

## **The National Portrait Gallery & Wikipedia The Conflict between old and new media**

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A large number of photographs from the collection of the National Portrait Gallery (NPG) have been appropriated from its website and are now freely available on the media section of Wikipedia, Wikimedia Commons. The ensuing legal row has engulfed two world famous institutions from the worlds of new and old media.

The gallery maintains a collection of priceless old paintings and, admission to view these is free. According to its website the NPG *“is increasingly keen to find new ways to share the Collection”*. The declared mission of Wikimedia Commons is *“to collect and develop educational content under a free license or in the public domain, and to disseminate it”*. Both organisations want to make works of art available to the public; it would seem a perfect match. Not so.

Sometime in March 2009 it seems that Derek Coetzee (a Wikipedia user) accessed the NPG database of images, circumvented their copy protection measures and downloaded more than 3,300 high resolution images. He then uploaded these images to Wikimedia. Having reportedly invested £1 Million in the creation and publication of these images, the NPG was not amused.

According to the NPG, Coetzee has breached the terms of use of its website, improperly circumvented the technological protection measures they put in place, infringed their rights in the database of images and, most controversially, infringed copyright in the images. This last assertion has the Wikimedians up in arms. According to a Wikimedia policy statement, claiming that faithful reproductions of public-domain 2D artworks are subject to copyright is *“an assault on the very concept of a public domain”*. Wikimedia maintains that, if copyright is claimed in reproductions and the taking of photos is prohibited, museums become *“gatekeepers”* who can make historical works, legally in the public domain, inaccessible to the public.

Copyright law grants the author of an original artistic work the right to control reproduction and distribution of his work. In most cases this right extends for 70 years after the Author's death. The public policy justification for this law is that society benefits from the creative effort of artists and these efforts should be rewarded with license fees. The law also recognizes that this right should be limited and, once the creative contribution has been repaid, the Author's work should be available to all.

Arguably this model is intended to promote creativity without placing undue restrictions on public access to creative works. In the UK copyright subsists in all “original” artistic works. Originality is interpreted as meaning that a work “originates” with the sweat of the Author’s brow. It is a long held principle in the UK courts that labour, skill and judgment are required to produce an expert reproduction of an existing work and that, as such, these are “original” works. The position in the USA is different; in the USA faithful reproductions of 2D works of art do not themselves give rise to copyright.

Wikipedia is arguing that Coetzee has done nothing wrong (yet they have removed his administrator rights - so Coetzee can't remove the pictures from the website). Central to their stance is the moral belief that NPG (or any other similar institution) should be not be able to rely on copyright to control the distribution of priceless works of art that are themselves out of copyright protection. However, that stance fails to take into account the effort and expense that the NPG invested in creating their database of images or the way in which those images were appropriated from the NPG website by Coetzee. The publication of content created by someone with their consent is one thing, but the publication of content created by a third party without their consent is entirely different - and in the opinion of this author is wrong.

Protecting old and priceless paintings requires the provision of climate controlled rooms with particular humidity and light levels; if these paintings were repeatedly subject to camera flashes or the level of lighting required for faithful photographic representations the paintings themselves would inevitably degrade and be lost forever. Therefore the NPG had, at great expense, commissioned a collection of such photographs and made them available for anyone to view, for free, on their website. To recoup their costs, over the last year the NPG had recovered £339,000 by licensing the commercial use of these images. Now that Mr Coetzee has appropriated and published the images this value has been destroyed in a mouse click, along with the NPG’s chances of recovering its investment. If the law does not provide a remedy then what incentive is there for the NPG (or other similar institutions) to invest the millions required to create, catalogue, reproduce and publish reproductions of any collection?

Making great works of art available is a noble aim. If the law fails to protect the rights of those who invest time, money and skill in reproducing great works then there will be no incentive for them to continue. Investment requires a return; we need to decide whether the person who pays should be the licensee, the gallery-goers, or the tax payer. Ultimately, someone has to pay the bill.

If you require advice or assistance with your IP strategy or your IP portfolio, or if you would like to know more about Mathys & Squire LLP, please contact the author or visit our website at [www.mathys-squire.com](http://www.mathys-squire.com).