

THE IRISH PROFESSIONAL PHOTOGRAPHERS' ASSOCIATION

SUBMISSION

to

THE COMMITTEE FOR THE REVIEW OF IRISH COPYRIGHT LAW

July 2011

The Irish Professional Photographers' Association

The Irish Professional Photographers' Association ("IPPA") was founded in 1949 to serve the interests of professional photographers in Ireland and to ensure the provision to the public of a high standard of expertise and professional practice. The IPPA has over 350 practising members, all full-time professional photographers, who are qualified and insured and who are dedicated to the production of high quality photography.

The IPPA is a member of both the Federation of European Professional Photographers and the World Council of Professional Photographers.

Copyright and the Photographer

Photographers are innovators and contribute to the growth in Ireland of the creative industries. The work of IPPA members is published in newspapers, magazines, books, television and in advertising campaigns. Many sell and licence their images as fine art through galleries, and in online picture libraries.

Copyright protection is central to the income of the photographer. Photographers potentially derive income from three sources:

- Commissions
- Royalties
- Picture library sales

The assignment or licensing of the copyright in the work is at the heart of each of these.

It was only with the Copyright and Related Rights Act 2000 ("The Act") that Irish photographers were finally granted rights equivalent to those of other creative authors.¹

¹ Under the Copyright Act 1963, a photograph was protected for a term of 25 years. The "author" of the photograph was the person who was the owner of the material on which the photograph was taken.

They were also for the first time granted the moral rights of paternity and integrity. This enhancement of the rights of the photographer was expected to effect an improvement in the ability of photographers to protect and monetise their works. This has not however occurred. On the contrary, over the same period photographers find that their bargaining power has declined, the contractual terms offered to them are increasingly unacceptable and the attribution of their work has actually decreased since the introduction of the Act. Photography is a profession currently in crisis.

Contract practices

“All rights contracts”

Much of the work of the photographer results from a commission. Where private commissions are concerned, photographers have the opportunity to negotiate agreed terms of use with the commissioner. Normally the terms involve the grant of a licence to the commissioner, the copyright being retained by the photographer. The licence covers the intended use of the commissioner and the numbers of reproductions to be furnished. If additional uses or further reproductions are required, an additional royalty or fee will be payable.

However, where public and commercial commissions are concerned, a demand is usually made that the photographer assign the copyright. This is presented on a “take it or leave it” basis, with no recognition of the fact that an outright assignment of the rights should command a higher fee than a licence limited to specific purposes/number of reproductions. In our experience the work may be used on multiple occasions long after the commission. The work is retained in the files of the commissioner, becomes part of their archive and may appear years later, without attribution or associated meta data, including on the internet.

Corporate and public sector contracts have been standardised around this practice of demanding an assignment. A typical such contract provides:

1. All copyright and other intellectual property created and/or arising out of or in relation to the work performed, including without limitation, all records, documents, images, data, drawings, design or other such materials and know-how will vest solely in [the commissioner].
2. The Photographer shall, at the request of [the commissioner] do all such things that [the commissioner] may reasonably require for the purpose of vesting in [the commissioner] of the rights granted to it.
3. On completion of the services or any termination of the Photographer’s appointment under this contract for any reason, the Photographer shall upon written request deliver to [the commissioner] all documents (in such manner as to be “unlocked”, readily accessible and useable for any reasonable purpose) and all materials and things whatsoever purchased or created by the Photographer.

In addition to these sample clauses, there are further obligations to procure third party licences, procure that employees are bound to the same terms, indemnifying the commissioner against all claims and costs incurred in respect of any litigation and imposing the obligation to conduct such litigation at the Photographer's expense.

Moral rights waivers.

Early drafts of the Act show that it was originally intended that moral rights would be, as they are in most European countries, unwaivable. In the progress of the Act through the Oireachtas this changed. A provision permitting waiver was inserted in section 116 of the Act.

In consequence, the grant of moral rights to the photographer has meant very little, when public and corporate clients now insist as a matter of course on a contractual waiver of the rights. A typical clause (again from a contract with a semi-state body), states:

The Photographer hereby unconditionally waives in favour of the Commissioner all moral rights conferred on the Photographer by the Copyright and Related Rights Act 2000 (and any amendments or re-enactments thereof)

It is the combination of the all rights clause and the waiver of moral rights that is really damaging to the photographer. It removes all control from the photographer, leaving the commissioner of the photography in a position to put the work into the public domain in whatever fashion or manner, over whatever period, via whatever medium and for whatever purpose the commissioner desires. It moreover enables the commissioner to licence or assign the work to third parties, thereby enabling the commissioner to monetise the rights. This is demanded of the photographer without any recognition in the contract terms of the value of the rights assigned.

To the extent that corporate and public sector organisation have managed to establish terms such as these as the norm when dealing with parties with low bargaining power, they severely compromise the contractual freedom, the exclusive right and the value of the moral rights of the photographer.

It is our submission that:

The Review Committee should recommend that publicly-funded bodies should take a lead in the *acceptance* of the rights granted to photographers in the Copyright and Related Rights Act 2000 and *refrain* from the practices of issuing non-negotiable contracts containing "all rights" clauses and waivers of the moral right.

Moral rights exemptions

The right of paternity need not be observed in relation to works made for reporting current events, nor by newspapers or magazines. This withdraws from the photographer the right of attribution where it would be highly visible and productive.

In fact the special value of photography to news reporting is recognised at section 51(2) of the Act, by excluding photographs from the fair dealing exception for reporting current events.

It is our submission that:

The exception to the right of paternity for reporting current events, at section 108(3) CRRA and for material included in a newspaper or periodical, at section 108 (34)(b) should exclude photographs, in the same manner as can be seen in section 51(2).

Enforcement of copyright

Photographers share the concern of all right owners relating to online infringement of their rights. Many of our members have found their works on internet sites, including in online galleries where they are being licensed as anonymous works, stripped of the meta data applied by the photographer.

Remedies exist for infringement of copyright, including online infringement. It is detecting the infringements and accessing the remedies that is the problem.

In so far as detection is concerned, photographers apply meta data to their work in digital form. This contains rights management information. It enables the photographer to conduct a file search on the internet that will detect unauthorised uses of the work. If an infringing use is detected, the photographer can request the internet service provider to take down the work. This is an accessible remedy in only a proportion of cases. Some internet service providers are both reluctant and slow to respond to such requests. In the case of infringements originating outside Europe it can be impossible either to identify or to communicate effectively with the ISP. The principal difficulty however is that it is not just possible but relatively easy to identify and remove the meta data. If meta data has been removed, it is no longer possible for the photographer to detect online infringement in any systematic way.

Removal of meta data is unlawful under section 376 of the Act. It creates an offence for removal or interference of rights management information. In practical terms this provision is useless to a photographer. The first hurdle would be to find a member of the Garda Síochána to take a complaint seriously. The second would be to prove who removed the meta data, and whether the offence was committed knowingly. A third is the impossibility of making a foreign internet infringer amendable to an Irish court. Our members are not aware of a single case in which a prosecution has been taken for unlawful removal of rights management information.

The more general difficulty with accessing remedies is that the legal fees for pursuing infringements on foot of a civil claim would normally be a multiple of what the claim is worth. The amount of time that is needed to prepare a case, coupled with delays in the court process amount add to the expense. Photographers simply cannot afford to litigate, even in the most blatant cases of infringement.

We cannot claim to have an effective system of enforcement, nor to be compliant with our international obligations in this respect, when the legal system is inaccessible for the purpose of enforcement to all but the very largest right holders.

It is our submission that:

A small claims track for copyright claims of low value is essential in the Irish court system.

A structured system of alternative dispute resolution, such as the mediation service provided in the UK by the Intellectual Property Office, would be of considerable benefit to right holders.

Orphan works

It has been established that the number of photographs which are “orphan” in the sense that their author cannot either be identified or located, is far higher for photographs than it is for any other type of work. A survey of museums in the UK found that 90% of their total collections of photographs could not be traced.²

We note the publication of the Proposal for an EU Directive on orphan works. We note also that the Department of Jobs, Enterprise and Innovation has announced a consultation on the draft and we intend to respond.

For the purpose of this submission we would simply make the point that there needs to be investment in the development of more robust open source software solutions to prevent the stripping of meta data. The ease with which meta data can be removed creates an ever-increasing number of orphan photographs.

Public awareness

In the experience of our members, the lack of public awareness of copyright and the lack of access to basic copyright information combine to exacerbate the levels of infringement of rights.

² Assessment of the Orphan Works Issue and Costs for Rights Clearance, a 2010 Study by Anna Vuopala commissioned by the European Commission, at page 2.

It will take a considerable effort to overturn the increasing public belief that content is “for free”, especially on the internet. We believe that it is the duty of Government at this point to recognise the problem and in the interests of all of the creative industries, large and small, to examine what can be done to raise public awareness and respect for copyright law.

Small right holders and start-up businesses frequently need ready access to basic copyright information. Most cannot afford to consult their solicitor every time the need occurs. If the Irish Patent office were to be developed along similar lines to the Intellectual Property Office in the UK, the facilities available would go a long way towards solving this problem, and would heighten the general level of observance of copyright.

It is our submission that:

The Review Committee should identify to Government the need to examine how public awareness of copyright can be heightened.

The role of the Patent Office should be expanded to provide some of the facilities offered by the UK Intellectual Property Office, in particular to provide information about copyright for small professional and business enterprises.

ADDENDUM TO IPPA SUBMISSION

SUPPLEMENTARY STATEMENT

BY A MEMBER OF THE IPPA

"I am a member of the Irish Professional Photographers' Association. I am one of almost 400 full-time working professional members of the Association.

As professionals, we are contributing to the Irish economy as employers and tax payers. We provide a vital service to the Irish public sector, Irish business, historical and cultural life by means of providing images for national and international media, medical and legal records, business records, cultural and historical archives. Our work preserves Irish family images down the years.

Since the introduction of "digital imaging" techniques, we have seen a drastic shift in our industry, largely due to a combination of factors: easy transmission and accessibility of images; lack of public awareness/understanding of copyright law; infringement of the law and limited funds to pursue infringements through legal means.

The introduction of the Copyright and Related Rights Act in 2000, while it was welcomed by our industry, because we were put on the same footing as other authors for the first time, opened the door to almost instant misuse of the provisions. The vast majority of purchasers of photographic services and images rushed to lay claim to our rights and to "force" us to abandon them by contract.

In the current economy, our members are being seriously undercut by black market operators. These are individuals with no professional qualifications and no insurance coverage. They are not paying tax on these earnings. Many of them have other jobs and are using photographic assignments to supplement their income. They are, in many cases only interested in the cash payment and so compete with our members with low charges and also by having no interest in 'image usage fees'. This does not provide a "level playing field" for professional photographers.

All sectors of our industry have been affected by a significant drop in revenue. Press and public relations agencies report losses of 40-70%, mainly in the area of revenue from "licensed image and usage fees". Commercial and architectural photographic revenue is down by 50-75%. All "social photography" is affected, with some of my fellow colleagues reporting cuts of 50-80% revenue. There have been many studio closures and job cuts not to mention trade suppliers going out of business.

All sectors of our membership are affected by unfair bargaining and bullying tactics employed to require us to relinquish our copyright or to hand over images without usage fees."