

The Latest in Cyberlaw

USE OF PHOTOS ONLINE

Have your clients been accused of using a photo without permission at a website or in a social media post? This month's column will provide some guidance under US law (foreign law may vary).

Often a client learns of a third party's claim when the client receives the "Getty Images letter" or a similar communication from a company or law firm that represents a copyright owner. The letter starts out something like this: "It has come to our attention that you are using an image represented by us for online promotional and/or editorial purposes. We have searched our records and have not been able to locate a valid license for the use of the image under your company's name. Attached is a copy of the image in question along with the usage found on your company's website." The letter typically demands that the recipient furnish a copy of a valid license to use the photo, or take the photo down and pay a specified amount of damages, or contact the representative for a license to use the image on an ongoing basis.

Responding to such claims can be frustrating. Sometimes your communications are met with template responses. Sometimes no infringement has taken place or at least not on the part of your client. The company or law firm representing the copyright holder might refuse to provide the copyright registration for the image, a significant item in light of the US Supreme Court ruling that a copyright infringement suit for a US work cannot be commenced without a registration. *Fourth Estate Public Benefit Corporation v Wall-Street.com*, 586 U.S. (2019). If you do receive a copy of the registration certificate, check to see if the effective date of registration predates the alleged infringement because, under 17 U.S.C. §412, the timing of registration impacts the copyright owner's ability to collect statutory damages (although there is a special grace period for registering within 3 months after the work is first published).

It is possible to negotiate the dollar amount with Getty Images and similar companies. In negotiating the amount, keep in mind that copyright liability is strict liability, so posting a photo without permission can be problematic even if the client had no malicious intent or knowledge that a copyright was being infringed. If you reach a settlement and your client remits payment, make sure that your client receives a release.

In some instances, defenses can be raised, such as the Classroom Use Exemption under 17 U.S.C. §110(1). One of the major defenses is copyright fair use, which protects various activities including news reporting. Four factors are considered in analyzing the fair use defense: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion taken, and (4) the effect of the use upon the potential market. Caution must be used when



Anne F. Downey

relying on the fair use defense, because often the public's view of fair use is more expansive than is warranted. Ultimately, copyright fair use depends on what a judge or jury decides.

Many times a photo will be posted to a company website or social media account by a third-party vendor that is handling the client's digital marketing. It is important for clients to review and negotiate vendor agreements to include an indemnification if the vendor posts infringing content. Of course, an indemnity is only as good as the bank account or insurance policy standing behind it. The client may also want to discuss its own insurance coverage with an insurance broker. And if an infringement claim is made, the client should generally give prompt notice to its insurer.

Sometimes clients find themselves in the hot seat when they use a photo under a stock license or Creative Commons license and it turns out that the client did not comply with the terms of the license. For example, a license might prohibit use of an image for commercial purposes, or might require attribution to the photographer.

A New York Court of Claims case provides a cautionary tale. The case did not involve a copyright claim, but rather some of the other claims that may arise when a photo shows an identifiable person. Such claims can include right of publicity or privacy, defamation, and false endorsement. In *Nolan v. New York State Division of Human Rights*, 2018 NY Slip Op 51789(U) (NY Court of Claims 11/8/18), the New York State Division of Human Rights ("DHR") ran an ad advocating for HIV-positive individuals. The ad featured a photo of a model, Avril Nolan, with the caption "I am positive (+)" and "I have rights". Ms. Nolan was not HIV positive.

DHR licensed the photo from Getty Images, which obtained the photo from the photographer. Getty Images assured DHR in an email and by phone that the model had signed a release, but it turned out that Nolan did not sign a release or give the photographer permission to sell the photo. Moreover, DHR failed to read the fine print in the license, which prohibited use of the stock photo in a defamatory or unlawful manner.

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Moreover, DHR failed to read the fine print in the license, which prohibited use of the stock photo in a defamatory or unlawful manner. The license also required that if any image featuring a model were used in connection with a subject that would be unflattering or controversial to a reasonable person, the image must be accompanied by a disclaimer indicating that “the image is being used for illustrative purposes only, and any person depicted in the image is a model.” No such disclaimer appeared in the DHR ad.

Nolan sued DHR and Getty Images. Ultimately, the New York Court of Appeals awarded Ms. Nolan judgment against DHR in the amount of \$125,000. For its part, Getty Images reached a confidential settlement with Nolan.

One final consideration is that if your client launches an ad campaign with audiovisual content, there will be additional issues to consider, including without limitation music licenses, Screen Actors Guild issues, and issues related to the use of third-party materials in the video (e.g., a painting appearing in the background of a video).

In summary, clients should be cognizant of third-party rights in photos and other content that they post online. With companies like Getty Images using automated systems that search the Internet for infringement, the risks are higher than ever.



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James P. Renda, Esq.

69 Delaware Ave., Suite 1006, Buffalo, NY 14202 | (716) 885-4335 | JRenda@rendalaw.com

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