Is Copying a Crime?

In 1999 The Bridgeman Art Library took the Corel Corporation to court in the US after discovering some of their images on a Corel CD . Although the paintings depicted were out of copyright, The Bridgeman said the copies could only have been made from their own transparencies. Corel defended the case, maintaining that there was no copyright in the transparencies themselves, and therefore they could not be sued for copyright infringement. The New York Southern District Court ruled in favour of Corel, stating that ‘ a slavish recreation of a work of art lacks originality and is therefore not covered by copyright.’

Despite protestations from the Bridgeman side, US law was used to determine the outcome, but the judge also gave his opinion that the Bridgemans case would fail in the UK. Though not yet tested in Britain, the case made legal history, and a major protection for libraries selling reproductions of works of art appeared to be under threat.

In May 2007, lawyers, publishers and picture libraries gathered at Queen Mary, University of London for a re-enactment of the case, to debate whether the judgement would hold under UK law.

The nub of the matter for courts of any jurisdiction is the issue of originality. If a photographer creates a photograph of a painting, what is the input? Is the photograph an original work or is it a mere reproduction, or slavish copy, of another work?

In the original Bridgeman vsCorel case, the court used the US definition of originality, from *Feist vs Rural, 1991* in which copyright protection was ruled out for works created using only ‘sweat of the brow’. The US position is that ‘more than a modicum’ of originality has to subsist in a work for it to be copyrighted. But there are disagreements too. Marybeth Peters, US Register of copyrights since 1994 revealed that although images of out of copyright paintings from the Bridgeman had been registered by her office, the Registry found itself in a difficult position when asked by the courts to file an amicus brief, or opinion on

the Corel case. They couldn't give an opinion on the matter because they had failed to reach agreement among themselves.

UK law has established that a mechanical photocopies are not copyrighted (*Reject Shop Vs Manners 1995*), and another case, *Interlego A.G. vs Tyco Industries (1989)* has been used in defence of the Bridgeman/Corel judgement. It found that a drawing which was a copy of another drawing did not hold its own copyright. 'Skill labour or judgement merely in the process of copying cannot confer originality' said the judge.

Does that mean that a photograph which is a copy of a painting also holds no copyright? Christina Michalos, barrister and author of 'The Law of Photography and Digital Images', a speaker at the event, argues that the UK definition of originality is low. It can be achieved by means of a photographer's decisions about type of film, choice of lens, camera angle and so on.

There is no debate about the originality of photography of 3D objects as the resulting image cannot not be a reproduction of the original. But where the intention is to reproduce the original as exactly as possible, the argument for originality beomes thin, or at least debatable. And 'thin' is how Christina Michalos describes the copyright protection she deems appropriate in this instance. This 'thin' copyright would protect the image from reproduction of that image, but there would be no infringement by taking a second independent photograph of the painting.

The case for the Bridgeman was made by Professor Adrian Sterling Fellow of Queen Mary Intellectual Property Research Institute and author of "World Copyright Law'. He argued that the question under consideration related to the law we have, not the law we might desire. English Law, he said, provides for copyright protection for the invested skill, labour and judgement in the creation of a work. The US judgement, was based on a case, *Feist vs Rural* , which does not pertain in the UK.

The defence of Corel for this re-enactment was expounded by Dr Uma Suthersanen , Chair of the British Literary and Artistic Copyright Association. She argued that the skill in producing a photograph of a painting is to make the copy indistinguishable from the original. If that is the aim of the photography, then where is the originality, she asked, citing *MacMillan &Co Ltd vs Cooper :* ' Labour skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.'

She also put forward the public interest case. If a work of art is in the public domain, is it in the public interest for the means of viewing it to be copyright protected?

Thresholds for copyright protection differ between the UK and the US. But in Europe, Civil Law, based on author's rights, takes a different approach. Claudia Andrieu, legal representative for the Picasso Administration argued that if reproductions were allowed as copyrighted works, that would weaken the Droit D'Auteur or author's rights. She chases violations of Picasso's copyright and moral rights all over the world, trying to enforce and argue author's rights even in areas where the law doesn't support them. Although French courts have said that copyright is granted to a work by the choices the photographer makes of angle, lighting and film, she argues that the protection for creativity should be paramaount and that other laws such as unfair competition should be used to protect works such as these. She raised the question of what would happen if the owner of a painting did not give authorisation for the photography in the case of an out of copyright painting. The photographer would posses a right over which the owner of the painting would have no control.

The German position was represented by Professor Thomas Dreier, Professor of Law at the University of Karlsruhe. German law allows for two levels of rights in a photograph; copyright, which receives the standard life of the author plus 70 years and a lower threshold copying right, or neighbouring right, which receives 25 years of protection. This approach would seem to offer a solution to the arguments about degrees of originality, but the surprise result of Professor

Dreier's deliberations was that German courts would not grant either of these rights to the photograph in the Bridgeman case. The image would have no protection at all. The copy must be distinguished in some way from the original, he argued, to receive even the lower threshold neighbouring right. Copyright protection for the reproduction of a work would run contrary to the idea that works fall into the public domain after a period of time has elapsed.

The position across the European Union is defined by the EC Term Directive Article 6, which gives protection to photographs which are original in the sense that they are the author's own intellectual creation. There is, however, provision for member states, under the Berne Convention, to provide protection for photographs not fulfilling this requirement. It is this provision which would allow the UK to protect reproductive photographs of paintings.

As always in matters of copyright, the law tries to balance the rights of creators with the interest of the public to access works of art. Case law is patchy andgenerally drawn from areas other than photography. And in an era when technology is moving so fast that many people in the picture industry are unsure of the skills required to process an image, it is not surprising that judges are have difficulty in understanding the detail.

The Corel Bridgeman case does raise other questions. If there is copyright in a copy of a painting, then there is probably also copyright in a scan or a photographic print. Large agencies protect themselves contractually when they have scans made, but there are no doubt large numbers of images circulating without that protection. Adrian Sterling calls for 'more research' into the process of making camera ready copy for publishing. This would amount to the process of CMYK conversion and correction in the new digital workflow, a job undertaken by a variety of people. Contract lawyers take note: the digital workflow has provided many more points of intervention in an image than used to be the case.

The official judgement of the re-enactment court , given by Andrew Sutcliffe QC, and based on UK law, would reverse of the US decision, and protect the Bridgeman photographs.

But the lawyers, in reality, don't agree on the matters discussed. The US lawyers in the Copyright Registration Office don't agree; and for every opinion stated in the re-enactment, you could find an opposing one somewhere else. The German analysis was thrown into question, and doubt was expressed in some quarters whether the Bridgeman would really win in the UK.

The picture library industry which is used to operating in an untested legal environment, will go back to business as usual. Meanwhile, as copyright and IPR become more critical to both public access and commercial markets, the lawyers will have an interesting time untangling the discrepancies both within and between national boundaries.

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