

allowed to be mixed with business e-mails.

- Eliminate potentially embarrassing or incriminating metadata before sending documents electronically. Metadata scrubbers are available from a number of sources.

- Establish a written document retention policy and be prepared to issue a "litigation hold" on all paper and electronic files once a

lawsuit is filed or reasonably anticipated.

- Above all, create a comprehensive document retention policy and follow it! In a legal proceeding, the court could throw out your whole policy if it is inconsistently practiced.

The times continue to change and the shift toward digitally created information has been enormous. The days of the "mom

and pop" company that generate only paper are virtually over. In 1999, 93 percent of all information was generated in a digital format—only 7 percent on paper. That was eight years ago. Be prepared—understand what data exists in your organization and where it is located, and then manage it effectively.

## COPYRIGHT INFRINGEMENT: I DIDN'T KNOW!

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**M**ere use of a picture downloaded from the Internet, even from a "free site," is enough to create liability for a business using the copyrighted work without permission. Copyrighted works that typically get businesses into trouble for copyright infringement include images and text "acquired" from the Internet.

Copyright infringement can occur willfully or "accidentally," but copyright law prohibits both. One federal court recently held, "there is no need to prove anything about a defendant's mental state; [copyright infringement] is a strict liability tort."<sup>1</sup> A strict liability tort is a legal wrong that does not require a "mental intent." In other words, a copyright owner does not need to prove a defendant intentionally infringed the copyright in order for the defendant to be liable because it is a "strict liability" tort. If you copy a picture from the Internet without permission, for example, you can be liable for damages even if you did not know the picture was copyrighted. That is the essence of "strict liability."

Further, if you hire someone, such as an employee, an independent contractor, or a web designer, you are also liable for using the pictures that third party posted to your website even if you were unaware of what they did. Thus, the business displaying the copyrighted work without permission on their website is liable as the end user of that image.

In fact, two or more people can be liable for the same act or acts of copyright infringement. This is called "joint liability." If joint liability exists, then each party is liable

for the full amount of the damages. For example, courts have found a corporation's president jointly liable for publication of imagery from a CD-ROM. Website owners have also been held liable for a third-party uploading content on their website even when the website operator did not know that the photographs had been uploaded onto their website.

In short, a business can be held liable for the acts of its independent web designer. If your web designer is liable, so are you. Sadly, the party with the deepest pockets or the infringement that is easiest to prove is the one that will likely be sued. In most cases, that is the business owner, not the web designer. The damages for copyright infringement can also be quite steep.

Under federal law, a copyright owner can be entitled to damages between \$750 and \$30,000 per infringement. If it is shown that the infringement is willful, the law allows as much as \$150,000 per infringement. Each image identified on your website can be considered a separate act of infringement.

Recent jury awards have ranged from \$675,000 to in excess of \$1 million dollars in damages for copyright infringement. Recently, one jury in Western Washington awarded over \$1 million dollars in damages for the unauthorized use of as few as five photographs. In another recent case, a jury awarded \$675,000 for infringing as few as 30 copyrighted works. The old adage, "ignorance of the law is never an excuse" applies to copyright law because even if you did not know, you might still be liable for copyright infringement.

There are a few things you can do to pro-

tect your business from these types of situations. First, be sure the person creating your website is knowledgeable about copyright and the proper methods to source and license imagery. Second, ask questions about where they obtained the imagery and what rights are included for use of the images. Ask to see a copy of the license for the images that details how the image can be used and for how long. Beware of sites that advertise images as "free to use" because often times they do not have the right to license that content. Finally, make sure you have a good contract with any website developer and use only reputable companies. A development company located abroad might seem cheap until you are served with a copyright infringement lawsuit.

If you do find yourself facing a copyright infringement claim, all is not lost. In some cases, a standard business liability insurance policy ("slip and fall" policies) will cover copyright infringement claims made against a business. This special coverage, which is included in many business policies, is often called "advertising insurance." Ask your insurance agent or consult a knowledgeable intellectual property or insurance lawyer to see if you have such coverage.

Above all, do not use copyrighted content without permission. A good general rule of thumb is, "if you did not take the picture, it is not yours."

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