



7 Steps to Help Your Retail Business Avoid Copyright Infringement

J. Tucker Barr

When people think of copyrights, they usually think of paintings and other works of fine art, novels, and the like. While copyright protection certainly applies to these types of highly expressive works, it also applies to other materials, such as photographs, website graphics and text, menus, store signage, newsletters and mailers, and many other materials that retail businesses use every day to promote their brands and communicate with their customers.

In this information age, obtaining access to the perfect image, song, or graphic for your retail business is only a few clicks away. Unfortunately, with a quick “copy” and “paste,” your business could find itself mired in a difficult and expensive dispute with a copyright owner. This article highlights the basics of copyright law in the United States, the risks of infringement, and a few simple steps to help your business avoid infringing the rights of others.

U.S. Copyright Law in a Nutshell

The United States Copyright Act prohibits the unauthorized use of a “work of authorship.” A work of authorship includes virtually any type of creative expression fixed in tangible form, including news stories, novels, books, movies, television shows, music, photographs, graphic designs, etc. The Copyright Act grants the owner of a work of authorship certain exclusive rights, including the right to copy, display, and perform the work.

Although copyright owners must register their copyright as a precondition to filing a lawsuit for infringement, copyright protection actually attaches immediately upon the creation of the work in question. The minimum threshold of creativity necessary for a work to qualify for protection is also very low, meaning that using even a few paragraphs of text from a news story, playing a short clip from a song or movie, or copying a photograph posted on social media could constitute copyright infringement.

What’s the Big Deal?

Copyright infringement penalties are *severe*. A person or legal entity that infringes a copyrighted work may be liable for payment of actual damages and profits, or statutory damages up to \$30,000 for each work infringed. Moreover, if the infringement is willful, an award of statutory damages may be increased by up to *\$150,000* for each work infringed! In addition, an infringer of a work can also be liable for the attorney’s fees incurred by the copyright owner in enforcing his or her rights. Finally, employees and officers may be held personally liable for their company’s copyright infringement if they willfully participated in the company’s infringing activities.

7 Steps to Avoid Infringement

- 1. Use Original Content.** When creating materials for your retail establishment (such as web pages, brochures, newsletters, mailers, and even social media posts), creating the materials in-house is the safest bet. Under the “work made for hire” provisions of the Copyright Act, a company owns the copyright in any materials created by any employee in the course of his or her employment. Thus, if an employee writes the text for an advertisement, takes a photo

for the company's social media pages, or posts an update to the company website, the company automatically owns those materials. No written assignment is necessary, and there is little risk of infringing the rights of others.

2. **Obtain Permission from Copyright Owners.** If creating materials in-house is not an option and you would like to use existing content created by someone else, you should obtain permission, preferably in writing. The written permission (also called a license) should specifically identify the content to be used, how it is to be used, and how long it is to be used. Obtaining permission to use the content of others can be surprisingly easy and inexpensive. In fact, in many cases, the copyright owner will simply ask for attribution rather than a license fee.
3. **Obtain Assignments from Content Creators.** If you pay outside contractors (*i.e.*, non-employees) to take photographs, draft text, design graphics, or create other materials, it is extremely important that they execute a "work made for hire" agreement or a document that otherwise assigns the copyright in those materials to you. Without such an agreement, it is likely that the contractor will own the copyright in your materials, even though you paid the contractor for the work. If you determine that there is no assignment agreement in place, contact the contractor and have them execute one. Otherwise, the contractor is free to sell or license the work to other parties, including to competing businesses.
4. **Pay Particular Attention to Photographs.** Photograph licensing companies employ an array of software tools that scan the internet to identify non-licensed uses of images in their libraries. If a non-licensed use is identified, the licensing company typically will send a threatening letter that includes a demand for a license fee and penalty. In many instances, the only option is to pay the full amount demanded. Licenses for images are relatively inexpensive and simple to secure from outlets such as AP Images and Getty Images. In addition, there are a number of "public domain" (license-free) image libraries available online.
5. **Get a License for Music.** With regard to recorded music (*i.e.*, music played on DVDs, an iPod or similar device, or broadcast radio within the store), retail establishments should obtain licenses from Performing Rights Organizations like ASCAP, BMI, and SESAC. You will need a separate license from these organizations if your company plays live music. Certain retail establishments that play only broadcast radio programs are exempt from the Copyright Act. Whether the exemption applies depends on the number of speakers, the size of the establishment, and other factors. Performing Rights Organizations have been known to anonymously audit retail establishments. The auditor will make a list of all unlicensed songs that are played in the establishment, and follow with a cease and desist letter that includes a demand for licensing fees and penalties. In many cases, failing to pay the entire amount demanded will result in the filing of a federal copyright infringement lawsuit.
6. **Get a License for Movies and Television Programs.** Retail establishments that play movies, television shows, or other audio-visual works in a waiting room or common area must obtain a license from a Performing Rights Organization, such as the Motion Picture Licensing Corporation or Swank Motion Pictures. As with respect to broadcast radio, the Copyright Act exempts certain retail establishments that play only broadcast television.
7. **Get Legal Help.** If you are unsure whether your use of content is permissible or have other questions about copyright law, you should consult with an intellectual property attorney.

Copyright issues are important to persons other than intellectual scholars, authors of popular fiction, and rock-and-roll legends. Retail operators, too, are affected by copyright law in myriad ways every day. A basic understanding of the way copyright law works, the risks associated with copyright violation, and the steps to ensure permissible use can go a long way to avoid the headaches associated with an infringement action.

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