

CLIENT ALERTS

Copyright Trolls May Be Staying At Home – But That Doesn't Mean You Can Relax!

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Despite the fact that many courts are working remotely and under strain to handle priority cases amid the lockdown, as reported by Law360, there continue to be proportionately large numbers of copyright cases being filed. These cases typically are filed on behalf of photographers or other creators against those who have allegedly used images without permission on the internet. Businesses cannot afford to let their guard down while operating remotely. It is important for businesses who may be using copyrighted material to make certain that remote workers adhere to policies requiring proper licensing of copyrighted material. It is also perhaps an opportunity for a business to review the images you use and make sure that you have them properly licensed with supporting documentation.

The Copyright Troll Model

The “copyright troll” model consists of a handful of attorneys or image licensing companies who bring claims on behalf of individual rights holders. Using image recognition software, they track down every use of their client’s copyrighted works online (especially images) and demand large settlements from each offender. They may file lawsuits without warning, or send a demand for a hundred times or more the true measure of damages and license fees, with the understanding that a defendant will pay an outsized settlement amount to avoid the cost of litigation. There is no question that content creators deserve to be paid for the use of their works, but some attorneys have created a high-volume business of wringing extraordinarily high settlements out of accidental infringers in order to line their own pockets.

Protecting Your Business Against Trolls

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If you want to use an image created by someone else – whether for printed marketing materials, your company website, or on your social media pages – it is essential that you engage in a two-step (overlapping) process: (1) obtain any necessary license/permission for the use and (2) use the image consistent with that license/permission.

You should always assume that any image obtained is copyrighted. That means that you need to obtain a license consistent with the use you contemplate. Creative Commons, for example, is frequently used to obtain free copyright licenses to give the public permission to share and use creative works according to certain rules. Other services, like iStock or Shutterstock, give you access to a database of images that you can use in accordance with your paid license.

A social media platform's Terms of Use can also govern. In a recent case, a court found that, by creating an Instagram account, a photographer was bound to Instagram's Terms of Use, which grants Instagram the right to sublicense content posted and made public by the user. Instagram then exercised that right by granting a sublicense to display the photo through sharing the embedded photo.

Depending on how you use the copyrighted material and the level of risk involved, you should consult your attorney to ensure that the risk is mitigated to the extent possible.

It is also important to document the license/permission/source. For example, with a Creative Commons license, you should print/scan the page containing the image (this will buffer you from trolls) and confirm the rights are available on the printed page. If you regularly license images, it is extremely helpful to create and retain a project-by-project log to document the licenses/permissions you have obtained. (And if you haven't created such a log, or it isn't up-to-date, now might be a good time to get that done).

Now is not the time to ease off your diligence in properly licensing copyrighted material and documenting your licensing. Trolls are still out there and they will find you.

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