

I WAS ROBBED!

FIGHTING DIGITAL PIRACY

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WHAT TO EXPECT

- Identifying digital theft
- The internet ≠ public domain
- Fair Use defense
- Self-help remedies
 - Lawsuits
 - CASE Act
 - Informal negotiations
 - Cease and Desist
 - DMCA Takedown
- Rustling Fergus (with Jean Abernethy)
- Questions

HAS MY WORK BEEN STOLEN?

- Probably, especially if you're a photographer or other visual artist, but it's difficult to know. The internet is like the Wild West—huge and unregulated. Policing the internet yourself is impossible.
- The best helpers:
 - Watchdog friends who know your work and your concerns
 - Google Alerts

MAY 16 GOOGLE ALERT TO MY HOTMAIL ACCOUNT


Mail - Milt Toby -

https://outlook.live.com/mail/deeplink?popoutv2=1&version=2019051303.07

Reply | Delete | Junk | Block | ...

Google Alert - "Milton Toby"

Flag for follow up.

 Google Alerts <googlealerts-noreply@google.com>
Thu 5/16/2019 4:02 PM
You




Google Alerts

"Milton Toby"

Daily update · May 16, 2019


WEB

[ruffian toby milton c](#)
etnikcraftshop.tk
scan from **milton toby** s book ruffian thoroughbred legends. Scan from Dec. '95 Equus magazine: "Her shattered sesamoids supported by an air cast, ...

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THE INTERNET IS NOT DIFFERENT!

- Does a creator lose her copyright interest by posting something for the public to read or view on the internet?
- No! Appropriating a copyrighted photograph from the internet without permission to illustrate a news article is **stealing**. United States District Judge Gregory H. Woods, *Jonathan Otto v. Hearst Communications Inc.*, U.S. District Court, Southern District of New York, Dec. 10, 2018.
- The same reasoning applies to a writing.
- Contrary to popular belief, posting on the internet does **not** mean the work is suddenly thrust into the public domain for anyone to use without permission.

THE “FAIR USE” DEFENSE

- The general rule: **unauthorized use = copyright infringement**
- The limited “fair use” exception
 - Criticism
 - News reporting
 - Parody
 - Research
 - Teaching

SELF-HELP REMEDIES

- Copyright protection is effective upon **creation** of a work, when it is fixed in a permanent medium.
- There are **no** copyright “police!” No one is going to protect your copyright interest if you decide not to take that step, and there might be reasons not to do so.
- The most serious self-help action is a legal process—a lawsuit in federal court—but there is a catch. Filing a copyright infringement lawsuit requires “registration” of the copyright.

THE LAWSUIT CONUNDRUM

- May be an unrealistic remedy:
- Must be filed in federal court
- Takes forever, costs a lot, difficult to interest an attorney on contingency
- May be difficult to prove actual damages
- Registration with US Copyright Office is required prior to filing
- What does “registration” really mean?

THE LAWSUIT CONUNDRUM

- Courts have differed about what “registration” means:
 - Delivery of the forms, copies of the work, and the fee to the Copyright Office, or
 - Action by the Copyright Office to actually examine and register the copyright
 - An important distinction because the Copyright Office can take months to complete the registration process

FOURTH ESTATE V. WALL-STREET.COM

- The US Supreme Court, on March 4, 2019, decided that “registration” in the context of a copyright infringement lawsuit does not happen until the Copyright Office actually registers the copyright. The “application” argument failed.
- After a copyright is finally registered and a lawsuit is filed, a successful plaintiff can recover damages for infringements before and after the registration. Statutory damages for infringement before registration may not be recoverable, however.
- Considering the time gap between applying for registration and actually having the Copyright Office act on the application, waiting for actual infringement to apply for registration probably isn't a sound plan.
- Register early!

A LITIGATION ALTERNATIVE

- On May 1, 2019, the Copyright Alternative in Small-Claims Enforcement Act of 2019 was introduced in the US Senate and House of Representatives, with what appears to be bipartisan support.
- The name means what it says: The CASE Act will create a voluntary small claims board within the Copyright Office to adjudicate some claims without the expense of filing a federal lawsuit. Recovery is limited to \$30,000 in damages, with a cap of \$15,000 in statutory damages. Proceeding in a small claims copyright court should be faster and cheaper.
- Problem solved—for most of us at least—correct?

THE CASE ACT—THE DOWNSIDE

- If enacted, the CASE Act will make it much easier and far less expensive for creators to enforce their copyright interests against infringers.
- What could go wrong?

THE CASE ACT—THE DOWNSIDE

- If it's easy for you to use a copyright small claims court to enforce your rights, it also becomes easier for another writer, or photographer, or visual artist to make an infringement claim against you.
- This applies to:
 - Infringement claims that are **legitimate**
 - And **Both** claims require a defense from you
 - Infringement claims that are **frivolous**

INFORMAL NEGOTIATIONS

- Pros
 - Cheap
 - Quick
 - No red tape
 - No attorneys
- Cons
 - Success depends on lack of intent by infringer
 - No enforcement process

CEASE & DESIST: SAMPLE PARAGRAPH # 1

- The bare bones
- Dear _____:
- You have copied, or are using significant portions of, my copyrighted work [insert name/description of work] without my permission on your website [insert URL]. I most recently viewed your infringing use of my work on [insert date]. This unauthorized use constitutes an infringement of my copyright which is prohibited by federal law (Title 17 of the United States Code). Please cease and desist any further unauthorized use of my work and remove it from your website immediately. Within 10 calendar days from the date of this email, send a confirming email to me at the above address acknowledging that you have done so.

CEASE AND DESIST: SAMPLE PARAGRAPH # 2

- This paragraph may or may not be appropriate, depending on circumstances:
- Because your unauthorized use of my copyrighted work is a violation of my rights as set out in the federal Copyright Act as set out above, I am entitled to a licensing fee of \$[insert fee], which is the same fee that I would have charged had you asked my permission to use the work. Failure to respond in a satisfactory manner within 10 calendar days from the date of this email will constitute an expression of your intent to continue your unauthorized use of my work and under those circumstances I intend to pursue all available legal remedies without further notice to you.

DMCA TAKEDOWN

- The Digital Millennium Copyright Act (DMCA) provides a “safe harbor” for internet service providers (ISPs) that insulates them from liability for copyright infringement by a user of the internet site.
- Example: You have a horse racing history blog on a website that you maintain, where you also allow users to post comments and other material. You are the ISP. One of your users posts a lengthy comment that includes an image of a painting of a famous horse. The artist, who is still alive and very protective of her work, learns of the unauthorized use of her painting, is upset, and wants the image taken down.

DMCA TAKEDOWN

- The artist's options, in order of seriousness for you (the ISP), include:
- A lawsuit against you as the ISP
- A cease and desist request directed at you and the infringer
- Informal negotiations between the artist, you, and the infringer
- *A lawsuit against the person who actually infringed the artist's copyright
- A DMCA takedown request

DMCA TAKEDOWN

- Your options as the ISP, in anticipation of this issue, include:
- Not allowing others to post on your site (no interaction with readers/buyers)
- Carefully curating posts in advance (time consuming, not foolproof)
- Purchasing expensive and hard-to-obtain liability insurance (very expensive)
- Taking advantage of the DMCA “safe harbor” by including on your site:
 - Identification of person designated to deal with infringement claims
 - An easy way to contact that individual (email or regular mail)
 - A template for a DMCA takedown request or information for the person to claim infringement

DMCA TAKEDOWN NOTICE

(AMAZON SITE TERMS)

- **NOTICE AND PROCEDURE FOR MAKING CLAIMS OF COPYRIGHT INFRINGEMENT**

- **If you believe that your work has been copied in a way that constitutes copyright infringement, please provide our copyright agent the written information specified below. Please note that this procedure is exclusively for notifying AWS that your copyrighted material has been infringed.**
- **An electronic or physical signature of the person authorized to act on behalf of the owner of the copyright interest;**
- **A description of the copyrighted work that you claim has been infringed upon;**
- **A description of where the material that you claim is infringing is located on the Site;**
- **Your address, telephone number, and e-mail address;**
- **A statement by you that you have a good-faith belief that the disputed use is not authorized by the copyright owner, its agent, or the law;**
- **A statement by you, made under penalty of perjury, that the above information in your notice is accurate and that you are the copyright owner or authorized to act on the copyright owner's behalf.**

DMCA TAKEDOWN COUNTER-NOTICE

- **Copyright owners whose work has been removed from a website pursuant to DMCA takedown notice may dispute the claim and have work returned to site. The counter-notice should be directed to the website's copyright agent and include the following information:**
 - **Identification of the material that was removed, with sufficient information about the location where it appeared before it was removed or disabled**
 - **A statement, provided under penalty of perjury, that the individual making the counter-claim has a good faith belief that the material at issue was either misidentified or mistakenly removed**
 - **The name, address (physical and/or email), and telephone number of the individual making the counter-claim**
 - **A statement consenting to the jurisdiction of the federal district court for the judicial district in which your address is located, and that you will accept service of process from the person who provided the complaint set forth above (if you are located outside of the United States, you must state that you consent to the jurisdiction of any United States federal district court in which we may be found)**
 - **A physical or electronic signature**

DMCA TAKEDOWN NOTICE & COUNTER-NOTICE

- Notices must be sent to the ISP's "Copyright Agent"
- Address should be listed somewhere on the ISP's website (for Amazon, search under the "Terms of Service")
- If that doesn't work, search the US Copyright Office's Directory of Copyright Agents:
 - <https://www.copyright.gov/dmca-directory/>

RUSTLING FERGUS: DIGITAL PIRACY IN THE REAL WORLD

- There are no “copyright police” to track down infringers and enforce your rights.
- Jean Abernethy took on the job when stolen images of Fergus started showing up on the internet.
- You won’t win all the battles, but you can win some of them.



RESOURCES

(FOR INFORMATION ONLY, CONFIRM WITH ATTORNEY)

- *The Copyright Handbook: What Every Writer Needs to Know*, Stephen Fishman (10th ed.), 2008, ISBN 978-1-4133-0893-8
- *The Writer's Legal Companion*, Brad Bunnin & Peter Beren (3rd ed.), 1998, ISBN 0-7382-0031-X
- *Protect Your Writings*, Maria Crimi Speth, 2010, ISBN 978-1-4502-4364-3
- *Author Law A-Z*, Sallie Randolph, Stacy Davis, Anthony Elia, Karen Dustman, 2005, ISBN 1-931868-26-3
- *Business and Legal Forms for Photographers*, Tad Crawford, 1991, ISBN 0-9607118-2-1

QUESTIONS?

Milton C. Toby JD

milt.toby@miltonctoby.com

859.285.9043

