

Wikimedia UK Submission on Copyright for the IPO Consultation

1. About us

The Wikimedia Foundation is the US-based charity behind the most popular general reference work on the internet, Wikipedia. This encyclopaedia is available in over 200 languages with the English version containing over 2.5 million articles. The Foundation also hosts eight other projects, including a news source, a dictionary and a media repository. The Foundation's projects are collaboratively edited by over nine million volunteers worldwide and their content is released under free copyright licenses such as Creative Commons.



We are Wikimedia UK, the local association of Wikimedia volunteers. We were established to support the aims of the Wikimedia Foundation and to represent the over 1,500 people in the UK who regularly volunteer on Wikimedia projects. We are an independent non-profit organization, incorporated as a Company Limited by Guarantee under the name "Wiki UK Limited" and using Wikimedia UK as an operating name.

2. Access to works: The impact of the copyright protection of photographs of 2D public domain works

The "Access to works" section of the IPO Consultation Document begins with the following objective:

"The copyright system should maximise the availability of creative works to the public, ensuring that creative endeavour is rewarded while users can enjoy what has been created, on fair and reasonable terms."

We at Wikimedia UK are similarly committed to enabling public access to creative works, especially those in the public domain. At the moment though, we are hampered in our efforts to enhance the accessibility of public domain art in the UK by the ambiguous copyright status in UK law of photographs of two-dimensional public domain works. We seek in this submission to present the case for a clarifying legislative amendment stating that photographs or other copies of 2D works in the public domain do not meet the originality standard required for copyright to subsist in the reproduction.

2.1. The core argument

Erik Möller, the deputy director of our parent organisation the Wikimedia Foundation (WMF), has summarised the Foundation's position as follows:

"WMF's position has always been that faithful reproductions of two-dimensional public domain works of art are public domain, and that claims to the contrary represent an assault on the very concept of a public domain. If museums and galleries not only claim copyright on reproductions, but also control the access to the ability to reproduce pictures (by prohibiting photos, etc.), important historical works that are legally in the public domain can be made inaccessible to the public except through gatekeepers."

British museums and galleries have adopted a variety of attitudes towards reproduction of such works. Some, such as the Victoria and Albert Museum, have encouraged dissemination of faithful reproductions of the two-dimensional public domain works of art in their collections, while others are doing their best to act as just such a gatekeeper, a situation which, in line with our charitable objectives, we at Wikimedia UK would like to see come to end.

2.2. The status of photographs of public domain 2D works outside of the United Kingdom

In 1999, the New York District Court held in the case of *The Bridgeman Art Library Ltd v Corel Corp*, (36 F. Supp. 2d 191, 1999) that “a photograph which is no more than a copy of a work of another as exact as science and technology permits lacks originality. That is not to say that such a feat is trivial, simply not original”. We at Wikimedia UK stand by this conclusion and are keen for it to be represented in UK law, as it already is in that of Germany and Canada.

2.3. The status of photographs of public domain 2D works in the United Kingdom

In the prior action to the aforementioned *Bridgeman v Corel* case (25 F. Supp. 2d 421 (S.D.N.Y. 1998)) the (US) judge made reference to British case law as in accordance with his position, interpreting dicta from *Interlego v Tyco* [1989] AC 217 to hold that the UK statute did not provide copyright in photographs of public domain artistic works. However both older (e.g. *Graves’ Case* (1869) LR 3 QB 715) and more recent cases (*Antiquesportfolio.com v Rodney Fitch & Co LTD* [2001] FSR 345 (relating to photographs of 3D objects)) provide support for the opposite conclusion, with Justice Blackburn concluding in the former that:

“An objection has been made as to the registration of the photographs, on the ground that they are photographs of pictures, and therefore are not within the words of the Act, which applies only to ‘every original painting, drawing, or photograph.’ It has been argued that the word ‘original’ is to be taken as applying to the word photograph. The distinction between an original painting and its copy is well understood, but it is difficult to say what can be meant by an original photograph. All photographs are copies of some object, such as a painting or a statue. And it seems to me that a photograph taken from a picture is an original photograph, in so far that to copy it is an infringement of this statute. As I have already pointed out, by s. 2, although it is unlawful to copy a photograph or the negative, it is permitted to copy the subject matter of the photograph by taking another photograph.”

One objection to this argument is that there is no scope for making any of the usual artistic choices of photography in taking a photograph of a two dimensional art work; the photograph will inevitably be taken straight on, with minimal border and with diffuse light. Moreover, the effort, labour, skill, and time required to take such a photograph in the nineteenth century was greater than it would be today due to advances in photographic technology. Thus, even with the UK’s relatively low threshold for originality, such photographs might not now meet the originality requirement for copyright to subsist in an artistic work under section 1 of the Copyright Designs and Patents Act 1988.

Were a similar case to *Bridgeman v Corel* to come to court in the UK, it is possible that these arguments will succeed. However, were they to fail, as they certainly might, we would be left in a situation where Wikipedia could be forced to remove many of its images by this country's great artists, leaving only prose to describe their works. We consider it imperative then for a legislative clarification to be made before a case is brought.

2.4. Conclusion

Britain's museums unquestionably provide a great service to the nation, and we respect their desire to recoup some costs through, for example, the sale of postcards of their artworks. However, we find it implausible that the free availability of the images of two-dimensional works of art used on postcards and similar items of merchandise would have any significant impact on the museums' revenues. In any case, any potential loss of revenue for museums must be balanced against the great value to the British public of the nation's (public domain) art collection being available for free online. Many school children in the north of England will never get down to London to explore its museums, yet potentially any of them can use their school's internet connection to explore those museums' works on Wikipedia. The requested small clarification on the status of photographs of public domain two dimensional works is all that is need to ensure that this remains the case in future.

3. Other areas

There are several other areas of UK copyright law in which we at Wikimedia UK would like to see changes, not least reducing the number of publicly funded works which are nonetheless not publicly copyable, due to crown copyright, as well as expanding fair dealing provisions to more closely resemble the US's ones for fair use. However, we consider the status of photographs of public domain works sufficiently important as to warrant focusing our response to this issues paper on this area. We would welcome further involvement in the consultation process on these and other areas, speaking as we do for the British editors of the largest freely accessible work ever created.

Please contact our board on: board@wikimedia.org.uk