

You've Been Trolled: Assessing a Copyright Infringement Cease and Desist Letter

Amundsen Davis Intellectual Property Alert
February 15, 2021

Almost every company's web site has one or more photographs. Maybe yours have been in use for years. You don't remember where or how you got them, but you like them. They look good. They illustrate your product or service. You have enough on your plate running your business without worrying about how your web site is illustrated.

Out of the blue, you receive a cease and desist letter from some lawyer, claiming that you are engaging in copyright infringement by displaying one of those photographs. The lawyer demands that you immediately remove the photo from your web site and pay thousands of dollars in damages and attorney's fees. What do you do?

Before making immediate changes to your web site and reaching for your checkbook, you should consider whether you have insurance coverage and quickly assess the merits of the claim. As to insurance, your business policy may or may not cover these types of claims, but you should report the claim to your carrier immediately to find out. Chances are they will assist you with defense costs and finding the right attorney to assist with assessing the claim.

Assessing the merits of the claim should be done quickly, because continuing to display the subject photograph after receipt of the demand letter may be evidence of willful infringement if it turns out the claim has merit.

To assess the merits of the claim, consider the following:

- Is the original image attached to the demand letter? If so, and if it is an image of a web site, does the web site display copyright notice?
- Compare the original image to yours. Copyright infringement exists only if the image you are using has been copied from the original work. If the photographs are quite different, proof of infringement may be more difficult to establish.
- Is a copyright certificate attached and does it show the image alleged to be infringed? Whether or not the work is registered with the Copyright Office is of

PROFESSIONALS

Kay Weiler
Partner

RELATED SERVICES

Intellectual Property

particular importance since no one can file for copyright infringement until the work is registered or, at a minimum, an application for registration has been filed. If the image was registered prior to your use, the claimant is eligible to receive an award of statutory damages and attorney's fees, increasing the value of the claim.

- Is the monetary demand reasonable or unreasonable? Under the Copyright Act, a claimant can potentially recover actual damages, lost profits, or statutory damages. Actual damages and lost profits are often difficult for a claimant to prove, so your analysis should focus on the potential statutory damages. For infringements that cannot clearly be defined as innocent, on the one hand, or willful, on the other, statutory damages range from \$750-\$30,000 per work. An innocent infringer may have to pay as little as \$200, while an intentional infringer may have to pay as much as \$150,000 for a single infringement of one work. Statutory damages, however, are not available before the effective date of the registration, unless registration is made within three months after the first publication of the work or one month after the copyright owner has learned of the infringement, so an analysis of the timing is critical.
- Who is the copyright holder and who is the attorney? Are they high-volume filers, seeking a quick settlement with minimal effort?

In summary, if you have received a cease and desist letter, don't panic. Rather, investigate it and assess the merits of the claim. Only then can you determine your next step. However, do not ignore the letter altogether. If you fail to take down the allegedly infringing photograph, your continued use of the photograph may be considered willful infringement subject to the much higher statutory damages noted above. When in doubt, consult an intellectual property attorney to help you evaluate the claim.

You've Been Trolled: Assessing a Copyright Infringement Cease and Desist Letter