

A Guide to Licensing Stock Photography

Philadelphia Volunteer Lawyers for the Arts
A program of the Arts & Business Council of Greater Philadelphia



200 S. Broad Street, Suite 700
Philadelphia, PA 19102

Phone: 215.790.3836, ext. 1
Fax: 215.790.3888

PVLALegal@artsandbusinessphila.org
www.artsandbusinessphila.org/pvla

Picture Perfect? A Guide to Licensing Stock Photography the Right Way

There are times when a graphic designer needs to find just the right image while working on a project, or a writer wants to have a visual for his or her blog. Sometimes, it's best to hire a photographer to create the exact image you have in mind, but that method is often cost-prohibitive once the photographer's fees, equipment rentals, model costs, and any necessary permits are factored in. Hiring a photographer is also less of an option when time is an issue. As a result, many graphic designers, web developers, and bloggers rely on an alternate source for readily available professional-quality images - **licensed stock photography**.

Today, it's possible to do an online search for "stock photography" and receive dozens of results listing sophisticated websites with large image collections. These agencies specialize in photographs, but some also include illustrations, fonts, and film footage. The ease of finding and searching through these libraries also makes it easy to run afoul of intellectual property laws, primarily ones involving copyright.

Some terminology

A photograph is a piece of **intellectual property**, meaning that the photographer conceptualized how he or she wanted to shoot the image, and the photograph represents that vision. It is this vision — this spark of original creativity — which gives the photographer a **copyright**. Copyright is typically the area of intellectual property law that protects the photographs. Possessing the copyright means that the copyright owner has the right to do — or not do — what he or she pleases with the photograph. One of the rights that a copyright holder possesses is the right to **license** use of the intellectual property. Licenses may grant specific usage rights to another party, and

may restrict the use geographically, or for a period of time, or in terms of sizing, just to name a few examples. Any use not authorized by the license is considered an **infringement**.

Infringement happens whenever an unauthorized use of intellectual property occurs. It is theft. If a person steals a car but never drives it, it is still car theft; the same holds true for intellectual property — if you download an image and use it without permission, but ultimately purchase permission later, an infringement has still occurred. While the copyright holder may opt to not pursue any legal action after the fact, it does not negate the infringement. Further, a charge of copyright infringement doesn't mean the copyright holder has to prove you infringed the copyright, which is the status quo when you are accused of stealing a car, to continue the earlier example; a copyright infringement charge means you have to prove you did not infringe on the copyright. In addition, the **Digital Millennium Copyright Act** allows the government to seek criminal punishment for infringement as well.

Every infringement of a registered copyright (most stock agency photographs are registered copyrights) allows the copyright holder to seek statutory damages. **Statutory damages** allow the holder to seek up to \$150,000 per infringement — which means if you have a license to print 100 posters, but you print 110 posters, you infringed the copyright 10 times — and each of those infringements may be penalized up to \$150,000 apiece (adding up to a total of \$1.5 million). If the copyright holder really wants to go after you, they may also attempt to seek their actual loss, their loss of income, any income you derived from the use, and the costs of collecting the damages. Since intellectual property is essentially easier to steal than real property, the punishments are high in order to deter would-be thieves.

A Guide to Licensing Stock Photography

The design of copyright law — to protect the rights of the owner — is a theme that runs throughout intellectual property law. This concept is not limited to photographs sold by stock agencies, but also applies to films, music, and other creative works. While you may be able to claim that your infringement is protected by **fair use** — essentially, that there is a social benefit to the public at large by your use — there is no guarantee that a court will agree that your use is fair. For more information on this topic, please see PVLA's informational pamphlet titled "The Fair Use Guide."

Since the majority of what the stock photography agency sells is intellectual property, you can be sure that they are especially concerned with protecting their copyrighted material. To get a better sense of how intellectual property law affects stock photography, it is important to consider how the business developed over time.

A brief history of stock photography

Stock photography started out as outtakes from various photo shoots, taken by professional photographers. These outtakes were not of much use at first, except in limited instances. As time went on, a dedicated market for stock photos developed and companies catered to advertising agencies and creative professionals, while photographers shot rolls of film aimed not at any specific assignment, but purposely so they would end up in a stock library. These libraries were printed in catalogues for ordering, and were not available to the public at large, which meant artists could not infringe very easily.

Today, stock photography agencies research the needs of their clients, seek to anticipate trends, and keep the needs of artists in mind with regards to photo orientation, cropping, and available space for text overlays. Photographers will typically shoot photos in a series, so that the same photo is available multiple times with slight variations, in order to give artists a greater number of options. Photos libraries include both straightforward and conceptual images, with subject matter ranging from everyday objects to celebrities and everything inbetween. As the libraries expand and become easier to use, there are expanded risks of infringing copyrights as well.

Some of the biggest names in stock photography today include Getty Images, Corbis Images, and JupiterMedia. Those agencies have purchased other smaller agencies over time. Other agencies do exist — some are highly specialized (e.g. focusing on celebrities), while others are more international in scope. All of these for-profit stock photography agencies share a common theme — they are all selling intellectual property, and they want to make sure that their photographs are not being infringed.

Why use a stock photography agency in the first place?

In this age of search engines and photo-sharing web communities, why bother paying to license stock photography? Why not just download images from Wikipedia or your favorite website? Aside from practical artistic concerns about the quality of the photographs you download — since most web photos can only be used in a web context — there are legal considerations to address as well.

When you conduct a general online image search — by using Google Images, for example — you will receive results from all over the internet. These pictures will come from blogs, news stories, personal websites, company websites, and so on. These pictures will also typically be protected by copyright. Some of these copyrights will be held by the photographer who took the picture, while others will be held by the companies who run the websites. This uncertainty often makes it very difficult for artists to track down the copyright owner to get permission for use of the picture. Further, even if you are able to find the copyright owner, they may end up charging you more than you would pay if you used an agency, since they aren't concerned with keeping you as a customer. And if you don't find the copyright owner, or you are unable to negotiate permission, you run a huge risk if you choose to use the photograph anyway — remember that infringements of registered copyrights can result in damages of up to \$150,000 per infringement.

In contrast, when you purchase a license from a stock agency, you know you are receiving the right to use that photograph. The license will set out terms of use which, if followed, will let you use the photograph without fear of infringement. Working with a stock agency will also help you avoid litigation over the content of a photo. For example, if you needed a picture of a mall for your artwork, and you found a random picture on the internet of a mall scene, you may leave yourself open to privacy or publicity lawsuits by any individual appearing in the photo; if any stores are visible in the image, you may also open yourself up to trademark infringement issues. On the other hand, purchasing a license from a stock photography agency will generally mean that all **model releases** — an agreement that the person(s) depicted in the photograph will not sue for the use of their likeness — have been obtained, and that any trademarks in the photo have been removed or approved in advance. It is important to note, though, that if your work is controversial — involving sensitive issues such as abortion, gambling, sexual issues, or religious extremism — you will want to make sure the release covers these topics.

Once you've made the decision to work with a stock photography agency, you'll want to try and answer a number of questions about your project regarding the intended use, size, and target audience in advance so you can obtain the specific usage rights you desire.

A Guide to Licensing Stock Photography

Conducting your photo research: what to keep in mind

Stock photos can be timeless (e.g. images of nature) or have a limited shelf life (e.g. fashion, portable electronics, cars). As you look to license pictures, it is important to keep these factors in mind, so you're able to make an informed decision.

Researching stock photography through an agency can typically be done in one of two ways — by doing the research yourself using keywords to search the agency's online library, or by asking the agency to conduct research on your behalf. Typically, stock photography agencies will conduct this research for you free of charge, although you may need to register on their site as a customer before they will begin; often, upon registration, you are assigned a representative who handles your account.

Whichever method you choose, there are things you should keep in mind so you're able to make the best decision you can when it's time to purchase the license. Answering certain questions in advance will help you avoid headaches later on in the process:

- **How will this image be used?** Are you looking to use the image in its low-resolution format on a website, as a high-resolution image for a poster, or will it be used across an entire branding campaign? Your budget may require you to exclude certain license types depending on this factor.
- **Where will the image be used?** Is it filling the front page of a brochure, or is it a small image on the fourth or fifth level of a website? Is it a small image on a flyer or is it going on a billboard? Depending on the type of license you require, size can play an important role.
- **If being used for a printed piece, how many are you printing?** The quantity you plan to print will impact the pricing available for certain licenses.
- **Would it be a problem if other people used the same image?** Is your work being done for an advertisement that demands uniqueness, or will the image be manipulated for an artistic purpose?
- **What is the nature of the work?** If the work is being done for a newspaper or magazine, it may be considered editorial in nature, while work being used for an advertisement or an art project is often considered creative. Some agencies may also have categories such as educational, non-profit, or materials aimed at internal communications.

Once you've answered these questions, and found the picture you want to use, you can proceed to the next phase — getting ready to purchase a license.

A picture might be worth a thousand words, but is it worth a thousand dollars?

Once your photo research is done — either by yourself or by the agency — you'll want a copy of the photo to use in your artwork. The copies available on the website are typically low resolution (72 dots per inch (dpi) or lower) and often **water-marked** (the agency often places an opaque version of their logo or name directly on the image). Even if there is no visible watermark, and you only need the low resolution image for a website, *do not simply use the photo*. Many photo agencies work to track the use of their photos and can track down the photo even where no watermark is visible — even if the file name has been changed and the image has been altered. When this happens, agencies may choose to have a salesperson call you rather than a lawyer — they prefer presuming the use was inadvertent or accidental, and want to convert you to a paying customer, after all — but keep in mind a lawsuit is always an option for them depending on how many images you use and the manner of usage.

Most agencies will let you use the low resolution, watermarked image temporarily (typically up to 30 days) for layout purposes. This is called a “**comp**.” A comp cannot be used on a printed piece, or displayed on a live website, but it allows you to “test drive” the photo before making your purchasing decision. If you need a larger size than the low resolution photo permits, your best bet is to register with the stock photography agency as a customer, if you haven't done so already, and talk to your account representative. They may be able to provide you with a high resolution version of the photograph for use in sample layouts or projects, with the understanding that you will either purchase the photo or delete it from your files before the “comping” license expires.

If the comp fits your needs, or you've decided you don't need a comp because you know the image is perfect, you'll need to purchase a license. This can be done in two ways — by purchasing the image using the agency's online interface, or by calling your account representative and negotiating with them. While some transactions are relatively straightforward and lend themselves to the online purchasing option, it is often wise to call your account representative directly. If you are buying multiple licenses, or have special usage needs, you can negotiate directly with your representative and often get a better price, a better “package” of rights, and sometimes both. Whichever method you choose, there are some additional terms with which you should be familiar.

A Guide to Licensing Stock Photography

Some more terminology

There are typically two types of licenses: **royalty-free** and **rights-managed** (or “traditional”) licenses.

A **royalty-free license** gives you what the name implies — the right to use the image as often as you like without incurring additional fees for each use. This license is typically the same across all the agencies, although some do cap the number of times you are allowed to print the photograph (generally a high number, from 250,000 to 500,000). The image can be downloaded as an individual photograph, although some are available as part of a CD collection. However, just because you “own” the right to use the photograph as often as you like does not give you the right to “sell” that photograph.

In addition, royalty-free images typically cannot be used for “templated” work — if you design a website or newsletter template which you plan to sell to multiple customers, for example, you typically can’t use a royalty free image without seeking additional permission from the agency first. This is because you have purchased the right to use the photograph, but you do not have the right to distribute the photograph or to let other people use the photograph. However, if you purchase a royalty-free image or collection for a graphic arts company, or if multiple people are contributing to the same project, many royalty free licenses allow a set number of users to use the image.

A **rights-managed license** is a specially tailored license, covering your usage needs on a project-by-project basis. You will usually need to provide the following information at a minimum: the use desired, the size of the photo, the placement of the photo within your project, the intended audience, the location of the audience (geography), and the quantity printed (if a print piece). Agencies typically provide an online calculator to help you determine the cost of your license in advance. Again, it is usually in your best interest to call your representative and see if you can negotiate the best license at the best price for your project.

A bonus feature of a rights-managed license is the ability to negotiate for **exclusive use** of the photograph for a set period of time for an additional fee. This may be referred to as a restrictive license or a rights protection license, and allows you to use the image without having to worry about it appearing in other projects over a period of time. This feature is not available for royalty-free images, which by their nature are available to all buyers for all times. A famous case of an image that has not been restricted by a rights protection license is the Everywhere Girl - www.theeverywheregirl.com - who has appeared in a variety of advertisements and websites over the life of the image.

If you purchase a license and subsequently violate it, or have a dispute with the company, note that many license agreements include **arbitration clauses** or **forum selection clauses**. These clauses dictate in advance how and/or where disputes related to the license will be addressed. Therefore, if the clause

says the dispute will be resolved in Alaska, but you are based in Pennsylvania, you will be bound to resolve the issue in Alaska. To avoid this scenario, keep this advice in mind:

- **Don’t steal someone else’s stock agency user password.** This should go without saying, but numerous instances of this have been reported, especially when it comes to blogs about celebrities. If you do this, you run the risk of receiving both criminal and civil penalties.
- **Don’t try to sell your copy of the photograph(s) you purchased.** A license does not give you an ownership interest. Licenses are non-transferrable — the permission is only between you and the copyright owner. On a related note, don’t pass out digital copies of the photograph to fellow artists.
- **Don’t lie when you negotiate your license.** If you negotiate a license that allows you to use the photo on 10,000 printouts, but you know you’re going to print 100,000, you are purposely infringing the copyright by printing an extra 90,000 copies. It’s not worth risking a huge penalty — up to \$150,000 per work infringement — just to save a couple dollars in the short term.
- **Don’t recycle previously licensed photographs.** If you negotiated a rights-managed license, and the license expired, your best option is to remove that copy from your computer so you are not tempted to reuse the photograph in a future project. If you need to reuse the same image in the future, contact the agency and negotiate a new license. Most importantly, make sure you know which photos are covered by each type of license.

Other options

If you’ve been to stock agency websites and feel they are not right for you, because of their content or because of budgetary concerns, other options do exist. As long as you’re careful and willing to put in the necessary effort, you’ll be able to add photographs to your graphic project, web design, or blog without violating the law.

- **Free online images.** Some websites post free photographs which are often provided by both professional and hobby photographers. Examples of these websites include morgueFile (www.morguefile.com) and the Creative Commons section of flickr™ (www.flickr.com/creativecommons). These websites are still governed by licenses, each with varying levels of permission. Be especially careful on flickr™, since there are multiple types of licenses involved, and they are restricted to those images the photographer agreed to place in the Creative Commons collection. Some libraries and cities have put their historic collections online; again, license terms vary from source to source.

A Guide to Licensing Stock Photography

- **User-generated content.** Websites like istockphoto.com allow you to download images created by users for considerably less than what the traditional stock agencies charge.
- **Subscription websites.** These websites charge a one-time fee and give you the opportunity to download multiple images over a set period of time. An example of this type of company is AbleStock.com (www.ablestock.com).
- **Digital photography.** While the photograph might not be professional-quality, some projects may allow you to use a digital photograph without impacting its effectiveness. Aside from making sure your camera's resolution suits your project needs, consider having a model release available for any people depicted in your photograph, and make sure that if you are shooting in a public area that you have secured any necessary permits.
- **Blogger options.** Any writer needing an image for his or her blog can utilize the service of picapp™, a web service (www.picapp.com) that works with stock photography agencies to provide free images for use on non-commercial blogs. The image is provided for free, but does include an advertising element (in order for the content provider to receive royalties).
- **Be creative!** An Australian blog devoted to cricket avoids infringing copyrighted photos by reenacting match highlights and posting images of the reenactment. Consider whether there are creative ways for you to convey your message and turn a limitation into an opportunity.

Photo finish

The availability of image resources today means your chances of finding the right image are extremely good. As long as you adhere to the license(s) for the image(s) you use, you should avoid any nasty surprises once your project is complete.

For more information about licensing stock photography, or any other arts-related legal issues, contact:

Philadelphia Volunteer Lawyers for the Arts

200 S. Broad Street, Suite 700

Philadelphia, PA 19102

Phone: 215-790-3836, ext. 1

Fax: 215-790-3888

Web: www.artsandbusinessphila.org/pvla

PVLALegal@artsandbusinessphila.org

Other titles in this series:

- Fair Use Guide
- An Artist's Guide to Wills and Estates
- Finding a Live/Work Space for Artists
- Censorship, Obscenity, and Indecency
- Guide to Licensing Stock Photography
- Documentaries — A Sample Release Form
- Intellectual Property — An Artist's Primer
- Transformative Works and Copyright for Visual Artists
- Music Licensing
- Nonprofit Incorporation
- Music Performing Rights Organizations
- Music Publishing — A Sample Contract between Composer and Publisher
- The Right to Publicity
- Parody and Satire
- A User-Friendly Guide to Copyright
- Financing your Film Project
- "The Naked Cowboy v. M&M" — An Explanation of Trademark Infringement
- The Visual Artists Rights Act of 1990
- Privacy and Photography
- Invasion of Privacy