

Section 52 consultation
Copyright Directorate
Intellectual Property Office
4 Abbey Orchard Street
London SW1P 2HT

23 December 2015

By email to: section52cdpa@ipo.gov.uk

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

Dear Sirs,

DACS welcomes the opportunity to respond to the consultation on transitional arrangements for the repeal of s.52 of the Copyright, Designs and Patents Act 1988 (CDPA). DACS has responded to the Government's previous consultation on s.52 CDPA and our response can be found appended to this document.

DACS is concerned that the Government has not provided sufficient options for the implementation period and that the option given is incorrectly applied as it effectively overrides the evidence gathering process. DACS is a member of the British Copyright Council (the BCC) and supports their response to this consultation.

About DACS

Established by artists for artists, DACS is a not-for-profit visual artists' rights management organisation. Passionate about transforming the financial landscape for visual artists through innovative new products and services, DACS acts as a trusted broker for 90,000 artists worldwide. Founded over 30 years ago, DACS is a flagship organisation that has and continues to campaign for artists' rights, championing their sustained and vital contribution to the creative economy. In its support of artists and their work, DACS collects and distributes royalties to visual artists and their estates through Artist's Resale Right, Copyright Licensing, Artimage, and via Payback. More information can be found on the [DACS website](http://dacs.org.uk).

DACS has a wide and varied membership including both creators of 3D works of artistic craftsmanship and photographers who may photograph such works. As such, DACS favours a transitional period and a depletion period that is fair and proportionate to balance the rights of both types of creators whose works are affected by s.52 CDPA.

General Observations

DACS considers that the Government has not correctly applied a timeframe for the repeal of s.52 CDPA. The fact that the 'clock' for the 6-month transitional period started when the consultation was announced prejudices the consultation and does not allow for effective evidence gathering.

Rightsholders and businesses were initially informed that the date of implementation was April 2020 and may have made arrangements to meet this date¹. The Government considered that implementation in 2020 would “provide a proportionate time frame for affected businesses to adjust to regulatory change”², therefore it follows that the impact of implementation 4 years earlier will be significant and not proportionate.

This second consultation refers to measures in respect of depletion of stock dates, pre-1957 designs and for second hand sales. These are significant changes that businesses and rightsholders will need time to implement, and any related costs must be taken into account.

The previous consultation provided an option for repeal to take place in April 2018 and this option does not appear to be considered at all in the second consultation.

Responses

- 1. What will be the impact of a transitional period of six months, both costs and benefits**
- 2. Should the six months run from the start date of this consultation or from a different date, and if different, why?**

DACS considers that six months from the date of the consultation’s release is not proportionate as it incorporates the evidence gathering period and therefore effectively overrides evidence given.

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

DACS believes that a longer transitional period should be adopted: a suggestion would be a midway point between April 2016 and the repeal date stated in the previous consultation (April 2020), which is a more balanced and proportionate approach, and which was originally considered the fairest option under the prior consultation³. The Government should actively seek evidence of any costs incurred by rightsholders or businesses in making arrangements to meet the previous implementation date.

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

As stated in our prior consultation, appended herewith, DACS considers it would be beneficial for guidance to be created in consultation with the relevant industry sectors.

¹ We refer to the Association of Photographers (AOP) who have stated that photographers will have been commissioned for work that can no longer go ahead and will have planned future business around the Government’s original implementation date in 2020.

² Department for Business Innovation and Skills Regulatory Policy Committee comments, p.2 in *Government response to the consultation and announcement of transitional provisions* (February 2015) p.67

³ Page 22 of *Consultation on the timing of the repeal of s.52 CDPA* (October 2014) states that the Government proposes a 3-year period commencing on 1 April 2015 (i.e. implementation to take place in 2018) “causes the least disruption for designers, rightsholders, business... and users”.

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

Differentiating between 2D and 3D works is necessary as it would take into account the way in which these works are used. For instance, where a 2D work appears in a publication, what will depletion of such stock entail? Additionally, the publication could then be copied and subject to secondary use licensing, as usually collected via a blanket licence. It is unclear how the works will then be treated and whether or not copying a publication of a 2D image of a 3D relevant work will be an infringement.

- 6. 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?**
- 7. Are there any other factors that the Government should consider for the depletion period?**

DACS considers that the subsequent use of 2D works should be taken into account when determining what the depletion period relates to and there should be clarity on what should be depleted. Six months (four given the length of the consultation process) is a very tight time frame in which to expect full depletion of stock without significant financial losses.

- 8. Do you agree that the period provided for depletion of stock is proportionate?**
- 9. Should a longer or shorter depletion period than six months be adopted, and if so, what are the costs and benefits?**

We refer to the AOP's response in this regard.

10. 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?

DACS does agree that this should be the case, especially in light of secondary uses of published works containing 2D images of 3D works relevant to this consultation. If a publication is issued prior to the repeal, we would consider that the rights of the 3D work are exhausted for the purpose of reprography of the 2D image. In that respect there should not be legislative change to items that have been purchased or created in the knowledge the copyright in the 3D work had expired.

11. 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?

As this amendment would have the consequences of enabling rightsholders to achieve remuneration for the use of works that were made before 1 June 1957, DACS considers this to be equitable to those rightsholders. However, in light of our comments above, this amendment must be compatible with the notion that the 2D copy of such works that relied on s.52 CDPA would have exhausted rights

in that work in, for example, a publication and therefore a person copying an old publication containing such an image would not require additional rights clearances.

12. 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?

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

DACS agrees that Regulation 24 should be repealed. Rights holders should have the ultimate decision when it comes to licensing their works. DACS has no evidence concerning the costs and benefits of compulsory licensing, or whether our members expect to reply on it in the future.

For further information please contact

Reema Selhi

Legal and Policy Manager

DACS

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Appendix 1

DACS' response to the consultation on the
transitional provisions of the repeal of s.52
CDPA 1988

October 2014



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By email: Section52CDPA@ipo.gov.uk

23 October 2014

Dear ██████████

Consultation on transitional provisions for repeal of Section 52 of the Copyright, Designs and Patents Act 1988

DACS welcomes the opportunity to respond to the transitional provisions for the repeal of Section 52 of the Copyright, Designs and Patents Act 1988 ("CDPA"). Since the majority of questions are addressed to users of works DACS will respond to the consultation more generally, restricting our answer to the point of view of visual artists. Whilst DACS generally supports the extension of copyright holder's rights, we believe that apart from striking a balance between rights holders and users of works, the interests of different types of visual artists need to be taken into account too.

About DACS

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General Observations

DACS notes with concern the sections in the consultation paper that contain legal assessments and assumptions that are prejudicial to visual artists and rights holders in artistic works. The consultation paper makes assumptions about the definition of artistic works, in particular works of artistic craftsmanship, and the application of exceptions is generalised. There is also a disregard to the fact that both situations call for a case by case analysis and established court practice.

When assessing which works are concerned by the repeal of section 52 CDPA, the consultation paper contains explanations about section 4 CDPA which are incomplete and which conclude in a suggestion to issue a Copyright Notice about what items are likely to attract copyright. DACS believes that this is insufficient and considering the expressed view of Government that items in museums and gallery

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collections often appear because of their prevalence or historical significance in a particular period of time, and may not necessarily make any attribution to its aesthetic qualities (page 7 of the consultation paper) may result in an assessment unfavourable to visual artists.

We believe this view may be the result of a very restricted application of one of the opinions expressed in the case *Henscher Ltd v Restawhile Upholstery* 1976 and that this view is no longer compliant with more recent developments on a European level, which risk for the delimitation of fixed categories of works in the CDPA 1988 to be non-compliant with EU law. Furthermore, section 4 CDPA may not comply with EU law given the apparent requirement, following the *Infopaq*¹ case, to allow open-ended subject-matter categorisation, as is already the case in other European countries like France, Germany and Italy.

Decisions of the Court of Justice of the European Union in *Infopaq*, *BSA*², *FAPL*³, and *Painer*⁴ have all sought to confirm this approach, focusing on the intellectual creation of a work rather than it falling within narrowly prescribed definitions of work categories.

UK law has not as yet fully encompassed this analysis as to works which are entitled to copyright protection and any analysis of which works attract copyright protection under section 4 CDPA should start there rather than on an explanation delivered by the House of Lords in 1976.

DACS further objects to the generalising assessment in the consultation paper that photographs taken of 3D artistic works will benefit from existing exceptions. It is well established case law that the application of an exception has to be determined on a case by case basis and that exceptions will only apply in limited special cases. The statement on page 17 of the consultation paper that “users and creators of 2D images of artistic works are likely to be able to benefit from existing copyright laws that allow the use of a work for the purposes of criticism and review, or for the incidental inclusion of a copyright work in another artistic work such as a photo, film or broadcast” is a generalisation that disregards established case law about the application of fair dealing exceptions as well as about the need for each and every use to be incidental, whilst being detrimental to visual artists as a whole. Such statements encourage an incorrect application of the law – incidental inclusion, for example, cannot be applied where there has been a purposeful use of a work.

We would therefore urge Government to refrain from issuing generalising guidelines such as the ones contained in the consultation paper and that any potential Copyright Notice would need to be created after consultation with the relevant industry sector.

Impact on DACS’ members

In general DACS welcomes the repeal of section 52 CDPA, as this will benefit visual creators whose copyright has been unduly restricted to 25 years under UK law. However, DACS also recognises that the repeal will have an impact on photographer members who photograph works that currently fall within section 52 CDPA. Following the line of argument in the consultation paper it does not appear that photographs taken of works falling within section 52 CDPA would become infringing photographs once the repeal is implemented. However, their subsequent use would need copyright clearance regarding the works included in the photographs as with any other artistic work shown in photographs.

¹ Case C-5/08 of 16 July 2009: *Infopaq International A/S v Danske Dagblades Forening*

² Case C-393-09: of 22 December 2010: *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury*

³ Case C-403/08: 4 October 2011: *Football Association Premier League Ltd and Others v QC Leisure and Others*

⁴ Case C-145/10 of 7 March 2013: *Eva-Maria Painer v Standard VerlagsGmbH and Others*

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This change will not prevent DACS from licensing these photographs because the photographer (or rights holder) still retains copyright in the photograph itself; however DACS appreciates that the clearance process will potentially be more laborious considering that the photographs contain works which are now back in copyright.

Transitional period

DACS favours a transitional period for the implementation of the repeal of section 52 CDPA that is fair, proportionate and balanced. We are aware that different stakeholders will have different interests and, in particular, we are concerned about the impact the repeal will have on photographers who have specialised their practice around taking photographs of works that fall within section 52 CDPA. DACS is further sympathetic to businesses who have specialised in the reproduction of artistic works they believe to be out of copyright following section 52 CDPA; however, as section 52 CDPA unjustifiably restricted the term of protection in those works we believe that rectifying this situation should take precedent over the interest in maintaining a business that was as such illegal in other European countries and is now in the UK.

DACS believes that the extension of the term for works that were affected by section 52 CDPA is in effect not fundamentally different to the previous extension of the term in the UK for all works from 50 years after an author's death to 70 years after an author's death. Although a substantially greater number of works was affected by this change the transitional period was limited to 18 months. DACS appreciates the fact that businesses have been set up and are focusing on the reproduction and sale of works that fell out of copyright under section 52 CDPA and that these should be given sufficient lead in time to adapt their practice. Because of the different stakeholder interests even amongst DACS on membership DACS cannot opt for a specific period.

Uncertainty about works of artistic craftsmanship

As outlined above DACS is aware that some stakeholders to this consultation and members of the public are uncertain about what items will attract copyright as artistic works. Nevertheless, DACS firmly believes that where legislation does not provide distinct guidance on this matter, it is not for Government but instead the courts to deal with interpretation. There have been several cases since the decision in *Hensher v Restawhile* that have considered the notion of artistic craftsmanship, including the recent case *Lucasfilm*⁵ and these cases provide significant interpretation of the law.

With regards to question 3 of the consultation paper and in respect of the above, we are mindful that a Copyright Notice would go above and beyond the interpretation of artistic craftsmanship that already exists through case law. It should also be borne in mind that any such interpretative guidance may affect other sectors than those directly affected by the repeal of section 52 CDPA and that a very limited view as expressed in the consultation paper could illegitimately restrict and deprive visual artists of their rights or ability to protect their work. A narrow interpretation to favour businesses specialising in copies of artistic work "furniture" may also have a negative impact on the application of Artist's Resale Right Regulations 2006.

As outlined above, DACS believes that section 4 CDPA needs to be reformed more fully which in our opinion a limited Copyright Notice will not achieve.

⁵ *Lucasfilm Ltd & Ors v Ainsworth & Anor* [2011] UKSC 39

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For further information please contact:

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