

IP Rights in Photographs

1. General

- Photographs constitute personal data so you must get consent from all the individuals concerned before you display their photographs
- Everyone who agrees to appear in a commissioned photograph should provide their express written consent to publishing via a consent form.
- Photographs featuring pictures of people and any consent forms which accompany them are considered to contain personal information and should be stored securely
- Since photographs may reveal details of the subject's race and ethnic origin they are classified as sensitive personal data
- Generally photographs should only be used and retained where strictly necessary

2. Working with images for which we do not have Express [Written] Consent to publish.

If subjects were aware their photo was being taken at the time:

- Images can be used to update an existing publication in which they have already appeared
- Images cannot be used in a new publication unless the subject cannot be identified (e.g. due to blurring or silhouette)

If subjects were not aware that their photo was being taken at the time:

- Images cannot be used in any publication unless the subject cannot be identified

If the images feature pictures of children for which we do not have express written consent to publish:

- Images cannot be used in any publication unless the subjects cannot be identified.

3. Under UK law photographs are recognised as copyright works provided time, skill and labour has been expended in producing them. Generally, the author of the photograph will be the owner of the copyright in that photograph and the author of the photograph is the person who creates it. In this case, this will be the photographer.

Where, as is the case at hand, the taking of a photograph has been commissioned and there is no express agreement in place between the photographer and the commissioner of the photograph, the general rule is that the photographer will own the copyright in the photograph. The commissioner will have an implied licence to use it, either generally or at least for the purpose for which it was commissioned. If the commissioner wants to own the copyright then a written assignment from the photographer is required.

Further if a photograph is made specifically for the commissioner's business and at its expense and neither party can have contemplated that the photographer would have any genuine use for the photograph himself, it may be that an *agreement* to assign the copyright can be implied. If you would like me to draft such an assignment under the supervision of one of the fee earners in IP I would be happy to.

You also wanted to know what the implications were if the photographs were taken at a private function. There is an additional right attached to photographs, which are commissioned for private and domestic purposes, such as for a private function or a family portrait, namely the right of the commissioner to privacy in respect of such photographs. This right is a moral right known as the "privacy right".

The commissioner of a photograph for private and domestic purposes has the right not to have copies of the photograph issued to the public nor to have the photograph exhibited or shown in public nor to have the photograph included in a broadcast or cable programme service.

This right of privacy is distinct from copyright. It is likely that the photographer will retain ownership of the copyright in accordance with the general rules set out above with the commissioner having an implied licence to use the photograph at least for the purpose for which it was created. This will generally not extend to making further copies.

In respect of the taking of photographs of children (defined as those under 18 years of age) you would need to consult the child protection policy for the event you are at, if this is the case. Some will say no photography, some will say selected, some will say vetted photographers only.

Section 45 of the Sex Offences Act 2003 amended S.1. Protection of Children Act (POCA) 1978 in May 2004 by raising the age of a 'child' from 16 to 18. Now section 1 POCA 1978 makes it an offence to; take, make, allow to take, distribute, show, possess with intent to distribute, or advertise indecent photos or pseudo-photographs of children under the age of 18.

Recommendations:

The following steps should be taken to reduce the potential for misuse:

- Avoid using children's full names in photograph captions. Consider the use of first names instead, but avoid full names if an image is being shown.
- Avoid using any names if it is possible from the image to ascertain a specific location, i.e. where a School name/ Company name is visible in the photo or a well known landmark is in view.

- The dress of a child should be considered when using the photo. If it is a posed shot, i.e. being presented with a medal or a team photograph, try to ensure that the child is fully clothed, e.g. in a track-suit or similar. If it is an action shot, taken during the activity, try to use profile imagery or avoid, if possible, full length shots. Alternatively, use digital software to blur the child's facial features
- Always use a parental consent form to ensure that the parent or guardian is aware that a child's image is being used. Try to avoid reliance on blanket acceptance procedures as part of consenting to take part in an event.
- Ensure you have obtained the child's permission to use their image. This ensures that they are aware of the way their image is being used to represent the sport. Use of a suitable permission form would address this.
- Be aware of the Data Protection Act and the use and storage of materials with people names and images included on them. Specific permissions must be sought for this from the persons and where applicable their parents/guardians.