



Response to the Intellectual Property Office's *Consultation on transition arrangements for the repeal of section 52 of the Copyright, Designs and Patents Act 1988*

Vitra (www.vitra.com) is a family-owned furniture company founded in 1950 with headquarters in Birsfelden, Switzerland. It is a manufacturer of the works of many internationally renowned furniture designers and is also known for its worldwide-famous Vitra Design Museum in Weil am Rhein, Germany, which hosts the works of many notable architects.

In the UK, Vitra is represented by its daughter company Vitra Ltd, London. Vitra Ltd sells products in more than 40 bricks and mortar shops in the UK, employing about 1800 people. The company has also furnished a number of prestigious institutions such as the British Library, the BBC London studios and the Foreign & Commonwealth Office.

Many of the products manufactured and sold by Vitra are internationally recognised as 'icons' of contemporary design, exhibited in most museums of modern art and design collections. Iconic pieces of design which are recognised for their authors contribution to the art such as the Eames Lounge Chair or the Nelson Coconut Chair are indisputably works of fine art and protected by copyright throughout the European Union.



Vitra does not consider itself a mere furniture manufacturer, but also an incubator of innovative furniture design. Vitra supports famous, well-established British designers such as Jasper Morrison and Sir Norman Foster, as well as young British designers like Edward Barber and Jay Osgerby.



We promote young designers, continually develop new products and provide also products which are not interesting in an economic way but valuable in a cultural sense, such as the Eames “La Chaise”.



Vitra has responded to a number of Intellectual Property Office (IPO) calls for evidence and consultations on transitional arrangements for the repeal of section 52 of the Copyright, Designs and Patents Act 1988 over the past few years, and we would like to stress that the evidence submitted and the points made at that time are still valid within the context of this consultation.

Section 1: Transition Periods

- 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?

Vitra would like to thank the Government for inviting it to respond on the consultation on the new transitional arrangements for the repeal of section 52 (S52) of the Copyright, Designs and Patents Act 1988 (CPDA).

Vitra considers that the proposed transition period of six months is appropriate and proportionate – Vitra fully supports this proposed transition period and agrees that six months should run from the start date of this consultation. Given that the Enterprise and Regulatory Reform Act received Royal Assent in April 2013, Vitra would like to stress that, as acknowledged by the consultation document, businesses selling replicas have already had sufficient time – more than two years – to learn about the planned change in law and begin to make preparations for it. The law has changed; that it is now being implemented should not come as a surprise to anyone in the sector.

This proposed transition period will also bring the UK into line with European law in the shortest time possible. It is worth noting here that the UK has been in breach of EU law since 2001, the date at which Directive 98/71/EC on the legal protection of designs became applicable.

This has been made clear in the European Court of Justice ruling in the Case C-168/09 Flos SpA v Semerano Case e Famiglia SpA (Flos case).

The Flos case makes clear that any transitional provisions must satisfy the following criteria:

- First, respect must be paid to acquired rights and legitimate expectations (see Flos, para 50). Accordingly, it is accepted that some protection must be provided to those who have acted in the belief that S52 would provide a defence to any claim of copyright infringement.
- Second, however, any transitional provisions must be temporary and “cannot be extended to the point of generally preventing new rules from applying to the future consequences of situations which arose under the earlier rules” (see Flos, para 53 and Case C-60/98 Butterfly Music, para 25). Furthermore, the transitional measures must not “have the effect of deferring for a substantial period the application of the new rules on copyright protection for designs so as to prevent them from applying on the date laid down by the directive” (see Flos, para 55 and

Case C-60/98 Butterfly Music, paras 23 and 28). In light of this, the Government's proposals in this consultation document are appropriate.

- Thirdly, any transitional period must be assessed in light of the principle of proportionality (see Flos, para 56). In particular “the legislative measure ... must be appropriate for attaining the objective pursued by the national law and necessary for that purpose – namely ensuring that a balance is struck between, on the one hand, the acquired rights and legitimate expectations of the third parties concerned and, on the other, the interests of the rightholders. Care must be taken to make sure that the measure does not go beyond what is needed to ensure that balance is struck.” (Flos, para 57). In this regard, any transitional provision must be directed to a “category of third parties entitled to rely on the principle of protection of legitimate expectations – that is to say, persons who have already performed acts of exploitation ...” (Flos, para 58).

Overly long transitional provisions, which permit new entrants to the market during the transitional period, are incompatible with Court of Justice case law. Further, the transitional period should be “limited to what is necessary ... to phase out the part of [the] business that is based on earlier use of those designs or to clear their stock.”

Those who are manufacturing products in the UK (if any) have already had the time – over two years - to phase out the relevant part of their business.

Further, and as previously stated, to our knowledge no manufacturing is taking place in the UK. According to the report of the private investigators Brand Solutions International Ltd.'s (The full dossier of evidence collected by Brand Solutions International Ltd. was attached to Vitra's response in 2013), there are very few legitimate entities operating out of the UK selling copies of these iconic furniture designs. Of those that do, the vast majority of the products are made in China and shipped into the UK on order. **None of them are produced in the UK.** Further, a distinction should be made between businesses simply assembling imported parts from Far East and those genuinely manufacturing from the scratch. It also worth noting that replicas are generally being sold for very low prices and this would not be possible if products were manufactured in this country.

Others, including those dealing with imported parts from China, (in our experience the vast majority, if not all, those affected by the change of law) require only enough time to clear their stock in order to phase out that part of their business. Again, they have had over two

years to do this. The Government's proposal to have a short, clear transition period of six months is therefore sensible.

There is no rationale whatsoever for longer transition periods. Any longer transition periods would not only be against European law, as noted above, but also impose significant costs on designers of industrially-manufactured artistic works. The continued availability of copies of artistic design on the UK market has a devastating impact on the financial situation of design companies and on employment in the sector. For Vitra alone, the estimated annual loss from replica sales exceeds £17m. There are therefore no clear benefits in delaying the implementation of the repeal of S52. Accordingly, any longer transition period than 6 months would result in the stay of the judicial review of the transitional provisions being lifted and the Government's decision being further challenged, not mentioning potential claims for compensation.

It is also important to stress that artists of industrially-manufactured works should be given the same protection for their work and efforts as other artists such as composers and writers. The UK has some of the best design schools in the world. Yet, many young British designers like Edward Barber and Jay Osgerby currently have little incentive to stay and create in the UK where the law offers limited protection for the works that they produce. Ensuring that the transition period is six months from the start of this consultation will send the right message to these designers. As previously indicated, much of our evidence to support this has been submitted in previous consultations/calls for evidence.

Finally, Vitra welcomes the proposed guidance aimed at providing information about factors to take into account in determining whether an item can benefit from copyright. It is important however that the content of the guidance is carefully considered. Only a Court is competent to define what a work of "artistic craftsmanship" is, and addressing such questions could increase the number of future legal proceedings. Furthermore, on the basis of the Government guidance and if caution is not taken when clarifying such complicated issues, some parties could claim that they have innocently infringed the law.

Section 2: Depletion periods

- 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?

Vitra fully supports same treatment for both 2 and 3-dimensional. In this respect, we would like to make clear that we never have brought and will never bring actions against museums, schools, film makers and libraries using 2-dimensional images of design classics and we are confident that the same is true for the other right owners on artistic pieces of furniture.

Vitra's only intention is to stop the import of illegal replicas of our products to the EU market. We simply would not consider action against the publishing of our works in magazines, catalogues etc., because such action would destroy the most important marketing platforms for furniture design classics. Furthermore, taking such steps would damage the cultural impact of these enormously significant designs and prevent new generations from learning about the importance of world-class design. In addition, it must be stressed here there are already a number of exceptions to copyright that allow use of copyrighted works without the permission of the copyright owner within the Copyright, Design and Patent Act 1988 (Part I Chapter III), which will not be affected by the implementation of Section 74 of the Enterprise and Regulatory Reform Act 2013 . It is worth also noting that a distinction between 2-dimensional and 3-dimensional copies could also affect certain industries, such as the wall paper industry.

Finally, a favourable treatment for 2-dimensional copies could make it difficult to act against marketing materials advertising replicas of artistic designs, and would therefore directly go against the goals of this legislative change.

In terms of depletion periods, Vitra agrees that the Government should apply these periods only to those contracts entered into prior to the start time and date of this consultation. The benefits of this are clear, as acknowledged in the consultation, namely that it will bring the UK into line with European law and encourage innovation in the British design sector, as young designers see their hard work properly protected.

There are also associated benefits: a depletion period any longer than the one proposed by the Government and applicable to contracts entered into after the start time and date of this consultation could potentially see copyists encouraged to build stock, which they would sell on and so undermine the spirit of the change in the law.

There will be costs to businesses engaging in the sale of replicas, but – as noted above – these businesses have had since at least April 2013 to adjust to the changed regulatory landscape and six months is enough time for them to sell through stock, no tooling or other machinery having to be considered because no manufacturing having taken place in the UK. If these companies have not been able to make significant changes to their business model in the two years since the law changed, and if they are then not able to sell through stock in six months, then they must bear these costs.

As it is, to our knowledge no manufacturing actually takes place in the UK and all the copies of design classics are imported from Asia by businesses merely registered in the UK to benefit from S52 of the CPDA - as we have highlighted this in our previous consultation submission/responses to the call for evidence.

By taking an approach that favours longer transition periods, the Government would not be supporting British industry but would instead stifle creativity and competitiveness in this country. Furthermore, as a world leader in helping to enforce intellectual property rules around the globe, the UK should ensure that its laws are in line with EU legal provisions and do not encourage intellectual property rights infringements elsewhere. The suggested depletion period is therefore proportionate.

Finally, Vitra agrees that the sale of second-hand items purchased under S52 **so long as this product is not being sold as part of a business** is permissible and agrees that the Government should not make any legislative changes in this respect.

Section 3: Provision of copyright protection for works made before 1957

- Do you agree that Paragraph 6 of Schedule 1 of the Copyright, Designs and Patents Act 1988 should be amended to exclude items protected by copyright in the EU at 1 July 1995?
- If Paragraph 6 of Schedule 1 of the Copyright, Designs and Patents Act 1988 is repealed or amended, are you aware of items where copyright would be conferred which never previously had copyright protection anywhere?

Vitra considers that Paragraph 6 of Schedule 1 of the CPDA is incompatible with the principle of cumulative copyright protection for designs set out in Article 17 of the Design Directive and explained by the CJEU in “Flos”. As such it should be repealed in its entirety. Alternatively, at the very least, it should be amended to exclude “artistic works which were on 1 July 1995 protectable in another EEA state under legislation relating to copyright or related rights”. The difficulty with such an amendment is that it will leave on the statute book a provision which is incompatible with EU law. It is also unclear what the basis would be for not protecting works which were protected in the UK, but not in other EEA member states on 1 July 1995 (if such works exist). As such, there is a greater chance of unintended consequences if the provision is amended rather than repealed.

That said, repeal or amendment will have significant benefits in terms of providing legal certainty. Such a change will also prevent the reoccurrence of the situation where, in correspondence with Vitra, some companies offering copies of iconic designs have already stated they will rely on this provisions as loophole to continue their activities after the transition period for S52 has expired. This situation would have inevitably led to an increase in legal proceedings that will now be avoided if this provision is to be amended.

Finally, the repeal of S52 only brings the UK into line with EU law if Paragraph 6 of Schedule 1 of the CPDA will be repealed as well.

Vitra asks that this repeal is passed at the same as the transitional arrangements and that it becomes applicable immediately.

Section 4: Compulsory licensing of works where copyright is revived

- Do you agree that Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995 should be repealed?

- Have you relied on or been subject to compulsory licensing in the past under Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995, and what were the costs or benefits?
- Would you expect to rely on or be subject to compulsory licensing in the future, and what would you expect the costs or benefits to be?

Vitra agree that Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995 should be repealed.

It was Vitra's understanding that "compulsory licensing provisions" (i.e. the permanent application of Regulation 24 to certain works which previously fell within S52) would deprive those works of the protection envisaged in the Berne Copyright Convention and be in breach of EU legislation. Indeed, this would amount to a failure to implement the Term Directive, the Information Society Directive and the Enforcement Directive. It would of course be essential that such a failure – and its consequences for all stakeholders – is avoided, and so Vitra welcomes the Government's suggested repeal of Regulation 24.

Again, the repeal of S52 only brings the UK into line with EU law if Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995 will be repealed as well.

As with the above, Vitra asks that this repeal is passed together with the transitional arrangements and with an immediate effect. .

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