



ACID Response to the Repeal of section 52 CDPA and related Amendments

Anti Copying in Design welcomes the opportunity to respond to the Government Consultation on the Repeal of Section 52 CDPA in the context of its original submission.

About Anti Copying in Design (ACID)

Anti Copying in Design (ACID) was founded in 1997 and is the UK's leading design and intellectual property campaigning organisation. It is a forward-thinking membership trade association for designers and manufacturers; a not-for-profit organisation funded by membership fees.

For nearly a quarter of a century ACID has been a consistent voice calling for design law reform and influential in providing evidence to support many of the IP and design reforms which have taken place in the UK before and since the Hargreaves Review. ACID spearheaded a UK campaign for the introduction of criminal sanctions for the intentional infringement of both registered and unregistered designs. This campaign resulted in a partial success with the criminalisation of intentional of a registered design (included in the 2014 IP Act). ACID continues to campaign for intentional infringement of unregistered designs to attract criminal sanctions as the ultimate deterrent against copying.

ACID is also a member of the Alliance for Intellectual Property (IP) which is a UK-based coalition of 20 trade associations and enforcement organisations with an interest in ensuring intellectual property rights receive the protection they need and deserve. Its members include representatives of the audio-visual, music, video games and business software sectors, as well as sports industries, branded manufactured goods, publishers, authors, retailers, and designers. ACID's CEO Dids Macdonald, OBE., is a Vice Chair of the Alliance for Intellectual Property. ACID is also a member of the IP subgroup of the Creative Industries Council.

General

Our comments will not address the specific questions in the review but form more of a general view. Five years on from the legislation which affected the term of copyright protection for artistic works, this removed compulsory licensing for works where copyright was revived and was particularly apposite for ACID's designer members; in particular, furniture, lighting, jewellery and ceramics and other works of artistic craftsmanship.

The complexity and uncertainty of UK design law

As if design protection in the UK were not complicated enough with four types of design law to navigate (and now, post-Brexit, five), we have had to deal with the added complication created by Section 52 of the Copyright, Designs & Patents Act 1988 which effectively provided that industrially exploited artistic works protected by copyright shall have their period of protection reduced from the life of the creator plus 70 years to 25 years from the date of "publication" of the design.

In relation to the most relevant works or certainly the works which have brought about the most discussion – namely works of artistic craftsmanship, although obviously artistic works generally are covered – it remains to be seen how effective the repeal of s52 has been in achieving its aim of protecting all artistic works equally. That is because there still seems to be an area of uncertainty around the point at which a work will become a work of artistic craftsmanship, and this move to gain copyright protection. The UK is not as wide in its interpretation as the national provision is in many other EU countries (i.e., France, where classic furniture often attains copyright)

The root of this uncertainty is the extent to which aesthetic appeal is required in a work of artistic craftsmanship, and how aesthetic appeal might manifest itself in a work. EU law, in *Cofemel*, indicates that a design work need not have aesthetic appeal to qualify as a copyright work. In *EWM*, Judge Hacon sought to interpret UK law in line with EU law in *Cofemel*, and determined that (1) a work of artistic craftsmanship can be made using a machine (2) aesthetic appeal can be of a nature which causes the work to appeal to potential customers and (3) a work is not precluded from being a work of artistic craftsmanship solely because multiple copies of it are subsequently made and marketed. In that case, Hacon did not actually need to address the pertinent question of whether the fabric design in question would have qualified as a work of artistic craftsmanship if it did not have any aesthetic appeal because he found on the facts that it did. This case certainly moved the position on somewhat in terms of the argument if not in substance, but arguably is distinguishable on its facts and would not necessarily transmit over to another area, i.e., design ‘classic’ furniture.

The vulnerability of the furniture and lighting sectors

The stated purpose of this provision was to align copyright protection for industrially exploited artistic copyright works with registered design protection. This anomalous provision has had a damaging effect 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 are once again protected following the repeal of Section 52 by the Enterprise and Regulatory Reform Act 2013 (“ERR”).

The confusion surrounding Section 52

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.

Case Study examples

ACID’s legal affiliates have received several requests for advice from companies which have been making and selling replicas of iconic designs, such as the famous “Eames” chair. We are aware that the owners of the copyright which was revived by the repeal of section 52 have made efforts to enforce their rights against the manufacturers of replica designs. The importers of replicas (many of whom are based almost entirely outside the UK) called for a long lead-in to the change in the law to give them time to adjust, despite having had two years to change their business models after the passing of the ERR into law (and the proposals were first discussed several years before that).

In the context of “evidence-based responses” a manufacturer who was interested in mass producing a well-known historic chair design was seeking clarity over whether that design would benefit from copyright protection. There was an argument that the design had a prima facie valid copyright protection in Sweden yet would likely fall foul of the test for a work of artistic craftsmanship in the UK would appear to evidence the lack of certainty referred to above and an evidence potential gap between the EU and UK positions on works of artistic craftsmanship in a similar way to Cofomel.

This point goes to the issue of clarity for retailers and manufacturers who want to know what they can and can't do. IP issues are never clear cut, but the position is far clearer for other “types” of copyright works in the “list” in s1(4) CDPA 1988. The difficulty at present is that if, as some indications and particularly EU indications in Cofomel and in the Swedish copyright case indicate, a design work can qualify as a work of artistic craftsmanship irrespective of artistic merit or aesthetic appeal, or with a ‘low’ level of aesthetic appeal, then a question arises of what is the bottom line for works of artistic craftsmanship – can any functional design qualify as a copyright work if it has some aesthetic appeal in the form that makes it an attractive article to customers regardless of the fact it has been made using a machine or multiple copies have been made.

It is an interesting and difficult example because if, as it may appear from the recent case law, there is a movement to an area of balance - somewhere in between the ideas that it is either (1) extremely difficult or (2) very easy for a work to qualify as a work of artistic craftsmanship, then further clarity is provided on where that balance lies which will undoubtedly come through case law, but it will be a case of waiting for that as Judge Hacon has recently progressed this issue.

In summary

ACID's view is that 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 because of the market being flooded with cheap replicas and counterfeits, many of which are of poor quality.

The repeal of Section 52 was essential in order to foster innovation and protect original design, all of which leads to the creation of jobs and opportunities will be created for keen, new designers and the enhancement of competition. Consumers who want classic designs still have access to them because their owners are now able to invest in manufacturing them, as well as 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. The repeal of section 52 was therefore an important step in recognising the contribution which design makes to British industry.

The production of cheap replicas of iconic designs also feeds consumer demand for cheap, disposal goods which have a huge, detrimental impact on the environment. Many UK design businesses are focussed on sustainability and producing sustainable, long-lasting, and iconic products in the UK, which is more costly and therefore requires greater investment. The sale of cheap copies would erode that investment.

Conclusion

Has the aim of protecting all artistic works equally has been achieved by the Repeal of Section 52?

The issue lies in the statutory differences between works of artistic craftsmanship and other artistic works. That difference is clear, and it would not be right to seek to remove it through case law. Accordingly, the aim of equal protection might alternatively be addressed by either (1) further court decisions providing clarity on the statutory requirements (or lack of requirements) for a work of artistic craftsmanship, or further legislation (2) reconsidering the “closed list” approach to copyright works in the UK. On the other hand, it can be argued that yes, once it is established that a work is a work of artistic craftsmanship, there is equal protection for it and other copyright works and undoubtedly this is a good thing for designers but that test of establishing artistic craftsmanship must be met and it still (in the UK for now at least) will not be an easy hurdle to overcome in respect of furniture ‘classics’ in the UK.

Section 52 has further complicated an already complex area of law which continues to show a lack of support and disregard for a sector which makes a significant contribution not only to the UK’s GDP but is a growing sector in export markets. Thus far, there is still no determination on a work of artistic craftsmanship and until this happens, the design sector remains confused about the IP laws that protect them, leaving those who flaunt the law, an ability to carry on infringing with impunity.

ACID’s submission to this consultation has been supported by our Legal Affiliates. Kelly Hudson of McDaniels Law, Gavin Llewellyn, Stone King, Boulton, Howard Kennedy, KounoupasIP and Taylors. Dids Macdonald, OBE., CEO of ACID, Nick Kounoupas, ACID IP Director and Chief Counsel