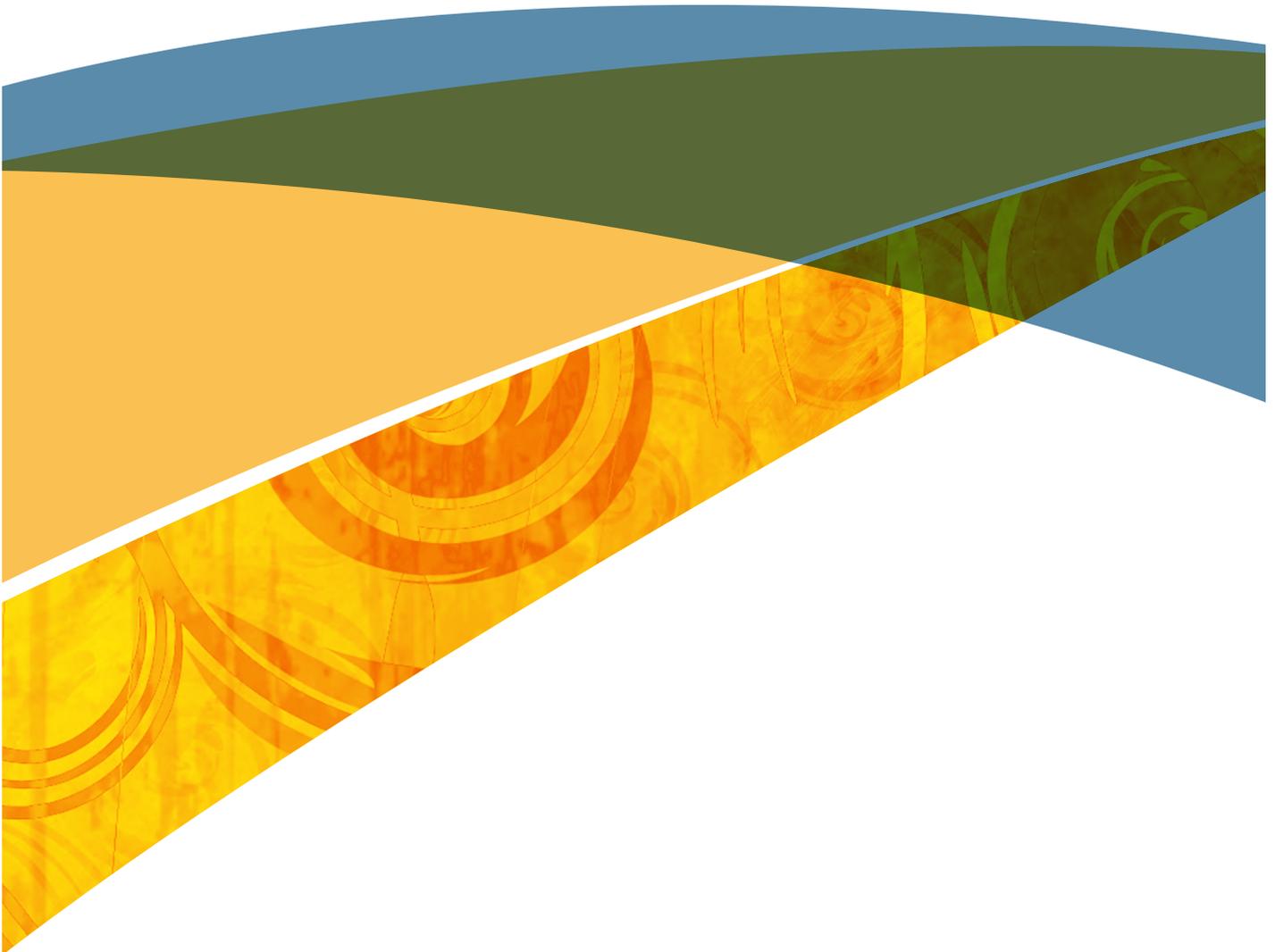




Intellectual
Property
Office

Transitional provisions for the repeal of section 52 of the Copyright, Designs and Patents Act 1988

Government response to the consultation and announcement of transitional provisions





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Foreword



Great design forms an integral part of our lives whether it be architecture, jewellery or home furnishings. Both cutting-edge designs and those that have stood the test of time continue to be in high demand and we need to ensure designers have an appropriate incentive to create. Registered designs enjoy protection for 25 years, others are also artistic works protected by the full term of copyright. But currently these artistic designs lose copyright protection after 25 years if they have been mass-produced. This is unfair in comparison to other artistic works, like literature and music, which are protected for the life of the creator and 70 years.

The Government has therefore passed a law to remove this unequal treatment. We view this as an important step, to bring about the fair treatment of all types of artistic works and to reward those that innovate and inspire.

The Government had to make a tough decision in deciding when the change in law should be introduced. We balanced conflicting demands to determine what was right for the United Kingdom in setting the date for when the law would change.

Having listened carefully to the views of designers and businesses, the Government has made the decision to implement the change in law in April 2020. When this happens, we hope the change will bring rewards for British designers and encourage a new generation to innovate and grow. But the change will also require firms that currently operate using existing laws to change how they do business so there will be a proportionate transition. The businesses likely to be affected by the changes bring their own enterprising spirit and contribute to the UK's economic growth and employment.

The Government's decision is a fair outcome. The innovative work of designers will have the appropriate copyright protection, whilst ensuring that UK-based businesses can adapt and thrive.

A handwritten signature in cursive script that reads "Lucy Neville-Rolfe".

Baroness Neville-Rolfe DBE CMG



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.¹ When more than 50 copies of these artistic works are made then the current period of protection is limited to 25 years (from the end of the calendar year in which the work was first marketed), 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 specified 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 to exist, and any artistic work, whether 2-dimensional or 3-dimensional, which qualifies for copyright protection will enjoy the full term of copyright protection.

In October 2013 the Government launched a Call for Evidence and used the information received to produce its consultation-stage impact assessment, found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/353373/Consultation_on_timing_of_repeal_of_section_52_CDPA.pdf.

The Government conducted a formal consultation between 15 September and 27 October 2014. Thirty three responses were received, of which 3 were received after the consultation closed. Respondents were broadly from 4 categories – businesses that traded in replicas of artistic works, designers and rights holders, the legal profession, and those that created or used 2D copies of artistic works.

The Government believes that there was a satisfactory response rate given the relatively narrow scope of the consultation to seek evidence on how and when to implement the policy of repealing section 52 of the CDPA. However, it notes that other sectors that could be affected by this regulatory change did not respond to the consultation, for example businesses that trade in jewellery, fabric or wallpaper.

The Government also held three roundtable meetings in October 2014 to discuss issues raised in the consultation with interested parties. Minutes of these meetings are found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366188/cdpa.pdf.

The Government would like to thank those who participated in the consultation process.

The Government has updated its impact assessment using information received from the consultation. The final-stage impact assessment is located in Annex B of this document.

This document provides a summary of responses to the consultation, the Government’s response to the key issues raised and announces the Government’s policy on transitional provisions.

¹ When read in conjunction with The Copyright (Industrial Process and Excluded Articles)(No.2) Order 1989.

Executive summary of Government policy on transitional provisions for the repeal of section 52 of the CDPA

Following extensive consultation, the Government has taken the following policy decisions:

1. The repeal of section 52 of the Copyright, Designs and Patents Act 1988 will commence on 6 April 2020. In other words, section 74 of the Enterprise and Regulatory Reform Act 2013 will commence on 6 April 2020.
2. The Government will exercise its powers to make express provisions to ensure that following commencement of the repeal, businesses and individuals trading in copies of industrially-manufactured artistic works (in both 2D and 3D format):
 - a. will have an indefinite period to sell off existing copies,
 - b. are prevented from the making or importing of new unlicensed copies,
 - c. may freely deal with existing copies after the repeal comes into force. This includes possessing or dealing with that item (including selling, offering for sale or hire, exhibiting in public, distributing to the public or putting in circulation).
3. The Government intends to issue non-statutory guidance on works of artistic craftsmanship and practical aspects of preparing for the change in law.



Issues raised during the consultation

The proposals in the consultation document were informed by a Call for Evidence in October 2013. The consultation itself was vital for the Government to receive evidence on its specific proposals, and to test whether its specific proposals were fair and reasonable.

The formal consultation document asked 23 questions on a range of issues relating to transitional provisions. In particular, the Government sought evidence on the impact of the proposed transition periods of 6 months, 3 years or 5 years.

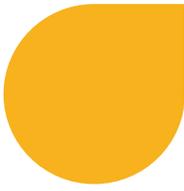
The next section provides a summary of the key points raised by respondents and the Government's response to these issues. For ease of reading, the Government has grouped the questions where relevant.

Readers should note that the summary does not provide an exhaustive list of the issues raised. Many of the issues raised by respondents are also discussed in the Government's final-stage Impact Assessment "Transitional provisions for the repeal of section 52 of the Copyright, Designs and Patents Act 1988" dated 16 December 2014. This document should therefore be read in conjunction with this Impact Assessment found in Annex B.

Publication of submissions to the consultation

The Government has no plans to publish the individual submissions received during the Call for Evidence or consultation. The Government has elected not to publish the submissions as it considers that the information contained in many of the submissions is commercially sensitive, and could therefore potentially prejudice the commercial interests of businesses and individuals. In particular, the Government notes that UK-based small and micro businesses are understandably sensitive about publishing commercial information. It should also be noted that a small number of respondents requested that their submission, in whole or in part, be treated as confidential.

The Government has therefore provided a summary of the key points raised by respondents, and a list of respondents. The Government is of the view that these actions balance the interests of transparency while protecting sensitive commercial interests.



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.

A majority of respondents had sought legal advice in relation to the repeal of section 52 of the CDPA. A trade association of businesses that trade in replicas submitted costs that have been incurred. They also submitted potential costs depending on when the implementation is brought into force. Other businesses that trade in replicas reported that they had incurred legal costs as a result of the upcoming change in law and would need to set aside funds in advance of the repeal's implementation date for advice on issues such as dealing with infringement notices, research on whether particular items are protected by copyright, determining whether businesses that purport to hold the copyright in artistic designs actually do so and to determine if licences could be obtained for new copies to be made.

Rights holders and designers reported that they had incurred and continue to incur costs for legal advice. One rights holder said they would also incur costs in the future to demonstrate the artistic value of certain designs. This business also reported that they have incurred costs for taking action in circumstances where replicas that enter Europe via the UK are alleged to have breached intellectual property rights in that EU member state.

Other businesses, including those that deal in 2D copies of artistic works, reported that they have sought legal advice, and would seek legal advice before the repeal is implemented. For example, a business dealing in 2D copies has surmised that there could be disputes as to whether a 2D image of a particular design must be licensed for use (i.e. publication). Legal advice could also be required for disputes and defending legal actions as a result of the lack of clarity on what constitutes a work of artistic craftsmanship.

One rights holder has also argued that "legal challenge is virtually assured for works designed before 1 June 1957 due to the Government's decision to maintain paragraph 6 of Schedule 1 of the CDPA". Other rights holders agreed, arguing that there will be greater confusion for works designed before 1 June 1957. They also argue that some affected businesses will rely on the provision contained in paragraph 6 of Schedule 1 of the CDPA ("Paragraph 6") and thereby continue their activities after the transition period has expired. This they argue will lead to an increase in legal proceedings that "could be avoided if this provision was to be repealed." These rights holders therefore argue that Paragraph 6 should be repealed.

One representative organisation wrote to the Government saying that the majority of members of its working party which considered this matter agreed with the view that repealing Paragraph 6 is neither necessary nor desirable. They noted that as far as pre-1957 works are concerned, Paragraph 6 denies copyright protection to certain pre-1957 works. They also argue that Paragraph 6 does not operate as a limitation on the enforceability of existing copyright, but rather goes to the question of subsistence of copyright. Therefore, the "repeal of Paragraph 6 would clearly benefit some, as it would confer copyright protection on works which have never been protected by copyright before in this jurisdiction. This would not be a question of 'reviving' copyright, but a question of conferring it for the first time".

They go on to argue that "given that substantive copyright law is not harmonised, it would be an odd outcome if the Term Directive, which goes to the duration of copyright protection... and the implementation thereof, had the effect of conferring



copyright protection on works which previously had never been protected by copyright at all. Repealing Paragraph 6 would create new copyright where none existed before”.

Government response

The Government notes that businesses and organisations have incurred costs as a result of the upcoming repeal, and would incur further costs for legal advice as they adapt and respond to regulatory change. These costs are discussed in more detail in the impact assessment.

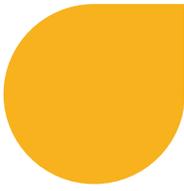
The Government confirms its position that it will not repeal paragraph 6 of Schedule 1 of the CDPA. Having considered the arguments raised during the consultation process, the Government remains of the view that repealing Paragraph 6 would either have no substantive effect (because all such works attract 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.

Creating a new copyright 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).

The Government believes that creating new copyright in these works would be likely to have a negative impact on users of affected works, disrupt existing markets and hinder innovation.

The Government understands 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 (2006/116/EC). If a work of artistic craftsmanship were protected by copyright in any EU member state on 1 July 1995, then it is likely to be protected in the UK.

Therefore, the Government’s position is that the 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.



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.

One business that trades in copies of artistic works reported that they have sought legal advice on the particular items that were likely to be affected by the change in law. However, there was still significant uncertainty due to a lack of UK case law or definitive guidance that could allow businesses to identify which items in their product ranges could be affected.

Other affected businesses in the 2D sector reported they would seek indemnity insurance, tighten existing contractual arrangements or not make copies of the work if the copyright status of the underlying work was in question.

Responses from rights holders and designers suggest that there is some uncertainty about what items would be affected by the change in law, with respondents telling the Government that they “trust that the artistic value of [icons of contemporary design] will also be recognised in the UK”.

Some rights holders also reported that they were principally concerned with identical copies of artistic designs, as opposed to certain lookalike products, which, while inspired by particular designs, are distinguishable products and that it was not their objective to bring proceedings against lookalike products. Other rights holders have reported that they would contact businesses dealing in copied products to draw attention to the change in law.

One representative organisation responded that the major reason for uncertainty was because there was little clarity as to what types of manufactured 3D items are protected by copyright. They argued that the meaning of “a work of artistic craftsmanship” was unclear to the point of rendering the law dysfunctional, pointing out that five Law Lords came to a different view over its meaning in the only ‘works of artistic craftsmanship’ case to reach the House of Lords. They thus argued that it was not currently possible for parties to give a confident view on what a work of artistic craftsmanship was, given that the definition was not capable of “consistent and predictable application”.

Government response

The Government has noted the concerns about the lack of legal certainty of what items would be affected by the repeal and notes that there is a lack of reliable precedent in the UK 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 *Hensher v Restawile*². There is also some recent case law in other EU member states that says that some specific furniture designs do attract copyright protection in those particular member states. In line with Article 10 of the Term of Protection of the Copyright Directive [2006/116/EC], these items are likely to have copyright protection in the UK for the life of the author plus 70 years if they were protected in any other EU member state on 1 July 1995 and were works of artistic craftsmanship.³

The practical implication is that many businesses are unavoidably unsure of what

² *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1976] AC 64

³ See regulation 16 of the Duration of Copyright and Rights in Performances Regulations 1995.



items would be affected by the change in law, and assumptions have been made as to what constitutes an artistic work. Further, given that copyright is partially harmonised at EU level, it is not within the UK Government's authority to provide further definition. Given the lack of clarity, the Government anticipates that the courts may ultimately have to make rulings in this area.

The Government notes that one way businesses that trade in replicas will reduce legal uncertainty (and therefore risk of copyright infringement) is to assume that many of their products could infringe copyright and need phasing out from their product range. It appears that many businesses that trade in replicas have responded in this way due to some rights holders sending them letters which imply that their licensed designs are protected by copyright. The Government considers these types of letters speculative at best, and arguably could lead to businesses exiting the sector when it is unclear whether there is copyright in any designer furniture in the UK.

The Government therefore considers that some form of guidance would be useful for all affected businesses.

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?

Many respondents were in favour of the Government providing some guidance as to what items are likely to have copyright protection, especially to help businesses stay inside the law, avoid inadvertent copyright infringement and reduce costs for legal advice.

One trade association argued that the Government should provide clarity on the criteria of what the Government considers is a work of artistic craftsmanship given it has not been legally determined. Another trade association suggested that the Government should provide guidance or an improved statutory definition of works of artistic craftsmanship.

Respondents suggested that the guidance could provide information and case studies on:

- the meaning of a “work of artistic craftsmanship”,
- what factors would lead to an item attracting copyright protection, especially for furniture, lighting and product design,
- how to determine the date a work was deemed to be created – for example providing guidance as to whether minor changes to a particular work constituted it being “created” at the time of modification, or whether the date of creation meant its original inception or registration,
- factors to consider for product design to ensure that an artistic work is not substantially copied,
- differences between UK law and other EU member states,
- the legality of cross-border selling,
- whether existing UK copyright exceptions apply for copies of artistic works, and
- how the transition period is intended to work in practice.

A number of respondents provided views on several of these issues. For example, some doubts were raised as to whether photographs taken of 3D artistic works would benefit from existing UK copyright exceptions due to the application of these exceptions as fair dealing exceptions. Another organisation argued that manufactured designs that reflect major moments in history would not be considered mass-produced artistic works. Another trade association argued that an industrially produced article that is a replica of a work of artistic craftsmanship cannot itself be a work of artistic craftsmanship as it was not manufactured by a craftsman but by a machine.

One respondent noted that the main uncertainty about the practical impact of the repeal is caused by the uncertainty over what could be defined as a work of artistic craftsmanship. One respondent noted the *Lucasfilm v Ainsworth*⁴ case arguing that it is “the only agreed interpretation of the term work of artistic craftsmanship at [the] UK Supreme Court and House of Lords level following the lack of unanimity of the Court in *Hensher v Restawile*”. However, this respondent also argued that the uncertainty has increased in light of subsequent decisions in the Court of Justice of the European Union which have created a harmonised concept of the works which EU member states must protect by copyright. This respondent thus argued that the current definition of works of artistic craftsmanship, and by extension the closed list of

4 *Lucasfilm Ltd & Ors v Ainsworth & Anor* [2008] EWHC 1878 (Ch)



copyright works in section 1 of the CDPA fails to protect works which constitute the author's own intellectual creation, means that the UK copyright regime is incompatible with EU law.

Some respondents argued that guidance should be at a high level and only provide a discussion of issues to consider, with reference to relevant statutory provisions. It was argued that if a particular work was in doubt that legal advice should be sought.

A number of respondents however expressed doubt on the usefulness of guidance if the guidance was neither definitive nor legally binding as it would be open to dispute. Another concern expressed was that guidance could potentially go beyond the interpretation of works of artistic craftsmanship already available through case law, and that any interpretative guidance could affect sectors other than those directly affected by the implementation of the repeal of section 52 of the CDPA.

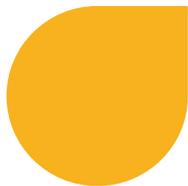
Government response

In the absence of extensive UK case law and given the complexities of copyright law, the Government understands that businesses, especially those that are responding to regulatory change, have a need for guidance so they are able to make informed decisions as to how to approach the change to their business model or product ranges before the repeal is implemented. The variety of responses as to what physical objects would be considered protected by copyright indicates the uncertainty in this area, and how small businesses may not be able to wade through the complex case law. The Government also understands that some businesses are concerned there will still be uncertainty about whether the designs they are producing, even if they are not direct copies, expose them to civil liability or criminal sanctions.

The Government also understands that businesses that trade in replicas are seeking a definitive list as to what items would be affected by the repeal. It should be noted however that any Government-issued guidance cannot be definitive on what items would be protected by copyright (for example, object "A" but not object "B"), but it is likely to provide some direction for businesses on which to assess their product ranges. It would also provide some high level views, including the Government's scepticism that an item being included in a museum or gallery collection would necessarily mean that the item in question 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 be a determinant of its aesthetic qualities. There is also an argument that the status of an item as an artistic work must be decided at the time of its creation, rather than if it later comes to attain an iconic status.

It must be stressed however that any disputes about whether or not copyright subsists in particular items must be assessed on a case by case basis, and ultimately by the courts. For example, it is possible that a business or individual may believe that their design does not substantially copy an earlier artistic work (i.e. their design is sufficiently different to other artistic designs and does not infringe copyright), but a court may take a different view and decide that the design constitutes an infringement of copyright.

Taking all views into consideration, the Government intends to publish non-statutory guidance on what items may attract copyright protection as artistic works and factors to consider when making this assessment.

**Question 4:**

If you wished to replace unlicensed copies in your current product range, which route [of obtaining new suppliers, commissioning new designs or obtaining licences] 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?

During the consultation businesses that trade in replicas reported they would seek to source alternative products through obtaining new suppliers and commissioning the development of new designs. These businesses told the Government that they had already engaged designers to generate new products and designs following the successful passage of the Enterprise and Regulatory Reform Act 2013.

Rights holders and designers were supportive of the principle of generating new designs and particularly creating new products in the UK. Rights holders and designers also suggested that businesses currently trading in replicas would have other avenues to source new products and designs, such as using other lookalike products that were not protected.

It was also reported that some of these businesses that trade in replicas had sought licences from rights holders, but there had been difficulties in obtaining licences, and doubts whether rights holders in the furniture sector would be willing to issue licences. It was also suggested that obtaining licences was unlikely to be a realistic mechanism for these businesses given the inherent imbalance in negotiating position and that the licence market could take an extended period of years to mature.

In relation to the 2D market for artistic works, it was suggested that publishers, dealing with future licensing costs, may allow books containing unlicensed 2D images of works of artistic craftsmanship to go out of print, and would not be replaced by new licensed books on the same or similar subject matters.

Government response

The Government has noted the responses to these questions. The Government's analysis of the issues raised is discussed in more detail in the impact assessment in Annex B.



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.

It was reported by businesses that trade in 2D and 3D copies that a three year transition period was not sufficient time for them to adapt to the change in law. Their overarching arguments were that:

- it was difficult to plan for the change in law not knowing the products that were likely to attract copyright protection which was argued to serve as a “blanket ban”, and
- sourcing, developing, testing and marketing new designs that were commercially successful (and therefore able to underpin a commercially viable business) was costly and time consuming, notwithstanding other uncertainties that apply in a competitive marketplace.

More generally, these businesses said that meaningful planning was difficult without knowing the actual length of the transition period (it was suggested that businesses were unable to put in place specific plans as their response to the proposed transition periods would vary depending whether the Government made a final decision on a transition period of 6 months, 3 years or 5 years).

A report written by economic consultants (commissioned by a trade association) argued that a 5 year transition period is justified on the basis that affected businesses would go out of business if an adequate time for adjustment was not provided, thereby leading to unemployment and serious social cost. They also argued that a 5 year transition period achieves a balance in copyright between various interest groups, “promoting the diffusion of furniture without eliminating incentives to create it”. They further argue that a 5 year transition period “protects British SMEs in the furniture industry from infringement liability and promotes public welfare by stimulating entrepreneurship, avoiding job losses and sending a clear message that the IP system is not in contradiction to the needs of small market participants”.

Rights holders and designers also wrote that they understood the difficulties of developing commercially successful products. However, they argued that a longer transition period does not benefit designers in the UK and denies designers of industrially-manufactured artistic works the same protection for their work compared to other creators such as artists, composers and writers. They contended that a long transition period would prevent the shift of companies trading in replicas to a model which introduced new designs to the market, thereby stifling creativity and innovation. Designers also argued against the delay in commencing the repeal, as their designs could be “easily copied in the near future unless the legislation is implemented soon”.

Businesses trading in 2D copies reported that existing licensing arrangements would need to be modified in line with the change in law. A short transition period would expose some photographic agencies to the risk of copyright infringement as they may have licensed images prior to the change in law which would have included warranties and indemnities guaranteeing the safe use of these images.

On the issue of costs, a trade association which represents businesses which trade in replicas submitted average costs per business. These figures are discussed in more detail in the impact assessment. It was also reported by these businesses that they would likely find the transition difficult given the high costs of transition (such as product development, marketing and obtaining licences).

The report written by the economic consultants mentioned above argued that businesses trading in replicas will suffer losses while they invest in building a new product portfolio, facing high transaction costs associated with long-term contract agreements (including production orders, warehouse leasing and vehicle rent).

It was argued by a number of businesses dealing with 2D and 3D copies that they would have difficulties absorbing the cost of transition, and that a 5 year transition period would be the most cost effective and reasonable, compared to the alternative transition period options of 6 months or 3 years.

Government response

The Government agrees that meaningful planning for businesses adapting to the change in law would be difficult if there was no confirmation of the date the repeal would come into force. The Government however recognises there is some merit in rights holders' arguments that the time between the passage of the Enterprise and Regulatory Reform Act 2013 and the announcement of transitional provisions in this document has provided some time for businesses to learn about the change, and at least begin to plan for it.

The Government is sceptical of the views expressed by rights holders and designers that a long transition period would discourage replica furniture businesses from adapting to the upcoming repeal of section 52, thereby stifling innovation and creativity. It has been reported to the Government that replica furniture businesses have begun to make changes to their business models by testing and introducing new designs to the market, although with varied success. The Government considers that these businesses that are making the effort to introduce new designs to the market should be provided a reasonable period of time to continue their efforts given it is generally agreed amongst all respondents that the design process takes time and effort.



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?

Question 10:

Do you agree it is unnecessary to exercise the powers under section 100 of the Enterprise and Regulatory Reform Act 2013 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?

There were mixed views about whether copies made or traded before the repeal is implemented should remain unaffected by the change in law. Businesses that trade in replicas argued that there should be a right to sell existing items that are currently in the UK on the date of the repeal. They argued that this would allow businesses that are adapting to regulatory change to be able to use the time to sell off stock without breaking the law, so as to finance the adaptation of the business and prevent a situation where stock needed to be destroyed after the repeal came into force. Another respondent noted that if all businesses trading in replicas attempt to sell their remaining stock below market price towards the end of the transition period, they will compete with one another and have to cut prices even further, representing a cost to the UK economy.

Rights holders and designers opposed the Government's proposed policy. They argued that the proposed policy would be an implicit invitation for businesses importing replicas to increase purchases of overseas-made stock while section 52 of the CDPA remained in force. Rights holders also argued that an indefinite period would be disproportionate and unlawful under EU law, that it would be unlawful to permit new entrants to the market during the transitional period, and that it would be a primary act of infringement to issue copies in the EEA market without the consent of the copyright owner (even after putting aside questions of exhaustion of rights).

One rights holder argued that providing proof of the provenance of a particular item is likely to be a disruptive and expensive exercise for both rights holders and alleged infringers, and that a single cut off date after which all dealings would infringe copyright would ensure compliance with EU case law and reduce burdens on UK businesses impacted by the change in law.

One representative organisation argued there could be evidential issues over when works were made or imported, leaving the legal position of a number of items unclear for a period of time. Other concerns were that disputes could arise because of this, and the potential ease for resellers to claim that items pre-date the repeal.

One representative organisation argued that if it was the Government's intention that any items lawfully made or imported before the repeal comes into force should not be affected by the change in law, that it would be necessary for the Government to exercise the powers granted under section 100 of the Enterprise and Regulatory Reform Act 2013 because of the existence of section 18 of the CDPA and so that the position was clear. They argued that section 18 of the CDPA does not relate only to

items which is an infringing copy within the meaning of section 27 of the CDPA. This means that any stock that had been made or imported before the change in law, but not yet put into circulation would mean that the first time that stock was put into circulation after the repeal came into force would be an infringement of copyright.

Government response

The Government has consistently expressed the view that any copies made, imported or sold under section 52 of the CPDA before it is repealed would be unaffected by the change in law. Therefore, any of these copies would be able to be sold or distributed after the change in law takes effect.

The Government's view is that it would be beneficial for businesses holding existing stocks to be able to continue to sell them, although they would no longer be able to make new replicas. The benefit, as articulated by many of these businesses in their consultation responses, is that they will use the revenue from sales of replicas to finance the changes to their business model as a result of regulatory change.

There were, however, concerns that businesses trading in replicas could seek to build up substantial stocks before the change in law. However, the Government was not convinced that businesses would choose to accumulate significant stocks of replicas that could distort the market for years. Self-limiting factors would constrain any significant stock accumulation: as stocks are often made to order, it is unlikely that businesses would risk accumulating stocks that would tie up capital in this and costly storage space.

Aside from tying up capital and paying for costly storage space, another concern that would prevent the accumulation of stock would be the time value of money. There is an economic argument that money today is more valuable than money in the future primarily due to inflation and risk. Therefore, if a business buys stock today and sells in the future, their profit will have a discounted value in today's terms. It is unlikely then that businesses will want the large cost of accumulating stock before the change in law, given the lower value these future sales will have in present terms. Furthermore, it is also possible that stock will depreciate in quality over time whilst stored in warehouses, and a decrease in quality will mean a decrease in value.

Finally, the Government believes that if businesses are not allowed to sell off existing stock after the change in law, it may force them to sell at reduced prices in an attempt to clear stock.

The Government has noted the argument that distributing copies that are made or imported before the change in law may be unlawful because businesses would not be able to rely on section 27(2) or section 27(3) of the CDPA⁵. Therefore, the Government will exercise its powers granted by section 100 of the Enterprise and Regulatory Reform Act 2013⁶ to make express provisions in the Commencement Order that implements the repeal of section 52 of the CDPA to ensure that copies (including 3D copies and 2D analogue or digital copies) that are made, assembled or imported into the UK before the repeal comes into force may be freely dealt with. This includes possessing, selling, offering for sale or hire, exhibiting in public, distributing or putting into circulation that copy.

It should be stressed that the individual or business should be able to reasonably

⁵ Section 27(2) and section 27(3) of the CDPA provides that an article is an infringing copy if its making in the UK or importation in the UK constitutes an infringement.

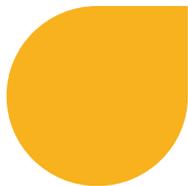
⁶ Section 100 of the Enterprise and Regulatory Reform Act 2013 confers powers to make transitional, transitory and saving provisions.



prove, before the repeal comes into force, that they have lawful possession of the item in the UK (without being required to hold a licence for it), full title to the item, and have paid for the item.

The Government is also of the view that assembling a collection of component parts (imported after the repeal comes into force) that results in a copy of an artistic work is likely to constitute an infringement of copyright if the result is an identical copy where permission or a licence has not been provided.

The making, importation, selling or distribution of physical component parts is unlikely to constitute an infringement of copyright, unless the component part itself qualifies as an artistic work. The intention is to allow the servicing or upkeep of lawful replicas or copies.

**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?

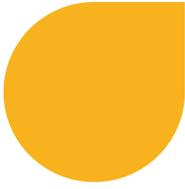
It was reported that most businesses already have some form of system for stock control, inventory and audit in place.

Government response

Given that Government policy intends that items that are made or imported before the change in law are unaffected by the repeal, individuals or businesses that trade in these copies at the time of the change in law (that is, 6 April 2020) will need to take steps to ensure that they are able to reasonably prove the provenance of these items, and that the items were physically in the UK on 5 April 2020.

The Government does note however that businesses that trade in replicas have reported that they already have stock inventory controls in place. If this is the case, then businesses trading in copies should be well placed to ensure that any items traded after the repeal comes into force is done so lawfully.

This is important as businesses that trade in newly made or imported replicas after the repeal comes into force would be liable for civil or criminal action from rights holders or be pursued by trading standards authorities in the UK.

**Question 13:**

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

Question 14:

Assuming that you have known since April 2013 that section 52 of the CDPA was to be repealed, 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?

Businesses that traded in replicas generally agreed with the Government's understanding that it would take 5 years on average to change their product offering, either through seeking new suppliers or commissioning and introducing new designs to the market. However, there was no guarantee that newly introduced designs would be commercially successful.

Furthermore, businesses that trade in replicas pointed out that one rights owner who is also involved in designing new products has previously commented on the huge amount of time and effort that is required in developing a new furniture design, including processes such as the initial concept, refining design elements, working materials and testing the final product – a process that could take up to 9 years.

These businesses therefore argued that they would need a minimum 5 year period (i.e. until April 2020) to change their business model in response to regulatory change. A majority of these businesses also said that a 6 month or 3 year period would not provide sufficient time for the adaptation of business models or product ranges, and it was argued that a short transition time could force businesses into receivership. It was also reported that small businesses may struggle even with a 5 year transition period as they would not have sufficient cash reserves or asset value to survive.

Another respondent argued that affected businesses should have every opportunity to adapt to the new regime, and that a 5 year transition period would be reasonable, proportionate and fair given that affected businesses will have to bear the burden of change whilst rights holders will reap the benefits. They also made the point that a 5 year period was fairer than the 10 years that was initially sought by one side and the 6 months that was sought by the other.

On the other hand, one rights holder disagreed that it would take 5 years on average for a company to change its product offering in the markets these businesses operated in. They argued that there was no design or manufacture of products (similar to theirs) in the UK and that there was only investment in stock and therefore alternative products could be sourced in a shorter period. This rights holder also argued that the Government should not take into account hypothetical or negligible UK-based design and manufacturing activities when considering the minimum transition period.

Many rights holders and designers commented that they believed that businesses trading in copies have had sufficient time to learn about the planned change in law and begin to make preparations for it. A number of rights holders argued that they believed that copyright protection for industrially-manufactured artistic works should not be disproportionately delayed, and that a 3 year transition period would be too long in light of the Court of Justice of the European Union case of *Flos SpA v*

Semeraro Casa e Famiglia SpA⁷. One respondent argued that if the rationale for the adoption of a longer transition period was to support British industry and jobs, it did not take into account the damage which existing copyright laws are causing in the UK.

A number of rights holders argued for the implementation of 3 different transition periods, and also noted that a single transition period for all activities would not be allowed because it would defer copyright protection for a substantial period. They argued that there should be a distinction made between businesses that were manufacturing replicas and those businesses that were importing them. It was their understanding that there were few companies that manufacture replicas in the UK, but these businesses should have an extended transition period until April 2018 compared to businesses that import copies into the UK which they suggested should have a transition period until April 2015. They also argued that there be no transition period provided for companies that issued replicas when the end user is based outside the UK.

One representative organisation commented that the law was so unclear that the period would be somewhat irrelevant in many cases as businesses would not know what is or is not covered regardless of the transition period provided.

Government response

The Government has decided that the repeal of section 52 of the CDPA will commence on 6 April 2020, thereby providing a transition period of 5 years from 5 April 2015.

This is an extension to the Government's proposal of a 3 year transition period from April 2015, reflecting the evidence that it received during the formal consultation. This shows, inter alia, that costs of reacting to regulatory change (including legal, transition and redundancy costs) would be lower if there was a 5 year transition period rather than a 3 year transition period.

The evidence also indicated that a 5 year transition period, from the point where the Government announced its final decision on transitional provisions, is necessary to allow affected businesses to adapt and create viable alternative business models (such as moving to a model which introduces new British designs to the market). The Government views this as a positive step as it could promote competition in the market.

In particular, the economic analysis, detailed in the impact assessment, indicates that a transition period of 5 years would minimise costs to affected businesses that currently trade in 3D copies or use and create 2D copies. The Government noted that UK businesses that traded in replicas were already experiencing upfront transition costs⁸, and therefore the 5 year transition period provides affected businesses a better chance of being able to adapt and survive by spreading out the costs of transition over a longer period. It has been noted, however, that there is no guarantee of all affected businesses surviving despite the costs of transition being incurred. These circumstances are in direct comparison to rights holders and designers who will likely benefit for a longer period of time after the 5 year transition period has elapsed.

It should also be noted that the Government's chosen transition period of 5 years, in comparison to the other options of 3 years or 6 months, means that the Government is not imposing additional net costs on businesses compared to the other options considered, in line with the Government's "Better Regulation Framework Manual".⁹

7 C-168/09 – Flos (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-168/09>)

8 For example, identifying which products are likely to be affected by the change in law and costs of sourcing or introducing new designs.

9 See: <https://www.gov.uk/government/publications/better-regulation-framework-manual>



On the timing of implementing the repeal, the Government sees some merit in the argument that the time between the passage of the Enterprise and Regulatory Reform Act 2013 and the announcement of transitional provisions has been sufficient for businesses to learn about the planned change in law and to begin making preparations for it. But the Government's view is that it could be difficult to make any meaningful plans without knowing when the repeal would come into force and because of the difficulties in establishing which items would be affected given the lack of UK case law. Indeed, there is no certainty that designs currently being copied without a licence are protected by copyright in the UK.

The Government also took into account the argument that there were two distinct markets between unlicensed and licensed copies in the furniture sector, and that the products are unlikely to be substitutable. The Government also noted that it appears that some rights holders are unlikely to be willing to provide a licence to some of the businesses that trade in replicas having to date characterised their business model as "counterfeiting".

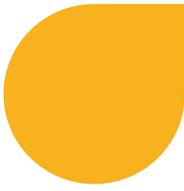
Rights holders have suggested that there should be a link between manufacturing of replicas in the UK and the transition period: they allege there is no or very little UK-based manufacturing of replicas¹⁰. The Government is not persuaded that the manufacture of items in the UK is, of itself, a key consideration in setting an appropriate transition period. The issue is to balance the economic interests of businesses which have legally invested in the production and sale of designs under section 52 of the CDPA and those of right holders.

It should be stressed that the Government's objective has always been to ensure that there is equal treatment of all types of artistic works. But there are tensions in the evidence presented to the Government about the reasons why the Government should act sooner rather than later to implement the repeal. For example, little clear evidence was provided to the Government that there is a direct causal link between the existence of section 52 of the CDPA in UK law and losses sustained as a result. For example, one design rights holder suggested that market share is lower in the UK compared to other EU markets as a result of the existence of section 52 of the CDPA. However, the same submission to the consultation notes that there are many other products that are readily available and that the markets in which this business operates are competitive. The Government therefore has some scepticism that the UK market share for this business is depressed primarily due to existing UK copyright law. Furthermore, as the impact assessment discusses, there was a lack of substantial and clear quantitative evidence from designers and rights holders as to why a longer transition period would be detrimental to them.

The Government is also aware of the impact across other sectors, not just those businesses trading in replicas. For example, the Government notes that publishers and museums will require lead time to modify their publication schedules and photographers will need time to review their collections. For many businesses as well, there is the cost of identifying relevant licences and purchasing these – costs again associated with adapting to regulatory change.

Therefore, on the basis of the evidence received, the Government is of the view that commencing the repeal of section 52 of the CDPA on 6 April 2020 provides a proportionate and fair amount of time for affected businesses to adapt to regulatory change, but also delivers, in 5 years, the fundamental objective of ensuring that all types of artistic works are treated equally.

¹⁰ The Government has received some evidence that suggests some manufacturing of replicas does take place in the UK.



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 to development plans?

Publishers called for a 5 year transition period, to align with a publishing cycle of commissioning, writing, producing and printing a book.

Publishers also argued that the retrospective nature of the repeal would negatively impact on the reprinting of books containing images of artistic works that had been published. It was argued that gaining copyright clearance was not factored into the original investment, and therefore the assumption was made that all copyright clearances were obtained for the duration of the book's life, including any reprints. Reprints run the risk of copyright owners seeking licence fees, and therefore affected books could be left to go out of print. The issue of reprints therefore was of particular concern to publishers as the costs of publishing illustrated books are rarely recouped from the first printing - costs are more likely to be recouped following reprints, and adding new licensing costs for reprinted books would be detrimental to the profitability of those books

Publishers also suggested that there be a separate transition period for businesses dealing in 2D copies. Their argument was that the repeal was essentially aimed at 3D copies and that 2D copies should be treated differently and carved out of the repeal. It was surmised that the effect of the repeal would potentially mean that publishers would abandon design books, thereby having a negative impact on design marketing and education.

It was also reported by a number of rights holders and designers that they would not consider taking action against those who use 2D copies of artistic works (such as educational and cultural establishments, film makers and businesses such as publishers) as it would remove a marketing avenue for their products.

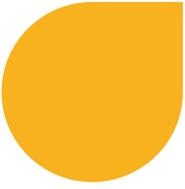
Government response

The Government notes that some publishers are likely to be affected by the change in law if they use 2D images of artistic works insofar as they may incur additional costs for licensing. The Government understands that publishers will therefore not be able to publish design books as cheaply once the change in law takes. The Government's view is that books may already have a mark up to take into account production costs, and publishers are likely to have to consider this when producing new editions or reprints. The Government does acknowledge however that in the case of reprints that retrospective copyright permission is likely to be required.

Further, when making copies of artistic works, copyright owners already need to provide permission or a licence before publishers are able to make copies. The change in law will mean that permission from copyright holders will need to be sought for all types of artistic works.

The Government believes that a 5 year transition period, which generally aligns with publishers' development schedules, is likely to be sufficient time for publishers to plan their development schedules while factoring in costs such as licensing fees.

Finally, the Government did not consider appropriate separate, longer, transition periods for businesses that dealt with 2D copies. The aim of the repeal is to ensure that creators of artistic designs benefit from copyright protection, and therefore the Government did not consider that exemptions should be made for specific sectors when making either 3D or 2D copies.

**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 of doing so?

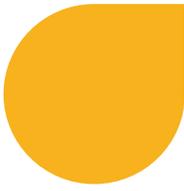
One organisation argued that a 5 year transition is necessary to mitigate the impact of the change in law, such as factoring the change into their publishing schedule, especially given the additional resource for administration and reproduction fees that were previously not necessary if copies were made under section 52 of the CDPA.

They also argued that a 6 month transition period would not be sufficient to manage existing publication schedules and identify additional rights clearance and resources to review the impact of the change in law on current projects.

Government response

Only one museum responded to the consultation. The respondent essentially reported similar issues to the ones that publishers faced, therefore suggesting that 5 years was likely to be a reasonable transition period for this sector. This would include planning for additional licensing costs when developing published products and determining the repeal's impact on the museum's collection policies.

A more detailed discussion is found in the impact assessment in Annex B.



Question 17:

Will a 3 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?

A trade association representing businesses dealing in 2D images argued that a 5 year transition period would provide them with time to assess their collections, put procedures in place (e.g. reviewing licensing models) to deal with the change in law and plan for potential loss of business. They argued that 3 years was the minimum time in which businesses would take a risk-averse approach by culling images from their collections.

It was argued by the same trade association that a 6 month transition period would lead to image libraries closing and photographers losing business as more photography assignments became risky (i.e. permissions would need to be considered for 3D items for each use). This would include small libraries holding 30,000 images in their archive and large libraries holding 80-100 million images. Other businesses anticipated that hiring additional staff with the requisite expertise to deal with the change in law would not be commercially viable.

This trade association surmised that the case of *Fondation Le Corbusier v Getty Images*¹¹ in the Paris Court of Appeals in 2014 has brought about a situation where businesses with specialist collections have rejected images with well-known pieces (of furniture) from their collections.

One licensing organisation noted that that the clearance process would potentially become more laborious considering that images contain works which would become copyright protected.

Government response

The Government notes that photographers and image agencies may have to set aside time and incur administration costs to adapt to the change in law, including assessing planned photography assignments to see if photos of artistic works are being taken, and checking existing photography collections to determine if rights need to be cleared because of copyright works contained in that picture. In particular, the Government is aware that assessing existing photographic collections could be a lengthy and costly process, and that smaller agencies or individual photographers may not have the resources to do so quickly.

Like all other creators and users of 2D copies of artistic works, the Government acknowledges that photographers and image agencies will likely be affected by the lack of legal certainty as to what industrially-manufactured items would be considered works of art. Some designers and rights holders have said they would not take action against those businesses which made 2D copies of their work since images are an important marketing tool for designers, but the Government notes that there are many other rights holders and designers who may wish to enforce their intellectual property rights. Accordingly, these businesses are seeking a 5 year transition period to prepare for regulatory change.

The costs of responding to regulatory change are discussed in more detail in the impact assessment in Annex B.

¹¹ This case (Paris Court of Appeals, Pole 5, 2nd chamber June 13, 2014) found that Getty images had infringed copyright through a number of photographs of Le Corbusier furniture pieces.



Question 18:

The Government has received evidence on costs and benefits of the proposed changes primarily from EU-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?

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 up to a period of 6 months, 3 years or 5 years.

One European-based rights holder reported that for many of their most successful designs, protection as registered or unregistered designs has already run out. They argue that as there is insufficient copyright protection to support their business in the UK, the business has not been active in the UK market in the past.

UK-based rights holders and designers have noted that the change in law would mean that industrially-manufactured artistic works will receive the same copyright protection afforded to other creators such as writers. They also reported that the continued availability of copies of artistic designs in the UK market has a negative impact on finances and employment in their sector, and argue that there are no clear benefits in delaying the change in law. The argument for the change in law is that original designs in the UK are placed in an “uncomfortable” legal position, and that the UK has seen a reduction in the amount of furniture that has been designed and manufactured in the country over the past 50 years. They also argue that British designers have no incentive to stay and create in the UK where the law “offers limited protection”.

Rights holders and designers also note that the change in law would likely force businesses currently dealing in replicas to change their business models, look for new designs and provide opportunities for new British designers. They also noted the benefits to businesses trading in replicas to move from a business model which utilises the designs of other creators.

One representative organisation noted that the repeal is a zero sum game, in that “the benefit to a rights owner of a longer period of copyright protection for an item will be matched by a disbenefit to a party who wants to sell that item without permission” – an “unavoidable consequence” of the repeal.

Government response

The main beneficiaries of the repeal are likely to be copyright owners (or their exclusive licensees), whose artistic designs are brought back into copyright protection when the change in law takes effect.

Designers and rights holders did not respond with evidence to substantiate the size of the potential benefits lost every year through the delay of implementing the repeal. One rights holder has contended that their market share in the UK is depressed, compared to other EU member states, due to the presence of replicas. They also argued that the markets which they operate in are extremely competitive and there are many alternative products available. The Government notes the tension between the two arguments.

The Government is sceptical that a lack of replicas in the UK market would mean

substantial gains to rights holders or designers because licensed products and replicas are unlikely to be substitutes given the marked difference in price. In the absence of replicas in the market it is unlikely that consumers will 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 a specific design.

However, the Government notes that consumers may become accustomed to the prices of replicas and become less willing to pay the price for licensed copies, and there is thus an argument that the repeal may bring about a transition to a market which is not influenced by UK replicas that potentially shapes consumer price expectations.

The Government discusses this issue in more detail in the impact assessment in Annex B.

**Question 20:**

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

Rights holders and designers argue that there are costs due to consumer confusion between replicas and licensed products. Rights holders and designers made the following points:

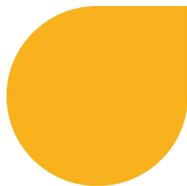
- that a 3 year transition period would lead to continued consumer confusion,
- there are complaints against businesses that sell replicas, and that European Consumer Centres also deal with complaints about replicas,
- consumer confusion is likely to occur as a result of copies being permitted in the UK market, although such costs of confusion are extremely difficult to quantify,
- consumers would be mistaken in believing they are purchasing cheaper version of licensed products, and
- the costs of confusion are extremely difficult to quantify but are likely to be considerable.

One representative organisation argued that rights holders already have potential remedies where there is passing off and registered trade mark infringement, and may be able to obtain protection under existing regulations or statutory authorities. They also argued that the introduction of a transitional period does not remove the ability of rights holders to take action based on confusion.

Government response

The Government notes that there is some anecdotal evidence that some customers are unable to differentiate between a replica and a licensed copy. However, given the absence of substantial evidence to support this, the Government is sceptical that buyers of replicas are unaware they have purchased a replica rather than a licensed product as savvy customers are likely to research the products and understand the reasons for the price difference.

The Government also notes that trade mark law already protects rights holders from 'confusingly similar' products in some circumstances.



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?

The trade association for businesses which trade in replicas reported that their members had tried to obtain licences from rights holders, but there was little evidence of successful licensing taking place. One business that sells replicas reported that they would prefer to obtain a licence for some designs so that their business could continue relatively seamlessly, but they argued that they did not believe that licences would be granted as rights holders wished to achieve a monopoly over relevant products. Other businesses surmised that there is little likelihood of fair or effective licensing taking place in this sector because rights holders were in a strong position and that it would be difficult for affected businesses to negotiate fair terms.

A number of respondents mentioned the compulsory licensing provisions¹² 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.

One business argued that the compulsory licensing provisions (i.e. Regulation 24 of the Duration of Copyright and Rights in Performance Regulations 1995) may not apply: because section 52 of the CDPA only places a temporal limit on enforceability. The revival of copyright by virtue of the repeal might not constitute a true revival of copyright since the underlying right would always have subsisted. This business, however, does argue that “applying a compulsory licensing regime to copyrights caught by the repeal... is in principle a... useful option”.

Furthermore, a number of rights holders argued that retaining the compulsory licensing provisions would be in breach of EU law as it would amount to a failure to implement the Term Directive, Information Society Directive and Enforcement Directive. They argued that this situation must be avoided for the sake of legal certainty. However, rights holders said that they could envisage licensing agreements with businesses willing to manufacture products to high standards. They argued that licensing agreements do not require a long time to develop but these agreements were unlikely to develop for as long as section 52 of the CDPA remained in place.

Another rights holder argued that the permanent application of the compulsory licensing provisions would not be appropriate as it would conflict with the requirements for any transitional provisions to be temporary.

One representative organisation noted that if the Government intended to introduce a compulsory licensing scheme on similar lines to that contained in Regulation 24, then it will need to make provisions to do so, arguing that “Regulation 24 applies only to ‘revived copyright’ and never caught (more recent) works which, by virtue of the Term Directive, always enjoyed copyright protection for the for life of the author plus 70

¹² Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995



years”.

Another representative organisation did not consider there to be a legal rationale or imperative for suggesting that the “extended right should be subject to licences of right or that the provisions of the 1995 Term Regulations should apply to it”.

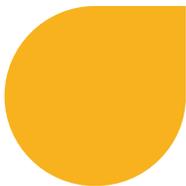
Government response

The Government believes that licensing may be of benefit, especially for new 2D copies. This is because some rights holders and designers recognise that this has marketing potential. The Government also believes that licensing of 3D copies may be of benefit, but the evidence suggests that there may be limited licensing offers.

On the matter of the compulsory licensing provisions, the Government wishes to make it clear that it was never its intention to introduce a mechanism for compulsory licensing for the sole purpose of mitigating the effects of the repeal of section 52 of the CDPA.

The Government notes some respondents argued for the compulsory licensing provision to be removed from UK legislation for the sake of legal clarity, but the Government did not see it desirable to remove an existing provision from UK law that could potentially provide compulsory licences for works which had copyright revived.

The Government believes that the existing provisions for compulsory licensing could allow some third parties to make use of licences. This could benefit some businesses that are currently trading in replicas as they would then be able to switch to selling licensed copies, providing for some degree of business continuity.



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.

The key issues raised by respondents to the consultation have been discussed in previous sections of this document.



Next steps

Following the Government's announcement of its final decision on transitional provisions for the implementation of the repeal of section 52 of the CDPA, the Government will make a Commencement Order which will implement the repeal on 6 April 2020 and make express provisions for articles made or imported before the change in law takes effect. The Commencement Order will be made shortly after the publication of this document, in line with the Government's objective to conclude this matter before the end of the current Parliament.

Given previous Parliamentary debate on this issue during the passage of the Enterprise and Regulatory Reform Act 2013 and the Intellectual Property Act 2014, and following consultation on transitional provisions, the Government believes that it is now appropriate to implement the transitional provisions for the repeal of section 52 of the CDPA through a Commencement Order.

All secondary legislation (including Commencement Orders) is available at www.legislation.gov.uk.

Technical review of the Commencement Order

The Government invites interested parties to review the draft Commencement Order contained in Annex D of this document. Respondents are requested to provide substantive (rather than drafting) comments as to whether the language of the Commencement Order achieves Government policy. Further details can be found on page 66.

Once the Commencement Order is signed by the relevant Government Minister, the provisions contained in that Order will become law. The Commencement Order will not be subject to parliamentary procedure because an Order of this nature is only implementing powers that have been granted in primary legislation. Therefore, there will be no further parliamentary debate on this issue.

Comments should be received by 23.59 on 25 February so that the Commencement Order can be made before the dissolution of Parliament scheduled for 30 March 2015.

Please email comments to section52CDPA@ipo.gov.uk or post them to

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



Annex A:

List of respondents to the consultation

- Anti Copying in Design (ACID)
- Arcaid Images
- Arik Levy Art & Design Studio
- Artek
- Artemide SpA
- Barber & Osgerby
- Bardehle Pagenberg
- British Association of Picture Libraries and Agencies (BAPLA)
- British Association of the International Federation of Intellectual Property Attorneys
- Cassina SpA
- Design and Artists Copyright Society (DACS)
- Eisenführ Speiser
- Ella Doran
- Expired Copyright Homewares Organisation (ECHO)
- Flos SpA
- Getty Images
- Intellectual Property Lawyers' Association
- IP Federation
- Jasper Morrison
- Loupe Images
- Motion Picture Association
- Powell Gilbert LLP
- Publishers Association
- Republic of Fritz Hansen
- Ron Arad Associates
- Rospatt Osten Pross
- Scott Howard Office Furniture
- SCP Ltd
- Stokke AS
- Studioilse
- Tecnolumen GmbH & Co KG
- Thames & Hudson Ltd
- The Law Society
- Thonet GmbH
- Victoria and Albert Museum
- Vitra
- Whitehouse Consultancy
- Zaha Hadid Architects

∴ The Government received correspondence from the following individuals and businesses after the consultation closed:

- Jay Osgerby
- Licensing Executives Society (Britain and Ireland)
- Mike Weatherley MP

Annex B:

Final Stage Impact Assessment: Transitional provisions for the repeal of section 52 of the Copyright, Designs and Patents Act 1988

16 December 2014

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 fully monetise costs due to a lack of available data. The Government has received evidence which is indicative of the costs to UK businesses that manufacture, assemble, import or sell unlicensed copies of artistic works and to some creators and users of 2D images affected by the change in law. These costs are anticipated by those who submitted evidence and assume the majority of their items fall under the aegis of section 52 of the CDPA. This evidence indicates that costs are higher under Option 1 than under Options 2 and 3. However, it has not been possible to extrapolate costs across the entire sector as the size of the sector and the precise items affected are unclear.

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 and 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 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 benefits to UK based businesses and affected parties due to a lack of available data from those beneficiaries based in the UK.

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

Copyright owners and exclusive licensees of designs that have fallen out of copyright protection will 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 adapt.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
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This Impact Assessment has been reliant on unverified stakeholder evidence gathered through consultation. It is assumed 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 3 year transition period from 5 April 2015 (commencement on 6 April 2018)

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 fully monetise costs due to a lack of available data. The Government has received evidence which is indicative of the costs to UK businesses that manufacture, assemble, import or sell unlicensed copies of artistic works and to some creators and users of 2D images affected by the change in law. These costs are anticipated by those who submitted evidence and assume the majority of their items fall under the aegis of section 52 of the CDPA. This evidence indicates that costs are lower under Option 2 than under Option 1, but higher than under Option 3. It has not been possible to extrapolate costs across the entire sector as the size of the sector and the precise items affected are unclear.

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

See Option 1 for a breakdown of costs. Costs to affected businesses under Option 2 are likely to be higher than Option 3 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 2 are likely to be higher than under Option 3 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 2 are likely to be higher than under Option 3 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	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 to UK based businesses and affected parties due to a lack of available data from those beneficiaries based in the UK.

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

See Option 1 for a breakdown of benefits. Benefits to rights holders and designers (e.g. from potential royalties) are likely to be higher than under Option 3 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 3 but higher than Option 1. The delay in the removal of unlicensed copies from the market may 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
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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 5 year transition period from 5 April 2015 (commencement on 6 April 2020)

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	5	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 fully monetise costs due to a lack of available data. The Government has received evidence which is indicative of the costs to UK businesses that manufacture, assemble, import or sell unlicensed copies of artistic works and to some creators and users of 2D images affected by the change in law. These costs are anticipated by those who submitted evidence and assume the majority of their items fall under the aegis of section 52 of the CDPA. This evidence indicates that costs are lower under Option 3 than under Options 1 and 2. It has not been possible to extrapolate costs across the entire sector as the size of the sector and the precise items affected are unclear.

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 3 than under Options 1 and 2 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 3 than under Options 1 and 2 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 3 than under Options 1 and 2 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	5	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 fully monetise the benefits to UK based businesses and affected parties due to a lack of available data from those beneficiaries based in the UK.

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

See Option 1 for a breakdown of benefits. Potential benefits to rights holders and designers are likely to be lower under Option 3 than under Options 1 and 2 as they will be delayed for the longest period. However, long term benefits to the design industry may be highest under Option 3 as the market adapts. The 5 year transition period is likely to delay the removal of unlicensed copies from the market, delaying the potential benefits to other designers from consumers seeking other designs. However, having a 5 year transition period will help provide sufficient time for 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 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 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 specified 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 launched a 2-stage consultation process on how and when to implement the repeal of section 52 of the CDPA. The Government launched a Call for Evidence in October 2013 and then in September 2014 consulted on its proposal to implement the repeal of section 52 of the CDPA in April 2018.¹ This final stage Impact Assessment takes into account all evidence received during the consultation process, though gaps remain despite extensive formal and informal consultation. The Government has therefore assessed the options based on the available evidence.

Problem under consideration

The Government wishes 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 the time to adjust, thereby minimising unnecessary harm to UK manufacturers and importers who have legitimately relied on section 52 of the CDPA.

As a starting point, the Government believes that a transition period of 10 years or longer risks 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 domain² but this was ruled unlawful by the European Court of Justice which said that transitional measures must be proportionate.

The Government understands 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 sell, manufacture or import unlicensed copies of artistic works. The Government was also told that some businesses (such as publishers or photographers) which create or use 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).

There is a lack of reliable legal precedent in the UK to determine whether an essentially functional object would be protected by copyright. There is some UK case law to suggest that items that are both

¹ The Government published a consultation-stage Impact Assessment “Timing of the repeal of section 52 of the Copyright, Designs and Patents Act 1988”, dated 5 September 2014.

² 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.

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, there is some recent case law in other EU member states that says that some specific furniture designs do attract copyright protection in those particular member states. In line with Article 10 of the Term of Protection of the Copyright Directive [2006/116/EC], these items are likely to 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'.³

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. Further, given that copyright is partially harmonised at EU level, it is not within the UK Government's authority to provide further definition. 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 copyright infringement 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 change in 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 3 years from April 2015
- Option 3 proposes a transition period of 5 years from April 2015

³ 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: Three year transition period from April 2015 (commencement on 6 April 2018)
- Option 3: Five year transition period from April 2015 (commencement on 6 April 2020)

The Government intends that the change of law occurs 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). If the change in law is not implemented it is claimed that these losses will continue.

One rights holder has told us that they are concerned about the sales of unlicensed copies of furniture in Europe.⁴ 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 in Europe 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.⁵

The Government's view is that this estimate is at the high end of possible gains from the repeal of section 52 of the CDPA, for several reasons. First, 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 shipments⁶: 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.⁷ 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

⁴ 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.

⁵ This business has made this calculation based on GDP (EU: ~EUR 12,945 billion; CH: ~EUR 486.13 billion = factor *27)

⁶ This same business that submitted evidence has said that only 1% of incoming goods to Switzerland are inspected by customs.

⁷ This would need to include an analysis of EU candidate countries. At the time of writing there are no EU acceding countries.

case law is exerting a harmonising influence⁸. 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.

This estimate does not represent an overall loss of revenue to the EEA as any revenue in the Swiss estimate is transferred from one European 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 as a key element of this Assessment is how burdens to UK businesses are reduced.⁹ The current information collected on costs to copyrights holders under this “Do nothing” scenario is from rights holders outside the UK.

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 also wishes to ensure that all types of artistic works, including those that have been industrially manufactured, are treated equally under copyright law.

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.

⁸ This was noted in the Final Stage Impact Assessment on “Copyright protection for designs”, 15 May 2012, Intellectual Property Office.

⁹ The Government notes the guidance contained in the “Better Regulation Framework Manual”, published by the Department for Business, Innovation and Skills in July 2013.

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 selected the median period of 6 months.

This option allows rights holders to assert copyright protection of their artistic works after the 6 month transition period has elapsed. 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 deals 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.¹⁰ 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.

The Government asked for costs and benefits for UK copyright owners during the consultation. Designers and rights holders from the UK failed to respond with substantive evidence to validate the size of the potential benefits lost every year through the delay of the repeal of section 52 of the CDPA. The few figures provided appear to be unreliable and were based on what the Government judges to be unrealistic assumptions. For example, one rights holder said that they incurred losses (no figure was provided) as their market share was lower in the UK compared with other EU countries due to unlicensed copies of their products being available in the UK. There is a tension in this argument with the claim in the same submission that the markets in which this business operate in are “extremely competitive and many alternative products are readily available”.

The business that provided its estimate of potential gain in the EU (in “Option 0”) estimated that annual loss from replica sales in the UK exceeded £17m. As no details were provided to justify this figure and in light of previous statements to the Government of the difficulty of proving actual losses, the Government is therefore unconvinced that this figure is reliable. Further difficulties in assessing loss could also be due to the market where, as reported by another European rights holder, there is a “vast choice of other unlicensed pieces of furniture, including lookalikes of iconic pieces which are not copyright protected”.

A number of other designers and rights holders in the UK responded to the consultation and claimed that they would benefit from the change in law as they would not incur costs to protect their own work and would likely make gains due to not losing revenue to firms making and selling copies of [their] products”.

¹⁰ See Annex A for a discussion on licensing for 3D copies of artistic works.

No figures or further evidence was provided and the Government is therefore unable to assess whether there is a negative impact in practice.

Potential reduction in competition between sales of licensed copies 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 little evidence to support this argument and 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.

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 because 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 copies¹¹). 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. They argue that consumers are sometimes unable to differentiate between a licensed copy and an unlicensed copy. There is anecdotal evidence that purchasers of 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 could be pursued separately to any copyright infringement.

Conversely, businesses that sell unlicensed copies of works have told the Government that they have not had customers returning products to them because they had mistakenly purchased an unlicensed copy believing it was a licensed copy.

¹¹ Impact Assessment: Copyright protection for designs, 15 May 2012, Intellectual Property Office.

In the absence of substantial 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. Savvy 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 rights holders from ‘confusingly similar’ products in some circumstances.

The Government also notes that unlicensed copies from other EU member states may diminish the benefit of any transition period.

Long term benefits to design industry

Once the change in law comes into effect, 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.

The Government also notes the in principle arguments of designers that the repeal of section 52 of the CDPA could encourage businesses reacting to the change in law to commission new designs.

Designers and rights holders also suggested that existing UK legislation is a disincentive to UK designers because their “designs remain unprotected” and therefore have “no incentive to stay in the UK”. The Government is sceptical of this argument as designs can be protected under other laws that protect designs. Further, there is a tension in this argument from those designers who have made this claim, but are currently based in the UK.

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 UK 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.

The Government also has concerns with the possibility that some businesses, reacting to a risk of copyright infringement or in some cases implied legal threats, may exit the sector altogether when it may well be the case that there is no copyright in some designs, and therefore may continue to be copied lawfully.

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

It has not been possible to quantify the size of the market (both licensed and unlicensed copies), and it has therefore not been possible to quantify the total expected costs to businesses in Option 1.

The Government understands that there is a small volume of manufacturing or assembly of unlicensed copies in the UK, including those businesses that manufacture components or focus on a specific aspect of a product such as upholstery, while other businesses import already assembled products. Many of these businesses also operate retail premises in the UK.

The Government is not persuaded that the volume of manufacturing of unlicensed copies in the UK is a key consideration in setting an appropriate transitional period. The key issue is to balance the economic interests of businesses which have invested in good faith in the production and sale of designs under section 52 of the CDPA and those of the owners of any relevant copyright.

Another consideration is that manufacturers and importers 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. Licensed manufacturers have also made assumptions as to which of their designs would be protected by copyright in the UK – the Government notes that one licensed manufacturer has sent letters to businesses that make unlicensed copies implying that copyright exists, but says that the businesses which sell unlicensed copies are aware of which works are “probably” copyright protected. The Government considers these letters speculative at best, and could potentially lead to some businesses reacting to such implied warnings of copyright infringement by exiting the sector even when it is unclear whether there is copyright in any designer furniture in the UK. 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 – this is discussed in the next section.

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).¹² 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.
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.¹³

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

¹² This cost range has been sourced from a number of businesses that trade in unlicensed copies. While each business has different costs, the figures provide a reasonable average estimate.

¹³ See Annex A for a discussion on licensing for 3D copies of artistic works.

they can compete with existing players in the market that have strong presence and awareness in the UK (such as John Lewis). 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 costly and may well be beyond the financial capability of many businesses, especially small or micro businesses.

The trade association that represents businesses that manufacture, import and sell unlicensed copies provided figures¹⁴ to indicate the costs of transition, relative to each of the options presented in this Impact Assessment. The Government notes that the figures are self-reported (as is the nature with most qualitative evidence of this kind), but also considers that the information presented during the consultation is stronger than the evidence presented during the Call for Evidence as the sample size is larger and a breakdown of costs was provided by individual respondents¹⁵. Therefore, the Government considers these figures to provide useful average figures which were verified by a breakdown of estimated costs provided by individual respondents in that trade association.

In terms of overall, average transitional costs per business, the following figures¹⁶ indicate the cost effectiveness of spreading the costs of transition over a longer period as follows:

6 month transition period: £206,875

3 year transition period: £178,875

5 year transition period: £96,750

These costs include the cost of investment in new stock plus marketing and other costs associated with trialling new designs.

This association also reported legal costs sustained as a result of adapting to upcoming regulatory change. It was reported that the average cost of gaining clarity on the potential impact of the repeal was £13,000 per business (the range was from £1,000 to £45,000). Other legal costs were incurred, including defending against infringement claims (i.e. responding to letters from rights holders that claim potential copyright infringement) with a reported range of £3,000 to £45,000. It is assumed by this trade association that these costs will continue to rise due to the lack of legal clarity as to what designs would be affected.

Trading of existing stock of unlicensed copies

As noted previously, there is little clarity as to which items would be protected by copyright, and it is impossible to predict how and when 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.

Given the uncertainty, the Government's view is that it would be beneficial to allow manufacturers and importers to sell off lawfully made or imported existing stock while preventing the making or importing of new unlicensed copies after the repeal. 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.

¹⁴ The Government assumes that all costs provided by this trade association were total costs as it was not specified otherwise. The Government does note however that there is a possibility that the phrasing of the questions responded to in the trade association's questionnaire may have appeared ambiguous with regards to whether costs should be given as annual or total costs.

¹⁵ The Government notes that this trade association's sample size is limited, but was larger than previously provided and larger than the sample sizes of other respondents to the consultation. Additionally, given the Government's understanding of the size of the sector, the sample may be representative.

¹⁶ This evidence was reviewed by economic consultants contracted by the trade association that represents businesses that manufacture, import and sell unlicensed copies.

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.¹⁷

Therefore, the change in law will only apply to items manufactured or imported after the change in law takes effect, and this would be the case for the analysis of Options 1, 2 and 3 in this Impact Assessment. Further, it is the Government's view that the secondary market is not affected.

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.

The Government notes potential 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, although it has not been possible to quantify costs in this Impact Assessment.

Time required to introduce new designs to the market

The Government considers that UK businesses which manufacture, assemble, sell and import unlicensed copies of artistic works that will be affected by the proposed change should be provided sufficient time to adapt their business models and phase out that part of the business that trades in unlicensed copies. These affected businesses argue that an adequate 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). The Government understands that the furniture market is competitive, and that there are challenges with low customer awareness of new designs, especially for internet sales.

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 other 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, thus increasing costs for the introduction of a new design.

The difficulty, as alluded previously, is that businesses are making educated guesses as to what products they need to replace, and some have assumed 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 result in potentially expensive legal disputes which will affect smaller 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

¹⁷ 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.

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.

The evidence suggests that affected businesses, especially 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 a reported cost of up to £60,000 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 (including premises mortgages, equipment leases, logistics contracts and vehicle leases) which could require exiting if the change in law meant that that part of the business could no longer be operated (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. The Government also understands that premises leases are on average 5 years.

The trade association that represents businesses that manufacture, import and sell unlicensed copies provided useful average figures (verified by a breakdown of estimated costs provided by individual respondents in that trade association). The average costs per firm of having to cancel existing contracts were reported as follows:

6 month transition period: £96,617

3 year transition period: £49,917

5 year transition period: £31,000

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 business models.

Potential impact of financing of affected businesses

The Government understands that affected businesses may be impacted by the practice of “material change” which requires businesses to declare to their banks substantive changes in their business model which may affect the future turnover and profitability of their business. This could result in the foreclosure of loans, facilities and mortgages. The Government considers that a longer transition period that reduces harms to affected businesses could reduce the risk of “material change” and its consequences.

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

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 (i.e. copyright exceptions) that allow the use of a work for the purposes of quotation, criticism and review, or for the incidental inclusion of copyright work in another artistic work, film or broadcast (although there may be a cost associated with assessing whether a copyright exception applies to a use of a work).

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.

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 is effected, licensing fees are likely to result in 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 image¹⁸ leading to extra costs of £14,400 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. There are also uncertainties for reprints where publishers run the risk of copyright owners seeking to assert their rights and demand fees. Further, it has not been possible to quantify the lost benefit to consumers from the possible abandonment of any number of such publications.

Publishers have argued that they will need time to make themselves compliant with the new 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

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

¹⁸ DACS tariffs at the time of writing.

estimated the financial impact based on current activity is a reduction in profit of around £850,000 per year (no breakdown was provided). Development of new products could also be impacted – one example provided was the museum rejecting the use of a pattern for 5 products due to the minimum royalty fee of £5,400 from a collecting society.

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. Reproduction 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 provided). 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 was not provided 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 reproduced 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 (which can't be cleared wholesale).

They have told Government that the lack of legal certainty about what items are in scope is also problematic as they will not know which rights holders or designers will challenge the use of works within an image, thus leading to a chilling effect on image agencies using 2D copies of 3D design pieces to reduce risk of infringement and legal disputes.¹⁹

Even with agencies checking their collections and removing photographs of designer furniture from their collection, there is still a concern of unintentional copyright infringement and then being pursued for such infringement (even though a number of rights holders have told the Government they would not consider action against the publishing of copies of their works in magazines and catalogues as such actions would remove potential marketing opportunities). One image agency has told the Government that they would seek out insurance to cover instances where there was unintentional copyright infringement. The potential cost of insurance was not provided.

The Government however notes 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.

Photographers that specialise in home interiors photography have indicated 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. The Government did not receive substantive information on the time it would take to go through existing archives. The Government has however estimated that 1 person could clear 1626 photos over 3 years.²⁰

¹⁹ It has been also been argued that the 2014 case in the Paris Court of Appeals of *Fondation Le Corbusier v. Getty Images* (which found that Getty Images had infringed copyright through a number of photographs of Le Corbusier furniture pieces) has had the effect of image agencies rejecting images with design pieces from their collections. The Government notes it could also drive image agencies and photographers to devote resources to ensuring that images held or licensed do not infringe copyright.

²⁰ The Government has made this estimate using an example from the time it would take to clear rights for "orphan works" (where the rights holder cannot be found or is unknown and where there are difficulties in establishing whether there is underlying copyright in the photograph). In the Impact Assessment on domestic orphan works licensing in the UK (submitted to the Regulatory Policy Committee on 15 April 2014 –

This estimated time to clear photos could be reduced due to a number of factors. First, designers that create artistic designs 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 contactable. Second, not all photos of home interiors will include works of artistic craftsmanship. Third, as case law develops, there will be more clarity of which works will require clearance. Fourth, clearing of rights could become faster as licensing solutions are developed.

Fifth, especially in home interiors photography, the same popular items appear repeatedly. Once the rights have been cleared for one item in a collection of digitised photos, the number of similar photos that will need to be reviewed may 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 an argument that any artistic works included in that image had been incidentally included, and therefore a licence may not be required.

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.

On the basis that image agencies hold collections ranging in size of 30,000 images to up to 100 million images, the Government has been told that image agencies could not prepare for the change of law in 6 months. They have also said that a transition period of 3 years would require revision of licensing models (given that some licences, such as the royalty free licence may need to be recalled and refunded). Therefore, image agencies and photographers are seeking a 5 year transition period to enable them to adapt to the change in law.

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. A deadweight loss to society may also be created as businesses that trade in unlicensed copies may exit the sector as consumers are not longer able to purchase designs at a price they are willing and able to pay.

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: Three year transition period

Option 2 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 2 provides the same benefits to designers and rights holders in Europe as Option 1 (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 3.

COSTS

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

- Costs to UK 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 UK 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 2 relative to Option 1.

However, the costs are likely to be greater under Option 2 than under Option 3 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 3) 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 2 than under Option 3. 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 2 (relative to Option 3) given the self-limiting factors as previously discussed.

Time required to introduce new designs to the market

As discussed in Option 1, 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. While the evidence suggests that 3 years may be sufficient for some businesses to design, develop and market their products so that they are profitable, there is a question mark whether these businesses would have sufficient new and successful designs to counteract the loss of revenue from other unlicensed copies that they have decided to withdraw from the market.

There may be greater costs to these businesses relative to Option 3 in that there is less time to plan for and spread the costs of transition.

As discussed under Option 1, 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. There is also some doubt whether fair and reasonable licences can be obtained from rights holders.²¹ The Government believes that a 3 year transition period may 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 2 relative to Option 3 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, notwithstanding 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 3 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 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 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 3 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 2.

²¹ See Annex A for a discussion on licensing for 3D copies of artistic works.

Option 3: Five year transition period

A number of submissions to the Call for Evidence and consultation called for a 5 year transition period, including the trade association that represents businesses that manufacture, assemble, import and sell unlicensed copies, the publishing trade association and the trade association representing image agencies. Indeed, the Law Society of Scotland has suggested a minimum of 5 years be provided to provide adequate time for businesses and individuals 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”.

BENEFITS

Option 3 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 and Option 2.

COSTS

Option 3 would have the same costs as Option 1:

- Costs to UK 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 lowest under Option 3 because costs are spread over a longer period of time before the change in law occurs.

The longer transition period is likely to assist UK 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 3 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 3 are analysed below in more detail.

Costs to UK businesses that sell, manufacture or import unlicensed copies

UK businesses that manufacture, import and sell unlicensed copies will have more time to adapt their business models and product ranges under Option 3 than Option 1 and Option 2. 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 trade association representing businesses that manufacture and import unlicensed copies submitted information which 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 and Option 2.

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 3 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 3 than under Option 1 and Option 2 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, called for by publishers and a major museum based in the UK²², should therefore be sufficient for publishers to plan their development schedules while factoring in costs such as licensing fees.

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 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 5 years. The welfare costs to consumers from reduced choice of products would be delayed by 5 years.

In addition, Option 3 provides businesses that manufacture, import or sell unlicensed copies more time than Option 1 and Option 2 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 3.

²² See examples of costs incurred as a result of the repeal in the discussion under "Museums" in Option 1.

Government's preferred option

The Government has taken an evidence-based approach to determine the transitional provisions for the repeal of section 52 of the CDPA. The Government's key consideration was to ensure that the repeal achieved its primary objective of protecting all types of artistic works equally, while minimising unnecessary harm to those businesses which rely on existing laws and have been operating in good faith and in accordance with current UK law.

Following the Government's extensive consultation process, the Government is convinced that a 6 month transition period is likely to cause disproportionate harm to businesses that manufacture, import or sell unlicensed copies of artistic works. The Government is also persuaded that a 3 year transition period is not proportionate in light of the evidence received.

The Government initially proposed a 3 year transition period but now believes that it would not be proportionate in light of the evidence received. The evidence received indicates that a 5 year transition period from April 2015 is necessary to ensure that all affected businesses that had legitimate expectations of being able to trade in unlicensed copies made lawfully under existing UK laws are able to adapt to a change in law which is made difficult by the fact that there is currently little legal clarity as to what articles would be affected by the change in law.

The evidence indicated that affected businesses trading in unlicensed 3D copies, predominantly small to medium sized enterprises, are reacting to future potential copyright infringement and are changing business models to reduce risk of copyright infringement even when it is uncertain whether items in their product range are infringing copyright at all, thereby shouldering the burden of regulatory change. The Government is persuaded that 5 years is necessary for adaptation of these types of businesses given it could cost up to £60,000 to introduce one new design to the market, and that any shorter timeframe would force them to outlay upfront costs which would be detrimental to their business.

The Government has also been persuaded by the evidence that was submitted by businesses that trade in 2D copies of works. For example, the Government understands that some photography businesses have large collections to assess for copyright infringement, and that 5 years would be an appropriate period to act on and absorb the costs of regulatory change. The Government therefore notes the overall economic assessment that a transition period of 5 years would minimise costs (i.e. legal, transition and redundancy) to affected businesses that deal in either 3D or 2D copies of artistic works.

The Government was also convinced that providing a 5 year transition period could assist the adaptation and survival of these businesses so as to create viable business models that would encourage the introduction of new British designs to the market – an outcome that was supported by rights holders and designers. This would be positive in a market where some unlicensed copies of some designs are withdrawn from the market due to a risk of copyright infringement. However, while affected businesses would sustain costs due to responding to regulatory change, there is no guarantee of survival. This would be in comparison to rights holders and designers who are likely to benefit after 5 years and are arguably less subject to the costs of regulatory change.

It should be stressed that the Government understands the important principle of not unduly delaying the removal of a current law which brings about the unequal treatment of some types of artistic works, but the Government has balanced this against the lack of substantive or clear evidence from rights holders and designers as to why a longer transition period would be detrimental to them, the Government's desire to safeguard the economic interests of affected businesses that currently and legitimately deal in 2D or 3D unlicensed copies by providing a reasonable period of adjustment, and the outcome of the change in law being achieved in 5 years.

Therefore, the Government considers that this Option is consistent with the views expressed in the judgment of the European Court of Justice case *Flos SpA v Semeraro Casa e Famiglia SpA* to reconcile the competing interests, especially in circumstances where costs and benefits have not been able to be quantified. The preferred Option also takes into account the time that has elapsed between the passage of the Enterprise and Regulatory Reform Act 2013 and the conclusion of the consultation process. The Government believes that businesses have had sufficient time to learn about the planned change in law and begin to make preparations for it, and it would expect that businesses would begin the changes to

their businesses once the decision on transitional provisions had been announced. The Government however does note that the time to plan for the change in law may be difficult given the lack of legal certainty that has been discussed in this Impact Assessment.

Accordingly, in light of all the evidence received, the Government considers a 5 year period is a necessary period of adjustment for all affected parties. The repeal of section 52 of the CDPA will therefore come into force on 6 April 2020, which the Government views as a fair and proportionate timeframe to introduce the change in law that will bring about equal terms of copyright protection for all types of artistic works.

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. The Government also did not consider a suggestion to make provision for immediately halting the trade of unlicensed copies where the end user was based outside the UK as it believed this would be difficult to enforce.

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.

The Government did not consider calls to introduce a separate, longer, transition period for businesses that deal with 2D copies. Given the aim is to ensure that creators of artistic designs benefit from copyright protection, the Government therefore does not consider that exemptions should be made for specific sectors when making either 3D or 2D copies.

Summary and preferred options with description of implementation plan

The preferred option in this Impact Assessment implements section 74 of the Enterprise and Regulatory Reform Act 2013 on 6 April 2020.

Risks and assumptions

This Impact Assessment has relied upon unverified stakeholder evidence in providing the costs, benefits and time required to adapt to the change in law. Critique and analysis of this evidence has been included in this document where appropriate.

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.

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 in line 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. Although it is not possible to fully quantify the costs and benefits for all options, it is the Government's view that its preferred option minimises the costs for businesses by allowing them the greatest length of time to adapt to the change in law. Therefore, the Government is of the view that its preferred option introduces the minimum net burden to 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 the Government's consultation process which sought evidence from a wide range of sectors, the evidence submitted was primarily from the main group listed above.

Small and micro business assessment

The Government understands that affected small and micro businesses may not have the resources (either personnel or financial) to adapt to the change as quickly as larger businesses and may simply exit the sector if they feel unable to adapt to the change in law in time, or are required to spend a substantial amount of time and resources preparing for the change in lieu of usual business activities. It would not be possible to exclude micro businesses from this particular sector as excluding any businesses would make it difficult to enforce the change in law if some businesses were still able to trade in unlicensed copies of works, when other medium to large businesses are prevented from trading in unlicensed copies. Some small and micro businesses (such as those that own the copyright in artistic designs) could also benefit from the change in law, strengthening the argument that small and micro businesses should not be excluded.

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, and the provision of a 5 year transition period from April 2015 has been selected so as to minimise the cost on small and micro businesses that would be disadvantaged.

Evaluation

The Government proposes to evaluate the impact of the repeal of section 52 of the CDPA 5 years after the change in law has commenced. The evaluation will assess 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 could 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 C:

Regulatory Policy Committee's Opinion on the Final Stage Impact Assessment

6 February 2015

 Regulatory Policy Committee	Opinion	
Impact Assessment (IA)	Timing of the repeal of section 52 of the Copyright, Designs and Patents Act 1988	
Lead Department/Agency	Department for Business, Innovation and Skills	
Stage	Final	
IA number	BISIPO009	
Origin	European	
Expected date of implementation	April 2020	
Date submitted to RPC	16 December 2014	
RPC Opinion date and reference	6 February 2015	RPC14-BIS-2155(2)
<i>Departmental Assessment</i>		
One-in, Two-out status	Out of scope (EU)	
Estimate of the Equivalent Annual Net Cost to Business (EANCB)	N/A	
RPC Overall Assessment	GREEN	
<p>RPC comments</p> <p>The IA is fit for purpose.</p> <p>The proposal is of European origin. There is no evidence that the increase in regulation would go beyond minimum requirements or that the Department is failing to take advantage of available derogations that would reduce the costs to business. It is therefore out of scope of One-in, Two-out.</p> <p>The Department has not been able to monetise the costs and benefits of the proposal to business, because there is no case law yet to determine which items will be affected. However, it has provided sufficient evidence to show that its preferred option of a transition period of five years minimises the costs for businesses by allowing them sufficient time to adjust to the change in the law. The preferred option is therefore expected to impose the minimum net burden on business.</p>		
<p>Background (extracts from IA)</p> <p>What is the problem under consideration? Why is government intervention necessary?</p> <p><i>“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 specified 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.”</i></p>		

What are the policy objectives and the intended effects?

“The Government wish to implement the repeal of section 52 of the CDPA in a manner which is fair and proportionate. They seek 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.*
- *Minimise negative impacts on those British businesses that have been operating legitimately using the permitted act contained in section 52 of the CDPA.”*

“The following options have been considered:

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

The Government’s preferred option is Option 3 because it implements the policy objective while providing a proportionate timeframe for affected businesses to adjust to regulatory change.”

Comments on the robustness of the OITO assessment

The proposal is of European origin. There is no evidence that the increase in regulation would go beyond minimum requirements or that the Department is failing to take advantage of available derogations that would reduce the costs to business. It is therefore out of scope of One-in, Two-out, in accordance with the Better Regulation Framework Manual (paragraph 1.9.8.ii).

Comments on the robustness of the Small & Micro Business Assessment (SaMBA)

The proposal is of European origin. A SaMBA is, therefore, not required.

Quality of the analysis and evidence presented in the IA

The Department proposes to introduce a commencement order that repeals section 52 of the Copyright, Designs and Patents Act 1988 (CDPA) and ensures that UK legislation is updated in line with EU law. The timing of the commencement order will allow for a transition period for affected businesses to prepare for the change in law.

Section 52 of CDPA contains an exception that 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 full term copyright protection, which

is the lifetime of the creator plus 70 years. When section 52 is repealed, any artistic work which qualifies for copyright protection will benefit from the full term.

The Department explains that businesses that manufacture, import or sell unlicensed copies and users of 2D copies of 3D artistic works are expected to face increased costs as a result of the proposal.

The Department has identified the following costs resulting from the proposals:

1. UK businesses that currently manufacture, assemble, import or sell unlicensed copies of artistic works will face transition costs. These costs include investment in obtaining new designs, factory retooling, marketing, agreeing licences with rights holders and legal costs. The Department estimates that it could cost a business between £60,000-100,000 to introduce and market a new product.
2. Increased licensing costs for some creators or users of 2D images of artistic works, such as publishers and museums. The Department estimates that the proposal could reduce an organisation's profits by £850,000 each year but has been unable to estimate total costs for all affected users.
3. Costs to consumers resulting from reduced consumer choice, although the Department has not been able to estimate these costs.

The IA includes estimates that have been provided by businesses, which indicate that it would take at least five years, on average, to successfully change their product offering. This includes the sourcing and testing of products and the successful marketing of a new brand. Further, the Department received evidence of supply contracts and leases lasting five years and that cancellation of these contracts would incur costs. The Department expects that a transition period of fewer than five years would increase transition costs and could lead to businesses closing.

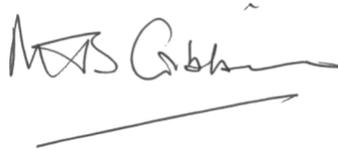
The Department considers that a five year transition period represents the appropriate balance between the economic interests of businesses which have invested in good faith in the production and sale of designs under section 52 of the CDPA and those of the owners of any relevant copyright. The IA also explains that manufacturers and importers have little certainty as to which products in their range will be affected, as there is no case law that indicates which artistic works would be affected. The IA includes an estimate for the average legal cost of £13,000 for a business to gain legal clarity.

Copyright owners and exclusive licensees of designs that have fallen out of copyright protection will benefit from renewed protection as a result of the change in law. These groups are expected to benefit from increased royalties through licensing of the designs. One rights holder estimated the annual loss from replica sales in the UK exceeds £17 million but provided no evidence to support this figure. The Department does not consider that the proposals will result in substantial gains to rights holders or creators because licensed and unlicensed copies of furniture are unlikely to be substitutes given product differentiation. For example, according to the Department, unlicensed copies of 'designer' furniture typically sell at around 15% of the price of the licensed copies.

The Department explains that, despite extensive consultation, it is unable to monetise the costs and benefits of the proposal. The reasons for this are threefold. First, there is uncertainty over the number of businesses that trade in unlicensed copies of artistic works in the UK due to a lack of data, although the Department understands the industry to be small. Secondly, the Department explains that there is uncertainty regarding which artistic items would be protected by copyright once the change in law takes place. As a result, until there is sufficient case law to determine which items will be affected by the proposal, it is not possible to provide robust estimates of the costs and benefits. Finally, only a limited number of copyright owners provided estimates of current losses from replica sales in response to the consultation.

Although the Department has not fully quantified the costs and benefits of the proposal, it has provided sufficient evidence to show that its preferred option of a transition period of five years minimises the costs for businesses by allowing them sufficient time to adjust to the change in the law. The preferred option is therefore expected to impose the minimum net burden on business.

Signed

A handwritten signature in black ink, appearing to read "Michael Gibbons", with a long horizontal stroke underneath.

Michael Gibbons, Chairman



Annex D:

**Draft Commencement Order to implement
section 74 of the Enterprise and Regulatory Reform
Act 2013**

2013 No.

COPYRIGHT

**The Enterprise and Regulatory Reform Act 2013
(Commencement No.8 and Saving Provisions) Order 2015**

Made - - - - *****

The Secretary of State, in exercise of the powers conferred by sections 100 and 103(3) and (4) of the Enterprise and Regulatory Reform Act 2014(a), makes the following Order:

Citation and interpretation

1. This Order may be cited as the Enterprise and Regulatory Reform Act 2013 (Commencement No. 8 and Saving Provisions) Order 2015.

Day appointed for the coming into force of section 74

2. The day appointed for the coming into force of section 74 of the Enterprise and Regulatory Reform Act 2013 is 6th April 2020 (“the commencement date”).

Saving provisions – Articles made in, or imported into the United Kingdom

3. The amendments to the Copyright, Designs and Patents Act 1988 made by section 74 of the Enterprise and Regulatory Reform Act 2013 do not apply in relation to—

- (a) a copy of an artistic work made in the United Kingdom before the commencement date where the making of the copy does not by virtue of section 52 of the 1988 Act infringe copyright in the artistic work; or
- (b) a copy of an artistic work imported into the United Kingdom before the commencement date where at the date of its importation its making in the United Kingdom would not by virtue of section 52 of the 1988 Act have constituted an infringement of copyright in the artistic work [or a breach of an exclusive licence agreement relating to that work].

Date

Name
Parliamentary Under Secretary of State
Department

EXPLANATORY NOTE

(This note is not part of the Order)

This Order brings into force section 74 of the Enterprise and Regulatory Reform Act 2013 which repeals section 52 of the Copyright, Designs and Patents Act 1988. Section 52 introduced a copyright exception into United Kingdom law relating to the industrial exploitation of artistic works which limits copyright protection to a period of 25 years from the end of the year in which such articles are first marketed.

Copyright and Enforcement Directorate
Intellectual Property Office
4 Abbey Orchard St
London
SW1P 2HT

Tel: 0300 300 2000

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