

# The BRITISH ART *Journal*

## EDITORIAL

### Copyright again, only much, much worse

Submissions ought now urgently to be made by readers of this journal in response to the British government's attempts to get to grips with what are called 'orphan works'. Photographic records of works of art themselves out of copyright have been dragged into legislation that was initially prompted by the need to straighten out rights in film and video. The implication of the proposals is that photographic still reproductions of works of art are themselves works of art and therefore subject to copyright under EU rules (70 years after the death of the creator). The problem is, once this extraordinary step has been taken (statute law in England presently demands an element of creativity in a work of art, which case law partly supports, partly confuses), that there are countless such photographic records, often in the possession of agencies, the originators of which are not known or whose estate cannot be traced, records that are to be treated as if they were genuinely 'orphan works' in the copyright sense. Agencies that wish to charge fees for the use of reproductions, which includes a most unfortunate number of public museums, have a vested interest in promoting this unexamined notion. The government needs to pay attention to the threat that this implication in the legislation poses to art-historical publications, books as well as journals, which will be an economic disaster in addition to the dire consequences to the dissemination of knowledge.

As art historians know well, many of the reproductive images in the agencies' hands are now supplied in digital form, created from existing reproductions. There is an implication, although the question is not addressed in the proposals, that copyright must henceforth subsist in these digital reproductions, which are of course reproductions of reproductions (although with a nod to the continuation of the 'original' 'copyright'), created in a purely automated process. There is little or no attention paid to the whole question of digital reproduction in the proposals, which fail even to address the question of the use of scanners. Yet scanning is a method employed not only by reproduction agencies but also by owners of original works of art to create digital images. The pressing of a button, it would seem, is now to be deemed sufficient to create copyright in the image thus produced. The whole idea of copyright is being effectively degraded, which surely cannot have been the government's intention.

The proposals envisage, as a means of solving a conundrum that ought never to have been posed (reproductive images considered as 'orphan works'), that a fee will be collected on behalf of any possible claimant to such rights. Moreover the fee will be fixed at 'market value', a phrase that will fill art historians with dread. It is implied in the consultation document that the government will not set up its own agency to collect these fees, but will pass the duty to the existing agencies. This can be understood as promoting the poacher to the gamekeeper's position – if not as a licence to print money. How, do we suppose, the agencies will even begin to fulfil their accompanying duty diligently to seek out the owners of 'orphan works'? How are they equipped to carry this out? Common sense suggests that any search is likely to be passive or cursory. Nor is there much incentive. Agencies already issue disclaimers along with their 'licensing' activities, which often indicate that they have no clue as to who made a particular photographic image – for the use of which they are none the less charging a fee. A fair test of how these things go at the moment may be the activity or lack of it of by the body funded by the EC since at least 2007, MILE (Metadata Image Library Exploitation), which is confessedly 'co-ordinated by the Bridgeman Art Library'. Activity on its database (<http://orphanworks.ssl.co.uk>) has not been intense: to date: there are precisely seven 'resolved orphan works claims'. The website gives this definition (by a then employee of the Bridgeman Art Library): 'Orphan Works are works of art (and other copyrighted material) that are believed or known to be in copyright but whose copyright owner is unknown or untraceable. Orphan Works can be original works of art, or an original image (e.g. a photograph) of a work of art. When an original work of art is out of copyright, images of that work of art may continue to be in copyright.' You have to admire that disingenuous 'e.g. a photograph': not 'e.g. a drawing or a painting of a work of art', but 'e.g. a photograph', as if it were not the most contested instance. And, according to the final sentence of the definition quoted here, copyright may continue to the crack of doom. This definition of 'copyright' in reproductions is effectively repeated by the Tate ([www.tate.org.uk/about/media/copyright](http://www.tate.org.uk/about/media/copyright)), which actively supports this retrograde protectionism. It is distressing to find that an institution that looks after one of our great public collections is more interested in constricting knowledge about those collections than in promoting the free understanding of them, which ought to be its overriding objective.

Readers are urged to make their submissions in objection to these unfortunate proposals (reference Intellectual Property Office 2011-004) by 21 March 2012: <http://www.ipo.gov.uk/pro-policy/consult/consult-live/consult-2011-copyright.htm>

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