Cooley

Extended Copyright Protection for Industrially Exploited Artistic Works

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28 July 2016 shall see the repeal of section 52 of the Copyright Designs and Patents Act 1988 ("**CDPA**"), which currently limits the term of copyright protection for industrially exploited artistic works (for example, works where more than 50 copies have been made) to 25 years from the end of the year in which the relevant article was first marketed.

The rationale behind this provision was to ensure that industrially exploited artistic works were offered only the same level protection as offered to registered designs. By contrast, artistic works which have not been industrially exploited are protected by copyright for the life of the creator of the artistic work, plus 70 years.

The repeal of section 52 CDPA effectively extends the full term of copyright protection – the life of the creator, plus 70 years – to *any* artistic work, so industrially exploited works will now benefit from a significantly extended period of protection.

Transitional arrangements and key dates

The Government has put in place transitional arrangements to give businesses time to adjust to the new regime. An overview of the key dates for various arrangements is set out below:

i. Copies produced, imported or acquired under a new contract entered into *after* 28 October 2015 (i.e. the date of publication of the consultation) but *before* 28 July 2016 may be sold or dealt with until **28 July 2016**.
ii. Copies imported or made before 28 October 2015, or produced or imported under a contract entered into before 28 October 2015, may be sold or dealt with until **28 January 2017** (the so-called "depletion date"). Following this date, all articles must be sold or destroyed, have permission from the copyright owner (for example, through a licence) or rely on an exemption. The mere possession of an article after this date will not infringe copyright, though this will not be the case if the possession is in the course of business.
iii. Copies made or imported after the date of the repeal (i.e. 28 July 2016) must be licensed by the copyright holder or used under a copyright exemption.

Implications for those currently taking advantage of section 52 CDPA

Those currently taking advantage of section 52 CDPA to make unlicensed copies of artistic works for which copyright protection had expired – such as photographers, publishers, museums and possibly classic furniture replica businesses – will need to take action to: identify existing articles which may now be copyright protected, and consider whether any exemptions to copyright protection may apply (for example, the exemptions covering criticism and review, quotations and research for a non-commercial purpose); approach rights holders for permission to copy protected articles and consider taking a licence of those articles; review existing licences whose terms may be affected by the change; and potentially redesign affected product ranges. The timetable highlighted above is tight, so businesses will need to move quickly in order to avoid liability for copyright infringement.

Implications for rights holders

Articles for which copyright protection may have expired under the old regime may now benefit from restored protection, so rights holders should now be conducting an internal audit to identify all works likely to benefit from

the restored protection, and ensure records are clear as to the ownership of works and the date of first marketing. This could be a fairly extensive task given artistic works dating from the 1940s and earlier could be eligible for restored protection.

Rights holders are also advised to closely monitor infringements of their protected works and put third parties on notice of their rights in a work.

As ever, the fact that there is no registration regime for copyright in the UK makes it all the more important for rights holders to be proactive in dealing with infringements and putting third parties on notice of their rights in a work.

What is a work of artistic craftsmanship?

For an artistic work to be protected by copyright in the UK, it must fall within section 4 CDPA which protects, amongst others, works of "artistic craftsmanship". In light of the upcoming repeal, and considering there is no statutory definition of a work of artistic craftsmanship, there is likely to be some debate between rights holders and potential infringers over whether allegedly infringing works can be protected by copyright at all as works of "artistic craftsmanship".

There is, unfortunately, little case law on what constitutes a work of artistic craftsmanship. The little case law available does however make clear that the work must combine two elements: (i) artistic quality; and (ii) craftsmanship, although these cases must now be interpreted in light of recent EU harmonisation to certain aspects of copyright law.

Craftsmanship presupposes special training, skill and knowledge for production, whilst artistic quality will be determined in light of evidence which has in the past, and may in the future continue to include: evidence of the intentions of the maker; evidence from members of the public; expert evidence; whether the maker already has works to his/her name which are acknowledged to be artistic; and the level of aesthetic appeal[1]. This artistic element has proved elusive in some of the seminal cases regarding artistic craftsmanship, for example, with respect to Stormtrooper helmets in *Lucasfilm Limited and others v Ainsworth [2008] EWHC 1878 (Ch)*, where the purpose of the helmets were held "not to appeal to the aesthetic at all"[2] and therefore no copyright protection subsisted.

Given the question of what can be considered a work of artistic craftsmanship is not clear cut, those creating new designs are advised to seek protection through registering their designs in the UK or obtaining a Community registered design, which may confer a monopoly right in the design for up to 25 years (subject to renewal every 5 years). Both routes offer a relatively quick and low-cost registration procedure.

If you have any questions about the repeal of section 52 CDPA, or would like any further information about copyright or design protection, please do not hesitate to contact one of your Cooley team members.

Notes

1. See the helpful UKIPO Guidance for individuals, organisations and businesses affected by the repeal
2. Justice Mann at paragraph 134, Lucasfilm Limited and others v Ainsworth [2008] EWHC 1878 (Ch)

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