

How an Orphan Works (OW) Bill would effect a copyright holder from the perspective of a small family business.



In 2008, I participated with artists-rights groups to help communicate the needs of copyright holders as it relates to Orphan Works legislation before the House and the Senate on behalf of my family's small business. My husband holds the copyrights to more than 7,500 cartoons and I work with him selling the reprint usage rights to organizations that use his cartoons for projects such as books, newsletters, websites and presentations.

In theory, both myself and my husband believe that it is fair and reasonable to have a provision set up for certain non-profit organizations including libraries, documentaries and scholarly research organizations to be able to use materials that are classified as orphan works. It is not our intention to object to having a means to provide usage for very specific non-profit organizations that would benefit the public.

Our objection is in how the legislation was written: a) Could be cost-prohibitive to comply to b) the impossibility of complete compliance to prevent our current body of work from being designated as Orphan Works c) Making it easy for commercial entities to declare copyrighted works as Orphans and thereby devaluing the creative works.

We had the following issues with the previous legislation:

1. The legislation did not clearly indicate that *only* non-profit organizations including libraries, documentaries and scholarly research organizations to be able to use materials that are classified as orphan works.

a) The definition of the type of organizations that could declare that a "diligent search" was conducted and no owner found was so broadly defined that aggregators such as search engines would have been able to claim that they fall into the above categories and therefor qualified for exemption from legal liability.

2. The previous legislation did not define what a diligent search consisted of.

a) The previous legislation talked about databases for use with diligent searches but there are many logistical problems with a database registry.

i. The International Berne Convention Treaty signed by our government prevents the government from creating a copyright registry database and therefor, private entities would need to provide this role.

ii. The previous legislation did not define how many databases would be created nor how many databases would needed to be searched to be considered a diligent search.

iii. If given the restrictions on the Berne Convention Treaty, the US government would not be creating a single database, how many databases would we have to participate in order to satisfy a diligent search? Who would fund these databases?

iv. If mandatory databases were required in order to protect your copyrighted works from becoming Orphaned, then US law would in fact me requiring copyright holders to publish their works which is not a requirement under current US copyright law. I know of quite a few visual creators who are hesitant to put all of their works online because of copyright theft.

If, I as the copyright holder had to pay to upload my images, would I to pay per image for this? How many databases would I have to subscribe to to make sure that my works do not get orphaned?

Visual Artist copyright holders tend to be individuals creators who do not work for a large company. If we were required to have our work in 3 databases to protect our work, then assuming a nominal fee of \$1.00 per image, that would cost us $\$1 \times 7500 = \$7500 \times 3 = \$22,500$. Would this be a yearly fee? Most commercial artists don't make a lot of money. We would be unable to support family business when you add in this additional expense.

iv. Compliance of registering copyrighted works using mandatory databases could be cost-prohibitive to many creators. We spent the time and money to digitize our archive of cartoons about 10 years ago. It was very time consuming and expensive but we did this digitizing over a period of five years and spread out the costs. I estimate that it cost us more than \$5,000 - \$10,000 to do. Many creators do not have these types of resources.

v. There's also the issue of copyright holders being unaware of the need to complete this because this change to the 1976 copyright act would in effect be retroactive to the existing laws. There could be creators who are retired and no longer actively promoting their work for revenue but could potential lose their rights as a copyright holder.

3. The Digital Millennium Copyright Act (DMCA) of 1998 absolved Internet aggregators and hosting company from copyright infringement claims and in the process made it even easier for current works to become Orphaned.

The onus is on the copyright holder to send the DMCA takedown requests. There is no requirement that these organization have to keep the any metadata provided with the image and nor is there technology that locks in the information. The DMCA act has made it extremely difficult for my family business to control the sharing of our images without our permission. The takedown requests are very time consuming and the aggregators have no legal liability or potential for financial loss and therefor do not provide adequate notification of users that the images use are likely subject to copyright law.

4. Orphan Work Legislation that is defined as too broad would put our family business out-of-business.

i. I have sold the rights to our cartoons for more than 25 years. In the last decade I have seen our work used without permission increasing more. The DMCA Act has made it extremely difficult to prevent misuse of our cartoons. Trying to have the cartoons removed via the DMCA Act is a never-ending job that does not generate any income, only an expense to protect our copyrights. Having an overly broad definition of the types of organizations that could use "Orphaned Works" would make unauthorized use even greater.

ii. We sometimes grant exclusive usage rights to a cartoon. If OW legislation was enacted we could be in breach of our own legal agreements.

iii. With the inability to prevent people from freely using our cartoons (as already demonstrated with the DMCA) and with organizations no longer facing the threat of financial loss due to misuse, people will freely use our cartoons without permission. Why would anyone pay to use the cartoons, when they can just say, well I search for the image but it couldn't be found? Even with the current copyright laws in place, it is cost prohibitive to go after unauthorized use except in the cases of large organizations.

In conclusion, I implore you to consider that copyright holder's rights. Who is really footing the bill to make copyrighted works declared as Orphans? Who will really gain financially if an Orphan Works bill is made law?

Also, how critical is this need? A simple and narrowly defined expansion of fair use would remedy the legitimate usage without unduly burdening the copyright holder.

Detailed on the following pages is an example of one of our cartoons and the details of how it became an Orphaned Work.

How a copyright cartoon image gets orphaned without the copyright holder's permission.

1. Original Post - 2011-12-26

Original

URL:<http://www.gocomics.com/offthemark/2011/12/26#.Uxnyp15CaCg>

Even though the website that posted this image (our cartoon syndicate) allows users to share on FB, Twitter, Pinterest, etc., none of the images below were actually posted with the tools that link back to the website.

Here's a sampling:

<http://forums.wordsfree.org/index.php?topic=1621.175>

<http://www.dumpaday.com/random-pictures/funny-pictures/random-funny-pictures-70-pics/>

<http://picturesmerrychristmas.blogspot.com/>

<http://www.clausnet.com/newsletter/02-2014.html>

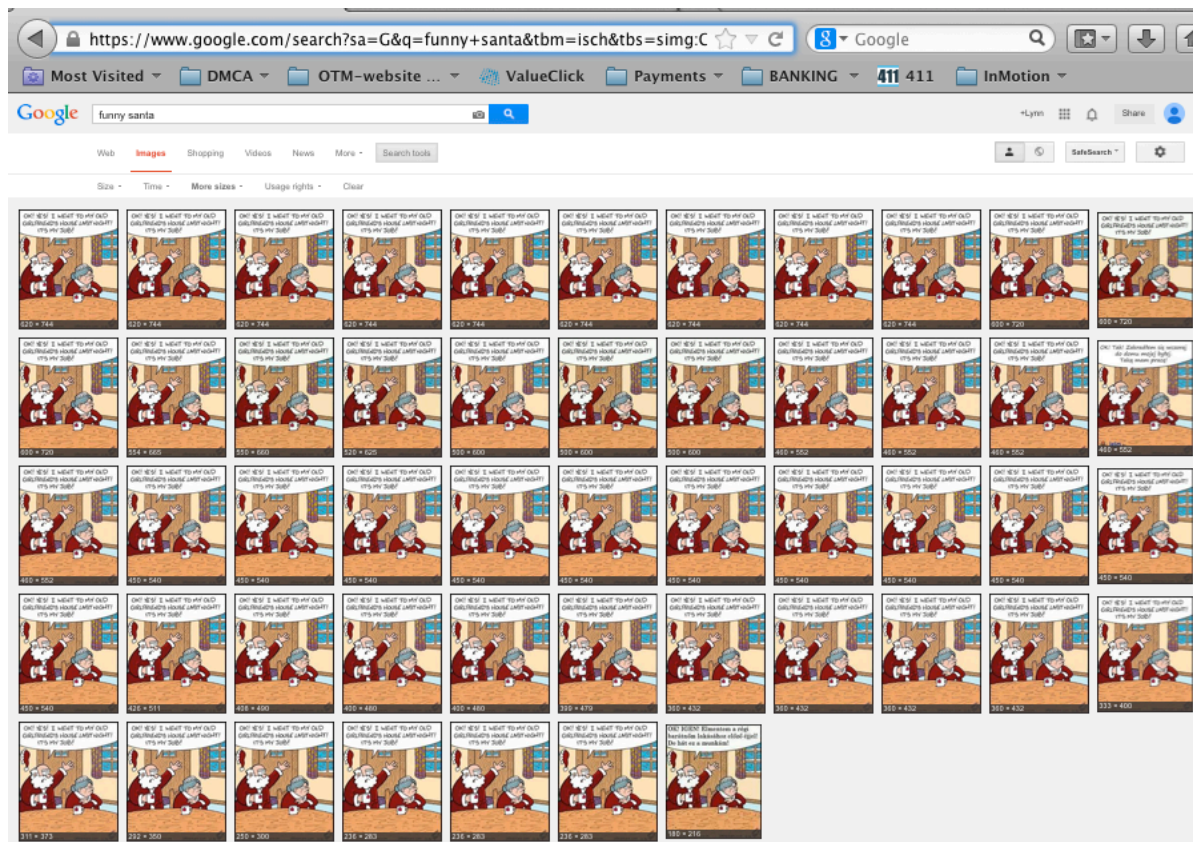
<http://beartales.me/2013/12/13/it-is-christmas/>

And so on:

https://www.google.com/search?sa=G&q=funny+santa&tbm=isch&tbs=simg:CAQSYxphCxCo1NgEGgAMCxCwjKcIGjwK0ggBEhTrAuWC6gLjAuYcKA0FA5ID_1QKAAxogq1pJmqb0I0X392iDs8p6mYXbjrN_1ZPa4x41irn0DWkMCxCOrv4IGgoKCAgBEgRRclbKDA&ei=jLUcU4ivO8bQkQfy24G4Aw&ved=0CCQ2A4oAQ&biw=815&bih=380



This is on the image search. →



2. If you look at google text search, you can find even more!



Many websites such as the one below one just steal the images without permission and then people start sharing them from these sites.

<http://www.bestfunnyjokes4u.com/funny-christmas-pics/>

<http://www.pinterest.com/pin/542261611354863567/>

3. Additionally, there were over 250 references on google to the full color version of the cartoon that were also posted without permission.

4. On many of these websites they offer share usage (again without permission).

5. Then, someone decided to crop out the identifying information:



6. So now when you look at the same cartoon without our copyright information, you find many more posts. Some have even been translated into other languages or have had new captions added without permission:



7. And now there are over 300 additional cartoons with all identifying information stripped out and the cartoon work has now been orphaned.

8. This is just one cartoon that was posted on our cartoon's syndicated website. Any metadata also lost because many website such as Facebook strip out the data.

9. This is an example of how 1 of our cartoons became orphaned. We have over 7,500 cartoons.

