

WEB IMAGES AREN'T ALWAYS FREE – THE CASE FOR CLEARING RIGHTS (2013)

When you see an inviting Internet visual image which seems ripe for the taking, consider that it may not be freely available.

Increasingly, I am being contacted by clients on the receiving end of copyright cease and desist letters based on their unlicensed use of visual images in digital works. Not clearing rights is simply penny-wise and pound foolish, particularly because it is very easy to monitor third-party use in a digital environment.

Before you copy and paste that, say, perfect photo that will complement your article, blog or other creative work, stop and check its provenance: verify its copyright status and review the terms of service on the website where you located the image. Even if the site claims that images are free, or free with attribution, use may still be risky – an indemnification is one thing (it still may cost money to enforce it), a license another. And because copyright arises from creation in the United States, the absence of a notice doesn't indicate that the work is freely available.

In addition, the Copyright Act is a strict liability statute, which means that even if you did not intend to violate any of the creator's exclusive rights, you may still be liable for statutory damages and attorney's fees. Without having to prove any damages, a copyright owner of a timely registered work may be entitled to \$750 to \$30,000 *per image*, and up to \$150,000 for willful infringement. Of course liability could be reduced to \$200 for innocent infringement, but presumably that would require some due diligence in investigating rights to the image. And attorney's fees often run into the tens of thousands of dollars.

Ok, you have located an image you would like to use, containing a copyright notice. Do you (a) alter or remove the notice, or (b) license the work, or at least establish from the source the availability terms? If you chose alternative (a), you should be aware that it is a violation of the Digital Millennium Copyright Act to alter or remove a copyright notice or strip metadata associated with an image. So the better course is to seek permission, rather than doctor and repurpose another's work.

Finally, unauthorized use of an image may implicate publicity, privacy and trademark rights. Commercial use of a celebrity's image, for example, generally requires permission; publication of a private image may violate another's privacy rights; and unlicensed use (not protected by the First Amendment) of a trademarked image may violate the owner's Lanham Act or common law rights.

Aside from the ethical considerations of appropriating the creative work of another, a cost-benefit analysis is probably in order.

On the one hand, gambling that you won't get caught, you may make some money from the image embellishing your work.

On the other, a lawyer might charge for a few hours of work to clear rights (or inform you that the work is not available, or is available under specific terms). Saving on rights clearance, you risk the legal costs (including statutory damages, and your and the plaintiff's attorney's fees). And settlement alone may still cost you several thousand dollars.

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