

'Alterers' Filtering out Artists: Using the 'Public' Perspective to Preserve Moral Rights over Digital Art

Thomas GC Hood

Thomas GC Hood is a Herchel Smith Scholar and postgraduate at Queen Mary University of London, completing an MSc in the Management of Intellectual Property. He is also a Volunteer Research Fellow at Queen Mary, supervised by Dr Guan H Tang. Thomas previously studied music at Trinity College, Cambridge, graduating in 2020. He is an aspiring barrister and will begin his PGDL LLM at BPP in September 2021.

In the digital age, the sharing of images is prevalent across a variety of online platforms. Instagram, one of the largest of these, can provide an up-and-coming artist with an audience of over one billion users. Some already predict the platform's decline. Kenny Schachter recently commented that, given Instagram's ever-changing format, 'it is only a matter of time before the powers that be get too greedy and the ease and accessibility of the app decline'.¹ Yet platforms like Instagram provide a space to interact with a vast amount of material. They form what Hayleigh Boshier and Sevil Yeşiloğlu call a 'cultural "remix" environment', a space for creatives to be influenced and inspired by other works.² This can create tension between an artist's legal moral rights and the creativity of users on the platform.

In the United Kingdom, the Copyright, Designs and Patents Act 1988 (CPDA) ss 77–89 protect moral rights. Notably, they give the author the right to be named and the right to object to derogatory treatment of their work.³ Both of these moral rights could be undermined in the creative environment of Instagram if an 'alterer' were to digitally change their image. An altered image could be deemed original if it expressed a new aesthetic idea. Since current copyright law only

protects works that result from individual 'skill and labour', the new image is unlikely to be afforded copyright protection. But as copyright law begins to recognise changing artistic practices, could the actions of an 'alterer' be legitimised? And would this lead to a weakening of the moral rights of the original artist?

The high originality threshold for 'skill and labour' in the law of England and Wales has thus far proved a stable groundwork for establishing authorship. Yet this approach must keep up with the shift in the technology used by artists, and with how apps like Instagram offer an artistic outlet for millions of people worldwide. One way forward could be an objective test using a 'public'. This notional public would have an interested, informed view that could objectively recognise artworks. This view could be used in an assessment of infringement of moral rights. After all, the 'real' public has a vested interest in moral rights, as all artistic work created becomes part of our cultural history, no matter its aesthetic quality. By considering the public view in cases of moral rights, copyright law would recognise the stake society has in knowing who is contributing to its heritage, and in preserving that information. Any lowering of the originality standard in copyright law must balance the new artistic capabilities of the digital world and the importance moral rights have for both the artist and society. In evolving from existing standards for skill and labour, the test of a 'public' view could preserve the rights an artist wishes to claim over a digital image.

Can filters make an original image?

In the UK, the test for originality remains largely the standards of skill and labour. An author must show that they have expressed

1 Kenny Schachter, 'Gram today, gone tomorrow? Kenny Schachter predicts Instagram's future in 2021' (*The Art Newspaper*, 4 January 2021) <<https://www.theartnewspaper.com/blog/gram-today-gone-tomorrow-three-predictions-for-2021>> accessed 20 January 2021.

2 Hayleigh Boshier and Sevil Yeşiloğlu, 'An analysis of the fundamental tensions between copyright and social media: the legal implications of sharing images on Instagram' (2019) 33(2) *International Review of Law, Computers & Technology* 164, 177.

3 Copyright, Designs and Patents Act 1988, ch 4.

their ideas by the application of techniques that create a fixed work. Bingham LJ in *Designer Guild Ltd v Russell Williams Ltd* defined this principle:

[A]nyone who by his or her own skill and labour creates an original work of whatever character shall, for a limited period, enjoy an exclusive right to copy that work. No one else may for a season reap what the copyright owner has sown.⁴

This standard has been under strain since the decision of the Court of Justice of the European Union in *Infopaq International v Danske Dagblades Forening (Infopaq)*. The Court's decision expanded copyright protection, defining an original work as one shown to be the author's own intellectual creation.⁵ While the UK is no longer a member of the European Union, this European standard has been subtly recognised in our case law.

For example, Judge Colin Birss QC in *Temple Island Collections Ltd v New English Teas Ltd* assessed two similar images of a red bus.⁶ He focussed on the key elements of the earlier image, stating that:

What is visually significant in an artistic work is not the skill and labour (or intellectual creative effort) which led up to the work, it is the product of that activity. The fact that the artist may have used commonplace techniques to produce his work is not the issue. What is important is that he or she has used them under the guidance of their own aesthetic sense to create the visual effect in question.⁷

The application of digital effects to a photograph or other work of art could be considered the result of an 'aesthetic sense' and therefore original. Nevertheless, Judge Colin Birss QC held that the defendant had infringed copyright by reproducing distinct elements created by specialised techniques, ie the skill and labour of the original artist. While this judgment shifted towards the ideas captured in the image, the outcome still focused on the techniques that had been deployed to express an original and unique work, and linked them to the reproductions made by the copier.

An expansion to the doctrine may be necessary to keep up with new creative approaches. Clarke DJ in *Suzy Taylor v Alison Maguire* held that for an artistic work to be original, it must have been produced by an artist's independent skill and labour.⁸ Yet digital spaces let artists collaborate with each other and incorporate elements of each other's work, in new and exciting ways. Truly independent creation is becoming less and less common. Persisting with the doctrine of skill and labour could fail to protect works created digitally through legitimate collaboration. These might not be considered independent applications of skill and labour.

By contrast, a more open standard, such as in *Infopaq*, could let any altered image be copyrightable. Darren Hudson Hick proposes that merely applying a filter could create a new expression. Hick argues that in such a case an image would undergo a

transformation, claiming that by 'employing the image in service of expressing some distinct idea, it will be, strictly, speaking, a distinct expression. Without formally altering the original, I will nevertheless have transformed it.'⁹ Hick's theory of transformation could classify an altered image as a new, original expression of an idea, even if it were not independent of another's work. By applying Hick's interpretation, copyright law would protect the fluid and participative processes of the digital age.

Protecting the moral rights of the individual through the 'public'

If UK law were to adopt a broader definition of originality as explored above, would this lead to a rapid erosion of moral rights? There could be benefits to this: removal of the artist's grip on a piece of work could better foster creativity in the digital environment. However, copyright law must carefully traverse the line between ensuring creativity and genuinely protecting the rights of authors. Filters could dilute artistic endeavour. Furthermore, they could lead to multiple persons claiming protection for their alterations. Creativity could become a society-wide collaboration where no individual has control. Yet without some form of moral rights, art has no intrinsic value. It is under constant review and change. The digital creative environment is accelerating the need for copyright to encompass a greater number of artistic expressions. At the same time, concepts of authorship and integrity remain key to the idea of artistry, and necessitate a new approach from the law to reinforce moral rights.

One way forward could be to consider what the moral rights of authorship and objection to derogatory treatment mean to a notional 'public'. An objective test of the 'public' could establish the common will to recognise and perceive an individual as an author. Jane Ginsburg stresses that recognition of an author 'enhances the public interest because it affords, or it should afford, the fullest possible public information about who created a work, about the source of the work.'¹⁰ The moral right to be named as an author does not only protect an author's interests. It also ensures that society as a whole is kept informed about the origin of a work.

Jessica Lewis contends that moral rights stem from a misconception that the wider public have a vested interest in maintaining artistic works.¹¹ She proposes that levels of interest in a work can fluctuate, and that 'it is in the public interest to sometimes allow mutilation or modification of works, even if it prejudices the original artist or creator. This fluidity is both a mark and stimulus of contemporary artistic creation.'¹² Lewis would allow autonomous artistic expression to be rejected in favour of a creative sphere without boundaries, where alteration and augmentation are prevalent and even preferred, and where no thought or recompense are given to original authors. Over time, extending copyright protection to 'altered' expressions could unravel the concept of authorship. Successive 'alterers' in digital communities would lead to a never-ending chain of deformation that obscured the original owner.

4 *Designer Guild Ltd v Russell Williams (Textiles) Ltd* [2000] UKHL 58, [2000] 1 WLR 2416.

5 Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-06569.

6 *Temple Island Collections Ltd v New English Teas Ltd* [2012] EWPC 1.

7 *ibid* [34].

8 *Suzy Taylor v Alison Maguire* [2013] EWHC 3804 (IPEC) [8].

9 Darren Hudson Hick, *Artistic Licence: The Philosophical Problems of Copyright and Appropriation* (University of Chicago Press 2017) 154–55.

10 Jane Ginsburg, 'Moral Rights in a common law system' (1990) 1(4) *Entertainment Law Review* 122.

11 Jessica Lewis, 'With Love and Kisses: Nothing Lasts Forever: An Examination of the Social and Artistic Antiquation of Moral Rights' (2016) 23 *International Journal of Cultural Property* 267.

12 *ibid* 280.

An objective test of a notional ‘public’ would break this chain by recognising and fortifying the contribution artists make to our culture. Judge Michael Fysh QC established in *John P Harrison v John D Harrison*,¹³ a case of false attribution, that the court could deploy a test from the perspective of the ‘reasonable, interested person of reasonable intelligence’—the familiar fiction of the ‘reasonable person’.¹⁴ A test of a notional ‘public’, based on the premise that the public is interested in the origin of artistic works and how works of art are treated, could establish the true author of an altered work, even one significantly altered.

This ‘public’ test could also ensure that the moral right to object to derogatory treatment covers digital works. In *Emma Delves-Broughton v House of Harlot Ltd*,¹⁵ Recorder Campbell assessed the derogatory treatment of a photograph of Miss Delves-Broughton that had been distorted and used on a website for leather lingerie items. Recorder Campbell held that the efforts of the original photographer had been altered by significant editing.¹⁶ This sets a precedent for digital alterations creating new works. A ‘public’ test could determine if the original work was still perceivable. It could determine whether the content of the image had been altered to the extent that it drifted from the intention of the original artist. Derogatory treatment could be better understood as the consequence of an adverse and recognisable effect from a ‘public’ perspective on the work of an artist. Overall, this proposed approach balances digital creative collaboration with the need to stop the plausible threats ‘alterers’ and their filters pose to artistic authorship and integrity.

Finding the balance

At their core, platforms such as Instagram encourage the sharing of artistic works. This can threaten an individual’s moral rights under copyright law. However, as Caroline Russ explains, ‘platforms like Instagram and Twitter are not truly incentivized to crack down on copyright infringers and misattributed content. Brands will not restrict sharing images and tweets freely over the Internet when it is part and parcel of the social media experience.’¹⁷ Images will continue to be shared, easily accessed, and augmented. That is the nature of these platforms.

Copyright law must adapt, but without undermining the moral rights of artists. Society wants to know who created a work because art is a reflection of human expression at a given point in time. Digital creativity is the future of art, and there are powerful digital tools that can spread artworks far and wide. This creativity would not be halted by securing moral rights, since objections will only occur when an artist objects through litigation. Nonetheless, an artist should have a remedy in law to protect their work.

An objective test of a notional, informed, and interested ‘public’ would give the courts a perspective from which they could assess and ensure the moral rights of an author. In protecting moral rights, the test would give an artist control over their work, so that they would feel valued as a member of society’s cultural landscape. The test would also let copyright law recognise the

creative contributions of an ‘alterer’ who collaborated with a consenting artist. ‘Artist’ and ‘alterer’ are becoming synonymous. Copyright law has a duty to adapt. It must allow authors to protect their moral rights over digital works, and thereby ensure that the true expressions of authors’ work continue to be valued and enjoyed by society.

¹³ *John P Harrison v John D Harrison & Ors* [2010] EWPCC 3.

¹⁴ *ibid* [55].

¹⁵ *Emma Delves-Broughton v House of Harlot Ltd* [2012] EWPCC 29.

¹⁶ *ibid* [7].

¹⁷ Caroline Russ, ‘Tweet Takers & Instagram Fakers: Social Media & Copyright Infringement’ (2020) 22 *Tulane Journal of Technology and Intellectual Property* 205, 222.