



CONSULTATION ON TRANSITIONAL PROVISIONS FOR THE REPEAL OF SECTION 52 OF THE COPYRIGHT, DESIGN AND PATENTS ACT 1988

Submission from Anti Copying in Design (ACID)

About ACID

ACID (Anti Copying in Design) is a leading design membership organisation representing thousands of designers from 25 different industry sectors including photographers. ACID's core objectives are IP education and awareness, prevention, deterrence, support and influencing future design policy to encourage a safer trading environment for designers to achieve growth and maintain jobs. ACID's members have a collective turnover of approximately £6+ billion. The organisation is committed to raising awareness about intellectual property infringement within the creative industries and encouraging IP respect within declared corporate social responsibility. ACID's remit is to encourage intellectual property creation within design as a positive force for growth.

UK Design - impact on global perception

"The aping of ingenious design and engineering impedes new ideas, sticks a finger up at investment in costly research and development, and circumvents any original thinking. There's nothing clever about it." **Sir James Dyson**

"Intellectual property underpins our creative industries. It's what our past success was built on and it's what our future success depends on. We need to get the message across that if people value creativity— and most do - then it has to be paid for." **Rt. Hon Sajid Javid MP, Secretary of State for Culture, Media and Sport**

"Helping UK businesses develop its IP has been a top priority for the Government and we have made some good progress with new funding, new tax incentives and improved enforcement when things go wrong." **The Prime Minister, Rt. Hon David Cameron MP**

"Design has an important contribution to make to the growth of the UK economy at a time when it is sorely needed." **Sir Terence Conran**

From iconic to every day, European and UK designers are ranked amongst the world leaders as individuals whose ingenuity and artistry have broken moulds, opened new horizons and made a lasting impact. Designers' innovation has helped to shape the world we inhabit. We were transformed into a supersonic age of travel by the Anglo-French design and precision engineering of Concorde. I-Pod users experienced a seismic shift in the way they interact with technology through design, championed by Jonathan Ives. Every day, millions experience efficiency as a result of Dyson's endless experimentation with a simple roller ball movement. The respect, protection and enforcement of heritage and current design is at the heart of the UK's design DNA, in line with current design thinking within most other EU governments. Designers have the vision to push boundaries and change things for the better for mankind - that is their strength. They deserve to be supported by policy which provides incentives to grow and a robust IP system, underpinned by effective licensing models and supported by a tougher stance on enforcement. The repeal of Section 52 must surely lead the way for the determination of the term 'artistic and iconic works' and 'works of artistic craftsmanship' and be the catalyst of an ongoing debate about clarity, together with best practice, compliance and ethics within declared corporate social responsibility.

Given the Government's commitment to harmonise IP law across the EU, to continue to allow the UK to be a trading post for access to unlicensed copies of artistic designs would appear to be in direct contrast to this strategy. Now that the UK has repealed Clause 52 in line with the vast majority of EU countries, to allow a long transition to companies (who continue to sell replicas of iconic works) would appear to contradict a Government commitment to reach an audience of 5 million people with messages to build respect for IP by the end of 2015. As a country which prides itself on its design capability it is somewhat disconcerting that the UK was one of the last countries (apart from Romania and Estonia) to repeal Section 52.

It is a comparatively short time since the Hargreaves Review, when Professor Ian Hargreaves commented that Design policy (in the context of intellectual property) had been neglected. Since then, Design was included in the ten recommendations announced by the Prime Minister for Government focus and there have been significant improvements. This is a rare opportunity for the Government to be seen to further support the iconic and artistic works for which the UK has (rightly) earned its global reputation. It would be a travesty, now that the law has changed, for companies who have built their business models on a loophole in UK law, under the misguided and supposed reputable description of "replica", which is surely just a sanitised name for unlicensed copying, to be allowed an extended period of legitimate trading.

Facts & Figures (latest Design Council 2015 statistics)

Between 2009-2013, the design economy grew by 28% - a faster rate than the UK economy (18%). The export of product, graphic and fashion design services increased by 76% since 2009. 5% of the UK workforce were employed in the design economy in 2014. The design economy is adding jobs at a rate of 22% - almost x3 the national average. For every £1 invested in design, businesses can expect over £4 in net operating profit.

Pressure from other EU countries

The stated purpose was to align copyright protection for industrially exploited artistic copyright works with registered design protection. This anomalous provision was repealed by the Enterprise and Regulatory Reform Act 2013 (the "ERR"), but the repeal has yet to be implemented. There is now pressure from the rest of Europe and the UK furniture industry, as well as various other parts of the UK design industry, to ensure that the repeal takes effect as soon as possible because of the damaging effects which Section 52 has had on the British design and manufacturing sector, particularly in the furniture industry, our largest design sector. There are many classic furniture designs which are over 25 years old which qualify as copyright works as works of artistic craftsmanship and which will once again be protected when Section 52 is repealed.

Rationale

Section 52 was anomalous because the reasoning behind it was fundamentally flawed. There is no point affording copyright protection to a design (which recognises the intellectual creativity of the design), rather than unregistered design right, with one hand and then undermining it with the other by preventing its enforcement against copiers after 25 years. There is no difference between a counterfeit or cheap replica "Eames" chair, for example, and a pirate DVD which remains protected for life plus 70 years. Creators of classic designs protected by copyright should be able to enforce their copyright for the full term of protection. Cheap replicas and counterfeits of classic furniture and furnishings protected by copyright as artistic works damage the market for the original products, reducing consumer demand and affecting the ability of British designers and manufacturers to invest in good, new design which has longevity. They also damage the reputation of designers of classic pieces whose names become tarnished as a result of the market being flooded with cheap replicas and counterfeits, many of which are of poor quality.

The importers of replicas (many of whom are based almost entirely outside the UK) are calling for a long lead-in to the change in the law to give them time to adjust. They have already had two years to change their business models since the passing of the ERR into law (and it is several years since these proposals were first discussed). The repeal of Section 52 will foster innovation. Consumers will be prevented from buying cheap replicas after 25 years, but in their place will arrive new, original designs at replica prices (unless mass-market producers can obtain licenses to produce and import replicas – or face litigation). Jobs and opportunities will be created for keen, new designers. Competition will be enhanced. Consumers who want classic designs will still have access to them because their owners will be able to manufacture them (and create new future classics) with confidence that their businesses and reputations will no longer be undermined and that the allure of such designs will be preserved as it should be.

Almost all of the rest of Europe has repealed laws like Section 52. The UK is lagging behind the rest of Europe and is not nurturing the UK's enormous talent for design, a huge amount of which resides in the furniture and furnishings industries.

ACID's understanding of the facts surrounding Clause 52 are:

- Clause 52 only really benefits creators of artistic works created before 30 June 1988 and the effect of this change will bring some older works back into copyright
- Since 1 July 1989 all new designs are protected by design laws and not copyright laws.
- Prior to 1 July 1989 all 3D designs were protected by copyright law but since then, unless they are also works of artistic craftsmanship, they will no longer be protected by copyright law.
- The Government is seeking further information on what items may be affected in practice. ACID's understanding is that what constitutes a work of craftsmanship is one created by a craftsman. An industrially produced article that is a replica of a work of artistic craftsmanship cannot itself be a work of artistic craftsmanship as it was not manufactured by a craftsman but by a machine
- Awareness around Section 52 started with the first consultations in April 2012, though many were alerted following the Flos and Semeraro Casa e Famiglia case 7 years ago.
- The ERR Bill travelled through Parliament during 2013/2014 and received Queen's Assent in April 2014
- When the change comes into effect, the consequence will be that rights holders can license these works or prohibit further copying. Anyone who is not the copyright holder or their licensee will need to seek permission or a licence to make copies lawfully.
- The Government has held three consultations to hear views from different stakeholders on the timing of the repeal of section 52 of the Copyright, Designs and Patents Act 1988 ("CDPA"). One for designers and rights/licence holders, one for manufacturers, importers and retailers of physical copies of artistic works and one for users or creators of 2D copies of artistic works.

Sustainability

The majority of official licensors of iconic furniture adhere to strict rules of sustainable development and product longevity and have not cut corners in any way to serve the purpose of short termism in styling. Rolls Royce is a classic example of a similar design and engineering strategy that has stood

the test of time on quality and sustainability. Henry Royce once remarked, “The quality will be remembered long after the price is forgotten.” Many classic pieces of furniture, lighting, textiles stand the test of time. To achieve this level of quality takes significant pre-development costs, testing and the use of the most sustainable materials which, in themselves are replaceable and recyclable.

Moral (consumer confusion and passing off)

“Sustainability is just like morals: one should live by them and not just talk about them. Our roots in modern design make the first step easy: we make products that avoid the superfluous and last for a very long time.” Rolf Fehlbaum (Chairman of Vitra)

In 2011 Elle Decoration selected 5 examples of copies of iconic furniture and sawed them in half. Whilst on the surface the products looked identical when they were sawn in half it was clear to see that the quality was vastly sub standard in comparison to the five iconic designs sold through authorised licensed manufacturers, all of whom adhere rigidly to the integrity and composition of the original designs. This is clear and unequivocal evidence of the outward appearance of a product (which looks like a design classic) deliberately confusing a consumer who may not be aware that they are buying an inferior replica which is unauthorised, thereby misleading the consumer.

Many replica websites have a dedicated tab named “Designers” which may lead consumers to thinking that the designers are somehow linked to the replica company and thereby may lead to a mistaken authenticity and provenance which does not exist. They may also assume that the replica companies have been allowed to sell designers’ work when in fact they are producing unlicensed copies. A list such as the following including photographs is included on many replica sites:

A. and P. Castiglioni (10) Alvar Aalto (2) Anna Castelli Ferrieri (1) Arne Jacobsen (17) Børge Mogensen (9) Charles Eames (41) Charles Le Corbusier (20) Claude Monet (1) Eero Aarnio (11) Eero Saarinen (14) Eileen Gray (3) Erik Buch (5) Finn Juhl (3) Florence Knoll (10) Franz Romero (1) George Nelson (19) Gino Sarfatti (4) Grant Featherston (4) Greta Grossman (3) Gustav Klimt (2) Hans J. Wegner (34) Harry Bertoia (3) Isamu Noguchi (5) Jean Prouve (4) Jens Risom (3) Josef Hoffmann (4) Marcel Breuer (3) Michael Thonet (1) Mies Van Der Rohe (13) Paul Gauguin (2) Philippe Starck (4) Pierre Paulin (2) Piet Hein (1) Poul Henningsen (27) Poul Kjærholm (22) Arne Jacobsen (4) Gino Sarfatti (1) Greta Grossman (1) Hans J. Wegner (1) Isamu Noguchi (1) Poul Henningsen (19) Serge Mouille (3) Serge Mouille (6) Verner Panton (6)

When the PM’s wife bought an unlicensed replica of an Arco lamp, with her connections to Smythson and the British Fashion Industry, it is very, very doubtful that she would have even considered this had she been in possession of the facts. So if the PM’s wife is confused how many other thousands of design aware consumers in the UK are also confused?

Terminology

A “replica” is a copy resembling the original concerning its shape and appearance. To counterfeit means to imitate something. Counterfeit products are fake replicas of the real product. Counterfeit products are often produced with the intent to take advantage of the superior value of the imitated product. This begs the question, is the use of “replica” a consumer-friendly and sanitised description for what, with the new law, is counterfeit products (produced mainly in China) by companies who have built their business models on the unauthorised use of licensed trade marks such as Corbusier, Eames etc?

Results of ACID survey - There were 50 responses to the ACID survey (this was created for the earlier consultation and we have kept the original dates)

Q1 What transitional period (from April 2015) should replica furniture companies be given to adapt their business model to comply with the new law which came into effect in April 2013, which will make it unlawful to copy licensed iconic works

6 months 70%

3 years 24%
5 years 6%

Q2 Trading of existing stock. Should Government insist on an inventory, as at April 2015, on those companies who will be allowed to sell existing stock?

Yes: 90%
No: 10%

Q3 Impact on creators and users of 2D images of artistic works. What do you consider is sufficient time to adapt to a business model so that you don't run the risk of copyright infringement?

6 months 68%
3 years 24%
5 years 8%

Q4 Publishers and institutions such as museums – which transition period would be sufficient in any licensing cost (if any) to development plans?

6 months 42%
3 years 52%
5 years 6%

Q5 Do you think that the lack of availability of unlicensed copies of artistic works could drive replica design companies to produce new designs to fill a market gap and offer consumers more choice in the future?

Yes: 70%
No 30%

Q6 Do you think that unlicensed (but currently lawful) copies of artistic works in the market lead to consumer confusion?

Yes: 90%
No: 10%

Q7 Do you think this is an opportunity for the UK Government to demonstrate their full support of original design and to put their full weight behind the Design Community to stop exploitation in the UK of iconic designers sooner rather than later?

Yes: 94%
No: 6%

Summary and recommendations

- ACID holds a firm view that 6 months is a realistic timescale, given that many within the replica industry will have been aware of the Flos and Semeraro Casa e Famiglia decision (7 years ago) and the majority will be aware since the consultation was first mooted in 2012. If the 6 month option is chosen they will have had (until October 2015) a total of 3.5 years to change or adapt their business models.
- 3 years (until April 2018) will cause further consumer confusion, allow replica companies to continue to sell unlicensed products, which is against the law, and further dilute the perception that Government supports UK original design (heritage, iconic and new) in the context of the furnishings industry.

- The UK is being used as an access route through which other EU consumers can purchase unlicensed replica goods (on one replica site 40% (out of 72) of its testimonials were from EU customers). Extending this period to April 2018 highlights what would appear to be a confused view held by the Government regarding design, which sets it apart from other sectors within the Creative Industries such as art, literature, drama, film or music (all of which enjoy copyright protection). It would also seem to contradict Government's other IP plans which are for a single digital market based on tried and tested (legal) licensing models.
- The UK Government will be seen, in significant situations, to be condoning products which are of inferior quality to the officially licensed products.
- So long as the importing of unlicensed products is allowed to continue, the market for UK bespoke makers will be unfairly undermined by the confusion of inappropriate replica furniture, which has the potential to damage our balance of payments both by reducing value added within the UK and the potential export of UK manufactured product.

ACID's urges Government for clarity on the criteria of what they consider is a work of artistic craftsmanship, artistic and iconic work. We are aware that this has not been legally determined and there would appear to be two options:

- Wait until the flood gates open and deal with it on a case by case situation in Court judgments which may take decades to resolve and further confuse an already confused market. The legal costs will be enormous and it will become a financial and time consuming burden and distraction and further impede growth opportunities for those involved.
- Act decisively and produce clear Government guidelines on what is and isn't considered an artistic work protected by copyright, (therefore, the life of the originator plus 70 years).

Length of transitional period for use of 2D images

We appreciate that commissioning, writing, editing, picture researching, producing, printing and distributing a book does not happen overnight, or in six months. Books can be years in the planning and have life spans of several more years. We therefore, in order to minimise the impact on publishers and the design community these publications serve, support the recommendation from The Publishers Association for there to be a longer transition period for the use of 2D images of 3D works. The level of harm to the designer from the use of a 2D image of their work is very different to the harm the sale of a 3D replica causes. It is correct that neither Directive 98/71/EC on the legal protection of designs nor the *Flos* case makes a distinction but we do not believe this to be material; both simply state that the same protection should be afforded to designs as to copyright, which this proposal would still ensure. Q4 of the ACID survey created prior to the first submission indicates and supports a longer transition period for 2D images.

Conclusion

The preferred option for a transitional arrangement for 3D designs is minimal, as a law has been passed which will make it unlawful to sell unlicensed replica artistic or iconic products in the UK. However, given the possibility that these companies could, potentially, change their business model to support new and up and coming British designers and support British manufacture, ACID believes that 6 months will have given these companies 3.5 years to fully consider their options. We believe this is fair and reasonable.

However, ACID supports a longer transition period for 2D images in order to minimise the impact on publishers and the design community these publications serve.

ACID Support - The Alliance for Intellectual Property

Established in 1998, the Alliance for Intellectual Property (IP) is a UK-based coalition of 22 associations and enforcement organisations with an interest in ensuring intellectual property rights receive the protection they need and deserve. With a combined turnover of over £250 billion, our members include representatives of the audiovisual, music, video games and business software, and sports industries, branded manufactured goods, publishers, authors, retailers and designers.

ACID is a member of the Alliance for Intellectual Property which fully supports an efficient transitional implementation of Clause 52. The Alliance is keen to work with Government to ensure that the transition is effective accompanied by clear guidance that also references the legislation and case law.

www.allianceforip.co.uk

The Worshipful Company of Furniture Makers and the British Confederation of Furniture Manufacturers

On behalf of the Furniture Makers and the British Furniture Confederation (BFC), Paul von der Heyde, Past Master of the Furniture Makers and Chairman of the BFC supports a 6 month transitional implementation of clause 52. ACID is an Associate member of the British Furniture Confederation.

There are approximately 150,000 people working in the furnishing manufacture industry today, and many more in the furnishing retail sector, meaning the furnishing industry remains a vital part of the British economy. The Furniture Makers is the British Furnishing Industry's central organisation, promoting excellence, education and charitable works helping those who have worked in the UK furnishing industry. www.furnituremakers.co.uk

The BFC acts a single voice for the UK furniture, furnishing and bed industries and has a mission to ensure that it has a strong and sustainable dialogue with Government in order to understand and influence changes in the market. www.britishfurnitureconfederation.org.uk

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