

Do You Know the Origin of your Website Content? . . . and Why You
Should.

by Jonathan Richards

Much has been written about patent trolls. While not as widely publicized, trolls of a different flavor, namely copyright trolls, also exist and they are out there with automated bots scraping websites to find their next target.

This happened to one of my clients recently, and their experience is instructive. A little over a year ago, the client received an initial multi-page letter, which was clearly a form letter, but which asserted ownership of an image that, at one time, had appeared on the client's website. The letter went on to make assertions of copyright infringement, along with various demands (including demand for payment for past damages and/or licensing fees). Under the press of everyday business, the letter was set aside and never addressed. Follow up letters were received the following two months, but, again, the letters went unanswered. Then, almost a year later, the client received a formal demand letter from a law firm, again asserting claims on behalf of the original claimant and threatening litigation if the matter continued to go unresolved.

In the ensuing investigation, it was discovered that: the image had, in fact, appeared on the client's website for a period of two to three years; that the image had been removed from the client's website about 18 months previously; and that one or more archived copies of the webpage containing the image still existed, which, while no longer a part of the client's active website, were nevertheless still accessible via the internet. While it was believed that the image at issue had originally been downloaded from Google Images and was believed to be in the public domain and free for anyone to use, the person responsible for originally selecting and downloading the image four years previously was no longer employed by the client. And, even though the client's website had been updated and the image removed 18 months earlier, the image had in fact been used for a time falling within the statute of limitations for copyright, which is three years.

While we were able to help the client resolve the matter, it took time, effort and money that could have been devoted to more important pursuits. Here are a few take aways:

- If you receive an infringement claim of any kind, even if it appears to be a form letter,

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investigate and address it timely. Simply ignoring it could ultimately cost more to resolve the matter, as the claimant incurs additional expenses (including legal expenses) to pursue and escalate the matter.

- While good faith belief that an image is in the public domain is certainly a factor that a court will likely consider, it may not necessarily insulate you from infringement liability and/or damages.
- Just because an image appears on Google Images or elsewhere on the internet, that does not make it free to use. In the long run, you are better off creating your own images or licensing them from a reputable image bank (such as istock.com, shutterstock.com, etc.).
- If your website currently includes content of questionable provenance, take steps as soon as reasonably possible to replace it with your own original content or properly licensed content to start the clock running on the statute of limitations.
- Carefully document the creation and/or origin of all content incorporated in your website and retain such documentation in case an issue should arise in the future.
- If you work with an independent contractor to create any content for you, make sure you have an agreement, *in writing*, that either transfers to you all rights, including copyrights, in the created content or licenses you to use the created content in the form and for the duration you need. Under U.S. copyright law, independent contractors own the copyright on content they create (even if created and paid for by someone else), and a verbal agreement is not sufficient to transfer ownership.
- As you update your website, move any legacy or archive copies to off-line, secure storage that is not accessible to internet crawlers. While this may not eliminate the risk associated with an unauthorized copy of a work, it should make it more difficult for internet crawlers to detect.