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Mr Taffy Yiu
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By email: Section52CDPA@ipo.gov.uk

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Dear Mr Yiu

Consultation on transitional provisions for repeal of Section 52 of the Copyright, Designs and Patents Act 1988

DACS welcomes the opportunity to respond to the transitional provisions for the repeal of Section 52 of the Copyright, Designs and Patents Act 1988 ("CDPA"). Since the majority of questions are addressed to users of works DACS will respond to the consultation more generally, restricting our answer to the point of view of visual artists. Whilst DACS generally supports the extension of copyright holder's rights, we believe that apart from striking a balance between rights holders and users of works, the interests of different types of visual artists need to be taken into account too.

About DACS

Established by artists for artists, DACS is a not-for-profit organisation for visual artists' rights management. Passionate about transforming the financial landscape for visual artists through innovative new products and services, DACS acts as a trusted broker for 80,000 artists worldwide. Founded over 30 years ago, DACS is a flagship organisation that has and continues to campaign for artists' rights, championing their sustained and vital contribution to the creative economy. DACS collects and distributes royalties to visual artists and their estates through three rights management schemes: Payback, Artist's Resale Right and Copyright Licensing.

General Observations

DACS notes with concern the sections in the consultation paper that contain legal assessments and assumptions that are prejudicial to visual artists and rights holders in artistic works. The consultation paper makes assumptions about the definition of artistic works, in particular works of artistic craftsmanship, and the application of exceptions is generalised. There is also a disregard to the fact that both situations call for a case by case analysis and established court practice.

When assessing which works are concerned by the repeal of section 52 CDPA, the consultation paper contains explanations about section 4 CDPA which are incomplete and which conclude in a suggestion to issue a Copyright Notice about what items are likely to attract copyright. DACS believes that this is insufficient and considering the expressed view of Government that items in museums and gallery

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collections often appear because of their prevalence or historical significance in a particular period of time, and may not necessarily make any attribution to its aesthetic qualities (page 7 of the consultation paper) may result in an assessment unfavourable to visual artists.

We believe this view may be the result of a very restricted application of one of the opinions expressed in the case *Henscher Ltd v Restawhile Upholstery* 1976 and that this view is no longer compliant with more recent developments on a European level, which risk for the delimitation of fixed categories of works in the CDPA 1988 to be non-compliant with EU law. Furthermore, section 4 CDPA may not comply with EU law given the apparent requirement, following the *Infopaq*¹ case, to allow open-ended subject-matter categorisation, as is already the case in other European countries like France, Germany and Italy.

Decisions of the Court of Justice of the European Union in *Infopaq*, *BSA*², *FAPL*³, and *Painer*⁴ have all sought to confirm this approach, focusing on the intellectual creation of a work rather than it falling within narrowly prescribed definitions of work categories.

UK law has not as yet fully encompassed this analysis as to works which are entitled to copyright protection and any analysis of which works attract copyright protection under section 4 CDPA should start there rather than on an explanation delivered by the House of Lords in 1976.

DACS further objects to the generalising assessment in the consultation paper that photographs taken of 3D artistic works will benefit from existing exceptions. It is well established case law that the application of an exception has to be determined on a case by case basis and that exceptions will only apply in limited special cases. The statement on page 17 of the consultation paper that “users and creators of 2D images of artistic works are likely to be able to benefit from existing copyright laws that allow the use of a work for the purposes of criticism and review, or for the incidental inclusion of a copyright work in another artistic work such as a photo, film or broadcast” is a generalisation that disregards established case law about the application of fair dealing exceptions as well as about the need for each and every use to be incidental, whilst being detrimental to visual artists as a whole. Such statements encourage an incorrect application of the law – incidental inclusion, for example, cannot be applied where there has been a purposeful use of a work.

We would therefore urge Government to refrain from issuing generalising guidelines such as the ones contained in the consultation paper and that any potential Copyright Notice would need to be created after consultation with the relevant industry sector.

Impact on DACS’ members

In general DACS welcomes the repeal of section 52 CDPA, as this will benefit visual creators whose copyright has been unduly restricted to 25 years under UK law. However, DACS also recognises that the repeal will have an impact on photographer members who photograph works that currently fall within section 52 CDPA. Following the line of argument in the consultation paper it does not appear that photographs taken of works falling within section 52 CDPA would become infringing photographs once the repeal is implemented. However, their subsequent use would need copyright clearance regarding the works included in the photographs as with any other artistic work shown in photographs.

¹ Case C-5/08 of 16 July 2009: *Infopaq International A/S v Danske Dagblades Forening*

² Case C-393-09: of 22 December 2010: *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury*

³ Case C-403/08: 4 October 2011: *Football Association Premier League Ltd and Others v QC Leisure and Others*

⁴ Case C-145/10 of 7 March 2013: *Eva-Maria Painer v Standard VerlagsGmbH and Others*

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This change will not prevent DACCS from licensing these photographs because the photographer (or rights holder) still retains copyright in the photograph itself; however DACCS appreciates that the clearance process will potentially be more laborious considering that the photographs contain works which are now back in copyright.

Transitional period

DACCS favours a transitional period for the implementation of the repeal of section 52 CDPA that is fair, proportionate and balanced. We are aware that different stakeholders will have different interests and, in particular, we are concerned about the impact the repeal will have on photographers who have specialised their practice around taking photographs of works that fall within section 52 CDPA. DACCS is further sympathetic to businesses who have specialised in the reproduction of artistic works they believe to be out of copyright following section 52 CDPA; however, as section 52 CDPA unjustifiably restricted the term of protection in those works we believe that rectifying this situation should take precedent over the interest in maintaining a business that was as such illegal in other European countries and is now in the UK.

DACCS believes that the extension of the term for works that were affected by section 52 CDPA is in effect not fundamentally different to the previous extension of the term in the UK for all works from 50 years after an author's death to 70 years after an author's death. Although a substantially greater number of works was affected by this change the transitional period was limited to 18 months. DACCS appreciates the fact that businesses have been set up and are focusing on the reproduction and sale of works that fell out of copyright under section 52 CDPA and that these should be given sufficient lead in time to adapt their practice. Because of the different stakeholder interests even amongst DACCS members DACCS cannot opt for a specific period.

Uncertainty about works of artistic craftsmanship

As outlined above DACCS is aware that some stakeholders to this consultation and members of the public are uncertain about what items will attract copyright as artistic works. Nevertheless, DACCS firmly believes that where legislation does not provide distinct guidance on this matter, it is not for Government but instead the courts to deal with interpretation. There have been several cases since the decision in *Hensher v Restawhile* that have considered the notion of artistic craftsmanship, including the recent case *Lucasfilm*⁵ and these cases provide significant interpretation of the law.

With regards to question 3 of the consultation paper and in respect of the above, we are mindful that a Copyright Notice would go above and beyond the interpretation of artistic craftsmanship that already exists through case law. It should also be borne in mind that any such interpretative guidance may affect other sectors than those directly affected by the repeal of section 52 CDPA and that a very limited view as expressed in the consultation paper could illegitimately restrict and deprive visual artists of their rights or ability to protect their work. A narrow interpretation to favour businesses specialising in copies of artistic work "furniture" may also have a negative impact on the application of Artist's Resale Right Regulations 2006.

As outlined above, DACCS believes that section 4 CDPA needs to be reformed more fully which in our opinion a limited Copyright Notice will not achieve.

⁵ *Lucasfilm Ltd & Ors v Ainsworth & Anor* [2011] UKSC 39

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