



CIRSA LIABILITY ALERT

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SAFER TOGETHER

The Risks of “Borrowing” Images from the Internet

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Scenario: You're working on the Town's community newsletter, which is posted on the Town's website and also printed and placed in Town offices and facilities for citizens to grab a copy. You're in a big hurry to find a photo to accompany one of the articles, so you jump on the internet, find a suitable image, and plop it into the newsletter.

The internet is a treasure trove of photos, clip art, cartoons, and other images that seem to be available for the taking with just a “right click” and a “copy image” command. Right? **Wrong!** That photo or other image is likely someone's intellectual property and using it without the proper permission can be a costly mistake for your entity.

Any given photo or image you find on the internet may be a copyrighted work, subject to the protections of federal copyright law, and using it without a license may infringe on that copyright. Generally, these laws give to a photographer or other creator of “original works of authorship” the right to control how their work is used, displayed, or reproduced, including the ability to require a license—and charge a price—for their work.¹

Some misconceptions about use of images found online are that they must always have an express copyright notice—the ubiquitous “©”—to be protected and that local government use is not subject to copyright law. Right? **Wrong!** While there are legal benefits for the works' owner in using a copyright notice, use of the “©” or similar notice generally is not required in order to pursue a claim for infringement.² Therefore, don't conclude an image is free for the taking just because a copyright notice is missing. (Also, while states and state actors can have Eleventh Amendment immunity against copyright claims, local governments do not.)

While copyright laws include the “fair use” doctrine permitting the unlicensed use of copyright-protected works in certain circumstances,³ the uses allowed under this doctrine are narrow. Certain types of uses—such as news reporting, teaching, scholarship, and research—can qualify as fair use, but there is no categorical exemption for local government use. To the contrary, local governments do not have a “free pass” and municipalities and their employees can be subject to the same liabilities as anyone else who improperly uses works protected by copyright.

The potential liabilities for copyright infringement can be significant. For example, federal copyright laws permit owners to seek either actual or statutory money damages and attorneys' fees for infringement. Violations need not be intentional, so even an unintentional infringement can subject your entity to claims for damages under federal copyright laws.⁴

And don't think that your lil' ol' community newsletter will never be found! There is a whole industry of copyright protection agencies devoted to seeking out these kinds of copyright violations, and detection and enforcement have been made easier by emerging technologies capable of scanning the internet for unauthorized uses of protected images. And when they are found, you may get a letter—often referred to as a “takedown notice”—from the copyright holder or their representative offering the choice of a “negotiated settlement” or being taken to court. If you get one, report it to your supervisor so that management may consult your entity's attorney. Even a single, unintentional infringement may subject you to thousands of dollars of exposure. And because the Colorado Governmental Immunity Act (CGIA) does not apply to claims brought under federal law, the CGIA will not bar a claimed violation of the federal Copyright Act.

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The Risk of "Borrowing" Images from the Internet (cont.)

To avoid infringing on copyrights when using images, follow these suggestions:

- Don't assume you can just "borrow" an image from the internet. Even if you give credit or attribution to the source, you haven't received permission from the copyright holder.
- Look for an image that you know is copyright-free or licensed under a "creative commons" or similar license. Review the license terms to make sure that it allows your specific desired use.
- Subscribe to a stock image site so that your entity has access to a library of images that it can use for a price. Paying a known price in advance is far more certain than negotiating a settlement after you have received a notice and "bill" for an alleged infringement.
- For any photo or image, investigate whether it has copyright protection. If unclear, assume it is protected. If it is protected but is the "must have" image, pay a one-time license fee, which is often nominal and easily paid online. Keep your receipt and other records of the transaction.
- When possible, create and use your own original photo or image.

The internet has greatly expanded opportunities to obtain photos and other images that may be "picture perfect" for a current project, but recognize these photos and images have legal protections. Protect yourself and your entity by making sure you have the right permissions for any photos or other images you get from the internet or other sources.

If you are faced with an infringement claim, note that CIRSA's liability coverage provides CIRSA members with coverage for defense of claims or suits alleging "advertising injury." This includes coverage for injury arising out of infringement of copyrighted advertising materials, subject to the terms, conditions, limitations, and exclusions in the coverage document.⁵ If you have questions about this coverage, contact your CIRSA underwriting or claims representative for further information.

Lastly, while a full discussion of issues surrounding music copyright is beyond the scope of this article, know that music is also protected by copyright, and thus your entity should ensure that it has proper permission to play or perform copyrighted songs and music—whether from a recording or live—for the enjoyment of the public. Permission is typically obtained by entering into a license agreement or royalty contract with a performing rights organization (PRO) that licenses musical works on behalf of copyright holders in exchange for a fee, a portion of which is shared with the copyright holders in the form of royalties.⁶

As an obvious example, your entity must obtain permission to play or perform copyrighted music at public venues or events, such as a public holiday ice rink or Fourth of July show. Less obviously, your entity must also obtain permission to play recorded copyrighted music in the "background" at your retail establishments, such as your recreation center. While it's true that some songs—particularly certain "old time favorites"—are no longer protected by copyright because the time limit for protection has expired, the idea of plugging your public ice rink's sound system into Spotify or a similar service and playing the latest hits is a bad idea! (And a practice that might lead you to get an infringement notice and demand from one of the agencies that represents music artists.)

While copyright law is complex, your entity can reduce its exposure to potential infringement claims by following the suggestions above.

If you have any questions about this article, contact CIRSA Deputy Executive Director/General Counsel Sam Light at saml@cirsa.org, or CIRSA Associate General Counsel Nick Cotton-Baez at nickc@cirsa.org.

Note: This article is intended for general information purposes only and is not legal advice. Readers should consult with their entity's own counsel for legal advice on specific issues.

The Risk of "Borrowing" Images from the Internet (cont.)

1. 17 United States Code §§ 102 & 106. Federal copyright protections are primarily found in the 1976 Copyright Act, found in title 17 of the United States Code. The United States Copyright Office (USCO) has published a useful "Copyright Basics" Circular, which can be found at www.copyright.gov/circs/circ01.pdf.
2. USCO Circular 3, "Copyright Notice," at www.copyright.gov/circs/circ03.pdf, provides an overview of notice issues.
3. Section 107 of the 1976 Copyright Act provides the framework for determining whether a use is a "fair use," using several factors, including (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion of the work used; and (4) the effect of the use upon the potential market for or value of the copyrighted work.
4. For example, for infringement involving a single work, such as a single photo, federal law allows the copyright holder to pursue their actual damages and any profits of the infringer that are attributable to the infringement, or elect statutory damages of at least \$750, up to \$30,000, to be awarded as the court finds just. If a court finds the infringement is willful, it can award damages up to \$150,000. Claims against public entities often involve mistaken misuse of a photo or image for non-commercial purposes. Given these circumstances, a typical practice of the copyright holder—or attorney or trade group working on its behalf—will be to seek to resolve the matter through a demand letter and settlement agreement that offers a release of liability in exchange for a license fee plus additional costs and fees for pursuing the violation.
5. For example, coverage is excluded for a willful violation of a penal statute, such as a criminal copyright law, committed by or with the consent the covered party.
6. C.R.S. § 6-13-101, et seq., provides proprietors of retail establishments (e.g., municipal recreation centers) that perform or play copyrighted music with certain protections against unfair and deceptive trade practices by PROs and copyright holders with respect to copyright investigations and royalty contract negotiations. While the law is intended to increase transparency and prevent coercion in music copyright investigations and royalty contract negotiations, it does not prohibit PROs or copyright holders from enforcing claims for copyright infringement or excuse entities that play copyrighted music without proper permission from liability under federal copyright law.