Consultation – December 2015.

6th December 2015

[redacted]
Section 52 consultation
Copyright Directorate
Intellectual Property Office
4 Abbey Orchard Street
London
SW1P 2HT

Dear [redacted],

Section 52 consultation

Thank you for this opportunity to take part in the third consultation on the repeal of section 52.

I feel I must start by saying that the sudden change from a five year transition period to the new suggestion of a six month period has already had a catastrophic negative effect on Scott Howard Office Furniture Ltd.

No company (let alone our own) has the capacity to "**Back Pedal**" its entire product offer, as well as it's staff levels, it's fixed asset base, it's property leases, it's finance and HP commitments sufficiently in just 180 days to survive such an appallingly drastic series of changes.

For the record - This new six moth position has signed our company's death warrant here in the UK after 40 years and two generations of trading which is something three major world recessions failed to achieve.

Having watched my father's business close in 1991 after losing just one important chair range to a competitor (ironically German) I already have huge experience of how this game plays out in the real world in the coming weeks - I am under no illusions of what happens next, and I do not expect Scott Howard Office Furniture Ltd to survive a 6 month changeover, as this time we are losing 15 mainline products in one go and if anyone thinks we can simply adjust to that scenario in just 180 days they are crazy.

To avoid litigation from our creditors we have had to warn them, as well as our bankers and landlords, of a **"fundamental forthcoming change"** to our business structure in the coming weeks which will fundamentally affect our ability to trade – An immediate result of supplying this information was that our bank overdraft facility was not renewed even though we have traded profitably for decades.

This action by the bank immediately reduced our available cash by 20% overnight.!

We did warn the IPO and the Baroness of exactly this possibility (to all businesses not just our own) when we talked face to face in 2015 about the reporting responsibilities of company directors of any "fundamental changes" within a business structure.

After hearing from the IPO that the previous commencement order of a five year transition period had been approved by Parliament and signed off by the Baroness, our director went ahead and signed a new five year lease on a Central London showroom secured by his personal guarantee - only to then find days later that a new consultation would be announced. As a result our director is now personally liable for the rental of this expensive West End Central London showroom for 60 months, - at a time when our business now faces imminent closure because of the new six month rule.

Having spent the last three years working closely with the government on this matter (hopefully unbiasedly for the benefit of all British businesses and all market places) we believe that the previous commencement order was fair to all concerned, but it must be said that we now take part in this new consultation very, very, reluctantly as everyone we speak to in the industry as well as our legal team say that attending the meetings is pointless exercise as the final decision has clearly been made by the IPO and this latest consultation is just a wallpaper exercise.

I decided to attend the meeting on the 25th of November and remain at the table because I did not want to look back in 5 or 10 years from now and think "I wish I finished what we started" so I very reluctantly took part on the day in the hope that the IPO and the Government might still be willing to listen to the very serious, grave concerns of British furniture businesses.

I can summarise our position as follows - The five year rule was fair to BOTH sides of the argument – reinstating copyright back to the rights holders whilst allowing UK retailers time to change their business models to new, but as yet unproven designs, - However the six month suggestion is completely one sided giving no chance whatsoever for British businesses to survive the carnage. In fact we already know of companies that have decided to close because of this new 6 month suggestion.

So now back to the consultation document:-

Q1. What will be the impact of a transitional period of six months, both costs and benefits?.

A1. The impact will be dramatic - We fully expect that our 40 year old company will not survive the dramatic reduction of 15 main line products from our portfolio in one swipe if a new six month rule is applied.

The products we believe we are loosing are the eggs, milk, bread, butter, sugar, and salt of our industry.

The reduction of cash flow from loosing these main line products will be catastrophic to any business and in fearing the worst some of our staff have already been made redundant as a result - and more will follow.

This dramatic loss of cash flow also means that we can no longer afford to hire any young UK product designers to design new in-house designs in the months to come, and even more importantly that the idea of us purchasing or leasing new manufacturing tools and machinery to make new product designs is now a distant dream.

Q2. Should the six months run from the start date of this consultation or from a different date, and if different, why?.

A2. It was a crazy idea to start the six month rule on the same day that retailers were advised about the new consultation period and its proposals.

Our company has just spent tens of thousands of pounds buying in stocks of **un-proven products** in readiness to market over the 5 years period, which has massively dented our cash flow and now overnight we are informed that we have just 180 days to turn these new stocks into “cash cows” – No Chance.!

We fundamentally DO NOT agree with the six month suggestion and require at least a minimum of 36 months to achieve the changes the government is demanding of us.

Anyway how can we change ……after three years debating **we are still completely unaware which iconic items are going to be prohibited** and which are not and we are painfully aware that after many discussions together the IPO and UK government are also totally confused on this point as well but they expect us to make an informed guess – WELL WE CAN’T JUIST GUESS! – We need informed opinions..

Five years to change, was workable, but we fundamentally disagree with the new six month transition it should be an absolute minimum of 3 years.

Q3. Should a longer or shorter transitional period than six months be adopted and if so, what are the costs and benefits?

A3. It has always been our industry’s position that we needed ten years to design and launch new products of our own, - even Vitra Ag agreed with us that they take nine years to launch new products, and yet this mutually recognised product development period confirmed by both sides was categorically rejected by the government on legal grounds, so the middle ground of a five year term seemed a reasonable compromise to all parties in order to seek a way forwards.

We do fully accept that change is coming, and we did accept the UK government's position of five years as being fair to all parties but it must be emphasised this change also applies to many other un-connected industries such as watches, clocks, clothing, jewellery, books and photography - as well as many others who still have no idea this change is coming.

Vitra had won their objective of changing UK law so it only required them and their allies to sit out the 60 months and they would have had everything they wanted for a further 40 years, but instead we now have yet another very expensive third consultation process and no one knows exactly what will happen next.

In recently days we have been inundated by interior designers expressing their anger that the UK government backed down so quickly just because of a threat of a Judicial Review from a foreign lobbyist. It is even more annoying when we hear this action has now been "Stayed" – This smacks of we wont attack you only as long as you do as we say.

The UK government's decision in both houses and then scrutiny committee as well as approval from our Monarch had taken three years to find a compromise which could be applied to ALL AFFECTED INDUSTRY'S only for it to be wiped out in days by merely a threat of litigation from a Swiss company that does not even have it's headquarters in Europe.

The transitional period should be longer than six months and **we believe the government was correct in awarding 5 years**, and still feel this is appropriate. But failing that 36 months is still a real requirement but it only works if retailers are advised on what they can't sell in advance.

Q4. Are there any other issues which guidance should cover which are not listed?.

A4. In a meeting held with the IPO in mid 2012 our Director pointed out that there was insufficient evidence on which products this new law would affect.

Since that time we have been promised guidance notes on several occasions by various government ministers but three years later this fundamentally important information has never been published. In a meeting with the IPO on the 25th of November 2015 we pointed out that as this information was still not available UK traders were working "completely blind".

We also informed the IPO that Scott Howard had contacted Four mainEU rights holders on at least three separate occasions and they were deliberately with holding valuable information on which of their products actually held EU judgements, information that could easily clarify the position for the government as well as UK retailers while also assisting the rights holders to protect their positions

In a recent letter from Scott Howard Office Furniture Ltd to Baroness Neville Rolfe we asked for her direct assistance in obtaining clarity on which items this might affect - but our request was rejected.

Since that time we have written formally to all the major European rights holders that have lobbied the government on three occasions formally asking them to identify which of their products already hold artistic judgements, so that retailers can stay within the new law, however **at the time of writing this document we have not received a single response from any of the right holders,** not one!. - So we are no further forward on this point than we were three years ago.

You would think that the rights holders would have wanted to immediately declare which of their product lines hold an artistic judgement in order to stop the importing of reproductions of these designs and yet to date there has been total silence from all of them, which suggests that maybe they do not hold the judgements they have been shouting about for so long.

The government has consistently stated guidance notes would be released via the IPO to assist on this point but they would be guidance only and not be legally binding. - What is the point of the IPO producing a document which we are all desperately in need of if its contents are not worth the parchment they are written on.

The IPO clearly states that they are an enforcement division yet they themselves do not know which products will be illegal so how are traders supposed to make sense of these changesand how can the IPO enforce something that is at best vague.

Q5. Do you agree the government is right not to distinguish between two and three dimensional copies?.

A5. Undecided ……

Q6. Do you agree that applying the depletion period on 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?.

A6. The principle of allowing existing contracts to be fulfilled but restricting new contracts is fundamentally flawed and covered elsewhere in our reply.

Q7. Are there any other factors that the Government should consider for the depletion period?.

A7. As we do not have any list of which products have judgements and the opposing parties are refusing to release that information, we do not know what to deplete.

We can only proceed on the bases that no products are protected until proven otherwise in a court of law, so **we have no choice but to continuing ordering and importing iconic products as normal until the other parties declare their interests**

It is our belief that certain European suppliers of original products who claim to have EU protection actually do not hold EU judgements at all, or indeed ever received title from the deceased originators and that a veil of silence is deliberately being created by the top four European suppliers to give the impression that all their products are protected when in reality the opposite is true.

On a personal level the reluctance of the Under Secretary of State to assist on this clearly critical point matter is a source of much regret.!

Q8. Do you agree that the period provide for depletion of stock is proportionate?.

A8. Absolutely not for reason already covered, it is a death sentence for many UK retailers.

Q9. Should a longer or shorter depletion period than six months be adopted, and if so, what are the costs and benefits?.

A9. The government's previous decision of 5 years was fair and proportionate but in its absence a lower limit of 36 months from commencement at least allows UK businesses time to adjust and deplete their stocks, but we would stress that until the other side declares which products have EU judgements the commencement period is totally academic as we will still do not know which items to stop importing.

Q10. 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?.

A10. It is our position that the government made the correct judgement previously that sales of "pre used" reproductions which had been made and imported prior to 2020 should remain legal, and that all parties (including individuals and traders) should be permitted to trade in "pre-used furniture" if it had been legally supplied in the UK before the cut off date.

This is currently the legal position for any genuine "used" products that are sold – anyone can sell a used Vitra or Knoll chair privately or as a trader on

any media or IT platforms – So it is crazy to suggest that traders can legally sell a “pre used” Herman Miller, Knoll or Vitra chair (legally obtained before today), and yet they cannot sell a pre-used Asis or Freeroom chair (which had also been legally sold to customers in the UK before today).

The last time I checked the UK does not operate two tier standard of law - What is good for Herman Miller or Vitra pre-used chairs should equally apply to all other pre-used chairs irrespective of the nationality of the supplier.

If these items were pre-used jewellery, glass or ceramics items would this point even be up for discussion. Surely any item which was legally traded here in the UK before the repeal should remain tradeable as a used item in the exact same manner.

Furthermore since October 28th we have been inundated with concerned customers wishing to know if our guarantees for repairs still apply, and it is frustrating that we are unable to give them any comfort in this regard. Surely the repair of an item that was legal before this repeal should still be allowed to ensure customers can continue the happy use of their legitimate purchases.

Q11.Do you agree that Paragraph 6 of schedule 1 of the Copyright Designs and Patents Act 1998 should be amended to exclude items protected by copyright in the EU at 1st of July 1995.

A11. It is crazy that the UK government is even being asked to look at this point just because of the financial concerns voiced by Vitra Ag. over the design rights of **ONE** product the Eames Lounge Chair and Ottoman which was originally designed and launched by Herman Miller in the United States in 1946 - not Vitra.

Herman Miller Inc. only received 25 year protection for their design in the USA and this chair no longer enjoys any protection whatsoever in the USA or for that matter anywhere else outside the EU.

If Vitra (the licensee, not the originator) had not approached the previous Secretary of State for Business on this point last year because of their fears of copyright not being covered on the Lounge chair by Eames no one would have cared about design right being different from copyright and this issue would not be in today’s consultation document.

The UK government has far more important issues to address than supporting new legislation to protect ONE seventy year old chair design from America for the financial benefit of just one European lobbyist based thousands of miles away in Switzerland.

The separation of copyright and design right has always been clear to manufacturers and designers prior to 1995 and indeed Scott Howard worked within those rules when we designed and launched many of our own products during that time – Vitra are only pushing this point because the original

manufacturers of the Eames Lounge chairs in the USA did not enjoy copyright, but design right, so our government is now being asked to change our law (not by the US originators but a Swiss licensee) to protect just one item they sell.

Why should every manufacturing company in the UK have to take on a new law for the sake of one chair design that the vast majority of the UK public would not even recognise let alone know the designers name.

Q12. If Paragraph 6 of schedule 1 of the Copyright Designs and Patents Act 1998 is repealed or amended are you aware of items where copyright would be conferred which never previously had copyright protection anywhere?.

A12. **ONLY** the Eames Lounge Chair originally launched by Herman Miller Inc from Michigan in the United States produced under licence by Vitra Ag in Europe.

I am more concerned that this decision could open the flood gates to a swarm of other products trying to get further unintended copyright protection - Exactly like the position today where due to the **law of unintended consequences** Mr Vince Cable MP wanted to support young UK designers with the repeal of clause 52 yet now we find international big businesses jumping on the band wagon and hijacking this process in order to gain further protection for their sales of old 70 year designs.

Q13. Do you agree that Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995 should be repealed?.

A13. Not applicable to our industry.

Q14. 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

A14. No never.

Q15. Would you expect to rely on or be subject to compulsory licensing in the future, and what would be the costs or benefits be?.

A15. Not applicable

Sundry comments

I would like to close by saying that since the new six month transitional arrangement has been declared my telephone has rung non-stop with

architects and designers from all parts of Europe asking me why the UK government are cow towing to the whims of a single foreign company.

Those very same young designers that Mr Vince Cable MP wanted to protect are telling us (hour after hour) that this new suggestion absolutely goes against their needs as they can no-longer afford to use historic iconic designs in their clients homes, their clients offices, and more importantly their own homes.

We sell both originals and copies and we know from direct experience that only 2% of our customers buy originals from us, whereas the remaining 98% knowingly choose high quality reproductions instead.

If this was an election 98% result the populous would have voted massively for reproductions and yet they are being banned from acquiring them. This would not be tolerated in any democratic country and ridiculed by other states - if this was a general election there would be civil war within days.

At a time when 53% of the British public have been polled saying they want to exit Europe, British designers feel this repeal has been forced on them BEFORE they have even had the opportunity to decide - as a country - if they wish to be in Europe.

As we watch the Schengen agreement falling into tatters and many EU countries reinstating their borders and their laws and only four EU countries welcoming migrants, it is bizarre to see EU copyright changes being forced on an unknowing public at speed especially when the public are expecting to have their say in a referendum first.

Whilst we recognise it is the government's position to remain in Europe it should also be reminded that government only rules by the will and consent and vote of the people and currently the polls are suggesting that a majority of the country's voters wish to exit Europe not get closer to it.

Surely common sense says that if we are changing from a established UK law to a new EU law **this matter should be delayed until AFTER the country has had a chance to vote on membership of this elite club**. If the country votes to remain in Europe then we are duty bound to harmonise our laws with EU laws but if we vote for exit then the UK should retain its laws, its opt outs and its vetos.

If the IPO and the Government seek to push this legislation through before a referendum on Europe has taken place it will only appear that the IPO and the Government are forcing their privately held views on the people to get this through BEFORE the referendum takes place.

Either way if the six month rule remains in place it will be academic for Scott Howard as we will be in receivership.

Yours sincerely

SCOTT R. APPLETON
Managing Director
Scott Howard Office Furniture Ltd