

<p><b>Title:</b> Repeal of section 52 Copyright, Designs and Patents Act 1988 and associated amendments</p> <p><b>PIR No:</b> BEIS052(PIR)-21-IPO</p> <p><b>Original IA/RPC No:</b> BISIPO009</p> <p><b>Lead department or agency:</b> Intellectual Property Office</p> <p><b>Other departments or agencies:</b>  <a href="#">Click here to enter text.</a></p> <p>Contact for enquiries: <a href="mailto:copyrightconsultation@ipo.gov.uk">copyrightconsultation@ipo.gov.uk</a></p>	<b>Post Implementation Review</b>
	<b>Date:</b> 16/12/2021
	<b>Type of regulation:</b> Domestic
	<b>Type of review:</b> Non-statutory
	<b>Date measure came into force:</b> 28/07/2016 and 06/04/2017
	<b>Recommendation:</b> Keep
<b>RPC Opinion:</b> not required (de minimis)	

### 1. What were the policy objectives of the measure?

The policy objectives were to ensure the copyright for artistic works was harmonised. This ensures that the type of work and the type of artist do not have an impact on the term of protection.

Compulsory licensing of works where copyright is revived was also removed. This was to ensure that that rights holders can decide when to license their works.

### 2. What evidence has informed the PIR?

This review has been informed by stakeholder consultation over 10 weeks. The Intellectual Property Office (IPO) received 62 written submissions from stakeholders, including rights holder representative organisations, lawyers, replica manufacturers, cultural heritage institutions, journalists, and individual customers<sup>1</sup>.

### 3. To what extent have the policy objectives been achieved?

Responses from stakeholders indicated strongly that the policy objectives have been met in harmonising the copyright for artistic works of different kinds and that compulsory licensing has been removed for works where copyright is revived.

Sign-off for Post Implementation Review: Chief Analyst or Chief Economist

***This PIR represents a fair and proportionate assessment of the impact of the measure.***

Signed: **Sam Brand**

Date: 27/10/2021

<sup>1</sup> See annex for list of respondents.

#### **4. What were the original assumptions?**

The impact assessment set out that there is a general lack of available data in this area. Some assumptions could be made: replica manufacturers and retailers would face transition and/or licensing costs; consumers may experience a reduced product choice; rights holders and licensees would benefit from the full term of copyright protection with increased licensing income or the ability to exploit their works; the changes to the law were known since 2013; and there is some uncertainty as to which items constitute artistic works.

#### **5. Were there any unintended consequences?**

A large number of respondents suggested that car brands had identified classic cars as being a work of artistic craftsmanship and used copyright infringement as a way to prevent the UK replica car industry operating. This was not identified by the original impact assessment.

#### **6. Has the evidence identified any opportunities for reducing the burden on business?**

The burdens on business appear to be a logical consequence of extending the term of protection in these works, and it is difficult to identify any way that this objective could have been achieved without these impacts. However, the evidence did highlight some issues not directly related to the change which may deserve further exploration, including the definition of a “work of artistic craftsmanship” and the impacts on photographers making images of protected designs. In particular, clearer guidance following recent case law on what qualifies as a work of artistic craftsmanship was suggested as helpful for users.

## **Introduction**

This report sets out the results of the IPO’s Post Implementation review (PIR) of changes made to the copyright framework on artistic works in 2016. In conducting the review, the IPO has considered whether and to what extent the changes:

- have achieved their original objectives;
- are still required and remain the best option for achieving those objectives;
- could be achieved in another way which involved less onerous regulatory provision.

## **Policy background**

The Copyright, Designs and Patents Act 1988 (CDPA) sets the term of protection for copyright works. For artistic works, the term of protection is life of the author plus 70 years<sup>2</sup>. Section 52 CDPA previously reduced the term for industrially manufactured artistic works to 25 years, aligning it with the maximum protection available for registered designs.

In 2011, a [CJEU judgment on design works](#) led the UK government to conclude that section 52 CDPA should be repealed to provide equal protection for all types of artistic work, in line with international norms. The main copyright works affected were works of artistic craftsmanship; the primary types of work believed to be in scope were furniture, jewellery, ceramics, lighting and other homewares. This would be both 3D manufacture and retail, and 2D representation in publishing.

A need for a related change was later identified to allow certain artistic works made prior to 1957 to have copyright protection, whatever their design status. This allows works to have both design protection and copyright protection. Finally, the government removed a compulsory

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<sup>2</sup> See also [Copyright Notice: Duration of copyright \(term\)](#) on this subject

licensing requirement in revived copyright works, to allow rights holders to control licensing of their works.

Parliament legislated to pass [section 74 of the Enterprise and Regulatory Reform Act 2013](#), which included provisions to address the first of these issues by repealing section 52 CDPA. This would be formally implemented using a commencement order. To help determine the form of the commencement order, the government consulted on the transitional arrangements to put in place which were intended to help affected sectors adjust to the repeal. [The Enterprise and Regulatory Reform Act 2013 \(Commencement No. 10 and Saving Provisions\) Order 2016](#) took effect on 28 July 2016. Industrially manufactured works now had the full term of copyright protection. Any retailers, manufacturers or other users would need to obtain licences or rely on a copyright exception to copy affected works. The order also provided a depletion period for sectors to sell existing stock of copies lawfully, ending on 27 January 2017. After this date, affected copies would no longer be lawful and would have to be destroyed. The relevant documents can be found on the [Transitional arrangements for the repeal of section 52 CDPA consultation](#).

[The Copyright \(Amendment\) Regulations 2016](#) came into force on 6 April 2017. They amended Schedule 1 CDPA to allow certain works made before 1957 to attract copyright protection, whatever their separate design status. They also removed compulsory licensing provisions for works with revived copyright from the Duration of Copyright and Rights in Performances Regulations 1995. Existing compulsory licences which had agreed a royalty or remuneration with the rights holder could continue. The relevant documents can be found in the [Changes to Schedule 1 CDPA and duration of Copyright Regulations consultation](#).

The [impact assessment](#) for the repeal of section 52 was published alongside the 2016 legislation. It was not possible to fully monetise the expected costs and benefits due to a lack of available data. However, the costs of the changes were expected to impact licensing costs for users and affect income for rights holders for all affected works. For businesses in these areas, there would be costs of adjusting to the new environment, mitigated by the transitional arrangements.

### **Economic rationale for intervention**

The interventions above were intended to harmonise copyright for artistic works and to remove the requirement for compulsory licensing when copyright is revived. In these circumstances, rights holders would be able to control how their works were used for the full copyright term up to 70 years following the artist's death, and potentially benefit from increased income from licensing.

Imposing equal term of protection for artistic works (whether they had been industrially manufactured or not), were expected to result in a simpler copyright system. If creators were presented with a copyright system which is easier to navigate, they might be less averse to producing copyrighted works which could result in an increase of the production of such goods within the UK economy.

Finally, increasing the term of protection afforded to industrially manufactured artistic goods beyond 25 years was expected to tackle the market failure argument. Without the full term of protection, there was a risk that creators would not be sufficiently incentivised to create industrially manufactured artistic goods – as they may not be able to recoup the investments they made to develop successful products. Greater protection of term might result in greater levels of production, therefore.

These expected economic benefits should be considered alongside the potential economic costs to consumers of IP rights holders gaining a longer period of monopoly power over their creations.

## **Methodology/review process**

The impact of these measures was expected to be below the £5 million threshold (net annualised impacts to business); this PIR is classified as de minimis, therefore. As set out in the guidance, we have taken a proportionate approach to the review appropriate to the expected benefits or levels of uncertainty associated with the measure. It has not been possible to estimate costs/benefits over the last five years due to the lack of available data.

We requested written evidence and received 62 responses, via a 10 week [call for views](#) 22 June to 31 August 2021 (see Annex A for a list of respondents). The call for views contained questions intended to assess the impact of the changes, and stakeholders could submit any additional evidence they felt relevant. When detailing costs and benefits, we asked respondents to clarify if these were annual, for the duration that the policy has been in place or some other time period. We reminded them of the [criteria for good evidence](#) which we aim to use in copyright policy making: evidence should be clear, verifiable and peer-reviewed.

## **Stakeholder responses**

### Replica car industry

The majority of responses to the call for views were classic car replica manufacturers or retailers, customers, journalists and enthusiasts. This was in relation to copyright enforcement action taken by some car brands to prevent replicas being produced, classifying the cars as works of artistic craftsmanship. There was no suggestion that the changes had not met the objective of equalising copyright term for artistic works, but the majority of these respondents suggested that the law should be returned to its previous state.

Several responses stated that companies had gone out of business due to the actions of one car brand but did not provide more detail on specific impacts or name all the relevant businesses. There were statements that these enforcement actions were having a devastating effect on the industry, particularly on small replica manufacturers, and putting thousands of UK jobs at risk.

The Centre for Economics and Business Research (CEBR) provided context on the industry and quoted its study report commissioned by Historic Endurance Rallying Organisation and Endurance Rally Association (HERO-ERA) in 2020<sup>3</sup> that the UK historic car sector has an aggregate turnover of £18.3 billion, supporting 113,000 employees. A separate analysis by CEBR for HERO-ERA in 2020<sup>4</sup> calculated that 11.3% of all jobs generated by the motor industry are in the historic and classic vehicle sector.

### Rights holders

Rights holders responding to the call for views stated that the changes to copyright law had achieved the original objective and prevented the detrimental effect of consumer confusion and poor-quality replicas being on the market. It corrected the previous anomalous situation. No quantitative evidence of licensing income or other benefit was provided.

### Users

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<sup>3</sup> The report may be downloaded at <https://www.herostore.eu/historic-motoring-impact-study.html>

<sup>4</sup> Information accessed at <https://heroevents.eu/article/impact-of-brexit-on-the-historic-and-classic-motor-vehicles-industry/>

The increased cost of licensing and/or insurance costs was reflected in responses from cultural heritage institutions and picture libraries and agencies. Both will have potential works of artistic craftsmanship as objects in their collections or incorporated into new works (photographs, illustrations in books etc.). This has directly affected the affordability of specific projects, the cost of which will either be passed to the consumer or the project abandoned.

In interior design, there was a statement by Designiversity/ The Interior Archive/ Associated Photographers that interior design work has been transferred to North America with a loss of jobs in UK publications. In one response from the sector, three picture libraries were said to have closed due to the changes.

The response from the British Association of Picture Libraries and Agencies (BAPLA), based on a survey of members, stated that 20% of specialist photographic collections featuring presumed works of artistic craftsmanship have been dissolved and 18% are no longer operational in the UK. The reduction in licensing opportunities and the increased cost of rights clearance was estimated £3-4 million 2016-2021.

Other user responses stated that the changes break the balance between the rights of creators and giving access to creative works. No quantitative evidence was provided in this area.

### **Issues and recommendations from stakeholders**

Several issues and recommendations were made in relation to the copyright framework. Anything requiring legislative change would need to go through the usual policy-making process. To make a case for change would require significant evidence to show the need for the change from the requesters, as well as evidence of the related impact on both users and rights holders.

#### *Status of the changes now that the UK has left the EU*

Several respondents commented that the UK is no longer bound by EU law and should reverse the changes made in 2016. The changes were initiated by a decision of the CJEU in 2011, but they also ensured that the UK treats all artistic works consistently as regards copyright term. Reversing the changes would require more detailed information on impact on rights holders as well as users to be provided than has been put forward in the call for views for this PIR.

#### *Review of section 51 CDPA*

The International Trademark Association said that [section 51 CDPA](#) should be reviewed in light of recent case law. Section 51 was not affected by the changes made in 2016 and is outside the scope of this PIR.

#### *Definition of works of artistic craftsmanship*

Guidance was originally published alongside the changes made in 2016 to help businesses understand the transitional arrangements, but which also included some information and commentary on what might be protected by copyright, particularly under the category of works of artistic craftsmanship. Several respondents commented that the lack of statutory definition has led to confusion and that recent case law has not helped in this respect. A suggestion was made that guidance may assist on this subject. The IPO will consider publishing a copyright notice or other guidance on works of artistic craftsmanship following this PIR.

### **Conclusion and next steps**

Holder of the extended copyright now have the ability to control use of their works, whatever the type of artistic work and type of artist. The evidence on both sides is limited, but rights holder respondents confirmed that they have been able to exploit their works since the changes were made. They agreed that the original aims of the changes are relevant.

Users provided no evidence of detriment about the removal of compulsory licensing for works where copyright was revived. However, several user groups (such as replica manufacturers, enthusiasts and picture agencies) highlighted a detriment to consumers in some areas in relation to the changes on term of copyright for artistic works.

The effect on the replica car industry was not predicted by the original impact assessment. This is partly due to more recent case law. The IPO will consider whether guidance on works of artistic craftsmanship could help both users and rights holders in the future, as outlined above. It will also consider the other issues raised during this process.

## **Annex – 62 respondents to call for views**

43 individuals

Anti Copying in Design (ACID)

Air Group Ltd

British Association of Picture Libraries and Agencies (BAPLA)

British Copyright Council (BCC)

Centre for Economics and Business Research (CEBR)

Classic Jaguar Replicas Ltd

Creative Commons

Delta House Group

Design and Artists Copyright Society (DACS)

Designiversity/ The Interior Archive/ Associated Photographers

International Trademark Association

Marks & Clerk Law LLP

Phoenix Sports Cars

PICSEL

Proteus Sports & Racing Cars

Suffolk Sportscars Ltd

Totnes Motor Museum

Victoria and Albert Museum/ V&A Enterprises Limited

Wikimedia UK