



Double-Click to Infringe

By: James B. Astrachan

A contributor to an Internet bulletin board who had posted photos of his car was really miffed when he learned that another contributor had down-loaded these photos and had posted them for all the world to see and use. The photographer called the down-loader a thief and his comment sparked a heated debate among some otherwise well-educated folks over whether photographs posted on the Internet become public domain and are free for the taking.

"You should not be surprised at the reaction," said a friend when I explained what happened. "Most people recognize no rights of others in any work posted on the Internet because they feel they can use the work without harming the original in any way." "In other words," the friend said, "taking pictures in no way damages the car, so many people perceive no harm to property."

One on-line participant in the ensuing discussion backed his position that the photos were in the public domain as soon as posted because, "They were easy to download."

Another contributor expressed his belief that anything posted on the Internet was fair game, because the Internet was intended as a medium to exchange information.

"Sad," I thought. "There's not much respect out there for the intellectual property rights of others."

Perhaps a response that explained an author's rights and why they were created would help these misguided souls develop an understanding of why these photos were protected. I started at the beginning, being the United States Constitution which grants to Congress the power

To promote the progress of science and useful arts, by securing for limited time to authors ... the exclusive right to their...writings....

After many reported decisions, it is clear that the primary purpose of the Framers in allowing Congress to create copyright laws was not, as is often misunderstood, to provide financial incentive to authors. Instead, the primary purpose of these laws is to motivate authors to create works that will eventually allow public access after the duration of granted protection expires.

This can be easily tested if it is accepted that public policy forbids the grant of a monopoly unless a corresponding public benefit is derived. Copyright law does grant such a monopoly, and does so in exchange for eventual public access to the works of authors.

If there exists a genuine public benefit to copyright protection, the next step has to analyze whether the photos were protected. Photos are generally considered protectable as original works of authorship under the classification "pictorial, graphic and sculptural works". It is also well established that photos are considered "writings" under the Constitution.

Like all works, to be protectable photos must have at least a modicum of originality. In cases where photos were denied copyright protection, the photo was a shot of another photo, print or painting - in other words, a copy of an original work without the necessary originality.

The Internet photos of the car were original and copyrightable. They are most certainly entitled to protection by their author.

What are the author's rights? The author has the exclusive right to copy his own work, or to license others to make copies. Often the question of whether infringement has occurred requires analysis of how much of the work was copied. De minimis copying generally will not constitute infringement. However, where the entire work has been copied, as in the Internet case, no way will a court apply a de minimis exception to prevent a finding of infringement. So once a copy of a protected work is fixed by any method, including mechanical reproduction or down-loading unto a server, infringement has occurred.

There is simply no way around this proposition, although the unauthorized down-loader thinks the whole situation is silly because as he claims, "The Internet was

specifically designed to share information back and forth; someone else's car is someone else's car." Maybe the Internet was designed to share information back and forth, but so are books, movies and software.

It seems to me that the ease of copying should not dictate whether a license to copy is implied by an author as this infringer appears to state. His grandfather likely made the same argument the day his grandmother first brought home a photocopy machine.