



The Law Society

**Consultation on Transitional Arrangements for the
Repeal of Section 52 of the Copyright, Designs and
Patents Act 1988**

The Law Society response

December 2015



Introduction

1 The Society is the professional body for the solicitors profession in England and Wales, representing over 160,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.

2 This response has been prepared by the Intellectual Property Law Committee of The Law Society of England and Wales ("the Society").

Comments

Transitional Period

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

3 Six months is a short period, especially if it is to start from the commencement of the consultation period. Accordingly, if six months or a similarly short period is adopted, it is important that sufficient and swift publicity is given to the proposals to ensure businesses affected are aware of the position and can take steps to adjust their business models accordingly.

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

4 See previous answer.

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

5 See previous answer.

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

6 There are two areas where greater clarification is required.

7 First, and briefly, some worked examples of the impact of the repeal on items manufactured or imported by a certain date would be useful and could be dealt with through non-statutory guidance, in order to illustrate how the transitional period is intended to work in practice.

8 Second, we would like to reiterate our earlier call for guidance as to the meaning of "works of artistic craftsmanship", without which the law will remain in an uncertain state after this repeal is brought into effect. Although 'sculptures' are included within the Section 4 CDPA definition of 'artistic works' and so protected, most designed items are unlikely to be within the courts' interpretation of the scope

of the term "sculpture". Instead, the category under which such items are most likely to attract any copyright protection is that of "a work of artistic craftsmanship" ("WAC") within Section 4(1)(c) but which regrettably is not further defined in the Copyright, Designs and Patents Act 1988. The meaning of "a work of artistic craftsmanship" is, in our view, unclear to the point of rendering the law dysfunctional. It follows that steps must be taken to provide clarity of this concept if there is then to be any predictability as to those items which are to be affected by the Section 52 transitional provisions.

9 In support of this view:

- Five Law Lords each came to a different view over its meaning in the only WAC case to reach the Lords.
- The balance between the terms "artistic" and "craftsmanship" is unclear and gives rise to a number of questions. For example: Is it art which involves a "making" craft? Is it craftsmanship which has an artistic intent? Is functionality relevant? Is artistic quality relevant? Does it only apply to works from the Arts and Crafts period? It is also not clear whether a WAC needs to be fashioned by the artist-craftsman or whether it may be made by one artist but then crafted by another. It is not currently possible for parties or their advisers to give a confident answer to any of these questions.
- The IPO has itself stated that this phrase lacks clarity:
- "it is unclear under UK law what proportion of [industrially manufactured products] would satisfy the conditions for it to be protected by copyright" (2014 Consultation page 7);
- "the main source of uncertainty is whether or not a particular item is an artistic work" (ibid. p.8);
- "there is uncertainty as to which items would be protected" (ibid. p.9);
- "there is little certainty as to which products will be affected" (ibid. p.13);
- "there is little clarity which [sic] items would be protected by copyright once the change in law take [sic] effect and it is impossible to predict how and when case law will develop on which specific items will have copyright protection" (ibid. p.14).

10 The Law Society believes that laws should be as clear as possible, and be capable of consistent and predictable application. The definition of Works of Artistic Craftsmanship fails on these counts. This definition may not be something that can effectively be done through statutory guidance, however, as it may instead need a restatement of the law in some form. In the Law Society's view this is an important area that needs clarification and if this is not done there is a danger that the section 52 repeal will not be successful whether for owners or users of rights.

11 Unclear laws such as this may have a chilling effect on commercial activities to which they apply and so reduce the amount of related legitimate commerce. They

are also a recipe for litigation. As the leading case on the meaning of WAC is a House of Lords decision, it is unlikely there can be a clear statement of the meaning of the term until a case has been litigated to the Supreme Court, a process which may be many years away. Furthermore, if a case does eventually merit consideration by the Supreme Court, a likely prospect is a reference to the CJEU concerning the proper interpretation of the Infopaq case (ECLI:EU:C:2009:465) as the UK's list-based approach categorising copyright works may be unlawfully restrictive (as the Government's 2012 Impact Assessment for this measure acknowledged). Again, this would be many years away and in the meantime the law will be unclear and hazardous to rely upon.

12 We reiterate our concern that the law is so unclear that the period will be somewhat irrelevant in many cases. Businesses will not know what is or is not covered regardless of how long they are allowed for transitioning.

Depletion period for existing stock

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

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?

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?

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?

13 The repeal of section 52 is a zero sum game, in that a benefit to a rights-owner of a shorter depletion period will be matched by a disbenefit to a party who wants to sell that item without permission.

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?

14 The only reason advanced in the Consultation as to why Paragraph 6 should be amended, is to provide legal certainty. However, for the reasons stated above, the position on repeal of section 52 will have considerable uncertainty for at least a number of years before the position is considered by a senior court. Therefore, amending Paragraph 6 will not add any material certainty; to the contrary, another layer of legislation may only serve to increase uncertainty and complexity. Unless legislative clarification is to be provided concerning the scope of WAC, then there is little to be gained by amending Paragraph 6 and risking unforeseen consequences. Judicial interpretation of the impact of Paragraph 6 can be applied by the court, with due regard to the Marleasing principle, at the same time that a ruling is made on the extent of WAC. It is only then that there will be a functional degree of certainty.

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?

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?

15 With respect, we consider that there has been a misunderstanding of the 1995 Regulations and the Term Directive. The repeal of section 52 is for the purposes of bringing UK law into line with obligations under EU law and "to remove an unfair difference in how long copyright lasts". If some works are now to get the full life + 70 term of copyright, that protection should be entire. We do not consider there is a legal rationale or imperative for suggesting that the extended right should be subject to licences of right or that the provisions of the 1995 Term Regulations should apply to it. This is not a situation where the term of copyright has been extended generally.

16 If there is a serious possibility that parties may seek to rely upon the 1995 Regulations and seek licences of right with the result that rights-owners are not able to rely upon the full copyright term, the Government should consider providing guidance that that understanding of the law is misconceived (possibly by means of a Copyright Notice).

FOR FURTHER INFORMATION

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