

GOVERNMENT COPYRIGHT REVIEW

RESPONSE BY THE
OUTDOOR WRITERS AND
PHOTOGRAPHERS GUILD

ABSTRACT

The Outdoor Writers and Photographers Guild is an association of professionals whose livelihood depends on copyright. Members of the Guild have particular expertise in the areas of photography and writing, and this response considers the effect of copyright on these often overlooked areas.

This response explains the vital importance of copyright to our members. It sets out areas in which we feel the existing Act is fundamentally sound and others where we feel it needs to be strengthened to meet the challenges of the digital age. In particular it stresses the need for better enforcement of existing rights, a move towards an EU-style inalienable copyright that cannot be removed from the creator, and a straightforward and simple process (that is accessible to the typically sole-trading creator) to obtain redress when copyright is breached.

An itemised summary of specific recommendations is set out at the end of the document.

OUTDOOR WRITERS AND PHOTOGRAPHERS GUILD (OWPG)

The OWPG is a group of over 150 of the UK's top writers and photographers professionally engaged in writing and creating images of sustainable activities in the outdoors. The membership is largely made up of individual freelance workers.

As such our members have a great deal at stake professionally in any review of the Copyright Act, and therefore we feel it is essential to respond to the Government Review of Copyright.

The Secretary
Outdoor Writers and Photographers Guild
PO Box 520
BAMBER BRIDGE
Lancashire PR5 8LF

CONTENTS

1. Recognising creative input	5
2. Access to works	6
3. Does the legal enforcement framework work in the digital age?	8
4. Incentivising investment and creativity	9
5. Authenticating and protecting works	10
6. Orphan works	12
7. Exploitation of amateurs/general public	12
8. Summary	14

A: THE ISSUES

1. RECOGNISING CREATIVE INPUT

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?

1.1. The 1988 Copyright Act was a major step forward in protecting the rights and livelihoods of those who create copyright works of all descriptions, and a particular feature of this Act was the bringing in line of the terms that apply to photographic works with those that apply to other forms of creative copyrighted works. However, the 1988 Act is not without its flaws, particularly these days with regard to the ability of copyright holders to enforce its provisions and gain reasonable redress when copyright is breached.

1.2. So while the current Act has a lot of good points in it, we feel that it does not provide the right balance between commercial certainty and the rights of the creative artist – especially where the ability of the creator to obtain financial reward is concerned. This is because in all too many cases it is largely unenforceable for the average creator – whether they are photographer, writer or other form of creative artist. Please see enforcement section below for more information on the issue of enforcement.

1.3. An additional issue that needs to be highlighted here – the Issues paper¹ states “Typically creators assign their rights to commercial rights holders in return for a fee or a percentage of ongoing profits.” This is unclear as it fails to distinguish between All Rights and specific limited rights. It must be understood that by tradition, and in line with the 1988 Act, writers and particularly photographers generally assign or license rights for specific time-limited uses (e.g. First British Serial Rights). Creators are now coming under increasing pressure from commercial rights users to assign All Rights but without any concomitant increase in remuneration.

1.4. There is also a great deal of misuse of copyrighted material in the digital age – in the words of one of our members: “How easy it is for our photographs to be lifted from the web and misused – how easy it is for our material [words] to be used without our knowledge.”

1.5. We believe that it remains essential that there is also a system (such as the present one) that enables major acts of piracy (for example bootleg counterfeiting chains) to be sued in the civil courts, although this remedy is only available to those who can afford the cost and time involved.

¹ IPO Copyright Issues Paper – <http://www.ipo.gov.uk/c-policy-consultation.pdf>.

2. ACCESS TO WORKS

Q. Is our current system too complex, in particular in relation to the licensing of rights, rights clearance and copyright exceptions?

2.1. Although the system is complex in detail, the underlying principles enshrined in the 1988 Act are both simple and fair. However, it seems that there is a general lack of knowledge and understanding of these principles among both the general public and business users of creative content. There is probably a strong need for much wider education on the subject of copyright – without requiring users to read the full legalistic text of the Act. It should be clarified so that everyone, especially those that currently use creative works without regard to the Act, understands what it is about. Perhaps to achieve this, it would be of benefit to all if plain English leaflets summarising the Act in relation to “Copyright for images”, “Copyright for words”, “Copyright for sound recordings” etc were published as a set of general guidelines.

2.2. It should also be remembered that there is a reason for complexity – particularly with regard to licensing of images. Simply put, to recover all the costs of acquiring the image in the first place would normally be prohibitively expensive for any one publisher to stand. Therefore, in an effort to reduce the costs to the publisher, rights management models were set up so that a publisher negotiates and pays for a licence to cover only those rights that they actually need, leaving the creator free to licence the work to other publishers and thereby splitting the cost of production over several purchasers. This applies even where the first publisher was the commissioner of the image – a fact enshrined in the 1988 Copyright Act, which states that the creator holds the copyright, not the commissioner.

2.3. It is a sad fact that in this day and age, the vast majority of business and private publishers of images are unaware of this, and think that if they ask someone to take images or write words or design a logo for them they automatically own the copyright. This situation isn’t helped by the explosion in the number of companies soliciting images, with assignment of rights as a condition. Notable examples include competitions (sometimes high profile ones e.g. Take A View²), broadcasters requesting images from the general public for inclusion in their programs (e.g. the BBC³), newspaper websites (e.g. the Mail⁴), blogging sites (e.g. TravelPod⁵) and social networking sites (e.g.

² Take a view T&Cs - <http://www.take-a-view.co.uk/termsandconditions.htm> (see item 16 for free use by Tourist Boards).

³ BBC T&Cs - <http://www.bbc.co.uk/terms/%234> (see point 6 – “free of charge” use by BBC).

⁴ The Mail T&C’s – ‘Material Submitted by You’ - <http://www.dailymail.co.uk/home/terms.html> “By submitting any material to Associated, you automatically grant Associated the **royalty-free, perpetual, irrevocable, exclusive right and license** ... you also **waive all your moral rights** in such materials”.

Facebook⁶). This is in addition to the numerous companies that still (and perhaps increasingly) try and take copyright from any photographer commissioned by them, in return for simply getting the commission – a hard argument to fight successfully when the photographer depends on the commission for their livelihood!

2.4. We would also like to see some education of the general public that IPTC data (metadata) is the normal place to find copyright information for digital images, and it should be looked for before use. Many image browsing programs have an ability to do this – it would be useful if the basic computer operating systems such as Windows, Mac OS and the various Unix flavours also had this capability built in. It is staggering how few people, apart from professional photographers, are aware of this, and this simple piece of education could save many images from being misused unwittingly. However, it must also be remembered that even in this digital age, copyright theft is not confined to digital use alone.

2.5. One thing that is simple, and that the current Act handles very well, is the automatic existence of copyright on creation of a work, with no requirement for copyright registration. It is invaluable that this right exists in the UK regardless of any symbol or marking of the work in question. This is something that we would very much like to retain in any revised Act. A revised Act could be usefully strengthened by applying the same principle of automatic existence to moral rights such as the right for the author to be credited.

2.6. However, one simplification that could be introduced to the Act is the right to free personal copying for education and research – even if this may lead indirectly to commercial gain (e.g. a travel writer looking up information on a place they intend to visit before visiting to later write their own article; a photography student learning information on a new technique or style). Needless to say, reproduction of any such ‘research’ material within an end published work would have moved beyond research and would therefore no longer be covered by the provisions for permissible copying. This would help to address the situation highlighted in the issues paper where “the existing system can often be seen as too restrictive by users – preventing use of works for education, enjoyment and follow-on creativity”.

⁵ Travelpod T&Cs (http://www.travelpod.com/cgi-bin/help.pl?tweb_helpID=termsofuse – see item 7 paragraph 2_.

⁶ Facebook T&Cs (<http://www.facebook.com/terms.php?ref=pf-> “you automatically grant, and you represent and warrant that you have the right to grant, to the Company an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide licence (with the right to sub-licence) to use, copy, publicly perform, publicly display, reformat, translate, excerpt (in whole or in part) and distribute such User Content for **any purpose, commercial, advertising, or otherwise**, on or in connection with the Site or the promotion thereof, to prepare derivative works of, or incorporate into other works, such User Content, and **to grant and authorise sublicences of the foregoing.**”).

3. DOES THE LEGAL ENFORCEMENT FRAMEWORK WORK IN THE DIGITAL AGE?

3.1. Unfortunately, not in the slightest. There is a widespread popular belief that “it’s on the internet, therefore it’s free for me to do whatever I like with it”. Disturbingly, that view is not limited to private individuals, but is also apparent those using images and words to aid their business.

3.2. We wish to suggest the concept of setting out rights of redress for creative people when their material is misused. As things currently stand, if anyone is caught with a copyright breach they will, eventually and at worst, have to pay the same fee as would have originally been paid. Clearly, it is to the advantage of the unscrupulous to attempt to get away with misuse.

3.3. As things currently stand, lawyers are extraordinarily reluctant to take on all but the largest of copyright cases, as the theft of words or pictures is, in legal terms, a much more complicated matter than the theft of any other property. This is doubly so when it comes to online images – where even the penalties are much lower.

3.4. There used to be a means of enforcing a multiple of the normal contract rate for unauthorised use. This at least had some punitive impact on those using material without authority, as well as compensating slightly for undetected breaches of copyright are undetected. However, even this is no longer enforced. The result is a “Thieves’ Charter” whereby it is in the financial interests of a publisher not to licence an image or words.

3.5. It should become a financially punitive offence (with the proceeds going to the copyright holder) to publish an image without permission – with sufficient penalty that acts as a strong deterrent to misuse and provides a straightforward means of redress to those whose works are misused.

3.6. Redress under this system should be claimable in the Small Claims Court, or similarly inexpensive tribunal. This would mean that anyone misusing a creative author’s work would face a substantially higher bill than if negotiations and an agreement had taken place properly in advance for legal use, and the burden on the creator in getting such payment is not overly arduous, and could act in a very similar way to that which they are already used to for pursuing non-payers of commissioned work.

3.7. The ease with which it is possible to remove original creator information from creative works in the digital arena also presents a major problem – whether this be simple copying and pasting of just the words (rather than including the creators’ copyright details) from a published article (online or otherwise) or the removal of creators’ metadata from images. To add to this, many software programs routinely strip the metadata from images – sometimes without the awareness of the person using the software (e.g. ‘Save

for Web' in Photoshop, or some email clients that can strip all metadata when a message is sent with an image).

3.8. There is a real need to make it an offence to remove such data (whether or not it was intentional – as intention is nigh on impossible to prove in practice) and especially to make it illegal for software to strip creators' details from creative works. Use of software that strips metadata should then also become illegal and this should in turn force software suppliers to provide software that does not add to the problem.

3.9. In practice making it illegal to publish creative content without the original creator's details is perhaps easier to enforce, but this does not mean that the law should not be strengthened on removal of metadata. A possible suggestion here is it should become illegal to publish any creative content that no longer has the original creator's details without registration, payment and a licence from a central clearing house (like the Canadian system of Orphan Works⁷ – see Orphans Works section later on in this document).

3.10. One further area that is of relevance to professional photographers (rather than other creators) is that it is becoming increasingly impossible to supply private individuals with small digital copies of images (that they feature in or were present at, for example) without running a high risk of problems resulting from the individual not having a sufficient understanding of copyright and those images then unintentionally ending up in unscrupulous hands. This was less of an issue previously (though not without some problems), when prints were the commonly accepted token of thanks, but these days the individual has their own images on computer and online, and wants the same options for images obtained from other photographers – whether they are professional or amateur.

4. INCENTIVISING INVESTMENT AND CREATIVITY

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)?

4.1. Currently, no. It is lacking in teeth to enforce the rights of creators, and there is a major flaw in the Act that too many companies are exploiting – the ability of a commissioner to require creative producers to contractually assign the copyright to the commissioner if they wish to be given the work. A good example of this is the former Wales Tourist Board (WTB), who operated such a

⁷ Canadian system of Orphan works (<http://www.ipso.gov.uk/ctribunalreview.pdf> – see p59).

scheme, despite the unsuccessful attempts of photographers to negotiate more reasonable terms. When the WTB was merged into the Welsh Assembly Government (WAG), the WAG adopted this grossly unfair (though not currently illegal) practice through its departments. The net results are that: the WAG may currently pay over the odds for their images (they do not need all the rights that they insist on, but as they insist, they should pay for all of them); the best and most principled photographers refuse to work for them under such terms (losing them valuable creative talent and expertise); and the photographers in question lose both the ability to work on reasonable terms and a potentially lucrative source of income, which may in turn jeopardise their ability to remain in business. The WAG – and other organisations adopting these practices – may perhaps argue that they have a ready supply of amateurs willing to agree to such terms, but this approach cannot sustain a professional industry – it can lead only to a rapid turnover of hopeful amateurs selling their skills well below a commercially viable value.

4.2. A revised Act should look carefully at Copyright in Germany and France where the creative author has an inalienable right to copyright. In particular, in Germany the author also has an inalienable right to receive recompense in direct proportion to the level of licence granted to any publisher. A revised Act in the UK would be usefully brought more in line with EU legislation by adopting such ideas of inalienable copyright and economic right, and would give much better protection to the typical creative author. Failing this, a revised Act should at least make it illegal to require a creative author to assign their copyright as a condition for getting the work, except under exceptional circumstances (e.g. where national security is at stake). This would make it much harder for numerous organisations to effectively bypass the Act and take unfair possession of copyright.

5. AUTHENTICATING AND PROTECTING WORKS

5.1. In the digital age, identical or near perfect copies of original works are easy to make. Users need to be able to identify genuine works and locate the owner of those works while creators must be able to distinguish their works from the works of others. Is there more that should be done to help users and creators here?

5.2. The copyright system does not require registration. Nor does it require that works are of a certain quality or are commercial in nature. In the online environment content is easily created, shared and disseminated. A personal blog attracts the same protection as the works of a best selling author.

5.3. Does this approach continue to provide the best framework for copyright in the digital age? Emphatically, yes.

5.4. Regardless of what was produced, it still involves a significant act of effort from the creator. For those who want to make their work freely available without payment there are options such as explicitly saying that its free for use, or using licences such as Creative Commons to give certain rights but keep others. A personal blog or image collection is still a creative work – it may be that the best selling author or award-winning photographer is just getting started here, it may be purely non-commercial, but that should not mean that it should become free for anyone to use in any manner they feel like. There are already numerous examples of images and words being used “for free” as they were deemed to be “amateur”. Whilst this is technically against the provisions of current copyright legislation, there have been few, if any, challenges to this in law (due, perhaps, to the complexity of proving intent and cost of bringing such a case). This again highlights the need to address the issue of the unfair transfer of copyright away from the author in all its manifestations – from competitions to commissioned work – and enforcement of breaches of the Act. A European style of inalienable copyright and economic right that exists from the moment of creation of the work would address this.

5.5. Further, compulsory copyright registration is to be avoided at all costs for the following reasons:

- It would be prohibitively expensive (e.g. for photographers who produce thousands or tens of thousands of images a year it is unreasonable to be expected to pay a fee to register every image when only a small percentage actually get sold, but all have to be displayed and hence all need protection).
- It would place an impossibly time-consuming burden on creators, and as such would stifle creativity and professional production of creative works.
- It would open the floodgates for free and unauthorised use of creative works and strengthen the current “Thieves’ Charter”, by implicitly allowing anything that was not registered (and for the reasons above, most would not be) to be used free of any risk of penalty.

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?

5.6. Please see additional Orphan Works section below for points regarding the suggestion to make it illegal to remove creator identity from a creative work – which covers this question adequately. The system suggested below should also simplify things rather than adding further complications to an already complicated world.

B: OTHER ISSUES

6. ORPHAN WORKS

6.1. This is an issue of great seriousness to all creative authors (of words, pictures or any other creative content), and is intimately tied in with any review of copyright. The Gowers Report⁸ appears to indicate an intention by the Government to make such works freely available to anyone who wishes to use them – for whatever purpose. This is wholly unacceptable to us. Given the high percentage of images which have had their creator’s data stripped from them (thus making them *de facto* orphan works), and the ease with which words can be separated from their original copyright statement, this would result in unscrupulous publishers having a “free ride” to use creative content with no payment or penalty whatsoever.

6.2. We strongly urge that any system relating to Orphan Works should follow similar lines to the Canadian model where the onus is on the publisher to make a diligent search for the owner. The Canadian system also requires that, if no owner can be found, the would-be publisher must then register the work with the central clearing house and pay an appropriate fee, which is then held in trust for the rightful owner to claim when they become aware of the “orphan”.

6.3. To avoid the issue of orphan works occurring in the first place, we would like to see the current “proof of intent” removed from the law as it stands on metadata (or other copyright/creator identification) removal. Whilst the law should be of use as it stands, in practice it is impossible to prove “intent” and as such “rights thieves” currently have free rein.

6.4. In its place, we would like this to become a simple issue of being unable to publish a copyright work without the original creator information unless an orphan works licence has been granted by the central clearing house – and only under a system similar to the Canadian system (where there is both good redress for the owner of the creation to receive payment for the use made and a disincentive to publishers to “create” orphans to reduce their costs – a currently all too common practice).

7. EXPLOITATION OF AMATEURS/GENERAL PUBLIC

7.1. As has been mentioned in the Issues Paper, increasingly the general public are becoming creators rather than just users of creative content. There is

⁸ Gowers Review (http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf) and IPO summary of Gowers (<http://www.ipa.gov.uk/policy-issues-gowers.htm>).

an increasing trend, of massive concern to professional photographers and writers, to exploit the naïve majority of such creators, with competitions that require assignment of copyright – or other such rights that amount to the same thing – as part of the entry requirements. Many of these are little more than harvesting operations for building a commercial content library (whether words, images, sounds or other forms of creative content) where the creator sacrifices all their rights. All too typically, one winner, or a handful of winners, receive prize(s) whose value may not reflect the potential commercial value of their work while other entrants also sacrifice their rights for no reward whatsoever. In many cases entrants even pay for this “privilege”!

7.2. Such assignment of copyright clauses should be made illegal in competitions, both to protect the rights of the creator, and also to prevent a situation where naïve entrants undermine the professional’s ability to earn revenue from their creations by providing free works.

7.3. For the same reasons, it should also become illegal to make use of entries for any commercial use, except in direct connection with the competition itself. Again a European style model of inalienable copyright and economic right would go a long way to preventing this.

C: SUMMARY

8.1. An updated Copyright Act would benefit from taking into account the following elements, which would strengthen the rights of creators to reward from their efforts and prevent them suffering unduly from breaches of the Act:

- A simple system (probably through the Small Claims Court) to receive the greater of a multiple (e.g. 5x) of the normal licence fee or fixed penalty (e.g. £500) for unauthorised publication of a copyright work.
- A European style inalienable right of copyright and economic right that cannot be parted from the creative author, but instead provides a way to licence the works to those who wish to publish them.
- A clause that makes it illegal to publish any creative work that is lacking details of its owner.
- A clause that makes it illegal to remove metadata or other data identifying the creative author of a work – without the need to prove that this was intentional.
- A Canadian-style system of Orphan Works rights clearance and payment that puts the onus on the publisher to register a work as orphan and pay a reasonable fee (decided by creative industry producers, not purchasers) that is held in trust for the rightful owner.
- Assignment of rights clauses in competitions and commissions to be made illegal.
- Increasing the extent to which moral rights automatically attach to a copyright work, rather than having to explicitly assert them.
- Allowing broad educational and research use without penalty under the Act.

8.2. It is important that the following elements of the current Act should be retained:

- Copyright which automatically comes into force on creation of the work.
- Copyright which automatically exists, regardless of any marking or statement to draw attention to this.
- No requirement for the creator to register any creative work to obtain protection under the Act.

- The court system to deal with major acts of piracy.

8.3. With these changes, the Outdoor Writers and Photographers Guild believe that we would have a truly useful Copyright Act, fit for the 21st century.

OTHER REFERENCES

1. ABCD of Copyright (EPUK Edition) –
http://www.epuk.org/files/ABCD_of_copyright.pdf
2. UK IPO website - <http://www.ipo.gov.uk/pro-types/pro-copy.htm>
3. Green Report - <http://www.ipo.gov.uk/pro-types/pro-copy/c-policy/c-policy-eupaper.htm>
4. Discussion among members of OWPG