

Hey, Isn't That . . . People Are Doing Double-Takes, And Taking Action, As Web Snapshots Are Nabbed for Commercial Uses

By Monica Hesse | Washington Post Staff Writer | Wednesday, January 9, 2008

The pug in the corner of the Saints-Eagles football telecast on Fox looked familiar to Tracey Gaughran-Perez.

Not in the slobber-smile way that all pugs look familiar, but in the *who else but me would dress their pug up in a bleeping Santa suit* kind of familiar.

Gaughran-Perez logged on to <http://www.sweetney.com>, the personal blog where she'd uploaded a snapshot of her dog, then waited for the Fox pug -- a sort of "Merry Christmas" icon -- to appear again on TV.

Argh.

The pug was definitely Truman; the photo was definitely one she'd marked as "all rights reserved."

"It's not like the picture was some golden chalice of Internet wonder. It's a picture of a stupid dog," says the Baltimore mom. "But it's *my* dog and it's my photo!"

Supreme irony: "Every commercial break there would be a warning from Fox saying, 'This telecast may not be reproduced,'" she says. "I guess copyright pertains only to them."

Under the banner of "intellectual property," record labels warn you not to bootleg their songs. Hollywood studios warn you not to download their movies. Intellectual property has lately seemed the concern of corporations trying to protect the artist from the grabby public.

But in an increasingly user-generated world where the public *is* the artist, sometimes it's the big boys who get grabby. And the questions that arise are about ownership, but they are also about fairness, and changing culture, and ultimately, the search for authenticity.

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The (literal) poster child for corporate photonapping: Dallas 15-year-old Alison Chang, who paused in the middle of a church-sponsored carwash last summer to flash a goofy grin and a peace sign to her friend Justin Ho-Wee Wong. *Click!* Wong posted his pictures from the event on the photo-sharing Web site Flickr. A couple months later, the one of Alison resurfaced -- as part of a national ad campaign for Virgin Mobile in Australia. "Dump Your Pen Friend," the billboards read. "Free text virgin to virgin." Alison was the chump to dump.

The Chang family lawyered up.

While Wong had agreed to make his snapshots available through Creative Commons, a nonprofit that licenses photos for Flickr, he didn't anticipate commercial use, says Ryan Zehl, the attorney and

spokesman for both the Chang family and Wong. Additionally, Zehl says, the license had required Wong to be attributed by name, which he was not. He and Alison, now 16, learned what had happened only when another Flickr user forwarded Wong a picture of the ad.

They're all suing Virgin Mobile Australia -- the Changs claiming Alison's violation of privacy and Wong claiming the company's failure to credit him properly.

Understanding cases such as the Changs' requires a crash course in copyright law:

Photographers (even amateur ones) automatically own the rights to their own work (even online). That means others can't use a photo without permission.

But sometimes, through "fair use," it actually *is* okay to use a photo without permission. Fair use can include scholarship or parody, and is determined by a number of criteria.

Further: sometimes, individuals such as Wong can decide to give away just *part* of their control. For example, permitting use of a photograph as long as the source is credited.

It's all doubly muddled online, where images can be thoughtlessly taken with one mouse click, such as when [thousands of boys made screensavers out of high school track star Allison Stokke's photo](#) and never once asked, "Legal?"

Clearly, the only way to really make sure your photos on the Internet don't get splashed around is *not to put them up there to begin with*.

In some ways the more interesting question for this corporate breed of photonapping isn't "Is it legal?" but rather, "Why does it sting so badly?"

For Niall Kennedy, the issue was hypocrisy -- the casual smugness with which corporations seemed to say, *Copyright? What copyright?* Kennedy had snapped photographs at a technology convention in late 2005 only to see one suddenly appear, without proper crediting, on a Microsoft-run blog.

"I've had audits where Microsoft has sent people to verify that I have copyrights for the software running on each employer's computer," says Kennedy, who once worked for Microsoft and now runs a Web technology firm. "This is a company that goes after copyright violators with the assumption of guilty until proven innocent."

The original blogger later posted an online mea culpa: "I forgot to include an attribution, which I had fully intended to do, but for which I apologise [sic] to him." Microsoft did not return calls seeking further comment.

Says Lawrence Lessig, the Stanford legal scholar who created Creative Commons, when asked about the issue of corporations borrowing photos: "There's really no excuse for [these companies] except that they think it's not important to protect the rights of the amateur."

Brandon Stone, a Web designer in Fort Lauderdale, Fla., was as flattered as he was peeved when he saw his photographs of a dirty alley appear as background in a "Real Time With Bill Maher" skit on HBO.

Still, the amateur photographer didn't want to undersell himself, and solicited advice online. While still debating a course of action, he received a call from an apologetic show producer who had been forwarded Stone's advice request.

They negotiated a price of \$500 for the images used, "plus a little more for pain and suffering," Stone says. "They know the business. They have to be held to a higher standard. The average Joe doesn't have a team of lawyers telling him what's legal and what's not."

The producer's explanation? An intern, a lowly intern who didn't know any better, had grabbed the screen shots for the last-minute sketch.

Low-level employees were also the forces cited when stay-at-home dad Jim Griffioen's daughter appeared on Babble, an online parenting magazine. The story, about lead paint, featured a photo from Flickr of Juniper playing in front of a paint-peeling wall.

"It implied that I expose my daughter to all kinds of evils," says Griffioen, who hadn't agreed to licensing. "I'm just glad it wasn't an article about smoking pot [in front of] your kids," the subject of another Babble story.

Griffioen, as it happens, was once an intellectual property lawyer. When he unleashed his legalese, he says, staffers removed the photo.

Griffioen accepted their untrained-employee explanation -- until, he says, he started hearing from other bloggers who said they'd been wronged by the site. One woman said a photo of hers was improperly used for the magazine's inaugural issue. When she complained, the editor blamed . . . an intern.

"That is one very active intern," says Griffioen.

Babble, for its part, immediately admits wrongdoing, but says that the cases were not nearly as widespread as Griffioen implies. "There was a period of a few weeks where it happened as a pattern," says Rufus Griscom, Babble publisher. He says that one photo assistant did not understand permissible use, but that when the problem came to light, the offending photos were immediately removed and replaced with stock photography or with images from Flickr that Babble had permission to use. The photo assistant was fired, and the magazine reviewed all of its published images to make sure it had the photo rights.

What's noteworthy in each of these cases, Lessig says, "is that bloggers, a community typically associated with piracy, are rallying in support of copyright."

He says average individuals are increasingly thinking of themselves as artists, whose work has value -- or at least deserves respect. Lessig predicts that as the average Joes have their own material appropriated, it will eventually result in better behavior from both individuals and corporations.

Or, in total anarchy?

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When news broke of the Alison Chang story earlier this fall, Virgin Mobile Australia released a statement (and has subsequently declined all interview requests, including one requested for this article). In part: the campaign "was part of an approach designed to reject cliched 'advertising' imagery in favour of more genuine and spontaneous shots."

Griscom, of Babble, similarly explained the magazine's decision to use Flickr, calling the images found there "more original, less generic."

It's easy to get so caught up debating the fairness of photonapping that we miss the other question: Why would big name corporations even *want* our point-and-click photographs?

The answer seems to be less "Because we can" and more "Because we need to."

"Authenticity is the new consumer sensibility," says Joe Pine, a business consultant and co-author of "Authenticity: What Consumers Really Want." It is the criterion "by which people decide what to buy and who to buy it from."

It's a byproduct of the user-generated world: the trustworthiness of YouTube, the realness of Facebook. Above all else, we believe ourselves. "People don't want to buy the fake from the phony anymore," Pine says. "They want to buy the real from the genuine."

Most of Flickr looks genuine. Type in "nerdy teen" and the current first hit is not some stylized nerd with braces and suspenders and mismatched socks. What you get instead is an image more subtle -- an old yearbook photograph of a smiling brunette, glasses not quite right, hair not quite right.

The image is more "right" than the Steve Urkel an ad firm would have concocted.

And the ad firms get that. So we get videos like Burger King's "Freakout" campaign in which real people are told the Whopper has been discontinued. They do their best to replicate real.

Viewers can spot a professional pug model from across the living room.

It all gets very meta.

And none of it is comforting to the people who have had their images grabbed online.

So while these issues of authenticity and fairness and legality are all being sorted out, amateur photographers who find themselves more famous than they would like may consider taking advice from Niall Kennedy.

When his initial e-mails to the Microsoft blog asking it to remove links to his photo didn't immediately work, Kennedy replaced the image with one of a man engaging in an activity best described as "extreme mooning." Visitors to the Microsoft blog who clicked on the innocent-looking link were guided to the new photo.

Says Kennedy, "They pulled down the link within 15 minutes."

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