



# Copyright, Designs and Patents Act 1988

## 1988 CHAPTER 48

### PART III

#### DESIGN RIGHT

### CHAPTER III

#### EXCEPTIONS TO RIGHTS OF DESIGN RIGHT OWNERS

##### *Infringement of copyright*

#### **236 Infringement of copyright.**

Where copyright subsists in a work which consists of or includes a design in which design right subsists, it is not an infringement of design right in the design to do anything which is an infringement of the copyright in that work.

##### *Availability of licences of right*

#### **237 Licences available in last five years of design right.**

- (1) Any person is entitled as of right to a licence to do in the last five years of the design right term anything which would otherwise infringe the design right.
- (2) The terms of the licence shall, in default of agreement, be settled by the comptroller.
- (3) The Secretary of State may if it appears to him necessary in order to—
  - (a) comply with an international obligation of the United Kingdom, or
  - (b) secure or maintain reciprocal protection for British designs in other countries,by order exclude from the operation of subsection (1) designs of a description specified in the order or designs applied to articles of a description so specified.

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- (4) An order shall be made by statutory instrument; and no order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

### 238 Powers exercisable for protection of the public interest.

- [<sup>F1</sup>( 1 ) Subsection (1A) applies where whatever needs to be remedied, mitigated or prevented by the Secretary of State [<sup>F2</sup> or (as the case may be) the Competition and Markets Authority ] under section 12(5) of the Competition Act 1980 or section 41(2), 55(2), 66(6), 75(2), 83(2), 138(2), 147(2) [<sup>F3</sup> , 147A(2) ] or 160(2) of, or paragraph 5(2) or 10(2) of Schedule 7 to, the Enterprise Act 2002 (powers to take remedial action following references to the [<sup>F4</sup> Competition and Markets Authority ] in connection with public bodies and certain other persons, mergers or market investigations etc. ) consists of or includes—
- (a) conditions in licences granted by a design right owner restricting the use of the design by the licensee or the right of the design right owner to grant other licences, or
  - (b) a refusal of a design right owner to grant licences on reasonable terms.
- (1A) The powers conferred by Schedule 8 to the Enterprise Act 2002 include power to cancel or modify those conditions and, instead or in addition, to provide that licences in respect of the design right shall be available as of right.
- ( 2 ) The references to anything permitted by Schedule 8 to the Enterprise Act 2002 in section 12(5A) of the Competition Act 1980 and in sections 75(4)(a), 83(4)(a), 84(2)(a), 89(1), 160(4)(a), 161(3)(a) and 164(1) of, and paragraphs 5, 10 and 11 of Schedule 7 to, the Act of 2002 shall be construed accordingly.]
- (3) The terms of a licence available by virtue of this section shall, in default of agreement, be settled by the comptroller.

#### Textual Amendments

- F1** S. 238(1)(1A)(2) substituted (20.6.2003 for certain purposes and 29.12.2004 otherwise) for s. 238(1)(2) by 2002 c. 40, ss. 278(1), 279, Sch. 25 para. 18(4); S.I. 2003/1397, **arts. 2, 3(1)**, Sch. (with arts. 4-12); S.I. 2004/3233, **art. 2**, Sch. (with arts. 3-5)
- F2** Words in s. 238(1) substituted (1.4.2014) by [The Enterprise and Regulatory Reform Act 2013 \(Competition\) \(Consequential, Transitional and Saving Provisions\) Order 2014 \(S.I. 2014/892\)](#), art. 1(1), **Sch. 1 para. 58(a)** (with art. 3)
- F3** Word in s. 238(1) inserted (1.4.2014) by [The Enterprise and Regulatory Reform Act 2013 \(Competition\) \(Consequential, Transitional and Saving Provisions\) Order 2014 \(S.I. 2014/892\)](#), art. 1(1), **Sch. 1 para. 58(b)** (with art. 3)
- F4** Words in s. 238(1) substituted (1.4.2014) by [The Enterprise and Regulatory Reform Act 2013 \(Competition\) \(Consequential, Transitional and Saving Provisions\) Order 2014 \(S.I. 2014/892\)](#), art. 1(1), **Sch. 1 para. 58(c)** (with art. 3)

#### Modifications etc. (not altering text)

- C1** S. 238(1) amended (20.6.2003) by [The Enterprise Act 2002 \(Protection of Legitimate Interests\) Order 2003 \(S.I. 2003/1592\)](#), **Sch. 4 para. 7(2)(a)**
- C2** S. 238(2) amended (20.6.2003) by [The Enterprise Act 2002 \(Protection of Legitimate Interests\) Order 2003 \(S.I. 2003/1592\)](#), **Sch. 4 para. 7(2)(a)**

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### **239 Undertaking to take licence of right in infringement proceedings.**

- (1) If in proceedings for infringement of design right in a design in respect of which a licence is available as of right under section 237 or 238 the defendant undertakes to take a licence on such terms as may be agreed or, in default of agreement, settled by the comptroller under that section—
  - (a) no injunction shall be granted against him,
  - (b) no order for delivery up shall be made under section 230, and
  - (c) the amount recoverable against him by way of damages or on an account of profits shall not exceed double the amount which would have been payable by him as licensee if such a licence on those terms had been granted before the earliest infringement.
- (2) An undertaking may be given at any time before final order in the proceedings, without any admission of liability.
- (3) Nothing in this section affects the remedies available in respect of an infringement committed before licences of right were available.

#### *Crown use of designs*

### **240 Crown use of designs.**

- (1) A government department, or a person authorised in writing by a government department, may without the licence of the design right owner—
  - (a) do anything for the purpose of supplying articles for the services of the Crown, or
  - (b) dispose of articles no longer required for the services of the Crown; and nothing done by virtue of this section infringes the design right.
- (2) References in this Part to “the services of the Crown” are to—
  - (a) the defence of the realm,
  - (b) foreign defence purposes, and
  - (c) health service purposes.
- (3) The reference to the supply of articles for “foreign defence purposes” is to their supply—
  - (a) for the defence of a country outside the realm in pursuance of an agreement or arrangement to which the government of that country and Her Majesty’s Government in the United Kingdom are parties; or
  - (b) for use by armed forces operating in pursuance of a resolution of the United Nations or one of its organs.
- (4) The reference to the supply of articles for “health service purposes” are to their supply for the purpose of providing—
  - <sup>F5</sup>(za) primary medical services or primary dental services under <sup>F6</sup>the National Health Service Act 2006 or the National Health Service (Wales) Act 2006,<sup>F7</sup> or primary medical services under Part 1 of the National Health Service (Scotland) Act 1978<sup>F8</sup>
  - <sup>F8</sup>(a) pharmaceutical services, general medical services or general dental services under—

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- [<sup>F9</sup>(i) Chapter 1 of Part 7 of the National Health Service Act 2006, or Chapter 1 of Part 7 of the National Health Service (Wales) Act 2006 (in the case of pharmaceutical services),]
- (ii) Part II of the National Health Service (Scotland) Act 1978 [<sup>F10</sup>(in the case of pharmaceutical services or general dental services)], or
- (iii) the corresponding provisions of the law in force in Northern Ireland;  
 or
- (b) personal medical services or personal dental services in accordance with arrangements made under—
- (i) <sup>F11</sup> . . . . .
- (ii) section 17C of the 1978 Act [<sup>F12</sup>(in the case of personal dental services)], or
- (iii) the corresponding provisions of the law in force in Northern Ireland]<sup>F13</sup>or
- (c) local pharmaceutical services provided under<sup>F14</sup> the National Health Service Act 2006 or the National Health Service (Wales) Act 2006].]
- (5) In this Part—
- “Crown use”, in relation to a design, means the doing of anything by virtue of this section which would otherwise be an infringement of design right in the design; and
- “the government department concerned”, in relation to such use, means the government department by whom or on whose authority the act was done.
- (6) The authority of a government department in respect of Crown use of a design may be given to a person either before or after the use and whether or not he is authorised, directly or indirectly, by the design right owner to do anything in relation to the design.
- (7) A person acquiring anything sold in the exercise of powers conferred by this section, and any person claiming under him, may deal with it in the same manner as if the design right were held on behalf of the Crown.

#### Textual Amendments

- F5** S. 240(4)(za) inserted (1.4.2004) by [Health and Social Care \(Community Health and Standards\) Act 2003 \(c. 43\), ss. 184, 199\(1\), Sch. 11 para. 52\(a\)](#); S.I. 2004/288, [art. 5](#) (with [art. 8](#)) (as amended by S.I. 2004/866, [art. 2](#)) and by S.I. 2004/480, [art. 4](#) (with [art. 7](#)) (as amended by S.I. 2004/1019, [art. 2](#))
- F6** Words in s. 240(4)(za) substituted (1.3.2007) by [National Health Service \(Consequential Provisions\) Act 2006 \(c. 43\), ss. 2, 8, Sch. 1 para. 113\(a\)](#) (with s. 5, Sch. 3 Pt. 1)
- F7** Words in s. 240(4)(za) inserted (1.4.2004) by [The Primary Medical Services \(Scotland\) Act 2004 \(Consequential Modifications\) Order 2004 \(S.I. 2004/957\), art. 2, Sch. para. 5\(a\)](#)
- F8** S. 240(4)(a)(b) substituted (1.4.1998) by 1997 c. 46, s. 41(10), [Sch. 2 Pt. 1 para. 63](#); S.I. 1998/631, [art. 2\(1\)\(b\), Sch. 2](#) (subject to [arts. 3-5](#))
- F9** S. 240(4)(a)(i) substituted (1.3.2007) by [National Health Service \(Consequential Provisions\) Act 2006 \(c. 43\), ss. 2, 8, Sch. 1 para. 113\(b\)](#) (with s. 5, Sch. 3 Pt. 1)
- F10** Words in s. 240(4)(a)(ii) inserted (1.4.2004) by [The Primary Medical Services \(Scotland\) Act 2004 \(Consequential Modifications\) Order 2004 \(S.I. 2004/957\), art. 2, Sch. para. 5\(b\)](#)
- F11** S. 240(4)(b)(i) repealed (1.4.2004) by [Health and Social Care \(Community Health and Standards\) Act 2003 \(c. 43\), ss. 184, 196, 199\(1\), Sch. 11 para. 52\(c\), Sch. 14 Pt. 4](#); S.I. 2004/288, [art. 5](#) (with [art. 8](#)) (as amended by S.I. 2004/866, [art. 2](#)) and by S.I. 2004/480, [art. 4](#) (with [art. 7](#)) (as amended by S.I. 2004/1019, [art. 2](#))

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- F12** Words in s. 240(4)(b)(ii) inserted (1.4.2004) by [The Primary Medical Services \(Scotland\) Act 2004 \(Consequential Modifications\) Order 2004 \(S.I. 2004/957\)](#), art. 2, **Sch. para. 5(c)**
- F13** S. 240(4)(c) and the word "or" immediately preceding it inserted (1.7.2002 for W. and 1.1.2003 for E.) by [2001 c. 15, ss. 67\(1\), 70\(2\), Sch. 5 Pt. 1 para. 7 \(with ss. 64\(9\), 65\(4\)\)](#); [S.I. 2002/1475](#), art. 2(1), [Sch. Pt. I](#); [S.I. 2003/53](#), **art. 2**
- F14** Words in s. 240(4)(c) substituted (1.3.2007) for s. 240(4)(c)(i)(ii) by [National Health Service \(Consequential Provisions\) Act 2006 \(c. 43\)](#), ss. 2, 8, **Sch. 1 para. 113(c)** (with s. 5, [Sch. 3 Pt. 1](#))

## 241 Settlement of terms for Crown use.

- (1) Where Crown use is made of a design, the government department concerned shall—
- notify the design right owner as soon as practicable, and
  - give him such information as to the extent of the use as he may from time to time require,

unless it appears to the department that it would be contrary to the public interest to do so or the identity of the design right owner cannot be ascertained on reasonable inquiry.

- (2) Crown use of a design shall be on such terms as, either before or after the use, are agreed between the government department concerned and the design right owner with the approval of the Treasury or, in default of agreement, are determined by the court.

In the application of this subsection to Northern Ireland the reference to the Treasury shall, where the government department referred to in that subsection is a Northern Ireland department, be construed as a reference to the Department of Finance and Personnel.

[<sup>F15</sup>In the application of this subsection to Scotland, where the government department referred to in that subsection is any part of the Scottish Administration, the words “with the approval of the Treasury” are omitted.]

- (3) Where the identity of the design right owner cannot be ascertained on reasonable inquiry, the government department concerned may apply to the court who may order that no royalty or other sum shall be payable in respect of Crown use of the design until the owner agrees terms with the department or refers the matter to the court for determination.

### Textual Amendments

- F15** Paragraph in s. 241(2) inserted (1.7.1999) by [S.I. 1999/1820](#), arts. 1(2), 4, **Sch. 2 Pt. I para. 93(2)**; [S.I. 1998/3178](#), **art. 3**

## 242 Rights of third parties in case of Crown use.

- (1) The provisions of any licence, assignment or agreement made between the design right owner (or anyone deriving title from him or from whom he derives title) and any person other than a government department are of no effect in relation to Crown use of a design, or any act incidental to Crown use, so far as they—
- restrict or regulate anything done in relation to the design, or the use of any model, document or other information relating to it, or
  - provide for the making of payments in respect of, or calculated by reference to such use;

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and the copying or issuing to the public of copies of any such model or document in connection with the thing done, or any such use, shall be deemed not to be an infringement of any copyright in the model or document.

- (2) Subsection (1) shall not be construed as authorising the disclosure of any such model, document or information in contravention of the licence, assignment or agreement.
- (3) Where an exclusive licence is in force in respect of the design—
- (a) if the licence was granted for royalties—
    - (i) any agreement between the design right owner and a government department under section 241 (settlement of terms for Crown use) requires the consent of the licensee, and
    - (ii) the licensee is entitled to recover from the design right owner such part of the payment for Crown use as may be agreed between them or, in default of agreement, determined by the court;
  - (b) if the licence was granted otherwise than for royalties—
    - (i) section 241 applies in relation to anything done which but for section 240 (Crown use) and subsection (1) above would be an infringement of the rights of the licensee with the substitution for references to the design right owner of references to the licensee, and
    - (ii) section 241 does not apply in relation to anything done by the licensee by virtue of an authority given under section 240.
- (4) Where the design right has been assigned to the design right owner in consideration of royalties—
- (a) section 241 applies in relation to Crown use of the design as if the references to the design right owner included the assignor, and any payment for Crown use shall be divided between them in such proportion as may be agreed or, in default of agreement, determined by the court; and
  - (b) section 241 applies in relation to any act incidental to Crown use as it applies in relation to Crown use of the design.
- (5) Where any model, document or other information relating to a design is used in connection with Crown use of the design, or any act incidental to Crown use, section 241 applies to the use of the model, document or other information with the substitution for the references to the design right owner of references to the person entitled to the benefit of any provision of an agreement rendered inoperative by subsection (1) above.
- (6) In this section—
- “act incidental to Crown use” means anything done for the services of the Crown to the order of a government department by the design right owner in respect of a design;
  - “payment for Crown use” means such amount as is payable by the government department concerned by virtue of section 241; and
  - “royalties” includes any benefit determined by reference to the use of the design.

## **243 Crown use: compensation for loss of profit.**

- (1) Where Crown use is made of a design, the government department concerned shall pay—

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- (a) to the design right owner, or
  - (b) if there is an exclusive licence in force in respect of the design, to the exclusive licensee,
- compensation for any loss resulting from his not being awarded a contract to supply the articles made to the design.
- (2) Compensation is payable only to the extent that such a contract could have been fulfilled from his existing manufacturing capacity; but is payable notwithstanding the existence of circumstances rendering him ineligible for the award of such a contract.
  - (3) In determining the loss, regard shall be had to the profit which would have been made on such a contract and to the extent to which any manufacturing capacity was under-used.
  - (4) No compensation is payable in respect of any failure to secure contracts for the supply of articles made to the design otherwise than for the services of the Crown.
  - (5) The amount payable shall, if not agreed between the design right owner or licensee and the government department concerned with the approval of the Treasury, be determined by the court on a reference under section 252; and it is in addition to any amount payable under section 241 or 242.
  - (6) In the application of this section to Northern Ireland, the reference in subsection (5) to the Treasury shall, where the government department concerned is a Northern Ireland department, be construed as a reference to the Department of Finance and Personnel.
- [<sup>F16</sup>(7) In the application of this section to Scotland, where the government department referred to in subsection (5) is any part of the Scottish Administration, the words “with the approval of the Treasury” in that subsection are omitted.]

#### Textual Amendments

**F16** S. 243(7) inserted (1.7.1999) by S.I. 1999/1820, arts. 1(2), 4, **Sch. 2 Pt. I para. 93(3)**; S.I. 1998/3178, **art. 3**

#### 244 Special provision for Crown use during emergency.

- (1) During a period of emergency the powers exercisable in relation to a design by virtue of section 240 (Crown use) include power to do any act which would otherwise be an infringement of design right for any purpose which appears to the government department concerned necessary or expedient—
  - (a) for the efficient prosecution of any war in which Her Majesty may be engaged;
  - (b) for the maintenance of supplies and services essential to the life of the community;
  - (c) for securing a sufficiency of supplies and services essential to the well-being of the community;
  - (d) for promoting the productivity of industry, commerce and agriculture;
  - (e) for fostering and directing exports and reducing imports, or imports of any classes, from all or any countries and for redressing the balance of trade;
  - (f) generally for ensuring that the whole resources of the community are available for use, and are used, in a manner best calculated to serve the interests of the community; or

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- (g) for assisting the relief of suffering and the restoration and distribution of essential supplies and services in any country outside the United Kingdom which is in grave distress as the result of war.
- (2) References in this Part to the services of the Crown include, as respects a period of emergency, those purposes; and references to “Crown use” include any act which would apart from this section be an infringement of design right.
- (3) In this section “period of emergency” means a period beginning with such date as may be declared by Order in Council to be the beginning, and ending with such date as may be so declared to be the end, of a period of emergency for the purposes of this section.
- (4) No Order in Council under this section shall be submitted to Her Majesty unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

### *[<sup>F17</sup>Miscellaneous*

#### **Textual Amendments**

**F17** Ss. 244A, 244B and cross-heading inserted (1.10.2014) by [Intellectual Property Act 2014 \(c. 18\)](#), [ss. 4, 24\(1\)](#); [S.I. 2014/2330](#), [art. 3](#), [Sch.](#)

#### **244A Exception for private acts, experiments and teaching**

Design right is not infringed by—

- (a) an act which is done privately and for purposes which are not commercial;
- (b) an act which is done for experimental purposes; or
- (c) an act of reproduction for teaching purposes or for the purpose of making citations provided that—
  - (i) the act of reproduction is compatible with fair trade practice and does not unduly prejudice the normal exploitation of the design, and
  - (ii) mention is made of the source.

#### **244B Exception for overseas ships and aircraft**

Design right is not infringed by—

- (a) the use of equipment on ships or aircraft which are registered in another country but which are temporarily in the United Kingdom;
- (b) the importation into the United Kingdom of spare parts or accessories for the purpose of repairing such ships or aircraft; or
- (c) the carrying out of repairs on such ships or aircraft.]

### *General*

#### **245 Power to provide for further exceptions.**

- (1) The Secretary of State may if it appears to him necessary in order to—
- (a) comply with an international obligation of the United Kingdom, or
  - (b) secure or maintain reciprocal protection for British designs in other countries,



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by order provide that acts of a description specified in the order do not infringe design right.

- (2) An order may make different provision for different descriptions of design or article.
- (3) An order shall be made by statutory instrument and no order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

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