EXPLANATORY MEMORANDUM TO

THE COPYRIGHT (FREE PUBLIC SHOWING OR PLAYING) (AMENDMENT) REGULATIONS 2016

2016 No. 565

1. Introduction

1.1 This explanatory memorandum has been prepared by the Intellectual Property Office, an Executive Agency of the Department for Business, Innovation and Skills, and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Instrument amends the Copyright, Designs and Patents Act 1988 (the "Copyright Act") to remove Section 72 (1)(c) (free public showing or playing of a film included in a broadcast). The amendments are being made following a series of decisions in a case brought by the Football Association Premier League Limited[1] (FAPL), which found that UK law is incompatible with the requirements of the Directive of the European Parliament and of the Council (2001/29/EC) of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the InfoSoc Directive).

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 The relevant law on copyright is contained in the Copyright Act. It provides copyright owners with a range of rights allowing them to control the use of their works and to seek payment for their use – for instance through grant of a licence in exchange for a fee or royalty. Among these rights are rights to control the showing, playing and other communication of works to the public. This includes the showing of a film or broadcast to a public audience.

4.2 The Copyright Act includes certain exceptions to copyright, which permit third parties to carry out certain acts without infringing copyright in a work. Section 72(1) allows organisations which do not charge for admission to show broadcasts without needing permission from some (but not all) of the owners of copyright in those broadcasts. In particular, it means such organisations do not need permission from owners of 'film' copyright. A 'film', as defined in Section 5B of the Copyright Act is a recording from which a moving image may be produced. This definition includes all audiovisual

[1] Case C-403/08, (2012) EWHC 108, (2012) EWCA Civ 1709

recordings, not only films made to be shown in cinemas. Schedule 2 of the Copyright Act contains an equivalent exception in relation to performers' rights.

4.3 If an organisation wishes to show broadcasts that contain other copyright elements, for example any original literary, artistic, musical or dramatic works, as well as most commercially produced sound recordings it will still require the permission of the relevant copyright owners of those works.

4.4 An exception of this type was first introduced by the Copyright Act 1956. It was intended to enable those who show or play television or radio in publicly accessible places to which entry is free to do so, without the need to seek multiple licences for all the rights in the broadcast, thus reducing the licensing burden on these premises.

4.5 Section 72 maintained a similar exception to that provided by the Copyright Act 1956, which was justified by the then Government on similar policy grounds, namely a desire to relieve businesses from an excessive licensing burden.

4.6 Section 72 has been amended on previous occasions to ensure consistency with EU law. The effect of these changes has been to remove commercial sound recordings from the scope of the exception. This means that shops, hairdressers and other premises are required to hold licences from PPL (the body which represents owners of sound recording and performance copyrights) in addition to licences from PRS (the body which represents owners of music copyright) in order to play music tracks or songs featured on the radio or television.

4.7 As a result of these changes, Section 72 is narrower than originally enacted and does not apply to most works contained in television broadcasts, but continues to apply to films.

4.8 EU law recognises two different types of copyright in film:

- the original creative aspects of a film (a 'cinematographic' work). These rights are first owned by the creator of the work (for example, the director).
- the recording of the film (a 'fixation'). These rights are first owned by the producer or the broadcaster who makes the investment to enable the film to be made.

4.9 The relevant EU law relating to acts restricted by copyright and copyright exceptions is set out in the Infosoc Directive and the Directive of the European Parliament and of the Council (2006/115/EC) of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (the Rental and Lending Directive).

4.10 The InfoSoc Directive provides for the rights of authors of works (which includes cinematographic works) to authorise or prohibit the communication to the public, including the making available to the public of those works by wire or wireless means (Article 3(1)), and a more limited right for producers in respect of the first fixations of films and for broadcasters in respect of fixations of their broadcasts to authorise or prohibit the making available to the public of their films and broadcasts respectively (Article 3(2)). Section 20 of the Copyright Act broadly mirrors the types of works required to be protected by Articles 3(1) and (2) of the InfoSoc Directive. Member States are permitted to create exceptions to the harmonised rights relating to copyright (Article 5). The list of permitted exceptions is exhaustive. Any exception must also comply with the "three-step test" set out in Article 5(5). This test requires that exceptions shall only be applied in certain special cases which do not conflict with a

normal exploitation of the copyright work and do not unreasonably prejudice the legitimate interests of copyright owners.

4.11 The Rental and Lending Directive provides for broadcasting organisations to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee (Article 8(3)).

4.12 The need to amend Section 72 of the Copyright Act stems from a series of decisions in a case brought by FAPL, which found that UK law is incompatible with the requirements of the Directive of the European Parliament and of the Council (2001/29/EC) of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the InfoSoc Directive).

5. Extent and Territorial Application

5.1 These Regulations extend to all of the United Kingdom.

5.2 These Regulations apply to all of the United Kingdom.

6. European Convention on Human Rights

6.1 Baroness Neville-Rolfe DBE CMG, Minister for Intellectual Property, has made the following statement regarding Human Rights:

In my view the provisions of The Copyright (Free Public Showing or Playing) (Amendment) Regulations 2016 are compatible with the Convention rights.

7. Policy background

What is being done and why

7.1 These regulations are the culmination of over three years of discussion and consultation with all interested parties. They follow a legal action brought by FAPL which highlighted a question as to the scope of Section 72. FAPL's case was against pubs which were using unauthorised satellite decoder systems to show live Premier League football matches, and firms supplying these satellite decoder systems. The action gave rise to a series of judgments, including a reference to the Court of Justice of the European Union (CJEU).

7.2 The result was a Court of Appeal ruling which concluded that Section 72 does not clearly distinguish between the two types of film copyright set out at EU level. The first is known as "cinematographic" copyright, and applies to the original creative content of a film. It is first owned by the creator of an audiovisual work – for example, the director of a cinematic film. The second type of copyright is known as the "fixation" right, and applies to audiovisual recordings. It applies irrespective of whether the content of the recording is creative, so applies equally to recordings of news and sport, as well as drama. The first owner of the fixation right is the film's producer. This distinction is important, as EU law does not permit an exception of the type provided by Section 72 in relation to cinematographic works, whereas film fixations are not subject to the same restrictions. Therefore, the Court of Appeal questioned the compatibility of Section 72(1) with EU law.

7.3 The Government consulted on a preferred option for amending Section 72 in July 2015. Responses to this consultation revealed several complexities with the proposed option (in particular that it was effectively impossible to distinguish between the two

types of film copyright in practice). Therefore, based on the feedback to the consultation, the Government set out a different preferred option of removing film completely from the Section 72 exception.

7.4 As a result of the Regulations, Section 72 will only provide a defence against infringement (in the showing or playing of a broadcast) of the rights in a broadcast *per se*, and will not extend to any film rights in the broadcast. The situation in respect of any other underlying rights remains unchanged. This change provides greater clarity to the law, creates a level playing field for legitimate users of copyright works, and provides a clearer basis for right holders to bring enforcement action.

Consolidation

7.5 The Intellectual Property Office makes an informal consolidated copy of the Copyright Act freely available to the public online. Following the entry into force of the Regulations, they will be incorporated into the consolidated copy. Link: http://www.ipo.gov.uk/cdpa1988-unofficial.pdf.

8. Consultation outcome

8.1 The Government first publicly consulted on amendment of Section 72 in 2015. The consultation ran for 12 weeks (from 16 July 2015 to 08 October 2015). Nineteen responses were received, from: the legal profession; rightsholders; bodies representing users of copyright, and others. This consultation revealed problems with the Government's intended approach, and consequently the Government consulted further on a policy of removing 'film' from Section 72, as well as a technical review of draft Regulations which proposed the addition of the words 'communication to the public'. This was intended by way of clarification that the exception applied in respect of a broadcast, where that broadcast is communicated to the public for free, in line with the Courts' interpretation in the FAPL litigation. . In view of the 12 week consultation that had already been conducted on the topic, the further consultation and technical review ran for 4 weeks (from 23 March 2016 – 20 April 2016). Links to the consultation documents are provided at the bottom of this section.

8.2 The Government received 10 responses to the further consultation and technical review. All consultation responses supported the Government's policy of removing 'film' from Section 72. In line with the Government's policy objectives, consultation responses noted that removal of film would: bring greater clarity to the law; avoid the need for complex changes to the rest of the Copyright Act; enable right holders to bring enforcement action more easily, and lead to a more level playing field for those pubs and other organisation that take out legitimate television subscriptions.

8.3 Some consultation responses raised concerns with inclusion of the term "communication to the public" in the draft Regulations. The Government had included this wording to clarify, in line with the Courts' interpretation in the FAPL litigation that Section 72 applies in respect of a broadcast where that broadcast is communicated to the public for free. However, some respondents thought that there could be unintended consequences in doing this. In particular, communication to the public, as defined by Section 20 of the Copyright Act, comprises 'broadcasting', covering a broadcast by wireless means or by cable(Section 20(2)(a)), and a 'making available' right, covering interactive on-demand communication e.g. over the internet(Section 20(2)(b)). Were the term to be included in Section 72 without further

elaboration, these respondents thought it would be unclear whether or not the exception applies only to Section 20(2)(a), or also to Section 20(2)(b).

8.4 In view of these concerns, the Government has chosen to remove reference to 'communication to the public' in the amended draft Regulations. The Courts have interpreted "communication to the public of the work" in Section 20 as including the "showing or playing in public of a broadcast" within Section 72(1). The inclusion of the words "communication to the public" in Section 72(1) was not intended to have any substantive effect in relation to the interpretation given by the Courts and was only included by way of clarification. The Government is, however, persuaded that the clarification is not required in order to give effect to the interpretation of the Courts in the FAPL litigation.

8.5 Link to 2015 consultation: https://www.gov.uk/government/consultations/section-72-copyright-designs-and-patents-act-1988-cdpa

8.6 Link to 2016 consultation and technical review: https://www.gov.uk/government/consultations/technical-review-section-72-copyright-designs-and-patents-act-1988-cdpa

9. Guidance

9.1 The Intellectual Property Office intends to publish guidance to help businesses showing or playing television broadcasts in public to understand what is and isn't permitted.

10. Impact

10.1 The impact on business, charities or voluntary bodies has not been possible to monetise.

10.2 The impact on the public sector has not been possible to monetise.

10.3 A Final Stage Impact Assessment, evaluated as 'fit for purpose', is submitted with this memorandum and will be 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.

11.2 The extensive process of public consultation that supported the development of this Instrument included the views of small business representatives. However, it did not prove possible to monetise the impacts on businesses small or otherwise.

12. Monitoring & review

12.1 Baroness Neville-Rolfe, Parliamentary Under-Secretary of State and Minister for 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:

12.2 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 Michael Prior at the Intellectual Property Office Telephone: 01633 814431 or email: Michael.Prior@ipo.gov.uk can answer any queries regarding the instrument.