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Abstract

Copyright law in the UK is without doubt a vital area of law for our economy allowing the protection of our creative works. If it were not for copyright photography as a profession would struggle to exist. With the advent of the digital age the question that must be considered is how copyright law should change to keep up and protect photographers. This paper will examine the current standing of copyright law and the challenges facing photographers both in the subject matter they photograph and the publication of their photographs online. Looking at the Gowers Review[1] this paper will propose changes that will allow copyright law to maintain its relevancy and with the aide of new governmental bodies enable further prosecution of those who insist on infringing the rights of copyright holders as well as educating the public. The problem of orphan works and user generated content will also be considered and changes to the law to deal with these will be looked at.

[1] Gowers Review 2006

Chapter 1 – Introduction

1.1-Overview

Photography has grown in popularity since its inception but it is only since digital photography that it has become so universal, with even basic mobile phones containing a camera. When looking at a photograph one's first thoughts are normally whether or not it is pleasing to the eye or a memory of a moment from the past: only a few people will think about the legal rights within that photograph. This paper will examine the rights contained within photographs, intellectual property law in the United Kingdom, the effects of people in a photograph, how UK copyright law compares to that of other countries and how the law could be changing in the future. It is not just in the UK that copyright law exists: it is a global law which can be at the forefront of discussions between nations on enforcement and duration. This paper will therefore look at copyright law in Europe, the Commonwealth and the United States of America to examine the possible persuasive arguments these laws and judgements may have in UK courts.

Copyright law is also a topic that can create divisive opinions. For example in the 2008 US presidential elections a poster of the then Senator Obama was created by Shepard Fairey and became one of the images of the election. Fairey had copied the image from a photograph by Associated Press photographer Mannie Garcia; at the time of writing The Associated Press is now considering legal action against Shepard Fairey[2]. Meanwhile in Sweden the founders of The Pirate Bay[3] are on trial for

[2]Copyright battle over Obama image.
http://news.bbc.co.uk/1/hi/world/americas/7872253.stm
[3]www.thepiratebay.org

copyright infringement[4]. Copyright law is clearly global and there must be some similarities and harmonisation; therefore the laws of the US or Germany will have persuasive value in UK courts but will not be binding. Clearly copyright is at the forefront of our creative law.

1.2 -What are intellectual property and copyright?

Before going into detail on copyright in photographs we must understand what copyright is. Copyright comes under the umbrella of intellectual property, which the World Intellectual Property Organization defines as follows: "Intellectual property refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce.[5]" This paper will focus on copyright - but then what is copyright? As Bently states "In British legal parlance, 'copyright' is a term used to describe the area of intellectual property law that regulates the creation and use that is made of a range of cultural goods."[6] Unlike other intellectual property such as patents, copyright does not need to be registered: "Copyright comes into effect automatically and without any necessary process as something that can be protected is created."[7] When looking at copyright what is being examined is a person's rights to sell, license and publish an image and stop others from doing so. The first thing that must be examined is the current standing of copyright law; we will also examine the future of the law and how it will and must change. As Professor Fitzgerald has asserted, "As we enter an era of unprecedented knowledge and cultural

[4]Pirate Bay awaits court verdict. http://news.bbc.co.uk/1/hi/technology/7921933.stm
[5]http://www.wipo.int/about-ip/en/
[6]Bently & Sherman , Intellectual Property Law, Second Edition, Oxford University Press, 2004, p29
[7]The Gowers Review,2006, p14

production and dissemination we are challenged to reconsider the fundamentals of copyright law and how it serves the needs of life, liberty and economy in the 21st century."[8]

[8]Professor Fitzgerald, Copyright 2010: the future of copyright, European Intellectual Property Review, 2008 30(2), p43

Chapter 2-The law of copyright for photographers currently

2.1-Brief history of copyright

In the UK the idea of copyright can be traced as far back as the 16th century.[9] In the 17th century this was expanded with the likes of the Statue of Monopolies[10] and the Licensing Act.[11] Modern day copyright though will be traced back to 1709 and the Statute of Anne.[12] As well as being the foundation for UK and Commonwealth copyright law it was also adopted by the US to found their copyright laws, it is because of this that there are many similarities between UK and US copyright laws. Nocella explains what the statute meant: "The author was just one of the characters targeted by this statute, which gave him only one right, which prevented another from delivering his work to the public without his consent."[13] Whilst this was the first copyright statute, it was not until 1862 that photographs were expressly protected by statute.[14] However, the level of protection was somewhat lacking compared to modern standards, with protection for just the authors life plus seven years after his death.[15] In addition but unless there was some express retention by the artist of his copyright it would be lost on first sale of the work.[16] To see modern day protection for intellectual

[9]The Articles of the Pope's Bulle (1518), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org
[10]Statute of Monopolies (1624), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org
[11] Licensing Act (1662), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org
[12]Copyright Act 1709
[13]Lauriane Nocella, Copyright and moral rights versus author's right and droit moral: convergence or divergence?, Entertainment Law Review, 2008, 19(7) p152
[14]Fine Arts Copyright Act 1862
[15]Fine Arts Copyright Act 1862 s1
[16]Garnett explains: "The wording of the Act was such as to produce the somewhat remarkable result that, unless the work was commissioned, so as to vest the copyright initially in the person commissioning the work unless on that occasion, there was some written instrument assignment to the purchaser or by the way of express retention by the artist" Garnett, James & Davies, Copinger & Skone James on Copyright 14th Edition, Sweet & Maxwell, 1999, p42

property rights in photographs modern copyright law must be examined. Copyright law is defined in section 1 of the Copyright, Designs and Patents Act.[17] Under the act photographs are protected and the owner of a photograph has property rights. The act goes into detail on what a photograph is in section 4,[18] and with the move from film to digital recording for a great number of photographs the same definition will apply, however with a digital photograph it is possible for two copyrights to exist, one in the original photograph it self and the other if the photograph is manipulated using software such as Adobe Photoshop[19].

Photographs are automatically given copyright but this is not so for all photographs, as Bainbridge explains they, "must be original and must be 'works'[20]." What does original mean in the context of copyright? Lord Pearce said it requires "only that the work should not be copied but originate from the author."[21] But this relates not just to cameras and photographs in the traditional sense, images produced by photocopiers and scanners would fulfil the requirements of section 4[22] but could have problems with the originality requirement as far as copyright is concerned[23]. The same can be

[17]The Copyright, Designs and Patents Act 1988 defines copyright in Part 1 Chapter 1 Section 1.1 saying "(1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work: (a) original literary, dramatic, musical or artistic works,(b) sound recordings, films [or broadcasts] and (c) the typographical arrangement of published editions".
[18] The Copyright, Designs and Patents Act 1988 Section 4 defines a photograph as a "recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film."
[19]Michalos, The Law of Photography and digital images, Sweet & Maxwell, 2003, p 24 looks at this but makes the observation that will be so long as "the final image is itself an original and not a mere copy of the photograph with minor adjustments"
[20]Bainbridge, Intellectual Property, Pearson Longman, Seventh Edition, 2009, p41
[21]Ladbroke (Football) Ltd v William Hill (Football) Ltd (1964) 1 WLR 273
[22]Copyright Designs and Patents Act 1988 s4
[23]Reject Shop v Manners (1995) F.S.R 870

said for X-rays, which would fall under the "other radiation" definition of section 4[24] and also holograms, so long as either met the originality requirement. For the purposes of this paper though we will examine photographs within the traditional definition. So the current situation is that the law of copyright in the UK is based on the Copyright, Designs and Patents Act 1988, supplemented by European Community directives and case law along.

2.2-International treaties

Copyright law is global and there are a number of treaties that the UK has signed up to. The first major treaty is the Berne Convention.[25] First created in 1886, it has been used ever since, with major revisions along the way. Whilst it has been the main international treaty on copyright for the last century not all countries signed up to it indeed because the US did not sign up to it the Universal Copyright Convention was created in Geneva in 1952. The idea was to provide an alternative to the Berne Convention and whilst it served its purpose, it effectively became obsolete in 1989 when the US passed the Berne Convention Implementation Act 1989 and joined the Berne Union. It is worth noting that whilst photographs have been protected by the convention since its creation they were not specifically mentioned in it until 1951.[26] Photographs were one of the points of contention when the Berne Convention was first drawn up, as due to the nature of what photography is there were questions about whether it was truly artistic; hence, since the creation of the convention, every time it

[24]Copyright, Designs and Patents Act 1988 section 4
[25]Berne Convention 1886
[26]Art 2 (1) "Photographs to which are assimilated works expressed by a process analogous to photography"

was revisited up to 1951 photographs gained more and more protection. However, whilst photographs are covered there are still issues, as Michalos states: "It remains the case for the Berne Convention potentially leaves gaps in the protection of photographic works. The Berne Convention operates on the principle of national treatment - namely that member countries of the convention must grant to authors from other countries the same rights which they grant their own nationals. This can cause difficulties because the convention protects 'artistic' photographs but this is interpreted differently by different countries."[27] This obviously can cause problems for photographers, especially if they need to enforce their copyright in other countries, because while a work may be considered artistic in their home country it may not be in another. However, this protection is still more than was afforded under the Universal Copyright Convention, which does not require any mandatory protection for photographs.[28]

As well as the Berne Convention and the Universal Copyright Convention there are the TRIPS agreement[29] and the WIPO Copyright Treaty.[30] The TRIPS agreement builds on the Berne Convention, with members of the agreement applying articles 1-21 of the Berne Convention apart from article 6. For photographers the WIPO Copyright Treaty is important: it prevents signatories from applying article 7 (4) of the Berne Convention, which allows countries to determine the term of protection they give to photographs. Instead article 9 of the treaty says photographs must be protected for the life of the author plus 50 years, thus giving more protection to

[27]Michalos, The Law of Photography and Digital Images, Sweet & Maxwell, 2004 p 130
[28]Universal Copyright Convention article 1 and article IV (3) do not provide protection for photographs
[29]TRIPS agreement (1994)
[30]WIPO Copyright Treaty (1996)

photographs.

2.3-When is a photograph protected and what requirements are there for protection?

When examining photographs specifically, in addition the statutes there are specific cases that deal with issues unique to photographs. The first case that we need to examine the case of Apple Corps Ltd v Cooper[31] to fully understand how the photographer is always the initial copyright holder. In this case the question of who owned copyright to a photograph was in question. The court held that the initial copyright holder is the photographer and that the vesting of copyright occurs when the shutter is opened and the light strikes the film. For the copyright to be held by someone else it needs to be expressly assigned and it is for the second copyright holder to prove that the right has been so assigned.[32] Considering this and the Copyright, Designs and Patents Act[33] we can see that in the first instance the copyright holder in most circumstances will be the photographer (this is not always the case and this issue will be examined in more detail later, at 4.5). This case and others[34] have looked at the question of the copyright holder of a photograph in respect of the Copyright Act 1956, due to the similarities in relation to photographs between the1956 act and the 1989 act, and the cases will still be considered to be relevant.

Whilst the standard is low there may still be a standard; however, whether or not it will be applied in UK courts is still uncertain. The case of Bridgeman Art Library

[31]Apple Corps Ltd v Cooper [1993] F.S.R. 286
[32]Apple Corps Ltd v Cooper [1993] F.S.R. 286
[33]Copyright, Designs and Patents Act 1988
[34]Gabrin v Universal Music Operations Ltd [2004] E.C.D.R. 4

Limited v. Corel Corporation[35] does set a standard and has been referred to in UK courts,[36] but it is a US case. Whilst the fact that is a US case may mean it does not currently have any legal standing in the UK, the fact that it examines English law and has been referenced by English courts means it is likely that a judgement by English courts will follow it as precedent. Another case that looks at this and may have persuasive value in UK courts is that of Blau v BBC.[37] This case revolved around a photograph taken by a journalist of a security guard holding documents taken from a Swiss bank showing the accounts of holocaust survivors. The BBC used the photograph in a television programme without asking permission.. The question of jurisdiction was looked at and it was decided that the courts of Switzerland had jurisdiction rather than the UK courts. The court held that there had been no violation of copyright as the photograph was a simple image and did not meet the Switzerland requirements of artistic merit.[38] Although the case will not be binding on UK courts it will be persuasive on the courts and could if followed mean that any simple photographs such as family holiday shots would not have the protection of copyright.

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[35]Bridgeman Art Library Limited v. Corel Corporation[35] at 25 Fed. Supp. 2d 421 per District Judge Caplan at 426 to 428

[36]Referred to in Justice Neuberger's judgement in Antiquesportfolio.com plc v Rodney Fitch & Co Ltd (2001) FSR 345 para 34

[37] Blau v BBC [2002] E.C.D.R. 34

[38] Blau v British Broadcasting Corporation [2002] E.C.D.R. 34 p375 paragraph 16 of the judgement states, "As far as the use of photographic techniques is concerned, the photograph of Christoph Meili is devoid of any special features. The choice of frame and choice of angle give a head-on portrait of such a size that the face of Meili and the two files create the centre point of the picture, so that the titles of the files can be read without difficulty in the original photograph. Anyone who wants to show that Meili is in possession of these documents would choose to show these elements in this way. The rest of the photographic techniques are commonplace and accord to what a simple camera would have chosen automatically. Even the manner in which Meili shows the two files (i.e. with the title pages facing towards the camera) is obvious, and is how anyone would have shown these things. The lighting comes exclusively from an automatic flash of the kind that is attached to any simple camera featuring a built-in flash. The photograph is only unique because of its subject matter."

Another case we need to examine to understand photography copyright is Antiquesportfolio.com PLC v Rodney Fitch & Co Ltd.[39] This case concerns the use of photographs of antiques used by Rodney Fitch in the creation of a website. The second issue that Justice Neuberger deals with is whether or not copyright exists within these photographs. They are of antiques and had been used in the Millers Antique Encyclopaedia and are no more than stock photographs of antiques and the question of originality was addressed. In the judgement Justice Neuberger states, "In the case of photographs of a three-dimensional object, with which I am concerned in the present case, it can be said that the positioning of the object (unless it is a sphere), the angle at which it is taken, the lighting and the focus, and matters such as that, could all be matters of aesthetic or even commercial judgement, albeit in most cases at a very basic level."[40] The originality standard for photographs has always had a low threshold since it was first established in the 19th century[41]; in this case the courts reaffirmed this and showed that even with modern technology it still applies. As Stokes states "Only a low level of originality is required in UK law; that some, albeit limited, work or effort has gone into the creation of the work is enough."[42]

2.4-Plagiarism in photography

One issue to be considered is that of when a photograph is copied by another artist in another medium. There are no major cases in the UK that have examined this and those that have gone to court have been settled before judgement. If we look to the US

[39]Antiquesportfolio.com PLC v Rodney Fitch & Co Ltd (2001) FSR 345
[40]Judgement of Justice Neuberger in Antiquesportfolio.com PLC v Rodney Fitch & Co Ltd (2001) FSR 345 para 13
[41]Graves' Case (1869) L.R. 4 Q.B. 715
[42]Simon Stokes, Categorising art in copyright law, Entertainment Law Review, 12(6), p181

the case of Rogers v Koons[43] needs to be examined. In this case the court showed that a photographer's copyright can be infringed by a sculpture, even if it is a parody. Rogers took a photo of a man and women with their arms full of puppies, Koon saw the photo as a postcard in a museum shop and after tearing off Rogers copyright notice he gave it to one of his assistants and told them to copy it.[44] The court held that there were substantial similarities between the two works and, rejecting Koon's defence, which relied on the US doctrine of fair use, it found that Koon's work infringed Rogers' copyright.

Another case to consider is a French case that examines the plagiarism of a scene with two people kissing on a roundabout.[45] Getty Images won its case for plagiarism against the French Tourist Federation, which was forced to pay damages.[46] The difficulty in trying to prove plagiarism by another photographer, which has been pointed out by the courts, is that even the same scene shot at the same time will look different depending on the photographers, because of their skill levels and the look they may use.[47] However if the copy is so obvious that there has clearly been an infringement of rights the court will act. The question for the UK courts is whether or not they will follow these cases. As has been shown, the UK and US copyright stem from the same body of law but with 300 years of case law there will of course be differences. European Union harmonisation and international conventions mean the

[43] Art Rogers, Plaintiff-Appellee-Cross-Appellant v Jeff Koons, Sonnabend Gallery, Inc 960 F.2d 301
[44] Art Rogers, Plaintiff-Appellee-Cross-Appellant v Jeff Kons, Sonnabend Gallery, Inc 960 F.2d 301 paragraph 9& 10
[45] Getty Images v FNOTSI and Prisme, (16th November, 2007 unreported)
[46] Getty Images v FNOTSI and Prisme, (16th November, 2007 unreported)
[47] Sahuc v. Tucker, 300 F. Supp. 2d 461 (E.D. La. 2004)

copyright laws of France and the UK are now more similar, but as with the US case UK courts are not obliged to take cases into consideration.

However in relation to parody the decision of Rogers v Koons[48] may go differently in the UK if the courts use the view put forward in the Gowers review.[49] Recommendation 12 states, " Create an exception to copyright for the purpose of caricature of pastiche."[50] If the courts did follow this then if a photograph was copied as a parody in another medium the courts would find that the photographer's copyright had not been violated. However, the Canadian case of Tony Stone v Stephen Arscott[51] may have more weight in the UK courts. Arscott entered a competition making a painting of a photograph by Stone. Arscott submitted it stating it was an original work and won cash and prizes worth over $100,000. Stone sued on the grounds that his copyright had been infringed. The Canadian court found that Stone's copyright had indeed been infringed and awarded damages of $400,000. As the case being Canadian, UK courts may take it into account and would likely follow its ruling but they would not be obliged to do so.

So what does this mean for photographers? If the UK courts followed these series of cases then if a photograph were copied or parodied into another medium then the courts would find that the photographers copyright had been infringed. Even if it were a photograph trying to emulate another photograph, if UK courts were to follow

[48]Art Rogers, Plaintiff-Appellee-Cross-Appellant v Jeff Koons, Sonnabend Gallery, Inc 960 F.2d 301
[49]Gower Review 2006
[50]Gower Review, 2006 page 68.
[51]Tony Stone v Stephen Arscott & Corel Corporation (1994 unreported)

French cases this too would be copyright infringement.[52] With the harmonisation of UK and EU laws and the recent adoption of droit de suite it is quite possible that UK law will look to follow French cases. As well as that there are other similarities between UK copyright law and French copyright law, so whilst the general conception is that of an Anglo-American copyright and a European copyright this is not quite the case.[53]

Whilst we have seen that photographs can be taken of still works of art or of live scenes, what about works of films or broadcasts? UK courts have dealt with this question in the case of Spelling- Goldberg Productions v BPC Publishing Ltd.[54] In this case the defendant published a photograph of one frame of a film and the court held that it was an infringement of the copyright in the film. Although this case occurred before the Copyright, Designs and Patents Act[55] it is still good law and needs to be looked at in the context of the act, even if the Copyright, Designs and Patents Act[56] definition is more generous compared to the Copyright Act,[57] which was in place at the time. Not only that but the same rule will apply to taking photograph's on an internet web page.[58] Another thing to consider is that the Copyright, Designs and Patents Act does look at this and widens it further, so it is not just photographing a film that will infringe the copyright but also the filming of a film.[59] So what does this mean for photographers? Whilst photographers can photograph other works of

[52]Getty Images v FNOTSI and Prisme (16th November, 2007 unreported)
[53]For example the resale directive which brings further harmonisation of copyright laws across the EU 2001/84
[54]Spelling- Goldberg Productions v BPC Publishing Ltd (1981) RPC 283
[55]Copyright, Designs and Patents Act 1988
[56]ibid
[57]Copyright Act 1956
[58]Bainbridge, Intellectual Property, Pearson Longman, seventh edition, 2009, p144
[59]Copyright, Designs and Patents Act 1988 section 17(4)

still art such as a painting they cannot take a photo of a film. There is only one exception to this rule and that is if the photograph is taken of the television and is for private use only.[60]

2.5- Droit de suite and moral rights

When looking at the copyright of photographers it is necessary to look at their moral rights within their work too. What do we mean by moral rights? This is "the name given to a bundle of rights, that vest in the author of a work."[61] These rights are provided for under the Copyright, Designs and Patents Act 1988 and provide the right to be identified as the author, the right to object to derogatory treatment of the work, the right not to have a work attributed to another author and the right to privacy of certain photographs. These rights have been brought into the UK due to the fact the UK is part of the Berne Union and these moral rights are one of the principals of the Berne Convention; however, this did take some time, with the UK signing to the convention in 1887 and the rights coming into force in 1988. Whilst these do provide additional rights to photographers the UK is somewhat lacking compared to other countries that include the right to the withdrawal of the work[62] and the right of publishing the work.[63]

Whilst in the UK these moral rights do exist what we currently do not have is resale rights otherwise known as droit de suite. The idea originated in France in the 1920's

[60]Copyright, Designs and Patents Act 1988 S 71 (1)
[61]Michalos, The Law of Photography and Digital Images, Sweet & Maxwell, 2004 p 162
[62]French Intellectual Property Code of 192 Art.L.121-4
[63]French Intellectual Property Code of 192 Art.L.121-2

and is not part of UK law but it will be in 2010 as part of the European Directive on resale rights.[64] The right provides a resale right to authors, giving them a percentage of any future sales but not the first sale of the work. This right only applies to graphic art and therefore will apply to photographs. However, there is some concern over the exact definition. The directive states that the right applies to all works of graphic art "provided that they are made by the artist himself or are copies to be considered original works of art."[65] This could cause a problem for photographers as many photographs can be printed from the same digital file. Article 2 (2) does however provide rights in limited edition prints as well.[66]

So what will be considered original and what will be considered limited edition for photographers? According to Michalos, "In the modern environment, the original work is a digital file that can be easily copied and thus the photographer's resale market at auction is realistically limited to limited edition prints."[67] However, whilst this right will exist from 2010 for photographers in the UK it is unlikely to provide any additional income for photographers as a minimum sale price can be set by the UK before the resale right comes into force but this must no be more than €1000, as such the sale of the work must be more than £22,400[68] to reach the threshold and therefore it is unlikely to apply to the vast majority of photographers. If the resale right does apply, a tiered commission system is used[69] to determine the amount,

[64]Resale Directive 2001/84
[65]Resale right directive 2001/84 Art 2(1)
[66]Resale right directive 2001/84 Art 2(2)
[67]Michalos, The Law of Photography and Digital Images, Sweet & Maxwell, 2004 p 630
[68] Based on exchange rate of 8th March 2009.
[69] Article 4 (1) of the directive states that the commission should be the following
<€50,000 - 4% of the sale price
€50,000.01-€200,000-3% of the sale price

which is capped at €12,500[70]. The right will last for the life of the author plus 70 years.[71] It has taken some time for the resale right to come into the UK due to the fact that the UK government has been opposed to it as there is a belief that it will damage the UK art market with works being sold in the US where no such right exists. Whether or not this will happen only time will tell.

2.6- Remedies for photographers suffering copyright infringement

Whilst copyright holders may know their rights in relation to there copyright what do they do when their copyright is infringed? There are a number of possible remedies for copyright owners: damages, statutory additional damages, account of profits, statutory delivery up, an interim injunction and a final injunction. Whilst these are all the options open to copyright holders who have had their rights infringed they cannot choose all these options and must choose between whether they wish to receive damages or an account of profits. Whilst account of profits can be looked at before deciding which remedy to choose for the infringement of photographs it is unlikely to be used. As Michalos, explains "Taking an account is usually an expensive process and comparatively rare for copyright infringement cases. In the vast majority of cases involving reproduction of single photographic works, it is unlikely to be a profitable exercise."[72]

€200,000.01 – €350,000-1% of the sale price
€350,000.01 – €500,000 -0.5% of the sale price
>€500,000.01-0.25% of the sale price
[70]Resale right directive 2001/84 Art 4(1)
[71]Resale right directive 2001/84 Art 8(1)
[72]Michalos, The Law of Photography and Digital Images, Sweet & Maxwell, 2004 p 630

So for the copyright holder the option will be to look for damages. The damages will look to compensate for the harm that flows directly from the tortuous loss.[73] The amount that will be awarded will normally look at the loss suffered, so if the copyright holder would normally license the photograph the court will look at the cost of the licence.[74] Whilst the court will try to award damages to the cost of the licence if the cost is too low the court may decide to increase the damages, as was the case in Chabot v Davies.[75] The court then will look to find out the licence fee that should have been paid and award damages accordingly. If however the photograph would not have been licensed, the court will also look at statutory additional damages. Under section 97 (2) of the Copyright, Designs and Patents Act 1988 the court is empowered to award additional damages with regard to the flagrancy of the infringement and any benefit to the defendant by reason of the infringement. These additional damages will only be available if the person suffering infringement has decided to seek damages rather than an account of profits[76].

The next option is that of delivery up. This means that the "owner of the copyright in a work may apply for an order that infringing copies of a work be delivered to him against any person who has an infringing copy of the work in his possession, custody, or control in the course of a business."[77] Whilst this option is open to photographers suffering from copyright infringement it is unlikely to be used.

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[73]General Tire & Rubber Co Ltd v Firestone Tyre & Rubber Co Ltd (No.2) [1975] 1 W.L.R. 819
[74]Stovin- Bradford v Volpoint (1971) Ch 1007
[75]Chabot v Davies (1936) 155 L.T 221 an architects normal fee was £52 the court increased the damages to £100
[76]Redrow Homes Ltd v Bett Brothers (1998) 1 AC 197
[77]Copyright Designs & Patents Act 1988 section 99 (1)

The next option open to copyright holders is to seek injunctions to prevent publication of their photographs. An interim injunction may be sought at first if the copyright holder is aware of the infringement before it occurs. However, to obtain this the court will need to be persuaded that there is a serious question to be tried and that there is a chance of success in the claim, that damages are not adequate and that the balance of convenience favours the claimant.[78] The claimant would also need to meet a cross-undertaking to pay for damages if he were to lose the case at trial.[79] The likely hood of a photographer doing this is limited due to the possible cost if the case is lost. However, if the interim injunction is sought and is successful at trial a permanent injunction will be granted restraining further infringement of the work[80]. For most photographers and copyright holders the main remedy will be damages but as we have seen there are other options available if required.

[78]American Cyanamid Co v Ethicon Ltd (1975) A.C 396
[79]Vapormatic Co Ltd v Sparex Ltd (1976) RPC 433
[80]See Weatherby Sons v international Horse Agency and Exchange Ltd (1910) 2 Ch 297

Chapter 3- The affects the subject of a photograph has on the photographer's copyright.

3.1-Overview

The subject of a photograph may impact the copyright in a photograph. This will not be a problem if it is a scene of the countryside but could be if people, buildings or trade marks are included: how visible they are, what they are or who they are will impact the copyright in the image in a different way. An examination of all of these and how they impact the copyright is therefore required.

3.2-Police in photographs

When looking at copyright law for photographer's one thing to consider is what is contained within the photographs. A photographer may photograph almost anyone or anything in a public place if people but if buildings are in that photograph there may be restrictions on its use. Whilst any member of the public can be photographed, this may no longer be the case for a member of the police. The Counter Terrorism Act[81] makes it an offence to elicit, publish or communicate information regarding the police[82] and expands on the provisions of the Terrorism Act,[83] which made it an offence to do so with members of the armed forces. As the Counter Terrorism Act is altering and amending the Terrorism Act it is clear that photographs are included in the definition of records, section 58 states, "In this section 'record' includes a photographic or electronic record."[84] However, section 76 (2) of the Counter

[81]Counter Terrorism Act 2008
[82]Counter Terrorism Act 2008 section 76
[83]Terrorism Act 2000
[84]Terrorism Act 2000 section 58 (2)

Terrorism Act does provide a defence for "reasonable excuse for their action"[85] the question of reasonable excuse is one to be examined by the courts and whether photography of any kind is covered will have to be seen. People convicted under the law could face up to 10 years' imprisonment and a fine.

What does this mean in the terms of the photographer's copyright? If a photographer is convicted will he get to keep the offending photograph or will he lose it and the rights within it? According to the Terrorism Act he would lose the photograph and therefore his copyright within it.[86] This could be extremely damaging for photojournalists, who could be put into an extremely difficult position when on assignment having to photograph the police as they could not only lose the photographs they take but also end up in prison and paying a substantial fine. Whilst the likely hood of a court finding a photojournalist guilty the police will still have the power to stop a photojournalist taking there photograph and confiscate the photograph and equipment. As Walker has pointed out, "In the light of the scale and ferocity of recent attacks, especially suicide bombings, the point of intervention by the security agencies must be earlier than normal before, and not after, the offence is perpetrated. This imperative has implications for policing powers."[87] Whilst it may seem over reaching to suggest that the police can stop any photographer taking their photograph and confiscate the photograph we have seen that there is a lack of judicial review when it comes to dealing with powers the police are granted under terrorism statutes.

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[85]Counter-Terrorism Act 2008 c. 28 section 76 (2) and Terrorism Act 2000 section 58 (3) which states "(3) It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession"

[86]Terrorism Act 2000 section 58 (5) states, "A court by or before which a person is convicted of an offence under this section may order the forfeiture of any document or record containing information of the kind mentioned in subsection"

[87]Clive Walker, Terrorism: Terrorism Act 2000 s.57 - direction to jury on defence of possession of items for defensive purposes, Criminal Law Review, 2008,1, p74

In the case of R. (on the application of Gillan and Quinton) v Metropolitan Police Commissioner[88] the court was asked to judicially review the stop and search powers under the Terrorism Act.[89] The court dismissed the case, saying that parliament was aware of the powers it was giving the police to deal with terrorism. As Beck asserts, "In effect, the court chose to exercise its discretion by not exercising it and by deferring to the authority of policy-maker despite the ECHR provisions mandating judicial review of the authorisation."[90]As we can see the possibility then of photographers being detained by police and losing control of the photographs is a real one.

3.3-Photographing a person in public and the subjects effect on copyright

Whilst in public photographers can photograph anything people, buildings, shops, adverts. This is only if they are on public property: if they are on private property they must have permission to be there and also have permission to take photographs; if they do not their presence will be considered a trespass.[91] This means that if photographers are on or are using private property could find that their copyright is subject to the rights of the owner of the land and could be made subject to an injunction: for example propping a ladder against a wall to take photographs was considered a trespass.[92] Whilst it seems there have been recent incidents with the

[88]R. (on the application of Gillan and Quinton) v Metropolitan Police Commissioner (2006) H.R.L.R. 18
[89]Terrorism Act 2000 section 44
[90]Beck, Human rights adjudication under the ECHR Between Value Pluralism and Essential Contestability, European Human Rights Law Review, 2008, 2, p237
[91]For case law on trespass see Ashby v White (1703) 2 Ltd Raym 938 and Ellis v Loftus Iron Co (1874) LR 10 CP
[92]Westripp v Baldock (1938) 2 All ER 779

police and public who have tried to stop photographers shooting, they legally have the right too shoot.[93]

However whilst photographers can shoot any image they cannot do whatever they wish with the image when it comes to publication. If a person is clearly visible in it and the image is to be used for advertising a model release is normally a good idea to avoid possible action from the model at a later date. However if the image is for editorial use then no release will need to be have signed however there could still be issues regarding privacy[94]. In UK law the photographer owns an image not the person who has been photographed. However, as Foster states, "Although the law does not provide the individual with an absolute right over their photographic image, the law of confidentiality (and copyright) can be employed to protect such.[95]" This idea would seem to conflict with the Copyright, designs and Patents Act[96] which states that a photographer owns the image. However case law from the 19th century has shown that when a person's image is at stake it can trump the copyright owners rights. The first case to set the ground work was Prince Albert v Strang:[97] private drawings of the royal family were granted an injunction so they could not be published by an employee, although in dealing with drawings the principle has been carried over to photographs and although there is a contractual obligation between employer and

[93]Police Officer Uses Sexual Offences Act to delete images http://www.bjp-online.com/public/showPage.html?page=838217 and Another Press Photographer Threatened by Police
[94]Murrary V Express Newspapers Plc (2008) H.R.L.R. 33
[95]Steve Foster, Photographs, Privacy and Press Intrusion, Coventry Law Journal, 2007, 12 (2), p37
[96]Copyright, designs and Patents Act 1988
[97]Prince Albert v Strange (1842) 2 De G & Sm 652.

employee later cases have ignored this fact.[98] Cases such as Shelley Films Ltd v Rex Features Ltd[99] ignored the contractual obligation part of Prince Albert v Strange and found that photographs taken on a film set could be restrained from being published by an injunction. This has been followed up by Hallewell v Chief Constable Derbyshire,[100] and HRH Princess of Wales v MGN Newspapers[101] further expanded on this. In Hallewell[102] it is asserted "If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would as surely amount to a breach of confidence.[103]" The law has more recently looked at in the case of HRH Prince of Wales v Associated Newspapers Ltd[104] which although it did not deal with photographers is the most recent high profile case to deal with breach of confidence and has re affirmed the test for breach of confidence set out in Campbell v MGN Ltd.[105] As we can see, then, if there is considered to be a breach of confidence in obtaining a photograph the rights of the copyright holder to use the photograph as he wishes are trumped by the rights of the person who has suffered the breach of confidence.

The cases looked at thus far were before the introduction of the Human Rights Act:[106] subsequent cases, as well as dealing with breach of confidence, have also looked at article 8 on the right to private and family life. One of the first major cases to deal

[98]Steve Foster, Photographs, Privacy and Press Intrusion, Coventry Law Journal, 2007, 12 (2), p37
[99]Shelley Films Ltd v Rex Features Ltd (1994) EMLR 134.
[100]Hallewell v Chief Constable Derbyshire, (1995) 1 WLR 804.
[101]HRH Princess of Wales v MGN Newspapers Unreported, 8 November 1993.
[102]Hallewell v Chief Constable Derbyshire, (1995) 1 WLR 804.
[103]ibid
[104]HRH Prince of Wales v Associated Newspapers Ltd [2008] E.M.L.R. 3
[105]Campbell v Mirror Group Newspapers Ltd [2004] H.R.L.R. 24
[106]Human Rights Act 1998

with this is Theakston v MGN Ltd.[107] It concered a television presenter who had photographs taken off him whilst in a brothel. An injunction was granted on the basis that taking photographs of him there without his consent were a breach of his right to privacy. This idea has been looked at more recently by the European Court of Human Rights in the case of Von Hannover v Germany.[108] Princess Caroline von Hannover was photographed with her children in public when not on an official engagement. She applied to the European Court of Human Rights that her article 8 rights had been violated and the court agreed. The court said that the photographs were of her private life and taken secretly and without her knowledge and whilst there was public interest and debate around her the photographs did not add to these. This further extends the law of privacy to situations where an individual is in a public place and as such the rights holder to such a photograph may not be allowed to publish it. Foster states,"The decisions in Von Hannover and Campbell, and subsequent cases, might have been interpreted as providing a right not to be photographed without one's consent; or at least not to have such photographs published in the media."[109] As can be seen then if a photograph is a breach of confidence or a breach of privacy the rights holder's right to publish will be subservient to the rights of the person in the image. This has been clearly stated in Greece, where the Greek Data Protection Agency looked at complaints of wedding photographers displaying negatives of wedding photographs in their shop. Whilst the agency said that under Council Directive 93/98[110] the author had the right to keep the negatives, as he owned the copyright, he could not display

[107]Theakston v MGN ltd (2002) EMLR 22.
[108]Von Hannover v. Germany, 59320/00 (2004) ECHR
[109]Steve Foster, Photographs, Privacy and Press intrusion, Coventry Law Journal, 2007, 12 (2), p41
[110]Council Directive 93/98 article 6

them, as this would breach the subjects right to privacy.[111] This would also be reflected in UK law under the Copyright, Designs and Patents Act,[112] for any work that is commissioned for private or domestic purposes such as a family portrait. However this right of privacy does not apply to any photographs taken before the 1988 act.[113] If it is then subjects of the image have the right for photograph not be shown or distributed to the public.[114]

3.4-Publishing a defamatory photograph.

Another time When the rights of the photograph copyright holder may be subservient to those of the subject of the photograph is if there may be a defamation claim. If a photograph is taken and then manipulated in some way to show the person in a bad light a claim may be brought. It is likely to be brought against the publication any accompanying article. However if the photograph is published the article as a whole will be taken into account when deciding if it is defamatory.[115] Since 1906 the courts have made it clear that a photograph can be seen to be defamatory stating that it is "well settled that a person may be defamed as well by a picture or effigy as by written or spoken words."[116] So whilst it is clear that a photograph can be defamatory it is unlikely to be so unless the accompanying words are also defamatory and in such a case it is the publisher of the article who will be held liable for the defamation.

[111]Wedding Photographs (2005) E.C.D.R. 16
[112]Copyright, Designs and Patents Act 1988 section 85
[113]Copyright, Designs and Patents Act 1988 schedule 1 paragraph 24
[114]ibid
[115]Charleston and Another v News Group Newspapers Ltd (1994) E.M.L.R. 186
[116]Corelli v Wall (1906) 22 T.L.R. 532 at 532, per Swinfen Eady J

3.5-The right of publicity

There is another right for subjects within photographs, the right of publicity. The idea was first introduced in the US case of Healan Laboratories, Inc v Topps Chewing Gum, Inc[117] by Judge Jerome Frank. Whilst this idea has been developed by the US courts it has been somewhat ignored in the UK and Europe. As Klink asserts, "Surprisingly, major European jurisdictions seem to be able to ignore 50 years of economic and legal development in this area and remain astonishingly resistant to the needs of the holders of these valuable assets. The legal situation in powerful celebrity markets such as the UK and Germany still forces stars and starlets to sneak through back doors of all kinds of legal provisions which were designed for other purposes."[118] For example in the case of Harrison and Starkey v Polydor[119] George Harrison and Ringo Starr were unable to prevent the use of the name Beatles nor photographs of the band.

What is required to establish the right of publicity then? There are four elements that have been established that must be satisfied[120]:

- The ownership of an enforceable right in identity or persona of a human being.
- The defendant has used some aspect of the identity or persona in such a way that the plaintiff is identifiable from the use
- This has been done without the consent of the rights owner,

[117]Healan Laboratories, Inc. v Topps Chewing Gum, Inc 202 F. 2d 866 (2d Cir. 1953)
[118]Klink, 50 Years of Publicity Rights in the United States and the Never Ending Hassle with Intellectual Property and Personality Rights in Europe, Intellectual Property Quarterly, 2003, 4, p363
[119]Harrison and Starkey v Polydor (1977) F.S.R. 1.
[120]Healan Laboratories, Inc. v Topps Chewing Gum, Inc 202 F. 2d 866 (2d Cir. 1953)

- The unauthorised use has or is likely to cause damage to the commercial value of the plaintiff's persona.

The claimant then must establish that there has been damage to commercial value. So whilst this right exists elsewhere it does not exist in the UK; however, with the increasing scope of human rights and the possibility of copyright reform in the future there is the possibility that it could come within the scope of the UK law, as has been pointed out: "Regardless whether on a common law basis or by statutory provisions as in New York or California, the use of separate property based publicity rights leads to more security, clarity and market stability. Maybe it is time to change attitudes?"[121]

3.6-Restrictions on publishing photographs of convicted people.

Another area that can restrict publication is that of photographs of an accused person. As Munro states, "Although the operation of the law of contempt in recent years has not been notable for its consistency, it is still perfectly clear that the publication of photographs of an accused person may involve a risk of prejudice to a trial and so be punishable."[122] One of the earliest cases to deal with this is R. v Daily Mirror, ex p. Smith.[123] In this case the photograph of the accused was published in the paper before he appeared in an identity parade. A more recent case is that of Attorney-General. v News Group Newspapers Ltd,[124] where The Sun newspaper published a photograph of the accused with the headline "Baby was blinded by dad." The court imposed a £5,000 fine on the paper for publishing the photograph.

[121]Klink, 50 Years of Publicity Rights in the United States and the Never Ending Hassle with Intellectual Property and Personality Rights in Europe, Intellectual Property Quarterly, 2003, 4, p387
[122]Munro, Photographs and Legality, Entertainment Law Review, 1997, 8(6), p200
[123]R. v Daily Mirror, ex p. Smith (1927) 1 K.B. 845.
[124]Attorney-General v News Group Newspapers Ltd (1984) 6 Cr. App. R. (S.) 418

As well as restrictions on photography of convicted persons there is a general restriction the photographing of all court proceedings.[125] It is not just within the courtroom that photography is restricted but also anywhere in the building and custody areas that are not open to the public.[126] So as has been seen there are further restrictions to the copyright holder's right to publish the photographs if they will defame the subject of the photographs or damage court proceedings.

3.7-Overview of the people's effect in photographs

Assuming then that a photograph of a subject is not defamatory, does not affect court proceedings, is not subject to confidence or privacy law, then the copyright holder publish as he pleases? If the person is identifiable in the photograph there are still a few restrictions on the photograph. If it is for commercial use - that is when an image is used to advertise, promote, sell or endorse a product, service, organisation or brand a model release will be needed if it is to be used internationally in a country such as the US. If it is for use in the UK a release may be required if it endorses a product as this could potentially be defamatory, depending on the product. However it should also be noted that there could a case for prevention under the Data Protection Act[127] but whether or not a photograph is data is debatable.

[125]Section 41 of the Criminal Justice Act 1925 sub section 1 A prevents the taking of the photograph whilst subsection 1 B prevents the publishing of the image
[126]R V Loveridge (2001) EWCA Crim 973
[127]Data Protection Act 1998

3.8-Buildings in Photographs

After people the next possible subject of a photograph is property. Copyright in a building can exist and the drawings of the building will be the copyright of the architect. Whilst there is copyright a photograph of the building will not necessarily constitute infringement of the architect's copyright in the building. Under section 62 of the Copyright, Designs and Patents Act making a photograph or a film of a building will not infringe the copyright[128]. As well as the exception of section 62 there is also the defence of incidental inclusion under section 31 of the act if the use of the building is not of commercial value to the photograph..[129] As Michalos explains "The trade marking of images of buildings and building facades is relatively uncommon in the UK."[130] This contrasts with the US where a large number of building facades are registered, for example the Chrysler building, the Empire State building, the Wrigley building in Chicago and Monticello, to name a few."[131] However, it has been shown in Germany that a photograph of a well known building can infringe the architect's copyright unless the photograph is taken from a position accessible to the public. Therefore when a photograph of the Hundertwasser Haus, a famous landmark in Vienna, was used as a poster the architect was able to sue under German law as the photograph had been taken from a position inaccessible to the public.[132] The law is similar in the US with the US Copyright Act giving architects copyright within their works but allowing photographing of the buildings from public places but not private

[128]Copyright, Designs and Patents Act 1988 section 62 (2b) states that the copyright in such a work is not infringed by making a photograph or film of it.
[129]Copyright, Designs and Patents Act 1988 section 31
[130]Michalos, The Law of Photography and Digital Images, Sweet & Maxwell, 2004, p214
[131]ibid
[132]German Federal Supreme Court (Bundesgerichtshof - BGH) Urteil vom 5.6. 2003, I ZR 192/00

places.[133] However, for the time being it would seem that there is no restriction on photographing buildings, which would seem to be somewhat an enigma when considering the idea of harmonisation of laws across all member states of the European Union.

3.8-Trademarks and logos in photographs

The final area to look at is photographing trade marks and what restrictions may be imposed on the photograph. The Trade Marks Act[134] allows registration of a trade mark of any "sign capable of distinguishing goods and services of one undertaking from another; any word (including personal names), design, numeral and shape of goods or their packaging."[135] If something is trade marked there is nothing preventing a photograph being taken but there will be restrictions of the copyright in regards to publication of the photograph. It will also depend on the context of the photograph: if for example the subject of the image was wearing a Nike T-shirt bearing the company, if it was not noticeable and was not part of the overall theme of the image it is unlikely to be subject to restriction.[136] However, if the main subject of the image is a product with a logo that is trade marked it will be subject to publishing restrictions. This was shown in the case of Football Association Premier League Ltd v Panini UK Ltd.[137] The case revolved around whether or not Panini could be allowed to sell stickers of well known footballers wearing team strips which showed the Premier

[133]US Copyright Act 1976 allows for architects copyright protection under (17 U.S.C. 102(a)(8)) and (17 U.S.C. 120(a)) allows for photographing from public places.
[134]Trade Marks Act 1994
[135]Trade Marks Act 1994 section 1(1)
[136]Copyright, Designs and Patents Act 1988 section 31 allows for incidental inclusion, Football Association Premier League Ltd v Panini UK Ltd [2004] 1 W.L.R. 1147 examines the meaning further.
[137]Football Association Premier League Ltd v Panini UK Ltd [2004] 1 W.L.R. 1147

League logo. Panini had argued that the inclusion was incidental and therefore protected under the Copyright, Designs and Patents Act 1988. The court disagreed, looking at the reason for the inclusion of the logo applying both artistic and commercial reasons In so doing it found that it was evident that the inclusion of the logo was not incidental and therefore the defence did not apply.

As we can see, then, if the use does not add any value to the photograph, trade marks and logos will not restrict the use of the photograph. However, if the photograph has a logo that adds commercial value to the image the right of the copyright holder will be restricted for the owner of the logo of the copyright and trademark within the logo, such as the case was in Football Association Premier League Ltd v Panini UK Ltd.[138]

[138]ibid

Chapter 4- The Future Of Copyright

4.1-The future of copyright

In December 2008 the Intellectual Property Office published an issues paper entitled "Copyright, the Future, Developing a Copyright Agenda for the 21st Century." In the paper four questions are asked about our current system and how it could be improved. This was a follow up to the examination of UK intellectual property law by the Gowers Report in 2006. As well as the recent issue's paper the UK has also had the Gowers Report and the follow up consultation paper from the Intellectual Property Office.[139] The European Commission has also put out its own green paper, entitled Copyright In The Knowledge Economy. These papers need to be examined to see where copyright law within the UK and Europe is heading and where it currently exists before looking in detail at the questions raised by the Intellectual Property Offices issues paper on the future of copyright in the UK.

First the European Commission's green paper should be examined. It examines the problem of so-called "orphan works" and looks at it in relation to the digitisation of work, in particular whether there should be an "exception for user-created content."[140] This could be monumentally damaging to photographers copyright in their works. However, before we go into orphan works and user generated content we need to understand what these are. For that we need to examine the definition given in the study on Participative Web and User-Created Content,[141] which defines it as "content

[139]Taking Forward the Gowers Review of Intellectual Property, Proposed Changes To Copyright Exceptions, UK Intellectual Property Office, 2007
[140]Working Party on the Information Economy, Participative Web: User-Created Content Committee for information, Computer and Communications Policy DSTI/ICCP/IE(2006)7/FINAL
[141]Organisation for European Cooperation and Development's (OECD) 2007 study Participative Web and User-Created Content, October 2007.

made publicly available over the internet, which reflects a certain amount of creative effort, and which is created outside of professional routines and practices."[142] The paper follows the recommendation laid out by the Gowers Report[143] and examines the possibility of an exception under the Berne Convention's three step test, which states "Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder."[144] The three step test has been part of European Community law since 2001 with the Copyright Directive,[145] which brought harmonisation of copyright law to the member states. But even with harmonisation there are still distinct differences between different states copyright law.

Looking at the three step test, for there to be an exception it must be deemed to be a "special case" and this case must not "conflict with the normal exploitation" and does not "prejudice legitimate right holders". The exact meaning is somewhat uncertain since there has only been one test of the three step test,[146] even though it has been used in multiple international treaties.[147] This might seem odd, reusing the same principle that was originally conceived in 1967 before mass computer use and digitisation of photographs and music, but as Koelman explains, "Negotiators fell back on the three-step test that had proven unspecific enough for anyone to read in it

[142]Organisation for European Cooperation and Development's (OECD) 2007 study Participative Web and User-Created Content, October 2007, p4
[143]Gowers Report 2006
[144]Article 13 of TRIPS
[145]Directive 2001/29/EC
[146]Looking at within TRIPS agreement the WTO examined in WT/DS160/6 August 199
[147]TRIPS agreement 1994 article 13, 10 WCT 1996 & 16 WPPT

what he wants and therefore would not hinder the reaching of consensus."[148] As such a test that it could be argued is somewhat out dated is at the core of copyright law: " The three-step test is seriously flawed and not suited for application by the courts."[149] However, some academics have argued that it deserves respect, having been more than adequate to deal with the challenges of copyright law. Nordemann believes, "On the one hand, it is flexible enough to make a domestic shading possible but, on the other hand, it allows no more than just such shading."[150] Before further examining the Gowers Report and the European Commissions report the only test of the three-step test must be looked at.

4.2 -The Berne Convention and the three-step test

The three-step test has only been tested on the international stage once, when the US Copyright Act[151] was brought into question by the EC under the TRIPS agreement and therefore a panel was created by the World Trade Organisation to look into it.[152] The EU objected to the exemptions under the act to allow anybody to perform non-dramatic works in their business premises for the enjoyment of customers.[153] What

[148]Koelman, Fixing the Three-Step Test, European Intellectual Property Review, 2006, 8 p 407.
[149]ibid
[150]Wilhelm Nordemann et al, International Copyright and Neighbouring Rights Law (VCH, 1990), 109
[151]US Copyright Act Section 110(5)
[152]WT/DS160/6 0f 6th August 1999
[153]Copyrighjt Act section 106 subsection A, says, anybody is allowed to perform in his business premises for the enjoyment of customers under certain conditions without the consent of the copyrigh holder, copyrighted works other than nondramatic compositions such as plays, operas or musicals from radio or television transmission. While section B covers anybody is allowed to perform in his business premises for the enjoyment of customers, "nondramatic music" by communicating radio or TV transmissions without the consent of the copyright owner in cases where a certain

this means is that a business could make use of television or radio broadcasts without the consent of the copyright holders. Under the Berne Convention there are minor exemptions to the copyright even though not expressed in the document itself. As Ricketson explains, the idea is "based on the de minimus principle of interpretation, namely that the law is not concerned with trifles… this means that exceptions to the rights granted in the relevant articles of the convention must be concerned with uses of minimal, or no, significance to the author".[154] When looking at the Copyright Act[155] the panel found that subsection B did violate the TRIPS treaty whilst subsection A did not. As Brennan states "The effect of the panel's decision was to permit the extent of free-of-charge exceptions to a Berne article 11bis (1) right to be determined solely by reference to the three step test and without reference to the requirement of non-prejudice to the right to obtain equitable remuneration."[156]

Even with the decision there are still many questions regarding the three-step test, such as what other areas can be considered a special case. How far exceptions can go under the three-step will only be seen when new law is passed and is challenged by other countries. This then makes the idea of basing future copyright exemptions on the three-step test difficult as it is not definitively known how the test will be applied in the future and for photographers this raises the possibility that their work unknowingly could fall under a copyright exemption.

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surface is not exceeded without any practical limitation or above that surface limit by respecting certain conditions as to the number of loudspeakers used.

[154]Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986 (Queen Mary College, University of London, 1987), paragraph 9.63(1).

[155]US Copyright Act 1976

[156]David J. Brennan, The Three Step Test Frenzy - Why The TRIPS Panel Decision Might Be considered Per Incuriam, 2002,2, p222

4.3-Orphan works and user generated content

When looking at the orphan works the Gowers Report does make some valid arguments for a relaxation of their copyright stating "The chair of the Museum Copyright Group, Peter Wienard, believes that from the total collection of photographs of 70 institutions (around 19 million), the percentage of photographs where the author is known (other than for fine art photograph) is 10 per cent."[157] But what is an orphan work exactly? It has been defined as "a copyright protected work (or subject matter protected by related rights), the right owner of which cannot be identified or located by someone who wants to make use of the work in a manner that requires the right owner's consent."[158] Currently in the UK the Copyright, Designs and Patents Act states that if the author of a work can not be found through reasonable enquiry the work will be of unknown authorship.[159] If this is so, the right will only be copyrighted for a period of 70 years from the date of creation[160] or, if it is made available to the public, then 70 years from the year it entered the public domain.[161] Problems occur particularly in the digitisation of work for projects and libraries and if, after searching, institutions or individuals carrying out the work are unable to find the copyright holder they are faced with a difficult choice of carrying on and facing a case against them for infringement of copyright, or abandoning the project. The question then is whether or not the ability to use these orphan works without the need for consent is in the public interest enough to warrant effectively taking away someone's

[157]Gower Report, 2006 page 69
[158]Stef Van Gompel, Unlocking the Potential of Pre-Existing Content: How to Address he Issue of Orphan Works in Europe?, International Review of Intellectual Property and Competition Law, 2007
[159]Copyright Designs and Patents Act 1988 S9 (4)
[160]Copyright Designs and Patents Act 1988 S12(3a)
[161]Copyright Designs and Patents Act 1988 S12(3b)

rights within their works. It is clear then that at times it may be difficult to find the copyright owner; however, the fear for copyright owners is that those wishing to use a copyrighted work will not look very hard to find the owner and will simply call it an orphan work as an excuse, so as to not have to compensate the copyright holder. For photographers the proliferation of photographs online thanks in part to websites such as flickr[162] has meant that, although it might be easy to track down the rights owner if their photographs are still on the original site, if they are copied a few times and any metadata is removed from the image it might prove very difficult to track them back to the originals and therefore they could be classified as orphan works. Currently in the US a bill going through the legislature is looking at making it legal for orphan works to be used without the copyright holder's permission.[163] The bill would mean that the user of the work must take all reasonable steps to find the copyright owner and if none emerges they may use the work but must attach an orphan work symbol. If the owner does later emerge, the user has to pay reasonable compensation. Similar bills have been or are being looked at in other countries and the possibility of a similar law in the UK and the EC seems more likely with the commissions green paper.[164] The commission has recommended that the idea of orphan works be dealt with on a national level. In the UK orphan works have been looked at by the Gowers Report; however, somewhat ironically recommendation 13 of the report suggests that the issue should be dealt with by the European Commission by amending previous directives.[165]

[162]www.flickr.com
[163]Orphan Works Act of 2008
[164]Organisation for European Cooperation and Development's (OECD) 2007 study Participative Web and User-Created Content, October 2007.
[165]Recommendation 13 of the Gowers Report recommends amending directive 2001/29/EC

Potentially this could mean that anyone who is not a fully fledged professional or who might appear not to be a professional may not have full copyright protection. The green paper focuses on digital copyright and since most photographs are shot digitally or if on film many photographers will scan them onto their computer and upload them to the internet, meaning they will be digital images.

4.4-Licences for photographs and creative commons

One issue in law to consider which is having a direct impact on user-generated content is the rise of creative commons licences. Creative commons licences allow copyright holders to grant certain rights to their works while maintaining others. Users of online photography sites such as flickr[166] have the option to make their images available for use under the six different types of creative commons licences, which vary from allowing a photograph to be used for any purposes so long as the original author is credited,[167] through to the most restrictive licence which only allows the photograph to be shared with others so long as the original author is credited and linked back to and if it is for non-commercial purposes.[168] A creative commons licence has been defined as "a form of copyright licence that can be linked to via the web. In addition to the legal code, the licence is described by a "human-readable" commons deed,[169] which identifies the key terms of the licence and machine-readable metadata that associates the online location of the licensed resource with the online

[166]www.flickr.com
[167]Creative Commons Attribution Licence 3.0 Unported.
[168]Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 Unported
[169]http://creativecommons.org/about/licenses/

location of the licence document."[170] James has said that its "intention is to circumvent the restrictions current copyright laws create for sharing of information and to act as an antidote to what the licensing body considers to be an increasingly constrictive 'permission culture."[171] The first test came in the Dutch case of Curry v Audax[172] with the court holding the licence to be valid and that Audax had breached it. There have been a number of other cases since then which have dealt with creative commons licences and have backed up the Curry v Audax case. It would appear that creative commons licences are legitimate licences that have been upheld by the courts and could potentially be used to deal with problems posed by user generated and orphan works. However there have also been criticisms of the licence: "Far from being perceived as a liberating force, the creative commons has been criticised for becoming an indiscriminate corporate filter, giving huge corporations like Virgin, the opportunity to use hundreds of images free of charge (often without the owner's consent) while depriving owners of their rights."[173] It can be argued then that creative commons, rather than allowing a greater public domain for the use of all, is mostly benefiting large corporations and companies at the cost the creator of the copyright holders. Not only that but for sites such as flickr a simple tick box is all that is required to change from an all rights reserved to a creative commons licence without informing the copyright holder exactly what it is they have given up or are allowing to be done with their work. That said, they could be one way to look at dealing with the problem of user-generated content which may not require full copyright protection or deal with orphan works. In certain scenarios modified versions of such licences could

[170]Carroll, Creative Commons and the New Intermediaries, Michigan State Law Review, Spring, 2006, p45
[171]James, Picture Use Does Not Sit Pretty, Copyright World, 2007, 175, p10
[172]Curry v Audax 334493/KG 06-176 SR
[173]James, Picture Use Does Not Sit Pretty,, Copyright World, 2007, 175, p10

therefore be used with the obvious change of attribution for orphan works since by definition the author of an orphan work is unknown. Whilst this could be a possibility it would require the user to actively change the licence to creative commons, which would require greater awareness of creative commons. The alternative being that it photographer's are automatically creative commons and are then all rights reserved would be problematic due to the fact that as creative commons licenses currently stand users can not change the licence at a later date.[174]

4.5-The Issues raised by the Intellectual Property Office

In December 2008 the Intellectual Property Office published an issues paper asking for input in regard to the future of copyright. The paper is the first step in working towards a new Copyright Bill to be presented to parliament. In the paper four sets of questions are raised and these questions that will be examined further to try and establish where the future of copyright lies and what this may mean for photographers.

4.6-Question 1: Does the current system provide the right balance between commercial certainty and the rights of creators and creative artists? Are creative artists sufficiently rewarded/protected through their existing rights?

The first area to be examined is the idea of certainty of creators or in this case photographers. The Copyright, Designs and Patents Act defines the author of a work

[174]ibid

as the person who creates it.[175] This would seem to be the photographer and would appear to be quite flexible, for example person A sets and directs the scene and orders person B to press the shutter on the camera, then although person B is technically the photographer it is clear that person A is the one who has created the image and under the definition of the act[176] would be the one to gain the copyright as A would be the creator.[177] However, some ambiguity could arise if for example the photograph contained a model and it was their look that made the photograph. It could potentially be argued that the model may have a right to the copyright unless the model had signed a model release. Another possibility when the photographer would be work done to the image in postproduction. As Abbott and Garnett argue, "In certain cases someone other than the person who operates the camera will make a substantial creative contribution to the final image--perhaps in the darkroom, perhaps in composing the picture through the viewfinder without actually pressing the button and it would not be right to deny him a copyright in it on the grounds that he was not the actual photographer."[178] Whilst this would favour designers it does mean that if there is heavy post production work done to the photograph by someone other than the photographer then the photographer will lose his copyright in the altered image. However, as previous case law has shown us there seems to be certainty for the

[175]Copyright, Designs and Patents Act 1988 section 9(1)
[176]ibid
[177]Creation Records Ltd v. News Group Newspapers Ltd (1997) E.M.L.R. 444, at 450. Timothy Lloyd J. said, "It seems to me that ordinarily the creator of a photograph is the person who takes it. There may be cases where one person sets up the scene to be photographed (the position and angle of the camera and all the necessary settings) and directs a second person to press the shutter release button at a moment chosen by the first, in which case it would be the first, not the second, who creates the photograph."
[178] Abbott and Garnett, Who Is the "Author" of a photograph?, European Intellectual Property Review, 1998 20 (6) p206

photographer that in most normal cases if there is no contract stating otherwise he will be owner of the copyright of the photograph.[179]

The question here then is how best to protect the photographer's right as the creator of the image. One way to look at it is to examine how other countries define the author of the photograph there are a few looked at by Abbott that are worth exploring for example "the intellectual creator, who must have personally chosen the subject matter and conditions of creation (Portugal); the person who produces the photograph (Denmark, Finland); the person who organises and directs the creation of the work or, in the case of 'simple' photographs, the photographer (Italy); the person responsible for the composition of the work (South Africa); the person who took the photograph (Australia, India, Nigeria, Singapore)."[180] Portugal and Italy's definitions are by far the most in depth and leave little chance of error over who the author of the work is, since it will be the photographer who will envisage the photograph and organise it. The South African definition, whilst not as in depth as those of Italy and Portugal, would appear to be a somewhat similar coverage. Australia's definition whilst in most circumstances would work if a situation occurred as previously looked at where the person directing the scene of the photograph and the person actually taking the photograph are different people. It could be a similar situation with the definition used by Denmark. So other definitions may narrow down the exact terms and favour photographers more greatly than the current UK definition.

[179] Apple Corps Ltd v Cooper (1993) F.S.R. 286 and Gabrin v Universal Music Operations Ltd (2004) E.C.D.R. 4
[180] ibid

So is there a need to alter the definition to narrow it down? The current law and definition[181] have been adequate until now but we now live in an age where photographs are easily accessible online and can be altered by another person, so looking at changing the definition along the lines of those of Italy and Portugal could warrant merit.

The other part of the question to consider then is the certainty of the rights. If we examine the Copyright Designs and Patents Act[182] we can see that the copyright holder has the right to publish and alter the photograph and can prevent anyone else doing so. Not only that but there are also the moral rights of the photographer which should give credit even if the photographer does not own the copyright:[183] for example, if the photographer is under an employment contract with Reuters whilst Reuters will own the copyright when published the photograph will have the photographer's name as he has a moral right to be credited. Unlike other copyright systems as soon as a photograph is taken it has copyright: it does not need to be registered like it does in the US.[184] This would seem to show that photographers will know exactly what rights they have in their image and do not need to do anything to register the right.

[181]Copyright, Designs and Patents Act 1988 S 4 (1a)
[182]Copyright, Designs and Patents Act 1988
[183]Copyright, Designs and Patents Act 1988 S 70
[184]US Copyright Act of 1976

4.7-Question 2- Is our current system too complex, in particular, to the licensing of rights, rights clearance and copyright exceptions? Does a legal enforcement framework work in the digital age?

When looking at photography it needs to be established whether the photographer is giving over the copyright or giving a licence to use the photograph, as Deazley explains: "They can license the use of the work by another (for certain specified purposes). In this instance they still retain the copyright in the work but cannot legally complain against the licensee who makes such use of the copyright work as is allowed by the agreed licence. When photographs are collected from their copyright owners, does the exchange between the parties more often take the form of an assignment of the copyright, or of a licence to make use of the work?"[185] So photographers can sell the right to use an image to a third party whilst still retaining the copyright and ownership of the photograph and then could sell rights to use the image to a second or third person. There will be two types of licences. The exclusive licence would give the licensee the right of exclusive use of the photograph and would be enforceable against anyone including the copyright holder (until the licence expired). The other type of licence would be the non-exclusive license whereby the copyright holder would be able to have multiple licensees for the photograph rather than just the one. If someone without a licence uses the image, the copyright owner can enforce his rights in the photograph against the person using the photograph. Whilst it might seem a simple enough task for the copyright holder to license an image to someone a problem might occur if the person wanting to license the image cannot find out who the copyright holder is or if they use it without the copyright holder's permission it might

[185]Deazley, Collecting Photographs, Copyrights and Cash, European Intellectual Property Review, 2001, 23 (12), p 554

not be a straightforward case of enforcement of the copyright holder's rights. As the issues paper states, "Innovation in business models is essential, but if the copyright system is not able to secure sufficient remuneration for online use the we put investment and jobs at risk."[186]

How in a digital era can photograph copyright holders enforce their rights? One possibility would be to have copyright registration, as in the US[187]: this would mean for a photographer to have copyright in his photograph he would have to fill out a form attached to the photograph and register it with a central body if he wanted to be able to enforce his copyright against someone who infringed it. If there was registration it would be clear who had rights in the photograph and would make enforcement much easier. As Fry asserts, "Even where there is an obvious case of flagrant infringement of copyright, and the infringer located, detailed (but legitimate) challenges regarding origination, first ownership, title, first publication, subsistence and the substantiality of copying can be thrown up by the defence, all causing real difficulties for a legitimate claimant. These are challenges that are not readily recognised in equivalent trade mark claims where registrations can be produced, authorship is irrelevant and substantiality is rarely an issue. For individual copyright owners (whether corporate or private individuals), acting alone, enforcement identification of infringement and then prosecution of proceedings is a real challenge."[188] One change that could be made would be the use of a supervisory body

[186]Copyright The Future, Developing a Copyright Agenda for the 21st Century, Intellectual Property Office, 2008, p 7
[187]Wolff, The professional Photographer's Legal Handbook, PACA, 2007, p42 states "A US author must register his or her work with the Library of Congress before filing an infringement action in court"
[188]Fry, Copyright Infringement and Collective Enforcement, European Intellectual Property Review, 2002, 24(11), p516

to reduce copyright infringement; currently this is dealt with by individuals, companies or trade organisations. Fry has examined this issue "Unlike in certain areas of the law, there is no one supervisory body mandated to reduce "copyright theft" in the same way that, for instance the United Kingdom's Information Commissioner and the Environment Agency have statutory remits to monitor and enforce the data protection rules and environmental legislation respectively."[189] If such a body were created it would need to have powers similar to that of the aforementioned bodies so that if there was an infringement of copyright it could enforce it and also if copyright holders had their rights infringed they could go to the body for advice and get help from the body in enforcing their rights. If copyright registration was introduced and handled by the body it could make enforcing copyright far simpler and easier for individuals than it currently is and possibly act as a deterrent to copyright infringers.

4.8-Question 3: 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)?[190]

For photographers (or any content producers for that matter) to continue to produce work they must be able to earn a living doing so. They therefore need to be able to properly monetize their works and this requires that the copyright system can work in a way that will allow this. This is true for all of those who work in an industry based

[189]Fry, Copyright Infringement and Collective Enforcement, European Intellectual Property Review, 2002, 24(11), p517
[190]Copyright the Future, Developing a Copyright Agenda for the 21st Century, Intellectual Property Office, 2008, p 7

around the protection of their intellectual property whether it be copyright or patents. As Van den Bergh states, "In the absence of copyright, publishers of books would be harmed by pirates who put copies onto the market. These pirates, copying works that are already published, do not have the same fixed costs as the original publisher. They do not need to look out for suitable authors, nor do they need to edit and advertise the works."[191] When looking at the copyright system for photographers we must look at the incentives currently in place, that is that the copyright holder of the photograph has the right to. One problem is that the availability of images for online publications can put print media at a disadvantage as they have to pay more for the use of images while online sources are able to use copyrighted images and not have to worry about the consequences of infringing the copyright holders' rights. The problem then is to tackle copyright infringement online and clearly new legislation and/or new governmental bodies would be required for this.

The Gowers Report has brought up the idea of differences of online and physical penalties for copyright infringement. Recommendation 36 of the report suggests amending section 107 of the Copyright, Designs and Patents Act. Currently the penalties for online infringement and physical infringement are different. If the Gowers Report's recommendation were followed the online penalty would be brought upto the same as that of physical infringement[192]. If this was done the hope would be that it would be a greater deterrent to copyright infringement online but it would also be necessary to educate the public about the punishment for online copyright

[191]Van den Bergh, The Role and Social Justification of Copyright: a "Law and Economics" Approach, Intellectual Property Quarterly, 1998, 1, p23
[192]Gowers Report 2006 Recommendation 36 Match penalties for online and physical copyright infringements by amending section 107 of the Copyright Designs and Patents Act 1988

infringement. The question of value within photographs is a highly subjective one and as with most creative works it depends on who the author of the work is and what the purpose of the work is. For example stock photography is going to have a much lower value than that of a specially commissioned photograph of President Barack Obama. The value for the end user will be deal with by the market and economics and is not something that should be decided by the law. However, what the law must do is ensure that the economic forces that allow photographers to continue to produce work are reinforced by the law so that when rights are infringed there is a clear mechanism to act against the infringement.

4.9-Question 4: 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?[193]

It is only in the last two decades that digital copies of copyright works have existed. It is possible to make perfect copies of photographs and post them on the web without having any way to trace the original author and copyright holder. The problem of authenticating a photograph therefore arises when a person wanting to use a photograph is unable to locate the owner. The question then becomes that of whether or not UK law should adopt a similar approach to the US of copyright registration? If copyright was registered it would put the photographer in a much clearer position and if there was a database of copyrighted works similar to that which exists for patents, the ability to locate the copyright owner by the person wishing to use the copyright

[193]Copyright the Future, Developing a Copyright Agenda for the 21st Century, Intellectual Property Office, 2008, p 7

would be far greater than it currently is. Possible problems could occur with organising something as big as this since the amount of copyright created every day from people taking photographs would be extremely large. However not all photographs would be registered and only those that met the minimum requirements for protection would be covered[194], Photographs would be copyrighted as soon as they were created and the ability to register the copyright would ensure better protection for professionals and allow easier enforcement of their rights in their works. This would allow differentiation between the copyright of professional works and that of personal or amateur works. However, it could be argued that the addition of registration of copyrighted works could add to an already complicated situation acting an against layer which might seem unnecessary to some. There could also be the problem of when the court would consider the copyright registered. In the US it depends on the state whether or not the right is deemed to be registered when the application is submitted or when the copyright registration certificate is received.[195] Not only that but registration could act as a barrier to enforcement for copyright holders if the fee is too excessive or if other requirements are laid down for registration before they can go to court to enforce copyright. It also adds an extra complication to the copyright holder having to go and register the copyright with a central body. Dietz has observed,"Although the US now adheres to Berne, it still burdens US authors with formalities going back to earlier copyright laws. One of these is that a US author must register its claim to copyright in the U.S. Copyright Office as a precondition to filing suit. Failure to do so deprives the court of subject-

[194]Copyright Designs and Patents Act 1988 judicial consideration may be given to Blau v BBC

[195]Wolff, The Professional Photographers Legal Handbook, Allworth Press, 2007, p43

matter jurisdiction and the suit will not be entertained."[196] The problem would be that it goes against the last part of the question, as it will no doubt add complication to the process, possibly defeating the purpose.

When looking at differentiating rights of creative artists and other rights holders it is difficult to see how the current system could be changed. Currently the creative author will have the moral rights no matter what and then what ever rights they give to others will depend on whether or not they license or assign them to any third parties. The law here seems to be sufficient in the protection it grants to rights holders, whether they be the author or not, and the rights of the author are protected under their moral rights, although these rights could be increased with the inclusion of the right to the withdrawal of the work[197] and the right of publishing the work.[198] However authors rights will be increasing with the resale right coming into force in 2010,[199] meaning that if a work goes on to increase in value and it is sold within the UK they obtain a percentage of the fee. It is clear that rights are currently separated and whilst there is a serious question to be examined when looking at the authentication of copyrighted works, when it comes to the differentiation there already is to a certain degree with that or moral rights and copyrights, whether or not further differentiation is required is some what debatable.

[196]Dietz, United States: Copyright - Registration Requirement Prior to Action for Infringement, European Intellectual Property Review, 2000, 22(10), N154
[197]French Intellectual Property Code of 192 Art.L.121-4
[198]French Intellectual Property Code of 192 Art.L.121-2
[199]Directive 2001/84

4.10 Overview

It is clear then that questions one and two from the Intellectual Property Office require legislative action to improve the situation. However, as for question three there is a clear argument that as long as the copyright holders rights can be enforced the value of the work is something best left to economics and market forces. With question four it is clear that authentication is something that needs to be examined further, however the idea of further differentiation within the copyright system may not. Whilst the current copyright system does work within the UK it is clear that there are gaps that need to be looked at, and with the digital age the current legislation does require updating.

Chapter 5-Conclusion

5.1- Conclusion

As we have seen the law of copyright is not an absolute one for photographers: there are many areas where a photographer's rights in a photograph are subject to the rights of others. It is also interesting to note that as we have seen that copyright law is a global law with similarities between different countries' copyright laws, and not just those within the European Union. There are also some distinct differences, such as the right of publicity and the period of time for copyrights. It is clear that copyright laws in all countries are in the process of changing, and with the advent of social networking and digital media and its wide availability across the internet the laws of copyright need to be changed since the internet was nothing more than an idea when the Copyright, Designs and Patents Act[200] was brought into law. So there is a need for clear laws that can deal with the digital age and be adaptable to the ever-changing nature of the internet. With the follow up to the Intellectual Property Offices issue's paper likely to come out in the second half of 2009 it is quite possible that in the next few years we could see the Copyright, Designs and Patents Act,[201] which has been at the heart of copyright law for the last two decades, replaced by new legislation from parliament. Not only that but with copyright law being reviewed within the European Community there is the possibility of more directives with regard to copyright law and in particular some that focus on user-generated content. These new laws should be created so as to guard against creating a two-tiered copyright system that could potentially disadvantage photographers whose works could potentially be classified to effectively have a second class of copyright protection. This possibility could be very

[200]Copyright, Designs and Patents Act 1988
[201]ibid

harmful to photographers, more than to other content creators due to the threshold in creating photographs that have the protection of copyright.

Along with the new legislation the creation of a new governmental body to exclusively deal with copyright issues could help with enforcement. For individuals to enforce their own copyright might seem quite daunting and this could be resolved if there was a governmental body to go to. As well as helping with enforcement this body could help raise awareness of the rights of copyright holders, which could help to reduce infringement. Whilst there are campaigns from organisations trying to make the public aware of copyright infringement and piracy they normally only focus on one element such as films or music. If the body were created it could act in a similar way the environment agency might act and would require substantial powers to deal with copyright infringement that would obviously be open to judicial review if so needed. Whilst it may seem quite radical it may be what is needed to deal with copyright infringement in the digital age.

The question of how these new laws work and whether or not the enforcement of copyright and the gaining of consent are made easier will depend on the new laws and whether they work within the existing framework or use additional governmental bodies. Whether or not registration is introduced or the use of a two-tier copyright system is created with distinctions between amateur and professional works remains to be seen. However if registration was introduced then a new governmental body would obviously be needed or an existing governmental body would need to be granted new powers. If this were to occur then previously looked at governmental

copyright body could deal with registration as well as the other areas previously discussed.

With orphan works it would seem that the law would change in relation to the copyright of these works, with the introduction of bills in the US and Canada and the European Commissions report on orphan works. Whether the law will come from the UK parliament or as a directive from Brussels is as yet unclear but it seems that the current law is inadequate and that it is only a matter of time before the law changes to alter the rights of orphan works and allow their use by those who wish to use them. It is clear though that the law must change, as Fitzgerald states: "In my view by 2010 we should be moving beyond the limited conceptual framework of copyright to a legal framework that looks more closely at the relationships any individual or entity has with information, knowledge, culture or creativity. A crude name would be information or cultural relationship law. By focusing on the information or cultural resource and how we nurture and allocate it for social and economic good we open up the politics and economy of the rights to access, reuse and communicate information, knowledge, culture or creativity."[202]

For photographers the law is currently adequate with digital photographs being covered by the 1988 act as well as film. However, due to the wide definition of photograph, enforcement of those rights has become more difficult and more unclear; new legislation will hopefully clarify certain areas and allow photographers to know their legal situation and use those rights for commercial gain, but no matter how the law is changed there can be no doubt that copyright will play an important role in the

[202] Fitzgerald, Copyright 2010: the future of copyright, European Intellectual Property Review, 2008, 30 (2), p49

future. As Justice O'Connor of the American Supreme Court put it, "It should not be forgotten that the framers intended copyright itself to be the engine of free expression."[203]

Word Count: 12348

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