

Response To The Gowers Review of Intellectual Property

Model making is an often forgotten area in terms of IP law. The model making world ranges from British companies like Hornby with a £45M turnover in 2005 through to many small cottage industries and hobbyists operating non-commercially. Unlike many industries there is also no clear separation between "users" and companies supplying products. Model making is at its heart "making", and in doing so helping people preserve and grow practical skills such as carpentry that numerous surveys show are otherwise in terrible decline in the education market. This lack of separation means that IP law affects everyone equally commercial, hobbyist, small and large.

This response started as a draft sent to MRemag, the leading online model railway magazine and then had comments received in public or private from other readers folded in. It cannot be said to represent the "entire community", if such a community exists, but does hopefully highlight problems and possible solutions in the area of model making in general.

1. How IP Is Awarded

The complexity of IP law is a barrier to modellers. It is ill understood and fear of violating the law causes many modellers to avoid legal activities. Copyright is hard to enforce for the many small enterprises that make up much of the model railway industry due to the costs and some of them have seen their work abused by others.

2. How IP is used

Railway modellers deal primarily with copyright law, design rights and trademark law. Copyright law is important to protect manufacturers from piracy of their models, artwork and designs. Trademark law is used by vendors to protect their good name. IP is extremely important as the cost to manufacture a master for a model may exceed £50,000.

Building models involves copyright law, which generally does not cover builds and physical objects themselves (due to Clause 51(1) in the consolidated legislation), design rights, which in places do not, and trademark law - which is used by the railway companies to protect their logo and thus their name and reputation. Some architectural models are also more complex but no contributor reported problems in this area.

3. How IP is licensed and exchanged

Small organisations face particular problems obtaining licenses to use the trademarks and logos of the organisations they model, in model form. Some train operating companies are very helpful, others are not. An additional problem is the complexity of some agreements, such as that

for the London underground logo. One of the results of this is few models of London underground items exist, the barrier is just too high. There is a need to make this process easier without compromising the good name of the trademark owners.

Some organisations have refused to grant modelmakers permission to make models which include tiny reproductions of their logo as per the original, in one case because the right owners themselves could not afford the cost of figuring out the legal requirements. Others have demanded such huge fees that it is as good as impossible to make models of their items even non-commercially for fear of being sued.

4. How IP is challenged and enforced

Regrettably it is almost impossible for a small company or individual to enforce copyright law in the UK, even after the legal reforms. While large scale piracy becomes a criminal matter there is no interest in enforcement in this area given the larger problems in other industries.

Specific Issues

The modelling community would benefit from further or clearer exceptions on fair use. In particular it would benefit from the right to reproduce trademarks and logos on models. Conditions to avoid confusion could easily be applied such as requiring that such fair use applies only "to the use of the trademark logo in the same position on the model as on the real object, where the model is at least ten times smaller than the original object". This area has become problematic in the USA and large unproductive lawsuits between railroad companies and model manufacturers are now ongoing. Trademarks exist to protect the good name of their owners, and their use as a system to extract money from model makers, made possible by the current grey areas in trademark law, are an inappropriate corporate expansion of the intent of IP law and easily corrected.

A second area of confusion is design rights. It is currently not clear that a model such as that of a railway locomotive made for the purpose of railway modelling is clear of design right claims. Copyright law has sought to recognize the difference between a model and the genuine article. Design rights should also be amended to recognize that a model is not an infringing article within the meaning of the law, unless the model is manufactured for the purpose of creating an object which, outside of this exception, would infringe.

Orphan works are not currently a major problem in the railway modelling world, but this is primarily luck and due to the historical sequence of events. With the current short term train leasing and route franchising schemes it is inevitably going to happen that some train operating company logos will remain protected and become owned by a body which has no interest in them, or their licensing. This could create real problems

for modellers in the longer term. The proposed lengthening of copyright terms may also make this problem worse.

Conclusions

In the arena of modelling, in particular railway modelling we believe that IP law is functioning fairly well. The complexity of the law is problematic and the cost of enforcing IP rights is prohibitive for small companies, rendering them at a disadvantage. Clarifying the situation on design rights would not materially harm existing rights holders and would improve the legal situation, as would fair use rules on miniature reproduction of trademarks and logos.

Modelling is very closely tied to copyright law, given that it is fundamentally around both creation and copying. The requirements to tidy up the loose ends causing problems in the modelling world are small and easy to fix and we urge that these problems are resolved now that an opportunity to do so exists.

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