

Use of Photographs on Websites

Legal Alert
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Website owners are battling or quietly settling an increasing number of copyright infringement claims for images posted without permission. To avoid such claims, webmasters should be careful to make sure they have the proper permission from the copyright owner. Just because an image is on the Internet and easy to cut and paste from another website, Facebook, Twitter, or other social media sites does not mean it can be re-used without permission. Images are protected even if they do not display the symbol ©. Save yourself headaches and legal fees by first going through the proper channels to obtain the clearances you need to use others' images. This article focuses on copyright issues but depending on how a photograph is used on your website, other permissions may be needed. For example, publicity rights laws may require that you obtain permission from the people in the photograph, and trademark laws may require permission from the owner of any logo or branding appearing in the photo.

Who owns the copyright?

Determining who owns the copyright can be tricky. Take, for example, the selfie Ellen DeGeneres orchestrated at the 2014 Oscars, which was re-tweeted millions of times. Does [Bradley Cooper](#) own the photo since he actually clicked the shutter, or does Ellen DeGeneres own the copyright because she composed the shot, the photo was taken with her smart phone, and she uploaded it to Twitter? With all photographs taken after 1923, you need the permission of the copyright owners (usually the photographer).

[Twitter's Terms of Service](#) preserves users' ownership of content they post. Once posted, photographs can be used by others on Twitter's platform, but they cannot be re-used elsewhere without obtaining permission. A case in point involved a photojournalist who posted [photos of the earthquake devastation in Haiti through Twitter's Twitpic site](#). Someone else re-tweeted, and falsely claimed ownership of, the photos, which were then used,

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and licensed by, media companies [Getty Images](#) and [Agence France Press](#). A jury awarded the photographer \$1.2 million in damages against Getty Images and Agence France Press because they did not properly determine ownership of the photos and obtain permission before rushing to use them. For more information, read *Agence France Press v. Morel*.

How can I locate the copyright owner?

Unfortunately, locating copyright owners to obtain necessary permissions can be tedious and time-consuming. The first step is to try to contact the copyright owner directly. If the image does not include the name of the artist or a designation as to the source of the image, an extensive search on the Internet may be needed. Most websites have an e-mail address for the webmaster, and the webmaster may be able to provide the appropriate contact information needed to move forward with clearance. As was the case with the Haitian earthquake photos, however, proper rights clearance may not be simple. And, as with an Ellen DeGeneres selfie-style photo, several persons or entities may need to consent before an image can be cleared for use.

If the Internet search is too daunting, you may wish to contact an image agency that can assist in the clearance process. These agencies offer clearance assistance and, for a fee, will do the heavy-lifting when it comes to contacting rights-holders, obtaining a license, acquiring the appropriate permissions, and negotiating a fee on your behalf.

If you know the photographer's or copyright owner's name, but don't have contact information, you may want to search the copyright office database of registered works. Registration is not required to establish copyright ownership, but if a work is registered, the copyright database may help you locate the owner.

What should be in the permission to use an image?

Obtain a license that grants the right to use the image in the manner you plan to use it, such as displaying it on your website or in your newsletter or video. Decide whether you need an exclusive right, for how long, whether you can make and distribute copies or archive the image when it's included in your materials and in what medium, and whether there is any geographic limitation on your license. Include a representation from the rights-holder that they are indeed the copyright owner of the image or have the right to license use of the image.

If the rights-holder affirms he owns 100% of the copyright to the work, he should make an additional representation that no other permissions are needed in order to use the photograph. Always get approval of use in writing from all copyright owners, in case a copyright infringement claim is filed.

What are some resources for pre-licensed images?

Another option for obtaining pre-cleared images is to use stock image companies such as [Getty Images](#), Corbis and [Sipa Press](#). These companies provide images licensed for particular uses. Another agency is [WireImage](#) (a division of Getty Images), which is an extremely popular site for licensing images, particularly those of celebrities. Subscribing to any of these agencies will give you access to thousands of pre-cleared images that can be added to your website or used in other materials (if the license allows). It is advisable to ask for indemnification in case an unknown copyright owner sues you for infringement, as occurred with the Haitian Earthquake photos.

Another source of images is from sites that grant permission through [Creative Commons](#). Those sites have specific rules about how materials posted on their sites can be used, based on the type of Creative Commons license they have selected. And [Flickr](#) allows you to search specifically for photographs posted under the Creative Commons.

What if someone complains?

Regardless of how vigilant you are, rights-holders may still claim unauthorized use. While some copyright owners will immediately move forward with an action, some copyright owners contact alleged infringers by sending a cease and desist letter, stating that they are the rightful owner of the image and that your use is unauthorized. Don't ignore a cease and desist letter. If you have reason to believe that your use of the image is authorized, you should contact the sender of the letter and provide the license or other proof of authorization. If your subscription with a stock photo agency contains an indemnification clause, notify that agency. If your use is not authorized or you are not sure about the clearance status of the image, contact an attorney who can evaluate the claims of the copyright owner and advise you of your rights, possible defenses, and next steps.

What are the potential damages?

If the copyright owner registered the image with the [Copyright Office](#) before your unauthorized use of the photo, he can claim statutory damages for infringement, and is also eligible for an award of attorney's fees. A court can assess between \$750 to \$30,000 per infringement, or \$150,000 if the infringement was willful. Alternatively, the rights-holder can elect actual damages and obtain an injunction prohibiting further use of the image.

What are some other ways to limit risk?

While most of this Memo refers to your own use of a copyrighted image, if you allow others to post content on your website, it's possible that they will post infringing photos or music or other materials they don't own, without obtaining the proper clearances. The [Digital Millennium Copyright Act](#) allows a service provider to limit liability for content posted by others if the website operator posts a notice and takedown procedure on the website and files a Designation of Agent to Receive Notice of Claimed Infringement with the Copyright Office in Washington, D.C. The notice and takedown procedures explain who the rights-holder should

contact to have infringing content removed (this should be the same as the information in the registration form), the type of information that must be included in the notice, and the right of the user who initially posted the content to file a counter-notice to preserve the posting. This limitation of liability is available only to service providers who do not actively alter postings other than to remove offending or infringing materials.

Conclusion

The best way to avoid copyright liability for images is to ensure that all photos used on your website are licensed for that use and that you have obtained the permission of the photographer. Depending on how the photograph is used, you may also need permission from any person pictured in the photograph and from the owner of any trademark or branding. If the photo includes a picture of minor children, obtain the consent of the child's parent or guardian. Keep a record of the licenses you have obtained and don't ignore cease and desist letters. Finally, include notice and takedown procedures on your website, and file a Designation of Agent to Receive Notice of Claimed Infringement with the [Copyright Office](#) to help avoid liability for photos and other works posted by visitors to your website.