

Section 52 consultation
Copyright Directorate
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CONSULTATION ON TRANSITIONAL ARRANGEMENTS FOR THE REPEAL OF SECTION 52 OF THE COPYRIGHT, DESIGNS AND PATENTS ACT 1988

Summary

The repeal of section 52 of the Copyright, Designs and Patents Act 1988 (CDPA), as part of the Enterprise and Regulatory Reform Act 2013 (ERRA) sets up a burdensome and destructive area of uncertainty and risk for publishers, given that it entails a new requirement to licence the use of images of works of artistic craftsmanship and potentially renders infringing, works already published which contain such images. The damage to manufacturers caused by the sale of 3D copies of their products is evident but these same manufacturers suffer no financial damage from publication of 2D representations of those products, and potentially stand to gain from publicity. The benefit to manufacturers in the monetary value in copyright in such photos would be more than outweighed by the loss of publicity and critical acclaim.

Publishers were opposed to the inclusion of 2D images in the repeal, and despite the fact that there was no consultation at all at that stage, Laurence King wrote to the House of Lords at the time of the second reading. In an email from Lord Clement-Jones of 3 January 2013 we were told "You are entirely right to be concerned about the question of 2 dimensional copying under this clause. Lords Stevenson (Labour front bench) and I have agreed on an amendment to be put down at Committee Stage which would protect publishers such as yourself and we will be pressing the Government hard to accept it or otherwise to make it absolutely clear that this is excluded from the ambit of the clause".

As it became apparent that no such amendment would be made, we were reassured that at least the repeal would not take effect until further consultation had been undertaken regarding the transition arrangements. It was a great shock therefore to

discover in October this year that the Government had changed its position so drastically, especially as publishers had already highlighted the immense difficulties they would encounter should a 6-month transition period be implemented resulting in the proposal for a 5-year transition period in February 2015, and in fact in the Call for Evidence of 16 October 2013, the Government stated "The UK Government wishes to make it clear that section 74 of the ERR Act has not yet come into force.... until the repeal comes into force, it is lawful to make, import, sell and buy copies of artistic works that are older than 25 years and have been made through an industrial process".

The withdrawal of that Commencement Order following an application for Judicial Review and the Government's decision to re-consult on the length of the transition period is in itself a matter for concern but this has been heightened by the rushed manner in which the Consultation is being run, the fact that the Consultation is being run concurrently with the proposed transition period, and the fact that it appears only one Option is being considered in the Consultation. In addition the scope of the new proposals has been changed such as to affect titles on our backlist (148 out of 525 books) which were previously not included.

There appears to be a complete lack of balance or proportionality in the new proposals. We understand that the arrangements made on 9 February 2015 were challenged as being incompatible with EU law and the *Flos* judgment (CJEU case C-168/09 *Flos SPA v Semeraro Casa e Famiglia SPA*). However that judgment does permit for transitional arrangements so long as they are proportional. We believe that it would also not be incompatible to have two parallel arrangements for different types of users. The initial proposals met with the requirement for balance and proportionality in that they provided sufficient time for publishers to run down existing stock and revise new commissions, whilst not adversely affecting the interests of the rights-holders of any works of artistic craftsmanship depicted in those books. If these arrangements were consistent with the vies expressed in the judgment of the European Court of Justice to reconcile competing interests in February 2015, some explanation for why they are no longer consistent less than 8 months later should surely be presented? The opaque reference to a JR with no further information available from the Courts or the IPO makes it almost impossible for publishers to address the points put forward by the IPO to justify the volte-face. The commercial expectations of the publishing sector have been completely disregarded in a very unfair manner, even though the *Flos* judgement recognised "the principle that acquired rights must be respected".

As the consultation and transition periods are concurrent, publishers are now being asked to act not on legislation, but upon a consultation document. It is entirely probable that some publishers and other users of 2-dimensional images are not even aware of the consultation and will suddenly find themselves in breach of the new rules when they are enacted. Effectively the new proposals give less than 4 months for transition (and 10 months for depletion) for part of which users will not even know the results of the Consultation, which is completely disproportionate. This haste is compounded by the Government's complete lack of guidance or even explanation of the terms used in the Consultation document, which is explored further below.

We are extremely concerned that the conduct of this Consultation has been both hasty and so much at odds with the Government's own guidelines for the process.

TRANSITIONAL PERIOD

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

Effect on backlist titles

Although six months is better than no transitional period, it allows very little time for assessing our entire backlist of books currently in print or about to go into reprint or a new edition. It does not give sufficient time for alterations to books already sent to the printers for publication in spring 2016. A typical schedule for a book to be published on 1 April 2016 would be:

Book Commissioned	early 2014 (latest date - this might be as early as 2012) and work would have begun months or even years earlier than the contract	1st contract (to author)
Manuscript delivered	January 2015	
Copy editing	February-April 2015	2nd contract (to copy editor)
picture research	February-August 2015	3rd contract (to picture researcher) plus a contract for each picture or group of pictures from each supplier (anything from 20 up to 1000 different contracts, ranging across this entire date period)
Design	May-August 2015	4th contract (to designer)
Final designs and hi res pictures	early August 2015	
Production Dept buy paper and prepare files for repro	August 2015	5th contract (paper purchase) and 6th (repro house)
Translation(s) commence	late August 2015	7th and subsequent contracts (1 with each foreign language publisher i.e. co-edition) up to 10 contracts. Some will be sold at this stage and others after printed book is available to review
Files to repro house	late August 2015	
Files to the printer	November 2015	8th contract (to printer)
Plotters passed for press	mid December 2015	

Hand-bound approved	end January 2016	
Shipped	February 2016	
Arrive in warehouse for distribution	mid March 2016	
Further co-editions sold	April 2016 - mid 2018	1 contract per co-edition plus paper & printer contracts for each print run

There may have been a considerable period of work before commissioning to shape the book and agree its scope and general thesis.

To suddenly find, *after* the files have been sent to the printer, that a book we've worked on for 2 or 3 years may be in breach of copyright puts us in an impossible situation. Until the new Consultation Paper was published in October 2015 we had understood that the changes would only affect future titles. To retrospectively clear all the copyrights will impose costs in time and licence fees, and the book may never make enough profit to cover these additional expenses. In addition it may not be possible to clear copyright in some items due to lack of response from the manufacturer, or a refusal. It may be hard to ascertain whether, for example a chair is an original Eames, one made under licence by Vitra, or a knock-off copy made by an unlicensed manufacturer. The publisher would then have to decide whether to risk infringement by releasing the stock of books already in the warehouse.

We have looked at the cost of retrospectively clearing 3 titles currently in print, based on current DACS prices plus £20 per image for someone to do the work of securing the licences. The complete lack of guidance as to what does constitute a work of artistic craftsmanship makes this procedure very tentative and the costings below are worst-case scenarios but this is what we would have to make decisions on:

████████████████████ (2nd edition) 2010

A 74% increase on total costs of production

577 pictures of which 273 affected, some requiring multiple clearances

£281 per image = £213 for World All Language rights in print 25,000 plus £48 up to 3,000 ebooks plus £20 per picture for research]

In order to ascertain who will charge a licence fee there would be a minimum of 276 hours work just contacting each designer, assuming that they are all easily identifiable, and all respond within a couple of emails.

On the same premise we have calculated the impact on to further backlist titles:

████████████████████ (4th edition) 2013

A 60% increase on total costs of production

700 pictures of which 141 affected but with multiple clearances per picture because many show views of rooms with different items which might be construed as works of artistic craftsmanship

2015

A 60% increase on total costs of production

600 pictures of which 243 affected, some with multiple clearances required

We currently we have 525 titles in the catalogue of which we estimate 148 will be affected to a greater or lesser extent and will have to be assessed for rights clearances and decisions taken as to whether to pulp them or seek the extra licences. Under the previous transitional arrangements back-catalogue books already published were not considered infringing so this is an extraordinary amount of extra work to undertake in just a few months.

Effect on list of titles for future publication

It takes several years for an author to write an academic book such as the 600 page A [REDACTED] cited below. [REDACTED] has been writing since 2014. Books like this, which would have been just commercially viable, with several years in which to sell them, will now become un-commercial. Authors who have done years of work will now only receive compensation rather than their full fee plus royalties if books have to be cancelled.

They may have incurred additional expenses such as purchasing items for photography, which will now have to be changed in order to make the book financially viable for us to produce. As this work would be over and above the original contract, authors might demand extra payments. With the previous transitional arrangements there would have been 5 years in which to sell at least an initial print run and thus recoup costs and have sales figures by which to judge whether it was worth the extra clearances being undertaken to keep the books in print.

6 months is completely insufficient time in which to obtain so many extra picture licences. On top of the 148 titles on the back list, we would need to assess another 51 titles of our future list of 232 books and obtain the extra licences required for works in books either just sent to print or currently in progress, all of which has to be done at the same time. This is a huge volume of extra work that was not budgeted for when the books were undertaken.

It is our submission that the companies and designers concerned will not have staff in place to execute these licences, exacerbating delays, which will most likely lead to unintentional infringements. In some cases it may take weeks or even months to research who a particular item should be cleared with (potentially a manufacturer and several different designers who may have conflicting views about licensing the work), especially if the designer was not noted when the original photograph was made. This exercise has to be repeated for hundreds of items per book for a combined total of 199 books on our current lists.

We have made the following assessments, again based on DACS tariff list, for 3 of the 51 titles in the list of books scheduled to be published in the next few seasons:

[REDACTED] - August 2016 - ie complete and passed for press

A 47% increase on total costs of production and takes the book into a 31% loss if everyone charges a DACS level fee

300 pictures of which 150 affected, some with multiple clearances required

[REDACTED] - March 2017 - book is about half completed

A 59% increase on total costs of production

600 pictures of which 300 affected, some with multiple clearances required

[REDACTED] - August 2017 - books is about 30% complete at the moment

An 80.8% increase on total costs of production and takes the book into a 12.8% loss if everyone charges a DACS level fee

300 pictures of which approximately 220 affected. Items have been bought for photography so if licences are refused alternative items may have to be bought adding to overall costs.

Impact on authors

Authors who expected to receive royalties for the next 7 to 10 years would suffer a dramatic loss of income where books are either cancelled or pulped. Authors expecting to rely on their annual royalties as part of their income or a pension will lose the rewards for their previous labour at a stroke.

Impact on design education

Another unintended consequence of the 6-month transition period is that teachers and professors who have designed courses at schools and colleges around using particular textbook(s) will suddenly no longer have access to that /those books within the EU. Books that are published will become a lot more expensive making it difficult for students to purchase or have access to a variety of titles. Laurence King Publishing is not in a position to make a cost assessment of this impact.

Design education and the publishing industry

In the long term, as books become either a lot more expensive or only available from US, Australian or Asian bookstores, it is almost inevitable that students will not be able to afford to buy such books. The most likely short-term outcome will be that pirated scans of books will be used and an existing black market in this kind of title will be fed with hundreds of purchasers who have pretty much no other option. As students get used to this illegal way of purchasing books they are likely to follow suit in other areas of study thus damaging textbook publishing across the country. LKP is not in a position to make a cost assessment of the impact of this on the company or more widely to students and educational establishments. Nor can we assess the impact on the design industry as students opt to study abroad and potentially end up working outside Britain.

Contrary to the assertion in the Consultation Paper on page 11, that this is simply putting all such works on an equal footing and should remove any copyright-driven distortions in decisions on whether to write on topic A or topic B, the most perfunctory

study of design and art publishing would have revealed that the one area that is consistently under-represented in publishing programmes is modern and contemporary art. The minimal (and diminishing) gains to be found by including 2D representations in this legislation will be vastly outweighed by the loss to the design industry, both in terms of immediate publicity, and in long-term reputational damage and the loss of the design industry in this country.

Benefits

There are no foreseeable benefits to authors, publishers or within education.

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

It seems to us highly unusual that the six months should run from the start date of the consultation rather than when the ERRA is enacted. In particular, as vital questions which would enable us to assess which books are affected have not been answered in a timely manner, we will be forced to make decisions about whether to deplete stock before knowing what the law will in fact require. When pressed, the IPO were only able to mention one case when the start date of a transition period coincided with the start date of the consultation period and despite the information being requested, have not even provided details of that one case.

Starting the two periods concurrently means that effectively there is no transition period, because by the time the results of the consultation are known the 6 months will be almost over, thus we only have the extra 6 months depletion period in which to act on hundreds of titles, each of which will require vast expense and hundreds of hours of extra work.

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

A minimum period of 5 years would be a more viable option to give sufficient time for books currently in production to be adapted as described above with the example schedule. Publishers usually plan for a 7 to 10 year shelf life for a major book or edition of a text book.

Books currently in production

These will require large amounts of extra work to assess whether images selected include any products that infringe copyright, with no guidance as to what does or does not count as "artistic craftsmanship". There would be further costs in time for a researcher to clear the copyright in all the potentially infringing images, some of which (e.g. shots of interior design) may contain many more than one copyrighted item, and then yet further costs for licensing those products. It would be almost impossible to replace these images with other suitable ones that did not also include copyrightable products, as a book on interior design has, by its nature to include top-end products that have been produced within the last century. However, if a publisher suddenly has

to pay for research time at an average of £20 per hour and one hour per item as well as licensing fees the book may be financially unviable and have to be cancelled. As noted above, a book on architecture is particularly likely to have multiple products in one photo so there could be a need to obtain 3 or 4 licences for many images.

Backlist stock and reprints

The initial print run may only cover the costs of production and it is only through reprints that these books would generate a profit. Published books such as [REDACTED] which include images that will now infringe copyright, may have to be withdrawn or significantly altered if the appropriate licences are too expensive to obtain. Costs incurred in changing text and images, proofing new images and generating new repro files will be significant and may not be worthwhile. The only alternative will be to delete these titles and pulp existing stocks.

Co-editions

We are legally obliged to provide reprints of co-editions of books which will become illegal as a result of the ERRa. We would have to pay compensation to these co-edition publishers and others with whom we have licensing arrangements.

Faulty costs in impact Assessment

The Consultation Paper suggests a rate of £72 per licence based on 2014 DACS rates though where this figure appears on the price list is not mentioned: the closest we can find is £75 for a print run up to 1,500 (print only) in the one language. For an illustrated book to make a profit, a minimum initial print run of 10,000 is needed, with multi-language rights, and to reduce costs (administration and licence fees) later down the line, publishers would normally clear for sufficient quantities to allow for future print runs: typically 25,000 including e-books. Going by current DACS tariffs the costs would therefore be £213 for print plus and additional £59 for a proportion of the print run to be released as e-books, adding up to £272 per licence. So using the example in the illustration given on page 11 of the Consultation Paper, this would cost an additional £54,400, assuming only 1 licence per photo (unlikely for a book on interior design or fashion), plus a minimum of £4,000 for researcher time to obtain the licences. The Government's assessment on page 2 of the *Regulatory Policy Committee Opinion*, that the cost of licensing 2D images in books would be £4,500 to £6,000 is clearly a gross underestimate, as shown by our analysis, and shows a total lack of understanding of publishing and an unwillingness to discover the real costs if not a deliberate attempt to underestimate them.

If £58,400 (ie £54,400 for licences plus £4,000 for research) are suddenly added to the costs for producing a book it would almost certainly not produce sufficient revenue to cover its costs. This would have a further impact, if a number of titles have to be cancelled, as there would be a drop in need for staff, resulting in potential redundancies, which would add to the financial stress. In addition authors would still have to be paid their advances for commissioned titles and they in turn will suffer from lack of royalty payments.

This scenario, repeated over Laurence King Publishing's entire list could result in up to 199 (26%) books out of 767 titles having to be withdrawn, some before they have even been published, despite all the costs of production having been incurred. For those we

decide to keep in print, burdensome extra costs will have to be born and many new books may have to be cancelled and existing ones pulped.

With a period of 5 years it would be possible to start commissioning books in other areas, though of course an entire area of publishing would be stifled and this would lead to significant job losses across the sector.

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

There are a number of questions on which clear guidance is required:

1. There is no framework for assessing whether an item is one of "artistic craftsmanship". This is crucial, as most publishers will not want to take the matter to court with all the costs and reputational damage associated. Leaving the matter open to individual interpretation will make selling co-editions around the world a risky business for the original publishers and will likely damage sales and thus reduce the number of books published. If this law is to be tested in a court of law, a judge will need a guide as to what would or would not qualify. It is possible that courts would also become cluttered with some test cases going to appeal at higher and higher levels up to the EU due to the lack of a test, which excludes any questions of taste, subjective quality and personal opinion. Based on previous cases (*George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* 1976 and *Interlego AG v Tyco Industries Inc.* 1988), a court making a decision on artistic craftsmanship must look at the question of what is or is not *artistic*, and yet this is something it is expressly forbidden to do in relation to graphic works, photographs and sculpture. Parliament, by stipulating the works of artistic craftsmanship are to be protected, must be taken to have had in mind a test capable of being adjudicated upon in a court of law.
2. In the case of manufactured goods there is often no named designer. How should a user of a 2D copy determine when a product is, or is not in copyright if there is no "life" period to which to add the 70 year term? If there is a named designer but the work was undertaken on a work-for-hire contract, which is the normal course of events in industry, again, whose life will the copyright period be based on bearing in mind that the rights would belong to the manufacturer not the designer? See Copyright, Designs and Patents Act 1988, Section 215. This has been raised with the IPO but no response has been received.
3. Further guidance on what could or could not be considered 'fair use' under Section 30 is needed. The Consultation Paper glibly suggests that if the matter went to court, it might well be decided that no licence was necessary, but the risk is for the publisher to incur huge legal bills, even if only small damages were awarded, and reputational damage would have further impact on the publisher's profits. It should also be noted that unhelpful precedents have been set in the past when judges have, through no fault of their own, not been well-informed about copyright, photography, publishing etc. Examples should be provided.

4. Would the onus be on the publisher to distinguish between photographs of unlicensed copies of manufactured goods and licensed copies? It is frequently the case that a photograph is taken to show for example a room designed by a particular architect and no note was made of who designed the furniture in that room. Extensive research would be required to find out whose design it was, let alone whether it was genuine, a licensed copy or a fake. Likewise a photograph that was taken to show a compilation by a particular interior designer is unlikely to have notes attached as to who designed individual items of furniture, textiles and so on.
5. How many times would a publisher need to contact the manufacturer to count as having made sufficient effort to licence the content of a photo? In our experience, most companies do not have a department or any staff in place to undertake this task so it is difficult to find anyone who will take responsibility. In our experience, it takes on average 10 calls and emails to get any sort of response, obviously in some cases fewer, but in many far more. Some companies (e.g. Apple Computers) give a blanket response that you can only use products in their current lines, even though you have written specifically to request permission to include an older product in a book with historical scope. Another common response is a licence designed for a 3D copy and then lengthy negotiations ensue to change clauses to make them suitable for book publication.
6. At the meeting on 23rd November at the IPO offices, mention was made by IPO staff that fashion would not be included in the changes to the law, however it was not clear whether this referred only to couture or whether ready-to-wear collections which are of course industrially produced, would in fact be included in the changed copyright terms? This has been raised with the IPO but no response has been received.
7. When does the depletion period end for books containing images which previously had the benefit of the S52 exclusion? As outlined in Jackie Wilson (from Quarto)'s email of 25th November to which no satisfactory answer has been received, there are a number of different contracts with different dates which could be used in assessing this.
8. There is no mention within the consultation document regarding the use of design imagery on websites. Does this mean that material that would be subject to the legislation if in printed form, might not be subject to the same legislation if provided digitally online. If this was the case, then it seems grossly unfair on traditional print publishers. Every design-led website or blog would also be potentially affected, yet it would appear the stakeholders of such enterprises (many of which are commercially based and rely heavily on advertising revenues) have not been consulted during the drafting of the amendment. If they had been, then surely their concerns would have been addressed in the section pertaining to "Costs to creators and users of 2D images of artistic works" found in the consultation document on p.11.

9. The Consultation Paper refers to the Le Corbusier Foundation suing Getty for copyright in photographs of buildings designed by Le Corbusier. Following on from the recent vote that the UK does not need legislation to cover Freedom of Panorama as it effectively exists in Section 62, are works of architecture in fact going to be included as manufactured works of artistic craftsmanship or only if more than 50 identical buildings are erected? Specific guidance is required.
10. The Consultation Paper seems to conflate two categories of works: those which have until now been in the public domain and will now acquire copyright protection for the first time and those in which copyright has lapsed and would now be revived. As Professors Bently and Dinwoodie have asserted (para 9.6 of their response), it is possible that as no copyright in pre-1957 designs existed, copyright is not in fact created by repealing paragraph 6 of Schedule 1 of the CDPA.

DEPLETION PERIOD FOR EXISTING STOCK

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

The difference between a copy of a single work of art and a copy of a manufactured, mass-produced creation

This is the fundamental issue that should be addressed. Design works, which are meant for multiple replication, are different to art works, which are generally intended to be unique artefacts, and so should not necessarily have the same copyright regime. An image of a design is very different in nature from an image of a painting or sculpture, because it is of something that was always intended to be widely publicised as a consequence of its industrial mass-producibility.

A work of art whether 2 dimensional or 3 dimensional is created by a known artist or group of artists who retain all the rights in both their work and images of it. A designer, working on a work-for-hire or employee contract does not create a prototype for a mass-produced article on the same understanding, and usually does not retain any rights in their work.

The Government's assertion that the legislation would be putting "all such works on an equal footing" with "other works of art" with regards to publications (page 11 of Consultation document), disregards the fact that very few art monographs and general modern/contemporary art surveys are now published because of the additional costs associated with DACS and other copyright clearances. A similar situation would undoubtedly ensue with regard to design books, as, like art monographs and general contemporary art surveys, they would be rendered uneconomic to produce.

The difference between a 2D representation and a 3D copy

It is also questionable whether a photograph is a "copy" per se of the design rather than a representation of it. If a pattern from for example a wallpaper design was used on a fabric or printed onto a handbag that would be a copy, but is a representation of the physical original actually being copied or only represented in a photograph? We agree with Professors Bently and Dinwoodie that the Government may want to consider the distinction between copies and original derivative works (para 5.15), and that the Government could introduce a limitation in relation to any two dimensional graphic reproductions of a three dimensional object that had been mass produced, in the form of a specific definition of "reproduction" in section 17, a defence in Chapter III of the CDPA, or even a statutory/compulsory licence (Bently and Dinwoodie response para 5.23)

The value in a photograph of a work does not diminish the profits of the company making that product and in many cases will in fact enhance its profitability by publicising the product. In fact, design is very much image-led. The stars are the ones that have played with the media and promoted their creations through product placement in films or association with the rich and famous. For example the fashion industry found that the designers who restricted access to photography, or restricted its use in the press and online also restricted their sales and designers now court the press spending their money on Supermodels rather than advertising.

There will be no benefits to design publishers in the repeal of section 52, but a great deal of cost both monetarily and in terms of their publishing programmes. The only way to mitigate this would be to carve out design copyright protection on all 2-D images of mass-produced designed objects for use in publications, such as magazines, exhibition catalogues and books. Re. page 12 of the Consultation document: "The Government's view is that there should be no distinction between a 3D or 2D copy" seems to disregard the fact that a photograph of an object used in a publication is not "copying" an object per se but rather representing it within a given media/scholarly context. Why the Government cites exemption or a longer transitional period relating to 2D imagery for publication as being within "Options not considered" seems to make a mockery of the consultation process.

Feasibility of collecting licence fees

It is possible that a collecting society, similar to DACS, could come into being creating a small handful of jobs, which is the only benefit we can perceive.

As described above, it may not always be possible to tell from a photograph whether an item is an original, a replica, a licenced copy or a fake.

By specifically including 2D copies in the bill, the implication is that a licence should be sought for every use rather than that fair use Section 30 would prevail.

The Design and Artists Copyright Society (DACS) have in the past frequently tried or in fact charged fees for use of manufactured works designed by their members, for example armchairs designed by Marcel Breuer or Gerit Reitveld, despite the fact that

they are not covered by copyright. Their monopolistic position makes them hard to challenge and the inclusion of 2D copies with 3D copies in the new Act will only serve to reinforce their position of strength and inability to operate impartially. They also do not accept the concept of incidental inclusion, for example they demand a full fee for a side-on view of a painting or a small section of a work behind a portrait.

By creating a monopoly (a collecting society, whether DACS or any other body) that is both judge and jury in deciding when "fair use" does or does not occur, freedom of the press is seriously compromised, because when asked, the copyright owner or collecting society will always decide that a fee is payable. For the press there would be insufficient profit margin to cover the licensing fee and therefore the article or book would most likely never reach publication.

Effect of Censorship by withholding licence permission

This is likely to lead to a secondary unintended effect of the repeal, censorship, which should also be taken into account. If publishers have to seek permission from manufacturers to reproduce any photograph which contains items they have produced, they are likely to require sight of copy and layouts, and can refuse permission if a negative comment is made or they are not given sufficient prominence. Fair comment and critical assessment of design would thus be stifled. Currently a disproportionately small sector of fine art and design publishing includes any copyrighted works of art because the costs involved make the investment in producing such a book hard to recoup.

Weakening effect on the design industry and design publishing in the UK

Including 2D copies in the repeal will have the unintended effect of weakening UK design publishing - a renowned export industry - and ceding a market advantage to the competitors of the UK design publishing industry in the USA and Asia. It would essentially make the global publishing field unevenly weighted towards non-European publishers, who would not be subject to the legislation and its associated costs.

Design education in Britain will be seriously affected if design-publishing is curtailed thanks to the new legislation, as design books are used as essential teaching tools in many institutions across the country, from primary schools to universities. As Farrer & Co note in their Design Updates (attached) which can be found at

<http://www.farrer.co.uk/Global/Documents/Design%20Updates.pdf>:

"As a final thought, it is worth noting that before ERRA was passed, a number of national museums and academics had raised concerns about the repeal. In particular, there was a concern that the change would damage the fragile art- publishing world, as well as the work of teachers, photographers, and film-makers, all of whom have traditionally relied on section 52 as a means of replicating mass-produced designs in their 2D works. There was a suggestion (publically supported by members of the Cambridge University Law Faculty) that there should be an exemption for these kinds of 2D uses (making, distributing or communicating) of copyright-protected designs in the CDPA, so as to avoid indirectly damaging the use of design in education. However the amendment, which was discussed in the House of Lords in mid-March 2013, has not found its way into the final version of ERRA, which will no doubt be a cause for concern for some".

The letter cited above was signed by ten professors at the Faculty of Law at Cambridge University and can be viewed at this link (and is also attached):

http://www.create.ac.uk/wp-content/uploads/2013/03/IP_Profs_to_Stevenson_and_Clement_Jones.pdf

- **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?**

This will depend on which contract is referred to. We await the government's response via the IPO to a question raised on this issue. As we have no information and this guidance may not be forthcoming until the outcome of this consultation, it seems that publishers will have to decide whether to deplete stock before even knowing which titles this clause refers to, and may find that they have pulped books which had a further 6 months selling time. This is a highly inequitable situation.

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

As described above a publisher would expect to derive revenue from a book over a period of up to 10 years. There may be warehouse stocks of books which cannot be sold fast enough to be used up within the depletion period and these cannot be sold to remainder merchants as they would still contain infringing images. They would therefore have to be pulped at a cost to the publisher. In addition, as noted above, we would have to pay compensation to co-edition publishers and licenced partners.

In both 1988 and 1996 works when copyright was extended by new Acts, the effect was not retrospective - only forthcoming books were affected by the changed length and scope of copyright. Precedent is therefore in favour of the depletion period only having effect upon new books:

See The Copyright and Related Rights Regulations 1996, PART II AMENDMENTS OF THE COPYRIGHT, DESIGNS AND PATENTS ACT 1988, Section 9.1 -3

Issue of copies of work to the public: extension of right

9.—(1) Section 18 (infringement of copyright by issue of copies of work to public) is amended as follows.

(2) For subsections (2) and (3) (meaning of issue of copies to the public) substitute—

“(2) References in this Part to the issue to the public of copies of a work are to—

(a) the act of putting into circulation in the EEA copies not previously put into circulation in the EEA by or with the consent of the copyright owner, or

(b) the act of putting into circulation outside the EEA copies not previously put into circulation in the EEA or elsewhere.

(3) References in this Part to the issue to the public of copies of a work do not include—

(a) any subsequent distribution, sale, hiring or loan of copies previously put into circulation (but see section 18A: infringement by rental or lending), or

(b) any subsequent importation of such copies into the United Kingdom or another EEA state,

except so far as paragraph (a) of subsection (2) applies to putting into circulation in the EEA copies previously put into circulation outside the EEA.”.
(emphasis added)

See also PART III - TRANSITIONAL PROVISIONS AND SAVINGS

General rules

26.—(1) Subject to anything in regulations 28 to 36 (special transitional provisions and savings), these regulations apply to copyright works made, and to performances given, before or after commencement.

(2) No act done before commencement shall be regarded as an infringement of any new right, or as giving rise to any right to remuneration arising by virtue of these Regulations.

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

No, for reasons described above. It is also neither balanced nor proportional that as of October 2015 the effect is also to be retrospective in that the works represented in 2D form were never copyrighted and therefore the manufacturers and designers did not have any expectation of revenue from such representations. This provision was absent from the original consultation and poses disproportionate harm to publishers and users of design books. We have made decisions to reprint titles and even print new books in good faith, based on a five-year transitional period.

EU law requires that the transition period be limited to what is necessary to phase out the part of the business that utilises the relevant designs, or to clear stock. As evidenced above, this is completely impossible in a 6 to 12 month period, particularly when the 6 week consultation period is coterminous and guidance requested has not been promptly provided.

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

As noted on page 11 of the Consultation Paper, a book takes 2-3 years to produce and this is a conservative estimate. Sufficient revenue to cover this investment period cannot be generated in 6 months, especially when forecasts were based on 7-10 years of sales. For the reasons stated above, a minimum transition period of 5 years, as proposed in February 2015, would be proportional for users of 2D representations.

6 months allows absolutely no time to change our publishing programme or schedule so books will either have to be withdrawn, potentially resulting in redundancies for staff working on those lists, or the sudden and unexpected extra expense of extra licences will have to be born resulting in us publishing books that will make a loss.

- **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?**

Photos previously purchased should be exempted from the transition and depletion period as happened when the copyright period was extended in 1996. See our note above with quotation from the 1996 Act.

In the original Regulations, regulation 3 offered a broad saving in relation to all copies lawfully made before the repeal of section 52 was to come into effect. It therefore sought to secure the safe circulation of goods already on the market. According to its own publication in February this year, "The Government has consistently expressed the view that any copies made, imported or sold under section 52 of the CDPA before it is repealed will be unaffected by the change in the law." No explanation is offered as to why this position has changed.

PROVISION OF COPYRIGHT PROTECTION FOR WORKS MADE BEFORE 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?**

As noted above, guidance is needed as to who will own copyright in designs created under employment or work for hire arrangements and when no named designer(s) are known on whose life the extended copyright period will be based.

- **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?**

Currently exteriors of structures and buildings in public places are considered to be in the public domain, according to Section 62 of the CDPA, although, despite the recent parliamentary vote that no further legislation was required to confirm the concept of Freedom of Panorama in this country, it should be noted that DACS still attempts to charge a fee for exteriors of buildings designed by their members. Would Freedom of Panorama now be lost by this repeal as the created buildings could be judged to be realisations of the drawings and designs of the architect and therefore copyrightable in

spite of the law relating to Freedom of Panorama and the fact that they are not usually made in runs of 50 or more copies?

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?**
- **Have you relied on or been subject to compulsory licensing in the past under Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995, and what were the costs or benefits?**
- **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?**

We do not believe that this is relevant as copyright is not being revived. As Professors Bently and Dinwoodie explain in their submission, an existing defence is being removed.

We would like to request clarification, in relation to the Duration of Copyright and Rights in Performances Regulations, Regulation 23, as to why the position is different now than it was in 1995 when books such as [REDACTED] or [REDACTED] would have been permitted with no cut-off date for sales of copies as long as the book was created before the new law was enacted, and in fact a book already in production such as our [REDACTED] or [REDACTED] would also have been permitted? Has Regulation 23 been challenged? It is not consistent with Government principles that holders of lawfully produced stocks should have to sell them off at below market rates as outlined on page 15 of the Impact Assessment. The established principle in previous cases of extending and reviving copyrights is that they are subject to mandatory licensing, otherwise the absence of the permission of one right holder (when it may be impossible to determine who that is, as described above) out of potentially hundreds may render an entire book potentially infringing, meaning that the publishers has to pulp the books.

Conclusion

Like the Publishers Association, and other illustrated book publishers, Laurence King Publishing urge the IPO to reconsider the direction and pace of travel it is taking with this consultation. We believe that there is a profound lack of understanding of the impact of the proposals, a total lack of proportionality in the effect on publishers compared with other rightsholders, and a failure to comply with the Government's own consultation principles.

The Government should:

1. Immediately stop the clock ticking on the length of the transition period for 2D images of 3D works. The start of the transitional period must be linked to a piece of legislation which all users would legitimately be expected to know about.
2. Re-introduce the previously accepted longer 5-year transitional period for the use of 2D images of 3D works in published materials. We believe that it would not be inappropriate for transitional rules to be nuanced for different categories of users of the designs (see Professors Bently and Dinwoodie paras 5.9-5.10 and 5.13-5.14). Publishers are entitled to protection of their acquired rights and legitimate expectations in fair balance with those of the manufacturers of works of artistic craftsmanship, and a 5-year transition period is the minimum we could find acceptable, particularly as the same manufacturers would suffer no material loss from the publication of images of their products.
3. Exclude existing published books from any depletion period.
4. Consider the option to introduce a definition of "reproduction" in Section 17 of Chapter III of the CDPA excluding 2D graphic representations of 3D objects that have been mass produced from the reach of the ERR.

CONDUCT OF THE CONSULTATION

The Government's own consultation principles outlined in the October 2013 paper found online at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf mention "achieving real engagement rather than merely following bureaucratic process" and that "Engagement should begin early in policy development when the policy is still under consideration and views can genuinely be taken into account." It states that "Information provided to stakeholders should be easy to comprehend...and [should] clarify the key issues" and that "sufficient information should be made available to stakeholders to enable them to make informed comments".

All of the above seem to be lacking when you consider that

- the clock started ticking at the start of the consultation, not the end, which is wholly incompatible with the principle of "legitimate expectations". A "transitional period" by definition begins *when the law is changed*, because the consultation may result in a range of outcomes.
- the introduction to the consultation document states that the government intend to publish their final proposals for the repeal in the spring whereas the depletion of stock period could, at worst, end in April (which is, of course the spring) so we will have to take a view on whether to pulp stock or get clearance before we know the outcome of the consultation.
- the consultation document does not provide sufficient information to enable us to make informed comments and the IPO is unwilling to answer our questions in order to provide any clarity.
- no new evidence is provided for the complete volte-face in position from 10 March 2015 when the Government accepted that some businesses needed a phase-out period of 5 years, and brought the ERR into force from 6 April 2020. At that time it specifically rejected, as likely to cause "disproportionate harm" a 6-month transition and even concluded that a 3-year transition would not "be proportionate in the light of the evidence received." Despite the end date of the consultation being moved, almost all the paperwork connected to the Judicial Review has not been made available, thus making it impossible for those who supplied evidence to the previous consultation to know what arguments they are required to counter and what further evidence any user of 2D images should show, making a mockery of the supposed Consultation process.
- the new proposals, in seeking to create balance on behalf of the manufacturers of works of artistic craftsmanship, seem to have swung so far in their favour as to completely lack balance and proportionality for all others concerned
- we are told that it is not in the Government's gift to provide binding definitions on what is considered a work of artistic craftsmanship (letter from Ros Lynch to

Richard Mollett of the Publishers Association of 4th December 2015), but if the Government is not to provide the definition, who is? Leaving the matter for judges to decide without any framework against which to test their judgment would seem to be lazy and even sloppy law-making. It is also contrary to the stipulation in all other areas of artistic copyright (paintings, graphic works, photographs, sculpture etc.) where a judge is specifically forbidden to make a judgment as to what is or is not "artistic". It seems a necessary supposition that Parliament, by stipulating that works of artistic craftsmanship are to be protected, whereas works of mere craftsmanship are not, must be taken to have had in mind a test capable of being adjudicated upon in a court of law.

- the Impact Assessment provided with the Consultation Paper is wholly inadequate and ill-informed. It does not appear that any advice was sought from publishers or the Publishers Association in relation to the figures provided for publishers (let alone other users of 2D copies) in the Analysis and Evidence
- only two options were even considered, one of which was clearly there only to be discounted immediately, making a farce of the process. Effectively only 1 option was ever considered. The obvious second option, i.e. that 2D copies should be treated differently to 3D copies given that the impact of reproduction of their work in this way on designers is so minimal and is in fact often beneficial, is not even mentioned. In fact this would logically be divided into 2 options - Option 2 (a) to carve out 2D copies from the legislation and Option 2 (b) to provide different transitional arrangements for users of 2D copies that are proportional to those industries and the rights of designers.
- the IPO and the Consultation Paper state "We also believe that those making 2D copies may be able to rely on copyright exceptions such as the ones for incidental inclusion, quotation and criticism and review." (eg Consultation Paper p.11 para 2 and letter from Ros Lynch to Richard Mollett, Publishers Association, 4th December 2015), but the specific inclusion of 2D copies in the new legislation renders an unacceptable risk for most publishers, yet no further guidance is offered as to how this rather vague assumption was reached. The government appears to be washing its hands of the effects of poor legislation.
- the premise of much of the lack of guidance in the Consultation Paper is that matters can be decided in a court of law but there is no provision for the costs this would lead to in the impact assessment, nor, as stated above, is there any guidance for said court of law to test their judgments against.
- the "principle that acquired rights must be respected" or "the principle of legitimate expectations" are both "among the fundamental principles of European Union law": Case C-168/09 *Flos*. As the judgment in that case states, the aim is to do "what is necessary for them to phase out the part of their business that is based on earlier use of those designs or to clear their stock", yet the present Consultation fails to take account of the acquired rights and legitimate expectations of certain categories of third parties; begins with an administrative, rather than a legislative act and fails to explain how evidence which only months ago justified a transitional period of 5 years for some

interests, now justifies a mere 6 months. The purpose of transitional provisions under European law is to shelter those who have already carried out acts of exploitation (including preparatory acts), thereby protecting that investment. There appears to have been no assessment of the different categories of third party despite the fact that the product cycles will inevitably vary between different types of users of public domain designs.

- the Government's statement (at para [20] of the Consultation) that it need not deal differently with users of two-dimensional images differently from those of replica makers and retailers because the Court did not indicate that this was necessary in *Flos* ignores the fact that (i) the issue was not relevant in *Flos*; (ii) the issue was not raised in *Flos*; (iii) the general principles espoused in *Flos* imply the opposite, i.e. that a careful analysis of particular interests is required (see para 5.14 of Bently & Dinwoodie's response).
- further, a Consultation does not change the law and by its very nature does not carry with it the assumption that people will know about it. Treating the start of the Consultation Period as the start of the implementation period assumes the outcome before the Consultation has even taken place.