



Bridgeman Art Library's submission to the Gowers Review of Intellectual Property

Introduction

The Bridgeman Art Library, established for nearly 35 years and employing some 55 people across its four international offices, is the world's leading source of fine art, history and culture with some 250,000 images available on-line, plus 750,000 historical photographs, from over eight thousand locations.

We maintain and develop a commercial picture library representing museums and galleries throughout the world by providing a central source of fine art for image users. The Bridgeman Art Library has a long history of feeding monies back into museums, of figures up to £1.5 million per year. The Bridgeman Art Library also represents a growing number of artists and artists' estates, handling copyright clearances, licensing reproduction rights and providing sales services.

The Bridgeman Art Library also offers copyright advice. We are committed to making fine art accessible and therefore we have built up an extensive database of artists' contact details. This information is provided free of charge on request. In addition, we provide informal advice on how to proceed when a copyright holder cannot be located or contacted.

The Bridgeman Art Library has considerable expertise in digitising art and works with over 2000 stakeholders world-wide, including 150 museums in the UK enabling them to digitise their collections.

We also develop educational resource packages such as the Bridgeman Education which has recently been developed as an innovative education subscription service aimed at educational publishers, academic tutors and their students both in the context of schools or universities. It is designed to stimulate and boost e-learning and offers a unique and flexible way to search over 8000 locations covering the world's major museums, art collections and historical sites with online access to these digitised artworks.

The Bridgeman Art Library welcomes the opportunity to comment on the review of intellectual property. Please accept the following comments to be considered when preparing the final report. We emphasise that we represent the visual arts and approach the response from this perspective. We are also acutely aware of the overriding emphasis placed by the government on other industries such as the music industry and we are very keen to carve out a voice for the visual arts communities within this response and indeed generally within the government as associated communities.



General questions set out in the consultation:

1. How IP is awarded

(a) Are there barriers to obtaining IP rights due to system complexity? What could be done to improve this situation?

In the visual arts arena the barriers to obtaining IP rights are often more concerned with knowledge of where to go, awareness of copyright issues and the ability to process rights speedily. The advent of the digital age means that users need to obtain content and the associated rights almost immediately – for instance to reproduce an image in a newspaper or book to deadline. Again, the digital age has spawned a whole group of users who have limited knowledge about copyright.

However there is one major barrier where reproduction rights are concerned and that is the grey area of the law dealing with reproduction of art. They are threatened because of ignorance that reproduction rights exist in photographs and the easy access via Google and other sources, the ability to scan hard copies so easily at home or in a SOHO environment encourages the public to think that it is acceptable. The entire photographic library industry, the museums, galleries and archives community and photographer community need more protection in this respect if they are to be able to continue to survive and service the creative industries. This applies to the UK, Europe and solutions are discussed in more detail below.

(b) How easy is it to find out about obtaining IP rights? What could be done to improve awareness for businesses and innovators? Is there sufficient awareness of the need to protect IP internationally?

Central point of information on copyright

We believe that there should be a central helpline for copyright information which is fully publicised and could provide information, clarification, education and prevention of IP crime. Whilst there is general IP information at the Government Intellectual property website, this is not tailored to the visual arts and is not the most obvious place for potential users to go to deal with specific issues – a more detailed and functional adjunct to this is needed. Such a central service should:

- 1) Advise users generally about IP issues as they relate to reproduction, copyright and other rights.
- 2) Offer more specialist training services to special interest groups (within the creative industries, within education and other parts of the community – even amongst artists themselves who can often in our experience be unaware of their own rights and come to us for assistance) and within the museums, archives and libraries community who also have limited knowledge at grass roots level with little funding for training.
- 3) Assist users who have inadvertently infringed copyright to help them negotiate a suitable settlement with the creator. The Bridgeman Art Library has daily experience of this and seeks funding to develop further resources which would form an extension of our existing facility.



- 4) Operate a service to track down & negotiate with owners of 'orphan' works of art.
- 5) Be able to offer the provision of licences and licence templates to assist users and copyright holders with different layers of rights within any potential usage area. (This is currently done to an extent at Bridgeman and we have licence options running into 15 pages to cover the multitude of creative industry uses)
- 6) Be able to act as a clearing house for rights or to direct users to the most appropriate body depending on requirements.
- 7) Be a body which can work with and advise government and the appropriate communities on the issues arising and to provide key statistics which will be useful in determining how IP is used, controlled and potential measures to improve future use within industry.

2. How IP is used

(a) What types of IP does your organisation use and why?

We use broadly four types of IP, all of which overlap at times;

1. Reproduction rights
2. Copyright
3. Database rights
4. Digital rights

We use **reproduction rights** because we administer the IP on behalf of museums, galleries, archives & institutions, photographers and artists. IP is managed on behalf of the museum community for the following sectors in the creative industries:

- Books – educational and commercial
- Periodicals & journals
- Newspapers and Magazines
- Electronic usages (web, CD, multimedia, games)
- Television, video, audio-visual and film
- Advertising, design, packaging of all kinds
- Paper products (cards, prints, calendars, stationery)
- Gifts and other products such as ceramics, wallpaper, textiles
- Educational – subscription services to schools
- Museums – catalogues and exhibition display & products

Licences vary according to usage, territory and type but are typically for one use with restrictions on number of copies printed, term/period of use, ISBN number and so on.

It should be noted that in many cases these rights are non exclusive and will be administered by a museum or artist and by their agents such as us at the same time.

We **administer copyright** on behalf of museums who often own reproduction and copyright in a work of art in their collection and on behalf of over 500 artists we



represent. This copyright often overlaps the reproduction right and both rights can be cleared together ensuring a better facility for the user.

We own the **database rights** in the entire collection from our contributors including the valuable metadata we have gathered which enables a single user to access 2000 of these collections we directly represent and 8000 locations overall around the world from one single point of entry. This database is offered as a facility to those in the creative industries who need to find content from remote collections and indeed to education (schools and universities) in the form of www.bridgemaneducation.com.

In addition to these three key areas we have negotiated specific rights to use or display images from various sources in order to help the dissemination of content – an example of this are certain key C20th and C21st images currently protected by copyright.

We still operate a thriving business in analogue files which are still important to some specialist sectors.

(b) To what extent do you seek multiple overlapping forms of IP protection?

The type of protection we seek is in the form of tightening up of legislation where reproduction right is concerned as mentioned in the answer to Question 1(a) and in the adoption of standards for encryption. There should also be a central database for the use of image number identifiers and control and tracking of images on the internet.

We still operate an image licensing service without proper encryption of images because we have found no software that works effectively. We are currently testing a new system which may offer the protection we need. We are also currently testing image tracking software with regards to the pursuit of piracy.

We feel that it would be helpful if the Government could fund some further research and examine the standards in this area. We have further outlined some of these issues in the answers to the Question No4 below.

3. How IP is licensed and exchanged

(a) How easy is it to negotiate licences to use others' IP for commercial or non-profit purposes?

We negotiate contracts with the holders of IP and act as their agents – this is relatively simple considering we have been doing so for over 30 years although it is costly in terms of administration. This arrangement makes it easy for clients to use and access images from multiple international, private, public and individual collections via the web or our specialist picture research desk. We also participate in certain European portals for digital content which we deem to be good for the greater dissemination of information.

Similarly where we act as copyright holder for the museum for modern art works or for artists, this is straightforward. Where we don't act as an agent and have to assist clients to deal with third parties – this is more complex as out of our control.



(b) What mechanisms do you use for finding potential licensing partners?

We attend the relevant trade fairs internationally including publishing fairs, TV industry trade shows, and conferences related to the picture library industry such as the AAM, PACA, CEPIC and BAPLA. Having been around for 35 years we are often approached by various parties and regularly engage in joint ventures.

(c) How easy is it to use others' IP for research purposes? Have you experienced difficulty around research exemptions?

We offer www.bridgemaneducation.com for research purposes on an annual subscription basis at a subsidized fee as well as a picture research desk for our commercial sales.

The difficulty in using IP ranges from not being able to find the copyright holder or having direct access to them in order to negotiate rights. Hence our suggestions in (2) b

We have difficulty with the concept of exemptions because licensing IP is the livelihood of our industry.

(d) Are there specific barriers to licensing in the main forms of IP currently used: patents, copyright, trade marks, and designs?

The barriers already mentioned above are identifying the owner of the rights and the time and administration costs (as well as the legal cost implications) in handling this.

There are trademark issues for us when a trademark appears in an image reproduction (such as a vintage advertisement or incidental use in a photograph) – we believe that identification of the owner and clearance procedures could be dealt with by the copyright service we already offer and which we recommend expanding as already discussed. Often the trademark depicted in an image ceases to exist or is from another territory so work is required to research clearance procedure. Laws applying to orphan works should apply to trademarks. A database of trademark registrations throughout Europe and the USA dating back to the eighteenth century would be useful.

(e) Are there barriers to licensing IP on grounds of cost? What drives these costs?

Yes there are barriers to licensing IP on the grounds of cost but this is also positive because it fuels the economy for the creative industries. Furthermore authors and creators should have the right to exercise their ownership of their work and profit from it.

(f) Are there specific barriers to licensing IP in your sector?

Yes – see 4 (b) & 1 (a) – this relates to the lack of protection for reproduction rights.

(g) Does your organisation use methods to facilitate exchange of IP - such as cross-licensing or pooling IP rights with other firms or organisations?



Yes – this is our core business – pooling the rights of the key museums around the world alongside the world's hidden treasures. The result is a database of unrivalled richness and range with appeal to numerous different industries and subject areas.

We pay museums a royalty on all fees licensed through an automated rights clearance and management system which has operated efficiently for over thirty years.

We hold a database of information about copyright holders which we have built up over the years and make available on request.

We also cross-licence rights with our sub-agents around the world, so that the content is widely disseminated.

In terms of database rights – we also pool these with various portals – again to make the dissemination of information even more valuable.

(i) Are there barriers to trade and exchange of IP internationally?

There are no barriers or concern over reproduction rights with agents as this is a standard commercial negotiating process but we do experience difficulties with display of 20th and 21st images where those images are protected by copyright relating to the collecting societies or independent agents and artists. There is an unlevel playing field whereby we are bound to pay for display of images in copyright on the internet but our European and international competitors are not. This puts us at a disadvantage. We also requested a referendum from DACS, the English collecting society, to get the artists' view on whether a fee should be charged for displaying their images on our website to enable a choice to be made for commercial use and this was refused. We approached the Picasso and the Matisse estates independently and they gave us their permission. However for the majority of the artists we have now negotiated a fee with DACS whereby we pay a fee for display. We have decided to make no display charge ourselves for those artists whom we represent. Clearance through collecting societies and other representative agents can be protracted and costly and a project can be cancelled as a result.

l) Do you have any experience of the compulsory licence provisions within current patent law? Are they effective? How could they be improved?

We are eligible for licence fees under the payback scheme administered by the CLA and DACS. The procedure for claiming is very inefficient nor is it transparent. We have made recommendations to DACS as to how it could be improved.

4. How IP is challenged and enforced

(a) Are there specific problems with enforcing the main different forms of IP: patents, copyright, trade marks, and designs?

(b) Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drives these costs?

Tracking unauthorised use of copyrighted material: The Bridgeman Art Library has had to make considerable investments to protect the archives against unauthorised use and dissemination, including through the famous test case in New York City



Bridgeman vs. Corel.¹ There are measures currently under way to challenge this in Europe and we seek the governments help in this.

In order also to protect the archives, The Bridgeman Art Library annotates digital images or optical discs with caption tracking information. The real work, however, comes in following up infringements and this requires extra resources and is extremely onerous and time consuming.

In the analogue environment, which still exists and will always exist, for The Bridgeman Art Library this means visiting trade fairs and book/gift shops and browsing newspapers daily to seek out infringements and check up on usages of content.

In the digital environment it means searching the internet (pages for which no login is required) for images. The Bridgeman Art Library has been testing a new service which provides reports of its images used on the internet and this has proved interesting and useful in assisting us in tracking where images appear and what is legitimate. However, the development of this type of technological solution requires additional investment and must be further developed to keep up with technological advancements.

Arts images are particularly onerous to track as a number of photographers took advantage of museums before they prohibited outside photography, hence there may be a number of copyright owners of the photographs of the same image in circulation at any one time. Should the onus be on the Library to prove that the museum image for which it is claiming payment was sourced from its archive rather than anyone else's, or should it be up to the user of the image to prove from where they obtained the rights?

As can be seen from the above, the costs of tracking unauthorised use can be very open ended. The Bridgeman Art Library estimates that it takes approximately three members of full time staff plus at least Euros 50,000 per annum for internet tracking services, plus legal fees as and when necessary.

The Government could assist by conducting research into watermarking and tracking software, helping to establish or seek out the best international standards to work to and ensuring the law protecting rights holders and the photo-library industry (which includes all museums, archives and artists) is stronger and more efficient.

(c) To what extent does your organisation make use of other methods than litigation to resolve IP infringement cases, for example the Patent Office opinion service, mediation services, Alternative Dispute Resolution, or the Copyright Tribunal?

We have not to date used any of these official services as they were perceived to be too bureaucratic, to take too long and to be too expensive for an S.M.E. to work with

¹ Bridgeman Art Library v. Corel Corp., 36 F.Supp.2d 191 (S.D.N.Y. 1999): It was a decision by the United States District Court for the Southern District of New York, which ruled that exact photographic copies of public domain images could not be protected by copyright because the copies lack originality. Even if accurate reproductions require a great deal of skill, experience and effort, the key element for copyrightability under U.S. law is that copyrighted material must show sufficient originality. This judgement would almost certainly have been reversed in an European Court of Law and we are looking for a similar test case in the UK or Europe to fight which would strengthen our position.



but this may not be the case. The Patent Office should perhaps engage in a promotional awareness campaign? We might consider this in the future and think it is a good idea in principle.

The establishment of a small claims court to deal quickly and cheaply with the smaller infringements could be developed so as to put a quick stop to those who do not respect the rights of creators and photographers. To have the right to place an injunction on those producing or distributing goods where reproduction rights are infringed would be a highly beneficial solution.

(d) To what extent do you use IP litigation insurance? How effective is it?

We feel that litigation insurance is too expensive for an SME to adopt. This is an issue which could maybe be looked at in more detail by the Government.

(e) Are there barriers to using such methods to settle IP disputes without recourse to litigation? How might they be removed?

Again – more help from the patent office could help here with relation to reproduction rights, as well as making IP crime a criminal offence and allowing injunctions against infringements to be raised in an inexpensive way. For instance official legal notices from the patent office could be of benefit to rights holders and fact sheets could be sent to infringers explaining the law.

(f) Are there specific barriers to challenging and enforcement of IP rights for small businesses or individuals?

Already discussed – cost of legal protection as well as the difficulties of obtaining adequate funding and assistance compared to not for profit organisations in order to reach this area.

(g) To what extent is the risk of litigation a factor in your organisation's investment in innovation?

None – we exist to protect the rights of the museum and creative community.

(h) What are the principal barriers to efficient and successful challenge and enforcement internationally?

Unlevel playing fields as already discussed plus the legal mechanism to fight cases in other territories as well as tracking down infringers on the internet. More assistance could be given here by the search engines if more of the right legislation was in place to insist on this. Moreover if the Patent Office were able to establish an international network that would assist the creative industries in the UK with pursuing claims overseas via partner offices, this could bring pressure to bear on perpetrators.



SPECIFIC ISSUES [ALI]

Copyright exceptions - fair use / fair dealing

- (a) What are your views on the current exceptions in copyright law?**
- (b) Could more be done to clarify the various exceptions?**
- (c) Are there other areas where copyright exceptions should apply?**
- (d) Are the current exceptions adequate or in need of updating to reflect technological change? For example copyright law in the UK does not currently have a private “fair use” exception. Such an exception might allow individuals to copy music CDs onto their PC and MP3 player for their personal use. Should UK law include a statutory exception for “fair use”?**

As the livelihood of our industry is concerned with the licensing of IP, we have concerns about fair use.

Firstly, there is not a clear understanding of what fair use is and users can hide behind this concept when infringing rights. Secondly this could be seen as the erosion of rights and IP which is so vital to the creative economy in the west, now and particularly in the future.

There are so many copyright infringements we believe there should be much more training and education about copyright – especially as it could be a key aspect of our future economy. Should there be an argument for making certain content available to certain sectors of the community, this should be managed very carefully. Firstly it should not be seen as ‘copyright free’ and secondly if free at the point of access, the rights holders should be compensated.

Just as one example, in order for Bridgeman to obtain images for our library, we have had to engage in a process which has taken many years – for instance visits to museums in the Ukraine, Poland, Russia and Australia. These images have had to be selected and edited, catalogued & key worded, archived, (sleeved and labelled if transparencies), uploaded to the website and other platforms, not to mention the contracts negotiated with the museum not to mention the ongoing contact which is inevitably necessary. This is a phenomenal amount of work and the payback can take many years. This richness of content simply would not be available without such a huge investment and this must be protected.

(e) How would you see content owners being compensated for such use?

The government could take up contracts with the owners of rights to see them compensated for provision and delivery of content and offer this at subsidised rates to third parties. The owners should always be clearly credited so as to reap the benefits of their work and to impose professional practice and attribution to the works.

(f) To what extent has technological change presented difficulties in use of copyrighted material in the field of education?

Technological change has meant that the distribution channels for educational materials are shifting and there is a large learning curve required. It is made particularly difficult for content providers to find their way into schools and



universities – especially via Curriculum Online, Jisc or the NGFL. There are too many criteria, not enough staff involved to help the process and too much bureaucracy. We believe in the value of disaggregated data provision for schools, but this is still restricted from being eligible.

(g) Are there issues concerning the archiving of material covered by copyright?

If the images cannot be legally accessed for viewing purposes only this virtually disables their use. Again it is problematic as to whether or not orphan works should be archived if the whereabouts of the copyright holder is not available hence the urgency of finding a solution to this problem.

Copyright – digital rights management

(a) Do you have a view on how the use of digital rights management technologies should be regulated?

Encryption software products already exist for digital images. However, they are not permanent or foolproof and can be removed by Photoshop and other programmes. Bridgeman therefore do not use encryption software at present, but we support the idea of encrypting digital images so that images can be traced, should a foolproof system be found. The same goes for visible watermarking. We would welcome a common standard for watermarking software and permanent image number recognition but the latter is of no value unless every image producer adheres to the system. As regards the former, the Bridgeman Art Library and a major French library are testing a new system which they believe may be sufficiently foolproof as to warrant investment in the future as a standard.

As regards universal and permanent image identifiers, the Bridgeman Art Library and fellow libraries within the industry undertook a series of discussions with the Stationary Office (TSO) with respect to the Digital Object Identifiers (DOI) universal imaging standard. However talks were finally abandoned until such time as a universal agreement could take place as to how everyone could participate in this scheme. Many other unsuccessful attempts have been made in this area in the hope of replicating the ISBN and ISSN coding system.

Companies licensing material should have good DRM systems in place so that they can ensure that licences & images are managed and monitored appropriately.



Copyright – orphan works

(a) Have you experienced any difficulties in identifying the owners of copyright content when seeking permission to use that content?

(b) Do you have any suggestions on how this problem could be overcome?

Orphan Works whilst technically subject to copyright law should be treated differently so that their reproduction is not restricted by lack of information about the copyright holder.

By not restricting reproduction, the exposure of these works would enable and encourage the copyright holder to come forward and make the work available for subsequent reproduction with the appropriate copyright information available.

However, users **must do all they can** to locate the copyright holder by sending requests by registered post to copyright agencies such as The Bridgeman Art Library which administers a copyright database and represents copyright holders. Organisations such as ourselves, the National Portrait Gallery, and WATCH, an initiative fronted by the University of Reading have a large database of copyright information which is used internally only, partly because of the Data Protection Act and which we have built up at considerable expense to ourselves.

We are often contacted by those who have been referred to us by the Tate Gallery and the Arts Council as one of the only UK organisations who can provide this type of information. With appropriate funding we would like to build and maintain a centralised database for all copyright information, including copyright information for all the collecting societies and the many other arts organisations with whom we are in constant contact, both nationally and internationally.

Where requests have previously been made and no owner found by one party, there must still be an 'independent duty' for another party to attempt to locate the owner to ensure that due attempt has been made by that party (at the very least for legal purposes) and in order to give a fair chance for the owner to subsequently be found. The issue of a 'reasonable efforts' search is of course a grey area, but can be redefined over time with the benefit of experience.

If a copyright holder comes forward as a result of an orphan work's use, this use should not be unduly penalised if they have made acceptable efforts to find the author prior to publication. For re-uses or future uses of the work however a fee can be duly charged and the artist remunerated and credited so they do not lose out.

We find the Canadian solution too onerous in terms of administration and mitigating in terms the creative industries' ability to function profitably. The approach used in Canada, is that advanced licences and a deposit is required against the publication of a work of art which is in copyright but for which the copyright holder cannot be located. Money from this fund is distributed if and when a copyright holder comes forward to claim a fee. If the fund reaches a high level, money is donated to the Canadian equivalent of the Artists' Benevolent Institution. Should however copyright holders subsequently come forward to claim a fee, this is easily identified and administered. Canadians have been congratulated on their system by the US Library of Congress but heavily criticised by many other parties who actually have to



work with it and who in practice find it less successful. The British Government should learn from this experience and seek to find a suitable middle ground.

The Bridgeman Art Library is project leader of MILE an EU project funded under the E-content plus programme which together with the nine other members of the consortium will be looking onto the question of orphan works.

Legal sanctions on IP infringement

(b) Should criminal sanctions on online infringement be the same as those relating to physical infringement?

Yes. We feel that criminal sanctions should apply to analogue as well as digital infringements and that it should be made easier to pursue. There is still so little knowledge amongst the general public about this and public service advertising (in conjunction with say FACT who have a high profile with video) would be beneficial.



OTHER ISSUES

Education about copyright

It is vital to avoid infringements wherever possible in the first place and the way forward is to exercise the proper controls when licensing copyrighted materials as well as educating users about copyright:

a) Making information available

The Bridgeman Art Library has produced factual information about copyright and has been educating its clients in the creative industries to this effect for over 30 years. However, we still find many people are ill informed about clearing rights and the reasons why they have to pay. We believe copyright should be part of the curriculum in schools and at universities as well as in colleges and associations of appropriate industries – such as the advertising, film and publishing industries.

The Bridgeman Art Library currently seeks funding to use their knowledge and experience to enhance data and awareness and facilitate the further use of our cultural heritage.

b) Different types of copyrights

The Bridgeman Art Library manages two levels of copyright - reproduction rights on behalf of museums and creator's rights on behalf of museums and artists. There is much confusion about the differences between these rights and we assume this must be the case for other industries where more than one type of right applies. We believe there should be more education about this and the differences made explicit.

c) Different Territories

Even within the European Union where attempts at harmonisation of copyright law have taken place the position as regards various types of copyright is diverse thanks to the fact that national law still applies. Photography of architecture is just one example. For example, the electricity installation in the Eiffel Tower is copyrighted so a copyright fee is payable when the Eiffel Tower is photographed after dark when the lights are in use. The Rock and Roll Hall of Fame in the United States provides another singular example of a copyrighted building of which not every photographer would be aware. Communicating such information is important and due to case law, its interpretation changes from time to time.

Code of Conduct

The Bridgeman Art Library would welcome the development of a code of conduct to discourage infringements from taking place. We think that the industry should take an active part in the fight against unauthorised use and dissemination of copyrighted



content by adhering to collectively agreed standards and procedures for fighting piracy.

We believe the image industry (which collaborates world wide via conferences, workshops, literature and other discussion groups) should not be overlooked in favour of solutions which solely focus on the needs of the music and performing arts industries. The visual arts have always been regarded as the poor relation of the music and performing arts since the profit they can generate is considerably less. Visual arts, however, remain a very effective method to widen access to cultural heritage and to broaden the knowledge of cultural history. Ideally, the Government should be able to give added support to the visual arts to compensate for this.



Contact Details

If you would like to have further information from The Bridgeman Art Library, please feel free to contact us.

Pandora Mather-Lees International Manager

The Bridgeman Art Library
17 - 19 Garway Road
London
W2 4PH
E london@bridgeman.co.uk
T +44 (0)20 7727 4065
F +44 (0)20 7792 8509