

BOOK REVIEW

COPYRIGHT AND PHOTOGRAPHS

SALLY MCCAUSLAND¹

Ysolde Gendreau, Axel Nordemann and Rainer Oesch (editors)

Copyright and Photographs — An International Survey

Kluwer Law International London 1999, 334 pages

[167] Over the last century or so photography has established itself as the most powerful visual medium of the age. Legally speaking however, it is still the poor cousin of the art world, suffering from its unfortunate relationship to other mechanical processes such as photocopying. This nexus between photography and machines has raised the question of whether all photographs are of sufficient intellectual creation to warrant protection. As Professor Ricketson states in the opening chapter of this book, the question has led to disagreement at the international level over how photographs should be protected.

Photographs also receive a much shorter term of copyright protection than other works. To take one notorious Australian example, the iconic 1930s photographs of Max Dupain are now out of copyright despite their popularity on calendars and posters. In contrast reproductions of paintings, drawings and sculpture of the same era can still generate royalties for the families of the artists who created them for 50 years after their death.

This book shows that despite the push for international harmonisation of copyright laws there is continuing divergence of interpretation over protection of photographs. Professor Ricketson provides an overview of international conventions affecting the protection of photographs. In the following essays each of the authors, (who are from Austria, Belgium, Canada, Finland, France, Germany, Italy, Japan, the Netherlands, United Kingdom and the United States) writes about the laws of his or her country relating to photography. The reader is then invited to draw his or her own

¹ Inhouse lawyer, SBS.

comparisons between jurisdictions based on the similar issues addressed in each essay.

As the book demonstrates, legal discrimination against photography is slowly reducing. In Australia for example, 1998 amendments to the Copyright Act generally reversed the presumption of ownership of commissioned photographs in favour of photographers. The requirement of 'originality' for copyright protection has been progressively lowered across all art forms, making [168] it easier for photographers to protect their work from infringement. Bodies such as the Australian Copyright Council are pushing for legal amendments to correct the anomaly in duration of protection between photographs and other artistic works.

However, it is clear that the mechanical nature of photography still throws up difficult theoretical questions for lawyers across the world. An example of such a 'hard question' is whether photograph of an old work (such as an old Masters painting) is sufficiently original to have its own copyright. If so, could this set up some form of 'perpetual copyright' in the old master by virtue of the fact that others cannot get access to it to take their own photographs? Is this against public policy? This is an important issue for the many museums which now sell cards and CD-ROMs of images of old works from their collections. Another such question is whether a photographer can restrain another photographer from mimicking his or her composition — a question which frequently arises in wedding and other commercial photography.

If international legal comity on such questions is to be achieved then it is necessary for lawmakers to be aware of what is happening in other jurisdictions. The book is a useful comparative source which should aid policymakers and academics in this task. It would also be a useful aid to students and others interested in comparative research or legal history in the field.

It is less obvious that the book would appeal to a commercial legal market. While on occasion it may necessary for a lawyer to research the laws of another jurisdiction, this would be a fairly rare occasion. It is therefore unlikely that many practitioners would consult the book on foreign statutory provisions such as duration. Where the

book is most commercially useful is where the authors cite cases on the universal 'hard questions'. Understanding which arguments were successful in other jurisdictions can assist lawyers in formulating persuasive arguments where their own jurisdiction has no precedents. However, the book might have put more emphasis on such case studies, perhaps with text boxes in the manner of some North American entertainment law books. An appendix collecting the best cases by subject heading would also have been useful. This would have been preferable to leaving the reader to sift through more general material on each jurisdiction.

To take this one step further, given the quality of contributors it would have been interesting to record a 'round table' discussion of topical issues with a concluding overview of how the contributors envisage future developments in the field. But perhaps these suggestions go beyond the project of the book.