

From: FOCAL [REDACTED]
Sent: 10 December 2015 12:30
To: Section52CDPA
Cc: 'Marie Egan'; Margaret Briffa; Chair
Subject: RE: URGENT: Submissions in respect of the Consultation on transitional arrangements for the repeal of Section 52 of the CDPA 1988

Categories: Blue Category

This submission is made in response to the Consultation on transitional arrangements for the repeal of Section 52 of the Copyright, Design and Patents Act 1988.

FOCAL International is a trade association representing film and video libraries and archivists. It has 300 members ranging from footage archives to the freelance archive researchers/producers, facility companies through to consultants and legal within the industry. Formed in 1985 to represent the commercial archives throughout the world, with the majority of members within the UK and Europe. FOCAL International promotes the members; informs the industry on issues which affects their day to day work; training on formats, copyright etc; holds an annual Awards Ceremony to celebrate the best use of footage and restoration.

The repeal of Section 52 and the proposed transitional provisions affects FOCAL members who have within their libraries or archives images of work that a member assumed was in the public domain but which will, once the transitional arrangement are set, be subject to copyright with all the attendant consequences.

This submission is response to the following two questions posed in the current Consultation

Do you agree the government is right not to distinguish between two and three dimension copies?

FOCAL International's position is that the government is wrong to not distinguish between two and three dimensions copies of works which will become the subject of copyright once the repeal of Section 52 takes effect.

The Government relies on the principles laid down in the European Court of Justice in Flos Spa v Semeraro Casa e Famiglia Spa. The government's position, that as no distinction between 2 and 3 dimensional copies is made in that case no such distinction should be made here. It follows that no distinction should be made in the treatment of 2 and 3D dimensional works in determining the transitional provisions to apply for all works.

FOCAL International's submission is that this approach is crude and ignores the fundamental problem that the repeal of Section 52 was intended to stop in the first place; that is the losses being suffered by furniture and lighting designs who were unable to prevent their work being copied for a period comparable to other creators of other artistic works. The repeal of the law therefore was to prevent this clear unfairness and rife opportunistic copying.

Transitional provisions which pay no regard to the exploitation of those who copy 3D works and those who trade in images of such articles creates a new unfairness and fails to strike a balance between the legitimate interests of the parties. In the case of a business that copies 3D works which it assumed are in the public domain, the repeal of Section 52 merely restricts the categories of work that it may reproduce. There is no enduring value to such business in being able to reproduce any particular work and no long term investment made by it. Such a business simply makes profit from a particular manufacturing run. The position with a library or archive is different. If it is not able to keep and use an image which is within the archive itself is undermined. Its value which has been built over years of collecting and preservation is

undermined. In effect all value is lost. Further the need to remove this material from the archive could distort the historical record and have a wider impact on cultural heritage.

The rights of the copyright owner and the library should be balanced here. As stated above the rights owners primary concern is not over the use of images of their work in archives. Indeed this is something that they may even welcome. The mischief is the slavish imitation of their works in 3D sold for a price well below the genuine article.

The balance sought is not something that can be left to the general law to provide. For example: It is arguable that the use of such images may at least in certain circumstances amount to 'fair use'. However that is not tested and to rely on fair use would give a library no certainty. There is also the possibility that a right owner may, having never received any complaint from a rights holder, that the work infringes any right that there is in effect a licence to use such work. Again it is untested to what extent such a licence could be claimed where a work was not subject to any right that could have been infringed or complained about.

In order to remove uncertainty FOCAL International suggests that with respect to 2D works that the opportunity is taken to clarifying the permitted use of 2D works as part of the transitional provisions and namely that:

- 1) Consideration be given to the legislation granting an implied license to use such work for the purpose of archives and libraries which cannot be revoked by the right holder; or in the alternative
- 2) Consideration be given to the legislation granting an implied licence to use such work for the purpose of archives or libraries which can be revoked by a right holder on one year's written notice; or alternatively ...
- 3) Consideration be given to the repeal of Section 52 only applying to images of works which are created after the date on which the law comes into effect.

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

FOCAL International notes with great concern that in combination with the repeal of section 52, the government is considering repeal of these regulations in so far as they would relate to 2D works. While FOCAL International understands the need for the rights owner to control its licensing programme in respect of 3D works, FOCAL International sees no reason for the rule allowing compulsory licensing with respect to 2D rights to be repealed. As noted above the reproduction of works in 2D is not the real mischief which the repeal of Section 52 was intended to fix.

Sue Malden, Chair



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