McAfee & Taft

TIP SHEET™

an informational newsletter on intellectual property matters

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INTELLECTUAL PROPERTY PRACTICE GROUP

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When a Picture's Worth a Thousand...*Dollars*

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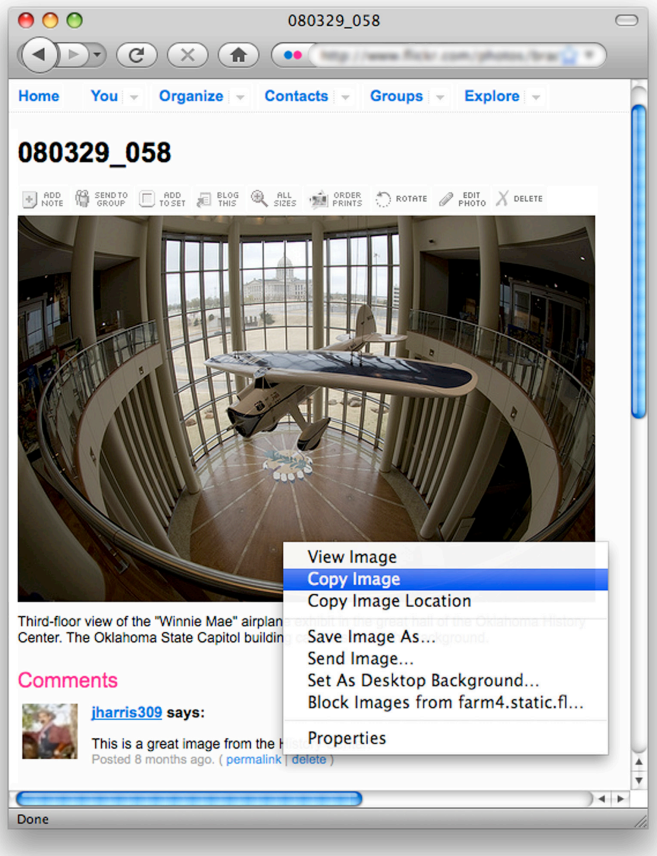
Right click, cut, paste. Now you've got an image to liven up your website, PowerPoint® or Facebook® page. It may have been a very expensive click.

Whether you create your new website or PDF portable promotional materials in-house or pay someone to do it for you, you need to be sure you have rights to the materials you incorporate into them.

It's a common myth that if an image appears on the Internet, it's fair game — part of the public domain. And it's so easy to hit that right click button and copy. But just because you can copy an image you found on the web doesn't mean you should. No matter where you find a picture, it is still the right of the person who owns the underlying intellectual property rights to decide where that picture is going to appear, how often, and under what circumstances. In fact, some digital image companies and photographers install digital watermarks that allow them to track infringing "clicks", then pursue copyright damage settlements — which in some cases is more profitable than simply selling the images.



Copyright infringement is a "strict liability" tort, meaning that even unwitting or "accidental" infringement is still infringement. Whether you have a physical copy of a picture or not, the underlying

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intellectual property rights (the copyright) to the photograph belong to the photographer or the company for which the photographer works. Generally, digital libraries purchase rights from photographers or hire photographers to create works for hire — images that go into their stock library. Using one of these images without permission, particularly if it's the subject of a registered copyright, can cost you, and some digital libraries are becoming increasingly aggressive about enforcing their rights.

The Copyright Act provides for statutory damages for infringement. This means that if the photograph is the subject of a copyright that has been registered with the U.S. Copyright Office, damages for infringing that copyright are prescribed by the statute. The owner doesn't have to prove any particular amount of actual damages. Damages for an innocent infringement begin at $750 and can range up to $30,000 per instance of unauthorized copying. Damages for willful infringement can go up to $150,000 per instance.

How are you supposed to know if you can use an image or not? The most obvious signpost is the appearance of the copyright notice, ©, but you can't take the absence of notice as a sign that the photograph isn't protected by copyright because copyright owners are not required to post notice on their copyrighted works. If you're looking through a library of images, look for a general "terms of use" page, and don't just click through it. Often, digital libraries will have a single gateway page that gives a copyright notice. In short, if you didn't create the image yourself or through a work-for-hire agreement, you're risking copyright infringement if you use it without permission.

Don't fall victim to the common copyright myth that using some small percentage of a work, or just a couple of images will give you a "fair use" defense. Real fair use is a very limited defense that allows excerpts of copyrighted material to be used for criticism, comment, news reporting, teaching, scholarship, or research. It is not a free pass to use something you found on the web.

Let's say you use a website developer to revamp your site. If the developer knows more about source code than about copyright law and enhances your website with a digital image that he's cut and pasted from another site without obtaining proper permission, you could wind up as a contributory infringer, particularly if you didn't have a written agreement with the developer addressing the issue of rights clearance.

How can you protect yourself?

1. If you are contracting with an outside provider to develop a website, promotional materials or anything else that might use images or other content that you did not create yourself, be sure you have a written agreement that specifically obligates them to obtain the appropriate permissions for any materials they use in creating content for you and indemnifies you if they don't.
2. Check your own insurance policy. Find out if your commercial general policy carries an advertising liability clause that gives you a defense to infringement. Although it is no certainty, most companies attempting to enforce rights are relatively practical about their ability to collect statutory damages from individuals or small companies who do not have coverage, so it may be easier to negotiate a settlement based on the value of an authorized license for the image.
3. Don't use anything that can be the subject of a copyright without asking permission from the creator. That means music, photographs, videos, text, dramatic or artistic works, software, and architectural drawings or models. If you really want to use content you didn't create, get clearance first, either directly from the creator of the content or through a rights clearance agency.

If you have further questions, please do not hesitate to contact contact any member of our intellectual property group listed on this newsletter.

A former trademark examining attorney with the U.S. Patent & Trademark Office, Rachel Blue brings extensive experience and insider knowledge to her role as a valued counselor on intellectual property matters. Based in McAfee & Taft's Tulsa office, her practice is global in scope.

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