

Copyright Act: Balance may have tilted too far in favour of photographers

New law should better protect individual consumers of commissioned photography services who lack the bargaining power of commercial clients

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For The Straits Times

One of the objectives driving proposed legislative changes to Singapore's Copyright Act is to better reward authors for their creative efforts by giving them more rights they can assert against others who make use of their creations.

This includes giving creators default ownership of the works they create at the request of a commissioning party, replacing the current default rules which vest ownership of the copyright of such works with the commissioning party.

This has raised questions which deserve scrutiny, given the potentially far-reaching impact on ordinary Singaporeans.

Apart from wedding photographs, the average consumer is likely to engage the photography services of others – both professionals and amateurs – on many other occasions. Family portrait photography is particularly popular

at this time of the year, after university students graduate with their caps and gowns. Pre-Covid-19, event photography was common for birthday parties, welcome lunches and company dinner-and-dance events. Most major tourist attractions also offer personal photography services, giving visitors a chance to take home photographic souvenirs of their excursion. The list grows longer when we add the photographs we pay others to take for our resumes, name cards, passports and other forms of personal identification.

Giving the photographer first copyright ownership of all these photographic images seems inconsistent with our intuitive expectations of privacy and fairness, especially since the commissioned photographer is already being compensated for his services and can already exercise control over the individual consumer's access to these images. For example, it is common for photo studios to limit the number of printed photographs they supply to the customer at first instance, charging higher rates to those who want digital copies with

fees directly proportional to the resolution quality of the image files they grant access to.

Where commissioned photography takes place in a business or commercial context, entirely different considerations apply when we give the photographer first ownership of the copyright. The freelance photographer gets an additional bargaining chip when his works are commissioned for magazine spreads or advertisements. The aerial photographer may be incentivised to invest in advanced drone technologies to deliver superior quality images to his clients. Unlike ordinary consumers, business clients are more likely to have some degree of savviness or sophistication to manage the applicability of a default rule which vests copyright ownership in the photographer.

BARGAINING POWER AND TRANSACTION COSTS

The crux of the reservations with this default rule for commissioned photographs lies in its over-inclusivity and unrestricted scope of application.

Giving first copyright ownership to commissioned photographers may be underpinned by noble intentions which recognise their status as "creators", by subjecting them to the same default rule as that applied to commissioned

books or computer programs, but the practical consequences of changing the law will be quite unpleasant for consumers.

When the new copyright ownership rule takes effect, a consumer must not only seek the consent of the photographer to reproduce or publish the photograph, but also tolerate the photographer's use of the commissioned photograph for purposes completely unrelated to why the photographer was engaged in the first place.

While it is possible for this rule to be displaced by an agreement between the parties, there is no reason why photographers would voluntarily surrender their copyright ownership to consumers in their photography services contracts. How realistic is it to expect consumers to negotiate for these rights in each and every transaction, even assuming they are aware of the existence and implication of this new default copyright ownership rule?

Without the bargaining power of business or commercial clients, individual consumers are likely to be subject to the standard-form contracts of photography service providers and, possibly, boilerplate clauses which require them to pay higher fees to get ownership of the copyright in "their" photographs – something which they have enjoyed for decades under the current law.

Changing the default rule in a way which could seriously prejudice consumers of photography services should not be done lightly, especially when all that is practically achieved is an increased likelihood of transactional friction and customer aggravation that might, ironically, diminish the level of public support for stronger copyright laws in favour of creators.

COPYRIGHT LAW: STRIKING THE RIGHT BALANCE

Like all intellectual property statutes, the Copyright Act must strike a sensible balance between the competing interests of creators and users. Strengthening the rights of creators should not come at the expense of consumers unless there are good reasons for doing so.

Will photographers be incentivised to take more photographs of events or people if they are given copyright ownership of these photographs? Do photographers deserve to be rewarded with something more than what they are paid for their photography services, namely, copyright ownership of the photographs they take? Does that justify depriving consumers of the property rights which they would otherwise enjoy under the current rules?

There is another feature of the new Copyright Act that will benefit all creators, including

photographers – the right to be identified as author of a copyright-protected work. What this means is that photographers, as authors of the photographs they have made, will be entitled to get their names identified in a clear and reasonably prominent manner whenever these photographs are published, exhibited or communicated to the public by their customers. Perhaps this new right of attribution is enough to achieve the goal of elevating the "creative" status of photographers, without also making them owners of the copyright in the photographs they have taken at the request of others.

In the light of the concerns, it may be prudent to reconsider the scope of the changes to be made to the default rule for copyright ownership of commissioned photographs where the commissioning party is an individual consumer. After all, consumers are given special treatment elsewhere in the law, such as protection against unfair trading practices, in recognition of their relatively weaker bargaining positions. Consumers of commissioned photography services should be viewed through the same lens by the legislators reforming our copyright laws.

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