

The UK Picture Library Industry

The British Association of Picture Libraries (BAPLA) thanks the Gowers Review team at HM Treasury, for the opportunity to respond to the Gowers Review of Intellectual Property.

BAPLA is the national trade association for the creative industry concerned with the supply of images and licensing of rights in those images. The UK has the largest concentration of picture libraries in the world, and BAPLA represents over 450 organisations including sole traders, small businesses, museums, galleries, and multinational corporations.

Our members are the directly appointed representatives of many thousands of photographers and other creative artists. Their clients are media and other creative industries, in the UK and worldwide.

BAPLA serves its members by

- enabling them to set and promote standards,
- providing a forum for the exchange of information, skills and advice
- acting as a representative collective voice for the industry, notably in relation to developing UK and EC rights legislation and licensing practice.

Impact upon the picture library industry of developments in digital media technology

The picture library industry has been profoundly affected by new media technology. Our members have made huge investments in acquiring this technology and have rapidly developed highly evolved practices in its application. Our primary marketplace is now the Internet, where most of our client/supplier transactions are initiated and fulfilled. Large, international corporate players have entered the industry. With a spectacular series of mergers and acquisitions, they have created strategically significant aggregated collections and, in a very short space of time, changed the character of the industry for suppliers and clients alike. New business models have also emerged, in response to market demands, including new ways of licensing images, such as open-ended 'royalty-free' licensing and the integration of packages of rights and content into software applications, such as the controversial Adobe Bridge project.

Others have been explored and rejected, for example extending the scope of 'collective' licensing to cover the 'blanket' use of stills images in the digital environment.

The UK has an exceptionally vibrant picture library industry with markets which are now increasingly aggressive. These conditions favour large corporate players (the 'supermarkets'), who are extremely successful in profitably delivering high volume at relatively low prices. The same conditions, however, threaten the great number of small, highly-specialised suppliers (the 'delicatessens'), who are able to deliver extremely high value but are finding it increasingly difficult to charge accordingly. There is no easy solution to this tension within our industry. If these specialist businesses prove unsustainable, there are genuine concerns, not only in terms of the potential loss of livelihood for those involved, but also in terms of the potential loss of the significant cultural value vested in these collections of images and the precious knowledge associated with them.

BAPLA engages with these tensions in the industry, to encourage diversity and depth within this marketplace, because it is of value both to owners of rights in creative content as well as to end-users of that content.

Protecting creators against unauthorised reproduction and dissemination of creative content

Our industry exists on the premises that individual creators have an interest in creating culturally and commercially valuable work, because they have a monopoly on the reproduction and dissemination of their work and can negotiate payment in exchange for licensing that monopoly. Those who reproduce and disseminate creative content without authorisation are stealing from such creators.

New media technology enables reproduction and dissemination of creative content with unprecedented ease and shields the user from consideration of the possibility of infringing others' rights, let alone any other aspects of the context and consequences of their praxis. This is problematic.

Digital technology also provides some scope for protecting against unauthorised use, by means of DRM systems, and it is helpful that the law is moving to make it illegal to interfere with DRM systems and the content-objects they protect. However, unauthorised reproduction and dissemination of creative content continues to happen on a huge scale and is estimated to be costing our industry some millions of pounds in lost revenue every year.

Our members are struggling to combat this theft, on the one hand, and a combination of increasingly draconian rights contracts with coercive negotiating practices from corporate clients, on the other (regrettably, the practices of a number of government departments fall into this category).

In principle, UK copyright and other IPR legislation provides useful protection. However, availing oneself of this protection, in the case of infringement, is problematic. It is not a suitable means to pursue individuals responsible for illegal file-sharing, since file-sharing is damaging in aggregate rather than individually, and it is a precarious means to pursue corporate infringement, due to the costs involved in exploring the frequently complex legal technicalities and the David/Goliath mismatch of individual creators against corporate giants.

Great opportunities are provided by the new media, not least because they allow us the possibility of transcending geography. One of the greatest issues regarding the licensing of intellectual property rights in the new media age is that these rights are defined in terms of geography – territory and jurisdiction. The licensing industry has had to become increasingly reliant on contract law, since the international community has not been able to construct an effective rights regime for the Internet.

This strategy may enable larger businesses to be effective in a global economy but, again, it does not address the increasing vulnerability of the rights of individual creators. Instead, it compounds matters, as the balance of power in the negotiation of contractual relationships most frequently works against the interests of individual creators and their representatives. Contracts for the commissioning of new creative work now routinely seek to acquire all rights in that work, without adequate compensation. The rights which these contracts seek to acquire are frequently irrelevant to the original purpose for which work is commissioned, therefore unnecessarily restricting creators' rights to their own work.

Protecting the rights of individual creators and nurturing original talent is in the long-term interests of a thriving creative economy. It is therefore disappointing that the Office of Fair Trading resolutely refuses to move on these unfair trading practices of large-scale buyers.

The challenges for the picture library industry, posed by widespread unauthorised use of creative content, are not due to the lack of a legal framework, they are due to the costs and other difficulties in policing and enforcement. But they also involve issues of communication, culture and praxis.

Our clients in education, publishing, broadcasting, advertising, marketing and many other sectors, are looking for opportunities to exploit their output in different ways on an ever-increasing range of media platforms, in an ever-increasing territory. With increasing media convergence, many of the existing licensing models are becoming harder to apply without adaptation. Our members are happy to explore these new models and fragmented markets with their clients. They are extremely keen to adapt their practices to new circumstances, but are consistently faced with the problem that, among their clients, competence in new media technologies is not matched by competence in issues surrounding new media content, particularly rights and licensing issues, even among recent graduates from the UK's top creative and media institutions (one would hope that graduate estate agents would not be similarly ignorant of UK property law - trespass, for instance).

The reality of 'cut and paste' amateur creative practice and the culture of file-sharing on the Internet have made unwitting criminals out of normally law-abiding people. Cumulatively, they have also done unwitting damage to the livelihood of individual creators.

Major media corporations are now also exploiting the naïveté of amateur creators by committing them to relinquish their valuable rights and by making commercial use of 'user-generated content'. This is very clearly unethical and corporately irresponsible.

Positive steps

In thinking about how to begin to address these issues, some key features emerge. Although there is public sympathy for the negative impact of this new reality on individual creators, these individuals have no power/platform with which to garner public sympathy and support, and promote change. On the other hand, corporate rights-holders and rights-holders organisations (who have at least some access to a wider platform) have been unable to change the public perception of this theft of rights as a 'victimless crime'.

Clearly, there is a difficulty in communicating the issues. There is a tendency to treat intellectual property rights solely as a professional/technical issue, but there is no real chance of change unless we (collectively!) find a way of demonstrating its relevance to ordinary people, and addressing the practice of file-sharing, etc., as a cultural/social issue.

Following BAPLA's participation in discussion of these issues at the Dti Creative Industries Forum on Piracy and File-Sharing and other forums, it seems that a major strategic partnership initiative is needed. BAPLA has constructed an outline for such an initiative and presented it to the BBC.

The BBC has many interests in protecting rights and a commitment to fair trading in rights. It sits in a unique position, as a commissioner of creative work, a licensee of creative works and as an owner/licensor of creative works, the most trusted broadcaster and multi-platform information-provider, with a huge international profile. It also has unrivalled experience and skill in interpreting complex issues for public consumption. It is alone in possessing the ability to undertake a comprehensive programme of online, broadcast and publishing activities to interpret complex issues, such as these, in a way which makes sense to ordinary people, and which stands a chance of achieving real impact at user and community level, providing leadership within the UK and beyond.

A comprehensive campaign to raise awareness on the issue of rights, at a variety of levels, and in a variety of directions, would further not only the BBC's own considerable interests, including current strategic initiatives 'building public value', 'content supply' and 'value for money', but also UK Government's 'citizenship', 'creative industries' and 'knowledge economy' objectives, as well as being of enormous benefit to the UK's creative community.

We have also begun to build support for this initiative, which the BBC is taking to its Board. It is to be hoped that the BBC will grasp this massive opportunity and that BBC Executives on the

Editorial, Education and Corporate Affairs sides will work together to spearhead a genuinely collaborative initiative of this kind, in the aftermath of the Creative Economy conference in October last year on behalf of the creative and audiovisual industries in the UK.

Regulatory environment for creative content on non-traditional media platforms

The current culture of the world wide web is that the interests and freedom of the end-user are paramount. It is hard to conceive of protecting 'freedom' and 'interests' without some concept of 'rights', and therefore of a regulatory environment of some kind.

Each and every media platform, which we now consider traditional, was, at some point, non-traditional. The picture library industry has found it relatively easy to adapt established models to new platforms and to apply the legislative framework appropriately. There is little doubt that new media platforms represent the future for the distribution of much creative content and it is difficult, therefore, to see how the creative industries could survive without a suitable regulatory environment.

This environment will need to evolve to the new circumstances and it will be hard to conserve the current delicate ecology of interests, but it would certainly be productive to clarify the 'fair use' provisions of the CDPA.

Balancing the rights of creators and the expectations of consumers

Who creates the expectation of consumers? - In discussion of consumer expectation, there is frequently an implicit assumption that this expectation is to be met, without examining how or why it has come about. This is in spite of what we know about the sums of money which are invested, every day, in the deliberate creation of expectation.

The Creative Archive is an interesting case in point, and in relation to this project, it is worth asking about how well founded the expectations of consumers might be, in comparison to the expectations of creators.

The vision of the Creative Archive is a grand and generous one. In order to facilitate the delivery of this vision, BAPLA is keen to ensure that creators' expectations are dealt with appropriately, in respect of the contracts they have with the BBC and the rights they have in their own work. For this reason, we are actively involved in the project, as part of the Creative Archive Licence Group's advisory panel.

Creators have a well-founded expectation that the integrity of their work will be respected and that their work will not be subject to derogatory treatment. It is difficult to see how the Creative Archive can deliver on this expectation, since (on the BBC site) it invites end-users to '...Rip it; Mix it...', which obscures fundamentally important issues and creates an unrealistic consumer expectation. There are profound ethical implications, for example, pertaining to the manipulation of interviewees' contributions to documentary films, and to the content and context of stills images.

Rights-holders' organisations, including BAPLA, have already put a lot of effort into trying to address such important issues, for the greater good rather than any immediately discernable benefit to our members. The film and TV industries are considerably behind the music industry and the stills images industry in respect of the co-ordination and presentation of its resources, and in addressing contemporary end-user practice. It is regrettable that the partners in the Creative Archive project were tardy in involving representatives from these industries, and in co-opting our expertise, not least because this created a larger amount of unnecessary friction. The delay has also meant that the Creative Archive has invested in promoting unrealistic consumer expectation, which it will subsequently need to redress.

The use of 'cut and paste' has quickly and firmly established itself as an important element in contemporary creative practice. But, as a model for 'creativity', the quick montage techniques provided by digital technology stand in marked contrast to the care, time, blood, sweat and tears which go into the creation of original work, and for which there was no alternative, in earlier times. It is important to find a way for contemporary montagistes to enjoy and exploit the

resources laboriously created by others, but it is important also to do so in a way which recognises the continued investment many of the original creators have in their work, which funds and sustains their own continued creativity.

There is a cultural as well as an economic ecology at work here, and it is important that the Creative Archive should therefore be seen as promoting a praxis, rather than simply offering a resource for easy exploitation. It is interesting to see the differing extent to which current project partners have embraced this approach in the user-interfaces which invite people to engage with the project online.

Great care needs to be taken over the creation of customer expectation and there is good reason to hope that the Creative Archive Licence Group, in consultation with rights-holders' representatives, can change the direction of the Creative Archive, to become part of a wider movement to develop the healthy praxis required by the demands of good citizenship and the creative economy.

In conclusion

The UK picture library industry has embraced the opportunities of digital media technology but is also suffering as a result of the unauthorised reproduction and dissemination of creative content enabled by this technology. The application of a regulatory environment to new media platforms is an essential element in realising opportunities, protecting investment and addressing threats in the new media for the picture library industry. BAPLA welcomes the elucidation of interests between creators, other rights-holders and end-user/customers, towards mutual understanding and realistic expectation, in particular the work of the Institute for Public Policy Research, the Museums Copyright Group, and the Creative Archive Licensing Group. We look forward to helping to create a properly balanced clarification of the 'fair use' provisions of the CDPA. We also hope that the DCMS and DTI will support the submission of the BBC's proposed rights awareness project to its Board and, if it is approved, engage as a partner in this initiative.

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The UK Picture Library Industry (part II)

The British Association of Picture Libraries (BAPLA) thanks HM Treasury, for the opportunity to respond to the Gowers Review of Intellectual Property

BAPLA is the national trade association for the creative industry concerned with the supply of images and licensing of rights in those images.

The UK has the largest concentration of picture libraries in the world, and BAPLA represents over 400 organisations including sole traders, small businesses, museums, galleries, libraries, archives, and multinational corporations. There is enormous diversity within the contents of our members' collections, and in the knowledge and culture which pertains to them.

Our members are the directly appointed representatives of many thousands of photographers and other creative artists. Their clients are media and other creative industries, in the UK and worldwide.

BAPLA serves its members by

- enabling them to set and promote standards,
- providing a forum for the exchange of information, skills and advice
- acting as a representative collective voice for the industry, notably in relation to developing UK and EC rights legislation and licensing practice.

How IP is awarded

The IP rights which underpin our industry are primarily those of copyright and moral rights. The fact that these rights subsist in all creative works, automatically, without the need to register them and without cost, has enabled and encouraged the development of an extremely vibrant industry, with an annual turnover in hundreds of millions. It has also created a massive stakeholder community including, for example, practically everyone in the UK who has ever taken a photograph. The stake which members of this wide community have in IP is, in many cases, more concerned with issues of moral rights of paternity and privacy than with commercial issues, but recent developments in 'citizen journalism', for example, have revealed that there is commercial as well as cultural value in the creation of these new works. There is concern that amateur stakeholders do not appreciate the value they are creating, and are vulnerable to exploitation by unscrupulous media interests.

How IP is used

Our industry is posited on the tradable value of IP. During the last decade, large corporate interests have raised substantial sums of money to fund the buying and selling of entire image collections on the basis of the tradability of these assets and the consolidation of market value.

Although the threshold of originality for the awarding of copyright protection in the UK is extremely low, there is value in quality, innovation and originality. There is concern that market forces are eroding this value.

How IP is licensed and exchanged

Our industry exists to facilitate the licensing of rights in images. Most of our licensing is conducted on an individual transactional basis within a 'business to business' context, in contrast to the collectivised licensing practices which exist in some other industries, many of which are conducted predominantly within a 'business to consumer' context.

Our transactional licensing practices are highly developed and designed to preserve creators' essential rights to determine the context in which their work is used. This aspect of control is of fundamental importance in our industry, where images are produced for a variety of reasons and to sometimes particular personal and moral agendas. As facilitators of licensing, BAPLA members' transactions aim to ensure that creators' agendas do not clash with those of end-users.

As an example of moral agenda clashes to avoid, consider that a committed environmentalist might travel to photograph species endangered by the activities of a multinational corporation. By coincidence, the same corporation might select the photographer's work for use in their PR campaign to promote a positive image of their corporate responsibility. The importance of the photographers right to control the use of this work, and refuse permission, if necessary, is clear in this example.

As facilitators, our members are required to protect the interests of photographers and other visual creators, by protecting the rights in images and the value in these rights, but they are also required to address the needs and expectations of end-users. Huge investments have been made by our members, to facilitate research and licensing transactions, in technical means as well as in creative development of new licensing models. BAPLA has helped to standardise practices, to the benefit of members, creators and end-users alike.

Clients in education, publishing, broadcasting, advertising, marketing and many other sectors, are looking for opportunities to exploit their output in different ways on an ever-increasing range of media platforms, in an ever-increasing territory. With increasing media convergence, many of the existing licensing models are becoming harder to apply without adaptation. Our members are happy to explore these new models and fragmented markets with their clients. They are extremely keen to adapt their practices to new circumstances, but are consistently faced with the problem that, among their clients, competence in new media technologies is not matched by competence in rights and licensing issues. An example of this confusion and incompetence is in the 'have-your-cake-and-eat-it' attitude of certain media producers who portray IP as a barrier to their creativity, when producing composite works containing others' IP, yet insist that their composite works should be given full IP protection and that the paternity of these works should be attributed to them.

A very comprehensive training initiative is required, which addresses IP issues not as a rarefied technical matter for specialists but as a day-to-day matter for ordinary consumers, as well as business professionals, if the next generation of creators is to thrive. Both users and creators need to understand IP in terms of good citizenship in the digital age.

There is a productive ecology around IP and the creation of new works but this is poorly appreciated, even amongst professionals. Even where there is good understanding of the issues, contracts for the commissioning of new creative work now routinely seek to acquire all rights in that work, rights which are frequently irrelevant to the original purpose for which work is commissioned, therefore unnecessarily restricting creators' rights to their own work, without adequate compensation.

There is concern in our industry over the balance of power in the negotiation of contractual relationships, which is increasingly at odds with the interests of individual creators and their representatives, and BAPLA would like the Office of Fair Trading to look into this issue of balance. Major media corporations are now also exploiting the naïveté of amateur creators by

committing them to relinquish their valuable rights and by making commercial use of 'user-generated content'. This is very clearly unethical and corporately irresponsible.

How IP is challenged and enforced

Digital media have enabled the reproduction and dissemination of creative content with unprecedented ease but also shield the user from consideration of the possibility of infringing others' rights. Unauthorised reproduction and dissemination of creative content continues to happen on a huge scale and is estimated to be costing our industry some millions of pounds in lost revenue every year¹. Alongside the many infringements which are routinely performed out of ignorance, there are others which are cynical and criminal in intent, such as the circumventing of technical protection measures, for example, through the sale of passwords on e-Bay.

In principle, UK copyright and other IPR legislation provides useful protection. In practice, the effectiveness of this protection is limited, due to the costs and other difficulties in policing and enforcement. Litigation is not a suitable means to pursue individuals responsible for illegal file-sharing, since file-sharing is damaging in aggregate rather than individually. Litigation is also a precarious means to pursue corporate infringement, due to the costs involved in exploring the frequently complex legal technicalities and the David/Goliath mismatch of individual creators against corporate giants.

In international terms, the licensing industry has had to become increasingly reliant on contract law, due to territorial differences in IP legislation and because the international community has not been able to construct an effective rights regime for the Internet. It must be noted that this strategy does not address the increasing vulnerability of the rights of individual creators. Protecting the rights of individual creators and nurturing original talent is in the long-term interests of a thriving creative economy.

Copyright exceptions

BAPLA is in favour of clarifying the copyright 'fair dealing' arrangements in the CDPA with a view to producing a more pro-actively informative set of 'fair use' provisions, and would welcome the opportunity to contribute to an in-depth review of this particular area.

Copyright – digital rights management

Digital rights management ('DRM') is a broad 'umbrella' term which includes technical protection measures ('TPMs') as well as systems used to automate royalty payments.

The investment by BAPLA members and others in the automation of certain aspects of rights management has led to large-scale administrative efficiencies, to the great benefit of creators and end-users of IP, and has contributed greatly to the energy and value of the creative economy in the UK. This investment continues, as does the development of these systems and the licensing models which they facilitate.

TPMs operate at different levels. The use of technical means, in digital media, to tie a set of records to a media asset, detailing the source and authorship of a digital image file, for example, and the terms of the licence under which it was supplied, is extremely useful to the licensor and the end-user alike, and is uncontroversial in principle. This practice protects the interests of the parties by making the transaction transparent. It protects the licensees, by providing the means to ensure that infringement is less likely to happen inadvertently. It protects the licensors by making infringement more provable, when it occurs.

¹ Est. annual figure £4.2 million - BAPLA Industry Survey, 2006

Digital media has enabled the rapid expansion of the image licensing industry because of its ability to address end-user interests and facilitate their requirements. TPMs are essential tools for creators and their representatives in managing their relationships with end-users. They can be used to facilitate the role of 'gatekeeper', essential to the common trading activities which deliver the revenue stream in our industry. These TPMs which restrict access to works are controversial, particularly in an archive/heritage environment, where there may be tensions between the interests of those seeking access to works under the terms of the CPDA's 'fair dealing' arrangements and those of creators and service providers. If there were to be an in-depth review of the balance of interests in this particular area and an exploration of solutions, BAPLA would welcome the opportunity to contribute.

Copyright – orphan works

Many important image collections have been built up over many years (sometimes centuries) as collections of objects. The IP aspects of these objects have in many cases not been an issue in relation to these collections, and have therefore only more recently begun to be addressed, as the asset value of the collections has begun to be appraised and new publishing and trading activities have been initiated. BAPLA members who own or manage significant archive collections or operate within a museums or galleries environment are very familiar with the issues, including costs, involved in sourcing and agreeing authoritative permissions in these collections. These difficulties are a product of the ease with which IP is awarded and the lack of formal requirements to register IP ownership, but are a trade-off against the enormous value to BAPLA members of these features of the UK rights regime.

The term 'orphan works' is misleading. It suggests that the creator of a given work is no longer in existence, whereas it is more frequently the case that the creator is simply hard to trace. One of the reasons creators are hard to trace is that the practice of media producers and publishers in crediting creators is often extremely poor. In a recent survey², for example, 68% of images in UK newspapers appeared without a credit, in breach of their creators' moral rights and, in many cases, the contractual terms of the licence under which the images were supplied.

BAPLA has worked hard, with successive 'Credit where Credit is Due' campaigns, to promote good practice in relation to this issue, in support of creators moral rights but also in support of the very real commercial issue, that proper credits are essential to the building of creators valuable reputations, and to the tracing of permissions, when other end-users wish to re-use images in other projects and contexts. Our figures suggest that the success of our campaigns has been limited, due to the fact that we are up against the inertia of entrenched cultures within client organisations.

BAPLA would greatly support and appreciate a strengthening of the moral rights provisions in the regulatory framework, particularly in respect of the commercial issues this would address.

BAPLA would not support any specific 'orphan works' provisions which would loosen the requirements to seek proper permission from the legitimate rights-holder or limit the liability of end-users in respect of their responsibilities in respect of others' rights. This is because such a move would undermine the basis for trading in our industry as well as fundamental principles of rights and ownership.

In correspondence over this issue, a prominent member³ of our association writes:
'...I would assume that most people, if they found an item of lost property, would hand it in to the local police lost property department. I assume you would not defend a law legalising theft, even of lost property...'

² BAPLA 'Credit where Credit is Due' Survey, 2006

³ Bob Croxford

Trade marks

Trade mark legislation is seldom called upon, in our industry, to settle disputes, although trade marks are used to define and distinguish individual businesses and, as they relate to creators names and reputations, are used to define and promote commercial value. For example, a photograph by David Bailey is valuable, not only because of the quality of the work but partly also because of the associations brought by the name, under which he trades. In this respect, moral rights and trade mark issues share a commercial connection in our industry.

Our industry also has a strong interest in promoting a balanced approach to the use of the law in protecting trade marks. Trade marks are often incidentally included in images, particularly in a reportage context, and there have been some rather over-zealous approaches by the proprietors of trade marks, seeking to control the use of legitimate reportage images which made such incidental inclusions. Probably the most extreme example we have been given, is of a Scandinavian airline, whose trade mark consisted of a white bird on a blue sky, and who actively sought to use trade mark legislation to control the use of all images featuring white birds on blue skies.

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