Enterprise and Regulatory Reform Bill

The Enterprise and Regulatory Reform Act 2013 ("ERRA"), which received Royal Assent recently, will bring in wide ranging reforms designedto "support the UK's enterprise culture and help make it one of the best places to do business". But the changes to copyright lawhave sections of the creative industries, particularly photographers, up in arms.

Extending the period of copyright for industrially exploited designs, the licensing of "orphan" works, the introduction of a system of collective licensing and changes to the collecting society regime, will potentially have a huge impact across the design, retail, photography and music industries.

Equal rights for designers! But bad news for design lovers?

Section 74 of the ERRA repeals section 52 of the Copyright, Designs and Patents Act 1988 ("CDPA") which allows the copying of mass produced artistic works 25 years after the designs were first marketed. This applies where more than 50 articles are made with the copyright owner's consent. Certain articles are currently excluded such as book jackets and sculptures.

This limit to 25 years copyright protection has seen a legitimate thriving market for "authentic replicas" of design classics. Covetable designs such as the Arco lamp and the Eames chair can be found for sale on-line and in numerous stores for a fraction of the price.

Under the reform, this 25-year limitation will disappear, extending to the life of the designer or artist plus 70 years. This gives mass produced designs the same length of protection as literary, dramatic, musical and artistic works.

On the face of it, this is very good news for high end furniture designers who saw section 52 as a prejudice against them. They were not given the same length of protection as other artists and rights holders, simply because their designs were popular and over 50 people wanted to buy them. Designers such as Sir Terence Conran have argued that the reforms will encourage more investment in talent of british design, leading to more manufacturing and jobs for the UK.

But, unsurprisingly, ithasn't been welcomed so warmly by the authentic replica market.. This is surely the kiss of death for outlets that only sell replica furniture and over 6,000 furniture outlets in the UK as well as the stock of many high street retailers are likely to be threatened. Shoppers who have been used to cheap, often good quality designs will now have to stump up for the original or more likely buy mass produced "designs" with minimal artistic value.

The high end designers say this is fair arguing that they too should be rewarded with the same long period of copyright protection for their creative ideas. If anyone can infringe with impunity after only 25 years, where is the motivation to create beautiful designs?

But the consumer may see it as powerful design companies trying to hog the market. As well as pricing them out of the market, or potentially making them liable for copyright infringement for owning replica pieces, making the designs more exclusive may actually backfire as the general public may lose their appetite for impressive design, if all they can afford to buy are cheap and cheerful pieces.

So with the prospect of reduced spend on designs and a threat to retailers, is there in fact another impetus behind the repeal? It is likely that the government have been pushed to action by the 2011 decision of the Court of Justice of the European Union in *Flos v Semeraro* (*Case C-168/09*). Although this decision does not necessarily mean that section 52 should be repealed, it may be that the government is wary of opening itself up to "Francovitch" claims of not acting in accordance with UK law.

Professor Lionel Bentley,Cambridge University thinks that the repeal is ill-conceived and ill-considered. He argues that although the current law is not perfect, it has generally worked in practice and achieves its objective of harmonising protection of design laws. Furthermore, he argues that the wider repercussions have not been considered. Notably those designers using elements of an original design as "inspiration" may currently be protected from infringement proceedings because their design creates a different overall impression. In future copying any original part could result in infringement.

So although the "prejudice" against designers has now been removed, there could be a whole raft of unintended consequences.

Orphan works licensing- the death of copyright as we know it?

The change that has caused most upset is in relation to the new licensing procedure for orphan works, with rights holders, particularly photographers, enraged that they may be "done out" of their rights.

Orphan works are copyright works which have no identifiable owner. Currently, permission needs to be sought from the *owner* of a copyright work before it can be exploited. The fact that the owner can't be identified or located does not provide a legal defence to a claim of copyright infringement.

This presents a legitimate problem for many galleries, libraries and other institutions that have acquired works over time where there is insufficient information to identify the author, the owner of the copyright could not be located or the copyright holder has died and there is no further information about ownership of the rights.

As such there are approximately over 25 million orphan works sitting in archives, film heritage institutions and with public broadcasters in the UK who cannot use the work for fear of an infringement claim. Most of the orphan works are likely to be those with little commercial value, but high academic and cultural significance and where rights holders, if traced, would usually be happy for their works to be reproduced.

The UK government's response is the provision of a new section 116 A of the CDPA ("Power to provide for licensing of orphan works"), stating that "the regulations may provide for the granting of licences to do, or authorise the doing of any act restricted by copyright that would otherwise require the consent of the missing owner." The works will only qualify as orphan works and will only be able to be licensed if the owner of the copyright has not been found after a "diligent search". The licence will have effect as if granted by the missing owner and will only give non-exclusive rights.

Photographers in particular have been particularly upset by the introduction of the licensing scheme. The fear is that the changes won't just affect old works whose owners are dead or forgotten, but the millions of photographs that are uploaded to social media sites. The metadata, which may include information that recognises a person as a copyright holder is often stripped from digital files so that it is not obvious from the photograph who the rights holder is. So commercial organisations will be allowed to make money from our orphan photographs. A "diligent search" for the owner is likely to come up blank and so then the Secretary of State can grant a licence and the owner will not be able to prevent it.

The UK Intellectual Property Office ("IPO") have tried to separate the "myths" from the "facts" about the orphan works scheme.

The IPO clarify that if a work is licensed following a diligent search, there will be a licence fee payable up front for its use. That licence fee will then be held in a pot for the missing person. A government appointed independent authorising body will decide if a diligent search has been carried out to find the rights holder and only then will the work genuinely be considered an orphan and a licence issued.

The key point that the IPO make is that the absence or removal of metadata does not in itself make the work an orphan. The terms of service of Instagram or Facebook imply that the person who uploads a picture to his or her page is the rights holder for the work and that they grant a licence to the site to use it.

The problem appears to be works that are taken without the permission of the rights holder. Undoubtedly there are many many images like this on the internet, which have been taken from their source, used without permission and which have no metadata attached. However, as the IPO says, they are not in fact orphan works andthe new regime will not prevent images from being used in this way.

In fact, the new system gives a user who wants an image that they find online without and identifiable owner , a way of putting some money into a pot to remunerate the copyright holder. If the copyright holder finds out that their image has been used, they can claim some money from that pot. Previously an honest user will simply have looked elsewhere for an image and the dishonest user will have gone ahead and used the image anyway.

The language of "honest" versus "dishonest" is probably not particularly accurate in the internet age. The proliferation of copyright works on the internet and ever more sophisticated and easy to use technology make it very straight forward to copy and use music and photographs on the internet. There is also a general attitude that if something is posted online then it is ok to use it. Taking a picture from a newspaper website and using it to illustrate a post on your blog does not feel to many like they are doing something wrong.

But if you don't want your images to be abused on-line, the easiest way to prevent unauthorised use of work is not to put it online at all. Other options would be to watermark work online to make the ownership clear to anyone attempting to use the work. Stock photography agencies often do this with their work, only providing a full size image without watermark on payment.

But the internet is a hard place to police. Only when we see the detail in the regulations will we be able to judge if this is indeed the "death of copyright". There are concerns about making these changes through regulations rather than through direct legislation. There is arguably not the same level of scrutiny, but the text can still be accepted or rejected by Parliament.

So, good or bad?

There are certainly substantial changes to copyright in the ERRA, but it is likely that they will not be as damaging as some predict. Only when we see the regulations and see how the changes work in practice will we get a true feel for whether the changes are "good" or "bad". The balance between protecting creators and not punishing users is becoming ever more difficult in the internet age, but hopefully the government listens to those that are passionate about their rights and carves out a fair, a workable copyright system.

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