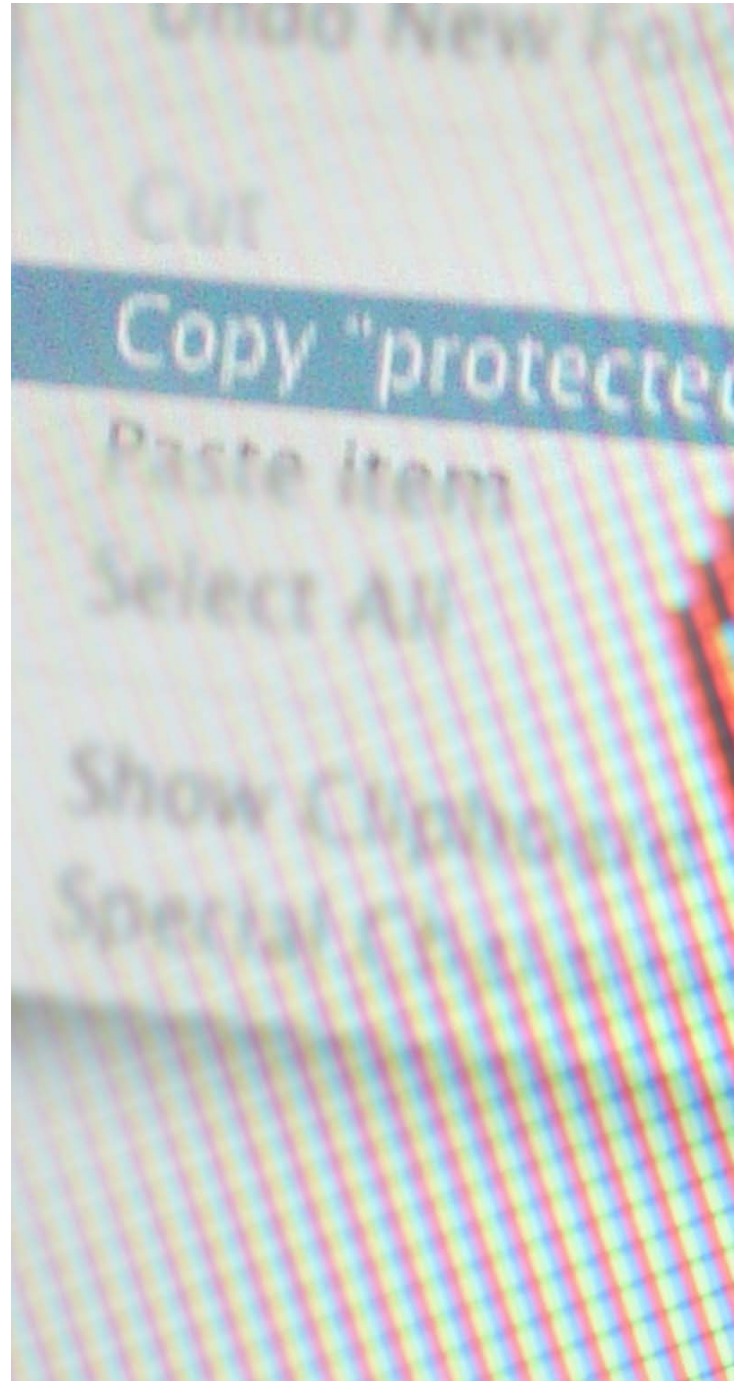


Free Access, Not Use

It's not just a copy-and-paste world on the Web; permission is required to borrow images and trademarks

by Jennifer L. Collins, Esq.



Just because it's on the Internet, doesn't mean it's free. The Internet is not a lawless frontier. The same laws that apply to the use of intellectual property outside of cyberspace also apply to Web sites and the Internet. So, if you find a great photo on the Web that you want to use on your site, be careful to make sure you have the right to use it. The consequences of using someone else's intellectual property or image without their permission can add up to millions of dollars in damages.



Copyright on the Internet

Virtually everything you see on the Internet is protected by copyright. Web sites, graphic designs, photographs, video images, audio files and text are all “works of authorship” that qualify. Copyright protection exists as soon as such a work is created, and no notice or registration is required to create the rights. The author of the work is generally the owner of the copyright, and the copyright owner has the following exclusive rights with

respect to the work: the right to reproduce or copy the work; the right to prepare derivative works based on the work; the right to distribute copies of the work; the right to perform the work publicly and the right to display the work publicly. With few exceptions, the copyright owner can stop others from doing any or all of these things without their permission.

Many of these exclusive rights are implicated by use of a copyrighted work on the Internet. For example, if you want to post a photograph of the Empire State Building on your Web site, you must have permission from the copyright owner of the photograph (usually the photographer) in order to: copy the photograph onto your Web site; distribute the photograph over the Internet and display the photograph publicly on your site. The photographer may or may not charge a fee for the use of the photograph, but paying an upfront fee is sure to be less expensive than paying attorney fees and possible copyright infringement damages for failure to get permission.



Before using any photographs or other copyrightable works on your Web site, contact the copyright owner and get written permission to use the work. Make sure the permission is broadly worded to include use of the work in multiple media (electronic, print, etc.) if necessary and to cover all the copyright privileges implicated by the proposed use. If you get the image from a stock photography company, the purchase of the stock photo should include a license to copy, use and display the photograph, but be sure to read the purchase agreement to confirm it adequately covers the intended use.

Publicity Rights

Apart from the rights to a photograph, but equally important, are the publicity rights of any people shown in a

photograph or other artwork. It is advisable to obtain permission of any people in a photograph or other image prior to using their images, particularly for commercial purposes. Many states recognize a “right of publicity” that allows individuals to sue companies or other people who use their image or likeness without their permission. This issue has been illustrated by two recent cases. Last fall, actress Catherine Zeta-Jones sued a Reno, Nev., topless club after it used her photograph on its Web site without her permission. She is seeking an unspecified amount of damages for the unauthorized use of her image and misappropriation of her rights of publicity. In another case, a kindergarten teacher from Seattle was awarded \$15.6 million in damages earlier this year after he sued Nestle USA for using a photograph of him on Taster’s Choice coffee labels for six years in several countries, without his permission. In each case, the user of the photograph thought they had these rights.



To avoid this type of liability, it is imperative to obtain the permission of any people shown in a photograph prior to using it publicly. Ideally, the people should sign a written publicity release, authorizing the use of their image for the purpose for which it is being used. Like copyright licenses, publicity releases should be drafted as broadly as possible to use the image in any type of media. If the photograph was purchased from a stock photography company, the agreement may or may not include publicity releases for people shown in the pho-

tographs sold. If the stock photography company does not grant publicity rights or does not warrant the people in a photograph have signed a publicity release, then any use of the photograph carries with it the risk the person(s) shown may later make a claim for damages for unauthorized use.

Trademark Rights

Trademarks are also prevalent on the Internet. Trademarks and service marks are the brands that identify goods and services. These include words, logos and slogans, such as the word “Nike” for athletic wear, the Nike “swoosh” logo and the slogan “Just Do It.” As with copyrighted works, trademarks generally may not be used without the permission of the trademark owner. However, it is permissible to use a trademark to describe something, as long as it is not being used in a manner that would suggest the trademark owner is somehow sponsoring the use of the mark. In other words, it would be permissible to include on a shopping center Web site a press release announcing the opening of a Starbucks, with the word “Starbucks” used to identify the new restaurant. However, it would not be permissible, without the consent of Starbucks, to use the company logo on a shopping mall Web site. Generally, the use of a logo is considered a “trademark” use, which is only permissible with the consent of the trademark owner. Use of a word mark, such as “Starbucks” is permissible as a “fair use” if limited to using the word to convey information and not as a “brand” for commercial purposes. If there is any question about whether a particular use is permissible, a trademark attorney should be consulted for advice.

As the sophistication of Internet search engines continues to grow, making images and other intellectual property freely accessible, one must keep in mind the use of intellectual property is not free. If you want to use the intellectual property or likeness of another person, obtain permission first. Begging forgiveness may be very expensive. □

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