

Stop43 is a photographers' rights advocacy group. This is our submission to the extended consultation on the repeal of Section 52 of the CDPA 1988.

Transitional period before the repeal of section 52 takes effect

• What will be the impact of a transitional period of six months, both costs and benefits?

1. Professional image creators and rights owners depending substantially for their livelihood on the licensing of images containing representations of industrially exploited artistic works previously covered by Section 52 will suffer from the value of these works, and commensurate income from them, effectively being reduced to zero unless Property Releases are acquired from all rights holders of all works depicted which might fall under the scope of Section 52. For most typical uses of such images, the cost and disruption incurred by attempting to identify and acquire Property Releases is likely to be uneconomic. Therefore, image collections containing such works will largely be rendered economically valueless.

2. It is likely that for most image uses it will be uneconomic to attempt to acquire Property Releases for future images containing representations of works previously covered by Section 52 or other exceptions. Consider not only images of decorated rooms featured in interiors magazines, but also portraits of people shot in domestic environments. In a typical image of this type there could be tens of objects previously covered under Section 52, other exceptions and case law concerning the Incidental Inclusion of copyright works, or editorial usage. The requirement to clear rights for every object represented in an image will have a severe chilling effect on production in this sector.

3. Your Consultation Document states, in Paragraph 15: *'Once the six month period has elapsed, the repeal will come into effect and businesses and individuals will no longer be able to rely on Section 52. This means that any copies of affected works which fall within the life of the creator or 70 years after their death will need a licence to be imported, manufactured, photographed, advertised or sold.'* Stop43 takes that to mean it will be unlawful to photograph an industrially exploited artistic work without first acquiring permission to do so from its rights owners.

Stop43 notes the widespread use made by the general public of social media; of its use of 'sharing' sites such as Facebook, Pinterest and Flickr; and of the many millions of images made and uploaded daily, a substantial proportion of which contain representations of industrially exploited artistic works previously covered by Section 52. Stop43 wonders whether it is practicable, workable or proportionate to render these images unlawful.

• Should the six months run from the start date of this consultation or from a different date, and if different, why?

Stop43 understands that it is very unusual, although not without precedent, for a transitional period to run from the start rather than the finish of a consultation. The government has had around 15 years from being informed of the need to repeal Section 52 because of its incompatibility with EU law but has sat on its hands. Last summer the transitional period was to have been 5 years. Given the devastating effects of repeal of Section 52 on the value of existing images containing representations of industrially exploited artistic works, its chilling effect on the creation of new images, and the effect on the businesses and livelihoods of image creators, Stop43 considers six months to be an unworkable and disproportionately short time for image creators and rights holders to realign their businesses. This repeal is likely to be the direct cause of bankruptcies and financial hardship.

• Should a longer or shorter transitional period than six months be adopted, and if so, what are the costs and benefits?

A longer period should be adopted to allow businesses to transition from reliance on images containing representations of industrially exploited artistic works. In practical terms, Stop43 cannot imagine that any

period shorter than two years will suffice. Stop43 sympathises with the frustration of rights owners of industrially exploited artistic works given that they have been waiting 15 years for the government to act, but we fail to see why their understandable frustration at government inactivity and vacillation should put us out of business without sufficient time to abandon our economic dependence on our works that contain representations of works previously covered under Section 52. We fail to see why we should become 'collateral damage'.

• Are there any other issues which the guidance should cover which are not listed?

1. The fundamental problem of the definition of an 'industrially exploited artistic work'; and
2. Government inactivity, followed by precipitate haste, whilst abnegating its responsibility to legislate properly.

The Consultation Document says:

'Whether an individual item qualifies for copyright protection is on a case by case basis, and can ultimately be a matter for the courts. Nothing in this consultation should be understood as providing a Government view as to whether any particular artistic work is protected by copyright.'

The Court of Justice of the European Union defines a copyrightable work as 'the author's own intellectual creation reflecting his personality'. Under this properly broad definition, almost any designed and manufactured object must qualify either for design rights protection or copyright protection, because they have all been designed - they are 'the author's own intellectual creation' - to best or most economically solve the design problem or fulfil their intended function. Choosing the most appropriate design is a decision taken by the designer - another designer might come to a different conclusion - and therefore the design 'reflects his personality'.

The world is full of 'designer' goods. A substantial proportion of all photographs incidentally include representations of 'designer' goods. Their rights owners can be expected to assert their status as 'industrially exploited artistic works' because the added value of their 'designer' status separates them from generic or commodity objects and adds Veblen value to them. In referencing EU case law concerning 'designer' furniture the Consultation Document ignores most other categories of 'designer' goods, which of course include 'designer' crockery and ceramics, soft furnishings, clothing, etc. etc.

During the Copyright Consultation leading up to the ERR Act, much was made of the problem of Orphan Works and the need to use the Precautionary Principle in dealing with potential orphans, which resulted in works not being used if their status was in any doubt. The same will apply here: if an object in view of a camera might be an 'industrially exploited artistic work' it will have to be removed from shot to avoid the possibility that its copyright will be infringed, should it qualify. This application of the Precautionary Principle will have a severe chilling effect on photographic production and exploitation.

The Consultation Document goes on to say:

'The practical implication is that many businesses are unsure of what items would be affected by the change in law, and assumptions have been made as to what constitutes an artistic work. Given the lack of clarity, the Government anticipates that the courts may ultimately have to make rulings in this area.'

The change in law will affect those that create and use 2D images of artistic works. As with 3D copies, once the change is implemented there is uncertainty about whether some images of artistic works would be infringing copyright. As with businesses that trade in replicas, many photographers have assumed that many items they include in their photo shoots would be protected by copyright once the change in law took effect.'

Photographers, image agencies and users of 2D images (such as publishers) have said they will need to check every image to ensure that the user or the licensee does not run the risk of copyright infringement, although the Government believes that they would prioritise the images which they actively license, rather than checking the whole archive. Picture agencies report that their collections range in size from 30,000 to over 100 million images. However, it should be noted that users and creators of 2D images of artistic works may be able to benefit from existing copyright laws (i.e. copyright exceptions) that allow the use of a work for the purposes of quotation, criticism and review, or for the incidental inclusion of copyright work in another artistic work, film or broadcast.'

The key words above are 'unsure', 'assumptions', 'lack of clarity', 'uncertainty', 'risk', 'may be able to benefit'. The government intends to delegate the job of introducing surety, definition, clarity, de-risking, and assigning benefit, to the courts. At our expense. **The public is wholeheartedly sick of civil servants abnegating their responsibility to write proportionate and workable legislation, instead writing vague, undefined or impractical rubbish, and then simply saying 'well, sort it out in court, at your expense'.**

Depletion period for existing stock

• Do you agree that the Government is right not to distinguish between two- and three-dimensional copies?

1. There is no such thing as a 2D **copy** of a 3D object. The 2D 'copy' is actually a **distorted or partial representation** of the 3D object. The difference is crucial. The educated and cultured know that the Cubists were primarily concerned with this problem of 2D representation of 3D objects, and that traditional Renaissance perspective renderings (and photographs) present only one of an infinite number of possible 2D representations of a 3D object. Their paintings attempted to overcome this problem by combining multiple 2D partial representations of a 3D object into one image.
2. A 2D representation is not the 3D object itself. René Magritte most succinctly illustrated the difference between 3D objects and 2D representations of them in his 1929 painting *The Treachery of Images*:



M. Magritte said of this painting: "The famous pipe. How people reproached me for it! And yet, could you stuff my pipe? No, it's just a representation, is it not? So if I had written on my picture 'This is a pipe', I'd have been lying!"

https://en.wikipedia.org/wiki/The_Treachery_of_Images

Stop43, being composed of image creators who know our field, wonders whether, if a photographic representation of a Corbusier chair were to be placed on a cold, hard floor, it would be possible to sit on it in the same comfort the chair itself would provide. We think not.

3. Stop43 notes that three recently introduced copyright exceptions, namely the Data Mining exception, the Quotation exception, and the Parody exception, are based on the notion that the exploitation of works under these exceptions does not compete with the normal exploitation of the original work, and therefore complies with the Berne/TRIPS Three-Step Test in that such use is confined to '...special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.'

Stop43 agrees with M. Magritte. A 2D representation of a pipe is not the pipe itself. Whereas a 3D copy of a Corbusier chair is functionally equivalent to, substitutable for, and in the marketplace in competition with the original, a 2D representation of the selfsame chair is not. It is not the chair itself: one cannot sit in it. If one wanted a chair to sit in, one would not buy a photographic representation of it instead. The chair and the photographic representation are different objects, with different copyrights. They are functionally different and put to entirely different uses in the marketplace. Sales of photographs containing representations of Corbusier chairs do not substitute for or compete with sales of the chairs themselves; indeed, they may even lead to more chair sales than would otherwise occur. In this vein, Stop43 clearly remembers, during the recent Copyright Consultation, IPO representatives asserting that parodies can increase sales of the works they are based upon.

4. Given that the practical uses and markets for 3D objects and 2D representations of them are entirely distinct and separate, it is both unrealistic and irrational not to distinguish between 3D copies of objects and 2D representations of them.

5. Stop43 was told in a consultation meeting that the government intends not to distinguish between ‘two- and three-dimensional copies’ because the EU Copyright Directive demanding the repeal of Section 52 doesn’t either, and that it doesn’t want to introduce new legislation which might be found to be incompatible with EU law. Stop43 notes that the Court of Justice of the European Union has on occasion found EU law to be incompatible with EU law. The fact that some EU law appears to be incompatible with common sense and the workings of the real commercial world ought not to impede the UK government from seeking to introduce practical legislation fit for its intended purpose. The simple repeal of Section 52 without consideration of its wider consequences, merely to achieve ‘compatibility’ with EU law, appears to Stop43 to be an abnegation of the government’s duty to introduce practical, workable, proportionate legislation.

6. As it stands, the definition of any individual object as an industrially exploited artistic work protected by copyright is to be left to the courts, case by case. Most creators and rights holders of 2D images are individuals and micro-businesses. Most publishing contracts include clauses requiring the image creator to indemnify the publisher against any and all claims for copyright infringement or plagiarism. Here is an example:

‘You warrant to the Publisher that the said Text is original and in no way whatever a violation or an infringement of any existing copyright or licence, that the manuscript contains nothing libellous, that all statements contained therein purporting to be facts are true and that any formulae and instructions contained therein are not injurious to the user. You will indemnify and keep the Publisher indemnified against all actions, suits, proceedings, claims, demands, damages and costs (including any legal costs or expenses properly incurred and compensation costs and disbursements paid by the Publisher on the advice of their legal advisers to compromise or settle any claim) occasioned to the Publisher in consequence of any breach of this warranty or arising from any claim alleging that the Work constitutes an infringement of copyright or contains libellous or defamatory matter.’

[Do not try to argue that creators can negotiate away such clauses: they are in practice non-negotiable. The publisher who offered this contract stated that the clause was included as a condition of his professional liability insurance and that much higher premiums would be incurred if it were deleted. Stop43 thinks it unlikely that any Impact Assessment has ever considered the influence of the insurance industry on media markets.]

Publishers will incur costs and losses in pulping copies of books and magazines rendered unlawful by the repeal of Section 52, but as a result of clauses such as that quoted above, the legal costs of defining case-by-case what is and is not an industrially exploited artistic work, and which copyright exceptions are applicable to 2D representations under which circumstances, will disproportionately be borne by individuals and micro-businesses: i.e. those least able to afford it.

• Do you agree that applying the depletion period only to those contracts entered into prior to the start time and date of this consultation appropriate, and what are the costs and benefits of this?

Stop43 notes that there is no ‘depletion period’ for a digital image. All existing images of industrially exploited artistic works have been made under Section 52 or other exceptions. As we have said, the practical result of the repeal of Section 52 without consideration of the different usages and markets for 2D

and 3D objects will be deflationary value destruction of existing images and a deflationary chilling effect on the creation of new images, coupled with the everyday photography undertaken by the general public being rendered unlawful.

In light of this, Stop43 regards discussion of when the 'depletion period' should start to be pointless, irrelevant and akin to rearranging the deckchairs on the Titanic.

• Are there any other factors that the Government should consider for the depletion period?

See above.

• Do you agree that the period provided for depletion of stock is proportionate?

No, because six months is insufficient for businesses dependent on the economic value of images containing representations of works previously covered by Section 52 or other exceptions to escape their dependency, and reconfigure. Because of this, Stop43 asserts again that simple repeal will be the direct cause of bankruptcies and financial hardship.

• Should a longer or shorter depletion period than six months be adopted, and if so, what are the costs and benefits?

The depletion period should be a minimum of two years, for the reasons described above.

• Do you agree that no legislative change should be made in respect of items previously purchased under section 52 CDPA? If not, what provision would you make and why?

See above concerning the innate differences between 2D and 3D works, and why provision must be made for 2D representations of 3D objects, bearing in mind their dissimilar functions and markets, and that they do not compete with each other.

Provision of copyright protection for works made before 1 June 1957

• Do you agree that Paragraph 6 of Schedule 1 of the Copyright, Designs and Patents Act 1988 should be amended to exclude items protected by copyright in the EU at 1 July 1995?

Yes.

• If Paragraph 6 of Schedule 1 of the Copyright, Designs and Patents Act 1988 is repealed or amended, are you aware of items where copyright would be conferred which never previously had copyright protection anywhere?

The CJEU defines a copyright work as 'the author's own intellectual creation reflecting his personality'. Under this definition it is inconceivable that copyright would not be conferred on objects which never previously had copyright protection anywhere.

Compulsory licensing of works where copyright is revived

• Do you agree that Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995 should be repealed?

No.

• Would you expect to rely on or be subject to compulsory licensing in the future, and what would you expect the costs or benefits to be?

Yes. It will only be possible to retain the value of existing images containing representations of industrially exploited artistic works, and be viable to make new ones, if these images are covered by a compulsory licence for the same range of uses that images containing representations of other artworks are normally put to.