

Legal Update from Flagler Law Group



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Brian Flagler founded Flagler Law Group in the spring of 2006 to serve the legal needs of publishers, designers, producers, and distributors of Christian media. With a combined 20+ years in the industry, we know Christian publishing. We believe that our experience handling matters for a diverse variety of Christian publishers, ministries, and other organizations from the publishing perspective significantly contributes to the value that we offer our clients.

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Copyright Considerations: Photographs of Design Objects and Foreign Law

By Craig Gipson and Brian Flagler

An upcoming change in U.K. copyright law means that publishing a book containing certain images may now require the purchase of a license. The law affects the reproduction, including photographs, of design objects such as architectural structures, furniture, textiles, jewelry, and other similar items entitled to their own copyright protection. In some instances, the copyright of design objects may be resurrected—meaning that images of objects that were the public domain may once again be subject to copyright. At issue are answers to the questions: can a photographer own copyright to the image of an object which itself is entitled to copyright protection? And can the object's copyright owner require a license to publish a photograph of that object?

Copyright in the U.K. Goes Back to the Future

In the U.K., copyright protection of design objects lasts 25 years. Beginning in April and applying retroactively, copyright protection will extend to the life of the authors plus 70 years as it does for other artistic works. This means reproductions of such objects, including in photographs, will now require a license to avoid infringement. Book publishers generally will be affected by the change in law but design and academic publishers may especially feel the impact. Licensing images retroactively can be a daunting task that requires locating and verifying the correct rights owners and negotiating what may be an expensive license.

British design firms lobbied for the change due to concerns about foreign-based companies producing cheaper imitations of British and European-designed items. In the effort to protect those who produce creative works in the design, architecture, fashion, and similar industries, publishers were left in the wake of unintended consequences. *The Digital Reader* reported publisher Thames & Hudson associate director for legal and business affairs Natalie Kontarsky stating: "The government has actually said '[publishers] are collateral damage' in a very sanguine, offhand way. The dark end of the spectrum would be to take books out of circulation and have to pulp. Obviously no one wants to look at that." [1] Publishers distributing books in the U.K. should examine their images to avoid liability for infringement or violating a warranty of non-infringement made to a subsidiary rights partner.

Domestic Issues

What about images of public domain design objects in the U.S.? A federal court ruled that exact photographic reproductions of works in

the public domain are not entitled to copyright protection [2]. The court reasoned that there is no originality in such images that could qualify for copyright protection apart from the public domain work. If this line of reasoning stands, it would mean image companies may charge for access to their libraries of public domain items but would have no copyright infringement claim if their images are later used without authorization; publishers could pay for one-time access, or if a high enough quality version is available elsewhere, avoid paying a fee altogether.

For objects still protected by copyright, another case is not as favorable. The U.S. Postal Service issued a stamp featuring an image of the Korean War Memorial statue draped in snow.[3] The sculptor of the memorial sued the Postal Service for infringement. The Postal Service argued that the photograph of the memorial was entitled to copyright protection apart from the sculpture due to the choice of lighting, weather conditions, and other factors contributing to the stamp's appearance. It presented evidence of the number of different photos taken by its hired photographer and the process of choosing the photo used. The court disagreed, however, and awarded the sculptor damages for use of the image on stamps. The application for publishers: beware of images of other copyright-protected objects and ensure that photographers properly clear all rights in and to their photographs.

Copyright Abroad

The change in U.K. law provides a reminder of the legal traps of publishing abroad. Copyright law and terms may change based on legislation and court decisions. Certain countries (e.g. Greece) have cultural agencies charged with overseeing the use of its country's archaeological and cultural history, including photographs of historic items. Museums, whether government operated or privately owned, almost invariably have their own set of terms regarding photography. Working through these issues before publication should help avoid legal problems, although as this U.K. example illustrates, even then copyright may prove fluid or fickle.

[1] Glyn Moody, *UK citizens may soon need licenses to photograph some stuff they already own*, Arstechnica, Dec. 12, 2015. <http://arstechnica.com/tech-policy/2015/12/you-may-soon-need-a-licence-to-take-photos-of-that-classic-designer-chair-you-bought/>.

[2] *Bridgeman Art Library v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999)

[3] *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010).



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