UK Consultation on the repeal of section 52 CDPA

Submission by Creative Commons

Prepared by Brigitte Vézina, Director of Policy, Open Culture and GLAM, Creative Commons[1]
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This document is submitted to the UK Intellectual Property Office (UKIPO) Post-implementation review of the repeal of section 52 of the CDPA 1988 and associated amendments - Call for views. It summarizes Creative Commons' (CC) provisional position in four key points.

For background, in 2016, section 52 of the Copyright Designs and Patents Act 1988 (CDPA) was repealed to bring the law in line with EU law, notably the 2011 CJEU decision in *Flos* (C-168/09). The repeal retroactively extended the term of copyright protection for industrially manufactured works (such as furniture, lamps, jewellery, tableware, etc.) from 25 years to the full 70-year term.

In short, we believe that the repeal of s. 52 CDPA:

1. led to yet another expansion of copyright rights to the detriment of the public domain. By extending the term of protection for industrially manufactured works, it created further enclosures of creativity and innovation and thereby deprived our shared public domain of valuable creative content to build upon. Any intellectual property (IP) law needs to accommodate two values: (1) incentivization of the creation of new works through the granting of exclusive rights to creators, and (2) free exchange of ideas, knowledge and creativity. To help ensure that IP does not impinge on the public's ability to share ideas, engage in valuable discourse, and author new creative works, an IP protection term cannot set off the balance between public and private rights; an overly long term of protection generates inappropriate or inequitable applications that break the balance between public access and the rights of creators.[2] What is more, given the repeal's

[1] Creative Commons is grateful to members of the Creative Commons community and partners who contributed and provided insightful comments on this submission, namely: Dimitar Parvanov and Andres Izquierdo; however, this submission does not necessarily represent their opinions or those of the institutions with which they are associated.

[2] "In practice, lengthy copyright terms tilt the traditional copyright balance between the rights of copyright owners and the rights of the public firmly in favor of the former. They force the public to pay a heavy price, in the form of both continued royalty fees for content use and impediments to our ability to access and build-on existing works. What is worse, there is little

retroactive effect, works whose term had already expired were also granted a 70-year term and “came back from the dead.”

2. raised important concerns around intellectual property rights overlap leading to overprotection. Other exclusive rights — especially industrial design rights under the CDPA, Part III - Design Right and Part IV - Registered Designs — already provide sufficient protection. Overprotection has negative impacts on creativity, innovation and the provision of public goods.
3. generated confusion due to the lack of statutory definition of “work of artistic craftsmanship” and heterogenous case law interpretation and blurred the lines between functional articles and artistic works; and
4. had a negative impact on the legitimate activities of cultural heritage institutions (such as galleries, libraries, archives and museums or “GLAMs”). It increased complexity and costs in rights clearance and licensing (due in part to the cancellation of the compulsory license). Further, those items in the collection whose protection was “revived” could no longer be displayed, copied (e.g. 2D reproduction (such as a photograph) and digitization), or otherwise made available for use. Any replicas (such as merchandise for sale in the gift shop) made under the shorter term could no longer be sold without a license. These extra license fees introduced much higher costs to GLAMs and became prohibitive.

To conclude, functional, utilitarian articles can benefit from design protection with a shorter protection term that responds to market dynamics for such articles. This ensures that the practical, utilitarian benefits conferred by the articles are not kept from the general public for an unduly long period of time. The full copyright term of protection for such design articles unfairly tips the balance against the public interest in access, use and reuse of those designs.

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empirical evidence that extending copyright terms does anything to encourage new creativity." See “Copyright Extensions and Public Domain,” Electronic Frontier Foundation (EFF), https://www.eff.org/files/filenode/copyrightterms_fnl.pdf.