



Response to the Consultation on  
changes to the UK designs framework

November 2025

Bath  
Birmingham  
Cambridge  
Leeds  
London  
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# 1. Introduction

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Our experience within the UK design industry stretches back over 26 years. We understand how crucial the protection of intellectual property is in an industry where distinctive design, original content and innovation are key to maintaining market leadership and consumer trust and where certain businesses operate on the basis that design copying is easy and low-risk by comparison with the infringement of copyright works.

We have helped countless design business over decades to protect, exploit and enforce their IP. Our clients have come from the following sectors: furniture, fabrics, furnishings and interiors, kitchenware, bathroom and sanitaryware, toys and giftware, artists, photographers, ceramicists and sculptors, cosmetics and personal care, jewellery, fashion and accessories, gardening and garden products.

Stone King is also a Legal Affiliate of the design industry trade association and leading campaign organisation Anti Copying in Design (ACID), supporting them in their mission to raise awareness of and protection for IP rights in the design industry and advising ACID members on the protection and enforcement of their IP rights in the face of what is frequently blatant copying.

The majority of our contentious advisory work falls within the field of unregistered design rights. We therefore have a deep understanding of the issues which designers face in seeking to prevent and obtain redress for the infringement of their rights. It is our considered opinion, based on many years' experience working with designers, that unregistered design protection in the UK is insufficient to meet the needs of a £100 billion design industry. Our response to the Consultation therefore focuses on *Section F – Simplification of unregistered designs and overlap with copyright*.

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## 2. Section F – Simplification of unregistered designs and overlap with copyright

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Design law is certainly complex, but it has to deal with competing considerations and achieve a balance between form and function which copyright law does not. A wholesale reform which dealt with all of these issues would be time-consuming and expensive and it would not necessarily result in a law which was less complex. Copyright and trade mark law, after all, are not simple. The danger of trying to simplify design law is that the protection it provides to the design industry becomes correspondingly weaker, thereby encouraging copying which is detrimental to the design industry as a whole.

In setting out various options for design law reform, the Government has listed several, key aims which are (i) to create a balanced IP system which recognises the needs of both designers and third parties, (ii) to simplify and streamline the system and (iii) to incentivise the registration of designs.

With regard to aim (i), the current system favours the copier and design law needs strengthening to redress the imbalances which are not found in copyright law. The term of protection, available defences to infringement claims and lack of equivalent sanctions to those found in copyright law all contribute to making unregistered design law a hostile environment in which to protect designs.

Aim (ii) recognises the need to minimise negative impacts of reform on designers. It is noted elsewhere in the Consultation<sup>1</sup> that Respondents to the 2022 call for views were clear that they did not want the system to be simplified at the expense of protection. It is therefore alarming that many of the proposals set out in the Consultation would have the effect of weakening design right protection.

In its explanation of aim (iii), the Government states<sup>2</sup> that registration of designs brings greater legal certainty. On the contrary, there is a defence for third parties who wish to challenge the validity of registered designs. They can apply to the UK Intellectual Property Office to invalidate registered designs or raise invalidity as a counterclaim in infringement proceedings. A registered design is therefore always subject to challenge, as is the case with registered trade marks. The validity of a design registration is no more certain than the validity of a claim to own unregistered design right. The value of having a registered design is its deterrent effect (partly attributable to the criminal sanctions for deliberate infringement) and stricter liability provisions.

We shall respond firstly to the Government's discounted options before moving on to comment on the options which have been put forward as viable suggestions for reform.

### 1. Discounted options

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The three options which have been discounted are:

1. abolishing supplementary unregistered designs and retaining design right,
2. abolishing unregistered designs and extending copyright protection,
3. making no changes and improving guidance about how designs can be protected.

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<sup>1</sup> Section F, paragraph 14

<sup>2</sup> Section F, paragraph 17

We agree that option 2 above should be discounted given the need for design law to achieve a balance between form and function which copyright law is not equipped to deal with without significant and radical change.

It is our view that design protection in the UK, whilst complex, is extremely comprehensive in terms of what can be protected and that the protection afforded to designers of useful products is, whilst lacking in some respects, significantly greater than that provided by many other countries. No change (option 3) would therefore be preferable to any change which diminished the protection currently enjoyed by designers.

Recognising that some reforms to design law would benefit the design industry more than doing nothing, we strongly disagree that option 1 should be discounted. On the contrary, with certain qualifications, we believe that discounted option 1 would be a simple and effective way to achieve the stated aims, which include protecting the interests of designers. In that respect, it is the most desirable of all the options proposed by the Government in this Consultation. It would also be infinitely preferable to the opposite proposal (considered below).

We set out our views on the various options, including discounted option 1, below.

## 2. Options

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### **Option 0: Do nothing and maintain the current system**

As stated above, doing nothing (Option 0) would be preferable to weakening design protection.

### **Option 1: Retain supplementary unregistered design, abolish design right**

We strongly disagree with the suggestion that UK unregistered design right could be abolished whilst retaining the Supplementary Unregistered Design Right. UK unregistered design right protects any design which is original and not commonplace in the design field in question at the time of its design, whereas the Supplementary Unregistered Design Right only protects designs which are new with individual character. In assessing novelty, any design in any field can amount to novelty-destroying prior art. This has the ability to undermine or significantly curtail protection for new product designs which derive their features from earlier designs, for example, a lamp base with a similar shape to an antique spindle or table leg, even if such a design were new in the field of lighting designs. It would abolish the “new uses for old” concept which design right has long championed.

The concept of the “informed user” in assessing the individual character of a design for the purposes of the Supplementary Unregistered Design Right also creates an unnecessary layer of complexity which is not found in the UK unregistered design right commonplace test. The originality tests in unregistered design right and copyright are harmonious, which makes it easier for designers to understand the law.

Further, Supplementary Unregistered Design Right does not protect designs for products which form component parts of complex products which are not visible in everyday use<sup>3</sup>. In our view, there is no justification for denying protection for components which are not seen in everyday use. Sufficient protection against undesirable monopolies is provided by the “must fit” and “must match” exclusions from UK unregistered design right<sup>4</sup>.

### **Option 2: Consolidate the unregistered designs framework**

We disagree with the way in which a distinction which is drawn between aesthetic and functional aspects of designs and the comparison between the appearance of a design and the shape and configuration of a design<sup>5</sup>. Elements such as shape and configuration can be and often are equally aesthetic and are no less deserving of protection as designs than other aspects of appearance. Further, the possibility of claiming protection for lines, contours and configuration alone is provided under both the Supplementary Unregistered Design Right and in

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<sup>3</sup> Council Regulation (EC) No 6/2002, article 4(2).

<sup>4</sup> Copyright, Designs & Patents Act, s.213(3)(b).

<sup>5</sup> e.g. Section F, paragraph 29.

the registered design system. Accordingly, we believe that there should be no difference in the qualification requirements for or the term of protection of different aspects of designs. The scope of protection of different aspects of designs will be determined by the freedom of the designer in creating a design and the relevant prior art.

We therefore agree with the suggestion of creating a fully consolidated right which protects both aesthetic and functional elements and to which the same legal provisions apply. Given our views already expressed on the limitations of the Supplementary Unregistered Design Right, we believe that designers would benefit more from an enlargement of the scope of UK unregistered design right to encompass all aspects of a design for an article instead of just shape and configuration by amending section 213(2) of the Copyright, Designs & Patents Act 1988 (the "Act"). It is not necessary to incorporate the Supplementary Unregistered Design Right concept of a "product" into the Act because UK unregistered design right relates to the design of an article which has been interpreted by case law to mean any type of article. Further, there is no need to apply UK unregistered design right to products such as graphic symbols and typographic typefaces (which are products for the purposes of the Supplementary Unregistered Design Right) because such creative works are protected by copyright and clearly distinguishable. This would also maintain a clearer boundary between design right and copyright.

There are demonstrable benefits to keeping the current UK unregistered design right, as has been demonstrated by case-law. A good example is provided by *Kohler Mira Limited v Bristan Group Limited*<sup>6</sup>, in which the Claimant was unsuccessful in its claim of registered design infringement owing to the differences in the overall impression created by the designs in issue, but successful on its design right infringement claims because the Court was satisfied that copying had taken place in relation to the shape and configuration of the Claimant's designs.

### Qualification requirements

The purpose of limiting UK unregistered design right protection to UK residents and residents of qualifying countries was to avoid affording protection to nationals of countries which do not adequately protect unregistered designs (such as Australia). There is therefore a strong argument for saying that the system should remain as it is. Design registration is an option for those unable to claim UK unregistered design right protection.

We disagree with the suggestion that an unregistered design should be created when it is first disclosed to the public. This overlooks the fact that designers often show their designs to potential manufacturers and customers without some form of confidentiality agreement and that they often exhibit their new designs at design exhibitions – some of which might be outside the UK which currently precludes any claim to Supplementary Unregistered Design Right protection - before thinking about protecting them. The current system of protecting a design by UK unregistered design right from when the design is first made available for sale is preferable and sufficiently clear from case law. We do not see any need to change it or benefit which would be achieved by doing so.

### Term of protection

A distinction has again been drawn between aesthetic and functional designs in a way which we do not think accurately reflects design or the needs of the UK design industry. The UK unregistered design right does not protect solely functional designs. It is capable of protecting aesthetically pleasing products and products which combine form with function. The comment is made<sup>7</sup> that, "*A 10-year term of protection would be a significant increase for aspects of aesthetic aspects of a designs [sic] appearance such as surface decoration and colour*". Firstly, surface decoration is protected by copyright law in any event. Secondly, shape can be equally as aesthetic as ornamentation and if a design for any aspect or multiple aspects of an article passes the subsistence test, whether the design relates to the aesthetic or the functional, it is deserving of protection as a design. Thirdly, aspects of designs which fall within one of the exceptions (must fit, must match, method or principle of construction<sup>8</sup>) do not meet the requirements for protection. There is no justification in our view for treating designs for visually appealing aspects of an article as deserving of a shorter period of protection on the basis that such

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<sup>6</sup> [2013] EWPC Civ 2

<sup>7</sup> Section F, paragraph 36.

<sup>8</sup> S.213(3)(b) of the Act.

designs have a shorter shelf life due to fashion trends. This undermines the UK design industry by encouraging copying instead of innovation. It is also at odds with copyright law which protects artistic works for life plus 70 years after death.

Indeed, we believe that the current term of unregistered design protection is too short. If a product design is worthy of protecting because it meets the requirements of originality and passes the commonplace test and it is not excluded by one of the exclusions from protection, it is surely deserving of equal protection to a drawing, a piece of music, a book and so on.

Competition would not be stifled by increasing the term of protection for unregistered designs; on the contrary, it would be encouraged and new and better designs would be created as a result. It would also be a good way to reward innovation and demonstrate that the UK values the contribution of design to the UK economy, thereby encouraging confidence, stability and investment in design and design businesses.

Reference is made in the Consultation<sup>9</sup> to the repeal of section 52 of the Act which, it is claimed, led to the blurring of copyright and design right. The “Eames” chair is an example of a copyright work (under earlier legislation) for which protection was revived as a result of this legislative change. If created today, the Eames chair would only be protected (without design registration) for a maximum of 10 years by design right once commercially exploited and a licence of right would be available in the second five years, yet designs of this calibre have longevity, being both desirable to consumers and an attractive proposition to manufacturers of replicas and look-alike products (many of which are of much lower quality than the original product).

The obvious question which needs to be considered, therefore, is why creators of good product designs are not given the same term of protection as creators of copyright works, whilst keeping the boundaries between copyright works and designs distinct through separate copyright and design right regimes. Providing a vastly shorter period of protection to product designs devalues the contribution which the UK design industry makes to UK productivity and growth. Continental European jurisprudence is now challenging the assumption that three-dimensional articles which combine form with function are not protected by copyright (see, for example, the *Cofemel* and *Brompton Bicycle* cases and the IPEC’s application of *Cofemel* in *Response Clothing v The Edinburgh Woollen Mill*<sup>10</sup>).

There are significant disadvantages to relying on the registered design system to achieve longer term protection for product designs. Many designers who use the system do so without the benefit of legal advice and frequently register designs themselves. By doing so, they risk prejudicing their rights if they do not represent their designs in the most favourable way possible (the “Trunki” litigation<sup>11</sup> is a good example of this). It is also impossible to anticipate every conceivable infringement when deciding how to represent a design for registration purposes. Unregistered design right provides important fall-back protection in this respect, allowing as it does a Claimant to specify the aspects of shape and configuration of a design which it claims have been infringed.

We submit that the term of unregistered design right should be increased to a minimum of 10 years with no licence of right provisions, if not for the full 15 years of protection currently available to an unregistered design which has not been commercialised. If the Government wishes to foster innovation and growth, it could even extend the term of protection for unregistered designs to 25 years, being equivalent to the maximum term of protection available for registered designs and the reduced period of protection previously afforded to an artistic work which had been industrially produced under s.52 of the Act prior to its repeal.

### **Conclusion on harmonisation of design laws**

For the reasons set out above, we strongly disagree with the suggestion<sup>12</sup> that “*the most straightforward way to simplify the regime would be for supplementary unregistered design provisions to apply to the consolidated*

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<sup>9</sup> Section F, paragraph 11.

<sup>10</sup> [2020] EWHC 148 (IPEC).

<sup>11</sup> *Magmatic Ltd v PMS International Ltd*, [2016] UKSC 12.

<sup>12</sup> Section F, paragraph 41.

*unregistered design system*". Using the concepts of Supplementary Unregistered Design Right to protect all unregistered designs would have a chilling effect on design protection due to the higher threshold for protection and shorter term of protection.

Furthermore, the interface exclusions under Supplementary Unregistered Design Right are narrower than under UK unregistered design right, applying only to features which must necessarily be reproduced in their exact form and dimensions<sup>13</sup>. This means that the Supplementary Unregistered Design Right has the potential to lead to greater monopolies over spare parts than UK unregistered design right (features which enable the article to be connected to, or placed in, around or against, another article so that either article may perform its function or are dependent upon the appearance of another article<sup>14</sup>).

The optimum solution for the design industry, which comprises many micro businesses and SMEs, is to increase the deterrent factor created by unregistered design rights (on which many designers rely) by increasing the term of protection under the UK unregistered design right and by making deliberate copying of an unregistered design an unattractive proposition through criminal sanctions. This would result in less need for litigation. Copyright and registered design law contain criminal provisions for deliberate infringement and this should be extended to cover the deliberate copying of an unregistered designs so as to create a real deterrent against deliberate copying. We have dealt with countless cases in which the alleged infringer was plainly guilty of deliberate infringement of unregistered design rights, not merely an innocent (or naïve) importer. Safeguards are already established within the criminal prosecution mechanism which would prevent abuse.

We therefore propose that UK unregistered design right should be amended to apply to all aspects of the design of an article, not only to shape and configuration, that the term of protection should be extended to 25 years, which mirrors the reduced term of protection for copyright works under the now repealed section 52 of the Act and the maximum term of registered design protection and that criminal sanctions should be introduced to mirror those available under copyright and registered design law. This would strengthen protection for designs and foster innovation, investment and growth which are so very much needed.

### 3. Overlap with copyright

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We agree with the suggestion in the Consultation that no changes should be made to copyright legislation (Option 3). With respect to works of artistic craftsmanship in particular, we agree that further clarity around the protection provided to such works should be allowed to develop through case law. Attempting to define a work of artistic craftsmanship in legislation would lead to disputes about the interpretation of the statute, which would be counter-productive.

We do not agree with the suggestion set out under Option 5 that s.52 of the Act should be reinstated or that an exception should be introduced to allow works of artistic craftsmanship to be represented in new artistic works (the purpose of which is entirely unclear). No such measures are proposed in respect of films, music or literature, which perpetuates the notion that design has a lower value. There seems to be no logic to this. The design industry – and the economy - will only be supported through the strengthening of design laws, not their weakening.

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<sup>13</sup> Council Regulation (EC) No 6/2002, article 8(2).

<sup>14</sup> Section 213(3)(b).

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