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The impact of the Hargreaves Review on photographers in the digital age.

Preface

This article revisits some of the questions raised in my undergraduate dissertation in 2005 looking at Online Digital Image Copyright and the adequacy of then current legislation to protect the Intellectual Property Rights of photographers. This article is intended to be an initial exploration of developments since 2005 and the possible impacts on photographers in a digital age.

In 2010 the Prime Minister, David Cameron (cited Hargreaves, 2011, pg 1) commissioned a review of UK Intellectual Property (IP) framework to assess whether or not it was sufficient to promote innovation and growth in the UK economy. Technology and digitisation have undoubtedly created challenges for creators and publishers of IP. The challenges posed by digitisation have not only just been recognised, with authors such as Pratt (2001) and Wayner (1997) exploring the dilemma of regulating digital IP.

Over the last 10 years we have seen many developments in the way that commercial businesses try to protect their digital IP with Digital Rights Management (DRM) solutions, copy protection and in some cases litigation. The review that Hargreaves (2011) was commissioned to undertake was a sign that the government recognised the challenges that commercial businesses operating in the UK were facing with regard to IP. Fundamentally, the Hargreaves Review (2011) recognises that the IP framework in the UK is “falling behind and must adapt”. Arguably the most significant outcomes of the Hargreaves Review (2011), as explained by Grassie (2013) at the IP and Digital Entertainment Conference run by CLT, was the recommendation to form a Digital Copyright Exchange (DCE) to facilitate Copyright licensing.

From a photographer’s perspective, the DCE is an interesting prospect when selling images in their digital form. Stock libraries have facilitated the licensing of images for photographers for some time and a DCE has the potential to allow new entrants into this market. However, the DCE doesn’t address the issue of photographers who market their images online to sell as a physical product since there is no requirement for a licence to be granted. If we consider a scenario where a photographer has posted their images on their own website and on their social media profiles to promote their sale in physical form, the proposal to form a DCE does not help that photographer when images are copied from an online source. Indeed the use of

social media promotes the sharing of images across social media platforms and in some cases it becomes difficult to identify the author and whether or not Copyright exists in those works; this could lead to an increase in what the Copyright, Designs and Patents Act (1988) (CDPA 1988) describes as “orphaned works” where it is not possible to ascertain the Copyright holder. Although somewhat supported, Hargreaves (2011) was criticised by The British Photographic Council (2011) for proposing a system for licencing orphaned works without also proposing an enforceable right to be identified. It could be argued that this places a greater responsibility on Copyright holders to protect their own IP to ensure that it doesn't end up being licensed as an orphaned work.

The subsequent report produced by Hooper (2012) in response to the Hargreaves Review (2011) recommended the formation of a Copyright Hub, which would be a one stop shop for Copyright needs; it appears to be an interim step towards the formation of DCEs, which as Grassie (2013) explained would need more funding than the £150K that has currently been proposed. Hooper (2012) argues that spending large sums of money on a DCE could end up being money wasted if no one uses it, again adding support to the view that The Copyright Hub (2013) is an interim step. To photographers, the main benefit of The Copyright Hub (2013) is that it allows people want to use an image to identify the Copyright holder and acquire licences for the image; Solon (2013) explains that this is achievable because the hub is linked to The British Association of Picture Libraries and Agencies, Getty, DACS, the BBC and Focal International. When considering that the proposed system requires prospective image users to carry out due diligence to find the Copyright holder and acquire a licence if necessary, one can see the rationale for Hooper (2012) wanting to undertake a pilot since the service may simply not be used. Indeed one must question whether a photographer selling physical works would see any benefit at all from the formation of The Copyright Hub (2013) or a DCE.

Smith (2012) explains why IP Rights are so important in the context of business and commercialisation, describing them as intangible assets of a business; this is particularly critical for creative industries, such as music and photography, where these IP Rights are, or at least protect, the primary source of revenue. Jeremy Phillips (2013) raises concerns that the recommendations that have come from the Hargreaves Review (2011) and the Hooper Report (2012) have come too quickly, which he feels may suggest a less obvious agenda; he also

raises concerns that the IP framework is being reviewed and developed by economists rather than businesses, the entities for which these reforms are supposed to be for.

It remains apparent that little consideration is being given to those who sell physical works but market them in a digital form, such as photographers. Instead, much of the emphasis is on licencing of digital works, such as music, digital images and video. Perhaps this is a reflection of the economy and photographers still operating in the aforementioned way need to review their business models and adapt further to embrace the digital age. Alternatively, perhaps it is felt that photographers selling physical works are not impacted as greatly by digital image theft online and should therefore rely on existing legislation and litigation to protect their images. Jeremy Phillips (2013) made the point that there are comparatively few cases of Copyright litigation in the UK. This could be indicative of IP Rights holders not being aware of their rights, not being aware of any infringement, reaching a resolution out of court or simply not pursuing infringements due to the cost implications. Daniel Goodall (2013) shared the observation made by Jeremy Philips (2013), suggesting that most cases are settled out of court but also welcoming the introduction of a Small Claims process in the Patent County Court; this would allow photographers, for example, to pursue cases of Copyright infringement through small claims and therefore avoid expensive legal proceeding. The introduction of a small claims track for IP cases was fully supported by the British Photographic Council (2011).

While the reforms of the UK IP Framework are generally considered to be a positive move, the reforms seem to be focussing on digital licencing so as to support the larger creative industries such as the licencing of digital music, video and digital images. There appears to be a gap where businesses who's revenue comes from physical works but who's products can also be digitised or promoted in digital form must rely on more traditional remedies to Copyright infringement. The initial exploration of developments in the UK IP framework suggests that little has changed for professional photographers selling physical works in the UK when it comes to protecting their IP in digitised formats.

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