

## **Gowers Review of Intellectual Property**

### **Reply from the Association of Photographers (AOP)**

The Association of Photographers Limited (AOP) is a not for profit professional trade association founded in 1968, our aims are:

To promote and protect the worth, credibility and standing of all photographers and the wider photographic profession.

To enable members to understand and safeguard their rights as authors of creative work.

To encourage the highest standards in creative, technical and commercial practices in the photographic industry at all times.

To defend vigorously and lobby for the best interests of the membership.

To form active links between photographers and those in related creative fields worldwide, and to recognise and respect each other's objectives and needs.

Members of the AOP are professional photographers working in the fields of fashion, advertising, editorial and design. Members have a wide client range including individual clients in the corporate sector, design groups, publishing houses, music publishers and advertising agencies. Their work is published worldwide in magazines, newspapers, books and advertising campaigns and many sell their images as fine art through galleries.

25<sup>th</sup> April 2006

## General Questions

### 1. How IP is awarded

#### **(a) Are there barriers to obtain IP rights due to system complexity? What could be done to improve this situation?**

The work of the members of the AOP is photography and therefore attracts copyright as an IP right. Copyright protection is easily obtained, as there is no requirement for registration. The work itself must qualify as an original work, to attract copyright protection, and the author be a qualifying person. Photographs are listed explicitly as an artistic work, S. 1 (1) (a), S. 4 (1) (a) CDPA, contains a definition of the term photograph. Additionally, UK legislation does not differentiate between simple photographs and photographic works as the EC Duration Directive provides for. Therefore any photograph, which is not a mere copy, is by law considered to be a copyright work.

However, the authorship rule in S. 9 CDPA does not contain a legal definition in respect of the author of a photograph. Although photography is similar to the other listed types of work - creating a photograph usually requires similar work, time and effort as a film where guidance as to authorship is given in the CDPA, S. 9 (2) (ab) - S. 9 CDPA does not contain any guidance in respect of who the author of a photograph is deemed to be. It can, therefore, be unclear as to who actually qualifies as the author of the work. Due to the common law approach in the UK, the Act by itself is not always sufficient to determine the legal position.

#### **(b) How easy is it to find out about obtaining IP rights? What could be done to improve awareness for business and innovators? Is there sufficient awareness of the need to protect IP internationally?**

Following an internal survey conducted by the AOP 75% of the members who took part did not find it problematic to obtain information regarding their IP rights. However, the majority of these members found the legal language in the Act too difficult to comprehend and relied upon advice by the AOP regarding obtaining, maintaining and handling their copyright. This implies that authors who are not part of associations or unions must have difficulty in obtaining information regarding legislation. Without further guidance and education many do not know where to obtain the information necessary to efficiently administer their rights.

In the AOP's experience members of the public do not understand that copyright exists in photographs as it does in music. Currently this situation is being abused by broadcasters and newspapers encouraging amateur photographers to submit images for publication (hardcopy or digital) or

broadcasts. The standard terms and conditions of these companies provide for an assignment of copyright from the amateur photographer, who in general are not aware of their rights. This movement harms the field of professional photography whilst encouraging a lack of respect for photography. The AOP sees it necessary to invest in education of the public as well as the industry in order to raise awareness about copyright.

International treaties especially in the field of copyright (Berne Convention, Universal Copyright Convention, TRIPS, WIPO Copyright Treaty, etc.) provide for the protection of photographs, which should be appropriate to provide for awareness of the need for international protection. In the field of photography, particularly in the digital age, this need is more prominent as photographs are a perfect medium for the Internet and are easily copied and distributed worldwide in digital form. According to the AOP member survey however, more than 75% of the participating members felt that their works were not sufficiently protected on an international level. This gives rise to the assumption that there is an insufficient awareness of the need to protect IP internationally, and a need for further education about international instruments to create trust in the functioning of those instruments.

**(c) Are there barriers to obtaining UK IP rights on grounds of cost? What drives these costs?**

N/a

**(f) Is lack of trust in the system a barrier? To what extent do you rely on other tools to bring innovation to the marketplace, such as being first to market, maintaining trade secrets, or using an open innovation model to generate value through reputation or network effects?**

**(g) Are there specific barriers to obtaining IP rights in your sector?**

**(h) Are there specific barriers to obtaining IP rights for small businesses or individuals ?**

Lack of trust is not a real issue in the field of photography due to the automatic creation of copyright in a work. However 60% of AOP members do think that current copyright legislation in the UK does not protect their business/professional interests sufficiently. We therefore believe that whilst this mistrust does not constitute a barrier in obtaining IP rights in photography it maybe a barrier to promoting creativity and innovation.

## **2. How IP is used**

**(a) What types of IP does your organisation use and why?**

AOP members are mainly photographers and therefore deal with copyright issues.

**(d) How does your company value its IP? Are there problems with raising finance against intangible assets based on IP? What improvements could be made in this area?**

The copyright of the members in their work is their main and sole source of income. The copyright in their works is therefore of essential value to, and the driving force of, their productivity and creativity.

Problems arise with authors' moral rights (intangible assets), which do not have a financial value and can be waived - S. 87 CDPA. It is already standard practice for commissioners to require the author to waive their moral rights via contracts or terms and conditions. This is contrary to the understanding of moral rights as well as to the intentions behind the introductions of these rights in the Berne Convention.

Exceptions to moral rights are drafted very widely. CDPA S. 79 and 81 exclude the application of the attribution and integrity right for a wide range of actions and subject matters. In the field of photography the exclusion for publications in newspapers, magazines, similar periodicals etc. affects the majority of works created by members of the AOP.

For visual artists there are particular problems with the attribution right, S. 77 CDPA and the integrity right, S. 80 CDPA.

**Attribution Right, S. 77 CDPA**

The attribution right, the right to be identified as the author of a work, is of major importance to photographers, in respect of protecting their works against misappropriation; to distribute their works under their name to build up a reputation; to achieve remuneration for re-use of their works; and to determine the duration of copyright. This right of attribution is also of importance in respect of the artists' resale right, implemented into UK law on 14<sup>th</sup> of February 2006, to ensure the visual artist receives the additional remuneration from further sales. The CDPA requires the right of attribution to be asserted (S. 78) in order to be infringed by the actions listed in S. 77. This requirement is contrary to the understanding of moral rights per se as well as opening the gate for abuse, which is likely to deprive the author of the benefit the right is intended to provide. As a moral right, the right of attribution is a personal right that cannot be assigned. To require its assertion by law is therefore

contrary to its nature, it either exists or it does not exist. Authors who are not aware of this right are not in a position to assert it.

If the author is forced to waive this right by contract then the work is in danger of being classed, in the future, as a work of 'unknown authorship', or 'orphan work'.

#### Right of Integrity S. 80

The right of integrity enables the author of a work to object to derogatory treatment. This right is intended to allow the author to object to treatment of their work that may be prejudicial to their honour or reputation and control how their work is perceived. This right is usually required to be waived like the attribution right which deprives the author of the benefits the right is intended to secure. This particular moral right is of great importance to visual artists in the digital age. Images are the perfect medium for the Internet and are widely accessible, they can easily be downloaded, copied, altered and mutilated.

The practice of demanding a waiver of moral rights is not subject to regulations or supervisions of the Unfair Contract Terms Act 1977, where IP is explicitly excluded. In the field of photography, where individuals or micro / small businesses deal with large publishing houses, this creates an imbalance that the majority of AOP members experience as a "sign or don't work" situation.

Improvements to this field could include the abolishing of the CDPA waiver provision; to include IP in Unfair Contract Terms legislation as well as bringing UK copyright law in line with the European author's rights approach, where copyright is seen as an author's right, a personal right, rather than an economic or property right.

#### **(f) How well does the UK IP system promote innovation?**

The AOP believes that copyright in general does promote creativity which in turn leads to economic growth for the benefit of society as a whole. However, abuse of the current system in the UK tends to benefit larger economic entities and places the author/creator under minimum wage thresholds. This can lead to an inability to pursue a professional career and discourage creators from entering the market. In a European context this is alien to author's rights legislation, putting the UK creative sector at a disadvantage and discouraging cross border trading.

### **3. How is IP licensed and exchanged**

**(a) How easy is it to negotiate licences to use others' IP for commercial or non-profit purposes?**

As an association of right owners, the members of the AOP do not generally need to negotiate licences of other peoples' IP rights.

AOP members licence their own rights in a number of ways. When they are commissioned to produce images for their clients, licences are negotiated depending on the clients needs. The licence will be exclusive to the client and allow them use of the work in specific territories, media and time periods to accommodate their requirements. Guidance on licensing for photographers and clients is given in our publication Beyond the Lens [www.beyond-the-lens.com](http://www.beyond-the-lens.com) , on our website [www.the-aop.org](http://www.the-aop.org) and [www.copyright4clients.com](http://www.copyright4clients.com)

Images already in existence will either be licensed through a stock photo library, such as Getty, or by the photographer themselves. Many of these licences are non-exclusive but, as with commissioned work, are negotiated to accommodate the areas needed by the client.

Areas where the use of images is impossible to track by the author, eg photocopying, cable re-transmission, educational resources, are licensed collectively by the Design and Artists Copyright Society and the funds distributed to visual artists.

**(f) Are there specific barriers to licensing IP in your sector?**

The most significant barrier to licensing copyright for visual artists is due to market dominance – as alluded to in previous answers a large amount of the commissioning market, in particular the publishing field, demand copyright assignments and moral right waivers. These onerous contracts are presented as a “sign or don't work” option and severely limit the market place for visual artists to work in. The terms and conditions in these contracts also include other restrictive terms, are often non-negotiable and do not offer equitable remuneration. This results in an imbalance between creators and users of works – individual creators feel oppressed and unable to compete fairly.

**(h) Are there specific barriers to licensing IP rights for small businesses or individuals – for example barriers to enter patent pools?**

See above.

**(i) Are there barriers to trade and exchange of IP internationally?**

Copyright is widely protected by international treaties such as Berne Convention, WIPO Copyright Treaty and the Universal Copyright Convention, etc. However provisions in CDPA such as S. 6 bis (3), which provides for the governing of Convention rights being governed by national legislation, can leave too much space for interpretation.

Regional regulations by the EU try to harmonise the trade in IP rights by Directives. However, barriers may arise in interstate trade of copyright by non-harmonised regulations eg unfair contract regulations.

According to the results of the AOP's internal survey, the majority of the participating members do not feel that their works are sufficiently protected on an international level. This would appear to be due to a lack of accessible and understandable information rather than a lack of actual treaties and legislation.

A greater investment is needed to provide information and education.

**(k) What could be done to improve 'licence of right' provisions and business awareness of them?**

The right to assign copyright in equity weakens our position with respect to other countries such as Germany. Unfair Contract terms legislation in the UK does not apply to contracts concerning the creation or transfer of intellectual property rights, we believe that the grant of an exclusive licence or the wholesale transfer of copyright ownership should be balanced by the applicability of Unfair Contract Terms Act 1977 to IP contracts and by a statutory recognition that compensation should be equitable.

Secondly there should be a greater investment in education of IP rights. Education should encompass all sectors from students, creators and users to the general public. It is striking that even in creative specific education, students are not fully aware of their rights and how to deal with them in business. Many students in media courses at colleges and universities leave with no copyright education. Through lack of knowledge, this future generation are easily abused by unscrupulous commissioners and can undermine all visual creators by accepting low fees and assigning copyright. Effective tutoring to cover aspects of the law that affect them should be made compulsory not only in image making courses but also in design courses as many will become future commissioners. Our publication Beyond the Lens [www.beyond-the-lens.com](http://www.beyond-the-lens.com) is aimed at students and whilst colleges who are affiliated to us have to use this publication in their course material, we are unable to ensure students in other establishments are made aware of their rights, the book and the website.

The AOP is aware that the requirement of a copyright assignment by a client often stems from a lack of knowledge of the subject matter and that a timely limited license will most of the time suffice to fulfil the envisaged purpose. Instead the requirement of a complete transfer of the copyright is often seen as the only way to secure the work. This opinion is supported by the AOP's internal survey, where members see a great need in educating clients about the sufficiency of licensing in order to retain their copyright. We have gone some way in addressing this by our website [www.copyright4clients.com](http://www.copyright4clients.com) but would welcome a wider initiative.

As addressed in the answer to question 1b, the general public are aware of copyright in music and books but generally ignorant of the artistic sectors rights. "Citizen journalism" is becoming the norm for broadcasters, the amateurs who provide images for broadcast need to be aware of copyright in images and business practice 'rights and wrongs'.

#### **4. How IP is challenged and enforced**

##### **(a) Are there specific problems with enforcing the main different forms of IP: patent, copyright, trademark and design?**

For photography, especially in the digital age, where it is easy to duplicate works, a quick response (enforcement) is essential, as there is a risk that the work becomes widely spread throughout the world (by means of the Internet), meaning an action against the primary infringer is no longer sufficient.

The CDPA does not provide for punitive damages that can be awarded to make it worth challenging an infringement of rights. Photographers are only awarded the amount they could have achieved had their work been licensed. The value of the work is usually more transient than in the other areas of copyright work and licences not usually expensive. This licence fee is completely disproportionate to the costs of a legal challenge of infringements. The costs resulting from litigation should be proportionate to the damages. This could either be achieved by a reduction of the costs that mirror the amount of damages or by awarding additional damages, which would have the side-effect of constituting a greater deterrent to discourage others from infringing copyright.

We also believe that, in the case of commissioned works, the statutes should clearly state that copyright ownership rests with the author of the work and that courts should not imply licences or assignments in consideration of the nature of the contract between commissioner and creator. Copyright ownership in commissioned works should be subject to the provisions in Chapter V CDPA and in particular S. 90, i.e. the transfer of ownership should not be effective unless in writing and signed by the rights holder or other person acting on his/her behalf. We believe that

judicial interference with the rules for copyright ownership, as laid down in the CDPA 1988, is damaging, especially in relation to contracts entered into by street-wise commissioners and often copyright-illiterate creators with little bargaining power. The Griggs v Evans (2003) case is often cited.

**(b) Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drives these costs?**

The AOP's internal survey showed that many members do not even try to enforce their rights legally. Costs were the main obstacle, establishing a barrier for challenging infringements and enforcing copyright. It is clear that there is an unequal balance between the small business and the companies who infringe:

" When you start legal proceedings you may as well dig a hole and throw money in it. A company/design group/library has legal and financial resources that make legal proceedings impossible for the single trader"

County courts, where copyright infringements can be challenged, are usually not familiar with copyright or business practice in the visual arts field, which often results in unfair judgements. The Patent Court is now hearing copyright cases, the knowledge of this court should be extended to other County Courts.

**(c) To what extent does your organisation make use of other methods than litigation to resolve IP infringement cases, for example the Patent Office opinion service, mediation services, Alternative Dispute Resolution or the Copyright Tribunal?**

These alternative methods are usually not attractive for photographers, as they also involve disproportionate costs and, in the ADR system, a perceived lack of knowledge of the visual arts. The new Patent Office Mediation Service has not yet been tried but we welcome this as an alternative.

**(d) To what extent do you use IP litigation insurance? How effective is it?**

IP Litigation insurance is rarely used by photographers, as freelance SME's the premiums are too expensive and the legal services the policies are tied to are generally not media specialists.

**(e) Are there barriers to using such methods to settle IP disputes without recourse to litigation? How might they be removed?**

The cost and time of taking cases to the Copyright Tribunal should be reduced and procedures simplified. Improve the expertise and balance of interests in all the alternative methods stated to encompass SME's and trade associations.

**(f) Are there specific barriers to challenging and enforcing of IP rights for small businesses or individuals?**

Yes, see (b).

**(h) What are the principal barriers to efficient and successful challenge and enforcement internationally?**

The barriers we have outlined for challenge within the UK are the same internationally, but more daunting due to different legislative procedures; language barriers; time and effort; and extreme costs even more disproportionate to UK enforcement.

**Specific Issues**

- **Copyright exceptions – fair use/fair dealing**

**(a) What are your views on the current exceptions in copyright law?**

Fair dealing of a photograph for educational purposes is not allowed if the copy is made by a reprographic process, which eliminates photographs. These educational establishments are licensed through the Educational Recording Agency [www.era.org.uk](http://www.era.org.uk) and the Copyright Licensing Agency [www.cla.co.uk](http://www.cla.co.uk) to allow this use to be made legally and the monies are distributed to visual artists by DACS [www.dacs.org.uk](http://www.dacs.org.uk) . In addition DACS runs a licensing scheme for slide collections in educational establishments.

**(b) Could more be done to clarify the various exceptions?**

We do not believe that further legislation is needed or would be helpful.

**(c) Are there other areas where copyright exceptions should apply?**

We do not consider further exceptions necessary for the field of photography.

**(d) Are the current exceptions adequate or in need of updating to reflect technological change?**

Exceptions relating to private copying in the UK are for non-commercial research, private study and time-shifting activities. We would be wary of any change or widening of these exceptions. Photographers working in the social sectors, eg wedding and portrait already lose income from the public reproducing their images illegally now that computers, scanners and printers are so widely accessible.

**(e) How would you see content owners being compensated for such use?**

Should an exception for private copying be adopted into UK legislation then it is essential that some workable form of compensation be introduced. A blank levy for private and domestic use or a licensing system for private copying between the industry and manufacturers are two ways we believe are worth investigating.

**(f) To what extent has technological change presented difficulties in use of copyright material in the field of education?**

We do not believe the technological changes have presented any difficulties in the field of education, on the contrary, the number of images available on the Internet has enabled a wider use of copyright material. Unfortunately much of this use is not legitimate, and students are not taught to respect others' work. The advent of royalty free images has sent out the wrong message to users of images on the internet, both students and commercial users, undermining the worth of artistic works and giving the assumption that all images are free to use.

**(g) Are there issues concerning the archiving of material covered by copyright?**

Solutions need to be found to enable copyright protected works to be included – collective rights management organisations, such as DACS should be used to ensure that secondary rights are licensed and the fees distributed fairly to visual artists.

- **Copyright – digital rights management**

**(a) Do you have a view on how the use of digital rights management technologies should be regulated?**

We would refer you the British Copyright Committee's (of which we are members) submission to the All Party Parliamentary Internet Group and the key points made by them (and highlighted in the submission to yourselves) to which we are in agreement.

The Visual Creators Index [www.vci-uk.com](http://www.vci-uk.com) was established by ourselves and other associations and unions in the UK visual arts field to establish a not for profit register of visual artists. The register enables users to track creators via a unique individual code imbedded in their images, and request licences to use the work.

- **Copyright – Orphan works**

**(a) Have you experienced any difficulties in identifying the owners of copyright content when seeking permission to use that content?**

**(b) Do you have any suggestions on how this problem could be overcome?**

Photographers are increasingly concerned by intended change in legislation presently being discussed in the USA regarding orphan works legislation. With particular regard to the lack of damages and limited licence fees being proposed should the copyright owner discover the use and assert their right at a later date.

The majority of UK artistic works published editorially are in danger of being classed as an orphan work, or work of unknown authorship. This fear is due, in the main, to the UK moral rights exemption of the attribution right for photographs which are produced for the purpose of reporting current events, for publication in newspapers, magazines or similar periodicals and made by employees in the course of their employment. Photographers who do not work in the editorial field, but whose commissioned work is published widely are generally asked to waive their moral rights by contract. Their work is also in danger of being classed as “orphan”.

A complete overhaul is needed of UK moral rights, removing the exceptions for artistic works; the need for an assertion of the attribution right; and a change in UK Unfair Contract Terms legislation to include IP contracts and prevent unfair waivers of moral rights by contract.

Photographers are encouraged to implement digital data into their images to enable authorship to be easily established, however this information is often removed by users and the link back to the author broken.

A not for profit international archive where artists can submit or register their work in digital form, at no or reasonable cost, is needed, this could be similar to the VCI as mentioned above, to give an easy route for potential users to contact copyright owners.

- **Legal sanctions on IP infringement**

**(a) Are you aware of any inconsistencies or inadequacies in the way the law applies legal sanctions to infringement of different forms of IP or to different circumstances?**

Photographers have only had copyright in their commissioned work since the CDPA 1988 came into force. Previous legislation generally awarded copyright in commissioned work to the commissioner. The worth of copyright in images therefore, is not clearly understood by many and is not an area that attracts strong enforcement by, for example, trading standards officers.

**(b) For example, should criminal sanctions on online infringement be the same as those relating to physical infringement?**

We believe that commercial infringements, be they physical or online, should be treated in the same way. Photographs are a perfect medium for the internet and policing infringements difficult enough without there being a lesser deterrent.

- **Coherence between competition policy and IP policy**

**(a) Has your organisation experienced any activity linked to IP rights that you regarded as unfair competition?**

When big market players abuse their dominant position and force photographers into contracts by demanding they assign their copyright or license it in perpetuity in order to get work.

**(b) How did you deal with this problem?**

We try to negotiate with commissioners, on behalf of our members, and help them re-write their contracts if they are willing to listen. Unfortunately a lack of understanding as to the worth of professional photography; the worth of copyright to the author; and the expertise necessary to produce the images, particularly as digital cameras are available to all, this is not always successful.

Our website [www.copyright4clients.com](http://www.copyright4clients.com) is aimed at empowering photographers to educate their clients and our publication Beyond the Lens [www.beyond-the-lens.com](http://www.beyond-the-lens.com) is aimed at educating commissioners, photographers and students.

Negotiations with advertising agencies has, on the whole, been successful and guidelines on licensing together with calculating re-usage of images can be found on the front page of our website [www.the-aop.org](http://www.the-aop.org)

**(c) Was competition law effective at controlling this behaviour?**

No, because whilst the major publishing houses are large they do not have enough of the market for their practices to be deemed as dominant.