

FAO [REDACTED]
Copyright and Enforcement Directorate
Intellectual Property Office
Room 1Y05 Concept House
Cardiff Road, Newport
NP10 8QQ

T +44 (0) 20 7336 8811
F +44 (0) 20 7336 8822
E info@dacs.org.uk

dacs.org.uk

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By email to: copyrightconsultation@ipo.gov.uk

Changes to Schedule 1 of the Copyright Designs and Patents Act 1988 and the Duration of Copyright and Rights in Performances Regulations 1995

Dear Emily,

DACS welcomes the opportunity to respond to the consultation on Schedule 1 of the Copyright, Designs and Patents Act 1988 (CDPA) and the Duration of Copyright and Rights in Performances Regulations 1995 (the 1995 Regulations). DACS has responded to the Government's previous consultations on s.52 CDPA in 2014 and 2015. As the 2015 consultation contained questions relating to the 1995 Regulations and Schedule 1 of the CDPA, our response can be found appended to this document.

About DACS

Established by artists for artists, DACS is a not-for-profit visual artists' rights management organisation. Passionate about transforming the financial landscape for visual artists through innovative new products and services, DACS acts as a trusted broker for 90,000 artists worldwide. Founded over 30 years ago, DACS is a flagship organisation that has and continues to campaign for artists' rights, championing their sustained and vital contribution to the creative economy. In its support of artists and their work, DACS collects and distributes royalties to visual artists and their estates through Artist's Resale Right, Copyright Licensing, Artimage, and via Payback. More information can be found on the [DACS website](http://dacs.org.uk).

DACS has a wide and varied membership including both creators of 2D works and 3D works that are affected by the changes made to s.52 CDPA. It is important that all creators have equal enjoyment of copyright in their works, therefore we support the removal of temporal restrictions in Schedule 1 CDPA. Additionally we agree that it is the exclusive right of the creator to choose to license their works in line with Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (herein the InfoSoc Directive) and we support the removal of parts of the 1995 Regulations that call for compulsory licensing.

Responses

- 1. Do the proposed amendments to Schedule 1 and Regulation 16 equalise copyright protection for works created before and after 1 June 1957?**

DACS welcomes changes to paragraph 6 of Schedule 1 of the CDPA, however DACS considers that these amendments are not sufficient and may not completely achieve the envisaged outcomes. DACS

believes that in instances where an artistic work was reproduced into a design work before 1 June 1957 there is a risk that this clause would effectively exhaust the rights in that artistic work, which would not be compatible with Article 3(3) of the InfoSoc Directive.

The suggested amendment to paragraph 6 intends to override this issue, however it may not be entirely effective as it essentially relies on the laws of other countries to provide the protection against this incompatibility with EU law. Given that this clause is problematic for more reasons than just the lack of protection for design works from before June 1957, DACS considers it would be more effective to revoke this clause instead.

2. Do the amendments confer copyright protection to any matter not currently eligible for copyright protection in the UK?

We do not think that the suggested amendments do confer copyright protection to any other matter, however we do consider revocation of paragraph 6 of Schedule 1 would also prevent such issues, considering that the requirements for copyright protection still have to be met.

Compulsory Licensing

3. Do these amendments achieve our aim of complying with Article 2 of the InfoSoc Directive?

The amendments proposed for revocation of these regulations 24, 25, 34 and 35 of the 1995 do achieve the aim of compliance with Article 2 of InfoSoc Directive. These regulations are also incompatible with Article 2 of the InfoSoc Directive and Article 9(1) of the Berne Convention 1886 (as amended), and therefore should be revoked.

DACS considers that users should make it their priority to seek permission and/or a licence for the use of works. The commercial reality of many users is yet to be seen following the revocation of s.52 CDPA, but DACS considers it would only be in a minimal number of cases that a work cannot be effectively licensed.

4. Are there any other regulations we need to repeal or amend in light of these issues?

Yes: the Copyright (Industrial Process and Excluded Articles) (No. 2) Order 1989, see [here](#), needs to be repealed. This statutory instrument creates further criteria for a work to be considered to fall under s.52 CDPA 1988, including for “goods manufactured in lengths or pieces”. This has the effect of limiting artistic works if they are reproduced on goods such as wallpaper or curtains, for example. This would create a distinct lack of clarity for rightsholders and should be revoked following the repeal of s.52 CDPA 1988.

For further information please contact

Reema Selhi
Legal and Policy Manager
DACS



Appendix

Response to the consultation on transitional
arrangements for the repeal of section 52 of the
Copyright Designs and Patents Act 1988 (23 December
2015)

Section 52 consultation
Copyright Directorate
Intellectual Property Office
4 Abbey Orchard Street
London SW1P 2HT

23 December 2015

By email to: section52cdpa@ipo.gov.uk

Response to the consultation on transitional arrangements for the repeal of section 52 of the Copyright, Designs and Patents Act 1988

Dear Sirs,

DACS welcomes the opportunity to respond to the consultation on transitional arrangements for the repeal of s.52 of the Copyright, Designs and Patents Act 1988 (CDPA). DACS has responded to the Government's previous consultation on s.52 CDPA and our response can be found appended to this document.

DACS is concerned that the Government has not provided sufficient options for the implementation period and that the option given is incorrectly applied as it effectively overrides the evidence gathering process. DACS is a member of the British Copyright Council (the BCC) and supports their response to this consultation.

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DACS has a wide and varied membership including both creators of 3D works of artistic craftsmanship and photographers who may photograph such works. As such, DACS favours a transitional period and a depletion period that is fair and proportionate to balance the rights of both types of creators whose works are affected by s.52 CDPA.

General Observations

DACS considers that the Government has not correctly applied a timeframe for the repeal of s.52 CDPA. The fact that the 'clock' for the 6-month transitional period started when the consultation was announced prejudices the consultation and does not allow for effective evidence gathering.

Rightsholders and businesses were initially informed that the date of implementation was April 2020 and may have made arrangements to meet this date¹. The Government considered that implementation in 2020 would “provide a proportionate time frame for affected businesses to adjust to regulatory change”², therefore it follows that the impact of implementation 4 years earlier will be significant and not proportionate.

This second consultation refers to measures in respect of depletion of stock dates, pre-1957 designs and for second hand sales. These are significant changes that businesses and rightsholders will need time to implement, and any related costs must be taken into account.

The previous consultation provided an option for repeal to take place in April 2018 and this option does not appear to be considered at all in the second consultation.

Responses

- 1. What will be the impact of a transitional period of six months, both costs and benefits**
- 2. Should the six months run from the start date of this consultation or from a different date, and if different, why?**

DACS considers that six months from the date of the consultation’s release is not proportionate as it incorporates the evidence gathering period and therefore effectively overrides evidence given.

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

DACS believes that a longer transitional period should be adopted: a suggestion would be a midway point between April 2016 and the repeal date stated in the previous consultation (April 2020), which is a more balanced and proportionate approach, and which was originally considered the fairest option under the prior consultation³. The Government should actively seek evidence of any costs incurred by rightsholders or businesses in making arrangements to meet the previous implementation date.

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

As stated in our prior consultation, appended herewith, DACS considers it would be beneficial for guidance to be created in consultation with the relevant industry sectors.

¹ We refer to the Association of Photographers (AOP) who have stated that photographers will have been commissioned for work that can no longer go ahead and will have planned future business around the Government’s original implementation date in 2020.

² Department for Business Innovation and Skills Regulatory Policy Committee comments, p.2 in *Government response to the consultation and announcement of transitional provisions* (February 2015) p.67

³ Page 22 of *Consultation on the timing of the repeal of s.52 CDPA* (October 2014) states that the Government proposes a 3-year period commencing on 1 April 2015 (i.e. implementation to take place in 2018) “causes the least disruption for designers, rightsholders, business... and users”.

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

Differentiating between 2D and 3D works is necessary as it would take into account the way in which these works are used. For instance, where a 2D work appears in a publication, what will depletion of such stock entail? Additionally, the publication could then be copied and subject to secondary use licensing, as usually collected via a blanket licence. It is unclear how the works will then be treated and whether or not copying a publication of a 2D image of a 3D relevant work will be an infringement.

- 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 appropriate, and what are the costs and benefits of this?**
- 7. Are there any other factors that the Government should consider for the depletion period?**

DACS considers that the subsequent use of 2D works should be taken into account when determining what the depletion period relates to and there should be clarity on what should be depleted. Six months (four given the length of the consultation process) is a very tight time frame in which to expect full depletion of stock without significant financial losses.

- 8. Do you agree that the period provided for depletion of stock is proportionate?**
- 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 the AOP's response in this regard.

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?

DACS does agree that this should be the case, especially in light of secondary uses of published works containing 2D images of 3D works relevant to this consultation. If a publication is issued prior to the repeal, we would consider that the rights of the 3D work are exhausted for the purpose of reprography of the 2D image. In that respect there should not be legislative change to items that have been purchased or created in the knowledge the copyright in the 3D work had expired.

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?

As this amendment would have the consequences of enabling rightsholders to achieve remuneration for the use of works that were made before 1 June 1957, DACS considers this to be equitable to those rightsholders. However, in light of our comments above, this amendment must be compatible with the notion that the 2D copy of such works that relied on s.52 CDPA would have exhausted rights

in that work in, for example, a publication and therefore a person copying an old publication containing such an image would not require additional rights clearances.

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?

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

DACS agrees that Regulation 24 should be repealed. Rights holders should have the ultimate decision when it comes to licensing their works. DACS has no evidence concerning the costs and benefits of compulsory licensing, or whether our members expect to reply on it in the future.

For further information please contact

Reema Selhi

Legal and Policy Manager

DACS

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