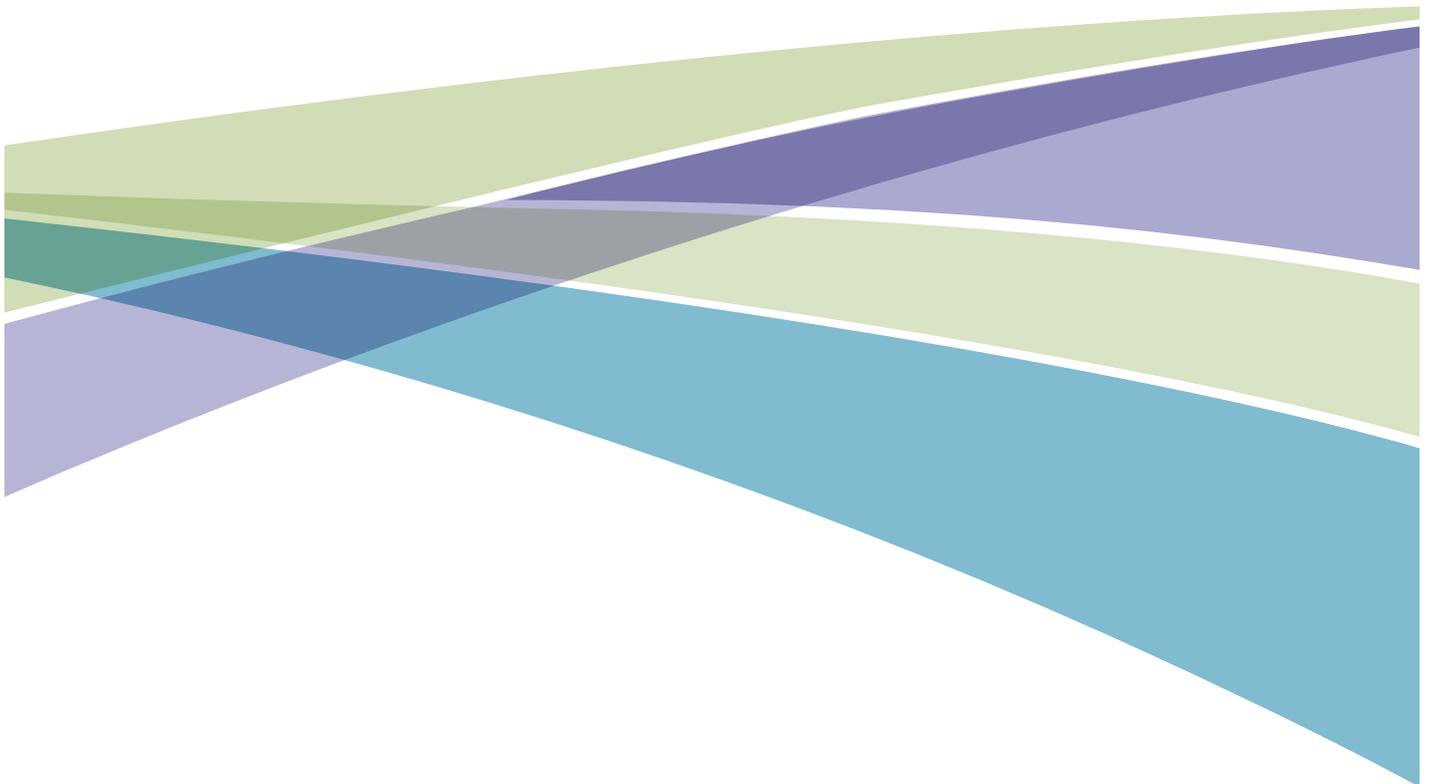




Intellectual
Property
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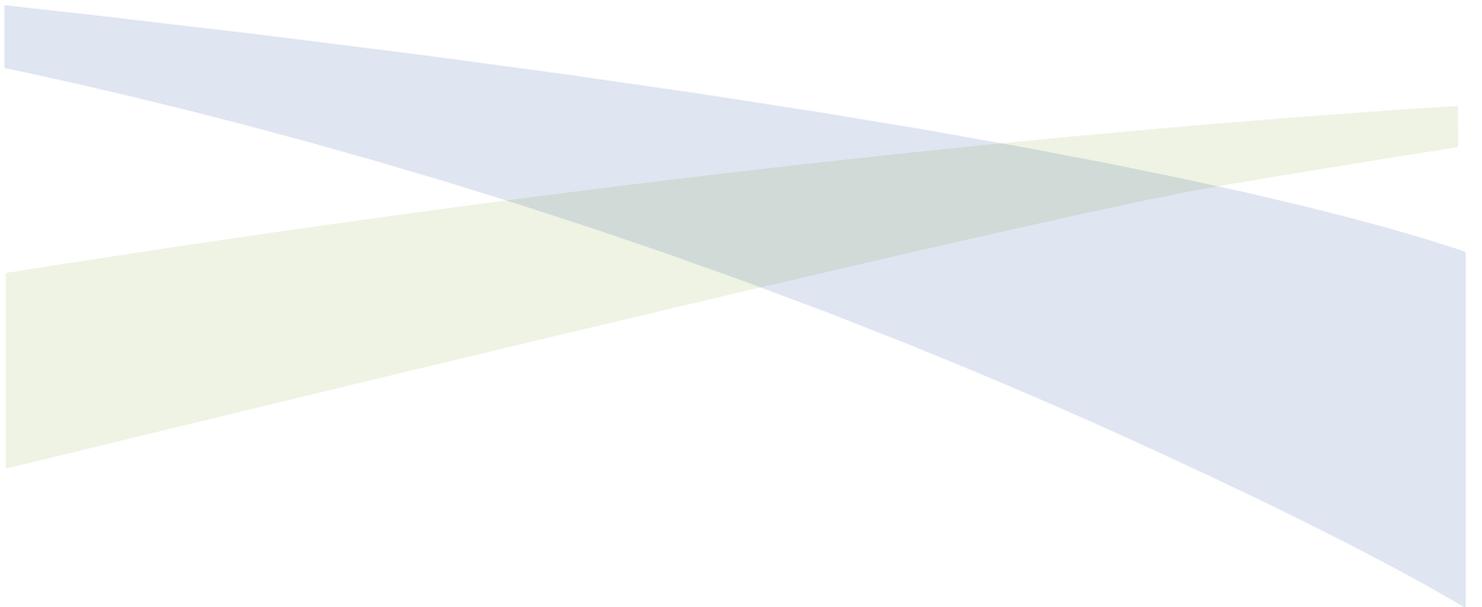
Call for evidence:

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



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Introduction

The creative industries are a vital part of the UK economy and the UK Government continues to be a strong advocate for promoting investment and innovation in the creative and design industries. The Government plays a part in this by ensuring that copyright both incentivises the creation of work and protects original material and the creator or owner of this material.

One of the actions the Government has taken in copyright is to provide for the removal of a law that reduces the term of copyright protection for artistic works which are produced through an industrial process. The Government did this by introducing legislation, the Enterprise and Regulatory Reform Act 2013, that allows section 52 of the Copyright, Designs and Patents Act 1988 (“CDPA”) to be repealed.

During passage of the Enterprise and Regulatory Reform Act, the Government committed to consulting on how and when to introduce the repeal of section 52. The Government would like to start this consultation process with a call for evidence to hear views on when the change of law should be implemented and why.

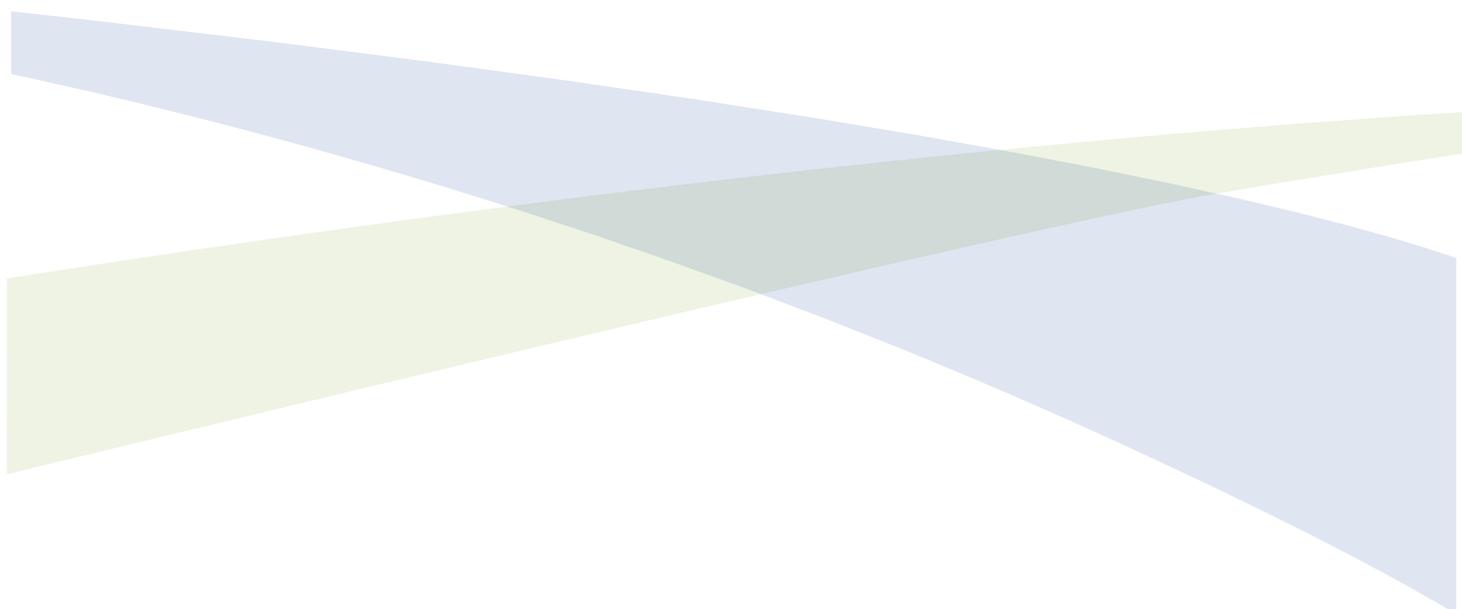
Call for evidence

The purpose of this call for evidence is to seek comments and supporting evidence from interested parties on how and when the UK Government should repeal section 52 of the CDPA by statutory instrument.

The Government's objective is to consult with interested parties to ensure that the right transitional arrangements are in place, and to take a balanced and proportionate approach which can be objectively justified on the basis of the evidence submitted in response to the consultation process.

The Government will use the evidence and responses from this Call for Evidence to shape its proposals on transitional provisions, and to inform a revised economic impact assessment.

The Government intends to publish a final consultation document with its proposals for transitional provisions and a revised economic impact assessment in 2014, subject to Government and independent regulatory clearance processes.



Responding to this call for evidence

How and when to respond

The Government welcomes comments and evidence from those with an interest in the issues raised in this document.

This call for evidence commences on Wednesday 16 October 2013 and will close at 23.59 on Wednesday 27 November 2013.

We would prefer electronic submissions be emailed to:

Section52CDPA@ipo.gov.uk

You may also send your comments and evidence by post to:

Call for Evidence: Section 52 CDPA
Copyright Directorate
Intellectual Property Office
4 Abbey Orchard St
London
SW1P 2HT
United Kingdom

How will your responses be used?

The Government will use the responses and supporting evidence to inform its policy on transitional provisions for the repeal of section 52 of the CDPA.

Please be aware that we intend to publish all responses to this Call for Evidence on the Intellectual Property Office website, unless we have agreed in writing that we will not publish your response.

Transparency and Confidentiality

Information provided in response to this call for evidence will be dealt with in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004.

According to the requirements of the Freedom of Information Act 2000, all information contained in the responses including personal information may be subject to publication or disclosure. Where respondents request that information given in response to the consultation be kept confidential, this will only be possible if it is consistent with freedom of information obligations. A request for confidentiality from a respondent will not be enough to guarantee confidentiality. Where respondents specifically request confidentiality, this can only be agreed if it is consistent with freedom of information obligations.

Whose views are being sought?

Organisations and businesses that have been notified of this call for evidence include those listed in Annex A. We welcome any other individual, business or organisation to respond to this Call for Evidence.

For copies in alternative formats please contact the Intellectual Property Office Information Centre on 0300 300 2000 or email information@ipo.gov.uk.

Good Evidence for Policy Making

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

The Intellectual Property Office will shortly publish an updated “Guide to Evidence for Policy”. This document will lay out the Government’s aspiration that evidence used to inform public policy is clear, verifiable and able to be peer-reviewed.

The current version of “Good Evidence for Policy” is located on the Intellectual Property Office website at <http://www.ipo.gov.uk/consult-2011-copyright-evidence.pdf>.

Background

Introduction

Section 52 of the Copyright, Designs and Patents Act 1988 contains an exception (a permitted use of copyright works) which limits copyright protection for certain artistic works when they have been industrially manufactured. When more than 50 copies of an artistic work are made 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.

In January 2011, a judgment of the European Court of Justice in Case C-168/09 *Flos SpA v Semeraro Casa e Famiglia SpA*¹ (the *Flos* case) dealt with the distribution of imported lamps from China which infringed the copyright in the Arco lamp which belonged to Flos, but had fallen into the public domain.

Italian law provided a transitional 10 year grace period for third parties which prevented copyright protection from being enforced against those who had manufactured, supplied or marketed products based on designs that had entered into the public domain. This period was ruled unlawful by the European Court of Justice which said that transitional measures must be proportionate. This call for evidence is aimed at getting information about what would be proportionate in the particular case of the section 52 repeal.

What is an “Artistic Work”?

The CDPA says that copyright may subsist in an artistic work, which could mean a graphic work, a work of architecture or a work of artistic craftsmanship².

In terms of items that have been industrially manufactured, it is unclear under UK law which proportion of these would satisfy the conditions in order for it to be protected by copyright. In the UK, if an item is essentially functional (and the work’s artistic expression is constrained by functional considerations), it may not qualify for copyright protection.

It is ultimately up to the courts to decide if an item would be considered an artistic work.

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

2 DACS has provided its own factsheet on “works of artistic craftsmanship” at <http://www.dacs.org.uk/knowledge-base/factsheets/works-of-artistic-craftsmanship>.

Why the UK Government decided to repeal section 52 of the CDPA

The UK is one of the few EU countries that have provisions to limit copyright protection for artistic works that have been industrially produced, and it has been suggested that this provision has enabled online traders to use the UK as a staging post to import replicas into the EU that would be protected by copyright in other EU Member States. The Government has also received information from a company that manufactures furniture design classics claiming to have sustained losses as a result of the UK's restrictions on copyright protection for its designs.

In May 2012, the UK Government therefore announced its intention to repeal section 52 of the CDPA with the objective of updating and clarifying legislation in line with EU law through the then Enterprise and Regulatory Reform Bill, and the Government published its impact assessment "Copyright protection for designs" on 3 May 2012 (see Annex B).

The Government believes that the change could help support the British design industry. Designers have suggested that the change could make British companies more willing to support long-term investment in design. This long-term thinking is crucial given UK investment in design has been estimated at £15.5bn in 2009³, with 350,000 people employed in design across all sectors⁴.

UK Legislation

Section 52 of the CDPA is repealed by section 74 of the Enterprise and Regulatory Reform Act 2013 ("ERR Act") on a date to be appointed by a commencement order. The ERR Act received Royal Assent on 25 April 2013.

When the repeal is put into effect, the exception contained in section 52 of the CDPA will disappear, and any artistic work, whether 2-dimensional or 3-dimensional, which qualifies for copyright protection will enjoy the full term of copyright protection, namely life of the creator plus 70 years. No new types of work will gain copyright protection.

During passage of the ERR Act, the Government committed to consulting on how and when to implement the repeal and to publish a revised impact assessment. No decisions have been taken on transitional provisions, and no decisions have been taken on the commencement date.

Once the entire consultation process has concluded, the UK Government will make the necessary secondary legislation.

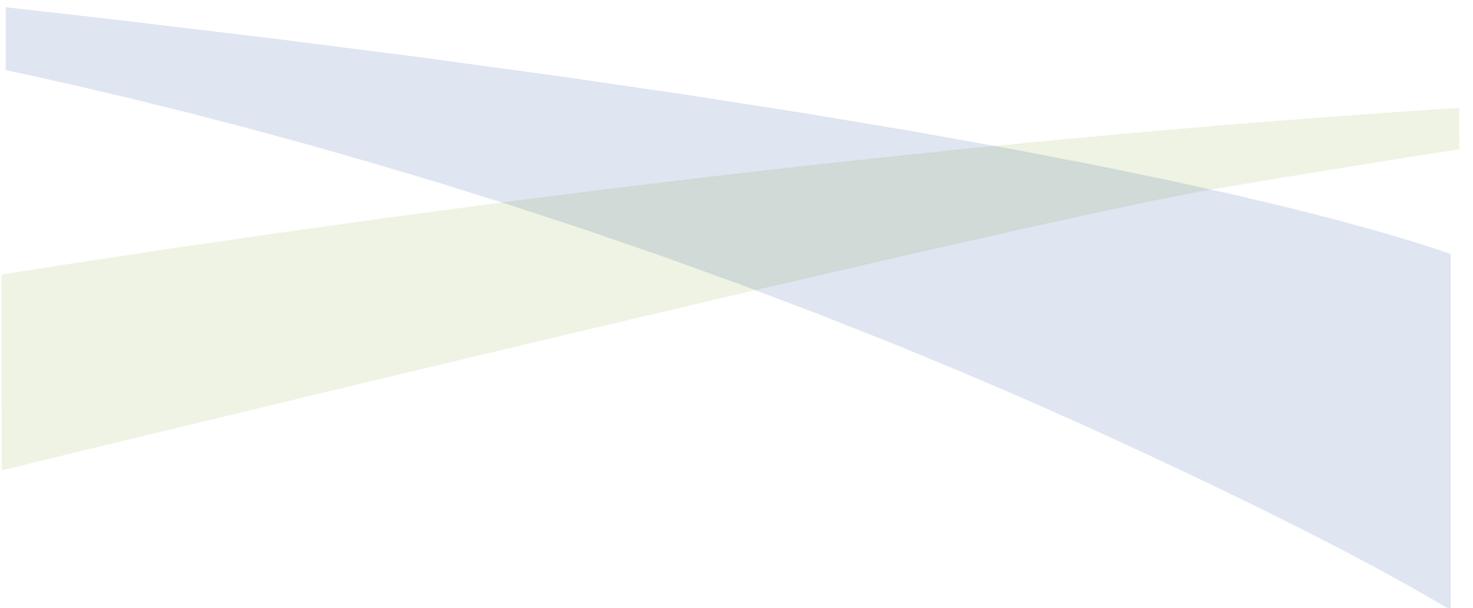
3 NESTA Innovation Index 2012

4 Haskell and Pesole (2011) Design services, design rights and design life lengths in the UK

Current Situation

The UK Government wishes to make it clear that section 74 of the ERR Act has not yet come into force. In other words, no decisions have been taken on how and when to implement the repeal of section 52 of the CDPA.

As such, until the repeal comes into force, it is lawful to make, import, sell and buy copies of artistic works that are older than 25 years and have been made through an industrial process.



Evidence sought

The Government is seeking evidence to help it decide the length of transitional provisions which will be fair and proportionate. This would include evidence on the time required to change the behaviour on the part of those whose actions would infringe the copyright of others with the repeal of section 52. It also seeks evidence on the impact on rights holders and owners of artistic works.

Respondents do not have to answer every question and may choose to only answer questions relevant to them. Respondents are free to provide any other relevant comments and evidence.

The policy of repealing section 52 of the CDPA is out of scope for this Call for Evidence given the repeal has been approved by Parliament.

Designers and holders of design rights

It has been argued that those who produce designs that qualify for copyright protection will benefit from a longer period in which their works can be licensed for use (in contrast to the 25 year design term), and hence will be more likely to invest in new designs and copyright works.

The Government is also aware there could be an impact on follow-on or “inspired-by” designs. For example, designers who use motifs (i.e. an image, pattern or a dominant or recurring theme in an artistic work) from existing designs could be affected if there is copyright in the underlying work.

Question 1: Do you anticipate there will be any impact on you as a designer as a result of the proposed changes to the law? If so, what will be the impact? Will the timing in implementation of the change in law affect this? If so, how?

There is a possibility that businesses are losing out on sales because of unlicensed but currently legal copies in the market, potentially due to UK restrictions on copyright protection for designs contained in section 52. The repeal of section 52 will now mean that manufacturers, importers and retailers of artistic works which attract copyright protection will be able to bring legal proceedings to stop the manufacture, distribution or sale of unlicensed replicas of artistic works, which will become unlawful after the change takes effect.

Question 2: Are artistic works to which you hold the rights being copied without your authorisation? If so, please provide evidence. Are there any benefits or costs to being copied? If so, what are these benefits or costs? How would the costs or benefits be altered depending on the date of implementation?

Question 3: A number of artistic works that were in the public domain (that is, could be used without licensing) as a result of the exception contained in section 52 may now be protected by copyright. If you hold the rights to these artistic works do you provide licences for these, either in 2-dimensional or 3-dimensional form? If not, would you provide licences under the new law? How long would it take to develop such licensing arrangements?

Question 4: Have you ever taken or do you anticipate taking action against infringement of your copyright-protected designs? Would you anticipate taking action against copyright infringements of any designs which would come back into copyright?

Manufacturers, importers and retailers of classic designs replica furniture

Businesses which manufacture, import or sell certain replica furniture have raised concerns that they would no longer be able to market their copy designs. These businesses have argued that a reasonable transitional period will provide them time to adjust.

One potential issue is that the change in law could raise difficulties for businesses when assessing if copyright subsists in any items of their product range. There have been concerns that the repeal of section 52 of the CPDA will lead to uncertainty in whether replicas of certain designs, even if not direct copies, would lead to infringement of copyright.

Question 5: Will the changes have an impact on your business as an importer, manufacturer or seller of replica furniture? If there is an impact, please explain the proportion of your business you expect to be affected and explain the changes you will need to make to your business model (such as re-tooling of equipment for manufacturing or assembling products). Please explain the time it will take to make the changes, and the costs and benefits of making such changes.

Question 6: If you were no longer able to manufacture, import or sell certain products in your current range, would you expect to be able to obtain licences to do so? If so, would you obtain a licence; how would the date of implementation affect the process and time to obtain a licence? What would be the costs and benefits of obtaining a licence?

The Government is seeking evidence on where the manufacture and/or assembly of replica products take place. The 'UK Replica Furniture Industry' report, published by Arts Economics, uses survey evidence of the top 40 replica furniture companies to estimate the size of the industry. In 2011, this section of the industry is estimated to employ 600 individuals across 60 small, knowledge intensive businesses and contribute £136m in

revenues to GDP. Indirectly, the industry is estimated to employ 3,000 individuals in 605 firms and contribute £597m to the UK economy. The report states that as a whole the UK furniture industry contributes £8.3 billion directly to GDP, employing over 112,000 people within 8,360 companies.

Question 7: Do you have data on the volume of manufacturing or assembly of replica furniture that takes place in the UK as distinct from importation? As an importer, would you expect to increase purchases of stock before the repeal came into force? As a manufacturer or assembler, would you expect to increase production before the repeal came into force?

It is important to note that any existing stock lawfully manufactured or imported into the UK when the law comes into force will not be affected. The change will only apply to items that are imported or manufactured after that date. It will still be possible to sell existing stock after the repeal is implemented.

However, affected businesses may need to find new models which they can manufacture, import or sell.

For example if the change is implemented on 1 October 2014, existing stock of a hypothetical replica chair that would qualify for copyright protection had it not been industrially manufactured can continue to be sold. On 2 October 2014, if a business wished to manufacture more replicas of that particular chair's design, then that business would have to obtain a licence from the rights holder, or would have to cease trading in these replicas of that particular chair design (although stock manufactured before the change in law could continue to be sold).

Question 8: If you currently sell, import or manufacture replicas, would you be able to distinguish products which are imported or made before the change in law was to take place? What changes, if any, will you need to make to develop a suitable inventory system to ensure that the products you continue to sell were manufactured or imported before the change in law was implemented?

Users of 2D images of relevant artistic works

The Government is aware that users of 2-dimensional images of certain artistic works could be affected by the changes.

For example, publishers which use images of artistic works affected by the change in law may find it necessary to obtain permission from the rights holder in order for it to be used (which is currently the case as permission needs to be gained to use images of paintings and sculptures, for example).

Some publishers have told the Government that the change to the law would mean that some projects would not be viable due to the costs of gaining permission and licences to use images of artistic works in their books.

Question 9: Do you currently use or plan to use 2-dimensional images of artistic works that you believe will have copyright revived? If so, what are the costs and benefits of the changes, and how long would it take your business or organisation to make changes to comply with the change in law?

Other groups such as museums, schools, universities, film makers, and picture libraries have raised concerns that the change could impact on how they use 2-dimensional images of mass-produced artistic works.

The Government considers that the proposed changes to UK copyright exceptions (announced by the Government in December 2012 in “Modernising Copyright: A modern, robust and flexible framework”⁵) could deal with many of the concerns which have been raised about the use of images of artistic works affected by the repeal.

For example, schools and universities teaching design history could potentially be affected when they use an image of an artistic work in a presentation currently permitted by section 52 of the CPDA. The Government’s proposals for new exceptions for teaching and for research and private study and the existing exception for criticism and review could address some uses of 2-dimensional images of certain artistic works.

Question 10: Would the Government’s proposed new and amended copyright exceptions (announced in December 2012) assist you in situations where you need to make 2-dimensional copies of artistic works? If so, how?

Consumers

Once the repeal comes into effect and any existing stock has been sold, some replicas (such as furniture) may no longer be available new. Some see the availability of replicas as good for consumers who are able to buy a particular design and have the option to choose either a replica or “original” at various price points.

The Government anticipates that the repeal of section 52 will lead to UK designers developing new designs in markets which become less dominated by copies of artistic works, and would therefore benefit consumers by offering greater choice and variety.

Question 11: As a consumer, would you be more likely to buy replica furniture (or any other goods which could potentially be affected) before the repeal comes into force?

Question 12: If you were no longer able to buy a replica of a certain design (such as a lamp) and were unable to buy a licensed copy, would you forgo buying this item, buy the original or seek a completely different design?

5 <http://www.ipa.gov.uk/response-2011-copyright-final.pdf>

Calling all businesses and consumers that will be affected

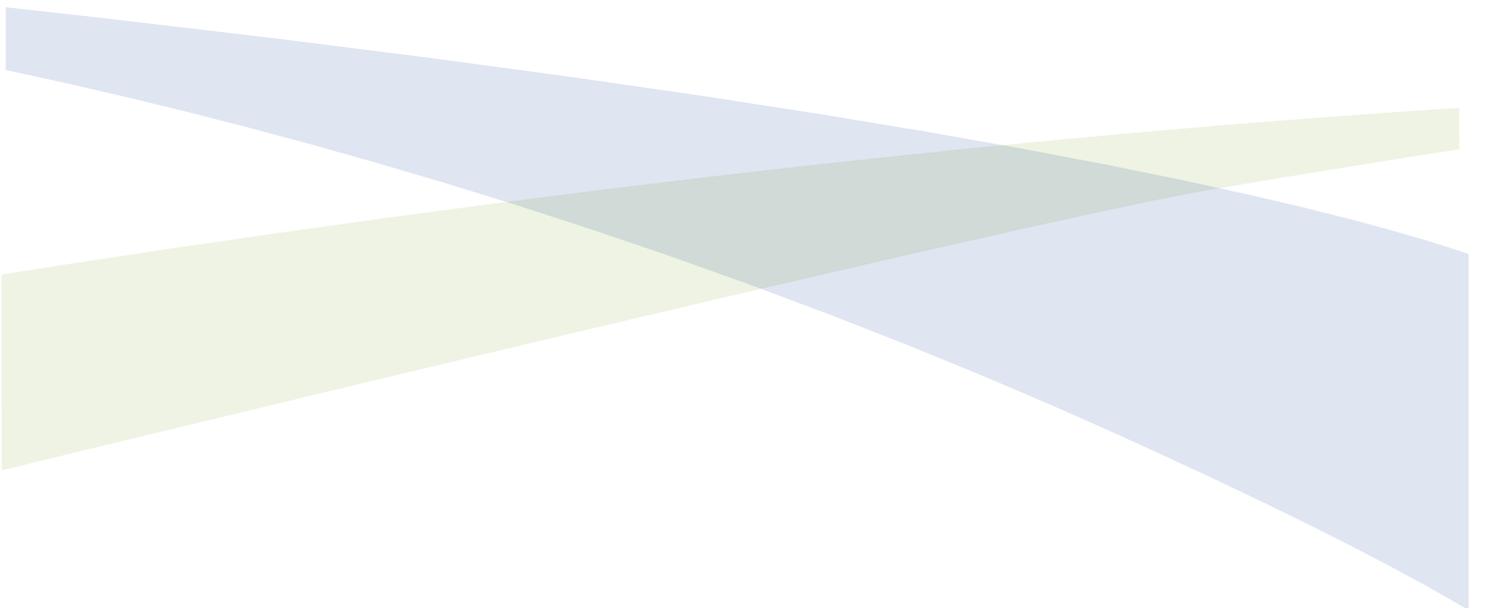
We have already heard from several groups of interested parties such as furniture manufacturers and retailers about the potential impact and we are looking for information that relates to their specific cases, as well as more general information. The Government would be pleased to hear from other groups – for example:

- Furniture and homeware
- Jewellery
- Digital works (computer games, social media, etc.)
- Car and ship models
- Fabric or wallpaper
- Retail sector
- Importers
- Educational institutions

Question 13: Does the proposed change in law have any impact on your business or organisation that has not been mentioned in this document? If so, please explain how you might respond to this impact and provide evidence on the time, costs and benefits required to respond.

What we will do next

Once this Call for Evidence closes, the Government will assess the evidence. We may contact individuals or businesses for further clarification if required. The information gathered will inform a Government proposal for a repeal date and an accompanying Impact Assessment.

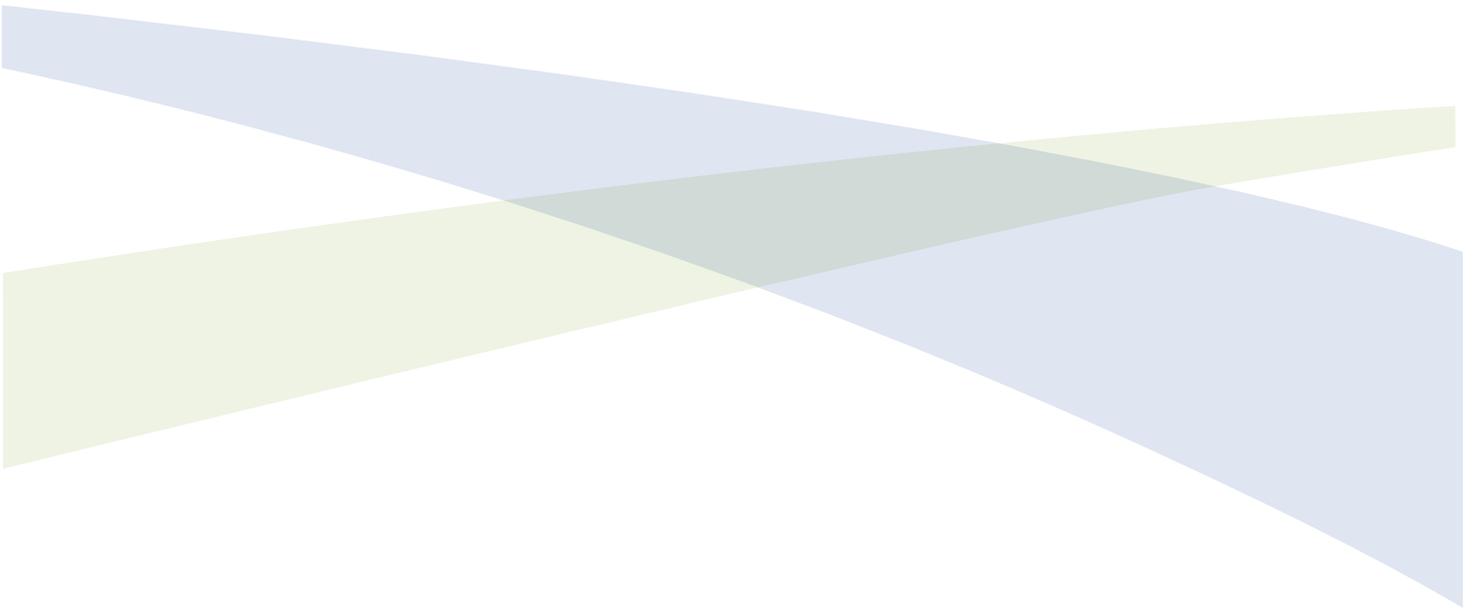


Annex A

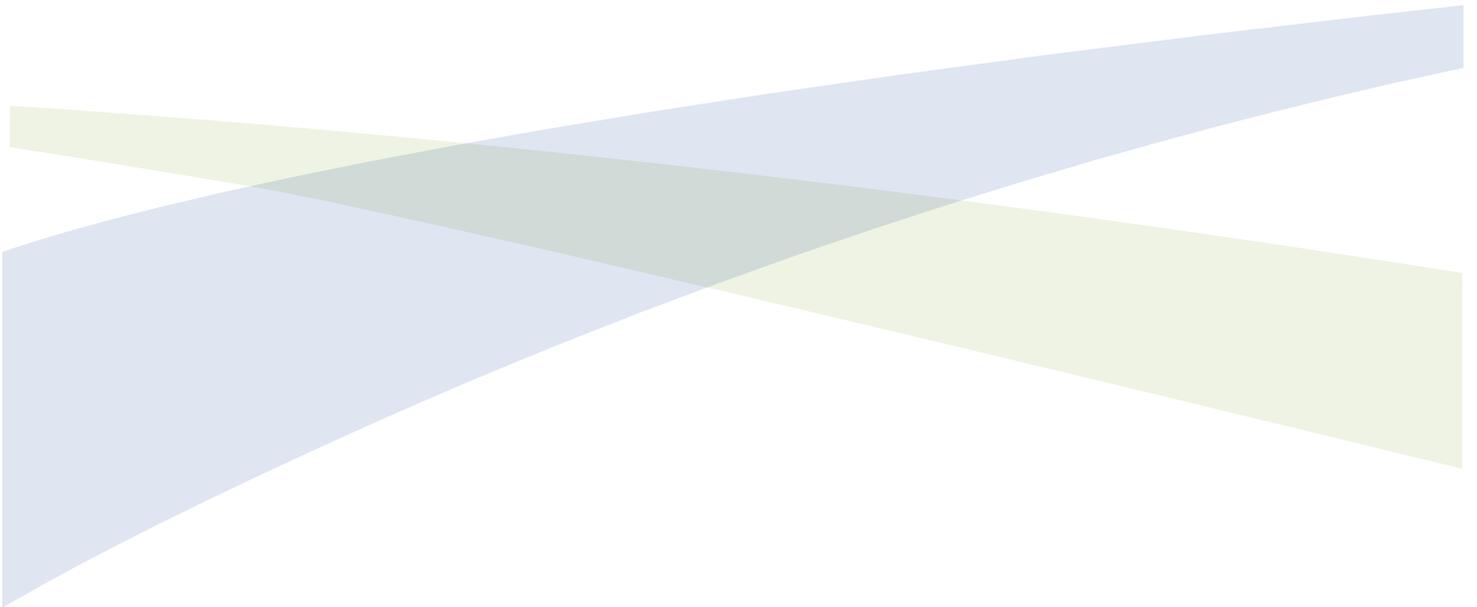
Organisations and businesses that will be notified of this Call for Evidence

- Alliance for Intellectual Property
- Anti Copying in Design
- Artek
- Artemide
- BBC
- Blue Sun Tree
- British Association of Picture Libraries and Agencies
- British Ceramic Confederation
- British Copyright Council
- British Film Institute
- British Library
- British Retail Consortium
- British Screen Advisory Council
- Cassina
- Centre for Intellectual Property and Information Law, Cambridge University
- Chartered Society of Designers
- ClassiCon
- Coco Interiors
- Confederation of British Industry
- Consumer Futures
- Copyright Licensing Agency
- Design and Artists Copyright Society (DACS)
- Design Council
- Design Museum
- Designfurn Ltd
- eBay
- Edwards Wildman Palmer UK LLP
- Expired Copyright Homewares Organisation (ECHO)
- Federation of Small Businesses
- Flos
- Forum of Private Business

- Global Connexion
- Iconic Interiors
- Infurn
- Institute of Directors
- Interior Addict
- Interior Icons
- International Association for the Protection of Intellectual Property (United Kingdom)
- Knoll
- Louis Poulsen Lighting A/S
- Meyerlustenberger Lachenal
- Modacor Furnitures Pvt Ltd
- National Centre for Product Design & Development Research, Cardiff Metropolitan University
- National Education Network
- Powell Gilbert LLP
- Publishers Association
- Publishers Licensing Society
- Queen Mary Intellectual Property Research Institute
- Republic of Fritz Hansen
- RSA
- Russell Group
- SC Andrew LLP
- Scott Howard Office Furniture
- Squire Sanders UK LLP
- Swivel UK
- Tate
- Thames and Hudson
- The Law Society
- The Whitehouse Consultancy
- Thonet
- UK Film Council
- Universities UK
- Vertigo Interiors
- Victoria and Albert Museum
- Vitra
- Voga



Annex B: Impact assessment – copyright protection for designs, 3 May 2012



Title: Copyright protection for designs IA No: Lead department or agency: Intellectual Property Office Other departments or agencies:	Impact Assessment (IA)
	Date: 15/05/2012
	Stage: Final
	Source of intervention: EU
	Type of measure: Primary legislation
Contact for enquiries:	

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

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

The term of copyright protection for an artistic work is life of the creator plus 70 years. However, UK copyright legislation contains an exception (section 52 of the Copyright Designs and Patents Act 1988) which effectively limits the term to 25 years if the artistic work is mass produced. A company which makes 'furniture design classics' has claimed that it loses more than EUR 250million per year in international turnover due to copies and that a significant proportion of that loss is attributable to the UK legislation which differs from that in other EU states.

What are the policy objectives and the intended effects?

The Government wants to repeal section 52. This will mean that copyright applies for life of the creator plus 70 years rather than 25 years to artistic works which are manufactured on the industrial scale. It will update and clarify UK law and bring it in to line with EU law.

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

- Option 1 - Do nothing.
- Option 2 - Repeal section 52 of the Copyright Designs and Patents Act 1988.

Option 2 is the preferred option as it will update and clarify UK legislation in line with EU law.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: 05/2017					
Does implementation go beyond minimum EU requirements?				N/A	
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
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 (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible SELECT SIGNATORY: _____ Date: _____

Summary: Analysis & Evidence

Policy Option 1

Description: Do nothing

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
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'					
No change					
Other key non-monetised costs by 'main affected groups'					
No change					
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					
Description and scale of key monetised benefits by 'main affected groups'					
No change					
Other key non-monetised benefits by 'main affected groups'					
No change					
Key assumptions/sensitivities/risks					Discount rate (%)
					3.5

BUSINESS ASSESSMENT (Option 1)

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

Summary: Analysis & Evidence

Policy Option 2

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

FULL ECONOMIC ASSESSMENT

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

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

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

We do not have adequate data to make reasoned estimates of monetised costs.

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

Firms who manufacture/sell replicas which will become illegal will be vulnerable to civil action from firms who hold original copyrights. They'll have to invest in substitutes or purchase licences. Consumers won't have access to certain cheap copies of classic designs and will need to buy other substitute products. Costs will be borne by Government only to the extent that there is resort to the criminal process and that costs are not recovered from defendants or offset by proceeds of crime recoveries.

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'

We do not have adequate data to make reasoned estimates of monetised benefits.

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

Manufacturers and distributors of some design classics will be able to stop the manufacture, distribution and sale of replicas. It is unlikely that in some sectors (e.g classic design furniture), the illegal replicas are substitutes for the originals because of the large price differential. However, firms argue that they will be able to reinvest any increased profits in the promotion of innovative designs and artistic works. Further investment in innovation will contribute to economic growth.

Key assumptions/sensitivities/risks

We assume increased profits to original designers will be invested in innovation.

Discount rate (%)

3.5

BUSINESS ASSESSMENT (Option 2)

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

Evidence Base (for summary sheets)

1. Background

The Government intends to repeal section 52 of the Copyright Designs and Patents Act 1988 ('section 52') in the Enterprise and Regulation Bill. No consultation has been carried out as this is being done in order to update and clarify UK legislation and bring it in line with EU law.

Section 52 effectively limits copyright in certain artistic works, copies of which are industrially manufactured (i.e. more than 50 copies are made), to a period of 25 years from the end of the year in which the copies were first marketed. However, the term of copyright protection for an artistic work is life of the creator plus 70 years.

The overall purpose of this provision is to stop copyright being used to prevent the copying of designs and to reduce double protection. It does so by aligning the period of copyright protection for an artistic work which is mass produced with the period that it would have enjoyed as just a registered design. The 25 year period is based on the current maximum term of registered design protection and the provision acts as a sort of boundary line between the copyright and design regimes.

A similar provision existed in the Copyright Act 1956 which was replaced by the Copyright Designs and Patents Act 1988.

Example: a painter creates a painting. He later authorises teapots to be made with a reproduction of his painting on the side. After 25 years, the painter can no longer prevent his painting being copied onto competing teapots or any other kind of article.

Note that certain items are excluded from the exception in section 52 and therefore enjoy the unrestricted copyright term (e.g. works of sculpture, book jackets, calendars, greeting cards) and the exception does not extend to films. So the painter in the example above could prevent his painting being reproduced in a film.

2. Problem under consideration

The effect of section 52 is, as stated above, to limit the exclusive rights of a copyright owner of an artistic work to 25 years where that work has been applied industrially.

A judgment of the European Court of Justice of 27 January 2011 (Flos SpA v Semeraro Casa e Famiglia SpA, Case C-168/09, (the Flos case) dealt with the importation from China and distribution in Italy of lamps which infringed the copyright in the well known Arco lamp which belongs to Flos. Following that judgment, a company that makes classic design furniture has approached the Government. It has claimed that its worldwide losses on account of copies are more than EUR250 million per year in turnover. It also claims that a significant proportion of that loss arises directly from the UK's restrictions on copyright protection for its classic designs.

Moreover, a number of other manufacturers of classic design furniture (which include Flos, Vitra, Cassina, Fritz Hansen, Teknolumen, Classicon, Knoll and Thonet who are all based outside the UK) are campaigning for the law to be changed. They claim that the effect of section 52 is to prevent them from taking infringement action against parties importing and selling replica furniture.

The Government has been told that nearly all the significant internet importers into the EU from the Far East of the replicas use the UK as a staging post to take advantage of the UK's relaxed copyright legislation and have pointed out that the only other Member States which reduce the term of protection afforded by copyright to designs are Estonia and Romania.

The extensive use made by the internet importers of the UK as a staging post for EU wide sales, means that it is likely that a very significant part of this claimed loss could be caused by infringers trading in the UK.

It is, however, worth bearing in mind that the number of products manufactured and sold in the UK which may be affected by the repeal of section 52 is uncertain for the following reasons:

- i) it is unclear what proportion of items which are sold and/ or industrially manufactured in the UK copy or incorporate an artistic work protected by copyright; and
- ii) the number of works which would meet the requisite standards to qualify for copyright protection cannot be estimated without wide margins of error.

It is worth expanding upon (ii) and the unquantifiable number of items may qualify for copyright protection. Broadly this boils down to the fact that in principle, it is for each Member State to determine the extent to which and the conditions under which copyright protection apply. In the UK, if an item is essentially functional (and the work's artistic expression is constrained by functional considerations), it is unlikely to qualify for copyright protection and this means that potentially very few household products and pieces of furniture are likely to qualify for copyright protection. This, in turn means that the impact of repealing section 52 may have limited impact in some sectors.

However, the landscape is changing with the advent of a number of recent judgments from the European Court of Justice which have had the effect of harmonising the conditions under which copyright protection apply. These developments may mean that more items will potentially qualify for copyright protection and, accordingly, the impact of repealing section 52 would be more significant.

3. Rationale for intervention.

The rationale for UK intervention is to clarify and update UK legislation and ensure that it is in line with EU law.

4. Policy objective

The policy objective for UK intervention is to clarify and update UK legislation and ensure that it is in line with EU law. This will also respond to requests from designers and design firms to bring protection for their work closer to standards in other EU Member States.

5. Description of options considered (including do nothing)

Option 1: do nothing

This means leaving section 52 in the Copyright Designs and Patents Act 1988. It also means that parties will remain unable to bring copyright infringement proceedings to protect certain copyright works.

Option 2: Repeal s.52

Repealing section 52 will mean that copyright applies for life of the creator plus 70 rather than 25 years to artistic works which are manufactured on the industrial scale. This potentially applies to some classic furniture designs, and possibly other products such as jewellery and common household items, which qualify for copyright protection.

The manufacturers and distributors of design classics will be able to bring legal proceedings to stop the manufacture, distribution and sale of those replicas which will become illegal. They cannot do this at present in the UK.

6. Costs and benefits of options (including administrative burden)

Proportionality

Pressure on Government to change the law

This change to primary legislation is driven by calls for the Government to clarify and update UK law in line with EU law. The impact assessment has therefore been made taking a proportionate approach, recognising the pressure upon the Government to update and clarify the law. Therefore, it would be disproportionate to conduct a detailed analysis of the monetised costs and benefits.

The assessment identifies the areas in which costs and benefits will arise, but in a number of areas it is not possible without very detailed analysis to make precise assessments of value in what are complex and heterogeneous industries. Industry sources with which we have discussed the changes have not been able to provide adequate bases for estimates.

Significance of furniture

The policy issue concerns the cumulative protection of the regimes for copyright and design rights. There is no registration of copyright but designs can be registered. Looking at the number of registered designs, furniture is the sector which attracts the largest number of registered rights, it follows that since there may also be copyright in some of those designs, this is the sector which is potentially most affected by section 52.

The table below shows the total number of rights applied for at the EU Design Right Office by rights class over the period 2003-2010

Furniture	Household goods	Containers	Jewellery etc	Lighting	Total
60,035	30,388	199	19,299	22,211	132,132

Source IPO Analysis of OHIM registration data
<http://oami.europa.eu/ows/rw/pages/OHIM/statistics.en.do>

This distribution of rights applied for is representative of the pattern of demand by consumers, and of distribution, rather than of manufacturing supply. This is because a high proportion of furniture demand in the UK, and a significant part of other product categories including 'designed products' are met by imports. UK designers account for over 6% of the registrations in furniture and household products above, but less than 4% of registrations in jewellery and lighting.

The pattern is consistent with the fact that, so far, the IPO is only aware of calls from the manufacturers of classic design furniture to change the law. It is also consistent with data on distribution of industry activity of subscribers to the design protection membership organisation Anti Copying in Design (ACID) <http://www.acid.eu.com/news/wp-content/uploads/2011/02/ACID-Quarterly-Newsletter-Issue-40.pdf> which exists to help designers create and retain value from their work. Furniture designers are its largest single industry group, with significant numbers also in jewellery, lighting and ceramics.

With this consistent picture, most of the evidence examined in this assessment relates to furniture, but some attention is given to other markets. Given the pressure to change the law, and the difficulty of gathering detailed data in these fragmented and highly differentiated sectors, this is a proportionate approach.

Office for National Statistics data from the 2009 Prodcum survey shows that furniture is much the largest area of economic activity in this area. It shows that in most areas covered by these products there is a large (and growing) negative balance of trade.

£million

Product	UK Sales	Exports	Imports
Office / shop furniture	1284	178	401
Kitchen furniture	1093	45	299
Other furniture	3192	572	2115
Personal jewellery (where precious metal is main component)	243	2183*	1826*
Pottery tableware	108	23	19

Source ONS Prodcum survey 2009

* affected by trading of precious materials

<http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-201890>

The Procom survey also records, for some products, volume or weight as well as value. This is helpful in understanding relative prices for domestically produced and imported products. In all the above areas where this comparison can be made (for jewellery the data is not available) average UK sales prices are an order of magnitude higher than prices of imports, especially of imports from outside the EU.

Volume and value of imports

The ratios of average domestic to imported prices range from as high as 20:1 in some areas of furniture to 3:1 in tableware. This tends to confirm, as shown later, that most imported products compete in very different, lower priced, segments of their markets compared to domestically produced goods. It also means that volume shares of imports in the 'non premium' parts of these markets are very much higher than the value figures imply. This has a significant bearing on considerations of the impact of the policy measure.

For 'personal jewellery' (where precious metal is the main component, see table above), reported trade is much larger than UK production. Watches, some of which are thought of as jewellery, have few UK producers. Watches are not included within the official statistics for jewellery but are often sold and distributed through the same channels. They show similar trade patterns to jewellery, and similar pricing patterns to furniture, with high volumes of low priced imports. However on closer examination of categories such as luxury jewellery and watches, it seems that there is likely to be very little impact from the proposed change. It would ultimately be the Courts to decide whether any particular product met the threshold for copyright protection. In any event, the proposed change in the law is unlikely to have significant effects on trade; notwithstanding that UK production of watches is very low. This is because most watches are protected by branded and protected by a trade mark and this is likely to continue to be the most effective way of preventing unauthorised replicas.

Option 1 – No Change

Costs to Business

There will be no change to the ability of firms to import copies of classic designs which also qualify for copyright.

UK producers engaged in copying classic designs which also qualify for copyright, will be able to continue to operate in a manner unchanged.

Costs to Consumers

Consumers will see no change

Costs to Government

The potential costs to Government are those which might arise from proceedings aimed at seeking clarification of the current law and its relationship with EU law

Benefits

There will be no benefit by way of relief to firms whose works are protected by copyright but who cannot enforce their rights after 25 years from when they were first marketed if they are mass produced.

Option 2 – Repeal section 52 of the CDPA

Costs

Costs to business

The Government proposes to consult when the repeal should come into effect. This is the most proportionate approach for clarifying the range of products which may potentially be affected and how long business will need to make any necessary changes.

UK importers

The ability of firms to import copies of classic designs which also qualify for copyright protection and sell them through UK distributors will be curtailed unless the term of copyright protection has expired. This means that the range of importers (identified to Government by manufacturers) will no longer be able to use artistic designs which may be protected by copyright. Most of these importers are international firms, which use the UK as a point of entry to the EU because of the loophole in UK law. It is likely that a significant part of the profits and employment of these firms is outside the UK, even if they have registered subsidiaries in the UK. To remain in business, these firms will need to switch to: products which use their own designs or designs which do not also qualify for copyright protection; or other designs for which they have obtained a licence.

UK producers

Producers engaged in copying designs which were first marketed over 25 years ago but which are still covered by copyright will no longer be able to do so. However, analysis of company reports associated with sales websites suggests that copying production – certainly in the furniture industry which is the largest area where it is common – is often from international companies, and sourced from China and the Far East. Evidence to this effect has been presented to IPO by firms in the industry, in the ELLE Decoration ‘Equal Rights for Design’ (April 2012) campaign, and by ACID. The recent increase in low price imports from the Far East also shows in the official trade statistics.

If the main impact of the measure is on low priced imports, the impact on UK manufacturing is likely to be small. Where firms are able to switch to alternative designs, which do not qualify for copyright protection or where the copyright has expired, they will be able to continue in operation and remain in the market.

Producers will also be able to seek licences from copyright owners to use classic designs, in which case they will need to negotiate a royalty agreement acceptable to both sides. There are no administrative registration costs associated with copyright (unlike registered designs) but there may be legal costs to set up a licensing agreement. It is not possible to estimate the impact on potential licensing costs, the number of agreements or legal costs because these will depend on demand for classic products compared with demand for products of more recent design

It is possible that some producers will continue to copy, without licences, and face legal action by the copyright holders that they cannot undertake with the law as it is today. In principle costs of legal action incurred by those who break the law should not be counted in an impact assessment, but it is at least possible that some unjustified actions might be brought. This may give rise to legal costs which cannot be quantified.

UK retailers

Retailers engaged in selling copied designs which will qualify for copyright and which are not covered by a licence will need to change their mix of products to substitute either products for which a licence is available, to new designs rather than copies of old ones, or to products which do not qualify for copyright protection. There may be transition costs as stocks are changed, although rotation of styles is standard in the industry. The Government's intention is to provide a commencement date long enough to enable retailers to dispose of existing stock of copied models and to switch to other products. The Government proposes to consult on this date.

Cost to consumers

Consumers will no longer be able to buy cheap copies of some classic designs, which may result in loss of choice and welfare. However, it is clear from the very large differences in price between original products and imported copies that few if any will switch to buy at higher prices from the design / copyright owners. Across a range of furniture and lighting products, the copies typically sell at around 15% of the price of originals. Differences for jewellery are even more extreme.

Prices of originals and copies

Designed Products	Original Producer price £	Online Replica price £	Replica Price as % of Original
Fritz Hansen Egg Chair	2,799	449	16.0
Flos Arco Silver Floor light	1,615	195	12.1
Eileen Gray side table	585	79	13.5
The Eames Lounge chair	5,065	699	13.8
Ludwig Mies van der Rohe Barcelona chair	2,412	299	12.4
Marshmallow Sofa	3,877	390	10.1
BLOSSOM Suspension Light	581	49	8.4
Coconut Chair	3,457	289	8.4
Nelsons table	622	219	35.2
Hang it all	206.40	32	15.5

Source IPO research on company websites May 2012

The process of defining a market in a competition investigation (set out in OFT guidelines) typically begins by establishing the closest substitutes to the product or group of products that is the focus of the investigation. These substitute products are the most immediate competitive constraints on the behaviour of the undertaking supplying the product in question. In order to establish which products are 'close enough' substitutes to be in the relevant market, a conceptual framework known as the hypothetical monopolist test (the test) is usually employed. In these markets the price differentials between the 2 sets of products are way outside the indicative 5-10% price increases that would be looked at. Therefore it would be reasonable to suggest that the original and imitation designs are in separate markets and do not compete directly.

One possible cost which should be taken into account is that the introduction of copyright to this market may lead to some works with designs over 25 but less the term of copyright protection (life of the creator plus 70 years) disappearing from the market altogether, because of the complexities and costs of copyright. This would reduce consumer choice without any compensating benefit. New work by Paul Heald (University of Illinois March 2012 <http://www.techdirt.com/blog/?tag=paul+heald>) shows how this has occurred in book publishing. It is not possible to judge in advance how far this might affect designs, but the policy review will pay attention to this potential issue, and if it is found to be a problem, how to address it.

Costs to Government

Key costs to Government will be those associated with pursuing (in criminal proceedings) infringing firms, which copy copyright protected designs in the UK, or sell imports copied elsewhere. There are dozens of such firms operating in the UK and hundreds of products.

The total number of prosecutions for copyright offences under the Copyright Designs and Patents Act (CDPA) in 2009 was 753, covering all types of existing copyright applications. We do not know how many actions for design infringement took place, as this is a civil matter, and often settled out of court. There are many importers who could be subject to prosecution if they continue to copy, but the effect of enforcement should be to change their behaviour. Given the importance of the markets covered by the products involved there would inevitably be some infringements to prosecute. It is impossible to estimate what the increase would be, but copying would be relatively easy to spot, as many of the products are sold over the internet. If half of the leading importers were to continue to infringe it could mean up to additional 10 prosecutions per year.

Most of the costs of investigating current infringement cases fall on Trading Standards Authorities. They devote a national average of days per case as follows:

- 85 by middle management Trading Standards Officers followed by
- 44 days of junior grades and
- 29 days by senior officers

This amounts to 0.72 person years of investigation per case (although in the area of copyright infringement this might be less, because of the ease of demonstrating the presence of an infringing product on the market).

At an average cost per person for IP experienced staff, based on IPO's own average staff cost of £41,000 p.a. this would imply an investigation cost to developed case of £29,520

If all these were heard at Magistrates Court, the cost per case of prosecution would be expected to be £2,500 per case. If heard at Crown Court, the cost per case would be expected to be £9250.

A low estimate of prosecution costs in year 1 would therefore be £435,000 (all cases heard in Magistrates' Courts). A high estimate would be £500,250 (all cases heard in Crown Court), but these should be regarded only as illustrative figures, not as firm estimates.

Benefits

Benefits to Business

Designers argue that the effect of s.52 is that it undermines the integrity of the design industry and it may make British companies less willing to support long term investment in areas such as furniture design than their European competitors.

On a separate issue which is outside the scope of this Impact Assessment, ACID (the design membership organisation, Anti Copying in Design) submitted evidence which it argues shows that the lower status given to design rights in the UK compared to other countries leads to barriers to development of design based businesses. (See <http://www.ipo.gov.uk/ipreview/ipreview-c4e.html>)

The data shown on registered rights above (page 6), and independent research for IPO, (<http://www.ipo.gov.uk/ipresearch-designsreport4-201109.pdf>) confirms that UK design based firms use registered rights much less than other EU comparators. Removing the exception to copyright protection in section 52 will bring the returns to long lasting designs for UK firms into line with those in the rest of Europe. It may also improve conditions of doing business in the UK and improve the balance of trade for the UK vis a vis the rest of the EU.

UK Producers

Firms producing classic designs which also qualify for copyright protection will benefit from being able to protect their products from unrestrained copying by others. This may not result in much 'switching' from low priced copies to high priced originals by consumers, as the gap in price is typically 85%, with the 'replica one sixth of the price of the original (see table above). There may be some marginal gain to UK producers. They may be better able to defend and sustain the high prices they say they need to support better materials and manufacturing techniques, and the training of designers.

In addition it is probable that permitting copyright to be asserted after 25 years will make it more common for licensing of designs to develop. This would develop legal access to popular designs, give the incentive for the right holder to invest in his brand and also make it possible for more reputable (and more likely UK) producers to get access to classic designs and build a sustainable business. The extent of this is impossible to estimate in advance.

Firms producing classic designs will gain from the fact that the quality signals to consumers in their markets will be clearer. The presence of low cost producers making replica products has led to some cases where purchasers' expectations have not been met. The current Conran exhibition shows clear examples where this has happened, and the overall effect of this can be to reduce the reputation of all suppliers in a market. This has knock-on effects on consumers who may find the impact of 'fake' designs is to undermine trust in products supplied by the original designers.

If other areas, such as jewellery are potentially affected, similar considerations are likely to apply. UK jewellery production is a small proportion of trade, and is likely to be in products which depend more heavily on craftsmanship, to appeal to consumers looking for unique products.

Across all sectors which may be affected, it is likely that there will be additional scope for competition through new design, and some additional protection for UK firms whose competitive advantage depends on the creation of long lived design assets. One of the points made to IPO by European producers pressing for change is the large number of UK designers whose work is encouraged by producers elsewhere.

Designers

There will be unquantifiable benefits to designers of works which become classics and which have a long life in the market. In addition to benefitting from a longer period over which royalties can be claimed (if designs have not been assigned to producers) classic designers will avoid the risk of having their reputations associated with poor quality replicas which may be unsafe (lamps) or uncomfortable (beds, chairs) to use.

In addition, it is likely that if products in mass markets are less affected by pure price competition in commoditised replicas to classic designs, demand for new designs will grow. This would give rise to additional incentives for producers to engage designers to develop new innovative products (at close to mass market prices) which will give new opportunities for current designers. How much this occurs in the UK, which has a strong design capability, and how much in emerging markets where much manufacturing will take place, is impossible to estimate. But in any event there are likely to be more opportunities for living designers to add value, while reliance of manufacturers on designers no longer living is likely to fall.

Legal profession

There will be some additional income to lawyers in setting up licensing agreements and in enforcement actions. It is impossible to quantify this in the private sector, but the costs are reflected in earlier section. Only in criminal enforcement has an attempt been made to make a quantified illustration.

Consumers

Buyers of some classic designs may benefit, to an unquantifiable extent, from better assurance in the quality of designed products, and will be less likely to be misled by classic design names

attached to inferior copies. In this market classic designs share some of the characteristics of brands.

7. Summary and preferred option with description of implementation plan

Government proposes to repeal 52 of the Copyright Designs and Patents Act 1988 in order to clarify and update UK legislation in line with EU law. This will allow those artistic works which are exploited through an industrial process to be protected for the full term of copyright (life of the creator plus 70 years) instead of the reduced term of 25 years from the end of the year in which the copies were first marketed.

It is proposed to implement the repeal of section 52 with a relatively long commencement period to allow manufacturers to adjust, and to allow distributors and retailers to clear their stock of any products which will, in future, infringe the copyright of artistic works used as classic designs. The Government proposes to consult upon the commencement date.

8. Specific Impact Tests

Small Firms Impact Test

Analysis conducted for the Furniture, Furnishings and Interiors (FFI) industry by the Sector Skills Council and Proskills in 2007 showed that the furniture industry has around 200,000 employees in 20,000 workplaces, so the majority of firms in this industry are small firms. For those firms which develop their own designs or work with recognised designers the measure will provide additional protection and enable them to resist copying by others. However if any of these firms are involved in manufacturing or trading the replicas, they will incur the costs of either switching to a new product or licensing their current one. We have no data to show how many firms fall in either category.

Statutory Equalities Duties

The proposed changes will not have any impact.

Economic impacts

Economic benefits will include:

- Clarification and update of UK legislation in line with EU law on the use of 'artistic' designs used in manufacture, which should encourage the development of the single market on equal terms.
- Enhanced incentives to firms to develop long lasting designs and to maintain their presence in the market.
- Designers whose works qualify as artistic works will be able to avoid the risk of having their reputations associated with poor quality replicas.
- Opportunities for new UK designers to engage in developing new designs in markets which will be less dominated by low quality imports of classics.

Economic costs will include:

- Additional costs to Government from enforcement of extended copyright protection
- Adjustment costs to manufacturers using designs which will fall under copyright if they choose to change their product range.
- Licensing costs to manufacturers using designs which will fall under copyright if they chose to continue with the same product and seek a licensing agreement.
- Reduced choice to consumers as low priced copies of classic designs will have their supply restricted

The overall impact on the UK economy will depend on how far UK producers are able to respond to the additional incentives to develop long lived design assets, and to market them effectively. UK designers' work is used by international producers who already benefit, in other markets, from the protection which this change will bring to the UK. If the balance in the UK is struck as proposed, it may encourage more investment in innovation to exploit new design, aiming at longer term returns.

Where UK manufacturers choose to develop the work of UK designers, the additional licensing costs described above will stay in the UK. If they choose to license designs by international designers, this will represent a loss to the balance of payments.

Reduced availability of cheap imported replicas which have not been authorised by the copyright owner is unlikely, in itself, to affect the overall economy. This is because the most likely outcome for the majority of any affected purchases in this price range is that they will be replaced by alternative imported designs in the same price range.

Environmental Impacts

The proposed changes are not expected to have any significant impact.

Social Impacts

The proposed changes will not have any impact.

Sustainable Development

The proposed changes will not have any impact.

OIOO Methodology

As this is a measure to harmonise UK law with EU it does not qualify as in scope.

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