



**THE LAW SOCIETY
of SCOTLAND**
www.lawscot.org.uk

Consultation Response

**Intellectual Property Office Consultation on transitional arrangements
for the repeal of section 52 of the Copyright, Designs and Patents Act
1988 (“the Consultation”)**

**The Law Society of Scotland’s response
December 2015**

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors.

With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's legal profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective legal profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

We are pleased to respond to the Intellectual Property Office ("IPO") Consultation on transitional arrangements for the repeal of section 52 of the Copyright, Designs and Patents Act 1988 ("the Consultation").

This response has been prepared on behalf of the Law Society by members of our Intellectual Property Sub-committee.

In response to the questions contained in the Consultation, we should like to respond as follows:

Question 1. What will be the impact of a transitional period of six months, both costs and benefits?

It is our view that the principal cost of the proposal is that the period is too short to allow an adequate and fair period of adjustment for those currently dealing in goods which will be caught by the repeal of s.52. The benefit of a short transitional period is that it allows greater clarity on the position in law.

On balance, our view is that it is better to impose a practical transitional period on operators. We believe that if organisations are given time to adjust their business model, there will be fewer transitional obstacles. In the absence of a financially viable and legitimate alternative, a basic assessment of risk will incentivise businesses (and in particular SMEs) to infringe the copyright of rights holders.

Question 2. Should the six months run from the start date of this consultation or from a different date, and if different, why?

We consider that it is not practical for the six months (if six months is ultimately deemed to be the appropriate period) to run from the start of the Consultation period. It renders the Consultation period redundant and undermines the prospect of resulting feedback being incorporated into the final transitional arrangements.

We suggest that the period should commence three months after the end of the Consultation period. This allows time for interested parties to respond to the Consultation and provides the IPO with adequate time to develop transitional proposals based on the findings of this Consultation. We question the possible utility of the Consultation if there is such limited scope for its results to be implemented.

Question 3. Should a longer or shorter transitional period than six months be adopted, and if so, what are the costs and benefits?

We refer to our comments at Question 1 above.

A transitional period of two years should be adopted. This mirrors the provisions which are generally imposed on Member States for Directives to be transposed into national law.

Further, the UK Government and businesses operating in the UK have experience of major legislative changes being imposed over a two year timescale.

Question 4. Are there any other issues which the guidance should cover which are not listed?

We note that this Consultation covers only the transitional elements of the repeal, rather than the substance of the repeal itself. Indeed, it is stated at paragraph 6 that it “proceeds on the basis that at least some such works do exist”. However, we observe that there is very little guidance on which works will fall within the scope of the repeal of Section 52 of the Copyright, Designs and Patents Act 1988 (“CDPA”). To that end, and in the absence of a manageable, fair and reasonable transitional framework, we anticipate a greater level of litigation on this subject matter. It will be in the financial interests of the Small to Medium Enterprises (“SME”) to argue that the works do not qualify for extended protection. The consequential additional workload for the courts may result in significant delays for copyright holders to obtain an effective remedy and enforce their rights efficiently.

In short, it is our view that to hurry the transitional period may impose higher costs on rights holders in enforcing their copyright and at the same time, would not necessarily guarantee a faster remedy.

Question 5. Do you agree that the Government is right not to distinguish between two and three dimensional copies?

Yes.

Question 6. Do you agree that applying the depletion period only to those contracts entered into prior to the start time and date of this consultation is appropriate, and what are the costs and benefits of this?

No.

We consider that the start of the Consultation period ought not to be a critical date. Due consideration should be given to the responses received from the Consultation and proposals should follow thereafter.

The depletion period should apply to all contracts which are entered into prior to the last date of the transitional period. Any other approach results in a blending of the transitional period and the depletion period.

In normal commercial contracts, there is freedom to manufacture products in commercially reasonable quantities until the date of termination and thereafter, a sell-off period is imposed, to allow the disposal of products created during the term of the agreement. It is our view that the IPO's approach should reflect this accepted norm.

Question 7. Are there any other factors that the Government should consider for the depletion period?

We refer to our response at Question 6.

Question 8. Do you agree that the period provided for depletion of stock is proportionate?

It is our view that if the transitional period is extended from six months to two years, as we suggest at Question 3, we consider that a depletion of stock period of six months is proportionate and appropriate. However, if the transitional period is not extended, we would suggest that a longer depletion of stock approach is adopted in order to balance the potential inequities of the shorter period. We would suggest a period of at least one year in the event that the transitional period remains six months.

In the event that the IPO considers that there is, for whatever reason, less flexibility on one element (transitional period and depletion period) we encourage it to extend the other aspect in order to achieve a fairer and more balanced equilibrium between rights holders and those currently operating in the market for industrial designs.

Question 9. Should a longer or shorter depletion period than six months be adopted, and if so, what are the costs and benefits?

We refer to our response to Question 8 regarding an appropriate depletion period.

It is our view that the obvious cost of a longer depletion period is that it delays the period over which the rights holder may enforce its rights. The associated benefit is that if a practical and realistic depletion period is adopted, there may be less need for the rights holder to take enforcement action against third parties following the conclusion of the transitional arrangements imposed.

Question 10. 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?

Yes. We agree with that position.

Question 11. 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. We agree with that position.

Question 12. 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?

No. However, we believe that organisations operating in the market are better placed to answer.

Question 13. Do you agree that Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995 should be repealed?

No.

It is our view that in repealing the obligation on the rights holder to license the revived copyright, this provides the rights holder with a bottleneck monopoly, providing a greater degree of power to the rights holder than would otherwise be the case. Consequently, a viable alternative business structure for operators to engage with rights holders will not be possible.

It is our view that keeping the Regulation incorporates a much-needed element of fair dealing and helps to strike an appropriate balance between the competing interests of stakeholders.

We believe that the existing Regulation is similar to the essential facility doctrine in competition law. Maintaining the status quo allows commercial terms to be agreed between the rights holder and the operators. Both stand to benefit.

Whilst the rights holders and operators are free to reach an agreement even if the Regulation is repealed, we suggest that in the absence of an imposed obligation to negotiate, it is possible that a conceptual cartel may form among rights holders.(in non-competing products) It is possible that each would agree that none will license their respective copyright.

Q14. 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?

Yes, we have relied on this form of copyright. This is because we hold a licence from both the CLA and the PRA.

Q15. 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, if we continue to hold both licences.



For further information and alternative formats, please contact:

Brian Simpson

Law Reform

DD: [REDACTED]

E: [REDACTED]

www.lawscot.org.uk