Professor Lionel Bently
Herchel Smith Professor of Intellectual Property Law

CIPIL
CENTRE FOR INTELLECTUAL PROPERTY & INFORMATION LAW

UNIVERSITY OF CAMBRIDGE

Faculty of Law

Lord Stevenson
Lord Clement-Jones
House of Lords

8 March 2013

Dear Lord Stevenson and Clement-Jones,

Repeal of CDPA s 52/Clause 66 of the ERR Bill

Last July, we wrote to *The Times* objecting to the Government's proposal to repeal section 52 of the Copyright Designs and Patents Act 1988, and thereby increase the term of protection of copyright in mass-produced designs from 25 years to the life of the designer plus-seventy years thereafter. We expressed concerns about the absence of consultation, the failure to assess in any detail the implications of the change on British jobs in the feeble Impact Assessment, and our concerns for interests that had been overlooked.

In the intervening months, the Intellectual Property Office has done nothing to make up for the failures we identified at that point. Instead, it has promised consultation on transitional provisions. We therefore are delighted to see that you both are making some attempt to limit some of the side-effects of this change in the law with amendments 84C-E that you have tabled for Report stage.

Amendment 84ZC will offer some comfort to museums, teachers, publishers, photographers and film-makers. At present, they are able to rely on s 52 to justify the inclusion of images of mass-produced designs (that are more than 25 years old) in books, catalogues and on films. In the case of a number of art-publishers, this freedom represents the difference economically between a viable publication, and one which could not occur. For museums, it allows the inclusion of images of such designs on websites. Indirectly, both facilitate education in design. We fully support this amendment.

Amendment 84ZD seeks to protect "follow-on design", that is design which builds on design. This is threatened by the proposed repeal of section 52 because of the strict test of copyright infringement that will henceforth be applied, in effect, to use of any design from the twentieth century. The test of infringement of copyright is reproduction of any original part of the copyright work – it does not matter how much the user has added. That means that copyright can impede the use of design-contributions that draw upon but add to and transform a design. In contrast, in European design law the test of infringement of design rights is whether the users design produces a "different overall impression" on an "informed user". This test

Faculty of Law
10 West Road
Cambridge CB3 9DZ

Telephone: 01223 330081
Fax: 01223 3300986
E-mail: cipil@law.cam.ac.uk

means there will be no infringement where a second generation designer draws on existing design features but produces something that is transformed into a new design. If copyright protection is to be extended in time, as the Government proposes, we think this is a preferable test. Establishing impediments to follow-on designers is a reckless move, particularly in the middle of a recession. We support this amendment.

The Government may object to both exceptions on the basis that they are inconsistent with Article 5 of Directive 2001/29 ("the Information Society Directive"). For what it is worth, we offer our view that the freedom of Member States is not as limited as this supposes. Member States are free under Article 17 of the Design Directive and Article 96(2) to regulate "the extent" of protection of designs by copyright. Article 96(2) of the Design Regulation states:

> 2. A design protected by a Community design shall also be eligible for protection under the law of copyright of Member States as from the date on which the design was created or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State.

The significance of our drawing attention to the Regulation is that this legislation occurred ***after*** the Information Society Directive – indeed 7 months after the ISD, on 12 December 2001. The freedom to regulate the conditions of protection and ***its extent*** was reaffirmed, making clear that Member States have free rein to determine the extent of protection. As a consequence, *any exception* is permissible (short of one that completely eliminates the right).

Amendment 84ZE proposes to delay the coming into force of the repeal. We support this for two reasons. First, it will give the Government time to consider carefully the impact of the repeal, something which regrettably it has not done. There has been no formal consultation. Second, it will ensure that the more flexible exceptions that are proposed in consequence of the Hargreaves Review are in operation. Those exceptions will offer comfort at least to those in the educational sector who are worried about the impact of repeal of section 52 on the teaching of design.

Yours sincerely,

Professor Lionel Bently
Professor Tanya Aplin
Professor Ronan Deazley
Professor Graeme Dinwoodie
Professor Robin Jacob
Professor Martin Kretschmer
Professor Hector MacQueen
Professor Charlotte Waelde
Professor Estelle Derclaye
Professor Paul Torremans

Faculty of Law
10 West Road
Cambridge CB3 9DZ

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E-mail: cipil@law.cam.ac.uk