

COPYRIGHT IN PHOTOGRAPHS: OWNERSHIP

Ronan Deazley and Kerry Patterson

1. Introduction

Determining who owns the copyright in embedded photographs that feature in newspaper and magazines can be challenging: it will not necessarily lie with the newspaper or magazine proprietor. Moreover, this often requires familiarity with the provisions of several Copyright Acts. In this note, we focus on material created before 1 August 1989, when the current copyright regime came into force: the Copyright Designs and Patents Act 1988 (the CDPA).

2. In Practice

In the sections that follow we consider the following:

Ownership of copyright in works of unknown authorship created both before and after 1 August 1989	Section 4
Ownership of works of known authorship created by employees, freelance workers and on commission, before 1 August 1989	Sections 5, 6 and 7
The effects of revived copyright on photographs taken before 1 January 1945, as a result of the implementation of the European Term Directive	Section 8
The case of <i>Alan Grisbrook v. Mirror Group Newspaper Limited</i> (2009), a decision with important implications for the digitisation of freelance photographs first published in commercial newspapers and magazines	Section 9

Experience of contacting newspapers to clear rights as part of the Edwin Morgan project has shown that newspapers often cannot provide information on contractual arrangements with journalists as far back as the 1950s. However, there were exceptions: The Times was able to provide the names and contractual status of writers not named in the printed newspaper, from 1912.

In the absence of reliable information about whether work was created by an employee or on a freelance basis, as well as details about the contractual arrangements between the employee/freelancer and the publisher, it is necessary to rely on the presumptive rules set out within the relevant legislation.

For example, consider the issue of photographs from magazines or included in newspaper clippings. Whether the author of the photograph is known, and when the work was first published will guide which Copyright Act should be consulted.

If there is no author's name accompanying the work when published but the name of the publisher does appear on a copy of the work as first published, then the publisher is presumed to be the owner of the work (in accordance with s.104(4) of the CDPA). This presumption may be rebutted depending on other available evidence.

However, if you know who the author of the work is, the relevant presumption to apply will depend on when the work was published. For example, if the work was first published in 1956, as the 1956 Copyright Act only came into force on 1 June 1957, the governing law about first ownership is set out in the 1911 Act.

If the photographer in question was a staff photographer then the copyright, as it relates to publication in a newspaper, magazine or periodical, belongs to the publisher (s.5(1)(b)) subject to the terms and conditions of the contract of employment (if one still exists). If the photographer was commissioned by the newspaper for valuable consideration (in effect, for money) then copyright belongs to the publisher, subject to any contrary agreement (s.5(1)(a)).

If the photograph was not commissioned by the newspaper, and the photographer was not an employee, then the copyright likely lies with the photographer, subject to evidence of any contrary agreement.

Finally, it is important to bear in mind the special rules concerning the rights in photographs taken before 1 January 1945 that benefit from a revived copyright (in accordance with the Term Directive). That is, ownership of the revived copyright lies with the owner of the copyright in the work immediately before it expired, *unless* the former copyright owner had died before the commencement of the Regulations in which case the revived copyright vests in the author (or, if the author is dead, in her personal representatives).

3. Legislative Context

The first ownership of copyright in works created on or after 1 August 1989 is determined in accordance with the provisions set out in s.11 of the CDPA.

However, in relation to material created *before* 1 August 1989, the first owner of the copyright in the work is determined by *the law in force at the time when the work was made or completed* (CDPA, Schedule 1, paragraph 11(1)).

Typically, the first ownership of copyright in works created before 1 August 1989 lies with the author, as is the case under the CDPA, although this is not always the case. Given the historical nature of archive material, it is important to be familiar with earlier copyright legislation including the 1911 and 1956 *Copyright Acts*, the forerunners to the CDPA.

4. Works of unknown authorship

In relation to the first ownership of copyright in works of unknown authorship the same rules apply under the CDPA whether the work was created *before or after* 1 August 1989.

For literary, dramatic, musical and artistic works published without the name of the author appearing on the work, s.104(4) of the CDPA states that if the name of the publisher appears on the work when first published then the publisher shall be presumed to have been the owner of the copyright at the time of publication.

However, this is a just a presumption; it will not apply in the face of contrary evidence or proof of ownership lying with the author of the work or elsewhere.

5. Work created under the Copyright Act 1956

5.1. Work created by employees

Similar to the CDPA (s.11(2)), the default position under the 1956 Act is that, in the absence of any agreement to the contrary, copyright in work made by an employee in the course of her employment shall be owned by her employer (s.4(4)). This relates to works created between 1 June 1957 (when the 1956 Act came into force) and 31 July 1989 (after which the CDPA came into force) but is subject to the exceptions discussed in sections 4.2 and 4.3 below.

5.2. Work created by employed journalists

Special rules apply to the ownership of copyright in literary, dramatic and artistic works created by a journalist in the course of her employment for the purpose of publication in a newspaper, magazine or periodical. However, these presumptive rules do not apply to work created by freelance journalists (see section 7 for further discussion).

Where the journalist is an employee of a newspaper or magazine proprietor, the employer is entitled to the copyright in the work but *only* in relation to publication in the newspaper or magazine. In all other respects, the copyright in the work remains with the employed journalist (s.4(2)). For example, this would enable a staff photographer or illustrator to reproduce their work elsewhere, including online without the need for permission from their employer.

5.3. Commissioned works of art

In relation to photographs made on commission for money or for some other valuable consideration (that is, for some form of payment), the copyright shall belong to the person commissioning the work and not the author (s.4(3)).

So, for example, with a photograph commissioned by a newspaper or magazine the presumption would be that the commissioning publisher owns the copyright in the photograph.

6. Work created under the Copyright Act 1911

6.1. Work created by employees

Similar to the CDPA, the default position under the 1911 Act is that, in the absence of any agreement to the contrary, the copyright in a work made by an employee in the course of her employment shall be owned by her employer (s.5(1)(b)). This relates to works created between 1 July 1912 (when the 1911 Act came into force) and 31 May 1956 (after which the 1956 Act came into force) but is subject to the exceptions discussed in sections 5.2 and 5.3 below.

6.2. Work created by employed journalists

Special rules apply to the ownership of copyright in articles or other contributions created by the employees of newspapers, magazines and periodicals. These presumptive rules do not apply to work created by freelance journalists.

Under the 1911 Act, in the absence of any agreement to the contrary, the right to publish the work remains with the author *other than* as part of a newspaper, magazine or periodical (s.5(1)(b)). This rule, as set out in the 1911 Act, applies to any work that constitutes 'an article *or other contribution* to a newspaper, magazine, or similar periodical' (emphasis added); as such it would seem to encompass both literary and artistic contributions, such as photographs taken by a staff photographer.

6.3. Commissioned works of art

In relation to photographs made on commission for valuable consideration, then, subject to any contrary agreement, copyright shall belong to the person commissioning the work (s.5(1)(a)).

7. Work created before 1 July 1912

Before the 1911 *Copyright Act*, the UK copyright regime was made up of a number of different copyright acts:

- Copyright in literary, dramatic and musical works was regulated by the *Copyright Act 1842*
- Copyright in paintings, drawings and photographs was regulated by the *Fine Arts Copyright Act 1862*
- Copyright in works of sculpture was regulated by the *Sculpture Copyright Act 1814*
- Copyright in engravings was regulated by the *Engravers Copyright Acts 1735 and 1766*

None of these Acts set out any general rules about work created by employees in the course of their employment. Whether copyright in work created in the course of employment belonged to the employer or to the employee was a matter for the courts to decide at common law. Unfortunately, judicial discussion of this issue throughout the nineteenth century was neither very consistent nor clear. Often, although not always, the courts would conclude that the author (employee) owned the copyright even though the work had been created in the course of employment.

The 1842 *Copyright Act* did include provisions regarding the ownership of work created by journalists however the scope of the Act does not include artistic works such as photographs.

7.1. Commissioned works of art

The ownership of copyright in a work produced on commission (as opposed to a work created by an employee) was specifically addressed in the *Fine Arts Copyright Act 1862*. The 1862 Act states that ownership of the copyright of any painting, drawing or photograph made for or on behalf of another person 'for a good or a valuable consideration', lies with the person commissioning the work *unless* copyright has been expressly retained by the author in writing (s.1).

8. Ownership and Revived Copyright: Photographs taken before 1 January 1945

As discussed in our note on *Photographs: Understanding Copyright Duration*, the duration of protection for photographs within the UK has a complicated history, often making it difficult to determine whether a photograph taken before 1 January 1945 is in copyright or not. What we can say, however, is that if a photograph taken before 1 January 1945 is in copyright, it is because the copyright in the work has been revived as a result of the implementation of the *Directive on the Duration of Copyright* (the European Term Directive).¹

The Term Directive was implemented within the UK by the Duration of Copyright Regulations 1995. Importantly, for our purposes, the Duration Regulations included special rules regarding the ownership and use of copyright in works benefitting from a revived copyright.

First, Regulation 19 of the Duration Regulations states that ownership of the revived copyright lies with the owner of the copyright in the work immediately before it expired, *unless* the former copyright owner had died before the commencement of the Regulations in which case the revived copyright vests in the author (or, if the author is dead, in their personal representatives).

Second, the Duration Regulations allow for anyone to make use of a revived copyright *as of right*. That is, the regulations state that any acts restricted by copyright shall be treated as licensed by the copyright owner so long as reasonable notice of intention to use is given to the copyright owner and subject to the payment of a *reasonable royalty* (whether or not a fee has been agreed upon at the time of use).² In other words, so long as you give notice and are prepared to pay a reasonable fee to make use of the work, the copyright owner *cannot refuse permission*.

9. Digitising Freelance Photographs

Often, when dealing with photographic images published in a newspaper or magazine, the photograph will not have been taken by a staff photographer but rather by a freelancer. In many cases, the freelance photographer will have granted the newspaper or magazine a licence to publish their work, rather than assigning their copyright to the publisher. Understanding the scope of that licence is particularly important when dealing with material that was first published in a pre-internet era. The implications of this issue when digitising archive material is well illustrated by the case of *Alan Grisbrook v. Mirror Group Newspaper (MGN) Limited*.

Between 1981 and 1997, Alan Grisbrook, a freelance photographer, supplied the *Daily Mirror* with photographs, many of which appeared on the front page of the *Mirror* as well as other titles in the MGN stable. During the time that Grisbrook worked for MGN, no written contract was ever concluded between the two parties. Instead, as was standard practice with all freelance photographers, Grisbrook would provide the *Mirror's* night picture editor with images who would then decide whether or not to use

¹ For further details, see *Photographs: Understanding Copyright Duration*.

² Duration Regulations 1995, regulation 24. In default of agreement between the two parties, the Copyright Tribunal is authorised to determine what constitutes a reasonable royalty.

them; if used, Grisbrook would subsequently contact the picture editor to agree a price for that use.

In June 2006 MGN launched *mydailymirror.com* which allowed users to both access the front pages of archived editions of the *Daily Mirror* from 1903 to the present day and purchase a reproduction of any front page either as a poster, T-shirt, or a greetings card. Grisbrook complained about the inclusion on the website of front pages containing his photographs (111 in all) and asked that they be removed. MGN tried to negotiate, but Grisbrook was unwilling to accept a fee for the inclusion of his photographs on the website. As a result, MGN decided to delete from their website any front pages featuring a photograph by Grisbrook.

Subsequently, in April 2007, MGN established *mirrorarchive.co.uk*, a resource primarily aimed at academic and library users. Unlike *mydailymirror.com*, *mirrorarchive.co.uk* was not limited to front pages but provided access to all articles and stories from the daily archives of the *Daily Mirror* from the 1903 onwards. In March 2008 Grisbrook once again complained about the inclusion of his photographs on the *mirrorarchive* website, at which point MGN decided to argue the issue before the courts.

In court, it was agreed between the parties that Grisbrook, in submitting his photographs to MGN for inclusion in one of their publications, granted a licence to MGN to reproduce the photographs upon payment of a fee. It was also accepted that MGN was entitled to retain the original negative for use in further editions (again subject to the payment of an appropriate fee), and that Grisbrook was entitled to revoke the licence to make further use of those photographs at any time.

Where the parties disagreed, however, was in relation to the subsequent use of his photographs in already published editions. MGN maintained that the initial licence granted by Grisbrook to MGN to permit the publication of his photographs must necessarily be treated as extending to any subsequent reproduction or use of that published material, including online. As such, they argued, making their previously published material available on a resource such as *mirrorarchive.co.uk* was within the scope of their existing licence and did not require any additional permission from Grisbrook.

Lord Justice Patten disagreed. In the absence of an express contract between the two parties, he reviewed the legal authorities regarding the implication of contractual terms. Before any term might be implied into the agreement between the two parties, he observed, it had to be reasonable and equitable, and it had to be necessary to give business efficacy to the contract. In other words, no term would be implied if the contract could be effective without it. Moreover, in relation to implied terms when dealing with the licensing of a copyright work, he continued that the scope of a licence 'must be the minimum which is required to secure to the client the entitlement which the parties to [the] contract must have intended to confer upon him', which licence must accordingly 'be limited to what is in the joint contemplation of the parties at the date of the contract, and does not extend to enable the client to take advantage of a new unexpected profitable opportunity'. With that in mind, Patten LJ continued that the commercial exploitation of MGN's archive through websites such as *mirrorarchive.co.uk* would not have been contemplated at the time when Grisbrook granted a licence to MGN to make use of his photographs. In short, by including his work within the *mirrorarchive* resource, MGN had infringed Grisbrook's copyright.

The decision in *Grisbrook* is obviously specific to the facts of that particular case, but it does give rise to an important consideration when digitising material from newspaper and magazines held in archive and other collections. With freelance material, even if the publisher has licensed or owns the right to reproduce the work in print they may not hold the rights to reproduce the work online. Much will depend on the facts of the case, whether a contract exists between the freelancer and the publisher, and what the terms of that contract say. Moreover, the case neatly illustrates how a publisher might interpret an agreement to mean one thing while the freelancer interprets it to mean another. Determining who actually owns which rights will not always be straightforward in these situations.

10. Legal References

Copyright Designs and Patents Act 1988 c.48 (www.legislation.gov.uk/ukpga/1988/48/)

Copyright Act 1956 c.74 (www.legislation.gov.uk/ukpga/1956/74/contents/enacted)

Copyright Act 1911 c.46

(www.legislation.gov.uk/ukpga/1911/46/pdfs/ukpga_19110046_en.pdf)

Duration of Copyright and Rights in Performances Regulations 1995 No.3297

(legislation.data.gov.uk/uksi/1995/3297/made/data.htm?wrap=true)

Directive 93/98/EEC of October 1993 harmonizing the term of protection of copyright and certain related rights [1993] OJ L290/9 (the *Term Directive*)

Fine Arts Copyright Act 1862 c.68

(www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_uk_1862)

MGN Limited v. Alan Grisbrook [2010] EWCA Civ 1399

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