

**“The Future – Developing a copyright agenda for the
21st Century - Intellectual Copyright Office.”**

A Response

By

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3673 words

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Moral Rights asserted



Pete Jenkins is a photojournalist with more than thirty years experience. Undertaking commissions and supply stock imagery to 'Fleet Street' newspapers, UK regional press, magazines, books, public relations companies and new media. From black and white dunk tanks to tethered digital shooting.

Formerly a sports specialist working in London, Pete is now based in Nottingham, East Midlands. His clients include unions, newspapers, publishing companies and commercial businesses worldwide.

Pete has written for a number of UK professional and amateur, photographic and Journalist titles about professional photography and the business of photography.

The Future – Developing a copyright agenda for the 21st Century - Intellectual Copyright Office.

Response

Introduction

In December 2008, David Lammy, Minister of State for Higher Education and Intellectual Property, to act further on the recent Gowers Review of Intellectual Property reported in 2006, released a consultation document (<http://www.ipo.gov.uk/c-policy-consultation.pdf>). The 'Gowers Review' made a number of recommendations some of which are good, some of which many creators consider controversial, and seen by many to have omitted to deal with several important issues arising in the 21st Century.

This is an important document and although it makes a few suggestions that many photographers will be concerned about, it does give professional creators, and that includes photographers the opportunity to input directly into the process that creates legislation and make a real impact.

The 1988 Copyright was the last time a real major change was made in Copyright and thanks to people like Ann Bolt, Andrew Wiard, Tim Gopsill, and many others working hard, lobbying, and making an impact we got some real breakthroughs.

Even so there were flaws. Moral rights were not obligatory for newspapers and magazines, and that needs to be addressed. Staff creators do not retain copyright that is signed over to the employer. And seeking legal redress for unauthorised use is very difficult, time consuming and expensive for the lone trader, making unauthorized use (stealing) a viable business model for some users. All these points need addressing.

Most visual creators, license their images for use by different clients. The terms of such licenses will vary according to duration of use, type of use and size of use, and will vary from client to client and different parts of industry. Any future legislation has to take these factors into consideration

A photographer for instance can license an image to a number of users at the same time – this is not the same as assigning rights.

Assignⁱ– To transfer (property, rights, or interests) from one to another.

Licenseⁱⁱ - Official or legal permission to do or own a specified thing

The Problems

For the past fifteen years, we have experienced the rights of creators being eroded systematically, if for no other reason than users (typically large national, even multi-national publishing houses) want more for less:

- Members of the public (and organizations) downloading and publishing images without paying for them (stealing) either through ignorance of the law or deliberate intent.
- Large publishing houses, (for instance), many of whom, publish works without resort to the creator, and without payment or permission.
- Some publishers will publish works that have been supplied for UK use, subsequently overseas without permission of, or suitable payment to the creator.
- Some Musician (bands) management teams are attempting to take the copyright of photographers attending concerts for editorial purposes.
- Creative Commons Licensesⁱⁱⁱ
- The ability to recover losses through legal means.
- Moral rights – these are frequently ignored regardless of the 1988 Copyright Act.
- Commercial pressures.

Copyright is not difficult to understand, the perception that it is somehow complicated is a misconception. What is clear is that whilst the rights and wrongs of plagiarism are in many cases taught as part of the primary school curriculum, copyright itself is not acknowledged or understood by many primary (and secondary) schoolteachers. That teachers remain ignorant ensures that their pupils have little or no knowledge also.

The principal of theft is well understood by citizens, copyright theft is little different from stealing a car or taking items from a shop without paying, and is just as simple to teach.

The process of rights clearance is not difficult, nor is it complicated. One requests use of a created work. Contact with the creator, or the creator's agent is required (assertion of moral rights will assist here). Permission is sought, and an exchange negotiated. By the very nature of buying and selling, it is the creators right to determine the fee required for any specific use. Exactly the same as a publican can choose the price of the beer he/she sells, and the manager of a store the cost of goods for sale.

Publishing houses struggling against their own commercial pressures to maintain shareholder dividends, are increasingly seeking to cut costs in order to preserve share value. The work of lone traders (by far the largest category of producer), small and medium sized business creators are targeted because they seen as easy pickings.

As moral rights do not have to be legally recognized, many publishers take advantage of this and simply do not credit creators. With the established system of keeping material 'on file', it is only a short step further for systems to be abused and it is common practice amongst some publishers to not issue payment for work used until an invoice is received - often those same publishers who announce to their suppliers that they are 'self-billing'.

The further problem arises in that amongst newspapers especially there are many editions specific to certain areas of the country. Creators in the regions have virtually no chance of keeping a physical check on uses by many of their clients, as they will never see the uses of their work. The published work is frequently not seen by the creator, the creator therefore does not invoice and the publisher does not pay. With many creators supplying material for many years, it is not uncommon for there to be many thousands of works on file with, (for example), newspaper clients. A large number of these are used and many of those uses remain unpaid.

The absolute right to be recognized as the creator of a published work and the easy and affordable enforcement of that right, will start to stop such practices and begin to ensure that creators are always paid for uses of published work. There does need to be an easy to use and easy to enforce way for lone traders to obtain not only the payment that should have been paid on licensed uses (and pirate uses), but also an element of payment of damages to make unlawful use less attractive to would-be pirates. Such systems must be easy to use and easy to enforce.

Copyright piracy, or the using of images sourced from one publication in a further use unlicensed and for which permission has not been sought is now rife.

Further it is International. An image can be sourced from a UK website and used in a US website in a matter of moments. Whilst there are a number of measures that can be taken to protect creators work, it is often the tracking of abuse and recovering license fees for unauthorized use and commensurate compensation that proves difficult for most, and impossible for many.

Although the means to trace unauthorized uses are becoming more available they are by no means widespread, accessible, or affordable, and in the event that piracy has been identified, in the case of cross border infringements, recovery is next to impossible for the sole trader, small and even medium sized business operations

Photographers are being presented on arrival at concerts (gigs) with so-called 'photographers agreements'^{iv} that attempt to remove all rights from the creator, for no reward, without the opportunity to seek legal advice and in many cases after the photographer has travelled at great expense to the concert to undertake a commission for a specific client. This is morally wrong, and is without question a despicable practice and should be made illegal.

Creative Commons Licenses have been introduced which rather than making things easier and clearer, have actually created a cloud of uncertainty around copyright.

Creative Commons Licenses are simply licenses, which allow the user to do certain things, as defined by the specific license agreed. This can present a problem as there a number of interpretations of the so-called Creative Commons License. According to the Creative Commons website there are no less than six different definitions of creative Commons – Highly confusing. And if one asks members of the public, invariably they not only do not know this but also will give a completely different definition of the license, usually an amalgam of the six.

The weakest of these – Attribution allows others to distribute, remix, tweak, and build upon ones work, even commercially, as long as they credit the creator for the original creation

The strongest CC license is 'Attribution Non-Commercial No Derivatives' which allows redistribution. Users can download original works and share them with others as long as they mention the creator and link back to the creator, but change in the image in any way or commercial use is denied.

The danger in 'Creative Commons' licensing, however well intentioned the concept may be, is that it creates huge misconceptions amongst users as to the rights they have. There is nothing that 'Creative Commons' licensing does that cannot be obtained through conventional licensing, indeed, returning to conventional licensing strengthens the value of copyright, yet still enables the creator to 'give away' licenses to use should they so desire.

Legal enforcement is a huge issue especially for lone traders and small businesses. The current system of rights licensing would not seem too complex when applied correctly. It is easy to determine what rights are required and to advise that use to the creator, for negotiation, payment, licensing, and use.

That some users wish to enforce their own (lower) standards onto creators is repellent, and regrettably, there is an increasing tendency amongst publishing concerns to demand all rights from creators without making any attempt to recompense the creators for those rights. The notion that the creator retains all rights, moral rights, copyright, and control of their work is under challenge. Many of our long established publishing concerns are guilty here.

Legal enforcement of a creator's right, most especially those of a lone trader are currently very poor. Even when piracy is traced and a conviction in the civil courts obtained, there is little chance of any recompense for the misuse, and indeed it is often difficult to obtain even the appropriate fee that could have been negotiated legally. In fact, with the current system there is financial incentive for the sharp dealing publisher deliberately not to pay for uses, as the chances of all such piracy being identified is low, and in any case the only real fees applicable will be that which could have been negotiated in the correct manner.

The creator has little support in ensuring all unauthorized usage is tracked and payment obtained. Indeed the time taken on such exercise is often outweighed by the effort in tracking uses and taking action. Difficult enough as it is for the lone trader.

Moral Rights, while legally enforceable for some media, are ignored by many users. This is not helped by the fact that one of the main exceptions of the 1988 Copyright Act – the current legislation to the assertion of moral rights were newspapers and magazines, two areas where copyright violation, intentional and unintentional are rife.

Until the right to be recognized as the creator of a work is enshrined absolutely in UK (and International) law, then improvement of the copyright system will prove very difficult, and further, the right to redress for copyright offences must also be made simple, easy and effective. Without this legislative support copyright abuse will continue and just become unmanageable, (for many lone traders it already is).

The commercial pressure being put on creators in many sectors, the UK newspaper and magazine publishing market, being an excellent example, is high. It is becoming more and more difficult for creators to maintain a full time living. This is especially true of editorial stills photographers. In many cases the fees paid for commissioned works have changed little between 1994 and 2008. Indeed, the fees for commissions have remained more or less static during this period, the expenses paid reduced, yet the expenses the photographer/creator expends and overheads incurred have increased by as much as 100%. The situation is now so acute that there are no full-time freelance editorial photographers solely servicing the local/regional newspaper sector. This sector is now by necessity serviced by part-timers and amateurs. Those full-time photographers still working for these media outlets, now mainly work in other areas of photography, such as PR or commercial.

Commercial Creators are also under pressure, but unlike their editorial counterparts it is much harder for their works to be replaced by those of amateurs, or simply works of lower quality. However, even here, there is high pressure to assign all rights and supply work at a lower than previous rates.

Exploitation is not limited to the conventional users of photography. There is a growing perception that somehow digital capture has made photography easier, and that digital transfer has made writing easier.

Digital capture has not changed the skills needed to make a good image; it has just made it easier to transfer a poor quality image from camera to computer. Much the same for those writing using a computer. Not having to use a pen does not make the construction of prose any easier, rather it just makes it simpler for those unskilled with a pen to put words onto a digital document. Ease of transfer bears no relation to quality of product.

Indeed most skilled professional photographers will be able to advise that whilst digital capture has its many advantages, the act of photography remains the same as it was for Fox Talbot in the 19th Century and that processing of the images now requires new skills such as those required to use complicated software such as Adobe Photoshop competently.

Increasingly those wishing to use created works are putting huge pressure on creators to supply at a lower rate and to surrender rights. Many lone-trader creators are put under extreme pressure, often under financial threat, or worse.

The Consultation document asked a number of questions:

Q. Does the current system provide the right balance between commercial certainty and the rights of creators and creative artist? Are creative artists sufficiently rewarded/protected through their existing rights?

Creators, photographers in particular are finding themselves being squeezed very hard by those who wish to license and use their imagery. With respect to newspapers, the rates paid to newspapers remained more or less static in most cases from 1994, the photographers still supplying that industry are now finding that not only are less images being used, and being used smaller, but that those newspaper clients are simply imposing pay cuts. Individuals and small businesses find themselves in a position of making a stand and risking losing work in a shrinking market, or acquiescing to these imposed cuts and finding themselves under even more difficulties which leads many to leave the industry.

In addition to imposing pay cuts, large publishing companies are imposing other conditions such as loss of moral rights to work, compulsory assignation of all rights, compulsory syndication (stopping the creator from selling the work on to other clients) yet not selling the work on losing the creator much needed revenue to no advantage to the publisher.

Large publishing concerns are often, more so now than ever before, treating creators with little or no regard, and as cheap disposable commodities. Photographers in particular feel vulnerable, powerless, and certainly not protected, and experience their rights, even those guaranteed by law, abused.

Q. Is our current system too complex, in particular in relation to the licensing of rights, rights clearance and copyright exceptions? Does the legal enforcement framework work in the digital age?

The current system of licensing work for a particular use, for a set period of time, for an agreed fee, is simple and easy to work. The problems occur because as already described large companies use their industrial muscle to take what they want, and even what they don't need, without any regard to the creator. Large publishing concerns have been observed to rewrite licensing agreements to suit themselves. Creators find it difficult to assert many of their rights in law, and even when they do all that they can get is what they should have got in the first place, meaning there is little discouragement to stop large organisations taking advantage of the small creator, as they know that the worst punishment will be to pay what they should have paid originally. Law enforcement with regard to copyright is insufficient to protect the creator.

A major difficulty that is not often apparent is that simple though the law actually is, many people remain ignorant of it. Copyright is misunderstood by the youngest in society and the oldest.

As most of society at some time or other will become creators at some point it would seem commonsense to ensure that all pupils at all schools are taught the basics of copyright, much as they are taught about plagiarism, and basis right and wrong

Q. Does the current copyright system provide the right incentives to sustain investment and support creativity? Is this true for both creative artists and

commercial rights holders? Is this true for physical and online exploitation? Are those who gain value from content paying for it (on fair and reasonable terms)?

Copyright should work for the creator, but more and more users of imagery are either simply ignoring the rights of creators or insisting on talking more and more rights from those creators, to such a point where copyright protection becomes non-existent, or at least unenforceable. Fees, especially in publishing are being forced down by publishers, even when the publisher itself is extremely successful and producing healthy or better profits.

Exploitation is not just down to conventional publishers. Whilst many publishers want to enter the Internet market and produce publications online for which they need content, creators find themselves increasingly expected to supply such material free of charge or at such a low rate that the production of such material is uneconomic. More and more publishers feel pressured to produce online products, but seem unable (and in many cases unwilling) to pay for the content required to produce these new online products. We are constantly told that the Internet is the future for publishing, but publishing seems to have great difficulty (and no desire in many cases) in funding this great new future.

Internet users do seem reticent to pay for content it is true, which means that much of what is available seems to be comment, opinion or blatant touting of products. Little that is available for free on the Internet can be regarded as reliable. Is this what society really wants?

Q. What action, if any, is needed to address issues related to authentication? In considering the rights of creative artists and other rights holders is there a case for differentiation? If so, how might we avoid introducing a further complication in an already complicated world?

First and most importantly every creator should have the unalienable right to be recognized as the author of his or her own work. There would appear to be no justification for differentiating between different types of creator, or for instance between a blogger and the lead writer of a major newspaper. Every creator should have the right to be recognized as the author of his or her own work. There is nothing complicated about this, nor is it difficult to understand.

In the case of photography it would help hugely if the removal of identifying information were an offence. In this day of digital imaging it is very easy to label digitally using Photo metadata; that is the information that is stored digitally within the photograph that identifies not only the particulars of the image but those of the creator.

IPTC (International Press Telecommunications Data Council) data is the recognized way creator information is attached or contained within digital images. It is easy to apply, but regrettably just as easy to remove, or worse replace with alternative data using the appropriate software (such as Adobe Photoshop).

EXIF Data (Exchangeable Image File) is similar to IPTC but it is produced by the camera and records the technical data of the image and often the camera users name etc. Like IPTC data it is both extremely valuable to the creator and image user alike, but also easily removed.

Retaining IPTC and EXIF data is as important to a photographic creator as the author's title is to a book writer, maybe more so as today's digital images are so easily replicated and distributed.

Under normal legal circumstances there is absolutely reason why IPTC or EXIF data need to be removed from any image, and usually this removal is either accidental through ignorance, or deliberate with intent. It is difficult to understand why any party would remove existing

metadata unless some sort of deception was intended. Retention of Photo Metadata, (and other creator information), should be protected in law

Conclusions

- The establishment of the principle of absolute right to moral recognitions will assist all creators, especially those in media prone to piracy. It should also not be left to the creator to have to police such matters. All creators should be given similar rights.
- Moral rights should also be restored to employed creators, and the means to enforce these rights simply and affordably made available.
- Enforcement of rights that currently exist, and the bolstering of copyright law including giving the absolute right for moral recognition in all media including newspapers and magazines will go a long way to making copyright better understood.
- Teaching copyright in schools is simple and would go a long way to restoring the place of creator's rights within society.
- Providing the back up of easy enforcement of Copyright law, that is easily accessible, (and affordable), to the lone trader, as well as the multi-national is essential. In addition it has to be made commercially non-viable to steal.

None of this is complicated, nor need it be made complicated.

It must be remembered that if creators cannot make their creativity pay, society will lose so much.

We have already seen the damage done to our society by the loss of manufacturing industry in the UK, purely as the result of chasing extra profit.

Restore the rights of the creator, and make it possible for creators to enforce those rights, and improve society for all.

3673 words

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Samples of Contracts etc., that assume or take rights for no reward, or without agreement (and one contract showing how the needs of both parties can be met without one party taking advantage of the other)

1. London Olympics Photographers Agreement.

See section 6 - Grant of rights. Not only are all rights demanded in the images but also the photographer is expected to irrevocably and unconditionally agree not to assert moral rights.

2. Bauer Publishing Commission Agreement.

Bauer already highlight the important terms.

"Key Terms

We draw your attention to the following key terms of this agreement which affect you:

(i) paragraph 4 requires you to transfer all intellectual property rights in the Commissioned Works to us and to waive all moral rights that you may have in the Commissioned Works; and

(ii) paragraph 8 requires you to represent and warrant that (a) you are able to enter into this agreement and grant the rights you have granted (b) the Commissioned Works are all your original work or you have been granted all rights (including intellectual property rights) in the Commissioned Works by third parties and you have the power to transfer all intellectual property rights in the Commissioned Works to us (c) there are no restrictions on how the Commissioned Works may be published or exploited (d) nothing in the Commissioned Works will be obscene, indecent, racist, defamatory or will breach any law and (e) the facts stated in the Commissioned Works are true."

3. National Magazines

The publisher makes no bones about demanding all rights.

RIGHTS.

"ALL RIGHTS" means National Magazine acquires the entire worldwide copyright in the material and all other intellectual property rights in the material for all uses including but not limited to all rights to use the material in any and all electronic and digital formats and for use on the Internet Magazine web sites and any future medium for the full period of copyright therein and all renewals and extensions thereof and all rights of a like nature wherever subsisting. In the respect of Photography this includes all images shot during the commissioned assignment and if requested all images must be supplied

4. EMAP Active

See 4. Irrevocably and unconditionally assign copyright, and waive moral rights.

See 8. At EMAPs discretion they might decide not to pay.

See 9. EMAP reserve the right to cancel at any time and not make any payment

5. Associated Newspapers

Exclusive right and syndication grab

6. Telegraph media group

Compulsory self billing, irrevocable assigned license for no extra fee, compulsory syndication.

7. TSL Education photography contract

Enforced 2 year licence (free re-use)

8. Guardian Newspapers Ltd ("GNL"),

Compulsory syndication, specified fee subsequent uses.

9. Robbie Williams (Rock singer)

Artist exercising editorial control, rights grab, rights waiver including moral rights.

10. My Chemical Romance (Rock band)

Compulsory work for hire Contract, rights grab, photographer loses control.

11. Ryan Adams & the Cardinals (Rock band)

Artist exercising editorial control, rights grab, rights waiver including moral rights.

12. Beastie Boys (Rock band)

Artist exercising editorial control, rights grab, rights waiver including moral rights.

13. Coldplay (Rock band)

Artist exercising editorial control, rights grab, rights waiver including moral rights.

14. Foo Fighters (Rock band)

Artist exercising editorial control, rights grab, rights waiver including moral rights.

15. Jimmy Eat the World (Rock band)

Artist exercising editorial control, rights grab, rights waiver including moral rights.

16. **Lenny Kravitz (Rock band)**
Artist exercising editorial control, rights grab, rights waiver including moral rights.
17. **Steven Seagall (Rock band)**
Artist exercising editorial control, rights grab, rights waiver including moral rights.
18. **The Mars Volta (Rock band)**
Artist exercising editorial control, rights grab, rights waiver including moral rights.
19. **Stevie Wonder (Rock singer)**
Artist exercising editorial control, rights grab, rights waiver including moral rights.
20. **Future Publishing Contract**
The publisher makes no bones about demanding all rights.
21. **Suggested Photographer-artist Agreement**
This is an agreement that could replace those being imposed by bands on photographers, protecting the bands without exploiting photographers

ⁱ <http://www.thefreedictionary.com/assign>

ⁱⁱ <http://www.thefreedictionary.com/license>

ⁱⁱⁱ <http://creativecommons.org/about/licenses/>