482. P Knight

Full name: Peter Knight

Proposal 4-1:

Proposal 4-2:

Proposal 4-3:

Proposal 4-4:

Question 4-1:

Question 4-2:

Proposal 6-1:

Question 6-1:

Proposal 7-1:

Proposal 7-2:

Proposal 7-3:

Proposal 7-4:

Proposal 8-1:

Proposal 8-2:

Proposal 8-3:

Proposal 9-1:

Proposal 9-2:

Proposal 9-3:

Proposal 9-4:

Proposal 9-5:

Proposal 10-1:

Proposal 10-2:

Proposal 10-3:

Proposal 11-1:

Proposal 11-2:

Proposal 11-3:

Question 11-1:

Proposal 11-4:

Proposal 11-5:

Proposal 11-6:

Proposal 11-7:

Proposal 12-1:

It is not clear what is meant by this.  The section on “fair use” in the discussion paper merely observes that the proposed fair use defence, which would provide for a complete defence to infringement in the case of “fair use” defined by reference to a number of criteria, including converting the current prescriptive defences to mere illustrations, might apply in the case of some orphan works.  However, the proposal under the heading of orphan works would suggest that the same criteria should also be applied to the limited defence in respect of orphan works.  That is, where the complete defence in respect of fair use may not be applicable, the same criteria in conjunction with orphan works may lead to a limited defence in respect of damages.

Proposal 12-2:

I respectfully submit that the extension of such a defence to any commercial use of a work or other subject matter is not justified in any circumstances.  It is submitted that the present law is perfectly adequate and the extension of such a defence to commercial uses will be abused by scoundrels and misapplied by Courts precisely because of the nature of the internet and, in particular, the world wide web.

This is what happens in practice today:

1.      Let us take the example of artistic works.  Artists, like anyone else wishing to market  his or her skills, put on their websites samples of their work.  Often, they will embed their signatures or watermarks on these images in the hope that this will provide some protection.  Routinely thereafter, copies of these images are picked up by Google searches and copied by people all over the world, many in countries where copyright is little respected and any effort to control such taking will be expensive and futile.  Many of these captures will not be commercial – these days, the images will be used on family websites, blogs, Pinterest, Tumblr, Facebook and so on for private amusement.  However, every one of these captures is available on a Google search.  Sooner or later, and inevitably, these images will be taken and used commercially – on commercial websites advertising travel, financial services, pool suppliers – anything and everything.  These days, there are an enormous number of “wallpaper” and other websites set up solely to copy attractive images (set up by people whose identities and locations are concealed) who derive income from “click-through” links appearing on their pages.  In this process, any embedded signature or watermark is quickly removed or cropped out using software such as Photoshop.

2.      Most people do not appreciate the replicative power of the internet until some simple mathematics is brought to bear.   A commercial photographer client, who runs a small business, created a portfolio of images of Hawaii, which he posted on his website in January, 2000.  These are his ‘signature’ works, many of which have proved very popular.  Let us postulate a scenario in which one of those images is copied by just two people in the ensuing year, and then each instance of the work is copied by another two people in each ensuing year,.  This means that in year 1, there will be 3 copies of the work by the end of the year (including the original), 9 in the following year, 27 in the following year and so on.  This geometric progression can be represented by the formula an = a1rn-1.  In this case, more simply, a1is the number 1 (the first instance of the image), n is the number of years and r is 3.  This means that, by today, our photographer’s work will appear on the web 531,441 times.  If we imagine the same progression occurring every six months, the number is so enormous it is not worth putting down.  Of course, in reality, the rate has been much greater in recent years because of social networking and it must be supposed that there will be some attrition of these images, but I know this to be a working hypothesis because of the complaints of those who copy my client’s works for commercial purposes.

3.      Every person caught using the images of my client without permission will say that it was obtained for free from an unspecified site, or one of these wallpaper sites, and will bleat that he or she had no idea that the image was not available for commercial use.  Further, he or she will add, the image appears ‘thousands of times’ on the internet – in one case, the infringer complained that there were nine million copies of my client’s work on the web – and that was only before Google stopped counting - and no amount of diligent inquiry would reveal the identity of the artist, let alone the copyright owner.  Sometimes, the defence turns into a vicious attack, insinuating that my client, a sole trader (with his wife looking after the books, part-time), has deliberately set up these websites or salted them as a honey pot for such innocents.

4.      In answer to these claims, we can say, at present, that it is the responsibility of every person copying a work that is clearly subject to copyright to identify the owner (and author, for the purpose of attribution) or, simply, not use the image and seek a licence from a reputable licensor (relying on Milwell Pty Ltd v Olympic Amusements Pty Ltd (1999) 85 FCR 436; 161 ALR 302; 43 IPR 32; [1999] AIPC 91-460; [1999] FCA 63 at [52]; Corby v Allen & Unwin Pty Ltd (2013) 297 ALR 761; [2013] FCA 370 at [101]).

5.      In fact, we can also say that, so long as one knows the location the subject of the photograph (and, invariably, infringers do – they use images of Hawaii to advertise travel to Hawaii, for example) or some other characteristic of the image, it is much easier than you might think to identify the copyright owner – usually on the first or second page of any Google search.  Indeed, for that reason, we usually suspect that the infringer was unaware of the supposed difficulty of identification and the numerous copies available on the internet – this is an ex post facto rationalisation of the idea that anything on the web must be free.

6.      However, this does not justify the proposed ‘orphan works’ defence as you may think.  It is respectfully submitted that no current judge in any court would fail to be impressed by the mere fact of there being half a million, nine million, or more copies of the work, unattributed and “free” on the web. Will the judge listen when we point out that Google Images warns of copyright infringement (as do some of the wallpaper sites)?  Will the judge think that the infringer’s lament, and protestations that he or she did try to find the copyright owner (really, your Honour, hand on heart) sounds reasonable enough?

7.      What a defence of this type will do in practice, notwithstanding the theoretical burden on the defendant to make it out, will be to throw the burden back on the copyright owner to prove the negative – that the search was not carried out at all, or not “diligently.”

With respect, the concerns of public interest bodies in respect of orphan works may be reasonable.  It is entirely unreasonable that such concerns should lead to any rights to make commercial use of works by any other person.

The remedy of an account of profits or limited damages is worthless.  As it is, it costs at least thousands of dollars to go to any court for relief, and the awards of costs are so low, the only reason to do take action is the prospect of additional damages under s 115(4) of the Copyright Act.  The uses of the images so stolen is almost never to convert into money directly but to decorate a website to sell other products, such as travel services or trade competitions. What account of profits would there be?

Proposal 12-3:

See above.  These will not help at all.

Proposal 13-1:

Proposal 13-2:

Proposal 13-3:

Proposal 14-1:

Proposal 14-2:

Proposal 14-3:

Proposal 15-1:

Proposal 15-2:

Question 15-1:

Proposal 15-3:

Question 15-2:

Proposal 16-1:

Question 16-1:

Proposal 16-2:

Question 16-2:

Question 16-3:

Proposal 17-1:

Additional comments?:

File 1:

File 2: