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About MOCA

The MOCA – Ministry of Copyright, Cultural and Creators' Assets is a leading international business consulting company specialising in the media industry. We are copyright PR actioners, with a savvy eye on technology and business affecting the creative industries. We offer strategic and operational advice alongside automated technical solutions to deliver successful strategy robust decision-making at a time of great change.

We have over 50 years cross-sector expertise and wide-ranging connections with policy and decision makers in heritage, business and government; we work hard to keep our clients informed and up-to-date with legislation, evolutions in licensing and workflow innovations.

Our clients range from picture libraries, footage archives, to museums, universities and trade associations such as British Association of Picture Libraries and Agencies. We also work with international associations including CEPIC in EU and DMLA in the USA – whose members will also affected by s52.

At the copyright event we ran (25 November this year) on behalf of the Copyright Hub for the heritage and image-licensing sector, the subject of section 52 was discussed. Views ranged from deep uncertainty to concerns over increased costs and risks.

In reaching out to IPO in this consultation MOCA wishes share the views we hold on behalf of our clients regarding s52. We also wish to draw attention to the work that we are doing in the area of robust data capturing, research and technology.

The technological solutions will look at workflow in the field of copyright licensing, and may be of interest for further discussion. These include:

- The use of technology to facilitate the management of copyright reform, such as s52 and ECL for image and footage archives
- Our proposed objective to deliver a report on the state of copyright in the second quarter of 2016.

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

MOCA understanding:

As part of this consultation, the Government is considering four issues:

- Transitional period before the repeal of section 52 takes effect;
- Depletion period for existing stock;
- Provision of copyright protection for works made before 1 June 1957;
- Compulsory licensing of works where copyright is revived

The first two issues were previously included in the [now repealed] transitional arrangements but the Government is of the view that the law requires a different approach to be taken. The second two issues are areas where the Government did not previously consider action necessary.

Transitional period before the repeal of section 52 takes effect;

In 2011 the Court of Justice of the European Union (CJEU) in the Flos case ruled that a transitional period may be lawful, **but must take account of the principle of proportionality**. In the case of the UK, under consideration here in this consultation is the position of businesses which have relied on the reduced term of protection under section 52, as well as the position of the individuals and businesses which will benefit from the term of protection being extended is being considered here.

It has been agreed that:

a) Only a small number of items would be classified as works of artistic craftsmanship[1]
b) In terms of those industrially manufactured, it is unclear under UK law what proportion of these would satisfy the conditions in order for it to be protected by copyright.[2]
c) In terms of copyright protection for works made before 1 June 1957, the Government is of the view that some artistic works created before 1 June 1957, may attract copyright protection[3]
d) Whether an individual item qualifies for copyright protection is on a case by case basis, and can ultimately be a matter for the courts
e) Transitional arrangements and related legislative changes are intended to clarify UK legislation4

As published in papers by the IPO:

1 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366188/cdpa.pdf
2 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/353373/Consultation_on_timing_of_repeal_of_section_52_CDPA.pdf page 8
3 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/353373/Consultation_on_timing_of_repeal_of_section_52_CDPA.pdf

4 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471833/Consultation_and_Impact_Assesment_-section_52.pdf

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a) What will be the impact of a transitional period of six months, both costs and benefits?
b) Should the six months run from the start date of this consultation or from a different date, and if different, why?
c) Should a longer or shorter transitional period than six months be adopted, and if so, what are the costs and benefits?
d) Do you agree that the period provided for depletion of stock is proportionate?
e) Should a longer or shorter depletion period than six months be adopted, and if so, what are the costs and benefits?

Costs

From previous consultations, government learnt that photographers, image agencies and users of 2D images (such as publishers), who form the basis of MOCA's client base, have said they will need to check every image to ensure that the user or the licensee does not run the risk of copyright infringement.

There can be no precise figure to quantify costs - q.v. case study below on **costs of clearing** images *.

In creating and making available works that include 2D and 3D items covered under the proposed revision of s52, these aforementioned businesses will no longer be in a position to recoup the costs of shooting, and investment in digitising and distribution of their archives where content may now contain infringing material.

Government's view that such entities could prioritise the images that they actively license, rather than checking the whole archive is based on the assumption that there is a knowledge of which photographs contain items that may now be protected under s52 copyright. Our clients tell us that they do **not** know which items in their collections may now fall under copyright in this regard.

Specialist archives and publishers that are design-centric may be in a position to identify which works are potentially and most likely to be at risk by relying on the descriptive details contained in the metadata or from their specialist knowledge. These items if removed from archives and publications and destroyed would incur significant costs; there can be no reliable figure to quantify these costs.

The majority of image archives and publications are non-specialists and it is this majority that will need to check their entire archives. Regarding film archives the work of checking the archive would be laborious and much more complex than images as the archivists would have to view each film (number of hours being unquantifiable but significant) to ensure no objects included in the production would incur a new licence. In most cases this is an impossible task to retrospectively review each film / clip to ensure all rights have been cleared.

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With regards to incidental inclusion of such copyrights in photographs, the Court in the Panini case reminded us that 'incidental' is an ordinary English word that was purposely left undefined by Parliament. In the more recent case of German furniture catalogue Moebelkatalog[5], the two lower German courts interpreted the application of EU law in this regard[6] differently from the case when it was later raised by Germany's highest civil court, the Bundesgerichtshof. This indicates that the process of establishing objective / subjective incidental inclusion is not straightforward and could be costly.

Cost will be determined on a case-by-case basis depending on the scope of works (unknown) that may be contained in each repertoire and may fall into copyright. These costs will be disproportionately costly to the revenues that designers will receive; to that add the risk of criminality.

It is unlikely that the risks of making these works available will justify the rewards and the greatest costs will be from consequential censorship of such works.

MOCA is aware of the paucity of data available to support government in its objective to arrive at good policy decision-making. We are of the view that technological initiatives such as those we are working on, will assist in the short term.

Benefits

Government's view is 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. These exceptions to copyright allow for the use of works without seeking permission from the owner. The exception has also removed the obligation to pay for the use of these works, so the economic benefit to creators of 2D photographic is zero.

Most commercial licenses for photo usage are under £50 and most companies that operate in the photo-licensing sector are SME's and micro businesses. Le Corbusier v Getty Images case is representative of neither the design nor the image licensing market and is reflective of a bygone era when licensing attracted much greater royalties than they do today. This case also relies on French law. Our clients say that they are not able to absorb additional costs of obtaining new licenses to clear the design rights – including costs to display their images on their websites for potential sale, nor are they able to increase the sales value of their images to their clients to offset their cost of the additional licence fees

5 As quoted in http://kluwercopyrightblog.com/2015/09/24/incidental-inclusion-of-works-mere-incidental-relevance-of-the-exception-according-to-the-german-bundesgerichtshof/
6 Article 57 GCA and Article 5 (3) lit i) Copyright Directive 2001/29

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It is unlikely that designers will receive much economic benefit from royalty payments from use of their work in photographs. We are of the view that this is not a victory for any stakeholder.

Timescale

Given the disproportionate impact on creators and publishers of this legislation it would be ideal to see as long a transitional period as possible to prepare. If an exception of 2D photographs can no longer be argued, then a reversion to five years for photographs of copyright works and the depletion of stock and completion of contracts would be entirely more practical. To do otherwise would be disproportionately unfair to all other creators except a limited number of unidentified copyright holders of works now to be included in scope.

Are there any other issues which the guidance should cover which are not listed?
Do you agree that the Government is right not to distinguish between two- and three-dimensional copies?

Government is not in a position to list items that are protected by copyright in this area, as this may be a matter for the courts ultimately, but our clients indicate that provision or facilitation between stakeholders to arrive at an MOU on how industry might proceed in light of S52 would be greatly welcomed.

Government has stated that it has no intention of creating a register of designs or designers of such copyright, but a central source is required. Guidance on available case law to identify and minimise risk in the first instance, is essential and this will take time for industry to compile.

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?

At time of writing neither we, nor our clients are aware of licensing solutions for the management of s52 to discern with great certainty whether licences should be compulsory and blanket or not. It should be up to the designer whether they wish to assert the moral right of attribution and no fee or £1m for the use of their work.

In the case of existing publications, exhibition etc. where works of the nature covered by s52 and form part of an embedded work, if one designer elects to opt out of an existing publication or may demand fees greater than is within a project budget this may prove problematic.

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A case study in support of our request that IPO treat 2D and 3D works differently

Process for capturing works which may include works in scope of s52

The following entities (will be affected)		
Stage One: the following commission or use existing 2D images	**Estimated number in the following categories**	
Professionals / creators Designers Interior designers **Architects** **Publishers / creators** Agencies Product distributors (such as retail outlets), Independent television and film companies **Museums**	**Architects:** RIBA 3000 Architects Registration Board Numbers not available – circa 3000? International Union of Architects has a membership of 1.5 million Total Estimate 1.5 million	**Design:** British Institute of Interior Design, Interior Designers, Design Associations Total Estimate 6000
	UK Museums: based on MOCA's client list & research data, excludes design museums & regional collections, stately homes, etc Conservative estimate 18	
	Photographers / Agencies Some designers for example may have asked for their works to be shot, but in life style photography images may include work of others designers Total Estimate Unquantifiable – upwards of 1000	
Stage Two These works are made available via:		
Magazines Professional awards	Wikipedia lists the following design related magazines: 76 on design, 10 design award magazine, 14 design organisations' magazines, 4 architectural design, 12 industrial design, 7 designer led works, 5 urban design etc. Total Estimate: Upwards of 100 titles	
Books	Amazon search for books by subject: design 736,987 titles found, designers, 27,283, history of design 124,783 Total Estimate Min 800,000 titles (excluding dupes) Multiplied by the average print run (ranging from 1k-1m) Conservative Estimate: Min 400m books	

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Brochures Entities own web sites	Unquantifiable – upwards of 5m
Social media – quoted to provide the context of the world of 2d images	Circa 3 trillion images per year uploaded in various forms of social media, of these 106 million are lawfully licensed[7] of these an unknown % include works within scope of s52 Unknown - Estimate – upwards of 10m images

***Case study – costs of clearing images by UK architects alone**

We asked Hon Sec of The Architecture Club and Director of Arcaid Images,
Mrs. L Bryant to quantify the time it might take architectural practices in the UK to assess photographs they have commissioned or in their possession to review the inclusion of s52 works:

Using 'the Consultation On Timing of Repeal of Section 52 CDPA (2014)' it takes 3.5 hours to clear a photograph. Government estimates that 1 person could clear 1626 photos over 3 years (@ 253 working days and 7.5 hours per day)

If a UK architectural practice pays one person £35k pa to review an archive of circa 5000 images, using the calculations given by Government, it would take one architectural practice 3 years to clear the images or in financial terms £105,000 over the 3 years.

If this figure were applied to RIBA membership (3,000 members) the costs to this one community of due diligence of their archives would be **£315m**

If this figure were applied to the universe of architects using International Union of Architects membership as a base (1.5 million members) the cost to identify copyright images under s52 would be circa **£157b**

Conclusion

The aim of s52 is to offer protection to industrial designers equal to other artistic works (70yrs PMA). Outside of the scope of this consultation is a profound desire that IPO re-consider an exception for 2D works - photographs of industrial works, as photographs are not the works, merely 2D representations of the works in question. Using calculations above to apply to other sectors such as book, magazines and AV, we hope will indicate to IPO the size of the potential unintended consequences.

Costs aside, the social impact of s52 alone of the eradication of visual artefacts of 21st century design from history, culture is unquantifiable.

[7] Sources: Wikki Image, DMLA 2015, Adobe presentation 2015, Selling Stock 2015

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The aim of secondary legislation is its light touch approach; changes can be brought in with greater speed, to quote a former head of IPO, "policy mistakes can easily be rectified by another SI". In the instance of 3d works in s52, appearing as 2D embedded works (books etc.); the depletion of such stock is a step towards permanently removing these. We hope that in our submission we have argued that it will have a disproportionate impact on the many - demise of specialist publishers and image supplies that form part of the delicate eco system that is copyright licensing, and the expense of the very few.

MOCA would welcome the opportunity to meet with IPO, perhaps early 2016 or sooner to discuss:

• Our work to create a report on the State of Copyright – an analysis of 25k – 45k global copyright cases, involving between 519k- 950k images. The aim would be to remedy the paucity of data available from our sector and in support of good policy and decision making on copyright

• Workflow solutions being evolved at time of writing by MOCA and her technology partners to manage the workflow process of rights clearance of ECL and s52 respectively

• An approach in the creation of an MOU and guidelines for industry.

Ends

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[redacted]