

EXPLANATORY MEMORANDUM TO
THE COPYRIGHT AND DURATION OF RIGHTS IN PERFORMANCES
REGULATIONS 2013

2013 1782

1. This Explanatory Memorandum has been prepared by the Intellectual Property Office, an Executive Agency of the Department of Business, Innovation and Skills, and is laid before Parliament by Command of Her Majesty.

2. Description of the Instrument

2.1 The Copyright and Duration of Rights in Performances Regulations 2013 (the “Regulations”) implement Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and certain related rights. They do so by amending the Copyright, Designs and Patents Act 1988.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Background

4.1 Directive 2011/77/EU amends Directive 2006/116/EC on the term of protection of copyright and certain related rights, itself a codification of Directive 93/98/EEC harmonising the term of protection of copyright and certain related rights. The Regulations are made under the powers contained in section 2(2) of the European Communities Act 1972 and section 78 of the Enterprise and Regulatory Reform Act 2013.

4.2 BIS submitted an EM on Council Doc No. 12217/08 on 27th October 2008 relating to a “Draft Directive amending Directive 2006/116/EC on the term of protection of copyright and certain related rights”. The Lords Select Committee on the EU cleared it (POS 26th February 2010, *Session 09/10*). The Commons European Scrutiny Committee considered it legally and politically important and cleared it (Report 24, *Session 10/11*).

4.3 A transposition note on the implementation of the provisions of the Directive has been prepared and is annexed to this memorandum. In line with Government policy, the intention has been to use copy out wherever possible, however it is not possible to implement the Directive by simply copying out its basic provisions since the Directive amends an existing Directive which was not implemented using copy-out. In relation to certain of the provisions of the Directive it has been necessary to make additional provision in the interests of ensuring that the new rights conferred on performers are clearly defined and enforceable as a matter of law.

5. Territorial Extent and Application

5.1 This instrument extends to all of the United Kingdom

6. European Convention on Human Rights

6.1 The Viscount Younger of Leckie, Parliamentary Under Secretary of State for Intellectual Property has made the following statement regarding human rights:

“In my view the provisions of the Copyright and Duration of Rights in Performances Regulations 2013 are compatible with the Convention rights”

7. Policy Background

7.1 Under the original Directive 2006/116/EC as implemented, the length of the term of copyright in sound recordings and performers` rights in sound recordings was set at 50 years from the date of publication. Directive 2011/77/EU extends this term of protection to 70 years from the date of publication.

7.2 The increased term of protection for producers of sound recordings and the performers in a sound recording should go some way to tackling the income gap that some performers experience at the end of their lifetime. It will also provide performers with a longer period of time during which they may exercise their moral rights¹ which last for the same length of time as performers` rights.

7.3 The Directive also contains elements that aim to ensure that the benefits of the extension reach performers and musicians:

7.3.1 *Session Fund* - Many performers, session musicians in particular, transfer or assign their exclusive rights to producers in return for a one-off payment; the Directive provides an obligation for producers to set aside for such performers a sum, to be paid annually with effect from the end of the original 50 year period, equivalent to 20% of their revenues from the distribution and making available on the internet of recordings protected under the extended term. The Directive mandates that this sum must be distributed to such performers by Collecting Societies.

7.3.1.1 *Clean Slate Provision* - Some performers are paid an advance on royalties; this is deducted from future royalty payments until the producer has recouped the initial advance. In some cases the advance is not fully recouped during the current 50 year term of protection. Under the provisions of the Directive a

¹ The right to be identified as the performer and the right to derogatory treatment of performance.

producer may not make any further deductions from royalty payments to performers after a period of 50 years.

7.3.2 'Use-it-or-lose-it' Right - Performers and musicians in sound recordings will have the power after 50 years to claim back their rights from a producer if the producer is not exploiting the recording.

7.4 The Directive will also harmonise, within the EU, copyright provisions for certain musical compositions (with words) of co-authorship so that the length of copyright term shall last for 70 years following the death of the last surviving creator. Current copyright protection differs between EU Member States for these types of work; for example in the UK the terms of copyright in the words and in the music operate independently of each other.

8. Consultation Outcome

8.1 The Intellectual Property Office (IPO) ran a public consultation during the period 7 January to 4 March 2013 on the Government's proposed approach to implementation of EU Directive 2011/77/EU extending the term of copyright in sound recordings, performers' rights in sound recordings and certain co-written works. The consultation paper and supporting documents were made available through the IPO website.

8.2 The consultation invited comment on the detail of transposition of the Directive into UK law, in particular specific provisions in the Directive that required further clarification. The responses received demonstrated general support for the Government's approach to implementation of the Directive. In taking forward the implementing Regulations the Government considered the responses to the specific questions asked by the consultation.

8.3 The Government also considered other issues, including those relating to the UK's legal obligations, that were raised by respondents. In these cases the Government, in taking forward the implementing Regulations, considered views submitted and *where possible* made any changes that were within the scope of the specific provisions of the Directive.

9. Guidance

9.1 Guidance on the Regulations will be made available no later than *12 weeks* before the implementation date of 1 November 2013

10. Impact Assessment

10.1 An Impact Assessment was produced and is provided with this Explanatory Memorandum

11. Regulating small business

11.1 This type of European legislative measure is not in scope for micro-business exemptions.

12. Monitoring & review

12.1 In accordance with regulation 26 a review of the Regulations will be carried out five years after they come into force and further reports will be published at intervals of not more than five years. In considering certain responses to the consultation provision is also made for review of specific elements of the Regulations, namely: consideration of whether, and to what extent certain producers should be subject to the obligation to pay the annual supplementary payment (‘session fund’); and whether to implement the optional measure in the Directive providing a right for the performer to renegotiate his contract with the producer of the sound recording after 50 years.

13. Contact

13.1 Nick Ashworth at the Intellectual Property Office, an executive agency of the Department of Business, Innovation and Skills, can answer any queries regarding the instrument. Contact: 01633 814397 and e-mail: nick.ashworth@ipo.gov.uk