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Use of Photographs on Websites

Website owners are battling or quietly settling an increasing number of copyright infringement claims for images posted without permission. To avoid such claims, webmasters should be careful to make sure they have the proper permission from the copyright owner. Just because an image is on the Internet and easy to cut and paste from another website, Facebook, Twitter, or other social media sites, does not mean it can be re-used without permission. Images are protected even if they do not display the symbol ©. Save yourself headaches and legal fees by first going through the proper channels to obtain the clearances you need to use others' images.

Who owns the copyright

Determining who owns the copyright can be tricky. Take, for example, the selfie Ellen DeGeneres orchestrated at the 2014 Oscars which was re-tweeted millions of times. Does Bradley Cooper own the photo since he actually clicked the shutter, or does Ellen DeGeneres own the copyright because she composed the shot, the photo was taken with her smart phone, and she uploaded it to Twitter? With all photographs, you need the permission of the photographer and, in addition, you may need permission from the people in the photograph before posting the photo to your website.

Twitter's Terms of Service preserves the user's ownership of the content. Once posted, photographs can be used by others on Twitter's platform, but they cannot be re-used elsewhere without obtaining permission. A case in point involved a photojournalist who posted photos of the earthquake devastation in Haiti through Twitter's Twitpic site. Someone else re-tweeted the photos and falsely claimed ownership of the photos. The jury awarded the photographer \$1.2 million in damages against media companies, Getty Images, and Agence France Press because they did not properly determine ownership of the photos before rushing to use them. *Agence France Press v. Morel* available at:

<http://www.nysd.uscourts.gov/cases/show.php?db=special&id=256>.

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How to locate the copyright owner

Unfortunately, locating copyright owners to obtain necessary permissions can be tedious and time-consuming. The first step is to try to contact the copyright owner directly. If the image does not include the name of the artist or a designation as to the source of the image, an extensive search on the Internet will be needed. Most websites have an e-mail address for its webmaster, and the webmaster may be able to provide the appropriate contact information needed to move forward with the clearance. As was the case with the Haitian earthquake photos, however, proper rights clearance may not be simple. And, as with an Ellen DeGeneres selfie-style photo, several persons or entities may need to consent before an image can be cleared for use.

If the Internet search is too daunting, contact an image agency that can assist in the clearance process. These agencies, such as Getty Images, offer full-service clearance assistance and will do all the heavy-lifting when it comes to contacting the rights-holders, obtaining the license, acquiring the appropriate permissions, and negotiating a fee on your behalf.

What should be in the permission to use an image

Obtain a license that grants the right to use the image in the manner you plan to use it, such as displaying it on your website or in your newsletter or video. Decide whether you need an exclusive right, for how long, whether you can make and distribute copies or archive the image when it's included in your materials and in what medium, and whether there is any geographic limitation on your license. Include a representation from the rights-holder that they are indeed the copyright owner of the image or have the right to license use of the image. If the rights-holder affirms he owns 100% of the copyright to the work, he should make an additional representation that no other permissions are needed in order to use the photograph. Always get the approval of use in writing from all copyright owners, in case a copyright infringement claim is filed.

What are some resources for pre-licensed images

Another option for obtaining pre-cleared images is to use stock imaging companies such as Getty Images, Corbis and Sipa Press. These companies provide images licensed for particular uses. Another agency is WireImage (a division of Getty Images), which is an extremely popular site for licensing images, particularly those of celebrities. Subscribing to any of these agencies will give you access to thousands of pre-cleared images which can be added to your website or used in other materials (if the license allows). It is advisable to ask for indemnification in case an unknown copyright owner sues you for infringement, as occurred in the Haitian Earthquake photos.

What if someone complains

Another source of images are from sites that grant permission through Creative Commons, e.g., www.creativecommons.org. Those sites have specific rules about how materials posted on their sites can be used.

Regardless of how vigilant you are, rights-holders may still claim unauthorized use. While some copyright owners will immediately move forward with an action, copyright owners also contact alleged infringers by sending a cease and desist letter, stating that they are the rightful owner of the image and that your use is unauthorized. Don't ignore a cease and desist letter. If you have reason to believe that your use of the image is authorized, you should contact the sender of the cease and desist letter and provide the license or other proof of authorization. If your subscription with a stock photo agency contains an indemnification clause, notify that agency. If your use is not authorized or you are not sure about the clearance status of the image, contact an attorney who can evaluate the claims of the copyright owner and advise you of your rights, possible defenses, and next steps.

What are the potential damages

If the copyright owner registered the image with the Copyright Office, he can claim statutory damages for infringement. A court can assess between \$750 to \$30,000 per infringement, or \$150,000 if the infringement was willful. Alternatively, the rights-holder can elect actual damages and obtain an injunction prohibiting further use of the image.

Other ways to limit risk

While most of this Memo refers to your own use of a copyrighted image, if you allow others to post content on your website, it's possible that they will post infringing photos as well as music or other materials they don't own without obtaining the proper clearances. The Digital Millennium Copyright Act allows service providers to limit their liability if they post notice and takedown procedures on their web site and file a Designation of Agent to Receive Notice of Claimed Infringement with the Copyright Office in Washington, D.C. The form is available at this link: <http://www.copyright.gov/onlinesp/agent.pdf>. The notice and takedown procedures explain who the rights-holder should contact to have infringing content removed, as well as the right of the user who initially posted the content to file a counter-notice to preserve the posting. This limitation of liability is available only to service providers who do not actively alter postings other than to remove offending or infringing materials.

Conclusion

The best way to avoid copyright liability for images is to ensure that all photos used on your website are licensed for that use and that you have obtained the permission of the photographer as well as of any person pictured in that photograph. If the photo includes a picture of minor children, obtain the consent of the child's parent or guardian. Keep a record of the licenses you have obtained and don't ignore cease and desist letters. Finally, include notice and takedown procedures on your website, and file a Designation of Agent to Receive Notice of Claimed Infringement with the Copyright Office.

For further information:

Contact Melodie Virtue at 202-298-2527, mvirtue@gsblaw.com or Allison Carryl at 212-965-4532, acarryl@gsblaw.com. You may also contact any of the attorneys in the Communications and Information Technology Group listed below.

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