

**CONSULTATION ON TRANSITIONAL ARRANGEMENTS FOR THE REPEAL OF SECTION 52 OF THE
COPYRIGHT, DESIGNS AND PATENTS ACT 1988**

RESPONSE FROM THE PUBLISHERS ASSOCIATION

1. The Publishers Association

The Publishers Association (“The PA”) is the leading representative voice for books, journal, audio and electronic publishers in the UK. We have over 100 companies in membership who publish academic journals, text books for higher, secondary and primary education, fiction, non-fiction, children’s and learning resources.

2. Summary

The repeal of section 52 of the Copyright, Designs and Patents Act 1988, as part of the Enterprise and Regulatory Reform Act 2013, had clear and far-reaching implications for books and other publications which contain photographs of three-dimensional artistic works, given that it entailed a new requirement to license the use of images of such works and potentially rendered infringing already published works which contained such images. For this reason we were opposed to the inclusion of the use of two-dimensional (2D) images in the repeal. However, we were reassured by the Government’s commitment that this repeal would not take effect until further consultation had been undertaken on the transition arrangements.

The Publishers Association is profoundly concerned with the Government’s dramatic change of position in relation to the transition period for the repeal of Section 52 of the Copyright, Designs and Patents Act 1988 (“CDPA”).

In the Government’s initial consultation, publishers highlighted the immense difficulties they would face should the transition period be limited to six months and clearly set out the reasons why a longer transition period was necessary. We were pleased that this case was initially accepted by the Government in its response of 9th February 2015 and that a five year transition period would be introduced.

The Government’s subsequent withdrawal of the Commencement Order following an application for Judicial Review and its decision to re-consult on the length of the transition period would by itself be a matter of some concern. This concern has been elevated by two further factors: first, the limited alternative options presented in the consultation; and secondly the rushed manner in which the consultation itself is being run.

Several member companies of The PA will be responding individually to the present consultation and this submission fully endorses the points made in those submissions. We also draw attention to the paper prepared by Professor Lionel Bently of Cambridge University and Professor Graeme Dinwoodie of Oxford University, both of whom are acknowledged authorities on UK copyright law. In addition, we would like to take this opportunity to make the following general points:

1. the lack of balance and proportionality in the new proposals;
2. the fact that the new impact assessment is incomplete and, without adequate explanation, ignores findings of previous assessments;
3. the manner in which, with this consultation, the Government is riding roughshod over its own consultation principles.

These, and other points, are explored below in greater detail.

3. Lack of balance and proportionality

Overall, publishers have been astonished at the lack of balance or proportionality in the new proposals. We understand that the Judicial Review challenge brought by three furniture manufacturers (Knoll, Cassina and Vitra) was based around the previous arrangements being incompatible with EU law and the *Flos* judgment¹. However, *Flos* does permit for transitional arrangements so long as they are proportional. We would contend that the initial proposals met this requirement in that they provided sufficient time for publishers to run down existing stock, whilst not adversely affecting the interests of those with rights in the artistic works. The change of the assessment by the IPO is irrational given that in the original Impact Assessment the IPO concluded that the original transitional arrangements are “consistent with the views expressed in the judgment of the European Court of Justice case *Flos SpA v Semeraro Casa e Famiglia SpA to reconcile the competing interests ...*” We do not comprehend the motivation of the IPO in changing its stance and no information has been provided as to the reasons for it, other than an opaque reference to a JR. Nor has information has been accessible either from the IPO or the Courts. Consequently, it has been impossible for The PA to address any of the points which were put forward by the IPO to justify the complete change of direction. This is clearly unfair in view of the commercial expectations of the publishing sector which Government acknowledged in the original response.

Conversely, the combined effect of the Government’s new proposals (an effective four months transition period, a de facto ten month depletion period, the repeal of Regulation 24) swing the pendulum back in the opposite direction and are utterly disproportionate. As member company submissions to the consultation will make clear, publishers stand to suffer economic harm as a result of this hasty implementation. The contracted time periods are utterly insufficient to complete the sale of affected stock, or secure the appropriate licensing of relevant content. Indeed, the current stance contradicts Government’s conclusions from February 2015 which stated: “therefore, on the basis of the evidence received, the Government is of the view that commencing the repeal of section 52 of the CDPA on 6 April 2020 provides a proportionate and fair amount of time for affected businesses to adapt to regulatory change, but also delivers, in 5 years, the fundamental objective of ensuring that all types of artistic works are treated equally.” Without providing any argument or justification this problem is exacerbated by the failure of Government to provide adequate guidance or even to explain its terminology (as we detail further below).

The sum effect of the new proposals is to ignore the interests all users of 2D images of the designs. Given that there is no evidence of harm caused to the rightsholder of a three-dimensional (3D) work when its image is used in a printed work, the overall impact is utterly disproportionate.

4. Incomplete impact assessment

The new Impact Assessment accompanying the current consultation acknowledges that there will be costs to some creators and users of 2D images but then makes no attempt to ascribe a monetary value to these costs. This evidence will, apparently, “be sought at consultation stage”. Despite Government, by its own admission, not being aware of the impact of its proposals, it nevertheless is embarked on a policy course of starting the transition period before the consultation exercise has even closed.

The Impact Assessment also exposes a complete lack of appreciation as to how books on design are commissioned and published, nor of the nature of the market they serve. It states: “the Government

¹ CJEU case C-168/09 *Flos SpA v Semeraro Casa e Famiglia SpA*

notes that such costs 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 decision on whether to write on topic A or topic B”.

Thus the Government appears to assume that the only determining factor in publishing a book on design is the copyright status of the images to be used. This is totally erroneous, as should have been clear from the extensive conversations which the IPO had with publishers earlier in 2015. Actually, these conversations were clearly reflected in the original Impact Assessment; it is perverse that the new Impact Assessment completely ignores the original conclusions without providing any justification or argument as to why they changed their view.

Whether or not an image is protected by copyright is only one factor in a commissioning decision to the extent of whether a book is economically viable or not. Margins on specialist design books are incredibly tight and so the introduction of a requirement to retrospectively seek additional permissions will simply make such books unviable as a commercial proposition. Removing what is termed a ‘distortion’ in such a disproportionate way will, in fact, lead to the removing of the books from publication through pulping existing stock.

5. Starting the transitional period from the date of the consultation

Members of The PA will be submitting evidence detailing the impact a transition period of six months on their business. We strongly disagree with this proposal as well as the Government’s recommendation that this start from the date of publication of the consultation document.

As a matter of good practice we would hope and expect that any transition period would not start until the Government has had the opportunity to receive, consider and respond to the consultation. The Cabinet Office guidance on consultation principles² state that *“Engagement should begin early in policy development when the policy is still under consideration **and views can genuinely be taken into account**”* [emphasis added]. For the IPO to ‘start the clock ticking’ before any of these three things has happened is a gross abuse of process and makes a mockery of the notion of consultation.

The assertion in the consultation document that *“Beginning the transition period from the date of consultation minimises the delay in bringing about the repeal of section 52, but allows time for businesses to understand the effect of the repeal on existing stock and future business practice”* demonstrates a total lack of understanding or appreciation of the publishing industry and the work involved in licencing images for publication.

The IPO have told The PA that there is one precedent for Government taking this anomalous approach in a consultation exercise. We would be extremely grateful if full detail on this consultation could be provided so we can assess whether it is a directly analogous case. It is in any event highly instructive that only one other such oddity exists.

6. Length of transition period for use of 2D images

Commissioning, writing, editing, picture researching, producing, printing and distributing a book does not happen overnight, or in six months. Books can be years in the planning and have lifespans of several more years.

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf

The Government must, therefore, apply a different, longer, transition period for the use of 2D images in published materials compared with copies of 3D works, as the longer the transition period, the less damaging the impact will be on publishers and the design community these publications serve. It would ensure that the costs associated with gaining the necessary additional rights clearance could be built into the planning of new publications while not impacting too adversely existing works. A point previously accepted by the Government

The case for this is particularly strong given that the harm to the designer from the use of a 2D image of their work is totally different to the harm the sale of a 3D replica causes. It is correct that neither Directive 98/71/EC on the legal protection of designs nor the *Flos* case makes a distinction but we do not believe this to be material; both simply state that the same protection should be afforded to designs as to copyright, which this would still ensure.

7. Guidance and clarity over definitions

This is a complicated area of copyright and for publishers to be certain of being compliant it is vital that there are accurate definitions of what is being proposed. As a matter of course, any guidance must include information on the following:

- What is a “work of artistic craftsmanship”. With a lack of clarity in case law, the Government must be clear as to what it intends this repeal to protect.
- Examples on how the copyright exceptions may be used.
- What is meant by the term “contracts”.

Hitherto the IPO has refused to provide any guidance on these terms, seeking to hide behind the excuse that this has to be a matter for the courts. The logic of this position is faulty. For the IPO Consultation even to utter the term “artistic work” it must itself have some sense as to what it means. There has to be some intentionality behind the use of the term or otherwise the sentence is completely meaningless. It may well be that the Government’s definition could subsequently be challenged in court and a tighter or different meaning made to apply – such is the nature of any legislation. However, to refuse to provide any sort of explanation demonstrates a diffidence bordering on negligence, and what is more, it renders publishers incapable of knowing whether and how to comply with the proposed law.

Clarity is particularly urgently required in relation to the term “contracts” and it is a matter of great concern that this was not able to be provided as publishers were developing their responses to the consultation. To explain further:

Paragraph 19 of the consultation document talks about depletion meaning “*ceasing to sell or deal in the copies made or imported under section 52*”. It then talks about an additional depletion period for “*goods produced or acquired under a contract entered into before the publication time and date of this consultation*”.

An illustrated book is likely to contain multiple images from multiple sources acquired under multiple contracts/licences. A book may contain photographs which might be “copies made under section 52” and it is those photographs which will become infringing when section 52 is repealed. So, if a photograph was acquired by a publisher under a contract with a photographer dated 1st September 2015 (before the date of the consultation), does that mean copies of the book containing that photograph can be sold until 28th October 2016? i.e., is the relevant “contract entered into” the

contract under which the publisher acquired the photograph? This would seem to be the logical interpretation of paragraph 19 of the consultation document. However, the question is immediately raised as to what would happen where there is a book containing three photographs acquired under three different contracts at different dates. This is just one of a number of scenarios which the consultation and proposed legislation fails to anticipate and we are concerned that in the undue rush to consult and legislate that such matters will be left unresolved.

We also, again, here point to the Government's consultation principles. It states that "*sufficient information should be made available to stakeholders to **enable them to make informed comments***". This principle is being abandoned in this consultation. The introduction to the consultation document states that the Government intends to publish their final proposals for the repeal in the spring which is when the first depletion period takes affect meaning publishers will be having to take a view on whether to pulp stock or get clearance before they know the outcome of the consultation. In addition, given the lack of guidance and clarity over key questions (even after multiple approaches to the IPO), the consultation document certainly does not provide the "sufficient information" required to enable us to make "informed comments".

8. Depletion period for existing stock

This provision was absent from the original consultation and poses a disproportionate level of harm on publishers and users of design books. Such books have much longer shelf-lives than allowed for by the proposed depletion. The margins involved in these publications are very slim and if each and every book already on the market or commissioned in anticipation of a publication date between now and April 2016 needs to be revisited and multiple images relicensed then the net effect will be that these books will simply be taken off the market and / or pulped. This is totally disproportionate and will have a damaging knock-on effect on the books available for use by UK schools, colleges and universities on their design courses.

Moreover, the retrospective nature of this repeal will have a potentially highly damaging impact on the re-prints of books containing images of artistic works already in publication. Members inform us that they will simply not reprint a substantial number of titles after the repeal takes effect as the process and costs of seeking licences for images now in copyright make it uneconomical. Such copyright clearance was not factored into the original investment and as such publication was based on good faith and the assumption that all necessary copyright clearances had been obtained for the duration of the book's life (including any subsequent reprints). Not only is this harmful for publishers but it is likely to be inimical to the interests of the design community for whom such publications are important as promotional tools. It is also harmful to the interests of those consumers wishing to purchase such titles. Therefore, in many cases "compliance" will simply mean abandonment of publication. This impact has been exacerbated by the Government's unsuspecting about turn. Publishers has already, in good faith, been making commercial decisions on their back list titles based on a five year transitional period. These decisions are now having to be abandoned. Individual publishers will provide evidence of the economic impact.

The Government should provide for books already published to be reprinted following the implementation date until the publisher considers they no longer have a commercially useful life. A depletion period should not apply to existing stocks of published works.

9. Compulsory licensing of works where copyright is revived

This is another proposal which was absent from the original consultation and which is now being subject to over-hasty consultation. 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 rightholders 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, has the ability to take 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 rightholders withholding permission. Its repeal is, therefore, of extreme concern.

It also contravenes the long established principle that an extension of copyright is accompanied with a pragmatic certain provision that the revived copyright is subject to mandatory licensing. Otherwise, the absence of the permission of one right holder out of potentially hundreds will render an entire book potentially infringing and thus the only option for the publisher is to “pulp” the publication.

This situation is exacerbated by the problems of the publisher identifying all the right holders involved. Often the designer will not have been acknowledged by the producer and impossible to identify. The publisher will need to consider the contract between the producer and the designer to assess whom to ask for a permission; whether there was an assignment, a licence a work made in the course of employment, pre 1988 a commissioned work, or a US style work for hire contract. This will be an impossible task for all parties involved, designers, producers and publishers.

10. Concluding Remarks and Recommendations

For all of the reasons outlined above, and made in our member company individual submissions, we urge the IPO to reconsider the direction and pace of travel it is taking with this consultation. We believe there is a profound lack of understanding of the impact of the proposals, an utter lack of proportionality in the effect on publishers compared with other rightholders, and a failure to comply with the Government’s consultation principles.

The Government should:

1. Immediately stop the clock ticking on the length of the transitional period for both 3D copies and 2D images of 3D works. The start of such a transitional period must be linked to an actual piece of legislation.
2. Re-introduce the previously accepted longer five year transitional period for the use of 2D images of 3D works in published materials.
3. Exclude existing published books from any depletion period.

We look forward to continuing to engage with the IPO on this matter and hope that the policy differences can be resolved at this stage without recourse to further legal proceedings.

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