

**THE SEVEN DEADLY MYTHS OF INTERNET COPYRIGHT:
What Photographers Must Know About Copyright and Photography
to Protect Their Work**

by Attorney David L. Amkraut

This is a summary of essential information about photographs, copyright, and the Internet. This was written for photographers. Most of the examples are about use and misuse of photos on the Internet. But the principles also apply to other visual works, text and other copyrightable material.

CAUTION

Nothing here is specific legal advice for your case. Each case has its own facts.

Copyright is a specialized field of law, which continues to evolve, and there are sometimes exceptions to the rules. If you have a specific concern—typically, that your work is being copied and used without permission—you should consult a lawyer with expertise in copyright issues.

This article deals with American law. Copyright laws vary from country to country.

AN EXCELLENT RULE OF THUMB FOR USING OTHER PEOPLE’S PHOTOS

If you do not have specific permission (preferably written!) from the owner of the rights in a photo, you cannot legally copy it, display it on a website, post it on Facebook, send it around by Email or other means, make prints of it, sell it, or otherwise use or exploit it. The exception to all these prohibitions is the rare case of “Fair Use,” discussed below.

If you are a photographer, and someone is making use of your photos without your permission, the answer is normally, “No, they have no right to,” except for the rare case of “Fair Use.”

MYTH # 1: No Need to Register Copyright

"I don't need to register my photos with the copyright office to protect them, because I 'automatically' own copyright at the instant I snap the shutter and create the image."

This first myth is a myth of the photo's owner; the other myths below are self-serving myths of infringers.

Actually, this is more a half-truth than a myth. It's true that you *own* copyright in a photo without *registering* the copyright. Your copyright in a work "vests"—is owned by you—at the moment you create the work "in tangible form." That includes digital photos; even if you never print them out, you own copyright in them the moment you click the shutter. But if you want to deter infringement, and make sure you have full remedies for infringement, you should "timely" register the photos with the Copyright Office.

When we refer to "timely" registration we mean applying for registration either (a) *before* the photos are published by you or with your authorization; or (b) during a three-month window after such authorized publication.

Legally, registration within the "window" is as good as registration before publication. But for various practical reasons, such as ease of registration, record-keeping, and proving your case in court, it is better to register photos *before* any publication.

Legally, the registration date is the date the Copyright Office receives your application, copy of the work ("deposit"), and fee, even though it may take the copyright office many months to mail you your registration certificate. Why the delay? One reason is that the Copyright Office is swamped with applications. Another is that because of the 9/11 Islamic terrorist attacks, and other terrorist attempts and threats, application packages are first sent to a secure location for bomb, chemical, and poison screening.

When you timely register your photos, you gain powerful remedies against infringers. These include:

- * *Civil penalties ("statutory damages")*. "Statutory damages" means damages that are set by law; you do not have to prove how much you were harmed or how much the infringer benefitted. Statutory damages can be "nuclear": The infringer is at risk for up to \$150,000 for *each* photo infringed if the infringement was "willful." Even if the infringement was not willful, statutory

damages of \$5,000 to \$10,000 per infringed photo are common.

- * *Attorney's fees and costs*: the infringer has to pay your attorney's fees, and various lawsuit costs and court fees.

Additional remedies for copyright infringement (even if registration is tardy) include:

- * *Injunctive relief*: Restraining orders, followed by a preliminary injunction and eventual permanent injunction barring the infringer from infringing the photos.
- * *Seizure*: If the infringer is making hard copies such as printed photos or CDs or DVDs, those can be seized. Sometimes even the pirate's computers or other equipment used to enable the copyright infringement, such as CD or DVD duplicators, can be seized.

Timely registration allows potential penalties that give you strong leverage to compel settlement before and during a lawsuit. The infringer is faced with the risk of paying huge statutory damages and your attorney's fees and court costs as well as his own. And he may face a possible injunction or equipment seizure which could mean being put out of business (depending on the injunction's wording and the infringer's business model). Faced with these risks, many pirates will settle, pay, and stop infringing your work.

A key practical point is that if the photos are timely registered, you are much more likely to find an attorney to take your case on "contingency." This means the attorney doesn't charge you by the hour. Instead he gambles and takes the case for a share of your recovery.

What if you did *not* timely register your photos? Then it is often very difficult to get money from an infringer. Statutory damages are not available. To get any money, you have to prove how much money the pirate made by infringing your photos, and/or how much money the infringement cost you. Often it is tough to prove either, and the total may be minimal anyhow. And even if you win, you do not recover attorney's fees.

In addition, because it is so tough to get meaningful damages, and impossible to recover attorney's fees, you will be unlikely to find an attorney willing to help you on

contingency. So you would have to pay an attorney up-front by the hour, and his bill might dwarf any recovery.

Let's sum up. If you have timely registered your work, you are in good shape to convince an infringer to stop infringing, and to pay you a settlement. You are also in a good position to successfully sue the thief, with the help of a lawyer on contingency.

If you have not timely registered your work, you may be without a *practical* remedy against copyright infringement.

This discussion may be depressing if you have *not* registered copyright in the work that is being infringed, or registered it too late. Don't despair. In many states such as California, there are state laws that may allow you to recover statutory damages and attorney's fees. A good lawyer will be familiar with these remedies, which may be available instead of copyright remedies or even tacked on in addition to copyright remedies.

The following six myths are self-serving myths of infringers.

MYTH # 2: The "Public Domain" Myth

"I got the photo off the Internet, the owner's own website, Facebook, MySpace, a 'public' website, Google, or whatever . . . so it is in the 'Public Domain'."

Myth #2 is based on a misunderstanding of the term "Public Domain." The term has the specific legal meaning that no one owns the photo; anyone can use it as he wishes. There are only two ways for a photo to fall into the public domain.

1. The owner clearly gives up his rights, such as by signing and publishing a document saying, "I now give up my copyright and irrevocably place this work in the public domain." OR
2. Through passage of time. The term of copyright depends on several factors, including the date of first publication. As a general rule, for works created after January 1, 1978, copyright extends for the life of the creator plus 70 more years. As a practical matter, no recent photo will have fallen into the public domain through passage of time.

When a rights-owner posts a photo anywhere on the Internet, he does not lose his

rights. This rule applies to his own website, Facebook, MySpace, and other “social networks,” or to photo portfolio or hosting sites like Flickr, Tumblr, or Photobucket. Making a photo available for *public viewing* does not put it in the *public domain*.

This fact reflects well-established copyright law. When a photo is printed in a book or magazine or displayed in an art gallery or museum, it is not thrown into the public domain for anyone to copy. Likewise, when an owner displays his photo in cyberspace. There have been many copyright cases involving infringing websites which got their content from the internet—and courts have awarded judgments in the millions of dollars against the pirates.

Sometimes an infringer will post photos to websites, social media, and other Internet places without the owner’s knowledge or against the owner’s wishes. Examples include the many infringing copies of thousands of photos owned by *Playboy*, *Penthouse*, and top photographers. Such posts are themselves violations of copyright. Then other infringers copy the photos from such places and republish them. Obviously if the original unauthorized postings violated copyright—as is typically the case—the secondary copying and misuse is equally illegal.

An interesting and common situation involves people who stock their websites, blogs or Email newsletters (or for that matter, print media ads or direct mail) by copying photos they find through Google or other search engines. Google itself finds, makes thumbnails, copies and displays photos without asking the owners’ permission. Virtually every photo displayed through Google “image search” is there without the owner’s permission. So someone who infringes by copying photos he got through Google is still violating copyright; getting the photos through Google does not excuse the infringement. The owner did not give permission, and Google had no right to give any permission.

Some experts say that Google’s own image search function, and its video operation YouTube, are illegal infringement-based business models. Similar arguments have been made about Yahoo! and other search engines’ image search functions. So far the courts have let the search engines get away with this copying, saving them from liability for untold billions of dollars for copyright infringement. But it is clear that taking and using photos *from* Google and other search engines without permission of the actual copyright holder, is still infringement.

In short, taking photos from cyberspace, and using them elsewhere such as on your own website is copyright infringement, and you risk the severe penalties of copyright infringement.

MYTH # 3: *The “Fair Use” Myth*

“My [website use, posting, whatever] is 'fair use,' so I haven't violated copyright.”

“Fair Use,” like “public domain,” is a legal term of art that is often misused. “Term of art” means it has a specific legal meaning.

"Fair use" is a legal "affirmative defense," excusing what would otherwise be infringement. The fair use doctrine was created to allow some use of copyrighted material for limited and socially valuable purposes such as criticism, comment, parody, news reporting, education, and scholarly research, without permission of the copyright holder. A typical example would be a brief quotation from a book as part of a book review. Fair uses generally take only a small part of a work, and typically include an author and source attribution. Fair uses are often for non-profit purposes, although they are not limited to such purposes.

Courts rarely accept an argument of fair use when the use competes directly with the original work or harms its commercial value.

Most fair use situations involve text. It is difficult to imagine any situation involving the Internet where someone who simply copies and uses a photo, without any of the “valuable purposes” such as comment or education, could claim fair use. In typical infringements, such as unauthorized posting, stocking one’s website from search engines, scanning from *Playboy* magazine, or simply copying from other websites, the fair use doctrine does not apply. In such cases, the pirate is taking 100% of the work, not acknowledging the creator, hurting the work's market value, denying the owner payment for the use, and unfairly competing, directly or indirectly, with the creator or licensed users of the work. Since he is not using the work for scholarship, news reporting, or other allowed uses, fair use would not apply.

So if you are a typical photo pirate, do not even think about the fair use doctrine. In your context it is a myth. If you are the victim of infringement, don’t worry about the fair use argument.

MYTH # 4: *The “Photos Require a Copyright Notice” Myth*

“If a photo does not have a copyright notice on it, it is not copyrighted—so I can use it freely.”

This myth results from previous copyright law, under which it was vital to include a copyright notice with published work in order not to lose copyright. This myth also results from misunderstandings even of that past law. Today, infringement is infringement whether or not there is a copyright notice.

Still, a copyright notice has two important functions. First, as a practical matter, it warns off pirates that the work is not to be infringed. Second, as a matter of law, the notice often prevents the infringer from minimizing statutory damages by claiming he was making an “innocent” mistake.

The copyright notice may be missing because the owner or permitted user does not want to deface the photo, or because either the infringer or an intermediary infringer has deliberately removed the notice. (Removing a copyright notice is itself a violation of copyright law.) In any case, the absence of a copyright notice does not change the fact that a work is protected by copyright (and hopefully, by timely registration as well.)

One is reminded of an anecdote about a bicycle thief. When caught by the owner, the thief protested, “I didn’t know it was *your* bike.” Replied the owner, “You sure knew it wasn’t *yours*!” When a photo is published without a copyright notice, the infringer may not know who owns the copyright, but he knows it isn’t himself, and that the owner didn’t sell him a license to use it.

A proper notice has the © mark, or word “Copyright,” or abbreviation “Copr.”; the year of first publication; and the name of the owner. For example, if this author shot and published a photo in 2008, it might be marked “© 2008 David L. Amkraut” or “Copyright 2008 David Amkraut” or “Copr. 2008 David L. Amkraut.” The owner can add “All Rights Reserved” if he wants—it has no real significance in the U.S. and some countries, but some value in several countries.

The commonly–seen parenthesis “(c)” instead of the proper copyright mark “©” is incorrect. If you use a copyright notice, you may as well do it right.

To sum up, if you do not see a copyright notice, do not assume the photo is yours to use; someone still owns copyright and you have to get his permission (“license”) before

using the photo. For photographers: include a copyright notice if convenient. You should also put it in the metadata—data included in the photo but not visible.

MYTH # 5: *The “No Profit Means No Infringement” Myth*

"If I am not making money off the photos, I am not violating copyright."

Copyright infringement is not excused if you are doing it for some reason other than profit, such as the collectivist notion that an individual's creative work should be free for all to share. That's the motive of some people who post thousands of other people's photos—often adult photos—to social networks, file-copying sites, and other places.

The court may fine you less or treat you less harshly if you lack a profit motive. Or it may not. You can still get hurt—badly—especially if your actions are harming the commercial value of the infringed pictures. Or if you infringed “knowingly” or “willfully.” Or if you've been warned previously by law enforcement or by the photos' owners. Or if the judge thinks it appropriate to “send a warning” to discourage you or other would-be infringers.

Next time you rent a DVD or Blu-ray movie, actually read the FBI copyright warning notice. It reminds you that there are severe penalties for infringement—period.

Violating copyright is illegal whether you do it for love, hate, money, competitive advantage, personal philosophy, or any other reason.

MYTH # 6: *The “Nothing Much Will Happen To Me Anyhow” Myth.*

"I'll win. I have a lot of rights in court. And they can not do much to me anyhow."

Very wrong. Though copyright infringement can be a crime, an infringer is far more likely to be sued in civil court than to be arrested and criminally charged. As a civil defendant you have far fewer rights than in a criminal case. The plaintiff—the copyright owner—only has to show a “preponderance of evidence”—that he is more right than you. He does not have the heavy burden of proof “beyond a reasonable doubt” as in a criminal case.

And, boiled down, the plaintiff's job is often easy. There's plenty of skilled legal work required, but the plaintiff really does not have to prove much to win. He just needs to show the court two things: (1) he owns copyright in the work; and (2) the defendant

infringed it. The owner proves the first element by showing his Certificate of Registration from the Copyright Office. This is almost absolute proof of copyright ownership in the typical photo infringement case. He proves the second element by showing his copyright-registered photos and your infringing copies side-by-side and saying, “Your Honor, these are the same. Just take a look at them.”

End of story. All that remains is to figure out how much money in damages, attorney’s fees, and costs the defendant must pay the plaintiff, and the exact terms of the permanent injunction, equipment seizure, or other relief.

And a copyright suit moves surprisingly quickly. You could be slapped with a restraining order within days after the suit is filed, ordering you to stop infringing the plaintiff’s photos, and maybe others’ photos too—or risk being held in contempt of court. Final judgments may be reached in less than a year from when the case begins.

Perhaps you think you can charm or fool a jury? If the facts and issues are clear—and they generally are in such cases—the judge will decide the case based on written legal arguments and exhibits. You will never see a jury. Nor have juries proven to be sympathetic to copyright pirates, even in the rare case that goes to a jury.

Think you can fight the case? Talk to a copyright attorney. Think of paying by the hour for what will probably be a hopeless defense. And do not forget, Mr. Pirate, that when you lose you will also be stuck for the plaintiff’s legal fees (assuming he has timely registered.)

Can they “do much” to you? Copyright penalties have been called “nuclear.” For “willful” infringement, statutory penalties can be up to \$150,000 per infringed photo. Even for “innocent” infringement, penalties of \$5,000 to \$10,000 per photo are common. There will also probably be an injunction which, depending on your business method, may put you out of business. In some cases, your computer or other “infringement-enabling” equipment can be seized.

In addition to the severe money damages for copyright violations, the infringing acts may expose the defendant to additional state civil claims, such as “unfair competition,” “passing off” other people’s work at his own, or state “RICO” (Racketeer-Influenced and Corrupt Organization Act) laws. If that were not enough, persons shown in photos, or the copyright owner, may be able to sue you under state

“right of publicity” laws, which protect a person’s right to control the commercial use of his image and name. (Right of publicity law varies from state to state.)

And there are non-legal costs. Copyright cases can be big local news. Most people would not want to be famous in their community as an Internet “pirate,” let alone (as is sometimes the case) an “Internet pornography pirate.” Court filings and proceedings are public records, and the media, always looking for stories, routinely check every lawsuit filed.

In addition, in the Information Age, “information is forever.” Lawsuits and judgments may show up on search engines forever, and prospective employers, schools, business partners, lenders, and licensing agencies routinely Google the name of every applicant. Judgments may also show up on your credit report and severely hurt your credit score.

Don’t think you can successfully defend a routine copyright case. Especially when timely-registered photos were infringed. You cannot.

For the victimized photographer, the takeaway from this is that when an infringer threatens to fight a case tooth and nail, he is typically either ignorant or bluffing.

MYTH # 7: *The “Copyright Violation Is Not a Crime” Myth*

“Copyright violation is not a crime—it is just a quarrel between two businessmen.”

Wrong. Although rarely charged, intentional copyright infringement is a federal crime as well as a civil wrong. You can go to federal prison. Read the Copyright Act. Or the FBI copyright warning screen at the start of any DVD or Blu-ray movie. You also may be violating criminal statutes such as the federal “No Electronic Theft” law.

As icing on the cake, if you infringe “adult” images, you are taking another risk. Federal criminal law requires publishers of explicit images to keep proof of the model’s age and identity, and comply with many other strict and specific rules. Because there is no way to comply if you are pirating images, you risk severe criminal penalties.

Although this article’s title is “Seven Deadly Myths,” two other myths now come up so often that they should be included. Consider them a bonus.

MYTH # 8: *The “If I give credit I don’t need permission” Myth*

“If I give credit I don’t need permission.”

No! This myth reveals confusion between plagiarism (claiming someone else’s work as your own) and copyright infringement (copying someone else’s work). Reprinting someone else’s creative work and claiming it as yours, makes you both a copyright infringer and a plagiarist. Reprinting someone else’s creative work with a credit makes you merely a copyright infringer. Indeed, by crediting the owner you are admitting you knew someone else owned the work you infringed. Copyright infringement is copyright infringement whether or not you credit the rights owner.

MYTH # 9: *The “Poor Man’s Copyright Registration” Myth*

“I can simply mail myself a copy of my work to prove copyright.”

This is a widespread myth. Incredibly, we have even seen this “proof” suggested in articles and books as an alternative to copyright registration.

Self-mailing is called “the poor man’s copyright.” The photographer (or other creator) sends a copy of his work to himself or a friend or family member, typically by certified mail, or Federal Express or other services which provide proof of delivery. The envelope is securely sealed and tamper proof. The sender then files away the envelope, believing that if infringement happens, he can open the envelope in court to prove ownership.

The myth of “poor man’s copyright” has an interesting history. It actually stems from misunderstandings of *patent* law and procedures, which are beyond our scope here.

At any rate, “poor man’s copyright” is unnecessary to secure copyright, and is no substitute for copyright registration. The creator owns copyright in his work at the moment it is created and put in tangible form. No further acts are necessary to secure copyright, so self-mailing adds nothing. Suing for copyright infringement requires copyright registration; self-mailing is no substitute. Statutory damages and attorney’s fees require timely registration; self-mailing is no substitute.

The Copyright Office itself agrees with this article. The Office regards “poor man’s copyright” as worthless, stating in FAQ reports,

“... sending a copy of your work to yourself is sometimes called ‘a poor

man's copyright.' There is no provision in the copyright law regarding any such type of protection, and it is not a substitute for registration."

SUMMARY

If you create photos, timely register your copyright. Ideally, register before you publish or distribute the photos or authorize others to do so. At worst, register within three months after publication. Such timely registration preserves the vital legal remedies of statutory damages and attorney's fees. As a practical matter, registration *before* publication is best.

Unless one has specific permission, one can not distribute, copy, publicly display, sell, or otherwise exploit or use photos in which someone else owns copyright.

One is not free to use photos displayed on Myspace, Facebook, peer-to-peer networks, newsgroups, other people's websites, search engines like Google, or elsewhere in the electronic world. Such photos, even when widely available to the public, are almost never in the "public domain." In fact, with extremely rare exceptions, no recently-created photo is in the public domain.

The "Fair Use" doctrine rarely excuses infringement of a photograph, particularly where the infringing use is commercial or where it hurts the owner's market for the photo.

Copyright is valid, and the infringement penalties apply, with or without a copyright notice.

Copyright infringement is copyright infringement regardless of the infringer's motive.

People who infringe photographs are likely to be crushed in court. In the case of timely-registered photos, they are also at risk of being socked with large money penalties and having to pay plaintiff's attorney's fees. Infringers may also suffer injunctions or even equipment seizures which may cripple or shut down their whole business.

Copyright infringement may be charged by the government as a federal crime.

Infringement may also violate other criminal and civil laws in addition to the Copyright Act. For example, infringers may be sued for violating the right of publicity of the models in the photographs.

Copyright infringement cases may be treated as news, especially locally, and

especially if adult images are involved. Copyright infringement can have many personal consequences, all bad.

Giving credit when taking someone else's work does not excuse copyright infringement.

“Poor man's copyright” (mailing your work to yourself) is a myth. It is not a substitute for registering copyright with the Copyright Office.

The good news for photographers is that when anyone uses their photos without permission, copyright law may provide the photographer with powerful remedies. There may be additional remedies under state law. If your work is being infringed, talk to a lawyer!

ABOUT THE AUTHOR

David L. Amkraut is a Los Angeles-based Attorney-at-law. In addition to major personal injury cases, his practice emphasizes copyright law, protecting creators of work against those who exploit it without permission. He is particularly involved in cases involving photographs.

Among many other cases, he represented the plaintiffs in *Louder v. CompuServe*, a class-action case involving publication of 930 photographs of models by the (then) second-largest Internet service provider in the world. He also served as attorney in other important cases involving copyright and the “right of publicity” (The right to control commercial use of one's own image). Mr. Amkraut has obtained judgments and settlements totaling millions of dollars, in lawsuits by publishers, photographers, and models against infringers.

Mr. Amkraut welcomes copyright infringement cases. An initial consultation and evaluation is free. He can often take cases on contingency—“no recovery, no legal fee.”

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