

# The 7 Deadly Myths of Internet Copyright

by Attorney David L. Amkraut

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WARNING: The following is a summary of important information regarding the use and misuse of photos on the Internet. It is not specific legal advice. Copyright is a specialized field of law, and there are sometimes exceptions to the rules. If you have a specific copyright concern, you should consult a lawyer with expertise in copyright issues concerning the use and misuse of photos on the Internet.

**AN EXCELLENT RULE OF THUMB:** If you do not have specific permission (preferably written!) from the owner of a photo, you cannot legally display it on a website, post it to the Usenet, copy it, send it around by Email or other means, make photos derived from it, sell it, or otherwise exploit it.

## MYTH # 1:

*"I do not need to register my photos with the copyright office, because I 'automatically' have copyright at the instant I snap the shutter."*

This is a serious misunderstanding of the law. Yes, you do own copyright without registration. BUT if you want to protect your photos from theft, you should register them with the Copyright Office, before you publish or distribute them. If you register your photos, you gain powerful remedies against infringers. These can include:

- \* Civil penalties ("damages"). The pirate is on the hook for up to \$150,000 for each misused photo;
- \* Attorney's fees: the infringer has to pay your attorney's hourly fees and all costs such as copies, postage, filing fees, etc.
- \* Restraining orders, Preliminary and Permanent Injunctions against the infringer, and even seizure of the pirate's computer equipment in some cases.

An important practical point is that if the photos are registered, you might find an attorney to take the case on "contingency," which means he takes the risk of gambling on a win, rather than you paying him by the hour. Faced with a lawsuit over registered images-and an injunction which would likely mean being put out of business forever-many pirates will quickly settle up and pay.

By contrast, if you did not register your photos, it is almost impossible, as a practical matter, to nail an infringer. To get any damages at all, you have to prove how much the pirate made off your particular photos, or exactly how much money the theft cost you. Either is almost impossible to prove. And you do not recover attorney's fees, so the cost of the lawsuit would far outweigh your possible recovery.

So-if you have registered your work, you are in good shape to "convince" an infringer to stop, or to successfully sue him. If you have not registered, you probably cannot do anything about pirates.

## MYTH # 2.

*"I got the photo off the Usenet (newsgroups) so it is in the 'Public Domain'."*

The above shows a misunderstanding of the term "Public Domain." The term has the specific legal meaning that no one controls the photo; anyone can use it as he wishes. There are two ways for a photo to fall into the public domain:

- \* the owner clearly gives up his rights, such as by signing a document saying, "I now give up my copyright and irrevocably place this work in the public domain." OR
- \* 75 Years have passed since the owner died.

When an owner posts a photo to Usenet, he does not lose his rights, any more than publishing the photo in a magazine or on his own website would. When an owner posts to Usenet, the only license he gives is for replication and transmission within the Usenet system. There have been many copyright cases involving websites which got their content from the Usenet-and courts have awarded fines in the millions of dollars against the pirates.

In addition, photos are often posted to Usenet against the owner's wishes. Eg., the many infringing copies of work owned by Playboy, Penthouse, and top photographers. Such posts are themselves violations of copyright. Obviously if the original post to Usenet was illegal-as many are-subsequent copying and misuse is equally illegal.

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

### **MYTH # 3.**

*"My [website use, posting, whatever] is 'Fair Use' so I haven't violated copyright".*

"Fair use" is a legal "defense" to copyright. It was created to allow use of copyright material for socially valuable purposes such as commentary, parody, news reporting, education and the like, without permission of the copyright holder. A typical instance would be a brief quotation from a book as part of a book review. Uses allowed by "Fair Use" are normally a small part of a work and include an author credit and attribution. Fair uses are generally for non-profit purposes.

Fair use is rarely allowed where the use competes directly with the work or harms its commercial value.

Most fair use situations involve text. It is difficult to imagine any situation involving the Internet where someone copying a photo could claim the fair use defense. In typical infringement activities, such as unauthorized posting to Usenet, stocking websites from Usenet trolling, scanning from Playboy magazine, or simply copying from other websites-the fair use doctrine does not apply. Because the pirate is taking 100% of the work, not acknowledging the creator, hurting the work's market value, competing directly with the creator or licensed users of the work, and for other reasons.

So if you are a photo pirate, do not even think about the fair use doctrine. In your context it is a myth. Your lawyer will laugh at you, and the judge might not have a sense of humor where thievery is concerned.

**MYTH # 4.**

*"If it does not have a copyright notice on it, it is not copyrighted-so I can use it freely."*

This myth results from past law, and misunderstandings of past law being passed along. In virtually all cases, photo copyright is valid whether or not there is a copyright notice.

A copyright notice has two main functions. First, it warns off at least a few would-be pirates that the work is not to be stolen. Second, it has some useful legal effects, because it prevents the infringer from claiming he was making an "innocent" mistake.

The copyright notice may be omitted because the owner or legitimate user does not want to deface the photo, or even because an intermediary infringer has deliberately removed the notice. (Removing a copyright notice is itself a serious legal violation.) And of course, if someone has illegally scanned and posted Playboy pictures or the like, there will not be a notice. However, the absence of a copyright notice does not change the fact that a work is copyrighted.

We are reminded of an anecdote about a thief who stole a bicycle from a public place. When caught by the owner, the thief protested, "I didn't know that it was your bike." Replied the owner, "You sure as blazes knew that it wasn't yours!"

A proper notice has the © mark, or word "Copyright" or abbreviation "Copr."; the year, and the name of the owner. For example, if this author took and published a photo in 2000, it might be marked "© 2000 David L. Amkraut" or "Copyright 2000 David L. Amkraut" or "Copr. 2000 David L. Amkraut." You can add "All Rights Reserved" if you want-it has no real significance in the U.S. and most countries but has a bit in several 3rd world countries.

The commonly-seen parenthesis "(c)" instead of the proper copyright mark "©" has no legal significance and may invalidate the notice. So, if you do not see a copyright notice, do not assume the photo is yours to use; someone owns copyright and you have to get his permission before using it.

**MYTH # 5.**

*"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 malice or the collectivist notion that an individual's creative work "should be free for all to share." These are the typical motives of some people who post thousands of Playboy photos to newsgroups. The court may fine you more or treat you more harshly if you have a profit motive. But you can still get punished-badly-if your actions are harming the commercial value of the infringed pictures. Or if you infringed "knowingly" or "willfully." Or if the judge thinks it appropriate to "send a warning" to discourage other would-be infringers.

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

**MYTH # 6.**

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

Very wrong. A pirate 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 only has to convince the judge that he is more right than you. He does not have the heavy burden of "beyond a reasonable doubt" as in a criminal case.

A copyright Plaintiff does not have to prove much to win. He just needs to show two things: (1) Ownership of the copied work; and (2) Copying or other misuse by the Defendant. He proves the first by showing his Certificate of Registration from the copyright office. He proves the second by showing his photos and your infringing copy side-by-side. End of story.

And a copyright suit, in federal court, moves surprisingly quickly. You could be slapped with a restraining order immediately after the suit is filed, meaning an end to your infringements under threat of arrest for contempt of court. For technical reasons having to do with the copyright law and federal rules of procedure, final judgments may be reached within a few months.

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. You will never see a jury.

Think you can fight it? Talk to a copyright specialist attorney and 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.

Can they "do much" to you? Copyright penalties have been called "nuclear." Penalties of up to \$150,000 per photo are permitted. And an injunction which, depending on your business method, may put you out of business forever, is likely.

Do not assume you can successfully defend a legitimate copyright case, especially when registered photos are concerned. As a rule of thumb, if you get caught, better try to settle cheap and quickly.

**MYTH # 7:**

*"Copyright violation is not a crime-it is just a quarrel between two businessmen."*

Wrong. Copyright violation is a crime as well as a civil wrong. Read the splash screen disclaimer at the start of any video you rent if you think otherwise. Or talk with an FBI agent. Most of the copyright cases we see are federal felonies, as well as civil law violations.

In addition to the severe civil and criminal penalties of copyright violations, the same acts leave the pirate open to additional civil and criminal charges, for wrongdoing like "unfair competition," and violation of the "No Electronic Theft" law and other statutes.

We are not saying that a pirate can expect to be arrested by FBI agents for his theft

of photos. But it is a possibility, especially if the FBI responds to demands for action against Internet pirates and begins pursuing such cases more actively. And especially if the pirate is infringing on a large scale or infringing work owned by a large corporation.

## **SUMMARY**

Unless you have specific permission, you can not distribute, copy, publicly display, sell, or otherwise exploit or commercially use someone else's photos.

Photos posted on newsgroups are not yours to use. They are not in the "public domain." In fact, with extremely rare exceptions, no recently-created photo is in the public domain.

The "Fair Use" doctrine almost never excuses infringement of a photograph, particularly where the infringing use is commercial or where it hurts the market for the photo.

Copyright is normally valid 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, and even have their businesses closed down.

Copyright violation may be treated as a serious crime, as well as a civil wrong.

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## **ABOUT THE AUTHOR**

David L. Amkraut is a Los Angeles-based Attorney at law. His practice emphasizes cutting-edge Internet-related copyright matters, especially cases involving photographs. He was attorney for the Plaintiffs in *Louder v. CompuServe*, a class-action case involving publication of 930 photographs of models by the 2nd-largest Internet Service Provider in the world. Recently he served as counsel in *KNB v. Matthews*, an important case about the relationship between copyright and the "Right of Publicity." He has repeatedly obtained judgments in the hundreds of thousands of dollars and represents some of the best-known glamour photographers against web sites which infringe their work.

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