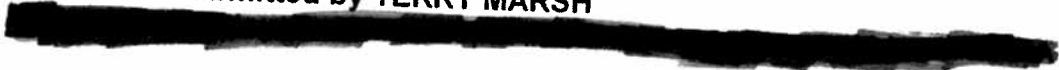


MARSH, TERRY

The Government's Review of Copyright Legislation

Comments submitted by TERRY MARSH



Introduction

I would like to take this opportunity to comment in the current debate on copyright issues, including the content of the consultation document.

I work as a self-employed freelance writer and photographer specialising in the outdoors and travel. Much of my work is in print, and in the public domain. I continue in this employment, and so have a keen interest in the protection of my rights. My comments closely follow those of colleague writers and photographers, but I have included some additional issues for your consideration.

In my response, I use the term 'creator' to mean all people creating works, and 'publisher' to indicating users of my works, whether as publications on paper, to the internet, or any other use (including competitions and similar uses; there is no distinction here between commercial or other uses).

Background

Under current UK law, creators possess two rights: copyright and moral rights, inherently owned from the point of creation of the work. While copyright can be transferred to other parties, Moral Rights cannot. The inception of these rights was an important part of the Copyright, Designs and Patents Act 1988 and while they are incredibly significant, the intent of that act (and subsequent revisions) has been in many instances circumvented by publishers, either accidentally or deliberately, and by members of the public (who nevertheless become publishers when they use the materials in question).

The latter often misuse copyright material due to a lack of knowledge of the law, in the belief that they are acting responsibly and within the law, but equally other members of the public do so in full knowledge that they are breaking copyright law and simply do not care. My experience indicates that commercial publishers are little different, sometimes cynically using copyright materials in breach of the law in the knowledge that they are unlikely to be caught and, if they are, the consequences will be negligible.

Further, in recent years the topic of orphan works has frequently arisen – the problem facing institutions in being able to properly archive copyright materials where no owner is known (and thus copying the material for posterity is potentially illegal), but this has spilled into commercial areas where it is evident that commercial concerns have a great deal to gain from the legal use of Orphan Works without challenge. On its own, the subject of orphan works is utterly invasive to the concept of copyright material being a valuable

resource for its owner. At the same time, I recognise that resolving the issues surrounding orphan works requires direct action.

Problems

1. A lack of knowledge of copyright law on the part of the public
2. A willingness to ignore those laws by both the public and commercial concerns – publish and be damned, here in the sense of 'If caught, so what?'
3. The difficulty that creators face in knowing what uses their copyright material has been put to
4. The difficulty in enforcing the law when transgressions are found
5. The difficulty in ensuring that orphan works, perhaps created intentionally by the unscrupulous, are properly dealt with
6. Problems faced when publishers and others attempt to remove rights from creators by unfair contract (or other documented) stipulations. In this particular regard there is a frequent attempt to persuade copyright creators to waive their moral rights in a work. Of course, it is not legally possible to do so, but some publishers insist on this.

Solutions

None of these problems is insurmountable; nor are the principles behind copyright and moral rights difficult to understand. They do require education, however; both problems and plain English explanations of how these should be dealt with should be part of an education campaign both in schools (where if pupils do not understand the outcome of their illegal actions, neither will the next generation) and to target adults.

The right to be identified as the creator of the work is enshrined in copyright law, but there are exceptions such as the right to a credit in periodicals. This omission immediately creates orphan works for the future to deal with, where no copyright owner is identified. In years to come, such occurrences will become more and more problematic for all concerned – it is no answer to simply classify these images as orphan works and permit their re-use without any recompense to their legal owner. Any revision to the law should encompass this problem and force proper identification of published works.

This would have an immediate effect if the principle is followed through. At present, it is possible to embed copyright and owner information in digital files (the commonest form of transmission of photographs and other work). It is already illegal to *knowingly* remove this information from a file, thus creating an orphan work, under the Copyright and Related Rights Regulations 2003;

but proving that someone has knowingly removed data is impossible in the real world.

What is required in law is that the avoidance of identifying the copyright holder under their moral rights is removed from periodicals, thus decreasing the creation of orphans. And the use of a digital file which does not bear any identifying content should become illegal, thus removing any advantage in deliberately removing the metadata and instead forcing publishers to trace owners prior to use.

The situation that currently exists that permits publishers to use photographs with impunity, let alone via any that are classified as orphans (which may or may not become law), must be addressed.

Of course, there are some photographs that are genuine orphans, such as very old works that may nevertheless still be in copyright, perhaps old photographs that have a value to the community and should be made use of. The only viable approach is to set up an independent clearing house where a publisher must show what searches have been made to identify the copyright owner, and then be issued permission for use *upon payment of the publication fee that would have been made at current commercial rates if the copyright owner had been found*. This would be held by the house and no doubt would support its operation, to be paid to the copyright owner if in the future this person or institution becomes known.

Neither of these principles – of further enshrining moral rights and ensuring that orphans are properly dealt with – is impossible. Far from it; they are enshrined in German and Canadian law, respectively. Notably, both factors were mentioned in the Gowers review of 2006, though typically for that text there was not a single consideration of photographs. Even in the current consultation document the phrase appears that:

'Typically creators assign their rights to commercial rights holders in return for a fee or a percentage of ongoing profits.'

Which indicates in itself a misunderstanding of how creators deal with their works – not by assigning their rights to commercial concerns, but by licensing the use of their works, typically for specified uses and periods of time. Such practices are common and easily understood by all concerned, forming a contract between the parties. If agreement is not reached over use or payment, no licence is issued.

However, under current law if a publisher uses a work without payment or licence, it is left to the creator to stumble across this use and take up the matter with the publisher. Too often, 'fair use' is screamed by those on the web, even when utterly inappropriate, and the best that often occurs, even in commercial situations, is that the offending image is removed without further recourse even though use has already been made of the image without payment. For printed material, the best that happens is that eventually, after much effort, payment is made – at the same rate that would have been paid if

a licence had been properly negotiated. Some unscrupulous users rely on this fact – there is utterly no incentive for ‘fair play’ here; publish and if caught pay what would have been the original fee works to the publishers’ entire advantage.

Here, clearly, something more is needed as a means of redress. Almost monthly, I locate such breaches of my copyright. The work involved in bringing a complaint to a conclusion outweighs, too often, the recompense. There needs to be enforcement of stronger laws here and the ability to charge a factor of the original fee when copyright has been breached in this manner, perhaps three or five times, as a means of dissuading those who would take this course. At present, taking an action through the court is too involved and expensive for any but major offences.

Finally, while all such difficulties can be dealt with by uncomplicated amendments to existing law and by education, one problem remains: that the 1988 Act is currently frequently circumvented to great effect, and a similar occurrence will no doubt continue with any future Act.

When copyright and moral rights became further enshrined in law for the creator in 1988, many users began including clauses in contracts requiring assignment of copyright. This continues unabated and increasingly today; within the trade it is known as a ‘copyright grab’ and extends through competition rules to publications. To paraphrase such clauses: ‘by sending us your image you assign us perpetual rights to do with it whatever we wish throughout the universe, but if a legal problem arises it is your fault and you will be sued’. Such meanings are often buried deep in the small print and are difficult to understand by laymen, but you do not need to look far to find examples. The BBC operates such terms, and the Bill of Rights proposed by Pro-Imaging at: www.pro-imaging.org/content/view/177/156 offers many more instances.

In these days of increasing financial pressures on creative people, such clauses removing rights enshrined in law for no recompense or benefit should become illegal.

Furthermore, it is strongly advised that it should become an offence to require the waiving of moral rights in a work, and to penalise publishers who decline to use a creators works if they refuse to do so.

Summary

1. The public and publishers should see a campaign of education relating to the law of copyright
2. The problem of continued creation of orphan works should be tackled by making this more difficult, by making it plainly illegal to remove metadata from digital files. Further, any publication must be accompanied with a credit to the creator under his or her moral rights

3. The problem of use of orphan works must be tackled fairly with respect to their creators and owners, not merely using some mechanism to permit their publication while granting immunity in law to the publisher. Publication of any orphan work should be made illegal, unless this use is logged and a fee paid and held for future recompense of the owner
3. Removing rights inherently granted under the law, by the use of clauses in contracts without recompense, should be prevented
4. In instances of misuse of copyright material, the courts should have a clear route to enforce the law and a legal penalty should be applied for flagrant breaches such as publication without payment for use

I am particularly indebted to Chris Howes, whose own submissions on this issue I have substantially subsumed in the above with his consent.

Terry Marsh
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