



**A BAPLA Members Guide to Section 52 (CDPA
1988)**



What we do

The British Association of Picture Libraries and Agencies¹, or BAPLA, is the trade association for picture libraries in the UK and has been a trade body since 1975.

Members include the major news, stock and production agencies as well as sole traders and cultural heritage institutions. A substantial percentage of images seen every day in print and digital media are supplied by BAPLA members.

BAPLA's lobbying group undertakes advocacy work on behalf of its members. In 2014 many of the proposals of the 2011 Hargreaves Review and the 2013 first stage legislation were finally implemented. Further regulations were passed, and two major schemes proposed by the UK Government - Extended Collective Licensing and Orphan Works - launched in the autumn of 2014. During this time, BAPLA was recognised as the most active lobbying group on behalf of visual artists.

Through various BAPLA events held throughout the year with an emphasis on education and debating key issues affecting the image industry members have the opportunity acquire further knowledge to navigate through the latest changes.

Being part of BAPLA gives you a voice in the only UK trade organisation exclusively representing picture libraries & agencies, which lobbies to raise awareness of their significance within the creative community, as well as the importance of IP, innovation and growth our sector fosters.

Our core objectives

- Represent picture libraries and agencies of all sizes and types.
- Encourage best practice within the industry.
- Lobby at UK and international level to ensure the core principles of our industry are protected.
- Develop and deliver solutions on 21st Century copyright.
- Channel the knowledge and expertise of the wider picture community.

BAPLA is steered by an elected voluntary Executive Board of seven officers, supported by two permanent office staff and a number of subcommittees. Our work is funded by membership fees and in return we are dedicated to supporting our members by providing day-to-day business support and by representing our industry on a national and international level.

BAPLA works closely with its sister organisations CEPIC² in Europe and DMLA³ in the USA.

¹ www.bapla.org.uk

² cepic.org

³ www.pacaoffice.org

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Introduction

During 2013 & 2014 the UK Government introduced a series of legislative measures on Copyright. These measures will undoubtedly have an impact on the UK Photography Industry, including picture libraries and agencies; some changes will impact the industry more than others. This Members Guide has been drafted to enable you to have a simple overview of the new legislation, with links for further reading. As always these guidelines are only meant as a reference and do not constitute legal advice, which you should seek if you have any specific questions. BAPLA has a list of recommended advisors (*at the end of this guide*).

Background

The UK Government initiated the changes to Copyright Law after the controversial Hargreaves Review was published in May 2011, under the title Digital Opportunity⁴. From the recommendations to reform UK copyright, along with a series of three consultations with a variety of stakeholders, including designers and related rights holders, manufacturers, importers and retailers, and 2D rights holders and creators, the Government set to introduce the following legislative change to IP law - Extending the term of protection of mass-produced artistic works (see Other Useful Terms below) - otherwise known as the **Repeal of Section 52 of the CDPA**, in order to fulfil their commitment to harmonising UK law with the rest of the EU.

Definition of Copyright

Copyright is an exclusive property right; it protects the form of expression of ideas, including artistic works such as photographs. It provides the rights holder with the right to financially exploit, grant permission to sell, or license the right to copy their creative works, and importantly protects a rights holder against unauthorised use. The copyright term in the UK is the lifetime of the author plus 70 years.

There are two types of rights under copyright: economic rights allow the rights holder to derive remuneration from the use of their works by others; and moral rights which enable the creator to take actions to preserve the personal link with their works by authorship credit and the right to prevent derogatory treatment of the work. In the UK and Europe as a whole, created work is considered protected as soon as it exists for a period of the life of the author plus 70 years, without the need to register the work in any way, (unlike the USA where registration can make it easier to protect against infringement, although fees apply).

Importance of Copyright

Whilst many of our members work in the creative industry, it can be easy to forget that our industry is founded on copyright. Without copyright anyone can copy creative works without permission, from an individual making a flyer for an event to a large corporate/retail company publishing a photo you took of your favourite moment (online and/or in print), neither of which would see the rights holder receive any remuneration. As picture libraries and agencies we facilitate the process for the creator by investing in marketing the photographer's work to the marketplace. It is a synergy that has benefited both parties for several decades.

⁴ tinyurl.com/digital-opportunity

Removal of Section 52 of the CDPA (Limiting Artistic Design Works to 25 years once manufactured)

The removal of this clause brings back a full term of protection to design works to the 'life of the author or creator plus 70 years'⁵. It is important to note what types of design works maybe included, as it may require permission to be sought by the rights owners whose design work may feature in a 2D work, such as a photograph. However it is also worth noting that such a work must also prove to be of artistic craftsmanship, which remains unclear in UK law⁶.

It's not just furniture

Certain design works may also be protected by copyright as 'artistic works', hence providing a **non-exhaustive** list of possible items, along with a link to a list of named design works:

Items/products, which may be considered as 3D Design Works:

- furniture - chairs & sofas, tables, shelving, incl. garden
- lighting - lamps, lampshades
- tableware - cutlery, ceramics, pottery and glassware
- installations - taps, handles, clocks, pots (e.g. Alessi, Le Creuset)
- electrical appliances - vacuum cleaners, audio, video, cameras, phones
- textiles - fabrics, wallpaper, rugs
- fashion and accessories - handbags, jewellery, shoes, costumes
- toys and games - including those protected by trademarks
- certain graphics, such as packaging
- retail merchandise - including film and TV paraphernalia⁷

The link to this website gives you an idea of some of the types of works listed above⁸.

Repeal Date

The UK Government originally announced the commencement date as 6th April 2020. From the repealed date certain design works will be afforded the same protection as artistic works. However, this was subsequently revoked and a **new recommendation of the 28th July 2016** for the exception to be repealed **takes effect**. The Government has provided a **guideline for affected individuals, organisations and representatives**⁹.

A reversal of the decision was made for several reasons, the most influential was the legal challenge to the Government brought about by an open ended Judicial Review from three furniture companies - Vitra, Cassini and Knoll on the basis of compatibility with EU law, forcing a U-turn on the Government 's initial decision on the transition period announced in March 2015. The reversal of that decision rests on two key elements - the 2011 Flos case which looks at the balance and proportionality of the rights holders affected by Section 52 in conjunction with the 2001 Designs Directive, in which the terms have to be proportional to the change

⁵ tinyurl.com/transitional-provisions

⁶ <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/documents/consultation-on-transitional-arrangements-law-society-response/>

⁷ tinyurl.com/lucasfilm-ainsworth

⁸ designmuseum.org/design

⁹ <https://www.gov.uk/government/publications/copyright-protection-of-industrially-manufactured-artistic-works>

for the beneficiaries. The Government believes a better balance must be struck in light of this.

Other Useful Terms

Copyright Exceptions

These are limits on the exclusive rights of the copyright holder to exploit the protected work. They provide legal parameters in which a person can copy a work without seeking permission from the rights holder.

Insubstantial & Incidental Use

Having a 3D design work in a photograph does not automatically mean it would infringe copyright of the feature work, but it depends on the substantial use of the work. Whilst 'substantial' is not defined in the Copyright Act (CDPA 1988), it is a matter of degree and fact and can be tested by quality as well as quantity. Incidental use refers to the focus of the photograph, if the object/item forms part of the photograph setting but is not the main focus or the commercial driver then it maybe deemed incidental.

Q. Why should we be concerned about this change when EU countries have the same protection for such works already?

A. There have been several cases already in certain EU countries where a designer has challenged the copying of a design work. Essentially it is about mitigating the possible risks of infringement, as there is uncertainty about who may challenge a use.

Q. How can I ensure our photographs are not liable for infringement?

A. In many cases where a photograph features a design product it maybe difficult to tell. We would always recommend getting a legal opinion in the first instance (*see back of the guide*). You may also want to consider taking out indemnity insurance, in case you are uncertain about the works you hold or represent.

Quotation Exception

An extension of the original exception for Criticism & Review, which includes 'quoting a photograph' in a publication in print and online provided that such inclusion can be said to be 'Fair Dealing'. Historically, the Criticism & Review Exception was introduced for the purposes of reporting a current event, provided there was sufficient accompanying acknowledgement and that the dealing was fair; the exception did not apply to photographs as it was argued that photographs contain a unique visual report of a person or an event, and therefore as photos were excluded it meant a newspaper could not use photos from rival newspapers and claim a fair dealing defence. This struck the right balance between protecting the rights of the photographer and the wider public interest. However, the introduction of a wider exception under 'Quotation' does not exempt photography, and the exception is also protecting by 'Fair Dealing' (see below), which means that a work should not be used beyond a non-commercial purpose¹⁰.

Contract Override

All of the new/revised UK copyright exceptions include a 'Contract Override' principle, which simply put means that the exceptions apply regardless of any contractual clause preventing the new use. This means that rights holders cannot restrict the use of exceptions by contract.

¹⁰ Page 6: tinyurl.com/consult-ia-bis0310

Q. Why is relying on the quotation exception an issue?

A. Previously, a photograph could only be published without permission for the purpose of critiquing or reviewing the photograph. The exception has been extended to include any quotation, which can be a full photograph. Where this is important is on internet search engines where the whole image can be quoted without permission to do so. It remains restricted by 'Fair Dealing', which means it cannot be exploited when a paid for copy can be obtained.

What Is Fair Dealing

Exceptions only apply if the use of a copyright work is 'fair dealing' and are permitted acts, which do not require permission from the copyright owner. Firstly, 'Fair Dealing' extends to published works only, it should not interfere with the normal exploitation of the work - for example if the new work acts as a substitute for the original, causing the rights owner to lose income. Secondly, is the use reasonable and an appropriate proportion; is the amount of work copied necessary for a legitimate non-commercial purpose? Fair Dealing in the UK and Europe is not the same as the US 'Fair Use' which has different stipulations and a far broader use of exceptions, such as full use for education and transformative use.

BAPLA Recommended Legal Firms:

Open Plan Law

Ania Skurczynska is the lead UK and European counsel to Corbis, and also runs her own legal consultancy, Open Plan Law, focusing on copyright and commercial law. Before her involvement in the images industry, she practised Intellectual Property at City law firms of White & Case and Berwin Leighton Paisner. She is a former BAPLA director and has actively participated in the last round of the legislative reforms of copyright in the UK lobbying in the interests of the visual industry.

ania.skurczynska@openplanlaw.com

Tel: +44 (0) 7889634117

Swan Turton LLP

Swan Turton LLP is a leading media law firm advising clients in all areas of the photographic industry. Clients include the AOP, whose legal advice service Charles Swan and his team provide, along with numerous picture libraries and photographers.

www.swanturton.com

Tel: +44 (0)20 7520 9555

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www.shaip.co.uk

shadland@shaip.co.uk

Tel: +44 (0)1491 628669

Business Support:

Matthew Whinney BA (Hons) ACII

Chartered Insurance Broker, Director Whinney Insurance Brokers

T: 01206 765 580 M: 07731 737 191

matt@whinneyinsurance.co.uk

www.whinneyinsurance.co.uk