Photography rights hit by anomalous Act

The lobbying of successive governments for almost a decade has done little to rid professional photographers of irregularities in the Copyright Act which give them little control of their work

Australian photographers have no protection from their work being freely reproduced and altered in print or on the Internet, just one of several anomalies in the Australian Copyright Act.

Unlike other creative artists, under section 35(5) of the Copyright Act, photographers who produce work on commission do not own their work or have the right to control how it is used and reproduced.

This gives rise to questions about the nature of copyright law. Who is it designed to protect? The creator or the publisher of the work?

Reform to 35(5) is increasingly important as international copyright conventions change because of the all-encompassing digital environment. For reasons of economic benefit and creative integrity, it is essential for photographers to own copyright in their work in order to control its secondary use.

Copyright laws in most English speaking countries, including Australia, are derived from the British model. These laws balance the conflicting interests of public interest and private property but are essentially concerned with the product rather than its creator. As producers and publishers usually undertake the commercial exploitation of copyrighted works, it is perceived as essential to encourage them so the rest of society can benefit from intellectual property.

In Australia, copyright material is protected automatically, without a need to register the work. The period of protection is usually 50 years after the death of the author in "works" (literary, dramatic, musical and artistic) or for a period of 50 years from date of publication for other material which could be loosely described as collaborative or mechanical reproduction (sound recordings, films, broadcasts and published editions).

Photography is an exception. Photographs are only protected for 50 years from creation or from publication date. This anomaly discriminates against photographers who in some cases cannot exploit their own work during their lives. For example, Australian photographers Henry Talbot, now in his 70s, and Olive Cotton, in her 80s, since the 1930s have photographed memorable images with historical and archival value. Neither are in control of the use of these images as the work is no longer copyright.

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A second anomaly in the Act relating to photography deals with commissioned works. Under the current law, the author of the work is usually also the copyright owner whether its creation is initiated by the artist or commissioned and paid for by a third party. The client in this case usually has a licence to use the work for the specific commissioned purpose. This is not the case if the commissioned work is a photograph, portrait or engraving, sound recording or film, or if the commissioning body is the government. It is not clear why photography, portraiture and engraving are excluded from the protection given to other authors though these three categories could cover a large number of practitioners in photography, illustration and printmaking.

In contrast to this situation, under U.K. law the author is considered the owner of copyright in commissioned works. The client has the licence to use the work for the specific purpose for which it was commissioned. This is the case in most countries, indeed, in some countries such as Germany the author is always the owner of the copyright and this cannot be transferred or assigned during the author's lifetime, though it can be licensed.

Peter Knight of Clayton Utz says that the anomalies stem from the origins of copyright law in the U.K. Photography, portraiture and engraving have always been treated differently under English law and this has never been corrected in the Australian Act. Knight says that these categories were created to cover for the aristocracy who used to commission artists to record their portraits either in painting or photography. Another reason could be the close kinship between photography and photogravure, a form of engraving using light sensitive materials to create printing plates. Photography became a part of the "engraving" category in the Act, which aimed to protect publishers using photogravure to reproduce photographs.

In the digital environment, the concepts of "original" and "reproduction" no longer apply, especially when the image is captured on a digital, film-less camera where there is no way to verify its authenticity. In cases of straight, un-manipulated copies, the copies are identical to the original digital image and there is no original hard copy.

The ease of acquiring high quality

images from the Internet or by scanning from a book or magazine creates serious difficulties for copyright owners of images in enforcing their economic and moral rights through the current copyright system. The Society of Advertising, Commercial and Magazine Photographers (ACMP) has been lobbying for years for a change in the copyright law. Nancy Cohen, chair of ACMP's Copyright Committee, quoted in *Good Weekend* in 1993, said that the law is inadequate. "All kinds of people are scanning the images, and once they are in the computer, they can do anything. Essentially, under the copyright law, unless they reproduce into hard copy a significant portion of the original, it is not considered an infringement".

The global nature of the Internet has lead to heavy pressure on governments to address the legal situation of ownership of intellectual property. The U.S., one of the main intellectual property exporters, embarked upon a crusade in the early 1990s to tighten international copyright agreement. It went to the extent of threatening trade sanctions with any country dealing with pirated goods.

The outcome was the 1993 agreement on Trade Related Aspects of Intellectual Property (TRIPS), a part of the General Agreement on Tariffs and Trade (GATT). The administration passed to the newly formed World Trade Organisation (WTO) which requires its members to protect copyrighted material in line with the Berne Convention.

Australia, as a member of WTO and a signatory to the Berne Convention, has embarked on a path to change its copyright law. The previous government modified some areas of the Copyright Act as a condition of joining WTO. Under the Berne Convention, Australia is obliged to have moral rights in its copyright law. The government released a discussion paper in 1994 inviting submissions from interested bodies. This was a step in the right direction.

Following on from this, as part of the review process of the Copyright Act and in response to years of lobbying by photographers, in 1995 the Attorney General's department invited submissions from interested parties such as photographers, media proprietors and advertising agencies.

The latter argued that they should be able to get the maximum return on their investment and therefore should hold the copyright. The photographers argued that they be paid according to the particular purpose of the commissioned work and should be able to exploit the images elsewhere as long as this use did not compete with the commissioner of the work.

The Advertising Federation of Australia (AFA) disputed the protection photographers have under the category of artistic works and described the role of the photographer as "to record work designed and created by third parties – costume and set designers etc". The AFA also rejected the only opportunity currently available to photographers under the right of restraint.

Viscopy, the Visual Arts Copyright Collecting Agency and the Australian Copyright Council, which also submitted a response to the Copyright Law Review Committee, supported the photographers.

The joint Submission of the ACMP and the Australian Institute of Professional Photographers (AIPP) concentrated on two issues – section 35(5) and the duration of protection for photographs. In the submission, there is one argument which sums up the debate:

"Copyright gives large, powerful and wealthy corporations a monopoly on visual information. In the hands of the author it becomes a property to be widely distributed, to the good of the public, for commercial gain. Corporations use it to increase profits, whereas authors use it to survive".

In December 1995, ACMP and AIPP met with Michael Lee, then Minister for the Arts. He was supportive of the photography lobby but expressed his concern that changing the Act could upset media proprietors. Section 35 (5) remained unchanged.

The current Minister for Communications, Senator Alston, supported the photographers when he was in opposition. But the Attorney General has requested fresh submissions from media proprietors, delaying further any possible changes. Is the government refusing to act in favour of photographers because it is hesitant to change anything that could upset the media moguls?

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