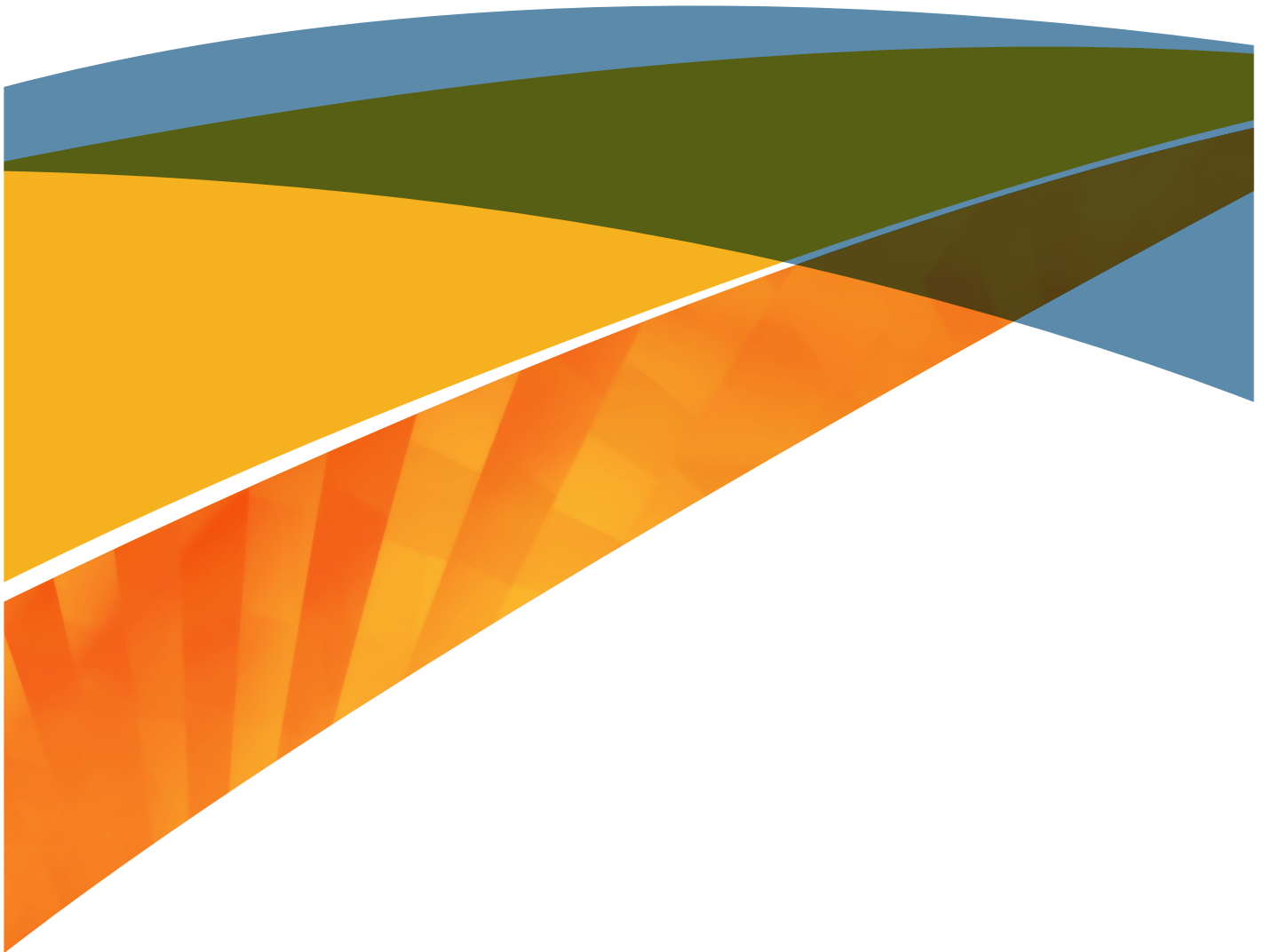




Intellectual
Property
Office

Consultation on new transitional provisions for the repeal of section 52 of the Copyright, Designs and Patents Act 1988: Government Response and Summary of Responses





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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 consulted on transitional arrangements for the repeal of section 52 CDPA in a consultation that ran 28 October – 23 December 2015.
2. In addition to the written consultation, stakeholders were offered meetings covering the three- and two-dimensional copies of works affected by section 52 and a separate meeting for rights holders. These took place in November 2015.
3. Where additional evidence of impact was received which was not previously known, this has been included in the revised impact assessment (Annex A). A list of respondents is included in this document (Annex B) and the responses are published online.

Policy aims

4. Section 52 CDPA¹ currently limits 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. The Government originally passed legislation in 2013² to remove the exception in section 52, but it has not yet been commenced.
5. Whether an individual item qualifies for copyright protection is determinable on a case by case basis, and can ultimately be a matter for the courts. Nothing in this Government response should be understood as providing a Government view as to whether any particular artistic work is protected by copyright. This document 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.
6. When the repeal is put into effect, section 52 CDPA will cease to have effect, and any artistic work which qualifies for copyright protection will enjoy the full term of the life of the creator plus 70 years (subject to any applicable copyright exceptions).
7. Transitional arrangements surrounding the repeal allow individuals, businesses and organisations which have previously relied on section 52 to make adjustments, subject to certain conditions. This included a transitional period until the repeal came into effect, and an additional depletion period for qualifying items. This was consulted on in 2015³ and responses are set out below with the Government's response.
8. Two additional changes to legislation were consulted on, relating to artistic works made prior to 1957 and compulsory licensing of works where copyright is revived, in order to allow rights holders to control copying of their works in the same way as rights holders in any other artistic works. These elements received a broader range of responses, and although they are included in this document, a further technical review will take place to inform the manner of implementation of the changes (see also Next Steps section).

¹ The text of the section may be accessed at <http://www.legislation.gov.uk/ukpga/1988/48/section/52>

² Section 74 of the Enterprise and Regulatory Reform Act 2013 may be accessed at <http://www.legislation.gov.uk/ukpga/2013/24/section/74>

³ The consultation document is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483203/Section_52_consultation.pdf

Responses to Consultation

Transitional period

9. A transitional period helps affected businesses, organisations and individuals to adjust to the new legislative framework of the repeal. The Government consulted on a transitional period of six months from the publication of this consultation, which would end on 28 March 2016. In addition, guidance would be published to seek to assist affected businesses.
10. The consultation document included the following questions on the transitional period:
 - 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?
11. Rights holders who submitted responses to the consultation were in favour of as short a transitional period as possible, and agreed that six months from the start of the consultation period achieved this.
12. There was significant concern about the impact of a six month transitional period from many other respondents, whether from replica furniture businesses, publishers, photographers or libraries and archives. In particular, there were arguments that this period was disproportionate and proportionality was one of the essential elements according to the *Flos* case,⁴ which considered these issues.
13. In addition, this group of respondents said that six months was unfair because of the previous period of five years which had been set out in the previous commencement order⁵. This was because they had already acted on this period – for example, by signing new leases on premises, or planning publishing schedules which can be over a five year period.
14. Some replica business respondents said that a six month transitional period would mean they would have to close their businesses. The operating environment was already challenging because of the uncertainty and the new proposals were already having a negative effect on cashflow. Many respondents which trade in three-dimensional copies said that they would have to cease trading or rely on other types of business because of the short transitional period. On the publishing side, publishers said that six months would disrupt publication schedules for contracts already signed and lead to the destruction of stock.

⁴ *Flos SpA v Semararo Casa e Famiglia SpA* (C-169/09, available at <http://curia.europa.eu>)

⁵ This commencement order was revoked on 23 July 2015.

15. If the transitional period were to be a different length, respondents mostly thought five years was appropriate, although some respondents said they needed at least two years to make changes to their businesses.
16. Most respondents who commented on the start date of the transition being tied to the consultation felt that this was inappropriate and were unaware of examples of other policies which had used this approach. In addition, there was no guarantee that every business that would be affected had known about the consultation. Some respondents suggested that the transitional period could start from the end of the consultation period or three months afterwards, but most felt that the date should start from a date of legislative action, such as the date of the commencement order which would be required.
17. Guidance on this area is felt to be very important by respondents. Many respondents thought that the Government might be able to provide some definitive advice on what is covered by the repeal so that anyone affected could make appropriate decisions. They argued for any guidance to be published as soon as possible and to include:
 - definition of a work of artistic craftsmanship;
 - a list of works which are known to be protected by copyright in other EU member states with any associated case law;
 - the situation for warranties required by law;
 - how the changes will affect academic and museum use;
 - comprehensive guidance on how exceptions may be deployed in relation to commercial use of two-dimensional copies of works, including incidental use, criticism and review, and education;
 - the situation for previous image licences granted in perpetuity; and
 - worked examples of how the depletion date applies.

Government response

18. Following representations received in the consultation, the Government has decided to **extend the transitional period to nine months from the date of consultation**. The priority remains, however, to allow all artistic works to benefit from the same term of protection, however they were manufactured, and this should be done as soon as possible.
19. The starting point is that the decision in *Flos* clarified that the Government was obliged (by Directive 98/71 and Directive 93/98) to ensure the implementation of full protection for the affected works by 28 October 2001, subject to transitional arrangements not extending to a substantial period beyond the implementation date. Having considered the matter, the Government reached the view that the five-year transitional period originally proposed was too long and that in view of the time already elapsed since 2001 only a short transitional period could be justified.

20. As set out in the consultation document, the Government originally felt that six months would be an appropriate period. It has listened carefully to the respondents' concerns and decided to increase it. The addition of three months beyond the original proposal will provide a margin for businesses who may have heard about the changes relatively late in the process while still ensuring that rights holders gain control over their works in a short space of time. However, given the position under EU law and the time that has already elapsed since the implementation date, the Government does not feel that a longer period can be justified, and is not persuaded that the start date of transition should be moved to the date of the commencement order or other legislative provision.
21. The **guidance is published on the same date as this document** and covers most elements of the areas identified by respondents. However, it is worth reiterating that the Government is unable to be definitive about many of the specific points, such as what is protected by copyright, as this would be a matter for the courts. This is why the courts will be the decision makers if a dispute cannot be resolved by the parties. On the same grounds, the Government cannot provide a list of works which are protected by copyright in other member states, as this would require a large amount of resource to analyse and would also potentially be a matter for the courts of other member states.

Depletion period for existing stock

22. The Government proposed 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 in which to sell or deal with stock. Any goods produced or acquired under a contract after the publication of the consultation would need to be sold or dealt with before the repeal date.
23. There were some related issues, including whether two- and three-dimensional copies of artistic works should be treated in the same way, and the status of second hand goods. The questions asked in the consultation were:
- 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?

24. Most respondents commenting on the treatment of two- and three-dimensional copies in the transitional arrangements said that they should be treated differently. Some argued that there is an obvious difference between these two types of copies, and that two-dimensional copies do not compete with the three-dimensional original work and can be beneficial for sales of the original or licensed copies. Others argued that the case law in *Flos* allowed different treatment of different types of copy.
25. Some rights holders commented that they would not seek to take action against people making two-dimensional copies of their works if the outcome was effectively to provide publicity of the designs.
26. Some respondents from the photography and publishing sectors suggested that a longer depletion period should be granted to two-dimensional copies because checking every image in a library or book would take much longer than checking product lines of three-dimensional copies. Many image agencies, libraries and archives felt that it was unworkable to check all images due to resource costs.
27. One suggestion was that the depletion period should be directly linked to the transitional period as proposed, but that the combined period should be longer overall – a longer transition could lead to a shorter depletion period, or vice versa.
28. There were suggestions that the status of second hand goods was particularly difficult, so some respondents thought that all existing stock should be excluded from the transitional arrangements. For example, a charity shop might sell a copy (two- or three-dimensional) of an affected work in the course of a business after the repeal and be caught out. These respondents said that legislative provision should be made in this case. However, some respondents argued that the rights in the original work were exhausted once the copy was second hand.

Government response

29. Although there is a clear difference between the purpose and use of two- and three-dimensional copies of works affected by section 52, the responses have not shown a clear justification for distinguishing between them in the transitional arrangements. Although some rights holders said they would not take action against unlicensed two-dimensional copies which helped with publicity, there is nothing to stop other rights holders taking a different approach, and indeed some case law suggests that rights holders do want to enforce their rights against two-dimensional copies. The Government has decided that the **depletion period will remain six months in duration and will apply to both two- and three-dimensional copies equally.**
30. The Government proposed that legislative change was not required in relation to second hand goods. Although second hand dealers and charity shops may be concerned, they would need to ask themselves the same question when selling copies of other artistic works that they sell, such as sculptures. In light of this, the **Government will not make any special transitional arrangements for second hand goods.**

Provision of copyright protection for works made before 1957

31. The CDPA contains provisions in Paragraph 6 of Schedule 1⁶ 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. This prevents a category of artistic works from benefiting from the full term of copyright, in contrast to similar works created after 1 June 1957. The Government asked questions in the consultation about amending Paragraph 6, Schedule 1 CDPA to exclude articles protected by copyright in the EU at 1 July 1995:
- 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?
32. Some respondents argued that making the amendment would not provide clarity, as paragraph 5 of Schedule 1 would effectively exclude anything which was brought into copyright protection by paragraph 6. These respondents explained that both paragraphs 5 and 6 would need to be amended to achieve the desired effect.
33. Some respondents argued that amendment was unnecessary because Schedule 1 was already compatible with EU law and other international law, including Article 17 of the Designs Directive⁷ and the Berne Convention⁸. They argued that these provisions allowed the extent and conditions of the protection given to industrial designs to be left to individual countries, which was the effect of paragraph 6.
34. A submission was received that some works which were never intended to be protected by copyright would fall into copyright by virtue of the amendment, resulting in a broad definition that included 'intellectual creations' like smells. These would be outside the closed list of protected works in section 1 CDPA⁹. Other respondents said that without clarity on what is in scope of a work of artistic craftsmanship, any amendment to Schedule 1 would be of limited assistance.

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

7 The text of the Designs Directive (98/71/EC) may be accessed at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0071:en:HTML>

8 Berne Convention for the Protection of Literary and Artistic Works, to which the UK is a signatory. The text of the convention is available at http://www.wipo.int/treaties/en/text.jsp?file_id=283698

9 The text of this section may be accessed at <http://www.legislation.gov.uk/ukpga/1988/48/section/1>

Government response

35. The full text of paragraphs 5 and 6 of Schedule 1 CDPA is set out below:

Paragraph 5

- (1) Copyright subsists in an existing work after commencement only if copyright subsisted in it immediately before commencement.
- (2) Sub-paragraph (1) does not prevent an existing work qualifying for copyright protection after commencement-
 - (a) under section 155 (qualification by virtue of first publication), or
 - (b) by virtue of an Order under section 159 (application of Part I to countries to which it does not extend).

Paragraph 6

- (1) Copyright shall not subsist by virtue of this Act in an artistic work made before 1st June 1957 which at the time when the work was made constituted a design capable of registration under the Registered Designs Act 1949 or under the enactments repealed by that Act, and was used, or intended to be used, as a model or pattern to be multiplied by an industrial process.
 - (2) For this purpose a design shall be deemed to be used as a model or pattern to be multiplied by any industrial process-
 - (a) when the design is reproduced or is intended to be reproduced on more than 50 single articles, unless all the articles in which the design is reproduced or is intended to be reproduced together form only a single set of articles as defined in section 44(1) of the Registered Designs Act 1949, or
 - (b) when the design is to be applied to-
 - (i) printed paper hangings,
 - (ii) carpets, floor cloths or oil cloths, manufactured or sold in lengths or pieces,
 - (iii) textile piece goods, or textile goods manufactured or sold in lengths or pieces, or
 - (iv) lace, not made by hand.
36. Amendment of paragraph 6 of Schedule 1 was considered necessary to be more explicit about the copyright protection of works which were protected in other EU Member States on 1 July 1995, as explained in the consultation. In particular, the decision in *C-240/07 Sony Music Entertainment (Germany) GmbH v Falcon Neue Medien Vertrieb GmbH* [2009] ECDR 12¹⁰ makes clear that Directive 2006/116 requires such works to be protected for the full term of copyright even if they did not attract protection under UK law at the time they were created.
37. The Government will **amend paragraph 6 of Schedule 1 CDPA** to make the position clear. The Government agrees that **paragraph 5 of Schedule will need amendment to reflect the amendment to paragraph 6**. In making those amendments, the Government will ensure that they only affect works which are capable of being protected under UK law, i.e. which would be so protected if they were created now. The Government has no intention of expanding the *types* of works which may be protected by copyright in UK law.

¹⁰ Accessible at <http://curia.europa.eu>

38. Following further consideration of the responses, the Government also expects to **amend Regulation 16 of the Duration of Copyright and Rights in Performance Regulations 1995** (the 1995 Regulations)¹¹ to ensure that the provisions of those Regulations apply to works which attract copyright protection as a result of the amendments to Schedule 1.
39. Given that there are amendments which were not anticipated in the current consultation, the Government intends to carry out a technical consultation on the amendments required to Schedule 1 CDPA and the 1995 Regulations, to ensure that the proposed amendments achieve what is now intended (see also section on Next Steps).

Compulsory licensing of works where copyright is revived

40. Regulation 24 of the 1995 Regulations¹² imposes an obligation on the right holder of a revived copyright work to grant a licence. The Government asked questions in the consultation about repealing Regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995.
- 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?
41. Some respondents felt that this consultation was not the right place to discuss the repeal of Regulation 24 because of its wider application to copyright works which are not affected by the repeal of section 52.
42. Many respondents felt that compulsory licensing was good in principle, because it provides a mechanism to allow trade to carry on for a period whilst providing some recompense to rights holders. If this Regulation did not apply to section 52 works, some respondents suggested trying to replicate this type of provision to have compulsory licensing as a way of compensating expectations which businesses had as a transitional provision connected to the repeal.
43. Some respondents said that compulsory licensing did not apply to works previously affected by section 52, as repealing section 52 does not revive copyright, but removes a defence. Rights holders were against the application of compulsory licensing and in favour of the repeal of Regulation 24.
44. Only one respondent was able to state that they had relied on Regulation 24 for audio-visual works and continues to do so, although a court case relating to compulsory licensing was cited by another respondent.

¹¹ The text of the regulation may be accessed at <http://www.legislation.gov.uk/ukxi/1995/3297/regulation/16/made>

¹² The text of the regulation may be accessed at <http://www.legislation.gov.uk/ukxi/1995/3297/regulation/24/made>

Government response

45. The Government has reconsidered the justification for Regulation 24 of the 1995 Regulations in light of later EU law, in particular Article 2 of the InfoSoc Directive¹³, which states that rights holders should have the exclusive right to reproduce their works, which is not possible if a compulsory licensing provision is in place.
46. In light of this, the Government intends to **proceed with the repeal of Regulation 24**. The Government has not been provided with a justification for compulsory licensing or similar to cover works previously affected by section 52 which would meet the requirements of the exclusive right of reproduction for rights holders.
47. However, the Government agrees that despite the consultation having been publicised relatively widely and a range of responses being received, it may be the repeal would affect individuals or organisations who are not yet aware of the issue. Therefore the repeal will be included in the technical consultation on amendments of Schedule 1 CDPA and the 1995 Regulations to ensure that the proposed amendments achieve the intended result (see also section on Next Steps).

¹³ Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC, accessible at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>)

Other points raised in the Consultation

Alternative ways to handle two-dimensional copies

48. Several respondents said that there should be an exception for photos of own home interior or for editorial use. One way of achieving this might be to extend section 62 CDPA¹⁴ which currently applies to representing artistic works on public display. Another suggestion received from the photography sector was to guarantee that photographers would not be liable for their work at all – which would probably be an exception for all photography. The Government believes that there are already several copyright exceptions which can be used in relation to images and there is no requirement to re-open the scope of exceptions at this time.
49. Concern was expressed about the impact of the transitional period on publications used for academic purposes with titles becoming unavailable or unusable, such as in the study of design history, and the knock-on effect on higher education resourcing. This was mainly in relation to the availability of two-dimensional copies. However, these responses failed to take account of the pre-existing copyright exceptions, including those for research and private study, criticism and review, and the education exception. These will already be used for other artistic works such as sculptures and paintings. The guidance from the Government includes some of the issues to consider when considering the copyright exceptions.

Matters outside the consultation

50. Some respondents believed that the repeal of section 52 was unnecessary and undesirable. The decision to repeal section 52 was not the subject of this consultation. It was enacted by the Enterprise and Regulatory Reform Act 2013, when a commitment to consult on the transitional arrangements was made.
51. Many of the same respondents also felt that copyright is too long and should be reduced to allow reasonable use of artistic works and encourage creativity. This issue is outside the scope of this consultation.

Complaints about conduct of consultation

52. Two complaints were received from respondents about the conduct of the consultation and its adherence to the central principles of consultation. One was answered by the Better Regulation Unit based at the Department for Business, Innovation and Skills as it related exclusively to the current consultation. The other was answered by the Intellectual Property Office because it related to the previous consultation and engagement with stakeholders. Neither complaint was upheld.

Freedom of Information requests

53. Two Freedom of Information (FOI) requests were made during the course of the consultation. One FOI request was refused in full using exemptions under the Freedom of Information Act 2000. The other request was granted in part and information released, which may be seen online in the Intellectual Property Office's record of FOI releases¹⁵.
54. Neither request was taken to an internal review by the original requesters. An internal review is the first step of challenge relating to FOI requests and answered by the organisation; the second challenge would be to the Information Commissioner's Office.

¹⁴ The text of the section is available at <http://www.legislation.gov.uk/ukpga/1988/48/section/62>

¹⁵ Specific information accessible at <https://www.gov.uk/government/publications/legal-challenge-to-ipo-repeal-of-s52-cdpa>

Next steps

55. There are two elements which require further action by the Government:
- the transitional period of nine months and depletion period of six months to be taken forward in the commencement order; and
 - the legislative changes to Schedule 1 CDPA and the 1995 Regulations.
56. The draft commencement order is in Annex C of this document. **Following publication of this document, a period of 14 days is in place for stakeholders to respond on whether the draft commencement order achieves its intended purpose.** Following this period the commencement order will be made after taking into account any responses received. Any comments on the order should be sent to the following address:

Section52CDPA@ipo.gov.uk

Or by post:

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

57. The amendments to Schedule 1 CDPA and the 1995 Regulations will be taken forward separately, and the draft statutory instrument will be published for technical consultation in due course. This is expected to take place by the summer.

Annex A – Impact Assessment and RPC opinion

Title: Repeal of section 52 of the Copyright, Designs and Patents Act 1988: revised transitional arrangements and related legislative changes IA No: BISIPO009 Lead department or agency: Intellectual Property Office (Department for Business, Innovation and Skills) Other departments or agencies:	Impact Assessment (IA)
	Date:
	Stage: Final
	Source of intervention: EU
	Type of measure: Secondary legislation
	Contact for enquiries: section52CDPA@ipo.gov.uk

Summary: Intervention and Options

RPC Opinion: **Fit for purpose**

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?
£0m	£0m	£0m	No
			Measure qualifies as NA

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 intended.

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 (where more than 50 copies have been made).

The other 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 Schedule 1 CDPA allowing copyright protection for specific works made before 1957, and
- amend the Duration of Copyright and Rights in Performance Regulations 1995/3297 to remove compulsory licensing of works where copyright is revived

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, nor clarify it in line with EU law.

- 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 Schedule 1 CDPA so that articles protected by copyright in the EU are excluded from its scope and amend the Duration of Copyright and Rights in Performances Regulations 1995/3297.

- Option 2: Implement the repeal of section 52 CDPA 9 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 January 2017 by which stock must be depleted, amend Schedule 1 CDPA so that articles protected by copyright in the EU are excluded from its scope and amend the Duration of Copyright and Rights in Performances Regulations 1995/3297.

The Government's preferred option is Option 2. 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 and gives the maximum viable transitional period.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: 07/2021

Does implementation go beyond minimum EU requirements?	No					
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes	
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)	Traded: n/a			Non-traded: 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: Implement the repeal 6 months from consultation, depletion date of October 2016, amend Schedule 1 CDPA, amend Duration of Copyright and Rights in Performances Regulations

FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2014	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: 0	High: 0	Best Estimate: 0
COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)	
Low	0		0	0	
High	0		0	0	
Best Estimate	0		0	0	
Description and scale of key monetised costs by 'main affected groups'					
It has not been possible to fully monetise costs due to a lack of available data. The Government has received estimates which are indicative of the costs to UK businesses that trade or use copies of artistic works. Evidence was sought at consultation stage but no quantifiable evidence was provided.					
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 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 (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)	
Low	0		0	0	
High	0		0	0	
Best Estimate	0		0	0	
Description and scale of key monetised benefits by 'main affected groups'					
It has not been possible to monetise the costs due to lack of available data. Further evidence was sought at consultation stage but no quantifiable evidence was provided.					
Other key non-monetised benefits by 'main affected groups'					
Copyright owners and exclusive licensees of designs benefit from the full 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.					
Key assumptions/sensitivities/risks				Discount rate	3.5
This Impact Assessment has been reliant on unverified stakeholder estimates gathered through consultation. 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)

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

Summary: Analysis & Evidence

Policy Option 2

Description: Implement the repeal 9 months from consultation, depletion date of October 2016, amend Schedule 1 CDPA, amend Duration of Copyright and Rights in Performances Regulations

FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2014	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: 0	High: 0	Best Estimate: 0
COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)	
Low	0		0	0	
High	0		0	0	
Best Estimate	0		0	0	
Description and scale of key monetised costs by 'main affected groups'					
It has not been possible to fully monetise costs due to a lack of available data. The Government has received estimates which are indicative of the costs to UK businesses that trade or use copies of artistic works. Evidence was sought at consultation stage but no quantifiable evidence was provided.					
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 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 (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)	
Low	0		0	0	
High	0		0	0	
Best Estimate	0		0	0	
Description and scale of key monetised benefits by 'main affected groups'					
It has not been possible to monetise the costs due to lack of available data. Further evidence was sought at consultation stage but no quantifiable evidence was provided.					
Other key non-monetised benefits by 'main affected groups'					
Copyright owners and exclusive licensees of designs benefit from the full 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.					
Key assumptions/sensitivities/risks				Discount rate	3.5
This Impact Assessment has relied on unverified stakeholder estimates gathered through consultation. 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 when 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)

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

Evidence Base (for summary sheets)

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 Order¹ 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 transitional arrangements and related legislative changes are intended to clarify UK legislation.

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 order to make it viable. 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”².

The Government also wishes to make two other legislative changes in this area to ensure that rights holders are able to control copies of affected works. First, 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

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

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

1995/3297, "Regulation 24") may need to be amended, as it has the effect of compelling rights holders to grant a licence for other businesses to make copies of certain works on payment of a reasonable royalty, thereby interfering with the rights holders' exclusive right to control copies of their 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'.³

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 Schedule 1 CDPA and amend the Duration of Copyright and Rights in Performances Regulations 1995.
- Option 2: Implement the repeal of section 52 within 9 months of consultation, introduce a date of January 2017 by which existing by which existing stock must be depleted, amend Schedule 1 CDPA and amend the Duration of Copyright and Rights in Performances Regulations 1995.

³ 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.⁴

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 52.⁵ 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 shipments⁶: 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.⁷ 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 copyright works.

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

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 Schedule 1 CDPA so that it excludes from the scope of this provision works protected under EU law, and
- d. amend 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 proposed to implement the repeal within 6 months of its consultation on the 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 will be protected for life of the creator plus 70 years within 6 months of the consultation 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.

Designers and rights holders have generally noted that the short transition period is reasonable but no additional substantive evidence on benefits to UK rights holders and creators was received through the recent consultation.

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 benefit from a swift implementation of the repeal. 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 also 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.⁸

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 have 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 (e.g. 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

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

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 there are specific laws to protect designs. Further, there is a tension in this argument from those designers who have made this claim, but are currently based in the UK.

COSTS

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

- a. Costs to UK businesses that 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).⁹ 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.

The overall average transitional cost per business with a 6 month transition period was reported as £206,875.¹⁰ 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 transition¹¹. 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 also told the Government that the short 6 month transition period only provides them time to clear out stock, and does not enable them to phase out those parts of their businesses that trade in replica furniture.

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.

⁹ 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.

¹⁰ This evidence from the trade association was reviewed by economic consultants contracted by it.

¹¹ 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.

Some replica businesses highlighted that in order to invest in new business models, they would need to rely on turnover from existing replica sales. They said that a short transition process would lead to large turnover losses which could prevent them from being able to fund new product development.

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 £96,617¹².

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.

These costs may be higher in some cases as replica businesses told the Government during consultation they have made plans based on the original 5 year transition period, signing new long-term contracts and leases which may now have to be broken. They claim that breaching these contracts will lead to losses of equity, goodwill and reputation. Some responses to the consultation, including from a group of academics and some legal groups, argued that the depletion period is unlikely to be sufficient to protect the interests of those who have made investments in reliance on the lawfulness of copying old designs.

The trade association representing replica furniture businesses has said that such a short transition period will mean these businesses having to sell off their stock as quickly as possible and then shutting down, without opportunity to phase out the part of the business dealing in replicas of artistic designs.

¹² 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. 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, education, criticism and review, or for the incidental inclusion of copyright work in another artistic work, film or broadcast, although some publishers and photographers doubt the helpfulness of exceptions in their consultation responses.

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 from the change in law as they will face additional licensing. Indeed, publishers may err on the side of caution and pay licence fees when they may not be necessary at all.

Assuming that licences are available, 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 the publisher typically licenses worldwide in all languages and all formats for 50,000 copies at a cost of £286 per image¹³ and that such additional licence fees could lead to abandonment of publication where this makes publication uneconomical. 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 a copyright-driven distortion in deciding whether to write on topic A or topic B, amongst other factors when considering commissioning or publishing books.

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.

A number of publishers provided case study evidence in their consultation responses on how the change may impact on their costs. They highlighted that for the relevant illustrated books, profit margins can be as low as 10% and are typically realised over the longer term. As such, publishers believe additional licence costs may be especially burdensome and may lead to them abandoning certain products. One publisher has calculated that licence costs will add 28% to production costs on one book.¹⁴ Another publisher claims increased production costs of between 47% and 80%, based on six examples. While the Government believes the upper estimates seem large, they suggest that for some projects even a conservative increase in costs could make them commercially unviable, resulting in the destruction of existing products.

It is worth noting that such estimates depend on the assumption that rights holders will decide to charge fees in line with the DACS tariff. A number of rights holders have told the Government that they consider publishers and other users of 2D images as critical marketing platforms for their work and therefore have

¹³ Fee based on the DACS tariff in 2014.

¹⁴ Based on the DACS tariff in 2014.

no intention of bringing action against such groups. With this in mind, any licence costs may be much less substantial than the case studies might imply.

Some respondents said that users of 2D copies may have secured funding or entered into contracts with other parties, which may need to be severed with financial cost, although no costs were provided.

Publishers have argued that they will need time to make themselves compliant with the new law. Evidence submitted by publishers 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 say that it takes 1-2 years post publication for the books to break even. They contend 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. Moreover, they claim that there is insufficient opportunity to substitute other images and adjust text and layouts in existing books.

The Government does note, however, that it should have been clear to publishers for some years that section 52 CDPA was not a safe provision on which to rely.

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 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 consultation did elicit some information that at least one other museum will be similarly affected in terms of checking publishing backlists.

Photographers and image agencies/archives

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).

An independent photographer estimated that for each magazine submission, picture research will add an additional week of work. To prevent copyright infringement they believe it will take an hour per shot (based on average submission of 50 shots) to identify any infringing objects and track down the rights holder. For a full submission this would involve 50 hours of extra work, equating to one individual's working week, a large time commitment for small firms and individuals.

Photographers and image agencies have also 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. There was also some concern highlighted by small enterprises at consultation who claim the disproportionate liability risk from accidental infringement is a strong deterrent from remaining in business.

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 and that other designers and rights holders may wish to enforce their rights even with 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. It has been argued, however, that if an archive is not able to use an image (due to fear of copyright infringement or no licence being available) the value of that archive will be lost. Having said that, the Government notes that market-led licensing solutions could develop for those wishing to take photographs of 3D artistic designs. For example, it is possible that a licensing agency may set up a blanket or collective licence that would allow businesses to obtain comprehensive coverage for photos and images of this nature.

An image agency offered evidence on the cost it faces to examine its archive of 130,000 images in the 6 months transition period. They estimate that it will take 65 full-time workers 2 months to check the archive at a cost of £214,500.¹⁵ The agency also points out this will involve software and system updates that would take approximately 2 months to install and implement at a cost of between £18,000 and £24,000.

On the basis that picture agencies hold collections ranging in size from 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 without excessive cost. 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.

Education sector

One response from a UK university argued that the swift change in law will cause disruption to supporting materials for educational courses in art and design, such as the use of a licensed scanning service to put extracts in virtual learning environments. If these extracts need to be removed part-way through the academic year, it might cause confusion for students when scans are removed. In addition, illustrations from digital versions of articles may need to be removed if a licence is not obtained or not available. Furthermore, it was argued that reading lists of relevant titles for students to peruse could be affected given books may need to be removed if they contravene the change in law.

Film sector

One respondent argued that film archives will need to be checked as well for infringing material. This would be extremely time intensive as entire films would need to be reviewed (the number of hours had not been quantified, but estimated to be significant) to ensure that no artistic designs included in that film would require a licence.

Costs to consumers

Once the change in law comes into full effect the supply of replicas 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. British consumers may not be able to access certain designs that should not have been withdrawn, but have been withdrawn due to confusion or legal disputes over rights.

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

¹⁵ This assumes a temporary worker with a wage of £10 an hour can check 50 images a day.

replace the replicas that would disappear from the market. It is therefore not possible to quantify costs to consumers from implementing Option 1.

It has also been argued by respondents to the consultation that if businesses go into receivership or exit the market as a result of the change in law that consumers will not be able to rely on warranties that they are entitled to under EU law.

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 will implement a cut-off point where businesses trading in replicas or 2D copies sell off or deplete existing stock they have or have contracted for prior to the consultation date (the “depletion period”).

The CJEU in *Flos*¹⁶ 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 proposed 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
- 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

¹⁶ Reference at note 2 above.

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. 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 potential enforcement by 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 proposed 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".

There has been some concerns expressed that small replica furniture businesses will not have the finances to afford legal advice to ensure that they complied with the terms of the depletion period. Furthermore, it has been argued that cut-off dates should be set in legislation rather than in a Government document (the consultation document) which has no statutory force.

One legal respondent has suggested that if the transition period is short, then the depletion period should be extended in order to achieve a fairer and more balanced equilibrium between rights holders and those currently operating in the market for industrial designs.

Rights holders generally agree with the depletion period, but one has suggested that it should be shorter.

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. Some academics have argued that holders of lawfully produced stocks should have a legitimate expectation that they should be able to sell off stocks at market prices, that is, under normal conditions.

The Government has previously received information on economic considerations that would point to a longer depletion period as follows¹⁷:

- 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) with established consumer shopping patterns that would not necessarily coincide with the depletion period. 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.
- viii. A short depletion period will mean unsold stock will need to be destroyed.

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

¹⁷ Evidence from consultation response of the trade association that represents businesses that manufacture, import and sell unlicensed copies.

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. It was pointed out that the absence of the permission of one rights holder out of many could render an entire book potentially infringing. In addition, it was contended during the consultation that the end of the depletion period could have the effect of transforming second-hand bookshops and some charity shops into infringers. Libraries may also need to take books off shelves and out of circulation in instances where images are infringing.

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 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, who say that they support the logic of the repeal, have argued that the depletion time is insufficient to secure the appropriate licensing and to plan their development schedules for licensing of re-prints and assessing books that are in current development plans. 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 and that older books will take longer to be sold. Furthermore, books with authoritative scholarship often stay in print for years and one publisher has quoted that there are stocks of books with 10 year old publication or print run dates.

One publisher has argued that it is not an option for them to drastically reduce the recommended retail price of titles and sell them as remainder stock (e.g. 20% of the recommended retail price) as remainder sellers would not have the incentive to buy stocks that must be sold in a short period of time. Publishers have therefore argued that the depletion period should be sufficient for stock to deplete, not destroyed.

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. The Government notes that publishers have had reasonable time, at least since the passage of the Enterprise and Regulatory Reform Act 2013 to be aware of the Government's intention in this area and the likely consequences of the repeal of section 52 CDPA, and to have taken steps to learn and then plan for the change in law.

Government proposal at consultation

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

The Government rejected April 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 would be:

28 October 2015	Start of consultation (0 months)	<ul style="list-style-type: none"> Copies made before the consultation date are able to be dealt with until October 2016 (depletion date) New stock ordered after the date of consultation will become unlawful following the repeal date
28 April 2016	Repeal implemented (6 months)	<ul style="list-style-type: none"> Repeal comes into force 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) Goods made between the consultation date and the repeal date must be sold by this date
28 October 2016	Date by which stock must be depleted (12 months)	<ul style="list-style-type: none"> All stock must be depleted No further dealing with any replicas or unauthorised copies

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 proposed 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.

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

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 is an issue as to whether that provision is compatible with EU law. The issue is that in *C-240/07 Sony Music Entertainment (Germany) GmbH v Falcon Neue Medien Vertrieb GmbH* [2009] ECDR 12¹⁸ the CJEU made clear that the Term Directive (2006/116/EC) applies even to works which did not attract protection under UK law at the time they were created.

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

¹⁸ (accessible at

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d5e9ec046bc79d4238b2d7ae067150ab34.e34Kaxil.c3eQc40LaxqMbN4OchaTe0?text=&docid=74016&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1034991>)

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.

However, the Government considers that it may be appropriate to amend the CDPA in the interests of legal certainty. The intended 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; 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 also be surmised that there is no substantive effect if Paragraphs 5 and 6 were amended. This is because, if the Term Directive does indeed apply to works which did not attract protection under UK law at the time they were created (which the Government considers it does), the current effect of the *Marleasing* principle means that works protected in any other EU country on 1 July 1995 would already be protected. Amending Schedule 1 merely codifies this effect in UK legislation.

Costs and benefits in amending Schedule 1 CDPA

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.

It has been argued that there are practical difficulties in complying with an amendment to the law: having to seek permission for every article made before 1 June 1957 could be impossible if the manufacturer has gone out of business, the manufacturer has been liquidated and dissolved before copyright has been assigned, or the manufacturer has been taken over and subsumed generating a long and complex chain of title. Indeed, such diligence in seeking permissions has been argued to be uneconomic.

A further technical review will take place on the proposed changes to Schedule 1.

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 will 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 asked about the costs and benefits of revoking Regulation 24 in the consultation 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 impact on existing use 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 and first exploited before 1991, if the *Marleasing* principle applies and copyright is revived in some works, there would nevertheless be no acts restricted by copyright if section 52 is in place, so no-one could have relied on Regulation 24.
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.
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 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).

One organisation has argued that the changes to Regulation 24 will impact on organisations using old photographs and pre-1957 films. It was claimed that there would be unspecified undesirable consequences in changing the conditions applying where copyright in old photographs and pre-1957 films might have been revived in 1996.

It was also suggested by a legal submission that a 5 year term of compulsory licensing following the end of the transition period (like that of unregistered design rights) would compensate rights holders while allowing businesses to wind down business slowly. This is because there is greater inconvenience in varying three dimensional manufacturing processes than two dimensional processes.

Consultation responses did not provide substantial evidence that Regulation 24 was utilised. On the basis that there was no compelling evidence that the impact of the repeal of Regulation 24 was not minimal, the Government intends to implement this repeal on the basis that it 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.

However, given that the issue arose in the context of a consultation concerning section 52 CDPA, and there may therefore be other potential respondents with views on this issue, it will be addressed in the consultation on the amendments to Schedule 1 CDPA.

Option 2: Implement the repeal of section 52 with revised transitional arrangements and related legislative changes

Under this option, the Government will:

- a. implement the repeal of section 52 within 9 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 Schedule 1 CDPA so that it excludes from the scope of this provision works protected under EU law, and
- d. amend the Duration of Copyright and Rights in Performances Regulations 1995.

IMPLEMENT THE REPEAL OF SECTION 52 CDPA WITHIN 9 MONTHS OF THE CONSULTATION

The Government did not consult on this option to implement the repeal of section 52 CDPA by 28 July 2016. However, using the evidence submitted during consultation, the Government considers that a slightly longer transition period will be beneficial for businesses that have been affected by impending regulatory change.

The Government is mindful however of the careful balance that needs to be struck between the clear competing interests: of the need for rights holders and designers to have ultimate control over how copies of their artistic works are made, and the need for businesses that have lawfully utilised the defence contained in section 52 CDPA to bring their business models and activities in line with the impending change in law.

The Government is of the view that a 9 month transition period, as opposed to 6 months as discussed in Option 1, better meets this balancing act. It provides the longest possible transition period when taking into account what would be considered proportionate and reasonable under EU law.

BENEFITS

In comparison to option 1:

- Designers and rights holders of 3D artistic works: the benefits under option would be marginally reduced, due to waiting an additional 3 months before complete control of licensing is possible. However, there is a lack of quantifiable evidence on the costs to rights holders due to lack of licensing and reduced competition in the market.
- Reduction of confusion between licensed copies and replicas: there is a potential for consumer confusion to continue for the three month extension of the transition period; however, other intellectual property rights may still be enforced where present.
- Development of new works: while there may be a marginal reduction in this benefit to designers seeking to fill the gap in the affordable side of the market, some of this may be absorbed by the natural design and manufacture cycle of the product.

- Businesses, organisations and individuals relying on section 52: the benefit for these groups will be a slightly longer period in which to make business decisions and plan for the future. Costs of change (see below) may also be reduced.

COSTS

The scale of these costs may be lower under Option 2 than Option 1 because there is a 3 month extension of the repeal period. The evidence does not seem to suggest that there will be a dramatic fall in costs given some affected businesses have been calling for a transition period in years rather than months, but it is expected that there may be some reduction in costs, for example, if there are any costs in breaking existing contractual terms.

- Costs to businesses that trade in replicas of artistic works: transition costs will be slightly reduced because there will be a longer period in which to invest in the changes using existing cashflow, and the length of any contract which needs to be broken will be shorter and may be cheaper. There will be a small reduction in costs from having longer to start changing the business model and product range, although the full product cycle can last years.
- Costs to creators and users of 2D images of artistic works: users such as publishers, photographers and image libraries may benefit from the additional time to seek permissions or licences from relevant rights holders and designers. This may only be a marginal reduction in costs because of the long development plans involved in publishing.
- Costs to consumers: there may be a reduction in costs for consumers who have additional time to seek replica furniture that those businesses may otherwise withdraw from the market when the repeal comes into force.

IMPLEMENT A DEPLETION DATE OF 28 JANUARY 2017 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

In line with the 9 month transition period, the 6 month depletion period will end on 28 January 2017. Because the length of the period is still the same as in Option 1, the analysis there is relevant.

It is not likely that this short extension to the depletion period will have substantive impact on rights holder or designers given that depletion period only relates to specific stock that was produced or contracted for before the consultation date. Potential gains in the market may be reduced if copies of specific products are still circulating in the market until the later depletion date.

BENEFITS

There will be a small reduction in the time by which replicas will cease appearing on the market, which can be seen as a reduced benefit. The Government is not persuaded with arguments that a longer depletion period will allow replica furniture businesses to stockpile replicas and continue to sell them after the depletion date (even assuming that some pieces of furniture would be considered artistic). The Government has anecdotal evidence that businesses are already beginning to prepare for the depletion period by selling down stocks of furniture they would consider would either be protected by copyright after the repeal comes into force, or would be subject to litigation from rights holders. The Government has seen print and internet advertisements that indicate that businesses are attempting to sell down such stocks.

COSTS

The depletion period only covers items that were produced or contracted for before the consultation date: the later depletion date may assist to mitigate the costs. For example, book sellers will have additional time to sell down stock with images that are affected by the repeal of section 52 CDP.

Consumers will have reduced costs because they will be able to access replica products for a marginally longer period. Consumers may also benefit from a longer period in which books containing images of affected artistic works are available in the market. This could assist to reduce the likelihood of stocks having to be destroyed at the end of the depletion period.

28 October 2015	Start of consultation (0 months)	<ul style="list-style-type: none"> • Copies made before the consultation date are able to be dealt with until January 2017 (depletion date) • New stock ordered after the date of consultation will become unlawful following the repeal date
28 July 2016	Repeal implemented (9 months)	<ul style="list-style-type: none"> • Repeal comes into force • 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) • Goods made between the consultation date and the repeal date must be sold by this date
28 January 2017	Date by which stock must be depleted (15 months)	<ul style="list-style-type: none"> • All stock must be depleted • No further dealing with any replicas or unauthorised copies

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

Under Option 2, the Government would continue to implement legislative changes to provide for copyright protection for works made before 1957. There is no change to the proposals, costs and benefits as detailed in Option 1.

LEGISLATE TO REMOVE COMPULSORY LICENSING OF WORKS WHERE COPYRIGHT IS REVIVED

Under Option 2, the Government would continue to legislate to remove compulsory licensing of works where copyright is revived. There is no change to the proposals, costs and benefits as detailed in Option 1.

Government's preferred option

Option 2 is the Government's preferred option.

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 (and therefore to control if and how any copy is made), the Government therefore does not consider that exemptions should be made for specific sectors when making either 3D or 2D copies. The intention is to allow rights holders and copyright holders to control how copies of their works are made, whether in 3D or 2D format, and if they so wish, be recompensed for copies that are made through licensing. As one licensing agency argues, rights holders should have the ultimate decision when it comes to licensing their works.

A number of respondents argued that the harm to the designer from the use of a 2D image of their work is totally different to the harm from the sale of a 3D replica. The Government is not persuaded by this argument. The principle is that producing a 3D or 2D copy still prejudices the designer or rights holder's ability to fully exploit their intellectual property as they wish. Rights holders may wish to publish books containing images of their own artistic designs and wish to sell them to consumers. On this basis, it is well within reason and the rights of the copyright holder to be able to prevent other publishers from producing books of specific artistic designs for commercial gain.

Furthermore rights holders argued that a favourable treatment for 2-dimensional copies could make it difficult to act against marketing materials advertising replicas of artistic designs, and would therefore directly go against the goals of the legislative change.

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 9 months of the launch of the consultation, implements a stock depletion cut-off date of 28 January 2017, 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 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.

Opinion: final stage impact assessment
Origin: European
RPC reference number: RPC-3078(4)-BIS (was 2155)
Date of implementation: April 2016



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 Department 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 consulted on a shorter transition period, seeking to provide the maximum time for affected businesses to deplete stock while being compliant with EU requirements. The Department has amended the proposed depletion time following consultation.

For goods ordered after the 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 January 2017 (revised from October 2016 as proposed during the consultation). The inclusion of a depletion period is to mitigate some of the burdens on businesses that purchased items in good faith prior to the legal challenge to the five-year transition period.

Impacts of proposal

The Department discusses a range of potential costs and benefits of the proposal, recreating the analysis and evidence used in the previous IAs. 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

Opinion: final stage impact assessment
 Origin: European
 RPC reference number: RPC-3078(4)-BIS (was 2155)
 Date of implementation: April 2016



- limited numbers of copyright owners responding and/or providing robust evidence to the consultations to provide 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 nine-month period. Trade associations estimate that the cancellation of contracts will, 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 also 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. The length of the depletion period is expected to have a direct effect on the costs incurred by businesses currently trading in items which will no longer benefit from the exemption. The depletion date will also directly affect how soon copyright holders will begin to benefit from the end of the exemption. However, despite the detailed qualitative discussion, as with the previous IA, the Department's assessment that it is not possible to provide a robust appraisal of the net effect of the proposal is reasonable. It is also reasonable that the Department is not able to provide a robust estimate of the net effect on business as a result of the change from a five year depletion period to a nine month period. The RPC, therefore, validates the estimated equivalent annual net cost figure of zero for reporting purposes.

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 preferred transition time limit. The previous IA argued that a six-month depletion period was the maximum time period that would be consistent with EU requirements. The Department now argues that a nine-month depletion period would be consistent with the minimum EU requirements. While the Department's assessment that the difference is unlikely to have a significant monetisable effect on the long term impacts of the proposal appears reasonable, the IA would benefit from

Opinion: final stage impact assessment
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providing further information on why the nine-month depletion period will also be consistent with EU requirements and why it was not proposed in the original IA.

Initial departmental assessment

Classification	Out of scope (EU)
Equivalent annual net cost to business (EANCB)	Zero (non-monetised cost)
Business net present value	Not quantified
Societal net present value	Not quantified

RPC assessment

Classification	Out of scope (EU)
EANCB – RPC validated ¹	Zero (non-monetised cost)
Small and micro business assessment	Not required (EU)

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

Michael Gibbons CBE, Chairman

¹ For reporting purposes, the RPC validates EANCB figures to the nearest £100,000

Annex B – Respondents

95 responses were received, including 18 from individuals, and multiple responses from some businesses or organisations. Responses are published online, subject to redaction to remove personal or confidential data.

Abode Interiors Picture Library Ltd
ACC Art Books
Amanda Turner Photography
Anti Copying In Design¹
Aram Designs Ltd
Archives and Records Association
Association of Art Historians
Bardehle Pagenberg
British Association of Picture Libraries and Agencies
British Copyright Council
British Film Institute
Bruce Hemming Photography
Burleigh Dodds Science Publishing Limited
Cassina SpA
Chartered Institute of Patent Attorneys
Double-Barrelled Booked Ltd
Douglas Gibb Photography
Fiell Publishing Limited²
FOCAL International
GAP Interior Images Ltd
Hachette UK
Independent Publishers Guild
IP Federation
Knoll International
Laurence King Publishing Ltd
Law Society of England and Wales
Law Society of Scotland
Libraries and Archives Copyright Alliance
London Metropolitan University
Loughborough University
Motion Picture Association
National Portrait Gallery
Osprey Publishing
Photoword
Powell Gilbert LLP
Professor Lionel Bently & Professor Graeme Dinwoodie
Richard Gadsby Photography
Rubinstein Phillips Lewis Smith³
Scott Howard Office Furniture
SCP Ltd

1 Also sent on behalf of the Worshipful Company of Furniture Makers and the British Confederation of Furniture Manufacturers

2 Open letter with 25 signatories from the design publishing sector and academia

3 Sent on behalf of 21 photographers, picture libraries and interior designers

Shire Publications
Society of Authors
Stonebutterfly Ltd
Swansea Library
The Booksellers Association
The Fifth Sector
The MOCA
The Publishers Association
The Quarto Group
Truli Photo
Twentieth Century Design Ltd
UIT Cambridge Ltd
University of Hertfordshire
University of Wales Press
V&A Museum
Yale University Press

DRAFT STATUTORY INSTRUMENTS

2016 No.

COPYRIGHT

The Draft Enterprise and Regulatory Reform Act 2013
(Commencement No. 10 and Saving Provisions) Order 2016

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

The Secretary of State makes the following Order in exercise of the powers conferred by sections 100 and 103(3) of the Enterprise and Regulatory Reform Act 2013(a).

Citation

1. This Order may be cited as the Enterprise and Regulatory Reform Act 2013 (Commencement No. 10 and Saving Provisions) Order 2016.

Interpretation

2.—(1) In this Order—

“commencement date” means 28th July 2016;

“consultation time” means half-past four in the afternoon on 28th October 2015;

“depletion date” means 28th January 2017;

“relevant copy” means a copy of an artistic work that was made in, or imported into, the United Kingdom—

(a) before the consultation time; or

(b) on or after the consultation time but before the depletion date pursuant to a contract entered into before the consultation time;

“the 1988 Act” means the Copyright, Designs and Patents Act 1988.

(2) Words and expressions used in this Order have the same meaning as in Part 1 of the 1988 Act.

Day appointed for the coming into force of section 74

3. The day appointed for the coming into force of section 74 of the Enterprise and Regulatory Reform Act 2013 is the commencement date.

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

4.—(1) This article applies to the following acts done on or after the commencement date but before the depletion date—

- (a) the copying of an artistic work;
- (b) the provision of means for making a copy of an artistic work; and
- (c) the importation into the United Kingdom of a copy of an artistic work.

(2) An act of a kind mentioned in paragraph (1) does not constitute an infringement of copyright if—

- (a) the act is done pursuant to a contract entered into before the consultation time; and
- (b) before the commencement date the doing of that act would not, by virtue of section 52 of the 1988 Act, have constituted an infringement of copyright.

5. The following acts done on or after the commencement date but before the depletion date do not constitute an infringement of copyright in an artistic work if before the commencement date the doing of those acts would not, by virtue of section 52 of the 1988 Act, have constituted an infringement of copyright—

- (a) the issue of a relevant copy to the public;
- (b) the renting or lending of a relevant copy to the public; and
- (c) the possession or dealing with a relevant copy.

6. The communication to the public of an artistic work on or after the commencement date but before the depletion date does not constitute an infringement of copyright in the artistic work if before the commencement date it would not, by virtue of section 52 of the 1988 Act, have constituted an infringement of copyright.

	<i>Name</i>
	<i>Title</i>
Date	Department for Business Innovation and Skills

EXPLANATORY NOTE

(This note is not part of the Order)

This is the tenth Commencement Order made under the Enterprise and Regulatory Reform Act 2013 (c.24) (“the Act”).

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

The transitional provision in article 4(1) provides for the making or importation of a copy of an artistic work after the commencement date, if it is pursuant to a contract entered into before the consultation time. The transitional provision in article 5 provides for what can be done with those copies after commencement, and also with copies that were already in existence before the consultation time (this would cover, for example, the sale of such copies). Article 6 covers the act of making available to the public of the work by electronic transmission, and so would include the marketing of products by way of online advertising (for example, if a seller wished to display images of the works on a website).

NOTE AS TO EARLIER COMMENCEMENT ORDERS

(This note is not part of the Order)

<i>Provision</i>	<i>Date of Commencement</i>	<i>S.I. No.</i>
Section 71	6th April 2016	2016/191

Section 7(1)	6th April 2014	2014/253
Section 7(2) (partially)	6th March 2014	2014/253
Section 7(2) (remainder)	6th April 2014	2014/253
Sections 8 and 9	6th April 2014	2014/253
Section 14	29th July 2013	2013/1648
Section 15(10)	29th July 2013	2013/1648
Section 16	6th April 2014	2014/253
Section 19	25th June 2013	2013/1455
Section 23	29th July 2013	2013/1648
Section 25(1) and (2)	1st October 2013	2013/2227
Section 25(3)	1st April 2014	2014/416
Section 25(4)	1st October 2013	2013/2227
Section 26	1st April 2014	2014/416
Section 27	1st October 2013	2013/2227
Sections 29 to 51	1st April 2014	2014/416
Sections 54 to 58	1st April 2014	2014/416
Sections 60 and 61	6th April 2014	2014/416
Section 63 (partially)	25th June 2013	2013/1455
Section 63 (partially)	1st October 2013	2013/2227
Section 63 (partially)	6th April 2014	2014/416
Section 65	1st October 2013	2013/2227
Section 66	6th April 2014	2014/416
Sections 67 to 70	1st October 2013	2013/2227
Section 72(1)	25th June 2013	2013/1455
Section 72(2) and (3)	16th December 2013	2013/2979
Section 72(4) (partially)	25th June 2013	2013/1455
Section 72(4) (partially)	1st October 2013	2013/1455
Section 72(4) (partially, in relation to England only)(4)	1st October 2013	2013/1455(a)
Section 72(4) (partially, in relation to England only)	16th December 2013	2013/2979
Section 72(4) (partially)	16th December 2013	2013/2979
Section 72(4) (partially, in relation to England only)	31st December 2014	2013/2979(b)
Section 72(4) (partially in relation to Scotland)	15th September 2014	2014/2481
Section 73 (partially)	1st October 2013	2013/2227
Sections 79 to 82	1st October 2013	2013/2227
Section 90(7)	1st October 2013	2013/2227
Schedule 1, paragraphs 2 and 3	6th March 2014	2014/253
Schedule 1 (remainder)	6th April 2014	2014/253
Schedules 2 and 3	6th April 2014	2014/253
Schedule 4, paragraphs 1 to 18, 20 to 28, 29(1), 31, 32, 34, 35, 51 (partially), 52 (partially), 53 (partially), 59, 60, 61(1) to (4), and 62 to 65	1st October 2013	2013/2227
Schedule 4 (remainder)	1st April 2014	2014/416
Schedules 5 to 13	1st April 2014	2014/416
Schedule 14 (paragraphs 1 to 19 and 23 to	1st April 2014	2014/416

(a) S.I. 2013/1455 (C. 55) was amended by S.I. 2013/2271 (C. 94) in relation to the commencement of this provision.

(b) S.I. 2013/2979 (C. 122) was amended by S.I. 2014/824 (C. 33) and S.I. 2014/2481 in relation to the commencement of this provision.

29)		
Schedule 15	1st April 2014	2014/416
Schedule 16	6th April 2014	2014/416
In Schedule 17—		
Paragraphs 1 to 6	1st October 2013	2013/2227
Paragraph 9	25th June 2013	2013/1455
Paragraph 10	1st October 2013	2013/2227
Paragraph 11	6th April 2014	2014/416
Paragraphs 12 and 13	1st October 2013	2013/2227
Paragraphs 14 to 19	6th April 2014	2014/416
Paragraph 20	25th June 2013	2013/1455
In Schedule 20—		
Paragraph 1	1st October 2013	2013/1455
Paragraph 2 (partially)	25th June 2013	2013/1455
Paragraph 2 (partially in relation to England only)	1st October 2013	2013/1455
Paragraph 2 (partially in relation to England only)	16th December 2013	2013/2979
Paragraph 2 (partially)	16th December 2013	2013/2979
Paragraph 2 (partially in relation to England only)	31st March 2014	2013/2979
Paragraph 2 (partially in relation to Scotland)	15th September 2014	2014/2841
Schedule 21, paragraph 5	1st October 2013	2013/2227

Intellectual Property Office
Concept House
Cardiff Road
Newport
NP10 8QQ

Tel: 0300 300 2000

www.gov.uk/ipo

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