

BE SHREWD, BUT CAUTIOUS, WHEN MARKETING ON THE INTERNET

By J. Vincent Stevens



The internet era provides exciting marketing potential for companies. Effective marketing tools include creative websites, domain names, links or media presentations. But while the free flow of information is literally at our finger tips, companies must be cautious of committing copyright infringement, because a one-time mistake can lead to statutory damages of \$30,000, and a finding of willfulness can increase those damages to \$150,000. In addition, willful

infringement of a registered work for the purpose of commercial advantage or private financial gain can, under certain circumstances, subject the infringer to criminal fines and penalties.

Use Caution

Companies all too frequently download, copy or adapt material from the Internet for use in their own websites, presentations or advertising materials, be it text, music, graphics or logos, without considering whether use of the material infringes the rights of the owner. Such activities can subject you to allegations of copyright infringement. A number of recent court cases have ruled in favor of owner-protection and against unfettered copying of materials on the Internet.

A copyright infringement claim is judged under “strict liability,” which means that defendants can be liable even if they did not know they were doing something illegal. A plaintiff need only prove that the defendant had access to the copyrighted work and copied it without the authorization of the owner.

As in the hard-copy world, facts, ideas or methods of operation cannot be copyrighted, but the expression of those items on the Internet can be. And although copyright law usually does not protect names, titles, slogans or short phrases, they may be protected under trademark law.

Under modern law, owners need not register their copyright nor include a copyright notice in order to claim protection, although failure to do so may impact the owner’s ability to collect damages. Copyright protection in a work attaches as soon as the work is affixed in a “tangible medium,” which has been held by the courts to include the Internet. Therefore, simply because there is no copyright symbol on web content does not mean that it can be freely used by others.

Additionally, it is advisable to carefully read the terms and conditions of any website from which material is used. Aside from copyright infringement, you can be liable for breach of contract if you use material, without permission, in violation of contractual conditions found on the site.

All of this caution does not mean that you should avoid the use of others’ work entirely. There are lawful avenues to exploit, such as requesting permission, seeking licensure for use or using work already in the public domain.

The Fair Use Doctrine As A Defense to Copyright Infringement

The fair use doctrine, originally created by the courts and codified in the 1976 Copyright Act, may, under the right circumstances, provide a defense to a claim of infringement. The purpose behind the doctrine of fair use is to allow the public to use limited amounts of another’s work for “purposes such as commentary, criticism, news reporting, teaching, scholarship or research.” The statute provides that in determining whether the use made of a copyrighted work is fair use, the factors to be considered will include:

- (1) the purpose and character of the use, including whether it is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the work.

When material is used for commercial purposes, courts disfavor applying fair use, although this factor alone is no longer dispositive.

The defense of fair use is somewhat of a moving target and there is significant disparity among the courts as to how the doctrine is applied. It is difficult to predict with certainty when an otherwise infringing act will be found to constitute fair use of copyrighted material. Careful consideration must be given to all of the facts before expecting protection from the doctrine. When in doubt, seek the permission of the owner before copying the material.

Conclusion

Generally, any material found on the Internet should be presumed to be protected until it is determined to be otherwise. Therefore, although fair use is a possible defense to copyright infringement, you should be aware of the risk involved and avoid taking actions that could subject you to involvement in a costly lawsuit. The Internet can be a useful source of information that facilitates marketing, and it should be used to its fullest potential. However, you must apply sound judgment when using material found on the Internet, and remember that publication on the Internet makes detecting infringement easier than ever before. Clever marketers can use the Internet effectively, but should always be wary of the risk involved.

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