

RESPONSE ON BEHALF OF THE VITRA GROUP

Consultation on the overlap of intellectual property protection between Industrial Designs and Copyright Law

September 2016

In 25 out of the 28 EU Member States copyright protection for artistic designs – like for all other artistic works that qualify for copyright protection – lasts for 70 years past the life of the author. Ireland is one of only three remaining Member States (together with Estonia and Romania), where if artistic designs are exploited through an industrial process then such full term copyright protection does not apply. Not only is this lack of a full term of copyright protection incompatible with EU law but the absence of such protection also means that cheap, poor-quality copies of iconic designs manufactured in Asia appear on the market much sooner, with severe long term consequences on innovation and creativity in Ireland. Furthermore, the recent changes to UK law could see Ireland become the principal EU centre for the distribution of these counterfeit products.

In focusing on the element of exploitation by the industrial process rather than the artistic work itself, Section 78b of the CRRA creates an arbitrary distinction between copyright protection for artistic designs themselves and protection for artistic designs subjected to an industrial process. This contravenes EU law (see *C-168/09 Flos SpA v. Semeraro Casa e Famiglia SpA*).

The effect of Section 78b of the CRRA is that businesses can market in – and through – Ireland copies of iconic, famous designs that have a recognised artistic value and are fully protected by copyright law elsewhere in the EU. Examples of these iconic products include the designs of Eileen Grey or the designs of other famous names such as Charles and Ray Eames.

Foreign entities offering “replicas” of artistic designs will increasingly incorporate companies in Ireland in order to avail themselves of the shorter term of copyright protection for artistic designs in Ireland. These Irish registered companies then own and operate websites marketing these replica designs and distributing these replica products around Europe. We believe, following considerable research, that these entities are not actually manufacturing these copies/replicas in Europe. Most replicas are cheap, poor quality imports from Asia. The impact of their discontinuance of their business on the Irish economy is minimal.

Section 78b in our view undermines the integrity of the design industry and acts as a barrier to the development of original design based businesses in Ireland. This conflicts with other initiatives that emphasise the importance of design in Ireland. Both the Department of Jobs, Enterprise & Innovation and the Department of Foreign Affairs and Trade gave valuable support to the Irish Design 2015 campaign. This sought to increase awareness of the value of design to everyone, from individuals and businesses to the public sector, and to showcase the importance of design to success in business and as a driver of economic growth. Irish Design 2015 was also part of the Irish Government’s Action Plan for Jobs.

Question 1: Will the proposed amendment potentially impact in a positive or negative manner on businesses?

The market in “artistic design furniture” is currently heavily targeted by entities offering unauthorised and cheap copies of designs classics, mostly imported from Asia (in particular China) by dubious internet intermediate dealers with companies registered in the UK. With the repeal of section 52 of the Copyright, Designs and Patent Act (CPDA) in the UK on 28 July 2016, the UK has become an unfavourable territory for entities offering cheap unauthorised copies of design classics. Vitra already observes that entities offering unauthorised copies of furniture designs are moving their domicile to Ireland. This is the case, e.g., for Voga, a well-known copyist that was domiciled in the UK until the UK repealed section 52 of the CPDA (see <http://www.voga.com/still-legal/>). Vitra expects this trend to accelerate once the depletion period for existing stock of six months under UK law will end on 28 January 2017.

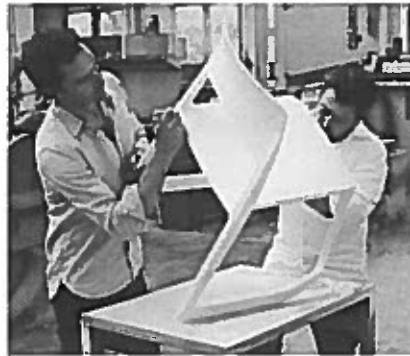
Failure to end these practices undermines the integrity of the design industry and acts as a barrier to the development of design-based businesses in Ireland. Importing cheap, unauthorised copies of design classics not only threatens the existence of manufacturers of furniture, but also that of manufacturers of other artistic industrial design products which may claim copyright protection. These activities have a devastating impact on the economic situation of design companies and employment within it.

Thanks to the proposed changes to the law, many pieces of iconic design distributed by Vitra will finally benefit from appropriate protection in Ireland, such as the Eames Lounge Chair, the Noguchi Coffee Table or the Panton Chair (please see the pictures below).



These works were ground-breaking innovations in the field of furniture design at the time of their creation, ranging from the end of the 19th to the middle of the 20th century. They serve as a standard of furniture design and, despite their age, they remain up to date. Nowadays, most of them may be found not only in the literature about masterpieces of furniture design but also in all major design museums of the world.

As noted above, Vitra does not consider itself only a furniture manufacturer but also a home for innovation in design. Vitra promotes young designers, like Edward Barber and Jay Osgerby,



continually develops new products and also provides products which are not interesting in an economic way but valuable in a cultural sense, such as the Eames Chaise.



However, Vitra can only encourage innovation and maintain its commitment to high quality because of the exclusive ownership of the rights on, and the exclusive sale of, design classics such as the furniture designed by the world-famous designers Charles & Ray Eames, manufactured by Vitra to a continually high standard since the 1950s and 60s.

The time and effort that goes into designing a new furniture design is huge. The development involves not just the initial concept, but the refining and design of each element of that concept, working with materials to get the right quality and effect and testing all the materials and the finished product. This process can take years – often as much as eight or nine years and sometimes even longer. Because of this important investment, it is usual for the “furniture design classics” to be produced by the same manufacturer for decades, namely by the manufacturer who was involved in the creation process with the designer and who still owns the original manufacturing tools.

A change of the current rules would therefore encourage us (and other design companies) to invest in the Irish design market, supporting and promoting Irish designers. In turn this would also have positive effects for the Irish labour market, creating jobs in a number of sectors (including design and development, manufacturing and sales).

The economic impact on the extension of the term of protection for iconic furniture designs, on the other hand, is limited. From Vitra’s experience in the UK, the vast majority of companies offering replica furniture are internet dealers offering unauthorised and cheap copies of design classics, mostly imported from China. Vitra could not identify a single entity that offers replica furniture in the UK that manufactures any products in the UK. Vitra has in summer 2013 contracted a brand security and intellectual property specialist organisation, Brand Solutions International Ltd, to conduct a research survey looking at the market for copies of iconic designs in the UK – including designs by Vitra, Cassina, Fritz Hansen, Artek, Tecnolumen, Artemide, Thonet and Flos.

This company has been specifically tasked to investigate how readily available these copies were, whether they were being stored and manufactured in the UK and how they were being marketed. The intention was to discover the extent to which the implementation of the repeal of Section 52 of the UK Copyright, Design and Patent Act would impact upon employment in the copyist sector in the UK. Please find a brief summary of Brand Solutions International Ltd.'s findings below (please let us know if you wish us to send you the full dossier of evidence collected by Brand Solutions).

As part of their investigations, Brand Solutions identified a number of companies dealing in copies of iconic furniture which appeared to be UK based. In total, 23 apparently UK based companies were identified. Information was requested from each of these companies on the availability of certain products, specifically those identified as copies of famous designers, such as Eames.

Investigations revealed that out of the 23 companies identified:

- Two had inactive websites and telephone numbers, implying that they were no longer operating. Neither of these two had a current registration with Companies House – one had no entry and one had a registration which had been dissolved in May 2013.
- Eight were not contactable by telephone, and emails sent and chased up received no reply. Four of these companies were currently registered with Companies House; two were not registered and two had apparently previously been registered, one under a slightly different name, but they had been dissolved in 2010 and 2011 respectively. Again, the lack of response implies that these companies are no longer operating in the UK.
- Four companies answered the phone but directed us to email our inquiry in. The emails, however, never got any response, even after chasing. Of those four, two of the phone numbers were not in the UK – one in France and one in Italy.
- The remaining nine companies had UK phone numbers which were answered and the people who answered were able to supply information about the companies and how they operated. One of these, however, had a UK phone number which actually connected with an overseas line, in Spain.
- Most importantly, of these nine companies, one said that their products were made in a factory in Tuscany and eight said that all or most of their products are produced in China – often quoting lead times for delivery of between eight to 16 weeks, because stock was often not held in the UK and had to be shipped in from China.

Overall, it is obvious from this investigation that there are very few - if any - legitimate companies operating out of the UK selling copies of these iconic furniture designs. Of those that do, the majority of the products are made in China and shipped into the UK on order. None of them are produced in the UK. Vitra assumes that the same is true for Ireland, because the low cost at which replica designs are offered makes production in Ireland cost unattractive.

This underlines that changes to the laws around copying of iconic design would have negligible impact on Irish businesses engaging into piracy. Even if these companies ceased to operate, which is unlikely to happen because they do not sell only replicas, what little impact there would be, would mainly be felt in China where the factories that produce these products are located.

Question 2: Would a short transition period before the amendment comes into force be the most appropriate and efficient?

Vitra believes that a short transition period is most appropriate. In effect, the transition period has already started since the publication of Directive 98/71/EC on the legal protection of designs became applicable in October 1998, more than 18 years ago. Article 19 of Directive 98/71/EC provides that “Member States shall bring into force the laws, regulations or administrative provisions necessary to comply with this Directive not later than 28th October 2001”. Companies engaging in copying activities know since October 1998 that their practices will soon be prohibited, also in Ireland. At the latest, companies engaging in the trade of unauthorised copies of iconic designs must have become aware that their business model was contrary to EU law with the publication of the CJEU’s judgment in the case C-168/09 *Flos SpA v. Semeraro Casa e Famiglia SpA* on 27th January 2011, more than five years ago. As the consultation puts it, “[t]his ruling brought to light potential divergences in Irish and EU law.”

A long transition period - that would allow the sale of products until stock exhaustion - would be extremely inappropriate, due to the difficulty in controlling the stock situation. To maximise their benefits, companies are likely to declare large amount of stock of products manufactured in Asia. Such a lengthy transition period would only serve to encourage on-going piracy activities, prohibited elsewhere in Europe.

To the best of our knowledge and based on our research, none of the entities offering replicas of artistic designs do manufacture these products in the European Economic Area (EEA). In many cases the individuals behind them have no real premises, much less any production site or stock in the EEA. Most replicas are imported from Asia (for further information on this please see the summary of the Brand Solutions International Report in question 1).

Accordingly, it is reasonable to provide for a short transition period to allow businesses to comply with the law. Vitra would like to point out that upon judicial review of the commencement order providing for a transitional period of five years for the repeal of section 52 UK CPDA, the UK government revoked the commencement order¹ and implemented a transitional period of nine months from the start of the consultation period.² Since the consultation period in Ireland started on 24 August 2016, an equivalent transitional period would end on 24th May 2017. Vitra therefore suggests that the transitional period for the amendment of sections 31A and 78B of the CRRRA should end not later than 24th May 2017, as any longer transitional period is incompatible with EU law.

For further information, please contact: Tony Ash (tony.ash@vitra.com)

¹ See www.gov.uk/government/news/change-to-transitional-arrangements-for-the-repeal-of-section-52-of-the-cdpa (last visited 20 September 2016).

² See www.gov.uk/government/consultations/transitional-arrangements-for-the-repeal-of-section-52-cdpa (last visited 20 September 2016).