ownership of a legal person.

The Danish Copyright Act does not contain a general presumption that copyright in works created by employees in the course of employment automatically vests with the employer. Article 59 of the Act provides for a transfer of copyright onto the employer only in the case

of computer programmes created during employment by an employee. In the case of photographic pictures anyone who has prepared the picture shall be the owner of the neighbouring right.

### **Duration**

Chapter 4 Article 63 contains the provisions for the duration of copyright, life of the author plus 70 years. In the case of photographic pictures, Article 70 provides for a term of 50 years from the year when the picture was taken.

Article 75 extends the duration of the moral right of integrity as well as the divulgation right beyond the normal duration of copyright, if cultural interests are violated through the alteration or the making available of the work.

### **Rights conferred**

Article 2 and 3 contain the economic and moral rights conferred on the author of photographic works while Article 70 (3) contains referrals to provisions about copyright in particular Article 2 (2) - (4) and Article 3 to be applicable for photographic pictures.

### **Economic Rights**

The economic rights, pursuant to Art 2 paragraph 1, comprise the reproduction right and the right to make the work available whether in the original or amended form; in translation; adaptation into another literary; artistic form; or into another technique.

The reproduction right gives the copyright owner the right to control directly or indirectly; temporarily or permanently; in whole or in part; by any means and in any form the preparing of copies, regardless of the form or the method under which the copies are made. Further comprised are translations and adaptations or the reproduction in a different form.

Article 2 (2) clarifies the situation that in case a work is recorded on a device, which enables its reproduction, this shall be regarded to be the making of a copy.

Article 2 (3) defines the right to make the work available by stating that ‘the work is made available to the public if copies of the work are offered for sale, rental or lending or distribution to the public in some other manner; copies are exhibited in public; or the work is performed in public, while this shall include the communication to the public of works, by wire or wireless means, including broadcasting by radio or television and the making available to the public of works in such a way that members of the public may access them from a place and at a time individually chosen by them; and the performance at a place of business before a large group, which would otherwise have been considered not public.’

### **Moral Rights**

Article 3. (1) contains the paternity right, the right to be named as the author of the work. Article 3 (2) lays down the integrity right and therewith protects the author’s literary or artistic reputation and individuality.

Article 3 (3) forbids, in general, the waiver of these rights except regarding a use limited in nature and extent.

### **Photography specific exceptions**

The Danish copyright law does not provide for photography specific exceptions although, as in Finland and Sweden, some of the exceptions in the Act are more relevant in the field of photography.

Article 11 clarifies that the limitations contained in the following provisions are not affecting the author’s moral rights, but for the case of alterations to buildings and articles of everyday use, Article 29; the work shall not be altered other than is necessary for the particular and exempted use and, in case the work is used publicly, the source shall be stated in accordance with the requirements of proper usage, Article 11 (2).

Article 11a allows the making of temporary copies.

Article 12 (1) allows the copying for private use, as long as the use is

not commercial and the copies are not used for other purposes. Article 12 (2) further restricts the application of 12 (1), and in the case of works of art provides that it is not allowed to make a copy of a work of art by casting, by printing from an original negative or base, or in any other manner implying that the copy could be considered an original, Article 12 (2) (ii); Article 12 (2) (v) is of relevance for photographs as it provides that the exception does not cover the making of single copies in digital form of works other than computer programs and databases, unless this is done exclusively for the personal use of the copying person, himself or his household.

Article 14 allows business enterprises, for internal use and for the purpose of their activities, by photocopying, etc., the making of, or have made, copies made of descriptive articles in newspapers, magazines and collections, of brief excerpts of other published works of a descriptive nature, of musical works and of illustrations reproduced in association with the text. This provision however is subject to the proviso of collective licensing according to Article 50, through which authors are granted a remuneration for certain uses exempted under the Act.

Additionally, Article 39 provides for a levy system, so that authors whose copyright is exempted in cases of private use, as specified by the Act, receive a remuneration which can only be claimed through collecting societies.

Article 23 states certain exempted uses of works of fine art, including photographic works, like the inclusion in scientific, non-commercial presentations and for criticism, and in the case of a commercial nature of the use, if the requirements of Article 50 are met. Article 23 (3) further allows the reporting of current events in newspapers and similar periodicals, if the work has not been specifically produced for these purposes. In this case the use of the work is not exempted and requires a licence. Article 23 (4) provides for published works of art, or copies of works of art that have been transferred to others by the author, to be used in newspapers, periodicals, films and television if the use is of subordinate importance in the context in question.

Article 24 contains an exception for works of art that are included in a collection, exhibition, or are offered for sale and maybe freely reproduced in catalogues

### **Contracts**

Danish copyright law allows for the assignment of copyright as a whole or in parts. However, when transferring copyright, the moral rights in Article 3 remain with the author according to Article 52 (1). Article 52 (1) places a further restriction on the complete transfer of copyright as it declares Article 38 as applicable, and declares the artist resale right as un-assignable; it shall only be transferable onto the heirs upon the death of the author. Article 53 states that the transfer of copies of the work shall not constitute a transfer of the copyright and, in the case of an agreement of a certain way of exploitation, the transferee is limited to the scope of the agreement.

The Act further provides in Article 54 - 59 for certain regulations that shall further specify the obligations of the parties if there is no agreement to the contrary, Article 53 (4).

Article 54 imposes an obligation on the transferee to exploit the work and provides for a right of the transferor to cancel the contract if the transferee does not fulfil this obligation in due time (five years at the latest).

In the case of an unlimited/unspecified contract regarding the kinds of exploitation, Article 55 gives the author the right to terminate the assignment of right, in respect of ways of exploitation not made use of by the transferee. Article 56 retains rights to the author in the case of an assignment, as the assignment itself does not enable the assignee to alter the work or to further assign the rights in the work should this not be usual or obviously presumed.

Article 57 contains regulations of methods of payment and gives the author the right of information, while the following articles provide for special regulations for certain kinds of contracts.

Interesting to note is Article 60, which states that the author of a commissioned portrait cannot make use of the author's rights without the consent of the commissioner. So although the copyright vests with the author, the use of the right is limited through the interests of the person portrayed. This provision is, according to Article 70 (3), also applicable to photographic pictures.

The Danish copyright law further contains provisions about compulsory licences (Articles 17 (4), 18 (1), 51 (2), 68). Articles 47 ff contains common provisions for compulsory licences and provides for the right for each party to seek help from the Copyright License Tribunal.

A further interesting provision in the Danish Copyright Act is Article 83, which regulates the damages to be awarded when rights are infringed, providing in (3) that an author, as well as a photographer (Article 70), whose rights are infringed by an unlawful act, shall be entitled to compensation for tort.

## United Kingdom

### **What is protected**

The Copyright, Design and Patents Act 1988 (CDPA 1988), as last amended in 2006 contains in Section 1 an exhaustive list of categories of protected works. If the work in question cannot be subsumed under one of the headings in Section 1, the work does not attract copyright protection. Section 4 (1) (a) CDPA 1988 lists examples of artistic works, listing photographs as a subcategory of artistic works, which attract copyright protection if the work is original as required by Section 1 (1) (a).

Section 4 (2) contains a definition of the term photograph by stating "photograph' means a recording of light other or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film."

The CDPA 1988 does not differentiate between photographic works and photographs; as long as the photograph is original it will be protected under copyright law. The term 'original', however, is not defined in the Act, but according to the existing common law system in the UK, specified by case law. In *University of London Press v University Tutorial Press* the court decided that originality consists of two aspects. First, the work in question must not be a mere copy of a previous work and secondly, the work is the result of the investment of individual skill, labour and judgement. This definition does not require the work to be creative, contrary to the civil law jurisdictions. In the case of photographs as artistic works, copyright exists in the 'coarsest or the most commonplace or the most mechanical representation of the commonest object' according to the case *Kenrick v Lawrence*. Therefore the CDPA 1988 protects simple snapshots.

### **Owner**

To understand the ownership regulations under UK copyright law better, it is important to note that UK copyright law follows an economic approach, different to the authors-rights approach under most civil law jurisdictions. Copyright is seen as a primarily economic right, that protects the investments made for its creation and provides remuneration for the investing person and/or entity. The UK is, therefore, one of the few jurisdictions that protect computer generated works on the same scale as individually created works (subject to some exceptions, see below).

Section 9C DPA 1988 regulates the ownership in copyright protected works. Section 11 contains the rule that 'the author of a work is the first owner of the copyright in the work'. This does not apply in the case of Crown Copyright, Parliamentary copyright, copyright of certain international organisations (Section 11 (3)) or, if the work is created by an employee during the course of employment (Section 11 (2)) where the copyright automatically vests with the employer.

Sections 9 and 10 contain regulations for the authorship in works,

and differentiates between certain cases according to the category of works and the person creating the work. For photographs, Section 9 (1) provides that the author of the work is the person who creates it. In the case of computer generated work, it is assumed that the author of the work is the person by whom the arrangements necessary for its creation are undertaken, Section 9 (3); this includes legal persons/entities.

Section 10 contains regulations for joint authorship, where more than one person collaborated in the creation of the work and the contribution of each author is not distinct from that of the other author/s. In the case of photographs, the photographer is usually considered to be the author of the work and therefore the first owner of the copyright, if none of the above stated exceptions apply.

### **Duration**

Sections 12 CDPA 1988 contain provisions about duration of copyright. As an artistic work, photographs enjoy copyright protection for 70 years after the author's death (Section 12 (1), (2)). However, if the photograph is computer generated, the copyright expires at the end of 50 years from the end of the year in which the work was made, pursuant to Section 12 (7).

### **Rights conferred**

As mentioned above the UK copyright law follows an economic approach towards copyright and therefore emphasises the economic rights of the copyright owner. However, the CDPA 1988 also contains moral rights of the author as required by international treaties and their European implementations.

### **Economic Rights**

The rights attached to the copyright in photographs include the reproduction right, the distribution right, the rental and lending right, the communication right. The right to perform, show, or play the work in public and the right to make adaptations are not applicable to artistic works.



## **Moral Rights**

Sections 77 CDPA 1988 regulates the moral rights of authors and provides for the paternity right (Section 77, the right to be identified as the author), the integrity right (Section 80, the right to object to derogatory treatment of the work), the right to object to a false attribution (Section 84, the right to not having a work wrongly attributed to oneself). These are author's rights rather than rights for the owner of the copyright in the work.

(Section 85) gives a moral right to privacy of certain photographs and films.

These moral rights are subject to further provisions. Section 78 CDPA 1988 requires the paternity right to be asserted 'by an instrument in writing', Section 77 (1), 78.

Section 80 (4) specifies the circumstances in which the integrity right is infringed in the case of artistic works. For photographs, 'the right is infringed by a person who publishes commercially or exhibits in public a derogatory treatment of the work or communicates to the public a visual image of a derogatory treatment of the work'.

Section 84 technically speaking, does not contain a moral right of the author as the right applies to anyone entitled to object to the false attribution of a work.

Section 85 provides for a right for persons commissioning the taking of a photograph (or making of a film) for private and domestic purposes. Rather than providing moral rights protection for authors this Section restricts the economic rights of photographers (and film makers) for the benefit of private individuals who commission the work. The author of works specified under Section 85 lose the right to issue copies of the work to the public, to exhibit or show the work in public and to communicate the work to the public, without the permission of the sitter.

Section 86 contains further UK specific provisions with regards to moral rights. Section 86 (2) provides for a different duration of the right to object to false attribution, this right ends 20 years after a person's death while the other moral rights have the same duration as the economic rights.

Section 87 CDPA 1988 provides for the possibility of a contractual waiver clause, which means that the moral rights provided for in the CDPA 1988 can be waived partially or as a whole.

Photography specific exceptions

The exceptions to copyright are regulated in Sections 28 CDPA 1988 while the exceptions to moral rights are contained within the chapter of moral rights Sections 77 CDPA 1988.

### **Economic Rights**

There is no photography specific exception provided for by the CDPA; however, the act contains a number of exceptions which can have a significant impact on the economic rights of photographers.

These exceptions include, the making of temporary copies; research and private study; the criticism and review; and incidental inclusion. It is relevant to note that Section 30, which regulates the fair dealing in a work for purposes of criticism and review as well as the reporting of current events, excludes photographs from the exception in the case of news reporting (Section 30 (2)).

A further relevant exception for artistic works under UK law is contained in Section 63 CDPA, which allows the copying of the work or the issue of copies to the public for the purpose of advertising the sale of the work.

### **Moral Rights**

The Paternity right is not infringed if it has not been asserted, further, there is no Paternity right or Integrity right for photographs reporting current events nor for publication in newspapers, magazines or

similar periodicals and other collective works. Neither right applies to computer-generated works.

Section 85 (2) provides for the privacy right not to be infringed in certain cases.

### **Contracts**

Together with the emphasis on the value of economic rights the economic approach in UK copyright law is expressed in the transferability of copyright. Copyright is not only subject to licences but also to complete assignments, Section 90 (1). Copyright can be transferred by assignment, by testamentary disposition or by operation of law and can embrace existing works as well as future works. Transfer of copyright and licences have to be in writing, but the *Doc Marten* case decision showed that it can also be implied. Although an instrument in writing did not exist, the court transferred the ownership of copyright in the logo created onto the commissioner, the court found: “It seems to me that when a freelance designer is commissioned to create a logo for a client, the designer will have an uphill task if he wishes to contend that he is free to assign the copyright to a competitor. This is because, in order to give business efficacy to the contract, it will rarely be enough to imply a term that the client shall enjoy a mere licence to use the logo, and nothing more. In most cases it will be obvious, it will ‘go without saying’, that the client will need further rights. He will surely need some right to prevent others from reproducing the logo..... but, if some officious bystander had raised it, I would have expected the parties to brush aside any suggestion that the beneficial title might belong to ....[the commissioner]”.

According to Section 94 CDPA 1988 moral rights are not assignable. However, as mentioned above, UK copyright law provides for the possibility of a waiver of moral rights in Section 87 CDPA by the author. Additionally the paternity right and integrity right do not apply to anything done by, or with, the authority of the author’s employer if the work was created during the course of employment.

The Unfair Contracts Terms Act 1977 (as amended) explicitly excludes copyright from the regulation of unfair contracts. In schedule 1 to the UCTA 1977 Section 1 Number 3 contracts, relating to the creation or transfer of copyrights are excluded from the scope of Art 2 to 4 of the Act (provisions about liability and indemnity clauses).

This lack of regulation and the free transferability in the UK, lead to a situation where the stronger party of the contract uses its bargaining power and solely directs the terms of the contract, while the weaker party usually faces a wholesale of its rights. This rather common phenomenon in the field of photography is known throughout the photography industry in the UK as 'rights grabbing'.









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