

# Legal Update

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## LINGERING COPYRIGHT LIABILITY ON YOUR WEBSITE?

By Damon E. Dunn

A surge in copyright litigation is targeting websites that contain third party images, such as freelance photographs and artwork. Now a recent Federal Court of Claims decision may extend the deadline for filing such copyright infringement cases indefinitely.

Infringement lawsuits against musicians (Katy Perry, Taylor Swift, Robin Thicke and Pharrell Williams, Led Zeppelin) grab headlines, but hundreds of more mundane cases involving images downloaded from the internet without authorization from the copyright owner also are working their way through federal courts. Many of these images were repurposed for marketing or illustration in the mistaken belief that works posted on the internet without obvious copyright protection are fair game, particularly if uncredited.

The Copyright Act imposes a three-year limitations period for filing infringement actions, but the recent *APL Microscopic v. United States* case recognized two loopholes that might extend that deadline for copyrighted work transmitted from, or merely viewed on, a website. In that case, the plaintiff sued NASA in 2018 for \$150,000 in statutory damages, alleging the agency infringed the plaintiff's copyrighted photograph (the "Work"), by posting it on a NASA website in 2004. The court agreed with NASA's argument that the three-year deadline for reproduction infringement started to run when the Work was first uploaded onto the server – 14 years before the case was filed. The Court found, however, that the plaintiff's claims for infringing its rights to control distribution and display of the Work were not time-barred. It explained, "the act of transmitting the webpage -- and the Work therein -- to a user would infringe" on the owner's right of distribution. Moreover, "each unauthorized showing of a Work through a computer infringes on the owners right of public display." Essentially, each "hit" from a user viewing the web page with the Work may activate another three-year term in which to sue for infringement.

The case affords a foothold for bringing older infringement claims, especially by specialist law firms that sift the internet on behalf of artists or licensees for potentially unauthorized copies to issue demand letters for statutory penalties and attorney fees. Because crediting the source (as NASA did) does not insulate one from liability and proving a "fair use" defense is a complex, multi-factored process, after *APL Microscopic*, any third party work accessible on a web site should be evaluated carefully for potential infringement liability.

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