



**British Journal of Photography**  
**Incisive Media**  
**32-34 Broadwick Street**  
**London W1A 2HG**  
**United Kingdom**

25 February 2009,

**To the Intellectual Property Office, in response to the Issues Paper - Copyright the Future, developing a copyright agenda for the 21<sup>st</sup> Century.**

The British Journal of Photography would like to thank the Intellectual Property Office, as well as David Lammy MP, Minister of State for Intellectual Property and Higher Education, for the opportunity to participate in this consultation on the future of copyright in the UK.

Below, you will find a summary of our recommendations, as well as a full report from a filmed editorial debate between five photography industry experts.

**Sincerely,**

**Olivier Laurent**  
News Editor  
The British Journal of Photography  
020 7316 9376 / [bjp.news@bjphoto.co.uk](mailto:bjp.news@bjphoto.co.uk)

## SUMMARY

The Review of Intellectual Property cast a shadow of uncertainty on the UK creative industry. Published two years ago, most people are still trying to understand Andrew Gowers' recommendations, but already the ground is shifting under their feet. Whether we like it or not, the internet has fundamentally changed the way we deal with copyrighted work.

Last December the Intellectual Property Office released an Issue Paper on the future of copyright, calling for a revamp of UK copyright laws to 'support creativity, investment and jobs, and inspire the confidence of businesses and users'. So far so good, but photographers' fears were stirred by the IPO's big question: 'Is the current system too complex, in particular in relation to the licensing of rights, rights clearance and copyright exceptions?'

The IPO has been consulting the creative industries on its intentions for the last 60 days, under the direction of David Lammy, the minister for higher education and intellectual property.

Photographers and their representatives were, therefore, given a rare opportunity to influence the government's decisions, and the British Journal of Photography is now submitting its own response.

To help us do so, we invited five industry experts to discuss the issues in a filmed debate at our Soho studios, looking in particular at what the government should do to protect photographers' rights in the digital age.

Our guests included Paul Brown, the managing director of the Mary Evans Picture Library and chairman of the British Association of Picture Libraries and Agencies, along with BAPLA's new executive director, Simon Cliffe. They were joined by John Toner, freelance organiser at the National Union of Journalists, Rupert Grey, consultant in the Litigation Group at media law specialist Swan Turton Solicitors, and Pete Jenkins, a freelance photographer and regular BJP contributor.

Attached with this response is our report of the debate. Also, we invite the IPO to view the debate in its video form online at <http://www.bjp-online.com/copyright>.

## RECOMMENDATIONS

- **The Government needs to take a different approach to copyright law when dealing with the photography industry.**

Photographers work by licensing their images, there are very few cases where the rights are assigned to someone else. Consequently, where a movie would require only one registration to be protected, a photographer, who creates hundreds of images a day, would be forced to register all of them. The Government has to deal with the photography industry separately from the film and music industries.

- **Enforcement of copyright infringement cases should be facilitated.**

We need a direction for the judicial process that damages can, and in some cases should, exceed the licensing fee and should bear some relation to the amount of trouble caused by the infringement and to reflect the value we place on the creator's rights.

- **Educating the public on copyright law is a pre-requisite.**

There should be an education programme explaining what copyright actually means to users. The most obvious filter is schools. We have a number of opportunities, from a very young age, where the government could do something if it is serious about making some changes about our copyright laws.

## **THE BRITISH JOURNAL OF PHOTOGRAPHY – FULL RESPONSE**

### **Rewriting the rights book**

It's been 20 years since copyright law was revamped, and it now seems inevitable that the government will introduce major changes, taking into account the way we share content in the digital age. Olivier Laurent brings together five experts to discuss the issue, and how the photography industry should lobby its own cause

The recent Review of Intellectual Property cast a shadow of uncertainty on the UK creative industry. Published two years ago, most people are still trying to understand Andrew Gowers' recommendations, but already the ground is shifting under their feet. Whether we like it or not, the internet has fundamentally changed the way we deal with copyrighted work. And now the government (in the guise of the Intellectual Property Office) wants to deal with the problem.

Last December it released an Issue Paper on the future of copyright, calling for a revamp of UK copyright laws to 'support creativity, investment and jobs, and inspire the confidence of businesses and users'. So far so good, but photographers' fears were stirred by the IPO's big question: 'Is the current system too complex, in particular in relation to the licensing of rights, rights clearance and copyright exceptions?'

The IPO has been consulting the creative industries on its intentions for the last 60 days, under the direction of David Lammy, the minister for higher education and intellectual property. Photographers and their representatives were, therefore, given a rare opportunity to influence the government's decisions, and BJP is taking a proactive role by submitting its own response. To help, we invited five industry experts to discuss the issues in a filmed debate (which can be seen at [bjp-online.com/copyright](http://bjp-online.com/copyright)), looking in particular at what the government should do to protect photographers' rights in the digital age.

Our guests included Paul Brown, the managing director of the Mary Evans Picture Library and chairman of the British Association of Picture Libraries and Agencies, along with BAPLA's new executive director, Simon Cliffe. They were joined by John Toner, freelance organiser at the National Union of Journalists, Rupert Grey, consultant in the Litigation Group at media law specialist Swan Turton Solicitors, and Pete Jenkins, a freelance photographer and regular BJP contributor.

### **New beginning**

Everyone agreed on one thing - copyright needs a major revamp. But, as ever, the devil is in the detail. The UK's current system dates back to the Copyright, Designs and Patents Act, passed in 1988 when the internet was still a little-known project referred to as ARPANET, NSFNET, UUNET or CERFNET.

'The digital age has rendered the Copyright Act 1988 obsolete,' says John Toner, opening the debate with a call for better protection for artists and authors. 'We've seen this for a number of years now. However well intentioned the 1988 act is, our objection is that the principle of copyright as property right is still enshrined in UK law. We believe that this has proved fundamentally detrimental to authors.'

The government is aware of the shortfall. Three years ago it looked at ways to improve its legislation, with then-Chancellor Gordon Brown commissioning Gowers to lead an independent review of copyright law focusing on intellectual property rights. Gowers made 54 recommendations for improvement, but some believe his suggestions didn't go far enough. Paul Brown, for example, says Gowers' review of moral rights was insufficient, while Toner believes he neglected thinking about images altogether, remarking at the time that 'Gowers focused so tightly on patents and on the music industry that he largely ignored the role of creators of texts, of images and even of films'.

## **Moral rights**

Today, the IPO's consultation offers photographers the opportunity to 'look at the gaps and have a chance to input more on the areas that affect them', says Brown. 'Gowers was two years ago, and much has changed already. Technology has changed how people look at copyright material, how they acquire copyright material, and what they do with it. The means by which we interact with this material have changed. We walk around with handheld devices exchanging copyright materials when we're at a coffee shop, for example.'

Photographers are affected daily, with images reproduced online, or even in print, without credit or remuneration. Some companies, it seems, think that any image used online is up for grabs, lifting shots from sites such as Flickr, or more blatantly direct from artists' websites.

'We think that it's vital that authors should have an exclusive and inalienable right to authorise the use of their work, to be credited and to defend the integrity of their work,' says Toner. 'It also protects the user. The moral rights of identification and integrity are really the only guarantees in a digital age to the user that the work has any veracity to it.'

These rights, known as paternity rights, were not examined in the Gowers review, leaving the UK with a system that makes it almost impossible for photographers to take action when their copyright is infringed, says Rupert Grey. 'One of the interesting results of the 1988 act, which introduced moral rights to our law for the first time, is that there have been no cases, at least in the photographic industry as far as I know, where a photographer or agency has taken to court a publisher that has omitted to give credit when he was obliged to give credit,' he says.

'The reason for that is partly, I think, because of the complicated process of having to assert rights. But also because nobody has any real idea how to evaluate a failure to give credit, and up to now people thought it wasn't worth all that much. I think that one of the things that is changing with the digital age is that the giving of a credit is now worth a great deal more in financial terms than before. Partly because at a click of a button, your photo can be seen by millions of people all at once and if they don't know who you are than there's no point you having taken the photograph in the first place.

'The value of that has not been properly recognised, and I'd like to see a major change and emphasis on paternity right. It's the way a photographer makes a living; it's his reputation. The right to have your name besides your picture at all times on the net and off the net is more important than the right to copy and more valuable than the right to copy, which is now a devalued right. The market's value of copying has dropped.'

## **Orphan works**

Crediting images could also help resolve another thorny issue, one that's been the subject of intense debate in the UK, the US and the EU. 'If images are credited, it automatically makes the orphan work issue less of an issue,' says Brown.

An 'orphan work' is generally accepted as a work from which the creator's identity has become separated and untraceable, or a work that's gone out of copyright (for example, the creator's life plus 70 years in the US). Such work is frequently used, at no cost to the picture user, in adverts, newspapers, magazines, books, websites and commercial hoardings.

'We've done a lot of work with the metadata standards so that the information about the image, the paternity right, the credit line are all stored within the digital image,' says Brown. 'That means that wherever the image moves, the information stays with it - who shot it and who should be credited.'

But while in the commercial sphere metadata tends to be respected, when 'we go out of that sector people can lift images off the web and share them', says Brown. 'The good thing is when the metadata is in the image. However, we have a problem with social networking sites like Facebook and Beebo, where when you upload an image, it's stripped out of all the metadata. These sites should be obliged to maintain metadata. Otherwise any image they publish becomes an orphan work.'

## **Education**

The biggest problem with orphan works and copyright infringement, say the experts, is lack of education among the population. 'If I talked about orphan work to an 18-year old internet user, he would probably think of Annie,' says Simon Cliffe. 'There should be an education programme explaining what copyright actually means to users. Every time another member signs to Facebook or any other social network it's another person who might contribute to the orphan works problem.'

Pete Jenkins agrees. 'With so many people on Facebook and all these other sites, everybody is potentially a creator. We have a big problem. Teachers often don't know anything about copyright, which means that even if they teach their students about plagiarism, they still don't know anything about copyright,' he says. 'And this has been going on for generations. We're producing children who are educated to a great degree but lack any knowledge of copyright. They all are creators on the internet, they all publish stuff and they have this perception that if it's on the web it's free. It wouldn't take much to change this.'

The internet has also created a generation of users 'submitting their own content to national broadcasters. Are they aware that they could actually charge?' asks Cliffe. 'Some of this content might be valuable. There does need to be this huge awareness campaign about copyright. It comes back to the same point - that this is a timely opportunity for us to say what needs to be done.'

'I think the government has got a responsibility to take on some of this education,' he adds. 'The most obvious filter is schools. We have impressive media study courses. We have a number of opportunities, from a very young age, where the government could do something if it is serious about making some changes about our copyright laws.'

Brown believes that industry should also take a role, arguing that copyright education will be futile as long as businesses continue to take advantage of the situation. 'You have broadcasters and newspapers asking for content, both video and stills,' he says. 'If you look at their terms and conditions, they are effectively asking for the assignment of rights. It encourages that sharing culture rather than showing people that their work has value.'

Jenkins has a stark name for it - exploitation, especially when corporations are usually so 'zealous and protective of their own copyrights'. But others point out that many content providers are unaware, or unconcerned, about receiving compensation for their work. 'People who use the internet often approach copyright quite differently to the hard-copy world we are used to and grew up with,' says Grey. 'There is a genuine move on the internet that our culture is more about sharing and recognition of contribution, than it is about asserting a right of property. Their view is that what they do on the internet is intended to be shared.'

'How do we deal with user-generated content?' he asks. 'I think the extent to which the governments can control how young people, or anybody else, uses the internet in the future is very limited because it has no borders and no jurisdiction. We have to recognise that this creature is here to stay.'

So while education could go a long way towards ensuring photographers' rights are protected, enforcement is vital. 'Most of the copyright infringement cases we encounter are on very small scale, and pursuing someone in court tends to cost too much,' says Toner. 'Enforcing the law, even an inadequate law as it stands, is an impossibility economically.'

### **Law enforcement**

Enforcement is not helped by the government's fundamental misunderstanding of the photography industry. 'The government believes that that all creators assign their rights to someone else,' says Brown, adding that while that might be true in the film and music industries, it's rarely the case in photography. 'Photographers work by licensing their images, there are very few cases where the rights are assigned to someone else.'

Consequently, where a movie would require only one registration to be protected, a photographer, who creates hundreds of images a day, would be forced to register all

of them. 'You would spend all of your time in administrative work,' Brown adds. 'It wouldn't work. You have to deal with the photography industry separately from the film and music industries. It's an essential message to send out to David Lammy.'

'We had registration in this country,' Grey points out. 'But it was abolished in 1911. No other country in the world has registration, apart from the US. And it does create a two-tier structure (where photographers who have registered their work enjoy better protection against infringements than those who have not).'

'By not giving everybody the same protection you would, in the long term, take a lot of business away from the industry,' says Brown. 'What would happen is that you would have less photographers creating work, making for less choice and less diversity. The quality of imagery would go down and the whole industry would suffer'.

For Grey the most important issue is how to deal with copyright in an age when copying is no longer the main problem. 'The right to a credit is, to me, more important in an internet world, than the right to copyright,' he says. But, as Jenkins points out, a credit will not pay a photographer's mortgage. 'I think we have to expect a certain amount of responsibility from the large corporations,' he adds. 'The big problem is the moral rights issue. Moral rights are currently not guaranteed for photographers at newspapers and magazines.'

'What Lammy is trying to do is to create the architecture within which our rights can be effectively and properly exercised,' Grey explains. 'What he needs to know is what is required to make it better for us to enforce our rights. It goes back to the two main issues: paternity rights, which is critically important, and the extent to which the fair-use division should be adjusted. The copyright law is still a very valid system, and it's brilliant. I think what we're doing is adjusting the degree to which exceptions will be made in light of what is happening in the internet age and of what the new generation is in fact doing.'

### **New solutions**

The photography industry should learn from past mistakes and successes in other creative industries, says Brown. 'If you look at the music industry, a few years ago there was Napster,' Brown says. 'It was illegal, but everyone was using it. It got shut down. But someone decided to re-invent Napster, package it differently and called it iTunes.'

'Now, iTunes sells a huge number of music tracks every year throughout the world. There are still underground sites that swap music, but the point is that iTunes has made something illegal legal. A lot of the people used to trade music illegally because there was no other option. When they are given a nice interface and nice hardware to play music on, they are encouraged to do things legally. We need to look at ways to translate that to our industry. We need to make access to images easier for them.'

However, this solution could also have pitfalls. 'What you start seeing is the penny-stock sites where everyone buys an image at 50 cents,' says Jenkins. 'They expect to spend that little on an image. Then when they try to buy an image from, for example,

the Mary Evans Picture Library, at Â£300 they don't understand why they have to spend so much. They don't understand the value of what they get.'

Part of the task is to educate the public about the value of art works, clarify what copyright infringement is and set out what damages a photographer can claim if infringement occurs. 'It is now 21 years since we passed the (Copyright Act). It's the perfect moment to review it,' says Grey. 'We need to have a clear system where we know what is an infringement and a clear enforcement system in which we don't limit the damages to the amount the licensing fee would have been.'

'The first thing we need is a direction for the judicial process that damages can, and in some cases should, exceed the licensing fee and should bear some relation to the amount of trouble caused by the infringement and to reflect the value we place on the creator's rights. The message I want to send to Lammy is, "Can we please have a system when if somebody infringes on our rights, we can go and whack them for enough money that they will think twice before doing it again".'