

So I Got This Letter Claiming Infringement. I Didn't Even Know the Picture Was Copyrighted . . .

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. . . but now the sender wants a lot of money. What should I do? Did I really stumble into a multi-thousand dollar problem just by using an image I found on the Internet? I've heard of patent trolls. Is this some sort of copyright troll?

This scenario may sound familiar. Businesses have websites. Sometimes images — often photographs — find their way onto the websites without the owner's permission. If you have received a letter accusing you of copyright infringement and demanding what seems like an exorbitant sum, what are the basic issues of which you should be aware?

Copyright Vests at the Time of Creation

This fact surprises people sometimes, but a photographer doesn't need to file anything with the federal government in order to obtain copyright in a photograph. Owning the copyright means owning a bundle of rights associated with the image, including, with some exceptions, the right to preclude anyone else from copying it absent permission.

As a Practical Matter, Copyright Registration Is Required

In our scenario, at least, this is true. Because, generally speaking, the owner of the photograph copyright must register the copyright before the owner may sue for infringement. In addition, while the copyright laws provide for other monetary remedies such as an award of *actual damages* and *disgorgement of profits*, chances are that your use of the image may not have (1) caused much in the way of actual damages, or (2) contributed much if anything to your bottom line, at least so far as can be proved.

Statutory damages, on the other hand, may be much more interesting to the copyright owner. The owner may elect to pursue these in lieu of other monetary remedies — indeed, statutory damages exist to help copyright owners who might find the other monetary remedies not worth pursuing. But, generally speaking, the owner cannot obtain statutory damages if the copyright is not first registered.

Finally, the courts have the discretion in an infringement action to award *attorneys' fees* to the prevailing party — but only if the copyright was first registered.

If Registration Is Required, Doesn't That Mean I Can "Look Up" the Image Somewhere to Check Whether It's Safe to Use?

No. While the law is designed to promote registration of protectable material, and one of the reasons is so would-be users can determine the material's copyright status, there is no practical way to check whether an image is registered. One reason is the obvious difficulty in researching an image that contains no indicia of ownership or registration status. Further, under a group of recent federal court decisions, "stock agents" are permitted under certain circumstances to register *catalogs* of images under a single registration number. Very possibly, the demand letter that prompts you to read this article was sent by a stock agent or its counsel. The revenue models of such agents and their lawyers often depend upon getting the demanded payment quickly and cheaply.

So Should I Just Write a Check?

We're not giving legal advice here, just providing a thumbnail of some of the issues. No lawyer could answer that question properly without knowing more details, and ultimately, the call is yours. But as you and your lawyer try to decide, here are some other things worth thinking about:

- If someone else truly owns rights in the image, or there is a reasonable prospect of it, then you should promptly try to do what is right. While figuring out what exactly that right thing is — copyright law is complicated — you may well want to take the image down. Both statutory damages and attorneys' fees can be exacerbated by willfulness. It's much harder for someone to say you willfully infringed if you took the image down as soon as you heard someone else might own exclusive rights in it.
- Only the owner of the copyright can sue for copyright infringement. Ownership is vested, in the first instance, in the "author," i.e., the photographer. The demander may or may not be the owner.
- The question may boil down not to whether you should pay, but how much. Demanders often want much more than is reasonable, especially if the work is innocuous. Indeed, demanders typically will focus on the upper statutory damages limit of \$150,000 (that for willful infringement) and not the lower bound of \$750 (down to \$200 for innocent infringement).
- Simply paying, in response to one demand, will not necessarily preclude other demands — from the same sender or from others. A written settlement agreement may give greater assurance.
- On the other hand, volume owners such as stock agents confront economic issues too. It costs money to sue, recovery of attorneys' fees is not a foregone conclusion, and the alleged infringer may not be subject to suit in a convenient forum. The lawyer for the demander may not even know what copyright registration (if any) pertains to the image in question, and may not want to take the time to find out, let alone reveal the results.
- Under the Copyright Office's current fee structure, registering an individual photograph costs less than \$100. If the photographer has elected to transfer the photograph to a stock agent for copyright enforcement purposes, instead of paying this nominal sum himself or herself, there is an argument that the enforceable copyright interest in the image is worth nothing more. At a minimum, responding to a demand by offering to pay or paying the minimum statutory damages figure may operate — if litigation proceeds — to persuade the court that the demander is entitled to nothing further.
- No law says you have to respond to the demand letter. For some of the reasons identified above, you may be better off if you do. On the other hand, especially if the alleged infringement is modest in scope and is remedied immediately upon notice, you may be better off if you don't. Responding tells the demander you are "in the game." Not responding may leave you slipping toward the "bottom of the stack."

Again, copyright law is complex, so the particulars of your situation may well matter in determining the optimal approach in responding to a demand. But hopefully the foregoing has helped identify at least some of the issues.

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