

A bargain at ten times the price? The \$1,850 stock photo that cost a travel agent over \$20,000

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Tools such as Google's Search by Image make it easier for photographers to detect unlicensed use of photographs online, but copyright infringements remain difficult to deter, and often financially uneconomic to pursue.

With the risk of legal damages only amounting to the equivalent of a licence fee, it has often been uneconomic for victims of one-off copyright infringement to pursue breaches via legal avenues.

However, in a recent Australian case, *Tylor v Sevin*, the Court awarded damages that were substantially higher than the original photograph licence fee. This sent a strong message to website owners to think twice before using unlicensed copies of photographs on their websites, and may set a standard for future New Zealand copyright cases.

Tylor v Sevin

Mr Tylor is a Hawaii-based professional photographer who operates his own stock image library. Having had concerns for some time that his photographs were being unlawfully abused by unlicensed online publishers, Mr Tylor confirmed his suspicions by conducting image searches. He discovered that an Australian travel agent, Ms Sevin, was using an unlicensed copy of his image "Waikiki Pink Boat" to advertise Hawaii as a destination on her "Home Away Travel" webpage.

Mr Tylor instructed Australian lawyers to contact the travel agent and resolve the matter, however Ms Sevin was uncooperative and initially shifted the blame on her web designer, before changing her email address and business name to "Seek Travel". Mr Tylor decided to bring legal proceedings against Ms Sevin. However, Ms Sevin still refused to take the photograph down from her website or offer to pay a fee for its use.

The Court's judgment specifically noted that, although online copyright infringement is a prevalent issue, this was the first such case to have been brought to an Australian Court. The Court took into account Ms Sevin's uncooperative behaviour, and emphasised the need to deter similar breaches of copyright. To this end, the Court awarded additional damages of AU\$12,500, on top of Mr Tylor's usual licence fee of US\$1,850. Ms Sevin was also ordered to pay a contribution to Mr Tylor's legal costs of AU\$9,500.

With orders totalling over ten times the original cost of a licence, the Court has made an example of Ms Sevin, reinforcing that making an image publicly available does not make it "public domain" in the copyright sense.

New Zealand Copyright Damages

In New Zealand, copyright holders must generally choose between two options when claiming for copyright damages.

The first option is an "account of profits", which essentially strips the infringer of all profits derived from the unlawful use. However, in many circumstances, such as *Tylor v Sevin*, it is not easy to find a link between a breach and "profit".

The second option is to seek compensatory damages, restoring the copyright owner to the position he or she would have been in 'but for' the breach. Essentially this is ordering the infringer to pay the original licence fee. A Court may also award additional damages on top of the licence fee under s121(2) Copyright Act 1994. To do so, the Court must have regard to the flagrancy of the copyright infringement, and any benefit accruing to the defendant from the infringement.

An infringing party's behaviour is an important factor in establishing whether additional damages will be awarded. In the 2012 *Skids Programme Management Ltd v McNeill* dispute, the Court of Appeal awarded over \$20,000 in damages for the flagrant and intentional copying of 50 pages of franchise documentation. However, in the 2008 *Sunlec v Electropar* case, the High Court ordered only an injunction and nominal damages of \$1,250 against Electropar for "unintentional albeit perhaps naïve" copying of marketing materials, which included photographs. No additional damages were awarded in *Sunlec v Electropar*, because none of the infringements were flagrant in the sense of being "glaring, outrageous or scandalous".

While no online copyright infringement case similar to *Tylor v Sevin* has yet been decided in New Zealand, the New Zealand courts may consider *Tylor v Sevin* when assessing damages in future copyright infringements. The judgment also provides a

useful resource to photographers when negotiating settlements for breaches of copyright out of Court. The clear message sent to unlawful copiers is a welcome development for the photographic and publishing industries.

Practical steps to prevent “copy + paste” copyright infringements

Pursuing Court action can be expensive and often unpredictable, so for most commercial photographers, prevention is the best cure. We suggest the following steps that photographers can take to assist in protecting copyright:

- Keep good records. If your claim ever goes to Court, you will need to prove when and where an image was taken, that you took it, and that you have the rights to enforce copyright.
- If you are publishing online, make your copyright notices clear (e.g. © 2014 Laura Campbell). This is not a legal requirement, but helps remind web publishers that your work is not theirs to use freely.
- When agreeing your fees, keep in mind that the best way to prevent licence expiry issues is to set automatic renewal fees before shooting. Note that a legal contract (including a licence) is often difficult to impose on a client unless agreed *before* commissioned photographs are taken.
- If you see unauthorised use, gather detailed evidence of it. Save entire webpages and screenshots (including dates), rather than just making a list. This enables you to prove unlawful use, even where an image is deleted from a site at a later date.
- Be proactive. If a client’s licence is coming to an end, get in touch to let them know, and offer a renewal of their licence in advance. If you have already agreed at the outset of the job what the renewal fee will be, this process will be simplified.

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