

August 25, 2021

Legal Alert: Use of Online Images and Other Online Materials

Many not-for-profit organizations consider using images and other materials they find online for their own purposes (on their website, in marketing, etc.). It is important as one considers using such materials to keep in mind that they are protected by copyright law (and sometimes other laws protecting the rights of original creators), and that **it is common for creators and their representatives to challenge any use that is not made with their permission and to extract settlement fees** (sometimes running thousands of dollars) from not-for-profit organizations for such unauthorized use.

- **What is Copyright?**
 - Copyright protects original works of authorship (works such as written works, audiovisual works, artworks, musical works) from unauthorized reproduction and use.
 - Copyright attaches as soon as a piece of original work is created and fixed in some kind of tangible medium (paper, on a hard drive (which means online), memory or film in a camera, etc.).
 - Copyright attaches to both published and unpublished works.
 - Use that violates a copyright is known as an “infringing use.”
 - **For more detail, you may review materials on the U.S. Copyright Office Website -- <https://www.copyright.gov/help/faq/>.**

- **What are potential consequences of infringing someone’s copyright?**
 - Your infringing use may be barred.
 - **You may be liable for damages, which may include actual damages suffered by the author or statutory damages that can range up to \$30,000 per work used.**

- **When is it clearly okay to use an image or other materials online or in other ways?**
 - The copyright in any materials created by an employee or officer of an organization as part of the employee’s or officer’s duties belongs to the organization so may be freely used by the organization.
 - Materials in the public domain (for which copyrights have expired -- a complex issue -- see <https://www.copyright.gov/help/faq/faq-duration.html#duration>) may be freely used. **Keep in mind that new works made using public domain materials (such as new arrangements of old music) may still be protected, even after the original copyright expires.**
 - Materials from which you have the author’s permission for the particular use may be used in accordance with that permission. It is strongly advised to get such permission in writing and to understand and abide by the scope of the permission granted. Permission given orally may fall under what is known as an implied license, and that permission may in many cases be revoked for any reason or no reason and without notice.
 - Practice Tip: Be sure to keep a record of any approvals received to use copyrighted materials in a secure place with your important corporate records.

- **What about fair use?**
 - Fair use is a doctrine that enables certain kinds of uses of works, but typically only limited portions of works, to be made without becoming liable for copyright infringement.
 - Four factors are considered by courts in determining whether a specific use is fair use under the doctrine, they are:
 - The purpose of use: helpful if the use is educational, nonprofit, scholarly, reporting, reviewing, or research;
 - The nature of use: helpful if the original work is factual or uses public-domain content (as opposed to being more creative), or if the use is “transformative” – a use that (to quote the U.S. Copyright Office) “add[s] something new, with a further purpose or different character, and do not substitute for the original use of the work”;
 - The amount and substantiality used: helpful if using only a small piece of an image (or a low-resolution version of an image) or excerpt of text;
 - The market effect: helpful if there is no revenue generated by the use, and if the use does not impair the original author from monetizing the work.
 - **It is a highly fact-specific determination**, made by a court (fair use is a defense, not a bar to being sued) as to whether a particular use of a particular material falls under the fair use doctrine, **so a copyright attorney should be consulted before relying on fair use**. More information about fair use can be found at <https://www.copyright.gov/fair-use/more-info.html>

- **What do we do if we have already used non-employee materials without the authors’ permission?**
 - **You may wish to consult a copyright attorney.**
 - Although it will not shield an organization for liability for prior use, it is best to cease any such use as soon as it is discovered.
 - Consider reaching out to the author to obtain permission (a license) for the use of the materials.
 - Find and substitute materials for which the organization has permission or that are owned by the organization. Substitute materials may be those created by or for the organization or for which a license is purchased (or available through Creative Commons or similar public licenses) or unnecessary because they are in the public domain.

- **What do we do if we are contacted by an author or representative about our use of materials?**
 - **You should reach out to a copyright lawyer as soon as you are contacted.** It may be that you have a defense, and in any case, you want to be sure that any payment you make settles the matter (including that you are settling with the correct person and that the documents involved are correctly drafted).
 - Do not make any statements or confirm or deny anything regarding the matter in your interactions with the author or representative unless advised to do so by an attorney.
 - Do not ignore the issue.

This alert is meant to provide general information only, not legal advice. If you have any questions about this alert please contact Ciarra Chavarria at cchavarria@lawyersalliance.org or visit our website at www.lawyersalliance.org for further information. To become a client, visit <http://www.lawyersalliance.org/becoming-a-client>.

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