

CLIENT ALERT

April 17, 2019

1

INTELLECTUAL PROPERTY

HOW TO AVOID COPYRIGHT INFRINGEMENT OF ONLINE IMAGE

Are you at risk for huge losses?

by William H. Honaker

Are you using images on your website that you clipped from the Internet? Do you know for sure? Did you leave these decisions to your webmaster? Are you certain you have the rights to use these images?

You might get a terrible shock. Copyright infringement is like swimming in a calm ocean and seeing black fins appear. A big problem that you weren't expecting just arrived.

We all know there are sharks in the sea, and copying images from the Internet could be a problem. But is it really a risk? Yes. Definitely.

What Copyrights Protect:

Copyright law protects creative works that are original. It protects the expression of an idea in tangible form. Tangible form means that it can be reproduced or copied. This includes images on the Internet, because they can be copied. That image is someone's intellectual property, and they have valuable rights.

The Copyright Act grants [five rights](#) to a copyright owner:

- The right to reproduce the copyrighted work.
- The right to prepare derivative works based upon the work.
- The right to distribute copies of the work to the public.
- The right to perform the copyrighted work publicly.
- The right to display the copyrighted work publicly.

Damages can be Huge

The copyright holder is entitled to an injunction, actual damages, and your profits that exceed actual damages. But, since these damages can be difficult to prove, [statutory damages](#) are available. These can range from \$750 to \$30,000 per infringement, and up to \$150,000 for willful infringement. The successful party can also get their attorney's fees. The amount of statutory damages and attorney's fee are at the discretion of the court, but most courts dislike copying, and award accordingly and are encouraged to award attorney's fees.

Use of images on the Internet

You should assume that images on the Internet are copyrighted. They are the expression of an idea in tangible form. If you use them, you need to be *certain* that you have the right to use. Even paid sites and stock photos can create problems. For example, if you copy an image from [Creative Commons](#), be sure that you also keep a record of the Creative Commons license and comply with its terms. Many free-image sites require you to give [attribution](#) to the copyright owner. If you don't, it may be argued that you don't have a license.

There is a High Likelihood of Getting Caught

One example is Richard Bell. He is an Indiana attorney who took a photo of the Indianapolis skyline that has been copied numerous times. In an article in the [Indiana Business Journal](#), he said that he has found about 300 infringers and most have settled. [The Indiana Lawyer](#) reported that Bell sued an Indianapolis lawyer and was awarded \$150,000.00 for infringing his photograph. You can search "Richard Bell skyline" to see an image. (I will play it safe and let you go look on your own. My advice; don't copy it.)

There's a growing trend of copyright enforcement actions. The ability to collect statutory damages make these actions very lucrative. In the example above, at \$5,000.00 an infringement, one picture can result in damages of \$1.5 million.

How do they Find Infringers?

Reverse image search is easily conducted on Google images. You simply upload an image and it searches the web for similar images. If the image is on your website, it will likely turn up in the search. If it does, you are likely to receive an infringement letter. These letters typically ask for your license, and if you don't have one; they demand payment for infringement.

More sophisticated owners use search programs to continuously scan the web to locate infringers. If you're using images from the web, you will likely be caught. They are looking for infringers because the potential damages are worth the effort.

Don't assume that the lack of a copyright notice gives you the right to copy. The copyright owner doesn't have to provide notice. Many people assume that if there's no copyright notice, the image is not protected. This is not correct. There is no need to use a copyright notice to have copyright protection. Regardless of whether there is a notice, it is still a copyrighted image and is copyright protected.

How Do You Protect Yourself?

The best protection is to *use your own* images. Your own images avoid copyright infringement because they are *your* copyrighted material. With the camera quality in phones today, it is easy to take your own photos and not be concerned with copyright infringement. If it is an exceptionally good photograph, you should consider copyright protection for your own work. The US Government recently issued a [new rule](#) allowing you to register up to 750 photographs in one claim for a single filing fee.

If you are considering copyright protection for your own works, file immediately. Statutory damages are only available if you [register timely](#). Statutory damages are only available for unpublished works if they are registered before infringement and for published works that are registered before infringement, unless the work was registered within three months of publication.

CLIENT ALERT

The Takeaway

There's great risk in using images on the web. The best approach is to take your own images. If you use images on the web, you have to be careful. To protect yourself, make sure you have the appropriate rights, and keep a record of those rights. The consequences are potentially devastating.

This client alert is published by Dickinson Wright PLLC to inform our clients and friends of important developments in the field of copyright law. The foregoing content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions relating to any of the topics covered.

FOR MORE INFORMATION CONTACT:



William H. Honaker is a Member in Dickinson Wright's Troy office. He can be reached at 248-433-7381 or whonaker@dickinsonwright.com.