EXPLANATORY MEMORANDUM TO

THE DESIGN RIGHT, ARTIST'S RESALE RIGHT AND COPYRIGHT (AMENDMENT) REGULATIONS 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Intellectual Property Office (IPO), an Executive Agency of the Department for Science, Innovation and Technology and is laid before Parliament by Command of His Majesty.

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

2. Purpose of the instrument

2.1 This instrument amends four separate pieces of legislation relating to intellectual property ("IP"), using powers contained in the Retained EU Law (Revocation and Reform) Act 2023 ("the 2023 Act"). The main purpose of the instrument is to make several technical changes that better align the UK's IP framework with the aims of the 2023 Act by tailoring the legislation being amended to a UK context.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument is made using powers contained in section 14(1), (2), (3) and (7) (revoke or replace powers) and section 20(1)(b) (power to make transitional provision) of the 2023 Act. The use of the section 14(3) power to revoke secondary retained EU law and make appropriate alternative provision automatically triggers the affirmative procedure (see paragraph 5(1) and (2) of Schedule 5 to the 2023 Act).

3.2 This instrument makes minor amendments to the Copyright Tribunal Rules 2010 (S.I. 2010/791) ("the Rules") in relation to an address for service. The Rules were made under provisions in the Copyright, Designs and Patents Act 1988 ("the 1988 Act") (including section 150) by the Lord Chancellor and after consultation with the Secretary of State. It has been agreed between IPO, DSIT and the Ministry of Justice that the amendments to the Rules regarding address for service can be made in this instrument (alongside various other amendments being made in relation to IP) by the Secretary of State using powers in the 2023 Act (rather than by the Lord Chancellor using powers in the 1988 Act). Section 150 only requires the negative procedure, and this instrument is subject to the affirmative procedure, so using the general powers in the 2023 Act will not circumvent a requirement for a more onerous parliamentary procedure.

3.3 This instrument also amends the Design Right (Semiconductor Topographies) Regulations 1989 (S.I. 1989/1100) to remove the need to periodically update the exhaustive list of countries set out in the Schedule to that instrument. Section 2(2) of the European Communities Act 1972 was previously used to update the Schedule when new countries joined the World Trade Organisation ("WTO"). Although section 256 of the 1988 Act could perhaps be used to add countries to the Schedule, the policy

aim is to remove the need to legislate to update the list each time a new country joins the WTO. It is for this reason that powers in the 2023 Act have been used.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State (Minister for AI and Intellectual Property), Viscount Camrose, has made the following statement regarding Human Rights:

"In my view the provisions of the Design Right, Artist's Resale Right and Copyright (Amendment) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument amends provisions in four pieces of legislation related to IP. The provisions that are amended are secondary retained EU law within the meaning of section 11(2) of the 2023 Act.

6.2 This instrument is made using powers contained in section 14(1), (2), (3) and (7) and 20(1)(b) of the 2023 Act.

6.3 Section 14(1) states that a relevant national authority may by regulations revoke any secondary retained EU law without replacing it. This instrument (regulation 3(2)) revokes part of a provision that it is no longer considered appropriate to retain.

6.4 Section 14(2) states that a relevant national authority may revoke any secondary retained EU law and replace it with such provision as the authority considers to be appropriate and to achieve the same or similar objectives. This instrument makes such replacement provision, primarily in order to tailor the existing provisions to a UK context (while largely maintaining the existing policy approach).

6.5 Section 14(3) states that a relevant national authority may revoke any secondary retained EU law and make such alternative provision as the authority considers appropriate. This instrument makes such alternative provision, to align better with UK law.

6.6 Section 14(7) enables regulations made under section 14 to modify (including amend) any secondary retained EU law. This instrument amends provisions that are secondary retained EU law.

6.7 Section 20(1)(b) enables regulations made under section 14 to include transitional provision. This instrument contains a transitional provision (regulation 4).

6.8 The four pieces of legislation that are amended are set out below:

- **The Design Right (Semiconductor Topographies) Regulations 1989 (S.I. 1989/1100)** implement Council Directive 87/54/EEC on the legal protection of topographies of semiconductor products and Council Decisions 87/532/EEC and 88/311/EEC on the extension of that protection in respect of persons from certain countries and territories. The current legislation modifies the

application of Part 3 of the 1988 Act to a design which is a semiconductor topography. The amendment made by this instrument amends section 217(3) of the 1988 Act to include within the definition of "qualifying country" any country that is a member of the WTO. This will mean that there will no longer be any need to update a list of countries each time a new country joins the WTO.

- **The Artist's Resale Right Regulations 2006 (S.I. 2006/346)** implement Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art and provide the basis for a "resale right" in the UK. In the current legislation, the sale price is required to be calculated in Euros and the thresholds for the calculation of resale royalty are in Euros. The amendments made by this instrument remove the requirement to calculate the sale price in Euros and replace all the references in the thresholds to "euros" with "GBP" to reflect the UK's currency. This approach was selected as the most straightforward to determine artist's resale right eligibility and calculate royalty payments rather than other potential options such as fixing thresholds at current exchange rates. A transitional provision has been included to allow industry time to prepare and adapt to the changes.
- **The Copyright Tribunal Rules 2010 (S.I. 2010/791)** set out the rules of procedure for the Copyright Tribunal, an independent tribunal established under the 1988 Act. It adjudicates on various commercial copyright licensing disputes, particularly concerning the terms of licensing schemes for copyright material. The amendments made by this instrument require an address for service (in a response to proceedings or a request for permission to intervene in proceedings) to be located in the UK rather than in the European Economic Area (EEA), as this is appropriate for this tribunal.
- **The Collective Management of Copyright (EU Directive) Regulations 2016 (S.I. 2016/221)** implemented Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. The current legislation sets minimum standards for the governance, transparency, and behaviour of collective management organisations ("CMOs") established in the UK, as well as certain requirements for independent management entities ("IMEs"), right holders and users. CMOs operate as companies, and so are also subject to domestic company law.

The amendments made by this instrument will exempt CMOs that qualify as "small" companies under section 382(1) to (6) of the Companies Act 2006 from the requirement, established by the EU Directive, for accounting information provided in their annual transparency report to be audited. This will make the regime more proportionate and aligns with the general approach to audit exemption in section 477 of the Companies Act 2006. The amendments also redefine other exemptions which apply when a CMO falls within the EU concept of a "micro enterprise" so that they apply instead to CMOs that qualify as a micro-entity under section 384A of the Companies Act 2006. This includes the removal of references to Euros. This again ensures greater alignment with the domestic company law regime.

7. Policy background

What is being done and why?

7.1 The provisions in the four pieces of IP legislation that are being amended by this instrument are secondary retained EU law. Retained EU law was established as a new category of domestic law by the European Union (Withdrawal) Act 2018 ("the 2018 Act") to ensure legal certainty and continuity immediately after EU Exit, by preserving EU and EU-derived law as it stood immediately before the UK's departure.

7.2 However, the retained EU law framework established by the 2018 Act was not intended to be maintained indefinitely. The 2023 Act enables the restatement, revocation and replacement (including amendment) of provisions that are secondary retained EU law. This instrument uses powers available under the 2023 Act to reform secondary retained EU law in four separate areas relating to IP.

Explanations

What did any law do before the changes to be made by this instrument?

7.3 The four pieces of IP legislation were preserved following the 2018 Act.

Why is it being changed?

7.4 The substance of the four existing pieces of legislation is being maintained but changes are being made largely to tailor the legislation to a UK context. The changes to the Design Right (Semiconductor Topographies) Regulations 1989 are intended to avert the need for further legislation each time a new country joins the WTO.

What will it now do?

7.5 The amendments to the Design Right (Semiconductor Topographies) Regulations 1989 remove the need to periodically update the Schedule to that instrument to add any new WTO members.

7.6 The amendments to the Artist's Resale Right Regulations 2006 ensure the relevant calculations will be made in GBP rather than in Euros, to reflect the currency of the UK.

7.7 The amendments to the Copyright Tribunal Rules 2010 require a respondent or intervener in a Copyright Tribunal case to provide an address for service in the UK, rather than one in the EEA.

7.8 The reform to the audit requirement in the Collective Management of Copyright (EU Directive) Regulations 2016 to create an exemption for CMOs that are companies that qualify as "small" implements a suggested change from the post implementation review[1] of that S.I. to ensure that auditing of annual transparency reporting is applied proportionately by alignment with certain UK company law thresholds in terms of when accounting information is subject to audit. The replacement of the EU description in that S.I. of micro enterprises (containing a reference to Euros) ensures that the applicable exemptions apply to CMOs that are companies that qualify as a micro-entity under section 384A of the Companies Act 2006. The approach of using

[1] The Post Implementation Review of the Collective Management of Copyright (EU Directive) Regulations 2016 can be found at: https://www.legislation.gov.uk/uksi/2016/221/pdfs/uksiod_20160221_en.pdf

definitions from the Companies Act is to ensure that S.I. 2016/221 remains in step with the domestic regime for small and micro companies.

7.9 The replacement provisions made by the Design Right, Artist's Resale Right and Copyright (Amendment) Regulations 2023 either make appropriate provision to achieve the same or similar objectives as the replaced provisions or make appropriate alternative provision to the replaced provisions.

7.10 The regulatory burden test set out in section 14(5) of the 2023 Act has been applied separately in relation to each of the four subject areas covered by this instrument. In relation to each of those subject areas, the overall effect of the changes made under section 14 of the 2023 Act does not increase the regulatory burden:

- Amendment to the Artist's Resale Right Regulations 2006 will reduce regulatory burden, as removing dependence of artists' royalties on fluctuating exchange rates will make these easier to calculate, reducing administrative costs and inconvenience to art market professionals. As some lower-value artworks will fall below the minimum threshold for the Artist's Resale Right ("ARR") when it is restated in pounds, there will be fewer transactions overall, reducing costs for art market professionals. There will be initial familiarisation costs associated with changing the currency for calculating royalties, however as the figures for calculation of ARR will not change (kept to the same round numbers), these costs are minimised under the preferred option.
- Amendment to the Collective Management of Copyright (EU Directive) Regulations 2016 will reduce regulatory burden, as small CMOs will no longer be required to bear the financial cost of auditing their annual transparency reports. The change in definition of "micro" will mean two CMOs are no longer subject to certain regulatory exemptions under the Regulations, however as these CMOs already do not make use of these exemptions, their regulatory burden will be unchanged.
- Amendment to the Design Right (Semiconductor Topographies) Regulations 1989 will reduce regulatory burden, by saving the public sector financial cost and administrative inconvenience of updating the Schedule to the Regulations each time a country qualifies for WTO membership.
- Amendment to the Copyright Tribunal Rules 2010 will not increase regulatory burden as, should involvement of an EEA party in a case occur, they would most likely call upon a legal adviser in the UK to represent them, who could provide a UK address for service.

8. European Union Withdrawal and Future Relationship and REUL

8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act.

8.2 This instrument does however, relate to the reform of retained EU law ("REUL") under the section 14 and 20(1)(b) powers of the 2023 Act because the instrument amends various provisions of secondary REUL.

9. Consolidation

9.1 The IPO does not consider that any consolidation of the relevant legislation is needed at this time.

10. Consultation outcome

10.1 A formal external public consultation has not taken place as this instrument maintains the substance of the IP legislation being amended and no, or no significant, impact on businesses is expected.

10.2 However, the IPO has engaged with the Chair of the Copyright Tribunal and met with a targeted range of affected stakeholders to understand their views regarding this instrument. DSIT and IPO officials also have an iterative process of on-going engagement with a broad range of interested stakeholders.

11. Guidance

11.1 The IPO is not producing any specific guidance on the changes effected by this instrument.

12. Impact

12.1 The impact on business, charities or voluntary bodies is estimated to be below £1 million, annually.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because the impact is estimated to fall below the threshold for full assessment.

12.4 Impact of amendment to the Artist's Resale Right Regulations 2006:

- Changing references in the Regulations directly from euros to pounds sterling provides the most straightforward figures to calculate ARR payments for the UK art market. The EANDCB (equivalent annual net direct cost to business per year) of the amendment is an estimated net benefit of £0.1 million. Based on our assumptions[2], in 2024, UK buyers of resold artwork will face an estimated £0.9 million increase in ARR royalty costs, UK artists will be distributed an estimated £0.8 million additional ARR royalty revenue, and UK CMOs will receive an estimated £0.1 million increase in administration charges.
- Based on 2022 data from the two CMOs that administer ARR in the UK[3], fewer than 20% of art market transactions involving ARR will be affected by the amendment. The minimum threshold resale price for ARR eligibility will increase from 1,000 euros (£854.70[4]) to £1,000. Around 400 UK artists will no longer receive ARR, with an estimated cost of ~£30,000 in lost royalty revenue in 2024 (a maximum of £40 per transaction), representing a benefit to buyers of these works. When UK inflation is taken into consideration, the minimum threshold will still be lower in real terms than when it was set in 2006. Therefore, small artists will be no worse off compared to when the Regulation was set in 2006.

[2] It is assumed that: (1) the exchange rate from euros to pounds stays constant at its rate on 12 July 2023 (1 GBP = 1.17 EUR); (2) 93% of ARR royalties are collected from UK buyers, as was the case in 2018; (3) ARR royalties are assumed to grow at their pre-Covid (2017-2019) average yearly rate of 5.6%; (4) UK CMOs deduct 15% administration charge from royalties collected from UK buyers, and 5% administration charge from royalties collected from overseas buyers.

[3] The Artists' Collecting Society (ACS) and the Design and Artists Copyright Society (DACS).

[4] All figures are converted at the exchange rate on 12 July 2023 (1 GBP = 1.17 EUR).

- The maximum ARR royalty will increase from 12,500 euros (£10,684) to £12,500, meaning UK artists whose works are sold for over 2 million euros (£1.7 million) will benefit from an increase in royalties. Furthermore, as ARR is calculated by applying percentages to consecutive portions of the sale price, larger portions of sale price will fall within the bracket for a higher % royalty when these are restated in pounds. For example, the first £50,000 instead of the first 50,000 euros (£42,735) will receive 4% royalty. UK artists of works resold for over £42,735 (just over 10% of transactions in 2022) will therefore benefit from an estimated £0.8 million increase in royalties in 2024, with a maximum increase of £1,816 per transaction, representing a cost to buyers of these works.
- Non-monetised impacts include improved certainty for the art market, as ARR payments will no longer be subject to exchange rate fluctuations. Removal of the need for currency conversion and reducing the number of works that qualify for ARR will also reduce CMO administration costs and possibly speed up transactions. One-off familiarisation costs for CMOs will be low, as threshold figures for ARR calculation are kept to the same round numbers of 1,000, 50,000 etc.

12.5 Impact of amendment to the Collective Management of Copyright (EU Directive) Regulations 2016:

- Removing the requirement for audit of accounting information in annual transparency reports by CMOs that are companies that qualify as "small" will affect 7 CMOs[5]. Some CMOs report that they spend approximately £2,500 to £3,000 on auditing services, implying total expected cost savings of around £17,500 - £21,000[6]. Cost savings depend on the complexity of the audit and the charges of firms in the audit market familiar with CMOs.
- Right holders are not expected to be significantly affected as small CMOs will continue to produce annual transparency reports. However, since "the audit is designed to ensure that the financial information presented is consistent with both the CMOs' underlying books and records and the disclosed methodology"[7], there will be some risk of reduced transparency. However, given the risk profile of small CMOs, that right holders can insist on a transparency report audit, and the read-across to the proportionate regime for small company accounts, removing the statutory audit requirement strikes a fairer, more proportionate, balance between risk and cost for these small entities.
- The transition (for the purpose of exemptions from certain obligations on CMOs) from micro enterprises under the EU's definition to micro-entities under the UK's definition (set out in section 384A of the Companies Act 2006) alters which CMOs are eligible for four exemptions in the Regulations (and removes the references in the Regulations to Euros). It is predicted that 2 CMOs are likely to be in scope of this change, however, both have stated that

[5] Artists' Collecting Society (ACS); British Equity Collecting Society (BECS); Directors UK; Educational Recording Agency (ERA); The Broadcasting Rights Agency (EoS); Picture Industry Collecting Society for Effective Licensing (PICSEL); and RadioPro.

[6] The cost savings are expected to be under £21,000, since one CMO wishes to maintain auditing of their annual transparency report as a voluntary measure.

[7] Guidance on the Collective Management of Copyright (EU Directive) Regulations 2016: supplementary guidance on annual transparency reports and audit (publishing.service.gov.uk)

they do not make use of these exemptions, preferring to voluntarily meet the obligations. They are very likely to maintain this position, and so no impact is expected to occur.

12.6 Impact of amendment to the Design Right (Semiconductor Topographies) Regulations 1989:

- The amendment will make it unnecessary to update the Schedule to the Regulations each time a country qualifies for WTO membership, saving the public sector time and resources (there are currently 25 countries negotiating WTO membership). No impact is expected on businesses, charities, or voluntary bodies, who can access the list of WTO members on the WTO website[8].

12.7 Impact of amendment to the Copyright Tribunal Rules 2010:

- Cases at the Copyright Tribunal are rare: there have been no cases filed in the last four years, and historically they have averaged four a year. Furthermore, as cases relate to licensing of UK copyright under domestic law, the involvement of an EEA party in a disputed matter has not been the norm, but should it occur, that party (if not also established in the UK) would most likely call upon a legal adviser in the UK to represent them, who would provide a UK address for service. The amendment is therefore unlikely to have any significant impact on EEA parties involved in future Copyright Tribunal cases as expertise resides in the UK. The amendment levels the playing field between EEA and Rest of the World parties in terms of any engagement with the Tribunal.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 Some of the smaller regulated CMOs that are companies that qualify as "small" under domestic company law, and are within scope of this instrument, are considered to be small businesses. The change to the Collective Management of Copyright (EU Directive) Regulations 2016 is intended to reduce, and make proportionate, the regulatory burden on these CMOs.

14. Monitoring & review

14.1 As this instrument is made under the 2023 Act, no review clause is required.

15. Contact

15.1 Andrew Sadler at the Intellectual Property Office Telephone: 01633 433171 or email: Andrew.Sadler@IPO.gov.uk can be contacted with any queries regarding the instrument.

15.2 Stephanie Dales, Deputy Director for Strategic Policy and Legislative Coordination, at the Intellectual Property Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Viscount Camrose at the Department for Science, Innovation and Technology can confirm that this Explanatory Memorandum meets the required standard.

[8] WTO Members and Observers can be found on the WTO website at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm