

H.M.Eland
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Dublin D07

December 30th 2016

Dear Sirs,

We are writing to you in relation to your request for submissions regarding your proposed amendment to the Copyright and Related Rights Act 2000 (as amended) ("the Act") as outlined in your document entitled "Consultation on the overlap of intellectual property protection between Industrial Designs and Copyright law", published on your website on 24th August 2016 (your "Consultation Paper"). While we appreciate that the deadline for filing submissions has passed, we would be grateful if you could nonetheless take the time to consider our views.

Dominidesign Furniture Limited has been trading in replica furniture since 2012 throughout Europe from the UK and since the end of this year from Ireland and it is therefore directly affected by your proposed change.

In your Consultation Paper you asked respondents to outline the positive or negative impacts the proposed amendment to the Act would have on businesses. There can be no doubt that the proposed amendment would have a severe negative impact on our business. Indeed, it would fundamentally change the nature of our business and could well lead to the winding up of our company and the redundancy of many if not all of our employees. As you can imagine, we are therefore extremely concerned about the proposed change.

We have attempted to (very) briefly outline our concerns below. We have broken down our submission into two main sections "Legal Considerations" and "Commercial Considerations" although, as you can appreciate, there is undoubtedly a significant amount of overlap between the two. As regards the legal considerations, we should also say that, while we are not lawyers, we do believe that there are significant legal arguments in favour of retaining the law as it currently stands.

Legal Considerations

Our understanding is that Sections 31A and 78B were introduced in order to promote innovation and competition. The proposed amendment would restrict such innovation and competition. This cannot be a policy objective of the Irish Government. In addition, we believe that the proposed amendment would create considerable confusion over what constitutes a "work of artistic craftsmanship", which is not in the interests of either designers or companies like ours.

Works of Artistic Craftsmanship

The effect of the proposed amendment to the Act will be to significantly increase the importance of the meaning of Section 78A of the Act to the replica furniture industry.

To paraphrase the effect of Section 78A, if a design document embodies an item of furniture which does not constitute an "artistic work", then our company is free to reproduce it. This naturally leads to the question: "what constitutes an "artistic work"?"

Assuming that items of furniture do not constitute "sculptures", the only way an item of furniture could constitute an "artistic work" would be if it qualified as a "work of artistic craftsmanship".

Unfortunately, there is no definition of this term in legislation. There is also no Irish case law on this issue. The only guidance companies such as ours would have are from the limited number of decisions from UK courts which, as you will be aware, are not binding in Ireland but merely of persuasive authority. Indeed, one does not know what, if any, authority UK decisions will have in Ireland post Brexit.

By way of example, the House of Lords was asked to determine what constituted a “work of artistic craftsmanship” in *Hensher (George) Ltd v Restawile Upholstery (Lancs) Ltd*¹. In that decision, five Law Lords took a different view of what constituted a “work of artistic craftsmanship”. The UK Intellectual Property Office has itself acknowledged that there is little clarity on this issue in its Consultations on the same provisions of the equivalent UK Copyright Act as are under consideration by you. For example:

- “it is unclear under UK law what proportion of [industrially manufactured products] would satisfy the conditions for it to be protected by copyright”²
- “the main source of uncertainty is whether or not a particular item is an artistic work”³;
- “there is uncertainty as to which items would be protected”⁴;
- “there is little certainty as to which products will be affected”⁵;
- “there is little clarity which [sic] items would be protected by copyright once the change in law take [sic] effect and it is impossible to predict how and when case law will develop on which specific items will have copyright protection”⁶

The practical effect of the above is that neither designers nor furniture manufacturers will be clear as to which works are allowed to be replicated and which works are not. Even if it could be definitively determined whether a work constituted a “work of artistic craftsmanship”, businesses such as ours would still have to consider whether each and every chair, lamp, sofa or table it intended to reproduce constituted such a work. This will lead to a significant reduction in commercial activity and also, in all likelihood, a large increase in the number of cases before the Irish courts. Neither of these outcomes is desirable.

We understand that there may be a natural inclination to change Irish law in light of the changes that have been made in the UK to its equivalent legislation. However, that of itself should not dictate what Ireland does particularly in circumstances where further changes or reversal of changes may be brought about in the UK post Brexit.

Commercial Considerations

There can be no doubt that the proposed amendment will have a significant negative commercial impact, both for our business but also for the furniture industry in Ireland as a whole. The replica furniture industry has been in existence for many years with participants entering into the normal commercial commitments that every business enters into e.g. buying or leasing premises, receiving finance and providing appropriate security, committing to employees etc. It may now find its whole business base disappears “at the stroke of a pen” and may find itself nevertheless with responsibility for the above residual liability continuing.

¹ [1975] RPC 31, HL

² Page 7 of 2014 Consultation by the UK Government

³ *ibid.* p.8

⁴ *ibid.* p.9

⁵ *ibid.* p.13

⁶ *ibid.* p.14.

In addition, your proposed changes does not ultimately benefit the consumer. The proposed changes will also lead to a significant reduction in the choice of affordable alternatives for Irish consumers. At a time when the Irish economy is recovering from one of the most significant recessions in its history, the imposition of such restrictions on businesses and the reduction of the amount of choice for consumers should not, in our opinion, be a policy objective of the Irish Government.

And how can we explain to European customers that, in spite all these designs are made by European designers, only the wealthiest on the European continent can enjoy these designs?

While for instance in Asia, Australia and America everybody can enjoy the replica European designs?

The current legal framework in Ireland strikes a fair balance between protecting the intellectual property rights of the designer and the policy objective of increasing the amount of choice for the consumer. Under the current framework, a designer is given a period of 25 years to commercialise his or her design as he or she sees fit. They may license it to whomever they choose and charge whatever they like for it. That, it is submitted, is sufficient time for designers to reap the rewards of their innovation (indeed that was the logic behind the protection offered by registered industrial designs).

Many of the items of furniture that are likely to be affected by the proposed amendment of the Act are currently on sale for astronomical prices far outside the budget of the ordinary consumer.

By way of example:

- the Børge Mogensen J39 chair (which, you may be interested to note, is commonly referred to as “the people’s chair” because the vision of Mogensen was to create “high quality functional furniture with a reasonable price tag that could make the ideas of simple modernism popular among the people’) is currently being sold for €472;
- the Arne Jacobsen series 7 chair (5 million copies of which have already been sold during the lifetime of the designer) is currently on sale for €402;
- the Eames Lounge chair 670, is currently being offered by offered by Vitra for an astronomical €8,649.

Customers have, for many years now, been able to purchase replica versions of e.g. the above furniture, at reasonable prices, after a certain period of time. To deprive them of this now, at a time when the Irish economy is emerging from a recession seems not only cruel but also potentially detrimental to the Irish economy. We would estimate that the average replica furniture company would return approximately €150,000 - €200,000 a year to the Irish Government in taxes. Dominidesign has returned €250,000 taxes in 2016 to the UK government, and we expect to do this for the Irish government in the future.

Accordingly therefore our position is that Ireland should retain the law as it currently stands. We assume however that if it is ultimately decided to change the law, interested parties will be given an opportunity at that time to make further submissions on the proposed legislation. You might confirm this.

Thank you very much for taking the time to read our belated submission.

Hella Eland