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Section 52 consultation
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Dear Sir or Madam,

Consultation of transitional arrangements for the repeal of section 52 of the Copyright, Designs and Patents Act 1988 ("CDPA") ("Consultation")

BAPLA's position on the Government's Consultation remains the same as already expressed on two prior occasions (including as part of the Enterprise and Regulatory Reform Bill): the repeal of section 52 will have a significant chilling effect on the photographic industry and so BAPLA supports a 5 year transition period in respect of 2D copies of the articles subject of the Consultation ("Articles"). These views are captured on page 12 of the impact assessment appended to the Consultation ("Impact Assessment") but, for completeness, we attach BAPLA's most recent submission from 27 October 2014.

Given our previous detailed responses on this topic, and the Government's acknowledgement of our industry's position, we will limit this submission to some additional comments in response to the Consultation.

BAPLA believes that the adverse impact of the repeal on the photographic industry would be minimised once the Government recognises that the objective underlying the transitional arrangements can be met by distinguishing the arrangements made in respect of 2D and 3D copies of Articles. This objective is expressed at paragraph 13 of the Consultation following the Flos case (C-168/09), and it is for the transitional arrangements to be proportional, bearing in mind the acquired rights of third parties concerned and the right holders.

It is BAPLA's assertion that this balance is achieved differently for 2D and 3D copies. The balancing exercise must, in each case, take into account the harm that the repeal will cause to parties operating under the current system versus the harm it will prevent. The quote from a right holder on page 6 of the Impact Assessment confirms our position. The concern expressed in the quote it focuses solely on potential losses resulting from imports of unlicensed 3D copies into the UK. It is beyond the scope of BAPLA's activity to comment on this alleged loss but one thing is clear - the loss from 2D copying does not feature in the quote, nor, we suspect in the consciousness of the majority of the designers. This is because any such harm - to the extent it arises at all (and BAPLA asserts it does not) - is disproportionately low compared to a loss suffered as a result of competing sales of 3D replicas of the Article in question. It is therefore imperative that the transitional arrangements reflect this position by affording the makers of 2D copies appropriately longer transition periods.

As you will be aware, section 52 was introduced to embody the UK's obligations under the Berne Convention in respect of works of applied art on the one hand, and on the other hand, to "rid copyright of its most egregious excess in entering the realm of industrial property"¹. This balance has now shifted in favour of designers as a result of the European Union legislation and case law. Whilst we must comply with it, the copyright "gain" of the design industry which damages other lawfully existing and unrelated business models seems to be overreaching beyond what the Design Directive and the Flos decision had intended.

The photography industry in the UK, and photographic agencies in particular, are important contributors to the UK economy, generating revenue, employment, and export earnings. BAPLA members employ in the region of 2,500 people in the UK and generate revenue for, and manage the interests of, 120,000 creators and rights holders. They range from a majority of sole traders and SMEs, to medium and large sized agencies. Our members contribute significantly to a whole range of economic activities such as news-gathering and reporting, education and research, as well as database creation, which supports the all-important digital agenda both at the national and international level. A change in law which results in our members having to abandon or reduce their activity due to disproportionately high costs of what our members may believe (correctly or not) that they must do to comply with it will have an impact on all the above activities, not only for our members but also their contributing photographers and publishing clients.

On a practical level, considering the impossible task of conclusively identifying which articles are protected for the newly extended term it is not feasible or realistic to expect the photographic industry to "deplete" images of the articles. First, as mentioned above, this would deprive our members of the possibility of carrying on the business which that they do lawfully and which serves an altogether different function from, and does not compete with, the business of designers. Secondly, the costs of doing so would vastly outweigh the value charged for such works within 2D images. The only way to lessen this risk for 2D rights holders, in addition to making the transition period a reasonable and proportionate duration, is to extend the depletion period indefinitely for 2D works to allow for the use of images licensed before the end of the transition period to be used within the full contractually licensed duration. This is particularly important given that many licenses granted to our members offer perpetual rights (e.g. images licensed under a "royalty-free" model). If implemented as currently proposed this law would unjustly prejudice interests of copyright holders in

¹ After W. Cornish and D. Llewelyn, Intellectual Property, Sweet & Maxwell 2007

contravention of the Berne Convention's three step test. 2D copies should therefore be distinguished from 3D copies for the purpose of the provisions relating to the depletion of stock.

BAPLA was advised by the IPO at the meeting on 30 November that photo agencies might benefit from certain copyright exceptions under the CDPA, such as the newly introduced quotation exception. It is noted that the application of this exception is as yet untested and therefore of no comfort to our members. Nor is the assumption that incidental inclusion (with "incidental" not defined by Parliament in this context²) may fix the problem, especially when there is also no clear definition of what artistic craftsmanship entails. BAPLA would welcome further guidance from the IPO on this.

To leave these boundaries to be determined via litigation, as will likely be the case if photographic agencies and their customers are not given sufficient time to adapt their practices to the new law, is likely to cause harm to a range of 2D rights holders, and following, create a considerable chilling effect across an entire repertoire, specifically impacting on the livelihoods of 2D rights holders whose intentions are to support the promotion of these aspirational 3D products. In any case, the mere existence of the exceptions does not justify the disproportionately short transition period in respect of 2D copies.

In the view of the above, we respectfully submit that the 6 months' transitional period proposed by the Government is inappropriate for our sector and at odds with the objectives of the proposed legal reform. Once again we call for a transitional period of 5 years, as previously committed to by the Government, based on the evidence provided by all 2D rightsholders for each consultation to date.

"The fact that there has been no consideration for those professionals whose livelihoods depend on 2D works, which supports the desirability of 3D works, either in relation to an extremely short transition process nor to the consequences of leaving them open to the possibility of legal challenges is irresponsible. Proportionate provisions must be made to cater for such professionals to enable them to adjust in a timely manner and with guidance." Isabelle Doran, BAPLA Chairperson.

Kind regards

Ania Skurczynska
On behalf of BAPLA

Encl. BAPLA submission on the last s.52 consultation, 27th October 2014.

² The Court in the Panini case reminded us that 'incidental' is an ordinary English word that was purposely left undefined by Parliament



Intellectual
Property
Office

Transitional provisions for the repeal of section 52 of the Copyright, Designs and Patents Act 1988 – consultation response form

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is 27 October 2014.

Please email section52CDPA@ipo.gov.uk your completed response form.

Name Isabelle Doran

Organisation (if applicable) BAPLA (British Association of Picture Libraries & Agencies) is the trade association representing over 200 members ranging from large to medium-sized companies to micro businesses and individuals licensing photographic images. Members include the major news, stock and production agencies as well as sole traders and cultural heritage institutions. A significant percentage of images seen every day in print and digital media is supplied by BAPLA members. Our members employ approximately 2,500 people in the UK and generate revenue for, and manage the interests of 120,000 creators and rights holders.

Email address info@bapla.org.uk

Please select the option below that best describes you as a respondent.

<input checked="" type="checkbox"/>	Business representative organisation/trade body
<input type="checkbox"/>	Large business (over 250 staff)
<input type="checkbox"/>	Medium business (50 to 250 staff)
<input type="checkbox"/>	Small business (10 to 49 staff)
<input type="checkbox"/>	Micro business (up to 9 staff)
<input type="checkbox"/>	Charity or social enterprise
<input type="checkbox"/>	Central government
<input type="checkbox"/>	Public body
<input type="checkbox"/>	Individual
<input type="checkbox"/>	Other (please describe)

Questions:

1. Have you obtained or will you obtain legal advice on the implications of the repeal of section 52 on your business? Please outline any costs or budgets assigned for this purpose.

As we represent photo libraries and agencies we have advised that they seek to obtain legal advice individually as our members represent a broad range of archives, from large organisations (with up to 100 million images) with a percentage of their collections that will be affected to small or micro businesses (with up to 30,000 images) who are specialist archives whose entire collections will be affected. Therefore the costs will vary across our membership.

Having consulted with several in-house photo library legal representatives for this legislation, it is fair to say there has been a great deal of uncertainty as to the extent to which the repeal will affect members and precisely which types of 3D works would be considered as artistic, therefore estimating costs may not reflect the true picture.

From a small sample however, those consulted said they would be seeking legal advice, although none were able to estimate the costs. One member offered £1-2,000 shared with other specialist libraries.

One of our larger members estimated the initial legal advice coupled with the review of a sample of their collection at £5,000. It pointed out, however, that the value of the legal advice is doubtful as it will be impossible – and unheard of – for legal advice to clear rights wholesale. As mentioned above, establishing whether a particular work constitutes artistic work, and whether any copyright exceptions or defences may apply is meaningful only on a case by case basis.

2. What type of action have you taken/will take to reduce the legal uncertainty of what items would be affected by the change in law? Please outline any costs.

Our members viewpoints vary from considering indemnity insurance, to tightening contractual arrangements, providing clear guidelines to contributors, to removing content which appears to show substantial use of 3D works. Further details on the range of measures that will be taken are mentioned in more detail in other questions.

3. Should the UK Government provide non-statutory guidance, for example in the form of a “Copyright Notice”, on what items are likely to attract copyright as artistic works? If so, what are the factors that should be considered in this guidance?

Overall our members were keen to see a guidance notice from the IPO, at the very least so they can advise their contributors and clients about Section 52 in relation to 2D works, including providing a guidance on the types of works to consider and reference points where reliable information can be found about specific copyright protected designs (including visual examples) and specific designers (including date of death, if applicable, and contact details for clearances). For example, one member was uncertain, as differentiating the types of works affected would be very difficult, as mentioned in our response to Question 1 above.

Another very important factor that we would like to see prominently featured in a Copyright Notice, is the availability of the various copyright exceptions that may apply, in particular how the incidental use exception will likely

apply where inclusion of the artistic work is not essential for the object for which a photograph or other 2-D work is produced (Panini case) and an acknowledgement of how this particular exception is considerably wider in scope than the equivalent “accessory” exception in France (as we reliably understand is the case).

4. If you wished to replace unlicensed copies in your current product range, which route are you more likely to take? Please explain why.

N/A

5. If you elect to source new products through new suppliers, what are the costs and benefits in a 6 month, 3 year and 5 year period?

N/A

6. The Government understands there are difficulties in developing commercially successful products, with only a small number of products being successful in the market. Do you think you would be able to replace products you believed were at risk of copyright infringement in a period of 6 months, 3 years or 5 years using one or more of these routes?

N/A

7. Are there any other difficulties (not discussed in this document) in responding to statutory change within a period of 6 months, 3 years and 5 years?

From the sample members, many found the largest issue was in increase in business uncertainty in terms of not knowing which 3D designers may try to legally challenge the use of their products within a photograph, causing a chilling effect in using well-know 3D design pieces, and affecting businesses servicing media and news gathering organisations including businesses of our members.

The case of Le Corbusier vs. Getty Images, in France, even without the details, has had a marked effect, particularly on specialist collections/libraries, to the point of rejecting images from collections with such well-known pieces.

The other significant issue was calculating the cost to businesses - without understanding the extent of the impact it was difficult for members to evaluate and present costs. One other aspect was trying to differentiate between whether the use of a work would be seen as editorial or commercial use, an issue which has perplexed many in the creative sector during the Orphan Works consultation process.

Many of our members distribute content through a network of international resellers. Some of those resellers have rights to distribute content in the UK. These are long-term agreements with detailed representations and warranties relating to the content offered under the agreements.

Implementation in a short timeframe would most certainly affect these relationships and re-allocate risk in a manner inconsistent with the bargain lawfully struck by the contracting parties.

Finally, a short transition period of 6 months would be the most costly and risk-inducing for photographic agencies that have licensed images prior to the date of implementation where they have included warranties/indemnities as part of their standard licensing terms guaranteeing the safe use of the images. This is especially so for images licensed under a 'royalty-free' license model where, often, the photo agency guarantees that any

necessary clearances will have been obtained for all commercial uses, in perpetuity. The "royalty-free" license model is increasing in popularity across the industry and, for some members, already accounts for a significant proportion of their archive. As one member commented, "Some of these licenses have already been purchased by many clients. To notify or recall and refund these licenses, and identify which images will be affected is an enormous and at the moment an unquantifiable task".

The longer the transitional period, the greater the opportunity to evaluate the associated risk and the greater the chance that any client uses will have come to an end. Accordingly, a transition period of 5 years would provide a greater, albeit certainly not a complete, level of comfort.

8. Will your business be able to absorb the costs of transition in a period of 6 months, 3 years and 5 years? Please explain why.

Most respondents agreed that a transition period of 3-5 years would be preferable, as 6 months would be unrealistic in terms of time to assess their archives even from a small specialist collection size of 25-30,000 images. One respondent said, "Unequivocally, we would not be able to absorb any costs within 6 months. 5 years would be more cost effective based in the size of the collection, and 3 years would be the limit." Another said "Uncertain as prices have dropped so much. We would require training for ascertaining the need for clearance".

9. What are the costs and benefits of allowing an indefinite transition period for items manufactured or imported before the change in law takes effect?

N/A

10. Do you agree it is unnecessary to exercise the powers under section 100 in order to give effect to Government policy? Please explain why.

N/A

11. Do you believe it is necessary to make express provisions to give effect to Government policy that the change in law will only apply to items that are manufactured or imported when and after the change in law takes effect? How should this be achieved?

N/A

12. If you wish to voluntarily establish a stock inventory system, what would be the costs of doing so? What would be the key factor for you in establishing such a voluntary stock inventory system?

N/A

13. Do you agree with this average timeframe for introducing new products and designs to the market? Please explain your views.

N/A

14. Assuming that you have known that section 52 of the CDPA was to be repealed since April 2013, would a transition period of 6 months, 3 years or 5 years provide sufficient time for your business to introduce new designs to the market in order for your business to survive?

N/A

15. If you are a publisher, will a 6 month, 3 year or 5 year transition period be sufficient to factor in any licensing costs (if any) to development plans?

Whilst our members are not publishers many of their clients are, with book publishers as one of the largest client sectors for photo libraries, the possible costs of either losses (cancelled projects or not using certain images) or incorporating costs of business over increased risk, will have a knock on effect.

One collecting society was quoted as saying to a contributing photographer, "We are often told by publishers that creators of [visual] works should waive fees as their works are effectively being marketed by the publisher. We disagree".

16. Will a period of 6 months, 3 years or 5 years be sufficient for museums to plan publication programmes, assess and mitigate impact on collections policies and planned exhibitions of artistic works that could have copyright revived? What are the costs and benefits of doing so?

BAPLA represents a number of museum picture libraries who will also be affected by the transition of this repeal. We support their submission to this consultation.

17. Will a 6 month, 3 year or 5 year period provide sufficient time to review existing photographic archives, taking into account the factors listed above? What are the costs of doing so, and could these costs be recouped over such a period?

As with Question 8, many of our members found it extremely hard to quantify the overall costs to their businesses, as many would have to assess their archives from the offset as well as look at several contingency plans once they had conducted a risk assessment. Most members offered a 5 year plan from the date the repeal transition is announced, to give them time to employ and assess their collections and put procedures in place as well as plan for the loss of business they will encounter. 3 years was the limit, with many taking the bare minimum or most risk averse approach by simply culling those photographs in their collections that were substantial detail shots. This would incur higher losses but would counteract any likelihood of claims or clearance required. The cost of the repeal effect would be amplified significantly if a 6 months transition period was introduced, with many specialist libraries closing and specialist photographers in architecture and interior design struggling to make ends meet as more assignments become risk averse. One member attempted to sum up the possible costs of taking on staff to assess their archive, using the Impact Assessment analogy from the Orphan Works submissions to the IPO (page 16). "...it would take approx. 14 people the same amount of hours (3.5) over 3 years to check half of our collection and determine whether rights need to be cleared. We have less than 5 staff employed and could not afford to employ more people."

Speaking with members, the factors many would have to consider are as follows, although this only a sample:

- putting procedures and policies in place;
- employing and training staff with specialist technical expertise, if affordable (as one member stated, "Without training it is hard to assess a timescale" and another "To employ extra staff...on the average UK wage of

£22,000 per year, requiring 3 years, it would cost £308,000 per year. This would simply not be commercially viable");

- reviewing & revising business models such as licensing;
- informing clients on copyright clearance;
- revising contractual revisions & arrangements;
- consider contingency & insurance plans to mitigate risks;
- assessing percentage of archives affected;
- photographer/contributor guidance notes and legal advice;
- either bringing forward to cancelling planned shoots with clients (incl. costs incurred and loss of revenue).

As one client stated, "5 years or longer, we work on books, some with academics that can take 3 - 5 years...One third of our collection will no longer be available. Because this one third will be strong graphic images, previously suited to book and magazine covers, it will cut our revenue by up to 50%".

Many members have not yet started to undertake an assessment of their archives and the implied costs, in the main because they as yet don't know what 3D works will be affected and how substantial the uses have to be. Only until the Secretary of State announces when the transition period will start and what 3D works will be included will they act to review their collections.

We need to point out that one of the key assumptions made in both the government's Consultation paper and the associated Impact Assessment regarding the ease with which photographs containing artistic works can be identified and tagged is patently wrong. This assumption reads: "Once the rights have been cleared for one item in a collection of digitised and tagged photography, the number of similar photos that will need to be reviewed should be reduced, thus lowering administration costs." However, this is certainly not true in practice for a number of reasons. Firstly, items of furniture and the like are not normally tagged in royalty-free lifestyle shots as the tagging normally concentrates on the overall message being conveyed by the photograph. At most, the tagging would normally contain a generic description of any inanimate objects featured, not by reference to designer or manufacturer. Secondly, photo agencies usually receive images from various contributors with varying degrees of knowledge and understanding, from countries all around the world. Educating contributors and monitoring submissions from such a diverse range of sources is extremely challenging. Even taking a cautious approach of trying to avoid artistic works altogether is not fool-proof when taking shots of interiors, in either domestic or industrial settings. Finally, just because an artistic work might be identified and tagged in one photograph does not then mean it is easier to identify the same artistic work in other photographs, especially photographs that are already in circulation delivered to clients in different ways (e.g. on hard drive, API, FTP feed, via DAM systems, etc) and at different stages of the licensing process (e.g. some clients might pre-license large pools of images as part of a subscription service or download high numbers of images before deciding much later which ones to actually use). Plus, at each stage of the production process there is a risk of metadata becoming detached.

18. The Government has received evidence on costs and benefits of the proposed changes primarily from European-based designers and rights holders. What are the costs and benefits of the proposed change for copyright owners and designers based in the United

Kingdom?

When it comes to 2-D copies of 3-D artistic works, we fail to see any benefits whatsoever for copyright owners and designers based in the UK (or elsewhere), as such copies do not pose any kind of competitive threat and, indeed, may in fact be complementary to sales of the 3-D artistic works by providing added profile and awareness. Similarly, for photo agencies and their clients, it is hard to see any benefits and the costs outlined are much the same as above. One client outlined the issue clearly, "Without an extensive list of 3D design works which maybe affected, the increase in uncertainty about who would come forward to request permission for use, require a licence, or expect royalty fee payments is much greater". They cited two examples, "we previously had a request for payment for a detailed photograph of a handmade toy used for the cover of a gift card. We also had a fabric designer whose work featured in several photographs used for a magazine publication which they questioned as the publication didn't match the aesthetic of the brand". Both represent the issue of clearing permissions, one raises the issue of potential costs and the other the increased risk of reputation/moral rights. As the same member pointed out it is the breadth of new and revived 3D design works and what is an 'everyday item' that is of most concern.

19. Please provide the benefits and costs for UK rights holders and designers if the implementation of the repeal of section 52 of the CDPA is delayed for a period of 6 months, 3 years or 5 years.

For photographers and their representatives who are the rights holders of 2D works, all agree that 6 months would be untenable based on the smallest specialist library archive of 30,000 images up to assessing some of the largest library archives of approx. 80-100 million images. Many favour 5 years transition as the revised their business models, whereas 3 years they would incur heavy costs but could just manage.

20. What are the costs, if any, due to consumer confusion over a period of 6 months, 3 years and 5 years?

N/A

21. Do you believe the licensing provisions in place would allow affected businesses to seek and obtain licences if they wished to transition their business from trading in unlicensed copies to licensed copies? If adequate licensing provisions are not in place, do you see this developing in a 6 month, 3 year or 5 year period?

N/A

22. What are the benefits and costs of the current licensing provisions in place? How would you anticipate the development of licensing schemes for 3D artistic works in a 6 month, 3 year or 5 year period?

N/A

23. Are there any issues that have not been raised in this consultation document, or in the associated Impact Assessment that would have an impact on the proposed transition periods of 6 months, 3 years or 5 years? If so, please provide information.

Many members are concerned by the unintended consequences of the repeal placing both visual creators and publishers who promote the works of

3D designers in a position of business uncertainty, which is hard to quantify when the potential range of works, whether new or revived, are unknown. Neither 2D creators nor publishers want to become a test case in UK law, and as one member commented "Design history will be edited."

There is an assumption that the exception provisions may potentially be useful, but this can depend, inter alia, on defining 'fair dealing'. Whether the use is editorial or commercial can also play into this analysis. Another member pointed out that there is "the assumption that obtaining permission for use occurs once only, in our industry, because there is a broad diversity of uses - all commercial, but some identified as editorial, some as advertising/promotion, and some as products/packages, etc, it means that permissions would have to be considered for each new use, everytime."

Of most concern are 2D visual creators and representatives who are not aware of the repeal of Section 52 and the 3D works that will receive the full term of protection of 70 years after the death of the author. Therefore a 6 months review would be highly impractical for our sector to prepare for the transition. A 3 year transition would mean significant revision of licensing models and abandoning possible book publications but by then many photographers and representatives would be in a reasonable and relative state, whereas a 5 year transition would enable most photographers and their representatives to fully embrace the changes, at least operationally.

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

One member noted from a contributing photographer that whilst they were fully aware of the copyright changes in UK law on Orphan Works, they were not aware of Section 52 and how far it would extend. The point here is that for the photography sector, many of our members and contributing photographers have been affected by number of significant copyright changes over the last four years, since the Hargreaves Review, which affect them directly whether it is hearing about them and understanding the legal changes. Many still have questions over the copyright changes, are confused and uncertain about where to get advice - legal advice is not often an option as it is a costly undertaking. There are few who would be aware of the legal case in France between Le Corbusier vs. Getty Images, but many who would simply state that they do not photograph or hold images of interior design pieces, not realising the full extent. For 2D visual creators, Section 52 did not receive the same level of scrutiny in Parliament, therefore it did not receive the same level of attention from our sector. The Government needs to provide further clear notification and increase awareness to all 2D creators so they can prepare for the transition process.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you indicate below.

Please acknowledge this reply

Yes ☒

No ☐