

Mr A Gowers
 Room 4/E1, HM Treasury
 1 Horse Guards Road
 SW1A 2HQ

19th April 2006

Gowers Review on Intellectual Property Submission of Evidence : Photographic Copyright & Trade Marks

Dear Mr Gowers

I welcome the opportunity to place before you facts about the *real* world of photographers in the UK and about the fears many of us share for our livelihood and futures with respect to the erosion of the Intellectual Property rights in our artistic works. Photography has changed out of all recognition in the last decade and with it has come the need to address problems which are happening NOW in our industry.

I have five areas of principal concern to place before you for your consideration but first I must give a brief history of our company as a background to those concerns.

1.0 *Skyscan Aerial Photography & Photolibrary*

- 1.1 Skyscan is a husband and wife partnership offering aerial photographic services since the early 1980's.
- 1.2 One of those services is an aerial photographic library representing the work of 40+ aerial and aviation photographers in addition to ourselves.
- 1.3 Our own Skyscan™ photographs are captured from a remotely controlled camera platform suspended beneath a tethered barrage balloon. We developed this system to capture an unusual birds-eye viewpoint which is higher than mast borne cameras and much lower than aircraft are usually permitted to operate.
- 1.4 'Skyscan' has been registered as a Trade Mark since 1982 to protect this unique photographic system and the results it achieves.

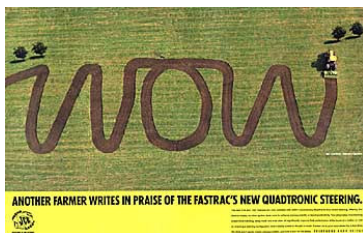


2.0 *Concerns : Orphan Works*

- 2.1 In common with most other UK photographers, we are monitoring with growing alarm, the passage of the US 'Orphan Works' Bill which will affect not only US based photographers and photo-users, but all such interested parties all over the World. The world is now a global Internet village and it is no longer possible to restrict legislated use to the borders of individual countries when the internet gives instant access to the intellectual content and property of those inhabiting that particular country.....to anyone else in the World.

2.2

- 2.3 Therefore, those involved in making legislation about IP matters MUST be aware that the consequences will also affect those outside their borders who may be unable to appeal or influence their decision. This realisation does not appear to have been appreciated in the US.



- 2.4 The movement of digital images around the world and the ease of manipulation of the images make it extremely easy to lose track of the identity of the original creator; and therefore lose the route to the proper payment of reproduction fees and copyright credit to the artist. I have had a Skyscan image used in an amusing advertising campaign

where the final image was sent to me twelve months later by a Canadian friend. He in turn had received it through a chain of international friends and at no stage was there mention of the original image creators nor even of the product it advertised.

- 2.5 There are large internet image specific search engines such as Google Images which garner images from all over the internet world and which facilitate the loss of accreditation of IP. Often the image is innocently 'stolen' by those naïve in the ways of commercial photographic copyright and who do not appreciate the effect on the photographer's livelihood. In my experience, those in the academic world are particularly prone to this failing... and are often those most likely to search for and use a copyright protected image.
- 2.6 I have personal experience of claiming in the UK court for recompense for deliberate damage to a unique original film transparency, (it was cut to shape with scissors!). The county court judge failed to understand the fact that a photograph has far more worth than a pound or two for the photographic material alone ie it has Intellectual Property value. Secondly, he reduced the compensation claimed since the image had previously been licensed for use and had earned a reproduction fee; without understanding that an image having sold one or more times is more likely to prove popular and sell again and again, therefore has arguably *more* value not less. A demonstrable lack of understanding within the UK judiciary about IP worth such as this case requires stronger safety measures enshrined within the UK Law for the protection of the IP owner.

3.0 *Suggested Actions : Orphan Works*

- 3.1 There should be global harmonisation on copyright laws including consideration for the interests of those IP holders outside the national borders. There should be discussions with legislators in other countries at early stages in reviews of laws (such as at this current stage, in your own Review?) to assess the impact on IP providers in other countries.
- 3.2 Urgent discussions at Governmental level are needed NOW with the US authorities to express the concerns of those like myself who will be injured by the passing of the proposed US Orphan Works Bill.
- 3.3 Research studies (and finance) should be provided into digital watermarking technologies such as those of Digimarc and HighWater Signum to produce an internationally accepted watermarking standard so that digital information containing the name of the creator can be embedded into a piece of copyright work or digital file, similar to an artist signing a painted canvas. This can then stay within the file and provide easy identification of the IP owner. Such systems exist but many users are unaware of them.
- 3.4 The creation of an international register of copyright owners where such identification marks can be lodged by the copyright owner and which can be queried by those picture users seeking to locate an artist for permission to reproduce his image. A similar system exists with internet domain names and should not be difficult to instigate. The US has a copyright system requiring every image to be lodged with the Department; this is so cumbersome that inevitably many photographers and many images fail to be registered.
- 3.5 Similarly, the UK legal system should support the right of the Artist to set a value on his work and receive what he decides is proper reward for his own creativity, with appropriate penalty where such breaches of his copyright are found. This conflicts with the current US bill which (as I understand it) allows the *user* to decide what he considers a reasonable fee and also to decide what *he* thinks constitutes "reasonable effort" to make to find the Artist. This goes against all natural justice and undermines the value of IP.

4.0 *Concerns : Copyright of the environment*

- 4.1 Whilst all creators are concerned about protecting their creations, it can be taken to silly extremes by recent attempts to trademark buildings, natural features and even areas of countryside. There are now places dotted all over the world which fall into a gray area for photographers such as :- the Chrysler Building, NY, the Guggenheim Museum Bilbao, DisneyWorld, Uluru / Ayers Rock, the Eiffel Tower. Some countries have upheld legal attempts by their owners or designers to trade mark these structures and restrict the use of images of them whilst other countries have no such regulations in place.
- 4.2 My own concern was raised by Peter Mandelson's intention (when in office) to trademark the City of London's skyline. As an aerial photographer, we naturally encompass a large area in most of our photographs and this would have rendered 90% of our photographs of London as unsaleable at a stroke. Do we now have to withdraw all our aerial views of New York from sale because the Chrysler building appears as a small part of an aerial overview of New York? Where do we draw the line, if at all, since US trademark restrictions do not currently affect UK businesses?
- 4.3 There also exists the anomalous situation where photographs of these places can be sold in some countries but not others. What then happens when the photographs are sold legally from one country but for distribution (ie

publishing rights) to cover the World including the countries where their use is forbidden? Can photographs captured legally prior to the introduction of these new restrictions be sold whereas those images captured after should be prohibited? The legal issues have not yet been properly tested in court and most photographers and photolibraries are either withdrawing all such images, scared of litigation costs, or crossing their fingers when sales are made. A ridiculous situation.

- 4.4 A fellow photographer stated recently that she was confronted by the artist of some street graffiti when a photograph of hers, of a street scene incorporating the 'Work', was published. He demanded a percentage of her fee in view of his copyright of the 'Work'. In this case she paid over half the fee and immediately withdrew the image, unwilling to be placed again in such a position with an aggressive and confrontational person; but what is the law in such cases?



- 4.5 In this example, she had worked from a public place, the street. In air to ground photography there are no areas of civil trespass and all our photographs - in theory - can be published. However, I have aerial photographs of an area of Manchester including a large, commissioned wall mural. If I sold any of these images to illustrate a general scene of urban regeneration have I 'stolen' the copyright of the wall artist? As it was a commissioned piece, is the copyright of the mural that of the commissioning agent? Or, as I was not on private land when capturing the image, is there any copyright theft at all?

5.0 *Suggestions : Copyright of buildings etc*

- 5.1 There needs to be clear guidelines for demarcation on intellectual property of buildings and places in 'the public domain' ie not on private land.
- 5.2 There needs to be clarification as to whether natural features such as Uluru in Australia or London's skyline can be copyright protected or trade marked or not.
- 5.3 Ideally, this needs to be done on a global basis since the publication of the image and its distribution whether by internet or purchase of the printed publication will be worldwide.
- 5.4 Personally I think it impossible to police and that any building, structure or natural feature in the public domain should not be subject to copyright restrictions especially when captured from a public place. The laws of trespass should govern other situations.

6.0 *Concerns : Trade Mark registration*

- 6.1 As mentioned previously, 'Skyscan' has been a UK registered Trade Mark since 1982 in the class covering 'printed matter, stationery and photographs'. Imagine my surprise therefore, when I discovered a few weeks ago that the name 'Skyscan' has been registered as a EU Community Trade Mark a) since 2000 b) to another UK based company c) covering the same class of 'printed paper etc' and d) **without telling me as an existing owner of the same name.**
- 6.2 I have been in extensive talks with the Patent Office who advise that there is no obligation on them to advise me, which leads by implication to the fact that I should have checked the Patent Office's new applications every day for the last 20+ years just to ensure no-one made an application such as the one now in place. A clearly ridiculous situation. By taking out an EU trade mark, this company now has the right to use the name Skyscan throughout the United Kingdom, as well as the EU, in addition to ourselves.
- 6.3 **This is a ludicrous situation.** I had the forethought and paid to have our name protected by the UK Government's Trade Marks laws since 1982 and have been let down by the same system which sought to administer it. Where is the justice in that? I now have to pay large legal fees to register a complaint in Alicante and try to have this other company's application annulled - six years after they legitimately took it out.

7.0 *Suggestions : Trade Marks*

- 7.1 I understand there are five proposals currently under review to alleviate the anomalies in the UK / EU trade mark registration legislation. My principal concern is that whatever proposal is decided upon, there should ALWAYS be transparency. By that I mean that existing owners of patents or trade marks should ALWAYS be notified, in writing, of any possible areas of conflict and given the chance to object. If there is doubt then always err on the side of notification, I am sure there is an adjudication panel to decide the justice of any objections.
- 7.2 In cases of applications governing several countries then ALL existing owners of similar names should be notified in EACH country concerned.

- 7.3 Existing owners of names should be notified even if the classes applied for are not duplicated by their existing mark for that name. There may now be processes, media and publishing methods which have not previously been in existence at the time of earlier applications (such as the internet and CD media in my case) and which might cause concerns for existing Trade Mark owners.
- 7.4 Anomalies already exist, as in my case. There should be a UK based panel to whom grievances can be taken for a hearing. I should not need to defend my rights in Alicante so long after the second application. I am of the opinion that the UK Government has been negligent in my own case and have not given me the duty of care due to me; I wish to take this up with the UK agency not Alicante.

8.0 Concerns : Crown Copyright

- 8.1 I have learned from the introductory letter to this review that Crown Copyright has been dealt with elsewhere. This is a shame since I and many others of a similar mind have found an important area for concern and complaint in the administration of Ordnance Survey's copyright protected aerial imagery.
- 8.2 In brief, the concerns lie in the outright refusal of OS to release details of aerial surveys captured by them since May 2001 and the refusal to supply prints from these surveys to the public and businesses who request them. I should point out that prints from all surveys captured *prior* to this date are still available through nominated distributors and there are no plans to stop this.
- 8.3 One service Skyscan offers is to locate and supply historic aerial photographs of the UK to clients seeking evidence of the landscape for legal and boundary disputes, for historical research and site investigations on environmental and building projects. Often multimillion pound projects are involved. These clients are being denied access to a valuable IP resource and one which has been captured by a Government Agency with a duty of care to the nation.
- 8.4 The situation is compounded each day and, despite many complaints to the highest level in OS, this short sighted practise has now continued for five years and will become more important, and the images more historic, as time progresses

9.0 Suggestions : Crown Copyright

- 9.1 I would welcome details of any body to whom we can address our concerns and ask that these be supplied. A legal case for disclosure under the Freedom of Information Act is currently being considered.

10.0 Concerns : Length of Copyright

10.1 My husband and I have a family and would wish to leave an inheritance to them of the rewards from the artistic work which we have created over the years. That being the case, we feel the minimum term for copyright should be "life of the artist plus 50 years". If a person's talent can create an artistic collection of value then it is only proper that their heirs should benefit from that legacy and this allows a just and sufficient time for that to occur. The photographers we represent and many other artists feel the same.

Summary

I represent over 40 aerial and aviation photographers all of whom are greatly concerned by any erosion of their IP rights as creators of artistic works which ultimately must provide them with a livelihood.

I earnestly ask you to consider ways in which the intellectual property rights in our photographs can be protected and valued so that the creators themselves have the legal authority to set the value, compensation and penalties which should be applied where those rights have been flouted whether innocently or by design.

It is difficult and daunting for individuals such as myself to make an impression on legislators by submissions like this but I know from discussions on several professional email forum how great is the concern throughout our industry that events such as the ill informed proposed US Orphan Works Bill could further destroy the livelihoods of photographers and erode IP values.

I therefore ask that any reviewers of legislation have representatives from our trade associations* on their review panel. The associations are actively concerned in the day to day fears and concerns of their members and, more than most, they can give well considered opinions as to what would be good legislation for the protection of IP in the photographic industry.

- *Trade organisations : British Association of Picture Libraries & Agencies; Association of Photographers: National Association for Aerial Photographers & Libraries; Pro-Imaging.org; National Union of Journalists.*

I would be happy to provide further details or clarification on any of the above points if required

Yours sincerely

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