



Expression  
Copyright

# Copyright Ownership

Eric E. Johnson

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Konomark  
Most rights sharable

## Ownership: Copyright vs. Material Object

This much is crystal clear (17 U.S.C. § 202):

- Ownership of a copyright is distinct from ownership of a physical, material object embodying a copyrighted work.
- Transfer of ownership of any material object doesn't convey copyright or any copyright rights.
- And transfer of copyright or any copyright rights doesn't convey any rights to any material object.

## IP PITFALL:

Not securing copyright ownership despite paying for it

### **Some important context: Transfers and licenses:**

- Copyright transfers (assignments and exclusive licenses) must be in writing.
- Non-exclusive licenses need not be in writing and can be implied.
- With works made for hire, the employer is the author, and no assignment from worker to hirer is necessary.

## Who owns the copyright?

- The general rule: The author (creator) of a copyrighted work owns the copyright.
  - Copyright can be assigned to another person, however.
- Exception: “works made for hire”
  - The copyright to a work made for hire is owned by the hiring party.
  - The hiring party is considered the author of a work made for hire.
  - Determined by 17 U.S.C. § 101.
  - Courts tend to be very strict in applying the statutory requirements.

## Two ways a work can constitute a “work made for hire”

- The work is prepared by an employee within the scope of employment
- The work is specially commissioned, under certain circumstances

## **Employee/scope-of-employment works**

- To qualify, there must be a real, bona fide employee/employer relationship.
- The agreement of the parties about the status of their relationship does not control.
- Employment status is determined under the common law of agency. (*CCNV v. Reid*)
- A few of the factors courts look at:
  - Employer's control over the work
  - Employer's control over the employee
  - Employer is in the business of producing such works
  - Indicia of employment: Taxes withheld from employee's pay check, etc.
  - *More on next slide ...*

## **Employment vs. Independent Contractor Under Agency Principles (CCNV)**

- hiring party's right to control the manner and means by which the product is accomplished
  - the skill required
  - the source of the instrumentalities and tools
  - the location of the work
  - the duration of the relationship between the parties
  - whether the hiring party has the right to assign additional projects to the hired party
  - the extent of the hired party's discretion over when and how long to work
  - the method of payment
  - the hired party's role in hiring and paying assistants
  - whether the work is part of the regular business of the hiring party
  - whether the hiring party is in business
  - the provision of employee benefits
  - the tax treatment of the hired party
- No one of these factors is determinative.

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## Employment vs. Independent Contractor Under Agency Principles

*According to empirical work by Prof. Ryan Vacca:*

**Most important to courts:**

- the tax treatment of the hired party
- the provision of employee benefits
- the method of payment

**Next most important to courts:**

- whether the hiring party has the right to assign additional projects to the hired party
- the skill required
- the source of the instrumentalities and tools

[Source: Ryan Vacca, *Work Made For Hire -- Analyzing the Multifactor Balancing Test*, 42 Fla. St. U. L. Rev. 197 (2017); <https://ir.law.fsu.edu/lr/vol42/iss1/8>]

## **Specially commissioned works**

- There must be an express written agreement saying that the work will be considered a work made for hire, signed by both parties, and
- The work must be for use as one of the following:
  - a contribution to a collective work
  - a part of a motion picture or other audiovisual work
  - a translation
  - a supplementary work (e.g., forewords, charts, tables, appendixes, indexes that would accompany the author's main text in a book)
  - a compilation
  - an instructional text
  - a test
  - answer material for a test
  - an atlas

## **Assignments**

- Even without qualifying for work-made-for-hire doctrine, a hirer can still get the copyright through an assignment.
- An assignment requires a writing signed by the assignor with express words of assignment.
- But being an assignee is not as good as being the author under work-made-for-hire doctrine ...
  - An author/assignor can recapture copyright around 35-40 years later through 17 U.S.C. § 203.
  - But if a work is a work-made-for-hire, then there is no statutory recapture.

Question: Who owns the copyright to wedding photos?



Question: Who owns the copyright to wedding photos?

Let's assume you just agree to pay the photographer \$\_\_ for the wedding photography and there's nothing in writing.

## Employee/scope-of-employment works

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**In this case, the photographer owns the copyright. That means they could commercially exploit your photos, selling them as stock photos.**

Review

Would a photographer really sell your wedding photos as stock photography?

Would a photographer really sell your wedding photos as stock photography?



**Yes.**

Would a photographer really sell your wedding photos as stock photography?



(Note lack of faces.  
Copyright and right of  
publicity are separate.)

**Yes.**

How can the hirer get the  
copyright?



**How can the hirer end up with the copyright to the work of the hired person?**

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Review

## Work-for-hire + assignment provision

22.1 Title. Company and University intend this to be a contract for services and each considers the Work and any and all documentation or other products and results of the services to be rendered by Company hereunder to be a work made for hire. Company acknowledges and agrees that the Work (and all rights therein) belongs to and shall be the sole and exclusive property of University.

22.2 Copyright Assignment. If for any reason the Work would not be considered a work-for-hire under applicable law, Company does hereby sell, assign, and transfer to University, its successors and assigns, the entire right, title and interest in and to the copyright in the Work and any registrations and copyright applications relating thereto and any renewals and extensions thereof, and in and to all works based upon, derived from, or incorporating the Work, and in an to all income, royalties, damages, claims and payments now or hereafter due or payable with respect thereto, and in and to all causes of action, either in law or in equity for past, present, or future infringement based on the copyrights, and in and to all rights corresponding to the foregoing throughout the world.

Company agrees to execute all papers and to perform such other proper acts as University may deem necessary to secure for University or its designee the rights herein assigned.

*(From: "Miscellaneous Sample Clauses - University of Texas System")*

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Company agrees to execute all such documents as University may deem necessary to carry out the provisions hereof and to designate the rights herein assigned to University.

(From: "Miscellaneous" system")

**FWIW, this typo is original to the UT language. I originally accessed this in 2013, and in 2022, it's still there on their website.**

## Work-for-hire + assignment provision

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**I like to add something that speaks to a specific category of specially commissioned work, such as "collective work":**

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The parties acknowledge that Photographer's work and services hereunder have been specially ordered or commissioned by Hirer for use by Hirer as a contribution to a collective work.

**This is the belt-and-suspenders approach.**

(From: "Miscellaneous" system")

## Work-for-hire + assignment provision

I like to add something that speaks to a specific category of specially commissioned work, such as "collective work":

That, in fact, is what I did for my own wedding. And yes, they really were for a collective work ...

This is the belt-and-suspenders approach.

(From: Miscellaneous ... system")

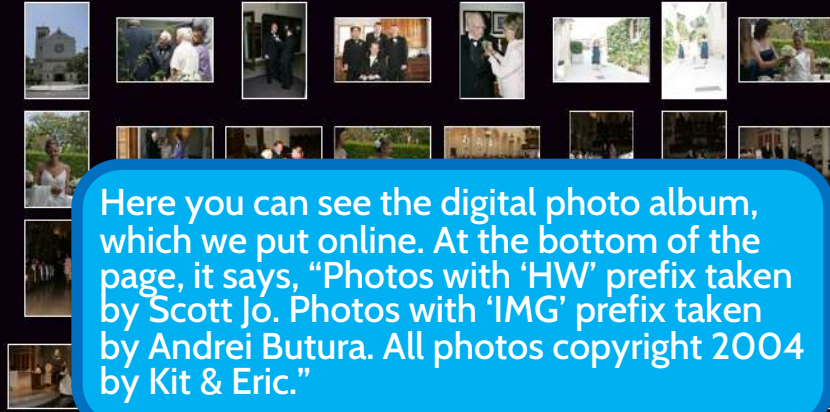
Kit & Eric - June 26, 2004

Page 1 of 8



Photos with "HW" prefix taken by Scott Jo. Photos with "IMG" prefix taken by Andrei Butura.  
All photos copyright 2004 by Kit & Eric.





Here you can see the digital photo album, which we put online. At the bottom of the page, it says, "Photos with 'HW' prefix taken by Scott Jo. Photos with 'IMG' prefix taken by Andrei Butura. All photos copyright 2004 by Kit & Eric."

Photos with "HW" prefix taken by Scott Jo. Photos with "IMG" prefix taken by Andrei Butura.  
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© 2004 Kit & Eric

**And now for a  
bonus tidbit about  
publicity rights,  
waivers, and  
model releases ...**

**How can a hired party  
commercially exploit photos  
with faces?**



**Crystal Smith's Photography**

WEDDING DATE: \_\_\_\_\_  
Wedding Photography

Print TWO copies: fill in the following information, read and initial all pages and return. Both bride and groom must sign. The photographer is not responsible for mistakes due to missing or incorrect information.

Bride's name: \_\_\_\_\_ email: \_\_\_\_\_ phone number: \_\_\_\_\_  
 Groom's name: \_\_\_\_\_ email: \_\_\_\_\_ phone number: \_\_\_\_\_  
 Ceremony time and date: \_\_\_\_\_  
 Name of venue: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 Reception time and date: \_\_\_\_\_  
 Name of venue: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 Color Scheme: \_\_\_\_\_

**Coverage (\$120 per hour)**  
 (2 hour minimum. Go by 30 minute intervals. I don't charge for the 10 hours postproduction time for edits.)

Location 1: TIMES ( : )to( : ) Address: \_\_\_\_\_ Hour Total: \_\_\_\_\_  
 Event being shot: \_\_\_\_\_  
 Location 2: TIMES ( : )to( : ) Address: \_\_\_\_\_ Hour Total: \_\_\_\_\_  
 Event being shot: \_\_\_\_\_  
 Location 3: TIMES ( : )to( : ) Address: \_\_\_\_\_ Hour Total: \_\_\_\_\_

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**This is a real wedding photography written agreement I found on the website of a wedding photographer.**

wedding or event; third offense, Photographer will end wedding coverage immediately and leave the event. Photographer shall be entitled to retain all monies paid hereunder and client agrees to relieve and hold Photographer harmless as a result of incomplete wedding or event photography coverage.

**Coverage:** Photographer will provide coverage for the dates, locations and continuous hours specified in this Agreement. Additional travel or coverage hours may be added by agreement on the wedding day and must be paid in full before any photos or products are released to the Client. Every reasonable effort will be made to take requested pictures, but no specific pose or photograph can be promised. Any files supplied will be used for organizational purposes only. Images determined by the photographer to be substandard or duplicated may be edited out. The Photographer will use her professional judgment and sole discretion to select which photos to deliver. Such selection shall constitute all images that will be made available to Client.

**Image Processing/Printing:** Unless agreed upon prior to any editing work, high-resolution discs and/or proof sets may contain a mixture of color, and black and white. An alternate color version of a photo may be purchased at the current rate. Limited color correction and/or retouching are included at Photographer's discretion. Client may request further changes for an additional charge. Photographer is not responsible for any prints that are not ordered directly from her. For best results, clients with the high-resolution files should order their prints through a reputable lab.

**Model Release:** This contract serves as a model release giving the Photographer the irrevocable right to use the photographs in all forms and in all media and in all manners, without any restriction as to changes or alterations, for advertising, trade, promotion, exhibition, or any other lawful purposes. The Photographer can grant use of the images to third parties and all compensation for use and credit for the images remain the property of the photographer. Client waives any right to inspect or approve the photograph(s), finished version(s) incorporating the photograph(s), or the use to which it may be applied, including written copy that may be created and appear in connection therewith. This release is binding on the Client, their legal representatives, heirs, and assigns. Initials \_\_\_\_\_

**Copyright:** All photographs taken by Crystal Smith are her property, will remain her property and are protected by United States Copyright Laws (USC Title 17). Client hereby waives any claims for ownership, income, editorial control and use of the images. Violators of this federal law will be subject to its civil and criminal penalties.

I have read, understood and agree to the terms and conditions of this Agreement. Each person signing as Client below shall be fully responsible for ensuring that full payment is made pursuant to the terms of this Agreement.

Total for Services due: \_\_\_\_\_ Deposit Paid: \_\_\_\_\_ Date: \_\_\_\_\_

Photographer: \_\_\_\_\_ Client: \_\_\_\_\_

Date: \_\_\_\_\_ Date: \_\_\_\_\_

The total balance is due 30 days before wedding date.

CrystalSmithsGlamourStudio

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CrystalSmithsGlamourStudio

**model release!**

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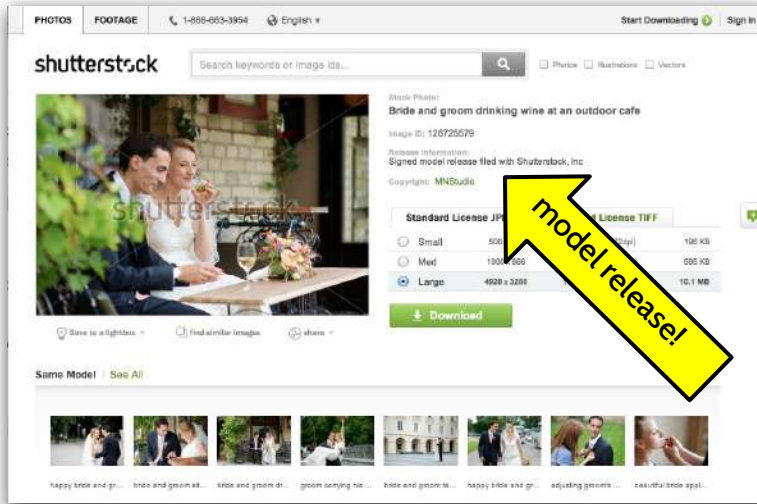
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But would a photographer *really* sell your wedding photos showing your faces as stock photography?

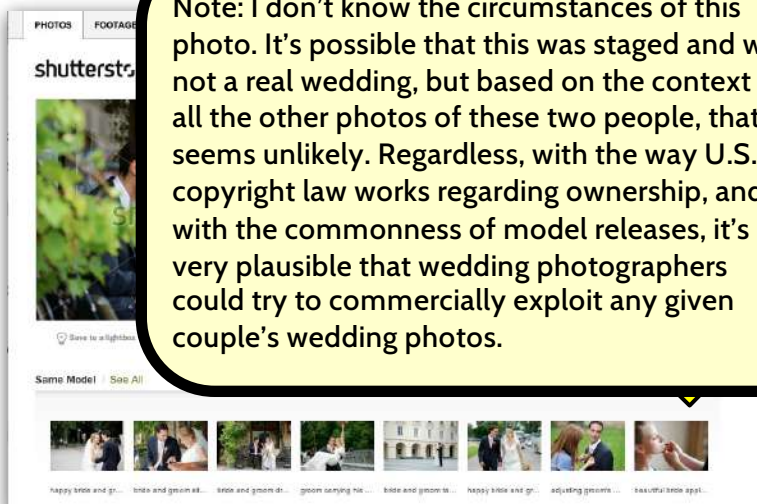
But would a photographer *really* sell your wedding photos showing your faces as stock photography?

Yes.



But would a photographer *really* sell your wedding photos showing your faces as stock photography?

Yes.



Note: I don't know the circumstances of this photo. It's possible that this was staged and was not a real wedding, but based on the context of all the other photos of these two people, that seems unlikely. Regardless, with the way U.S. copyright law works regarding ownership, and with the commonness of model releases, it's very plausible that wedding photographers could try to commercially exploit any given couple's wedding photos.