

Three Inexpensive Steps to Avoid a Copyright Headache

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Copyright law is complex and can hold a lot of traps for the unwary. Oftentimes, companies could avoid these traps by taking a few simple steps that could end up saving them time and money.

Register your DMCA agent with the Copyright Office.

Many online businesses have heard of the Digital Millennium Copyright Act (DMCA) and the notification procedures it specifies, but many do not know the requirement to register an agent with the Copyright Office, or forget to do so. Even some businesses that include notification instructions on their websites leave off this important step.

17 U.S.C. Section 512(c)(2) requires designating an agent and providing contact information to the Copyright Office. The form is simple and the filing fee only \$105 (plus \$35 per 10 more alternative names, such as D/B/As or website domains). Nor does a business need an attorney to file the designation. Of course, any business facing an accusation of infringement should consult an attorney, but filing the proper paperwork with the Copyright Office before that happens might give you a leg up in defending against a claim. Under certain circumstances, most commonly hosting user-posted material, the DMCA safe harbors immunize online service providers from monetary liability if the provider follows certain rules. Even for a business without a lot of user-generated content, having a designated agent may deter copyright trolls, as a lower potential payout might lead a troll to focus on a different target.

Check your contracts.

Hiring a photographer to take photographs of your company event? Make sure the contract allows your company to do whatever it wants (or might want in the future) with the photographs. Whether an assignment of ownership, exclusive license, or nonexclusive license is right for your company depends on your goals, but do you really want to face a lawsuit for including one of the photographs in your company

holiday card because the agreement was a license that only covered your company website?

The same principle applies to website designers, independent contractors, and anyone engaged by your company that is not a payroll employee. Even if you are working with a friendly and reasonable professional, you may not be able to find him or her in 10 years to ask for permission when your company wants to include a website design item in a television ad. Make sure the contract meets your company's needs without limiting its future growth.

Be thoughtful about which material you use.

Copyright law in the U.S. defaults to protecting (almost) everything. That includes the snapshot of your lunch, your coworker's flyer, or your child's refrigerator drawing. This makes using material floating around online a perilous lottery. Who are the original author(s)? Do they care if you use it? Will they find out? Will they make the effort to contact your business? Demand payment? File suit? Even if 99 out of 100 smartphone owners would not care if their photograph of a ramen bowl ended up on a ramen restaurant website, running across the one exception could be an expensive and distracting misadventure.

But to a business, not every use of material is worth spending a lot, or any, money on (whether it is on licensing or on attorney fees to carefully analyze whether fair use or another noninfringement doctrine applies). Options to consider for obtaining material to use inexpensively include:

- a. Ask for volunteers: If your noodles are good, your customers will be proud to share their snapshots. Spread the word your company is looking for the "best" customer photographs to feature on the website or in ads and you may be surprised how many entries you get.
- b. Creative-Commons licensed material: The authors expressly permit reuse in specified circumstances.

There are six standard licenses, including some that expressly permit commercial use, and some that condition it on good karma (users have to share-alike). Some collections like Flickr allow search by CC licenses, so familiarize yourself with the options.

- c. Public domain material: Anything published before 1923 is in the public domain, which means no one owns any copyright in it. Also, anything by the federal government is in the public domain (check out awesome photos at Great Images in NASA). 17 U.S.C. Section 105. Libraries and universities often have archives of older material, but double-check any contracts you agree to for limitations.
- d. DIY (or have your employees do it): This can take more work, but it is sometimes less of a headache than figuring out licensing terms, and it presents fewer risks. After all, a licensor might argue your business broke the terms of the license or ask for more fees year after year; a business will own its own copyrights automatically.
- e. User-generated content: Letting your users find and post material may be the right choice, and if done correctly, could maintain DMCA safe harbor immunity for your company. The DMCA can be tricky, so carefully evaluate how your company fits.

Licensing can also be a relatively inexpensive option as professional material may be of a better quality, or a flat-license collection may offer better selection or easier searching. (Even so, make sure to shop around and read the fine print before your company ends up in an argument over whether the annual retreat was “commercial” or “noncommercial.”) But the above options could help save your time and money for critical use cases instead of mundane ones.

Conclusion

Even if taking these precautions does not fully protect you from legal problems related to copyright law, they are cheap and easy first steps to reducing some of the risks many companies face. Also, consider a not-so-cheap option: insurance. It is oftentimes less expensive than the costs of defending a lawsuit,

even if your company wins. Note that many standard insurance policies exclude copyright and other IP claims. Talk to your broker and weigh the costs.

Or just hire a copyright lawyer.

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