

The devil in 'found' images' usage lurks in the details



By Bart A. Lazar

The Internet Age has created much more than the free flow of information. Images today are freely transferred at the click of a button, and it is more difficult to acknowledge or confirm the source or provenance of a particular image. While there are many benefits to the free flowing exchange

of images, it poses problems for those who use "found" images. Copyright, trademark, right of publicity and other claims are increasingly being filed against companies using images for commercial purposes. Usually, if there's improper use of the image or something contained in the image was unintentional, the "infringer" does not know that she has infringed or believes that she had the right to use the image because of a stock photography or other license. However, copyright and other intellectual property law typically does not excuse unintentional infringement. Worse yet, in copyright cases, it is not unusual for courts to award attorneys' fees, which encourages overaggressive litigation of copyright claims.

The first thing to check is whether the owner of the photograph has authorized the particular use of an image. If you cannot determine that you are the owner of, and/or have the right to use the image for the

intended purpose, you are taking a risk.

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Using stock photographs is a pretty standard way of avoiding the necessity of clearing rights to the use of an image. However, one should not be so fast to assume that if you have acquired the right to use an image from a stock operation, you do not need to clear any commercial use of the image. For example, a particular image of a sporting event could be cleared for use by a newspaper, however, that same picture may not be acceptable for use in a commercial advertisement. The photograph could contain such proprietary items as the baseball team's or league's trademark, the image of the player and/or the image of the stadium.

A close look at the license agreements contained on some major online stock photography houses indicates that the companies do not warrant or represent that the photograph or the contents of a particular image are approved for all uses. For example, the June 2005 version of the Corbis content license agreement states that there may be "restrictions as to time, manner, industry and territory of use, and required preapproval by a depicted person or their representative," and no representation or warranty is made concerning any persons, places, property or subject matter depicted in the image.

If an image includes an object that contains an item protected by intellectual property rights, the contents may need to be cleared as well. For example, I handled a matter in which a company took a photograph of an assortment of toys and used the image in a calendar that was distributed commercially. The copyright owner of the toys asserted that such commercial use of their toys in a promotional calendar constituted copyright infringement.

MARKETING AND THE LAW

Other claims have been made when identifiable buildings have been featured in images used for commercial purposes. And an individual's likeness may be protected under state right of publicity laws.

It is also possible that particular images may not be cleared for use in connection with certain types of products (typically, smoking-related or adult-oriented content).

Don't assume you have the rights just because it had been used before. Many times clients or agencies look into their own files, pull some image that was used before in an earlier advertisement and assume that the use is OK. That would be a risky assumption. Earlier this year, a California jury awarded \$15.6 million to a man whose picture was used without his permission on Taster's Choice coffee product labels throughout North America. Apparently, the man had been offered \$2,000 if his likeness

was going to be used in Canadian marketing for the product. There was a dispute over whether the amount had been paid, but the jury found that the use of the man's image was without permission. Talk about a wake up call.

Of course, to conduct business involves risk; if we did not accept some risk, we could not get out of bed. The key is determining what constitutes an acceptable level of business risk, then putting in policies to make it so. The best policy would be to gain the rights to use specific images for specific purposes when and where possible. If this cannot be done, the image should be reviewed to determine if it can be modified in a legal manner in such a way as to eliminate a claim for infringement, such as by cropping the image or blurring a face so the individual is not recognizable. If this cannot be done, you should consider having your own employees or independent contractors create original artwork that you know you have the right to use.

There are bound to be situations in which, after a reasonable investigation, you cannot

verify rights. In these situations, I would still recommend caution in using an image and strongly suggest that the image be reviewed carefully to determine if there is any content in the image that could come back to haunt you. The key, though, is not to assume that you, your agency or your client has the right to use any image or the subjects depicted in the image. Anyone who has seen *The Odd Couple* episodes knows what could happen when you "assume." ■

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