

Monday, 5 September 2011

Dear Photographer

RE: 2011 Melbourne Cup Carnival - Commercial / Non-Editorial Use of Photography

If you are seeking accreditation for the 2011 Melbourne Cup Carnival as a photographer, please refer to both the letter and sample agreement attached, which outline the requirements for commercial (non-editorial) use of photography.

Editorial use is defined as the display or publication in domestic or international newspapers, magazines and websites of an editorial nature in connection with the reporting of news, feature articles and the like.

Any supply or sale of photographs that is not solely for editorial use is considered commercial.

If you intend to produce photography that may be used for commercial purposes, then you will have to enter into an agreement with the Victoria Racing Club (**VRC**).

Please review the attached documents if there is a possibility that your Melbourne Cup Carnival photographs may be put to commercial use. If you require further information please contact Tracey Kendall 03 8378 0650, t.kendall@vrc.net.au

Yours sincerely



Fleur Salisbury
Executive General Manager – Brand, Sponsorship & Marketing



Major Partners



www.melbournecup.com

Victoria Racing Club Limited (ACN 119 214 078) 448 Epsom Road Flemington VIC 3031
Phone: Head Office (+ 61 3) 8378 0888 Customer Service 1300 727 575 Racecourse (+ 61 3) 9371 7171
Facsimile: Customer Service (+ 61 3) 8378 0855 Racecourse (+ 61 3) 9376 9273
Email Customer Service: customerservice@vrc.net.au

Monday, 5 September 2011

Dear Media Representative,

RE: 2011 Melbourne Cup Carnival - Commercial / Non-Editorial Use of Photography

Victoria Racing Club Limited (**VRC**) has made a significant investment in the Melbourne Cup, Melbourne Cup Carnival, Flemington and its associated intellectual property. It is VRC's intention to continue to protect and enforce its intellectual property rights through its policy relating to the commercial use of photographs.

Under the policy, each applicant for media accreditation must sign a Media Accreditation Application Form for the Melbourne Cup Carnival. This application form includes certain terms that set out the rights and obligations of the applicant and his or her corresponding Media Outlet (as nominated on the Accredited Party's Media Accreditation Application Form), if any, regarding to photography at Flemington Racecourse.

A reference in this letter to an **Accredited Party** includes the individual photographer who applies for and receives accreditation for the 2011 Melbourne Cup Carnival, and his or her nominated Media Outlet, if any (or the photographer's employer if no Media Outlet is specified but the photographer is acting in the course of his or her employment). **Applicant to insert name of media outlet and ACN.**

An **Accredited Party** must not, except where permitted pursuant to a written licence agreement with VRC:

- (a) take or make any film, video recording, video broadcast, still picture or photography or any other image in or of:
 - (i) the Flemington Racecourse (including surrounding public; members' car parks; and other event areas where marked) during the Melbourne Cup Carnival; or
 - (ii) any races, parades, entertainment or other activity forming part of the running or promotion of the Melbourne Cup Carnival as conducted by, or that may indicate an association or affiliation with, the VRC,

wherever occurring (**Works**), except where such Works are created for "Editorial Use" in an "Approved Medium" (as those terms are defined in clause 1 of the enclosed schedule) approved by VRC for that Accredited Party; or



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- (b) cause or permit any Works (or any part thereof) to be broadcast, published, communicated to the public or otherwise used, other than for Editorial Use in an Approved Medium approved by VRC for that Accredited Party.

An Accredited Party wishing to market, supply, license or otherwise use, for commercial purposes, photographs taken by them or on their behalf at the 2011 Melbourne Cup Carnival must enter into a written licence agreement with VRC.

As VRC believes that you may be interested in activities of this nature, I attach a schedule setting out the terms and conditions applying to such licence agreements. Please note that, under the licence agreement, a royalty of 15 per cent of the selling price or other fee charged by you in relation to each such photograph is payable by you to VRC. To avoid doubt, this royalty does not apply where those photographs are put to Editorial Use in a relevant Approved Medium pursuant to your Media Accreditation.

If you wish to use photographs for purposes other than Editorial Use, please indicate your acceptance of the terms and conditions in the schedule by signing and returning a copy of this letter to:

Tracey Kendall

Marketing Coordinator
Brand, Sponsorship & Marketing

VICTORIA RACING CLUB LIMITED

448 Epsom Road
Flemington VIC 3031

The terms and conditions of this letter, including the schedule, are intended to be legally binding and are confidential between the parties.

Yours sincerely



Fleur Salisbury
Executive General Manager – Brand, Sponsorship & Marketing

I, **Applicant to insert name**, in my own right and on behalf of the Media Outlet in respect of whom I am or will be accredited, agree to the terms and conditions of this letter, including the schedule:

.....

Signature

.....

Date



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Schedule – Terms and Conditions for Commercial Use of Photography

1. For the purposes of this schedule, **VRC** means Victoria Racing Club Limited; **Approved Medium** means each program, publication and communications medium of any kind for which VRC provided a Media Accreditation to the person who created the Works the subject of the Licence, as set out in the letter of authority, which accompanied that person's *Media Accreditation Application Form*; **Commercialise** means to use or license Works, whether or not in an Approved Medium, for purposes other than Editorial Use; **Editorial Use** means the licensing, reproduction, publication, communication or any other use solely for the purpose of reporting news or accompanying a feature article, opinion column or similar work appearing in an Approved Medium; **Licence** means the licence granted to the Licensee under clause 2; and **Licensee** means **Applicant to insert media outlet name jointly and severally**.
2. Subject to compliance with the provisions of this agreement, VRC grants the Licensee a non-exclusive, non-transferable licence to take photographs at the 2011 Melbourne Cup Carnival, and to market and supply those photographs (or copies of them) (**Works**) to third parties for Editorial Use pursuant to Media Accreditation given by VRC.
3. The Licensee must not Commercialise (or attempt to Commercialise) Works, including by means of creating, marketing or supplying any memorabilia items based on any Works, such as:
 - (a) framed Works or collections of Works; or
 - (b) any commemorative montage featuring or including Works depicting any winning horse or its owners, including, for example, montages of the kind produced for connections of winning horses by Kevmar Nominees Pty Ltd (trading as Slickpix) (**Slickpix**), VRC's Official Winning Owners and Race Finish Photographer, without the prior written consent of VRC.

VRC may elect to provide its consent on such conditions as it sees fit (including the payment of additional royalties) and, without limiting the foregoing, the Licensee acknowledges that VRC may withhold its consent on the basis that it has granted Slickpix the exclusive right to create such commemorative montages for marketing to the connections of winning horses. VRC will not be liable to the Licensee for any refusal to consent or arising from any conditions it places on its consent. To avoid doubt, the Licensee may provide Works to Slickpix for use by Slickpix in relation to such commemorative montages.
4. The Licensee must pay to VRC a 15 per cent royalty on the sale price or other fee (including any royalty) charged by the Licensee, exclusive of GST, in relation to each Work that is Commercialised (**Royalty**). Within 14 days from the end of a month in which any such use of a Work is made, the Licensee must provide to VRC a written report stating, in relation to each such supply:
 - (a) the Works that were so Commercialised;
 - (b) the price or other fee paid or payable to the Licensee in relation to the Commercialised Works;
 - (c) the date on which each Work was supplied or otherwise Commercialised;
 - (d) where the Licensee's customer who acquired the Work will or is likely to Commercialise a Work, the identity of that customer, and must procure that customer's consent to so disclose that information; and
 - (e) the Royalty payable.

The Licensee must provide with that report a cheque payable to VRC for the amount of the Royalty.

5. If any payment made by one party to any other party under or relating to this document constitutes consideration for a taxable supply for the purposes of GST or any similar tax, the amount to be paid for the supply will be increased so that the net amount retained by the supplier after payment of that GST is the same as if the supplier was not liable to pay GST in respect of that supply.

This provision is subject to any other agreement regarding the payment of GST on specific supplies, and includes payments for supplies relating to the breach or termination of, and indemnities arising from, this document. In order to be entitled to recover any such GST, the party must deliver a tax invoice to the other in compliance with the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*. This clause 5 survives termination of this agreement.

6. The Licensee must not, without the written authorisation of VRC, supply a Work to a third party in circumstances where the Licensee knows, or ought reasonably to know, that the third party (or anyone authorised or assisted by that third party) will or is likely to Commercialise the Work. VRC may refuse to provide such authorisation in its sole discretion and may impose conditions on such authorisation (including the payment of royalties). VRC will not be liable to the Licensee for any refusal to so authorise or arising from any conditions it places on such authorisation. Without limiting the foregoing, the Licensee must, unless otherwise instructed by VRC, impose on any third party to whom it provides an original or copy of any Work a contractual restriction prohibiting that third party from reproducing or otherwise Commercialising (or authorising or assisting anyone else to reproduce or otherwise Commercialise) that Work, so that the third party must retain that Work for private purposes only. At VRC's request, the Licensee must assist VRC by enforcing its contractual rights against any third party involved in the contravention of such a contractual restriction.
7. The Licensee must not:
 - (a) make any alteration or addition to any Work, or permit any such alteration or addition to be made by any third party (including any customer of the Licensee), including by incorporating any Work into any other materials;
 - (b) act in relation to any Work in any way which is likely to prejudice or adversely affect the reputation of VRC, of any person or organisation depicted in a Work, or of any sponsor, supplier, employee, contractor or other person associated with VRC or the Melbourne Cup Carnival; or
 - (c) take, or assist any other person directly or indirectly to take, any action which may invalidate, prejudice or impair any of VRC's rights in relation to any Work.
8. The Licensee must keep records in sufficient detail to enable compliance with its obligations under this Licence to be verified, and must for that purpose allow or provide for VRC or VRC's nominee to inspect those records upon request (including by allowing VRC or its nominee to enter any premises where the records are located between the hours of 8.30am and 5.30pm on any weekday that is not a public holiday in Melbourne) and take copies of them.
9. If the Licensee becomes aware of or has reason to suspect:
 - (a) any infringement or threatened infringement of any rights (including intellectual property rights) in or relating to any Work; or
 - (b) any conduct of any third party, which may cause deception or confusion to the public (including any passing off) relating to any Work, it must promptly notify VRC in writing, giving particulars of the infringement or suspected infringement, and the Licensee will cooperate in any investigation of the infringement or suspected infringement.
10. As between VRC and the Licensee, VRC will have absolute control over any litigation involving or affecting any Work or the Licence (except for litigation between VRC and Licensee) and the Licensee may not initiate proceedings for infringement in respect of any Work without VRC's prior written approval.

The Licensee agrees, at VRC's reasonable cost, to provide all reasonable assistance requested by VRC in relation to legal proceedings or matters before the Trade Marks Office instituted by or against VRC or otherwise involving any rights (including intellectual property rights) in or relating to any Work.

11. The Licensee acknowledges that VRC's approval of the use of the Works under this agreement relates only to VRC, and is not approval by any other person. The Licensee warrants that, except where VRC has advised the Licensee that it has obtained such approval on the Licensee's behalf, the Licensee has obtained or will (prior to any manufacture, publication, sale or distribution of the Work) obtain **all** relevant approvals from all such other persons. The Licensee must comply with any terms and conditions imposed by the approvals obtained by the Licensee and any approvals obtained by VRC on the Licensee's behalf, including the payment of royalties and other amounts. A copy of any approval obtained must be submitted to VRC within three days of receipt of that approval.
12. The Licensee must indemnify VRC against any claim for damages, losses or any costs arising in any manner whatsoever from the Works, or from their use by parties other than VRC.
13. VRC will be entitled to terminate the agreement if the Licensee is in breach of any obligation under this agreement. Once this agreement has been terminated, the Licensee will immediately:
 - (a) cease the publication, marketing and other Commercialisation of the Works; and
 - (b) destroy all electronic copies of Works in its possession, custody or control after seeking and receiving confirmation from VRC, and otherwise provide to VRC all copies of Works (in whatever form) in its possession, custody or control, with the exception of copies approved by VRC for personal use or self-promotion.
14. A party must not disclose, or use for a purpose other than contemplated by this agreement, the terms of the Licence or this agreement or any confidential unpublished information or confidential documents supplied by any party in connection with this agreement that are not in the public domain (the **Confidential Information**), provided that a party may disclose the existence (but not the terms of) the Licence and this agreement. Without limiting the continuation of any other rights of either party, this clause 14 survives termination of this agreement.
15. The rights and obligations of the Licensee under this agreement are personal and the Licensee cannot assign, charge, encumber or otherwise deal with any of its rights or obligations under this agreement without the prior written consent of VRC. VRC may assign or transfer all or any of its rights or obligations under this agreement. Where required by law, the assignment or transfer will be effected by a novation. The Licensee must cooperate fully in relation to such assignment or transfer including by executing any appropriately worded novation agreement.
16. The parties acknowledge that there is an existing agreement between them, which is comprised by the Licensee's *Media Accreditation Application Form* dated **applicant to insert date** and the *Conditions of Application* and *Media Protocols & Acknowledgement* attached to that Form. This agreement overrides that existing agreement to the extent of any inconsistency.
17. The Licensee grants to VRC a perpetual, irrevocable, non-exclusive and royalty-free licence (with the right to sub-licence) to exercise all intellectual property rights in any Works created or made by or on behalf of the Licensee in connection with:
 - (a) the ordinary conduct of thoroughbred racing events (including the production and promotion of race books);
 - (b) the promotion of VRC, the Melbourne Cup Carnival, Super Saturday, any other event or meeting conducted by VRC and the sport of thoroughbred racing generally; or
 - (c) the establishment of a permanent database of photographs (and the inclusion in it of any or all of the Works) as archival material, to be accessed, used and reproduced for promotional and historical purposes connected with the matters described in paragraphs 17 (a) or (b).

Nothing in this paragraph assigns copyright in any Works to VRC.

18. Upon request by VRC, the Licensee must provide VRC with access to, or copies of, all Works in a form in which they can be readily reproduced in high quality (high resolution) by VRC.
19. The Licensee irrevocably consents to VRC fully exercising the rights referred to in paragraph 17 without condition or restriction and in any way which might otherwise contravene the Licensee's moral rights under the *Copyright Act 1968* (Cth) or similar rights given in other jurisdictions.

The Licensee warrants that no use of any Works in accordance with paragraph 17 by VRC or its sublicensees will infringe the rights of any third party.

For further information regarding the above photography agreement, please contact:

Tracey Kendall VRC Marketing Coordinator 03 8378 0650 or t.kendall@vrc.net.au