

# Caricatures, orphan works and the legacy of the Normans

Stefan Hartmann spoke to Charles Swan

The English lawyer Charles Swan is considered one of Europe's leading experts on the law relating to photography. After leaving the Simkins Partnership last year, he set up Swan Turton, a London based media law firm comprising twelve lawyers covering all areas of the media and entertainment sectors including music, film and TV, theatre, advertising, publishing, visual arts and photography.

Swan is also Chairman of the international lawyers' association Adlaw International, which advises advertisers and agencies on cross-border advertising campaigns. He was the first non-photographer director of the Association of Photographers in the UK.

**visuell:** All the fuss about press freedom and the reprinting of the Mohammed caricatures has now, thank goodness, died down. While the Islamic world was bubbling over, there were heated discussions in Scandinavia, France and Germany and newspapers and magazines reprinted the cartoons. The British press, which is otherwise proud of having the biggest mouth in the whole of Europe, kept a low profile. Do you have an explanation for this?

**Charles Swan:** Yes. I was happy the British press took a more responsible attitude than some of their continental counterparts. Our press is often an embarrassment, and they regularly go too far when it comes to individuals' privacy. However, they got it right on the cartoons issue. I never actually saw the

cartoons myself but from the descriptions I read in the press here it was obvious they were going to be deeply offensive to Muslims. To debate the issues it was enough to describe the cartoons. There was no need to reproduce them. Freedom of speech is a fundamental right, but it isn't absolute and you have to draw the line somewhere. Britain has a large Muslim population and maybe the cynical explanation is that our press was just being pragmatic. Why would our newspapers want to insult a large proportion of their own readership by mocking those readers' core spiritual values? Freedom of speech is a fundamental human right. It's vital for photographers of course but, as one of the judges in the Princess Caroline privacy case recently warned, it is sometimes elevated to a fetish.

Photo: Tom Cowling / SwanTurton

**visuell:** Let's take a look across the Atlantic. The copyright issue currently occupying minds in the United States is the controversy surrounding so-called "orphan works". Photographers, illustrators and agencies are worried about a reduction in their copyright protection and a deterioration in the legal position of photographers and agencies. You British are closer to the United States than we continental Europeans. Is all that only hype or is there a genuine reason for concern?

**Charles Swan:** We're closer to the US than you are, but despite how it often seems we're not yet the 51st state. Our position is schizophrenic. We speak

Normans were!), but at the same time our outlook is essentially European even if we're not always totally comfortable about it.

Our copyright law shares much with American copyright law but is becoming increasingly European. Moral rights in the US are practically non-existent. Our moral rights are weaker than continental ones but still very much a European set of rights. Earlier this year, we introduced moral rights for performers which, like in many continental countries, can't be waived. We've also introduced *droit de suite* for photographers and other artists and that can't be waived either.

Orphan works is a tricky subject. PACA have got

heavily involved in the issue, and rightly so as it's a dangerous development for photographers and photo libraries. The problem is that in some ways what's being proposed in the US is actually quite sensible. It would be nice if museums and other archives, for example, could open up more material to the public which at the moment they don't dare put on the internet for fear of litigation.

There's already an orphan work provision in UK copyright law, but it's a narrow one, only covering revived copyright works which, in the case of photographs,

means photographs taken before 1945. No one bothered much about that when it was introduced. The dangerous thing about what the direction the



*Charles' picture selection: the photo on the left, by David Redfern, is of Marlene Dietrich*

a similar language to the Americans, and our legal concepts come from a common source (actually French or Scandinavian ultimately, or whatever the

Americans are heading in is that it opens the doors to the wholesale infringement of any number of photographs that aren't genuine orphans – including photographs owned by European photographers and libraries.

**visuell:** Can such an American policy decision have an impact on Europe?

**Charles Swan:** My guess is that the idea won't catch on easily in Europe, where more emphasis is placed on authors' rights. But if the Americans come up with a system that doesn't prejudice copyright owners as badly as the current proposals, there might be some movement in this direction in Europe. It's certainly one that European rights organisations will have to watch extremely carefully.

**visuell:** The EU is trying to bring about harmonisation by means of legal directives. Do you think that these attempts to take action from above – Brussels – will achieve the desired success?

**Charles Swan:** Ultimately, yes. It's a slow process, directives take years to filter their way through the system, but greater harmonisation is already

coming in copyright law just as it has in trade mark law. Copyright law is inherently controversial in a way that trade mark law isn't. The interests of creators and users of works are directly opposed in many areas, and striking the right balance between the two is difficult. But Brussels will continue to be involved in this process and our national copyright systems will inevitably converge more and more.

**visuell:** Do you consider that the present protection afforded to photographs in Europe is sufficient or would you like to see any specific changes?

**Charles Swan:** The biggest change in the UK occurred in 1989 when commissioners of photographs no longer automatically got the copyright. Photographers' organisations in the UK, mainly the Association of Photographers, have done a good job of protecting photographers from rights grabs, particularly in the advertising industry (where it's normal for photographers to retain their copyright). However, UK law still allows rights owners to sign away their rights with no protection against economic pressure (apart from droit de suite and performers' new moral rights). I'd like to see more photographer protection built into copyright law along the lines of

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what you see in Germany, laws which recognise the imbalance of economic forces and redress that in certain areas in favour of the little people.

**visuell:** You obviously like working in the photo industry. What do you find particularly appealing. Are you attracted by the pretty girls at the British agencies or do you have a special affinity with photography?

**Charles Swan:** No it's not the pretty girls, I've got one of those already! I do a lot of work for advertising agencies as well as photo libraries and they're full of pretty girls too. They're similar in other more important ways. Both types of company attract intelligent and sophisticated people, with interesting, varied and sometimes downright whacky legal issues, which makes working for them fun. And they both recognise the importance of legal issues and treat their lawyers nicely – ad agencies because they want to stay out of trouble and photo libraries because copyright is the lifeblood of their business. Affinity with photography? I don't consider myself an expert on anything other than photography law, I have no artistic talent myself, but I do love photography and it's great to be able to share that with the people who matter most in your work, namely your colleagues and your clients.

**visuell:** If I were to enter your living-room would I see any photographs hanging on the walls? If so, who are they by?

**Charles Swan:** You wouldn't see many photographs on my living room walls apart from family pictures and holiday snapshots. Most of my photographs come through my work and I keep them in my office. Over the years, I've been lucky enough to work for some very fine photographers and one of the perks

of being a photography lawyer is that you do end up with a visually interesting working environment. I've got several Magnum (or ex-Magnum) photos including Halsman's portrait of Einstein, one of Saldado's goldmine photos, Burt Glinn's portrait of Sammy Davies Jr and a beautiful romantic image by Elliott Erwitt. I've also got some wonderful photos by David Redfern of Ray Charles and Marlene Dietrich, and some more photos with a musical subject matter by the great Dutch photographer Anton Corbijn. I've got three partners who do music law so we like to reflect that side of the practice on our walls.

I also have several mountain photographs, including one by Fay Godwin, just because I'm a keen mountain person. John Cleare gave me an extraordinary view of Monte Rosa that he took from the summit of Mont Blanc and I put it above the photocopier on the way into the office, inspiring us all when we arrive in the morning to achieve ever greater heights!

I love the effect that photos have on other people, I love it when they notice a beautiful image and stop and stare. I tend to keep my favourite images by my desk – a bit selfish perhaps, but we're open plan and democratic so we all get to share them.

Anyone interested can sign up for Swan Turton's photography law e-bulletins by logging on to [www.swanturton.com](http://www.swanturton.com). These legal e-bulletins, which date back to 1999, were probably the first produced by any law firm in the UK.