



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

### Meeting for designers and rights/licence holders

Wednesday 8 October

Intellectual Property Office, London

#### Attendees:

- Alliance for Intellectual Property, Anti-Copying in Design, DACS, Redd Solicitors LLP and Vitra
- Taffy Yiu, Margaret Haig, Nicola Searle (Intellectual Property Office)

### Introduction

1. The IPO welcomed attendees and advised that the purpose of the meeting would be to discuss the Government's proposals for transitional provisions for the repeal of section 52 of the CDPA. The policy of the section 52 repeal would not be within scope of the discussion. The IPO also advised attendees that a note of the meeting would be published, but comments would not be attributed.

### Evidence

2. The IPO provided a brief explanation of the evidence it was seeking, in line with its "Good Evidence for Policy Making" guide. The IPO explained that it wished to obtain evidence that was clear, verifiable and able to be peer-reviewed but acknowledged that it was sometimes difficult for small businesses and organisations to achieve this. The IPO emphasised that the good evidence principles were ideals, and that it was something for those contributing to the consultation to aim for.
3. The IPO provided examples of evidence that could be helpful during this consultation, including information on revenue, royalties, licence fees and resource costs (including legal and consultancy costs). The IPO commented that evidence that was structured in a similar way to the Impact Assessment would be particularly useful.

### Policy Discussion

#### Transition period

4. One attendee asked how the commencement date had been decided. The Government advised the group of the parameters it had considered when it decided the proposed transition date, namely of the options discussed in the Impact Assessment ("IA") of a transition period of zero months, 6 months, 3 years, 5 years and 10 years.
5. One attendee suggested that if the objective of the repeal of section 52 of the CDPA was to ensure the same term of copyright protection for all types of artistic works, then there should be a minimum transition period so as not to delay an immediate remedy that could achieve the objective. This attendee suggested that consumer confusion would be reduced if there was as short as possible a transition period.
6. It was suggested that the Government could, in practical terms, commence the repeal very quickly. The IPO suggested that there would be difficulties in that works that had fallen out of copyright protection would have copyright revived, and there would need to be time factored in for affected parties to deal with this.

7. One rights holder suggested that the proposed 3 year transition was essentially a 5 year transition. This rights holder claimed that there would be losses sustained due to the delay in commencing the change in law, but advised that they would not be able to provide actual losses or prove potential gains as a result of the change in law.
8. One attendee asked if the time that had elapsed between the Enterprise and Regulatory Reform Act 2013 being passed and the consultation had been taken into consideration. The IPO confirmed that it had been taken into account, in that the Government expected that affected businesses should have taken the time to plan for the change in law, but had not been expected to begin to make changes until there was clarity as to what the Government's proposed transitional provisions were.
9. This rights holder also suggested that there could be 2 different types of transition periods – that there could be a set transition period for copies made overseas and another set transition for copies made in the UK. The IPO suggested that this staggered approach could cause consumer confusion, and was something that had been briefly considered (and rejected) in the IA as the Government believed that a single commencement date would be the easiest for all businesses and consumers to understand.

#### Commencement

10. One attendee asked if there was a risk of the commencement being delayed. The IPO confirmed that it was the Government's objective to implement the repeal of section 52 of the CDPA. The next steps were that once the consultation was closed the Government would revise the Impact Assessment in light of any new evidence and on that basis would make a final decision on transitional arrangements. The outcome of this would likely be a commencement order in Parliament which would nominate the date of commencement of the repeal.
11. There was a discussion amongst attendees of the implications of not implementing the repeal. It was suggested that the lack of commencement of the repeal would mean risking action at EU level and it would expose the UK to the risk of legal proceedings.
12. It was also acknowledged by participants that some consumers were happy to purchase unlicensed copies. Some consumer confusion was said to occur because those who had purchased the unlicensed copies had incorrectly believed they owned the licensed copy.

#### What is a work of artistic craftsmanship?

13. There was general consensus that identifying what a work of artistic craftsmanship was a very difficult area. One stakeholder with knowledge of design law suggested that it would be difficult to say what industrially manufactured 3D designs would be protected by copyright, but surmised that only a small number of items would be classified as works of artistic craftsmanship.

#### Copies made before and after change of law is implemented

14. One rights holder suggested that an indefinite transition period for copies made before the change in law would create confusion. The IPO suggested that any copy made before the change in law would be unaffected by the repeal of section 52 of the CDPA.
15. One rights holder present advised that they were aware that 2D copies of artistic works (e.g. photographs in design publications) helped in the marketing of their products, and as such would not wish to take action against those who made 2D copies of their works.

### Review of policy

16. One stakeholder asked when the policy was to be reviewed. The Government advised that the review date set in the IA would be reviewed once a final decision was made on transitional provisions, and it would likely be in line with the transition period set.

### Licensing

17. There were some queries as to whether rights holders would be able to refuse a licence. The IPO suggested that they believed that licensing in this area could be positive in that rights holders or designers would be able to receive royalties if they allowed others to use or make copies of their work, and it would allow businesses to be able to apply for a licence in order to be able to continue to make 2D or 3D copies if they were already doing so.
18. It was also suggested that that the IPO should consider the willingness to license versus being made to license.

### Guidance

19. It was agreed by attendees that some guidance might be helpful, especially if it would provide a steer as to what would be affected by the repeal (e.g. by reference to case studies or legislation).

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

### Meeting for manufacturers, importers and sellers of copies of artistic works

Thursday 9 October

Intellectual Property Office, London

#### **Attendees:**

Five attendees consisting of businesses that manufacture, import or sell unlicensed copies of artistic works and officials from the Intellectual Property Office – Taffy Yiu, Nicola Searle and Hamza Elahi.

#### **Introduction**

1. The IPO opened the meeting advising attendees that the meeting was the second of three meetings as part of the consultation process. There had already been an event for rights holders and designers, and there was one to follow for those who created or used 2D copies of artistic works. The IPO emphasised the policy was out of scope of the discussion given the repeal was already in primary legislation. The focus of the discussion was to gather evidence and discuss the Government's proposal for a 3 year transition period.
2. The IPO explained that a note of the meeting would be published, and that comments would not be attributed. It was suggested that there may be a need for the meeting note to be anonymous given some concerns that rights holders would use the information that had been freely discussed in the meeting to identify attendees' businesses and organisations. This could plausibly harm their commercial activities. As such, the IPO agreed that the meeting note would be anonymous.

#### **Evidence**

3. The IPO provided a brief explanation of the evidence it was seeking, in line with its "Good Evidence for Policy Making" guide. The IPO explained that it wished to obtain evidence that was clear, verifiable and able to be peer-reviewed but acknowledged that it was sometimes difficult for small businesses and organisations to achieve this. The IPO emphasised that the good evidence principles were ideals, and that it was something for those contributing to the consultation to aim for.
4. The IPO provided examples of evidence that could be helpful during this consultation, including information on revenue, royalties, licence fees and resource costs (including legal and consultancy costs), and suggested that evidence that was structured in a similar way to the Impact Assessment would be useful.
5. One of the attendees asked how any new evidence would be used given the large quantity of evidence that had already been presented to the IPO. The IPO confirmed that the Government would make its final decision on the totality of the evidence that had been presented to it. The IPO also said that whilst new evidence was always welcome, evidence that had already been presented, but had been re-cast in the light of good evidence principles, could also prove valuable.
6. In response to a question about how an organisation might peer review questions it had asked its members, it was suggested that other organisations, not necessarily dealing in the same works but with some knowledge of the issues at hand, could peer review.

## **Policy Discussion**

### Works that may attract copyright protection

7. Attendees raised concerns that there were no guidelines in place which would assist affected businesses to plan for regulatory change.
8. The IPO pointed out that while it would be up for businesses to make their own assessment and to seek legal advice (which it acknowledged could have costs attached to it), there was some European case law that could provide some indication. Further, the IPO also pointed out that works protected by copyright on 1 July 1995 in any other EU member state was also likely to be protected by copyright in the UK.
9. Attendees argued that there were only a handful of legal decisions concerning 3D works that qualified as works of artistic craftsmanship. This remained, then, somewhat a grey area. It was suggested that customs might have a list (albeit incomplete) of artistic works that had been imported into the country.
10. It was pointed out that having foreknowledge of works that qualified for copyright protection would make the transition much easier, because businesses would know what lines they would consider phasing out. It was surmised that the Government could make an enquiry with the rightsholders to find out what those items were, and to share this information with all businesses and organisations that were likely to be affected by the change in law.
11. The IPO asked if some form of guidance could be useful, and it was agreed by all attendees that such guidance would be useful. The IPO emphasised that such guidance could not provide definitive statements of what items would be affected, but the form of such guidance, if published, would be considered by the Government in light of consultation responses.

### Difficulties in developing new product lines

12. A number of attendees pointed out that they had already begun the transition process by introducing new product lines. Unfortunately, this had not met with much success. It was emphasised that completely new products by unknown designers had been tried, but these had failed to sell. In one case, 40 new products had been marketed, in various colours and designs, but of these only one had been sold in 8 months.
13. It was suggested that products that were similar to iconic designs were also not selling because there was consumer demand for replicas of the most famous items of designer furniture. It was then suggested that if the most famous items of designer furniture were ruled by a court to be protected by copyright, then businesses that sold these designs would struggle to survive once the change in law came into effect.
14. It was suggested that the change in law would drive rights holders to divert resources to protecting their new monopoly over works which had copyright revived, in contrast to the Government's goal of trying to stimulate new designs.

### Transition period

15. Attendees were understanding of the Government's proposed 3 year transition period, but firmly emphasised that anything less than 3 years would be very damaging if not fatal for their businesses.
16. There was a view that if the Government eventually decided on a 6 month transition period it would likely lead to all businesses that manufactured, imported or sold replicas going into receivership.

Attendees also confirmed that they had initially had not asked for a 10 year transition period because they understood that it was unlikely to be a realistic possibility due to the implications of the CJEU case. They did suggest however that 5 years was an acceptable middle road, and that 3 years would be extremely difficult.

17. Attendees emphasised that they understood the change was going to happen and that those at the meeting were making the changes already – but they needed 5 years in order to be given a chance to survive, and for the principle of fairness in responding to regulatory change that required them to make fundamental changes in how their businesses operated.

#### Review of policy

18. The IPO was asked about its commitment to a review following the implementation of the change in law (as stated in the Impact Assessment). The IPO advised that the Government would wish to review the impact, but a final decision on timing and form of the review had yet to be made.

#### Copies made, imported or sold before the change in law takes effect

19. The IPO was asked to clarify the position regarding copies that had been made, imported or sold before the change in law took effect. In particular, attendees asked whether it was possible to keep stock after the end of the transition period, and if so, how much. It was pointed out that during the passage of the Enterprise and Regulatory Reform Act, the Minister said that stock made or imported before the change in law would be unaffected. The IPO confirmed that this was the Government's existing view, and it would be reviewed in light of consultation responses.

#### Licensing

20. On licensing, attendees pointed out that some businesses had had correspondence with rights holders, but there was not clarity whether licensing was possible. It was suggested that rights holders were in a very strong position, and that it would be difficult for affected businesses to negotiate fair terms.

#### Miscellaneous

21. Attendees raised concerns that there was still widespread ignorance of the repeal, especially amongst other sector groups. It was pointed out that most affected businesses in the furniture sector were aware of the upcoming change in law, there were concerns other manufacturers and importers in other sectors making copies of 3D objects could be affected. The IPO responded that it had attempted to communicate the change to as many sectors as possible during its Call for Evidence and consultation, and that it was up to all businesses to keep up-to-date with any regulatory change.

#### Next steps

22. The IPO closed the meeting by outlining the next steps – that once the consultation was closed the Government would revise the Impact Assessment in light of any new evidence and make a final decision on transitional provisions. The outcome of this would likely be a commencement order in Parliament which would nominate the date of commencement of the repeal.

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

### Meeting for users and creators of 2D copies

Friday 10 October 2014

Intellectual Property Office, London

#### Attendees:

- BAPLA, Corbis, Getty Images, Loupe Images and Victoria & Albert Museum (V&A)
- Margaret Haig, Taffy Yiu, Nicola Searle (Intellectual Property Office)

### **Introduction**

1. Attendees were welcomed to the meeting by Intellectual Property Office (IPO) staff. This event was to explore the issues raised in the consultation on the transitional provisions for the repeal of section 52 of the Copyright, Designs and Patents Act 1988, and whether there was additional evidence to support or challenge the Government's decision. The Government's preferred option was for a 3 year transitional period (the repeal being effective from April 2018), but evidence on the other options of 6 months and 5 years would also be welcome.

### **Evidence**

2. A presentation on the IPO [Good Evidence Guide](#) was given. It is seen as the goal for all evidence submitted to the IPO to allow it to make evidence-based decisions, although we acknowledge that this may not be achievable for every organisation and individual. The evidence should be clear, verifiable and peer-reviewed. Research, surveys and case studies might all be counted as helpful evidence.

### **Policy Discussion**

#### Clarity on what is covered by copyright

3. Attendees noted that organisations may have guidelines on what is covered by design classics, but reviving copyright could cover a lot of items. It would be very helpful to have guidance or a copyright notice on what is covered, including the interaction with existing and new exceptions and a list of item types that may be covered. This will help to address the issue of awareness – many photographers are just unaware of the change. It should also cover what might be an 'artistic work' in this context, case studies and the issue of protection in other EU member states. There was also some discussion about who has the responsibility for clearing rights after the repeal takes effect.

#### Length of the transitional period

4. For publishing purposes, 2016-17 books are already being commissioned, so a 6 month transition would be too short to take account of book publishing cycles. In providing evidence of cost of change, it was suggested that some publishers will avoid publishing rather than have to get all the rights cleared, and this cost would be hard to quantify. A staggered transition for 2D and 3D copies might assist, it was argued, to denote the difference in being able to clear numerous rights.

#### Costs of adapting business model

5. The IPO suggested that existing stock from a print run before repeal would be unaffected by the change, but new print runs would need to have the rights cleared. One attendee indicated that an interior specialist picture library had said it would cease trading because clearing the rights would be too

resource-intensive. Hard copy magazines may not be aware of the need to clear rights if they digitised back copies after the repeal. There were concerns over the digital distribution of items and whether they would be included in the change. There would also be the cost of legal advice. One attendee commented that in a worst case scenario, the education on design would change and not cover what it should because it would be too expensive to tell people about designs where copyright had been revived.

### Licensing

- Attendees agreed that many rights are granted for free because of the benefits of publicity, but this cannot be guaranteed, so there is a scale from £0 to several thousand pounds as the cost of licensing. Licences might not be granted in perpetuity, which would also discourage businesses in this area; in effect, licensing was likely to be hindered by the repeal.

### **Next steps**

- The IPO explained the next steps. After the consultation closed on 27 October, the impact assessment would be revised and a decision made about the transition period, based on evidence received over the whole consultation process (including the Call for Evidence).