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## **The Quarto Group's Response to the Government's Consultation on transitional arrangements for the repeal of S52 of the Copyright, Designs and Patents Act 1988**

### Introduction

The Quarto Group ("Quarto") is a leading global illustrated book publisher and distribution group. It includes Quarto International Co-editions Group (which creates illustrated books that are produced for third-party publishers for publication under their own imprints) and Quarto Publishing Group UK (which creates and publishes general non-fiction and illustrated books).

The repeal of S52 CDPA 1988, amendment of Paragraph 6 of Sch1 CDPA 1988 and repeal of Regulation 24 of DCRPR 1995, as outlined in the IPO's Consultation Document, will affect Quarto's illustrated books dealing with design (including product design, textile design, interior design, furniture design, fashion and the decorative arts.) Those books include 2D representations of industrially exploited artistic works and those 2D representations will become infringing under copyright once the changes take effect.

In most of these subject areas, the majority of books are focused on the twentieth century and later, which is the period where design becomes an established activity and is of most interest in the market. Under the existing legislation a small proportion of the images (from the last 25 years) would need to be cleared for copyright. Under the revised legislation, the large majority of the images will be covered by copyright. The impact of the various repeals and amendments will therefore be significant in this area of publishing.

### Response Summary

Quarto's response to the questions in the Government's Consultation Document is outlined in detail below. In summary, Quarto's view is as follows:

- A distinction should be made between 2D and 3D representations.
- The original 5 year transition period should apply to 2D representations.
- A transitional period of 6 months is disproportionate and contrary to Quarto's legitimate expectations. It is not long enough to allow Quarto to adjust its business or to allow Quarto to obtain additional permissions.
- No satisfactory reason or evidence is given by the Government for why the transition period should be so dramatically reduced from 5 years to 6 months.
- The transitional period and depletion period should not be based on the start date of the consultation. This prejudices the outcome of the consultation and could force Quarto to take irreparable action before the outcome of the consultation is known.
- At the end of the transition period, existing copies should continue to be allowed to be sold.
- If a depletion period is required, it should run from the end of the transition period and be sufficient for stock to deplete, not be pulped.
- It is not workable for the depletion period to be based on a contract date as proposed.
- Paragraph 6, Schedule 1 CDPA should not be amended.
- Regulation 24 DCRPR should not be repealed.

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

Response: There are no benefits to Quarto. The impact and costs are significant and are as follows:

**1. Inability to adjust Quarto's business within the transitional period**

Publishing a book takes a considerable time and assumes a return on investment over a number of years and multiple printings. The publishing cycle is typically 3-5 years and Quarto prints a sufficient quantity of books to last between one and three years on each print run as it is not cost-effective to print for shorter periods. Heavily illustrated books have higher production costs and lower profit margins than text only books. Books on design tend to be high quality, high spec, heavily illustrated works aimed at a relatively niche market. For the above reasons, they require a minimum of 1-2 years post publication just to break even.

The *Flos* case (C-168/09) confirmed that the principle of legitimate expectations is among the fundamental principles of European Law. Before the revocation of the previous commencement order, Quarto had a legitimate expectation that (1) Quarto would have an indefinite period to sell off existing stock containing 2D representations of industrially manufactured artistic works and (2) for future titles or reprints of current titles, artistic works would continue to be covered by the S52 exclusion until April 2020. Quarto was in a position to make a planned adjustment to its publishing programmes as follows:

- Stock of existing titles would not be affected.
- For existing titles where sales were consistently high over a number of years, the majority of the upfront costs would have been recouped during the transition period and Quarto could take a decision ahead of time to clear any additional permissions required to enable reprints of those titles after April 2020.
- Quarto also would have had time to plan changes to titles where some images were estimated to be too expensive to clear after 2020 - those images could be removed and the layouts and text adjusted for reprinted editions to be published from April 2020 onwards.
- If it was considered that one or two existing titles would become economically unviable (because the cost of clearing additional permissions would be prohibitive and alternative images could not be substituted) a decision could be taken well in advance not to reprint after April 2020 and existing stock could be allowed to deplete naturally.
- For future titles, the cost of additional permissions could be estimated and factored in to the production costs of those books and into the prices charged to co-edition publishers or to the RRP from the start. If the cost would be prohibitive, a decision could be taken not to produce that title at all, before any contracts were entered into.

If the transitional period is reduced to 6 months and existing stock is not exempt, Quarto's ability to plan is hugely diminished:

- There is no possibility that any affected existing titles will have sold out by April 2016.
- There will be a much greater proportion of existing titles where the upfront costs have not been recouped by April 2016 so the cost of clearing additional permissions will be prohibitive in many more cases.
- For existing titles which become economically unviable due to additional permissions costs, there is no time for stock to naturally deplete and little opportunity to substitute other images and adjust text and layouts. This means that all such stock will need to be sold off in a "fire sale" prior to April 2016 or pulped.
- Future titles already in development will require unanticipated additional permissions to be obtained. Decreasing the transition period drastically alters Quarto's financial calculations. The costs of these permissions were never factored in to the production costs or to the prices charged to co-edition publishers and could make those titles economically unviable even though Quarto is contractually obliged to produce them (because it has already entered into contracts with authors, illustrators and co-edition publishers). Halting work on such titles altogether would entail writing off all the development costs to date (see case studies below).

## **2. Insufficient time to obtain permissions**

Six months is not enough time to adapt Quarto's business, as outlined above. Quarto is therefore left with three unpalatable options: (1) change the image selection, text and page layouts in as far as is possible and pay considerable (and potentially loss inducing) extra clearance costs for images which cannot be changed; (2) pulp stock; (3) risk infringement actions from copyright holders.

For all images requiring permission, there are considerable extra costs and there are additional complexities relating to the nature of designed objects. Unlike for fine art, there is little clarity regarding whether a particular industrially exploited item would qualify for copyright protection as an artistic work. The CDPA does not clearly define this, there is very little case law on the subject and the Consultation Document intentionally does not give any guidance. In the case of images which show interiors or several objects, each image will need to be carefully examined to see which elements might need clearing.

Furthermore, the creator of the artistic work in question may not be readily identifiable. Many items could have been designed by employees, for example. Individual copyright owners would need to be tracked down and contacted. In many cases, the only way to ascertain who should grant permission would be to contact the manufacturer of the item. Manufacturers are not set up to deal with permissions queries and may not respond quickly.

For Quarto, the number of potentially affected images runs into the thousands, which would equate to weeks of work in terms of simply ascertaining what clearances should be sought. Over a 5 year transition period, this would be workable, especially since the number of potentially infringing images would be fewer at the end of the 5 year period as explained above. In six months, this represents a huge and unmanageable disruption to Quarto's business. Additional clearances would need to be obtained quickly, which will limit Quarto's ability to negotiate reasonable fees.

Some Illustrated titles contain in the region of 1,000 images. It is not possible to remove 1 image from a book which is already published so it is possible that Quarto could waste many weeks identifying images where permissions are required; locating and contacting rights holders and paying costly additional fees to rights holders only to find out much later that one or two rights holders never respond or refuse to grant permission, meaning the book still needs to be pulped.

The IPO have said that publishers might benefit from one of the copyright exceptions such as incidental inclusion or fair dealing for the purposes of quotation, implying that this will reduce the permissions required. Incidental inclusion is unlikely to be of significant benefit for books about design because the items of furniture etc. in the images are not incidental; they are necessarily the focus of the image because the book is all about those items. The quotation exception is very new, its scope is unclear and it is completely untested. No publisher will want to be the one to test where the parameters of this exception lie by inviting potentially costly litigation so this exception is of no practical use.

## **3. Knock on effects and reputational damage**

The additional time spent clearing permissions will have obvious knock on effects in terms of additional administration costs and reduced time for the development of other titles.

For existing co-edition titles, Quarto will be liable under multiple warranties and indemnities with various co-edition publishers which may be invoked if co-edition publishers' stock has to be pulped because Quarto no longer holds all relevant clearances for books sold to those publishers before the law changed. This represents liability which was not envisaged when contracts were entered into.

For titles currently in development, Quarto will have existing contracts with authors, co-edition partners and others which would need to be severed at both a significant financial cost and reputational damage.

It is clear that a short transition for 2D copies of 6 months will inevitably lead to a number of titles currently in development never being published. This has an impact not only on publishers but

also on image licensing agencies, photographers, the consumer, students of design and the design industry itself.

#### **4. No evidence has been produced to suggest 6 months is an appropriate transitional period**

The Government's response to the original consultation and announcement of transitional provisions recognised that identifying, assessing and clearing permissions would be complex and time consuming. It also considered and rejected a 3 year transition on the basis that it would not "be proportionate in the light of the evidence received" and it rejected a 6 month transition on the basis that was likely to cause "disproportionate harm".

No evidence has been provided by the Government in the impact assessment to explain why all of the previous evidence, from which these conclusions were drawn, should now be invalid or disregarded. No evidence has been produced to explain why the balance of interests should suddenly have swung so far in the opposite direction to drastically reduce the transition period from 5 years to 6 months. This complete lack of evidence or rationale goes against the underlying recommendation of the Hargreaves Review on evidence-based policy-making. At the roundtable discussion on 23<sup>rd</sup> November, this issue was raised by a number of concerned parties but the IPO representatives refused to explain why the Government has changed its mind so dramatically.

The Consultation Document assumes that affected businesses already started to change their business model when ERRA 2013 was enacted but this does not take into account that the commencement order for the repeal of S52 CDPa was not enacted until March 2015 and so no action could reasonably be taken until that point. Neither does it recognise that, in altering their business models, businesses would obviously plan for a change in the law in April 2020 as a result of the outcome of the previous consultation and enactment of the commencement order. No business would have been planning for a retroactive change in the law in April 2016.

#### **5. Case studies**

The Consultation Document gives an example of an affected book containing 200 images which need to be cleared at a cost of £72 per image based on the DACS 2014 tariff. This is an unrepresentative example. The current DACS tariff gives a cost of £78 per image for world English language rights with a maximum 1,500 copies print run and no digital rights. No major publisher would licence an image on that basis. Quarto typically licences worldwide all languages all formats (including digital) for 50,000 copies. The DACS fee for this is £286 per image – almost four times the cost of the example given in the Consultation Document.

The following are just three examples which illustrate the costs to Quarto caused by the proposed change in the transition period:

(A) Existing co-edition book – a relatively small book on design icons

- Estimated sell off period for existing stock: 18 months
- Estimated remaining stock after 6 months: 1,600 copies
- Total number of images: 200
- Total number of images where permissions are currently required: 20
- Number of images where additional permissions are likely to be required: 150
- Cost of clearing additional permissions just to allow the sale of remaining stock after 6 months (calculated using DACS tariff for worldwide usage including digital for 1,600 copies): £156 fee per image + labour of £20 per image = £26,400

(B) Co-edition book currently in development on the subject of design

- Total number of images: 1,000
- Total number of images where permissions are currently required: 150
- Number of images where additional permissions are likely to be required: 700
- Cost of clearing additional permissions (calculated using DACS tariff for worldwide usage including digital for 50,000 copies): £286 fee per image + labour of £20 per image = £214,200
- Contracts have already been signed with authors/co-edition publishers obliging Quarto to produce the book.
- Approximate development costs incurred to date: £35,000

(C) In respect of 19 existing non-co-edition books:

- Taking only the paper, print and binding and origination costs (i.e. without taking into account author advances and overheads for editorial, sales, marketing and production) the valuation of stock alone would put approximately £140,000 worth of investment at risk based on a 6 month transition period.
- In addition to the above, the value of the loss of trade sales for those 19 affected existing books (based on only being able to sell stock for a 6 month transition period and calculated on copies sold at RRP less 55% discount) would be at least £1.9million. This does not take into account potential additional revenue from sublicences.

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

Response: A longer transitional period should be adopted in relation to 2D representations. Quarto submits that the original 5 year transitional period is appropriate for 2D representations as this would allow Quarto to adapt its business in line with its legitimate expectations (see above). The benefits would be:

- Considerable additional permissions costs could be absorbed by sales.
- Significant additional work required to clear those permissions could be spread over a reasonable period of time.
- There would be sufficient time to locate copyright holders and adequately negotiate fees.
- Copyright holders who are not set up to deal with permission requests would have time to put procedures in place and process permissions without too much additional disruption.
- Quarto would not be in breach of its obligations to co-edition publishers and would not be required to sever agreements with authors, publishers and other third parties, with consequent liability and reputational damage.

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

Response: A transitional period, by definition, begins when the law is changed. Any transition period should run from the date on which the repeal of S52 comes into force.

The Transition period is currently proposed to run from the publication of the Consultation Document and end on 28<sup>th</sup> April 2016. The introduction to the Consultation document states that the Government intends to publish its final proposals in the light of responses received to the Consultation “this spring”. Even the earliest interpretation of “this spring” would seem to be 1<sup>st</sup> March 2016. It could just as easily mean May 2016 – after the transition period ends.

In practice, if the transition starts to run at the start of the consultation, this reduces the transition period to an absolute maximum of 8 weeks and potentially to nothing. This cannot be considered to be proportionate and makes a mockery of the Government’s consultation principle that “engagement should begin early in policy development when the policy is still under consideration and views can genuinely be taken into account”.

Until the final proposals are published, the date on which books potentially become infringing will not be known. However, if no action is taken until the proposals are published and those proposals are published in the spring with an April 2016 deadline, it will be far too late to do anything other than pulp stock and cancel all titles currently in development.

Section 52 is still in force and Quarto is entitled to continue to invest and make decisions on that basis. It is unreasonable to require publishers to prejudge the outcome of the consultation by forcing them to take action based on their best guess as to what the Government’s final proposals might be. This effectively forces Quarto to take action which is not required by law on the basis of an administrative, not legislative, measure.



**Question: Do you agree that the Government is right not to distinguish between two- and three-dimensional copies?**

Response: No. Whilst 3D copies such as replica furniture have an obvious detrimental effect on sales of the original items, this is not true of books containing photographs of those items. The contrary is in fact true – books about design give publicity and authority to the items they depict and promote those items. If those books are pulped (for the reasons explained above), this can only have a detrimental effect on sales of design items.

The consultation document states that 2D and 3D copies should be treated equally because the *Flos* case did not distinguish between them. It is true that *Flos* did not specifically distinguish between 2D and 3D copies but neither did the *Flos* case suggest that no distinction should be made. It was simply not a factor in that case.

Paras 55-57 of the *Flos* judgment make it clear that the category of third parties is relevant to the assessment of the transition period and that a balance must be struck between, on the one hand the acquired rights and legitimate expectations of the third parties and, on the other, the interests of rights holders. A blanket transition for 2D and 3D copies strikes no such balance and does not take into account the different effects on the various categories of parties affected by the legislation. It therefore goes against the principles outlined in *Flos*.

There is no reason why 2D copies cannot be subject to a longer transitional period than 3D copies. This would be proportionate given the lack of negative impact (and likely positive impact) on rights holders in the design industry but the very significant negative impact a 6 month transition would have on publishers.

Quarto submits that the original 5 year transition is still appropriate for 2D copies and should remain. In Quarto's view, this compromise would go no further than necessary to allow publishers to phase out or change the affected part of their business and deplete their stock, based on their legitimate expectations as a result of the current law and implementation of the previous consultation.

**Question: 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?**

Response: No. Quarto believes that existing stock should be exempt. At the very least, the depletion period should not start to run until the end of the transition period. Under no circumstances should the depletion period start to run from a date linked to the start of a consultation.

Under the original proposals, existing stock was not affected by the repeal. Quarto's legitimate expectations were that stock of books produced before April 2020 would not be affected at all. To start the depletion period from a date based on the *start* of the consultation necessarily means prejudging the outcome of the consultation. If the Government intends to abide by its own principles that views should genuinely be taken into account then it must not force affected parties to act before their views have even been considered by the consultation process.

For example, Quarto's view is that 2D representations should be subject to a 5 year transition period and that the depletion period should start from the end of that transition, for the reasons given in this response. In those circumstances, Quarto would not need to halt development of titles currently in production and would not need to pulp existing stock in 2016. Quarto could therefore continue to enter into contracts with suppliers of images and with co-edition publishers for those titles in development and with co-edition publishers for existing titles which would sell out by the end of the transition period. However, the threat of the depletion period only being available for stock relating to "contracts entered into" prior to the start of the consultation may have the effect of forcing Quarto immediately to cease entering into any contracts relating to existing titles and titles already in development because all those books may need to be pulped in April 2016. It therefore forces Quarto to act (and irreparably so) before Quarto's views have been taken into account and contrary to what is required by the current law.

The Government's Consultation Principles state that sufficient information should be made available to stakeholders to enable them to make informed comments. In the context of publishing (as opposed to furniture manufacture) it is not clear what the Government means by "contracts entered into before the publication time and date of this consultation". The IPO representatives at the roundtable meeting

on 23rd November were asked to clarify this but were unable to explain what this meant in the publishing context. They offered to check and confirm this to stakeholders as soon as possible. However, on 3rd December, their response failed to clarify this, stating only that “You may want to provide submissions on this point when you respond to the consultation for us to consider in our response”. Quarto finds this to be an unreasonable and unsatisfactory way of dealing with ambiguity in the consultation document.

A depletion period based on “contracts entered into...” is completely inappropriate and unworkable in the context of publishing, as is demonstrated by considering the following two examples:

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”.

1. A book may contain multiple photographs which will 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 by a publisher under a contract with a photographer dated 1<sup>st</sup> September 2015 (before the date of the consultation), it follows that copies of the book containing that photograph can be sold until 28<sup>th</sup> October 2016.

If a book contains a photograph acquired under a contract with a photographer dated 1<sup>st</sup> November 2015 (after the date of the consultation), it follows that copies of the book containing that photograph can only be sold until 28th April 2016.

Unlike individual items of furniture, an illustrated book is likely to contain multiple images from multiple sources acquired under multiple contracts with photographers and image agencies. If one book contained both of the above photographs (which is very likely), it is impossible to apply different depletion periods to each of those photographs because they are both contained in one book and you cannot simply rip out a few pages and continue to sell the rest of the book.

2. For co-editions, Quarto will be producing books for a number of co-edition licensees simultaneously (our co-edition partners). For co-editions, Quarto enters into a contract with each co-edition partner under which it agrees to produce books for them. The dates of the contracts with our various co-edition partners will be different for each but the illustrative content of the books will be exactly the same – i.e. they will use the same photographs.

From our co-edition partner’s point of view, their books (containing images which will become infringing when S52 is repealed) were “produced or acquired under a contract” with Quarto. So, for example, if Quarto’s contract with Co-edition Partner A is 15<sup>th</sup> September 2015 (before the date of the consultation) and Quarto’s contract with Co-edition Partner B is dated 1<sup>st</sup> December 2015 (after the date of the consultation) and a photograph (which will become infringing when S52 is repealed) is in both books, the depletion proposal means that the stock of Co-edition Partner A can be sold until 28<sup>th</sup> October 2016, whereas the stock of Co-edition Partner B can only be sold until 28<sup>th</sup> April 2016. This is illogical but it is clearly the effect of the consultation’s proposed depletion provision.

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

Response: Quarto’s view is that any stock in existence on the date the law changes should be exempt. To require otherwise is to make the change in the law retroactive.

At the very least, the depletion period should last for sufficient time for existing stock to be depleted once the law actually changes. Quarto should not be required to pulp stock - this is not “depletion” in any sense of the term.

**Question: Do you agree that Paragraph 6 of Schedule 1 of the CDPA 1988 should be amended to exclude items protected by copyright in the EU at 1<sup>st</sup> July 1995?**

Response: No. The Government did not alter this provision originally on the basis that copyright might unintentionally be created in works which should never have been entitled to copyright.

At the roundtable discussion on 23<sup>rd</sup> November, the IPO representatives admitted that they have no idea what works might be affected by an amendment to Para 6, Sch 1, CDPA. This is the very definition of unintended consequences and no evidence has been provided in the consultation document or impact assessment to explain why unintended consequences are now acceptable when they were not acceptable after the initial consultation.

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

Response: No. The Government did not alter this provision originally on the basis that it may have unintended or undesirable consequences and yet the Government has adduced no evidence in the current consultation to suggest that it is aware of the consequences a repeal of Regulation 24 may have. To repeal this regulation without such evidence goes against the underlying recommendation of the Hargreaves Review on evidence-based policy-making.

In addition, the argument in the Consultation Document for the repeal of Regulation 24 is based on the premise that there would be no “acts restricted by copyright” because of the operation of S52. But S52 will be repealed so surely this is a false assumption. Works will be brought back into copyright by the repeal of S52 and, when S52 is repealed, all the usual acts restricted by copyright will apply.

If stock in existence on the date of the repeal of S52 is not given an exemption and immediately becomes infringing, Regulation 24 might at least have provided some comfort by requiring rights holders to compulsorily licence images in those existing works. This would have limited the most excessive effects of the consultation proposals because the situation could not arise whereby a book containing hundreds of images has to be pulped because permission for only one of those images is refused. To remove this possibility by repealing Regulation 24 simply exacerbates all the problems which have been identified earlier in this response.

Yours faithfully,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

**Marcus E. Leaver**  
**Chief Executive**