



FULFILLING OUR PROMISES
TO THE MEN AND WOMEN WHO SERVED

NONPROFIT ADVISOR

For DAV Departments and Chapters

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COPYRIGHT: WHY IT'S NOT RIGHT TO COPY

This past year, one of our departments faced the possibility of litigation for copyright infringement. The General Counsel's Office assisted the department in reaching a resolution before any legal action ensued. In light of this issue, we thought it would be informative to provide a brief discussion of the recent DAV dispute and an overview of copyright law.

The legal process commenced as most do – with receipt of an attorney letter. The lawyer represented a photographer, and the image at issue was a photograph of an iconic event in that particular state. The department copied the photograph from the internet (where there was no indication that it was subject to copyright), placing it on the department's website. The department's unauthorized use of the photograph did not arise from malice or nefarious intent. Interestingly, before entering the legal practice, the attorney for the photographer worked for twenty years as a commercial freelance photographer. The attorney's letter demanded \$6,500 to settle the matter, and the parties subsequently negotiated the terms of a settlement.

To find the genesis of copyright protection, one needs to look no further than the United States Constitution. In particular, Article I, Section 8 of the United States Constitution provides Congress with the power among other things: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." To effectuate this power, Congress enacted the Copyright Act of 1976, which provides the basic framework of the current copyright law. The Act defines copyright as the legal protection of

"works of authorship fixed in any tangible medium of expression" and touches our lives on a daily basis, whether you read a book, watch a film, transfer music, or take a photograph. Copyrightable works generally include the following:

- Literary works
- Musical works
- Dramatic works
- Pantomimes and choreographic works
- Pictorial, graphic, and sculptural works
- Motion pictures and other audiovisual works
- Sound recordings
- Architectural works

Conversely, copyright protection does not extend to ideas, procedures, methods, titles, slogans, familiar symbols, and listing of ingredients to name a few.

Under federal law, a copyright owner is entitled to recover his or her actual damages or in the alternative statutory damages in a sum not less than \$750 or more than \$30,000. The court may also increase the statutory damages to not more than \$150,000 if it finds the defendant committed the infringement willfully.

Copyright issues are often hot topics in the news, especially in the music industry. One of the recent cases involved the Estate of Marvin Gaye. Specifically, the Estate accused the creators of the popular 2013 song "Blurred Lines" of copying the musical style of Mr. Gaye's 1977 quintessential hit "Got To Give It Up." In the end, the creators did give it up after a jury in California returned a multi-million dollar verdict and the



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judge subsequently ordered the Estate was entitled to fifty percent of all royalties. In March 2018, the Ninth Circuit Court of Appeals affirmed the jury verdict on all issues except for the personal liability on behalf of one of the song's contributors.

The Marvin Gaye case illustrates the law's aim to balance the interests of those who create content with the public interest in having the widest possible access to that content. However, while copyright law may involve multi-million verdicts, disputes oftentimes appear on a smaller scale in the most unlikely instances. Case in point – the threatened litigation with the DAV department.

What could one learn from this incident? Here are some takeaways:

1. Widely available works of authorship, such as images, words and music, are often subject to copyright protection.
2. The statutory penalties are substantial, and the copyright owner does not need to prove an intentional violation to receive damages.
3. Permission to use a copyrighted work must be in writing, and the person providing the permission should be the copyright owner.
4. A copyright owner does not need to necessarily identify a work as copyrighted in order for the work to have protection under the law.
5. Some attorneys make it their practice to research (some may say troll) the internet, looking for potential copyright litigation. Once found, an attorney sends a boilerplate letter, accusing the entity of copyright infringement and requesting certain payment to settle the matter.
6. Get the picture (pun intended) and be careful what you get off the internet.

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