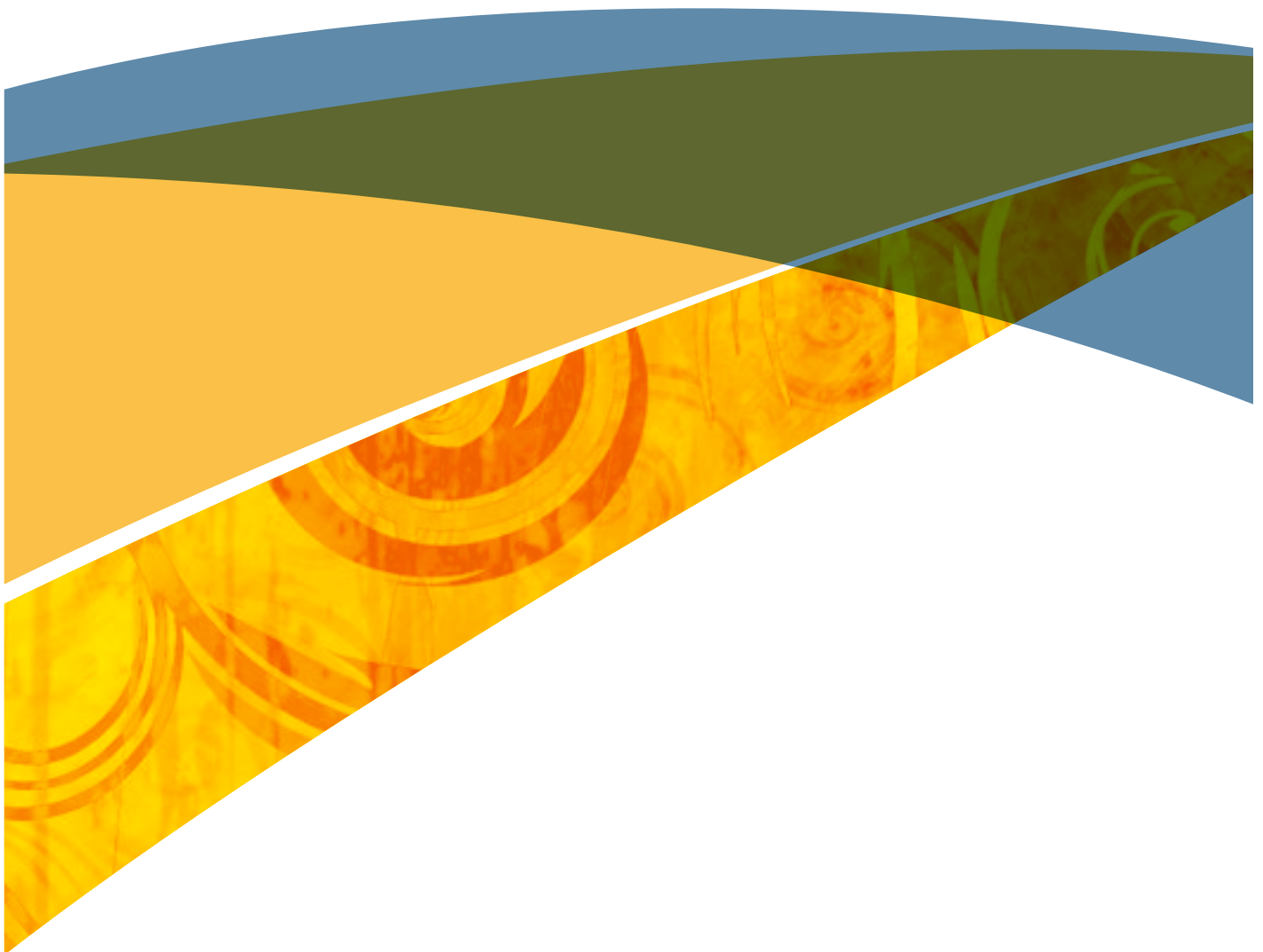


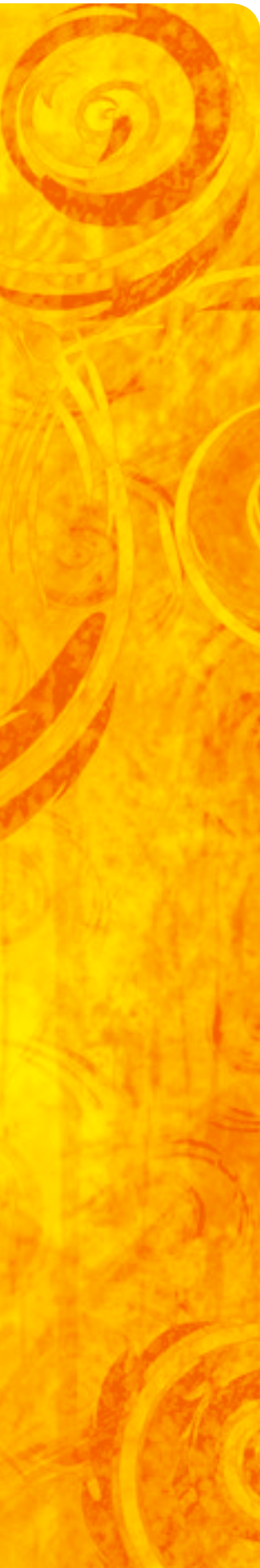


Intellectual
Property
Office

Repeal of section 52 of the Copyright, Designs and Patents Act 1988:

Guidance for affected individuals, organisations and businesses

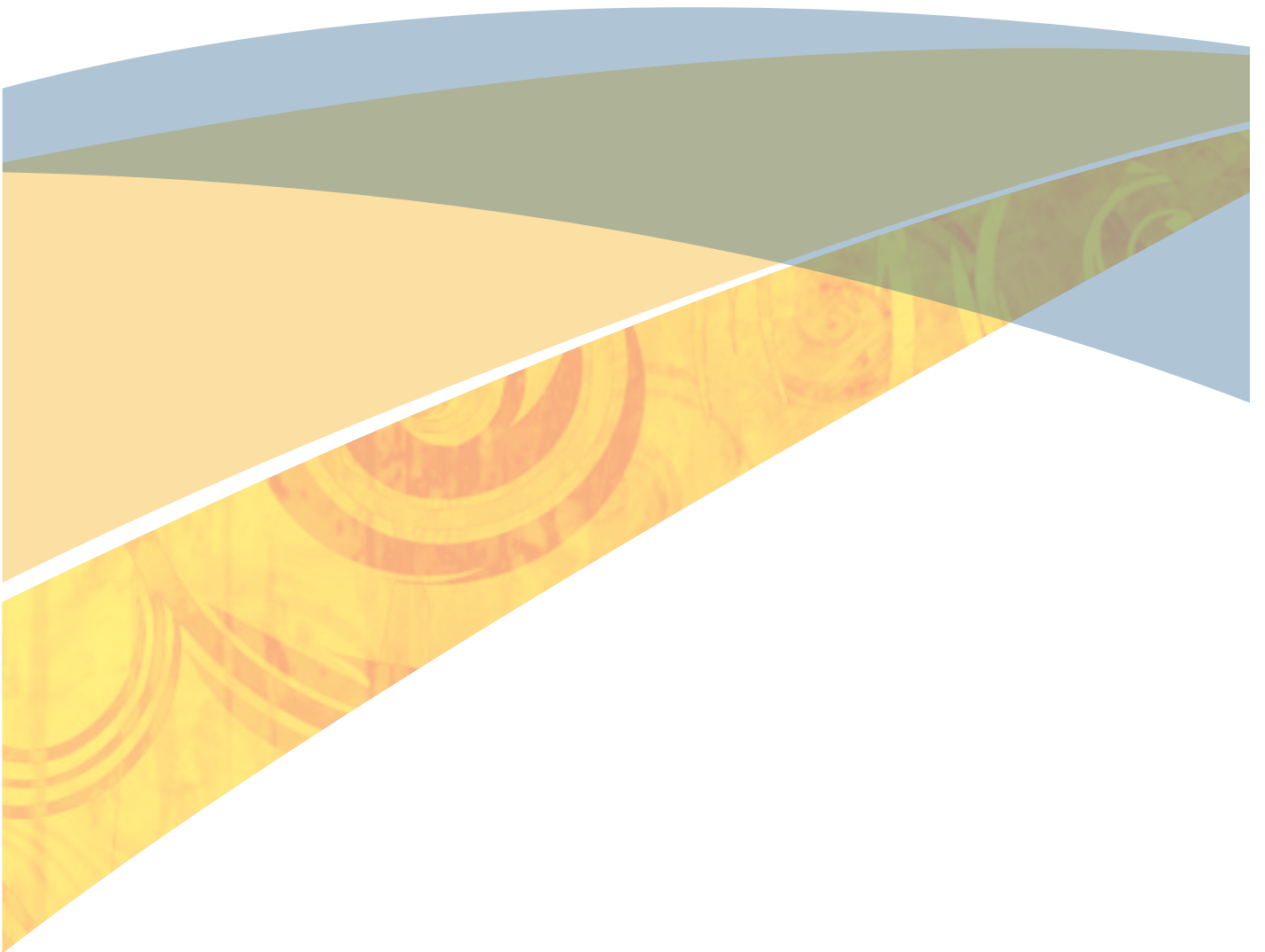




Copyright protects literary, dramatic, music and artistic works. This guidance is intended to help creators, rights holders and users of artistic works which have been industrially manufactured (that is, more than 50 were made). The law on these works changed on 28 July 2016 and affects how these works can be used.

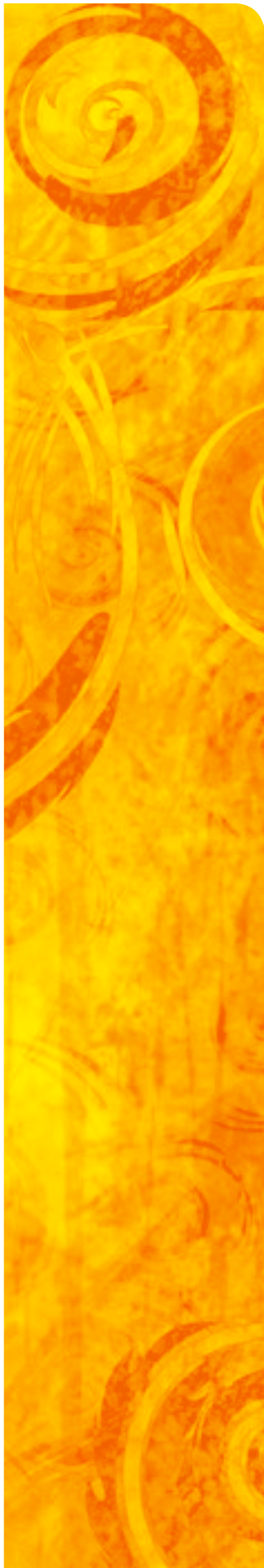
The majority of uses of copyright materials continue to require permission from the copyright owner, so you should carefully consider whether you can rely on an exception, and if in doubt you should seek legal advice. Copyright infringement is against the law. Deliberate infringement on a commercial scale may lead to a criminal prosecution. Further guidance on copyright is available on the GOV.uk website¹.

¹ See <https://www.gov.uk/topic/intellectual-property/copyright>



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Introduction

Who should read this guidance?

As a result of recent changes to copyright law, some UK businesses, organisations and individuals may find they need to change their business models or product ranges.

This guidance:

- focuses on copyright law,
- does not cover how to protect articles under designs or trade mark law²,
- is non-statutory, and
- does not provide legal advice.

If you think that these issues may affect you, you may want to seek independent legal advice.

What is the change to copyright law?

Section 52 of the Copyright, Designs and Patents Act 1988 (“CDPA”) contained an exception which limited the term of copyright protection for certain artistic works when they had been industrially manufactured. This meant that when more than 50 copies of these artistic works were made, then the period of protection was limited to 25 years, compared to other artistic works which are protected by copyright for the lifetime of the creator plus 70 years.

The Government decided to bring industrially manufactured items into line with other artistic works. The Intellectual Property Office (“IPO”) originally carried out a consultation in 2014 on the transitional arrangements which would be involved in the repeal of section 52. The transitional arrangements agreed after this consultation were challenged by way of judicial review and a new consultation was carried out in late 2015.

The Government published its response to the 2015 consultation on transitional arrangements on 21 April 2016³. From 28 July 2016, all types of artistic works were granted copyright protection for the life of the creator plus 70 years; this included industrially manufactured works which had previously been limited to 25 years under section 52 CDPA.

What artistic works are covered by this change?

Section 52 referred to artistic works which are industrially manufactured. The definition of artistic works in section 4 CDPA includes “works of artistic craftsmanship”. There is no statutory definition of a work of artistic craftsmanship. See the next section of this guidance on works of artistic craftsmanship for further information.

² More information about designs and trade marks is available online at <https://www.gov.uk/government/organisations/intellectual-property-office>

³ You can access the consultation document and the Government response at <https://www.gov.uk/government/consultations/transitional-arrangements-for-the-repeal-of-section-52-cdpa>



What happened on 28 July 2016?

The repeal of section 52 CDPA came into force. From this date, you could no longer make or import new copies of artistic works unless they fell within the transitional provisions (expired on 28 January 2017), permission was granted by the rights holder, or an exception applied.

What happened on 28 January 2017?

This date was the end of the depletion period for the transitional provisions which were put in place for the repeal of section 52. From this date you are no longer able to deal with any replicas or unauthorised copies made in reliance on section 52 CDPA. Now all these items must:

- have been depleted (sold or destroyed):
- have permission from the rights holder to continue their trading; or
- rely on an exception.

Simple possession of an article is not a breach of copyright, such as having a copyright protected chair in your house, although possession may become an infringement if done while acting in the course of a business.

What happened on 6 April 2017?

The Government's legislative changes to paragraphs 5 and 6 of Schedule 1 CDPA came into force on this date. These amendments clarified UK law to make clear that certain artistic works made before 1 June 1957 are entitled to the same term of copyright protection as those made after this date



All businesses, individuals or organisations affected by the change

What is protected by copyright after the repeal?

Copyright protects original literary, dramatic, musical or artistic works. Section 52 applied to artistic works which had been exploited by an industrial process, that is, more than 50 items were made.

Originality

In order for an artistic work to be protected by copyright, it must be original⁴. Originality in the context of copyright is considered to be something that is the ‘author’s own intellectual creation’⁵.

Works of artistic craftsmanship

For a design to be protected by copyright in the UK as an original “artistic work” (as opposed to a literary, dramatic or musical work), it must fall into a category in section 4 CDPA:

- a graphic work, photograph, sculpture or collage, irrespective of artistic quality;
- a work of architecture being a building or a model for a building; or
- a work of artistic craftsmanship.

The works most likely to be affected by the repeal of section 52 CDPA are “works of artistic craftsmanship”. There is no statutory definition of a “work of artistic craftsmanship”. Without a formal definition, it is ultimately up to the UK courts to decide what would be classified as a work of artistic craftsmanship (protected by copyright law). As a first step in any infringement claim the onus would be on the claimant to show that the work is one of artistic craftsmanship and therefore protected by copyright.

⁴ Section 1 CDPA, see also Case C168/09 *Flos SpA v Semeraro Casa e Famiglia SpA*

⁵ Case C-604/10 *Football Dataco and Others v. Yahoo! UK Ltd and Others*

It is always a question for the court to decide whether a specific product is a work of artistic craftsmanship, but the following criteria can be extrapolated from several UK cases:

- It is not enough for a work (such as a piece of furniture) to look attractive to qualify as a work of artistic craftsmanship.
- The phrase “artistic craftsmanship” designates two requirements combined in the same work: **artistic quality** and **craftsmanship**.
- “**Craftsmanship**” presupposes special training, skill and knowledge for production. One suggestion from users of artistic works is that examples of craftsmen include silversmiths, potters, woodworkers and hand-embroiderers.
- “**Artistic**” means it will have a real artistic or aesthetic quality and must be a work of art or fine art.
- Whether an article is artistic must be determined in light of evidence.
- This could include: evidence of the intentions of the maker, in particular whether or not he had the conscious purpose of creating a work of art; evidence from ordinary members of the public; expert evidence; whether the maker already has works to his name which are acknowledged to be artistic; and the level of aesthetic appeal.
- One factor in determining whether a work is a work of artistic craftsmanship is assessing the extent to which the particular work’s artistic expression is unconstrained by functional considerations. The extent to which functional considerations impact on the likelihood of a work being one of artistic craftsmanship is debated by legal scholars.

Although the issue of artistic craftsmanship has rarely been dealt with by the UK courts to date, there have been a few cases that touch upon the concept. It should be noted that **each of these cases dealt with a specific set of facts**, and the court’s ruling was based on those facts.

<i>Burke & Margot Burke Ltd v Spicers Dress Design</i> [1936] Ch 400	In this particular case, a lady’s dress did not constitute a ‘work of artistic craftsmanship’ within the definition of ‘artistic work’ in section 35 (repealed) of the Copyright Act 1911.
<i>Hensher (George) Ltd v Restawile Upholstery (Lancs) Ltd</i> [1975] RPC 31, HL	Law Lords did not agree on a test to determine works of artistic craftsmanship, but they did agree that the prototype of a new suite of furniture in this case was not such a work.
<i>Merlet & another v Mothercare plc</i> [1986] RPC 115	A baby cape was not considered a work of artistic craftsmanship as its purpose was to protect the child from the climate and, therefore, it was not a work of art.
<i>Vermaat & another v Boncrest Ltd</i> [2001] All ER (D) 167	A patchwork bedspread did not exhibit the necessary requirement of creativity so as to be a work of artistic craftsmanship.
<i>Lucasfilm Limited and others v Ainsworth and another</i> [2012] 1 AC 208	The High Court did not consider the helmet of the Stormtrooper® in the Star Wars® films to have the necessary “artistic” creation required of a sculpture.

What is unlikely to be a work of artistic craftsmanship?

Some copyright experts⁶ say that the more constrained the designer is by functional considerations, the less likely the work is to be a work of artistic craftsmanship. A work designed to be mass-produced (rather than designed as a one-off or limited run and then copied multiple times) can be a work of artistic craftsmanship as a matter of principle, although designing for mass production may cast doubt on whether it is truly one of artistic craftsmanship.

Authorship and rights holders

UK law presumes the author of a copyright work to be the first owner. If the work was created by an employee in the course of his employment, copyright will belong to the employer, unless the employment contract states otherwise.⁷ The law also recognises that copyright works may be the product of joint authors and co-authors.⁸ This means that as soon as the work is created, copyright in the work belongs to the person or persons who created it.

If a rights holder is unknown and cannot be ascertained by reasonable enquiry, copyright lasts for 70 years from the end of the calendar year in which it was made or in which it was made available to the public.⁹

If a work is computer-generated, the author is the person making the arrangements for the creation of the work but the term of protection for computer-generated works is only 50 years from the end of the calendar year in which the work was made.¹⁰

The law also provides that the term of copyright protection in the UK for works made outside the European Economic Area (EEA) by non-EEA citizens will usually be the same as in that work's country of origin.¹¹

Copyright in commercial objects is often licensed, so the rights holder in a work may be a licensee rather than the original author, depending on the terms of the licence. Copyright can also be transferred to another person or organisation. This is called assignment.¹² For a commissioned work, the copyright is usually owned by the creator, unless agreed otherwise.

6 Such as the views in the textbook *Copinger and Skone on Copyright, Volume 1, 2011*

7 Section 11 CDPA.

8 Sections 10 and 10A CDPA.

9 Section 12 CDPA

10 Sections 9(3) and 12(7) CDPA.

11 Section 12(6) CDPA

12 More information on assignment is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/379040/c-notice-201402.pdf.

Effect of the change in law

Does the change in law apply to old works where copyright had been limited to 25 years?

Yes. Following the change in law, artistic works that had been industrially made (that is, more than 50 copies were made) but whose 25 year term of copyright had expired under section 52, will resume the remainder of the complete lifetime plus 70 year term at the point at which the old 25 year term had expired. However, this does not mean that the law is retrospective, as it does not affect acts done in relation to the work in the past.

Take this example: person “W” created an artistic work in 1980. In the same year, “W” manufactured 51 copies and sold them. “W” died in 2010.

- Under section 52, this work would only be protected by copyright until 2005.
- Following the change in law this work would be protected until 2080.

Pre-1 June 1957 works

The Government has also amended Paragraphs 5 and 6, Schedule 1 CDPA to ensure certain artistic works made before 1 June 1957 are entitled to the same term of copyright protection as those made after this date. Previously, Schedule 1 CDPA prevented certain works from being entitled to copyright protection if they satisfied the following criteria:

- It was an artistic work which was made prior to 1 June 1957;
- At the time when the work was made it was capable of being registered as a design;
- It was used, or intended to be used, as a model or pattern to be multiplied by an industrial process; and
- It was protected by copyright in at least one European Economic Area (EEA) State on 1 July 1995.

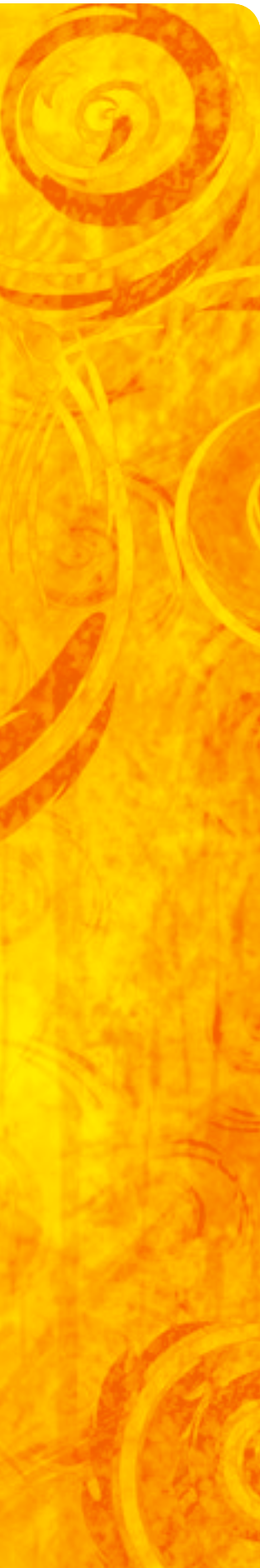
Example 1

Person “Y” created a lamp in 1950 which was capable of being registered as a design. Y manufactured 51 copies and sold them. This work was protected by copyright in at least one EEA state on 1 July 1995 and fell within the definition of an ‘artistic work’ under UK law. Y died in 2000. This work would be protected until 2070.

Example 2

Person “Z” made a prototype of a new suite of furniture in 1955 which was capable of being registered as a design. Z manufactured 51 copies and sold them. This work was protected by copyright in at least one EEA state on 1 July 1995. However, the UK courts found that the work did not fall within the definition of an ‘artistic work’ under UK law (looking, in particular, at whether the work constituted a work of ‘artistic craftsmanship’, but finding that it did not¹³). It is therefore not entitled to copyright protection. Dealing with this prototype would not constitute a copyright infringement.

¹³ See also *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1976] A.C.



The Government decided to make legislative changes to Schedule 1 CDPA to make the EU law position with respect to these works clear and to ensure consistency with the repeal of section 52 CDPA. The Regulations¹⁴ that made these changes came into force on 6 April 2017.

As outlined in this guidance, for a work to be protected by copyright as an original “artistic work” it must fall into a category in section 4 CDPA. In relation to Schedule 1 CDPA the most likely of these categories is a “work of artistic craftsmanship.” There is no statutory definition of a “work of artistic craftsmanship” and, without a formal definition, it is ultimately up to the UK courts to decide what would be classified as a work of artistic craftsmanship and therefore protected by copyright. In any infringement claim it would be the responsibility of the claimant to show that the work in question meets the criteria set out above, including whether it is an artistic work and therefore protected by copyright.

¹⁴ Copyright (Amendment) Regulations 2016



Rights holders in artistic works

What happens to old designs where I hold the copyright?

If the design is an artistic work that is protected by copyright, the term of protection will be life of the creator plus 70 years. You will be able to make decisions about who makes copies of your work, subject to copyright exceptions set out in UK law. The normal rules of copyright apply, such as being able to license copying of the work.

Can I issue new licences?

Rights holders in works protected by copyright are entitled to issue licences with the terms they are able to negotiate. You may be able to obtain assistance from various organisations on finding licensing solutions¹⁵.

Does the change make any difference to the terms of my licence?

A licensee is a type of rights holder, so will be able to operate within the terms of the licence for the period of life of the creator plus 70 years, unless the licence has already expired. If you control a work under a licence, you may also want to check the scope of the licence in case any terms were originally negotiated in light of section 52 CDPA. You should seek independent legal advice, if required.

How do I enforce copyright?

Copyright is a property right and can be enforced using legal remedies, including informal resolution between the parties, mediation or court action. More information about enforcement is available online.¹⁶

¹⁵ More information about licensing is available at <https://www.gov.uk/guidance/license-sell-or-market-your-copyright-material#license-your-copyright>

¹⁶ See further at <https://www.gov.uk/guidance/enforcing-your-copyright>



Businesses, organisations or individuals who have copied artistic works

What should we be doing now?

You should assess if you need to make any changes to your business model and product range and obtain legal advice if required. You may decide that no changes are necessary.

Others may decide that they do need to make minor or substantive changes to their business model or product ranges so as to avoid the risk of copyright infringement. It is not possible to provide an exhaustive list, but they may wish to consider the following activities:

- Identify existing items which are protected by copyright, determine if licences are available for copies to be made (2D or 3D), and negotiate these;
- Remove some specific items from their product range;
- Review any existing licences to check if the change in law impacts on the terms of the licence; and/or
- Check whether any copyright exceptions could apply when making or using new or existing copies (see further below on [exceptions](#)).

Where can I get a licence?

Licences may be available directly from the creator or a rights holder. The terms of licences will vary¹⁷.

¹⁷ More information available at <https://www.gov.uk/using-somebody-elses-intellectual-property/copyright>

3D Copies

Can we just make a number of changes to the work so we can sell a modified version?

There is no hard and fast rule to say how many changes make a modification to an artistic work acceptable.

Under copyright law, you must not take a “substantial part” of the work if you wish to avoid infringing copyright. A substantial part is not defined in copyright law, but has been interpreted by the courts to mean a qualitatively significant part of a work, even where this is not a large part of the work. If in doubt, you should seek independent legal advice on this.

How does this work for furniture design if we can't be inspired by existing works?

The change in law does not stop designers taking inspiration from previous works. The intent of the law is to stop slavish copies of existing artistic works. In other words, producing identical copies and substantially copying other artistic works.

Designers are usually able to base any new designs on the theme or ideas which underpin another work, as long as they do not copy a substantial part of another artistic work.

Not all 3D design objects would be protected by copyright, so it is possible to take inspiration from previous artistic designs, bearing in mind that design rights or trade marks must not be infringed either.

Are we allowed to sell replicas to Europe?

If an item is not protected by IP rights, then you should be able to. If you have a relevant licence then you may be able to – you must check the terms of your licence.

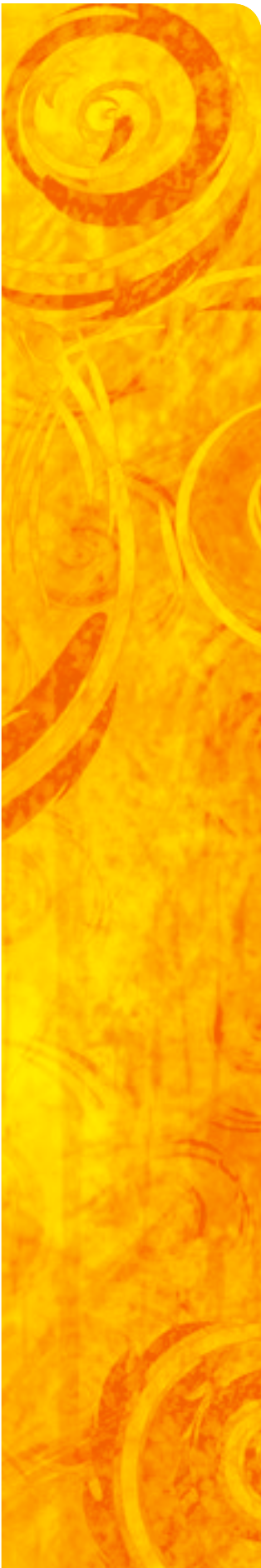
Irrespective of the change in law, it may still be unlawful in another country to offer for sale or sell from the UK there works that are protected by IP rights in that state. This is because there is the potential for a UK-based company to be pursued for damages in another EU country if the business infringes intellectual property rights in that EU country.

What if our website targets UK customers but someone in Europe wants to buy from us?

You should take care in offering for sale artistic works protected in other EU countries. As with all copyright-protected works, you should be mindful of the potential to offer for sale items which may be unlawful in other EU countries through websites.

As an example, a UK-based business lawfully sells product “A” (not protected by UK copyright) on a .co.uk website in the UK. An individual located in France finds the .co.uk website where product “A” is being offered for sale. In France, an identical copy of product “A” is an infringement of copyright.

By providing a payment method and delivery system, the UK-based business may infringe copyright in France because a copy of product “A” which is unlawful in France has been offered for sale in that country. Therefore the rights holder of product “A” can pursue the UK business for damages that occur in France, even though no damages would have occurred in the UK.





Photos, images and 2D copies

When publishing or reprinting books, will we need to gain permission or licences for images?

Publishers need to be mindful of the depletion date of 28 January 2017 if their books, periodicals or magazines contain images of works of artistic craftsmanship.

Publishers and bookstores had until the end of the depletion period to sell articles containing images of works of artistic craftsmanship if the 2D copies in those articles were printed or contracted for prior to the release of the consultation document, including “print on demand” titles.

Publishing any new title or reprinting books after 28 January 2017 will mean that any images of industrially-manufactured artistic works will require licences unless subject to a copyright exception. Licences for 2D copies, including photographs, can be obtained from rights holders and there are a number of organisations that can assist with licensing arrangements, including collective management organisations¹⁸ and trade associations.

What if there are multiple creators in a particular work?

As with any artistic work, a work of artistic craftsmanship might have multiple copyright owners if there were more than one “creator”. As an example, an individual created an artistic surface decoration for a plate and another individual may have created the artistic design for the structure of the same plate. Permission would be needed from both creators if a copy was to be made.

However, this artistic plate may have been commissioned by a particular manufacturer. In this case the manufacturer may well be the rights holder of all the “rights” held in that plate, and businesses that wish to make copies of this plate, whether in 2D or 3D form, will need to seek a licence or permission from the manufacturer.

What if we do not seek permission?

You will need to seek permission to distribute or communicate new copies of artistic works, unless covered by a copyright exception.

Merely possessing a 2D copy is unlikely to constitute an act of infringement, such as owning a copy of a book for private or domestic use, with images of works of artistic craftsmanship. However, possession of a 2D copy of an artistic work may be an infringement if done so while acting in the course of a business (such as using some of those images for an online catalogue).¹⁹ You will need to consider whether it is an “infringing copy”²⁰, for example it is a copy that was created following the repeal without the consent of the rights holder. You may wish to prioritise parts of your image library or archive to check and clear.

¹⁸ More information about collective management organisations is available at <https://www.gov.uk/guidance/licensing-bodies-and-collective-management-organisations>

¹⁹ See section 23 CDPA

²⁰ See section 27 CDPA



What happens if we have contracts issued for the “term of copyright”?

This is a matter for affected individuals to review, as contracts between different groups will have different terms, conditions and definitions. You may want to obtain independent legal advice on what your licences and contracts provide for.

Are we able to rely on image rights holders to clear image rights and provide a warranty?

Publishers and others that license from image rights holders may stipulate in their contracts that the rights holder is responsible for clearing copyright permissions in the image they buy from that rights holder. This is a matter for individual businesses to review, as warranties are likely to be a contractual issue.

Will we need to obtain permission from the photographer as well as the rights holder in the original work?

Copyright may exist in both the underlying work if it is an artistic work and the photo itself. If both are artistic works, then permissions or licences would need to be sought from each rights holder to use them.

Which copyright exceptions could we rely on for 2D copies of artistic works?

Copyright exceptions (otherwise known as “permitted acts”) may apply to your situation, allowing you to use and make copies of artistic works without having to seek permission from the creator or copyright owner. Many of these exceptions are for narrow and specifically defined purposes, and their use often requires “fair dealing” with works. Reliance on an exception is considered on a case by case basis.

Fair dealing is a legal term used to establish whether a use of copyright material is lawful or whether it infringes copyright. There is no statutory definition of fair dealing – it will always be a matter of fact, degree and impression in each case. The question to be asked is: how would a fair-minded and honest person have dealt with the work?

Factors that have been identified by the courts as relevant in determining whether a particular dealing with a work is fair include:

- Does using the work affect the market for the original work? If a use of a work acts as a substitute for it, causing the owner to lose revenue, then it is not likely to be fair.
- Is the amount of the work taken reasonable and appropriate? Was it necessary to use the amount that was taken? Usually only part of a work may be used.

More information on copyright exceptions and fair dealing is available online²¹ but some potentially useful exceptions are set out below.

Publishers and museums:

- The exception covering **criticism and review** of an artistic work could, for example, cover copies of artistic works in a book or article where there is genuine criticism and review of those artistic works. For this exception to apply, the copy should be accompanied by a “sufficient acknowledgement”. This exception is unlikely to cover a coffee table book comprised exclusively of photos of home interiors but might be applicable if there is review of the work alongside the images.
- The exception covering **quotations**, under which extracts or quotations for published works may be made for a variety of purposes such as illustration, as long as the use of the copy is “fair”. There is no definition of the word “fair”, and each use would depend on the facts of the case and on the purpose of the use. This quotation should be justified by the context it was used in and does not have the potential to substitute for or compete with the original work.

Educational establishments:

- The **education** exceptions which allows general fair dealing for teaching. This would apply to all types of works and any form of copying as long as it is not for a commercial purpose and it is illustrating a point. The exception could cover, for example, copying for educational instruction or preparation for instruction by those giving or receiving instruction. For example, a teacher could use a photo of a work of artistic craftsmanship in a lecture on design.

Photographers, film makers and broadcasters:


- The exception for **incidental inclusion** of copyright material. For example, the exception would cover a photo or film of a kitchen with a teapot on the table (assuming that the particular teapot was a work of artistic craftsmanship). It would unlikely cover photographs of that teapot in which that work was the main subject of the photo, or a book with a series of photos of that teapot, especially if the teapot was the main focus of the photo or book.
- There is an exception for making a photograph, filming or broadcast of certain artistic works made to be located **permanently on display** under section 62 CDPA. You may make 2D copies (i.e. making a photograph) if the work of artistic craftsmanship is permanently situated in a public place or in premises open to the public.

Students or academics:

- The **research** and private study exceptions where students may make copies or ask librarians to make a copy of an artistic work for them (i.e. an image of a work of artistic craftsmanship) if that image accompanies the text or is part of an article in a periodical, for the purposes of non-commercial research or private study.

These are only examples of exceptions which might be useful – using each of the available exceptions would always have to be assessed on a case-by-case basis, especially if the exception stipulates “fair dealing”.

²¹ See <https://www.gov.uk/guidance/exceptions-to-copyright>



What if a 2D image does not compete with the exploitation of the original work?

Some people have argued that 2D copies of physical objects should be allowed because they do not directly compete – for example a person who wants to buy a particular artistic lamp is probably not going to be satisfied with a picture of that artistic lamp.

We are aware that some rights holders have said that they will not pursue publishers for 2D copies of their works where it contributes to marketing or reputation. Some rights holders have already granted permission to reproduce their works for free. However, the rights holder of a particular work may still wish to retain control over how particular copies are used, for example, in terms of “moral rights” where a rights holder can object to any derogatory use of the work. Therefore, even though the 2D image may not compete with the original purpose of the work, you may still want to seek permission to use a 2D copy of that work.



Further information

If you have more questions on **copyright**, you may find the answer at www.gov.uk/topic/intellectual-property/copyright or you can email the copyright enquiries team: copyrightenquiries@ipo.gov.uk

If your question is about **other intellectual property rights** (such as designs, trade marks or patents), you can contact the IPO:

Email: enquiries@ipo.gov.uk

Address: Intellectual Property Office
Concept House
Cardiff Road
Newport
South Wales
NP10 8QQ

Telephone: 0300 300 2000

Outside UK: +44 (0)1633 814000

Fax: +44 (0)1633 817777

Textphone: 0300 0200 015

Concept House
Cardiff Road
Newport
NP10 8QQ

Tel: 0300 300 2000
Fax: 01633 817 777
Email: information@ipo.gov.uk

www.gov.uk/ipo

Facebook: TheIPO.UK
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