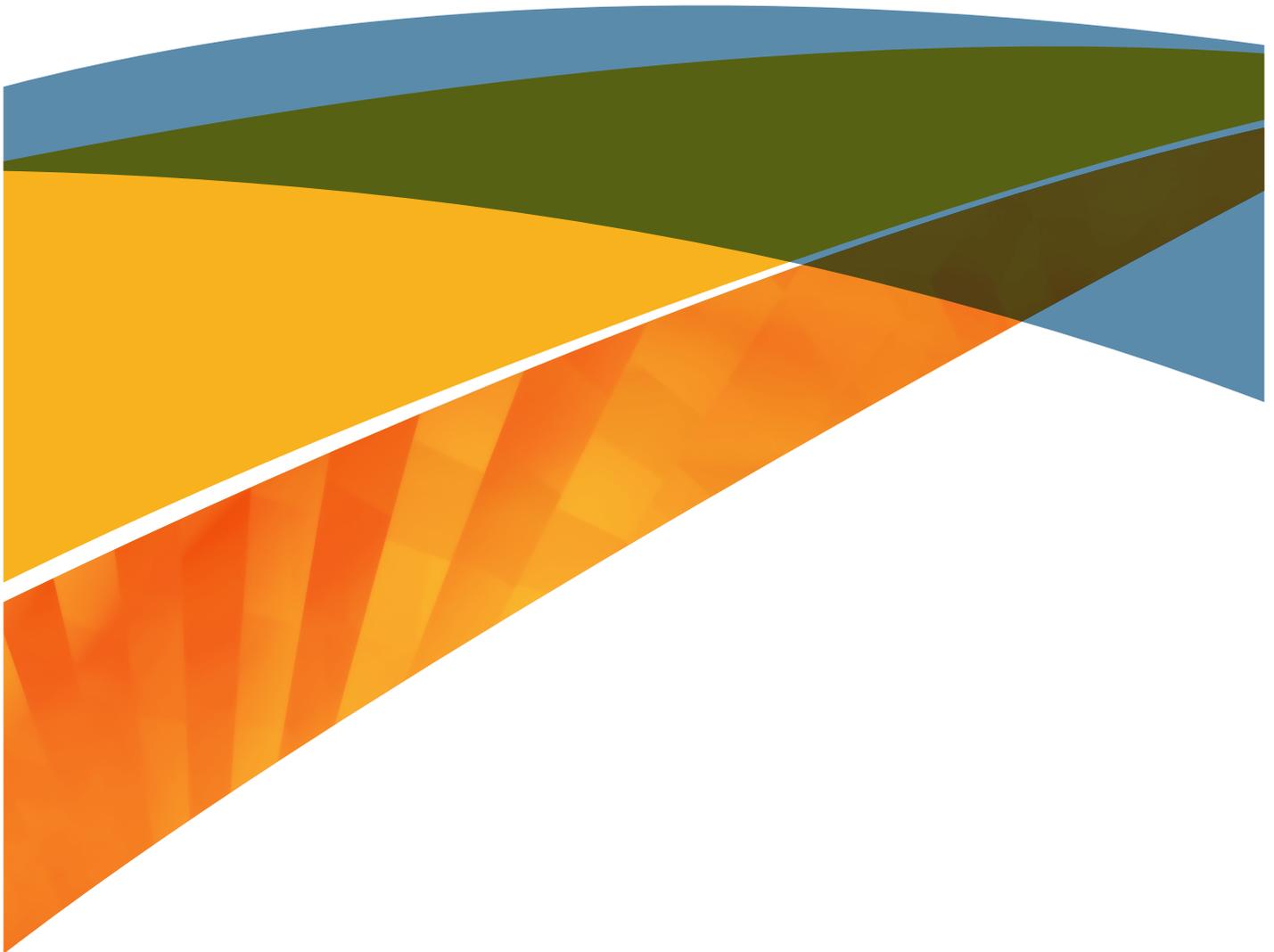




Intellectual  
Property  
Office

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





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# About this consultation

## Scope of this consultation

|                                   |  |
|-----------------------------------|--|
| <b>Topic of this consultation</b> | New transitional provisions for the repeal of section 52 of the Copyright, Designs and Patents Act 1988 and consequential amendments.  |
| <b>Scope of this consultation</b> | This consultation invites comments on the proposals for transitional provisions for the repeal, covering the time period until repeal, the status of existing stock, the status of copyright works made prior to 1 June 1957, and the repeal of compulsory licensing provisions. |
| <b>Geographical scope</b>         | United Kingdom.  |

## Basic information

|  |   |
|--|---|
| <b>To</b>  | This consultation is aimed at: <ul style="list-style-type: none"><li>• creators of works of artistic craftsmanship, such as designers;</li><li>• rights holders in those works, such as licensees;</li><li>• manufacturers, importers and retailers of replicas of those works;</li><li>• publishers, museums and educational establishments.</li></ul> |
| <b>Responsibility for the consultation</b>                                   | This consultation is being run by the Copyright and Enforcement Directorate in the Intellectual Property Office.  |
| <b>Duration</b>  | This consultation runs from 16:30 28 October to 16:30 23 December 2015.   |
| <b>Enquiries (including requests for the paper in an alternative format)</b> | For further information about this consultation please email <a href="mailto:section52cdpa@ipo.gov.uk">section52cdpa@ipo.gov.uk</a>   |
| <b>How to respond</b>  | Consultation responses should be submitted by email to <a href="mailto:section52cdpa@ipo.gov.uk">section52cdpa@ipo.gov.uk</a><br><br>Or by post to:<br><br>Section 52 consultation<br>Copyright Directorate<br>Intellectual Property Office<br>4 Abbey Orchard Street<br>London SW1P 2HT  |
| <b>After the consultation</b>  | A summary of the responses to the consultation will be published on the Department's website.   |

## Introduction

1. Section 52 of the Copyright, Designs and Patents Act 1988 (CDPA) limits the term of copyright protection for industrially exploited artistic works to 25 years. The Government had previously consulted on how and when to implement the repeal of section 52 CDPA and made a decision to have a transitional period of 5 years from April 2015. This meant that the repeal of section 52 would have come into effect in April 2020 and existing stock which had been made or imported prior to this date would have been unaffected by the repeal.
2. However, the compatibility of these arrangements with EU law was challenged by way of a judicial review and the Government decided to reconsider the issue, as announced on the Government's website on 23 July 2015<sup>1</sup>. This consultation covers the areas which are now being considered as part of the repeal of section 52 CDPA.
3. We intend to publish our final proposals for the repeal in the light of responses received to this consultation this spring.

## Overview of the repeal of section 52

4. The Government passed legislation in 2013<sup>2</sup> to remove the exception in section 52, but it has not yet been commenced due to the revocation of the previous Commencement Order, as announced on 23 July 2015.
5. Section 52<sup>3</sup> currently reduces the term of copyright protection for artistic works that have been industrially exploited. Thus, when more than 50 copies of these artistic works are made the current period of protection is limited to 25 years, compared to other artistic works which are protected by copyright for the life of the creator plus 70 years.
6. Whether an individual item qualifies for copyright protection is on a case by case basis, and can ultimately be a matter for the courts. Nothing in this consultation should be understood as providing a Government view as to whether any particular artistic work is protected by copyright. This consultation proceeds on the basis that at least some such works do exist, without expressing any view as to what they are, whether furniture, homewares (such as lighting or ceramics), jewellery or wallpaper.
7. The scope of this consultation is limited to the transitional arrangements and associated legislative changes, but does not include the repeal itself. When the repeal is put into effect, the exception contained in section 52 CDPA will cease to have effect, and any artistic work, whether two-dimensional or three-dimensional, which qualifies for copyright protection will enjoy the full term of the life of the creator plus 70 years (subject to any applicable exceptions).

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1 News article: <https://www.gov.uk/government/news/change-to-transitional-arrangements-for-the-repeal-of-section-52-of-the-cdpa>

2 Section 74 of the Enterprise and Regulatory Reform Act 2013

3 The text of the section may be accessed at: <http://www.legislation.gov.uk/ukpga/1988/48/section/52>

## Previous transitional provisions

8. Following a Call for Evidence and a public consultation which concluded in September 2014, the Government concluded in February 2015 that a transitional period of 5 years would have the lowest net economic impact on businesses which have previously relied on section 52. The Government's position was that existing stock should not be affected by the repeal, in order to help businesses transition to incorporate different products or different business models. No other changes were made to the law relating to this repeal.

## Review of transitional provisions

9. The Government received a legal challenge in May 2015 challenging the length of the transitional period before the repeal of section 52 takes effect as being excessive. The Government reviewed the position and accepted that the five year transition period adopted was too long. It therefore decided to withdraw the Commencement Order in order to consult again on elements of the transitional provisions for repealing section 52 CDPA. Although the Government recognises that this may cause disruption, it is a highly complex issue and it is important that the Government adopts the correct approach.
10. As part of this consultation, the Government is considering four issues:
  - transitional period before the repeal of section 52 takes effect;
  - depletion period for existing stock;
  - provision of copyright protection for works made before 1 June 1957; and
  - compulsory licensing of works where copyright is revived.
11. The first two issues were previously included in the [now repealed] transitional arrangements but the Government is of the view that the law requires a different approach to be taken. The second two issues are areas where the Government did not previously consider action necessary. More detail is set out below with questions for consultation on all these matters.
12. When responding to the consultation, you may choose which questions to answer. Any answers that you provide should be supported by evidence that is open and transparent in its approach and methodology. The Intellectual Property Office has published a Guide to Evidence for Policy<sup>4</sup> which lays out the Government's aspiration that evidence used to inform public policy is clear, verifiable and able to be peer-reviewed.

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<sup>4</sup> The guide is available at: <http://webarchive.nationalarchives.gov.uk/20140513133221/http://www.ipso.gov.uk/consult-2011-copyright-evidence.pdf>

### **Transitional period**

13. In 2011 the Court of Justice of the European Union (CJEU) in the Flos<sup>5</sup> case ruled that a transitional period to bring copyright for artistic designs to the full term of protection may be lawful, but must take account of the principle of proportionality. In the case of the UK, it is necessary to consider the position of businesses which have relied on the reduced term of protection under section 52, as well as the position of the individuals and businesses which will benefit from the term of protection being extended. The original transitional arrangements allowed for a five year period before the repeal came into effect.
14. A balance needs to be struck between the needs of rights holders and the period required for others to adjust, but it is also important to avoid delay in establishing the full term of copyright protection for affected works now established to be required by law. While a very short period to effect the repeal would be possible, such as one month, this does not allow any time for businesses relying on section 52 to become aware of and make the changes required in their business. Equally, a long period (such as the original five year period adopted) would not meet the required to avoid delay in establishing the full term of copyright protection. On this basis, the Government intends to provide for a transitional period of six months from the publication of this consultation, ending on 28 April 2016.
15. Once the six month period has elapsed, the repeal will come into effect and businesses and individuals will no longer be able to rely on section 52. This means that any copies of affected works which fall within the life of the creator or 70 years after their death will need a licence to be imported, manufactured, photographed, advertised or sold. This is subject to the provisions on existing stock – see paragraphs 18-22 below.
16. Beginning the transitional period from the date of consultation minimises the delay in bringing about the repeal of section 52, but allows time for businesses to understand the effect of the repeal on existing stock and future business practice. It also allows time for Government to produce guidance to help businesses in this area.

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<sup>5</sup> Flos Spa v Semeraro Casa e Famiglia Spa (Case C-168/09)

17. The Government had agreed to produce this guidance following the previous consultation. Although the Government is not in a position to list items which are protected by copyright in this area, as this may be a matter for the courts ultimately, the guidance will aim to provide information about factors to take into account in determining this point, as well as any copyright exceptions which might apply. In light of the challenge to the Government's arrangements, the guidance was paused and will be reworked following this consultation and responses.

- What will be the impact of a transitional period of six months, both costs and benefits?
- Should the six months run from the start date of this consultation or from a different date, and if different, why?
- Should a longer or shorter transitional period than six months be adopted, and if so, what are the costs and benefits?
- Are there any other issues which the guidance should cover which are not listed?

### **Depletion period for existing stock**

18. The Government had originally intended that any stock imported or produced up to the date of the repeal of section 52 would remain lawful if dealt with after that date. However, this means that rights holders would have been unable to control the copies made of their works through licences, which is the usual way of controlling creative works protected by copyright, and a common approach in the design sector.

19. If licensing is to work effectively after the date of repeal, existing stock needs to be covered. However, the 2011 CJEU decision in Flos recognised that it would be necessary to allow for a period to deplete stock. Depletion in this context means ceasing to sell or deal in the copies made or imported under section 52. The Government intends to allow for a depletion period of an additional six months following the date of the repeal, effectively ending on 28 October 2016, limited in its application only to goods produced or acquired under a contract entered into before the publication time and date of this consultation. That approach will protect the position of those who entered into such a contract prior to the Government's announcement of its proposal for a six month transitional period. The effect on contracts for copies of affected artistic works is that:

- goods produced or acquired under a contract entered into before the publication time and date of this consultation may be sold or dealt with until the depletion date;
- goods produced or acquired under a contract entered into after the publication time and date of this consultation but made or imported before the repeal takes effect may be sold or dealt with until the repeal takes effect, but do not benefit from the additional depletion period; and
- goods produced or acquired under contract entered into after the publication time and date of this consultation but made or imported after the repeal takes effect must be licensed or covered by a copyright exception.

20. The repeal of section 52 means that all stock which includes copies of affected works will either need to have a licence from the relevant rights holder, or will need to be depleted, either by the date on which the repeal comes into effect, or the depletion date, as set out above. The Government believes that this applies equally to two- and three-dimensional representations of the affected artistic works, as no distinction between these was made in Flos.
21. Businesses will need to consider which items need to be depleted, whether two- or three-dimensional, or whether a licence can be obtained. As stated in paragraph 17 above the guidance will not be able to give a definitive list on what is protected by copyright, but will aim to highlight issues for businesses making that assessment. The way in which a business depletes stock will depend on a number of circumstances, but may include a sale of outstanding goods or destruction of stock if the depletion period has expired.
22. After the repeal comes into effect, simple possession of items previously made under section 52 will not be an infringing act of copyright. However, there may be limitations on what other acts can lawfully be carried out. The Government believes that the sale of second hand items purchased under section 52 will be permissible, as long as it is not sold as part of a business. The Government does not intend to make any legislative change in this respect, but the matter will be covered in the guidance that the Government will produce.

- Do you agree that the Government is right not to distinguish between two- and three-dimensional copies?
- Do you agree that applying the depletion period only to those contracts entered into prior to the start time and date of this consultation appropriate, and what are the costs and benefits of this?
- Are there any other factors that the Government should consider for the depletion period?
- Do you agree that the period provided for depletion of stock is proportionate?
- Should a longer or shorter depletion period than six months be adopted, and if so, what are the costs and benefits?
- Do you agree that no legislative change should be made in respect of items previously purchased under section 52 CDPA? If not, what provision would you make and why?

### **Provision of copyright protection for works made before 1957**

23. The CDPA contains provisions in Paragraph 6 of Schedule 1<sup>6</sup> which deny copyright protection for artistic works made before 1 June 1957 where they could also have been a registered design and were used as a model or pattern to be multiplied by an industrial process. The Government did not alter this provision originally on the basis that copyright might unintentionally be created in works which should never have been entitled to copyright.

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6 The text of the paragraph may be accessed at: <http://www.legislation.gov.uk/ukpga/1988/48/schedule/1/paragraph/6>

24. However, in order to provide more clarity for right holders and ensure there is equality of copyright protection for artistic works capable of qualifying as designs and other artistic works, the Government intends to amend Paragraph 6, Schedule 1 CDPA to exclude articles protected by copyright in the EU at 1 July 1995. The paragraph would not be repealed in full, in order to prevent items obtaining copyright protection inadvertently.

- Do you agree that Paragraph 6 of Schedule 1 of the Copyright, Designs and Patents Act 1988 should be amended to exclude items protected by copyright in the EU at 1 July 1995?
- If Paragraph 6 of Schedule 1 of the Copyright, Designs and Patents Act 1988 is repealed or amended, are you aware of items where copyright would be conferred which never previously had copyright protection anywhere?

### **Compulsory licensing of works where copyright is revived**

25. Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995<sup>7</sup> imposes an obligation on the right holder of a revived copyright work to grant a licence. The Government did not alter this provision originally on the basis that it may have unintended or undesirable consequences.

26. The Government would like to ensure that right holders are able to control the making of copies of their work in line with its approach on the depletion period above, and intends to repeal Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995. This is on the basis that the regulation has limited scope in only applying to works where copyright is revived, and in practice would not cause significant disruption to business.

- Do you agree that Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995 should be repealed?
- Have you relied on or been subject to compulsory licensing in the past under Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995, and what were the costs or benefits?
- Would you expect to rely on or be subject to compulsory licensing in the future, and what would you expect the costs or benefits to be?

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<sup>7</sup> The text of the regulation may be accessed at: <http://www.legislation.gov.uk/ukxi/1995/3297/regulation/24/made>

## How to tell us your views

We welcome your views on these proposals. You may choose which questions to answer in the consultation, but answers should be supported by evidence (see paragraph 12 above for information). Please send your comments by 16:30 9 December 2015 to [section52cdpa@ipo.gov.uk](mailto:section52cdpa@ipo.gov.uk) or you can post responses to:

Section 52 consultation  
Copyright Directorate  
Intellectual Property Office  
4 Abbey Orchard Street  
London SW1P 2HT

## Confidentiality and data protection

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

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

## Consultation principles

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

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

Comments of complaints on the conduct of this consultation

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

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

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



|   |   |
|---|---|
| <b>Title:</b><br>Repeal of section 52 of the Copyright, Designs and Patents Act 1988: revised transitional arrangements and related legislative changes<br><br><b>IA No:</b> BISIPO009<br><br><b>Lead department or agency:</b><br>Intellectual Property Office (Department for Business, Innovation and Skills)<br><br><b>Other departments or agencies:</b> | <b>Impact Assessment (IA)</b>                 |
|   | <b>Date:</b> 15/09/2015                       |
|   | <b>Stage:</b> Consultation                    |
|   | <b>Source of intervention:</b> EU             |
|   | <b>Type of measure:</b> Secondary legislation |
|   | <b>Contact for enquiries:</b> Taffy Yiu       |
| <b>Summary: Intervention and Options</b>  | <b>RPC Opinion: Green</b>                     |

| Cost of Preferred (or more likely) Option |                            |  |                              |                      |
|---|----------------------------|--|------------------------------|----------------------|
| Total Net Present Value                   | Business Net Present Value | Net cost to business per year (EANCB on 2009 prices) | In scope of One-In, Two-Out? | Measure qualifies as |
| £0m                                       | £0m                        | £0m  | No                           | N/A                  |

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

Section 52 of the Copyright, Designs and Patents Act 1988 (“CDPA”) is due to be repealed by section 74 of the Enterprise and Regulatory Reform Act 2013 on a date to be specified by a commencement order.

The Government had introduced an order that would implement the repeal on 6 April 2020 and allow for copies made before the end of the transitional period to be unaffected by the change in law. However, this became subject to a claim for judicial review and the Government elected to revoke this order. The repeal therefore requires a new implementation date and revised transitional arrangements. In line with these new arrangements, other legislative changes to the CDPA are also proposed.

The effect of this will ensure that UK legislation is updated in line with EU law.

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

The Government wishes to implement the repeal of section 52 CDPA in a manner which is proportionate and in line with EU law. It seeks to change the law by removing an exception to copyright which reduces the term of protection for artistic works which are industrially manufactured.

The other proposed policy objectives will be to implement transitional arrangements and legislative changes as follows:

- set a date by which existing copies, either 2D or 3D, may no longer be distributed to the public without the permission of the rights holder,
- amend paragraph 6 of Schedule 1CDPA, and
- repeal Regulation 24 of the Duration of Copyright and Rights in Performance Regulations 1995/3297

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

- Option 0: Do nothing. This is not feasible because it would not amend UK law appropriately to protect right holders for artistic works which have been industrially manufactured.

- Option 1: Implement the repeal of section 52 CDPA 6 months from the date of consultation, introduce a date by which existing contracts would be excluded from the repeal, implement a cut-off date of October 2016 by which stock must be depleted, amend Paragraph 6 of Schedule 1 CDPA so that articles protected by copyright in the EU are excluded from its scope and repeal Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995/3297.

The Government's preferred option is Option 1. It implements the Government's policy to update UK legislation in line with EU law and provide rights holders of artistic works with the same term of copyright protection, whether or not the item was industrially manufactured.

**Will the policy be reviewed? It will be reviewed. If applicable, set review date: 04/2021**

|   |                     |                       |                       |                           |                     |
|---|---------------------|-----------------------|-----------------------|---------------------------|---------------------|
| Does implementation go beyond minimum EU requirements?  |                     |                       | No                    |                           |                     |
| Are any of these organisations in scope?<br>If Micros not exempted set out reason in Evidence Base. | <b>Micro</b><br>Yes | <b>&lt; 20</b><br>Yes | <b>Small</b><br>Yes   | <b>Medium</b><br>Yes      | <b>Large</b><br>Yes |
| What is the CO2 equivalent change in greenhouse gas emissions?<br>(Million tonnes CO2 equivalent)   |                     |                       | <b>Traded:</b><br>n/a | <b>Non-traded:</b><br>n/a |                     |

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

Signed by the responsible Minister: ..... Date: .....

# Summary: Analysis & Evidence

# Policy Option 1

Description:

FULL ECONOMIC ASSESSMENT

| Price Base<br>Year 2013 | PV Base<br>Year 2014 | Time Period<br>Years | Net Benefit (Present Value (PV)) (£m) |         |                  |
|-------------------------|----------------------|----------------------|---------------------------------------|---------|------------------|
|                         |                      |                      | Low: 0                                | High: 0 | Best Estimate: 0 |

| COSTS (£m)    | Total Transition<br>(Constant Price) Years | Average Annual<br>(excl. Transition)<br>(Constant Price) | Total Cost<br>(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 estimates which are indicative of the costs to UK businesses that trade or use copies of artistic works. Evidence will be sought at consultation stage to try and provide further information on the scale of potential costs.

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

UK businesses that manufacture, assemble, import or sell unlicensed copies of artistic works face transition costs (investment in new designs, factory retooling, marketing, agreeing licences with rights holders, expenditure on research and legal advice, costs from breaking contracts early). There will be costs to some creators and users of two-dimensional images affected by the proposed change as they incur costs of licensing and adapt business plans. There may be welfare costs to consumers arising from reduced product choice.

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

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

It has not been possible to monetise the costs due to lack of available data. Further evidence will be sought at consultation stage to attempt to provide further information on the scale of potential benefits.

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

Copyright owners and exclusive licensees of designs benefit from an extended term of protection. These groups may benefit from reduced competition from unlicensed copies; if a licensing system develops, rights holders will receive royalties when copying is permitted. A long-term indirect benefit to the design industry could arise if consumers seek other designs as unlicensed copies disappear from the market.

|  |                          |     |
|--|--------------------------|-----|
| <b>Key assumptions/sensitivities/risks</b> | <b>Discount rate (%)</b> | 3.5 |
|--|--------------------------|-----|

This Impact Assessment has been reliant on unverified stakeholder estimates gathered through a two-stage consultation process. 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 or for how long a licensing system will develop is uncertain. Sources of information have deliberately not been identified when submitted by a business as it is usually commercially sensitive information.

## BUSINESS ASSESSMENT (Option 2)

|  |                      |                 |                          |                             |
|--|----------------------|-----------------|--------------------------|-----------------------------|
| <b>Direct impact on business (Equivalent Annual) £m:</b> |                      |                 | <b>In scope of OITO?</b> | <b>Measure qualifies as</b> |
| <b>Costs:</b> £0m  | <b>Benefits:</b> £0m | <b>Net:</b> £0m | No                       | N/A                         |

# Evidence Base (for summary sheets)

## Problem under consideration

Section 52 of the Copyright, Designs and Patents Act 1988 (“section 52 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 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 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 consulted extensively on the matter of when to implement the repeal. In March 2015 the Government introduced a Commencement Order<sup>1</sup> specifying 6 April 2020 as the date on which the repeal would come into force, with a condition that the repeal would not apply to copies made before the end of the transition period.

In May 2015 the Government received a legal challenge on this matter and decided to withdraw the Commencement Order in order to consult again on elements of the transitional provisions for repealing section 52. The Government will consult on the transition period before the repeal of section 52 takes effect, a depletion period for existing copies to be sold off, provision for copyright protection for some works made before 1 June 1957 and removing compulsory licensing for works with revived copyright.

## Rationale for intervention

The Government will repeal section 52 to clarify and update UK legislation in line with EU law. A commencement date must be set for this measure to have effect. The other proposed transitional arrangements and related legislative changes are intended to clarify UK legislation.

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<sup>1</sup> Enterprise and Regulatory Reform Act 2013 (Commencement No.8 and Saving Provisions) Order 2015

# Policy Objective

The overall objective is to clarify UK law in line with EU law.

The intent has always been to ensure that copyright protection is given to those artistic designs that are industrially manufactured, but to allow affected businesses the time to adjust. The Government has decided to rebalance the transition period. In doing so, it is aware that businesses that traded in replicas or 2D copies (i.e. photos or books) would likely be negatively affected on the basis that these businesses had called for a minimum transition period of 5 years so as to be able to adapt to the change in law and spread the costs of transition over this time. However, this is necessary to avoid delay in establishing the full term of copyright protection for affected works.

The Government also considers that a date would need to be set by which copies made under section 52 could no longer be distributed or communicated to the public. The introduction of such a cut-off date for stock depletion is necessary to ensure that copyright protection for designs is not prevented in “future consequences of situations which arose under the earlier rules”<sup>2</sup>.

The Government also wishes to make two consequential legislative changes in this area to ensure that rights holders are able to control copies of affected works. First, Paragraph 6 of Schedule 1 CDPA may prevent the full term of copyright protection for some items made before 1 June 1957, and Government considers that it should make an amendment to clarify this provision in line with EU law. Second, the Government considered that Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995 (SI 1995/3297, “Regulation 24”) may need to be repealed, as it has the effect of compelling rights holders to grant a licence for other businesses to make copies of their work on payment of a reasonable royalty, thereby preventing copyright protection for artistic works.

## 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). This is because 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 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’.<sup>3</sup>

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

Whether or not there is copyright, many businesses that have so far relied on section 52 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 business models.

## Options

Option 0: Do nothing (section 52 CDPA remains in force and no other legislative changes are made).

Option 1: Implement the repeal of section 52 within 6 months of consultation, introduce a date of October 2016 by which existing stock must be depleted, amend Paragraph 6, Schedule 1 CDPA and repeal Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995.

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<sup>2</sup> CJEU Case C-168/09 *Flos Spa v Semeraro Casa e Famiglia SpA*

<sup>3</sup> See regulation 16 of the Duration of Copyright and Rights in Performances Regulations 1995.

## Option 0: Do nothing

The costs and benefits of Option 0 are counted as zero.

### Continued competition between licensed manufacturers and unlicensed sellers

Licensed manufacturers and rights holders, primarily based outside the UK but within the European Economic Area (EEA), have provided information claiming losses because the UK is currently used as a staging post for unlicensed copies to enter the European market.<sup>4</sup>

One rights holder says that while damages as loss of turnover are impossible to prove with certainty, its figure for harm in Europe is based on imports of unlicensed copies of furniture as intercepted by Swiss customs from the UK to Switzerland. It says that from February 2013 to February 2014, 139 of 142 pieces seized by Swiss customs were related to unlicensed furniture copies from the UK, estimating a potential gain of €4.4million per year for Europe from the UK repeal of section 52.<sup>5</sup> 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).

The Government views the estimate as at the high end of possible gains from the repeal. First, it is not clear why the products were seized (e.g. copyright, trademark infringement or other concerns). Second, it assumes that the products would have qualified for copyright protection and that the seized items would have been infringements giving rise to damages claims. Third, the Government does not believe that seizure estimates can be scaled up by a factor of 100 because Swiss customs only inspect 1% of all shipments<sup>6</sup>: it is likely that they inspect shipments that are judged likely to contain unlicensed copies.

Furthermore, while the seized items were almost exclusively from the UK, other EU countries lawfully allow the copying of industrially manufactured artistic works. The Government has not compiled an exhaustive list of which EU member states have similar provisions to the one contained in section 52 as such an analysis would be disproportionately costly. Meaningful comparisons between the legal regimes of different EU member states are difficult: national courts can determine the extent to which a furniture item (or any other item) qualifies for copyright protection, although some European case law is exerting a harmonising influence, as noted in the 2012 Impact Assessment “Copyright protection for designs”.

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.<sup>7</sup> The information received on costs to copyrights holders under this “Do nothing” scenario is from rights holders outside the UK.

Notwithstanding the above, 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.

### No change to UK laws

Doing nothing would mean that section 52 is not repealed. Rights holders would not be able to benefit from the full term of copyright protection for their artistic works.

The Government wishes to ensure that all types of artistic works, including those that have been industrially manufactured, are treated equally under copyright law and has committed to bringing about the repeal of section 52 in order to clarify UK law, following the clarification in the judgment of the Flos case. By doing nothing, action could be taken against the Government for lack of compatible law. Furthermore, by not amending Paragraph 6 of Schedule 1 of the CDPA and repealing Regulation 24, the Government considers that UK law may not be appropriately amended to ensure that rights holders can control copying of their affected works.

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

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4 The majority of EU member states provide for the full term of copyright protection for industrially-manufactured artistic works.

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 As set out in the “Better Regulation Framework Manual”, published by the Department for Business, Innovation and Skills, July 2013.

## **Option 1: Implement the repeal of section 52 with revised transitional arrangements and related legislative changes**

Under this option, the Government would:

- a. implement the repeal of section 52 within 6 months of launching the consultation,
- b. specify a date by which lawfully-made copies may no longer be distributed or communicated to the public without permission from the rights owner,
- c. amend Paragraph 6 CDPA so that it excludes from the scope of this provision works protected under EU law, and
- d. repeal Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995.

### **IMPLEMENT THE REPEAL OF SECTION 52 CDPA WITHIN 6 MONTHS OF THE CONSULTATION**

A number of businesses that hold design rights, many of them based outside the UK, have called for a swift implementation of the repeal of section 52. The Government proposes to implement the repeal within 6 months of its consultation on the proposed transitional arrangements.

This option allows rights holders to assert copyright protection of their artistic works after the 6 month transition period has elapsed, while limiting the period in which businesses that currently manufacture, import or sell replicas of artistic works would be able to adjust their business model and product range. This period assumes that affected businesses have already started to change their business model given the notification of the impending change of law via the Enterprise and Regulatory Reform Act 2013 and the now revoked Enterprise and Regulatory Reform Act 2013 (Commencement No.8 and Saving Provisions) Order 2015.

### **BENEFITS**

#### Designers and Rights holders of 3D artistic works

The main beneficiaries from the change in law are likely to be copyright owners (or those which have had copyright assigned to them) whose artistic designs that have fallen out of copyright are brought back into copyright protection. Specifically, industrially-manufactured artistic works from 6 months of the consultation 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 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. It would also allow rights holders to receive licence royalties when they have allowed others to make copies of their work on their behalf. 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.

In the 2013 call for evidence and the 2014 consultation on this matter the Government asked for evidence of the costs and benefits for UK copyright owners. Designers and rights holders from the UK did not provide substantive evidence to validate the size of the potential benefits lost every year through the delay of the repeal of section 52 and made some assumptions that are difficult to support. 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 replicas 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 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. No further evidence was provided and the Government is therefore unable to assess this benefit.

The Government will use the forthcoming consultation to seek evidence on the costs and benefits in the UK on rights holders and designers on its proposed transition period.

#### Potential reduction in competition between sales of licensed copies and unlicensed copies in the UK

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

replicas 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 replicas. 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.

The Government is sceptical of claims that 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 copies and replicas of furniture are unlikely to be substitutes given product differentiation (e.g. unlicensed copies of ‘designer’ furniture typically sell at around 15% of the price of the licensed copies). 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.<sup>8</sup>

Rights holders and designers argue that consumers become accustomed to the prices of the replicas (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). Their rationale for a shorter transition period would therefore be to transition to a market which is not influenced by replicas that potentially shapes consumer price expectations.

It has not been possible to 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.

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

Rights holders have said that replicas in the market lead to consumer confusion. They argue that consumers are sometimes unable to differentiate between a licensed copy and a replica. There is anecdotal evidence that purchasers of replicas 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 replicas 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.

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 replicas clearly label their products as “reproductions” or are “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 replicas 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 replicas in the market from the UK should cease, and selling replicas of artistic designs will no longer be lawful.

The benefit of a lack of availability of unlicensed copies of artistic works is that they may drive the development of new works and consumers to consider original works of 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 replica could well be minded to seek alternative designs. This market environment could therefore be beneficial for some designers.

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 may be protected under 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.

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<sup>8</sup> Taken from Impact Assessment written at the time the ERRA was going through Parliament: Copyright protection for designs, 15 May 2012, Intellectual Property Office.

## COSTS

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

- a. Costs to UK businesses that trade in replicas 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 trade in replicas

Businesses that trade in copies have told the Government that they believe that there is a risk that a majority of their product range of replicas could be affected by the change in law. These businesses have assumed there is a greater likelihood of legal action when the change in law takes place and have told the Government they see a need to change their business and product ranges to reduce the risk of being pursued for copyright infringement.

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 because of the uncertainty surrounding what is an artistic work in this area and no reliable legal precedent. The letters could potentially lead to some businesses exiting the sector or closing. It may well be possible that these businesses could be reacting to a risk which may not in fact materialise, that is, replacing or disposing products which would not have been found to infringe copyright, had the matter been tested in court.

Consequently, some UK businesses that trade in replicas may elect to adapt their business models and/or product ranges to reduce risk of copyright infringement.

### *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.

### *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). These estimates suggest that introducing one new product into the market could cost in the range of £20,000 to £60,000 (not including employee costs).<sup>9</sup> There are 3 suggested routes to replace existing product lines:

1. Obtaining new suppliers: 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. They suggest that 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.

The trade association presents other transition costs for marketing the new products of up to £40,000 for photography, advertising and trade fairs. One business has told us that these costs are crucial so that they can compete with existing players in the market that have a strong market presence in the UK. However, the trade association also suggests 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 replicas. While the investment to design new products spurs innovation, the process may be costly and may well be beyond the financial capability of some businesses, especially small or micro businesses.

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<sup>9</sup> This cost range has been sourced from a number of businesses that trade in replicas. While each business has different costs, the figures provide a reasonable average estimate.

The overall average transitional cost per business with a 6 month transition period was reported as £206,875.<sup>10</sup> These costs include the cost of investment in new stock plus marketing and other costs associated with trialling new designs.

The trade association that represents replica businesses previously provided figures to indicate the costs of transition<sup>11</sup>. The sample size is limited, albeit that this may be representative of this particular sector. The Government also notes that the figures are self-reported (as is the nature with most qualitative evidence of this kind), but considers that the information presented as a helpful illustration of costs.

#### Time required to introduce new designs to the market (i.e. adaptation of business model and product range)

UK businesses which traded in replicas strongly argued that they should be provided with sufficient time to adapt their business models and phase out the part of the business which trades in replicas. They told the Government that an adequate transition time would allow them time to invest in new products and generate new growth. If sufficient time was not given and the transition period was a year or less, they might need to downsize, cut jobs or close their businesses altogether because of the difficulties associated with acquiring 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, they reported that 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 and the depletion of stock.

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

- Years 1-2: Sourcing (or designing, developing and prototyping) products, and testing.
- Years 3-4: Developing and marketing products so they are profitable (many products are discontinued at this point). The furniture market is competitive and 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 believed these to be 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.

It should be noted, however, that the legal uncertainty as to what is protected by copyright could also have a “chilling effect” on planned investment in new products due to litigation costs and wasted effort.

#### Costs from existing contracts

A number of businesses have previously told the Government that they have contracts and agreements (including premises mortgages, equipment leases, logistics contracts and vehicle leases) which could be revoked if the law changed (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 duration, 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 terminated, 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 figures, which was verified by a breakdown of estimated costs provided by individual respondents in that trade association. The average cost per firm of having to cancel existing contracts over a 6 month period was reported as £96,617<sup>12</sup>.

Contracts that extend beyond the 6 month transition period could make it more difficult and costly for these businesses to attempt to adapt their businesses or even wind up given the costs of breaking contracts at the same time as having to deplete stock and source new product lines.

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<sup>10</sup> This evidence from the trade association was reviewed by economic consultants contracted by it.

<sup>11</sup> 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.

<sup>12</sup> Evidence from consultation response of the trade association that represents businesses that manufacture, import and sell unlicensed copies.

## 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. As with 3D copies, once the change is implemented there is uncertainty about whether some images of artistic works would be infringing copyright. As with businesses that trade in replicas, 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, although the Government believes that they would prioritise the images which they actively license, rather than checking the whole archive. Picture agencies report that their collections range in size from 30,000 to over 100 million images. 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.

### *Publishing*

Publishers and institutions (e.g. some museums) that derive some of their income from publishing may also 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, the Government was told that a title priced at under £10 with 200 images incurs extra licensing fees of £72 per image<sup>13</sup> 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 has not been possible to establish how many works would be affected or how the licensing costs may vary between different publishers and publications. There are also uncertainties for publishers who 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 because of the uncertainty of which works are affected.

Publishers have argued that they will need time to make themselves compliant with the new law. Evidence submitted by publishers during the call for evidence and consultation show development plans that generally follow a 5 year projection, of which around 2-3 years are spent on preparation and printing prior to publication. They argue that 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 previously 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 would limit the scope of what may be used from its own collections to make revenue-generating 2D products such as postcards. They argue that the change could potentially reduce by up to 50% the profit generated through the use of such designs. They have therefore estimated the financial impact based on current activity is a reduction in profit of around £850,000 per year (no breakdown was provided). Development of new products could also be affected. They would also have to pay licensing fees. For example, one museum had to reject the use of a pattern for 5 products due to the minimum licensing fee of £5,400 from a collecting society.

This museum would also be affected 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

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<sup>13</sup> DACS tariff in 2014.

additional resources and funding would be required to fund the licensing costs. 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.

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 and suggested that a 6 month transition period might lead to museums potentially abandoning or delaying planned products, leading to further (but unquantified) costs for them and their publishing arms.

Despite previous consultation 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 may be affected in a similar way. The Government hopes to gather further evidence from other museums and galleries in the UK in the forthcoming consultation.

#### *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.

The Government notes the 2014 case in the Paris Court of Appeals in *Fondation Le Corbusier v Getty Images* which found that Getty Images had infringed copyright through a number of photographs of Le Corbusier furniture pieces. This case has reported to have had the effect of prompting image agencies to reject images with design pieces from their collections. This implies there is an incentive to prevent copies of 2D images being made and/or there is a value in introducing licensing arrangements for 2D copies. The Government considers the reaction of image agencies is understandable so as to avoid risk of copyright infringement. Image agencies and photographers will therefore need to devote resources to ensure that their images held or licensed do not infringe copyright or fall under an appropriate copyright exception.

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 notes that photographers and image libraries already bear costs for time and administration in the normal course of their work 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.

This estimated time to clear photos could be reduced due to a number of factors. First, designers who create artistic designs are usually easily found. For example, designer furniture items are often marketed 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, 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 picture agencies hold collections ranging in size of 30,000 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 full effect the supply of unlicensed copies in the market should cease.

This represents a loss of consumer choice (after existing stocks have been depleted they will no longer be able to purchase newly imported or manufactured unlicensed copies) and a cessation in supply of replicas could mean that many consumers are no longer able or willing to purchase a design they want in their price range. This would mean a welfare loss for some consumers relative to the “Do nothing” counterfactual (Option 0) as they can no longer purchase their preferred choice. A deadweight loss to society may also be created as businesses that trade in replicas may exit the sector as consumers are no longer able to purchase designs at a price they are willing and able to pay.

The lack of availability of replicas may drive designers to produce new designs (or could drive rights holders to focus more on sales of design classics with competition from replicas removed). It is unknown what level of benefit consumers will derive from these designs relative to the replicas 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 replicas that would disappear from the market. It is therefore not possible to quantify costs to consumers from implementing Option 1.

#### **IMPLEMENT A DEPLETION DATE OF OCTOBER 2016 BY WHICH LAWFULLY MADE COPIES MUST BE DEPLETED AND MAY NO LONGER BE DISTRIBUTED OR COMMUNICATED TO THE PUBLIC WITHOUT PERMISSION FROM THE RIGHTS HOLDER**

The Government proposes that businesses trading in replicas sell off existing stock they have or have contracted for prior to the consultation date (the “depletion period”).

The CJEU in Flos<sup>14</sup> indicated that member states could put in place transitional arrangements in order to allow traders to deplete their stock. The Government considers that a date should be specified in the new order, by which time stock has to be depleted (this should cover stock from the orders placed prior to the date of the new consultation, even if manufactured or imported after that date).

There are 4 issues considered in this section:

1. Date and time from which contracts will not be able to benefit from the depletion period.
2. What needs to be depleted - in this context depletion is defined as the cessation of sales or “dealing” of any unlicensed copies from a specific date.
3. Date by which stock must be depleted.
4. Retrospectivity: whether existing copies will remain legal, and how this affects the secondary market.

#### *Date from which contracts will not be able to benefit from the depletion period*

The Government proposes that existing contracts entered into prior to the time of publication of the consultation date will be subject to a depletion period (effectively a longer transitional period) before the repeal of section 52 bites and it becomes unlawful to sell the goods that are the subject of those contracts.

Specifically this means that:

- a. goods produced or acquired under a contract entered into before the publication time and date of the consultation may be sold or dealt with until the depletion date;
- b. goods produced or acquired under a contract entered into after the publication time and date of the consultation but made or imported **before** the repeal takes effect may be sold or dealt with until the repeal takes effect, but do not benefit from the additional depletion period; and

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<sup>14</sup> Reference at note 2 above.

- c. goods produced or acquired under contract entered into after the publication time and date of the consultation but made or imported **after** the repeal takes effect must be licensed or covered by a copyright exception.

The Government's current view is that the time of publication of the consultation date is a suitable cut-off point for goods to qualify for the depletion period, as sellers entering into contracts after that date could have made themselves aware of the consultation proposals, and would consequently be entering into the contract knowing that they had only a limited period in which to sell the goods. The Government considers that interested parties will be expecting the Government's revised transitional arrangements and should already be considering alternative arrangements.

The effect of this approach is that if a business had ordered 5 replicas from another country before the time of publication of the consultation, those replicas could be lawfully imported into the UK, and sold up until the depletion date. If a business had ordered 5 replicas after the time of publication of the consultation from outside the UK, those would have to be imported and sold before the repeal date. This is on the basis of section 27 CDPA: people could purchase replicas as long as they were made or imported before the repeal date. After the repeal date, anything made or imported would be an infringing copy.

#### *What needs to be depleted*

The Government has previously stated that there would be no carve-outs for 2D images. This is because the intent of the repeal is to provide equity in treatment of all types of copyright works and for creators of industrially-manufactured artistic works to benefit from the full term of copyright protection. While the Flos judgment seems to be targeted at 3D copies, there is no comment on whether 2D copies are also required to be treated in a similar fashion. The Government's view is that there should be no distinction made between a 3D or 2D copy, as the rights holder will be able to set up a licensing scheme and receive payment regardless of whether it is 3D or 2D copies that are made.

The fact that the Le Corbusier Foundation sued Getty Images in France for copyright infringement in photographs implies there is a value in preventing copies of 2D images being made, or that there is a value in licensing arrangements for 2D copies. Some rights holders have said previously that they would not pursue copyright infringement by 2D copies in magazines and books, but this does not take into account the views of other rights holders. Therefore, businesses making and utilising 2D copies will still need to ascertain the position of rights holders before making copies. Obviously copyright exceptions may apply in the case of 2D copies (such as the incidental inclusion of a specific artistic work in a photograph, but this would be subject to a case by case risk assessment).

The issue of most concern to affected businesses is making an assessment of what needs to be depleted. 3D replica businesses will need to make an assessment about which of their replicas would infringe copyright following the repeal. Those that trade in 2D images will themselves need to make an assessment of whether their 2D images are allowed under any copyright exceptions such as incidental use, otherwise any use made following the repeal (or the depletion date if applicable) would infringe copyright.

The extent to which the original articles are protected by copyright is unclear, and Government is not able to provide definitive advice on this. Given a relatively short time period to dispose of stock, some businesses, facing rights holders, may simply choose to dispose of stock that are copies of famous designs, or simply close the business altogether. It is possible that businesses could be reacting to a risk which may not in fact materialise, that is, disposing of stock which would not have been found to infringe copyright, had the matter been tested in court.

The Government's considered view therefore is for all types of copies to be treated the same. Businesses dealing in 3D and 2D copies will need to make an assessment of their existing copies and to decide how to react to the change in law (for example, by depleting stock or seeking appropriate licences).

#### *Date by which stock must be depleted*

The Government proposes that stocks of 3D and 2D copies must be depleted by a certain date - the "depletion date" – following which copies issued to the public (such as by selling a replica or publishing a photo online) may be infringing copyright.

The Flos judgment suggests that it is permissible to allow for a period of time for businesses to phase out part of their business. The Flos judgment says at paragraph 59 that "the legislative measure should ensure that the period of use of the designs by those third parties is limited to what is necessary for them to phase out the part of their business that is based on earlier use of those designs or to clear their stock".

### 3D copies

As outlined above in relation to the transition period, there are a number of arguments in favour of providing for as long a period of time as possible to deplete stocks. But any period of time must be strictly limited to what would be considered lawful in light of EU and public law.

The Government notes it is possible for stock to be cleared quickly through a fire sale, selling stock at a loss. This would come at a very high price for those businesses given that much stock will have been made or imported lawfully and in good faith under the previous Commencement Order. The Government has previously received information on economic considerations that would point to a longer depletion period as follows<sup>15</sup>:

- i. Businesses in affected sectors will need to sell off stocks and therefore will need to compete with each other to attract sales by reducing prices. While this is beneficial for consumers, it can cause significant losses for replica businesses. The losses may be compounded if the stocks had been imported - businesses would have paid VAT and import duties for items imported lawfully and would have been assuming that they could achieve a certain profit margin.
- ii. Having a short cut-off date to deplete stock by a specific date could “stack” losses on losses if businesses in the sector find it necessary to sell off stock at reduced prices, while trying to replace replicas in their product range with other products which may not yet be commercially viable (there is an estimated 50% failure rate for new designs introduced to the market).
- iii. If businesses are unable to sell off stock with an appropriate amount of time, they may no longer be able to operate as a “going concern” and therefore be unable to pay suppliers, retain suppliers or even have the necessary cashflow to pay redundancy costs.
- iv. The furniture market in particular is not a fast-moving consumer goods market (like fruit or vegetables) and replica furniture businesses have told us that selling everything within a short time frame would be extremely difficult. This problem is compounded when stock of less popular goods are held on the basis that they may be purchased in the future. If these stocks can’t be sold they would have to be destroyed. This would represent a “deadweight loss” to society as they will essentially be wasted resources.
- v. Providing a longer period of time so that affected businesses can assess their stocks and sell or dispose of replicas they believe are likely to infringe copyright may potentially reduce copyright infringement once the repeal and depletion dates come into force.
- vi. Given furniture is not a fast-moving consumer good, that costs of storage are high, the risk of being unable to sell products, and the fact that the setting of the depletion date only provides for items made or contracted before the consultation date, the Government considers that the actual numbers of replicas that could be sold after the repeal date is very small.
- vii. A longer depletion period will allow consumers to sell their second-hand replicas if they wished in the time provided.

There is thus an argument that the repeal and implementation dates should be staggered in order to allow the maximum time permissible under EU law for the selling off of existing stock.

### 2D copies

The Government is of the view that sellers of digital and analogue photos will be in the same position as sellers of 3D copies. They will have until the end of the depletion period to sell their photographs or obtain the necessary licences, if their copies were made or contracted for prior to the publication of the consultation document. Following this, while mere possession of the 2D copies would not constitute an act of infringement, giving them away may constitute the infringing act of issuing copies to the public. Photos of artistic works taken after the repeal date would constitute infringing copies and the sale of those copies would be an infringing act. If acting in the course of a business, even the mere possession of an infringing copy of a work could amount to an infringement.

Similarly, sales of copies of books containing infringing copies would constitute the issue of copies to the public after the depletion period (assuming the copies were made or contracted for prior to the consultation date) and would need to be depleted before that point.

The critical point is that photographers and image agencies should have time to assess their image collections and to ascertain whether exceptions, licensing or depletion is the most appropriate course of action for their business. In the previous consultation, the Government was told that time was required to go through the hundreds of thousands of images (even the smallest image agency could have up to 30,000 images to review). Image agencies called for a

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<sup>15</sup> Evidence from consultation response of the trade association that represents businesses that manufacture, import and sell unlicensed copies.

long transition period so they had adequate time to assess their image collections and said that 6 months was not a realistic time period to review archives.

Publishers need time to plan their development schedules for licensing of re-prints and assessing books that are in current development plans, and bookstores need time to assess their stocks and sell or dispose of books which contains images that would infringe copyright when the repeal came into force. This could be helpful to bookstores given books are not a fast-moving consumer good.

The same legal risk of allowing for a longer depletion period for 2D copies applies – the later the depletion date, the more likely it would be considered to be delaying copyright protection for a substantial period.

#### Government proposal

Given the economic considerations, the Government’s proposed depletion date is October 2016 as it provides a sufficient period of time in which businesses can sell off existing stock before it becomes unlawful to do so. The Government has suggested October 2016 as it is six months after the repeal is implemented.

The Government has rejected March 2016 for depletion of stock made before publication of the consultation as it would likely cause disproportionately negative consequences for affected businesses and therefore undermine the correct balance between rights holders.

The staggered dates for treatment of existing copies are proposed as follows:

|              |  |  |
|--------------|--|--|
| October 2015 | Start of consultation (0 months)                 | <ul style="list-style-type: none"> <li>Copies made before the consultation date are able to be dealt with until October 2016 (depletion date)</li> <li>New stock ordered after the date of consultation will become unlawful following the repeal date</li> </ul>  |
| March 2016   | Repeal implemented (6 months)                    | <ul style="list-style-type: none"> <li>Repeal comes into force</li> <li>No new copies of artistic works may be made or imported into the UK (unless they were contracted before the publication of the consultation document)</li> <li>Goods made between the consultation date and the repeal date must be sold by this date</li> </ul> |
| October 2016 | Date by which stock must be depleted (12 months) | <ul style="list-style-type: none"> <li>All stock must be depleted</li> <li>No further dealing with any replicas or unauthorised copies</li> </ul>  |

The Government will use the consultation to seek evidence on the costs and benefits of its proposed depletion date of October 2016.

#### *Retrospectivity*

Replica furniture businesses, photographers and publishers have argued that copies, either 2D or 3D, should not be made illegal overnight.

After the depletion date, mere possession of replica furniture or books containing images of industrially-manufactured artistic works will not be an infringing act (other than possibly in certain circumstances in the course of a business, where the copies were made after the repeal date and so constitute infringing copies). People who wish to gift or show these in a private capacity are unlikely to be infringing copyright. Selling them on an online website is likely to be unlawful as it would be considered “issuing them to the public”.

The position in relation to second hand copies will depend on the facts of the case, for example whether it was sold second hand as part of a business, or whether it is the first sale of the item within the EEA.

The Government proposes to allow individuals to sell second hand copies on the basis that they purchased the goods with the purpose of using it, and that selling that copy is not done in the course of a business. This will be covered in guidance but the Government will assess the impact by consulting on whether this is the correct procedure or whether it should be in legislation.

## **LEGISLATIVE CHANGE TO PROVIDE FOR COPYRIGHT PROTECTION FOR WORKS MADE BEFORE 1957**

Paragraph 6 of Schedule 1 CDPA has the effect of denying copyright protection for artistic works made before 1 June 1957 which were used as a model or pattern to be multiplied in an industrial process.

There have been claims that this provision was not compatible with EU law. The Government has been of the view that the *Marleasing* principle (where national courts must interpret national law in light of EU laws) applies, and therefore the UK met its EU legal obligations. In February 2015 the Government made a decision that no further change to this provision was necessary, and that relying on the *Marleasing* principle was likely to be sufficient in law.

This is because the Government's current interpretation is that some artistic designs created before 1957 **may** attract copyright protection by virtue of regulation 16 of the Duration of Copyright and Rights in Performances Regulations 1995 which implements 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 would be protected by the EU.

However, the Government considers that it may be appropriate to amend the CDPA in the interests of legal certainty. One proposed mechanism for achieving this is to amend Schedule 1 which states that none of this schedule has effect in respect of any works which had copyright in 1995 in any member state. This therefore would only protect those works which are likely to be protected under Term Directive Rules. This would have the benefit of providing greater clarity for users who may be unaware of the operation of the *Marleasing* principle.

The Government has rejected an outright repeal of Paragraph 6 on the basis that it would guarantee copyright in some articles that had never had copyright in the first place – an unintended consequence the Government wishes to avoid. The Government thought this would be undesirable on the basis that the change could be disruptive to markets and hinder innovation (the perverse incentive of rights holders diverting attention to pre-1957 works, rather than engaging in the introduction of new designs). A full repeal of this provision is also unlikely to be limited to provide clarity since the main source of uncertainty is whether or not a particular item is an artistic work.

There may be greater certainty (but still no outright certainty) that works would receive copyright protection in the UK if they met the following criteria:

- a. They were made before 1957 and were capable of being registered as a design, and
- b. They are protected by copyright in any other EU member state on 1 July 1995.

However, because there is uncertainty whether or not a particular item is an artistic work, rights holders of these works made before 1957 may not have any real additional certainty of copyright protection in the UK. It could be surmised that there is no substantive effect if Paragraph 6 was amended. This is because the current effect of the *Marleasing* principle on Paragraph 6 means that works protected in any other EU country on 1 July 1995 would already be protected. Amending Paragraph 6 merely codifies this effect in UK legislation.

### *Costs and benefits*

It is anticipated that there would be some benefits to rights holders, if they were able to demonstrate that these particular works were in copyright, by being able to prevent copying of their works, or to benefit from royalties if they were to license the making of copies. However, the Government's view is that it is very difficult to determine whether there are such works affected, in the absence of evidence from UK court judgments. There is an argument that the subsistence of copyright in designer furniture in various EU member states, including the UK, is not a given in the same way that it would be say, for a novel or film.

The same uncertainty of what is protected by copyright applies, and therefore replica furniture businesses would likely react to a risk of copyright infringement by ceasing production or importation of copies for sale.

The Government will use the consultation to seek evidence on the cost and benefits of amending Paragraph 6.

## **LEGISLATE TO REMOVE COMPULSORY LICENSING OF WORKS WHERE COPYRIGHT IS REVIVED**

Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995 imposes obligations on the owner of a revived copyright work to grant a licence, even if the owner would prefer not to do so. The effect of this provision is essentially to compel a rights holder to provide a licence.

There have been claims that this Regulation is incompatible with EU law, and should be repealed in its entirety. The Government was of the view that amendments to this provision could have unintended and undesirable consequences unless further consequential amendments were made, and therefore announced its decision in February 2015 to make no change to this provision. The Government did not see it as desirable to remove an existing provision from UK law that could provide licences for works which had copyright revived. The Government believed that the provision could allow some third parties to make use of licences and could benefit some businesses that currently make copies of industrially-manufactured artistic works.

However, the Government is reconsidering the issue and notes that the effect of retaining Regulation 24 may prevent a creator or rights holder prohibiting reproduction of a work. The Government proposes to repeal Regulation 24 to clarify UK law to ensure that rights holders can control affected works from the repeal date or depletion date, whichever is applicable. This allows rights holders to licence copies of artistic works in the same way as non-industrially manufactured works.

The Government understands that in order for Regulation 24 to be applicable, there must be 'revived copyright' in a work (i.e. something brought back into copyright due to the 1995 Regulations, where copyright had previously expired), and "acts restricted by copyright". For many categories of works, there either would be no revived copyright, or where there is, there would be no acts restricted by copyright because of the operation of section 52.

The main categories likely to be affected by the revocation of Regulation 24 would be old photographs and possibly old sound recording and films (taken or made prior to 1945). There could also be implications for artistic works capable of qualifying as designs, which were made before 1 June 1957, but had not been marketed or were not marketed until 1990 or later. However, the extent to which these issues actually arise in practice are unclear. The Government will use the consultation to assess the costs and benefits of revoking Regulation 24 and to determine whether transitional measures are required in respect of the repeal of Regulation 24.

The core issue at stake is the intersection between Regulation 24 and the impact it has on artistic works capable of qualifying as designs (with section 52 in place). The Government understands the proposed impact to be the following:

1. Any works created and exploited after 1 June 1957 which are still in their 25 year copyright term would not qualify as "copyright revived" so Regulation 24 would have no effect.
2. For works created before 1 June 1957, if the Marleasing principle applies and copyright is revived in some works, but there would be no acts restricted by copyright if section 52 is in place.
3. For works created before 1 June 1957 if the Marleasing principle does not apply, Paragraph 6 would mean that no copyright subsists in pre-1957 works and therefore no one could have relied on Regulation 24.
4. For pre-1957 works that were not exploited until much later (first marketed in 1990 or later), assuming the Marleasing principle applies copyright would have been revived under the 1995 Regulations but in the case of works marketed in 1990 or later they are still within the scope of section 52 protection. Therefore, there are acts restricted by copyright and compulsory licensing could be relevant. However, while these works qualify for revived copyright, the copyright would have expired at the end of 2014 at the latest.
5. For pre-1957 works that are yet to be exploited, section 52 can't apply and would be treated like any other artistic work and would still be within copyright. Regulation 24 could therefore still be relevant.

The Government understands that its proposed repeal of Regulation 24 will have an impact on other categories of copyright works may be an effect on some pre-1945 sound recordings, photographs and films. However, the Government believes that Regulation 24 has ceased to be relevant for literary, dramatic, musical and artistic works (excluding artistic works capable of qualifying as designs).

The Government will use the consultation to seek evidence on the impact of repealing Regulation 24, and of the costs and benefits of repealing this Regulation.

If, following consultation, it is correct that the impact is minimal, then the Government plans to repeal Regulation 24 on the basis that its repeal will update UK law in line with EU law. The effect would mean that rights holders will not have to issue a licence and businesses will have firm knowledge they have no recourse to obtaining a compulsory licence.

### **Options not 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 (i.e. the repeal of section 52) within 6 months of the launch of the consultation, implements a stock depletion cut-off date of October 2016, amend Paragraph 6 of Schedule 1 CDPA so that articles protected by copyright in the EU is excluded from its scope and repeal Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995.

## **Risks and assumptions**

This Impact Assessment has relied upon some 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 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. While other designs in other sectors may be affected, the lack of evidence has prevented the Government from making further assumptions in this area (see wider impacts below).

Many businesses that have so far relied on section 52 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)**

All EU-driven measures are 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.

This is a legislative change to clarify UK law in line with EU law. It has not been possible to quantify all 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. However the government considers that the preferred option does not go beyond the minimum requirements to clarify UK law in line with EU law. Further, there is no available derogation that would reduce costs to businesses further as the proposed policy needs to be implemented in the manner set out in this impact assessment. Therefore, the Government is of the view that this measure is out of scope of the One In Two Out methodology.

### **Wider impacts**

The main groups that are directly affected are rights holders of copyright works, manufacturers of licensed copies of artistic works, businesses that trade in replica furniture and users and makers 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. The Government has previously 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, including stock depletion. 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 replicas, when other medium to large businesses are prevented from trading in replicas. 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.

### **Evaluation**

The Government plans to evaluate the impact of the repeal of section and related legislative changed 5 years after the change in law has commenced. The evaluation will assess the impact in the UK, in particular the design, furniture, detail, publishing, photography and museums sectors.

# Regulatory Policy Committee Opinion

Opinion: Consultation stage impact assessment  
Origin: European  
RPC reference number: RPC-3078(3)-BIS (was 2155)  
Date of implementation: March 2016



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## **Repeal of section 52 of the Copyright, Designs and Patents Act 1988: revised transitional arrangements**

**Department for Business, Innovation & Skills**

**RPC rating: fit for purpose**

### **Description of proposal**

The Government proposes to amend the transitional arrangements for ending the copyright limits for certain artistic works that have been industrially manufactured. The Copyright, Designs and Patents Act 1988 currently limits copyright protection for such items to 25 years, compared to other artistic works that have a copyright term for the lifetime of the creator plus 70 years. The RPC previously issued a final stage fit for purpose opinion on the proposed implementation in February 2015.

However, the proposed five year transition timetable was subject to a legal challenge. The Department is now proposing to consult on a shorter transition, seeking to provide the maximum time for affected businesses to deplete stock while being compliant with EU requirements. For goods ordered after launch of the consultation, the revised transition arrangements would require businesses to deplete their stocks by March 2016. For goods ordered prior to the consultation being launched, businesses selling copies need to deplete stocks by October 2016. This is to mitigate some of the burdens on businesses that purchased items in good faith prior to the legal challenge.

In addition, the Government proposes to repeal Regulation 24 of the Duration of Copyright and Rights in performances Regulations 1995 to ensure it is consistent with UK law. This is because the regulation has the effect of compelling rights holders to grant a licence, allowing other businesses to make copies of their work on payment of a reasonable royalty, thereby preventing copyright protection for artistic works. Repealing Regulation 24 will ensure that rights holders can control affected works from the repeal date.

### **Impacts of proposal**

The Department discusses a range of potential costs and benefits of the proposal, reproducing the analysis and evidence used in the previous IA. Despite extensive consultation, there is considerable uncertainty related to the assessment of the likely impacts as a result of:

- a lack of reliable data on the number of businesses trading in unlicensed copies of artistic works, although the Department believes there are some indications that the market is likely to be small:
- insufficient information on which items will be protected by copyright following the change in law; and
- limited numbers of copyright owners responding to the consultations and/or providing robust evidence on which to base estimates of the current loss of income as a result of the sales of replicas.

The IA provides some estimates of the scale of costs for individual businesses if a product becomes subject to copyright, for example:

- Developing new products to replace lines that become subject to copyright. Based on a range of estimates from the manufacturers of replicas, the cost of bringing a new product to market is estimated to be between £20,000 and £60,000.
- Cancellation of existing contracts for production within the six-month period. Trade associations estimate that the cancellation of contracts would, on average, cost the cancelling business around £97,000.
- The cost of licensing 2D images used in books, e.g. those published by museums, costing £4,500 to £6,000 per title.

The IA discusses a number of other costs and benefits, such as the benefits to copyright holders and the design industry and the costs to photography and image agencies of checking their libraries and catalogues. However, despite the detailed qualitative discussion, as with the previous final stage IA, the Department's assessment is that it is not possible to provide a robust appraisal of the net effect of the proposal. This appears reasonable.

The Department explains that the proposed repeal of Regulation 24 will mainly have an impact on "revived copyright" work (something brought back into copyright, where copyright had previously expired). For many categories of works, there either would be no revived copyright or, where there is, there would be no acts restricted by copyright. However, the extent to which this is the case in practice is unclear. The Government, therefore, proposes to use the consultation to assess the impact of repealing Regulation 24.

## Quality of submission

The IA provides a detailed qualitative discussion of the likely effects of the proposal, including highlighting the additional burden that will be imposed on business as a result of the reduced transition time. The Department has also provided sufficient

information that, as the reduced transition period is necessary to comply with legal requirements, the proposal does not go beyond the minimum EU requirements and does not fail to take up a derogation that would benefit business.

If further evidence becomes available during the consultation, especially on the potential impact of repealing Regulation 24, the Department should submit a final stage impact assessment for validation in the interests of balanced reporting of the effect of EU legislation.

#### **Initial departmental assessment**

|  |                         |
|--|-------------------------|
| Classification                                 | Out of scope (EU)       |
| Equivalent annual net cost to business (EANCB) | £0 (non-monetised cost) |

#### **RPC assessment**

|                                     |                   |
|-------------------------------------|-------------------|
| Classification                      | Out of scope (EU) |
| Small and micro-business assessment | Not required (EU) |



**Michael Gibbons CBE, Chairman**

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DPS/2563/2015

