

Decorating Danger: Pitfalls in Using Images of Rooms Decorated with Your Furnishings

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Everyone does it. A light fixture is featured in a prestigious publication, or a rug is shown in a home featured by an interior design publication. The image (and perhaps an image of the publication's cover) is quickly reposted on Instagram, added to the company's website, placed in promotional materials, and otherwise used to promote sales. There's just one problem. Use of the image could result in costly charges of copyright infringement.

Copyright Ownership:

Under U.S. law, the general rule is that the author of a work owns the copyright in the work unless the work was created within the scope of their employment, in which case their employer owns the work. In most cases, the photographers working for publications like *Interior Design*, *Architectural Digest*, *House Beautiful*, or *Coastal Living* are not employees but independent contractors, which means that the **photographers**, and **not** the publications, own the copyright in the photos they take and the photos shown by the publications. As a result, the photographer (not the publication) must give permission for any reproduction of their photo, including reproductions on social media or websites.

Photographers, not publications, generally own the copyright in photos featured in prestigious publications. Reproduction requires explicit permission from the photographer, extending to social media and websites.

Strict Liability in Copyright Infringement:

Reproduction without permission is copyright infringement. Copyright infringement is a strict liability offense, meaning there is no defense to whether infringement occurred — either something was copied without permission, or it was not. There are defenses that can be asserted, but these are directed to the amount of damages, not whether there has been infringement. Giving credit to the photographer or the publication is not a defense. Similarly, the fact the one didn't make any money directly from the use of the photo is not a defense. The fact that an image was available online is generally not a defense. Nor is a court likely to find that such a use is a fair use — to find out if a use is fair use (essentially arguing that no permission was needed), it will probably be necessary to take the case to trial, involving expense in terms of time and money.

Costs of Copyright Infringement:

If a photographer has timely secured a copyright registration for their photos, they are entitled to statutory damages of up to \$30,000 per infringement (and up to \$150,000 per infringement if the infringement is shown to be willful). The idea of such an award is to deter future infringement. In addition, the photographer is entitled to their reasonable attorney's fees if a timely copyright registration was made.

Reproducing images without permission can lead to costly consequences. Photographers with timely copyright registration can seek damages up to \$30,000 per infringement or \$150,000 if willful, plus attorney's fees.

Importance of Written Permission:

Having permission from the photographer would defeat a claim of copyright infringement, but that permission should be directly from the photographer and should be in writing. Permission from the publication in which the photo appears is probably not enough unless the magazine owns the copyright in the photos.

Reality Check — Cease and Desist Letters:

Think it can't happen? It has already happened and will happen again. Entities you know have received cease and desist letters from photographers. Others have been sued (roughly half of the copyright infringement lawsuits filed in the U.S. involve the unauthorized use of a photograph). In either case, payment has likely been made, and either a license permitting the images to stay up has been obtained or the images have been removed.

Entities have received cease and desist letters and faced lawsuits for unauthorized photo use. Roughly half of U.S. copyright infringement cases involve unauthorized photo use, resulting in payments and image removal.

Protection Against Claims:

The best way to protect against a copyright infringement claim is to make sure you have permission to use the photo showing your product or the room you designed or styled (if possible, take the picture yourself!). If a photographer refuses to give you permission, don't use the image.

If you are not sure if you need permission or have permission, contact me or one of my intellectual property colleagues at Offit Kurman — an ounce of prevention is worth a pound of cure.