

Gowers Review of Intellectual Property – Response

Copyright in reproductive photographs of works of art

Copyright law relating to photographs of works of art is in need of radical overhaul. This response discusses straightforward photographic reproductions of works which are themselves in the public domain (e.g. an old master picture, where there is no question that any copyright interest survives in the original work). The reuse of these photographs is vital in art historical publications, and it is now widely believed (see, for example, the editorial in the *British Art Journal*, vol. IV no. 3, and subsequent correspondence in 2004, or John Nicoll's article in *Apollo*, May 2005) that the charges imposed by copyright holders are having a crippling effect on scholarship.

Such photographs may have been taken by professionals but the results are often indistinguishable from those of a beginner. The level of skill required is plainly not such as to merit legal protection on any sensible analysis of the purpose of copyright law. Whether slavish reproductions are indeed protected under English law has been called into question by the *Bridgeman v. Corel* judgement, but the area remains sufficiently murky that legislation is required before scholars can safely publish these images. Costs mean that it is unlikely that a test case will go to the House of Lords for a resolution of the position.

Museums who pride themselves on free access to all have nevertheless staffed up rights departments to charge for licensing images, and feel it is their duty to earn royalties even if this deters scholarship which would deepen an understanding of their collections. In many cases the charges they seek to impose, although ruinous to an author requiring rights for several hundred reproductions in a monograph, barely cover the cost of administration. While licensing images for use on chocolate boxes and greetings cards may contribute useful revenues which can go towards the cost of new photography, collecting trivial amounts from scholars merely makes a small contribution to an unnecessary overhead. But trustees concerned about their obligations to raise money (often confusing revenues with profits) cannot easily be induced to adopt voluntary codes of practice. A law that said that reproductive photography is not protected by copyright would simplify the position for everyone.

As an alternative to excluding reproductive photographs from all copyright protection, the "related right" approach could be taken, as in various European countries. The key feature of such protection would be a shorter and properly defined term (e.g. 20 years from first publication rather than 70 years after the photographer's death, a date which is usually unascertainable). Such an arrangement could balance the needs of museums to secure revenues from new photographs while allowing scholars free use of many existing images. It would also help with the major problem (which you have already identified as a specific issue) of orphan copyright. The photographer or copyright holder of these reproductions is very rarely identified in older publications, and the result is that it is often in practice impossible to obtain consent to reproduce photographs which may be the only record of works of art which are not in public collections. The protection of this intellectual property is plainly to no-one's benefit.

A third approach would be to broaden the fair use exemptions so that authors are free to reproduce works of art in the context of academic research. There are many simple ways to define such a licence so as to allow scholarship to flourish without jeopardising museums' revenues from commercial reproduction.

A further area that needs to be considered is the interaction of any new legislation with historic codes both in the UK and other countries. Since art monographs usually include reproductions of photographs taken in a number of countries and are themselves sold internationally, the legal position is already beyond the comprehension not just of art historians but often of lawyers qualified in a single jurisdiction.

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24 February 2006