

## **INTERNET COPYRIGHT PROTECTION: WHAT YOU DO OR DON'T OWN, AND HOW TO PROTECT YOURSELF**

**By:**

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The rise of Social Media and the broad reach of the Internet have created a host of new challenges for copyright owners. Digital technologies, including file sharing and mobile devices, allow users to link to and display website content out of context while search engines, email and Social Media sites make it possible to disseminate copyrighted materials in an instant. Whether you are an entrepreneur or the owner of a small, medium or large business, you more than likely have or will set up a website, a business Facebook page, and in some cases you may even link your website or business Facebook page to sites such as Pinterest to advertise and market online.

No matter the vehicle you use, the commonality is that every law, statute and regulation in your country, or as applicable globally, that applies to your business and your industry as you advertise and market your brand or hire employees, whether the “old fashioned way” or online, applies.

Currently, the most important legal issue related to Social Media is **copyright** because users and businesses upload significant amounts of content to Social Media, and this frequently includes copyrighted material.

This leads to the question: Do you have a legal right to repost a third party's photo, video, speech, book or other content in whole or in part and do third parties have a legal right to repost your content?

The answer is simple:

**If you don't have the right or permission to use someone else's copyrighted material, you may be opening yourself up to major legal liability.**

It is important, therefore, that as a business owner, owner of a website or even as an individual, that you protect your copyrighted material from infringement. It's also important, when using third party copyrighted material, to protect your business from a copyright infringement lawsuit, whether it's you or your web designer producing the content.

The purpose of this post is to provide you with the basic principles of United States copyright law, the risks, and how to manage that risk of copyright infringement as a copyright owner and as a user of others' copyrighted content.

**Even if you aren't located in the United States, this information still applies to you!**

Irrespective of the country you or your business is located in, you are also subject to United States copyright law if you upload content that is owned by a third party who is recognized as the owner of such content under United States copyright law, which means that you are also subject to risk of infringement if you do not comply.

It is also important to note once again that in nearly all jurisdictions worldwide, including the United States, it is not necessary for a Work to have an explicit copyright notice for it to be copyrighted. It is also not necessary for copyright in a Work to be registered.

## **WHAT IS COPYRIGHT? (source: U.S. Copyright Law, Title 17)**

Copyright protection, according to U.S. law, is a form of protection grounded in the United States Constitution and granted by law to the authors of original works fixed in a tangible medium of expression that includes, but may not be limited to, literature, drama, music, photographs, logos, artistic works, speeches (inclusive of any slides, written material, or handouts of the speaker) or art (the **“Work”** or **“Works”**). The law also gives the author the **exclusive** right to distribute, perform, display, reproduce or prepare derivative works based upon the Work.

Copyright is chiefly governed by two federal laws: the Copyright Act of 1976 (**the 1976 Act**) and the Digital Millennium Copyright Act (the **DMCA**). The 1976 Act is the primary legislation governing copyright issues. Following are brief and limited summaries of the 1976 Act and the DMCA as found on the U.S. Copyright Office website (<http://www.copyright.gov>) to help you become familiar with some of the important basics outlined in this legislation.

### **1976 Act**

- The 1976 Act mandates that Work that is created (fixed in tangible form for the first time) on or after January 1, 1978, is automatically protected from the moment of its creation (registered or not – so important to remember) and is generally given a term based on the author’s life plus an additional 70 years after the death of the author.
- For works made for hire, and for anonymous and pseudonymous works (unless the identity of the author or authors is revealed in the copyright office’s records), the duration of copyright will be 95 years from publication or 120 years from creation, whichever is shorter.
- Works created before January 1, 1978 but not published or registered by that date, have been automatically brought under the statute and are now given federal copyright protection.

## DMCA

- This amendment to the 1976 Act was based on implementation of two 1996 treaties of the World Intellectual Property Organization (WIPO). On May 22, 2001, the European Union passed the Copyright Directive or EUCD, which addresses some of the same issues as the DMCA (yes, copyright protection is worldwide).
- The DMCA was passed unanimously by Congress in 1998 for the purpose of creating a “safe harbor” or exemption for Internet Service Providers such as Facebook; YouTube; Google; Ning; and Pinterest and other intermediaries (hereinafter collectively referred to as the “ISP”) who might otherwise be directly or indirectly liable for copyright infringement under the U.S. Copyright Act of 1976 for simply transmitting user-supplied (you) content or information.

This exemption includes waiving any affirmative duty on the ISP to police user supplied content to determine whether the content is infringing, **provided**, the ISP documents a mechanism for a copyright holder to protect their online content.

In other words, so long as the ISP has created ways for copyright holders to ask that their work be removed from the site and upon such notification the website takes prompt and affirmative action to remove the infringing material the DMCA generally provides the ISP with a safe harbor from liability.

It is important to note here that this kind of protection may not be available to a business or an individual who produces a brand marketing page on which users are able to upload content that may be infringing. This concern led Kristen Kowalski, a Georgia attorney, in March of 2012, to delete her Pinterest account. She took this action after doing some legal research and concluding that, based on Pinterest’s Terms of Service and Facebook’s Terms of Use, she could potentially have personal liability for copyright infringement.

**Case in point:** One of the most frequent errors that get businesses and people in trouble is using free photo sites such as Pinterest. Just because the photo is on one of these sites does not mean that the person who posted or “pinned” it there, or the person who “repined” it, had the right to do so. Pinterest’s Terms of Service and Acceptable Use Policy, requires that users agree not to “pin” or “repin” any content that infringes another’s intellectual property rights including copyright.

Additionally, scanning something does not, by itself, give you a new copyright over anything. For example, you cannot scan a photograph, say from a magazine and then put it on the internet without permission, as the copyright would still reside with the author of the Work. By not reading and following the ISP’s Terms of Service, Terms of Use, or Acceptable Use Policy or using caution as Kristen Kowalski did, you could receive the following email (with personal identifiable information deleted), sent by Pinterest in May 2012 to a Pinterest registered user for copyright infringement based on repining.

“Hi \_\_\_\_\_

We removed one (or more) of your Repins as a result of a complaint from the copyright owner.

The content was originally pinned from the following address by another user without permission: *[deleted for privacy protection]*

Most sites welcome Pinning since it results in traffic, but occasionally a site prefers users don't share their content. To respect copyrights and protect users, we remove Pins and Repins when we receive complaints of copyright infringement.

Thanks for using Pinterest.

- The Pinterest Team

Pinterest DMCA #ID 1855413716”

In the example above, as a user, you may think this is the end to your personal liability. However, it may not be, if you, as the copyright infringer:

- Do not comply with the takedown request;
- Continue to infringe the copyright owner's rights in violation of the U.S. Copyright Act.

But, you're thinking, what about my rights to be protected from copyright infringement under the Fair Use Doctrine?

Good thought – so let's discuss Fair Use.

## **“FAIR USE” AND OTHER EXCUSES**

Under the fair use doctrine of the U.S. copyright statute, it is permissible to use the legal defense of “fair use” if you use limited portions of a Work including quotes for purposes such as commentary, criticism, news reporting, and scholarly reports. However, it only permits limited quoting of copyrighted material. It is important to note the difference however, between a legal defense and a “right”.

The fair use doctrine, does not give you a right to do anything you please, including tweeting or retweeting, as there are no legal defenses permitting the use of a specific number of words, a certain number of notes, or a percentage of the Work, and call it “fair use.”

For fair use to apply, you must demonstrate that the use of the copyrighted material was non-commercial or educational in nature, that the nature of the copyrighted work was appropriate for fair use, and that only a very small amount of the Work was used and such use did not affect the potential market value of the Work.

Fair use can be hard to establish based on the extremely complex body of case law, and it is often very difficult to ascertain in advance whether or not a certain use will be considered fair use in court.

“Fair use is at best an “iffy” defense and there is virtually no way that anyone can say, in advance, whether the defense will be successful” (cited from: Hoffman, Fair Use: Further issues).

So, the best and most advisable course of action in any instance where you want to use material not owned by you, is:

**If in doubt, seek written permission first.**

## **Other Excuses**

“I found it on the internet”; or “it didn’t say it was copyrighted”; or “I acknowledged the name of the author (this was recommended during a recent webinar I was participating in by “experts” – incredible!) may not be a defense against copyright infringement.

Currently only Work that is in the public domain (such as government documents) or explicitly states “share” or “public” should be considered “safe” to repost without permission. Otherwise, assume that it is still under copyright and you are prohibited from using any of the Work or Works unless you have the owner’s written permission.

## **SO, WHO OWNS THE COPYRIGHT?**

Facebook, Pinterest, and other similar social media sites say you own the copyright because you agree that you do when you register as a user of their platform, or they “assume” you have the legal right from the owner or owners to repost the Work or Works and;

- You also represent and warrant that you have the right to grant the site(s) a license or sublicense to use the Work or Works;
- You also must indemnify them that all of that is true and hold them harmless and defend them and pay all legal costs if they are sued for copyright infringement because the actual owner of the copyright says it is not true. (See Pinterest and Facebook’s Terms of Use, Terms of Service, and acceptable use policies).

In the end, the bottom line is, ISPs have DMCA protections from liability for copyright infringement. **You and your employees, as users, generally do not have these protections, and you could be exposing yourself to a significant legal risk by reposting anything by a third party without written permission.**

## LEGAL CONSEQUENCES

Copyright infringement can result in both civil and criminal penalties. **Civil penalties** may include but are not be limited to:

**Compensatory Damages** – meaning damages designed to put the copyright holder in as favorable a position as he/she would have been had the copyright never been infringed. The calculation of these damages is either based on the economic loss to the copyright owner and the economic gain enjoyed by the infringing party, or, a court may order the infringing party to turn over his/her profits to the copyright owner.

**Statutory Damages** – meaning in some copyright infringement cases, compensatory damages are insufficient because the copyright holder cannot provide his losses and the infringing party earned no significant profits. Therefore, federal law allows the holder of the copyright to collect statutory damages of between \$100 and \$150,000 per act of infringement. Higher penalties can be assessed by the court when the infringing party had actual knowledge that the work was copyrighted. Statutory damages are only available for a copyright registered with the U.S. Copyright Office by the time of the infringement or within three months of publication.

**Injunction and Seizure** – meaning a court may enjoin an infringing party from committing further acts of infringement. Violation of this injunction can spill over into a criminal charge and criminal penalties, including incarceration. A court can also order the seizure without compensation of all illegal copies of a copyrighted work or the temporary seizure of allegedly infringing materials pending the outcome of the infringement lawsuit.

**Criminal charges** – meaning an infringing party can be criminally charged if he/she commits an act of infringement after being warned by the copyright owner, such as through a “cease and desist” letter. However, for criminal liability to be viable, the infringement must have been committed for the purpose of financial gain (irrespective of whether the infringing party makes a profit or not) or must have involved the reproduction or distribution of at least \$1,000 worth of copyrighted material. **Currently, in the United States the maximum criminal penalty for copyright infringement is five years in prison and a \$500,000 fine.**

## RECOMMENDED STEPS TO MITIGATE RISK OF COPYRIGHT INFRINGEMENT

Here are some recommended steps to mitigate risk of copyright infringement as a copyright owner and as a user of third party copyrighted material on your business website.

### Protecting your own copyright

- Limit the ways consumers can use your copyrighted Works by providing them with specific preapproved content through your own website and/or a Social Media site.
- Know and document what tools and processes ISPs have made available to copyright owners to help stop infringement.

- Negotiate terms with ISPs, such as YouTube, that permit your business to retain control of the content of your Work or Works.
- Register and designate a DMCA agent with the DMCA if you have web users posting content or comments to your site in order to benefit from some of the safe harbor provisions for copyright infringement.

### **Third party copyrighted material**

- Only use images, photographs or content on your site that you or your web designer own or have created as Original Work as defined in the Copyright Act. It may not be viewed as the best solution, but it is the best possible way to ensure that you are not infringing on a third party's copyrighted Work.<sup>24</sup>
- Do not take anything from the internet or anywhere else, including a third party's blog, just because it is on the internet or anywhere else because it is almost always, by default, copyrighted, unless you can reasonably prove otherwise.
- Get permission to use a third party's Copyrighted Works.
- If you know who the copyright owner is, contact that person directly.
- If you are not certain ask the Copyright Office to conduct a search of its records. (As of fall 2012, the Copyright Office's rate for this type of research is \$165 an hour with a two-hour minimum. As a cheaper option, you can do it yourself.) For example, online photos will often include credits to the photographer, which should enable such a search.
- Always get the permission in writing whatever the source, or get a license. For example, it is recommended that blogs be licensed under a Creative Commons Attribution 3.0 United States License.
- Have sections in your agreement with your web designer or web developer that they represent and warrant that they own or have a license with the right to sublicense for all the material they place on your website. The agreement should also stipulate that they indemnify you, hold you harmless, and will defend and pay all monies due if you are sued for copyright infringement based on their representation and warranties.
- Monitor your employees' content they are sharing through the business website and Social Media sites (including their personal sites) as you as the business owner may be vicariously liable for your employees' copyright infringement.
- Clearly state in your Social Media plan the processes for use of third party copyrighted materials (such as obtaining licenses and getting releases signed granting permission to use a third party's original works of authorship).
- Know the limitations of the fair use doctrine as a checklist in determining whether your business's use of such copyrighted material falls within the doctrine.

### **Takeaway**

While communicating with your business's customers through Social Media can increase brand recognition and reach new markets, it also opens the door to copyright infringement on a whole new level. That is why it's important for you to know and act on your responsibility as a copyright owner and as a user of others' copyrighted material. You must understand the

inherent legal risks, and how to manage those risks by following the spirit of the law. Adhering to copyright law helps reduce your legal liability and also reflects your desire to follow practices that are ethical and professional.

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## ABOUT THE AUTHOR



Judith is the founder and chief new media compliance strategist for [CMMR Group-TurnsonPoint](#), a new media compliance solutions firm located in Petaluma, Calif., and a valued member of [Agnes + Day's](#) Crisis Intelligence Team.

CMMR Group-TurnsonPoint specializes in the integration of new media strategies with business strategies to effectively manage risk associated with online compliance such as the HIPPA Omnibus Rule, global social media private and data protections and contract risk management.

Judith's experience and skills as a new media compliance strategist have been honed through a professional career of 27 years building and managing corporate legal departments for organizations such as SAP AG's SAP America, Sybase and the University of Southern California (Health Sciences).

Judith continues to demonstrate her thought leadership in these areas through her posts and articles, as well as through speaking to individuals and organizations, on the importance of understanding and taking action in response to legal and regulatory changes that affect brands and contractual positions in the online global world.

As a speaker, she has addressed these topics for among others, The Chief Financial Officers National Conference, San Francisco, Sonoma County Realtors, City of Santa Rosa, California and currently is a scheduled speaker on social Media and Privacy Risks to Petaluma businesses in late February, 2014.

Her posts and articles can be found at [Melissa + Day.com](#) Global Online Privacy Laws; Insurance Thought Leadership.com (under Thought Leaders); and [www.jahmd.wordpress.com](#)

Judith's affiliations include: The Wharton School of Business; Harvard Business School; the American Bar Association; the Denovati Group; ADR conflict resolution and mediation exchange; and the National Association of Professional Women.

Judith's honors include: Sybase Worldwide Customer Service Award; Sybase President's Club; the SAP Road Warrior Sales Award; and a member of the University of Southern California Faculty Club.

Judith is a skier, avid reader and a former marathon runner.

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