

From: Bryan Wagstaff

Comment:

This message is being sent based on the EFF's call for comments about individuals having problems with orphaned, copyrighted works.

I have done contract and volunteer work for several organizations. That work included assisting in the publication of several books, and the design of web sites.

In most of the projects, the groups have already gathered a set of images and animations they want to use. Most of the images were obtained with permission from the copyright holder, or the copyright holder was the one asking for the help. Occasionally, the groups said they just "found it on the Internet". When I search for these images using my favorite search engine, I can typically find the image used on hundreds or even tens of thousands of web sites. Long ago, I gave up on trying to track down the creator of the work. There was a time when I contacted several people who used the image, but invariably they reported that they also just 'found it on the Internet.'

For images that have been copied many times on the Internet, it is difficult (if not impossible) to track down the original creator of the image. Many images are placed online without concern for copyright issues, or with the intent to be copied freely, or perhaps expressly put into the public domain, but there is no way to track this down.

This situation places me into a difficult position. I inform the group that since they can't show permission to use the image, I won't use it. But I am willing to use a placeholder for that image in my work. I inform them that since so many people use the image, they probably wouldn't get in trouble if they decided to use it after I leave the project, but I don't want to get involved.

The status of these works is unclear. Because they are on the Internet, they must be copied from the server to the web browser in order to be used, so the original copyright holder must consent to some distribution. No matter how hard groups try to prevent the copying of images they place online, even resorting to extensive programatic methods to restric it, there is no way for them to place the content online without implicitly giving permission for unlimited copies to be distributed. The very nature of the Internet allows for caches and proxies to distribute additional copies without the express consent of the copyright holder. Web browsers cache the contents, making additional copies. The copyright holder has clearly released a portion of copyright control by placing them online.

Unfortunately, as the images are copied and inevitably used across the Internet (perhaps with permission, perhaps not), it becomes more difficult to track down the copyright holder. As the image becomes more common place, it is more likely to have the copyrights infringed upon by people who aren't under the jurisdiction of our copyright law, don't know about copyright law, or who disregard it.

These works should fall into the category of "orphaned works", since there is no practical way to discover the copyright holder.

Note that I am not talking about major works. Feature films and major audio recordings can trivially be tracked back to their corporate producers. These works should hold reasonable copyright protections, since the copyright holders can easily be contacted. I have worked with groups and obtained copyright clearance from various corporations when using copyrighted information; that is not difficult.

Congress needs to address this problem in copyright law. At some point, minor works have been distributed widely and must be considered publicly usable. If the work does not expressly enter the public domain at that point, hundreds or thousands of people in the general population will become violators of copyright law, either intentionally or accidentally.

The situation is akin to the trade secret problem. The owner could grant permission to enough people that the work is no longer considered a secret. Or, the first few violators are clearly be in violation of the law, and subsequent violators are not. The tipping point for moving between protected and unprotected is, unfortunately, a subjective problem. I do not envy Congress the task of enumerating that tipping point, but it is absolutely needed.

Minor works constitute the vast majority of all content on the Internet. These works automatically have copyright protection when they are created. Their content is available publicly and globally; the works are duplicated and archived on computers around the world. Once these works are placed online (either with or without permission), they need to enter the public domain after becoming orphaned.