

## THAMES & HUDSON LIMITED

### RESPONSE TO CONSULTATION ON TRANSITIONAL ARRANGEMENTS FOR THE REPEAL OF S.52 OF THE COPYRIGHT, DESIGNS AND PATENTS ACT 1988

#### TRANSITIONAL PERIOD

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

##### Background

- Thames & Hudson Limited ('T&H') is a UK registered company which has been trading continuously since 1949. It is one of the world's foremost publishers of books on the visual arts, including in the subject areas impacted by the repeal of s.52. Based in London, T&H employs, at present, 144 staff many of whom work on titles which will be impacted by the latest Government proposals. In addition, T&H acts as sales and distribution agent both in the UK and for worldwide export (excluding the North American markets) for over 100 publishers many of which also publish in the subject areas impacted. One of these publishers, Laurence King is already involved in the present Consultation. T&H also licences publishing rights in impacted titles from other UK publishers such as Quarto who, again, are involved in the Consultation. We mention this to emphasise that the repeal of s.52 impacts a network of interrelated publishers and commercial interests.
- For over 50 years T&H has consistently derived more than 65% of its turnover from overseas sales. Last year (2014) its turnover was £24m.
- We have previously responded:
  - (i) In February 2013 to the Call for Evidence in relation to the then Enterprise and Regulatory Reform Bill;
  - (ii) In November 2013 to the *Call for evidence: Transitional provisions for repeal of s.52 CDPA 1988*; and
  - (iii) In October 2014 to the *Consultation on the timing of repeal of s.52 CDPA 1988*.
- On each occasion we took pains to explain to the Government first, the impact of the repeal of section 52 and, latterly, of the need for balanced, fair, reasonable and, above all, proportionate transitional provisions to ameliorate the impact of repeal on the UK publishing industry.
- The *Flos* case (*Flos Spa v Semaro Casa e Famiglia* Case C- 168/09) that precipitated the repeal of s.52, made clear that a transitional period must take into account the principle of proportionality. Thus both the position of the rights holders who would benefit from the term of protection being extended and the position of those relying on s.52 must be considered. *Flos* also stated that a 10-year transitional period would be considered too long, but did not, as we understand it, rule on what a proportionate transitional period would be.
- The previous transitional provisions, permitting a 5-year period to adjust to the repeal and not impacting stock of titles already printed at the repeal date of 6 April 2020, in our view met the requirement of proportionality being balanced, fair and reasonable. Clearly, at the time, the Government thought likewise. We are perplexed and dismayed by the present proposals and what appears to be the Government's knee-jerk reaction to the judicial review brought, we understand, by the furniture manufacturers, Vitra, Knoll and Cassina. At a meeting with the IPO on 23 November 2015, representatives from the IPO were resistant to disclosing any information about this judicial review other than the name of the parties and that it has been stayed. We understand that The Freedom of Information request submitted by The Publishers Association has not elicited any helpful information and the Government are resistant to explaining exactly why this judicial review has resulted a complete u-turn on their part. We

would emphasise that none of the parties to the judicial review are UK companies and only one of them is EU based: Vitra being headquartered in Switzerland, Knoll in the US and Cassina in Italy. Thus the Government are, in effect, supporting the interests of non-UK companies at the expense of the UK publishing industry, picture libraries, photographers and museums.

- It is considered particularly egregious that the Government seem to take no account of the likely impact on publishers of their latest change in policy given the previous evidence provided both at repeal and before the first transitional provisions. It could be said to be disingenuous to demand publishers to provide evidence yet again. Is it the case that the IPO must be seen to consult and we, the respondents, must, yet again, be seen to jump through the hoops of the consultation? It is difficult not to conclude, somewhat cynically, that this is an empty exercise and the outcome already decided. We very much hope we are wrong on this score.

#### **Impact – general points**

- We have read the submission on the latest proposals filed by Professor Lionel Bently, Faculty of Law, University of Cambridge and Professor Graeme Dinwoodie, Faculty of Law, University of Oxford. So that this Response is not unduly long, we do not intend to repeat the legal points they have so cogently argued save to confirm that we endorse the arguments they have made (although not their conclusion that the transitional provisions should come into effect on April 28, 2016). This Response will therefore focus primarily on the commercial impact of the Government's latest proposals.
- The commercial impact of the six-month transitional period needs to be understood by reference to the T&H backlist (for the purposes of this Response to include all titles currently in print published up to and including 31 December 2015), our Spring 2016 programme (currently being printed), our Autumn 2016 programme (currently being edited and produced) and our forward programme for 2017 to 2020 including titles already commissioned and contracted and being written and compiled.
- T&H has c.400 design titles, c.100 architecture titles and c.172 fashion titles in its backlist as well c.20 titles in its *World of Art* series on architecture and design. These titles represent some 30 % of T&H's total backlist titles. All of these titles will need to be checked for 2D images which may be impacted by the repeal. Some of these titles may only contain a few images, but nevertheless will still need to be checked. In itself this is a gargantuan task. In addition, we have titles in our Spring 2016 and Autumn 2016 list and two major titles on mid-century design due for publication in 2017 and 2018 which will be impacted.
- However, this task is complicated by several factors:
  - Establishing the author/creator:
    - Artistic works which previously enjoyed the reduced term of protection under s.52 (as of the end of 2014) were those manufactured up to the end of 1989. Artistic works which will now come back into copyright will be those by reference to designers who died after the end of 1945. The records regarding both the identity of such designers and their works are likely in many cases to be scant or non-existent.
    - However, even if records do exist there are a number of other often insurmountable difficulties. First, who is the author/creator of the design work in question whose life determines the term of copyright? Often, a given design is the combined creative work of a team of designers, design engineers, material scientists and production specialists as well as

collaboration with any number of employees of a manufacturer. Whose life then are we talking about?

- Sometimes the name of the designer or the names of the designers can be established. Other times not. This difficulty is germane to design works which have been created specifically to be subject to industrial process. The creator of one-off artistic works is usually self-evident.

○ Establishing the copyright owner


- The creator/author of a design work is not always the copyright owner. Sometimes the designer will have been employed by the manufacturer so that copyright will have vested in the employer/manufacturer. Sometimes the design work will have been created under a 'works for hire' agreement or be subject to other license agreement for a fixed-term period. We would then be reliant on the records of manufacturers going back some considerable period, manufacturers which may, themselves, have been bought out by other companies or have simply ceased trading. These issues do not arise for other artistic works where the creator is clear - the artist themselves – and rights will either vest in the artist or their estate and can usually very quickly be established nor for more recent designed work (i.e. post-1989) where the designer is clear. In any event, contemporary designers and manufacturers are often disposed to understand the promotional value of their work being included in design publications and therefore to waive or ask for minimal fees for the inclusion of their work.

○ Establishing whether a design work is a 'work of artistic craftsmanship':

- This is a complex question. There is no definition in the CDPA 1988 or any other statute. Although there are many other terms relating to copyright law which are defined in statute, the Government are resistant to providing one in this case. So whether or not a given design work is afforded copyright protection as 'a work of artistic craftsmanship' is a vexed question.
- The oft cited House of Lords case: *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1976] AC 64 is not of much use being focused on considerations of whether a work is 'artistic' rather than if it constitutes a 'work of craftsmanship' (even though Lord Simon rightfully, in our opinion, judged that that 'work of artistic craftsmanship' should be considered a composite phrase). Laddie, Prescott and Vitoria's *Modern Law of Copyright and Designs* (4<sup>th</sup> Edition p.215, para 4.31) submits that '*the decision of the House is quite lacking in utility as a guide to practical action*'. More recent decisions of the Court of Justice of the EU have tended to look at the intellectual creation of a work rather than set defined categories of works. However, this does not assist. Intellectual endeavour is put into the creation of a Henry Hoover <http://www.henryvacuumcleaner.com/> as well as the iconic Dyson Ball Vacuum Cleaner <http://www.dyson.com/vacuum-cleaners/upright/dyson-cinetic-big-ball.aspx>, but are both 'works of artistic craftsmanship? Publishers are left in a great deal of uncertainty as to what works are or are not 'works of artistic craftsmanship' and so which works will need retrospective or prospective licenses.
- 'Works of artistic craftsmanship' were first granted protection in The Copyright Act 1911. Lord Simon's judgment in this respect is, in our view, salutary: "*The expression originates with the Copyright Act 1911, and a*

*consideration of the social and historical background leads to the view that it was introduced as a result of the arts and crafts movement associated with the names of William Morris, Ruskin, and others, who held that the handicraftsman should be restored to his proper place in society and become a creative artist ('creation par excellence'), while the artist should in turn be a craftsman and whose aesthetic was fitness and propriety, functional efficiency and respect for the worked material, 'made for a human being by a human being'. The question is whether it is work made by an artist-craftsman understood in that general sense".*

- What is key is the element of hand-craftsmanship involved. However, copyright protection for the artist-craftsman which would apply to, say, a hand-crafted vase has been extended over the years to a range of items in which such craftsmanship is wholly lacking. Items which are designed specifically to be manufactured by machine have design right protection and that this is also of 25 year term provides symmetry and rationale to the restricted term under s.52. It seems to us to be wholly unjustified to grant full term copyright protection to items that are designed solely for mass manufacture.
- The Government's states in relation to whether individual items qualify for copyright protection: *'This Consultation proceeds on the basis that at least some such works do exist, without expressing any view as to what they are, whether furniture, homewares (such as lighting or ceramics), jewellery or wallpaper.'* This is far from helpful. To make a major change in the law and to abrogate any responsibility for what it means is otiose. It is to be hoped that the Government will provide some practical guidance in this matter which would be welcomed. No publisher wishes to be the UK test case in this area, but it seems likely one will be.
- Establishing if acts permitted in relation to copyright works may apply: The Government has made much of the amelioration of the impact of s.52 by other exceptions in the CPDA 1988. However, in our view these will be of only very limited assistance:
  - Incidental inclusion of copyright material (s.31): in our opinion this will have limited application. Again the law on this area is not clear. Certainly, where a publisher's intention is to reproduce a photograph of an artistic work, which is often the case, there will be no recourse to this exception. There are circumstances where it might be possible to argue incidental use for example, a photograph intended to show the architectural features of a room of a house in which there happens to be, for example, a Flos lamp. However, in a book intended for co-edition publishing (and almost all our books are so intended), a publisher may still be required to license the Flos lamp as the incidental inclusion exception does not apply in the copyright law of other European countries. In addition, DACS who represent many designers (see below) take a very restrictive view on what constitutes incidental inclusion.

The difficulties of seeking to apply this exception are highlighted by the attached photograph from one of our case studies for this Consultation . The photograph shows the interior of the Oscar Niemeyer Strick House. As can be seen, it contains a great number of design works which may need to be retrospectively licensed following the repeal of

s.52. The purpose of the photograph is dual – to illustrate both the interior features of the house and its contents. Can we argue that the design works included in the room are incidentally included? If not, and I think we can be assured that DACS would resist this argument, we would be involved in licensing over 50 separate design works. This would be prohibitively expensive and such images will simply not be used in future publications.

- Fair dealing for the purposes of criticism and review (s.30 (1)): Again, the law on this area is not clear and is likely to be challenged by rights owners (see section on DACS below).
- Quotation exception (s.30 (1ZA)): It is difficult to see how this new exception will assist in the context of publishing a 2D image of a work in its entirety. Would it apply to publication of, say, a detail of a design work? Until there is case law in this area, this is an unknown.
- Representation of certain artistic works on public display (s.62): This section applies to works of artistic craftsmanship, but the requirement that it be '*permanently situated in a public place or in premises open to the public*' means this provision can only be of limited application.

It is therefore clear that such exceptions will only have a very limited application for users of 2D images.

## DACS

- It is yet to be seen what position the design community will take, following the repeal of s.52, in relation to the users of 2D images of their work. As outlined above, contemporary designers and manufacturers are often disposed to understand the promotional value of their work being included in design publications and, therefore, to levy minimal or no fees. This is particularly the case when a book is a monograph on their work which may be published with their direct participation. However, this is certainly not the case in relation to the rights owners of works that will potentially benefit from the extended term of copyright protection many of whom are represented by the Design and Artists Copyright Society and their sister collecting societies around the world (for the purposes of this Response 'DACS').
- That DACS are likely to take an aggressive line on licensing is clear. By way of background, in the 1990's DACS brought a criminal prosecution against the directors of T&H for copyright infringement of the work of one of their artist members which T&H considered covered by the fair dealing exception. DACS' case was not made out (because T&H were ultimately able to establish, as a matter of fact, that a licence had been granted by the artist's widow), but not until many hundreds of thousands of pounds of legal fees had been incurred by T&H. Since that time we have not asserted our rights in relation to fair dealing and have licensed works by their member save where we consider that other acts permitted under the CDPA 1988 apply. However, DACS have consistently taken a very restrictive view of the exceptions permitted under the CDPA 1988. Indeed, their line on 'works of artistic craftsmanship' and the exceptions that publishers may have recourse to is set out on their website in their letter to the IPO of 23 October 2014. We mention this to highlight that it is very likely that DACS will aggressively seek to assert the rights of their members to licence fees following the repeal of s.52.
- In addition – and this is an important point - there is no scope to negotiate fees with DACS. They claim that because of competition law they are unable to apply more favourable fees to one publisher than another. Thus all publishers are forced to pay the fees set out in their

published tariff which is increased on an annual basis. Their current rates (2015) are attached to this Response so the IPO can be clear what the current fees are that publishers have to pay. This is important because in the Annex to the Consultation (p.11, paragraph 4) the IPO have taken a tariff rate (£72 per image) from one particular example T&H have previously submitted to them. The rate per image for a title depends on the number of images and the print run band being licensed. Discounts are applied in the case of multiple reproductions. However, these may not always apply and in the case of a title that includes just a few works by their members, but has a high print run, the rate per image can now be as high as £255. This is prohibitively expensive for publishers.

### **Additional points**

- In the Annex to the Consultation (p.11, paragraph 4) is stated: *‘However, the Government notes that such costs [ie. license fees] 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 decisions on whether to write on topic A or topic B.’* With respect this is misconceived. First, as we have explained, the living creators of artistic works (by which we mean works that are not subject to industrial manufacture) are usually easily identified and often disposed to give permission for the inclusion of their work in a critical study for no or low fees. Secondly, books on design have a limited audience and so have necessarily lower print runs. Therefore, their production cost, which is at least as high, if not higher in some cases, as books on works of fine art has to be earned back over a longer period. In assessing the profitability of such books at least a 10-year life span, often more, is considered. Thirdly, we would like to quote from the 2103 submission by Charlotte and Peter Fiell: *“... the whole point of design is replication, unlike fine art where it is often the artwork’s uniqueness and directness to the creator that imbues it with value. Therefore, to effectively treat the copyright of a work of mass-produced design like a work of fine art is to fundamentally misunderstand the differences between these two fields of endeavour and their creators’ underlying motivations – art being mostly about aesthetics and/or the transference of ideas, while design is mostly about problem solving and functionality.”* Design works are not comparable to works of fine art and publishing on design is niche and is not comparable to publishing on other fields in the visual arts. Far from removing any copyright-driven distortions in deciding whether to write on topic A or topic B, the repeal of s.52 and the latest Government proposals will, in fact, introduce a significant distortion on publishing decisions. Namely, the decision will be not to publish in this area.
- Finally, it necessary for the Government to bear in mind that publishers have to pay two copyright fees in publishing a 2D image of a design work as there are also license fees to be paid to the photographer of the work.

### **Impact - Costs**

- Under the previous transitional provisions, publishers had until 6 April 2020 to adjust to the change in the law and stock already printed as at that date would not have been impacted. T&H have relied on these provisions in forward planning both new titles for publication pre-2020 and reprints of existing titles. All such forward planning must now be adjusted. In this context, we do not agree with Professors Bently and Dinwoodie that relying on the previous transitional provisions and reprinting sufficient stock to be sold after the law was to come into effect in April 2020 would have in any way been ‘opportunistic’. This charge might have been levied at the furniture replica manufacturers, but to publishers, reliant as they are for profit

on the considerable backlist life of their publications, this would have been prudent forward planning to protect the investment they have made in their books.

- Coming in the last quarter of the year (the very busiest time for publishers), the present Consultation is also an onerous burden, has absorbed significant overhead in formulating a Response and has taken key senior management away from the very necessary everyday business of running the company. The extension for filing to 23 December 2015 has been appreciated, but has not reduced the considerable work that has gone into this Response.
- It has not been possible in the time allotted for the Response for T&H to look at all its 600 + titles that may be impacted and work out the cost impact on each of the present Government proposals. This is the work of several months and will require the appointment of a dedicated team of picture researchers as well as substantial time of our in-house lawyer to advise on whether individual images will or will not need to be licensed. For the present purposes we have focused on two titles and presented evidence of the impact of the present proposals (see **Appendix** attached).
- The impact on other titles is likely to be just as marked. Most of our titles contain many images of works by different rights owner. If Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995 is also repealed we face the additional challenge of the refusal of licensing by rights owners. As we cannot simply remove an image from a book which is already printed, we might well be faced with the prospect of pulping entire print runs because one rights owner exercises their right to refuse permission.
- We do not consider it to be an option to drastically reduce the recommended retail price of these titles and sell them as remainder stock (some 20% of the RRP). Our understanding is that, following 28 October 2016, remainder booksellers would themselves be in breach of copyright by selling (issuing to the public) what would then be 'infringing copies'. Accordingly, remainder booksellers will have very little appetite to buy vast stocks of books they would only have a very limited time to sell. We will not even be able to donate books to charities who themselves would be infringing copyright by selling them on to their customers.
- Longer term the repeal of s.52 is going to result in T&H and other UK-based illustrated book publishers publishing significantly less books on the design industry resulting in considerable loss of income both from home and export sales. For T&H this may mean considerations of staffing levels and possible redundancies.
- This will also have a knock-on effect on other parties: photographers, picture libraries and authors writing on this field who derive their income from publishers (both book and magazine) publishing in this area. In turn, the lack of availability of books on design will impact students of design, members of the public who read books on design and the design industry themselves. A manufacturer may spend hundreds of thousands of pounds on advertising and social media, but the value of well-written, meticulously curated, designed and edited books on their work will be lost. Design will, overall, get less attention, to its detriment.
- We should add that there will also be fewer design exhibitions mounted by museums and other parties as an exhibition catalogue (the sales of which support the cost of mounting the exhibition) will be prohibitive. We mention it here because, from July next year, Thames & Hudson will be co-publishing with The Victoria & Albert Museum all but their children's list. The repeal of s.52 will have a direct impact on their exhibition programme and the books we publish with them.
- For the sake of completeness, we would also mention the film and television industry in whose existing work sit design works which will need to be retrospectively licensed. For these industries it will also entail, in future, avoiding such work as set dressings and props.

## Impact – Benefits

- We can see absolutely no benefits for T&H or other publishers of illustrated books on design of the current Government proposals.
- As we have pointed out in a previous consultation, the only parties likely to gain are those producing and trading in counterfeit copies of books on design who will step in to meet market demand for out-of-print titles. The IPO will presumably be aware of the production and dissemination of pirated copies of books, both in print and digitally on line. Thus, paradoxically, a law designed to extend copyright protection will likely have the opposite effect - resulting in greater copyright infringement. This will also entail publishers in additional costs of monitoring infringement and taking steps to deal with the infringers.

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

We find it extraordinary and unfathomable that the six months or indeed, any transition period should run from the start of a consultation rather than from the date of the Commencement Order brought into effect by Statutory Instrument following the Government's proper consideration of the responses of all parties to the Consultation.

It would seem to that in the conduct of the consultation itself, the Government are failing to follow its own consultation principles:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/255180/Consultation-Principles-Oct-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf)

In particular:

- *'Engagement should begin early in policy development when the policy is still under consideration and views can genuinely be taken into account'*. Given that the Government has already decided on the transitional provisions, this has not been followed;
- The fact that the consultation period is only of just under 8 weeks duration whereas the principles state: *'For a new and contentious policy, 12 weeks or more may still be appropriate.'*
- *'Policy makers should be able to demonstrate that they have considered who needs to be consulted and ensure that the consultation captures the full range of stakeholders affected'*. We have ourselves alerted their key illustrated publishers (Phaidon, Octopus, Dorling Kindersley) who have not been contacted by the IPO. There may be very many users of 2D images who have not been consulted because they are unaware of the present Consultation. We do not consider it sufficient for the IPO to have merely contacted those parties who have previously responded. It is not an onerous task to research and establish who are the affected stakeholders and to write to their CEOs or MDs. We do not believe that the Government have discharged their obligations in this respect.
- *'Sufficient information should be made available to stakeholders to enable them to make informed comments.'* The consultation document does not provide sufficient information to enable respondents to make informed comments and the IPO have shown themselves unwilling to answer our questions in order to provide clarity.

The introduction to the consultation document states that the Government intends to publish their final proposals for the repeal in spring (2016) whereas the 6-month period itself is due to end on 28 April 2016. How are publishers meant to consider what action to take when the final proposals are not yet clear? The Government opines that the proposal *'allows time for businesses to understand the effect of the repeal on existing stock and future business practices.'* This is a



wholly erroneous assumption. As the PA has already pointed out: *'For the outcome of the consultation to be pre-empted in this way does tend to call into question the value of the consultation exercise itself.'*

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

We have already fully set out our rationale for a 5-year transitional period in our previous responses. In brief, we would reiterate here, our publication cycle follows a 5-year time line from making an editorial decision to proceed with a new book, to commissioning it, it being written, edited, picture researched, produced, printed and shipped to warehouse. As we have said, we therefore consider a five-year transitional period for publishers to meet the criterion of proportionality being balanced, fair and reasonable.

We would add here again that we have made business decisions on our publishing list and incurred costs on the basis of the five-year transitional period and we consider it arguable that the Government are directly responsible for all our loss flowing from their change of policy.

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

In the circumstances, we consider it beholden on the Government to provide comprehensive guidance on all issues raised by this change of policy and to do so well in advance of the end of the transitional period so that publishers may take properly informed decisions on how to proceed.

**DEPLETION PERIOD FOR EXISTING STOCK**

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

This issue is fully addressed by Professors Bently and Dinwoodie in their submission and we can only endorse their learned arguments.

We would just add a few points.

It is self-evident that the reproduction by the replica furniture industry of unlicensed 3D copies of design objects is a wholly different and separate undertaking from the use by publishers, photographers, picture agencies, magazines, museums, film makers etc. of 2D images of such objects.

We have taken pains in previous consultations to explain this distinction and the Government has so far not been able to justify its stance save for stating that no distinction was made between them in the Flos case. With respect, we do not consider this to be a sufficient reason to inflict significant damage on the UK publishing industry, museums, photographic agencies and photographers with no particular benefit for the rights owner. In fact, as we have been at pain to explain, the designers will, inevitably, be damaged by the lack of books on their work.

We would urge the Government to consider this issue again and revert to the previous 5-year transitional period for users of 2D images with no impact on images taken or reproduced before the repeal date.

**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?**

The depletion period is to be limited to *'only to goods produced or acquired under a contract entered into before the publication time and date of this consultation.'* Jackie Wilson of Quarto has raised the

very pertinent question as to which contracts this applies given that each book will be subject to very many contracts.

Is the contract in question: the publishing contract with the author (this is usually the first contract time-wise), the contract with the photographer, or picture researcher, rights owner, printer, co-edition publisher? Indeed, are the 'goods' in question, the book itself or a photograph of an artistic work to be reproduced in the book? If the latter, this will raise all manner of complications as publishers will not have entered into a contract for photographs of works that may be caught by the repeal of s.52 as they would still be relying on that provision under the previous transitional provisions.

The depletion provisions are therefore flawed and contrary to consultation provisions: *'Sufficient information should be made available to stakeholders to enable them to make informed comments.'*

**Are there any other factors that the Government should consider for the depletion period?**

**Do you agree that the period provided for depletion of stock is proportionate?**

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

The Government should consider that books need to have a significant life in which to earn out advances and amortize production costs. Many books will take at least 10 years to do this. T&H is still selling backlist titles first published in the 1970s and before.

Accordingly, if there is to be a depletion period - with clearly defined parameters - it should be significantly longer – years rather than months. Five years would be proportionate given their continuing sale would not be harming the rights owner, but on the contrary for the reasons already given would be benefitting them. This is another argument to differentiate between 3D and 2D.

The costs of licensing or abandoning publications as at the 28 October 2016 are already dealt with above.

**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?**

It is not clear how this would apply to the publishing industry.

**PROVISION OF COPYRIGHT PROTECTION FOR WORKS MADE BEFORE 1957**

**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?**

**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?**

This is a provision absent from the original consultation and we can only endorse what Professors Bently and Dinwoodie have written on this. We also echo what the PA has written in their latest Submission – that although this is being presented as the closing of a loophole, the IPO itself seems unclear as to the impact of this. Instead, the Government are throwing the onus on respondents to state the impact of its amendment.

As the proposal would exclude from Para 6 items protected by copyright in the EU as at 1 July 1995, the effect would actually be to give such items protection as Para 6 is itself an exclusionary provision. This being the case, our view is that it should not be amended.

## **COMPULSORY LICENSING OF WORKS WHERE COPYRIGHT IS REVIVED**

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

Again, we defer to Professors Bently and Dinwoodie's arguments on this. Practically speaking, we have already written about the difficulties of establishing the author/creator and copyright owner of a given design work. Even if we are able to establish the author/creator and copyright owner what is going to be the position if one copyright owner, of one image of a design work in a book of several hundred images refuses to give permission? It is imperative that there be an obligation on rights-holders to provide a licence if publishers are not to be placed in the impossible position of choosing to risk legal proceedings for copyright infringement or else having to pulp entire print runs of books.

This was also absent from the original consultation and we wholly concur with what the PA have already written to Government on this: *'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 right-holders 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, had the ability to take at least 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 right-holders withholding permission. Its repeal is therefore of extreme concern'.*

### **Have you relied on or been subject to compulsory licensing in the past under Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995, and what were the costs or benefits?**

### **Would you expect to rely on or be subject to compulsory licensing in the future, and what would you expect the costs or benefits to be?**

Not applicable to T&H.

## **CONCLUDING REMARKS**

We echo the remarks made by the PA. The Government should:

1. Immediately stop the clock ticking on the length of the transitional period which must be linked to an actual piece of legislation;
2. Reintroduce the previously accepted 5-year transitional period for the use of 2D images of 3D works in published materials.

We would add to this the reintroduction of an indefinite depletion period for 2D images already reproduced in published materials as at the repeal date.

Finally, we consider that the 5-year transitional period should commence from the date of the new legislative act (SI) following the conclusion of the present consultation. The clock should not run from the previous revoked SI.

*Thames & Hudson 23 December 2015*

## APPENDIX – IMPACT ON TWO THAMES & HUDSON TITLES

### EXAMPLE 1:

- An expensive (£60 RRP) highly-illustrated title directed at design professionals, students and general readers. Author: [REDACTED]
- Description: *This definitive survey of one of the most popular, collectable and dynamic periods of international design offers a rich overview of all aspects of the subject. It covers furniture, lighting, glass, ceramics, textiles, product design, industrial design, graphics and posters, as well as architecture and interior design. Nearly 100 major and influential creators of the mid-century period are highlighted, including icons such as Saul Bass, Robin Day, Charles and Ray Eames, Marimekko, Isamu Noguchi, Dieter Rams, Lucie Rie and Paolo Venini, as well as architects Alvar Aalto, Philip Johnson, Richard Neutra and Oscar Niemeyer. An additional illustrated dictionary features hundreds more key mid-century designers and manufacturers as well as important organizations, schools and movements. Complete with thirteen specially commissioned essays by renowned experts and over 1,000 mainly colour illustrations, it is a must-have acquisition for any design aficionado, collector or general reader seeking inspiration for their home.*
- Press:
  - 'The ultimate compendium for fans of the aesthetic' Book of the Week, The Times*
  - 'An encyclopaedic volume that sets out to create a comprehensive portrait of every aspect of post-war production. That means a shelf-busting size, around 1,000 illustrations and a fascinating text that places objects in their often tumultuous historical context' Wallpaper\**
  - 'In collating mid-century design, this book does encourage one question - can you imagine life without it?' Alto Magazine*
- Publication date: 15 September 2014
- Format: Hardback/jacketed 544 pages 30.8cm (height) x 24 cm width
- Number of illustrations: over 1,000. A number are of buildings or other artistic works that have been licensed and some may fall under incidental use. So say, 750 images which were published in reliance on s.52.
- First print run (2014): 16,000 copies (including German and US co-editions)  
Second print run (2015): 7,750 copies (including Finnish and Dutch co-editions)
- For the purposes of our calculations we are assuming unsold stock as at 28 October 2016 will be in the order of 4,000 copies across all editions.

### IMPACT (see calculations attached):

We have looked at two scenarios in terms of profit. (This does not take into account additional licensing costs due to the repeal of s.52):

- A) We sell through the entire first and second print runs of 23,750; and
- B) We sell through the entire first and second print runs of 23,750 copies and reprint another 15,000 copies as was our plan under the previous five-year transitional provisions.

The additional copies would have taken a number of years to sell (possibly until 2025), but as can be seen, there would have been a modest profit on this title over time.

We have then looked at the impact of the current proposals:

### Option 1

We license our remaining stock as at 28 October 2016 of 4,000 copies.

This would result in a Net Loss to us of [REDACTED] or -14%;

## Option 2

We discontinue publication as at 28 October and pulp our remaining stock as at 28 October of 4,000 copies.

This would result in a Net Loss to us of [REDACTED] or -15% (Note: the percentage loss is higher here as we will not be receiving any income on sales);

## Option 3

We license 19,000 copies (4,000 copies + 15,000 copies)  
This would result in a Net Loss to us of [REDACTED] or -10%.

## **DECISION**

Under the latest proposals we will make a loss on this title, but the smallest loss in financial terms will be to discontinue publication and pulp all copies remaining at 28 October 2016. Not only will this impact on Thames & Hudson, but the Author will lose out on royalty income he would otherwise have earned.

It is important to add that in reliance on the five-year transition period we have commissioned two further large scale titles on mid-century design for publication in 2017 and 2018. Our plan would have been to print a sufficient number of copies of these titles prior to the April 2020 date to enable us to make a modest profit before selling out. This is not now possible and unless the transitional provisions change in the light of the present consultation, the future of these titles is bleak.

## Assumptions:

### Cost of picture researcher

- We pay our picture researchers a standard rate of £20 per image. This is predicated on the picture researcher spending one hour researching and negotiating each image. However, for all the reasons set out in the main Response under Impact, whether a particular image needs to be licensed is not straightforward and it is likely we will have to pay picture researchers an enhanced rate to reflect this. For the purposes of these calculations we are assuming a conservative £25 per image rate.
- We cannot use our own small team of in-house picture researchers as they already fully committed to working on new titles for the next year.

### Licence Fees

- We are using DACS Rates for 2015 (attached). These will be revised (uplifted) for 2016. Annual uplifts have been in the order of 1.4 – 2.0%. Last year the uplift was 1.5%. This means the loss set out in the examples in fact, will be higher than indicated.
- While most members of DACS (and that includes members of their sister collecting societies around the world) come under the DACS published rates, by means not all do. There are many who apply their own (uplifted) rates. They also demand to see layouts before granting permission. This means that if Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995 is repealed, there is a risk that rights owners will feel free to demand enhanced licence fees using the threat of withholding permission as leverage.
- Not all rights owners will be represented by DACS, but we can assume many will. Those rights owners who are not represented by DACS may charge a fee more or less than DACS rates

although, unlike DACS, such rights owners may be agreeable to a negotiation on fees. However, for the purposes of this Response, we are using DACS rates as indicative of the likely level of fees we will incur.

- We are applying DACS Rates for Worldwide (all languages).

#### **EXAMPLE 2:**

- A medium-priced (£30 RRP) highly-illustrated title directed at fashion professionals, students and general readers. Authors: [REDACTED]
- Description: *Indispensable accessories and sought-after collectors' items, scarves were an important innovation in 20th-century fashion. From Art Deco through 1950s Hollywood, the Swinging Sixties and beyond, scarves have been represented in every major decorative arts movement over the past century and into the present one. This illustrated compendium showcases the work of a wide range of international designers: Paul Poiret, Elsa Schiaparelli, Balenciaga, Mary Quant, Gucci, Christian Lacroix, Yves Saint Laurent, Zandra Rhodes, Nicole Miller, and many more. Here are more than 250 scarves, beautifully reproduced in colour and all specially photographed, and many never before seen in print. Includes concise biographies of more than fifty scarf designers, retailers and manufacturers, and a resource guide provides expert advice on dating and conservation, museum collections, vintage fairs and specialist dealers.*
- Press:

*'A rainbow-bright sourcebook of scarves ... reveals some unexpected gems' Harper's Bazaar*

*'Gorgeous ... "I don't give a chic!" reads the subversive slogan on a 1990s scarf by Moschino. This book will appeal precisely to those who do' Country Life*

*'Fascinating ... the neck's big thing' The Lady*

- Publication date: 14 March 2011
- Format: Hardback w/out jacket 304 pages 30 cm (height) x 25 cm width
- Number of illustrations: 257 of which 239 were published in reliance on s.52.
- First and only print run (2011): 10,500 copies (including US and French co-editions)
- For the purposes of our calculations we are assuming unsold stock as at 28 October 2016 will be in the order of 550 copies across all editions and these copies will need to be licensed

#### **IMPACT (see calculations attached):**

We have looked at two scenarios in terms of profit. (This does not take into account additional licensing costs due to the repeal of s.52):

- C) We sell through the entire first print run of 10,500 copies. This would not be sufficient to make a profit on this title resulting in a loss of [REDACTED] or 0.8%. This is a title which in backlist sells in steady, but modest numbers each year. When we published it in 2011 we were dependent on it having a long backlist life and coming into profit in c.2016.
- D) We sell through the entire first print run of 10,500 copies and reprint 2,000 copies (This is the number we would have printed under the previous five-year transitional provisions to enable us to make a very modest 0.1% profit.

We have then looked at the impact of the current proposals:

#### **Option 1**

We license our remaining stock as at 28 October 2016 of 550 copies.

This would result in a Net Loss to us of [REDACTED] or -14%

### **Option 2**

We discontinue publication and pulp our remaining stock as at 28 October of 550 copies.  
This would result in a Net Loss to us of [REDACTED] or -7%

### **Option 3**

We license 2,550 copies (550 + 2,000 copies)  
This would result in a Net Loss to us of [REDACTED] or -12%

### **DECISION**

We will make a loss on this title, but the smallest loss in financial terms will be to discontinue publication and pulp all copies remaining at 28 October 2016. Not only will this impact on Thames & Hudson, but the Authors will lose out on royalty income they would otherwise have earned.

Assumptions: (as per Example 1)

**MID-CENTURY MODERN**

**A) We sell through 23,750 copies**

**B) We sell through 23,750 copies & reprint 15,000 copies**

|   | Copies<br># | Income<br>£ | Copies<br># | Income<br>£ |
|---|-------------|-------------|-------------|-------------|
| TH UK Revenues  | 9,000       |             | 14,000      |             |
| Co-edition Revenues   | 14,750      |             | 24,750      |             |
| <b>Total Income</b>   |             |             |             |             |
| Production Costs  |             |             |             |             |
| Picture Fees  |             |             |             |             |
| Photographer Fees   |             |             |             |             |
| Author Fees   |             |             |             |             |
| Author Royalties  |             |             |             |             |
| Editorial, Design, Selling & Marketing Overhead (Trade)       |             |             |             |             |
| Editorial, Design, Selling & Marketing Overhead (Co-editions) |             |             |             |             |
| <b>Total Costs</b>  |             |             |             |             |
| <b>Net Profit</b>   |             |             |             |             |
| <b>Net Profit %</b>   |             | 2.7%        |             | 3.1%        |

|  |   |
|--|---|
| <b>Option 1 - Licence 4,000 copies as at 28 October 2016</b> | <b>Option 3 - Licence 19,000 copies</b> |
| Picture Researcher   | Picture Researcher                      |
| Licence Fee for 4000 copies                                  | Licence Fee for up to 20000 copies      |
| Legal Costs  | Legal Costs                             |
| <b>Net Loss</b>  | <b>Net Loss</b>                         |
| <b>Net Loss %</b>  | <b>Net Loss %</b>                       |
| -14%   | -10%                                    |

|   |
|---|
| <b>Option 2 - Discontinue &amp; pulp 4,000 copies</b> |
| TH UK revenue loss                                    |
| Co-edition revenue loss                               |
| Plus Royalty recoup from author                       |
| Plus cost of pulping stock                            |
| Overhead cost   |
| Total Cost of abandoning publication                  |
| <b>Net Loss</b>                                       |
| <b>Net Loss %</b>                                     |
| -15%  |



## SCARVES

### A) We sell through 10,500 copies

|   | Copies<br># | Income<br>£ |
|---|-------------|-------------|
| TH UK Revenues  | 5,000       |             |
| Co-edition Revenues   | 5,500       |             |
| <b>Total Income</b>   |             |             |
| Production Costs  |             |             |
| Picture Fees  |             |             |
| Photographer Fees   |             |             |
| Author Fees   |             |             |
| Author Royalties  |             |             |
| Editorial, Design, Selling & Marketing Overhead (Trade)       |             |             |
| Editorial, Design, Selling & Marketing Overhead (Co-editions) |             |             |
| <b>Total Costs</b>  |             |             |
| <b>Net Profit</b>   |             |             |
| <i>Net Profit %</i>   |             | -0.8%       |

### Option 1 - Licence 550 copies as at 28 October 2016

|                                  |      |
|----------------------------------|------|
| Picture Researcher               |      |
| Licence Fee for up to 550 copies |      |
| Legal Costs                      |      |
| <b>Net Loss</b>                  |      |
| <i>Net Loss %</i>                | -14% |

### Option 2 - Discontinue & pulp 550 copies

|                                      |     |
|--------------------------------------|-----|
| TH UK revenue loss                   |     |
| Co-edition revenue loss              |     |
| Plus Royalty recoup from author      |     |
| Plus cost of pulping stock           |     |
| Overhead cost                        |     |
| Total Cost of abandoning publication |     |
| <b>Net Loss</b>                      |     |
| <i>Net Loss %</i>                    | -7% |

### B) We sell through 10,500 copies & reprint 2,000 copies

|   | Copies<br># | Income<br>£ |
|---|-------------|-------------|
| TH UK Revenues  | 7,000       |             |
| Co-edition Revenues   | 5,500       |             |
| <b>Total Income</b>   |             |             |
| Production Costs  |             |             |
| Picture Fees  |             |             |
| Photographer Fees   |             |             |
| Author Fees   |             |             |
| Author Royalties  |             |             |
| Editorial, Design, Selling & Marketing Overhead (Trade)       |             |             |
| Editorial, Design, Selling & Marketing Overhead (Co-editions) |             |             |
| <b>Total Costs</b>  |             |             |
| <b>Net Profit</b>   |             |             |
| <i>Net Profit %</i>   |             | 0.1%        |

### Option 3 - Licence 2,550 copies

|                                   |      |
|-----------------------------------|------|
| Picture Researcher                |      |
| Licence Fee for up to 3000 copies |      |
| Legal Costs                       |      |
| <b>Net Loss</b>                   |      |
| <i>Net Loss %</i>                 | -12% |

# DACS RATES 2015

## Books

Please find below our current prices for reproductions in books, with further information on

## Prices

| Print Run     | Distribution territory / languages | Worldwide (English language only) |       | Worldwide (all languages) |       |
|---------------|------------------------------------|-----------------------------------|-------|---------------------------|-------|
|               | Type of reproduction               | Editorial                         | Cover | Editorial                 | Cover |
| up to 500     |                                    | £48                               | £214  | £51                       | £226  |
| 501-1,500     |                                    | £78                               | £254  | £83                       | £268  |
| 1,501-3,000   |                                    | £102                              | £305  | £108                      | £320  |
| 3,001-5,000   |                                    | £124                              | £382  | £132                      | £403  |
| 5,001-10,000  |                                    | £149                              | £436  | £156                      | £461  |
| 10,001-15,000 |                                    | £163                              | £493  | £173                      | £519  |
| 15,001-20,000 |                                    | £180                              | £547  | £190                      | £577  |
| 20,001-30,000 |                                    | £203                              | £609  | £213                      | £641  |
| 30,001-50,000 |                                    | £225                              | £672  | £238                      | £708  |
| 50,001-80,000 |                                    | £243                              | £735  | £255                      | £774  |

If your print run exceeds 80,000 please contact us at [licensing@dacs.org.uk](mailto:licensing@dacs.org.uk)

Prices are per reproduction.

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| Discount structure   |     |
|----------------------|-----|
| 1-4 reproductions    | 0%  |
| 5-10 reproductions   | 20% |
| 11-30 reproductions  | 30% |
| 31-50 reproductions  | 40% |
| 51-100 reproductions | 50% |

Please note: the number of reproductions refers to the number of copies of works in a single publication.



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