

Copyright Image Infringement

Hinckley Allen Intellectual Property Update

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It's so easy: You're making a sales deck and you need a picture, a brochure would look a little better with an image, or you really need a still pulled from a movie to fill out a web page. So, you pull up a search engine, type in the keywords, copy, paste . . . perfect! Or problem! Little did you know that the image that was so easy to get and appeared to be free for the taking might not be one you can legally use, at least not for free.

To someone who grabs a digital image found in a web search, it might not be obvious that most images are not free to use – that is, they are not in the public domain. In fact, for many images found using a search engine, someone controls the right to use that image—whether the image's creator, an owner, an agent, or a licensee. Although the image is readily found, it is likely that someone has the rights to control the image's distribution or to cause the removal of unlicensed or nonpermitted uses of the image, and the right to compensation for use of the image.

The rights that the creator of an image or work has are defined by copyright. Copyright is codified in Title 17 of the United States Code, which grants the creator of a work of art the right to control how the work is used. This creator might give a license to another person to use the work, for a fee. Alternatively, the creator might sell the work to another, also for a fee. The Code also states that if there is any unauthorized use of copyrighted material, even if that use is unintentional, then the infringer is liable to the copyright holder for compensation.

Recently, stock photo agencies who archive and manage millions of images and collect royalties for the use of those images have undertaken to find unauthorized users of those images. These stock photo agencies send demand letters to (a) notify companies and individuals of their unauthorized use of images or footage, (b) order the discontinuation of such use, and (c) demand compensation for the use, in the form of a royalty payment. These demand letters might seem incongruous with the image at issue being available on the web, but anyone receiving such a letter must take it seriously. As noted above, copyright infringement does not require intent to infringe. If someone uses an image without permission, particularly for any commercial purpose, that user can be liable to the copyright holder for compensation.

There are of course exceptions: a use of a copyrighted work may be defensible as a "fair use," such as a use that is non-commercial or for educational purposes only or one that is a parody. Whether a use falls under such an exemption is a factual question and requires thoughtful assessment.

If you receive such a demand letter from a stock photo agency or have questions about this topic, please contact the Intellectual Property practice.

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