

## **BAPLA Submission to the Post-implementation review of the repeal of section 52 of the CDPA 1988 and associated amendments - Call for views**

### **About BAPLA**

BAPLA welcomes the opportunity to comment on the post-implementation review of the repeal of section 52 of the CDPA 1988 and associated amendments.

Our members provide a 'vital economic link' for many professional photographers, videographers, illustrators and other image makers, supporting their ability to derive income and reinvest in their creativity.

Founded in 1975, BAPLA is the UK trade association for picture libraries and agencies representing up to 110 members of a unique area of the creative industry. We have a broad and diverse membership of image rights holders and purveyors, from sole traders to major news, stock and production agencies, as well as many SMEs, archives and cultural heritage institutions.

Our members are the main source of licensed images you see every day in print and digital media, and as such have contributed to the UK economy for over 40 years. BAPLA members generate revenue for and manage the interests of over 120,000 image creators and rights holders, encompassing a breadth of experienced and new young image-makers across the UK. Licensing digital content online is the significant driver of the image industry.

The majority of BAPLA's membership consists of small and medium enterprises (SMEs) accounting for approx. 72% of the membership, with 28% as sole traders - many operating on very tight economic margins.

BAPLA previously provided submissions to the IPO in 2016<sup>1</sup>, 2014<sup>2</sup>, and in 2013<sup>3</sup>, prior to the repeal of Section 52 of the CDPA 1988.

As a member of the British Copyright Council, BAPLA also supports their submission, and that of our own members' individual submissions, which includes PICSEL and the V&A.

### **BAPLA's Response to Questions:**

**Summary** - As stated in BAPLA's submission to the government's call for views in 2016 ahead of the repeal, we expressed concern about a change in the law affecting the livelihoods of our members who licence and/or create artistic works, such as photographs (2D), featuring works of artistic craftsmanship (3D products), and supporting the desirability of such works, leading

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<sup>1</sup> <https://bapla.org.uk/wp-content/uploads/2018/08/Transitional-arrangements-for-the-repeal-of-section-52-2016.pdf>

<sup>2</sup> <https://bapla.org.uk/wp-content/uploads/2018/08/Transitional-provisions-repeal-of-section-52-2014.pdf>

<sup>3</sup> <https://bapla.org.uk/wp-content/uploads/2018/08/Transitional-provisions-for-repeal-of-Section-52-2013.pdf>

to members either abandoning or reducing their activity due to disproportionate costs associated with the inclusion of such works, causing a chilling effect in this specialist area. This has been born out in reality.

For this implementation review, BAPLA contacted members and former members, to get a clear picture of the impact. Suffice to say that due to concerns of an increase in spurious litigious claims, members reported changing their business practices during the implementation period and thereafter - some culling image collections, others forced to take out larger insurance claims, and/or signing increased indemnity contracts with clients.

All those we contacted recognised the importance of the full-term protection now afforded to rightsholders of works of artistic craftsmanship, particularly in dealing with counterfeit 3D replicas. However, as a sweeping measure, this area of photographic expertise has undoubtedly been impacted.

In relation to membership, this specific expertise in photography and associated collections has shrunk by more than a third, with just under 20% of those specialists no longer in existence, having been dissolved as companies, and a further 18% no longer operational in the UK.

Those specialists that remain say costs have nullified income considerably, affecting their bottom line and as a result reinvestment into the growth of their businesses or payments to contributing photographers.

## **General Questions about the repeal of section 52 CDPA, amendment of Schedule 1 CDPA and amendment of 1995 Regulations**

1. In your view, to what extent have these changes achieved their original objectives to protect all artistic works equally?

We surmise that repeal of this section of the CDPA has achieved its original objectives and afforded protection to works of artistic craftsmanship, alongside artistic works, although we cannot quantify this.

Although the two-year notification period before the repeal of section 52 may be viewed by other stakeholders as a lengthy and unnecessary process, it was very necessary to image rightsholders and their clients, such as book and magazine publishers, in order to adjust their business practices in preparation for the repeal date.

Additionally, it was previously suggested that our members could make use of certain copyright exceptions, such as quotation, and criticism and review – we have no evidence to substantiate whether our members have been able to do so. It is more likely that members' clients may make use of copyright exceptions in certain circumstances.

2. Do you think that the changes remain appropriate? Could the same objectives be met through other, more efficient, means?

We recognise that these changes remain appropriate, in so far as giving greater protection to works of artistic craftsmanship, although the challenge for those managing collections of photographs, or taking photographs with these works featured, rests with knowing when

such a work is afforded full term protection of 70 years after the death of the rightsholder(s), or when the item is deemed industrial without copyright protection. As an example, we note there is a case underway in the Intellectual Property Enterprise Court (IPEC) in which a UK company is being challenged over their version of a coffee-making pot by a Swiss company claiming copyright infringement<sup>4</sup>.

3. Now that the UK has left the EU, do you believe the changes remain relevant and necessary?

We recognise that the repeal of section 52 achieved its objectives, and although a change in the law was necessitated to conform to EU law at the time, it is accepted that the change would be implemented whether or not the UK was a member of the EU. Additionally, while the copyright *acquis* remains reflected within the laws of EU Member States, it also supports issues relating to National Treatment and reciprocity.

4. Overall, do you consider that the changes have benefitted your business, organisation or your members? Please provide details.  
No, as explained in our summary.

5. Have the Regulations led to any consequences that you did not anticipate? Please provide details.

No, as explained in our summary, we anticipated the consequences our members have experienced as a result of the repeal of section 52, leading to greater uncertainty either in photographing new material and/or licensing photographs for commercial and editorial use. This is in addition to having to change business practices to accommodate, whether that is extensive and time-consuming rights clearance - which can be challenging to identify and track down rightsholder(s), and/or rights checking for current and new collections ranging from 50,000 to over 800,000 images – see appendix for individual anonymised responses.

## Questions for right holders – owners, assignees, licensees

*We have answered question 1 in this section as our members are also rightsholders of artistic works (owners, assignees and licensees).*

**1. Have the changes led to increases in revenue as a result of increased licensing? If so, how does this compare with any increases to revenue that you may have anticipated?**

No, as anticipated income revenues have decreased as a result, with an estimated £3-4m loss due to a reduction in image licensing opportunities, increases in additional costs (to accommodate rights clearance, increases in indemnity insurance, and rights checks), dissolved companies or ones that are no longer operational.

2. Have the amendments changed the extent to which you need to monitor and enforce your rights? *Not applicable*

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<sup>4</sup> Pi-Design (Bodum) represented by Briffa Legal Ltd v I.Grunweg Ltd (Whittard) represented by Franks & Co Ltd (Case # IP-2021-000038)

3. What was your original estimate of benefits (financial or otherwise) when the changes came into force? How does this compare with the actual benefits you accrued? *Not applicable*

4. Have the changes made any difference to your ability to protect your rights? Please provide details and supporting evidence. *Not applicable*

## Questions for copyright users – retailers and manufacturers; publishers; photographers and interior designers; educational institutions and museums

*We have only answered questions 3, 5, 6 and 7 in this section, with respect to their relevancy.*

1. Were you able to use the depletion period for works affected by the repeal of section 52 CDPA? Did you have costs relating to any stock left over at the end of the depletion period? Please provide details and any supporting evidence. *Not applicable*

2. If you could no longer obtain a compulsory licence, were you able to negotiate a licence with the rights holder? *Not applicable*

3. Did you change your business model as a result of the changes? For example, did you change the range of models you wished to reproduce or retail? *Not applicable*

4. What was your original estimate of the annual licensing costs to continue using affected works when the changes came into force? How does this compare to the actual costs you incurred?

For those members affected we estimate an initial £2-3m loss due to a reduction in image licensing opportunities, and estimate a further £1-2m per year annually as a result.

5. What other costs, if any, have you incurred as a result of the changes (e.g. legal advice, time for clearing rights)?

Our members have incurred increases in additional costs in order to accommodate rights clearance and rights checks, which may on occasion include legal advice, particularly for certain furniture designers that are known to be generally more litigious. Furthermore, members have had to take out far larger indemnity insurance cover to accommodate increases in warranties required by their clients.

6. If you have experienced higher costs, have you been able to absorb these? If so, how have you done so (e.g. any impacts on your supply chain/cost to customers)?

Members we spoke with reported obligations to absorb these costs without any opportunity to offset these against the possibility of increased fees. Financial margins in this specialist area are extremely narrow, with licensing revenue tending towards low fees - meaning you have to license a lot of images to generate revenue. As a result, both the library, agency or photographer receives less and less income.

7. What benefits, if any, have you accrued as a result of the changes?

As attested by our members, particularly those who specialise in 2D works of or featuring works of artistic craftsmanship, there are no benefits accrued as a result of the changes. For

the specialists whose ambitions were to document these works of artistic craftsmanship, or for these works to be included in interior settings, the aims have always been to inspire and educate.

Isabelle Doran  
BAPLA Chair

<http://www.bapla.org.uk>

31<sup>st</sup> August 2021

## **APPENDIX – Anonymous comments from members (and former members):**

*“The repeal of S.52 has affected how a significant part of the collection can be used. For example, we can no longer license very popular textile designs from the 1950s, 60s and 70s without the end client first clearing copyright in the majority of cases. It has proven reasonably difficult to ascertain who holds the copyright in some of these textiles, eg the designer or the manufacturer, as many designers were commissioned by the manufacturers and did not retain copyright. The manufacturer may then have been bought out by another company, details of the terms of commission are lost etc. This puts people off using images affected by the repeal of S.52, which means the collection is no longer being used as widely as it was, affecting the revenue we can make from the collection. It also means that publishers may avoid using images from a certain era and may therefore be presenting a restricted view of the history of design.”*

*“We have seen a marked increase in the number of client contracts where they are expecting 100% of the responsibility to be with the agency to ensure rights are clear for publication. In turn we have tightened our contracts with contributors, and where possible ensure that both we and the photographers are well insured.”*

*“The repeal of Section 52 effectively led to the closing of our business. The repeal made me and my partner 'redundant' but Section 52 was not there to pay our redundancy. The repeal forced us to make two members of staff redundant and we paid them. The repeal wiped the value off our archive – effectively wiping out a considerable portion of our pension fund. Why? Our collection specialised in architecture, interiors and the built world. From 2014 when the repeal was introduced our staff spent a disproportionate amount more time adding warnings to images and in some cases digitally removing items from interiors. This was wrong. While not quite Stalin removing his enemies it was / is creating fake spaces – not what the architect, business or homeowner had created. The impending repeal began to seriously impact – between December 2015 and December 2016 turnover dropped 35% and so it continued until we closed in December 2017. The prime international image distributor refused to accept our images without extensive property releases and ceased to market all but the most mundane of our material. Let the repeal of section 52 continue with outlawing outright 3D facsimile copies but do not continue to try and include inclusion in photographs or other 2D representations.”*

“The impact is felt on aspects of our reprint programme, as that now involves clearance investigation, where previously there was none. We have a long list of books we can't reprint as the costs involved would be too much. For new publications we factor in the time/cost of clearance investigation. This is definitely changing the course of published design history which may work against the makers, as we end up biasing content towards makers with whom we have existing relationships. It is worth noting that the purpose of the repeal appeared to be focussed on preventing physical copies of artworks, and that remains to be the focus of artists/designers, who (anecdotally) have little interest in copyright procedures concerning photography for publications. However, we still have to make efforts to ask them.”

*“Our archive specialised in interior photography, although not exclusively. It's a niche area of photography with very tight margins (output costs versus low market fees), which means having to license a lot of pictures to make very little in return - our annual income of over £100k pa gave us little room to accommodate extra costs. In preparation for the repeal, we had to take the decisive action of removing a fifth of our collection of images, which looked to feature furnishings with litigious owners to mitigate any risks, seeing this as a more cost-effective measure than paying far higher liability insurance premiums or for legal advice and rights clearance. We found that clients wanting to use our images become more nervous and uncertain about what they could/couldn't use, resulting in lost sales. In the end it was easier to stop operations and close the doors.”*