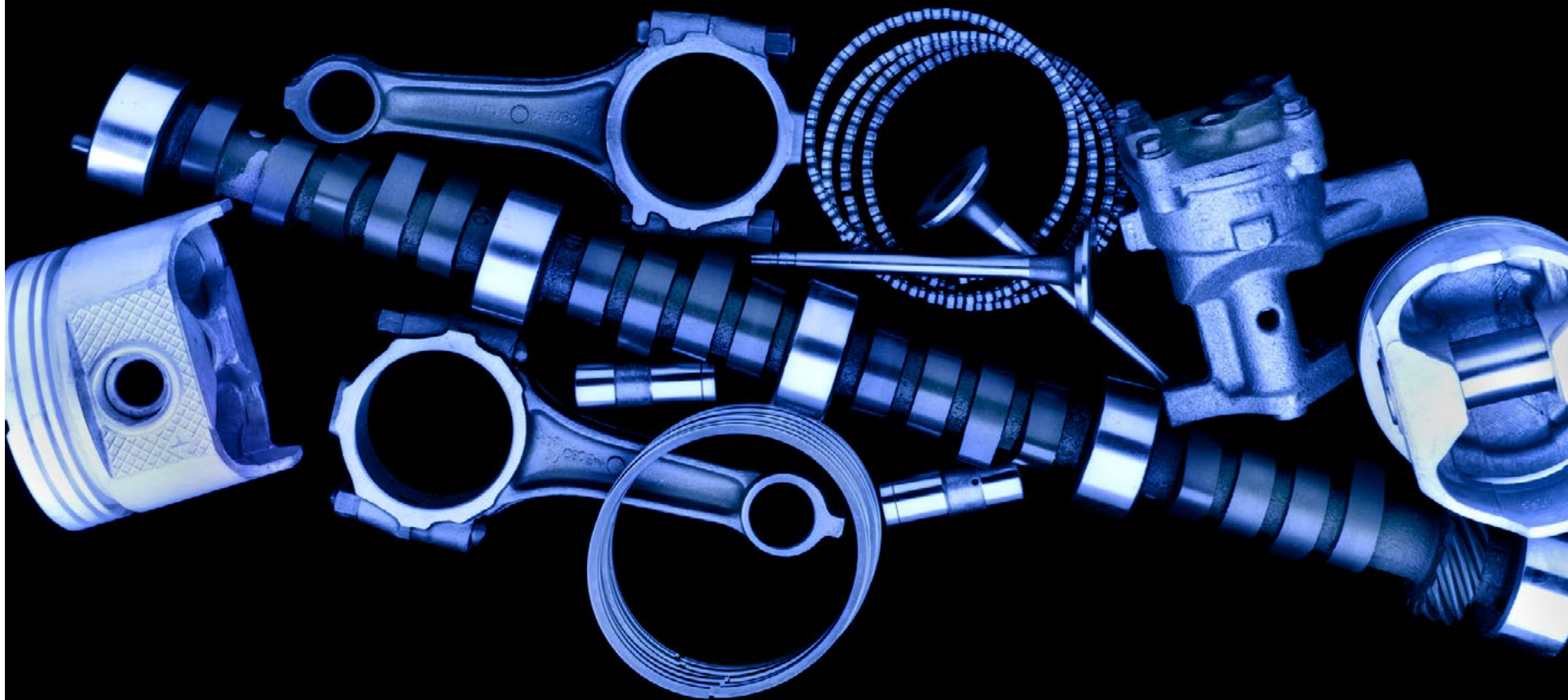


asmp Guides



Legal Jump-start

ASMP's Business Primer for Photographers

Foreword

For seventy-five years, the American Society of Media Photographers (ASMP) has had a guiding principle: to support photographers and photography, and to help creators build and protect their businesses. The book you are now reading is a distillation of what I believe are the core principles to help you do just that.

As General Counsel for ASMP, I talk to members each day about their legal and business issues. Over time, certain topics come up again and again: What is copyright, and how do I register? How do I form a business? What about licensing agreements and other contracts? In these pages, we will answer those questions and many more.

Let me say, however, that this is not an exhaustive treatise on these topics; in fact, each of these chapters could have its own book. Lawyers spend their entire careers focused on the nuances of copyrights and contracts. An additional wrinkle is that not only is every state and country different when it comes to many of these topics, the correct “answers” often change from month to month and year to year. Where I can, I will note areas that are particularly volatile and that you need to watch out for.

Of particular note, you will now have access to www.asmp.org/jumpstart once you are logged into the site. On that page, you will find “Bonus Chapters and Videos,” which I will reference in this book, on issues such as Copyright Registration, Fair Use, and Work for Hire, among others. These videos will be updated as the laws change, so keep an eye on that page!

As always, you know that if you are looking for answers specific to your situation (in your state, with your set of circumstances), you should always seek professional advice beyond the pages of this book. While I wish I could write something that would be applicable to

CHAPTER 1	
Copyright Basics:	
What You Need to Know	4
<hr/>	
CHAPTER 2	
Contract and How to Love Them	10
<hr/>	
CHAPTER 3	
Licensing Agreements	
(Hint: They’re Just Contracts)	15
<hr/>	
CHAPTER 4	
Formalizing Your Photo Business	21
<hr/>	
CHAPTER 5	
HELP! What Do I Do Now?	28
<hr/>	
Afterword	32

FOREWORD

everyone, alas, it cannot be done. Of course, you can always reach out to us using the form in the [Members Resources](#) section of the [ASMP website](#), and I or one of our attorneys will be happy to point you in the right direction.

Don't let any of the above discourage you, however! The goal remains constant: take what you love to do and what you excel at, and support that craft with sound business and legal practices. If you do so, you are already light-years ahead of your competition and well on your way to building the career and business you aspire to achieve. And, if you are already at the helm of a successful business? In that case, read closely, and I bet you will find a nugget or two of wisdom or best practices that you can implement into your already solid workflow.

From myself, Thomas Kennedy (Executive Director of ASMP), Marianne Lee (National Board Chair of ASMP), and the rest of the ASMP team, welcome to this group. We look forward to seeing what you create, and we look forward to supporting you at each and every step.

Thomas Maddrey
General Counsel, ASMP

Copyright Basics: What You Need to Know

I get more questions about copyright than any other single topic. In many ways, that is a comforting fact, as every photographer needs to know about, and focus on, their copyrights and how to protect their work. In this chapter, I hope to demystify the basics of copyright and answer some of the most common questions. While this is nearly the longest chapter in this guide, I know that by the end, you will feel so much more comfortable with your understanding of the most important property you own — your copyrights.

The Origins of Copyright

To begin, it's important to note that copyright is a legal set of rights with its origin in the United States Constitution! It isn't a recent development or something that was added on later... it's right there in Article I, Section 8, Clause 8: The Copyright Clause. Under this clause, Congress has the power "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The intention of copyright is straightforward: to promote creativity and protect all creators by giving them the exclusive right to their works for a set period of time.

Not only does this clause protect all creators of art, it was also developed with the idea in mind that the public has the right to access information. This is the balance of copyright protection. Without copyright protections, the public would have access to all creations and be able to do whatever they wanted with them, stripping the original authors of any protections of their own work.

In addition, these principles allow authors to show their work to the public without the fear of being taken advantage of. On the other hand, it does not benefit society as a whole for created works never to be in the "public domain." That kind of unlimited monopoly would be detrimental to society. So, copyright protections have a defined duration: **the life of the creator plus 70 years**. This strikes the balance of securing to creators the rights inherent in copyright while ensuring that at some point in the future these works will be accessible by society at no cost.

What Does Copyright Protect, and What is Eligible for Protection?

Above, we discussed the Copyright Clause of the U.S. Constitution, but the Copyright Act of 1976 is a far more recent source in U.S. law that sets out protections for all artists. Believe it or not, this is the most recent major statute covering copyright matters. While it has been amended over the years and modernized in many areas, we are still working off of the law as written in 1976! This act states that the copyright owner has the rights and protections included in a "copyright" at the time of the creation of "[an] original work of authorship fixed in any tangible medium of expression..." 17 USC § 102(a). That's well and good, but what does that mean? To answer that, I want to step back and discuss what a copyright actually is.

Copyright is a type of intellectual property that provides creators with a "bundle of rights" in their works of authorship. Works eligible for protection include literature, music, paintings, and photographs, among others. In order for a work to be

copyrightable, it must be (1) original, (2) an expression of the author, and (3) fixed in a tangible medium of expression. While there are other, more nuanced, rules that apply from time to time, the three parts above are the most critical.

Just as important as knowing what is copyrightable, however, is to also understand what is **not** protected. This includes ideas, themes, concepts, procedures, industrial designs, inventions, titles, and anything in the public domain, to name a few. One part of that bears repeating: ideas cannot be copyrighted! No matter how novel or unique your idea for your next shoot is, if it is not “fixed in a tangible medium of expression,” then it is not protected.

One of the most important and fundamental aspects of copyright is that the protections exist *the very moment* a work is created by an author. For photographers, this means that when they press the shutter, their original work of authorship has been fixed in a tangible medium of expression (as data on their memory card), and therefore, they have obtained a copyright. That’s right — each and every time you press the shutter, you have obtained a new copyright. One common misconception we hear is that an author does not have copyrights in their creations until those copyrights are filed with the U.S. Copyright Office, but this is simply untrue. You have all the protections afforded to you by the Copyright Act at the moment of creation. Exercising those rights may be a bit of a different story, and we will be discussing that later when we turn to why registering your works with the U.S. Copyright Office is so important.

Copyrightable Works

As mentioned above, any work a photographer intends to have copyright protections for must be an *original* work. In other words, it must be created through the independent effort of the author. There are no quality standards for a work to be copyrightable. There is not much originality required either, as many court cases have shown over the years. However, the item must be unique in some way and require minimal, but some, creativity on the part of the independent artist. Generally speaking, all photographs that you create will likely pass this very low bar for originality.

Additionally, the work must be an *expression* of the author. Books, photos, plays, and movies are all expressions protectable by copyright law. Certain phrases, letters of the alphabet, and words are not necessarily copyrightable. To explain, words are not in and of themselves copyrightable, but how you put them together makes that arrangement protected by copyright law. What is protected by copyright law is how those words are put together. No one may obtain a copyright for the word “It,” but you can certainly obtain a copyright if you were the first to create the phrase “It was the best of times, it was the worst of times...” (As an aside, even though the works of Charles Dickens, such as *A Tale of Two Cities* from which I took that quote, are still being sold, copyright protections have stopped, and therefore, his works are in the public domain. Remember, you cannot extend or renew the term of a copyright).

For photographers, this is less of an issue because once a photo is taken, that particular photo, including how it was angled, what

lens it was shot with, and other creative choices that were made on the way to the final image, is protected by copyright law, and the copyright is owned by the photographer. Someone could snap a photo of the same item as someone else, but each particular photo is an expression of the author and is protected by copyright law.

Finally, to be protected, the work must be *fixed in a tangible medium of expression*. The form of the expression must be relatively stable and permanent. The work must be in a form that others can perceive it. For photographers, the photo must be saved in some way that has some level of physicality. Back in the film days, the light hitting the silver crystals physically altered the film. Today, the data on the card fulfills the same function. Remember, though, just having an idea to take a photo a certain way is not yet in the form of expression protected by copyright law until the photo is actually taken.

Benefits of Registration

Earlier, I discussed that, even though you formally own your copyrights at the moment of creation, you do want to register them with the U.S. Copyright Office (USCO). Why? Because, although all works of expression that fit the criteria listed in detail above are given copyright protection, registering a copyright in the work with the USCO allows creators to pursue violators of their copyrights in court. It is a mandatory prerequisite to have a registered copyright **before** you file a lawsuit for infringement.

Despite registration being a very good idea, and something we at ASMP are all but begging you to do, registration of copyrights is voluntary and does not have to be done in order to get copyright

protections. But registration has other benefits. First, it establishes a public record of a copyright claim. You are putting the world on notice that you own copyrights to the works. Second, you can always register your copyright after you learn of a possible infringement of your work, but you inevitably lose out on some remedies regardless of who wins the legal battle. For example, if you register your work before the infringement occurs, then you can recover attorney's fees in a legal action if you prevail on an infringement claim. This is not a trivial matter. Right now, copyright infringement cases in federal court take multiple years and cost hundreds of thousands of dollars. It is because of this that ASMP has fought so hard in 2019–20 for Congress to pass the CASE Act, which would create a small-claims court for copyright infringement. For more information, visit www.asmp.org/advocacy.

Most importantly, however, registering your copyright also entitles you to *statutory damages*. Statutory damages can be awarded to a copyright owner who has been infringed even if no actual damages were incurred. In essence, it is a penalty to deter infringement and gives creators who have been infringed and haven't been substantially financially damaged their day in court. How much are statutory damages? Well, normally they provide a range between \$750.00 and \$30,000.00 per work infringed, but if the infringement was *willful*, then the statutory damages can go up to \$150,000.00 per work infringed. But you **must** have registered your works with the USCO within three months of first publication¹

1. "Publication" is an incredibly complex topic that even vexes copyright attorneys. For more info, see the video on "Published v. Unpublished Works" at www.asmp.org/jumpstart, and reach out if you have any questions!

or **before** the infringement. If you wait to register your works until you find an infringement, you're out of luck for statutory damages and can only recover what you have actually lost.

This has practical implications. Because of the cost and length of a copyright infringement trial, it is very hard to find an attorney willing to take on a copyright infringement case where the works were not timely registered and statutory damages are not available. Think of registration as good "insurance" for future infringements. Your livelihood is your work. Protect it.

What Rights Do You Have?

As the owner of a copyright, you have the exclusive right to reproduce, prepare derivative works, distribute, publicly perform, and display the protected works. Generally speaking, this means the author of the work (whether the copyright is registered or not) has exclusive rights to do whatever he or she wants with the work created. For photographers, we often see disputes about the right to distribute. Once a work is sold to an individual, that individual purchaser then has the right to sell it to someone else, display it, or dispose of that particular copy. Think of a print sold in a gallery. The buyer has title to the work purchased, but only the title. The purchaser does **not** have the right to make copies and then sell them for his or her own profit. Likewise, they cannot display the work in public without permission. These would be violations of the creator's rights because the copyright owner retains those exclusive rights as a benefit of owning the copyright.

Work for Hire in A Nutshell

In most cases, the copyright is owned by the individual author who created the work. However, that is not always the case. A work can be created under a *work for hire*.² This means that the author of the work does not actually ever own the copyright in the work — their employer does. The employee in this scenario has no ownership rights at all. This work is done as an employee in the course of his or her employment. For employees, the case is usually that all works prepared by the employee within the scope of their employment are *presumed* to be works for hire. In order to get out of this type of arrangement, each person has to expressly agree otherwise in a written document that is signed by the parties. For independent contractors, works specifically made by or commissioned from the contractor are presumed to be owned by the creator. If that is not the desired outcome, the parties should expressly agree in a signed document that the work is a work for hire.

Danger signs should be flashing in your mind right about now. In fact, work-for-hire situations are one of the only times a creator can be deprived of their copyright protections without affirmatively signing them away. Also, as you can tell from the above, how you are classified makes a huge difference in whether the work-for-hire doctrine applies.

We'll discuss another means of transferring some or all of your rights to your work, the licensing agreement, in Chapter 3.

2. For a detailed discussion of "Work for Hire," see Bonus Chapter #2 at www.asmp.org/jumpstart.

Conclusion

In the past pages, we have just scratched the surface of copyright protections and how they apply to your photo business. There is so much more to say, and that is why ASMP offers Legal Clinics, Webinars, Strictly Business conferences, and so many other ways to learn more. Don't forget about your two main resources: visiting www.asmp.org/jumpstart and filling out the form for Legal Advice in the [Members Resources](#) of the [ASMP website](#).

From copyright, we will now turn to the backbone of your business, the humble contract.

Contracts and How to Love Them

Every ASMP member is a business owner, even if you don't consider yourself one quite yet. And, every business owner relies on contracts for much of their day-to-day existence. From estimates to invoices, licensing agreements to receipts, each of these documents is simply a certain type of contract. Contracts can be in any form! Oral contracts can be valid, unsigned contracts can be valid, and even tweets can be valid contracts. In this chapter, I will take contracts back to their roots, examining what makes a contract valid and what makes a contract good. For more info on contracts, as well as examples of good ones and bad ones, visit www.asmp.org/jumpstart.

Contracts only have three components, the *offer*, the *acceptance* of that offer, and *consideration*. Much like how the English alphabet comprises 26 letters that can be combined into millions of words, these three building blocks create every contract that has ever existed. Let's get started by looking at each of these elements in order to get a better understanding of how you can enter into a contract and what must be present for each component. Fair warning: this chapter in particular has more legal terms than the others. I have always tried to explain these clearly, but if you have any questions, feel free to email us at legal@asmp.org.

The Offer – Element One

An offer is simply one person showing a willingness to enter into a bargain and another person understanding that they have an option to agree to that same bargain. Offers should be evaluated by thinking about if Party A has outlined a deal, not by any "magic

words" they may or may not have used. An offer can include words like "I offer to sell you . . .," but it doesn't always have to use the word "offer." Offers can be *General* or *Specific*. General offers are made to the world as a whole; specific offers are made to an individual or defined entity. Let's look at some examples:

- a) "Ann, I will mow your lawn for \$30." (Specific offer to Ann)
- b) "Josh, if you pay me \$500, I will do your corporate headshots." (Specific offer to Josh or his corporation)
- c) "If you find my stolen camera, I will give you \$350 as a reward." (General offer if something like this was on your website)

Note that if you put an offer on your website (as in example (c) above), then you are bound by it if someone fulfills the terms!

Let's say, however, that you don't want to accept an offer that someone else has made to you. Well, you can simply say, "I hereby reject your offer," and everyone will think you're an 18th-century attorney, or you can just say "no." The most common way an offer can end is through a simple rejection, which can either be express or implied. The two examples above are express rejections. Not searching for and returning the camera mentioned above is an implied rejection of the general offer in (c). Beyond the rejection of an offer, there are three other ways to tell someone you don't want to continue with a deal.

An offer can end through *revocation* by the person making the offer. For example, let's say someone offers to purchase a print of your image ("I will buy that image for \$500"), but before you

accept the offer, they say that they no longer wish to purchase the print. They have revoked the offer, and this ends it. Offers can also lapse after the time stated in the offer or after a “reasonable time” if no time is stated. For example, if you say that your drone shoots are 50% off through Monday at midnight, then at 12:01 a.m. Tuesday, the offer has been revoked. The last way an offer can end is through death or incapacity to enter into the contract.

An important thing to notice about offers is that it is not required that they come in any particular form. Meaning, you can make a valid offer orally, through mail, through contract, or even through text message, as long as one person is willing to enter into a bargain and the other person understands that they may agree to the bargain.

Acceptance – Element Two

The second prong of contracts is the acceptance. Acceptance is usually pretty straightforward. If you offer me corporate headshots for \$500, and I say “Yes,” then I have accepted your offer. But acceptance, like all business and legal matters, can be surprisingly nuanced.

One of the big rules of acceptance is that the person offering to make a deal (the “offeror”) can determine exactly *how* they want you to accept. That means that the person making the offer may require you to accept in any manner they please. For example, they may require you to accept by mail, in person, over the phone, standing on one leg, or with any other restrictions they can dream of, and you must accept only in that manner! Another important thing to remember about the acceptance is that an

uncommunicated intention to accept is not an acceptance at all. The offeror is not a mind reader, so silence is generally not acceptance. In real life, let’s say a client calls you to find out what your rates are for some advertising shots for their new product line. You tell her and in the conversation are very clear on the terms. She seems excited on the phone, but never calls back. There has been no acceptance. If you had already gone out and purchased materials and rented equipment, you are out of luck.

Another way to accept an offer is to perform the expected actions in the terms of a contract. For example, if the contract says you can accept by starting work on a project, then simply starting that work qualifies as acceptance. You don’t have to let them know you’re starting the project because you are accepting the terms of the deal by beginning the action.

What about a counteroffer? Is that an acceptance? If you say, “I will do your corporate headshots for \$500” and the client comes back and says, “That’s great! We can pay you \$475, can you come Thursday?” — do you have an acceptance? No. The law treats counteroffers as a simultaneous rejection of the old offer **and extension of a new offer**. For example, let’s say you disagree with someone about the price you should be paid for your work. If you say “no, I think I should be paid about \$100 more,” the law will consider this a counteroffer, which means you are now making a new offer that the other person can either reject or accept. Think of counteroffers as a sort of role reversal. The person making the counteroffer then becomes the person who is making a new offer. **Any** change to the terms of an offer is considered a rejection of that offer and the proposal of a new one.

Consideration – Element Three

Where the offer and the acceptance are usually pretty straightforward, consideration can be tricky. When you are forming any sort of contract, one person is usually giving up something in return for something else. You might be giving up money in exchange for services or a promise to render services, or giving up your time and expertise to get paid on a job. But consideration doesn't have to be money. In fact, you should think of the consideration prong of contracts as "value." This can be money, services, property, or even a promise to do something or not do something. For example, you can say, "I will give you this framed print if you stop mowing your lawn at 7 a.m." In that situation, you are getting something of value (extra time to sleep in the morning) in exchange for the other party getting something else of value (your print).

Consideration, however, has to go both ways. If I call you and say "Show up at my studio tomorrow at 9 a.m., and I will give you a new Ferrari," and then you show up at 9 a.m. and ask for the car, I don't have to do anything but laugh because we have not actually made a contract. It sure seems like a contract though — I made an offer of a car if you showed up at a certain time and place, and you accepted that offer, but the consideration (think "value") only went one way. This is called a *gratuitous promise* and is not consideration, thereby making the contract invalid. The reason for this is that there must be a *bargain* element to a contract. We'll look at other ways that contracts can be invalid next.

When Contracts are Invalid

Now that we have looked at the building blocks of contracts, we will explore what types of things can invalidate a contract that you may have entered. Sometimes, you need to get out of a contract; sometimes, you need to keep your client in one.

Remember when we discussed that not all contracts have to be in writing and signed? Well, some contracts DO have to be in writing and signed, and if they are not, they are considered invalid under a legal doctrine called the "Statute of Frauds." There are a few types of contracts that fall into this category, including marriage-related contracts and real estate contracts, but one of the most relevant for ASMP members is that contracts for the sale of goods worth \$500.00 or more **must** be in writing. Does that mean that if you enter into a contract for shooting an event and charge \$2500.00, which includes delivering a set of prints and a selection of files, this needs to be in writing? Most likely, yes! While this does not generally apply to sales of services (as opposed to goods), all photographers should think about what tangible "goods" they deliver vs. the "service" they provide.

Additionally, any contract that is not able to be performed within one calendar year of its creation **must** be in writing. For example, if on December 1, 2020, you are asked to photograph a New Year's Eve party on December 31, 2021, you must have a written contract because it is literally impossible that the task contracted for can be completed in one calendar year. But if the contract possibly can be performed in less than a year, then an oral contract can be enforceable. If I sign a contract to photograph

CONTRACTS

every building in the city of San Francisco for \$5 million dollars, that can be done without a written agreement. Why? Because, while it is incredibly unlikely, it is theoretically *possible* to fulfill this contract within a year. Bottom line: don't chance it. Get those contracts in writing.

The next way a contract can be invalidated is if one party is induced to enter into a transaction with another party through fraud or *material misrepresentation*. Material misrepresentation is a statement that is not in accord with the facts and that is likely to affect the conduct of a reasonable person. Enough legal definitions, here's an example:

Example: Imagine you are entering into a contract to buy a car that is supposed to go 400 miles per hour. You are assured that the car will go 400 miles per hour, the contract states that the car will go 400 miles per hour, and the only reason you purchased the car is because you're a speed demon and need a car that goes 400 miles per hour. You wouldn't have bought the car otherwise. After you purchase it, you drive the car on the track and find that it only goes 200 miles per hour. This would likely be considered a material misrepresentation because you would not have purchased the car if you had known the truth about its abilities.

There are a few other things that can invalidate a contract. These include a lack of capacity to enter into the contract (such as someone being a minor or mentally ill), duress or undue influence, and illegality. It makes sense that if you exert force against someone in order to get them to enter into an

agreement, that's not a good contract. And it hopefully makes sense that you can't have an illegal activity or item as part of a valid contract. You can't go into court and sue someone because you entered into a contract where you gave someone \$500.00 if they stole a car for you.

Conclusion

Contract law has many other intricacies, but this overview hits on the big topics you will need to understand when entering into any kind of contract. Now that we have this base of understanding, let's examine a particular type of contract that is part of many photographer's businesses: the license agreement.

Licensing Agreements (Hint: They're Just Contracts)

One of the most advantageous things photographers can do to both profit from and promote their work is to license it. Images can be licensed with any entity who might want to use them: art galleries, businesses wanting to use a photographer's work for promotional purposes, retail products, or any other imaginable use. A license is a permit from an authority to own or use something, do a particular thing, or carry on a trade. Really, just think of a license as granting someone a right that you already own.

But to properly license your work, you need a solid licensing agreement. This agreement, which is really just a specific form of contract, allows an individual or business to use a photo in a certain context for a certain period of time. Like any contract, specifics are key, and in most licensing agreements you will want to specify the parties, what works are to be licensed, how those works are to be used, what geographic territory they can be used in, and the media and delivery platforms they can be distributed with. You also must include information about exclusivity, assignment, and reservation of rights (which we will discuss below).

Here is the most important thing about licensing agreements: the reason you license work is because you, as the copyright owner, are the only one who has the right to display and reproduce your work (see Chapter 1). The license is giving someone permission to exercise a portion of your rights for some consideration. *This is the way to sell your work commercially, because this is the way you retain your copyright!* And retaining your copyrights should be at or near the top of your list of goals in your business.

Getting the photographer's permission through an agreement is the only way other people can use a photographer's copyrighted work. Of course, like everything in the law, there are a few exceptions. First, if the use is considered a *fair use*, then they may not need a license. Additionally, if the photographer no longer owns the copyright to a certain work, or if the photographer owns the copyright jointly with someone else, these can be situations that remove the requirement of a licensing agreement. For example, if a photographer takes a photo, the copyright in that photo can be sold to someone else through a written agreement. From that point on, the copyright owner, even though they are not the original creator, now has the right to license that work.

What Needs to Be in a Licensing Agreement?

Once you have determined that you need a licensing agreement, the next step is to define the terms of the agreement. Remember from Chapter 2 that every contract needs to have (1) an offer, (2) an acceptance, and (3) consideration. Licensing agreements are no different. While there are an infinite number of things that can be included in a licensing agreement, here are a few that you must make sure you address.

Description of Work: What Is Being Licensed?

First things first, the work being licensed in the agreement should be identified. This can be done by describing the work and / or by using the copyright registration number affiliated with the work listed in the contract. (Wait, you are registering your copyrights, right? If not, check out Chapter 1 and www.asmp.org/jumpstart for more info on how to do this). Here, specifics are key. For

example, you might describe the work being licensed as: “Twelve (12) retouched digital files from the May 12th, 2019 shoot for Condominium, Inc.” That is just an example, however. The more descriptive you are, the better. Double-checking that the work in the agreement is the work that both parties understand is being licensed is imperative to prevent confusion moving forward.

Rights Granted: How Can the Photographs Be Used?

How the work is going to be used is always important, and what exact rights you are granting is the central focus of the licensing agreement. Works can be used in many different ways. For example, a photo can be used on flyers, websites, physical products, ads, magazines, billboards, and so many other things. The contract should specify how the licensed work is going to be used and for what purpose. Central to this issue is determining which rights the licensee will be granted. How the work is being used goes hand in hand with what rights the licensor is granting to the licensee. This generally encompasses the scope of use the license will convey. Is the work going to be copied, reproduced, distributed, or published? If any, or all, of these are intended to be the case, the photographer drafting the agreement should make sure what rights he or she is willing to grant the licensee for the duration of the license. Once you sign this agreement, you are bound to it!

Note that, no matter what, granting certain rights to a licensee is not the same as transferring ownership of the copyright in the work itself. The photographer should generally always retain copyright ownership in the work being licensed.

Whether or not the work can be modified, altered, adjusted, or cropped may also be important in the contract, depending on how the work is going to be used by the licensee. If the work might be modified by the licensee when the photo is actually used, how it may be modified should be explicitly provided for in the agreement. This includes alterations to color, size, etc. If you provide a horizontal image for use in a vertical placement, you will likely see it cropped. But if you want to ensure that the image is not altered, you must make that clear in the agreement. If you don't say anything at all, the licensee can use the work however they please.

Price: Who Gets Paid What?

An essential part of any licensing agreement is a clear statement of the payments involved. You need to clearly state that for the images listed and the rights conferred, you expect to be paid X dollars. You also need to have language in the agreement that states that the license is not effective until this fee is paid in full. If a client uses the work before they finish paying, they are actually then infringing, since they have not completed payment.

Duration: How Long Can the Work Be Used?

Since a license is just a contract, the photographer gets to decide how long a work can be used under the licensing agreement. Sometimes you will specify one year or three years, but you can also specify a *perpetual* license which lasts... well... perpetually! *Be careful here.* If you specify a perpetual license which allows for assignment or sublicensing (see *Exclusivity* below), then you can find yourself in a situation where your license can be passed down from generation to generation without your say-so.

Exclusivity: Who Gets to Use the Work?

Licenses can be *exclusive* or *non-exclusive*. An exclusive license is telling the licensee that this image will not be licensed to others given the same parameters in the agreement. Often, clients may want to license an image, but wouldn't want any other business or company to use the same image. In that case, you would grant an exclusive license. If you grant a non-exclusive license, then you can sell the images wherever and to whomever you wish. Note, however, that if you start off granting non-exclusive licenses, you cannot later grant an exclusive license until the other ones expire.

I often hear from photographers whose clients ask for all the rights and complete ownership of the image. Here is where you as the photographer must help the client feel comfortable with what they are getting, and you must feel comfortable with what you are retaining. Often, what the client wants to know is that they will be the only ones to use the work. This is fine! I start by describing the relative value of the works for different media. For example, if a client just wants an image as the background to a blog post, then that is much less value to the company than if they put it up as the center of a worldwide advertising campaign. If you give the client the copyright in the image, they can do both of those things equally. Therefore, you might charge \$250.00 for a one-time use on a web page and \$250,000.00 for selling the entire copyright.

It's important to note that if you grant an exclusive license or sell your copyright without carving out permission for you yourself to use the image for publicity or promotion, this could mean that you would not be able to put it in your portfolio, show it on your

website, or post it on social media. Be very careful with exclusive licenses or buyouts. You don't want to lose your rights by default.

In conjunction with whether or not the license is exclusive, the photographer must decide if the licensee is allowed to grant sublicenses or assign the license to another party. This power allows the licensee to give the benefits and duties of the licensing agreement to a third party, giving the licensee power over how the work can be used throughout the duration of the contract. Be aware that if this type of language is in the license, the photography should make sure who the licensee is specifically allowed to grant the license to as a third party. Sometimes sublicensing or assignment clauses make sense; you may want a business to still use the work if they change names or are bought by another company. But, you often want to be very restrictive on allowing this practice. Including language that requires the client to contact you if they wish to sublicense or assign their rights is generally a great idea.

Geographic and Media Restrictions: In What Format and in What Region Will It Be Used?

In addition to *how* the work can be used, the photographer must make sure she defines where and through what platforms or formats the work is being used. For example, the licensee may be limited to use in promotional materials in a specific state or country. Often, you will see one license agreement for North America and another for Europe. As long as you are up front about where the images are to be used in your agreement, you are good to go.

LICENSING AGREEMENTS

In addition, the work may be limited to use only for digital or print media. These specifications must be considered in order to make sure the licensee and licensor are on the same page in regard to how the photographer's work is going to be used. You might license the work to be on t-shirts, but not on any other product. You might say you can use it on a website, but not on a billboard. The decisions are up to you.

Duties of the Licensee: Protecting from Infringement

When licensing work, the topics mentioned above should always be considered in order to prevent a licensee or a third party from infringing on the work being licensed. An infringement is an encroachment or trespass on a right or privilege. If someone infringes upon someone else's copyrighted work, that means they are using that work without the copyright holder's permission in a way that violates the rights of the copyright holder in some way (i.e., distribution, reproduction, copying, etc.).

In any licensing agreement, portions of the contract should provide what steps a licensee should take if they become aware of a third party infringing upon the work, whether the licensor is obligated to take enforcement action, and whether the licensee has the duty to cooperate with any enforcement actions and at whose expense. These particular details are crucial to licensing agreements and should generally be reviewed by an attorney before signing the agreement in order to keep the photographer protected. This is an area that is often overlooked by many photographers' licensing agreements.

Additionally, the photographer should make sure that there are specified steps in the contract for what happens if the licensee uses the work beyond the scope of the specified use in the contract. For example, if your license is for three years, and you find that the client is using it in year four, they have breached the contract, and additionally, infringed on your copyrights. Remember that the license grants a licensee the right to perform one of your exclusive rights under copyright law. Therefore, if the license has ended and they are still using the works, now you have a clear case of copyright infringement. Having language in the agreement addressing the above matters will help protect the photographer in the future if any issues regarding infringement arise.

Miscellaneous Considerations

There are myriad other parts of license agreements that are recommended, including

- a) payment schedules;
- b) late fees or interest, if any, on late payments;
- c) how and when the contract can be terminated; and
- d) confidentiality.

Other clauses that are usually standard in almost all contracts are

- a) Representations and Warranties,
- b) Indemnification,
- c) Remedies for Breach of Contract,
- d) Governing Law,
- e) Severability, and
- f) Waivers.

LICENSING AGREEMENTS

For information on these and other clauses, including what they mean and how they are used, check the forthcoming ASMP Business and Legal Glossary found in at www.asmp.org/jumpstart.

All of these sections should be reviewed by both parties, and advisably by an attorney, before the photographer considers signing a licensing agreement. Sections such as these are generally standard in most contracts, and you may hear them referred to as “boilerplate.” This does not mean these lack importance, however. These are essential terms of a contract and, ideally, should protect the artist from potential legal actions and liability if issues arise in the future.

Conclusion

In this chapter, we highlight a few of the most important areas that photographers should keep in mind when drafting, reviewing, and entering into contracts licensing their work, but we are merely scratching the surface. There are many other more specific details to watch out for as an artist entering into these, or any, contracts. As for any type of contract review, having an attorney to assist in reviewing, drafting, and negotiating on the photographer’s behalf can always be of help.

Formalizing Your Photo Business

Do you ever wonder if / when you should form a business officially? And if so, what type of entity would be best for your business? Are you curious about the advantages and disadvantages of business formations? Hopefully, we will answer these questions in this chapter as well as let you know what is important and what isn't.

You are a business. Let's begin with that basic premise, because if you have ever exchanged your work for anything of value, you are considered by state and federal officials, and courts, as a business owner. This is one area where you cannot stick your head in the sand. If you are going to be considered a business (and therefore have the responsibilities and liability associated with running a business), well, you better think of yourself as one right now!

Types of Business Formations

There are four main types of business structures, and we will examine each of them below. In general, these range from least complex to most complex, but recent laws and new guidance have made protecting your business easier than ever.

Important note: unlike copyright law, which is based in federal statutes, business formation law is regulated by the states and is governed by the laws in that state. Therefore, the information below is general enough to be applicable to all ASMP members, but you should seek counsel from attorneys and accountants in your particular state before relying on it.

Sole Proprietorship

A sole proprietorship is just as it sounds — it is a business that is run by one person. In fact, unbeknownst to many, a person who engages in business activities is *automatically* considered a sole proprietor. That's right. You may think you are a hobbyist, but the state will say you are a sole proprietor — and they would be right. The common refrain of "hobbyist" is a tax- and IRS-related matter, not a state business-classification matter. Make sure to keep the two separate!

To operate as a sole proprietorship, you generally do not need to file anything with the state. You do, however, have the option to file a "D/B/A," which stands for "doing business as." These are sometimes referred to as "Assumed Names" or "Fictitious Business Names," and they allow you to conduct business under any name you choose. For example, my name is Thomas Maddrey, so I can (and did) run a company called "Tom Maddrey Images." Because I was using my name in the name of the business, I did not need to file a D/B/A. But if I were to call my business "Bear Eagle Photography," I would have to get a D/B/A from the state (and often county) in which I reside. The filing fees for assumed names vary by state but are almost always less expensive than formation filings for other business structures.

It is a common misconception that filing an assumed name creates a business. This is not the case — an assumed name is merely a name under which you can conduct business; it does not create a separate business entity. This goes for every business entity that applies for an assumed name, from sole proprietorships to

corporations. As an example, let's consider the situation where you enter into a contract with another party, such as a licensing agreement. Typically, there is an introductory paragraph in every contract that identifies the parties of the agreement. You, as one of the parties, cannot list only your assumed name as the party entering the contract because the assumed name does not have a legal identity. Instead, you must list your name as the sole proprietor, and then you can follow that with your assumed name. If your name is "John Smith" and your assumed name is "The Smith Group," you would enter into the agreement as a sole proprietor as: "John Smith d/b/a The Smith Group." Essentially, this implies that as a sole proprietor you enter into business arrangements in your own personal capacity — a dangerous proposition that we will cover below.

Since you can be a sole proprietor without filing paperwork, the cost of formation for this business form is \$0. In most cases, you would file your business taxes as a "Schedule C," which is part of your personal 1040 tax return. Let me reiterate here that neither I nor ASMP are tax professionals, and you **must** seek tax advice and guidance in your state of residence. I do it, and you should too!

While sole proprietorships are easier to create and less expensive than other business forms, one of the major pitfalls of this business model is that a sole proprietor can be held personally liable for any debts or liabilities the business incurs. In essence, you are your business, and your business is you. Legally, there is no distinction.

Partnership

A partnership is very similar to a sole proprietorship, except that it is run by two or more people instead of just one. Any two or more people who conduct business together are deemed to be a partnership by default. Just like in a sole proprietorship, you do not need to file anything with the state to create a general partnership. Some states require that a partnership file an assumed name, and for other states, it is optional. It is important, then, that business partners consult an attorney and check their state laws to see whether they need to file an assumed name for their partnership.

Two types of partnerships exist: (1) general partnerships and (2) limited partnerships. In a general partnership, each partner is a general partner, which means each has decision-making authority in the partnership and has unlimited liability for the partnership.

In a limited partnership, there is typically one general partner who controls the day-to-day operations and has unlimited liability, and the other partners are limited partners, which means they do not have decision-making authority on behalf of the partnership but do have limited liability in the partnership. Therefore, partners of a general or limited partnership have greater exposure to liability than do the participants in other business structures. In most states, limited partnerships must file formation documents with the Secretary of State.

One of the most complicated issues related to partnerships is whether you are in a partnership at all! Say you rent studio space with another photographer but each have your own client base.

Yet, you share equipment, and maybe you split some expenses and use each other's gear from time to time. Even though you both think you are sole proprietors, you might be deemed by the state or the courts as being in a partnership! This is unbelievably dangerous, because, as noted above, each partner in a general partnership has complete liability for the partnership. Lawyers call this *joint and several liability*. In essence, that means that each partner is 100% liable for the actions of the other partner and the partnership as a whole. So, if your studio mate goes to a shoot, steals all the client's property and money, and then heads to a country without an extradition policy, you are responsible for 100% of the damages. Not 50%... 100%.

To put it bluntly, general partnerships are, in my professional opinion, terrible.

Limited Liability Company

A limited liability company, commonly abbreviated "LLC," is my most preferred entity structure for photographers and ASMP members with few exceptions. Since LLCs rose to popularity in the 1990s, this business form has taken the best parts of many of the other forms and put them together in a wonderful amalgam that can be quite beneficial to photographers and studios. To form an LLC, you must submit formation documents with the state in which you will conduct business. A fee is associated with filing these documents, and the fee varies by state. Some states have yearly renewal fees, while some do not. The entity that controls business formations of all types in the U.S. is the Secretary of State for each particular state.

The owner of an LLC is referred to as a *member*. An LLC can be single member or multi-member. If it is a single member LLC, the one member of the LLC is the sole owner and has complete control of the LLC. That means you as a photographer can (1) form an LLC, (2) be the LLC's only member, and (3) have full authority of the company. Boy, that sounds quite a bit like a sole proprietorship!

If you form a multi-member LLC, that means there are two or more members who are the owners, and each member shares in decision-making for the LLC according to the percentage interest each holds in the LLC (the "equity"). One thing to remember, however, is that you only ever get 100% of the equity in your company. While this seems simple, realize that if you give 20% to one person and 10% to another, and then decide to fire them or kick them out, they own that percentage until you buy it back from them. While it is beyond the scope of this book, a good piece of advice is to give away as little equity as possible — trust me, your life will be simpler in the future.

In all LLCs, you can have members be individuals, other LLCs, or even other business forms. This makes LLCs infinitely flexible in their structure. Speaking about structure, another thing to consider in creating an LLC is whether to make it *member-managed* or *manager-managed*. For member-managed LLCs, the members control the operations of the LLC and make decisions on its behalf. For manager-managed LLCs, the members name a person who is the manager, who may or may not be a member of the LLC and who will take on the management responsibilities of the LLC. Typically, multi-member LLCs will elect to be manager-

managed, while single member LLCs will be member-managed, though the requirements and common practice related to this varies by state.

Overall, LLCs are easy to form and maintain. There are no rigid formalities that must be followed in the conduct of business, just an initial application with the state. But, while that is the bare minimum, there are several other documents that are recommended when you start your LLC. The most important of these is the Company Agreement (or Operating Agreement). This document contains the rules of your LLC. It defines how you can accept new members, what happens when one member dies or becomes incapacitated, what happens in the event of a divorce, etc. It also sets out the financial requirements and reporting matters for your LLC. In most states, you do not have to have this document, but it is almost always a good idea. The devil is in the details, and I would recommend you find an attorney who is an expert in photography and small business law to help with your drafting of these documents. Often attorneys will perform a full LLC formation for you for one set flat fee. Just call around and find someone you trust.

Another benefit to the LLC business form is the flexibility it provides in federal taxation. Interestingly, the IRS does not recognize an LLC as a business form. In fact, it calls LLCs *disregarded entities*. What this means is that you can classify your LLC for tax purposes as a sole proprietorship or partnership (depending on if it is single member or multi-member) or corporation. So, you can decide with your accountant what is most beneficial to you. Maybe it's a multi-member LLC taxed as

a partnership, or a single member LLC taxed as a C-Corporation. Your choice!

Perhaps the greatest benefit of an LLC, however, is the liability protection it offers. In fact, it's right there in the name — limited liability. As a member of an LLC, your personal liability is limited to the assets of the company... not your personal assets. Whereas sole proprietorships and general partnerships do not shield their members from any liability, an LLC does afford that protection — the members of an LLC cannot be held personally liable for any debts or liabilities incurred by the business. Think of it this way: if you get sued for whatever reason and are a sole proprietor, you can have a judgment levied against you, your spouse, your house, your car, etc. But if you have a single member LLC, in many cases you would only be liable for what your company owns. I cannot overstate how important this is.

Corporation

The final entity type we will discuss is the corporation. Like with LLCs, forming a corporation creates a separate legal identity for your business. To form a corporation, you are required to submit formation documents with the state in which you will conduct business. You will be responsible for a filing fee, which varies by state, when you form your corporation. In most cases, it is more expensive to form and operate a corporation than other structures, though recent changes in tax law have made the corporate form more attractive to small business owners.

While generally easy to form, corporations can be more complex than other business formations in terms of management and

maintenance. Whereas an LLC is controlled and owned by its members, a corporation has two levels of oversight — the shareholders of the corporation have ownership in the corporation, and the board of directors controls the day-to-day operations of the corporation. You can have a single member “S-Corporation,” but in essence, you are all the roles listed above wrapped into one. The other main type of corporation is the “C-Corporation” which has much more rigidity to it. The corporation also must adhere to a number of formalities, like bookkeeping and recording minutes of a meeting. As a result, corporations are the preferred business structure for larger businesses that have several shareholders or for smaller businesses that want to raise outside capital, as investors prefer to invest in a corporation over an LLC. Though more formal in nature than LLCs, corporations also offer the same liability protection to its shareholders.

In truth, if you need a corporation, it is likely you already are working with the right advisors to let you know. Any business formation attorney can advise you on this decision. But, note that attorneys look most at liability and risk, and accountants look most at tax implications. Often, the advice you get from one will agree with the other, but not always.

Various Entity Advantages and Disadvantages

Generally, it is a good idea to register your business with the state in which you conduct business or plan to conduct business. For photographers, the LLC is the most approachable and beneficial business model. Here’s why.

First, as explained above, LLCs are simple! They are easy to create and maintain. The initial filing fee required upfront is worth it, given the benefits you receive in return. Plus, LLCs are informal and do not have the strict requirements that corporations do.

One of the biggest advantages of an LLC is liability protection, like we noted earlier. When you register your business as an LLC with the state, it becomes its own entity and has its own legal identity. The import of this bears repeating: if you were to be sued on a project, the person who sues you cannot come after your personal assets in most cases — he or she can only come after the assets of your LLC. The same cannot be said for sole proprietorships or general partnerships. Since there are no filings associated with forming sole proprietorships or partnerships, these two business formations are *not* separate legal entities. So, the sole proprietor or partners can be held personally liable, and their personal assets are at risk.

There’s another reason to make your business official: credibility. When you form an LLC, you send a message to others that you are serious about your business. Having an LLC shows people that you have a knowledgeable team in your corner, including a lawyer and an accountant, who are available to help you and give you advice. That way, people may be less likely to take advantage of you in deals or agreements because you appear prepared and informed. Signing a large contract in the name of your business instead of in your own can often establish your position in negotiations in the future.

Conclusion

For photographers, whether you are trying to book big commercial clients, or you are jumpstarting your career, it would be worth your while to go ahead and formalize your own business. And in general, an LLC would be the best type of business model — you have liability protection, you do not have to hassle with business formalities, you have flexibility in terms of how you want to do business and control your business, you have flexibility in how you want to be taxed, and you gain credibility both as an artist and as a business professional. It's a win-win.

HELP! What Do I Do Now?

This book aims to provide more than just a few helpful hints for photographers! We've discussed many of the biggest ones: copyright, contracts, licensing agreements, and business formations. However, there are a few issues photographers may run into on any given day in this industry but that may not warrant an entire chapter. Many problems arise in any job, and some issues are more challenging to navigate than others. Below are a few examples of common issues we've found that photographers often run into, along with suggestions for how to navigate them.

A quick aside before we jump in. If you have issues or concerns in the legal or business aspects of your career, and you need some guidance or help, please reach out to legal@asmp.org. We can help get you on the right path and in contact with the right people. We are here for you.

What Happens If Someone Is Infringing My Work?

Finding your work being used out in the world with no payment or license can be heart wrenching. The sad fact is that almost every professional photographer is infringed quite often, and most infringements will go unnoticed. But when you do find your work being used without your permission, it's good to have a plan of action.

As we discussed in Chapter 1, and further in the Bonus Chapter video on Copyright Registration at www.asmp.org/jumpstart, registering your work is so very important. While very few copyright infringement disputes will go to court, being able to say

to an infringer that your work is properly registered is a great tool in negotiating a settlement. Register that work!

Online Infringement

As a photographer in today's digital age, the Internet makes infringing all too easy! Not to worry, there are options for photographers when they find out their work has been infringed online. Without jumping from A–Z, the simplest thing a photographer can do is reach out to whomever they believe is infringing upon their work and request the individual pay a license fee. If you feel like attribution is payment enough, you can ask for that. Or, you can simply ask them to remove the image immediately (often called a Cease and Desist letter). If all that fails, you can often file a DMCA (Digital Millennium Copyright Act) Takedown Notice with the infringer's Internet Service Provider (ISP). The act requires sites that host content to remove infringing content if they receive notice of such infringement. To support this requirement, there are usually options on every content-producing website to fill out a takedown notice form.

Online or Any Other Medium for Which Infringement Is Taking Place

When simpler options fail, it may be time to send a demand letter. A demand letter typically asks the infringer to pay licensing fees and damages, to cease and desist the use of the photographer's work, and / or tells the infringer to give credit to the photographer. This is something for which getting a lawyer is highly encouraged. A lawyer can compose the letter, get your approval, and have it sent to the alleged infringer. A lawyer can

also assist with drafting and demanding reasonable compensation for the particular infringement. In my pre-law school days, I would often contact infringers and hear nothing in return. As soon as I became an attorney, generally everyone responds to my letters. It's unfortunate, but true, and getting a letter from an attorney can often immediately end an infringement in a positive way.

If all else fails, the last result is generally filing suit for copyright infringement. When takedown notices and demand letters fail, litigation will hopefully get the job done. If you think you may want to go down this path, the very first thing is to find the right lawyer. There are many lawyers who market to photographers but who may not have the photographer's best interests in mind. *Going to court and filing lawsuits should almost always be a last resort — not a first.* When filing a complaint, what's most needed is evidence of infringement such as screenshots or evidence the infringer admitted that such infringement occurred. Gathering up this info before you start the process is highly recommended.

It is always important to cover your bases before filing a lawsuit. For example, as stated before, try sending a letter or contacting the infringer beforehand. This will save time and money, and who knows? People can surprise you and are sometimes willing to cooperate. Also, make sure the infringement is not considered fair use. Fair use is a type of infringement that is allowed by law in certain circumstances. For more information about fair use, see the Bonus Chapter video on this issue at www.asmp.org/jumpstart.

Ultimately, the best route for you depends on the extent of the infringement and the damages suffered. Whether or not you want

compensation or simply want a credit for the use can also be determinative for what steps you may want to take. Don't forget, one simple option is to do nothing. Some infringements may not be worth the financial and emotional costs of seeking a remedy. These are factors every photographer has to weigh when facing these potential issues. Regardless of what you choose to do, hopefully this provides some insight on what your options are as an artist in this industry.

What Happens If My Gear Gets Stolen?

First thing first, be proactive! If you're a photographer using gear and traveling to different jobs on a regular basis, unfortunately, it is likely only a matter of time before something goes missing. With that being said, it is important to think ahead in anticipation of gear getting lost or stolen in any given scenario.

Step one is to always obtain insurance for your gear and your business. Common types of commercial business insurance include general liability coverage, property coverage, errors & omissions protection, and business interruption protection, just to name a few. In the future, ASMP will be creating information about this, but right now, know that you need insurance. If you are a business, act like it! This is particularly the case if you are making a profit as a photographer. A common misconception regarding insurance and photography gear is that it will be covered by renter's or homeowner's insurance. However, this is *not* the case. If you are making money as a photographer, your gear will then be covered as business equipment and not covered in your homeowner's or renter's insurance. To avoid this problem, it is

highly advised to get business insurance. Having this coverage is imperative in this industry if you plan to make a living and get your money back if any of your gear is stolen. Additionally, you should always have a list of all the gear you own. Keeping a list with each piece and its serial number is vital. If you ever find yourself in a situation where any item of your gear was stolen, it is handy to have and helpful for insurance as well as legal purposes.

Once you have your bases covered, knowing what to do if any of your gear gets stolen is simple. Like any type of criminal activity, reporting the theft of your photography gear is obvious. Call the police department and report it stolen to have a police report filed. Having the list of gear that was stolen and the serial numbers on each item is particularly helpful for police and will increase the likelihood of them being able to track it or keep an eye out for it (i.e., in pawn shops or other similar locations). However, once you've done your due diligence and have your police report filed, it is quite possible the gear is gone for good. The good news is that if you were proactive in protecting your gear and having insurance on it, you won't lose any money in the already unfortunate situation.

Afterword

You are creators. Image-makers. Visual journalists. Artists. But you are also business owners and ambassadors for all photographers. ASMP members have long been considered significantly more business savvy than most photographers; that is a reputation built upon the work you have done and the work ASMP has been involved in for seventy-five years. It is our goal to let you go do what you do best and provide the business and legal resources that will help you to succeed.

Between this book (which will be updated regularly) and the resources found at the [ASMP website](#), you should be ready to jumpstart or excel in your career, and you can be sure ASMP will be there to support you at each and every step. Thank you for being a member. We appreciate representing you from the halls of Congress, to the Supreme Court, and to each and every corner of your business.

Thomas Maddrey
General Counsel, ASMP