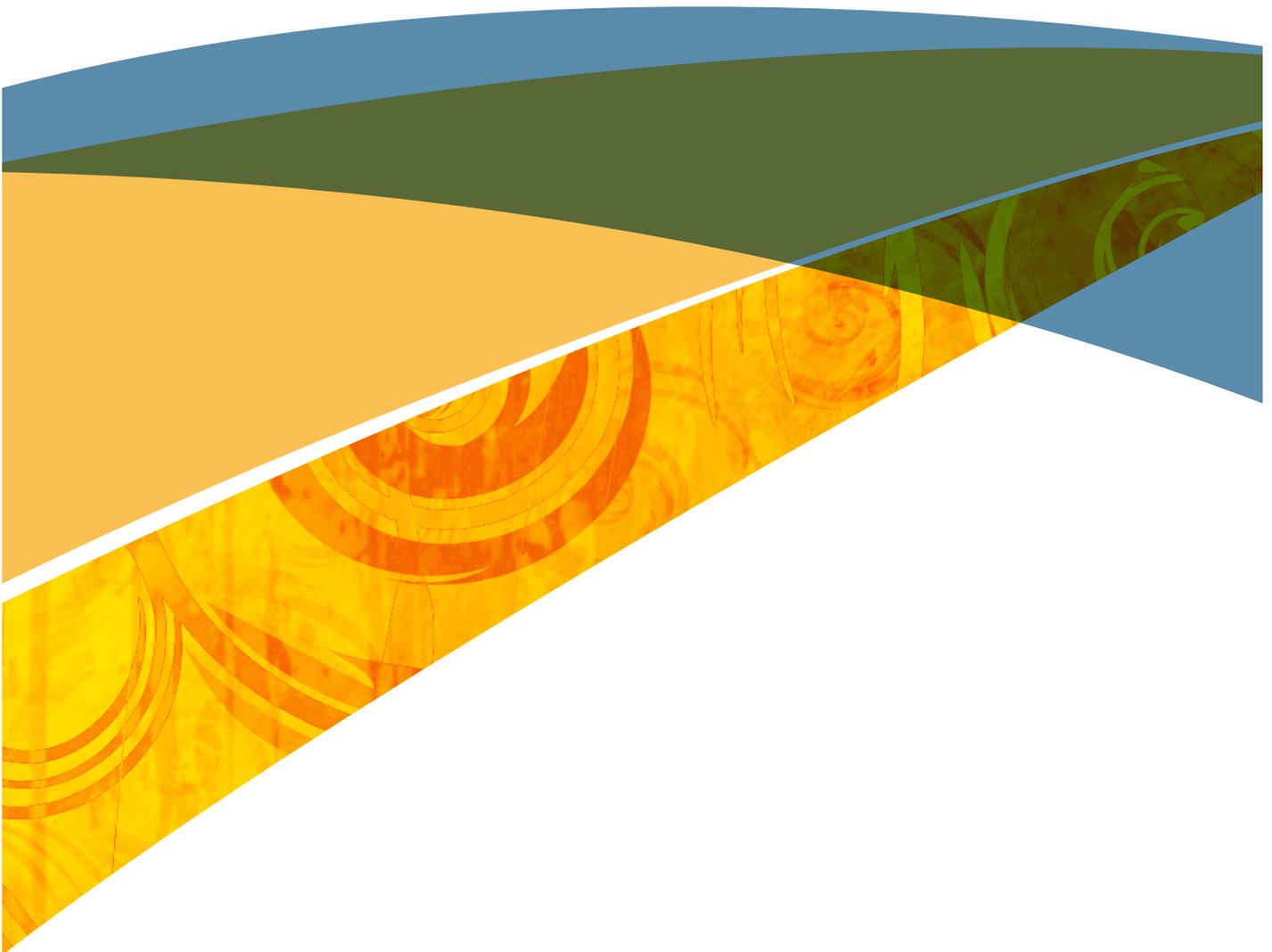




Intellectual
Property
Office

Changes to Schedule 1 of the Copyright, Designs and Patents Act 1988 and the Duration of Copyright and Rights in Performances Regulations 1995





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About this consultation

Scope of this consultation

Topic of this consultation: Changes to Schedule 1 of the Copyright, Designs and Patents Act 1988 (CDPA), amendment of Regulation 16 of the Duration of Copyright and Rights in Performances Regulations 1995 (1995 Regulations) and repeal of Regulations 24, 25, 34 and 35 of the 1995 Regulations.

Scope of this consultation: This technical consultation covers the proposed changes to Schedule 1 CDPA to ensure equal treatment of copyright works made prior to 1 June 1957; and the amendment and repeal of some of the 1995 Regulations to ensure compliance with Article 2 of Directive 2001/29/EC 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive)¹. Comments are invited on whether the proposed amendments and repeals achieve the intended changes.

Geographical scope United Kingdom.

Basic information

This consultation is aimed at:

- creators of works of artistic craftsmanship, such as designers;
- rights holders in those works, such as licensees;
- manufacturers, importers and retailers of replicas of those works;
- publishers;
- museums, archives and educational establishments;
- creators of photographs and films;
- performers in copyright works;
- rights holders in these works, such as licensees; and
- those who have used, or intend to use, compulsory licenses under the 1995 Regulations.

Any other interested individual, organisation or business is also welcome to respond to this consultation.

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>



Responsibility for the consultation

This consultation is being run by the Copyright and Enforcement Directorate in the Intellectual Property Office.

Duration This consultation runs from 21 July 2016 to 4pm 15 September 2016.

Enquiries (including requests for the paper in an alternative format)

For further information about this consultation please email
copyrightconsultation@ipo.gov.uk

How to respond: Consultation responses should be submitted by email to
copyrightconsultation@ipo.gov.uk

Or by post to:

Emily Jones
Copyright and Enforcement Directorate
Intellectual Property Office
Room 1Y05 Concept House
Cardiff Road
Newport
NP10 8QQ

After the consultation: A summary of the responses to the consultation, along with the responses, will be published on the Department's website.



Overview

1. The scope of this consultation is limited to technical considerations around the amendment of Schedule 1 CDPA and regulation 16 of the 1995 Regulations, and the repeal of regulations 24, 34, 25 and 35.
2. The proposed amendments originally arose from the consultations related to the repeal of section 52 CDPA. Section 52 currently limits the term of copyright protection for industrially exploited artistic works (which includes any artistic work of which more than 50 copies are made²) to 25 years. However, this section is being repealed so that these works are entitled to copyright protection of life of author plus 70 years. The repeal will come into force on 28 July 2016.
3. In a consultation carried out in 2015³, the Government asked questions about the amendment of Schedule 1 of the CDPA. Additionally, the consultation raised the issue of, and invited submissions about, the repeal of Regulation 24 of the 1995 Regulations, which establishes a regime for the compulsory licensing of works in which revived copyright subsists.
4. As outlined in the Government Response⁴ to that consultation, the Government has decided to amend Paragraphs 5 and 6 of Schedule 1 CDPA and regulation 16 of the 1995 Regulations to ensure UK law is compliant with EU law.
5. The repeal of regulations 24, 25, 34 and 35 concerns any works that are, or could be, the subject of a compulsory licence. In the Government's view, the provisions are at odds with Article 2 of the InfoSoc Directive in deeming that certain acts in respect of a copyright-protected work are to be "treated as licensed". Article 2 provides that the right of reproduction is an exclusive one. This means that authors and rights holders have the exclusive right to reproduce their works, and performers have the exclusive right to control the reproduction of fixations of their performances. That being so, in the Government's view the regime in regulations 24 and 34, which precludes rights holders from controlling the use of their works in certain circumstances, is not in compliance with Article 2. The Government has therefore decided to repeal these regulations, to ensure that UK law complies with EU law.

2 Copyright (Industrial Process and Excluded Articles) (No 2) Order 1989

3 The consultation can be accessed here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483203/Section_52_consultation.pdf

4 The Government response can be accessed here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515305/Gov-response_s52.pdf

Provision of copyright protection for works made before 1 June 1957

6. In order to ensure consistency with the repeal of section 52, the Government intends to **amend** the following provisions:

Schedule 1 CDPA, paragraphs 5 and 6(1)

Regulation 16 of the 1995 Regulations

Proposed amendments to Schedule 1

7. In the 2015 consultation relating to the transitional provisions for the repeal of section 52, the Government identified a need to amend paragraph 6 of Schedule 1. This is to ensure there is compliance with EU law.
8. The First Term Directive and the Second Term Directive⁵ 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. This applies to all works which were protected by copyright in at least one member state on 1 July 1995. Therefore, if a design was protected by copyright in at least one member state before that date, the UK must recognise the copyright in that work even if the copyright had expired in the UK, or had never subsisted.
9. Paragraph 6⁶ of Schedule 1 of the CDPA currently prevents artistic works having copyright protection if they were made prior to 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 times⁷. Amendment of this paragraph is needed to ensure works defined by this paragraph have the same level of copyright protection as other works.
10. The government proposes to introduce sub paragraph 6(1A) that would exclude from paragraph 6(1) works that were protected by copyright in another EEA state in 1995. Amendment of this paragraph is considered necessary to be more explicit about the copyright protection of works which were protected in another EEA state on 1 July 1995. The decision in *C-240/07 Sony Music Entertainment (Germany) GmbH v Falcon Neue Medien Vertrieb GmbH* [2009] ECDR 1210 makes clear that the Second Term Directive requires such works to be protected for the full term of copyright even if they did not attract protection under UK law at the time they were created. The intention of this amendment is to afford copyright protection to pre-1957 works. It is not the Government's intention to confer copyright protection on items that previously never had copyright protection anywhere, as the items would still need to qualify for copyright protection within the terms set out in the CDPA.

5 The First Term Directive can be accessed here: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0116> and the Second Term Directive can be accessed here: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32003L0109>

6 Paragraph 6 states: Copyright shall not subsist by virtue of this Act in an artistic work made before 1st June 1957 which at the time when the work was made constituted a design capable of registration under the Registered Designs Act 1949 or under the enactments repealed by that Act, and was used, or intended to be used, as a model or pattern to be multiplied by an industrial process.

7 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.



11. The proposed amendment is as follows:

In paragraph 6 of Schedule 1 after sub-paragraph (1) insert—

- (a) “(1A) Sub-paragraph (1) does not apply to an artistic work which was on 1st July 1995 protected under the law of another EEA state relating to copyright or related rights.”

12. Additionally, some responses to the 2015 consultation on the transitional provisions for the repeal of section 52 highlighted that an amendment to paragraph 5 of the schedule was also required. The Government agreed with this observation in its response to the consultation. Currently paragraph 5(1) states that copyright subsists in an existing work after commencement of the CDPA in 1989 only if copyright subsisted in it immediately before commencement.

13. In its current form this paragraph is not compatible with the proposed changes to paragraph 6. As copyright would not have subsisted in pre-1957 works immediately before the commencement date, an amendment is required to address this.

14. The Government proposes introducing an additional sub-paragraph into paragraph 5(1) to include works that qualify for copyright protection as a result of the amendments to paragraph 6:

In paragraph 5 of Schedule 1—

- (a) in sub-paragraph (2)(a) omit “or”;
- (b) at the end of sub-paragraph (2)(b) for the full-stop substitute “, or”;
- (c) after sub-paragraph (2)(b) insert—
“(c) where the work is an artistic work in which copyright subsists as a result of the disapplication of paragraph 6(1) by paragraph 6(1A)”.

15. The effect of that amendment is to remove a bar to affected works qualifying for copyright protection under the terms of the CDPA. Such works must still meet the other requirements of the CDPA in order to qualify for that protection. This should address any concern about the amendments potentially conferring copyright protection on types of work which are not otherwise protected under UK law.

Proposed amendment to Regulation 16

16. Regulation 16 of the 1995 Regulations⁸ sets out the application of the provisions relating to duration of copyright in works. The regulation requires amendment to make it clear that the full duration of copyright protection also applies to pre-1957 artistic works that are entitled to such protection because they were protected by copyright in at least one EEA state on 1 July 1995. To do this, the Government proposes adding a paragraph to Regulation 16 to include works that fall under proposed paragraph 6(1)(A) of the CDPA. This paragraph relates to pre-1957 works that were, on 1st July 1995, protected under the law of another EEA state relating to copyright or related rights:

(e) to existing works which qualify for copyright protection as a result of the disapplication of paragraph 6(1) of Schedule 1 to the 1988 Act by subparagraph (1A) of paragraph 6 of Schedule 1 to the 1988 Act.

17. The effect of this change should ensure that an artistic work that is also capable of being a design is entitled to copyright protection, even if the work was made before 1 June 1957, as a result of the amendments to Schedule 1 CDPA. It is not the Government's intention to confer copyright protection to works which are not entitled to such protection under UK law. That is the reason for framing the new subparagraph by reference to Schedule 1 to the 1988 Act rather than directly by reference to whether the work qualified for copyright protection in another EEA state on 1 July 1995.

- Do the proposed amendments to Schedule 1 and Regulation 16 equalise copyright protection for works created before and after 1 June 1957?
- Do the amendments confer copyright protection to any matter not currently eligible for copyright protection in the UK?

⁸ Current text:

16. The new provisions relating to duration of copyright apply—

- (a) to copyright works made after commencement;
- (b) to existing works which first qualify for copyright protection after commencement;
- (c) to existing copyright works, subject to Regulation 15 (general saving for any longer period applicable under 1988 provisions); and
- (d) to existing works in which copyright expired before 31st December 1995 but which were on 1st July 1995 protected in another EEA state under legislation relating to copyright or related rights.



Compulsory licensing

18. The Government previously consulted on the repeal of regulation 24 of the 1995 Regulations, as part of its consultation on the repeal of section 52 CDPA. These regulations relate to the compulsory licensing of works where copyright has been revived. The Government signalled its intention to repeal this regulation in its previous consultation, but acknowledged that a repeal of Regulation 24 will have wider application than just those works affected by the repeal of section 52. The regulations that the Government intends to **repeal** are:
 - Regulation 24
 - Regulation 25
 - Regulation 34
 - Regulation 35
19. In the UK, under the Duration of Copyright Terms Regulations, the length of term of copyright protection was extended from 50 to 70 years after the death of the author. Within those regulations, Regulation 24 stipulates that any works whose copyright was “revived” as a result of this increase in term 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. Similar provisions are laid out in Regulation 34 regarding performances.
20. In the Government’s view, the provisions under which works can be deemed to be licensed without the rights holder’s consent are at odds with Article 2 of the InfoSoc Directive. Article 2 provides that the right of reproduction is an exclusive one. Authors and copyright holders have the exclusive right to reproduce their works, and performers have the exclusive right to control the reproduction of fixations of their performances. A statutory regime under which those rights holders are prevented from objecting to any use of their works, regardless of the circumstances, is incompatible with Article 2. The Government has therefore decided to repeal these regulations, to ensure that UK law complies with EU law.
21. 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 repealed, these regulations will also be repealed.

Transitional provisions for the repeal of Regulations 24 and 34

22. The Government recognises that there may be situations where a royalty may have already been paid for an act that will not be done until after the repeals come into force. For example, a royalty may have already been paid to allow a film to be shown at a film festival, but the film festival itself may not take place until after the repeal of the Regulations. To address this, it is proposed that transitional provisions are provided so that, for acts which will occur after the regulations come into force but where a royalty or remuneration was paid before they come into force, the person will still be permitted to do those acts. The proposed provisions are as follows:

For regulation 24:

Despite the revocation of regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995 by these Regulations that regulation continues to apply to acts done by a person after [the date these regulations come into force] which are treated as licensed by the copyright owner under regulation 24(1) where—

- a) a royalty or remuneration is paid under regulation 24(1) before [the date on which these Regulations come into force]; and
- b) that royalty or remuneration relates to a period during which that person intends to do the act which is after [the date on which these Regulations come into force].

For regulation 34:

Despite the revocation of regulation 34 of the Duration of Copyright and Rights in Performances Regulations 1995 by these Regulations that regulation continues to apply to acts done by a person after [the date these regulations come into force] which are treated as licensed by the copyright owner under regulation 34(1) where—

- (d) a royalty or remuneration is paid under regulation 34(1); and
- (e) that royalty or remuneration relates to a period during which that person intends to do the act which is after the date on which these Regulations come into force.

23. The Government believes that these transitional provisions are proportionate to the aim to be achieved, namely compliance with Article 2 of the InfoSoc Directive. The current Regulations maintain compulsory licensing only for acts where royalties or remuneration have already been paid. Rights holders will have protection for any new acts of copying where remuneration or royalties have not been paid as soon as the transitional regulations come into force.

- Do these amendments achieve our aim of complying with Article 2 of the InfoSoc Directive?
- Are there any other regulations we need to repeal or amend in light of these issues?

How to tell us your views

We welcome your views on these proposals. You may choose which questions to answer in the consultation. Please send your comments by 4pm 15 September 2016 to copyrightconsultation@ipo.gov.uk or you can post responses to: Copyright & Enforcement Directorate, Intellectual Property Office, Cardiff Road, Newport NP10 8QQ

Confidentiality and data protection

Information provided in response to this consultation including personal information may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles:

www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf

Comments or complaints on the conduct of this consultation. If you wish to comment or make a complaint about the conduct of this consultation, please email angela.rabess@bis.gsi.gov.uk, or write to:

Angela Rabess
Better Regulation Unit
Department for Business, Energy and Industrial Strategy
1 Victoria Street
London
SW1H 0ET

If you wish to comment on the specific policy proposals you should contact the Intellectual Property Office via email to copyrightconsultation@ipo.gov.uk

Annex - Draft Copyright (Amendment) Regulations 2016

DRAFT STATUTORY INSTRUMENTS

2016 No.

COPYRIGHT

The Draft Copyright (Amendment) Regulations 2016

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

The Secretary of State is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972^(a) in relation to matters relating to copyright^(b).

The Secretary of State, in exercise of the powers conferred by section 2(2) of that Act, makes the following Regulations:

Citation and commencement

These regulations may be cited as the Copyright (Amendment) Regulations 2016 and come into force on [date]/[the day/[]days after the day on which they are made].

Amendments to the Copyright, Designs and Patents Act 1988

—(1) The Copyright, Designs and Patents Act 1988^(c) is amended as follows.

In paragraph 5 of Schedule 1—

in sub-paragraph (2)(a) omit “or”;

at the end of sub-paragraph (2)(b) for the full-stop substitute “, or”;

after sub-paragraph (2)(b) insert— k

“(c) where the work is an artistic work in which copyright subsists as a result of the disapplication of paragraph 6(1) by paragraph 6(1A)”.

In paragraph 6 of Schedule 1 after sub-paragraph (1) insert—

(a) 1972 c.68; by virtue of the amendment of section 1(2) of that Act by section 1 of the European Economic Area Act 1993 (c.51) regulations may be made under section 2(2) to implement obligations of the United Kingdom arising under the EEA Agreement.

(b) S.I. 1992/707 and S.I. 1993/595

(c) 1988 c.48

“(1A) Sub-paragraph (1) does not apply to an artistic work which was on 1st July 1995 protected under the law of another EEA state relating to copyright or related rights.”.

Amendments to the Duration of Copyright and Rights in Performances Regulations 1995

—(2) The Duration of Copyright and Rights in Performances Regulations 1995^(a) is amended as follows.
In regulation 16 (Duration of copyright: application of new provisions)—

at the end of paragraph (c) omit “and”

at the end of paragraph (d) for the full-stop substitute “; and”

after paragraph (d) insert—

“(e) to existing works which qualify for copyright protection as a result of the disapplication of paragraph 6(1) of Schedule 1 to the 1988 Act by sub-paragraph (1A) of paragraph 6 of Schedule 1 to the 1988 Act.”.

Regulation 24 (Revived copyright: use as of right subject to reasonable royalty) is revoked.

Regulation 25 (Revived copyright: application to Copyright Tribunal) is revoked.

Regulation 34 (Revived performance rights: use as of right subject to reasonable remuneration) is revoked.

Regulation 35 (Revived performance rights: application to Copyright Tribunal) is revoked.

Transitional provisions

Despite the revocation of regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995 by these Regulations that regulation continues to apply to acts done by a person after [the date these regulations come into force] which are treated as licensed by the copyright owner under regulation 24(1) where—

a royalty or remuneration is paid under regulation 24(1) before [the date on which these Regulations come into force]; and

that royalty or remuneration relates to a period during which that person intends to do the act which is after [the date on which these Regulations come into force].

Despite the revocation of regulation 34 of the Duration of Copyright and Rights in Performances Regulations 1995 by these Regulations that regulation continues to apply to acts done by a person after [the date these regulations come into force] which are treated as licensed by the copyright owner under regulation 34(1) where—

a royalty or remuneration is paid under regulation 34(1); and

that royalty or remuneration relates to a period during which that person intends to do the act which is after [the date on which these Regulations come into force].

(a) S.I. 1995/3297; there are amendments not relevant for the purposes of these Regulations.

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