Web Designers Need to Know Copyrights & Wrongs

For generations, a picture was worth a thousand words. Now, in the social network age, a picture is worth a few hundred likes, some +1's, a handful of retweets, stumbles, tumbles, pins, and shares of all sorts. Oh, and those original thousand words.

Using images in our online work is crucial. It's a visual medium and how better to tell your story or draw in your audience than with a compelling photo?

But while some may be flattered you're using a photo they took or image they created, most are not. Besides all the SEO and search-engine ranking reasons, using someone else's work without their permission is not only wrong but also may be illegal.

US Copyright laws may be years behind the fast-paced world of social media and blogs, but they still control how a copyrighted work can be used. And while there are aspects of Copyright law that have "gone digital," the Digital Millennium Copyright Act doesn't provide anything new when it comes to explaining how to properly use another person's photos or images online. Most people won't read the law and even those who do may not understand exactly what it means. Here's some "tips N Tricks" to help you:

Did You Take the Photo or Create the Graphic?

If you took the photo or created the graphic and are not subject to a Work For Hire agreement, then you likely own the copyright and can do whatever you wish. There may be other exceptions, but the general rule is if you make it, you own it.

Plagiarism and Copyright Infringement Are Not the Same

While it is difficult to detect visual plagiarism, when it does occur it's not a legal problem. Plagiarism is an ethical concern that may have other elements of intellectual property theft tied with it. Copyright infringement, on the other hand, is illegal and carries with it potentially significant consequences. Plagiarism can be avoided by providing attribution and giving credit, copyright infringement can not.

Attribution Does Not Make it Right

Taking another person's image or graphic and giving them a "shout out," linkback, or any other type of attribution does not negate copyright infringement. Common sense may say that an artist wants exposure for their work, but we're talking about the law here and common sense doesn't always parallel. Copyright law gives the copyright holder the right to decide where their work is published and maybe they don't want their work on your site, in your book, included in your newsletter or distributed to your social media network. It's not for us to question why they wouldn't want "exposure."

Ask and You May Receive

That same person who decides to send a DMCA Takedown Notice may have said yes if asked. Most people are rational and will agree to let their image or graphic be used. But they want the decision to be theirs and they want to allow it on their terms. Not everyone will say yes and we all have our reasons why we wouldn't, but most will. And if they say no, that's OK too because then you just move on and won't have to worry about your site going down because of a DMCA takedown.
Avoid All Problems and Use Public Domain Images

Sounds simple, but most people don’t even realize that there are tens of millions of high-quality graphics and photos available for the taking. I know you’re thinking I’m making this up, but I’m here to tell you that not all free images are low-quality, random pictures of wildebeests or clowns. There are many websites that curate images that are in the public domain and allow users to upload images they’re willing to put into the public domain. With public domain images you’re free to use them in any way and in most cases you don’t have to provide attribution. Check the terms of the site to determine if attribution is required and, if so, follow the requested format.

Understand the Creative Commons License You Use

There are several photo-sharing sites where users can allow others to download and use images under one of the several Creative Commons licenses, all of which require attribution. Many people are happy to share their photos. But again, they get to decide the rules. Also realize that the owner may change the license after you use the image and may that trigger a request for removal. It is important to know that a Creative Commons license is non-revocable, although explaining that to someone who didn’t read the license they assigned to their image could be a waste of time.

Different Uses Come With Different Obligations

It may be acceptable to use an image, as is, on your blog, but you may not have the right to use that same image in a paid newsletter, book, video or other type of work. Unless the image is in the public domain or you are the copyright holder, you have to consider the use(s) granted by the copyright holder or license. A copyright holder may be agreeable to certain uses but not to others.

Fair Use Likely Doesn’t Mean What You Think it Means

Fair Use is a doctrine in Copyright law that basically says you’re allowed to infringe someone’s copyright and they can’t demand anything from you. It may sound simple, but it’s one of the most complex parts of Copyright law. So complex that there are very few cases to look to for guidance. Copyright Fair Use for online images does exist, just not in the way most people believe it does.

Assume Every Image You Find Online is Copyrighted

The excuse that the image didn't have a watermark or a "©" to show it was copyrighted doesn't work. Most works first published after March 1, 1989 do not require a copyright notice, which is great given the speed we can upload photos at today. At the same time, this lack of copyright notice has some people believing that there are no restrictions to its use. Indeed, every one of those selfies with duck lips on Instagram is subject to copyright, as is that photo of a flower (or cloudscape, animal, cocktail, etc.) that would go great on your blog. Copyright laws are often blurred with the sharing mechanisms on many of the social networking sites. However, as soon as an image is taken from one platform and used on another, there may be problems. And while search engines are doing their best to provide copyright notice information if it applies, please don't assume that if it's not there in your search that there is none. (Image via Shutterstock.)

Your Website, Your Liability

One of the most common explanations I hear when someone gets a "cease and desist" or a DMCA takedown for an image used in their website design is that they didn’t choose that image. "It's the designer's fault!" is not a defense to copyright infringement. Not all web designers understand copyright laws, but that won't relieve you from liability if a copyrighted image is used...
without permission or license. Few design agreements address this issue, which leaves the site owner legally responsible for copyright violations. While a designer may not be willing to modify their contract, it's worth asking (1) if they will, (2) where do they source images, and (3) if the image they use is found to violate a copyright and you're required to pay, will they indemnify you.

Making Changes to a Copyrighted Image Doesn't Make it Yours

If you don't have the copyright in an image, changing it so it looks different doesn't relieve you from potential liability. You can't create a new work and call it yours if you don't own the underlying copyright. Adding a favorite quote or other text to an image doesn't negate the underlying copyright. Using one of the many photo editing software products to change the image to something that suits your particular use will not create a new copyright for you. We see this a lot, especially on the many social networks we belong to.

Just Because Other People Do it Doesn't Make it Right

Unfortunately, Copyright law doesn't care if "big name person" appears to be getting away with copyright infringement while "the little guy" isn't. Because copyright is very personal, a great deal of enforcement rests with the copyright holder. As we all know, there are some people online who just don't care that laws exist or somehow believe the laws don't apply to them. It's unfortunate and unfair, but the reality is that copyright law is not equally applied across the Internet. Having the ability to do something doesn't mean it should be done.

Copyright law is very complex but you don’t have to be a lawyer to understand the basics. When it comes to using images online, trust your instinct. If there's any tinge of uneasiness then reconsider or do some research. In many ways, copyright follows the golden rule.

Fair Use: Be Careful!

Fair use allows scholars, researchers and others to borrow or use small portions of in-copyright works for socially productive purposes without seeking permission. The doctrine -- which complements the First Amendment -- helps courts avoid rigid application of copyright law where rigid application would "stifle the very creativity which the law is designed to foster."

Fair use is not a right but a defense to copyright infringement. It should be looked upon as a privilege, and not a right. The central point is that certain fair use decisions involve risk.

When Do I Need to Ask Permission?

If your work contains "borrowed" material, and you have not obtained permission from the owner of the work, it can only be used if:

- The material is in the "public domain" (i.e. out of copyright)
- The material is immune from copyright protection
- The proposed use is a "fair use."

Be careful claiming “fair use” as doing so admits you have violated copyrights. Your only defense then is whether or not your use qualifies for an exemption under the fair use doctrine. When relying on fair use to “borrow” the work of others, it is important to understand the four factors courts weigh to determine fair use:

1. The purposes and character of the use, including whether the use is primarily commercial in nature;
2. The nature of the copyrighted work being borrowed from
3. The amount and importance of the portion used in relation to the copyrighted work as a whole
4. The effect on the potential market or value of the copyrighted work. Put another way, courts may ask, “Does the use supersede the market for the original?”