THE SOCIETY OF AUTHORS

REPEAL OF SECTION 52 OF THE COPYRIGHT, DESIGNS AND PATENTS ACT, TRANSITION ARRANGEMENTS.

RESPONSE TO CONSULTATION

Society of Authors
December 2015

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The Society of Authors is a company registered in England No. 19993 and an independent trade union

INTRODUCTION

ABOUT THE SOCIETY OF AUTHORS

The Society of Authors exists to protect the rights and further the interests of authors.

Founded in 1884 it now has nearly 9,500 members writing in all areas of the profession (from novelists to doctors, textbook writers to ghost writers, poets to games writers, broadcasters to academics, illustrators and photographers to translators).

BACKGROUND

The Enterprise and Regulatory Reform Act 2013 repeals Section 52 of the Copyright, Designs and Patents Act, the effect of which is to reinstate the full term of copyright protection to 3D artistic works, whether created as a one-off or industrially manufactured, and 2D images of them. This has obvious implications for books and other publications which contain photographs of such works. The Act provided that the exact date this would take effect was to be decided via a subsequent Commencement Order once transition arrangements had been agreed.

The Government consulted on the scope and length of the transition arrangements during 2014. Transition periods of three varying lengths were presented as options: six month, three years and five years; with the Government concluding that five years was appropriate. This was welcomed by publishers and authors as 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. In addition, existing printed works could still be sold without fear of being deemed infringing, so long as they had been published before the date of the Commencement Order.

However, the Commencement Order giving effect to this proposal was withdrawn by the Government following a legal challenge, the main plank of which apparently being that the proposed five year transition period was too long and incompatible with EU law. Publishers had already begun making commercial arrangements based on the original transitional arrangements and authors stand to suffer loss and even to find themselves in breach of contract as a result of the Government's rapid and dramatic change of course.

EXECUTIVE SUMMARY

The SoA supports the Publishers Association's submission in full. It is extremely concerned at the Government's proposed volte face in this matter and in particular it notes the profound lack of understanding of the impact of the proposals, the lack of proportionality in the effect on publishers and authors compared with other rightsholders, and a failure to comply with the Government's consultation principles. 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 and may constitute a breach of the human rights of authors and publishers to peaceful enjoyment of their possessions.

The Government should:

- 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.
- Re-introduce the previously accepted longer five year transitional period for the use of 2D images of 3D works in published materials.
- Exclude existing published books from any depletion period.

QUESTIONS

- What will be the impact of a transitional period of six months, both costs and benefits?
- Should the six months run from the start date of this consultation or from a different date, and if different, why?
- Should a longer or shorter transitional period than six months be adopted, and if so, what are the costs and benefits?
- 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?
- 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.

RESPONSES

From having once concluded that five years was an appropriate length of time for the transition period, the Government now puts forward as the only option a period of six months. Furthermore, and in a move which appears to be almost without precedent in Government consultation exercises, the clock is deemed to have begun ticking from the publication of the consultation, meaning that the repeal will come into effect on 28th April 2016 – effectively only five months from the closing of the consultation. In the consultation document the Government states that this proposal 'allows time for business to understand the effect of the repeal on existing stock and future business practices.' This assumption, made without prior consultation with publishers or authors, is false. For the outcome of the consultation to be pre-empted in this way calls into question the value of the consultation exercise.

A depletion period has also been introduced whereby all materials whether published before 28th October 2015 or between 28th October 2015 and 28th April 2016 must be sold or re-licenced by 28th October 2016. This provision was absent from the original consultation and is incredibly damaging creators of design books. A six month depletion period is far too short for books. The shelf life of books is long. It will typically take around two years from commissioning for a book to be produced and, thereafter the work can remain in circulation for many years. This is particularly true of the type of highly illustrated works which are likely to be affected by the new legislation.
Authors are likely to be adversely affected for the following reasons;

1. Indemnities authors often source and commission the photographs for such books. Our members include authors and also photographers and illustrators, all of whom provide artwork. At the time that they enter into contracts such authors are asked to provide indemnities that the work does not and WILL NOT (my emphasis) infringe any copyright. A typical clause would read:

Author warrants and represents to Publisher that the Author has the right to enter into this Agreement and grant the rights granted in it; that neither the Work nor entering into this Agreement will impair or violate anyone else's rights including but not limited to rights of privacy, rights of publicity, libel or infringement of copyright or any other rights. Author shall hold harmless Publisher, its licensees, agents, shareholders and officers and directors, against any claims, demands, costs, and damages, including legal fees, whether or not a breach of these warranties is finally sustained.

The effect of this change therefore is that authors may find themselves in breach of warranties given in good faith at the time the contract was signed. They may also find that they are now contractually obliged to provide images of particular items and will then have to pay fees, having worked on the assumption that the images would be free.

2. Royalties advances given for highly illustrated works are traditionally low or non-existent. Authors rely on sales to reap the benefits of their work, often put in many years previously. If books have to be pulped or withdrawn due to the repeal then authors will lose any royalties that would have been earned during the natural lifetime of the work. To apply a six month transitional period will be highly costly to authors but will give no financial benefit to creators of three dimensional works as there has been no evidence produced that the sales of 2D representations have any adverse effect on the sales of 3D works. This is extraordinarily unfair to an author who will find that a book is now not going to be published due to no fault of their own.

3. Licences. The government suggests that it may be possible for rightsholders to obtain retrospective licences to avoid works being pulped. This is unrealistic.

- Such works are carefully costed at the outset. Often an image will not be used if the fee will be too high.
- Rightsholders in the 3D works depicted will know that they have publishers over a barrel when negotiating these retrospective fees since if a fee is not agreed the work will have to be pulped. This is not the normal negotiating situation when the publisher would be free to go elsewhere. Such fees are likely therefore to be unrealistically high and to create a windfall for the rightsholder at the expense of the publishing industry and ultimately the author. We are particularly concerned in this respect at the proposed repeal of Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995. Also absent from the original 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 rightsholders 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, had the ability to take at least a small part of the sting out of the repeal by at least giving publishers and authors 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 rightsholders withholding permission. Its repeal is therefore of extreme concern.
- Publishers are very busy and most design books contain multiple images. 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.

Overall, we are surprised by the lack of balance or proportionality in the new proposals. We understand that the Judicial Review challenge was based around the previous arrangements being incompatible with EU law and the Flos judgment. However, Flos does make permit for transition arrangements so long as they are proportionate. The new proposals (six months transition period starting from the date the consultation was issued, a short depletion period,

the repeal of Regulation 24) all points to there being no balance in favour of users of 2D images of the designs and, given the devastating impact this could have on existing and future design books and the lack of harm caused by the image of a 3D product in a printed work as opposed to a 3D replica of the original product, is a disproportionate response which we would suggest would constitute an unjust interference with the rights of authors and publishers to peaceful enjoyment of their possessions in accordance with Article 1 of the First Protocol of the European Convention on Human Rights.

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. We, therefore, question why the Government is opposed to having a separate transition arrangements for the use of 2D images. It is correct that neither the Design Directive nor the Flos case makes a distinction but we do not believe this to be material. We believe that an approach giving a 5 year transition period to give effect for 2D images and excluding books from the depletion period entirely would provide the most equitable and proportionate solution and one which would not unjustifiably damage legitimate property rights.

FURTHER INFORMATION

For further information or to discuss any of the information provided, please contact **Nicola Solomon**, Chief Executive:

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