

EXPLANATORY MEMORANDUM TO
THE COPYRIGHT AND PERFORMANCES (APPLICATION TO OTHER
COUNTRIES) (AMENDMENT) ORDER 2021

2021 No. 636

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 The UK is party to several multilateral treaties on copyright and rights in performances. These require member countries to provide minimum standards of copyright protection, and to protect works (e.g. books, music, and broadcasts) and performances originating in other treaty countries. The UK is also party to trade agreements, such as the UK-EU Trade and Cooperation Agreement, that replicate and build on the obligations of the multilateral copyright treaties. These require the UK to extend certain copyrights to nationals of our trading partners.
- 2.2 Under UK law, works and performances originating in another country are granted full, limited or no copyright protection in the UK based generally on which multilateral treaties that country has joined and protection those countries provide to UK works and performances. The legislation in this area is out of date with some UK obligations in the multilateral copyright treaties and trade agreements. This instrument amends existing copyright legislation to extend protection to certain foreign works and performances to meet the UK's international obligations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is all of the United Kingdom.
- 4.2 The territorial application of this instrument is all of the United Kingdom.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 The UK is a member of several multilateral treaties on copyright. These treaties set minimum standards of copyright protection, which members must extend to works and performances originating in other member countries. These treaties include:
- The Berne Convention for the Protection of Literary and Artistic Works;
 - The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (“the Rome Convention”);
 - The WIPO (World Intellectual Property Organization) Copyright Treaty (WCT);
 - The WIPO Performances and Phonograms Treaty (WPPT); and
 - The WTO (World Trade Organization) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).
- 6.2 The UK is also party to several bilateral and plurilateral trade agreements. Many of these replicate and, in some cases, go further than the copyright obligations in the multilateral treaties. These trade agreements require us to provide certain levels of copyright protection specifically to works and performances from our trading partners.
- 6.3 In the UK, copyright protection for foreign works and performances is provided for by the Copyright, Designs and Patents Act 1988 (“the CDPA”) and the Copyright and Performances (Application to Other Countries) Order 2016 (“the 2016 Order”). Under the CDPA and the 2016 Order, foreign works and performances are given full, limited, or no protection, based generally on whether and how the country of origin of the work or performance has implemented the relevant treaty.
- 6.4 The CDPA and the 2016 Order are no longer fully consistent with the UK’s obligations to protect foreign works and performances. Several countries have recently joined the WPPT but are not included in the list of ‘WPPT countries’ contained in the 2016 Order. This means performances from those countries enjoy lesser protection in the UK than they should under the terms of the WPPT.
- 6.5 Additionally, the UK’s trade agreements with the EU, Ukraine, South Korea, and Singapore each require the UK to extend rights to works and/or performances from those countries or blocs in excess of those provided by the CDPA and 2016 Order.
- 6.6 In the case of the UK-EU Trade and Cooperation Agreement (TCA), however, UK law is nonetheless compliant. The UK has implemented the TCA via the European Union (Future Relationship) Act 2020 (“the FR Act”). Section 29 of the FR Act contains a general implementation clause, which modifies UK law where and to the extent necessary to implement the UK’s obligations in the TCA. This means that, to determine the copyright protection available to EU nationals, the CDPA and 2016 Order must be read alongside the FR Act and the UK-EU trade agreement.
- 6.7 The result is that UK copyright law is inconsistent with some UK international obligations, or consistent but unclear (in the case of the TCA).

7. Policy background

What is being done and why?

- 7.1 This instrument will amend the 2016 Order to address these issues and bring UK copyright law into line with the UK's international obligations. It will also make a clarifying change to the 2016 Order.
- 7.2 It will update the UK's implementation of the WPPT by adding countries that have recently joined the WPPT to the list of countries in Part 2 of the Schedule to the 2016 Order. This will result in new protections for performances from these countries. The impact of the change will be limited, however, because the 2016 Order already extends more limited protection to most of these countries by virtue of their membership of TRIPs.
- 7.3 This instrument will also implement copyright obligations in the UK's trade agreements with Ukraine, South Korea and Singapore. It will do so by extending copyright protection to wired broadcasts (e.g. cable broadcasts) originating in Ukraine or South Korea, and to sound recordings originating in Singapore.
- 7.4 Additionally, the instrument will clarify the UK's implementation of the copyright obligations of the UK-EU trade agreement. It will do so by explicitly according rights to EU works and performances that are currently extended only by virtue of the FR Act. These are rights in wired broadcasts originating in EU member states; and rights in sound recordings and performances originating in Malta (specific treatment is necessary for Malta because it is the only EU member state that is not party to the relevant multilateral copyright treaty, the Rome Convention). This will supersede section 29 of the FR Act insofar as it applies to copyright and rights in performances. Protection for works and performances originating in the EU will instead be determined only by the CDPA and the 2016 Order as amended by this instrument. This will clarify, but not alter, the protection for EU works and performances in the UK.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is not being made under the European Union (Withdrawal) Act but relates to the withdrawal of the UK from the EU because it re-implements elements of the UK's trade agreements with the EU.

9. Consolidation

- 9.1 No consolidated text of the 2016 Order as amended by this instrument is being prepared.

10. Consultation outcome

- 10.1 No consultation has been carried out for this instrument as the impact of its changes are minimal.

11. Guidance

- 11.1 The Intellectual Property Office will publish guidance on this legislation before it comes into force.

12. Impact

- 12.1 The impact of this instrument is expected to be significantly below the de minimis threshold of £5 million per year. The provisions that extend copyright protection to EU works and performances, in order to re-implement the UK-EU Trade and Cooperation Agreement, will clarify the law without changing its effect. The provisions that extend protection to other trading partners in accordance with our obligations in trade agreements are expected to have minimal practical impact. This is because the protection extended by this instrument is likely to only affect works of limited consumer interest and limited commercial value in the UK.
- 12.2 The provisions that extend performer's rights to certain WPPT countries could result in a small cost to UK users of recordings of those performances – e.g. online music platforms that operate in the UK – in having to pay licence fees to the holder of the rights in the performance. A survey of the most significant creative economies amongst the relevant countries indicates that the total additional costs are likely to be significantly less than £5m per year.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses. This is because the impact of the instrument, including on small businesses, is expected to be minimal.

14. Monitoring & review

- 14.1 The regulation does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Amanda Solloway MP has made the following statement: taking account the economic impact of this provision, a review would be disproportionate.

15. Contact

- 15.1 David Burns at the Intellectual Property Office, telephone: 01633 811445 or email: david.burns@ipo.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Chris Mills, Director of Copyright and Enforcement at the Intellectual Property Office, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Amanda Solloway MP at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.