Many people share the misconception that digital images that do not bear a copyright notice or protective watermark are in the public domain and free for copying. This can become a costly mistake for those people who make use of these images (for example, by copying them and posting them on another website, such as Pinterest). Companies that license digital photographs use sophisticated tools to locate unlicensed copies of their material on the Internet and often aggressively pursue those who have used copyright-protected content without permission.

Under the Copyright Act, the creator of an expressive work, such as a drawing, photograph or piece of writing, automatically owns copyright rights of the material as soon as it is set in fixed form.

While it is good practice for copyright owners to place a copyright notice on their works to alert others that it is protected, the law does not require the creator to display a copyright notice or take other protective measures in order to enjoy copyright protection.

Ignorance is expensive

Suppose you have copied a photograph from a website. You receive a letter from a copyright owner claiming that you have violated the owner’s copyright and demanding several thousand dollars in exchange for a “retroactive license.”

Immediately removing the image does not relieve you from liability for damages arising from past infringing use. Then, surely your use of the photograph was “fair use,” especially since you did not intend to violate any copyrights? Again, not necessarily.

While your intent in copying the material may affect the amount of damages awarded in a copyright infringement action, it is not a requirement for a finding of infringement. Moreover, although “fair uses” of copyrighted works do exist, the analysis involved in determining whether a use will be deemed “fair” is often complex, and it is difficult to predict the outcomes.

In this situation, the steep “retroactive license” fee might actually be the least expensive option to dispose of a copyright infringement claim. To establish copyright infringement, the copyright owner must only prove ownership of the material and that you have copied it without permission.

If the copyright owners registered the copyright with the Copyright Office before you copied the material, then they don’t even need to prove that your infringing use of the image caused them to suffer any actual monetary damages. Instead, once the copyright owner establishes infringement, the Copyright Act entitles the holder to recover “statutory damages” ranging from $350 to $30,000 (at the discretion of the court) for each separate instance. Damages can exceed $150,000 per copyright if the owner can prove that the infringement was willful, which people sometimes interpret as including actions taken with knowledge or reckless disregard of the copyright owner’s rights, as opposed to an actual intent to infringe.

Ultimately, the best (and least costly) course of action is to ensure in the beginning that you or your employees either create or purchase — from the copyright owner or licensed from the copyright owner — all images on your website or in print materials.

The opinions expressed in this article are intended for general guidance only and are not intended as recommendations for specific situations. Readers should consult a qualified attorney for specific legal guidance.

Protecting your image

Avoiding costly mistakes

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