

You do not have right to sell photos of people



He did not want his daughter's image sold to strangers for whatever purposes ...

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Back in November 2003, in a piece I wrote for Missouri Press News magazine on copyright and “fair use” as a defense to issues of copyright infringement in regard to use of a copyrighted photo in the newspaper, I mentioned an emerging trend for the sale of photographs by third parties on websites. I don't think it received much attention at that time.

However, in the last month the hotline has received several calls from publishers wrestling with the issues related to third-party sales via the Internet of photos from their newspapers. As a result of these calls I think it's time to address these issues once again for your consideration.

The issues arise when a publisher signs an agreement with a third-party reseller who offers to publish photos from your newspaper from their website. You agree to direct all inquiries for reprints to this third party.

You as a publisher need to realize there are some significant legal issues when you make this agreement, and the law in these areas is not clear at all. You may be creating liability for yourself, so any agreement such as this needs careful consideration.

There are several issues that arise in connection with these agreements. First is the principle of commercial appropriation – the theory that you cannot use someone's photograph to make money for yourself without his or her permission. When you run a photograph with an identifiable subject in your newspaper, that is no different than the theory of commercial appropriation, EXCEPT that there is an exception for use of someone's photograph in a news context. In short, you are permitted to do this because you are using the photograph to convey news in your newspaper.

For many years newspapers have sold copies of their news photos on the side. Usually the sale is to a member of the family of the subject of the photograph, and so there is not an issue that the paper is making money – it is arguably more of an accommodation to the person pictured in the paper's photo.

Now, I am certain that over the years there have been occasions when a newspaper sold a photo to someone who was NOT a member of the subject's family. But because it happened internally through the newspaper and very quietly, there was not a public perception of the newspaper using these photos to make money, regardless of what the reality was (and, because it was based in-house and not heavily promoted, it very likely was NOT a profit center for the paper.)

Times have changed. Companies now exist like DotPhoto.com, MyNewsPhotos.com and a variety of other companies like them that exist to take your paper's photos, put them on their websites and attempt to market them for you to the public. They market these services as “found money” and make it sound like you're missing a major revenue stream.

I am troubled by issues that arise in third-party sales of your photos. It seems clear to me that when you have sales of these photos to third parties, you are clearly using these photos to make money, and you have lost all the protection that attaches to this use when you do it as part of your publication. You are simply making money on the use of someone else's photograph.

Perhaps if there is no identifiable person in the photograph, you are fine. But that is rarely the case for newspaper photographs because images of people tend to be the best news images.

I have researched this issue over and over, and over the years have watched developing case law carefully

looking for some safe harbor for you, to no avail. I have asked owners of these companies who have told me that this is not an issue to show me case law supporting their position and have never received anything in response.

I have talked with other lawyers, and they agree with me. I have talked with counsel to the media insurance companies you use and they, too, are concerned about you participating in these ventures.

In short, the law does NOT support you in engaging in this kind of money-making venture. You are proceeding at your own risk.

And, in fact, it's not just a money issue. Not long ago, a staffer from a paper in the state called to discuss the fact that a father of a young woman had discovered his daughter's image for sale at one of these venues. He was greatly upset over this matter. His issue was not commercial appropriation but privacy. He did not want his daughter's image sold to strangers for whatever purposes they might make of the photo.

In short, you don't have permission to do anything with these photos. You don't need permission to run them in the newspaper. If you do ANYTHING else with them, you are on thin ice.

Please call me if we need to talk about this issue further. That's what I'm here for. And if a company you are working with says this is not an issue, tell them to call me because I'm still waiting for someone to tell me why they think I'm wrong.

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