

Response to the Consultation on transitional arrangements for the repeal of section 52 of the Copyright, Designs and Patents Act 1988

Response by Retro Furnish Ltd.

Without prejudice:

Background:

In 2014, the Government consulted on how and when to implement the repeal of section 52 of the Copyright, Designs and Patents Act 1988 (hereafter "CDPA"). Section 52 CDPA as currently in force, reduces the term of copyright protection for artistic works that have previously been industrially exploited. When more than 50 copies of these works are made, under section 52 CDPA, the period of protection is limited to 25 years, compared to other artistic works which are usually protected by copyright for the life of the author plus 70 years. A similar provision existed in the Copyright Act 1956 (which was replaced by the CDPA).

Based on an extensive consultation round in 2014, the Government concluded in February 2015 that a transitional period of 5 years would have the lowest net economic impact on businesses which have previously relied on section 52 CDPA. This resulted in the "*Enterprise and Regulatory Reform Act 2013 (Commencement No. 8 and Saving Provisions) Order 2015(b)*" (hereafter "Commencement Order No. 8") of 10 March 2015, which would have brought Section 74 (on the repeal of Section 52 CDPA) of the Enterprise and Regulatory Reform Act 2013 (hereafter "ERRA") into force from 6 April 2020 (subject to saving provisions; e.g. the Government allowed for copies made before the end of the transitional period to be unaffected by the change of law).

This Commencement Order No. 8 would thus have implemented an effective repeal of section 52 CDPA in April 2020 and would have given the stakeholders 5 years time to adapt their business models.

Based on a legal challenge by an unknown party, the Government suddenly decided to review its previous position and stated that a 5 years' transitional period was too long. On 20 July 2015, the Government thus revoked its own Commencement Order No. 8. It is to be noted that the latter order was in itself of a very recent date (from 10 March 2015). The Government refuses to disclose the content of the legal challenge, the legal or economic arguments mentioned in the legal challenge and the identity of the party that produced the legal challenge. The Government only mentions that it concerned a claim for judicial review challenging the compatibility of Commencement Order No. 8 with EU law.

The Government subsequently launched a fresh consultation (dated 2 October 2015) on revised transitional arrangements, including the date for implementing the repeal. In its consultation document of 2 October 2015, the Government proposes a very short transitional period of only six months from the publication of the consultation, effectively ending on 28 April 2016.

This response is meant as a response to the new consultation on the repeal of section 52 CDPA, launched by the Government in October 2015.

Response regarding the transitional period

First of all, we want to emphasize that Article 11.8. of the Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs (hereafter “Directive 98/71”) provided an option for EU member States to retain in force existing legislation for registered designs: *“Any Member State may provide that, by way of derogation from paragraphs 1 to 7, the grounds for refusal of registration or for invalidation in force in that State prior to the date on which the provisions necessary to comply with this Directive enter into force shall apply to design applications which have been made prior to that date and to resulting registrations.”*

Article 17 of the Directive 98/71/EC reads as follows: *“A design protected by a design right registered in or in respect of a Member State in accordance with this Directive shall also be eligible for protection under the law of copyright of that State as from the date on which the design was created or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State.”* In other words, the implementation of Directive 98/71/EC granted designs (already protected by design law) to be eligible for protection under copyright law as well, but at the same time gave the EU Member States the power to decide the limits to which such additional protection should extend. It may thus well be that Section 52 CDPA is in effect not in contradiction with EU copyright law or EU design law (Directive 98/71/EC in particular). In each case, since EU Member States are free to limit the extent of protection of copyright in designs (under article 17 Directive 98/71/EC), we would invite the IPO to launch a public consultation on this measure instead of on the untimely revocation of the 5 years’ transitional period.

For the sake of completeness, we also stress that the Berne Convention allows signatories to have different threshold for works of applied art.

In our view, the Government should adopt a proportionate transitional period to make sure that businesses have sufficient time to adjust and to minimise unnecessary harm to UK businesses that have lawfully relied on the permitted act contained in section 52 of the CDPA

- **What will be the impact of a transitional period of six months, both costs and benefits?**

UK businesses that manufacture, assemble, import or sell artistic works based on section 52 CDPA face various transition costs, including the following:

- Investment in new designs: market research with regard to consumers’ preferences, commissioning a designer team, paying for moulds, intensive product testing and prototyping, researching/developing products so they are profitable, researching/developing products so they meet the requisite regulatory standards, researching on consumer protection regulations, etc.;
- Obtaining new suppliers: research for new suppliers that can manufacture the new designs, negotiating new contracts, organising shipment, factory retooling, etc.;
- Marketing costs: marketing costs are expected to be huge for every single new design to be sold to consumers (furniture is typically a slow-moving consumer good: this means that people need time to get to know a new product and will easily purchase well-known designs sold by the Swiss or Italian ‘right holders’ rather than newly developed products); marketing costs

- include advertising costs, trade fairs, photography, other ways to create design and brand awareness, etc.
- Agreeing licenses with right holders;
- Legal costs and costs from breaking contracts early. This includes early termination of premises mortgages, employment contracts, equipment leases, supplier contracts (typically of a 3-5 year duration), transport/logistics contracts, refund of earlier discounts, etc.;
- Etc.

It is estimated that only around 10% to 50% of new products will be successful in the sense that they will make it to production stage. Only a small minority of new designs will be a commercial success.

In the light of this, it cannot be assumed that the repeal of Section 52 CDPA with a transition period of only 6 months as from the consultation date will spur innovation. On the contrary, this repeal without reasonable transition period will force many existing companies to exit the market, either voluntarily or through bankruptcy. The effects on (un-)employment will be massive.

Given the fact that many of the furniture items that are in the centre of the discussion date from the 1920s, 1930s and 1940s, it cannot be assumed that the repeal of Section 52 CDPA will give a boost to creativity, inventions or entrepreneurship in the UK. On the contrary, the (mostly foreign) companies that have lobbied for the repeal of Section 52 CDPA are known for the fact that they sell 'classic', 'vintage' or at least well-known items of furniture. These are not the type of companies that invest in the promotion of innovative designs or employ new designers/creators.

We note that the Government itself states: *"In the absence of countervailing evidence, the Government believed these to be reasonable timeframes (i.e. five years) for sourcing and developing new products given this is not a fast-moving consumer good market. One international rights holder has indicated that its product development life cycle is 9 years."* (See page 10 of the Government's "Policy Objective" (consultation document)).

We stress that the Government expects businesses that previously relied on the legitimacy of Section 52 CDPA to invest in new designs, digest the costs for breaking existing contracts and digest costs for selling off their existing stock (and costs for storage and destruction of unsold stock) ***all at the same time***. We emphasize that this is unrealistic. This type of regulation is in sharp contrast with the principles of good governance for public services. It is clear that most of the existing businesses won't have the financial and commercial capability to handle this 'tour de force' in less than 6 months' time.

If the repeal of Section 52 CDPA is to enhance creativity and the development of new models, the Government should give the existing businesses in the UK a reasonable transition period. If they are not granted a reasonable transition period, these businesses will simply go into receivership and other – international – companies will take their place.

The Government requests to disclose ***confidential information***. Given the fact that the Government already knows this type of information (through the tax declarations of the businesses involved, and through previous consultation rounds), and given the fact that this type of information will be used against the businesses by their international competitors lobbying for the revocation of the transition period, this information cannot be disclosed.

In its "Regulatory Policy Committee Opinion" of 2 October 2015 (page2), the Government notes a *"lack of reliable data on the number of businesses trading in unlicensed copies of artistic works"* and adds, *"the Department believes there are some indications that the market*

is likely to be small.” This is both incorrect and irrelevant. First, we believe that the market for replica furniture is a viable market in the UK and the EU (“small” is a subjective term); second, since the Government cannot guarantee the confidential nature of the data submitted during the consultation, the Government cannot expect businesses to disclose confidential commercial information to their main competitors.

We emphasize— again — that, until legal provisions are in place that effectively repeal section 52, dealing in copies of old designs is to be considered legal under UK law. This means that businesses should not be asked to supply confidential business information as “evidence” in order to obtain a reasonable transitional period when this law is revoked. We do not believe that the evidence – or the status of EU copyright law – has changed since the Government adopted its Commencement Order No 8 in March of this year.

Also, ***consumers will face welfare costs*** because of reduced product choice. Given the fact that many of the businesses that are currently benefiting from Section 52 CDPA clearly label their products as “replicas”, “reproductions” or “inspired by”, and given the large price difference between such “replicas” and the products sold by the “right holders”, there is very little risk of confusion in the market between the “original products” and the replicas (replicas are no substitutes for the “original products”).

Finally, since it is likely that many of the affected businesses will be forced to exit the market (or go into receivership) if the 6-months’ transitional period is pushed through, it is also likely that ***many consumers will not be able to benefit from the 2-years’ statutory warranty period*** that they are entitled to under EU law. However, if businesses are allowed a reasonable transitional period of 2-5 years, the vast majority of them will be able to survive and live up to consumers’ expectations with regard to the statutory warranty.

- **Should the six months run from the start date of this consultation or from a different date, and if different, why?**

Beginning the transitional period from the date of the consultation is a huge problem for various reasons:

- (i) First, this creates the impression that the final decision has already been taken and that the consultation is only a formality;
- (ii) Second, this effectively shortens the transitional period to an extremely short period of time: under good governance principles, the transitional period should start *as from the date a final decision is published by the Government*, not from the start date of the consultation when the final decision *is still unknown* (as long as the final decision has not been taken, businesses cannot adapt their business plans; the fact that the Government is continuously changing its position – even after a ‘final’ decision has been announced - obviously hampers a smooth transitional process).

- **Should a longer or shorter transitional period than six months be adopted, and if so, what are the costs and benefits?**

A transitional period of two to three years is to be considered a minimum period.

A transitional period of 2 to 3 years would be in line with the case law of the CJEU and with general EU law principles.

We refer in particular to the so-called “Flos” case at EU level:

Opinion of the Advocate-General in “Flos” (Case C-168/09):

- In Recital 78, the Advocate-General stresses the need for a transitional period that is sufficiently long to protect the economic interests of businesses that have in good faith invested in imitations of designs that were part of the public domain:

“In my view, the transitional period should be sufficiently long to secure the economic interests of undertakings which have invested in good faith in the production of designs imitating ones that entered the public domain before the date of entry into force of Directive 98/71. It is in fact a matter of protecting those undertakings whose economic activities become illegal almost overnight owing to the transposition of the directive.”

- In Recitals 83 and 84, the Advocate-General confirmed that a five-year transitional period strikes a fair balance between the rights of the parties relying on existing national law (similar to Section 52 CDPA) and the ‘right holders’:

Recital 83: *“During this period of a little over five years, Semeraro was, in fact, able to produce and sell its lamps on the market.”*; Recital 84: *“This period seems to me to strike a fair balance between protection of the rights that third parties have lawfully acquired and the need to secure one of the objectives of Directive 98/71, namely the application of copyright to designs.”*

- In Recital 85, the Advocate-General confirmed that it is up to the national courts (not the CJEU) to assess whether the transitional period is reasonable (or necessary):

“It is therefore in the light of the circumstances of the present case, and taking into account the legislative aims in question, that it will be for the national court to assess to what extent it is necessary to lay down a reasonable transitional period in order to ensure the protection of rights acquired by third parties.” → In this light, see below for the decision of the Italian Court of Milan – post-Flos – that confirmed that a 5 years’ transitional period was in line with EU-law.

- The conclusion of the Advocate-General reads as follows (Recital 86):

“In the light of the foregoing, I believe that Article 17 of Directive 98/71 does not preclude the establishment of a reasonable transitional period during which persons who were able lawfully to produce and market a product imitating a design that entered the public domain before the entry into force of national provisions implementing that directive may continue to market that product.”

Decision of the CJEU in “Flos” (Case C-168/09):

- In Recital 47, the CJEU confirmed that the grant of a transitional period by national law may give rise to a legitimate expectation on the part of third parties that they may continue their business (at least during the transitional period):

“It is true that national legislation transposing Directive 98/71, such as Legislative Decree No 164/2001 inserting Article 25a into Legislative Decree No 95/2001, and Article 239 of the IPC, setting a 10-year moratorium which renders the protection of the designs concerned unenforceable as against a category of third parties to have

manufactured products on the basis of those designs before 19 April 2001, may give rise to a legitimate expectation, on the part of third party producers of those products, that they will be able to continue using those designs.

- In Recital 50, the CJEU confirmed that the principle that acquired rights must be respected and the principle of legitimate expectations are fundamental principles of EU law:

“However, the absence of a provision expressly referring to protection, for third parties, of acquired rights and legitimate expectations in relation to the revival of copyright protection provided for in Article 17 of Directive 98/71 does not preclude application of the principle that acquired rights must be respected or the principle of legitimate expectations, both of which are among the fundamental principles of European Union law.”

- In Recital 53, the CJEU attenuated the principle of the protection of legitimate expectations in the sense that this principle cannot ‘generally’ prevent new rules from applying (which is not the case with a reasonable transition period):

“It should also be recalled that it is settled case-law that the principle of the protection of legitimate expectations 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, to that effect, Case 278/84 Germany v Commission [1987] ECR 1, paragraph 36; Case 203/86 Spain v Council [1988] ECR 4563, paragraph 19; Case C-221/88 Busseni [1990] ECR I-495, paragraph 35; and Butterfly Music, paragraph 25).”

- In Recital 55, the CJEU confirmed that Article 17 of Directive 98/71 does not preclude a transitional period, provided that the transitional period does not defer the application of copyright protection for a ‘substantial period’ (the question whether the transitional period is substantial is a matter to be decided by national courts; this must involve a balance between the acquired rights of the parties relying on existing national law on the one hand and the so called ‘right holders’ relying on copyright protection on the other hand):

“As regards, in the first place, the legislative measure providing for a transitional period in relation to a specific category of third parties with a view to protecting their legitimate interests, it follows from the principle that acquired rights must be respected and from the principle of the protection of legitimate expectations that Article 17 of Directive 98/71 does not preclude such a measure, provided that the measure does 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 that directive (see, to that effect, Butterfly Music, paragraphs 23 and 28).”

- The CJEU does not provide clear guidance about which specific factors should be taken into account when deciding whether a transitional period is “substantial” or not. However, in Recital 56, the CJEU refers to the principle of ‘proportionality’:

“In that regard, the assessment of the compatibility of the length of that transitional period and of the category of third parties covered by the legislative measure must be carried out in the light of the principle of proportionality.”

- In Recital 57, the CJEU specifies that the transitional period should be ‘appropriate’ and ‘necessary’ for obtaining a balance between the acquired rights and legitimate

expectations of third parties (relying on national law such as Section 52 CDPA) and the interests of right holders:

“Accordingly, the legislative measure adopted by the Member State concerned 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 also be taken to make sure that the measure does not go beyond what is needed to ensure that that balance is struck.”

→ We emphasise the significance of the specific choice of words of the CJEU: the CJEU mentions the ‘acquired rights and legitimate expectations of the third parties’ (in casu, third parties in the replica business that rely on national legislation precluding copyright protection for designs) versus the ‘interests’ of rightholders.

→ We also stress that the CJEU mentions that the transitional period should strike a ‘*balance*’, and thus should take due account of the acquired rights of third parties as well (and not only the ‘copyright holders’). A transitional period of only a few months obviously does *not* strike a ‘balance’, let alone a ‘fair balance’ – especially after the recent revocation of the previous transitional period.

This means that a transitional period that is either too long (e.g. ten years) or too short (e.g. a few months) will *not* be in line with EU law.

- In Recital 59, the CJEU emphasizes that the transitional period should not go beyond what is ‘*necessary*’ for third parties to phase out their previous business based on the national law:

“Furthermore, the legislative measure should ensure that the period of use of the designs by those third parties is limited to what is necessary for them to phase out the part of their business that is based on earlier use of those designs or to clear their stock.”

→ Again, the choice of words of the CJEU is remarkable: the CJEU mentions the word ‘*necessary*’: this means not only that the transitional period should be limited to the time necessary for third parties concerned to adapt their business to the new legislation (or clear their stock), but also – vice versa – that such *third parties are entitled to a transitional period allowing them to phase out their business* (based on the principle of protection of acquired rights and legitimate interests).

Also, the wording ‘*to phase out the part of their business etc. or to clear their stock*’ means that the transitional period does not have to be limited to the period necessary to clear out the existing stock, and that, on the contrary, the third parties concerned have a right to a balanced transitional period taking account of the time necessary to adapt their business.

- In Recital 60, the CJEU gives a fine example of circular reasoning: *“The measure does not go beyond what is necessary to ensure that a balance is struck between the competing rights if it does not defer entitlement to copyright protection for a substantial period.”*

→ To understand why this is a form of circular reasoning, we have to go back to the previous recitals: According to Recital 55, the transitional measure may not defer copyright protection for a ‘substantial period’. According to Recital 56, this should be

assessed in the light of the principle of 'proportionality'. According to Recital 57, this means that the transitional measure should be 'appropriate' and 'necessary' to strike a balance between the acquired rights of third parties and the interests of 'right holders'. According to Recital 59, the transitional measure should be limited to what is necessary for third parties concerned to phase out their previous business. Finally, in Recital 60, the CJEU closes the circle by mentioning that the transitional measure does not go beyond what is necessary when it does not defer copyright protection for a substantial period. In other words, the transitional period is substantial if it is substantial...

- Unfortunately, this means that national legislators and national courts have little or no guidance with regard to what type of transitional period is to be regarded as striking a fair balance. However, in Recital 62 the CJEU seems to give at least some kind of guidance by stating that the 10-years' transitional period of Italian law '*does not appear*' to be justified since it is '**apparent**' that a shorter period would also allow the previous business of the third parties concerned to be phased out (or their stock to be cleared):

"Conversely, unenforceability for a transitional period of 10 years does not appear to be justified by the need to safeguard the economic interests of third parties acting in good faith, since it is apparent that a shorter period would also allow the part of their business that is based on earlier use of those designs to be phased out and, even more so, their stock to be cleared."

→ In other words, the Italian transitional period of 10 years was considered to '*apparently*' (or obviously, manifestly, without any doubt, etc.) go beyond what was necessary to strike a correct balance. This does *not* mean that a shorter transitional period (such as 5 years or 3 years) should automatically be considered an infringement of EU law.

→ **Put otherwise, the Flos decision concerned an exceptional case where a specific transitional period of 10 years was considered to be unlawful because it was *apparent* that a shorter period would have sufficed. The facts and the national law considered by the Flos court are not transposable to the facts and the national law currently at hand with the repeal of Section 52 CDPA (since *it is not apparent that a shorter period than 5 years would suffice* for the affected companies to phase out their existing business and see their acquired rights and legitimate expectations honoured).**

- Finally, in Recitals 63 and 65 the CJEU confirms that a 10-year moratorium is to be considered as a 'substantial period' (the CJEU does not say that a shorter period such as 5 years or 3 years would also be considered a 'substantial period').

Italian law post the Flos decision:

We also refer to the fact that, after the Flos decision, Italy changed its law (Article 239 of the Italian Code of Industrial Property), first by limiting the transitional period to **five years**, and then in 2012 by extending the transitional period to **thirteen years**.

As recently as February 2015, in Italy, **the Court of Milan confirmed that a five-year transitional period was to be considered consistent with EU legislation and with the case law of the CJEU**. This is the so-called "Flou" decision of the Court of Milan (a direct consequence of the Flos decision of the CJEU). The Court of Milan considered that the 2012 version of Article 239 of the Italian Code of Industrial Property (13 year transitional period) is

not in line with EU law, and instead applied the 2010 version of Article 239 which provides for a five-years' transitional period. → Given this case law, it seems clear that a transitional period of 5 years is not an infringement of EU law.

Finally, we stress that, during the passage of Directive 98/71, the UK secured permission to retain Section 52 CDPA and the 25 years' protection period. It is unfortunate that the UK Government did not intervene in the Flos case to make this clear and to limit the scope of the Flos decision accordingly. In fact, the original proposals of the Directive required Member States to guarantee that copyright protection was available to registered designs *"irrespective of the number of products to which such design is applied or intended to be applied and irrespective of whether the design can be dissociated from the products to which it is applied or intended to be applied."* (see Article 14.1 of the Draft Directive – EU Commission's Green Paper on the Legal Protection of Industrial Design). This wording was subsequently dropped from the text of the final version of the Directive (based on concerns raised by the UK Government and the Irish Government), and as a consequence, no further amendment was considered necessary to UK law.

See also paragraph 49 of the UK Consultation Paper on the Implementation of the Designs Directive: *"This Directive does not amend the law relating to forms of protection other than registered designs. The fact that the design of a product is registered must not deny copyright protection which would have been available if the design had not been registered. However this is not presently the case in UK law. There does not appear to be any requirement for amendment to the Copyright, Designs and Patents Act 1988."* (available at <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/consul01.pdf>).

- **Are there any other issues that the guidance should cover which are not listed?**

(i) Assumption that businesses had time since April 2013 to adjust their business:

On page 3 of its "Summary – Policy Option 1" (consultation document), the Government mentions the following key assumption: *"It is assumed that businesses have known about the impending change in law since April 2013 and have had time to learn about the potential impact."*

This assumption is **not correct**: first, the date of April 2013 is an incorrect (and even misleading) date; second, up till today, businesses are unaware of the precise impact of the impending change. Businesses have known since 2013 that a *certain change* was to be expected in the law, but were unaware of the precise scope of the change. On the contrary, businesses were made to believe that the implementation date of the repeal of section 52 CDPA would be 6 April 2020. Based on the Commencement Order No. 8 of 10 March 2015, businesses had a legitimate expectation that they would have a 5 years' transitional period to adjust their business models to the new legal requirements.

In other words, the Government assumes that the affected businesses have already started to change their business models given the notification of a potential change of law in 2013 and given the Commencement Order No. 8 of March 2015, whereas

- (i) businesses need more time to adjust their business models; and
- (ii) businesses were made to believe that they would have time until 2020 to adjust their business models, so have drafted their transition plans based on this timeframe.

It is not correct – and not fair – to mention a start date of April 2013.

We further note that the minutes of the “Meeting for designers and rights/licence holders” held on 8 October 2014 during the 2014 consultation round make it clear that **the Government did in fact not expect businesses to implement changes until the Government had provided clarity about the transitional provisions**: *“One attendee asked if the time that had elapsed between the Enterprise and Regulatory Reform Act 2013 being passed and the consultation had been taken into consideration. The IPO confirmed that it had been taken into account, in that the Government expected that affected businesses should have taken the time to plan for the change in law, but had not been expected to begin to make changes until there was clarity as to what the Government’s proposed transitional provisions were.”*

We believe that, if the Government considers that businesses have known the potential impact of the repeal of Section 52 CDPA since April 2013, the Government should at least provide businesses the **time until April 2018** to adjust their business. This date of April 2018 would equal a transitional period of 5 years as from the date of publication of the Enterprise and Regulatory Reform Act 2013. Even though a such transitional period of 5 years would not be entirely correct (because the precise scope and implementation date have been unclear up to the Commencement Order No. 8 of 10 March 2015, and have been revoked thereafter; the precise scope and implementation date in fact remain unclear up to today), at least the Government would have something akin to a legal basis for arguing that it provided a proportional and fair transitional period.

We also note that, on occasion of the previous extension of the copyright term in the UK from 50 years after an author’s death to 70 years after an author’s death, a transitional period was granted of 18 months. This period seems the absolute minimum (as from the date of publication of the Government’s final decision). Given the uncertainty created by the Government with regard to the commencement date of the repeal of Section 52, a transitional period of 24 months to 36 months seems a realistic minimum period.

(ii) The Government has always mentioned the need for a “balanced” transitional period, ranging from 3 years to 5 years (and now suddenly reduced to less than 6 months)

We note that it has always been the intention of the Government to implement the repeal of section 52 CDPA with a “reasonable”, “proportional”, “balanced” or even “long” transitional period, starting from the date where the Government announced its final decision:

- The Government mentioned in its Impact Assessment of 15 May 2012: *“It is proposed to implement the repeal of section 52 with a relatively long commencement period to allow manufacturers to adjust, and to allow distributors and retailers to clear stock of any products which will, in future, infringe the copyright of artistic works used as classic designs.”*
- The Government mentioned in its Consultation document of September 2014 (page 11): *“The evidence suggests that affected businesses, especially small or micro businesses may not have the time to adjust, or to acquire the capital to adjust in a transition period of 6 months, given the costs involved in introducing new designs to the market.”*
- The Government mentioned in its Consultation document of September 2014 (page 12): *“The Government considers a 3 year transition period from April 2015 to be a fair, proportionate and balanced way to introduce the change in law. It will cause the least*

disruption across all affected sectors and will allow a reasonable period of adjustment for all affected parties.”

- The Government mentioned in its Response to the consultation of February 2015 (page 19): *“The evidence also indicated that a 5 year transition period, from the point where the Government announced its final decision on transitional provisions, is necessary to allow affected businesses to adapt and create viable alternative business models (such as moving to a model which introduces new British designs to the market). The Government views this as a positive step as it could promote competition in the market.”*
- The Government mentioned in its Response to the consultation of February 2015 (page 20): *“Therefore, on the basis of the evidence received, the Government is of the view that commencing the repeal of section 52 of the CDPA on 6 April 2020 provides a proportionate and fair amount of time for affected businesses to adapt to regulatory change, but also delivers, in 5 years, the fundamental objective of ensuring that all types of artistic works are treated equally.”*
- The Government mentioned in its Final Stage Impact Assessment of 16 December 2014 (page 23):
 - *“Following the Government’s extensive consultation process, the Government is convinced that a 6 month transition period is likely to cause disproportionate harm to businesses that manufacture, import or sell unlicensed copies of artistic works. The Government is also persuaded that a 3 year transition period is not proportionate in light of the evidence received.”*
 - *“The evidence received indicates that a 5 year transition period from April 2015 is necessary to ensure that all affected businesses that had legitimate expectations of being able to trade in unlicensed copies made lawfully under existing UK laws are able to adapt to a change in law which is made difficult by the fact that there is currently little legal clarity as to what articles would be affected by the change in law.”*
 - *“Accordingly, in light of all the evidence received, the Government considers a 5 year period is a necessary period of adjustment for all affected parties.”*

(iii) Need to verify the legal situation in other EU countries

On page 5 of its “Policy Objective” (consultation document), the Government mentions: *“The Government has not compiled an exhaustive list of which EU member states have similar provisions to the one contained in section 52 as such an analysis would be disproportionately costly.”*

We believe that, if the Government considers that Section 52 CDPA has to be revoked because of its alleged infringement of EU law, the very least the Government should do is verifying to what extent other EU member states have similar provisions to the one contained in section 52 CDPA. Since this is the very essence of the matter at hand, the Government should not consider the costs involved as disproportionate, but rather as necessary costs.

This is all the more true since the provision of replicas from other EU member states will have a clear negative effect on the repeal of Section 52 CDPA itself. It is likely that replicas from other EU member states will in the future be supplied to the UK instead of the other way round. This is (at least in part) acknowledged by the Government itself: *“The Government*

also notes that replicas from other EU member states may diminish the benefit of any transition period.” (see page 8 of its “Policy Objective” (consultation document)).

(iv) Actions that will be taken if the transitional period of (less than) 6 months is not revoked

The respondent confirms that, if it is not provided with a reasonable transition period, it will have no choice but to close its business in the UK, cut all existing jobs, and consider the possibility to conduct its business from another EU country where similar legislation as Section 52 CDPA is not considered an infringement of EU law. If on the contrary, the Government provides for a reasonable transition period, the respondent will execute its existing business plans for the development and marketing of new designs and will maintain a strong business presence in the UK.

We are furthermore of the opinion that **the Government has an overwhelming legal responsibility and liability because:**

- The Government enacted a law that now seems not to be in line with EU law;
- The Government kept this law in force for a substantial period of time, thus creating a legitimate expectation for local enterprises that they could rely on this act for the development of their business;
- The Government removes this law without giving the affected enterprises a reasonable and proportional transition time (a mere 6 months) to adjust their business models and mitigate the losses on past investments, current contracts and future business lines, thus creating vast losses to the affected businesses;
- The Government revoked its own Commencement Order less than 7 months after it was introduced, thus removing another legitimate expectation of businesses concerned (namely the expectation that a final decision had been taken and that the affected businesses would have a transitional period of 5 years to adapt their business).

Therefore, the respondent reserves all rights to defend its rights vis-à-vis the Government and, if necessary, start a court procedure against the Government in order to obtain compensation for damages (caused due to the way the Government has handled the repeal of Section 52 CDPA so far, i.e., decision in March 2015 to grant a transition period ending in April 2020, and then suddenly revoking this transition period to an unrealistic 6 months’ period ending in April 2016 without a possibility for *bona fide* companies that have relied on existing UK law (Section 52 CDPA and on Commencement Order No 8) to adapt their business models and product ranges).

Retro Furnish Ltd., a limited liability company having its seat at 60 Constitution Street, EH6 6RR, Edinburgh, United Kingdom (Company No. SC3965508).

December 23, 2015