



Why You Need Releases

An ASMP Tutorial: Part 1

Knowing your legal responsibilities is another important aspect in the business of photography. And this is especially true in regard to model releases, because this is an essential way for photographers to protect themselves. Understanding why they are necessary and in what situations they are needed is explained in depth in the two part tutorial, courtesy of the American Society of Media Photographers (ASMP). Part 1 explains why releases are needed, rights of privacy and publicity, the concept of defamation, the importance of taking this seriously and special considerations for the 21st century.

In addition to the two part tutorial presented in Resources, the ASMP website has excellent information including Frequently Asked Questions about releases and another FAQ about privacy and libel issues as well as sample releases that are available for download by members. For this information and other articles visit: <http://www.asmp.org/>

Why You Need Releases

A release is a written agreement between you and the person you are photographing, or the person who owns the property you are photographing. The purpose of the release is to protect you from any future lawsuits the person might file for claims such as defamation and invasion of privacy.

A model release says the person being photographed has given consent to be photographed and to the use of the images you capture. It doesn't just apply to professional models or situations where people know they are posing for photos. You should seek to get a signed model release any time that your photos contain recognizable images of people, unless you are certain that you will never want to use them for anything other than editorial purposes.

A property release says that the owner of a certain property, such as a pet or a building, has given you consent to take and use images of the property. You don't need one for public property, such as government buildings (although you may run into problems just from photographing them, for security reasons). But for images of private property — and particularly of objects that are closely identified with specific people — you are safer if you get a release.

The releases you obtain should be saved forever and should be linked in some way with the photographs to which they relate. You can expect to be asked to produce them whenever you license an image, and you will need them if you ever have to defend yourself in court.



The Right of Privacy

Although the laws of the 50 states vary, all states recognize that individuals have a right to be let alone in their daily lives and that harm (in the form of embarrassment, scorn or loss of status) can result if that right is violated.

However, the right of privacy is not absolute. In particular, the courts have long held that news reporting and social, political and economic commentary — the things the First Amendment was designed to protect — are more valuable to society than an individual's right to be let alone. Therefore, images that are part of the public colloquy about events have usually been exempt from privacy lawsuits. In contrast, the courts have generally held that making money is distinctly less valuable to society than the right to be let alone.

Thus, privacy issues typically arise when an image is used for purposes of trade or advertising. That is, it's not the picture, but how it is used that determines the need for a release. For instance, an image that is printed in a newspaper, shown in an exhibition or reproduced in a book might well be immune from a privacy suit. But the commercial sale of coffee mugs or t-shirts with the same image would probably not enjoy such protection. An advertisement almost certainly would not be immune.

Therefore, if you are on an advertising assignment, you will need to collect releases from every person in your shots. News assignments are a little trickier. You are always better off if you have permission to photograph your subjects and can prove it. But it's not always possible to get permission and, in the U.S., you can report the news without it. Lacking a release, however, you are limited in how you can license the image later on.

These days, even editorial clients are requiring releases — and releases using their specific forms — with more and more frequency, so you need to check the terms of your agreements with your clients and stock houses to see what is required.

The Right of Publicity

In an increasing number of states (California in particular), a famous individual has an additional "right of publicity": the right to control how his fame can be exploited for commercial purposes. Unlike rights of privacy, which die with the persons to whom they belong, rights of publicity survive their owners and can be passed along for generations. Rights of publicity also tend to be more specific in their prohibitions than rights of privacy.

Attorney Andrew Berger offers a more in-depth explanation of this right, with examples, on the Editorial Photographers web site (<http://www.editorialphoto.com>).

For photographers and their clients, the right of publicity can become a problem when people become celebrities after you have taken their picture. It can especially be a problem with crowd scenes.



Defamation

A defamation lawsuit alleges that a person has been portrayed falsely or maliciously in such a way as to damage his reputation. (The term “defamation” includes both slander, which is spoken, and libel, which is published in some tangible medium.) The falsity may be direct, such as by compositing several images to depict a scene that did not happen, or indirect, such as advertising a rehabilitation clinic with a picture of someone who has never been a patient there. As always, there is a distinction between commercial use and editorial use, with commercial uses being held to stricter standards of truthfulness.

Property Owners’ Rights

Privacy and defamation cannot apply to objects (although defamation can apply to business entities). Things — cars, buildings, statuary, costumes, animals, etc. — don’t have legal rights. But the people who are closely associated with those objects do have rights and could claim that your photo of their property has caused harm. This is a tricky area of law, with few precedents to guide us. We discuss property releases in more detail on a separate page on the ASMP website (see Legal releases/About Property). In general, though, we advocate following the cautious rule, “When in doubt, try to get a release.”

Why We Take This Seriously

Most of the time, you take your pictures, everybody gets paid and that’s the end of it. Once in a while, though, things can go very wrong.

An article in the Los Angeles Times for Feb. 1, 2005 describes how Nestlé got slapped with a \$15 million jury award because it used a model’s picture without taking care of the paperwork. In this case, there was no blame on the photographer; rather, the client (Nestlé) was accused of failing to pay all the fees that were specified in the model’s contract. But the size of the verdict shows that juries do take model’s rights very seriously.

The passage of time doesn’t necessarily reduce your risk. In the Nov. 22, 1999, edition of the New York Observer, an article relates that Peter Beard was threatened with a lawsuit for a photo he’d taken a dozen years earlier. In 1987, Beard had photographed a 17-year-old girl near Lake Rudolph in Kenya. But by 1997, that girl had moved to Los Angeles, where she was waiting tables and looking for work as a model. A New York friend called to tell her that a SoHo gallery was selling her picture for thousands of dollars. She reacted by hiring a lawyer and demanding \$50,000 plus 15 percent of Beard’s sales. (It appears that the matter was settled out of court, so we don’t know what really happened.)



Special Considerations for The 21st Century

In recent years, two changes have come to pass, one technical and the other social. Both require special care in the wording of your releases.

Digital Manipulation

It used to be said that “the camera cannot lie.” No one says that Photoshop can’t lie, however. Nowadays it is routine to alter colors, morph shapes and assemble scenes by compositing portions that were separately shot. Your release should state that the subject gives permission for this to occur.

“I hereby release Photographer from any liability by virtue of any blurring, distortion, alteration, optical illusion, or use in composite form, whether intentional or otherwise, that may occur or be produced in the taking of such photographs or in any subsequent processing of them.”

We’ve included a version of the above language in our general Adult and Minor model releases, because Photoshopping has become a normal aspect of advertising photography. But that’s pretty broad language: It allows every conceivable digital effect. Depending on the model’s concerns (and the client’s needs, of course), you may need to accept certain limits on the digital reworking that may be done. For instance,

“However, this compositing or distortion shall be done only by Photographer or by persons working under the direct supervision of Photographer, and it will be limited to images and image components that are photographed on the same day.”

If you need the “however” part and you are using a pre-printed release, you can hand-write the extra sentence, and both you and the model can initial and date the change.

There’s nothing magical about this particular set of limits. If you and the model have reached a different agreement on what may and may not be done, you should write it down in plain language. If it’s a short statement, you can write directly on the release. If it’s long, write it on the back or on a separate sheet of paper, and on the front, put a note that refers to the extra material. (Get the model to sign the extended statement and initial the note.) That way, the deal is recorded and there’s less chance that you will later be accused of doing what you promised not to do.



Sensitive Uses

There are certain subjects about which many people have concerns about being associated. Typically, they are subjects related to sex, religion, politics and health. In some cases, appearing in the “wrong” ad campaign can spell ruin for a model’s career. For those reasons, if you are going to use a photograph for any purpose that some people may find discomforting, offensive or even distasteful, you should make sure that your release specifically authorizes that use. Since the nature of that kind of permission is specific, having a general authorization to use images for “sensitive uses” would probably not be effective.

Instead, when needed you should insert language similar to the following, on an as-needed, case-by-case basis, filling in the blanks and changing words like “suffer” to fit your particular situation:

“I understand that the pictures of me will be used in public-service advertisements to promote AIDS awareness. Knowing that such advertisements may intentionally or unintentionally give rise to the impression that I suffer from this disease. I nevertheless consent to this use.”

Your licensing agreements should contain language that disallows using your photos for any sensitive subjects except those specifically identified. You would then grant such permission only where you have a model release that covers that use.



What's In A Release: The Language of Law

An ASMP Tutorial: Part 2

Don't be intimidated by legal language. The article below, Part 2 of the tutorial, courtesy of the American Society of Media Photographers (ASMP), explains frequently used words in model releases and contract law. Remember, understanding model releases and the situations they are needed for essentially protects you and your photography business.

In addition to the two part tutorial presented in Resources, the ASMP website has excellent information including Frequently Asked Questions about releases and another FAQ about privacy and libel issues as well as sample releases that are available for download by members. For this information and other articles visit: <http://www.asmp.org/>

What's in a Release: The Language of Law

At its heart, every release says the same things:

1. I have given you permission to take pictures of me and use them for commercial purposes.
2. In exchange, I have gotten something of value.

Along with the subject's signature and a date, these two statements would be enough to constitute a bare-bones, but entirely legal contract. Law students are taught that a contract records a "meeting of the minds" and, to be complete, must contain three elements: an offer, an acceptance and a consideration.

Offer. Often, the subject is offering to give you permission, along with a promise not to complain about things later on. Most of the words in the release are there to describe exactly what the subject is willing to permit and not complain about.

In some cases, e.g. where you are working with professional models, you are offering to pay the model for his services, and granting the permissions in the release is one of the conditions that must be met before you will make payment.

Acceptance. Where you are using unpaid subjects, your behavior (your making or using the photos, or accepting the signed release) indicates your acceptance. Where you are paying your subjects, their signatures show that the offer was accepted.

Our recommended releases have space to write the subject's address and to place a witness's name. These are not legal requirements, however. If there are no witnesses and the subject declines to give an address (or gives you only an email address — it has happened), the signed release is still a contract.



It is always good to have witnesses, of course. And it is useful to get the subject's address. For one thing, you may want to contact the subject later on. For another, you want to make it clear that the John Smith who signed your release is the same John Smith whose photo you took.

Consideration. A contract is complete only if value is exchanged. Consideration is the legal term for whatever your subject has gotten in return for the permission. It could be money; it could be tangible goods; it could be a promise to do something in the future, such as use your best efforts to get the photo published and thus increase your subject's renown. But it has to be something that has value, at least in your subject's eyes.

None of our releases say what the consideration actually is, but they all say that it exists and has value. Again, the subject's signature is an acknowledgment of the value.

Formal language. The releases that we recommend are a bit longer and more formal sounding than the bare-bones statements above. There are a couple of reasons why.

- By spelling out the nature of the permission in great detail, the release makes it harder for the subject to claim that he didn't intend to grant quite so much permission.
- The use of formal language alerts your subject that this is serious stuff and can't be lightly repudiated. In court, this would help reinforce the fact that the subject really did intend to give consent.

On the other hand, too much legalistic wording might scare your subject into refusing to sign. You have to strike a balance. That's why we offer our members four general-purpose releases, ranging from the Adult and Child versions, which detail everything in formal language, to the Pocket version that summarizes the deal in less than a hundred words.

Our releases are designed to be all-purpose, and so they call for a very broad grant of permission. If your subject raises an objection to signing a release with broad language, you can counter by offering to write a restriction into the document. Adding a restriction actually makes the release stronger, legally speaking, than a general release; the addition shows that your subject understood the document well enough to want a change, and that a real negotiation of terms took place. Besides, in practical terms, your subject's cooperation is always your best defense against lawsuits.

Using plain language. There are no magic formulas; the words in a contract mean what they say. If you add a restriction to a standard release, it's best not to get fancy with the language. Just write, in plain English and as exactly as you can, what you and your subject have agreed.



Further Points of Contract Law

Competence. Not everyone is legally able to make a contract. Signers have to be able to understand the consequences of their acts. That means they must be of legal age and of sound mind. A minor who signs a release can repudiate it when he becomes an adult, or his parent can repudiate it for him. In general, the legal age for entering into valid contracts is 18, though younger persons can, in certain circumstances, get a court order that makes them legal adults.

The “sound mind” requirement can be tricky. Crazy people can seem quite sane, and neither senility nor mental retardation are necessarily obvious in a brief conversation. Just as you need a parent’s signature on a minor’s model release, you need a guardian’s or conservator’s signature on a release for a legally incompetent person.

Illegality. The courts won’t enforce a contract for illegal activity, or one that is contrary to public purpose. For instance, in some circles, a few dollars’ worth of hashish might be welcomed as the “consideration” element of your release — but a court of law isn’t likely to see it that way. And if your pictures are used for blackmail, a model release is likely to be treated as evidence of conspiracy, not permission.

On a more practical level, there are plenty of gray areas and “iffy” situations. If you are in doubt, stop reading web sites and consult a lawyer!

Where to Go Next

A release is only useful if you can get the subject to sign it. This can sometimes be difficult (to say the least), but we have gathered a few suggestions that might help.

Ideas for Getting Signatures

Experienced models are familiar with model releases (perhaps more familiar than you are) and will expect your request to sign the papers. Others may be surprised by such a request, and you may need to do some explaining, or even some bargaining, to get the signature. There are no sure-fire techniques that work every time, but we offer a few strategies in the spirit of information sharing.

Elsewhere, we note that it is often useful to give out your business card and offer to send a print if the subject will sign your release. And we suggest using the “pocket” release for shooting in the field — it’s short and unthreatening.



It's for Stock

A lot of times, people will ask how you intend to use their picture. The more specific you can make your answer, the more likely that they will sign your release. Except, of course, you often don't know all the possible uses. But you can say that you are shooting "for stock" and explain what that means. If you work with a stock agency, tell your subjects its name and web address. Tell them that the images may or may not ever be licensed, that you find out when and where the photos are used only after the fact. It can't hurt to add that you get but a small fraction of the license fee.

The Celebrity Release

If you photograph performing artists and celebrities for purely editorial projects, you don't need a release. However, you do need consent for any commercial use — and that includes self-promotion, such as showing the images on your web site or in your portfolio. Rare is the artist who will sign a broad model release, though. A bit of creativity is called for.

"I have had the opportunity to photograph several music artists this past year for major music magazines. These have been editorial assignments; the artists have already agreed to be interviewed and want their photos to accompany the article. Everybody is agreeable to the use of the photos, and the magazine and the artist do not require or desire me to interject a model-release issue."

"I introduced a 'Celebrity Release' on one of the assignments and secured a signature from the artist. I modified a basic model release to specify the publication and that initial usage, and added a usage for me to use the photos in my own self-promotion. I intentionally did not include a broad unlimited release, believing that it would be rejected by any artist's management."

Timothy H. Wright
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