

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

Response from:

SCP Ltd.
18th December 2015

Company Details and Opening Statement

SCP is a UK owned and based company that was founded in 1985 by Sheridan Coakley as a manufacturer, retailer and wholesaler of modern furniture. Inspired by the designs of the Modern Movement, Coakley started to manufacture new products in the same spirit, and also began selling classic and hard to find design pieces. Nearly three decades on, SCP remains true to its founding idea, to make and sell design products that are functional, beautiful and made to last. SCP exhibit new products annually at international trade fairs in Milan, Paris and New York and is a pioneering force in the UK and international furniture industry, employing the rich talents of designers such as Jasper Morrison, Matthew Hilton, Terence Woodgate, Konstantin Grcic, Michael Marriott, Tom Dixon, Russell Pinch and Donna Wilson. SCP wholesale products in the UK to major retailers including The John Lewis Partnership, The Conran Shop, Heal's and also to a host of independent design stores across the country and to an international network of design stores. SCP make products in the UK and the EU and has long been established as one of the UK's most innovative and internationally respected manufacturers and suppliers of contemporary design. SCP is also an acclaimed and award-winning retailer, regularly voted as one of London's finest design shops.

We are very concerned that the impact on UK business seems to have been downgraded in this latest consultation document. We feel the short transitional period, the short stock depletion period and the lack of clarity in what products will be caught up by these changes all add up to significantly higher costs to UK SMEs than the short-term apparently minimal benefit to rights holders, most of whom are not UK based companies. It concerns us that the UK Government are prepared to see UK businesses suffer so much because of changes being pushed through with such haste. The financial impact will have extreme negative effects on cashflow of British SMEs and we fear they will not have the time or resources to effectively change their business models to react, with loss of staff and with potentially fatal consequences on their businesses as a whole.

It appears to us that the Government have been put under excessive pressure by a group of overseas companies who want to establish monopolies on the market of a very small number of designs by a very small number of now diseased designers. Both short and long term, we fail to see how this action will have a positive impact on the design industry in general and will believe it will have even less effect on individual living designers, whom the repeal of Section 52 is actually meant to benefit. The representations by these companies to call for zero transition is primarily driven to attempt to bankrupt the UK based SMEs who currently make and sell products that might be affected by the repeal. These companies have extremely large funds at their disposal for legal work, to lobby Government, and to make concerted efforts to stop any other companies producing designs that threaten their ability to maintain monopolies.

Another point of concern is that we have not been given, or been able to view full details of, the actual legal challenge that has caused this new consultation to be brought about. We regard detailed knowledge of this legal challenge as a fundamental prerequisite for us to be able to adequately reply to this consultation document.

Lastly, we would urge the Government to introduce a compulsory licence regime for copyrights effected by the repeal of Section 52.

Response to questions under “Transitional period”

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

We can see no benefits of a six month transitional period. A six month transitional period will have a major impact on our business, giving us little time to change our business model in a considered and satisfactory manner. It will ultimately lead us to lose revenue, lose up to four members of staff and we will also have to pay all of our own legal costs. We will lose significant turnover, which will have an immediate effect on our cash flow, and it is possible that our company will make a financial loss that we might not be able to recover from.

It was stated in the Impact Assessment that: “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 does not take into account the fact that SMEs such as us are simply not able to instigate an effective program to replace effected products until the transition date is confirmed. It would be taking on undue risk to hire new staff, develop new designs and invest in marketing without certainty around timescales. Too short a transition period will cause an unnaturally accelerated product development schedule, it will increase cost and will decrease the likelihood of us being able to successfully bring new products to market to replace those effected by the repeal.

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

The start date should be from when the results of the consultation are published, not from when the consultation has begun. At the very least, it would seem logical for the transitional period to begin once this consultation period has been completed. We can then plan our business activities once the transitional period is confirmed, before that we cannot make decisions about what action to take. Our preference would be that the start date of the transitional period would be the same as the date that the repeal comes into effect (28th April). This would mitigate against any further change in position of the Intellectual Property Office, which due to legal challenges has already changed position twice. We are not willing to commit resources and to assign costs until the Intellectual Property Office resolve these issues.

We also need to be provided with guidance by the Intellectual Property Office on all of the issues raised by the repeal of section 52 of the CPDA. Until we are provided with that correct guidance and know what the outcome of this current consultation is, it is illogical for us to make any firm business decisions. We must have clarity on where we stand legally before we make business decisions.

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

We believe a longer transitional period than six months should be adopted.

We are an importer and seller of two ranges of products that under the repeal of section 52 of the CPDA could be regarded as replicas, if any copyright subsists and our products are regarded as infringing copies (itself a legal issue which is fraught with uncertainty). The sales of these two product ranges amount to around 30% of our total UK wholesale revenue. If the business which we do with these two

product ranges were to stop, or to be curtailed due to the repeal, this would result in a significant loss of revenue in sales and potentially have an impact on staffing at our office, warehouse and workshop facility. Both product ranges in question are manufactured in the USA and imported in component form. They require skilled assembly work at our warehouse. If we were no longer able to trade in these products we will lose 4 to 5 members of staff. Our warehouse and workshop facility will need to be downsized, which we would not be able to do quickly due to our lease commitments.

We are a manufacturer, in addition to importing some articles that we retail. Around 70% of our wholesale output consists of designs made by or for us, and in respect of which we pay royalties to the designers. If the repeal of section 52 of the CPDA was to mean that we were no longer able to import and sell the two product ranges that make up the other 30% of our wholesale output, then we would have to replace this loss of revenue by developing our own products. From experience, we know that creating a new product takes on average 12 to 18 months of design, development and prototyping. The product is then launched at a trade fair either in Paris or Milan where it is exhibited to the press and the wholesale market. After the launch, the first production run starts and the first orders delivered, which can take another 6 to 12 months. From our experience if the product were to become a success, which is impossible to guarantee ahead of time, we believe that it will take another 12 to 24 months for this to happen. Thus, if a change in our business model is required due to the impact of the repeal, namely developing more products to make up for the 30% shortfall in wholesale sales, this whole process could take between 27 and 45 months. In reality, given the normal uncertainties that apply in business, we would expect it to take not less than 3 years, and certainly up to 5 years.

Furthermore, until we are completely certain that we cannot market the designs that we currently sell, those potentially impacted on by the repeal of Section 52 CDPA, we will not begin an expensive and time consuming product development program. The uncertainty caused by the repeal of Section 52 CDPA puts our company in a position where it would not make business sense to embark on a product development program until we know no other course of action is viable. In light of this, we want to emphasise that 5 years is the very least amount of time it would take to transition our business model. In reality we think it will take much longer.

We anticipate that even a 5 year or longer period may not be enough time for small businesses to absorb the costs of transition. We will find the cost of transition difficult, in particular because of the difficulty in obtaining licences and of product development costs. The previous Consultation Document (closing date 27th October 2014) refers to the evidence suggesting that the transitional cost of introducing a new product to the market would cost in the range of £20,000 to £60,000 (see page 12 of Annex B). We anticipate that the costs are in fact likely to be higher and in excess of £100,000. The Consultation Document (page 12 of Annex B) also recognises that on top of this figure, costs for marketing and promoting new products could amount to £40,000 and as we have previously explained, investment in time and money to introduce new products does not guarantee market success.

We strongly suggest that a transitional period of longer than six months be adopted. It is unrealistic for UK based SMEs like ourselves to transition successfully in such a short period. In the normal course we anticipate that we would actually need a minimum of 5 years to change our business model in a considered and satisfactory manner. If 5 years is absolutely impossible because of EU law (a matter

on which we have no direct information) then we can see no reason why a period as short as 6 months can be the only way around the difficulty which EU law creates. It seems to us to be a monstrous over-reaction.

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

The guidance needs to take into account that large international companies who are often those claiming to have copyrights also have an unfair advantage over British SMEs in that they are able to mount large scale legal operations against these smaller companies who may not be able to defend or challenge them.

It should also be taken into account the fact that repeal of section 52 of the CPDA may lead to the British consumer not being able to access certain products that perhaps should not be withdrawn, but are withdrawn due to confusion or legal disputes over rights. The guidance needs to create clear boundaries and also safeguard British SMEs.

The law in the UK regarding “works of artistic craftsmanship” is hopelessly vague and unclear. The lack of clarity places an instrument of oppression in the hands of multinational companies. An assertion of subsistence and ownership of rights in an article of furniture made maybe 60 years ago can be used to intimidate SMEs in the UK who do not have the resources to risk substantial litigation.

Response to questions under “Depletion period for existing stock”

- **Do you agree that the Government is right not to distinguish between two- and three-dimensional copies?**

This question is not applicable to our business to any significant extent.

- **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?**

No, we do not agree that this is appropriate. A number of factors influence this, including the timescales we work to as a manufacturer and seller of furniture designs, the time it takes to develop products and how we purchase and store stock (please refer to the Response under the previous section for further details).

If we are only able to sell stock bought before this consultation period, we will lose net profit (see attachment). There will be an instant impact on our business and with such a short transitional period suggested, we simply will not have the time or resources to effectively change our business model to respond to the change. We see no benefits of such a short depletion period.

- **Are there any other factors that the Government should consider for the depletion period?**

It should be considered that the market may be flooded with stock being sold by companies who need to unnaturally accelerate sales to deplete stock. It will actually be harder to sell those products in a flooded market. There is a natural ebb and flow of demand for furniture and the depletion period will confuse that flow. It may also lead to a level of consumer confusion as to why the market is flooded with product, unless the Government and IPO office take decisive action to mitigate against this

confusion. As the depletion period is so short, we definitely foresee having stock left over once the period has ended.

• **Do you agree that the period provided for depletion of stock is proportionate?**

No. There is an ebb and flow of demand for furniture in the market and we think it unlikely that the consumer will purchase more furniture in the depletion period. There are established consumer shopping patterns that exists in relation to consumers buying furniture, it is not the same as when consumers buy fashion for example. Research has shown that consumers can take up to two years to make a decision about buying furniture. Our business is also involved in specifying furniture on commercial projects such as residential development, hotels, restaurants and public sector spaces such as schools and hospitals. These types of projects often have an even longer development period than two years.

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

A longer depletion period will also give us more time to change our business model in a considered and satisfactory manner. In our Response under the previous section we have explained in more detail how a longer period of transition will assist us as a business; the same principles apply to the length of the depletion period. In short, we will be able to retain skilled staff, not have to maintain a warehouse that we can no longer afford, and should be able to transition from the existing products that are covered by the repeal of Section 52 to our new designs with the security that our business will not fail.

We believe a longer depletion period should be adopted. The benefits are that we can sell off all our stock without (potentially) acting in infringement of copyright and it will enable us to continue to purchase stock with confidence in what we forecast as the correct stock for sales. We have a robust inventory system that allows us to distinguish when specific products have been imported. The only cost change we can foresee is the potential requirement to employ an independent auditor (or company) to verify our stock levels when the change in law takes place. There would be a cost involved, but we would take this step only if we felt it was legally prudent to do so.

• **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?**

We observe that an act of sale under s.23(b) CDPA does not have to be in the course of a business to constitute an infringement; also that no special provision is made for second hand items, as suggested in paragraph 22 of the consultation document. The legislation should be made clear.

Response to questions under “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?

The Government concluded in the outcome to the previous consultation that repeal of Paragraph 6 was not necessary or desirable. Part of the reasoning was:

“Creating a new copyright would make decades-old designs suddenly become copyright works. There is no justification for this either on the basis of equity (the designers of the 1950s and earlier did not expect copyright protection) or on the basis of an incentive to engage in design work (the designers of nearly 60 years ago are unlikely still to be working in design and many may have died). The Government believes that creating new copyright in these works would be likely to have a negative impact on users of affected works, disrupt existing markets and hinder innovation.”

We consider that the same reasoning should apply equally to the suggestion that paragraph 6 should be amended to expressly exclude items protected by copyright anywhere in the EU as at 1 July 1995.

If indeed it is the case that works of artistic craftsmanship are alleged to have copyright then that is a matter for examination and enquiry on a case-by-case basis, rather than a sweeping exclusion to a long-established piece of legislation. An amendment such as this, intended for one limited purpose might also have unforeseen consequences elsewhere.

The practical aspect of this would give rise to huge and potentially expensive difficulties. From our perspective as an SME, it would be all but impossible to make enquiries as to the subsistence of copyright in a particular design in each of the many countries of the EU as to the status of the law in that country in 1995.

If it is a reality that EU law does extend copyright protection to certain designs in any event, then it should be a matter for the party seeking to enforce copyright to provide evidence, legal argument and other information to enable a third party to make an informed decision.

Leaving things as they are would result in the rights owners (or alleged rights owners) being in the position of having to prove their case. If in fact there is copyright law which assists them, then it is up to them to make the appropriate enquiries in the relevant countries to establish copyright subsistence in that country, and then to make out an argument that there is enforceable copyright in the UK. Any other solution would be manifestly unfair to companies such as ourselves who are based in the UK and do not have unlimited access to legal advice across many jurisdictions..

Response to questions under “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?

From our previous dealings with alleged rights owners in this field, and from our knowledge of the industry, it is clear to us that their objective is not to grant licenses, but to establish a complete monopoly over the relevant products so that they can sell them at elevated prices.

We do not realistically believe that the companies which we know of will be prepared to grant licenses, certainly licenses which would fall within the FRAND definition. They want companies like us off the market. We believe that they would threaten litigation to prevent us from continuing to manufacture and sell.

The worst-case scenario from our perspective would be the bringing into force of copyright in a work of artistic craftsmanship, perhaps dating from the late 1940s or early 1950s. At the time the work was made it would have been subject to s.22 of the Copyright Act 1911. The author would or should have known that if the work was a registrable design then it should be registered, and if it was not then there would be no protection. The consequence of the repeal of s.52 is that copyright which never existed in this work is to spring into life and to be enforceable against people like us. Alleged rights owners might of course have difficulty in establishing subsistence and ownership of enforceable copyright, but if they do, then the consequences are serious.

Regulation 24 addresses the revival of an expired copyright rather than the coming into force of a copyright which did not previously exist. In that case we can see that Regulation 24 would not directly apply.

If our worst-case scenario outlined above comes to pass, then the rights owner will be the beneficiary of an unexpected windfall. Whereas all that is proposed to be offered to companies like us is some sort of transitional period to enable us to think up some other way to run our business in order to compensate for the losses that would inevitably occur.

There has been a previous mention of the possibility of compulsory licenses under copyrights caught by the repeal of Section 52. This would give a measure of protection for companies like us.

There are precedents for this. When the patent term was increased from 16 to 20 years under the Patents Act 1977, a compulsory license regime was introduced so as to enable third parties to enter the market on suitable terms as to compensation for the patentee for the “windfall” period.

Also, a licence of right provision exists under s.237 CDPA 1988 for items which are subject to design right.

The creation of a licence of right regime would go some way towards mitigating the potential oppression to smaller manufacturers that would otherwise be caused by an unconditional creation of a copyright term. The subsistence and ownership of copyright would have to be proved before a licence came into effect. A compulsory licence would enable companies like us to continue in business, subject to the added overhead of a royalty

We urge the government to introduce a compulsory licence regime for copyrights caught by the repeal of Section 52.

Contact Details:

Sheridan Coakley
SCP Ltd.
135 Curtain Road
London

