

# Copyright Protection of Images

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As the internet and digital photography technology continue to develop at a rapid pace, a growing number of photographers and artists have embraced online forums such as Flickr, Instagram, Imgur, Facebook, and Photobucket, to share their captured images and videos. These sites offer free, instantaneous sharing and immediate social feedback. You can capture an image or video clip using your digital camera (or a smart phone which allows you to never be without a camera) and share your personal images with, in effect, the entire world (or your community) within minutes. Having others “like” your work and attracting followers is very gratifying and encouraging. No waiting for film to be developed, no editing process, and no scanning. But with all these advantages come disadvantages as well. The same ease with which a photographer uploads a photograph is mirrored in the effortlessness required to download and acquire the image. This is particularly troubling in situations where the acquisition is without the photographer’s knowledge. When this occurs, photographers look to copyright law to seek protection against impermissible use of their photographs.

The Copyright Act of 1976 is the current source of copyright protection in the United States. A copyright of a work covered by the Copyright Act provides its author with the exclusive rights to exploit the work for the life of the author plus seventy years. Photographs are included as protected works covered by copyright. The exclusive rights a photographer enjoys include the right to reproduce the photograph; prepare derivative works based on the photograph; distribute copies of the photograph; and display the photograph publicly. There are certain exceptions to these exclusive rights, such as fair use, but in general, if any third party republishes or exploits the photographer’s work by taking it from an image-sharing site, or any other website without

the photographer’s consent, these exclusive rights are violated, making that third party an infringer. The Copyright Act offers a copyright owner a variety of remedies against such infringers, and remedies include injunctive relief; impoundment of the infringing goods; an award of the copyright owner’s actual damages; an award of the infringer’s profits; and, if the work was registered properly before the infringement occurred or was registered within ninety days of its first publication, the photographer can seek statutory damages and attorney’s fees. Statutory damages range from \$750 – \$30,000 and if the infringement was done willfully, the court can increase the damages up to a maximum of \$150,000. Statutory damages and attorney’s fees are discretionary with the court.

Before you start planning your next vacation, while the amount of monetary damages that are possibly recoverable based on the infringement of a properly registered work seem encouraging, the ability to pursue an infringer and obtain relief in the form of monetary compensation may prove challenging for many reasons. Copyright is a federal statute, and claims may only be brought in federal court, requiring a lawyer to navigate the federal rules. In addition, U.S. authors are required to obtain a copyright registration from the copyright office in order to file a claim for infringement in federal court. Further, there is no international copyright statute and you can only bring a claim against an infringer in a U.S. federal court if that infringer is subject to jurisdiction in the United States. Because there are no boundaries to the internet, it’s likely that many infringers that you might find abusing your exclusive rights under copyright reside well outside the U.S. borders and the reach of U.S. copyright law.

While the United States has entered into international treaties with many other countries, the expense of tracking down an infringer and bringing a claim in the appropriate foreign jurisdiction can be daunting and expensive. Even within the United States, you must bring

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the case in the appropriate federal district court, which may well be on the other side of the continent from you.

Even though photographers can now electronically register copyright in their digital photographs with the U.S. Copyright Office (<http://copyright.gov/eco/>), the administration and financial expenses associated with registering the vast quantity of digital photographs that can be created each day during the life of a photographer can seem like an insurmountable hurdle. The Copyright Office does offer some relief in the form of group registration of photographs. (<http://copyright.gov/fls/fl124.html>). If photographers can make registration of copyright a part of their work flow, they can secure the ability to go to court if the work is infringed and increase the ability to resolve a matter amicably.

So while copyright attaches to a work from the moment the work is created—as soon as the shutter is released or the button on a screen is touched—it may be cost-prohibitive to take action against a third party who appropriated your photograph as his or her own, particularly when the infringer may only be known by a Twitter handle and may live in some distant land. While the U.S. Copyright Office is currently reviewing whether a copyright small claims court should be created to handle these types of matters within the United States, there are still some actions photographers can take if they want to at least have the appropriated works removed from use if pursuing monetary damages is not feasible.

Recognizing that digital copies of works could easily be uploaded by users, the Copyright Act was amended in 1998 to provide some relief. This amendment, known as the Digital Millennium Copyright Act (DMCA), addresses the problem of users uploading content that may not belong to them onto websites. Section 512 of the Copyright Act provides Internet Service Providers (ISP) with a “safe harbor” from monetary damages under the Copyright Act if the ISP promptly removes infringing content from their websites upon receipt of a proper notification as prescribed by section 512 that identifies the location of the infringing work. This remedy is available regardless of the photograph’s registration status. One drawback is that another user may upload the same material to the same site and you may continually have to monitor the Internet and send notices to the same ISPs to prevent the viral spread of a work. This scenario is proving frustrating to many copyright owners who compare the process of sending repeated takedown notices to the game of “whack-a-mole.”

Another section of the DMCA provides statutory damages for actions that could encourage infringement such as the altering of metadata or the removal of copyright ownership

information (such as name, contact information, or a copyright notice) in an effort to facilitate or conceal the infringement. However, there is a similar geographic caveat to the use of the DMCA: Since it is a U.S. law, the DMCA only governs ISP hosts within the United States. Consequently, if the website containing the infringing content is hosted outside of the United States, the photographer cannot seek protection under the DMCA and will need to look at the law of the country in which the website is hosted to see if there are any similar protections. (See the “Resources” section below for additional information on utilizing the DMCA).

As a photographer, aside from registering the copyright in your photographs and commencing a copyright infringement lawsuit in federal court or seeking relief under the DMCA, there are alternate courses of action when an infringing use is discovered on a website. Assuming the infringement is worth the time and effort to oppose, an official demand for recognition and photo credit can be sent to the website with specific conditions, such as providing a link to the photographer’s blog, in exchange for the website’s continued use. Conversely, a cease-and-desist or demand letter can be sent that explains that the use is infringing and not condoned and to request either payment of a licensing fee, photo credit with a link to the photographer’s website, or that the infringer cease use of the image completely. Although the options are not all-encompassing and in some ways, restricted, photographers are not without recourse, and should take reasonable steps to protect their original works from infringing uses. And if you do want to share your images with the public and let them be used legally, you can attach a creative commons license to your work and permit your work to be shared. Creative commons licenses allow a copyright owner to impose some restrictions, such as attribution, no commercial use, or no derivative use, depending on the copyright owner’s preference. (CreativeCommons.org)

So enjoy the freedom fostered by digital photography and the numerous websites and apps that allow you to share your photographic talents with your friends, family, and the greater world. But understand that there is some loss of control that comes with this freedom. ■

#### **Resources:**

##### **DMCA**

- Using the DMCA to Stop the Copyright Infringement of Your Photos: <http://petapixel.com/2013/07/10/using-the-dmca-to-stop-the-copyright-infringement-of-your-photos/>
- Sample DMCA Take Down Notice: <https://www.epicorg.com/sample-dmca-take-down-notice.html>