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A Picture May Be Worth A Thousand Words...And Dollars Avoiding Liability for the Use of Images on the Web

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When I meet new people and am asked what I do, I typically respond with an anecdote or two. One I regularly use describes how I helped resolve a complaint that an image was used in a website without permission. "That happened to me once!" is something I've heard many times in response.

I always ask for the details. And while there is some variation, I tend to hear the same tale: the image was found somewhere on the Web, saved, and casually inserted into the person's own website. In explanation, sometimes I hear, "I thought that was allowed; it's free, right?" Other times the person swears the image was legitimately downloaded from a "royalty-free" site. And then every so often, I get a shoulder shrug: "I dunno." The price to get things "square" with the image owner varies, but often exceeds \$1,000.00 for a short-lived use. Ouch.

The purpose here is two-fold: First, this article will attempt to dispel the myth that images on the Web are free. Second, it will provide a few common sense suggestions to help reduce the chance of walking into an unexpected bill for infringing another's copyright.

It amazes me that the myth persists. A photo or other image on the Web is likely to enjoy copyright protection unless it's particularly old (think of those Civil War photos we see from time to time). Just because you can—mechanically—copy it does not mean you may copy it. If you do so without permission, you may have infringed another's copyright and be on the hook to pay compensation.

Giving the owner "a nod" through a credit does not excuse liability. But it is avoidable.

The absolute best way to avoid the risk is to create the content. While there may be an exception or two, generally speaking, if you created it—i.e., you drew the image or took the photo—you should feel comfortable that you're in the clear.

If creating your own content, or hiring someone to do so, isn't an option, consider using public domain images. Public domain images (like those Civil War photos) are free to use. They're not difficult to find. Type "public domain images" into your search engine of choice and you'll find plenty of sources. But there's a catch: read the terms of use for the site to see if you need to give attribution.

Yet another source is the collection of sites offering free vector

art, graphics, and images—images whose permission to use comes pre-packaged. But be careful. Recently a client of mine downloaded "free" vector artwork depicting a woman in traditional Bavarian garb for use on flyers to promote an upcoming community Oktoberfest event. It turned out that the artwork itself was based on a photograph, for which the artist had not obtained permission to use. So the image was far from "free;" the client faced potential liability not only for copyright infringement, but also for misappropriating the woman's right of publicity! If you do go this route, do some homework to ensure that the site is credible. And here, too, ensure the rules are followed. A site may prohibit certain uses, including commercial uses.

Finally, if there is an image that you really want to use but you don't know its status, proceed under the assumption that someone holds a copyright. And then do your sleuthing. If you can determine who your point of contact is, ask for permission. You may be surprised to hear that you are given permission to use it, and maybe at little to no cost.

When it comes to use of images on the Web, the saying "It's better to beg for forgiveness than ask for permission" does not apply. Image owners are vigilant and can be unforgiving. They have surprisingly effective ways of discovering unauthorized use of their works. Avoiding liability is often a function of exercising good common sense. If you still are not sure or have received a demand letter, it's a no-brainer. Ask your copyright lawyer. It's what we do.

If you would like further information on this topic or any other trademark, copyright, or publicity issues, send me an email at anelson@fsglawyers.com.

Also, if you like the information, please share with others.

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