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Section 52 consultation
Copyright Directorate
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8 December 2015

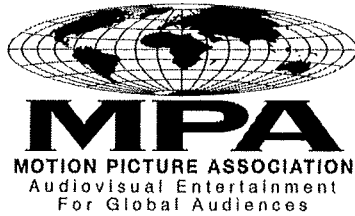
Dear Sir,

**Consultation on transitional arrangements for the repeal of section 52 of the
Copyright, Designs and Patents Act 1988**

We refer to your pending consultation on new transitional provisions for the repeal of section 52 of the Copyright, Designs and Patents Act 1988 and consequential amendments, which follows the Government's decision to consult again on elements of the transitional provisions for repealing section 52 CDPA. Having reviewed the four questions in the new consultation, we consider that the views submitted by the Motion Picture Association on 27 October 2014, and particularly those on pages 3 and 4 of our previous letter, remain relevant in particular to the issues of: transitional period before the repeal of section 52 takes effect; depletion period for existing stock; and compulsory licensing of works where copyright is revived. We therefore respectfully resubmit our October 2014 letter as an attachment to this letter and offer them together as our response to this consultation.

Yours faithfully,

Stan McCoy



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27 October 2014

Dear Sir,

Consultation over transitional provisions for the repeal of Section 52 CDPA 1988

The Motion Picture Association "MPA" welcomes the opportunity to submit these comments on the repeal of Section 52 CDPA. The MPA is the international trade association for the major companies that invest in, produce, distribute and market film and TV content in the UK. These companies include Disney, Sony Pictures, Warner Bros., Viacom, Universal, and Fox.

We are a key part of the UK film industry which was worth £2.9 billion in 2013, the third largest such market in the world, employing more than 66,000 people. Production of inward investment films, much of which was by MPA studios, generated £860 million in the UK in 2013, representing 81 per cent of the total amount spent on feature films last year.

Beyond its direct and indirect contributions to the economy, the film industry plays a key role in exporting British talent and crews worldwide and secures the country's position as a global creative hub. Our members have been established in the UK for many decades, investing consistently in production and distribution.

We welcome the government's intention to complete the repeal of Section 52 of the Copyright Designs and Patents Act 1988. Completing that repeal promptly and with adequate legal certainty is of great importance to our members in relation to the commercialisation of artistic works which were created for use in audiovisual works, such as films, TV and theatrical productions. One of the many ways that audiences in the UK and around the world connect with their favourite films is by buying models or toys

based on artistic film props. A study of UK sales of toys and models in 2009 found that just over a quarter of all sales (£730 million out of a total £2.7 billion) involved products made under license to a marketed entertainment product, such as animated films and children's TV shows.

To the extent that any such items have qualified until now as "works of artistic craftsmanship" but not as "sculptures" and so have been subject to the limiting effects of Section 52, the correction of the law will be welcome, and we applaud the government for moving to complete its repeal.

However, we nonetheless remain concerned about a number of the propositions at the heart of the Consultation. Our concerns do not neatly fit as responses to the individual questions posed so we have prepared this letter.

Works of artistic craftsmanship

As the primary copyright work to which section 52 relates and which will benefit from its repeal is the work of artistic craftsmanship, consideration of the benefits and costs of the repeal must focus on this type of work and the relevant rights owners. If copyright does subsist in an item because it is a work of artistic craftsmanship, it should be recognised that the item is likely to be unique and of high intrinsic value. The relevant rights owners will have invested heavily to create the work, whereas those businesses who simply sell copies of the works will not have invested to the same extent, or in the same way. The level of creativity which goes into creating a work of artistic craftsmanship should therefore be recognised by the Government and given more weight than the input involved in producing copies of those works. Put another way, the benefits of the repeal to rights owners should be given more weight than equivalent costs to unlicensed users. This is all the more so because creators of artistic works to which section 52 applies have been unfairly and unlawfully deprived of the benefits of their creations by section 52.

The Government is right to recognise the lack of clarity surrounding copyright protection for artistic works. Indeed, the majority of the uncertainty about the practical impact of the repeal of section 52 is caused by the uncertainty about what items satisfy the definition of "work of artistic craftsmanship". The world of film props benefits from the interpretation given by Lord Walker in *Lucasfilm v Ainsworth*¹, with which the other members of the Court concurred and which represents the only agreed interpretation of the term "work of artistic craftsmanship" at UK Supreme Court/House of Lords level, following the lack of unanimity of the Court in *Hensher v Restawhile*. Nevertheless the scope of the term remains unclear and the Government should take this opportunity to provide guidance or an improved statutory definition of this type of artistic work. A clearer definition would enable businesses to assess more easily whether the repeal would have any impact on their activities.

That uncertainty has only increased in light of the CJEU's *Infopaq* and subsequent decisions, which have created a harmonised concept of the works which Member States must protect by copyright. To the extent that the current definition of work of artistic craftsmanship (and, by extension, the closed list of copyright works in section 1 of the CDPA) fails to protect works which constitute their author's own intellectual creation, the UK copyright regime is incompatible with EU law. This incompatibility increases the strain on copyright law caused by the unsatisfactory definition of "work of artistic craftsmanship".

¹ "Other artefacts mentioned in the case, such as the Ribchester helmet in the British Museum or a decorated medieval suit of armour, would come more naturally under the head of works of artistic craftsmanship, together with fine furniture, musical instruments, silverware and ceramics." [2011] UKSC 39, at paragraph 39.

The uncertainty for business caused by the repeal (which should have taken place, at the latest, when the Term Directive was implemented into UK law in 1995) would be considerably reduced by an improved statutory definition of this type of artistic work. Businesses have been unfairly (and as a matter of EU law unlawfully) able to reproduce and sell certain works of artistic craftsmanship without infringing copyright for a number of years because of past improper implementation of the Term Directive. We therefore encourage the Government to correct the situation by (a) increasing legislative certainty of the definition, and (b) reducing the transitional period to 6 months.

The transitional period

The incompatibility noted above has created a situation in which the Government must repeal section 52. Rights-owners did not create this situation, and, particularly in light of the economic importance of the issue to the film sector, we respectfully request that the Government do its utmost to ensure that rights-owners incur no further burdens because of it. To delay the repeal until some 6 years after it was first proposed in May 2012 would unnecessarily cause further unfairness to rights-owners, and an undeserved windfall to businesses which have taken advantage of the error in UK law. The most equitable solution, we submit, would be for the repeal to take effect without further delay.

Compulsory licensing

The Consultation suggests that the effect of the repeal of section 52 will be a "revived copyright" and that compulsory licensing would be appropriate in respect of the period of the "revival". We respectfully submit that this is misconceived for several reasons:

1. It is incorrect to describe designs to which section 52 applies as having "fallen out of copyright (and therefore into the public domain)" and being "brought back into copyright protection" (page 20 and elsewhere). This misrepresents the effect of section 52. The section is an exception to copyright infringement. It does not reduce the copyright term. Instead, it deprives copyright owners of the benefit of the usual term for long periods. Copyright works to which section 52 applies are not in the public domain; they are, instead, able to be used by third parties without a licence from the copyright owner.
2. Point 1 has an important consequence for the discussion on page 23 about compulsory licensing of "revived copyright" and the role of the Copyright Tribunal. Repeal of section 52 does not create "revived copyright" within the meaning of the 1995 Regulations. Regulation 17 provides the circumstance in which revived copyright arises: when copyright had expired under the old provisions in the 1988 Act but "revived" because of the term extension. As discussed above, copyright works to which section 52 applies have not expired (assuming their author died less than 70 years ago) and copyright would not subsist as a result of the "new provisions" (i.e. the extension to 70 years). The compulsory licensing in Regulation 24 and the Copyright Tribunal's oversight in Regulation 25 only apply to revived copyright. It is therefore incorrect to discuss compulsory licensing and the Copyright Tribunal in the context of the repeal. Doing so misinforms unlicensed manufacturers and may complicate future business arrangements by causing them to incorrectly expect a compulsory licence with Copyright Tribunal oversight. The Government should clarify and correct the position as a matter of urgency.

3. It is largely irrelevant for the Government to refer to Article 10 of the Term Directive when assessing whether copyright subsists in works to which section 52 applies (page 7). Article 10 considers the position of works whose UK copyright had expired before the implementation of the Term Directive but whose copyright in other EEA states continued to subsist at that time. Those works enjoyed revived copyright in the UK following implementation. That is a very different situation to that which this Consultation is considering, for the reasons discussed above.
4. It is not accurate to say that existing businesses would be allowed to sell existing stock following the change in law (page 14). The Consultation does not mention the potential liability of businesses for the primary act of infringement by issue of copies to the public (section 18 CDPA). Under Section 18 "[t]he issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work." Leaving to one side questions of exhaustion of rights, in the case of existing stock made in the UK, those copies will not have been put on the market in the EEA with the consent of the copyright owner.

The position of 2D works

In our view, the impact of the repeal on the clearance exercises carried out by creators and users of 2D images of artistic works should not be exaggerated. These organisations are likely already to be assessing their works to check for the risk of copyright infringement (e.g. of graphic works and sculptures). The repeal should not significantly add to the clearance work which should already be undertaken.

In summary, we thank the Government for moving forward with the repeal of section 52, and urge that in doing so it take full advantage of the opportunity to increase legal certainty, decrease the transition period to six months, and address the other points noted above.

Yours faithfully,

A handwritten signature in dark ink, appearing to read 'Stan McCoy', with a stylized flourish at the end.

Stan McCoy