

Fair Use & State of the Web

13 April 2012

First things first.

If Fair Use is to be adopted then certain other aspects of Copyright legislation should also be reviewed to at least make it an enforceable criminal offence when infringing copies are exploited for profit as in the American system. That Fair Dealing is already contained within our current act in respect of private research / study, i.e. educational use, I am a little perplexed as to the scope of the proposed Fair Use amendments and how this differs from what already exists.

There must be balance although I get the sense that this is already a done deal, favouring the notion of Fair Use. Whether this will be allowed in a wider European context is another matter and I'm relying on their combined wisdom and good sense to refuse it.

Following are some of my points that will hopefully go some way to stating a case against Fair Use.

My following thoughts are from my own perspective as a photographer, concerned about the security and protection of my collection of images along with some general observations and suggestions on the current state of the web.

Not a member of any association, group, union or professional organisation. Just me and 20+ years experience as a photographer following 5 years of study, not forgetting a few years away in New York and even more working for an advertising agency.

The way the web has been allowed to develop as I see it has parallels with the claim jumping, con trick practises perpetrated during the outlaw days of the California Gold Rush during the mid 1800's but when transposed on today, our modern version is a web based, rights grabbing mob of puppets, screaming freedom, while the puppeteers use every legal trickery they can muster to undermine, devalue and assume ownership of other people's property.

By contemplating amendments to the law in Ireland, to even investigate the possibilities of introducing Fair Use is yet another indication to me that the erosion of rights, far from being halted, instead strongly indicates a gathering pace in the wrong direction leading to a further undermining of basic rights and I'm not reassured given that it appears to be the rights grabbers who are setting the agenda.

Technologies currently exist to identify ownership of digital stills images, enabling owners to apply © info, descriptions and contact details to their images (XMP image meta data) but this information is routinely being destroyed on countless images on a daily basis, particularly by web based companies to conform with their licensing T&C's, attempting an avoidance of infringement actions and in doing so they are separating these images from their owners which as a consequence it could be argued, put these images in the public domain. Image search engines not only ignore this Free meta data information embedded within an image, instead they choose to strip it away, effectively attempting again to put these images in the public domain and in the process eventually causing Orphan Works for vast numbers of images.

Here is an interesting 2 minute exchange between David Hoffman of EPUK highlighting this very point with Google's Matt Zitzmann

<http://vimeo.com/11923892> .

Although Google has since gone some way to rectifying this.

This is a case where I don't mind my meta data information being utilised to identify me as the photographer, provided this information is only used in the context of the image that contains it.

Meta Data in an image;

It should be an offence for anyone to delete Meta Data information from an image.

Property directories for example willfully strip meta data as a matter of course to fit with their dubious ' worldwide Royalty Free distribution ' licensing ethos although I'm sure they'd provide quite a different explanation.

Any solutions / remedies / findings / actions recommended by this process in the area of copyright infringement should be retrospective as I can't afford losing the past 20 years of my life to these thieving lowlifes.

Limitation statutes in this area should be extended to take account of the web effect where images can do the rounds of the internet for years before an infringement finally comes to light.

How I think this notion of FREE evolved as it applies to the web;

Contents of the web on publicly accessible pages *are* free to look at but only when displayed on the pages for which they were intended to be seen but NOT to be copied or hotlinked to websites or other applications. Then there was the advent of Royalty FREE images - but as people tend only to see the word free, they choose to ignore everything else.

Following this, websites offered FREE membership to generate web traffic, and so...

This snowball has been gathering momentum for far too long and I'm afraid that we are now at the stage of attempting to hold back a full blown avalanche.

The word 'Free' was misunderstood, 'Fair' will now be equally misunderstood.

Fair Use should not be enacted for the following reasons;

- 1) It will dilute existing legislation on copyright
- 2) It will be misunderstood
- 3) It will not lead to innovations (I would concede that Google image and text search exists as a result but that's already been done)
- 4) It will stifle creativity. I, for one can't go on like this indefinitely.
- 5) It will negatively influence offline real life business and influence general attitudes resulting in normalising these perceptions regarding the theft of IP from whatever source. See examples for newspapers on page 7
- 6) It will not be enforceable here for individual owners (the majority of creatives) under the Irish legal system.
- 7) That SOPA and PIPA almost made it to the House of Representatives indicates to me that Fair Use in America is not all that it's cracked up to be.

Google and Fair Use in America;

Fair Use as an enabler for innovation has not shown itself as having any great (legitimate) Midas effect in America with only one notable exception; Google, even though Fair Use has been part of their legislation for about 36 years.

Facebook, Twitter, and other social media also avail of this but in less appropriate ways given the constantly recurring mantra of "non-exclusive, transferable, sub-licensable, royalty-free, worldwide license" effectively a get-out clause they use for themselves to deflect litigation, amass and store this huge accumulation of information to claim later as their property and then sell it on. The information / images they gather on individuals is as good as hard currency.

A recent example; Twitter selling their contributors' tweets to marketing companies. I don't have any confidence in signing up to these social networks given their terms and conditions which would effectively allow them to do whatever they like with my images if I uploaded samples. Google search as I said is about the only notable exception that comes to mind - but as that's been done, what's needed now is to consider why no major advancements have been made in America since then as a result of their Fair Use legislation.

It's obvious to me that Fair Use is not the magic formula for automatic success and so the rush to conform to an American idea will have an enormously detrimental effect here, largely because of the differences in our judicial systems and also given that legal recourse here is so difficult to access for such issues.

In America they take copyright seriously - they threaten jail. Infringement for profit over there is a criminal offence whereas here it's trivialised by comparison and only treated as a civil matter.

Yahoo, Bing and all the rest of the search engines have had the same opportunity to enhance and innovate under their system but this simply has not happened to any great degree and with Yahoo recently letting thousands of employees go is a testament to this.

Why anyone thinks that the introduction of Fair Use here will add to our ability to innovate is beyond me.

I suspect it has more to do with Google and maybe they are fearful of yet another SOPA type bill appearing that might finally be enacted in the States that would threaten their current Fair Use policy, so maybe if Ireland has Fair Use in place then they could simply relocate to here. Although not completely insurmountable, this to my mind would be a nightmare scenario unless we have drastically new safeguards in place along with a radical new look at accessibility to our courts or other as yet unthought of reliefs.

I have seen references in various articles and reports in the news speculating that Fair Use would assist in the development of new technologies such as Cloud Computing but as far as I can figure as it relates to stored images this will just mean that infringements will be more hidden from general view in large closed systems and will only facilitate infringers further to hide from rights owners.

Innovations I would suggest are more likely to happen in situations where there are tighter regulations as this encourages more creative, robust thinking and so developing more solid and enduring solutions. Technologies that enhance copyright protection have largely been ignored so there's an area to apply some extra effort.

Time to coin a couple of descriptive phrases appropriate to this topic; ParaSites and Freedummies

My definition of ParaSites;

Parasitic websites that gather '*free information' from other locations on the web, while creating little or no original content of their own, presenting themselves as legitimate websites and that also make heavy use of advertising.

Text and images are gathered using straight copy / paste, hotlinking, news agrigators, Twitter posts, from Facebook and from Google images to name but a few.

More sophisticated versions of these will include interactive forums which in the interests of their SEO ambitions allow users to have some input which would go some way to hiding their lazy cynical approach and assist in fooling the search engines into believing that their websites contain unique information and in doing so increase their chances of higher ranking search results.

* 'Free information' interpretation from above;

The perception by many and encouraged by freedummies that anything online which can be easily copied can then be taken without regard to any rights ownership considerations or third party interests and so they wrongfully consider this content as being a free resource.

My definition of a Freedummy;

One who shouts for Freedom / Free Speech online while simultaneously trampling over other's Rights and Freedoms.

These characters might also have other ambitions - to maybe have their heads up in the Cloud - although currently I think they're view is of a somewhat darker place.

There are those of course who choose the path of Open Source and Creative Commons and if that's their business model then good luck to them but for the vast number of creatives - content producers, if you will - we are tied to a reality of basic economics and cannot either work for nothing, or allow our existing collections to be distributed for free. The perception of a free web, in monetary terms at least, is a myth.

The web was never free with payments required for;

- 1) Internet connections (from Eircom, or whatever it's next reincarnation will be - etc.)
- 2) A website name. This is not owned but licensed for a fee but for a limited period, with ongoing payments.
- 3) Website hosting fees; annual or ongoing fees.
- 4) Websites that are seemingly free but instead take user's personal information as payment in lieu of cash.

These are some of the most insidious practices of the web today when if you're not a paying customer but you still think you're getting something for free then think again as it's more likely that you are no longer a customer as you may have thought - you've just sold yourself and instead have become their product.

Web based Social Networks are prime examples of this practise and when compared to the natural world then Social Networks are the Lions at the very top of the food chain, whereas their members become the prey. To further this analogy the vultures (ParaSites) pick over the remains.

Other seemingly iniquitous websites that collect vast ammounts of personal information on people include genealogy / family tree websites.

Is there any data protection commissioner out there listening?

George Orwell's Big Brother comes to mind.

One of the more ridiculous arguments that I've heard so far in promoting the idea of Fair Use in this country was in an interview on RTE television news recently when a solicitor was interviewed by Brian Dobson about Fair Use and this Copyright Review process. When questioned, his over riding concern if Fair Use was not passed, gave this as his best example ;
that if a mother made a video of her young daughter dancing at their home while a song by Prince was playing in the background then she would be contravening the current legislation if she uploaded that video to Youtube and could therefore face prosecution.

Technically true, I'm sure but unlikely to happen although such an example could garner enormous support to the ' Fair Use' point of view by using such misleading scare tactics.

That a solicitor should trivialise such a vital issue does not bode well for the pro Fair Use lobby as his inappropriate reference only evokes incredulity at his lack of appreciation for the seriousness of the current situation, given this choice of scenario to argue his case.

One would surely expect a more sensible, considered and responsible approach from someone in his position.

That someone tries to upload infringing content to You Tube and is denied as a result hardly constitutes an infringement of their human rights. As far as I can see all it illustrates their level of stupidity.

This should be You Tube's responsibility to deny service in such instances and any argument on their part that this would be impossible to monitor or enforce illustrates a prime example of an unwillingness to apply any effort into researching technologies that would counter this common situation which would favour copyright protection as the over riding concern.

This example should also be dismissed as I doubt it would be allowed anyway under the American interpretation of Fair Use which only allows for; Commentary, Criticism, Education, Research, and News Reporting none of which applies to the example given by the interviewee above and so this raises the question on how broad will an Irish interpretation of Fair Use be if he thinks that its adoption will be a solution to her hypothetical problem?

What this spokesman describes is such an odd example that it suggests to me there may be an underlying thought process at play here. What could the ulterior motive be?

Usually when trying to understand seemingly inexplicable situations such as this, it's a useful exercise to think about - following the money.

Looking at this from another perspective, he describes a situation where a private individual uploads a video to the web.

Although this purports to be just an innocuous video it is still an example of very personal information about a family, their surroundings, their worth, their values their lifestyle in general.

It is in the area of personal information where the real fortunes are being made online and whatever unscrupulous company discovers the best way to separate people unwittingly or otherwise from their privacy and their personal data, track their movements even, along with their ideas and creative works will have hit the jackpot but at what price for real Freedom? This issue may not concern Fair Use directly but it should certainly be considered more closely in another arena.

Copyright is just one of many laws that need to be undermined by those who see a profit in private data, to unlock more and more information about people and their lifestyles and they can then just sit back while these Freedummies although unaware of the consequences do a very effective job beating the online freedom drum on their behalf.

There is an opportunity now for Ireland to take the lead and stand up for the rights of individuals, their creative works and private property which as we're told is guaranteed under the constitution, not forgetting their privacy in general of course but this will take some radical thinking given the current State of the Web.

I will hold back on my own ideas for the moment given past rights grabbing and ideas grabbing instances.

I don't licence library images to others for online use except in rare and exceptional circumstances.

This has not however prevented my images from being uploaded without my knowledge or permission, given that these were intended for and restricted to particular uses in other applications.

It is my right as owner to determine where and when my images will be seen, if at all.

Of the 670 (that's right, six hundred and seventy) documented hotlinking infringements I experienced during 2011, not one that I saw could be described as being used on websites that were either innovative or adding to or improving on a technological advancement. Apart from those images that were hotlinked, there were of course many other infringements.

I fail to see the need to interfere with current legislation to introduce Fair Use just because a vociferous lobby decides they need my work to pretty up their websites and so make money at my expense. Improvements should be made however to the current legislation on how this can be strengthened and be more easily accessed via the courts and then effectively enforced.

The notion should be dispelled that copyright ownership only resides in large corporations which adds to the ire of your typical ' Freedummy '. An enormous number of individuals rely on copyright protection just to make ends meet, so why destroy their ability to earn a living in pursuit of an idea that could have such a devastating effect.

Aesop's fable of the dog with a bone on seeing his own reflection in a pond, comes to mind. For those who are slow the dog's reflection represents Fair Use. Those with imagination will figure the rest.

The household charge / residential property tax currently in the news would be just a drop in the ocean if the government only took a long hard look at what they've already got, instead of exploring dubious pipe dreams such as Fair Use.

Enforcement of copyright on a large scale would result in increased VAT receipts and tax returns resulting from long overdue compensation to rights owners for their stolen work. This however can only happen if the government puts in place mechanisms to enable rights holders to benefit from their work and the *pièce de résistance* in all this will be that it's the wrongdoers who will finally end up paying.

Any website owners that I have contacted by phone in this country to complain about their infringements of my work have responded very aggressively. According to them I have no right to interfere in how they run their businesses and then there are others who seem to think that I am in some way lacking in community spirit by not allowing them the free use my work on their community websites or on local business networking sites. It's pointless trying to explain issues such as public domain or get across the idea that what they are doing is akin to smashing my shop window and stealing my goods.

Surely these people aren't all shoplifters in 'real life' and there should be a definite distinction between the web and day to day living but unfortunately in my experience this distinction is becoming increasingly less pronounced and their online personas and behaviours are making the transition which could have an enormously detrimental effect in a general sense. See ' Newspapers - personal experiences', on page 7.

Infringers choose to ignore the fact that to be lawfully engaged in commercial aerial photography requires strict adherence to IAA (Irish Aviation Authority) regulations which requires the hiring of commercial aircraft, whether rotary or fixed with specific licenses to operate within specified parameters and flown by pilots with specific types of commercial airwork licenses (as ordinary CPL's simply won't do) at commercial rates, not forgetting commercial landing fees when at IAA airports all paid for with real money and I have to then attempt to recoup those costs.

Maybe I shouldn't display my images online if I don't want them taken (as some have suggested) but this is a ridiculous argument at this stage given that I now rely totally on the web as this generates the largest proportion of new commissions for my business.

Watermarking sample images are no barrier to these infringers and now it seems the only purpose for having them in place will be to identify my work at a later date when compiling proofs in preparation for any future actions.

While it may technically possible to pursue infringers using the small claims court as I understand this is now available for business disputes, I was advised by a solicitor at some point that the court of best competence for copyright disputes is the high court although the claims levels would rarely reach that standard.

Practical drawbacks to the small claims process;

Some references I've seen suggest a solicitor must be engaged in business disputes. If the claim is rejected then an appeal to a higher court would limit the damages only to the level of the Small Claims Court making it almost impossible to contemplate proceeding further. This system also limits awards to the value (in this instance of the use) which be of no deterrent. An ability for this court to award substantial damages & costs is the only solution.

Few if any of these infringing websites using my images could be described as being educational, progressive, innovative or of having any real worth and as far as I can see the majority of these wannabe Fair Users just carry inane commentary on trivial subjects using my images to illustrate their point if there is one even as can be seen on websites such as forums and discussion boards.

These are simply examples of straight forward theft and most of these sites are commercial by virtue of the fact that they carry advertising but manage to hide behind intimidating sounding licence agreements - to evade their responsibilities. I've even seen examples where they have the cheek to infringe on the wording of others licenses in some cases.

Fair use will only give solace to the 'Freedommy' mob. If this is recommended by the committee it will only give a false impression that these people will in some way be licensed to do whatever they want due to a perception that if they steal a photo that benefits them and their supporters then they can justify in their own minds in as much as to say 'well, that's only fair' - albeit at my expense.

What Fair use will do for me is dilute my ability to pursue those who claim Fair Use as a defence as this will only muddy the waters and lead to more protracted battles which in turn are more likely to end up in front of a judge rather than being resolved out of court as has been my experience under our present system, that is if I can find a solicitor to represent me.

Better if the law is more black and white as opposed to having a situation of varying shades of grey which is what I think Fair Use would deliver.

Has anyone considered that there is value in rarity, this is an important factor in how I determine pricing my library work and would also be hugely important in the event of a buyout situation to retain the integrity and therefore the overall value of the collection.

Where has my freedom gone? I use my skill, qualifications, experience and cash to produce works that have real value so why should others with none of these attributes profit from my work? My photographic work is private property (just as much as land or bricks and mortar) which should allow me to exploit that work by negotiating licenses for legitimate uses and for fees that will allow me to continue in business. I'm seriously concerned that if some form of Fair Use is adopted then I will be left with nothing.

There is a real cost associated with the production of these images. Aircraft hire for instance.

I know this is an extreme example but the Fair Use lobby are just as extreme on the other side of this particular argument except in my situation these are very real facts whereas their arguments from what I've heard so far are only based on conjecture and semantics.

Even less costly methods of production in say the amateur arena still requires outlay for digital cameras, flash cards, digital storage, digital backup, computers, software, repairs, replacements, upgrades to all of the above again within a few years just to remain current and of course as in the course of producing the majority of photography there are also associated transport costs to some degree or other.

The proponents of Fair Use seem to believe they have an unfettered and inalienable right to the free use of copyrighted images.

I would suggest that to get a clearer picture of the Fair Use lobby, anyone with a profit motive that promotes Fair Use and would potentially benefit financially from its implementation should be excluded from contributing to this process - as having financial interests in its adoption are the antitheses of genuine Fair Use ideals as I understand the meaning of this concept.

If Fair Use is adopted then online discussion boards and ParaSites I would suggest should be banned from claiming protection under Fair Use if they provide advertising or derive any profit from their websites - that would soften their cough.

New innovative technologies should be developed for the protection of copyright rather than being focused on its destruction.

It's not so much that the current law is broken rather it is the system whereby legal practitioners (solicitors) frustrate the process and this attitude manifests itself more strongly in areas such as copyright infringements. Solicitors and barristers are simply not interested as they can't see acceptable financial returns for themselves. Most infringements are one-offs but these happen very often.

From an individual rights owner's point of view this leads to an inability to defend our property rights and is akin to death by a thousand cuts. So where's our constitution when it's needed?

If any reputable solicitor out there disagrees with my comments and is willing to put their money where their mouth is then I'd be happy if they could offer to represent me on a no win, no collection, no fee basis when payment of their pre agreed fee would only be made on receipt of the court award.

Thanks to the web I'm easily contactable.

I am meticulous in my gathering of evidence and would only present cases that are absolutely clear that an infringement had occurred. Yes, the situation is that bad! and I don't expect a flood of offers either.

To everyone who still thinks that just because you can see something online, this does not mean that it is in the public domain and NO you cannot take it.

Most forms of media that I have encountered over the past 20 years have their own shortcomings with ever decreasing standards in their observance of copyright laws which has only accelerated since the advent of the web..... so for reasons of brevity, - following are instances, just describing newspaper infringements on Copyright, Moral rights and other questionable practises.

NEWSPAPERS - suggestions on improvements based on my own personal experience;

- a) Newspapers must pay for all images published including those published for advertorial purposes, also including repeat uses (but excluding adverts supplied in artwork form, if supplied by a third party.)
- b) Newspapers must not blindly defend or attempt to protect their advertisers if there is any doubt as to the copyright status of any images contained within an advert.
- c) Newspapers must not recall or interfere with copies / microfilm held in public libraries to make changes following publication to cover up their past copyright infringements or to assist an infringing advertiser.
- d) Newspapers must not attempt to undermine the terms of an image library by including their own terms and conditions on the reverse of cheques to circumvent photographers terms of use if that cheque is banked.
- e) Newspapers must not create and publish a montage of a number of images without prior consent.
- f) Newspapers must not download images licensed to a third party from a website, create advertisements for that third party without their knowledge or permission, while not providing rough comps in advance of publication then following publication admit their wrongdoing and further compound their actions by invoicing their would-be customer for said advertisement.
- g) Newspapers must attribute all images and not wrongly attribute / credit images to another photographer. Newspapers should further stipulate that if a photographer does not want to be identified then they should refuse to publish the picture. Image attributions, especially on small reproductions could be identified by a brief code and indexed elsewhere in the paper with expanded details.
- h) Newspapers must not threaten blacklisting by attempting to force their terms on a photographer following publication of an image sent to them on spec although they were previously notified that it should not be published unless terms were agreed.
- i) Newspapers must not assume permission to use a photograph from their printed edition and then use it in an online edition without prior clearance from the copyright holder.
- j) Newspapers must notify the photographer in advance of their intended use of an image that they may have on file from a previous occasion in advance of publication and then undertake to pay for that use and then not expect the photographer to accidentally discover it in the paper before admitting to its use.
- k) Newspapers must not make further use of an image supplied to them for advertorial purposes and then later use the same image for their own editorial purposes in an unrelated story.
- L) Newspapers must not make further use of an image supplied to them for advertorial purposes and then later supply that image to another advertiser.

The following has not happened to me yet but it's only a matter of time...

- m) Newspapers must not syndicate images without the copyright holders authority and agreement.

Photo attributions are a right and must not be offered in lieu of remuneration.

If in the event that Fair Use is adopted;

Newspapers should be explicitly barred from using Fair Use as an excuse, in print or online as they are commercial enterprises.

If under Fair Use they do use a photograph without the owners permission they should not get away with the excuse ‘ these are our normal rates’ argument , instead they should be liable for that photographers normal fee plus a penalty charge for not notifying the photographer in advance along with further penalties if the photo is not attributed.

.. and a general observation;

Newspapers should be overseen and inspected by the press complaints commission or similar independent body on a daily basis to ensure they remain compliant.

Newspapers should not print any photo if they do not know it’s source... no matter how newsworthy.

They should retain records of all images printed and these records should be available for inspection at any time by the relevant regulatory authority.

ie. serious questions should be asked regarding any picture that does not have a photographer credited as this is just a symptom of the current culture infecting the press media in this country both online and in the wider general print media. Online versions should further direct a link to the photographers website if one is available.

Newspapers; suggestions for Copyright and moral rights.

Newspapers must attribute (stating image owners name) on all pictures, irrespective of club, association or union membership, without discrimination between amateur or professional or whether the article is for news or promotional / advertorial.

Inaccurate or no attribution to a photograph must carry severe monetary penalties and an excuse of “it’s a simple mistake” should not be accepted as a defence as this is rarely the case and is now becoming more prevalent.

I digress;

Excuses are just that and they change to suit the occasion which reminds me of a couple of instances over the years when on one occasion the company accountant on being reminded for payment told me for the third time over a period of months that he hadn’t sent the cheque because he was at his grandmother’s funeral.

The most astonishing was a company financial director in a similar situation who said that it was their company policy not to pay their suppliers! I was eventually paid but thankfully they’re no longer in business.

Photo attribution exclusion;

The only acceptable exclusion, I would suggest for not having a photo attribution would be when adverts containing photography are supplied to a newspaper in finished artwork form such as contained within a pdf.

Another excuse that I was given for non attribution was that “it’s company policy to not identify photographers unless they’re members of a union”.

Apparently the Universal Declaration on Human Rights does not apply here.

Article 27 (2) Here is the text;

‘ Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’

< <http://www.un.org/en/documents/udhr/index.shtml#a23> >

back to the issue in hand - or how about;

The European Charter for Personal Human Rights

Article 17 (2).. and here is this text;

“Intellectual property shall be protected.”

Article 54 is also interesting and could put into question this entire exercise of exploring Fair Use

“ Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.”

Self-styled ISP's; - certain directory websites purporting to be ISP's, operating under this banner of convenience for their own dubious business purposes seem to be taking an à la Carte interpretation on article 8 of the European Convention on Human Rights where they ignore the section where it describes the "protection for the rights and freedoms of others".

There should be clear definitions as to what constitutes an Internet Service Provider and this should definitely exclude commercial websites. As I said previously, probably the biggest obstacle given our present legal system are solicitors and their methods of doing business. It would also be helpful if certain wording in the preparation of licenses that assist in separating property from their rightful owners is outlawed especially contracts that mention the granting worldwide royalty free rights as this is an open invitation to others to 'lawfully' compound the offence.

Solicitors who prepare such documents where the intention by a website owner is to evade responsibility by shifting it on to third parties thereby enabling property theft, then those solicitors should be forced to forfeit their licences to practise.

In a recent conversation with a web marketing person it was clear that their attitude to unauthorised use of images was one of a total lack of concern. "all you have to do is take the photo down - the reality is there's nothing more they (the photographers) can do ". If enough people take this attitude online then nothing will protect the work of creatives who rely on their skills for a living.

A simple take down notice as a remedy is not simply that. In the case of an image that has been performing a function on an infringing website for a certain duration then that period would carry usage fees at the very least as normal licenses include a time aspect. Because the image had also been infringed then under these circumstances there should be further penalties.

I have responsibilities to legitimate users and should someone request an exclusive license then I could be considered to be in breach of contract should that image appear elsewhere.

This web marketing person also went on to say that there is a responsibility on ISP's to protect the identities of their members unless they are forced to disclose this information as a result of a court order.... Bloody Hell!! more costs. Who put these idiots on their pedestal? Are they licensed and if so by who? What constitutes an ISP (Internet Service Provider) are discussion boards, property directories, travel sites considered ISP's? They shouldn't be. For example anyone with the most basic knowledge of the web or computers could set up a forum for others to upload what they like and all they need for this are off the shelf software programs such as 'vBulletin' or 'IP.Board'. Does that mean that they can then claim to be Internet Service Providers? If so then that's madness because these guys (and there's lots of them) are causing absolute mayhem.

ISP status should be reserved only for companies that host websites or provide real technical infrastructure where there can be some degree of regulation, oversight and responsibility rather than Jack or Jill messing about at home and considering themselves as having the same protections as the aforementioned while creating untold damage in their blissful ignorance.

Is it any wonder then that when these web wannabees start making money from their enterprises that their attitudes will have formed around the notion of whatever they can get away with goes and soon enough they will have convinced themselves that they're doing nothing wrong and then it's fingers to anyone who disagrees. Law!. what Law?.

There are so many, especially involved in ' Web Marketing ' that choose to purposely misunderstand Copyright and so my current opinion is that only a severe shock will knock any bit of sense into them.

If online discussion boards for instance were serious about addressing copyright issues on their websites then all they need to do is adjust their license agreements to accept their sole responsibility for wrongdoing on their websites by including conditions such as 'if any member uploads an image then it must be copyright to that member or that member must have written permission from the owner'. They can further stipulate that 'if anyone is found to be uploading images without permission following a complaint from a copyright holder then their identity will be made known to the copyright holder and they will also be banned from further use of the website'. .. AND they can get rid of those detestable Royalty Free rights grabbing clauses from their licenses while they're at it. Information that would need to be supplied from members should include a name, address, telephone, number and email.

This is exactly the situation they are trying to avoid but given their track record of a total lack of responsibility or consideration for others rights they're bringing this is a logical conclusion and they're bringing it upon themselves. Responsibility should shift to the website operator to properly edit or otherwise pay for their members indiscretions.

Websites should review all images for copyright information contained, whether © symbol, visible watermarks or info contained within the meta data file and then prevent these from being used whether uploaded or hotlinked. These websites can then sue infringing members for breach of contract if they wish or run the risk of being sued themselves. All websites that allow their members to upload photographs;

How is it possible that a licence agreement between two third parties can manage to between them, strip away ownership of another's property? ... and get away with it - which is in effect what is currently happening even before this idea of Fair Use is considered.

Does the law draw a distinction between intellectual property and other forms of property? - I don't think so - otherwise there would be no basis for the concept of copyright in the first place. If there is discrimination on how differing forms of property are adjudicated upon then I might as well give up right now.

Successful judgements in copyright cases should award reasonable damages as a matter of course given that only a tiny fraction of any photographers infringed works would ever be practicable to pursue given the condition of the current legal structures.

Damages should be considered in light of the overall value of a collection and costs involved in creating that collection. Some judgements that I have seen from other jurisdictions seem to favour simply the value of use, had the image been legitimately licensed in the first place rather than been stolen.

This interpretation would only act as an encouragement to infringers and would always put the responsibility of the rightful owner to discover that use and suffer massive further costs in the pursuit of an action.

A pre digital rule of thumb for image stock libraries was that you could only expect about 10% of the images contained within a collection to ever be utilised and of that only 20% would be repeat uses so going by this calculation 12% (as an approximate base figure) of the images contained within a collection should then carry values to cover the cost of producing the collection as a whole, also considering items such as managing the collection, marketing, other expenses etc. plus a profit margin.

Based on this calculation alone, prices to an end user would be substantial if any normal business model was applied but other market forces i.e competitor prices would need to be considered resulting in adjusting prices downwards in order to gain any level of market share and so resulting in tight margins.

Prices are further determined on an image based on its use including considerations such as; type of licence eg; exclusive / non exclusive, duration, image size, publication dimensions, print run, territory, publication type, industry type, digital use, position, circulation, editorial / advertising, on products for profit eg postcards.

While infringements did occur pre web and in the days of film, they were negligible by today's standards and so were easier to manage.

Since the arrival of digital however and more especially the web, legitimate uses have plummeted and infringements have skyrocketed.

Ongoing costs for equipment have also increased enormously and prices for images offered by competitors have hit the floor largely as a result of non / un professionals entering the market with little or no sense of the damage they are doing, while the unscrupulous take advantage of their ignorance.

Image libraries have proliferated since the onset of the web but these operators don't carry the cost of producing anything, relying instead on the ignorance of others to supply them with the images and so with no costs then their fees are virtually non-existent.

The only hope left is for a real and concerted effort to re-establish copyright infringement as a serious offence by finding ways to enforce it effectively and protect the enormous investment of thousands of image genuine and talented collection owners.

The opposing sides of this Fair Use argument as I see it lie between those who on one hand that are trying to increase their profit margins by wanting wider access to even more material so that they can then further exploit copyrighted creative works for their exclusive benefit versus those who on the other hand are simply law-abiding creative individuals being put out of business as a result of the unlawful greed of others.

It's that simple.

There must be some way that I can assert my most basic human rights i.e. the protection of my private property and my right to earn a living but these are currently being denied me due to a whole series of anomalies under the present circumstances.

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John Alex Herriott ADipD Vis com (Advertising photography & advertsing graphics)

A handwritten signature in black ink, reading "John Alex Herriott". The signature is written in a cursive style with a prominent horizontal line at the bottom.