

EXPLANATORY MEMORANDUM TO
THE COPYRIGHT (AMENDMENT) REGULATIONS 2016
2016 No. 1210

1. Introduction

- 1.1 This Explanatory Memorandum has been prepared by the Intellectual Property Office, an Executive Agency of the Department for Business, Energy and Industrial Strategy, and is laid before Parliament by Command of Her Majesty

2. Purpose of the instrument

- 2.1 When this instrument enters into force it will have two main purposes:
- 2.2 Firstly, it will amend paragraphs 5 and 6(1) of Schedule 1 to the Copyright, Designs and Patents Act 1988 (CDPA), and Regulation 16 of the Duration of Copyright and Rights in Performances Regulations 1995 (1995 Regulations). The effect of this will be to make clear that an artistic work made before 1st June 1957 is not prevented from having copyright protection under paragraphs 5 and 6 of the CDPA if it was, on 1st July 1995, protected under the law of another European Economic Area (EEA) state relating to copyright or related rights
- 2.3 Secondly, it will revoke Regulations 24, 25, 34 and 35 of the 1995 Regulations subject to transitional provisions. The effect of this will be to remove the compulsory licence scheme for revived copyright and revived performance rights subject to transitional provisions in order to ensure compliance with EU law.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 This instrument is being made under section 2(2) of the European Communities Act 1972.
- 4.2 The relevant UK law on copyright is contained in the CDPA. In addition, the 1995 Regulations outline the term of copyright in protected works.
- 4.3 Paragraphs 5(1) and 6 of Schedule 1 CDPA and Regulation 16 of the 1995 Regulations currently prevent artistic works having copyright protection if they were made prior to 1 June 1957, were capable of being registered as designs, and were used, or intended to be used, as a pattern or model to be multiplied by any industrial

process (including being reproduced more than 50 times). Regulations 24, 25, 34 and 35 provide a compulsory licence regime for certain types of copyright works.

- 4.4 The relevant EU legislation is the InfoSoc Directive¹ and the Second Term Directive². The InfoSoc Directive provides for the harmonisation of the copyright laws and related performers' rights in EU Member States and sets out the exclusive rights of right holders and performers, including the exclusive right of reproduction and fixation of their performances respectively. The First and Second Term Directives provide that the rights of the author of an artistic work shall run for the life of the author plus 70 years after their death.

5. Extent and Territorial Application

- 5.1 This instrument extends to all of the United Kingdom.
- 5.2 The territorial application of this instrument is all of the United Kingdom

¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, the "InfoSoc Directive" can be accessed here: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029>

² The Second Term Directive 2006/116/EC can be accessed here: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0116>

6. European Convention on Human Rights

- 6.1 The Baroness Neville-Rolfe DBE CMG, Minister of State for Energy and Intellectual Property, has made the following statement regarding Human Rights:
- 6.2 *“In my view the provisions of the Copyright (Amendment) Regulations 2016 are compatible with the Convention rights”*

7. Policy background

- 7.1 In July 2016, section 52 of the CDPA was repealed. It previously limited the term of copyright protection for industrially manufactured artistic works (any artistic work of which more than 50 copies are made) to 25 years. The effect of this repeal is that these works are now entitled to the full copyright protection term of the life of the author plus 70 years. The amendments provided in these Regulations originally arose from the consultations relating to the repeal of section 52 and the Government announced that it would make this change on 21 April 2016³.
- 7.2 Paragraphs 5 and 6(1) of Schedule 1 CDPA and Regulation 16 of the 1995 Regulations are being amended to clarify implementation of the Second Term Directive. The Second Term Directive provides that the rights of the author of an artistic work shall run for the life of the author plus 70 years after their death. This applies to all works which were protected by copyright in at least one EEA state on 1 July 1995. Therefore, if a design was protected by copyright in at least one EEA state at that date, it is eligible for copyright protection under the CDPA even if the copyright had expired in the UK, or had never previously subsisted. The legislative changes outlined below will ensure that those works have the full term of copyright protection.

Amendments to paragraphs 5(1) and 6 of Schedule 1 CDPA, and Regulation 16 of the 1995 Regulations

- 7.3 Paragraph 6 of Schedule 1 CDPA currently prevents artistic works having copyright protection if they were made prior to 1 June 1957; were capable of being registered as designs; and were used or intended to be used as a pattern or model to be reproduced more than 50 times⁴. These Regulations amend this paragraph to be more explicit about the copyright protection of artistic works which were protected in another EEA state on 1 July 1995.
- 7.4 Paragraph 5 of Schedule 1 CDPA currently states that copyright subsists in an existing work after commencement of the CDPA only if copyright subsisted in it immediately before commencement. An amendment is required to be consistent with the changes to paragraph 6 (as copyright may not have subsisted in pre-1 June 1957 artistic works immediately before the commencement date).

³ The 2015 consultation on the transitional provisions for the repeal of section 52 CDPA and the Government response can be accessed here: <https://www.gov.uk/government/consultations/transitional-arrangements-for-the-repeal-of-section-52-cdpa>

⁴ This also applies when the design is applied to printed paper hangings, carpets, floor cloths or oil cloths, manufactured or sold in lengths or pieces, textile piece goods, or textile goods manufactured or sold in lengths or pieces, or lace, not made by hand.

- 7.5 Regulation 16 of the 1995 Regulations sets out the application of the provisions relating to the duration of copyright in works. It requires amendment to make it clear that the full duration of copyright protection also applies to artistic works that were protected by copyright in at least one EEA state on 1 July 1995 even where copyright had never previously subsisted in those works.

Revocation of Regulations 24, 25, 34 and 35 of the 1995 Regulations

- 7.6 These Regulations revoke regulations 24, 25, 34 and 35 of the 1995 Regulations subject to transitional provisions. The 1995 Regulations increased the term of protection for copyright works from 50 to 70 years. Currently, Regulations 24 and 34 provide a compulsory licence regime for any works whose copyright was “revived” as a result of the increase in term. These affected works are to be “*treated as licensed by the copyright owner*” if the person wishing to use them gives reasonable notice, subject to payment of a reasonable royalty. Article 2 of the InfoSoc Directive provides certain exclusive rights to authors and performers. Regulations 24, 25, 34 and 35 are revoked in the light of particular concerns about how these regulations implement the InfoSoc Directive.
- 7.7 Regulations 25 and 35 relate to applications to the Copyright Tribunal to settle the royalty or other remuneration payable in pursuance of Regulations 24 and 34 respectively. As Regulations 24 and 34 are to be revoked, these regulations will also be revoked.
- 7.8 The Government recognises that there may be situations where a royalty may have already been agreed or determined in relation to acts which will not be done until after the Regulations come into force. To address this, transitional provisions are provided so that where a royalty or remuneration has been agreed or determined before the commencement date of the Regulations, the person will still be permitted to do those acts.

Consolidation

- 7.9 The Intellectual Property Office will make an informal consolidated copy⁵ of the legislation available to the public (free of charge) by the time the changes come into force.

8. Consultation outcome

- 8.1 The Intellectual Property Office has consulted widely on the repeal of section 52 and these associated legislative changes. In 2015 the Government consulted on changes to paragraph 6 of Schedule 1 CDPA and the repeal of Regulation 24 of the 1995 Regulations. Responses to this consultation highlighted the need to amend paragraph 5(1) of Schedule 1 CDPA alongside paragraph 6. On 21 April 2016 the Government published its response⁶ to this consultation, in which it was announced that paragraphs 5(1) and 6 of Schedule 1 CDPA and Regulation 16 of the 1995 Regulations were to be amended. In its response, the Government acknowledged that the revocation of

⁵ The unofficial consolidated copy of the CDPA will be available here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/308729/cdpa1988-unofficial.pdf

⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515305/Gov-response_s52.pdf

Regulation 24 will have a wider application than just those works affected by the repeal of section 52, and that a further technical consultation would be needed.

8.2 This technical consultation⁷ related to: the amendment of paragraphs 5(1) and 6 to Schedule 1 CDPA; the amendment of Regulation 16 of the 1995 Regulations; the revocation of Regulations 24, 25, 34 and 35 of the 1995 Regulations; and transitional provisions relating to their revocation. This technical consultation was launched on 21 July 2016 and closed on 15 September 2016. The results to this consultation were considered by the Government and a Government response was published on 29 November 2016. The Government received 9 responses to the technical consultation and most respondents generally agreed that our proposed changes would achieve the stated aims of consistency and compliance with EU law, and made some technical observations.

9. Guidance

9.1 Guidance on the repeal of section 52 CDPA has already been published by the Intellectual Property Office⁸; it was most recently updated in September 2016. In addition, the Government Response to the recent technical consultation provides guidance on the transitional provisions for the repeal of Regulations 24, 25, 34 and 35

10. Impact

10.1 The Government published an impact assessment for the instrument repealing section 52 CDPA on 21 April 2016, which also covers the changes contained within this instrument. It has not been possible to fully monetise the costs owing to a lack of available data.

10.2 The Government considers the main benefit from the amendment to Schedule 1, to be the provision of legal certainty. The impact assessment recognised that there may be some benefits to rights holders, if they were able to demonstrate that these particular works are in copyright, by being able to prevent copying of their works, or to benefit from royalties if they were to license the making of copies. There is significant uncertainty about which works are affected by the existing provisions, as there is no statutory definition of "artistic work" and an absence of UK court judgments to define its scope in UK law. This makes it difficult to estimate both the number of works which would benefit from this clarification and therefore overall impact.

10.3 Estimating costs to those firms who may react to a risk of copyright infringement (by ceasing production or importation of copies for sale) is problematic for the same reason.

10.4 The removal of compulsory licensing of works where copyright is revived through the revocation of regulation 24 is expected to have minimal impact. The Government believes that regulation 24 has ceased to be relevant for literary, dramatic, musical

⁷ The technical consultation can be accessed here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539321/Changes-to-Schedule-1-CDPA-and-Duration-of-Copyright-Regulations.pdf

⁸https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/551236/160408_guidance_s52_final_web_accessible.pdf

and artistic works (excluding artistic works capable of qualifying as designs). There may be an impact on some pre-1945 sound recordings, photographs and films.

- 10.5 Consultation responses did not provide substantial or compelling evidence that regulation 24 was utilised. The effect of removal will be that right holders are no longer subject to a compulsory licence regime, and businesses will have firm knowledge that they have no recourse to obtain a compulsory licence.
- 10.6 The Government consulted stakeholders on these changes, but no substantial evidence was uncovered which enabled these impacts to be quantified or changed the overall assessment.
- 10.7 The original Impact Assessment is submitted with this memorandum and is published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 Baroness Neville-Rolfe, Minister of State for Energy and Intellectual Property, has made the following statement under section 28 of the Small Business, Enterprise and Employment Act 2015, having had regard to statutory guidance on the appropriateness of making provision for review: *The regulatory provision is contained in primary legislation (the Copyright, Designs and Patents Act 1988) and as such the provision of a review clause is not considered appropriate for the present Regulations.*

13. Contact

- 13.1 Emily Jones, Senior Policy Advisor at the Intellectual Property Office, an Executive Agency of the Department of Business, Energy and Industrial Strategy, can answer any queries regarding the instrument. Contact: 01633 813708 and email: Emily.Jones@ipo.gov.uk