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## The Case For Binding Contracts

The value of having a legally binding contract with your client was recently illustrated in a case which went to the Australian Federal Court and was won by the professional photographer involved. Lawyer Sharon Givoni outlines the circumstances and the outcome.



**In the early** 1990s North Sullivan was one of those lobbying through the Society of Advertising, Commercial and Magazine Photographers (ACMP) — ultimately successfully — for copyright reform and the need for commercial photographers to have watertight contracts with their clients. It's paid off because he was recently successful in a legal row with a resort owner who breached his copyright in his photographs of the facility.

Many professional photographers are aware of the fundamental rule of copyright law, namely that if they are commissioned to take photographs for a commercial purpose, they own the copyright in the photographs unless the copyright is assigned in writing to the commissioning party.

In these circumstances, the commissioning party only has a mere licence to use the photographs for the purposes which they agreed upon at the time of the commissioning. This rule applies regardless of how much the commissioning party may have paid for the photographs.

This principle may seem straightforward enough in theory, but problems can arise in practice when there is nothing in writing to document the agreement between the parties. For example, disputes in relation to how far the copyright licence extends are not uncommon. Issues may arise as to what purposes the pictures can be used for, whether this is on a one-off basis or not, whether the photographer's name needs to be acknowledged each and every time and terms of payment.

### Background To The Case

A recent Australian Federal Court case that went all the way to appeal demonstrates the issues that can arise. This case highlights the importance for photographers to enter into a carefully worded agreement with the

commissioning party to avoid problems down the track. It also demonstrates the courts' disapproval of people that breach copyright knowingly and in complete disregard for a photographer's rights.

In 2001, North Sullivan was commissioned by the owner of a holiday resort, FNH Investments Pty Ltd, to take photographs of the resort for promotional purposes.

The parties entered into a contract under which the photographer would be paid \$14,850 for the photographs with 50 percent of the fees payable in advance. The contract also provided that a licence to use the photographs would only be granted to FNH Investments upon full payment of the contract price.

With the formal legalities out of the way, and the advance payment, North Sullivan started shooting. In accordance with his usual practice, he first took some Polaroid test images which he showed to Mrs Davison, one of the directors of FNH and Mr Hill, the general manager of the resort. The shoot was duly approved, based on the Polaroids, giving North Sullivan the 'green light' to start shooting the real thing. Within two weeks, he had sent a selection of photographs to the resort owner.

### What Went Wrong?

The Davisons claimed they were unhappy with the quality of the photographs and refused to pay the balance of the contract price which was \$7425. However, despite their claimed dissatisfaction, they still went ahead and used some of the photographs for promotional purposes in an advertisement and a brochure. Subsequently, North Sullivan sent an email to FNH requesting that the balance of his account be settled. There had been no complaint made about any of the photographs used in the advertisement or the brochure.

FNH continued to circulate the brochure despite two letters of objection North Sullivan sent through his lawyers. He then sued FNH in the Federal Court of Australia, claiming copyright infringement. He also sought "additional damages" which are available under the Australian Copyright Act when the copyright infringement has been "flagrant"; that is when someone consciously disregards someone else's copyright rights.

### What The Judge Thought

In the initial hearing of the case, the judge took the view that the terms of the agreement were clear and that FNH had infringed North Sullivan's copyright by reproducing the photographs without permission. The judge awarded damages of \$7425, being the balance owed under the contract, to compensate North Sullivan for loss suffered as a result of his copyright being infringed.

On the issue of additional damages, the judge took into account "the aggressive determination on part of Mr and Mrs Davison and Mr Hill to use the photographs without regard to the legal consequences and in spite of ample warnings", and awarded additional damages in the sum of \$15,000.

As to FNH's "defence" that the photographs were of poor quality, the judge concluded that this was by no means clear on the evidence and in any event, observed that FNH chose to publish three of the photographs in its travel brochure, some magazines and on some Websites. The judge was also influenced by the fact that Mrs Davison herself had conceded that she had no right to use the photographs.

FNH appealed this decision in the Full Court of the Federal Court. On 7 November 2003, a panel of three judges rejected the appeal and upheld the original decision.



The images used in this article are reproduced from the exact same files that were sent to the resort as a preview of the job. The room shot and the food shot are from scans produced on North Sullivan's flatbed scanner so they were never intended as finals. They were, however, the images that were subsequently used on the brochure.

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### Lessons To Be Learned

This case demonstrates to photographers the importance of having a carefully drafted contract in place which clearly sets out the terms of the licence given to the commissioning party. In this case, the express terms of engagement made it clear that a copyright licence to FNH would only be granted upon full payment of the agreed fee.

When there is no written agreement in place, it comes down to whose arguments are more persuasive on the day. Sometimes, depending on the evidence, the courts are willing to imply a licence when there is nothing in writing. This may not necessarily work in favour of the photographer.

The case also highlights the courts' attitude to “flagrant” copyright infringement. If someone else uses photographs carelessly, continuously and in total disregard of a photographer's copyright, the photographer may be entitled to additional damages if the dispute ever sees the light of day in a court of law. In this case, such damages amounted to an extra \$15,000 for the photographer — just over the amount of the contract fee.

It is important for photographers to be proactive and diligent with documentation at the outset. It is often best to seek assistance from a lawyer. This certainly paid off for North Sullivan. 

*Disclaimer: This article is a summary of the subject matter covered and is not intended to be relied on as a substitute for professional legal advice.*

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