



Intellectual Property Law
Business Law PS

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Article provided by Timothy B. McCormack, Seattle Copyright Attorney working in area of copyright litigation, procurement and development. This article is a continuation in the series of Software Copyright articles.

Copyright Infringement – I Didn’t Know!

Mere unauthorized use of a picture downloaded from the Internet (even from a “free site”) is enough to create liability for a business using the copyrighted work without permission. This is true, regardless of how the infringement came about. Typical copyrighted works that get businesses into trouble include images and text “acquired” from the Internet.

Copyright infringement can occur willfully or “accidentally,” but copyright law prohibits both. One federal court recently held, “there is no need to prove anything about a defendant’s mental state; [copyright infringement] is a strict liability tort.”¹ A strict liability tort is a legal wrong that does not require a “mental intent.”

In other words, a copyright owner, does not need to prove a defendant intentionally infringed the copyright in order to create liability because it is a “strict liability” tort. If you copy a picture from the Internet without permission, for example, you can be liable for damages even if you did not know the picture was copyrighted. That is the essence of “strict liability.”

Further, if you hire someone (an employee or an independent contractor or a web designer) you are also liable for using a pictures posted to your website by that third party even if you did not know what they did. Said another way, the business displaying the copyrighted work without permission on their website is liable as the end user.

¹ *Educational Testing Service v. Simon*, 95 F. Supp. 2d 1081, 1087 (C.D. Cal. 1999) (holding copyright infringement occurred because the plaintiff owned the copyright and the defendant copied protected material).

In fact, two or more people can be liable for the same act or acts of copyright infringement. This is called “joint liability.” If parties have joint liability, then they are each liable up to the full amount of the damages. Courts have found joint liability in such circumstances as a corporation’s president being jointly liable for publication of imagery from a CD-Rom. Other examples include website owners held liable for a third-party uploading content on their website (owner of website, infringed copyrights by distributing copyrighted photographs, even when website operator did not know that the photographs had been uploaded onto website).

If your web designer is liable so are you. Sadly, the party with the deepest pockets is the one that will likely get sued. In most cases that is the business owner that hired the web designer. The damages for this type of infringement can also be quite steep.

Under federal law, a copyright owner can be entitled to a \$750 to \$30,000 per infringement. If it is shown that the infringement is willful the law allows as much as \$150,000 per infringement.

Recent jury awards have ranged from \$675,000.00 to in excess of \$1 Million dollars in damages for copyright infringement. One recent jury in Western Washington awarded over one-million dollars in damages for unauthorized use of as few 5 photographs or images. In another recent case a jury awarded \$675,000 for infringing as few as 30 copyrighted works. The old adage, “ignorance of the law is never an excuse” applies to copyright law because even if you didn’t know, you might still be liable.

In some cases a standard business liability insurance policy (“slip and fall” policies) will cover copyright infringement claims made against a business. This is called “advertising insurance.” Ask your insurance agent if you have such coverage or consult a knowledgeable intellectual property or insurance lawyer can help determine if you have such coverage.

Above all, do not use copyright content without permission. A good general rule of thumb is, “if you did not take the picture, it is not yours.”

Double check your business insurance policies to make sure you are covered for “advertising” injuries because these types of claims can sneak up on you and in many cases you might be completely unaware of latent liabilities. Lastly make sure you have a good contract with any website developer and use only reputable companies. A development company located abroad might seem cheap until you get served with a copyright infringement lawsuit.