

REDEYE, THE PHOTOGRAPHY NETWORK
SUBMISSION TO THE GOWERS REVIEW OF INTELLECTUAL PROPERTY
Including new survey results

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1 INTRODUCTION TO REDEYE

Redeye, the Photography Network, is based in Manchester, UK, and has over 3,000 subscribers and over 15,000 regular users of its services across the North of England and beyond. It aims to form a clear picture of the ways photographers and photographic artists are working now, and thus give them access to events, opportunities, advice and information that are relevant to their work and difficult to find elsewhere. We believe Redeye is now the fastest-growing and most successful organisation of its kind in the UK.

Redeye's rise mirrors the growth of photography as a creative medium. At the time of writing roughly a third of the exhibitions on at UK galleries contain photography. Photography is also a vital component in organisations' IP armoury; good photography is one of the quickest and most straightforward ways for an organisation to add value to its products and services.

2 REDEYE'S 2006 SURVEY AND OTHER INFORMATION SOURCES

In February to March 2006 Redeye conducted its fourth survey of photographers on various issues, this time including their experiences of copyright and licensing, and recent changes in this area of work. We received 491 responses, of whom just under half were full- or part-time working photographers, the vast majority freelance. Their work is evenly spread across editorial, commercial, social (wedding/portrait) and fine art practice. For the findings presented below we have referred only to survey responses of full- or part-time photographers.

In addition we receive frequent communications from photographers, and conduct regular interviews with them on these issues. Such is the significance of this issue to photographers that in early 2006 we established a copyright working group to co-ordinate this information and our activities in this area.

3 KEY FINDINGS

3.1 Required assignment of copyright

There is a practice among some photographers' clients (i.e. companies and organisations who commission or buy photography) of requiring the full assignment of copyright as a condition of giving out commissioned work. This practice, also known as copyright buyout or copyright grab, is growing. 31% of photographers are regularly asked to assign copyright with commissions. 34% report that this practice has increased in the past 3 to 5 years. There is significant anecdotal evidence that some clients are offering only a token payment, or no payment at all, in return for copyright assignment; figures of £1 and £5 are commonly cited. Many photographers report that they are simply told they will not get the work if copyright is not assigned, with no mention of financial compensation.

- *50% of photographers surveyed say that they would usually or always turn work down if required to assign copyright.*

3.2 Reasons that photographers prefer to retain copyright

It should not be forgotten in this complex subject that copyright originally emerged to protect the individual author and creator. Freelance photographers have a particular interest in retaining copyright, and in using a licensing model instead.

Redeye notes the following on the question of enforced assignment of copyright:

- The future earning potential of creators from their own material is negated, so upfront charges will need to increase significantly. The client can re-sell or give away work to the photographers' own clients, thus denying them a future income stream.
- Long-term, creators who assign copyright, who do not increase up-front charges, and who subsequently find themselves unable to work, will have a greatly reduced earning potential. Photography is an expensive, capital-intensive pursuit for the individual; upfront commission fees, particularly in areas such as publishing, often do not cover the full costs of photography. Photographers therefore depend on retaining copyright and licensing the re-use of their work to sustain their businesses. Creators in general tend not to have good pension provision. It is likely that many more will be impoverished in old age.
- Assignment of copyright discourages creators from giving the client any more than the bare minimum required.
- Almost all of the top photographers in this country refuse to assign copyright.
- It is highly likely for these last two reasons that clients who demand copyright are therefore getting second-rate work.
- It is possible for creators to use a licence similar to that recommended by Creative Commons, which allows certain types of free public use of material while copyright is retained by the creator. However some creators are reluctant to do this while the policing of unauthorised use is so lax.

3.3 Licensing – attitudes among photographers

In common with all photographers' trade associations, Redeye encourages photographers to use licensing routinely. However our survey indicates that 41% of photographers say they don't use licensing and a further 13% don't know whether they do or not. Since there is an implied or de jure licence agreement with all non-assigned commissions, it might be inferred that these figures are not strictly accurate; some photographers who say they do not use licensing are in fact using it without being aware of it.

Redeye's studies at FE Colleges, and particularly universities, indicate that copyright and licensing is poorly taught and understood. Emerging photographers are unlikely to happen upon an explanation of copyright and licensing except through their trade association; however fewer than a quarter of those responding to our survey are members of trade associations.

In general the use of licensing, while vital to any solution to these issues, could be better understood by many photographers.

3.4 Licensing – attitudes among clients

While the requirement for full assignment of copyright with a commission can appear to be set in stone, in fact there is often room for negotiation. Just 15% of the photographers we surveyed who are ever asked to assign copyright would do so without attempting negotiation. 51% would suggest a licensing deal and 34% would ask for extra payment.

Certain clients however are much less flexible in their demands. Particular offenders include government departments and large media organisations. This is not always to their advantage. A typical example brought to Redeye's attention was that of a well-known music magazine. They decided overnight to demand copyright from photographers; and, as a direct response to that, all their main contributing photographers stopped working for them. The results benefited no-one. The quality of the magazine declined; the photographers lost work; new and less experienced photographers were commissioned with full copyright assignment.

- *It is certainly the case that much potentially great creative work is never commissioned because of disputes over intellectual property.*

Redeye is particularly dismayed, although this subject is possibly outside the scope of this review, that the government sets such a bad example on this. Almost all government departments now demand copyright. The guidance issued by the OPSI on copyright in works commissioned by the crown is worded so as to encourage departments to seek assignment, with no note of the disadvantages of so doing (as listed in 3.2). (see <http://www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/copyright-in-works-commissioned-by-the-crown.htm>)

The tacit implication of this and similar guidance is that organisations are always better off seeking full assignment of copyright; whereas Redeye asserts (see 3.2 and 3.9) that the opposite is usually the case, i.e. that organisations are better off using a licensing model.

Many photographers report that there is an often-repeated pattern of response from new clients; firstly that they have never heard of licensing; secondly that all their other creative suppliers are happy to hand over copyright. Photographers are repeatedly forced into explaining their position to every client and are often involved in lengthy negotiations over licensing. The repeated assertion from photographers is that these are in fact deliberate tactics by organisations to acquire copyright wherever possible.

3.5 Labelling and identification of digital images and digital rights management

Traditionally photographic prints or slides were circulated with a stamp or sticker on and it was very easy to tell who the creator was.

Regarding protecting images in the form of digital files, there are essentially five methods of marking an image with some information about its creator and/or caption.

- The file name. This very short text area is often limited to 32 or even 8 characters. It is very easy to read and change.
- Metadata. This is text, typically caption and creator details, saved in a special area of every digital image. It is fairly easy to read using certain software, and some details can be changed or stripped out. It is a universal standard.
- Visible text in the image (bitmap information). Typically this will be a strip of information at the bottom or side of the image, or a short piece of text with a copyright symbol visibly superimposed on the image.
- Invisible watermarking. Information embedded in the image that is hard or impossible to move, and usually requires proprietary software to apply or read. There is no universal standard and the software concerned usually has a financial cost.
- Attached files. Separate files containing information are included on an email or a CD-R.

In the absence of a universal watermarking standard, metadata is the most useful universal standard for marking images with creator details. However Redeye notes that over 90% of the digital images and photographs received into its offices contain no user-assigned metadata, usually relying on one of the other methods given above. It is also possible to set up certain software used by picture desks to strip metadata out of an image. This is analogous to tearing out pages in a novel that contain the name of the author. Although it is hard to trace instances of this happening, we have anecdotal reports. Such practice may well be illegal.

3.6 Theft and unauthorised usage of photographs

74% of photographers reported an increase in the unauthorised use or copying of photographs in the past 3 to 5 years. While the internet is the cause of a lot of this misuse, photographers are also reporting cases such as the unauthorised reproduction of photographs, often in overseas editions, and the illegal copying of prints.

It is difficult to estimate the financial loss to UK photographers caused by unauthorised use of their work. It is very likely to be of the order of tens of millions of pounds per annum.

In many cases of unauthorised use of digital images and photographs, the offending party cites ignorance or confusion over the identifying mark, whether that be filename, metadata or bitmap information. This type of unauthorised use essentially falls into one of four categories:

1. Images are circulated with no identifying mark and re-used because the end user cannot tell who the creator was;
2. The identifying mark in the image cannot be found because of incompetence or software incompatibility;
3. The identifying mark in the image is deliberately removed by the client or their agent;
4. The identifying mark is changed to indicate a different creator.

Redeye notes that this can appear to be a complex matter and that offending parties often blur the boundaries between the four categories above. However these four categories are usually easily distinguishable with a basic understanding of the facts, and are clearly different in nature, with differing levels of culpability.

3.7 Penalties and legal sanctions for breach of copyright

Redeye notes that penalties for offenders are low – in fact they are often only identical to the financial charges that would have been legitimately made.

While market traders are regularly taken to court for breach of copyright when selling pirate videos, we hear far fewer cases of a large publishing house being taken to court for breaching copyright of individual creators. In most of the latter cases, even one as high-profile as Linford vs TSPL, an out of court settlement is reached where the creator receives only the fees he or she ought to have been paid anyway.

There is little incentive for those breaching the copyright of individual creators to desist.

There is anecdotal evidence that large photolibraries are treated better by clients than individual photographers in this matter; the photolibraries often have their own legal teams policing end use, while individual creators are considered an easier target for abuse.

3.8 Coherence between competition policy and IP policy

Many organisations commission photography that is then given away free of charge as "press release" material. However in 2004 Redeye received a large number of complaints from photographers that a Regional Development Agency had purchased a large collection of stock photography that was then given away through the web to anyone who wanted it – a "free" photolibrary. The RDA's reasoning was that they wanted everyone to have free access to imagery of their region in order to maximise interest and investment in the region. The photographers contacting Redeye claimed that public money was being used to undercut their legitimate trading. Under pressure from photographers the RDA placed limits on the free use of this material.

Where organisations are publicly funded, it is appropriate to distinguish between those that give away material specifically illustrating their own activities, which can be acceptable, and those that give away generic material suitable for many uses, which is not generally acceptable.

3.9 Innovation

This is to Redeye one of the key issues in the IP and copyright debate. The competitive edge that top quality IP gives to organisations is critical in the modern economy. Many organisations commission outside creative people to bring novelty and distinctiveness to their IP. However freelance creators are certainly less likely to give of their best if they lose any stake in the future of their work because of copyright assignment.

- *It is undoubtedly the case that some of the UK's leading organisations are missing out on the best quality IP because of their blinkered attitude in requiring full assignment of copyright from creators.*

4 REDEYE'S RECOMMENDATIONS

- We consider it absolutely essential, both for the survival of photography as a creative profession, and for the maximisation of quality of the work they produce, that the individual creator's right to the protection of their own work should be sustained and championed.
- The practice of blanket enforced assignment of copyright from creators to organisations should be strongly discouraged.
- Guidance on the acquisition of copyright and intellectual property should be rectified to put the individual creator's point of view, and include the arguments for not requiring assignment of copyright.
- The practice of licensing should be much more widely disseminated and understood among those making and particularly commissioning creative content.
- Consideration should be given to supporting alternative licensing models provided they can be policed.
- Penalties for large scale and systematic breach of copyright or unauthorised use of images should be increased, and help given to individual creators in protecting their rights.
- Work should be done to raise the profile of these issues at colleges and universities, not just

those teaching photography and other creative pursuits but also PR, management, publishing and similar subjects, as well as in legal training.

- Public organisations should be discouraged from undercutting legitimately trading photographers by supplying free generic stock photography.
- The usage and respect of metadata should be encouraged.
- Guidance needs to be issued on the legality of removing copyright information from digital images; this practice should be clearly illegal, and software companies alerted.

Ends