



# Guidelines on Photographer (& Contributor) Representation Agreement

The following are the guidelines on the 2017 version of the photographer's representation agreement, which covers the license of Images from photographers to photographer's representatives. Please read this entire document carefully as it is extremely important that you understand both the Agreement and any comments on it.

**Please note that the agreement may apply to individual and corporate contributors. If you use the template for an incorporated entity, you may consider using the term "Contributor" rather than "Photographer" throughout the agreement.**

There are huge variations in working practice across the industry. The new Agreement aims to cover those that affect most libraries and create a document that is an industry standard but clearly cannot cover all situations.

BAPLA issues the photographer's representation agreement to its members as a benefit of membership. It is not a condition of membership that members adopt it with their contributors. It is important that you judge whether it is suitable for you and your needs and that you make appropriate amendments (preferably with legal advice). If you do not understand a clause then do seek advice before deleting or amending it as it has probably been put there to protect you.

If you already have existing agreements with photographers or use the old terms and conditions you will need to decide whether you would like to update the terms and conditions with your contributors or whether you will continue acting on the old terms. If you plan to update your photographers with this agreement you should make and sign two copies and send both to the photographer for him/her to sign and return one copy to you. When the photographer returns the document it is essential to check whether the photographer has made any changes to the agreement before you file it. If changes have been made you should acknowledge and agree to these if you are happy to do so. The photographer is not obliged to sign the new Agreement and the old one continues until you bring it to an end (usually by giving proper notice).

## **FRONT PAGE**

The front page is intended to provide a short Memorandum of Agreement between you and the Photographer and to set out most of the variable terms. Most Agencies will be able to have standard agreed terms printed up and only change the front pages in their dealings with Photographers. **It is important that you put any urgent or exceptional information here to raise them to the photographer's attention.**

## **1 PHOTOGRAPHER**

- Some Agencies may prefer to use the term “Contributor” particularly if they are dealing with Estates or other Rights Holders who have not themselves taken the photographs.
- It is important that you insert the correct identity of the Photographer.
- It is sensible to put in the Photographer’s VAT number here.
- There is also a reminder to the Photographer to give you any new contact details as they arise.

## **2 THE LIBRARY**

- It is likely that Agencies will prefer throughout to define themselves not as “the Library” but as their name e.g.: “Fame Agency”.
- It is important to put in the proper identity of each party e.g.: if the Photographer is an Estate then the names should be properly set out. If the Library is a limited company then the proper company name should be put in. If it is sole trader or partnership then the names of the owners should be stated as well as the trading name.

## **TERRITORY**

This is becoming more difficult to restrict as Images are sold over the internet and the territory will therefore commonly be the World. If the territory is to be limited then note that under clause 5.2 the Library can grant any rights, including worldwide rights, to any client within the territory but cannot grant rights to clients outside the territory.

## **INITIAL DURATION**

See the comments at clause 15.

## **SOLE/EXCLUSIVE/NON-EXCLUSIVE**

See the comments at clause 5.

## **FEE**

Many Libraries call this a commission rate.

## **OTHER SPECIAL TERMS**

This could cover any expenses to be charged or any exceptional terms not set out elsewhere.

## **AGREED TERMS**

This Agreement anticipates that the parties are independent contractors rather than being bound by the agent-principal relationship in a strict legal sense (see 5.1 below).

## **1 APPOINTMENT**

This Agreement anticipates that the parties are independent contractors rather than being bound by the agent-principal relationship in a strict legal sense (see 5.1 below).

## **2 IMAGES**

The word Image is used throughout the terms and has replaced the words “material” or “photographs” in the old terms and conditions. “Image” is used here in its broadest sense.

It is not defined as this would restrict its application to those definitions. We wanted to make this document as future proof as possible with regard to any future developments as to what constitutes an image.

2.1.1 **What are Images?** The only way the images are defined is as material detailed in Schedule A or *any other material the photographer deposits with you*. This means that on signature of the Agreement you **MUST** attach to the Agreement a full schedule (in whatever form - *a database reference may be fine*) of all material which has been delivered to you by the photographer. This may be difficult for those Libraries who are given large amounts of material and especially so if the photographer does not catalogue material they send in. However, Libraries should have a record of what material they control and this should be agreed with the Photographer. It can cause great difficulties later if, for example, a Photographer claims you did not have exclusive rights to a particular image or claims that material given to you has not been returned or has been lost. In order to license the material you will have to catalogue it in some way and therefore schedules should be added to the Agreement both at the beginning and when further material is delivered.

2.1.2 Note: the contract states that all material under previous contract will be covered in this new agreement.

2.1.3 **What is the arrangement for new material to be added during the Agreement?** This is defined as *any other photographic material which any time during the Agreement the Photographer deposits with the Library*. This clause may need to be amended in accordance with your practice and agreement as to what is to happen with new material. Is all material “photographic” in nature? Note that if you accept video or illustrations you should remove the word “photographic” (included in square brackets in bold in the first line of clause 2.1.3). Do you agree to accept all new material which the Photographer creates? Is the Photographer obliged to send you all new material or can they offer it elsewhere? Are you obliged to take all material which is offered?\* If you operate an acceptance process, add “and that the Library accepts” here. \*You may wish to further state here that you are not agreeing to represent all the material sent to you either speculatively or on request.

2.2 The Photographer undertakes that Images will be correctly and properly captioned. \*If you have your own policy on captioning insert this here.

2.3 The Images will remain the property of the Photographer and the Photographer should insure them to their replacement value. Insurance is a thorny question for those Picture Libraries and Photographers who still work with valuable and original transparencies because it is both difficult and expensive to obtain insurance accept that which covers material cost. Therefore, you should encourage photographers to keep copies or scans of all material.

This Agreement states that **the Library will not be responsible for any loss or damage to the images however caused** - you may wish to amend it to state that the Library will take reasonable care of the Images while in your possession. If you choose to omit this wording, and you were negligent, the Photographer could sue

you for their loss (libraries working with original material may wish to see also The Law of Photography and Digital Images pp 603.)

#### **2.4 What is the arrangement for material to be removed during the Agreement?**

Here the Library is entitled to return Images which it considers outdated or surplus to its requirements and that material will no longer form part of the Agreement. If any material is returned under this clause then the Photographer will be free to license it elsewhere even if there is an Exclusive Image Agreement in force. Note that a Photographer may not remove part of their material or unilaterally change the terms or restrict their use during the Agreement. If they wished to do so, they would have to terminate the whole agreement on notice and see if you would be prepared to negotiate a new agreement for part only of the material.

If your library holds large volume of analogue material you should seek legal advice on additional protections such as limitation of liability and returns policy so that you can limit your exposure as the keeper of somebody else's materials.

The agreement permits you to hold digital copies after termination of the agreement (see also clause 15.3.3). Given the number of digital copies that get created in the life of the contract, it may not be possible to remove all copies. While you must undertake an effort to do so, you are entitled to keep a digital copy for archiving purposes.

### **3 WARRANTIES**

- 3.1 This clause should be deleted if the contributor is not the Photographer. In that case the rights are covered by 3.4.
- 3.2 The Photographer promises that all captions or rights information pertaining to the Images are and will remain full and accurate and all duplicate Images are identified as such. This puts on the onus on the Photographer to ensure that they update you in relation to any information regarding the Images.
- 3.3 The Photographer promises that s/he is exclusive owner of the whole copyright in the Images.
- 3.4 The Photographer promises that s/he has all rights to sell all rights in the Images.
- 3.5 This is a very important clause. The Photographer promises that s/he has all permissions needed for exploitation by third parties of any of the rights in the photographs including, if necessary, model releases, property releases, trade mark releases, etc. This is becoming increasingly important as there have been a number of cases taken by subjects of photographers, most notably the Naomi Campbell case, and the Panini case in relation to incidental inclusion, in which the subjects have been successful in limiting the right to use Images. You should note also that in the standard BAPLA terms and conditions of submission and reproduction of pictures, you do not in fact warrant that any such underlying rights are cleared and ask the customer to make their own investigations. This clause would allow you to make a claim against the Photographer if it turned out that you have not been notified and a claim is successfully made against you. The

aim of this clause is to prompt the photographer to bring to your attention any possible areas of concern that he/she may be aware of in the material. e.g. property releases.

- 3.6 This asks a Photographer to actually inform you in a schedule (or by a database reference or some digital rights management information) of any rights which have already been granted in any of the photographs.
- 3.8 The Photographer has to maintain accurate records and send you copies of all rights granted in the Images. This is here because more agreements are now on a non-exclusive basis.
- 3.9 The Photographer must reply to any request by you for information or rights clearances within three days of the request. If the Photographer does not respond within three days the rights will be deemed cleared. You may need to amend the time scale here or the system for clearing rights, if your practice is different. For some libraries three days is too long for say newspaper work.

#### **4 INDEMNITIES**

This sets out an indemnity under which the Photographer would have to pay you if s/he was in breach of any of the promises given above.

#### **5 RIGHTS**

- 5.1 Under this Agreement the Library is appointed as an independent Licensee. If you work as agent only, the Agreement will need substantial amendment.

**What is the difference between an agent and an independent Licensee (also known as a “principal”)?**

**Agency** If the Library is acting as an Agent then they are not taking any personal responsibility in respect of the work but are simply representing the Photographer, finding deals which the photographer enters into personally. (Think for example of an estate agent who puts a seller in touch with a purchaser but does not enter into the agreement for the sale of the property or an employment agency which introduces employer and employee but does not sign the employment agreement.)

**Liability** In those circumstances the Photographer is entering into a personal agreement with the end user and the Library is not responsible if any mistakes occur.

#### VAT and Commission

**End User** Although the Library will commonly send out invoices to the end user those invoices are sent on behalf of the Photographer and should have the Photographer’s name on them. If the Photographer is VAT registered then the Photographer will charge VAT to the end user and if not then the end user should not be charged VAT.

**Commission** The Agency charges the Photographer commission on the service to the Photographer. If the Agency is VAT registered it charges VAT on its commission

to the Photographer. The Photographer will not ever be in a position of charging VAT to the Agency.

**Principal or Independent Licensee** Most libraries do not act as agents but as Independent Licensees. This means that the Photographer licenses the Library rights in the Images and the Library can sell them on (This is similar to a bookshop buying books from a publisher on a sale or return basis).

Liability The Library is responsible if there are copyright or other claims which is why the terms and conditions are so important.

#### VAT and Commission

End User If the Library is VAT registered then when it sells work to the third party then it must charge VAT if it is VAT registered.

Library's Fee When a licence is granted, The Photographer is in effect charging the Library for its use of the photos and the charge it makes is its share of the licence fee (analogous to the wholesale price of a book.) The Photographer therefore charges the Library VAT on the fee if the Photographer is VAT registered. Although, strictly, the Photographer should provide the invoice to the Library, in practice the Library will normally provide a self billing invoice for the Photographer and will pay the monies due to the Photographer. It is therefore extremely important that the Library knows the Photographer's VAT status so that when it provides its self billing invoices it can add the VAT if necessary. If the Photographer has not informed the Library of its VAT status then the Library does not have to add VAT.

5.3 The Library is given full authority to negotiate all terms, commissions, licences and reproduction rights including the fee, duration and scope of any licence.

- Some agencies allow Photographers to have the final say as to whether they are going to enter any agreement or for example will allow that licences be granted but not a sale of the entire copyright.
- Some photographers will not allow agreement to copying, manipulation, etc.
- The Library can negotiate licences for terms which exceed the duration of the Agreement but again this is something that you may wish to delete.
- The Library can also agree on behalf of a photographer to omit the credit line if this is customary in a particular type of a licence (e.g. in some commercial uses).

5.4 This gives the Library the right to scan or make duplicates of Images and store and deliver them digitally. Many Libraries do charge the Photographer the cost of this but some do not. Some libraries charge expenses up front, others may prefer to recoup the charge from the first sale. In the alternative some libraries will absorb the cost into the fee, i.e. commission split, whereby the library takes a higher percentage. See clause 15 in relation to ownership of this material.

## 6 EXCLUSIVITY

This is a clause that you need to consider most carefully as it is one of the areas where there is the widest disparity of practice in the Industry.

**What is sole agency?** If you are a **Sole Agent** then you are the only agent who the Photographer may use but the Photographer is still entitled to sell their Images personally.

**What is exclusive agency?** If you are an **Exclusive Agent** then only you may sell the Images and the Photographer is not entitled to sell the Images personally but must direct all enquiries to you.

**What is non-exclusive agency?** If you are a **Non-Exclusive Agent** then the Photographer can sell the rights elsewhere and can also appoint other agencies.

**Can exclusivity can be limited?** Yes exclusivity can be limited in many different ways -

- by territory e.g.: England, the world, etc,
- by subject e.g.: nature photography,
- by image i.e. you are the **Exclusive Agent** for some of the Images but the Photographer may take other Images elsewhere,
- by medium e.g.: you are the **Exclusive Agent** for newspaper and editorial use but not for advertising.

You must consider very carefully with the Photographer exactly what rights are granted and make sure that the Photographer understands what rights are granted and what their obligations are in relation to the reserved rights. This cannot be set out in detail in the Agreement because arrangements vary so much but is perhaps the most important part of the Agreement to draft accurately. A Photographer may have more than one specialisation and you may only require exclusivity in one of them.

At present point 5 refers to territory exclusivity and any special points about exclusivity are set out the special terms.

6.1 In addition to exclusivity you may have a **Non-Exclusive Agreement** but have an outright ban on placing any other images with a particular class of competing libraries e.g. nature picture libraries.

6.2 Whether or not there is an exclusive agreement the Photographer is obliged to notify you if images are placed with another agency.

6.3 Even if there is Image exclusivity, Photographers may have similar Images and this prevents them from licensing any confusingly similar Images.

## 7 APPOINTMENT

7.1 This states that the Library is an independent Licensee, not an Agent. Obviously if you are acting as an Agent this clause would have to be amended.

7.2 This clause confirms that the library has the right - and not an obligation - to license images, and for such licenses to be at prices of its choosing.

7.3 The Library may use sub Agents or Licensees in overseas territories. It is not a requirement to detail which agents.

## **8 FEE**

This should be self-explanatory.

## **9 PAYMENT**

You will send the Photographer statements not less than 30 days after the end of each quarter setting out all monies received. The Agreement states that if the amount is under £100, no statement will be sent or payment made. Many agencies may prefer to send statements even if they are not making payments.

## **10 BOOKS AND RECORDS**

You agree to keep professional books and records and allow the Photographer to inspect them.

## **11 NON RESIDENCE**

You will negotiate for Certificates of Non Residence to avoid deduction of income or withholding tax.

## **12 ADVERTISING AND PROMOTION**

You should check that this is compatible with your practice.

12.1 This states that the Library can make a charge to the Photographer for the inclusion of the Images in promotional material but the charge must be agreed with the Photographer in advance.

## **13 LOSS OF IMAGES**

If any Images are lost any compensation that is received will be split in the proportion which you share profits after deduction of legal costs and expenses. You may prefer that any revenue is shared equally between the Library and the Photographer.

## **14 LITIGATION**

You are not obliged to take litigation for infringement of copyright, loss of Images or any other matter.

## **15 DURATION**

15.1 This Agreement has an initial duration of the stated term and will then continue unless terminated by either party giving 12 months' written notice to the other. You may wish to amend this notice period.

15.2 However, the Agreement can be terminated immediately by notice in writing if one of the parties is declared bankrupt or is in breach. At present it does not automatically terminate if one party dies but you may wish to include this.

15.3 After the date of termination no further licences will be granted and the Images will be returned as soon as reasonably practicable. You must also return all duplicates and prints which the Photographer has paid for. You must delete all digital files and destroy any prints, scans or duplicates for which the Photographer has not paid-or you can offer them to the Photographer at cost.

## **16 ASSIGNMENT**

16.1 The Library is entitled to transfer the rights under the contributor agreement to another person. The Photographer cannot do that.

## **17 FEES AFTER TERMINATION**

Fees will still be paid after termination and on any other exploitation including extensions or renewals.

## **18 ENTIRE UNDERSTANDING**

This Agreement cannot be varied except in writing signed by both parties. If you plan to update your photographer's agreement, make and sign two copies and send both to the photographer for him/her to sign and return one copy.

## **20 DISPUTES AND GOVERNING LAW**

The Agreement is governed by the Laws of England and Wales and subject to the exclusive jurisdiction of the English and Welsh Courts. If you wish to put in another jurisdiction then you should obtain independent legal advice.

## **SCHEDULE A**

This contains a list of the Images.

## **SCHEDULE B**

This contains the restrictions on the use of the Images.

- Ends -

This version of the notes and contract were updated in June 2017.

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