

**EXPLANATORY MEMORANDUM TO
THE SCOTTISH REGISTER OF TARTANS ACT 2008 (CONSEQUENTIAL
MODIFICATIONS) ORDER 2010**

2010 No. 180

1. 1.1 This Explanatory Memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

1.2 This Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the Instrument

2.1 This Order modifies the effect of sections 47 and 50 of the Copyright Designs and Patents Act 1988 (“the 1988 Act”) in consequence of the Scottish Register of Tartans Act 2008 (“the 2008 Act”), an Act of the Scottish Parliament. The 2008 Act established the Scottish Register of Tartans, a repository of tartan designs, to be held electronically by the Keeper of the Register, an Office also established by the 2008 Act.

2.2 The Order is required to ensure that the actions of the Keeper of the Register, in exercise of certain functions, and certain actions of members of the public copying material from the online Scottish Register of Tartans, will not infringe Intellectual Property Rights vested in tartan designs or certain other material held by the Keeper of the Register.

3. Matters of Special Interest to the Joint Committee on Statutory Instruments

3.1 The Order is to be made in exercise of the powers conferred by sections 104 and 112(1) of the Scotland Act 1998 (“the 1998 Act”). Section 104 of the 1998 Act provides for subordinate legislation to be made in the UK Parliament, which contains provisions that are necessary or expedient in consequence of an Act of the Scottish Parliament, in this case the 2008 Act.

3.2 This section 104 Order is expedient in consequence of the 2008 Act as the Scottish Parliament does not have the legislative competence to make provisions relating to Intellectual Property.

3.3 The Order is expedient in consequence of the establishment of the Scottish Register of Tartans. The Keeper of the Register, in the exercise of certain functions under the 2008 Act, should fall within the exceptions to copyright provided by sections 47 and 50 of the 1988 Act and members of the public can access the material held on that Register without fear of infringing copyright on the same basis as users of other public registers established under Acts of the UK Parliament.

3.4 The Scottish Register of Tartans website includes a temporary copyright statement intended as an interim arrangement between the inception of the Register, from 5 February 2009, and the coming into force of the section 104 Order. All enquirers requesting permission to reproduce content from the Register website have been advised that this is not possible at the current time without possibly infringing copyright, and all registrants have been advised that inclusion of a tartan in the Register

indicates that the tartan and its name are unique to the Register and meet the registration criteria of the 2008 Act, and that no other rights can be conferred.

4. Legislative Context

4.1 The 2008 Act received Royal Assent on 13 November 2008. The Keeper of the Scottish Register of Tartans may copy a document received by him in connection with an application for registration of a tartan design, or otherwise acquired by him in connection with the carrying out of the Keeper's functions, and permit a member of the public to do so under section 4(3) of the 2008 Act. The Keeper of the Register may also copy material when making an entry in the Register in respect of an application to register a tartan design under section 9 of the 2008 Act. The Keeper of the Register must establish a Register online for public use. The policy aim is that members of the public should be able to access the Register and to make copies of material from the Register for certain purposes.

5. Territorial Extent and Application

5.1 This Instrument extends to the whole of the UK.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State at the Scotland Office has made the following statement regarding Human Rights:

In my view the provisions of the Scottish Register of Tartans Act 2008 (Consequential Modifications) Order 2010 are compatible with the Convention Rights.

7. Policy Background

What is being done and why

7.1 The overarching aim of the 2008 Act is to create a Scottish Register of Tartans that is independent, definitive, accessible and sustainable to help promote and preserve tartan. The 2008 Act established a Scottish Register of Tartans, a repository of tartan designs, to be held electronically by the Keeper of the Register, an Office also established by the 2008 Act.

7.2 The Scottish Register of Tartans commenced officially on 5 February 2009. The National Archives of Scotland (NAS), an Executive Agency of the Scottish Executive, are responsible for operating and maintaining the Register. The Keeper of the Records of Scotland (Chief Executive of NAS) is also the Keeper of the Scottish Register of Tartans. The Keeper of the Register considers new tartan designs against a number of criteria, including the definition of tartan contained in the 2008 Act. Any person can register new tartan designs and can search the online website database facility.

7.3 The 2008 Act provided Scottish Ministers with a power to specify, by Order, fees for services provided in relation to the Scottish Register of Tartans, such as the registration of new tartans and to make provisions for the copy of material from the Register. An Order has been made under this power: *Scottish Statutory Instrument 2009/6 - The Scottish Register of Tartans Fees Order 2009*.

7.4 This Order under section 104 of the Scotland Act 1998 is required to ensure that the Keeper of the Register is protected from claims for damages and expenses by third parties claiming that the Keeper of the Register has infringed Intellectual Property Rights in the exercise of the Keeper's statutory functions. Such functions include permitting copies of material open to public inspection to be made by members of the public; copying and issuing copies of such documents by the Keeper of the Register; and registering tartan designs. It is also required to ensure that the users of the Scottish Register of Tartans, namely those viewing the Register website, may copy certain material without infringing those same Intellectual Property Rights. This does not apply where a user copies a design for commercial use. Such protection is given under sections 47 and 50 of the 1988 Act for material open to public inspection or on official registers or for acts done under statutory authority pursuant to an Act of the UK Parliament, but as the 2008 Act is an Act of the Scottish Parliament the exceptions do not apply.

Consolidation

7.5 This Instrument stands alone.

8. Consultation Outcome

8.1 From 2007 to 2008, the Scottish Executive worked closely with an expert group of stakeholders, comprising key industry figures and the two existing private registers of tartan designs, to develop and agree the detail of how the proposed statutory register of Scottish tartans would work. The expert group included:

- The Lord Lyon King of Arms, who as the head of the heraldic authority for Scotland, deals with all matters relating to Scottish Heraldry and Coats of Arms and maintains the Scottish Public Registers of Arms and Genealogies.
- Representatives of NAS which supports the Keeper of the Scottish Register of Tartans.
- Key industry figures including: the Scottish Tartans Authority ("STA") and the Scottish Tartans World Register ("STWR"), both of whom have expertise in running similar registers; Kinloch Anderson, one of Scotland's foremost experts in kilts, tartans, Highland Dress and accessories both as manufacturers and retailers; and the National Textiles Team at Scottish Enterprise.

8.2 The economic impact assessment of the tartan industry in Scotland commissioned by Scottish Enterprise in 2007 involved a significant amount of consultation with six of the major tartan industry companies, together with a broader sample of 21 smaller companies. Key industry representatives, the holders of the existing private registers and other interests were also consulted. The outcome of these consultations was support for a single, national and accessible Scottish Register of Tartans.

The report can be found at:

http://uk.sitestat.com/scotent/secom/s?se2008_ecotec_final_report&ns_type=pdf

8.3 This Order has not been the subject of a separate consultation exercise; the Order does not amend existing policy in relation to the Scottish Register of Tartans and Orders taken forward under the Scotland Act 1998 are not usually consulted on as the terms of the Order have previously been the subject of a separate consultation exercise. The Order ensures that members of the public may copy certain material from the online Scottish Register of Tartans, and that the Keeper of the Register can carry out certain statutory functions, without infringing Intellectual Property Rights.

9. Guidance

9.1 There is comprehensive guidance on the Scottish Register of Tartans publicly available on the Register website, see link:

<http://www.tartanregister.gov.uk/guidance.aspx>

This document provides background information and guidance on the facilities and services available for use in the Register.

10. Impact

10.1 An Impact Assessment has not been prepared for this Instrument as it has no impact on business, charities or voluntary bodies.

10.2 As far as the public sector is concerned, the intention is to allow the Keeper of the Scottish Register of Tartans to exercise the statutory functions of this Office under the 2008 Act. Without this Order the Keeper of the Register would be open to the risk of legal challenge for infringing copyright in that exercise.

11. Regulating Small Business

11.1 The legislation does not apply to small business.

12. Monitoring and Review

12.1 This Order will have immediate effect in that the Keeper of the Register in exercise of the statutory functions of this Office and members of the public copying material from the online Scottish Register of Tartans will not infringe Intellectual Property Rights vested in tartan designs or other material held by the Keeper of the Register. Monitoring and review is not considered necessary as the Order will remove the risk of legal challenge for parties using the register rather than creating new functions.

13. Contact

13.1 Jennifer Manton at the Scotland Office, Tel: 020 7270 6749 or Email: jennifer.manton@scotlandoffice.gsi.gov.uk, can answer any queries regarding the Instrument.