

Consultation on transitional arrangements for the repeal of section 52 of the Copyright, Designs and Patents Act 1988

This is the response from the Hachette UK Group. Hachette UK is one of the largest book publishers in the UK. The Group is made up of several publishing companies and imprints including Headline Publishing Group, Hodder & Stoughton, John Murray, Quercus, Orion Publishing Group, Octopus Publishing Group, Little, Brown Book Group and Hodder Education Group. Hachette UK is owned by Hachette Livre, the global publishing group based in France, which is in turn a wholly owned subsidiary of Lagardère.

The main illustrated publishing book company in the Hachette UK group is Octopus Publishing Group Limited (registered company number 3597451) whose registered office is at Carmelite House, 50 Victoria Embankment, London EC4Y 0DZ.

Octopus Publishing Group Limited ("Octopus") produces illustrated books on lifestyle topics including, design, fashion, furniture, jewellery and collectables, these types of books make up around 15 – 20% of its business. For example, Octopus publish "How to Live in Small Spaces" by Sir Terence Conran, "Miller's Collectables Handbook and Price Guide 2014 – 2015" by Judith Miller and "Vogue: The Gown". Octopus currently has in production and for sale around 46 titles which will potentially be significantly impacted by the repeal of section 52 of the Copyright, Designs and Patents Act 1988, nine of which are currently in production.

We have answered questions from the consultation below.

A. Do you agree that the Government is right not to distinguish between 2D and 3D copies?

1. There are two aspects to this question, first whether the Government is right not to distinguish between 2D and 3D copies in relation to the repeal of section 52 itself, and second whether it is right to distinguish between them in relation to the transition and depletion period timeframe. We will deal with the first question in this section, and answer the second question later in this consultation.
2. It is our opinion that the Government is wrong to not distinguish between 2D and 3D copies in relation to the repeal of section 52. The repeal should not apply to 2D reproductions of 3D items. Whilst works of art do not enjoy a distinction in this respect, there are some fundamental practical differences between works of art and artistic works which have been industrially manufactured, which mean the change in law is disproportionate, unnecessary, detrimental to society, detrimental to the rights holder themselves and consequently a waste of time and money.
3. We believe 2D reproductions should keep the current copyright term of 25 years after the products have been put on sale. This is justified by the following arguments:
 - a) **Amount of products to check:** The key difference between works of art, and artistic works which have been industrially manufactured, is the sheer mass of manufactured works that are in the marketplace which will now need to be checked inside a 2D photo that could "potentially" be protected following the repeal. You will see in Appendix 1, we have attached a sample page from our interior design book by Sir Terence Conran

called “Plain Simple Useful” to illustrate this. There are multiple products which may now be protected by copyright and will need to be checked or may be challenged e.g. the Eames RAR Rocker chair, the Mies van der Rohe’s Barcelona chair, the Eilersen modular sofa, the small Eames table and the Arne Jacobson’s AJ Visor floor lamp. This is just one example; we are currently publishing thousands of photos which could be potentially affected by this change in the law. Unlike works of art, people use these objects regularly in their everyday life and they appear everywhere. Putting aside the costs of licensing, even if designers gave us permission to use these products for free, the staff costs and time it would take to check every artistic manufactured item in our photos when we publish a book to see if it infringes copyright, and then to approach every designer for each item in the photo would be entirely disproportionate. This is a completely different situation from checking and clearing photos for the inclusion of works of art, which in contrast, is a manageable and proportionate exercise.

- b) **Lack of certainty:** Further, unlike works of art, there is a total lack of certainty or guidance as to which artistic manufactured items would be protected and which would not, leading to arguments between publishers and designers about whether the law applies, and to publishers erring on the side of caution and paying permission fees where they were not necessary at all. This is because a £200 permission fee is cheaper than court action. This will create a chilling effect on the publication of illustrated books, causing many books to be abandoned which may have been fine to publish, which is a great loss to our society.
- c) **Defence of incidental inclusion:** Incidental inclusion is not a black and white defence; it is a matter of judgment, which usually involves an argument between the publisher and the rights holder. In our experience it is often cheaper to pay a permission fee of £200 in a dispute than hiring a lawyer to argue a case on incidental inclusion. This is something that will never justify the costs of court action. To get into an argument about incidental inclusion for every artistic manufactured product in a book, would be disproportionate compared to doing this for works of art, which are much less often included in a photo.
- d) **Lack of appetite for the change:** Such a draconian use of copyright law should only be imposed on 2D reproductions if there was a very pressing need for it to come into place, of which there is none (by the Government’s own admission). On page 11 of the consultation document it states “*Some rights holders have said previously that they would not pursue copyright infringement by 2D copies in magazines and books*”. We are therefore imposing unnecessary obligations on publishers often when the rights holders also do not see the need. Unlike artistic works, which are produced once and thereby copyright fees are a way of exploiting the work for income, the designers of industrially produced works obtain their income through the manufacture of the product or by commission or salary, so it is not surprising they are not that concerned about the potential income from 2D reproductions. The basis for the repeal of section 52, the *Flos* judgment, was based on the need for copyright protection of 3D reproductions. There is clearly not a pressing and urgent need for this law to come into effect for 2D copies.
- e) **Benefit to the rights holder:** Rights holders are currently suffering damage as the copyright term is not long enough for 3D reproductions of their products; this allows competitors to produce replicas which undercut their sales. In contrast, a book which contains an image of the designer’s product and thereby promotes it to the public, does

not cause such harm to the designer, it provides them with a great benefit not a loss. It advertises the product to potential customers for free, as demonstrated in the sample page in Appendix 1. This again is different from works of art, which generally are not on sale to the public at large in the same way as a manufactured product.

- f) **Benefit to society:** These books have very tight profit margins as it stands already, are often written by experienced and informed design industry leaders, and educate and benefit society. For example, we publish books by Sir Terence Conran on interior design and books by Judith Miller on antiques and collectables, both are leaders in their field who have been publishing books for over 35 years, their insights are invaluable. We also publish books by Vogue on fashion, and books on design by the Design Museum. It would be a great cultural loss if these books were no longer published due to disproportionate licensing costs.
4. The consultation on page 11 states *“it should be noted that users and creators of 2D images of artistic works may be able to benefit from existing copyright laws (i.e. copyright exceptions) that allow the use of a work for the purposes of quotation, criticism and review, or for the incidental inclusion of copyright work in another artistic work, film or broadcast”*. This is a very generalised broad statement which is inaccurate.
5. First, the Intellectual Property Office has recently produced guidance that states photographs would only be allowed under the quotation exception in “exceptional circumstances”¹. If the Government intends the quotation defence to be used for artistically manufactured products which are the subject of a photograph, then this should be set out clearly in the guidance. Second, it is not the book which is covered by the defence, but each and every use, of each and every artistic manufactured product included in a photograph, inside the book. Unlike the inclusion of a work of art, due to the mass of artistic manufactured products, it would cost a disproportionate amount of time and money to check every photo to make sure that every product is either (a) an artistic design which would be protected by the new copyright term (b) incidental to the photo, or (c) is being critiqued or reviewed in some way. Otherwise we will not be able to include that particular design inside that particular photo without paying a fee or spending a disproportionate amount of time asking permission to use it for free. Please see the sample page in Appendix 1. Imagine how difficult, costly and impractical this exercise would be for thousands of photos.
6. The repeal of section 52 is evidently unnecessary for 2D reproductions, it will impose a huge financial burden in terms of fees and resources on publishers, to essentially give an unintended windfall to rights owners. Their objective is to prevent industrial manufacture of their work after 25 years. The impact on Publishers cannot be dismissed as mere “collateral” damage as the livelihood of many small publishers would be affected, and the designers would lose a means of having their work exhibited to the public. We would certainly choose to publish fewer titles that are likely to be affected.

¹ Page 7, “Exceptions to Copyright: Guidance for creators and copyright owners”, Intellectual Property Office, 2014

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

7. Our design books are typically commissioned around two to three years before publication.
8. For example, for the Octopus book entitled “Miller’s Art Deco”, the author contract was signed in January 2014, but the book is not due to be published until September 2016, nearly three years afterwards. Octopus also have a lavishly produced and illustrated “Vogue” book about designer bags that was commissioned as part of a series of books in May 2013, but is not due to be published until September 2017. Octopus has already spent significant costs on these titles.
9. Before we commission any book, we carry out a costing exercise to work out if the book is financially viable. This means looking at the estimated profit and comparing this to the costs of creating the book. This exercise is typically carried out about a month before the author of the book is commissioned. If the book is financially viable, then we proceed to consider the book for publication. Design books have very tight margins, so this is an important aspect when commissioning a work. It is unusual for an illustrated publishing company to achieve above a 10% profit margin, the average can be much lower.
10. A six month transition period would therefore mean that our design books currently in production, would now need to be legally checked (this would mean recruiting and paying for extra staff, and checking thousands of photos), and then re-budgeted to take into account unforeseen licensing costs. This would be budgeted on the standard rates supplied by DACS². Once we have the final figures, the cost of creating the book would then again need to be balanced against the estimated profit to see if the project remains commercially viable.
11. As demonstrated in the example below, it is likely that many of the design titles currently in production will simply be cancelled. Due to the already tight margins involved, the estimated profit will not justify the extra cost of re-licensing the photos and extra staffing costs. It is for this very reason we rarely publish books on works of art due to the permission costs involved. Octopus recently had to abandon a book on animations due to prohibitive permission costs.
12. For Octopus, the costs of creating the 9 titles currently in production is around ████████, a large proportion of which has already been spent and will be wasted if they need to be abandoned. Further if these 9 books proved to be no longer commercially viable and were cancelled, Octopus would lose substantial profits. Many of these titles are also co-printed with foreign editions to make the production costs viable and Octopus may also need to cancel contracts with co-edition publishers abroad which have already been entered into. This may entail cancellation costs as well as relationship issues with these partners.

²DACS stands for “The Design and Artists Copyright Society”. It is a not-for-profit visual artists’ rights management organisation. It collects and distributes royalties for visual artists and their estates. It has standard rates for the inclusion of artistic works inside photos.

13. As demonstrated it takes around 2 to 3 years to produce a design book, so a transition period of 6 months is practically not long enough for us to commission, create and publish new books to fill the gap and mitigate the sales and profit impact that this change in law will cause.
14. A six month transition period would create costs that are significant and extremely unfair given that our design books currently in production would nearly all have been arranged, budgeted and invested in before 28th October 2015, and would have been produced in accordance with the law as it currently stands.

EXAMPLE

For example, Octopus currently has a book by Sir Terence Conran in production, the last book they published by Sir Terence Conran was called "Plain Simple Useful" and was published in May 2014. We have attached a sample page of this book in Appendix 1. The book is about interior design and how to organise your home effectively, furniture and products are shown as examples and images are used to illustrate the book. Therefore, this book contains many products which currently would not require copyright permission, but due to the change in law, may now require permission to publish, and may not necessarily fall within the critique or review defence, or incidental inclusion, as the commentary may highlight but not critique individual pieces shown in the book as demonstrated in the sample page.

The direct costs of acquiring images and text content for this title and taking those to final print ready files (excluding staff, overheads, printing, binding and shipping) (the "Direct Origination Costs") was [REDACTED]. The Octopus picture research manager estimates that there are around 225 photos in this book which may be affected by the change in the law and need to be checked. She has estimated that under the new law, the costs of extra licensing for the book would be around £13,623 (based on DACS rates), and it would probably cost us around [REDACTED] in extra staffing costs in order to practically clear the permissions [REDACTED] [REDACTED]). These are extra costs of [REDACTED], which is a [REDACTED] increase in the Direct Origination Costs. As there are very tight margins already, if the Direct Origination costs increase [REDACTED] a book like this would no longer be commercially viable.

If the transition period is only 6 months, it would be more cost effective for Octopus to abandon any books like this currently in production (such as the new Sir Terence Conran book) and write off the production costs and years' worth of work, than to continue to publish. The cost of abandoning a title like this would also be cultural as well as financial. Our society will lose a culturally important and educational book. Sir Terence Conran has been publishing books about interior design for over 40 years. He is a winner of the Chartered Society of Designers Minerva Medal, the society's highest award.

We also publish about four titles a year by Judith Miller, who is a sought-after and experienced antiques expert, under the new law her books may no longer be viable commercially, we currently have 2 of her books in production, which may now need to be abandoned during the 6 month transition period; she has published more than 100 books on antiques and interiors over the last 37 years. Her recommendations for collectors are invaluable.

Further, for rights holders whose work was due to appear in our books, they will have lost a significant promotional opportunity (as demonstrated in the sample page of the title "Plain Simple Useful") and by the Government's own admission, they do not even want this change in the law to occur.

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

15. It is extremely concerning the Government has chosen to run the transitional period from the date of the consultation, or has even considered this as an option. What is currently happening is a “consultation” which by its very definition, is intended to engender discussion and debate to bring about change. The law as it stands is entirely ambiguous; we do not fully know our position. It is entirely possible things could change after the responses are received. Therefore it is extremely difficult as a business to make decisions about commissions, stock, print-runs and sales without any certainty in the law.
16. The transition period should run from the date of the Government’s Commencement Order giving effect to the transition period i.e. once the transition arrangements have finally been agreed. This is entirely in keeping with the *Flos* judgment. Any previous date would be extremely unfair.

D. Should a longer or shorter transitional period than 6 months be adopted, and if so, what are the costs and benefits?

17. If, after full and fair consultation, the Government still considers the current amendment to be necessary, a longer transitional period should be adopted, at the very least for 2D copies, to allow the publishing industry to adapt to the change in the law, assuming they can afford to carry on.
18. As demonstrated in question 1 above, it can take up to 3 years for us to publish a design book, from the initial idea and costing, through to the book appearing in a shop for consumers to buy. The benefit of having a longer transitional period is that it would allow us to plan our publishing list accordingly so that costly titles are avoided. The change in the law is likely to lead to gaps in our publishing schedule where future titles need to be cancelled. Therefore a longer transitional period means that we can continue with the books currently in production without having to abandon them meaning we would not have a gap in our publishing schedule.
19. If this potentially damaging legislation is to go ahead, we suggest a transitional period of a minimum of 3 years starting from the date the law is put into effect, would give us sufficient time to take account of the changes within our business and allow us to finish and publish any books currently in production, for which we have already invested money.

E. 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?

20. No we do not think this is appropriate at all for the publishing industry.
21. First, to reiterate our point in question 2, what is currently happening is a “consultation” which by its very definition is intended to engender discussion and debate to bring about change.

Therefore things could still change. The depletion period should apply to any licences entered into prior to the date of the Commencement Order giving effect to the Transition Period. This is the date the law comes into effect and provides us with certainty.

22. Further, we do not think it should apply from the start of the consultation as the consultation is not clear about what is meant by the term “contract” – does this refer to the first contract entered into when the book was first commissioned? This is when money was first invested in the book. Or does it refer to each licence for each photograph in the book? We cannot reasonably be expected to use this date as the criterion for the depletion date when we don’t even know what it refers to.
23. As stated previously, books can take up to 3 years to publish. So whilst a book may have been budgeted and commissioned in 2014 and money invested heavily in the project, it may not publish until September 2016, consequently photograph licences for the book may only be obtained towards the end of the editorial stage when it is certain which images will be used in the final layouts. Therefore, we may have budgeted and arranged for books to be published 2 years ago and invested significantly in the project, but such books will now not qualify for the depletion period and may not even now be financially viable, simply because the photo licences for the book won’t have been obtained until November this year once the final images to accompany the text were decided and in place.
24. Octopus currently has 11 titles that may be affected and were still in the editorial stage (i.e. had not yet gone to the printers) by 28th October 2015. Therefore it is possible they contain photographs that were licensed after this date. Despite having been commissioned and invested in before the consultation date, these books will potentially not qualify for the depletion period as infringing images may have been licensed after the consultation date.

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

25. No we do not believe it is proportionate for 2D reproductions. These books are not fast selling products with a quick turnover. The shelf life of a design book is up to around 5 years. After a book is first published, if it keeps selling steadily it enters the publishers “backlist” of titles, which are reprinted and sold every year. Design books are considered “backlist” books which recoup their investment by selling over many years; they do not normally make a quick profit.

EXAMPLE

In 2008, Octopus started publishing design books in the title format of “Fifty xxxxx that changed the World” (For example, “Fifty Dresses that Changed the World”). The first two books in this series are still in print and selling 7 years later; Octopus commissioned two new titles in the series in 2010, which again are still in print and selling 5 years later. Subsequently, it commissioned more titles in the series in 2012, 2013 and currently has two more books in the series in production. Octopus expect all the titles in the series to be in print for at least 5 years based on the previous sales performance.

26. Octopus has calculated that 35 of its titles would qualify for the depletion period, so the date by which the stock will need to be depleted, or alternatively the photos legally checked and any extra licensing paid for (if granted) is 28 October 2016.
27. Octopus has 100 employees and a turnover of [REDACTED] per year and has been publishing and commissioning these books within the law to date. Although Octopus is part of a bigger publishing group, it is a free-standing company and will be substantially affected by this change in law. Octopus has invested in these products with the expectation that they will keep selling for at least the next 5 years. To expect it to now check these photos, and either pay licensing fees, or pulp or remainder the stock of 35 of its titles by 28 October 2016 is extremely disproportionate and unnecessarily penalises Octopus. The current stock value of the 35 titles currently being published is [REDACTED]. The projected sales revenue of these books is currently [REDACTED]. If we sold these books quickly and cheaply at high discounts (as “remainders”) to comply with the depletion date, the projected sales revenue would only be [REDACTED]. This means we would make a loss of [REDACTED], and lose out on [REDACTED] worth of projected profit.
28. The damage caused to the publishing industry by this change, should be balanced against the damage caused to rights holders by 2D reproductions of their work, which are not in direct competition with their products, and the harm caused to rights holders is negligible in comparison given how the books actually promote their products.
29. The balancing act the Government needs to perform between harm caused to party in relation to 2D reproductions is entirely different to the balancing act they need to perform for 3D reproductions. It is clear that the depletion period currently suggested by the Government, would cause much more harm to publishers than rights holders and is disproportionate in the circumstances.

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

30. As the harm to a rights holder for 2D reproductions is negligible (it evidently provides them with a promotional and reputational benefit and clearly the law should not be changed in this regard at all), it would be much fairer to allow books which have already been published by the end of the transition date, to continue to be published and reprinted. As discussed previously, the time to create a new design book is so long, the warehousing costs so high and the margins are so tight, that it is extremely unlikely a publisher is going to rush to create a surplus of books on design before the law changes. Any other decision would penalise businesses for operating within the law. Applying this law retrospectively for 2D reproductions is clearly disproportionate to the harm caused to the rights holder.

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22 December 2015*

APPENDIX 1

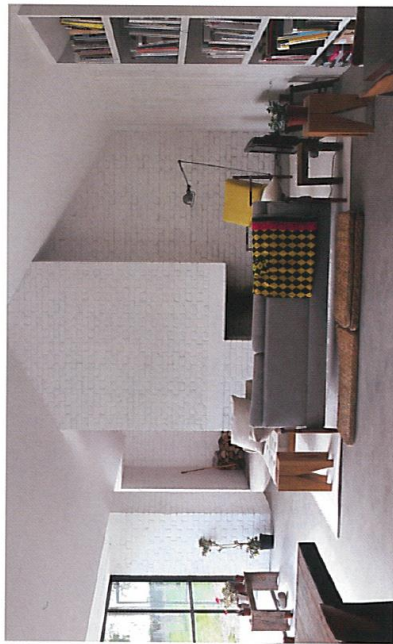
Left — Comfort is a matter of personal taste. Here an Eames RAR rocker (1950) and Mies van der Rohe's Barcelona chair (1929) accompany an Ellerssen modular sofa, offering

a choice of seating, while the small Eames table adds flexibility to the arrangement. The floor lamp is Arne Jacobsen's AJ Visor (1957).

Below — These teak-framed chairs and sofa have a mid-century modern appeal.

SITTING COMFORTABLY

To a large degree, what makes a living area a relaxing place to be is comfortable seating. However, one size doesn't fit all, and your own definition of comfort will differ from the next person's. This is as much to do with preference as it is body type. Some people like to sink down into squishy cushions; others would prefer to have more support.



Sofas

Large items of furniture such as sofas don't come cheap and their size means that they will necessarily dominate a room. Spend time researching the market and don't commit to a purchase before visiting a showroom or store to try out the sofa in person. The angle of the back, depth of the seat and height of the armrests are key considerations.

Opt for the best quality you can afford. Sofas that are well sprung and soundly constructed may cost more than mass-market alternatives, but they will last much longer. Similarly, look out for simple, clean silhouettes and classic shapes that won't date. Solid colours are a good bet for upholstery — white and off-white, grey and blue are recessive shades and visually minimize

bulk. Plain upholstery can always be dressed up with a throw or quilt; washable loose covers are another practical way of ringing the changes.

Modular and sectional seating

Appealingly mid-century modern in style, modular and sectional seating can be assembled in a variety of configurations to suit the size and shape of your living area. Elements can be added over time, which helps spread the cost. Different permutations include benches, sections with backrests and side sections with back- and/or armrests, like contemporary chaises longues. Many types of modular seating are flush with the ground; those on raised legs are more space-enhancing because the floor is not concealed.

Chairs

Their undoubted personalities explain why many of us have our favourite chairs. Mine is the Karuselli (see page 103), which is not only an iconic design but also one of the most comfortable chairs I have ever sat in.

Where the three-piece suite can be a little deadening in effect (two facing sofas are preferable), a grouping of different chairs is hospitable. From the upholstered armchair to the classic club chair, from the rocker to the upright side chair, variations on the basic theme add a sense of liveliness and character. Casual seating for when you are entertaining and there aren't enough chairs to go around include stacking stools, slatted folding chairs, floor cushions and upholstered benches.