

# ENTERPRISE AND REGULATORY REFORM ACT 2013

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 6: Miscellaneous and General**

#### **Copyright and rights in performances**

#### ***Section 77: Licensing of copyright and performers' rights and Schedule 22: Licensing of copyright and performers' rights***

525. *Section 77* inserts new provisions into the CDPA 1988. This will allow (through regulations) for a system for the licensing of “orphan works” (works for which the copyright owner/s is not known or cannot be located), the authorisation of applications to operate voluntary extended collective licensing schemes, and a reserve power which could be used to require a collecting society to adopt a code of practice.
526. The section responds to recommendations to modernise copyright licensing made in the Hargreaves Review of Intellectual Property and Growth. These recommendations were broadly accepted by Government and the proposals contained in this section were subject to consultation in 2011-12.
527. *Subsection (2)* inserts provisions into section 116 of the CDPA 1988 which enable the Secretary of State to make regulations to require a licensing body (usually known as a collecting society) to adopt a code of practice that must be consistent with criteria specified in the regulations. The power includes provision for enforcement and sanctions where a licensing body fails to comply with the provisions contained in their codes of practice. The details of the power are described in Schedule 22 of the Act which inserts a new schedule into the CDPA 1988. This provides a backstop power to put in place statutory codes in the event that self-regulation fails. Under self regulation collecting societies will adopt and adhere to codes of practice containing minimum standards set by Government.
528. *Subsection (3)* introduces a series of new sections to follow section 116 of the CDPA 1988, which makes provision regarding the licensing of copyright works. These are:
- section 116A, which gives the Secretary of State power to appoint a body or bodies to license the use of orphan works through secondary legislation. Orphan works are copyright works (such as books, photographs, films and music) for which one or more of the copyright owners is unknown or cannot be found. Public and private libraries, archives, museums and galleries may hold the original or a copy of such works but, without the permission of one or all of the rights holders, they are limited in what they can do to make such works available to the public without threat of legal challenge. These works could include published or broadcast works or unpublished works such as diaries and photographs.

- section 116A also sets out the areas which the regulations on orphan works will cover. Under the regulations the Secretary of State may appoint appropriate bodies - this can never be a body which wishes to use the work – to license orphan works. The regulations will also set out the requirements for the diligent search that must be conducted by potential licensees before a work qualifies as an orphan work. In addition, the section states that the regulations may apply where it is not clear whether an orphan work is in copyright or not as may be the case when the date of the author's death is not known. The regulations limit the licences to non-exclusive rights so that more than one person or organisation can obtain a licence to use the same work. Subsection (6) of section 116A includes provisions for dealing with the possible re-appearance of the copyright holder while the licence is extant and for orphan works registers.
- section 116B, which creates a power to enable the Secretary of State to make regulations for the authorisation of applications by licensing bodies to operate voluntary extended collective licensing schemes. Subsections (2) to (6) describe limitations that would apply to any such schemes, including the stipulation that a rights holder must have the ability to opt out of any extended collective licensing scheme. Currently, a collecting society can only license on the basis of express permissions to do so from its members, the copyright owners. A collecting society which applied and was authorised to operate an extended collective licensing scheme would be able to grant non-exclusive licences for specified uses of copyright works on behalf of all rightsholders, of works of the type covered by the scheme. Rights holders who chose to opt out would not be covered by the scheme.
- section 116C, which makes general provision about the powers in sections 116A and 116B. It states that the Secretary of State can impose conditions on any body authorised to license in accordance with 116A or 116B. It also makes provision regarding the treatment of fees, royalties and other sums paid in respect of a licence in relation to orphan works licensing and extended collective licensing. The section allows the Secretary of State to define what happens to end orphan work status and what happens if a rights holder wishes to opt out of an extended collective licensing scheme that is already operational.
- section 116D, which makes general provision about the regulations which could be made using the powers in this section. These include that regulations would be made by the affirmative procedure.

## **Part 1, Schedule 22: Regulation of licensing bodies**

### Codes of Practice

529. Paragraph 1 of Schedule 22 inserts a new Schedule A1 into the CDPA 1988. Paragraphs 1 and 2 of Part 1 of Schedule A1 enable the Secretary of State to establish procedures, through secondary legislation, to require a licensing body to adopt a code of practice that complies with criteria specified in the regulations. This is intended to be used where a licensing body fails to adhere to a self-regulatory code containing minimum standards set by Government.

### Licensing code ombudsman

530. [Paragraph 3](#) enables the Secretary of State to make provision for the appointment, remit and powers of an Ombudsman to investigate disputes.

### Code reviewer

531. [Paragraph 4](#) enables the Secretary of State to make provision for the appointment, remit and powers of a person to review and report on compliance with the codes of practice adopted by licensing bodies. It makes further provision for the provision of information to the code reviewer and for payments to him.

### Sanctions

532. [Paragraph 5](#) makes provision through the regulations for sanctions, including financial penalties (at a maximum £50,000), to apply to licensing bodies for failures to comply with requirements set out in the regulations. There are provisions for the imposition of sanctions on a director, and other responsible personnel, where that is deemed appropriate. The regulations must also include provisions for a licensing body to appeal against the imposition of a sanction or penalty.

#### Fees

533. [Paragraph 6](#) enables the Secretary of State to charge fees to a licensing body that becomes subject to statutory regulation. The amount charged in fees must not be more than the cost of administering the regulation.

#### General

534. [Paragraph 7](#) sets out the ambit of any regulations made under this Schedule.
535. Regulations would be made by the affirmative procedure.

### **Part 2, Schedule 22: Performers' rights**

536. [Part 2](#), Schedule 22 makes a number of amendments to Schedule 2A to the CDPA 1988, which makes provision for the licensing of performers' rights. They will have the effect of making equivalent provision in relation to these rights which apply to the licensing of copyright as set out at section 77. That is they mirror the provisions made for copyright in works for copyright in performer's rights. New paragraph 1A covers the licensing of "orphan works", new paragraph 1B the voluntary extended collective licensing scheme and new paragraphs 1C and 1D covers both the "orphan works" and voluntary extended collective licensing schemes.