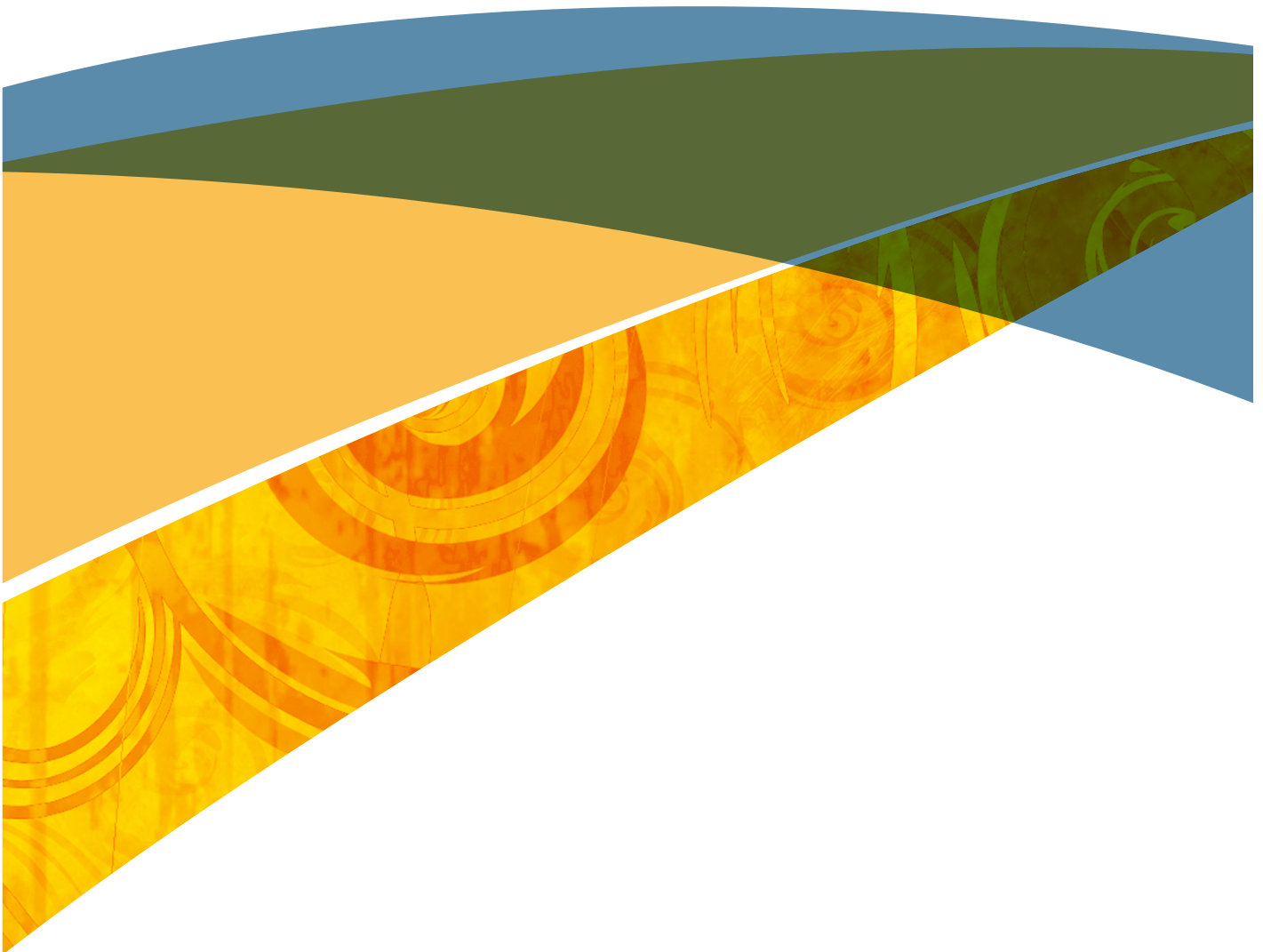




Intellectual  
Property  
Office

# Consultation on transitional provisions for the repeal of Section 52 of the Copyright, Designs and Patents Act 1988





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## Executive Summary

This consultation seeks views on the Government's proposals for how and when to implement the repeal of section 52 of the Copyright, Designs and Patents Act 1988.

The Government has legislated to remove a permitted act in law that reduces the term of copyright protection for artistic works that have been industrially manufactured. When this change to the law comes into force, it will benefit the creators of such works, or those to whom they have transferred the relevant rights. The Government however wishes to implement the repeal in a way that reduces negative impacts on those businesses which have been operating legitimately using the permitted act contained in section 52 of the Copyright, Designs and Patents Act 1988.

This document sets out factors the Government has considered in determining its proposed 3 year transition period from April 2015. It seeks further evidence on the impact on UK-based rights holders and designers and seeks information on the impact on UK businesses if the repeal takes effect on 6 April 2018 as proposed.



## About this consultation

This consultation sets out how the Government proposes to act on implementing section 74 of the Enterprise and Regulatory Reform Act 2013 which will repeal section 52 of the Copyright, Designs and Patents Act 1988.

The focus on this consultation is on how and when to implement the repeal. As the repeal has already been approved by Parliament as a result of the Enterprise and Regulatory Reform Act 2013, the policy of the repeal is out of scope for this consultation.

This document also sets out the Government's position on issues raised during the Call for Evidence on other areas of potential legislative reform.

This document should be read in conjunction with its associated Impact Assessment (Number BISIPO009: Timing of the repeal of section 52 of the Copyright, Designs and Patents Act 1988) which provides detailed analysis of how the Government determined its proposal.<sup>1</sup>

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<sup>1</sup> See Annex B

## How to respond

The Government welcomes views on the issues discussed in this consultation document. It also encourages respondents to provide information on the questions raised in this document. People who wish to respond do not need to provide answers to all questions – people can choose to answer the questions relevant to them.

When responding, please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents.

**This consultation will commence on 15 September 2014 and will run for 6 weeks. The closing date is 27 October 2014 at 23.59 GMT.**

We would prefer submissions to be sent via email to: [Section52CDPA@ipo.gov.uk](mailto:Section52CDPA@ipo.gov.uk).

You may also post responses to:

Mr Taffy Yiu  
Copyright Directorate  
Intellectual Property Office  
4 Abbey Orchard St  
London  
SW1P 2HT  
United Kingdom



## Good evidence for policy making

The Government is seeking evidence that is open and transparent in its approach and methodology. We are aware that some individuals and small businesses and organisations face particular challenges in assembling evidence and we will assess their contributions understandingly.

The Intellectual Property Office has published a guide to evidence for policy which lays out the Government's aspiration that evidence used to inform public policy is clear, verifiable and able to be peer-reviewed.

This document is available at [www.ipo.gov.uk/consult-2011-copyright-evidence.pdf](http://www.ipo.gov.uk/consult-2011-copyright-evidence.pdf).

## Confidentiality and data protection

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 ("FOIA"), the Data Protection Act 1998 and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

## Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles:

[www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf](http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf)

### *Comments or complaints on the conduct of this consultation*

If you wish to comment or make a complaint about the conduct of this consultation please email [angela.rabess@bis.gsi.gov.uk](mailto:angela.rabess@bis.gsi.gov.uk), or write to:

Angela Rebass  
Better Regulation Unit  
Department for Business, Innovation and Skills  
1 Victoria Street  
London  
SW1H 0ET

If you wish to comment on the specific policy proposals you should contact the Intellectual Property Office via email to [section52CDPA@ipo.gov.uk](mailto:section52CDPA@ipo.gov.uk).

## Introduction

Section 52 of the Copyright, Designs and Patents Act 1988 (“CDPA”) contains an exception (a permitted use of copyright works) which limits copyright protection for certain artistic works when they have been industrially manufactured. When more than 50 copies of these artistic works are made then the current period of protection is limited to 25 years, compared to other artistic works which are protected by copyright for the life of the creator plus 70 years.

On 25 April 2013, the Enterprise and Regulatory Reform Act 2013 (“ERRA”) was passed. Section 74 of the ERRA repealed section 52 of the CDPA on a date to be appointed by a commencement order. When the change in law is commenced, the effect will be to update and clarify UK legislation in line with EU law. Accordingly, when the repeal is put into effect, the exception contained in section 52 of the CPDA will cease, and any artistic work, whether 2-dimensional or 3-dimensional, which qualifies for copyright protection will enjoy the full term of copyright protection.

The Government wants to implement the change in law with a fair and proportionate transition period. While the Government wishes to ensure that rights holders and designers are able to protect their copyright work for the full duration of copyright protection, it also wishes to allow affected businesses to adjust and thereby minimise unnecessary harm to UK manufacturers and importers who have until now legitimately relied on section 52 of the CDPA.

The Government committed to consulting on when and how to implement the repeal of section 52 of the CDPA. As a first step, the Government launched a Call for Evidence in October 2013 seeking information in order to assess the potential impact of transitional provisions and timing of the change in law.

The Government also spent time to further develop the evidence base for determining its proposal on transitional provisions. It has now published an Impact Assessment, attached in Annex B of this document, which sets out an analysis of various options for the timing of the repeal.



## Consideration of issues on the timing of the repeal

The Government's objective is to ensure that rights holders and designers are able to protect their copyright for the full duration of copyright protection. However, the Government wishes to ensure that the change in law is implemented in a way that provides for a fair and proportionate transition period. A proportionate transition period will fulfil the Government's other objective of ensuring that businesses have sufficient time to adjust and minimise unnecessary harm to UK businesses that have lawfully relied on the permitted act contained in section 52 of the CDPA.

During the Government's Call for Evidence, the Government received information which suggested transition periods as short as 4 months to as long as 10 years. This consultation document discusses the factors in favour of a relatively short transition period, supported primarily by designers and rights holders. It also discusses the factors in favour of a relatively long transition period, supported by businesses that manufacture, assemble, import or sell unlicensed copies of 3-dimensional copies of artistic works and those that create and use 2-dimensional copies of artistic works.

As a starting point, the Government believes that a transition period of 10 years or longer runs a risk of being unlawful given the implications of the judgment of the European Court of Justice in Case C-168/09<sup>2</sup> *Flos SpA v Semeraro Casa e Famiglia SpA* in January 2011. Italian law had provided a 10 year transition period which prevented copyright protection from being enforced against those who had manufactured, supplied or marketed products based on designs in the public domain<sup>3</sup> but this was ruled unlawful by the European Court of Justice which said that transitional measures must be proportionate.

On the other hand, the Government considered a transition period of zero months (i.e. not having a transition period at all) given its commitment to providing a transition period that would allow affected parties to adjust.

This document sets out the factors that the Government has considered in proposing a transition period.

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<sup>2</sup> <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-168/09>

<sup>3</sup> When a work is in the public domain it is no longer protected by copyright and may be freely used without the permission of the former copyright owner.



# Copyright protection for artistic works

Currently, artistic works that have been industrially manufactured are able to be copied 25 years after it was first marketed. As such, many UK businesses have sought to make unlicensed copies of artistic works which had fallen into the public domain (with many being in the public domain for decades), as it was clear that these works would not infringe copyright. A number of businesses told us that section 52 of the CDPA was clear and simple to understand and reduced unintentional copyright infringement.

## What is an artistic work?

The CDPA says that copyright may subsist in an artistic work which could mean a graphic work, a work of architecture or a work of artistic craftsmanship.

In terms of items that have been industrially manufactured, it is unclear under UK law what proportion of these would satisfy the conditions in order for it to be protected by copyright. In the UK, there is limited case law to determine whether an essentially functional object would be protected by copyright. In the UK there is some case law to suggest that things that are both functional and mass produced are unlikely to qualify as works of artistic craftsmanship, as seen in the decision of *George Hensher Ltd v Restawhile Upholstery (Lancs) Ltd* [1976] AC 64.

Given this legal uncertainty, some have attempted to suggest attributes of what functional items would be protected by copyright. For example, some have argued that specific functional items that have been displayed in a museum or gallery would be classified as an artistic work, on the basis it has been selected by a museum or gallery for inclusion in its collection. While decisions on the subsistence of copyright in a particular item are ultimately for the courts to make, the Government is sceptical that the fact of an item being included in a museum or gallery collection would necessarily mean that the work should be considered artistic. The Government is of the view that items in museum and gallery collections often appear because of their prevalence or historical significance in a particular period of time, and may not necessarily make any attribution to its aesthetic qualities.

## UK and EU law on copyright protection for artistic works

It should be noted that copyright is partially harmonised at EU level, and therefore the UK Government has limited scope to provide further definition. There is some recent case law in other EU member states<sup>4</sup> that says a particular design is protected in that particular member state. In line with Article 10 of the Term of Protection of Copyright Directive (2006/116/EC) which was implemented in the UK by the Duration of Copyright and Rights in Performances Regulations 1995, items have copyright protection in the UK for the life of their author plus 70 years if they were protected in any other EU member state on 1 July 1995 and were works of artistic craftsmanship.<sup>5</sup>

<sup>4</sup> For example, *Cassina v High Tech s.r.l.* in the Court of Milan in 2011

<sup>5</sup> The relevant UK provision is regulation 16 of the Duration of Copyright and Rights in Performances Regulations 1995 (<http://www.legislation.gov.uk/ukSI/1995/3297/contents/made>)



### *Copyright protection for works made before 1 June 1957*

Some owners of design rights have told the Government that further legislative changes would be necessary to bring about legal clarity as to what items would be protected by copyright and to clarify the position of works that were designed before 1 June 1957.

The relevant legislation relating to works designed before 1 June 1957 is Paragraph 6 of Schedule 1 of the CDPA (“Paragraph 6”) which says that:

“Copyright shall not subsist by virtue of this Act in an artistic work made before 1st June 1957 which at the time when the work was made constituted a design capable of registration under the Registered Designs Act 1949 or under the enactments repealed by that Act, and was used as a model or pattern to be multiplied by an industrial process.”

The argument is that Paragraph 6 should be repealed to guarantee copyright protection for items made before 1 June 1957 in line with the Government’s objective of protecting all types of artistic works for the full term of copyright protection.

The Government’s position is that repealing Paragraph 6 would either have no substantive effect (because all such works attract copyright by virtue of the Term Directive and regulation 16 of the Duration of Copyright and Rights in Performances Regulations 1995) or it would create new copyright in works made before 1 June 1957 which were not protected in other EU member states.

In terms of copyright protection for works made before 1 June 1957, the Government is of the view that some artistic works created before 1 June 1957, where the work was also a design, may attract copyright protection by virtue of the Term Directive as mentioned above. If a work of artistic craftsmanship was protected by copyright in any EU member state on 1 July 1995, then it would also be protected in the UK.

The rationale for repeal of section 52 of the CDPA is to remove an unfair difference in how long copyright lasts. Creating a new copyright, by contrast, would make decades-old designs suddenly become copyright works. There is no justification for this either on the basis of equity (the designers of the 1950s and earlier did not expect copyright protection) or on the basis of an incentive to engage in design work (the designers of nearly 60 years ago are unlikely still to be working in design and many may have died). However, as with the repeal of section 52 there would be a negative impact on users of affected works.

Therefore, the Government’s position is that repeal of Paragraph 6 is neither necessary nor desirable. Nor would the repeal of Paragraph 6 provide any real additional certainty as to which items would be protected by copyright once the repeal of section 52 of the CDPA is put into effect, since the main source of uncertainty is whether or not a particular item is an artistic work.

## Practical implications

Once the change in law takes effect, some of the items which had been copied will be protected by copyright, although there is uncertainty as to which items would be protected.

The practical implication is that many businesses are unavoidably unsure of what items would be affected by the change in law, and assumptions have been made as to what constitutes an artistic work. Given the lack of clarity, the Government anticipates that the courts may ultimately have to make rulings in this area.

The Government believes that a number of rights holders are likely to assert their intellectual property rights – the Government has seen correspondence from rights holders where they have contacted businesses that trade in unlicensed copies of their licensed products for potential infringement of their intellectual property rights. In some cases, rights holders have written to businesses trading in unlicensed copies of their products, citing copyright infringement of their works, despite section 52 of the CDPA currently remaining in force. The Government has received other anecdotal evidence that some businesses that sell lawfully manufactured or imported unlicensed copies online have been subject to take-down notices or action, and other businesses being accused of being “infringers” or “pirates” despite their business activities being lawful under section 52 of the CDPA.

Further, some rights holders have told the Government they intend to take legal action against businesses that produce or sell unlicensed copies of their designs. Businesses that manufacture, assemble, import or sell unlicensed copies have told the Government that they expect rights holders to assert intellectual property rights in a number of products that they currently trade in. As a consequence these businesses have assumed there is a greater risk of legal action when the change in law takes place and have told the Government they see a need to change their business model and product ranges to reduce the risk of being pursued for copyright infringement and would need sufficient time to do so.

The cost to identify which products could infringe copyright could be high, and in some cases it may require potentially expensive legal disputes. These legal disputes are likely to affect smaller businesses disproportionately as they may not have the resources to pursue or defend such actions. The legal uncertainty and fear of copyright infringements (or fear of potential criminal liability due to copyright infringement) could also have a “chilling effect” on planned investment in new products.

The Government understands that many businesses have tried to plan for the change in law to identify which of their products could be affected and have obtained legal advice on copyright law.

**Question 1:** Have you obtained or will you obtain legal advice on the implications of the repeal of section 52 on your business? Please outline any costs or budgets assigned for this purpose.

**Question 2:** What type of action have you taken/will take to reduce the legal uncertainty of what items would be affected by the change in law? Please outline any costs.



The Government is considering whether it should issue non-statutory guidance on what items are likely to attract copyright in the form of a “Copyright Notice”. A Copyright Notice is a document published by the UK Intellectual Property Office that provides basic copyright guidance. The objective of the Copyright Notice is to provide an authoritative and impartial reference point on areas of copyright law. It would not make new law and would not issue direction to a judicial making body. Nor could it provide a definitive list of what items would be protected by copyright (e.g. teapot A but not teapot B), but would provide some direction for businesses on which to assess their product ranges.

**Question 3:** Should the UK Government provide non-statutory guidance, for example in the form of a “Copyright Notice”, on what items are likely to attract copyright as artistic works? If so, what are the factors that should be considered in this guidance?

## Government proposal on the timing of when to implement the change in law

The Government has carefully considered the information it has gathered on this issue during the passage of the Enterprise and Regulatory Reform Act 2013, the Call for Evidence on the timing of the repeal of section 52 of the CDPA and subsequent correspondence and meetings with stakeholders.

In considering its proposal, the Government has published an Impact Assessment (attached to this document) which considered a number of options as follows:


1. Do nothing (i.e. section 52 of the CDPA would remain in force)
2. A transition period of 6 months from April 2015
3. A transition period of 5 years from April 2015
4. A mid-point transition period of 3 years from April 2015.

As a starting point, the Government has ruled out the “Do nothing” option as it would mean that section 52 of the CDPA would remain in force (that is, section 74 of the Enterprise and Regulatory Reform Act 2013 would not be commenced). This would mean that rights holders would not be able to benefit from the full term of copyright protection for their designs, contrary to Government policy. Further, the Government understands that rights holders and designers could have potential gains as a result of the repeal of section 52 of the CDPA as the UK would not be able to be used as a source or staging post for unlicensed copies to enter the European market.

In considering the other options, the Government was of the view that either a 6 month or 5 year transition period would likely cause disproportionate harm to either rights holders and designers or businesses that manufacture, import or sell unlicensed copies of artistic works.

Accordingly, the Government considered whether a mid-point of 3 years would be proportionate in that the costs would be borne by each affected stakeholder group – that is, rights holders and designers and those that manufactured, imported or sold unlicensed copies.

The evidence suggests that affected businesses, especially small or micro businesses may not have the time to adjust, or to acquire the capital to adjust in a transition period of 6 months, given the costs involved in introducing new designs to the market. Further, if businesses judged their product ranges to contain many items that risked infringing copyright once the change in law took effect, then much greater financial capital would likely be required in order to replace products at a much greater rate. The Government is also of the view that the proposed regulatory change imposes new costs on manufacturers and importers of unlicensed copies, and creators or users of 2D copies of artistic works, compared to designers and rights holders who are arguably less subject to the costs of changing behaviour in response to regulatory change.



However, the Government was mindful that a 5 year period would delay designers and rights holders from benefiting from potential gains due to continued competition between licensed and unlicensed copies for a lengthy period of time.

**Therefore the Government proposes a transition period of 3 years from April 2015, with the repeal of section 52 of the Copyright, Designs and Patents Act 1988 taking effect on 6 April 2018.**

The Government has taken into account that businesses must take responsibility for keeping track and responding to changes in law, and has accordingly factored in the time between the passage of the Enterprise and Regulatory Reform Act 2013 and the publication of this consultation document in determining the start date of the transition period. The Government is of the view that businesses have had sufficient time to learn about the planned change in law and begin to make preparations for it, although not necessarily making full-scale changes until the Government provided an indication of the likely timescales for transition on which businesses could begin to make full-scale changes.

The Government is of the view that it would be reasonable to expect businesses to begin to make substantial changes to their businesses once the Government had announced its proposals for transitional periods as it would provide a reasonable framework on which businesses could make plans.

The Government considers a 3 year transition period from April 2015 to be a fair, proportionate and balanced way to introduce the change in law. It will cause the least disruption across all affected sectors and will allow a reasonable period of adjustment for all affected parties.

## Factors that would lead to a longer transitional period

British businesses that manufacture, assemble, import or sell unlicensed copies of artistic works have told us they are intending to adapt their business models and change their product ranges to ensure compliance with the law and to reduce risk of copyright infringement. As discussed, there is little certainty as to which products will be affected, and the Government understands that many businesses are taking an approach which assumes that many popular products in their product range will be protected by copyright after the change in law is implemented.

### Costs to British businesses that manufacture, assemble, import or sell unlicensed copies

#### Transition Costs

Businesses that trade in unlicensed copies estimate that the cost of introducing a new product to the market to replace unlicensed copies of artistic works could cost in the range of £20,000 to £60,000 (not including employee costs).

The Government understands that there are 3 routes to replace existing product lines:

1. Obtaining new suppliers to source new off-the-shelf products which could cost up to £20,000.
2. Commissioning the design of new products which could cost of to £20,000 with costs such as the cost of hiring the designer, computer-aided design modelling and costs of manufacturing and testing prototypes.
3. Obtaining licences that will allow businesses currently trading in unlicensed copies to trade in licensed copies.

**Question 4:** If you wished to replace unlicensed copies in your current product range, which route are you more likely to take? Please explain why.

**Question 5:** If you elect to source new products through new suppliers, what are the costs and benefits in a 6 month, 3 year and 5 year period?

**Question 6:** The Government understands there are difficulties in developing commercially successful products, with only a small number of products being successful in the market. Do you think you would be able to replace products you believed were at risk of copyright infringement in a period of 6 months, 3 years or 5 years using one or more of these routes?

**Question 7:** Are there any other difficulties (not discussed in this document) in responding to statutory change within a period of 6 months, 3 years and 5 years?

**Question 8:** Will your business be able to absorb the costs of transition in a period of 6 months, 3 years and 5 years? Please explain why.



## Trading of existing stock

As noted, there is little clarity which items would be protected by copyright once the change in law take effect and it is impossible to predict how and when case law will develop on which specific items will have copyright protection. As such the Government is of the view that it would be beneficial for businesses to be able to continue trading in unlicensed copies until case law is established and there is clarity for works whose copyright status is in doubt.

### *Government policy on existing stock*

The Government's policy therefore is to allow businesses that trade in unlicensed copies to have an indefinite period to sell off existing stock, but be prevented from the making or importing of new unlicensed copies after the change in law takes effect. The Government is of the view this policy is consistent with its objective of ensuring that rights holders are able to control the copying of their copyright works after the change in law has taken place.

**Question 9:** What are the costs and benefits of allowing an indefinite transition period for items manufactured or imported before the change in law takes effect?

### *Legal basis for Government policy*

The Government is of the view that there is a legal basis for existing stock lawfully manufactured, assembled or imported into the UK when the law comes into force to not be affected by the change in law. Section 27(2) and section 27(3) of the CDPA provide that an article is an infringing copy if its making in the UK or importation into the UK constitutes an infringement.

Further, the Government is of the view that the operation of the Interpretation Act 1978 will mean that copies of furniture made in the UK or imported into the UK before the commencement can be freely dealt with after commencement without infringing copyright. This position would reflect Government policy. Therefore whilst section 100 of the Enterprise and Regulatory Reform Act 2013 does confer power to make transitional, transitory and saving provision, the Government does not consider it necessary to make any further provision using this power.

**Question 10:** Do you agree it is unnecessary to exercise the powers under section 100 in order to give effect to Government policy? Please explain why.

**Question 11:** Do you believe it is necessary to make express provisions to give effect to Government policy that the change in law will only apply to items that are manufactured or imported when and after the change in law takes effect? How should this be achieved?

### *Rationale for Government policy on existing stock*

The Government is of the view that it is beneficial that businesses are allowed to sell existing stock following the change in law, rather than forcing businesses to sell off stocks at reduced prices (potentially at a loss) in a bid to clear stock before the change in law or be left with unsellable goods. It will also prevent a situation where businesses are left with stock that cannot be lawfully sold after the change in law takes effect.



### *Management of existing stock*

The Government however understands that there are concerns that businesses trading in unlicensed copies could seek to build up substantial stocks before the change in law. However the Government is not convinced that businesses would choose to accumulate significant stocks of unlicensed copies due to self-limiting factors including the risk of tying up capital and costly storage space.

Further, there is also the risk that following the change in law consumers may well think that any unlicensed copies made before the change in law was unlawful, thereby potentially reducing demand for lawfully made or imported unlicensed copies, and subsequently driving down the value of remaining stocks of unlicensed copies.

Businesses could choose however to manage this risk by voluntarily implementing a stock inventory system to establish between products that were manufactured or imported before or after the change in law took effect.

### *Voluntary stock inventory system*

Businesses trading in stock that is manufactured or imported before the change in law may wish to establish an inventory system to identify between products which were made or imported before or after the change in law.

The Government understands there are mixed views on whether it would be useful to implement an inventory system for this purpose. One business told the Government that it would be almost impossible to identify when a particular item was imported as date marking is not something that is not commonly used in some sectors (such as the furniture sector). It was also argued that while sales to customers could be identified by sales date, the item provided could have been in storage or the store for days, months or even years. Another business has told the Government they would employ an auditor to verify their stock levels when the change in law took effect, although there would be administration costs to do so. Other businesses however have told the Government that there are inventory systems in place (such as barcoding of products).

**Question 12:** If you wish to voluntarily establish a stock inventory system, what would be the costs of doing so? What would be the key factor for you in establishing such a voluntary stock inventory system?

### *Secondary market, components and warranties*

As existing stock is unaffected by the change in law, the Government is of the view that the secondary market is not affected – that is, sales of second-hand unlicensed copies remain lawful as long as the item was manufactured or imported before the change in law took effect.

Components of items are unlikely to be affected by the change in law, unless it is an artistic work itself. Therefore the Government considers that businesses that currently trade in unlicensed copies of artistic works are likely to be able to fulfil warranties in relation to repairs of unlicensed copies that had been manufactured or imported before the change in law takes effect.

## Time required to introduce new designs to the market

The Government is of the view that businesses that manufacture, assemble, import or sell unlicensed copies of artistic works should have a reasonable amount of time to adapt their business models, change products if they believe those products are at risk of copyright infringement or phase out that part of the business that trades in unlicensed copies. The Government anticipates that a reasonable transition period will allow businesses to invest in new products and generate new growth in order to make this transition.

The Government also considers that a reasonable transition time should also assist to reduce unnecessary harms to businesses in the form of downsizing, job losses or closures of businesses.

The Government has received evidence from businesses that suggest that it takes at least 5 years on average to change their product offering. These businesses have suggested that, on average, it takes 1-2 years to source and test products or to design, develop and prototype brand new designs. It then takes another 1-2 years to develop and market these products so they are profitable, culminating in commercial success and brand awareness in the fifth year.

The Government considers this as reasonable timeframes given that industrially-produced designs are not generally seen as fast-moving consumer goods. The Government is aware however that it could well take longer to introduce commercially successful products given the difficulties in developing a product that satisfies the market from an aesthetic and ergonomic perspective, yet is able to be manufactured on an industrial scale.

**Question 13:** Do you agree with this average timeframe for introducing new products and designs to the market? Please explain your views.

**Question 14:** Assuming that you have known that section 52 of the CDPA was to be repealed since April 2013, would a transition period of 6 months, 3 years or 5 years provide sufficient time for your business to introduce new designs to the market in order for your business to survive?

## Time to exit existing contracts

The Government understands that some businesses have contracts and agreements of varying length which could require exiting in response to the change in law. The Government is of the view that businesses should have been aware of the upcoming change in law and should have factored the potential impact in any negotiations.

## Impact on creators and users of 2D images of artistic works

The Government understands that the change in law could affect those who create and use 2D images of artistic works. Once the change is implemented, there is the uncertainty whether some images of works could potentially be infringements of copyright. As with businesses that trade in unlicensed copies of artistic works, many photographers and picture galleries have assumed that many items they include in their photo shoots or photo collections would be protected by copyright once the change in law took effect.

Photographers, image agencies and users of 2D images such as publishers have said that they will need to check every image to ensure that they do not run the risk of copyright infringement.

The Government notes however that users and creators of 2D images of artistic works are likely to be able to benefit from existing copyright laws that allow the use of a work for the purposes of criticism or review, or for the incidental inclusion of a copyright work in another artistic work such as a photo, film or broadcast.

### *Publishing*

Publishers and institutions, such as museums, that derive some of their income from publishing may be affected by the change in law if they use 2D images of artistic works. They may incur additional costs as a result of the change in law as they will face additional licensing fees.

The Government notes however that such costs are necessarily incurred in respect of publications covering other artistic works, so the change in law is simply putting all artistic works on an equal footing and should remove any copyright-driven distortions in decisions on what topics to write on.

A number of rights holders have told the Government that they would not seek to take action against the use of 2D copies of their works in magazines and catalogues (for example) as it would remove an avenue of marketing and publicity for their works. However, the Government does not consider this a factor in the timing of the change in law as other rights holders may wish to challenge the use of a 2D image or seek fees for the use of the 2D image of the 3D work. Further, any agreement between rights holders and users of 2D images of artistic works would need to be commercially negotiated and would be out of scope of government intervention.

This however could distort the direction of publication as publishers and licensees of images will learn which designers and rights holders expect fees and will consequently publish fewer images that contain their works (with the unintended consequence of having less exposure for those works).

### *Further print runs of previously published products*

The Government considers that books printed before the change in law takes effect are not affected. However, the Government is of the view that re-prints of books are likely to be affected by the change in law as new 2D copies of artistic works would be reproduced in the publication process.

Some publishers have told the Government that they will need time to adjust to the change in law. Publishers have development plans that generally follow a 5 year projection, of which 2-3 years are spent on preparation and printing prior to publication.

**Question 15:** If you are a publisher, will a 6 month, 3 year or 5 year transition period be sufficient to factor in any licensing costs (if any) to development plans?



### *Museums*

The Government has not had substantial evidence from the museums sector on the proposed change in law. It does however understand that museums, as users and creators of 2D images of artistic works, are likely to be affected. For example museums that have publishing programmes which depend on 2D images of artistic works currently in the public domain but will have copyright revived after the change in law will need to factor in licensing costs for each title. Further, it has been argued that the change in law may limit the scope of what may be used from its own collection on products and therefore limit the development of some published products.

The change in law may impact on museums as collectors of works in terms of distorting the collecting policy or influencing the commercialisation of collections.

On complying with the change in law, one major UK museum has suggested that the change would take 1-3 years, including gaining licenses for book re-prints.

**Question 16:** Will a period of 6 months, 3 years or 5 years be sufficient for museums to plan publication programmes, assess and mitigate impact on collections policies and planned exhibitions of artistic works that could have copyright revived? What are the costs and benefits of doing so?

### *Photographers*

The Government has had correspondence from photographers that specialise in home interiors photography that say they are likely to be affected by the change in law and would need sufficient time to check their existing photo archives to see if rights needed to be cleared.

Photographers and image agencies have told the Government that time and administration costs will need to be set aside for activities such as determining whether each 3D work in new commissions is protected by copyright and assessing existing photographic collections to check if rights need to be cleared because of copyright works contained in the picture (including pictures of unlicensed copies of 3D artistic works). If it is established that permission is required, clearance of rights will need to be managed.

The Government however considers that photographers and image libraries already bear costs for time and administration when assessing whether they need to obtain clearance when photographing other artistic works such as sculptures or paintings.

The time to clear photos could be reduced due to a number of factors. First, designers who create copyright works are usually easily found – the furniture industry in particular is well marketed where items are often advertised as being designed by a particular individual, making it more likely that the rights holder is contactable. Second, not all photos of home interiors will include works of artistic craftsmanship. Third, as case law develops over time, there will be more clarity of which works will require clearance. Fourth, the Government expects that clearing of rights will become faster with licensing solutions being developed.

Fifth, especially in home interiors photography, the Government has found that the same popular items appear repeatedly. Once the rights have been cleared for one item in a collection of digitised and tagged photography, the number of similar photos that will need to be reviewed should be reduced, thus lowering administration costs. However, if the subject of the image is of the interior of a home rather than the objects in it per se, there could be the argument that any artistic works included in that image had been incidentally included, and therefore a licence or permission may not need to be sought for that image.

**Question 17:** Will a 6 month, 3 year or 5 year period provide sufficient time to review existing photographic archives, taking into account the factors listed above? What are the costs of doing so, and could these costs be recouped over such a period?

## Impact on consumers

Once the change in law comes into effect the supply of unlicensed copies in the market should cease, and only those which had been sold or manufactured before the cut-off date will be unaffected and therefore can continue to be sold or “dealt” with. This should mean that the supply of unlicensed copies in the market will be reduced.

This represents a loss of consumer choice (after existing stocks have been sold off they will no longer be able to purchase newly imported or manufactured unlicensed copies) and a fall in supply of unlicensed copies and may mean that many consumers are no longer able or willing to purchase a design they want in their price range. However, the Government considers that secondary markets may mitigate this effect.

The lack of availability of unlicensed copies of artistic works, however, could potentially drive designers to produce new designs to fill a market gap, thereby offering consumers more choice in the future.



## Factors that would lead to a shorter transitional period

The Government wants to ensure that designers of industrially-manufactured artistic works have the same copyright protection for their work and efforts as other creators such as artists, composers and writers. This means that when the change in law takes effect, rights holders and designers will be able to prevent the copying of designs and will be able to bring legal proceedings to stop the manufacturing, importation and sale of new copies of artistic works which they cannot do at present.

Further, the change will also allow rights holders to receive licence royalties when they have allowed others to make copies of their work on their behalf if a licensing system is developed.<sup>6</sup>

The change in law should also reverse the current market position where none of the revenue from sales of unlicensed copies go to the individuals or businesses who have contributed to the creation of the artistic work.

The Government believes that the main beneficiaries from the change in law are likely to be copyright owners (or those that have been assigned the exclusive licences) whose designs have fallen out of copyright (and therefore into the public domain) are brought back into copyright protection. In other words, industrially-manufactured artistic works will be protected for life of the creator plus 70 years instead of being only protected for 25 years after the work was first marketed when the change in law takes effect.

**Question 18:** The Government has received evidence on costs and benefits of the proposed changes primarily from European-based designers and rights holders. What are the costs and benefits of the proposed change for copyright owners and designers based in the United Kingdom?

### Reduced competition from unlicensed sellers for licensed manufacturers

The Government has been told that rights holders would gain once the change in law was implemented. One EU-based rights holder has estimated that it could sell more of its licensed copies in the UK if unlicensed copies were absent in the market. The Government would like to seek further information on this as it has not been possible to fully quantify the potential gain in revenue or market share to rights holders once the change in law has been implemented as there is no way to predict consumer behaviour once UK unlicensed copies disappear from the market.

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<sup>6</sup> See discussion on context for licensing for 3D copies of artistic works on page 24.

The Government is sceptical that a lack of UK unlicensed copies in the market would mean substantial gains to rights holders or to creators. It is of the view that licensed and unlicensed copies of furniture are unlikely to be substitutes given product differentiation (e.g. unlicensed copies of ‘designer’ furniture typically sell at around 15% of the price of the licensed copies<sup>7</sup>). Further, many consumers are unlikely to switch to buy a licensed copy due to an inability or unwillingness to pay for the higher-priced licensed copy even if they are interested in the specific design. Consumers of licensed copies are usually willing to pay more for a product that is prestigious with a recognisable brand (which may be protectable via trade marks) and a perception of quality due to the price.

Rights holders and designers argue that consumers become accustomed to the prices of the unlicensed copies (which they argue are of poorer quality) and become less willing to pay the price for licensed copies (which they argue are of a higher quality). The rationale for a shorter transition period would therefore be to transition to a market which is not influenced by UK unlicensed copies that potentially shapes consumer price expectations.

**Question 19:** Please provide the benefits and costs for UK rights holders and designers if the implementation of the repeal of section 52 of the CDPA is delayed for a period of 6 months, 3 years or 5 years.

## Confusion in market between licensed and unlicensed copies leading to disadvantage for licensed manufacturers and rights holders

Rights holders have said that unlicensed (but currently lawful) copies of artistic works in the market lead to consumer confusion. Rights holders argue that consumers are sometimes unable to differentiate between a licensed copy (argued to be produced at a higher quality) and an unlicensed copy. There is anecdotal evidence that consumers who buy unlicensed copies sometimes contact the licensed producer about issues such as repairs or complaints about quality. Rights holders (i.e. licensed manufacturers) argue that this confusion between unlicensed and licensed copies causes brand damage, although any harm could be due in whole or in part to “passing off” or trade mark infringement which would not be impacted by this copyright measure.

In the absence of systematic evidence to the contrary, it appears unlikely that the typical buyer of the unlicensed copy is unaware that they have purchased an unlicensed product, rather than the licensed product. Customers are likely to research the products and understand the reasons for the price difference. Further, many businesses that sell unlicensed copies clearly label their products as “reproductions” or “inspired by” particular designs or designers. Trade mark law already protects many rights holders from ‘confusingly similar’ products in some circumstances. Furthermore, unlicensed copies from other EU member states may diminish these benefits.

**Question 20:** What are the costs, if any, due to consumer confusion over a period of 6 months, 3 years and 5 years?



## Long term benefits to design industry

Once the change in law comes into effect following a short transition period, the supply of unlicensed copies in the market from the UK should cease. Only those which had been sold or manufactured before the cut-off date will be unaffected and therefore can continue to be sold or “dealt with” lawfully.

The benefit of a lack of availability of unauthorised copies of artistic works is that they may drive consumers to consider original works of other designs that are not yet as well-known and popular as the licensed copies/authorised originals. While this is not possible to quantify, given uncertainty over how consumers will react, those consumers in the market for a particular design of chair who are unable to afford the original product or licensed copy could well be minded to seek alternative designs. This market environment could therefore be beneficial for some designers.



## Context for licensing of 3D copies of physical objects

Licensing of physical works of artistic craftsmanship may take some time to develop, in contrast to licensing of other artistic works such as photos of paintings which is already well developed, often with collecting societies in place. Licensing in this sector is also likely to develop as the status of works where copyright is in doubt could be clarified through case law over time.

At present, the Government understands that some rights holders of 3D designs have previously granted licences of designs in other European countries so that businesses may reproduce items in 3D form. One rights holder has said that they would provide licences in the UK for works that had fallen into the public domain, but had copyright revived, but only with conditions such as benchmarks for quality of manufacturing.

Some businesses that manufacture or import unlicensed copies have told the Government that they would consider the possibility of obtaining licences, as long as they were satisfied that the rights holders did in fact hold the exclusive rights for particular designs in Europe.

However, there are varied views whether licensing of works where copyright has been revived could help affected businesses transition faster. For example, some businesses which trade in unlicensed copies do not believe that rights holders would grant them licences, or if licences were granted, with terms that were fair and reasonable. Some businesses were also concerned they would not have the clout to negotiate a fair price for licences and would have to resort to the UK Copyright Tribunal.

Some businesses have told the Government that they would not wish to obtain licences, even if offered. It is not clear whether this was because they did not believe the products they sold would infringe copyright or simply planned to cease in trading of unlicensed copies.

The Government is of the view that the development of licensing of works where copyright is revived could be of benefit and generate value in the economy. Businesses that currently trade in unlicensed copies should be able to obtain licences from rights holders for works where copyright has been revived which may ameliorate the impact of the change in law - they could continue to trade, but the rights owner would also benefit from any royalties received from the licence as a form of compensation.

There is also a “compulsory licensing” provision<sup>8</sup> which imposes an obligation on the owner of a work where copyright has been revived to grant a licence, even when the rights owner would prefer not to do so (although some businesses have told us that they would provide licences).

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<sup>8</sup> Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995 (<http://www.legislation.gov.uk/uksi/1995/3297/contents/made>)



The Government received calls that the compulsory licensing provision be removed for the purposes of legal clarity. The Government does not agree that repealing the compulsory licensing provisions will bring about legal clarity. Indeed, The Government is of the view that retaining the compulsory licensing provision, which has been in UK law for over 30 years without challenge, could benefit both rights holders and affected businesses as discussed above.

As such, the Government's position is making any amendments to this provision would be unnecessary and undesirable.

**Question 21:** Do you believe the licensing provisions in place would allow affected businesses to seek and obtain licences if they wished to transition their business from trading in unlicensed copies to licensed copies? If adequate licensing provisions are not in place, do you see this developing in a 6 month, 3 year or 5 year period?

**Question 22:** What are the benefits and costs of the current licensing provisions in place? How would you anticipate the development of licensing schemes for 3D artistic works in a 6 month, 3 year or 5 year period?

## Next steps

Following the close of this consultation, the entire consultation process on the repeal of section 52 of the CDPA will be complete. Once the Government has considered the responses, it intends to publish a summary of responses.

It is the Government's intention that once a decision has been made on transitional provisions it will make the necessary secondary legislation and inform stakeholders of its decision.

**Question 23:** Are there any issues that have not been raised in this consultation document, or in the associated Impact Assessment that would have an impact on the proposed transition periods of 6 months, 3 years or 5 years? If so, please provide information.

## ANNEX A:

### List of respondents to the Call for Evidence and those notified of this consultation

Organisations, businesses and individuals that will be notified of the consultation (\* indicated that they responded to the Call for Evidence in 2013).

- Alex James Photography \*
- Alliance for Intellectual Property
- Amanda Turner Photography \*
- Andreas von Einsiedel \*
- Anti Copying in Design (ACID) \*
- Arcaid Images \*
- Artek
- Artemide SpA \*
- Association of Photographers Ltd \*
- Bardehle Pagenberg \*
- BBC
- BlueSunTree \*
- British Association of Picture Libraries and Agencies (BAPLA) \*
- British Ceramic Confederation
- British Copyright Council
- British Film Institute
- British Library
- British Retail Consortium
- British Screen Advisory Council
- Bruce Hemming Photography \*
- Cassina SpA \*
- Centre for Intellectual Property and Information Law, Cambridge University
- Centre for Intellectual Property Policy and Management, Bournemouth University \*
- Chartered Society of Designers
- Chris Tubbs Photography \*
- ClassiCon GmbH \*
- Clive Nichols Photography Ltd \*
- Coco Interiors
- Confederation of British Industry
- Conran Holdings \*
- Consumer Futures
- Dan Duchars \*
- Design Council
- Design Museum
- Douglas Gibb \*
- eBay
- Edwards Wildman Palmer UK LLP \*

- Eisenführ Speiser \*
- Elms Wilson Ltd \*
- Expired Copyright Homewares Organisation - ECHO \*
- Federation of Small Businesses
- Flos SpA \*
- Forum of Private Business
- Foster + Partners \*
- GAP Interior Images \*
- Global Connexion UK Ltd
- Grant Smith \*
- Grub Brugger \*
- Guy Montagu-Pollock \*
- Iconic Interiors
- Ingrid Rasmussen \*
- Institute of Directors
- Interior Addict
- Interior Icons
- International Association for the Protection of Intellectual Property (United Kingdom)
- Jake Fitzjones Photography \*
- James French Photography \*
- Jasper Morrison \*
- Jonathan Gooch \*
- Knoll
- Leslie & Rosie
- Louis Poulsen Lighting A/S
- Mark Bolton Photography \*
- Mark Luscombe-Whyte \*
- Mark Scott Photography Ltd \*
- Marks & Clerk Solicitors LLP
- Maxwell Attenborough \*
- Meyerlustenberger Lachenal
- Mike Weatherley MP \*
- Mirko Wilmanns \*
- Modacor Furnitures Pvt Ltd
- Nadia Mackenzie \*
- National Centre for Product Design & Development Research, Cardiff Metropolitan University
- National Education Network
- Nick Carter \*
- PhotoWord \*
- Powell Gilbert LLP
- Publishers Association \*
- Publishers Licensing Society
- Queen Mary Intellectual Property Research Institute
- Republic of Fritz Hansen
- Richard Bryant \*

- Richard Parsons \*
- Riichi Ushiki \*
- Ron Arad Associates \*
- Royal College of Art \*
- RSA
- Russell Group
- SC Andrew LLP
- Scott Howard Office Furniture \*
- SCP Ltd \*
- Seven&Eight Ltd \*
- Spike Powell \*
- Squire Sanders UK LLP
- Swivel UK Ltd
- Tate
- Tecnolumen GmbH & Co KG \*
- Thames and Hudson Ltd \*
- The Copyright Licensing Agency (CLA)
- The Design and Artists Copyright Society (DACS) \*
- The Law Society
- The Law Society of Scotland \*
- The Whitehouse Consultancy \*
- Thonet GmbH \*
- Universities UK
- Vertigo Interiors
- Victoria and Albert Museum \*
- Vitra \*
- Voga
- Zaha Hadid Architects \*

**ANNEX B:**

**Consultation stage Impact Assessment**

<b>Title:</b> Timing of the repeal of section 52 of the Copyright, Designs and Patents Act 1988  <b>IA No:</b> BISIPO009  <b>Lead department or agency:</b> Intellectual Property Office (Department for Business, Innovation and Skills)  <b>Other departments or agencies:</b>	<b>Impact Assessment (IA)</b>		
	<b>Date:</b> 5 September 2014		
	<b>Stage:</b> Consultation		
	<b>Source of intervention:</b> EU		
	<b>Type of measure:</b> Secondary legislation		
<b>Contact for enquiries:</b> Taffy Yiu			

<b>Summary: Intervention and Options</b>	<b>RPC Opinion: AMBER</b>
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Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out? Measure qualifies as
£0m	£0m	£0m	No NA

**What is the problem under consideration? Why is government intervention necessary?**

Section 52 of the Copyright, Designs and Patents Act 1988 ("CDPA") has been repealed by section 74 of the Enterprise and Regulatory Reform Act 2013 on a date to be appointed by a commencement order. The repeal has not yet been put into effect, and the Government must take a decision on how and when to implement the repeal so as to ensure that UK legislation is updated in line with EU law.

**What are the policy objectives and the intended effects?**

The Government wishes to implement the repeal of section 52 of the CDPA in a manner which is fair and proportionate. It seeks to enact a change in law in a timely way with the following intended effects:

- remove a permitted act in law that reduces the term of copyright protection for artistic works which are produced through an industrial process; and
- minimise negative impacts on those British businesses that have been operating legitimately using the permitted act contained in section 52 of the CDPA.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

- Option 0: Do nothing
- Option 1: Six month transition period (commencement on 1 October 2015)
- Option 2: 5 year transition period (commencement on 6 April 2020)
- Option 3: 3 year transition period (commencement on 6 April 2018)

Option 3 is our preferred option as it, so far as possible, balances the costs between affected parties.

<b>Will the policy be reviewed?</b> It will be reviewed. <b>If applicable, set review date:</b> 04/2021						
Does implementation go beyond minimum EU requirements?			No			
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		<b>Micro</b> Yes	<b>&lt; 20</b> Yes	<b>Small</b> Yes	<b>Medium</b> Yes	<b>Large</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b> n/a		<b>Non-traded:</b> n/a	

***I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

Signed by the responsible Minister: \_\_\_\_\_ Date: \_\_\_\_\_



# Summary: Analysis & Evidence

# Policy Option 1

**Description:** Repeal section 52 of the CDPA with a six month transition period from 1 April 2015 (commencement on 1 October 2015)

## FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2014	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 0	High: 0	Best Estimate: 0

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0	0	0
High	0	0	0
Best Estimate	0	0	0

### Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the costs due to lack of available data. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential costs.

### Other key non-monetised costs by 'main affected groups'

UK businesses that manufacture, assemble, import or sell unlicensed copies of artistic works face transition costs (investment in obtaining new designs, factory retooling, marketing, agreeing licences with rights holders, costs of legal uncertainty, expenditure on research and legal advice, costs from breaking contracts early). Shorter transition periods may increase some costs and could lead businesses to downsize or close. There will be costs to some creators and users of 2D images affected by the proposed change as they incur costs of licensing and will need to adapt their plans to factor in these costs. There may also be welfare costs to consumers arising from reduced product choice. Costs to affected groups are likely to be highest under Option 1 compared to Options 2 and 3.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	0	0
High	0	0	0
Best Estimate	0	0	0

### Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the costs due to lack of available data. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential benefits.

### Other key non-monetised benefits by 'main affected groups'

Copyright owners and exclusive licensees of designs that have fallen out of copyright protection benefit from renewed protection as a result of the change in law. These groups may benefit from reduced competition from unlicensed copies; if a licensing system develops rights holders would receive royalties when they allow others to make copies of their work. Benefits to copyright owners are likely to be highest under Option 1 compared to Options 2 and 3. A long term indirect benefit to the design industry could arise if consumers seek other designs as unlicensed copies disappear from the market. These benefits are likely to be lower in total under Option 1 compared to Options 2 and 3 as existing businesses will have less time to successfully adapt.

### Key assumptions/sensitivities/risks

Discount rate (%) 3.5

This Impact Assessment has been reliant on unverified stakeholder evidence gathered through a call for evidence. Further evidence will be sought in the consultation stage. It is assumed (on the basis of legal advice) that existing stock lawfully manufactured or imported into the UK when the law comes into force will not be affected. It is assumed that businesses have known about the impending change in law since April 2013 and have had time to learn about the potential impact. There is considerable uncertainty over which items constitute artistic works and it is therefore unclear which unlicensed copies would risk copyright infringement. Whether/how a licensing system for 3D copies will be developed is uncertain (this will impact on business adaptation/costs/benefits).

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:	In scope of OITO?	Measure qualifies as
Costs: £0m      Benefits: £0m      Net: £0m	No	NA

# Summary: Analysis & Evidence

# Policy Option 2

**Description:** Repeal section 52 of the CDPA with a 5 year transition period from 5 April 2015 (commencement on 6 April 2020)

## FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2014	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 0	High: 0	Best Estimate: 0

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0	0	0
High	0	0	0
Best Estimate	0	0	0

### Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the costs due to lack of available data. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential costs.

### Other key non-monetised costs by 'main affected groups'

See Option 1 for a breakdown of costs. Costs to affected businesses are likely to be lower under Option 2 than under Options 1 and 3 because they will have a longer period over which to plan and adapt their business models and product ranges. Costs to users and creators of 2D images of artistic works are likely to be lower under Option 2 than under Options 1 and 3 because they will have a longer period over which to plan and adapt. There will also be a longer delay before they have to pay any licence fees. Costs to consumers are likely to be lower under Option 2 than under Options 1 and 3 as they will have a longer time period in which they can purchase unlicensed copies before new copies disappear from the market, reducing consumer choice.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	0	0
High	0	0	0
Best Estimate	0	0	0

### Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the benefits due to lack of available data. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential costs.

### Other key non-monetised benefits by 'main affected groups'

See Option 1 for a breakdown of benefits. Benefits to rights holders and designers are likely to be lower under Option 2 than under Options 1 and 3 as they will be delayed for the longest period. Long term benefits to the design industry are likely to be highest under Option 2. The 5 year transition period will delay the likely removal of unlicensed copies from the market, delaying the benefits to other designers from consumers seeking other designs. However, having a 5 year transition period will help provide sufficient time for incumbent businesses that believe they are manufacturing, importing or selling unlicensed copies to successfully adapt.

Key assumptions/sensitivities/risks  
See Option 1.

Discount rate (%) 3.5

## BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:	In scope of OITO?	Measure qualifies as
Costs: £0m      Benefits: £0m      Net: £0m	No	NA

# Summary: Analysis & Evidence

# Policy Option 3

**Description:** Repeal section 52 of the CDPA with a 3 year transition period from 5 April 2015 (commencement on 6 April 2018)

## FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2014	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 0	High: 0	Best Estimate: 0

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0	3	0	0
High	0		0	0
Best Estimate	0		0	0

### Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the costs due to lack of available data. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential costs.

### Other key non-monetised costs by 'main affected groups'

See Option 1 for a breakdown of costs. Costs to affected businesses under Option 3 are likely to be higher than Option 2 but lower than Option 1 because they have a mid-length period over which to plan and adapt their business models and product ranges. Costs to users and creators of 2D images of artistic works under Option 3 are likely to be higher than under Option 2 but lower than Option 1 because they have a mid length period over which to plan and adapt. There will also be a mid-length delay before they may have to pay licence fees. Costs to consumers under Option 3 are likely to be higher than under Option 2 but lower than Option 1 as they will have a mid-length period in which they can purchase the unlicensed replicas before they are removed from the market.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	3	0	0
High	0		0	0
Best Estimate	0		0	0

### Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the costs due to lack of available data. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential costs.

### Other key non-monetised benefits by 'main affected groups'

See Option 1 for a breakdown of benefits. Benefits to rights holders and designers are likely to be higher than under Option 2 but lower than under Option 1 as they will be delayed from being incurred for a mid length transition period. Long term benefits to the design industry are likely to be lower than under Option 2 but higher than Option 1. The delay in the removal of unlicensed copies from the market will delay the benefits to other designers from consumers seeking alternative designs, however, a longer transition period could help provide incumbent businesses that believe they are manufacturing, importing or selling unlicensed copies to successfully adapt.

Key assumptions/sensitivities/risks  
See Option 1.

Discount rate (%)

3.5

## BUSINESS ASSESSMENT (Option 3)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: £0m	Benefits: £0m	Net: £0m	No	NA

# Evidence Base (for summary sheets)

## Background

Section 52 of the Copyright, Designs and Patents Act 1988 (“CDPA”) contains an exception (a permitted use of copyright works) which limits copyright protection for certain artistic works when they have been industrially manufactured. When more than 50 copies of an artistic work are made then the current period of protection is limited to 25 years, compared to other artistic works which are protected by copyright for the lifetime of the creator plus 70 years.

On 25 April 2013, the Enterprise and Regulatory Reform Act 2013 (“ERRA”) was passed. Section 74 of the ERRA repealed section 52 of the CDPA on a date to be appointed by a commencement order. When the change in law is commenced, the effect will be to update and clarify UK legislation in line with EU law. Accordingly, when the repeal is put into effect, the exception contained in section 52 of the CPDA will cease, and any artistic work, whether 2-dimensional or 3-dimensional, which qualifies for copyright protection will enjoy the full term of copyright protection.

The Government committed to consulting on when and how to implement the repeal of section 52 of the CDPA. As a first step, the Government launched a Call for Evidence in October 2013 seeking information in order to assess the potential impact of transitional provisions and timing of the change in law. In particular, it sought detailed information on impact on affected businesses (including but not limited to designers, rights holders, importers, manufacturers and those who use 2D images of artistic works) depending on the date of the change in law, potential licensing arrangements, and the impact on consumer activity. Little substantial evidence was submitted and the Government has therefore attempted to gather further information by meeting with interested parties and accepting information outside the Call for Evidence. Further evidence will be sought through the planned consultation.

## Problem under consideration

The Government wants to implement the change in law with a fair and proportionate transition period. While the Government wishes to ensure that rights holders and designers are able to protect their copyright work for the full duration of copyright protection, it also wishes to allow affected businesses to adjust and thereby minimise unnecessary harm to UK manufacturers and importers who have until now legitimately relied on section 52 of the CDPA.

As a starting point, the Government believes that a transition period longer than 10 years runs a risk of being unlawful given the implications of the judgment of the European Court of Justice in Case C-168/09 Flos SpA v Semeraro Casa e Famiglia SpA in January 2011. Italian law had provided a 10 year transition period which prevented copyright protection from being enforced against those who had manufactured, supplied or marketed products based on designs in the public domain<sup>1</sup> but this was ruled unlawful by the European Court of Justice which said that transitional measures must be proportionate.

The Government’s Call for Evidence received information suggesting that a short transition period, namely less than a year, would be very damaging to the survival prospects of a number of British businesses that sold, manufactured or imported unlicensed copies of artistic works. The Government was also told that some businesses (such as publishers or photographers) which created or used 2D copies of artistic works would sustain losses if there was not an adequate transitional period, and would require sufficient time to prepare for the change in law.

## Lack of definition of which items qualify for copyright protection

There is uncertainty over which items would be protected by copyright once the change in law takes place. An item which is primarily functional (such as furniture) will only qualify for copyright protection if it is regarded as a work of artistic craftsmanship (i.e. an artistic work).

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<sup>1</sup> When a work is in the public domain it is no longer protected by copyright and may be freely used without the permission of the former copyright owner.

There is limited case law to determine whether an essentially functional object would be protected by copyright. There is some case law to suggest that items that are both functional and mass produced are unlikely to qualify as works of artistic craftsmanship, as seen in the decision of *George Hensher Ltd v Restawhile Upholstery (Lancs) Ltd*. However, given that copyright is partially harmonised at EU level, it is not within the UK Government's authority to provide further definition. However, there is some recent case law in other EU member states that says that some specific furniture designs do attract copyright protection in that particular member state. In line with Article 10 of the Term of Protection of Copyright Directive [2006/116/EC], these items would have copyright protection in the UK for the life of their author plus 70 years if they were protected in any other EU member state on 1 July 1995 and were works of 'artistic craftsmanship'.<sup>2</sup>

The practical implication is that many businesses are unavoidably unsure of what items would be affected by the change in law, and assumptions have been made as to what constitutes an artistic work. Given the lack of clarity, the Government anticipates that the courts may ultimately have to make rulings in this area. The Government has therefore assumed in this Impact Assessment that some 'designer' furniture objects attract copyright but other furniture does not.

Whether or not there is copyright, many businesses that have so far relied on section 52 of the CDPA risk a copyright claim once the change in law is implemented, so the Government has assumed that a proportion of these businesses facing this risk will choose to change their behaviour and business models.

### **Rationale for intervention**

The Government repealed section 52 of the CDPA to clarify and update UK legislation in line with EU law. A commencement date must be set for this measure to have effect.

### **Policy Objective**

The objective is to implement the law with a fair and proportionate transitional period.

- Option 0 does not propose any action and would leave section 52 of the CDPA in force
- Option 1 proposes a transition period of 6 months from April 2015
- Option 2 proposes a transition period of 5 years from April 2015
- Option 3 proposes a transition period of 3 years from April 2015

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<sup>2</sup> See regulation 16 of the Duration of Copyright and Rights in Performances Regulations 1995.

## Options

- Option 0: Do nothing
- Option 1: Six month transition period from April 2015 (commencement on 1 October 2015)
- Option 2: Five year transition period from April 2015 (commencement on 6 April 2020)
- Option 3: Three year transition period from April 2015 (commencement on 6 April 2018)

It would be the Government's intention that the change of law would occur on a Common Commencement Date where new regulations which have a bearing on business would start on the same day. Common Commencement Dates are scheduled each year on 6 April and 1 October.

### **Option 0: Do nothing**

#### Continued competition between licensed manufacturers and unlicensed sellers

Licensed manufacturers and rights holders, primarily based outside the UK but within the EEA single market, have provided information claiming losses because the UK is currently used as a staging post for unlicensed copies to enter the European market (the majority of EU member states provide for the full term of copyright protection for industrially-manufactured artistic works).

One rights holder has told us that they are concerned about the sales of unlicensed copies of furniture in Europe.<sup>3</sup> While they have said that any calculation of damages is impossible to prove with certainty in respect of loss of turnover, they have calculated a figure for harm based on imports of unlicensed copies of furniture from the UK to Switzerland as intercepted by Swiss customs. They say that from February 2013 to February 2014, 139 of 142 pieces seized by Swiss customs were related to unlicensed copies of furniture shipped from the UK, which they estimate implies a potential gain of €4.4million per annum for Europe as a whole from the UK repeal of section 52 of the CDPA.<sup>4</sup>

The Government is of the view that this estimate is at the high end of possible gains from repeal of section 52 of the CDPA, for several reasons. Firstly, it was not clear whether the products were seized due to copyright or trademark infringement or any other regulatory concerns. Second, the estimate assumes that the company's products would have qualified for copyright protection and that the seized items would have been infringements of that copyright and hence could give rise to claims for damages. Third, the Government does not believe that seizures estimates can be scaled up by a factor of 100 on the basis that Swiss customs only inspect 1% of all shipments<sup>5</sup>: it is expected that authorities inspect shipments that they judge more likely to contain unlicensed copies. Rights holders actively supply information to help customs authorities make this judgement.

Furthermore, while the information provided confirms that these seized items were almost exclusively from the UK, it should be noted that other EU countries, such as Estonia and Romania, lawfully allow the copying of artistic works that have been industrially manufactured. Citizens of such EU member states would continue to be able to import unlicensed copies and to export them to other EU member states, thus reducing the potential benefit to rights holders from any change by the UK.

The Government has not compiled an exhaustive list of which EU member states have similar provisions to the one contained in section 52 of the CDPA and is of the view that it would be disproportionately costly to undertake such an analysis.<sup>6</sup> Meaningful comparisons between the legal regimes of different EU member states are also difficult. The courts of Member States have the ability to determine the extent to which a furniture item (or any other item) qualifies for copyright protection, but some European case law is exerting a harmonising influence<sup>7</sup>. Therefore, it is not possible in this Impact Assessment to compare like-for-like with other EU member states as to what qualifies for copyright protection.

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<sup>3</sup> In this Impact Assessment the Government has deliberately not identified the source of information when it has been submitted by a business as it is usually commercially sensitive information.

<sup>4</sup> This business has made this calculation based on GDP (EU: ~EUR 12,945 billion; CH: ~EUR 486.13 billion = factor \*27)

<sup>5</sup> This same business that submitted evidence has said that only 1% of incoming goods to Switzerland are inspected by customs.

<sup>6</sup> This would need to include an analysis of EU candidate countries. At the time of writing there are no EU acceding countries.

<sup>7</sup> This was noted in the Final Stage Impact Assessment on "Copyright protection for designs", 15 May 2012, Intellectual Property Office

It is thus unclear what proportion of the Swiss estimate above would be related to UK transactions although it does not represent an overall loss of revenue to the EU as the lost revenue figure estimates transfer from one EU party to another (i.e. from manufacturers and importers to rights holders).

Doing nothing would mean that rights holders would not benefit from any reduction in unlicensed copies of artistic works entering the EEA from the UK.

Costs and benefits to businesses outside the UK are out of scope of this Impact Assessment. The current information collected on costs to copyrights holders under this “Do nothing” scenario is from rights holders outside the UK. In the consultation the Government will seek further evidence on what the scale of any benefits to UK copyright owners may be.

#### Clarifying UK law

Doing nothing would mean that section 74 of the ERRA is not commenced and section 52 of the CDPA is therefore not repealed. Rights holders would not be able to benefit from the full term of copyright protection for their designs, and there would be no change for businesses that manufactured or imported unlicensed copies.

The Government has committed to bringing into force section 74 of the ERRA (i.e. the repeal of section 52 of the CDPA) in order to ensure that UK law is clarified.

On this basis, the “Do nothing” option has been rejected.

## **Option 1: Six month transition period**

Under this option, the Government would provide for a 6 month transition period.

A number of businesses that hold design rights, many of them based outside the UK, have called for a transition period of 4-8 months. The Government has therefore selected the median period of 6 months of the range suggested in the Call for Evidence as the shortest possible transition period.

This option allows rights holders to assert copyright protection of their artistic works after the 6 month transition period has elapsed. This then means that rights holders and designers of all types of artistic works will be able to protect their intellectual property for the full term of copyright protection when the change in law takes place.

However, this option limits the period in which businesses that currently manufacture, import or sell unlicensed copies of artistic works would be able to adjust their business model and product range in order to phase out that part of the business which dealt with unlicensed copies and to survive. This period assumes that affected businesses have already started to, at the minimum, plan for the change in law or have begun to take steps to change their business model.

### **BENEFITS**

#### **Designers and Rights holders**

The main beneficiaries from the change in law are likely to be copyright owners (or those that have been assigned the exclusive licences) whose designs that have fallen out of copyright (and therefore into the public domain) are brought back into copyright protection (that is, industrially-manufactured artistic works from 1 October 2015 will be protected for life of the creator plus 70 years instead of being only protected for 25 years after the work was first marketed).

Following the 6 month transition period, rights holders will be able to prevent the copying of designs and will be able to bring legal proceedings to stop the manufacturing, importation and sale of copies of artistic works, which they cannot do at present. At that point, if a licensing system has developed, it would also allow rights holders to receive licence royalties when they have allowed others to make copies of their work on their behalf.<sup>8</sup> It should also reverse the current market position where none of the revenue from sales of unlicensed copies go to the individuals or businesses who have contributed to the creation of the artistic work.

As mentioned previously, costs and benefits to non-UK businesses are out of scope of this Impact Assessment. The current information collected on benefits to copyrights holders that would be foregone under the “Do nothing” Option is from rights holders outside the UK. In the consultation the Government will look to gather further evidence on what the scale of any costs and benefits may be for UK copyright owners.

#### **Reduced competition between sales of licensed copies/authorised originals and unlicensed copies in the UK**

It has not been possible to fully assess or quantify the potential gain in revenue or market share to rights holders once the change in law has been implemented as there is no way to predict consumer behaviour once UK unlicensed copies disappear from the market.

Some limited evidence was provided to suggest that rights holders would gain once the change in law was implemented. One EU-based rights holder has estimated that it could sell 3 times more of one of its products if unlicensed copies were absent in the market. It also argued that the UK market for its products is underdeveloped by 30% relative to the rest of the EU because of the greater availability of unlicensed copies. There is some tension between this argument and the one discussed in Option 0 under “Continued competition between licensed manufacturers and unlicensed sellers”, which assumes the ready availability across Europe of unlicensed copies from the UK. The Government has been

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<sup>8</sup> See Annex A for a discussion on licensing for 3D copies of artistic works



unable to verify these figures and conclusions. Another submission provided information from Companies House which indicated that one major licensed manufacturer had made year-on-year increases in turnover and profits from 2009 to 2012; this is most probably due to a post recovery period where all sales were increasing, given that furniture sales are highly procyclical. The figures suggest that the markets for both licensed copies and originals are growing, but it is difficult to ascertain whether sales of licensed copies would be greater in the absence of a market for unlicensed copies, given the sharp distinctions between the two markets in terms of price, sales channel and product description.

The Government is sceptical that a lack of UK unlicensed copies in the market would mean substantial gains to rights holders or to creators. It is of the view that licensed and unlicensed copies of furniture are unlikely to be substitutes given product differentiation (e.g. unlicensed copies of 'designer' furniture typically sell at around 15% of the price of the licensed copies<sup>9</sup>). Further, many consumers are unlikely to switch to buy a licensed copy due to an inability or unwillingness to pay for the higher-priced licensed copy even if they are interested in the specific design. Consumers of licensed copies are usually willing to pay more for a product that is prestigious with a recognisable brand (protectable via Trade Marks) and a clear perception of quality due to the price.

Rights holders and designers argue that consumers become accustomed to the prices of the unlicensed copy (which they argue are of poorer quality) and become less willing to pay the price for licensed copies (which they argue are of a higher quality). The rationale for a shorter transition period would therefore be to transition to a market which is not influenced by UK unlicensed copies that potentially shapes consumer price expectations.

#### Confusion in market between licensed and unlicensed copies leading to disadvantage to licensed manufacturers and rights holders

Rights holders have said that unlicensed (but currently lawful) copies of artistic works in the market lead to consumer confusion. Rights holders argue that consumers are sometimes unable to differentiate between a licensed copy (argued to be produced at a higher quality) and an unlicensed copy. There is anecdotal evidence that consumers who buy unlicensed copies sometimes contact the licensed producer about issues such as repairs or complaints about quality. Rights holders (i.e. licensed manufacturers) argue that this confusion between unlicensed and licensed copies causes brand damage, although any harm could be due in whole or in part to "passing off" or trade mark infringement which would not be impacted by this copyright measure.

In the absence of systematic evidence to the contrary, it appears unlikely that the typical buyer of the unlicensed copy is unaware that they have purchased an unlicensed product, rather than the licensed product. Customers are likely to research the products and understand the reasons for the price difference. Further, many businesses that sell unlicensed copies clearly label their products as "reproductions" or "inspired by" particular designs or designers. Trade mark law already protects many rights holders from 'confusingly similar' products in some circumstances. Furthermore, unlicensed copies from other EU member states may diminish these benefits.

#### Long term benefits to design industry

Once the change in law comes into effect following this short transition period, the supply of unlicensed copies in the market from the UK should cease. Only those which had been sold or manufactured before the cut-off date will be unaffected and therefore can continue to be sold or "dealt with" lawfully.

The benefit of a lack of availability of unauthorised copies of artistic works is that they may drive consumers to consider original works of other designs that are not yet as well-known and popular as the licensed copies/authorised originals. While this is not possible to quantify, given uncertainty over how consumers will react, those consumers in the market for a particular design of chair who are unable to afford the original product or licensed copy could well be minded to seek alternative designs. This market environment could therefore be beneficial for some designers.

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<sup>9</sup> Impact Assessment: Copyright protection for designs, 15 May 2012, Intellectual Property Office

## COSTS

The costs that arise from Option 1 can be broken down into three main categories:

- a. Costs to UK businesses that manufacture, assemble, import or sell unlicensed copies of artistic works;
- b. Costs to creators and users of 2D images of artistic works; and
- c. Costs to consumers from reduced consumer choice.

### Costs to British businesses that manufacture, assemble, import or sell unlicensed copies

Businesses that manufacture, assemble, import or sell unlicensed copies have told the Government that they believe that there is a risk that a majority of their product range of unlicensed copies could be affected by the changes. The Government has had evidence that some of these businesses have already been contacted by rights holders that have sought to assert intellectual property rights in a number of products. Therefore, these businesses have assumed there is a greater likelihood of legal action when the change in law takes place and have told us they see a need to change their business model and product ranges to reduce the risk of being pursued for copyright infringement.

Consequently, this option is likely to lead to some harm to some UK businesses that manufacture, assemble, import or sell unlicensed copies as they will need to adapt their business models and/or product ranges so they are able to comply with the change in law and reduce risk of copyright infringement. In particular, it may cause disproportionate harm to UK businesses that had been acting lawfully and in good faith if they are not able to phase out that part of the business that was based on the use of the exception contained in section 52 of the CDPA.

### *Size of the UK market for artistic works affected by the proposed change*

The Government has received evidence that there are British businesses which manufacture, assemble, sell and import unlicensed copies of artistic works who believe they will be affected by the proposed change. There is evidence to suggest that while some businesses import entire (already assembled) products, such as a chair, other businesses manufacture components or focus on a specific aspect of the product (such as upholstery).

The Government has not received evidence on the volume of manufacturing or assembly in the UK, so it has not been possible to quantify the size of the market. However, the Government understands that many affected businesses operate retail premises in the UK.

A key issue for manufacturers and importers is that they have little certainty as to which products in their range will be affected as there is no developed body of case law that indicates which artistic works would be affected. However, businesses who believe they manufacture or import unlicensed copies have assumed that many of their popular products could infringe copyright and will need to be replaced.

This lack of information on the scale of the UK market for artistic works that could be affected by the proposed change means that it is has not been possible to quantify the total expected costs to business from Option 1.

As mentioned earlier, it would be up to the courts to decide whether a particular item qualifies for copyright protection. The Government has received information that some businesses which manufacture, import or sell unlicensed copies have sought legal advice to determine whether their items in their product range would risk copyright infringement once the change in law is implemented. The Government will use the consultation to ask businesses about the costs they have incurred or will likely incur to reduce the legal uncertainty of what items would be affected by the change in law.

The Government will also use the consultation to determine if affected businesses have identified other ways to mitigate the costs stemming from the belief that items in their product range risk challenge for copyright infringement once the change in law takes effect, and if so, the costs associated with this.

## *Transition Costs*

Businesses that trade in unlicensed copies submitted estimates of the transitional cost of introducing a new product to the market (to replace unlicensed copies of designs). The evidence suggests that introducing one new product into the market could cost in the range of £20,000 to £60,000 (not including employee costs).<sup>10</sup> There are 3 routes to replace existing product lines:

1. Obtaining new suppliers which requires time and costs for research on products that could lawfully be sold in the UK. One company has estimated that this research for suppliers of new off-the-shelf products could cost up to £20,000 in the first year. The Government will use the consultation to obtain detailed costs for sourcing new off-the-shelf products.
2. Designing new products which could cost up to £20,000. This includes costs for commissioning a designer, computer-aided design modelling, paying for moulds and product testing for strength and UK fire regulations.
3. Obtaining licences allowing the manufacture or importation of 3D copies. Costs are unavailable presently due to licensing not being developed in this area.<sup>11</sup>

No information was provided as to which route businesses were more likely to take, although the Government will use the consultation to ask for this information, especially in light of what could be achieved in our preferred option for the transition period.

On top of this, other transition costs for marketing the new products could cost up to £40,000 for photography, advertising and trade fairs. One business has told us that these costs are crucial so that they can compete with existing players in the market (such as Ikea and John Lewis) that have strong presence and awareness in the UK. However, this competition will presumably apply across all product ranges.

It should be noted, however, that the investment in time and money to introduce new products does not guarantee market success, and it is estimated that only 10-50% of new designs make it to production stage, and then only one or two of these lines would be commercially successful. On this basis, it would require substantial investment for new designs to replace the turnover generated by popular unlicensed copies. While the investment to design new products spurs innovation, the process is clearly costly and may well be beyond the financial capability of many businesses, especially small or micro businesses.

## *Trading of existing stock of unlicensed copies*

As noted in the background section, there is little clarity on which items would be protected by copyright, and it is impossible to predict when and how case law will develop. As such there is an argument that businesses should be allowed to continue trading in unlicensed copies until case law is established and there is clarity for works whose copyright status is in doubt. It could well be the case that many functional items (such as furniture) would not attract copyright protection.

Therefore, given the uncertainty, the Government is of the view that it would be beneficial to allow manufacturers and importers an indefinite period to sell off existing stock while preventing the making or importing of new unlicensed copies after the repeal, in line with the Government's objective of ensuring that rights holders are able to control the copying of their copyright works.

For the avoidance of doubt, the Government has obtained legal advice that existing stock in the UK will not be affected by the change in law – the change will only apply to items manufactured or imported after that date. Further, it is the Government's view that the secondary market is not affected.

The Government is of the view that it is beneficial that businesses are allowed to sell existing stock following the change in law, rather than forcing businesses to sell off stocks at reduced prices (potentially

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<sup>10</sup> This cost range has been sourced from a group of businesses that trade in unlicensed copies. While each business has different costs, the figures provide a reasonable average estimate.

<sup>11</sup> See Annex A for a discussion on licensing for 3D copies of artistic works.

at a loss) in a bid to clear stock before the change in law or be left with unsellable goods. It will also prevent a situation where businesses are left with stock that cannot be lawfully sold after the change in law.

It is assumed in the analysis of Options 1, 2 and 3 that existing stock in the UK will not be affected by the change in law. The change will only apply to items manufactured or imported after that date.

Allowing businesses to sell existing stock is more important in Option 1 given the short transition period. Costs to businesses would be higher if businesses could not sell existing stock – businesses may need to borrow money rather than use sales of existing stocks to finance the transition.

There are concerns, however, that businesses trading in unlicensed copies could seek to build up substantial stocks before the change in law. However, the Government is not convinced that businesses would choose to accumulate stocks of unlicensed copies that could distort the market for years. Self-limiting factors would constrain any significant stock accumulation – as stocks are generally made to order, it is unlikely that businesses would risk accumulating stocks that would tie up capital and costly storage space.<sup>12</sup>

There could be costs if businesses voluntarily elect to implement an inventory system to ensure they are able to discern between products made or imported before the change in law.<sup>13</sup>

#### Time required to introduce new designs to the market

The Government has received evidence that British businesses which manufacture, assemble, sell and import unlicensed copies of artistic works that will be affected by the proposed change should be able to adapt their business models and phase out that part of the business that trades in unlicensed copies of artistic work if sufficient time is given. They argue that a relatively long transition time will allow them time to invest in new products and generate new growth in order to make this transition. If sufficient time is not given they may need to downsize, cut jobs or close their business altogether.

A number of businesses submitted information to the Government that laid out the stages required to introduce new products to market. Most businesses that submitted evidence estimated that it will take businesses at least 5 years on average to change their product offering:

*Years 1-2:* Sourcing and testing of products. Alternatively, new designs would require up to 18 months to design, develop and prototype.

*Years 3-4:* Developing and marketing products so they are profitable (many products are discontinued at this point).

*Year 5 onwards:* At this point successful products are likely to have developed sufficient brand awareness so that people actively search for them.

In the absence of countervailing evidence, the Government views these as reasonable timeframes for sourcing and developing new products given this is not a fast-moving consumer good market. One international rights holder has indicated that its product development life cycle is 9 years. Further, the Government has been told that there are further difficulties in bringing a design to production – the initial sample can be changed multiple times due to aesthetic, ergonomic or manufacturing issues, and the final sample could cost thousands of pounds while in development for a number of months.

The difficulty, as alluded to earlier, is that businesses are unable to identify definitively what products they need to replace, even though they are making educated guesses. Some businesses are planning for a worst case scenario where they assume that most of their product range will be affected by the change in law. The cost to identify which products could infringe copyright may also be high. In some cases it may require potentially expensive legal disputes. These legal disputes will affect smaller

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<sup>12</sup> The Government is of the view that businesses are unlikely to accumulate stocks over a 3 or 5 year transitional period given these self-limiting factors.

<sup>13</sup> See Annex B for a discussion of the time required to implement a voluntary inventory system.

businesses disproportionately as they may not have the resources to pursue or defend against such actions. This legal uncertainty could also have a “chilling effect” on planned investment in new products. This could lead to potential costs for businesses as they would be disincentivised from investments they may have otherwise made or wasted effort by stopping planned investments.

One group of businesses that manufacture, assemble, import and sell unlicensed copies submitted a response to the Call for Evidence using survey evidence of its members. Of the 13 businesses that responded to the survey, 10 businesses said that they would need to close the business if the transition period was a year or less. Given the differences in size of the businesses, the impact on economic activity ranged from one business having to close with a projected loss of £25m turnover and 100 jobs to a smaller business having to close with a loss of £240,000 turnover and 5 jobs.

One of these businesses told us they will need 10 years to replace their entire product range of unlicensed copies (they have made the assumption that all of their products would be at risk of copyright infringement once the change in law took effect). They estimate that by introducing 500 lines each year, they will remove all unlicensed copies from their business in 10 years. They are unable to increase the rate of introduction of new lines as they have calculated that 500 new lines a year is the maximum they can finance each year into new designs without making a loss or downsizing the company. As such, they have told us that they could survive with a transition period of more than 5 years, but any less than that would mean closing their business.

The Government questions whether it is feasible to introduce new designs at such a constant rate and whether the introduction of new products will create additional costs such as storing new products while at the same time storing existing stocks of unlicensed products. These questions, alongside the Government’s wish to determine whether the entire cost of transition is able to be recouped during the proposed transition period, will be explored in the consultation.

The evidence suggests that affected businesses, especially manufacturers and importers which themselves are small or micro businesses, are unlikely to have enough time to adjust, or to acquire the capital that will allow them to adjust in 6 months (given it costs up to £60,000 just to introduce one new design to the market).

In addition, these costs of transition are more likely to be costly if frontloading requires more resources to ensure the adaptation of the product range, rather than “business as usual” activities.

The evidence presented in the above section suggests that a 6 month transition period may not allow affected businesses sufficient time to invest in new products and generate new growth in order to make the transition away from unlicensed copies. As a consequence, the Government is of the view that some businesses are likely to need to downsize, cut jobs or close altogether under Option 1.

### Costs from existing contracts

A number of businesses have told us that they have contracts and agreements which could require exiting if the change in law meant that that part of the business could no longer be operated (once again, assuming that the majority of their range of unlicensed copies is at risk of copyright infringement after the change in law). The main contracts would be with suppliers (such as factories) which are usually 2-3 years, but could last as long as 4-5 years. The Government has also been told that supply contracts can be up to 5 years, and that if contracts are ceased, then negotiated discounts on previous shipments would need to be paid back. Respondents to the Call for Evidence also told the Government that premises leases are usually on average 5 years.

Other contracts could include premises mortgages, equipment leases (forklifts and racking systems, etc.), logistics contracts and vehicle leases. No substantial evidence was provided and it has not been possible to estimate the time or costs it would take to exit these contracts or leases. The Government remains of the view that businesses that were aware of the upcoming change in law should have factored in this consideration when pursuing new contracts.

The evidence discussed in this section suggests that many businesses which manufacture, sell or import unlicensed copies of artistic works that will be affected by the proposed change may have contracts that

continue beyond the proposed 6 months transition period proposed under Option 1. This could make it more difficult and costly for these businesses to successfully adapt following the law change. Further, they might be constrained by existing contracts when making changes to their business models and may incur additional costs from breaking contracts if they want or need to make certain changes to their businesses model.

### Costs to creators and users of 2D images of artistic works

The Government understands that the change in law will affect those that create and use 2D images of artistic works. Once the change is implemented there is uncertainty whether some images of artistic works could potentially be infringements of copyright. As seen with businesses that trade in unlicensed copies, many photographers have assumed that many items they include in their photo shoots would be protected by copyright once the change in law took effect.

Photographers, image agencies and users of 2D images (such as publishers) have said they will need to check every image to ensure that the user or the licensee does not run the risk of copyright infringement. However, it should be noted that users and creators of 2D images of artistic works may be able to benefit from existing copyright laws that allow the use of a work for the purposes of criticism and review, or for the incidental inclusion of copyright work in another artistic work, film or broadcast.

### *Publishing*

Publishers and institutions (e.g. some museums) that derive some of their income from publishing may be affected by the change in law if they use 2D images of artistic works. They may incur additional costs as a result of the change in law as they will face additional licensing fees. These fees would represent a transfer of resources from publishers to rights holders.

Assuming that licences exist in some form, both museums and publishers will need to factor in costs for printed material that is being developed. One UK publishing company has said that once the change in law takes place, the costs of licensing fees will likely mean a drop in the number of published titles. For example, a title priced at under £10 with 200 images incurs extra licensing fees of £72 per image (current DACS tariffs) leading to extra costs of £14,400 and probable abandonment of publication. Another medium priced book priced at £28 with 450 images factors in licensing fees of £60 per image, leading to extra costs of £27,000 and probable abandonment of publication. However, the Government notes that such costs are necessarily incurred in respect of publications covering other artistic works, so this is simply putting all such works on an equal footing and should remove any copyright-driven distortions in decisions on whether to write on topic A or topic B.

It has not been possible to quantify the scale of costs to publishers across the UK because it is unknown how many works would be affected or how the licensing costs may vary between different publishers and publications. Further, it has not been possible to quantify the lost benefit to consumers from the possible abandonment of any number of such publications.

On the issue of timing, publishers have argued that they will need time to adjust in order to be compliant with the change of law. The Government has been told that publishers have development plans that generally follow a 5 year projection, of which around 2-3 years are spent on preparation and printing prior to publication. A 6 month transition period is therefore unlikely to provide sufficient time for publishers to plan their development schedules while factoring in costs such as licensing fees and could lead to abandonment or delay of planned products.

### *Museums*

Evidence from an internationally recognised museum based in the UK raised concerns as a user of 2D images of works (especially where copyright is revived). This museum generates a component of its income from its publishing programme which is dependent on the majority of 2D works copied being in the public domain. They have submitted evidence which gives the example that of the 25 titles that were published in 2012, around 50% would require permission from rights holder when this was not previously necessary. One example suggested that a book series (each book showing 60 images) would add costs of £4,500-£6,000 for each title.

The estimated financial impact would add £100,000 each year to the costs of publishing. They also believe it will limit the scope of what may be used from its own collections on products and potentially reduce by up to 50% the profit generated through the use of such designs. They have therefore estimated the financial impact based on current activity is a reduction in profit of around £850,000 per year (no breakdown was provided).

This museum would also be impacted as a collector of works: in 2012-13 the museum acquired over 4000 new works, and they have estimated that around 25% of these works would be affected by the change in law. Many of these works would require permission from multiple rights holders such as the manufacturer and designer, and additional resources and funding would be required to deal with this (although no costs were submitted to quantify this estimate). This would have the effect of influencing, and therefore distorting the museum's collecting policy although there were no costs or benefits laid out to support this assertion.

It has not been possible to quantify the total costs across all museums in the UK as information is not available on how many other institutions are affected in a similar way.

On timing, the museum said that it was difficult to estimate the time required to adjust, but would include gaining retrospective copyright permission for book re-prints. They estimate additional rights clearances would take several months, and the overall time required to make the change is estimated to be 1-3 years.

A 6 month transition period is therefore unlikely to provide sufficient time for publishers and the museum to plan their development schedules while factoring costs such as licensing fees. A 6 month transition period is likely to lead to museums potentially abandoning or delay of planned products, leading to further (but unquantified) costs for museums and their publishing arms.

### *Photographers and image agencies*

Photographers and image agencies have argued that time and administration costs will need to be set aside for activities such as determining whether each 3D work in new commissions is protected by copyright, and assessing existing photographic collections to check if rights need to be cleared because of copyright works contained in the picture, and then having established that permission is required, establishing and negotiating clearance of rights.

The Government however does understand that photographers and image libraries already bear costs for time and administration when assessing whether they need to obtain clearance when photographing other artistic works such as sculptures or paintings.

The Government has had correspondence from photographers that specialise in home interiors photography indicating that they are likely to be negatively affected by the change in law and say they would need a long lead time to check their existing photo archives to see if rights needed to be cleared.

No substantive evidence was provided to the Call for Evidence on the time it would take to go through existing archives. However, there may be some comparison with clearing rights for "orphan works" (where the rights holder cannot be found or is unknown) in that there may be difficulties in establishing whether there is underlying copyright in the photograph. In the Impact Assessment on domestic orphan works licensing in the UK<sup>14</sup>, the BBC and Imperial War Museum estimated that it takes 3.5 hours to clear a photograph. The Government therefore estimates that 1 person could clear 1626 photos over 3 years.<sup>15</sup>

The estimated time to clear photos could be reduced due to a number of factors. First, the difference between clearing rights for orphan works and works of artistic craftsmanship is that designers who create copyright works are usually easily found. The furniture industry is well marketed where items are often advertised as being designed by a particular individual, making it more likely that the rights holder is

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<sup>14</sup> Impact Assessment: Orphan Works, submitted to the Regulatory Policy Committee on 15 April 2014 (Reference: BIS1063)

<sup>15</sup> We have assumed that there are 253 working days in a year and 7.5 working hours in a day.

contactable. Second, not all photos of home interiors will include works of artistic craftsmanship. Third, as case law develops over time, there will be more clarity of which works will require clearance. Fourth, the Government expects that clearing of rights will become faster with licensing solutions being developed.

Fifth, especially in home interiors photography, the Government has found that the same popular items appear repeatedly. One UK-based furniture importer in this sector has estimated that 18 prominent designers designed 51 “iconic” products from 1929 to 1994, and it is these “iconic” products which provide the majority of sales turnover. Once the rights have been cleared for one item in a collection of digitised and tagged photography, the number of similar photos that will need to be reviewed should be reduced, thus lowering administration costs. However, if the subject of the image is of the interior of a home rather than the objects in it *per se*, there could be the argument that any artistic works included in that image had been incidentally included, and therefore a licence or permission may not need to be sought for that image.

The Government has been unable to quantify the costs to photographers and image agencies as it would be almost impossible to determine how many artistic works are captured in photography collections that would require licences to be used.

### Costs to consumers

Once the change in law comes into effect the supply of unlicensed copies in the market should cease, and only those which had been sold or manufactured before the cut-off date will be unaffected and therefore can continue to be sold or “dealt” with. This should mean that the supply of unlicensed copies in the market will be reduced.

This represents a loss of consumer choice (after existing stocks have been sold off they will no longer be able to purchase newly imported or manufactured unlicensed copies) and a fall in supply of unlicensed copies and may mean that many consumers are no longer able or willing to purchase a design they want in their price range. This could mean a welfare loss for some consumers relative to the “Do nothing” counterfactual (Option 0) as they can no longer purchase their first preferred choice, although secondary markets may mitigate this effect.

The lack of availability of unlicensed copies of artistic works is, however, likely to drive designers to produce new designs. It is unknown what level of benefit consumers will derive from these designs relative to the unlicensed copies of existing designs. It is also unknown how many businesses would be able to adapt within the 6 month transition period and introduce new designs in the short or long term, which could lead to a lack of new designs being able to replace the unlicensed copies that would disappear from the market. It is therefore not possible to quantify costs to consumers from implementing Option 1.



## **Option 2: Five year transition period**

The Law Society of Scotland has suggested a minimum of 5 years be provided to provide time for businesses and individuals enough time to “recover and write down investment made on the basis of the law as it was understood to be in a design that had been copied lawfully” and for businesses to “ascertain if there was, or is likely to be any copyright infringement by the goods they produced”. The consortium of businesses that manufacture, assemble, import and sell unlicensed copies also called for a 5 year transition period.

### **BENEFITS**

Option 2 provides the same benefits to designers and rights holders in Europe as Option 1 (see analysis of Option 1 for more detail) although designers and rights holders would have to wait for 5 years before they would start incurring these benefits. The scale of these benefits to designers and rights holders will therefore be lower than under Option 1.

### **COSTS**

Option 2 would have the same costs as Option 1:

- Costs to British businesses that manufacture, import or sell unlicensed copies of artist works that assume that the many of their unlicensed products could be protected by copyright once the change in law is implemented;
- Costs to creators and users of 2D images of artistic works affected by the proposed change; and
- Costs to consumers from reduced consumer choice.

However, the scales of these costs are likely to be lower under Option 2. This is because under Option 2 costs are spread over a longer period of time before the change in law occurs.

The longer transition period is likely to assist British businesses that manufacture, import and sell unlicensed copies to reduce costs relative to Option 1 by providing them with more time to adapt their businesses and the ability to generate enough finance to introduce new designs to the market. Further, as case law on what constitutes an artistic work will have more time to develop under Option 2 than under Option 1, this could reduce research and legal costs to businesses through increased legal certainty. This longer transition and possible introduction of new designs to the market may also help reduce the costs to consumers from reduced consumer choice.

Costs of Option 2 are analysed below in more detail.

### **Costs to British businesses that sell, manufacture or import unlicensed copies**

British businesses that manufacture, import and sell unlicensed copies will have more time to adapt their business models and product ranges under Option 2 than Option 1. It will also provide them with more time to plan and enable them to spread costs of transition over a longer time period.

#### *Time required to introduce new designs to the market*

Evidence collected by the Government and outlined in detail under analysis of Option 1 explains that British businesses which manufacture, assemble, sell and import unlicensed copies of artistic works should be provided with sufficient time to adapt their business models and phase out that part of the business that trades in unlicensed copies of artistic work. These businesses assume that the majority of their product lines could be at risk of copyright infringement and therefore argue that a relatively long transition time will allow them time to generate new growth in order to finance investment in new products and designs. If sufficient time is not given they may need to downsize, cut jobs or close their business altogether.

A number of businesses that manufacture and import unlicensed copies submitted information to the Government that laid out the stages required to introduce new products to market. A group of businesses that manufacture and import unlicensed copies which submitted information to the Call for

Evidence estimated that it will take businesses at least 5 years on average to change their product offering to a sufficient degree in that they can survive without being able to sell unlicensed copies. This suggests that a 5 year transition period should provide many affected businesses sufficient time to invest in new products and generate new growth in order to finance their business model that trades in unlicensed copies. This should help avoid the outcome where some businesses need to downsize, cut jobs or close altogether which is more likely under Option 1.

#### *Costs of existing contracts*

Potential costs of existing contracts are discussed under the analysis of Option 1. The evidence suggests that the 5 year transition period under Option 2 should provide sufficient time for existing contracts to finish or be ceased without penalty before the law is changed. This should help provide flexibility for businesses to adapt their business models. It will also mean that some affected businesses wishing to leave a contract before the change of the law is implemented do not face additional costs from finishing their contract early.

#### Costs to creators and users of 2D images of artistic works

As discussed in detail under Option 1, creators and users of 2D images of artistic works are likely to face additional costs following the change in law. The 5 year transition period is likely to mean that costs to users of 2D images of artistic works (such as publishers and museums) will be lower under Option 2 than under Option 1 as costs can be spread over a longer period of time and factored into any development plans.

On the issue of timing of the change in law, publishers have argued that they will need time to plan for the change in law. The Government has been told that publication plans generally follow a 5 year projection, of which around 2-3 years are spent on preparation and printing prior to publication. A 5 year transition period should therefore be sufficiently adequate for publishers to plan their development schedules while factoring in costs such as licensing fees.

As also mentioned in Option 1, an internationally recognised museum sought sufficient time to plan for the change in law. They suggested that the overall time required to plan for the change in law could take up to 3 years. A 5 year transition period should therefore be sufficiently adequate for this museum to adapt to the change in law. Given the available information it is not possible to know how many other museums may be similarly affected and what the required transition period would be for these.

#### Costs to consumers

As discussed in the analysis of Option 1, there is likely to be a reduction in choice for some consumers as a result of the repeal of section 52 of the CDPA.

Under Option 2, unlicensed copies of artistic works (apart from those already manufactured, assembled, imported or sold before the change in law) will disappear from the market after a period of 5 years. The welfare costs to consumers from reduced choice of products would be delayed by 5 years.

In addition, Option 2 provides businesses that manufacture, import or sell unlicensed copies more time than Option 1 to respond to the perceived risk of copyright infringement and adapt their business models away from trading in unlicensed copies towards introducing new products and designs into the market so there may not be as much of a reduction in consumer choice. This is discussed earlier under "Time required to introduce new designs to the market". However, it is unknown what level of benefit consumers would derive from these new designs relative to the designs of the unlicensed copies. It is therefore not possible to quantify the costs to consumers from implementing Option 2.

### **Option 3: Three year transition period**

Option 3 provides for a 3 year transition period which strikes a mid-point between what rights holders are seeking and what manufacturers and importers of unlicensed copies are seeking.

#### **BENEFITS**

Option 3 provides the same benefits to designers and rights holders in Europe as Option 1 and Option 2 (see analysis of Option 1 for more detail). This option would mean that designers and rights holders would have to wait for 3 years before they would start incurring these benefits. The scale of benefits to designers and rights holders will therefore be lower than Option 1 but greater than Option 2.

#### **COSTS**

Option 3 would have the same costs as Options 1 and 2:

- Costs to British businesses that sell, manufacture or import unlicensed copies of artist works affected by the proposed change;
- Costs to creators and users of 2D images of artistic works affected by the proposed change; and
- Costs to consumers from reduced consumer choice.

#### **Costs to British businesses that manufacture, assemble, import and sell unlicensed copies**

It is likely that there will be lower costs to businesses that manufacture, import, assemble or sell unlicensed copies of artistic works, consumers and creators and users of 2D images of artistic works under Option 3 relative to Option 1.

However, the costs are likely to be greater under Option 3 than under Option 2 as there will be less time for costs of transition to be spread over a longer period of time (and consequently for costs to be reduced). Businesses that manufacture, import, assemble or sell unlicensed copies of artistic works may need to generate or borrow capital in order to introduce new designs to the market given the frontloaded costs of transition. As has been previously discussed, it is an expensive and lengthy process to introduce new products to market. The shortened transition period (relative to Option 2) will mean that costs will have to be “front-loaded” if they are to ensure that their business model is adapted in 3 years rather than 5 years. These costs of transition are more likely to be costly if front-loading requires more resources to ensure the changing of the business model, rather than “business as usual” activities. However, the Government is of the view that businesses may be assisted in their transitional arrangements by having the ability to sell existing stock which will be unaffected.

Further, as case law on what constitutes an artistic work or licensing has had less time to develop as fully (as say, what could be developed over a 5 year transition period), affected businesses may find themselves dealing with legal action earlier than anticipated given the uncertainty over which designs are affected.

Allowing affected businesses that trade in unlicensed copies an indefinite period to sell existing stocks will likely be more important for Option 1 and 3 than under Option 2. Given the costs of transition, the Government is strongly of the view that affected businesses will benefit from being able to sell off stocks, thereby providing them with the finance for transition costs. Further, it is even less likely that businesses would have the finance or time to accumulate stocks of unlicensed copies under Option 3 (relative to Option 2) given the self-limiting factors as previously discussed.

#### **Time required to introduce new designs to the market**

As discussed in the previous two options, it has been estimated that it will take businesses that manufacture, import or sell unlicensed copies at least 5 years on average to change their product offering. However, the evidence suggests that 3 years may be sufficient for businesses to design, develop and market their products so that they are profitable.

There may be greater costs to these businesses relative to Option 2 in that there is less time to plan for and spread the costs of transition.

As discussed under Option 2, businesses that manufacture, import or sell unlicensed copies will need to diversify their product range – discontinuing certain product items which are to be protected by copyright and introducing new designs to the market. Given this process takes on average 5 years, affected businesses may need to utilise all 3 routes of introducing new designs to the market (i.e. sourcing new suppliers, commissioning new designs or obtaining licences to continue to make copies of artistic works) which is likely to be costly. The Government believes that a 3 year transition period should be sufficient time to introduce new products to the market, although there is some uncertainty as to whether there is enough time for marketing efforts in order for these products to be commercially successful. There may be a greater need for front-loading of marketing costs for businesses once they introduce the new products to the market to increase the likelihood of commercial success.

### Costs from existing contracts

There may be increased costs to some businesses under Option 3 relative to Option 2 given there is less time for businesses to exit without penalty from existing contracts if their contract (or break clause) is for longer than 3 years. Evidence presented in Option 1 suggests that some businesses may have contracts longer than this 3 year time period. However, the Government is of the view that businesses should have been cautious when entering contracts following the successful passage of the Enterprise and Regulatory Reform Act 2013.

### Costs to creators and users of 2D images of artistic works

This experience of front-loading of costs would likely be similar for creators and users of 2D images of artistic works who would be under similar pressures to adapt and to change their business models or plans for using 2D copies of artistic works. Creators and users of 2D images of artistic works would bear lower costs relative to Option 1, but would likely bear marginally greater costs relative to Option 2 if they are forced to adapt to the change in law more quickly – for example, obtaining resources to clear photographs and procure licences in 3 years rather than 5 years.

### Costs to consumers

As discussed in the analysis of Option 1, there is likely to be a reduction in choice for some consumers as a result of the repeal of section 52 of the CDPA.

Under Option 3, unlicensed copies of artistic works (apart from those already manufactured, assembled, imported or sold before the change in law) will disappear from the market after a period of 3 years. The potential welfare losses to consumers from reduced consumer choice would therefore be delayed by 3 years.

Further, it is more likely that there will be greater costs to consumers under this Option relative to Option 2 as there will be less time for businesses that manufacture, import and sell unlicensed copies to introduce new products and designs into the market. As mentioned previously, it is unknown what level of benefit consumers would derive from these new designs relative to the designs of the unlicensed copies. It is therefore not possible to quantify the costs to consumers from implementing Option 3.

### Government's preferred option

The Government has considered that either a 6 month or 5 year transition period is likely to cause disproportionate harm to either rights holders and designers or businesses that manufacture, import or sell unlicensed copies. The Government then considered whether a mid-point of 3 years would be proportionate in that costs and losses would be borne by designers and rights holders, and to those businesses that manufactured and imported unlicensed copies.

The evidence gathered to date suggests that affected businesses, especially manufacturers and importers which themselves are small or micro businesses, may not have enough time to adjust, or to acquire the capital that will allow them to adjust in 6 months (given it costs up to £60,000 just to introduce one new design to the market). The Government is also of the view that the proposed regulatory change imposes new costs on manufacturers and importers of unlicensed copies and creators

or users of 2D artistic works, compared to designers and rights holders who are arguably less subject to the costs of regulatory change.

However, the Government is aware that a 5 year period could lead to rights holders and designers not benefiting from potential gain due to competition between licensed and unlicensed copies for a lengthy period of time. The Government is also mindful of the principle of not unduly delaying the removal of a current law which brings about the unequal treatment of some types of artistic works. There is thus an argument that a 5 year period could be disproportionate.

The Government's impact assessment indicates that businesses that believe they manufacture, assemble, import or sell unlicensed copies, will sustain higher costs under Option 2, although costs would be lower than Option 1. On the other hand, designers and rights holders are likely to benefit most from Option 1 but benefit least from Option 2. The Government's view of the evidence is therefore that the middle ground of Option 3 is an appropriate balance, especially when reconciling such competing interests and where costs and benefits have not been able to be quantified. Thus, the Government believes that Option 3 is most clearly consistent with the views expressed in the judgment of the European Court of Justice case *Flos SpA v Semeraro Casa e Famiglia SpA* that "a balance is struck between... the acquired rights and legitimate expectations of [those who had in good faith relied on the availability of designs to produce or market products based on existing designs] and... the interest of the rightsholders".

Further, a 3 year period takes into account the Government's view that businesses must take responsibility for keeping track and responding to changes to the law. Therefore, the Government has factored in the time that has elapsed between the passage of the Enterprise and Regulatory Reform Act 2013 and the publication of this Impact Assessment outlining the options for the transitional period. The Government believes that businesses have had sufficient time to learn about the planned change in law and begin to make preparations for it (though not necessarily begin to make full-scale changes). The Government is aware that many businesses are already considering ways to adapt to the change in law, and some have begun to make adjustments.

The Government believes that it would be reasonable to expect businesses to begin to make substantial changes to their businesses once the Government has announced its proposals for transitional provisions, as it would provide a reasonable framework on which they could make plans. The Government understands that 5 years is sought by manufacturers and importers, but considers that businesses have already had since April 2013 to begin to make preparations.

Accordingly, in light of the evidence that it has at present, the Government proposes a 3 year transition period that will commence on 1 April 2015. The Government is of the view that it is a fair, proportionate and balanced way to introduce the change in law in that it causes the least disruption for designers, rights holders, businesses that manufacture or import unlicensed copies and users or creators of 2D copies of artistic works. This option allows a reasonable period of adjustment for all affected parties, and will provide a period of time that allows the consequences of the change in law to ripple through the market.

## **Options not considered**

The Government received correspondence suggesting a staggered approach to the introduction of the change in law, depending on whether the unlicensed copies were copied or made in the UK as opposed to copies that were imported into the UK (which would be provided a shorter transition period). While there are some merits to allowing UK-based businesses which manufacture unlicensed copies of artistic works having a longer transition period, the Government believes that a staggered approach would be confusing for consumers and potentially more difficult and costly to enforce. The Government believes that a single cut-off period for the change in law would be clearer and simpler for businesses and consumers alike.

The Government did not consider a “no transition” period (i.e. zero month transition period) as the Government committed to introduce a transition period for all affected parties to adjust. The Government did not think a zero month transition period was feasible given the evidence received, and there were no calls for such a transition period.

One business that manufactured and imported unlicensed copies suggested that they would need 10 years to modify their business on the assumption that over 85% of their products were going to be affected by the law. The Government’s view is that a 10 year transition period runs the risk of being considered unlawful by the courts, as discussed in the background section of this Impact Assessment. Accordingly, this was not an option considered.

## **Summary and preferred options with description of implementation plan**

The preferred option in this Impact Assessment implements section 74 of the ERRA that will come into force on the nominated date.

## **Risks and assumptions**

This Impact Assessment has been reliant upon unverified stakeholder evidence in providing the costs, benefits and time required to adapt to the change in law. Further evidence will be gathered in the consultation stage.

It is assumed, on the basis of legal advice received by the Government, that the change in law only applies to items manufactured or imported after the change in law.

It is assumed that businesses have known about the impending change in law since April 2013 and have had time to learn and plan for the change in law.

Given legal uncertainty it is assumed in this Impact Assessment that some but not all designs of furniture objects could attract copyright following the change in law.

Many businesses that have so far relied on section 52 of the CDPA could risk a claim of copyright infringement once the change in law is implemented, so it has been assumed in this Impact Assessment that a proportion of these businesses will choose to change their behaviour and business models on this basis.

## **Direct Costs and Benefits to Business Calculations (following OITO methodology)**

This is a legislative change to clarify UK law with EU law. It has not been possible to quantify costs and benefits in this impact assessment and it is not known, given current available evidence, under which option the **net** costs to business would be highest. Therefore, the Government is of the view that this measure is out of scope of the One In Two Out methodology. This is consistent with the Government’s current practice of providing for all EU-driven measures to be out of scope of the OITO methodology, unless they fail to minimise costs to business by going beyond the minimum requirements or fail to take available derogations which would reduce costs to business.

However, the Government notes the Regulatory Policy Committee’s view that that this could be within scope of the OITO methodology if the preferred option imposes additional net costs on business

compared with the other options presented. While the costs and benefits for the preferred option are not quantified in this impact assessment (the Government will seek more evidence to quantify costs and benefits at consultation), it is the Government's view that the proposed implementation date represents a minimum requirement because it is most clearly consistent with the *Fios* criteria of a fair balance. As discussed in this impact assessment, the preferred option balances the potential costs to businesses that manufacture, import or sell unlicensed copies and costs to other sectors such as publishers, museums and photographers that would need to adapt to the change in law versus the potential costs to rights holders and designers. Therefore, the Government is of the view that its preferred option introduces the minimum net burdens to all affected parties.

### **Wider impacts**

The main groups that are directly affected are rights holders of copyright works, manufacturers of licensed copies of artistic works, businesses that manufacture, import or sell unlicensed copies and users of 2D copies of 3D artistic works.

The Government is of the view that other sectors such as jewellery, digital works, car and ship models, fabrics, wallpaper, retailers, importers and educational institutions may be affected. Despite our Call for Evidence which sought evidence from a wide range of sectors, the evidence submitted to us was primarily from the first group listed above. The Government anticipates that the changes may also impact a wider range of sectors, and will use the consultation to gain more information about the wider impacts.

### **Impact on Micro Enterprises**

The Government has received a submission which points out that micro enterprises will be affected, in particular those manufacturers, importers and sellers of unlicensed copies. Designers are often self-employed, are also likely to be affected (but this may be more in terms of administration costs in adjusting to the change in law).

It is not possible to exclude micro businesses from this change in copyright law. The Government has committed to bringing into force the repeal of section 52 of the CDPA in order to ensure UK law is clarified in respect of EU law.

### **Evaluation**

The Government proposes to evaluate the impact to all affected businesses 3 years after the change in law has commenced. The Government has brought forward the evaluation period from 5 years to 3 years as it would wish to assess the impact at the point which many businesses have told us is the minimum to survive. The evaluation will assess whether the transitional period was proportionate and fair, and the impact on the UK's design industry.

## **Annex A**

### Licensing for 3D copies of artistic works

Licensing of works of artistic craftsmanship in this sector may take some time to develop, in contrast to licensing of other artistic works such as photos of paintings which is already well developed, often with collecting societies in place. Licensing in this sector is also likely to develop as the status of works where copyright is in doubt could be clarified through case law over time.

However, there are varied views whether licensing of works where copyright has been revived could help affected businesses transition faster. There is a “compulsory licensing” provision which imposes an obligation on the owner of a work where copyright has been revived to grant a licence, even when the rights owner would prefer not to do so (although some businesses have told us that they would provide licences).

The Government is of the view that the development of licensing of works where copyright is revived could be of benefit. Businesses that currently trade in unlicensed copies should be able to obtain licences from rights holders for works where copyright has been revived which may ameliorate the impact of the change in law - they could continue to trade but the rights owner would also benefit from any royalties received from the licence as a form of compensation.

However, it has been speculated that market forces may not be able to bring about an agreement of what constitutes a fair and reasonable licence for businesses that wish to manufacture or import licensed copies. While some businesses may be able to negotiate acceptable terms (or even seek recourse at the UK Copyright Tribunal), other manufacturers and importers of unlicensed copies have said that it is unlikely that they would be prepared to pay for a licence. The Government is of the view that a longer transitional period may allow market forces to encourage the development of licensing in this sector, although it is difficult to estimate the time for market forces to come up with a market solution.



## **Annex B**

### Voluntary inventory system

The Government is of the view that businesses trading in stock that is manufactured or imported before change in law should have the option to establish an inventory system to establish between products pre or post the repeal, and be sure they remain in compliance with the law after the repeal is implemented. This is the same under Options 1, 2 and 3.

The Government has received information that suggests that businesses have mixed views on implementing an inventory system. Some suggested that it would be almost impossible to determine when products were imported (date marking was not commonly used in the sector), nor could products be identified by their sale date as there was no way to determine how long that product been in storage.

Establishing an inventory system would be voluntary and the costs of doing so have therefore not been quantified in this Impact Assessment.

One business said they would establish the provenance of their stock by using an auditor, but another business has said that they already have an inventory system in place using barcodes.

If businesses elect to establish an inventory system, the Government believes that 3-5 years is a reasonable amount of time to do so. The Government is of the view that 6 months may not be a sufficient time for small businesses to develop such an inventory system (including researching and procuring such solutions) and may be too costly an upfront cost in addition to the other transition costs discussed in this Impact Assessment.

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