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Section 52 consultation
Copyright Directorate
Intellectual Property Office
4 Abbey Orchard Road
London SW1P 2HT

BAPLA[®]

Thursday, 07 January 2016

Dear Sir or Madam,

Consultation of transitional arrangements for the repeal of section 52 of the Copyright, Designs and Patents Act 1988 (“CDPA”) (“Consultation”)

BAPLA’s position on the Government’s Consultation remains the same as already expressed on two prior occasions (including as part of the Enterprise and Regulatory Reform Bill): the repeal of section 52 will have a significant chilling effect on the photographic industry and so BAPLA supports a 5 year transition period in respect of 2D copies of the articles subject of the Consultation (“Articles”). These views are captured on page 12 of the impact assessment appended to the Consultation (“Impact Assessment”) but, for completeness, we attach BAPLA’s most recent submission from 27 October 2014.

Given our previous detailed responses on this topic, and the Government’s acknowledgement of our industry’s position, we will limit this submission to some additional comments in response to the Consultation.

BAPLA believes that the adverse impact of the repeal on the photographic industry would be minimised once the Government recognises that the objective underlying the transitional arrangements can be met by distinguishing the arrangements made in respect of 2D and 3D copies of Articles. This objective is expressed at paragraph 13 of the Consultation following the Flos case (C-168/09), and it is for the transitional arrangements to be proportional, bearing in mind the acquired rights of third parties concerned and the right holders.

It is BAPLA's assertion that this balance is achieved differently for 2D and 3D copies. The balancing exercise must, in each case, take into account the harm that the repeal will cause to parties operating under the current system versus the harm it will prevent. The quote from a right holder on page 6 of the Impact Assessment confirms our position. The concern expressed in the quote it focuses solely on potential losses resulting from imports of unlicensed 3D copies into the UK. It is beyond the scope of BAPLA's activity to comment on this alleged loss but one thing is clear - the loss from 2D copying does not feature in the quote, nor, we suspect in the consciousness of the majority of the designers. This is because any such harm - to the extent it arises at all (and BAPLA asserts it does not) - is disproportionately low compared to a loss suffered as a result of competing sales of 3D replicas of the Article in question. It is therefore imperative that the transitional arrangements reflect this position by affording the makers of 2D copies appropriately longer transition periods.

As you will be aware, section 52 was introduced to embody the UK's obligations under the Berne Convention in respect of works of applied art on the one hand, and on the other hand, to "rid copyright of its most egregious excess in entering the realm of industrial property"¹. This balance has now shifted in favour of designers as a result of the European Union legislation and case law. Whilst we must comply with it, the copyright "gain" of the design industry which damages other lawfully existing and unrelated business models seems to be overreaching beyond what the Design Directive and the Flos decision had intended.

The photography industry in the UK, and photographic agencies in particular, are important contributors to the UK economy, generating revenue, employment, and export earnings. BAPLA members employ in the region of 2,500 people in the UK and generate revenue for, and manage the interests of, 120,000 creators and rights holders. They range from a majority of sole traders and SMEs, to medium and large sized agencies. Our members contribute significantly to a whole range of economic activities such as news-gathering and reporting, education and research, as well as database creation, which supports the all-important digital agenda both at the national and international level. A change in law which results in our members having to abandon or reduce their activity due to disproportionately high costs of what our members may believe (correctly or not) that they must do to comply with it will have an impact on all the above activities, not only for our members but also their contributing photographers and publishing clients.

On a practical level, considering the impossible task of conclusively identifying which articles are protected for the newly extended term it is not feasible or realistic to expect the photographic industry to "deplete" images of the articles. First, as mentioned above, this would deprive our members of the possibility of carrying on the business which that they do lawfully and which serves an altogether different function from, and does not compete with, the business of designers. Secondly, the costs of doing so would vastly outweigh the value charged for such works within 2D images. The only way to lessen this risk for 2D rights holders, in addition to making the transition period a reasonable and proportionate duration, is to extend the depletion period indefinitely for 2D works to allow for the use of images licensed before the end of the transition period to be used within the full contractually licensed duration. This is particularly important given that many licenses granted to our members offer perpetual rights (e.g. images licensed under a "royalty-free" model). If implemented as currently proposed this law would unjustly prejudice interests of copyright holders in

¹ After W. Cornish and D. Llewelyn, *Intellectual Property*, Sweet & Maxwell 2007

contravention of the Berne Convention's three step test. 2D copies should therefore be distinguished from 3D copies for the purpose of the provisions relating to the depletion of stock.

BAPLA was advised by the IPO at the meeting on 30 November that photo agencies might benefit from certain copyright exceptions under the CDPA, such as the newly introduced quotation exception. It is noted that the application of this exception is as yet untested and therefore of no comfort to our members. Nor is the assumption that incidental inclusion (with "incidental" not defined by Parliament in this context²) may fix the problem, especially when there is also no clear definition of what artistic craftsmanship entails. BAPLA would welcome further guidance from the IPO on this.

To leave these boundaries to be determined via litigation, as will likely be the case if photographic agencies and their customers are not given sufficient time to adapt their practices to the new law, is likely to cause harm to a range of 2D rights holders, and following, create a considerable chilling effect across an entire repertoire, specifically impacting on the livelihoods of 2D rights holders whose intentions are to support the promotion of these aspirational 3D products. In any case, the mere existence of the exceptions does not justify the disproportionately short transition period in respect of 2D copies.

In the view of the above, we respectfully submit that the 6 months' transitional period proposed by the Government is inappropriate for our sector and at odds with the objectives of the proposed legal reform. Once again we call for a transitional period of 5 years, as previously committed to by the Government, based on the evidence provided by all 2D rightsholders for each consultation to date.

"The fact that there has been no consideration for those professionals whose livelihoods depend on 2D works, which supports the desirability of 3D works, either in relation to an extremely short transition process nor to the consequences of leaving them open to the possibility of legal challenges is irresponsible. Proportionate provisions must be made to cater for such professionals to enable them to adjust in a timely manner and with guidance." Isabelle Doran, BAPLA Chairperson.

Kind regards

Ania Skurczynska
On behalf of BAPLA

Encl. BAPLA submission on the last s.52 consultation, 27th October 2014.

² The Court in the Panini case reminded us that 'incidental' is an ordinary English word that was purposely left undefined by Parliament