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17th December 2015

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

RESPONSE FROM THE BOOKSELLERS ASSOCIATION OF THE UNITED KINGDOM & IRELAND

The Booksellers Association

Founded in 1895 The Booksellers Association is a trade association, based in London WC2, currently (as at 30th June 2015) with 828 bookselling businesses in membership (of which 803 are independent bookshops), accounting in total for 4,595 outlets.

BA members cover a diverse range of different bookselling businesses - specialist bookselling chains (e.g. Waterstones and Blackwells); independents; large High Street chains with mixed businesses (e.g. W H Smith); supermarkets (e.g. Tesco, Asda, Sainsbury and Morrisons); library and school suppliers; specialist internet booksellers; and the two national wholesalers (Bertrams and Gardners).

BA members sell to all markets (consumer – fiction/ non-fiction/ reference/ children's; academic – academic/ professional/ school/ English Language Teaching) from retail shops and over the internet in a variety of different formats (hardback, paperback, audiobook and e-book).

The BA helps its members to sell more books; operate from a lower cost base; improve competitiveness and productivity; network with others in the 'book world' and further afield. Finally, and most importantly, to represent their views.

Summary

The repeal of section 52 of the Copyright, Designs and Patents Act 1988, as part of the Enterprise and Regulatory Reform Act 2013, had clear and far-reaching implications for books and other publications which contain photographs of three-dimensional artistic works, given that it entailed a new requirement to licence the use of images of such works and potentially rendered infringing already published works which contained such images. However, we were reassured by the fact that this repeal would not take effect until further consultation had been undertaken on the transitional arrangements.

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The Booksellers Association is profoundly concerned with the Government's dramatic change of position in relation to the transition period for the repeal of Section 52 of the Copyright, Designs and Patents Act 1988 ("CDPA").

In the Government's initial consultation, consultees highlighted the immense difficulties they would face should the transition period be six months and clearly set out the reasons why a longer transition period was necessary. We were pleased that this case was initially accepted by the Government in its response of 9th February 2015 and that a five year transition period would be introduced.

The Government's subsequent withdrawal of the Commencement Order which would bring this into effect following an application for Judicial Review and decision to re-consult on the length of the transition period would by itself be a matter of some concern. This concern has been elevated by two further factors: first, the limited alternative options presented in the consultation; and secondly the rushed manner in which the consultation itself is being run.

The Booksellers Association draw attention to the paper prepared by Professor Lionel Bently, of Cambridge University an acknowledged authority on UK copyright law. In addition to the comments made in these papers we would like to take this opportunity to make the following broad points:

1. The lack of balance and proportionality in the new proposals.
2. The fact that the new impact assessment is incomplete and, without adequate explanation, ignores findings of previous assessments.
3. The manner in which, with this consultation, the Government is riding roughshod over its own consultation principles.

These, and others, are explored below in greater detail.

Lack of balance and proportionality

We understand that the Judicial Review challenge brought by three furniture manufacturers (Knoll, Cassina and Vitra) was based around the previous arrangements being incompatible with EU law and the *Flos* judgment[1] . However, *Flos* does permit for transitional arrangements so long as they are proportional. We would contend that the initial proposals were proportionate whilst not adversely affecting the interests of those with rights in the artistic works. The change of the

[1] CJEU case C-168/09 Flos SpA v Semeraro Casa e Famiglia SpA

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assessment by the IPO is irrational given that in the original Impact Assessment the IPO concluded that the original transitional arrangements are "consistent with the views expressed in the judgment of the European Court of Justice case Flos SpA v Semeraro Casa e Famiglia SpA to reconcile the competing interests ..." We do not comprehend the motivation of the IPO in particular since there is no information as to the reasons other than an opaque reference to a JR; no information has been accessible neither from the IPO nor the Courts.

Conversely, the combined effect of the Government's new proposals (an effective four months transition period, a de facto ten month depletion period, the repeal of Regulation 24) swing the pendulum back in the opposite direction and are utterly disproportionate.

The contracted time periods are utterly insufficient to complete the sale of affected stock, or secure the appropriate licensing of relevant content. It contradicts Government's conclusions from February 2015 "Therefore, on the basis of the evidence received, the Government is of the view that commencing the repeal of section 52 of the CDPA on 6 April 2020 provides a proportionate and fair amount of time for affected businesses to adapt to regulatory change, but also delivers, in 5 years, the fundamental objective of ensuring that all types of artistic works are treated equally." Without providing any argument or justification this problem is exacerbated by the failure of Government to provide adequate guidance or even to explain its terminology.

Incomplete impact assessment

The new Impact Assessment accompanying the current consultation acknowledges that there will be costs to some creators and users of two-dimensional images but then makes no attempt to monetise these costs. This evidence will, apparently, "be sought at consultation stage". Despite Government, by its own admission, not being aware of the impact of its proposals, it nevertheless is embarked on a policy course of starting the transition period before the consultation exercise has even closed.

The Impact Assessment also exposes a complete lack of appreciation as to how books on design are commissioned and published, nor of the nature of the market they serve. It states: "*the Government notes that such costs are necessarily incurred in respect of publications covering other artistic works, so this is simply putting all such works on an equal footing and should remove any copyright-driven distortions in decision on whether to write on topic A or topic B"*.

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Thus the Government appears to assume that the only determining factor in publishing a book on design is the copyright status of the images to be used. This is totally erroneous.

Whether or not an image is protected by copyright is only one factor in a commissioning decision to the extent of whether a book to economically viable or not. Margins on specialist design books are incredibly tight and being now required to retrospectively seek additional permissions will simply make such books uneconomical. Removing what is termed a 'distortion' in such a disproportionate way will, in fact, lead to the removing of the books from publication; this will be done by "pulping" existing stock should the short depletion period be implemented in view of the economic impact of asking for retrospective permissions.

Starting the transitional period from the date of the consultation

We strongly disagree with this proposal and the Government's recommendation that this start from the date of publication of the consultation document.

As a matter of good practice we would hope and expect that any transition period would not start until the Government has had the opportunity to receive, consider and respond to the consultation. The Cabinet Office guidance on consultation principles[2] state that *"Engagement should begin early in policy development when the policy is still under consideration* ***and views can genuinely be taken into account****"* [emphasis added]. For the IPO to 'start the clock ticking' before any of these three things has happened is a gross abuse of process and makes a mockery of the notion of consultation.

The assertion in the consultation document that *"Beginning the transition period from the date of consultation minimises the delay in bringing about the repeal of section 52, but allows time for businesses to understand the effect of the repeal on existing stock and future business practice"* demonstrates a total lack of understanding or appreciation of the the work involved in licencing images for publication.

Length of transitional period for use of 2D images

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf

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Commissioning, writing, editing, picture researching, producing, printing and distributing a book does not happen overnight, or in six months. Books can be years in the planning and have lifespans of several more years.

As was originally accepted by the Government, a longer transition period must be adopted: the longer the transition period, the less damaging the impact will be on publishers, the design community and all in the wider book chain including booksellers whom these publications serve. It would ensure that the costs associated with gaining the necessary additional rights clearance could be built into the planning of new publications while not impacting too adversely existing works.

The case for this is particularly strong given that the harm to the designer from the use of a 2D image of their work is totally different to the harm the sale of a 3D replica causes. It is correct that neither Directive 98/71/EC on the legal protection of designs nor the *Flos* case makes a distinction but we do not believe this to be material; both simply state that the same protection should be afforded to designs as to copyright. What is at question here is not whether the *repeal* should apply to 2D images but simply the transition period giving effect to the repeal. There is a very strong case for applying a different, longer, transition period adopted for the use of 2D images in published materials compared with copies of 3D works. This should be presented as an option.

Guidance and clarity over definitions

This is a complicated area of copyright and certainty of being compliant is vital and it is also vital that there are accurate definitions of what is being proposed. As a matter of course, any guidance must include information on the following:

- What is a 'work of artistic craftsmanship'. With a lack of clarity in case law, the Government must be clear as to what it intends this repeal to protect.
- Examples on how the copyright exceptions may be used.
- What is meant by the term "contracts".

Hitherto the IPO has refused to provide any guidance on these terms, seeming to hide behind the excuse that this has to be a matter for the courts. The logic of this position is faulty. Even for the IPO Consultation to utter the term "artistic work" it must itself have some sense as to what it means. There has to be some intentionality behind the use of the term or otherwise the sentence is utterly meaningless. It may well be that the Government's definition could subsequently be

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challenged in court and a tighter or different meaning made to apply – such is the nature of any legislation.

Clarity is particularly urgently required in relation to the term "contracts" and it is a matter of great concern that this was not able to be provided. To explain further:

Paragraph 19 of the consultation document talks about depletion meaning *"ceasing to sell or deal in the copies made or imported under section 52"*. It then talks about an additional depletion period for *"goods produced or acquired under a contract entered into before the publication time and date of this consultation".*

An illustrated book is likely to contain multiple images from multiple sources acquired under multiple contracts/licences. A book may contain photographs which might be "copies made under section 52" and it is those photographs which will become infringing when section 52 is repealed. So, if a photograph was acquired under a contract with a photographer dated 1st September 2015 (before the date of the consultation), does that mean copies of the book containing that photograph can be sold until 28th October 2016? i.e., is the relevant "contract entered into" the contract under which the photograph was acquired? This would seem to be the logical interpretation of paragraph 19 of the consultation document. But what would happen where there is a book containing three photographs acquired under three different contracts at different dates? This is just one of a number of scenarios which the consultation and proposed legislation fails to anticipate and we are concerned that in the undue rush to consult and legislate such matters will be left unresolved.

We also, again, here point to the Government's consultation principles. It states that "*sufficient information should be made available to stakeholders to* ***enable them to make informed comments***". This principle is being abandoned in this consultation. The introduction to the consultation document states that the Government intends to publish their final proposals for the repeal in the spring. In addition, given the lack of guidance and clarity over key questions the consultation document certainly does not provide the "sufficient information" required to enable us to make "informed comments".

Depletion period for existing stock

This provision was absent from the original consultation and poses a disproportionate level of harm on, for example, publishers and users of design

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books. Such books have much longer shelf-lives than allowed for by the proposed depletion. The margins involved in such publications are very slim and if each and every book already on the market or commissioned in anticipation of a publication date between now and April 2016 needs to be revisited and multiple images relicensed then the net effect will be that these books will simply be taken off the market and / or pulped. This is totally disproportionate.

Moreover, the retrospective nature of this repeal will have a potentially highly damaging impact on the re-prints of books containing images of artistic works already in publication. We are informed by publishers that they will simply not reprint a substantial number of titles after the repeal takes effect as the process and costs of seeking licences for images now in copyright make it uneconomical. Such copyright clearance was not factored into the original investment and as such publication was based on good faith and the assumption that all necessary copyright clearances had been obtained for the duration of the book's life (including any subsequent reprints). Not only is this harmful for publishers but it is likely to be inimical to the interests of the design community for whom such publications are important as promotional tools. It is also harmful to the interests of those consumers wishing to purchase such titles. Therefore, in many cases "compliance" will simply mean abandonment of publication.

The Government should provide for books already published to be reprinted following the implementation date until the publisher considers they no longer have a commercially useful life. A depletion period should not apply to existing stocks of published works.

Compulsory licensing of works where copyright is revived

This is another proposal which was absent from the original consultation and which is now being subject to over-hasty consultation. This Regulation was introduced at the time when the term of copyright was extended from Life Plus 50 years to Life Plus 70 years. It imposed an obligation on those rightholders whose works were coming back into copyright to grant a licence to people who had been using their work on the understanding that they no longer had copyright protection. Such a provision, therefore, has the ability to take a small part of the sting out of the repeal by at least giving publishers the confidence that images they have been using will be licenced and that entire publications will not have to be abandoned by a small number of rightholders withholding permission. Its repeal is, therefore, of extreme concern. It also contravenes the long established principle that an extension of

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copyright is accompanied with a pragmatic certain provision that the revived copyright is subject to mandatory licensing. Otherwise, the absence of the permission of one right holder out of potentially hundreds will render an entire book potentially infringing and thus the only option for the publisher is to "pulp" the publication. This situation is exacerbated by the problems of the publisher identifying all the right holders involved. Often the designer will not have been acknowledged by the producer and impossible to identify. The publisher will need to consider the contract between the producer and the designer to assess whom to ask for a permission; whether there was an assignment, a licence a work made in the course of employment, pre 1988 a commissioned work, or a US style work for hire contract. This will be an impossible task for all parties involved, designers, producers and publishers. These new impositions will do nothing for bookselling.

Concluding Remarks and Recommendations

For all of the reasons outlined above we urge the IPO to reconsider the direction and pace of travel it is taking with this consultation. We believe there is a profound lack of understanding of the impact of the proposals, an utter lack of proportionality in the effect on publishers, artists, authors and booksellers compared with other rightsholders, and a failure to comply with the Government's consultation principles.

The Government should:

1. Immediately stop the clock ticking on the length of the transitional period for both 3D copies and 2D images of 3D works. The start of such a transitional period must be linked to an actual piece of legislation.
2. Re-introduce the previously accepted longer five year transitional period for the use of 2D images of 3D works in published materials.

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