

3. COPYRIGHT AND PERMISSIONS

Copyright, permissions, and future ownership of a project may seem to be secondary issues, especially when placed against the technical and administrative complexities of production and post-production work. However, these issues must be addressed early on in any project, ideally well before any money has been committed to traveling, equipment, or outside staff. The information in this section introduces these key legal issues that arise for commissioners, photographers, and project staff working both in the U.S. and abroad. This information is focused on U.S. law and is therefore less relevant to non-American readers, although the questions that arise are likely to be similar for all panorama project commissioners and creators.

The information contained in this section is not and should not be used as a substitute for legal counsel. It is intended to provide useful general advice for commissioners and creators of digital panoramas. Commissioners are strongly encouraged to contact their university's or institute's legal counsel and to work with experts who are familiar with the national and local laws for the area in which the photo shoot will take place. As the central underpinning of many of the legal issues that arise, copyright is fundamental here. But as one writer has put it: "in the United States, copyright law is pitilessly complicated...."¹ When the added complexities of international copyright are added into the mix, it should be apparent that no guide can do more than alert the reader to the possibility of issues that must be examined on an individual basis in each project.

The listed books and websites found in section 3.8 should be a helpful source of additional information, but the common mantra of this section is:

When in doubt, ask an Expert.

1. Susan M. Bielstein, *Permissions, A Survival Guide: Blunt Talk about Art as Intellectual Property*, p. 17 (Chicago: The University of Chicago Press, 2006).

3.1. COPYRIGHT

Copyright laws world-wide are designed to protect the ownership interests of the creators of original works. In the U.S., a work that is considered original and fixed, e.g., is in a tangible medium with some degree of permanence, is eligible for and is automatically given, copyright protection. The law grants a work's owner certain rights, including the right to reproduce the work, distribute copies, and make derivative works.

Depending on whether a work has been published or not, whether the work was made by an individual or a group, and other factors, the exclusive rights of the copyright owner cover a range of anywhere from seventy years from the creator's death, to 120 years from the date of creation. Because copyright requirements as well as copyright terms have changed repeatedly over the last century, determining whether or not an existing older work is protected by copyright can be a complex factual and legal endeavor. A widely-used chart compiled by Peter Hirtle at Cornell University is invaluable in describing U.S. copyright terms for works published both within the US and abroad.² Stanford University recently launched a new web-accessible database of copyright renewal records received by the US Copyright Office between 1950 and 1993 for books published in the US between 1923 and 1963 that is also quite useful for research into the copyright status of printed works.³

USING THE WORKS OF OTHERS

Panorama commissioners and creators who intend to use the work of others (whether print, images, sound or other media) must be careful to address relevant copyright concerns under governing law. While many uses of portions of works under copyright may be allowable without seeking formal permission under the legal concepts of "Fair Use" (or, in Great Britain, "fair dealing"), these principles of law are complex, apply case-by-case, and are handled differently around the world. If you plan to publish your work, it is wise to consult with the publisher well in advance to gain some understanding of how the publisher will treat copyright permissions issues. If your work will be publicly distributed through an institutional website at your home institution, it is wise to research how the dissemination of copyrighted materials in your project will be viewed and what will be permitted.

PROTECTING YOUR OWN WORK

For newly-created works (whether panorama or otherwise), there is no requirement of copyright registration in the U.S., although registration can confer special benefits to the copyright owner which should be thoughtfully considered. The U.S. Copyright Office Circular on "Copyright Basics" is a useful introduction to the registration process itself.⁴

2. http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm

3. <http://collections.stanford.edu/copyrightrenewals/bin/page?forward=home>

4. <http://www.copyright.gov/circs/circ1.html#hsc>

OPEN SOURCE AND CREATIVE COMMONS

Many in the academic, arts, and research communities find that conventional constructs of intellectual property ownership do not suit their needs, particularly where collaborative and inter-institutional projects are at issue or where the primary interest of the project “owners” is aimed at non-profit creative communities and learning. For software and similar hi-tech works, the Open Source Initiative has developed a series of licenses that allow the creators to shape the legal terms of access, collaboration, and use outside the scope of conventional sole ownership.⁵ The Creative Commons organization also “provides free tools that let authors, scientists, artists, and educators easily mark their creative work with the freedoms they want it to carry.” The Creative Commons website is invaluable in addressing questions of ownership and sharing of text, images, software, and other intellectual property in new ways.⁶

GRANT AND INSTITUTIONAL REQUIREMENTS

If your project is being funded by university monies or is performed by university personnel, the university may claim ownership of work under standard institutional policies governing intellectual property. Project participants from institutions of higher education should be careful to review the applicable policies, especially where university resources have been substantially utilized. Similarly, if the project is funded by government or foundation grants, the relevant funding organization may specify how grant-funded projects must be treated from an intellectual property perspective. For example, the Mellon Foundation requires that many of its digital projects be released into the academic and research communities with open source licensing such as the “Educational Community License” developed by the Open Source Initiative noted above.

CLARIFYING WHO ACTUALLY OWNS A WORK

If not delineated by institutional rule or grant requirements, who will own your panorama and the underlying material created to produce it? Many collaborative projects in creative and academic communities commence without the project participants having discussed and clarified their respective intellectual property rights. Often this is not a problem, especially where no one has an interest in commercial exploitation of the resulting project. But our advice is, don’t make assumptions; it’s better to work out issues of ownership in advance. Further, if you intend to commission work done by others, specific requirements apply under U.S. law to ensure that your contractors or subcontractors don’t walk away with independent intellectual property rights that could actually interfere with your use and dissemination of the materials (such as photographs) that they produced under contract for your project.

5. <http://www.opensource.org>

6. <http://creativecommons.org>

3.2. FAIR USE AND DE MINIMIS USE

U.S. law provides a safe haven, of sorts, for images of art (or advertisements, or billboards, or other objects entitled to copyright protection that are often found in public places), that are captured incidentally as part of photographic and film projects. Principles of both Fair Use and de minimis use may serve to protect against copyright infringement claims, particularly when the alleged “perpetrator” is engaged in a non-profit, research, educational, or artistic activity. However, these principles of law are applied in a case-by-case fashion and without predictable outcome in individual situations. Particularly where you are capturing a full image of a work of art that is still under copyright protection, it is important to explore whether you may need to seek permission.

Fair Use itself is a legal test that depends on a number of different factors. One of the key questions is the use you are going to make of an image. The result may vary depending on factors such as whether that use is for a publication or for teaching and study; and whether the image will be on a restricted, educational website or on a publicly accessible, unrestricted website. Because of the complicated nature of Fair Use, it is important to seek guidance from counsel, where possible. **Other helpful resources including many that offer specific guidance on Fair Use are found in Section 3.8 below.**

3.3. CONTRACT VERSUS COPYRIGHT

Contracts or licenses that you enter into can restrict the uses you can make of an image, even if that use is otherwise permitted under copyright law. Contracts can be formed in a number of different ways, including through oral agreements, through letters that you write to gain permission to visit or photograph a site, or through more formal documents.

It is very important in all of these communications to work hard to prevent accepting conditions that will unduly limit the uses you will be able to make of a panoramic image. For example, if you indicate in a letter seeking access to a site that you will only use an image for a particular class, for a specific publication, in conjunction with an identified grant or project, or on a particular website, you may be contractually prohibited from using the image in another setting or for another purpose, even one that has an educational or research purpose. If you purchase a pass to enter a site, you may be subject to “fine print” you haven’t noticed that establishes — or purports to establish — contractual restrictions on your use of images made during a shoot. It is important to catch these constraints early and to negotiate changes you will need at the outset.

Again, this is an area where advice from counsel is recommended, but when in doubt it is often better to start with a broad permissions request that includes the right to utilize images made, for example, for any “educational, research or scholarly purpose and in any medium including print publications, web or digital media, or other forms of communication.” If you wish to obtain the rights to publish the images commercially, you should attempt to include such rights on your list of potential applications or uses as well.

3.4. PERMISSIONS AND RELEASES

Handling permissions and related legal issues affecting the taking of panorama images both within the U.S. and abroad is a complex task. Are you shooting in a public or private park or recreational area, a public or private building? Are there public law, contractual, or cultural restrictions that affect your access to or use of the space in question? Are you shooting in nature or will human subjects, buildings, or works of art be captured in your photographs?

PEOPLE

Depending on the shoot and the subject, people may appear in the image, either by design or circumstance. People provide a sense of scale or show how the space or object is used. However, taking photographs of people can raise legal and administrative problems for the photographer and the commissioner. Local authorities may object to photographs of women, children, participants in religious rites, protestors, or soldiers. People who happen to be in the area may not want their photos taken. Or they may want to be paid for it.

In many cases, model releases may be desirable from anyone who will appear in the panorama. The model release should include the following information:

- The photographer's and commissioner's names
- The rights being granted under the release, i.e., how the images will be used. It is smart to obtain the broadest rights possible since it is difficult to anticipate the different media and projects your images might be used in.
- What time period the release document covers. It is smart to obtain perpetual rights to use the images.
- The model's name, address, a signature, and signing date.
- If any compensation is being provided.
- That the model gives up any claim to copyright of the image or right to inspect the final product.

PLACES AND WORKS

If other works appear (such as sculptures, paintings, buildings, etc.), it may be necessary to secure permissions from the owners of that work (even if the work is publicly funded and freely available to the public)⁷ as well as the owners of the underlying copyrights in that work (which is not typically the same as the owners of the objects or art themselves). Actually possessing a work of art is not the same as possessing the work's copyright. In turn, a photograph of an object or picture may have a double set of copyrights, for both the object pictured and for the photograph itself. Your intended use of the work or any fees charged for access and distribution can also affect what rights need to be addressed. It is also important to recognize when you must obtain permission to shoot in

7. See also Sections 3.3.

a particular location, and if the owner intends to subject you to contractual responsibilities or limitations that may be incompatible with your project needs.

LANGUAGE AND CULTURE

Releases or other legal documents will need to be produced in the relevant language and be cognizant of any particular legal or cultural issues (such as images of children and, in some countries, women, taking images of religious buildings and sites, etc.). There is no substitute for local knowledge of law and custom, so if you have hired a Mr. Fix-It, ask for guidance in how to avoid legal or cultural conflict. It may be wise to consult a local attorney, particularly if you are working in a country with anticipatable complexities of law or custom.

3.5. PERMITS AND INSURANCE

Permit and insurance coverage requirements for the photographer can vary according to country and location. Work undertaken in local, state, or federal parks or facilities that require a governmental permit in the United States, will typically include a requirement of insurance coverage and sometimes a bond.

The U.S. National Park Service's rules state that "commercial filming activities taking place within a unit of the National Park system require a permit. Commercial filming includes capturing a moving image on film and video as well as sound recordings." Further, still photographers require a permit when "1. the activity takes place at location(s) where or when members of the public are generally not allowed; or 2. the activity uses model(s), sets(s), or prop(s) that are not a part of the location's natural or cultural resources or administrative facilities; or 3. Park would incur additional administrative costs to monitor the activity."⁸

If a permit is required, "liability insurance naming the United States as additionally insured in an amount commensurate with the risk posed to park resources" is also a mandate. "You may also be asked to post a bond to ensure the payment of all charges and fees and the restoration of the area if necessary."

Many insurance companies will issue short-term insurance policies to cover specific projects, and such companies are well acquainted with the special requirements imposed by governmental agencies. Nevertheless, it is important to research the insurance issues early so that costs are incorporated into your project budget and the schedule is not delayed by your inability to obtain a permit and insurance if such is required.

Beyond specific requirements imposed under governmental or private permits, it is important for panorama commissioners and producers to be savvy about liability issues and risks. If you are hiring others to do work in a dangerous area or foreign country,

8. <http://home.nps.gov/applications/digest/permits.cfm?urlarea=permits>

you may have special responsibilities as an employer or commissioner towards those individuals that must be addressed with your own legal counsel.

3.6. Additional Issues Relating to Architecture and Art

As noted above, when works of art or architecture are captured by panorama photography, special intellectual property issues arise. Paintings, sculpture, and other tangible forms of visual art have long been protected in the United States and most other nations. Unless specifically agreed to, physical ownership of a work of art does not bring with it ownership of the underlying rights of copyright, including the right to make and distribute visual images of the work of art. Thus, in most cases, exploration of your right to publish images of an artist's work will require exacting research into life of the artist, not "simple" permission from the object's current owner (although you will typically have to obtain permission from that current owner to engage in the photography in the first place, of course.) And, the duration of copyright is long. Susan Bielstein's blunt description of the term and the complexity of determining copyright for works of art is well worth considering:

Unless your research [*or in our case, images you've captured in a panaroma*] posts you squarely in the mid-nineteenth century or earlier, you are probably dealing with at least some works that are in copyright. Even for many works created in the nineteenth century, you may not be in the clear, for today in most countries copyright terms are linked to the death date of an author. In the European Union and many other countries, the period of copyright protection is the life of the artist plus seventy years [*her footnote adds: "Except, as noted earlier in Spain, where the term is the life of the artist plus eighty years, and in France, where military service during the two World wars has given artists a term of life of the artist plus 84 years and 203 days."*], a rule that applies regardless of when a work was created or first published...⁹

THE SPECIAL CASE OF ARCHITECTURE

U.S. copyright law long failed to protect works of architecture. In 1990, in part to bring the U.S. into conformity with other nations under the Berne Convention, the U.S. Congress enacted the *Architectural Works Copyright Protection Act*, Pub. L. No. 101-650, sections 701-706, 104 Stat. 5133 (1990) (codified throughout sections of the U.S. Copyright Statute, 17 U.S.C.A section 101 et. seq). This law now affords architects and designers a copyright interest in their completed architectural works; however, in a notable difference with the rules governing images of art, the law contains special and important exceptions **allowing photography of works of architecture from public places without the need to obtain permission**. In the United States, the copyright in an architectural work that has been constructed does not include the right to prevent the making, distribution, or public

9. Bielstein, *Permissions*, *supra* at p. 16.

display of images of the work if the building is located in or ordinarily visible from a public place. However, different laws and local customs affect rights to make images of buildings in other countries and it is important that you familiarize yourself appropriately when working abroad.

3.7. INTERNATIONAL COPYRIGHT

There is no general “international” law of copyright; works of intellectual property are treated differently around the world. If you will be working in a foreign country and using images of art or other works protected as intellectual property, it is important to work with a knowledgeable attorney or other expert to gain basic insight into the legal landscape and cultural conventions surrounding copyright and the photography of cultural, religious, or iconic objects.

Despite the great diversity of national regulation of copyright around the world, as the U.S. Copyright Office points out in its *Circular 38a - International Copyright Relations of the United States*, “most countries offer protection to foreign works under certain conditions that have been greatly simplified by international copyright treaties and conventions.”¹⁰ There are two principal international copyright conventions, the Berne Union for the Protection of Literary and Artistic Property (Berne Convention) and the Universal Copyright Convention (UCC).

The Berne Convention guarantees that: “Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention. “(Article 5.1) Berne signatory nations will enforce their own copyright laws to protect works that were created in other signatory nations and have the right to expect reciprocal treatment of their own works in foreign countries.

The World Intellectual Property Organization (WIPO), which was founded in 1967 to provide international protection of intellectual property, is a U.N. agency that administers IP matters and treaties, resolves international IP disputes, provides forums for debate, and promotes better understanding of IP. The WIPO web site¹¹ is a useful resource for information on international IP laws and enforcement.

An international group of copyright scholars meeting under the rubric of the “Zwolle Group” has developed numerous papers and other materials addressing copyright from

10. <http://www.copyright.gov/circs/circ38a.html#general>

11. <http://www.wipo.int/portal/index.html.en>

an international perspective. These materials are very helpful in gaining a basic overview of how copyright is treated in areas pertinent to university scholarship.¹²

3.8. ADDITIONAL RESOURCES AND REFERENCES

WEBSITES:

- The United States Copyright Office's information on copyright contains basic information on U.S. Copyright coverage and registration procedures.
<http://www.copyright.gov/circs/circ1.html>
- The Visual Resources Association's list of copyright resources and their Image Collection Guidelines.
<http://www.vraweb.org/resources/ipr/copyright.html>
<http://www.vraweb.org/resources/ipr/guidelines.html>
- The University of Texas, Austin has an excellent crash course on copyright as well as other materials.
<http://www.utsystem.edu/ogc/intellectualproperty/cprtindx.htm>.
- Stanford University Libraries has a page on copyright and fair use.
<http://fairuse.stanford.edu>.
- The University of Minnesota has a copyright information and copyright page and a summary of four basic points that should be used when determining whether fair use can be applied to a particular use. A fair use Analysis Tool is also available.
<http://www.lib.umn.edu/copyright>
<http://www.lib.umn.edu/copyright/fairuse.phtml#fourfactors>
<http://www.lib.umn.edu/copyright/checklist.phtml>
- Washington State University provides its faculty and students with information on university publishing copyright.
<http://publishing.wsu.edu/copyright>
- The University of North Carolina maintains a table showing when U.S. works pass into the public domain.
<http://www.unc.edu/~unclng/public-d.htm>
- Yale University Library has a web resource for university librarians about licensing digital information.
<http://www.library.yale.edu/~llicense>
- University of Maryland University College's Center for Intellectual Property has a list of links.
<http://www.umuc.edu/distance/odell/cip/links.html>

12. <http://www.dlib.org/dlib/january07/crews/01crews.html> and http://www.surf.nl/copyright/files/International_Comparative_Chart_ZwolleIII_1104.pdf

- Catholic University's Office of General Counsel has an excellent website on copyright.
<http://counsel.cua.edu/copyright/index.cfm>
- Indiana University's Copyright Management Center is an extraordinary resource.
<http://www.copyright.iupui.edu>
- The Electronic Frontier Foundation's mission is "defending freedom in the digital world;" their website has a wide range of information resources on copyright.
<http://www.eff.org>
- Center For Social Media, part of the School of Communications at American University contains links to papers, panels, videos, and documents centered on, among other things, copyright, fair use, and permissions.
<http://www.centerforsocialmedia.org>
<http://www.centerforsocialmedia.org/keywords/copyright>
- Free Expression Policy Project (FEPP) at NYU Law School is a source on research and advocacy on free speech, copyright, and media democracy. A good paper on fair use, "Will Fair Use Survive? Free Expression in the Age of Copyright Control," is also on this site.
<http://www.fepproject.org/index.html>
<http://www.fepproject.org/policyreports/fairuseflyer.html>

USEFUL RECENT BOOKS:

Bert P. Krages, *Legal Handbook for Photographers: The Rights and Liabilities of Making Images* (Michelle Perkins ed., Amherst Media, Inc. 2002)

Susan M. Bielstein, *Permissions, A Survival Guide: Blunt Talk about Art as Intellectual Property*, (Chicago: The University of Chicago Press, 2006)

Richard Stim, *Getting Permission: How to License & Clear Copyrighted Materials Online & Off*, (NOLO Press 2004)

William Strong, *The Copyright Book*, 5th edition (MIT Press, 1999)