

Using photos from the internet: copyright ownership and 'orphan works'

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A picture is worth 1,000 words is an old adage, but in today's accelerated digital economy, the concept is more relevant than ever. With more and more competition for consumers' attention, many businesses -- from global advertising agencies to mom-and-pop shops -- are turning to the internet to find compelling images that reinforce their message.

Tied to this voracious demand is a seemingly endless supply of images available online, and many businesses are using them liberally in their websites, blogs, brochures and other materials. But where these pictures come from, who the original creators are and who owns the copyright are often unknown. These are important issues, as businesses cannot freely use photos found online. Instead, they need to identify who owns copyright and obtain authorisation through licensing fees or other arrangements.

Businesses face a real challenge when they try their best to identify who owns a copyrighted image but are unable to do so. When it's not possible to identify the owner of a copyrighted work, we refer to it as an "orphan work" -- that is, a work whose author or owner is unknown. Requesting permission to use such works for reproduction or to create a new work can become an insurmountable task, which leaves businesses in a difficult position.

Rights of copyright owners: Copyright owners have exclusive rights over their works including rights of reproduction, adaptation, dissemination and licensing. Any use of a copyright owner's photos without authorisation may result in copyright infringement, which leads to both civil and criminal liabilities.

It may also result in the infringement of rights management information if information that is used on the copyrighted work -- author names, signatures, watermarks -- to identify its owner is deleted or modified. This is a criminal offence.

Copyright works of unidentified owners: Orphan works are indirectly addressed in Sections 20 and 62 of the Thai Copyright Act. Section 20 states works created by a pseudonymous or anonymous author will be protected for 50 years from the date of authorship. If the work is published during this period, the protection will last for 50 years from the date of first publication.

While orphan works are not strictly the same as anonymous or pseudonymous works, copyright law ensures a work is likely to be protected even if the author is unknown. This protection may last beyond death, in which case the work would become a true orphan, as the copyright owner would not be available to assert his or her rights.

Section 62 describes the presumptions of copyright ownership that apply in litigation. It sets out the presumption that ownership of a copyright work that bears no name or claim of ownership will vest in the printer or publisher of the work. This does not, however, address who owns the work if the printer or publisher has subsequently gone out of business.

Under Sections 20 and 62, it is difficult for potential licensors to identify the owners of orphan works. It is a time-consuming process, and using orphan works may give rise to legal actions and/or financial claims to prevent further use by potential licensors.

Searching for a copyright owner: The Intellectual Property Department's Copyright Office provides a service anyone can use to search for the identity of a copyright owner for accreditation and/or licensing. However, this copyright recordation system is voluntary, meaning a limited number of copyrighted works have been recorded with the office. This means a substantial number of copyright works in Thailand have no formal record of their owners.

This challenge exists not only here in Thailand but also globally. Some academic experts contend if a potential user of a given work has performed a diligent search for the owner of the copyright -- often by searching copyright office records and databases -- the user of the work should be entitled to limited liability if the copyright owner later claims infringement. If a business has tried its best to find the owner and failed, this effort should provide some level of defence in future legal proceedings.

In addition, other jurisdictions have discussed a range of creative options including compulsory licence schemes or the involvement of the government in publishing proposals to use orphan works and royalty-fee deposits.

While these solutions sound attractive in theory, none has yet been implemented in Thailand. As a result, businesses face potential legal liability if they use photos that are orphan works.

While this area of the law continues to develop, businesses must be wary about the sources of their photos and other images. It is best to err on the side of caution and, wherever possible, use images only where copyright ownership can be clearly traced.