

# **STATES OF JERSEY**



## **DRAFT INTELLECTUAL PROPERTY (UNREGISTERED RIGHTS) (APPLICATION, TRANSITIONAL PROVISIONS AND SAVINGS) (JERSEY) REGULATIONS 201- (P.112/2012): COMMENTS**

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**Presented to the States on 4th December 2012  
by the Economic Affairs Scrutiny Panel**

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**STATES GREFFE**

## COMMENTS

1.1 The Economic Affairs Scrutiny Panel is comprised of the following members –

Deputy S.G. Luce of St. Martin, Chairman

Connétable S.W. Pallett of St. Brelade, Vice-Chairman

Connétable M.J. Paddock of St. Ouen

Review Adviser: Mr. N. Garnett, Interight Ltd.

Mr. Garnett is an internationally recognised expert in the areas of copyright and technology, with particular experience in the management and protection of intellectual property rights. Amongst other notable work, he is a leading consultant to the World Intellectual Property Organisation (WIPO) in these areas. He has produced major written studies for the Organisation, and speaks regularly at its conferences worldwide.<sup>1</sup>

1.2 The following Terms of Reference were established for the Intellectual Property (Unregistered Rights) (Jersey) Law 2011 (IPURL): Subordinate Legislation Review:

1. *To undertake a legal ‘sense check’ of the following subordinate legislation to Intellectual Property (Unregistered Rights) (Jersey) Law 2011 (IPURL), to ensure it is technically and factually sound:*

- *Intellectual Property (Unregistered Rights) (Application, Transitional Provisions and Savings) (Jersey) Regulations 201-*
- *Intellectual Property (Unregistered Rights) (Works of Foreign Provenance) (Jersey) Order 201-*
- *Intellectual Property (Unregistered Rights) (Miscellaneous Provisions) (Jersey) Order 201-*

2. *To establish whether the proposed subordinate legislation is consistent with, and constitutes, the best method of achieving the objectives of the Intellectual Property (Unregistered Rights) (Jersey) Law 2011 (IPURL).*

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<sup>1</sup> [www.bpei.co.uk/nic-garnett.html](http://www.bpei.co.uk/nic-garnett.html)

## 2. Comments

2.1 This report sets out the work undertaken by the Economic Affairs Scrutiny Panel on the principal pieces of subordinate legislation to the *Intellectual Property (Unregistered Rights) (Jersey) Law 2011*, as set out below –

- *Intellectual Property (Unregistered Rights) (Application, Transitional Provisions and Savings) (Jersey) Regulations 201-*
- *Intellectual Property (Unregistered Rights) (Works of Foreign Provenance) (Jersey) Order 201-*
- *Intellectual Property (Unregistered Rights) (Miscellaneous Provisions) (Jersey) Order 201-*

2.2 This represents a continuation of Scrutiny's work in this area. In 2010, the Economic Affairs Scrutiny Panel, under the Chairmanship of Deputy M.R. Higgins of St. Helier, undertook a Review of the *Draft Intellectual Property (Unregistered Rights) (Jersey) Law 201-*. It engaged an adviser, Mr. Nic Garnett, then a Partner at H.R.O. Grant Dawe L.L.P., to assist with that work. On 24th November 2010, the Panel presented *P.141/2010 Com. – Draft Intellectual Property (Unregistered Rights) (Jersey) Law 201-(P.141/2010): comments* – consisting of a report received from its adviser on the draft Law, the response from the Economic Development Department to the questions raised by that report, and lastly its adviser's comments on the Department's response. This was determined to be the best format to provide States Members with informed analysis ahead of the debate on the draft legislation, given its special nature, complexity and size.

2.3 Soon after its appointment in November 2011, the present Panel identified the need to undertake a Review in this important area, to follow up on the work outlined above and to help ensure the appropriateness of Jersey's Intellectual Property (Unregistered Rights) legislative framework. In May 2012, the Panel received initial drafts and a timeframe for the progression of the subordinate legislation from the Economic Development Department.

2.4 After careful consideration, the Panel agreed that the most appropriate approach to its Review would be to mirror the very effective and thorough work that had been undertaken by the former Panel in conjunction with its adviser. The Panel was therefore very pleased to be able to secure the services of Mr. Nic Garnett, Interight Ltd., to assist us with this Review, offering both his considerable expertise in this area and continuity with the previous Panel's work on the primary legislation.

2.5 In September 2012 the Panel received a briefing from the Economic Development Department and advanced drafts of the subordinate legislation, with final publishable versions shortly thereafter, enabling the Panel and its adviser to undertake the work which is presented in this report. This consists of a thorough analysis by the adviser of the policy, logic, language and simplicity of the draft subordinate legislation (Appendix 1), a considered response to that report from the Minister for Economic Development and his

Department (Appendix 2), and concluding comments from the adviser on that response (Appendix 3).

- 2.6 The adviser's overall conclusion, contained in his Final Comments (see Appendix 3), states that –

*'IPURL as implemented through the subordinate legislation constitutes a modern and comprehensive legal framework for the development and exploitation of unregistered intellectual property rights which should place Jersey on equal footing with its international trading partners.'*

- 2.7 **The Panel welcomes this conclusion and congratulates the Minister and his Department on their work in this area. However, the Minister should note that there are certain outstanding areas highlighted by the adviser in his Final Comments, and the Panel recommends that these are given further consideration.**

- 2.8 Having acknowledged that copyright law is constantly evolving, the Minister must continue to give attention to this area in order to maintain the modern framework and equal footing achieved by this legislation. Indeed, looking at Intellectual Property more broadly, Guernsey's recent publication of innovative proposals relating to image rights legislation are an example of what might be achieved to encourage economic activity and growth for the associated industries.

- 2.9 **The Panel urges the Minister for Economic Development and his Department to be continually vigilant and proactive on the subject of both registered and unregistered property rights. In this digital age, and with the ever-increasing speed of technological development, staying "ahead of the game" will become increasingly challenging and important.**

# **The Intellectual Property (Unregistered Rights) (Jersey) Law 2011**

## **A Report on the Proposed Subordinate legislation**

October 2012

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### I. Background

#### A. The Task

This report is written for the Economic Affairs Scrutiny Panel; it relates to the introduction of subordinate legislation relevant to the bringing into force of the Intellectual Property (Unregistered Rights) (Jersey) Law 2011 ("IPURL"). The task is to review the draft subordinate legislation to assist the Economic Affairs Scrutiny Panel in its evaluation of what is proposed.

Specifically, the terms of engagement of the author of this report ("the Advisor") provide as follows:

*Scrutiny is an evidence-based process, the principal function of which is to hold the Executive to account for its policies and actions. In reviewing Executive policy the Scrutiny Panel seeks to clarify key elements of the policy and its impact on the*

*population through examination of evidence provided by the Department, stakeholders and the general public.....*

*The role of the Adviser in this process is –*

*a) to apply specialist knowledge to the review in order to assist the Panel in assessing the evidence presented to it, and*

*b) to advise the Panel on further research it might undertake to develop a broad understanding of the issues involved.*

The proposed subordinate legislation comprises principally three separate items:

1. Intellectual Property (Unregistered Rights) (Application, Transitional Provisions and Savings) (Jersey) Regulations 201-
2. Intellectual Property (Unregistered Rights) (Works of Foreign Provenance) (Jersey) Order 201-
3. Intellectual Property (Unregistered Rights) (Miscellaneous Provisions) (Jersey) Order 201-

The separate items in turn complete the legislative scenario for IPURL by providing for the transition from existing law to the new law, dealing with the application of the new law to works of foreign origin and providing a number of operational provisions in relation to implementation of certain provisions of the new law.

A fourth proposed enactment specifies the date on which the new law and the subordinate legislation is to come into effect.

In short, the subordinate legislation deals with time, space and the details of implementation.

#### **B. The Context**

The importance of the subordinate legislation should not be underestimated. The existing law of Jersey which deals with the bulk of the subject matter of the new law came into effect in Jersey in 1913; the substance of the legislation, the UK “Imperial” Copyright Act, dates from 2 years before.

The 1911 Copyright Act followed 2 other earlier UK Acts: the Statute of Anne 1710 and the Copyright Act of 1842. It was in turn followed by 2 further UK Acts; the 1956 Copyright Act and the Copyright, Designs and Patents Act 1988.

The 1988 remains the act in force in the UK although it has been extensively extended and amended by subsequent legislation:

- 16 amending statutory instruments;
- 1 instrument extending Legislation to British Possessions;
- 27 sets of regulations made via statutory instrument under the Act;
- 11 Acts of Parliament amending certain provisions of the Act;
- 8 commencement orders

[The full list of this legislation is given in Annex A.]

Wisely, IPURL has been drafted to track current UK law and thus encompasses both the terms of the original 1988 Act and the subsequent, relevant, amendments. The scope of this legislative activity does however serve to illustrate the constant need to keep law on intellectual property rights up to date.

The challenge here is somewhat different being primarily about creating a path from an outdated law to a very new one and ensuring that the new law is applied as efficiently as possible and in the best interests of Jersey, its people and its place in the modern world.

1913 was a long time ago. Sound recording and film technology was in its infancy. International trade in copyright works was limited. Alan Turing - whose Universal Machine led the way to computing - was a year old. The internet was beyond the realm of even the wildest science fiction.

To a degree, the existing copyright law of Jersey has managed to respond to developments in technology and commerce: the 1911 Act was well constructed and drafted. However, the introduction of IPURL gives Jersey one of the most advanced and comprehensive unregistered intellectual property rights laws in the world. It also addresses many concepts and issues somewhat differently than did the earlier law. A structured and coherent transition path thus becomes essential.

There is also a strong requirement to establish a clear strategy for the application of IPURL to works of foreign origin. The world has become a much smaller place since 1913 and international trade in copyright works is now a major part of any nation's commercial agenda. As a result, there are a number of key international treaties which tie the world of copyrights together:

- The Berne Convention
- The Rome Convention
- The World Trade Organisation Treaty
- The WIPO Copyright Treaty
- The WIPO Performances and Phonograms Treaty

The UK copyright regime not only responds to the requirements of these international treaties. It has also been shaped increasingly in recent years by developments at EU level. Brussels has initiated numerous Directives in the field of copyright which have brought significant changes to the 1988 Act as originally enacted in the UK.

Jersey of course does not have any extensive obligations with regard to the major international copyright treaties nor is it beholden to Brussels in terms of its law on intellectual property rights. It does however have to consider its position as a trading partner for countries that do have such obligations. Consideration has therefore been given in the development of IPURL to this important international dimension: Article 399 of IPURL empowers the Minister for Economic Development to extend the application of the law (or specific provisions thereof) to works of foreign origin.

When considering the extension of IPURL to apply to works of foreign provenance it is important to understand how copyright and other intellectual property rights work internationally.

Intellectual property rights exist within a particular territory in relation to a specific work (regardless of where it was created) based on the law granting such rights within the territory in question. Thus



when an author in Jersey creates a literary work in Jersey she enjoys the rights in that work in Jersey accorded to her under the local copyright law of Jersey.

That same work will enjoy copyright protection in Argentina, France or anywhere else in the world in accordance with the law on copyright in each of these third countries. The Jersey author should therefore "own" a collection of copyrights established in whichever country has a law that grants such right. But there needs to be some basis for establishing that entitlement in a foreign jurisdiction and that is where the international treaties play a critical role.

The first international treaty in this field was the Berne Convention made in 1886. It establishes the basic principles for the international recognition and protection of copyright as described by WIPO (the World Intellectual Property Organisation which administers the treaty):

*The [Berne Convention] rests on three basic principles .....*

*(1) The three basic principles are the following:*

*(a) Works originating in one of the contracting States (that is, works the author of which is a national of such a State or works which were first published in such a State) must be given the same protection in each of the other contracting States as the latter grants to the works of its own nationals (principle of "national treatment").*

*(b) Such protection must not be conditional upon compliance with any formality (principle of "automatic" protection).*

*(c) Such protection is independent of the existence of protection in the country of origin of the work (principle of the "independence" of protection). If, however, a contracting State provides for a longer term than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases.*

### **C. The Approach**

This report is based primarily on a detailed review of each of the provisions of the three items making up the proposed subordinate legislation. Constant regard has also been had to the specific provisions of IPURL itself and to the Act of 1911 as applied to Jersey.

Additionally background research has been conducted on the overall context for the development and implementation of IPURL: the economic and social imperatives in Jersey which have thus far shaped the move towards a new regime for unregistered intellectual property rights.

Creating the draft subordinate legislation has evidently required the careful application of both policy and logic. Decisions have needed to be made in certain areas as to how to organise a fair and efficient transition from the old to the new set up while at all times having regard to the logical consequences of these decisions. In a very real sense, particularly with transitional provisions, legal code is somewhat similar to computer code: its configuration will have direct, logical consequences on its application.

Clearly, the first 2 items of the subordinate legislation – the transitional provisions and the application of IPURL to works of foreign origin – cover the most ground. They are also intertwined for the reason explained above: decisions taken in Jersey in respect of transitional provisions will have implications for the beneficiaries of rights granted in respect of foreign works under the law of Jersey.

An important part of the approach to this report has been to analyse the proposed legislation through clearly identifying both its policy and the logical dimensions. This will hopefully allow the Economic Affairs Scrutiny Panel to have the most informed basis for its task.

Additionally in relation to the transitional propositions the following basic perspectives and challenges have provided a framework for analysis.

First, consideration has been given to the classes of works and rights that fall to be considered:

- Works that are essentially the same under both the 1911 Act and IPURL;
- Works that are similar but treated somewhat differently under each of the 2 Acts
- Works and rights that are newly dealt with under IPURL

Second, insofar as a work created before commencement of IPURL continues to qualify under IPURL, and given that the new law provides (generally) for longer periods of protection, what period should be applied to the work in question?

Third, both the 1911 Act and IPURL include exceptions and limitations to copyright, specifying cases where the protection granted to a copyright owner does not apply. There are significantly more of these in IPURL: how are they to be applied to existing works?

Fourth, in the case of existing works things may have been done in relation to them prior to the commencement of IPURL. A use of a work may have been licensed and conversely, a use may have been made without a licence. How are these pre-existing circumstances to be squared with the provisions of the new law?

Fifth, how are all these considerations to be applied in relation to works of foreign origin?

Besides this basic analytical framework, another issue requires to be highlighted at this point. Given the complexity of the proposed legislation and the intricacy of the relationship between policy and logic, linguistic precision is paramount. Accurate definitions of key concepts (e.g. “existing work”) are essential to the proper functioning of the law. Accordingly, particularly rigorous assessment has been applied to this area.

A final consideration for analysis is the question of simplicity. To adapt and adopt Einstein’s famous aphorism, the subordinate legislation should be as simple as possible but no simpler. Lawyers enjoy complexity but it seems inadvisable to burden the law of Jersey with complex provisions dealing with the past when the thrust of IPURL is very much to the future.

That said, the provisions of the subordinate legislation are important not only in their own right. They are also important in demonstrating the competence of the legislators and thus in building international respect and trust in Jersey’s intellectual property rights system.

## II. Analysis

As explained above, four considerations have been applied in analysing the draft legislation:

- Policy
- Logic
- Language
- Simplicity

These will be discussed in greater detail in the following sections.

### A. Policy

A summary document provided to the Adviser gives an insight into the policy decisions relating to the substance. These are described in the document as follows:

#### i. For the transitional provisions

##### i. General

- make things that started legally before commencement under the existing law, which would have been illegal if done under IPURL, to continue to be legal when IPURL comes into force;
- limit the adverse consequences where something already started is continuing when it would always have been legal if IPURL had been in place because an exception to rights applies, even if technically it is currently illegal; and
- apply rights to existing things in such a way as to minimise the problems in both of these scenarios, but also to comply with relevant international law.

Comment: The policy approach is generally sound. There are unlikely to be many scenarios where the first position needs to be invoked as IPURL has in general more latitude with regard to permitted acts.

##### ii. Subsistence of Rights

- an existing work can only attract copyright if it is of a type which is still, or could be, protected under existing law;
- but there is no revived copyright so that, where copyright in a work has already expired in Jersey, it cannot have copyright again;
- existing databases can get database right;
- performers' rights can apply to performances which took place before commencement of IPURL; and
- design right does not apply to existing designs.

Comment: An important qualifier needs to be added here: an existing work can only be protected under IPURL if it also meets the requires for protection under IPURL. The other

policy positions are for the most part explained by compliance with international requirements.

### iii. Term of Protection

- the term of protection for existing material that can attract rights under IPURL is generally as in IPURL and cannot be longer than the IPURL term of protection for that material.

Comment: to illustrate this, consider the case of a literary work written before commencement. Under the old law, the copyright in the work would last for the life of the author plus 50 years. Under IPURL that term is extended by a further 20 years to the life of the author plus 70 years. The policy position here is based on adoption of the standard generally applied within the European Union law.

Sensibly, the transitional provisions opt not to exercise some latitude in applying EU law where this would lead to undue complication with little practical effect.

### iv. Infringement of Rights

- existing law generally applies to anything done before commencement of IPURL;
- existing law applies to anything done after commencement of IPURL in pursuance of arrangements made as well as an agreement reached before commencement;
- any copies made before commencement of IPURL that fall within the scope of IPURL exceptions are not infringing copies under IPURL; and
- any activity started before commencement of IPURL which would be legal under any IPURL exceptions to rights is treated as though the exceptions had always been in place.
- Parts 4 and 5 do not apply to anything done before commencement of IPURL; and
- Schedule 1 does not affect the liability of a service provider for anything done before commencement of IPURL.

Comment: Generally, these positions accord with good practice. A key question arises however as to situation where there exists an agreement to do something in relation to work that was required under the earlier law and that act is now the subject of an exception under IPURL.

### v. States Assembly, States and Crown Rights

- Crown copyright under IPURL will apply to existing works if, but only if, they already have Crown copyright;
- except when Crown copyright already applies to an existing work, States Assembly and States copyright will apply to any existing works where this would have been the case if they had been created after commencement of IPURL;
- if, though, the States Assembly or States is not the owner of copyright under the current law in an existing work that would after commencement attract States Assembly or

States copyright, then the States Assembly or States continues to enjoy any right they have to exploit the work; and

- in any other case of an existing work that would after commencement attract States Assembly or States copyright, the work will be treated as licensed to the States Assembly or States with the copyright owner entitled to claim payment of a reasonable royalty for any use of the work by the States Assembly or States.

Comment: this provides a logical and practical transitional path

#### vi. Moral Rights

- authors' moral rights apply to existing works where the author has not died before commencement of IPURL;
- performers' moral rights only apply to performances taking place after commencement of IPURL; and
- nothing done before commencement of IPURL infringes moral rights and also nothing done after commencement infringes moral rights where it results from a copyright licence or assignment agreed before commencement.

Comment: Positions 1 and 2 are based on compliance with the relevant international standards. It is not clear why performers are denied moral rights on the same basis as authors although this is as in the UK law. Furthermore, moral rights are generally inalienable so position 3 seems a sensible way to resolve any conflict in this area.

#### vii. Works of foreign provenance

- the term of protection and the rights that apply to existing works of foreign provenance may be less than provided in IPURL where this is consistent with international law and EU law on term of protection.

Comment: this is based on well-established principle of international copyright law: the rule of the shorter term. The Berne Convention in article 7(8) provides as follows:

*In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.*

## ii. For the application of IPURL to Foreign Works

### a. General

- provides rights in IPURL for material having its origin in the EEA, in Guernsey and the Isle of Man in the same way as rights apply to material having its origin in Jersey;

- anticipates Jersey's expected membership of the main international treaties and conventions and the WTO by protecting material of foreign provenance as would be necessary for convention/treaty compliance; and
- varies rights dependent on some convention membership where this is consistent with the convention requirements.

Comment: this is a logical approach and one consistent with the obligations Jersey will assume in becoming party to the relevant international treaties.

b. Protection for material from the EEA

- individuals who are nationals of, domiciled or resident in, an EEA State and bodies incorporated under the law of an EEA State are qualifying persons for the purposes of qualification for copyright under IPURL in any type of work by reason of authorship;
- EEA States are qualifying countries for the purposes of qualification for copyright under IPURL by reason of country of first publication or, for broadcasts, country from which the broadcast is made;
- provision in IPURL on database right, publication right, fraudulent reception of transmissions, performers' protection and design right also applies to material having its origin in EEA States

Comment: these positions follow logically from the general proposition above.

c. Protection of material from other countries

- copyright for literary, dramatic, musical and artistic works, films and the typographical arrangement of published editions for works having their origin in a Berne Convention country, a WCT country or a WTO country;
- copyright for sound recordings that have their origin in a Rome Convention Country, a WPPT county or a WTO country;
- copyright for wireless broadcasts that have their origin in a Rome Convention country or a WTO country;
- performers' protection for performances having their origin in a Rome Convention Country, a WPPT county or a WTO country; and
- design right in designs that are semiconductor topographies that have their origin in a WTO country.

Comment: these positions are consistent with relevant international obligations under the respective treaties

d. Modification of rights

- provides rules on duration of copyright for works of foreign provenance that are consistent with the rules in the EU term Directive;
- provides similar rules on duration of performers' rights;
- modifies copyright in sound recordings having their origin in a country that only belongs to the WTO, or in a country which belongs to the WPPT but not the Rome Convention;

- modifies rights in broadcasts having their origin in only a WTO country; and
- modifies performers' rights for performances having their origin in a country that only belongs to the WTO, or in a country which belongs to the WPPT but not the Rome Convention.

Comment: these positions are consistent with relevant international obligations under the respective treaties and with EU law

### iii. In relation to Miscellaneous Provisions

#### a. Educational establishments and teachers

- to the extent that it provides a course of higher, vocational or continuing education, any establishment is an "educational establishment" so that it can benefit from exceptions to rights for its educational activity; and
- peripatetic teachers are also able to benefit from exceptions to rights that apply to educational establishments.

Comment: these positions will no doubt serve the advancement of education in Jersey and are to be welcomed on that basis. The notion of peripatetic teachers requires careful definition to avoid the provisions based thereon being abused.

#### b. Supply of Copies by librarians and archivists

- Jersey Library, libraries in educational establishments, States or States Assembly libraries provided for the purposes of their administration and any other not-for-profit library in Jersey are prescribed for the purposes of anything permitted by Articles 61 to 66;
- Jersey Heritage Trust, any archive of a public institution of its public records and any other not-for-profit archive in Jersey are prescribed for the purposes of anything permitted by Articles 65 and 66;
- all libraries in Jersey are prescribed for the purposes of supplying copies under Article 64, and all libraries and archives in Jersey are prescribed for the purposes of supplying copies under Articles 65 and 66;
- any not-for-profit library outside Jersey is prescribed for the purposes of receiving copies under Articles 64 and 65 and any not-for profit archive outside Jersey is prescribed for the purposes of receiving copies under Article 65; and
- for all the provisions in IPURL permitting copying by librarians and archivists, conditions as prescribed must be followed, including in some cases the need for a signed declaration from the person supplied with a copy, the form of which is as set out in the relevant Schedule.

Comment: while generally sound, the position regarding the making of declarations regarding the use of copies of works for private study and research needs to be weighed against what may be practically resourced by the institutions in question.

c. Designs made by industrial process

- define an “industrial process” as one where more than 50 articles are made to a design (but where the articles are not part of a single set), or where goods are manufactured in lengths or pieces (but not when hand-made); and
- exclude a number of things from the scope of Article 80, such as works of sculpture (but not casts or models for making multiple copies by an industrial process) and printed matter primarily of a literary or artistic character.

Comment: this position maps to its analogue in the UK law; there is no reason why Jersey should adopt a different position.

d. Archiving or recordings of broadcasts

- the Jersey Library and Jersey Heritage Trust can record the prescribed broadcasts off-air for the purposes of putting in an archive; and
- all free-to-air public service broadcasts and webcasts made available without charge can be recorded as necessary for this purpose by these bodies.

Comment: The question can be raised why this position limits recording to free-to-air public service broadcasts. The BBC has a system for recording and archiving all broadcasts in the UK and is fully supported in this by the other major broadcasters. It is recommended that Jersey research this provision more fully before settling policy on this point.

e. Notice of seizure of infringing copies or illicit recordings

- the form of a notice that must be left at a place where infringing copies or illicit recordings have been seized under Articles 131 or 317 of IPURL respectively.

## B. Implementation

Implementation of the policy through the specific provisions of the subordinate legislation must have regard to the other three considerations; Logic, language and simplicity. A detailed analysis made on that basis is set out in Annex B.



### III. Conclusions

#### A. Assessment

The subordinate legislation reviewed here is extensive and in parts necessarily complex, particularly in relation to the transitional provisions. Policy decisions in areas where such decisions need to be made appear for the most well informed, at least with regard to the overriding concern: equipping Jersey with an intellectual property law for unregistered rights that passes international muster.

From the point of view of the internal logic of what is proposed, it has not been possible to follow through every possible consequence of the provisions included. The task would be overly time consuming and would involve scenarios that are highly unlikely to be encountered in practice. In terms of general application no major logical flaw appears from the drafting.

Language is generally well chosen and used. However, as indicated in the detailed analysis there are areas where definitions particularly could perhaps be somewhat modified to improve the understanding of the provisions. It should be noted however that generally the language used conforms with normal copyright practice.

Keeping the legislation simple is a major challenge, again particularly in relation to the transitional provisions. It is also clear that in applying the transitional provisions, recourse will be had regularly to the terms of the 1911 Act in order to understand the provisions of the subordinate legislation. This requirement will of course over time diminish.

In terms of the overall quest for simplicity, certain suggestions have been made in the detailed analysis.

#### B. Further questions and investigation

The Economic Affairs Scrutiny Panel may wish to consider raising certain questions of the Minister with regard to the following:

##### i. Policy

A key question arises however as to situation where there exists an agreement to do something in relation to work that was required under the earlier law and that act is now the subject of an exception under IPURL. Is this situation adequately managed within the provisions?

Is there no case for according moral rights to performers for their performances given prior to commencement?

Is there any precedent in the laws of other countries for the notion of a "peripatetic teacher" and the provisions relating thereto?

With regard to the copying provisions for libraries and archives, has evidence or other input been received and evaluated from the institutions in question as to their real ability to apply the system envisaged?

With regard to the copying of broadcasts for the purposes of archiving, is there a case for further researching the practice in the UK, in particular the system implemented by the BBC?

With regard to the Notice of Seizure provisions, has input been received from relevant law enforcement agencies as to the practicality of implementing what is proposed?

ii. Implementation

The questions relating to implementation are contained with the analysis table included as Annex B

iii. Generally

The policy decisions relating to the substance of the transitional and foreign works provisions are based for the most part on ensuring compliance with international standards. What level of investigation has been conducted in relation to local interests that may be directly affected by the provisions?

Is there any anticipation of negative reaction to anything proposed by any particular individuals or interest group whether in Jersey or beyond? For example, has any consultation occurred with the Mechanical Copyright protection Society (part of the PRS for Music) on the extension for one year of the mechanical reproduction statutory licence for musical works?

How "future proof" is the subordinate legislation? Are there any developments in international or EU law that will require further amendment of IPURL and/ or require further subordinate legislation in the near to mid-term?

## IV. Annexes

### Annex A

#### A List of UK Copyright Legislation

##### Original Legislation

- Copyright, Designs and Patents Act 1988 c. 48

##### Amending Statutory Instruments

- The Design Right (Semiconductor Topographies) Regulations 1989
- The Copyright (Computer Programs) Regulations 1992
- The Copyright (EC Measures Relating to Pirated Goods and Abolition of Restrictions on the Import of Goods) Regulations 1995
- The Duration of Copyright and Rights in Performances Regulations 1995
- The Copyright and Related Rights Regulations 1996
- The Copyright and Rights in Databases Regulations 1997
- The Parliamentary Copyright (Scottish Parliament) Order 1999
- The Conditional Access (Unauthorised Decoders) Regulations 2000
- The Copyright and Related Rights Regulations 2003
- The Copyright and Rights in Databases (Amendment) Regulations 2003
- The Re-use of Public Sector Information Regulations 2005
- The Artist's Resale Right Regulations 2006
- The Performances (Moral Rights, etc.) Regulations 2006
- The Intellectual Property (Enforcement, etc.) Regulations 2006
- Design Right (Semiconductor Topographies) (Amendment) Regulations 2006
- Parliamentary Copyright (National Assembly for Wales) Order 2007

##### Regulations Made via Statutory Instrument Under the Act

- The Copyright (International Organisations) Order 1989
- The Copyright and Rights in Performances (Notice of Seizure) Order 1989
- The Copyright (Recordings of Folksongs for Archives) (Designated Bodies) Order 1989

- The Copyright (Sub-titling of Broadcasts and Cable Programmes) (Designated Body) Order 1989
- The Copyright (Application of Provisions relating to Educational Establishments to Teachers) (No. 2) Order 1989
- The Copyright (Industrial Process and Excluded Articles) (No. 2) Order 1989
- The Copyright (Material Open to Public Inspection) (International Organisations) Order 1989
- The Copyright (Material Open to Public Inspection) (Marking of Copies of Maps) Order 1989
- The Copyright Tribunal Rules 1989
- The Copyright (Customs) Regulations 1989
- The Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989
- The Copyright (Hong Kong) (Amendment) Order 1990
- The Copyright (Material Open to Public Inspection) (Marking of Copies of Plans and Drawings) Order 1990
- The Copyright (Status of Former Dependent Territories) Order 1990
- The Fraudulent Reception of Transmissions (Guernsey) Order 1989
- The Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Guild Sound and Vision Limited) (Revocation) Order 1990
- The Copyright Tribunal (Amendment) Rules 1991
- The Copyright Tribunal (Amendment) Rules 1992
- The Copyright (Application to the Isle of Man) Order 1992
- The Copyright (Recording for Archives of Designated Class of Broadcasts and Cable Programmes) (Designated Bodies) Order 1993
- The Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Open University) Order 2003
- The Goods Infringing Intellectual Property Rights (Customs) Regulations 2004
- The Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Educational Recording Agency Limited) Order 2005
- The Copyright (Educational Establishments) Order 2005
- The Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts and Cable Programmes) (Educational Recording Agency Limited) (Revocation) Order 2006

- Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Educational Recording Agency Limited) Order 2007
- The Copyright and Performances (Application to Other Countries) Order 2007

#### **Amending Acts**

- National Health Service and Community Care Act 1990 c. 19
- Courts and Legal Services Act 1990 c. 41
- Broadcasting Act 1990 c. 42
- Judicial Pensions and Retirement Act 1993 c. 8
- Charities Act 1993 c. 10
- Trade Marks Act 1994 c. 26
- Criminal Justice and Public Order Act 1994 c. 33
- Broadcasting Act 1996 c. 55
- Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002 c. 25
- Copyright (Visually Impaired Persons) Act 2002 c. 33
- Legal Deposit Libraries Act 2003 c. 28

#### **Commencement Orders**

- The Copyright, Designs and Patents Act 1988 (Commencement No. 1) Order 1989
- The Copyright, Designs and Patents Act 1988 (Commencement No. 2) Order 1989
- The Copyright, Designs and Patents Act 1988 (Commencement No. 3) Order 1989
- The Copyright, Designs and Patents Act 1988 (Commencement No. 4) Order 1989
- The Copyright, Designs and Patents Act 1988 (Commencement No. 5) Order 1990
- The Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002 (Commencement) Order 2002
- The Copyright (Visually Impaired Persons) Act 2002 (Commencement) Order 2003
- Legal Deposit Libraries Act 2003 (Commencement) Order 2004

**Annex B**

**Analysis of the Draft Subordinate Legislation**

Analysis of the subordinate legislation

Provision	Comment	Question/ Proposal
<b>Intellectual Property (Unregistered Rights) Application, Transitional Provisions and Savings) (Jersey) Regulations 201-</b>		
<b>Part2</b>		
Reg. 2 (1)	Complexities arise with regard to the definition of "existing work"; "existing copyright work" and "work". In common with normal copyright practice the expression "work" is not defined. The relationship of the expressions "existing work" and "existing copyright work" as it plays out elsewhere in the draft regulations could benefit from a tighter definition in this regulation. Equally there is reference elsewhere to other subject matter in which copyright subsists indicating that not only "works" qualify under IPURL.	See the proposal under Reg. 19 below
Reg.2 (3) (c)(ii)	<ul style="list-style-type: none"> <li>i. It is not clear what is meant by "the photographs forming art of the film". IPURL defines film as "a recording on any medium from which a moving image may by any means be produced." Under the 1911 Act films were not protected as such; they were protected both as a series of photographs (artistic works) and as dramatic works. In the draft the possibilities are offered in the alternative; they should be offered as concurrent possibilities.</li> <li>ii. The expression "photograph" is defined as follows: "photograph" means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced,</li> </ul>	<ul style="list-style-type: none"> <li>i. Substitute "and" for "or" between (i) and (ii)</li> <li>ii. How can the definitional conflict of the use of the expression "photograph" be resolved?</li> </ul>

	<p><b>and which is not part of a film</b></p> <p>It would appear that there is a definitional conflict with the use of the expression "photograph" in this context</p>	
Reg. 3 (2) & (4)	There is reference to "document"; it is not clear what this refers to.	Provide clarification as to what is meant by "document"
Reg. 4	It is not clear what is meant by "things in existence" and "things coming into existence" and thus the purpose of the regulation generally is not clear.	Clarify the provision generally
Reg. 5	This set of regulations establishes the general principle for establishing qualification of existing works under IPURL. The provisions need to be read as whole and as such are complex. A flow chart setting out their application is attached as Appendix C.	Is the sequence set out in the flow chart correct?
Reg. 6	The purpose of this provision requires clarification.	What element of Part 1 are intended to have effect here? What is the reference to a "work" in the revised definition?
Reg. 7 (1)	Reference to "with the law in force"	Is this intended to include foreign law?
Reg. 7 (3)	<ul style="list-style-type: none"> <li>i. The 1911 Act provides that the author of a photograph is the owner of the negative from which the photograph was derived. The proposed revision places the treatment of photographs on the same basis under IPURL as other artistic works - retroactively.</li> <li>ii. The question of term in an existing photograph is only relevant where the work photograph qualifies for protection under IPURL.</li> </ul>	<ul style="list-style-type: none"> <li>i. Is the decision to retroactively change the status of existing photographs justified?</li> <li>ii. Should the reference be to "an existing <b>copyright</b> work that is a photograph"?</li> </ul>
Reg. 10 (2)	This provision deals effectively with the issues raised under Reg. 2 (3) (c) (ii). However, an issue remains as to how a film, made before commencement that was neither an original dramatic work nor a series of photographs (because of the technical medium in which it was made) can qualify for protection under IPURL.	Is there a case for establishing rights under IPURL in an existing work that were it made after commencement would qualify as a film?
Reg. 11	Protection of broadcasts made before commencement depends on their independent status as either films or	

	sound recordings. This again may subject qualification under IPURL to considerations of a technical nature.	
Reg. 15		How does this provision relate to Reg. 5 (2) (b) – qualification of a foreign work based on place of first publication?
Reg. 17	The amendment is explained as maintaining the existing basis of qualification in respect of existing sound recordings and photographs.	Is this the correct policy decision given that it establishes two distinct regimes for works of significant commercial importance? Would it not be simpler to allow for both the new and old bases for qualification?
Reg. 19	This- and other regulations – raises again the question of distinguishing between “existing works” and existing copyright works”. There is the potential for confusion.	Would it be appropriate to provide that existing works that only qualify under IPURL pursuant to Articles 21 (2)(d) and 22 of IPURL (certain works of foreign origin) are deemed to be existing copyright works? As a consequence all subsequent references to existing works that fall to be dealt with under IPURL and the transitional provisions may be referred to, in the interests of clarity, as existing copyright works.
Reg. 23	This is a difficult provision given that broadcasts made before commencement do not enjoy copyright protection. The proper analysis would appear to be that if the original broadcast did not qualify for protection then the repeat should not either. Alternatively, the repeat broadcast made after commencement should enjoy the full term of protection under IPURL.	How are repeat broadcasts made after commencement to be treated under IPURL?
Reg. 28 (2) to (4)	These provisions are difficult to understand.	Clarification is needed as to the intent and application of these provisions.
Reg. 30 (1)	The wording should be amended to read: “A provision of Chapter 4 of Part 1 that, following commencement, would permit anything <b>to be</b> done.....”	Is this suggested amendment correct?
Reg. 31 (1)	The wording of this provision should read: “Where the author of an <b>existing copyright work being</b> a literary, dramatic, musical or artistic work.....”	Is this suggested amendment correct?
Reg. 31		From a general perspective is this provision in accordance with the transitional provisions associated with the UK Copyright Act 1956? Has its impact on qualifying works of foreign origin been considered?
Reg. 33 (1)	These provisions relate to the existence	i. Why was the period of 1 year

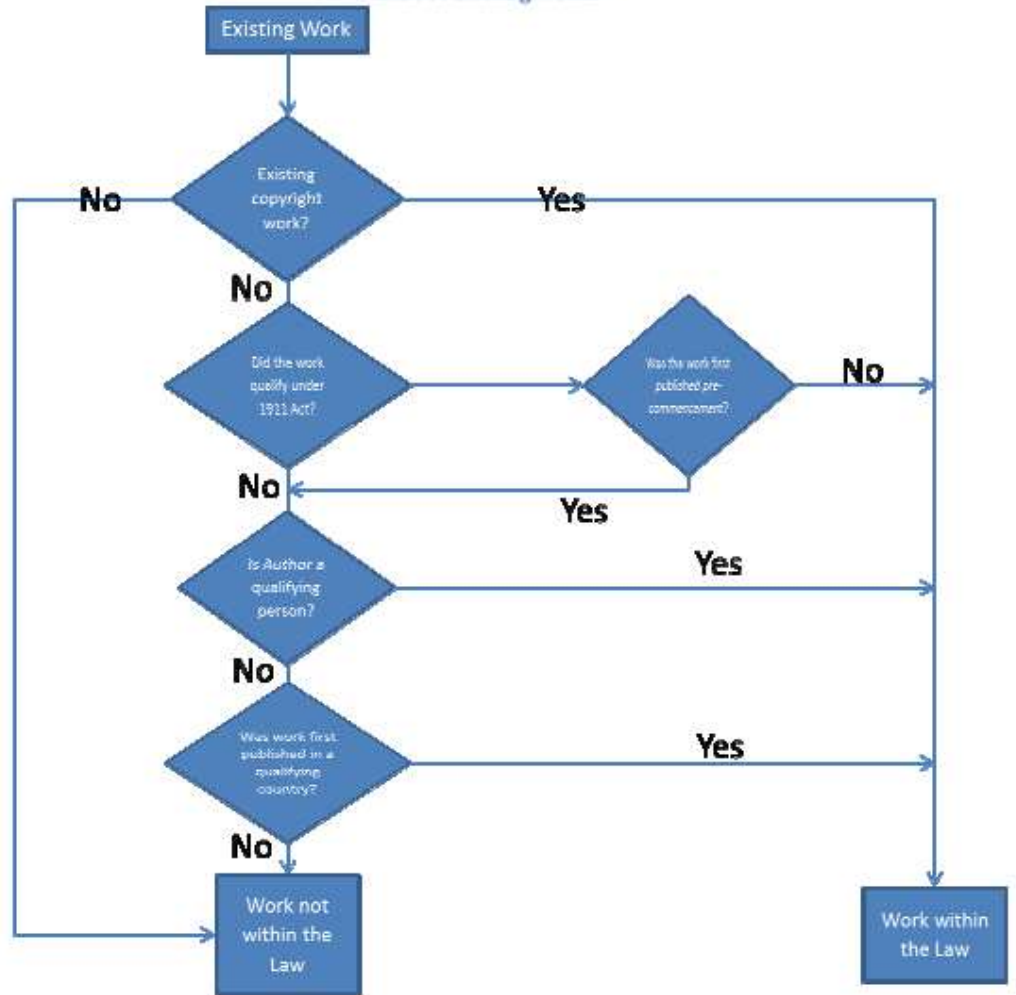


& (2)	of a statutory licence under the 1911 Act whereby record companies could use a musical work in a sound recording simply by serving notice of such use and paying the royalty. This could only be done for the second or subsequent use of the musical work. The provisions as drafted raise a number of questions.	<p>selected?</p> <p>ii. Royalties are to be set according to the ordinary retail selling price of the record. This provision has been outlawed in other contexts as in breach of competition law: is there an alternative basis?</p> <p>iii. How would these provisions apply to foreign works?</p>
Reg. 35		Why has this right been removed in respect of a person who is still alive after commencement?
Reg. 37	This provision concerns agreements made prior to commencement about future ownership of future copyrights; the provision states that any such agreement shall be of no effect. This may have the effect of defeating the intentions of parties who have entered into contract to this effect.	What is the rationale for the non-application of Article 119?
Reg. 42	The provision should read: "Any copyright and any term or condition of an agreement relating to the exploitation of <b>an existing</b> copyright work....."	Is this suggested amendment correct?
Reg. 43	The intent of this provision is to extend the life of compulsory licences granted in particular circumstances under the 1911 and which are still extant at commencement shall continue.	Is this provision compatible with international standards regarding permissible compulsory licences?
Reg.46 (2)	This references Article 139(3) which does not apply to sound recordings.	Why is this reference included?
Reg. 47 (2)	A literary work that may be licensed under the 1911 Act for the purposes of accessibility may also now involve a typographical arrangement. The latter was not a category of work recognised under the 1911 act and could therefore have been the subject of a licence.	Is there a case for deeming an existence licence for accessibility to cover the right in the typographical arrangement of the work as well as the work itself?
Reg. 48 (4)	The wording of this provision could be improved as follows: "The States Assembly shall, following commencement, be in the same position as regards <b>the use of existing copyright work</b> to which Article 182 applies by virtue of paragraph (1) as if it were the holder of a licence granted <b>for that use</b> by, as the case requires, the owner of the copyright in the work or the author."	Is this suggested amendment acceptable?

<b>Intellectual Property (Unregistered Rights) (Works of Foreign Provenance) (Jersey) Order 201-</b>		
Art. 1 (1)	Consider the following: "WIPO Copyright Treaty" means the WIPO Copyright Treaty done at Geneva, 2 <sup>nd</sup> to 20 <sup>th</sup> December 1996 "WPPT" means the WIPO Performances and Phonograms Treaty adopted at Geneva on 20 <sup>th</sup> December 1996.	Is there any significance in the different terminology?
Art. 1	EEA State is not defined other than in IPURL.	Is it necessary to define EEA State in the Order?
Art 3	There is recurrent reference to an individual being "resident in" a particular territory.	Are there any requirements attached to the notion of residence (e.g. lawfully, habitually)
<b>Intellectual Property (Unregistered Rights) (Miscellaneous provisions) (Jersey) Order 201-</b>		
Art 2 (3) (b)	The definition of peripatetic teacher could be improved as follows: " "peripatetic teacher" means a person employed by the States to give instruction to pupils of an educational establishment and who are not able to attend such educational establishment in person"	<ul style="list-style-type: none"> <li>i. Is this suggested amendment acceptable?</li> <li>ii. Is this provision intended to include remote instruction online?</li> </ul>
Art 3 (2) (a)		Can the declaration be submitted in electronic form?
Art 3 (2) (c)		How are these requirement intended to be verified?
Art 3 (2) (d)		What is the purpose of this provision (given that students will require the same materials at the same time)?
Art 8 (1)		<ul style="list-style-type: none"> <li>i. What is meant by an "encrypted transmission"</li> <li>ii. Why are encrypted transmission excluded?</li> </ul>
Schedule 3	This Notice of Seizure requires whoever makes it to specific in detail the nature of the goods seized. It should be sufficient to give a generalised description of the goods in question because precise information as to the nature of the goods in question may not be available at the point and time of seizure.	

Annex C

Flow Chart of Existing Works



**THE INTELLECTUAL PROPERTY (UNREGISTERED RIGHTS)  
(JERSEY) LAW 2011**

**RESPONSE FROM ECONOMIC DEVELOPMENT DEPARTMENT TO  
THE REPORT ON THE PROPOSED SUBORDINATE LEGISLATION  
WRITTEN FOR THE ECONOMIC AFFAIRS SCRUTINY PANEL**

Economic Development Department (EDD) welcomes the Report that has been prepared for the Economic Affairs Scrutiny Panel as it helpfully explores a number of important issues in the subordinate legislation. This legislation must in particular provide for a smooth transition from a very outdated copyright law to a modern and convention compliant legal framework for unregistered intellectual property rights. The overall assessment made on page 13 of the Report is generally positive and accurately recognises that parts of the subordinate legislation must necessarily be complex.

A number of detailed points and questions have been raised and these have been addressed in the comments made below. As a result of carefully considering the detailed analysis in Annex B of the Report, the Department has adjusted the transitional provisions to take on board one of the suggested drafting changes and to alter the policy on how a provision about compulsory licences under the 1911 Act is brought to an end. This is explained further in the Annex of this response.

**A. Policy**

**i. The transitional provisions**

The comments in the Report seem to be largely supportive of the policy position that has been taken in drawing up the Regulations which make transitional provisions. For example, EDD is pleased that the approach taken in the transitional provisions on term of protection has been recognised as sensible in avoiding undue complication which would have little practical effect. The recognition of the logic and practicality of the principles for States Assembly, States and Crown copyright, and works of foreign provenance, is also welcome.

Regarding the comment about the general approach to the policy, the first principle, which is about things which may be legal now but illegal under IPURL, is, of course, important in the situation where the exclusive rights in IPURL are more extensive than those in the 1911 Act. On subsistence of rights, it is certainly true that protection under IPURL will only arise where the requirements for protection are met, and this will include any variation to the requirements made in the Regulations. For example, Regulation 16 provides that existing copyright works do not need to be tested against the qualification requirements in IPURL because they will be deemed to qualify.

The comment about infringement of rights, and the position where there is an existing agreement and an act that is now the subject of an exception under IPURL, raises complicated issues. The Regulations do make some provision that would need to be considered, including Regulations 26 and 30, but the answer in any particular case would clearly depend on the terms of an existing agreement. Ultimately it would be for the courts to interpret what is and is not permitted. It also has to be remembered that in general exceptions to rights under IPURL can be overridden by contract, so it

would not be clearly appropriate to have any provision that required any existing agreement to be construed so as to, say, permit enjoyment of all the exceptions in IPURL. EDD recognises that the relationship between exceptions to rights and contracts is increasingly sensitive and it is for this reason that the provision in Article 44 of IPURL, which permits amendment to the provision on exceptions to copyright by Regulations, also permits amendment of the situations where an agreement that purports to prohibit or restrict an act within the scope of an exception is to be treated as void. This is an issue that is being explored in the UK at the moment. Regulations under Article 44 will be proposed to change provision in Jersey when this is appropriate.

Moral rights for performers have not been backdated because it was decided that doing this in Jersey would be even more problematical than in the UK (where rights were not, of course, backdated when introduced a few years ago). There are no intellectual property rights at all at the moment for performers in Jersey, but economic rights will be applied to performances taking place before commencement in order to comply with international standards. This backdating will, though, be qualified in various ways in order to minimise any problems that might otherwise arise. Backdating moral rights would have required extensive exploration of all the additional qualifications that would have to be made to deliver a fair result. There would inevitably still have been a danger that some unintended consequences would have been missed. Taking advantage of the possibility to not backdate moral rights is therefore arguably even more justified in Jersey than in the UK.

#### **ii. The application of IPURL to foreign works**

EDD welcomes the Report's conclusion that the policy positions taken in this Order are consistent with the obligations Jersey will assume when it becomes a party to the relevant international treaties and conventions.

#### **iii. The miscellaneous provisions**

There is a fuller explanation in the Annex as to why the suggested narrowing of the definition of "peripatetic teachers" is not appropriate. The Order does, moreover, limit the scope of who is included by providing that this only includes peripatetic teachers who are employed by the States. Abuse of the copyright exceptions that would then apply to peripatetic teachers should therefore not be an issue.

Regarding the declarations that must be made where people want copies of works for private study and research needs, these only apply where librarians do the copying and wish to be covered by the indemnity against infringement of copyright delivered by IPURL. The provision in IPURL and the Order has been discussed with Jersey Library and it is understood that a system of declarations is already in operation, so it seems fair to make sure that librarians there can in future benefit from the statutory indemnity in IPURL by setting out how this must work in practice. Librarians in other libraries in Jersey can operate under a similar system if the libraries want to put this in place. Librarians will still be able to make copies without declarations, although they would then not be covered by a statutory indemnity. The libraries can also decide that no copying will be done by librarians.

As has been noted in the comments in the Annex, it is currently expected that free-to-air public service broadcasts are the most likely type of broadcast where there is a

desire to make a copy for putting in an archive, but the provision in the Order can be amended in due course should this be appropriate.

## **B. Further questions and investigation**

Some of the issues identified in this section of the Report have already been answered in the above discussion of the comments in the Report on policy. The detailed points made in the Annex are also relevant. The following answers refer to these answers and points where relevant.

### **i. Policy**

The issue of existing agreements and exceptions under IPURL is answered above.

The reason for not according moral rights to performers for their performances given prior to commencement is also answered above.

The UK has made provision about peripatetic teachers very similar to that in the miscellaneous provisions Order (see the Copyright (Application of Provisions relating to Educational Establishments to Teachers) (No. 2) Order 1989 (SI 1989/1067). The justification for the provision being made in Jersey is explained above and in the Annex.

The provisions relating to libraries have been explored with Jersey Library in particular, and, as explained above, it is up to any other libraries to decide whether or not to implement the prescribed procedures for copying by librarians and so secure an indemnity for librarians against copyright infringement.

The nature of broadcasts that should be capable of being archived is discussed above and in the Annex.

The provision about notice of seizure implements the provision in Article 131 of IPURL, a provision which was in consultation drafts of the Law. No comments were received about problems with the provision. The provision does, moreover, copy provision in UK law. It is not, in any case, for law enforcement agencies to take the initiative when infringing copies are to be seized under this Article. Article 131 requires the copyright owner, or his or her agent, to give notice of the time and place of the proposed seizure to the Connétable of the parish in which the proposed seizure is to take place, but it is the copyright owner, or his or her agent, who then undertakes the seizure. The notice of seizure that is being prescribed in the miscellaneous provisions Order is then the notice that must be left at the place where a seizure takes place.

### **ii. Implementation**

Detailed comments on the issues raised are included in the Annex.

### **iii. Generally**

The work of Digital Jersey is expanding the interest in and understanding of the provision that will be made in the new Law. Those engaged in this work certainly believe that bringing the Law into force will be a milestone in encouraging diversification of the Island's economy in the area of e-commerce in particular.

The Department is not aware of any negative reaction. A number of UK collecting societies were consulted about drafts of the transitional provisions and the two Orders, including PRS for Music (which includes MCPS). No comments were received from this collecting society. It is not thought that there is anyone currently enjoying a statutory licence under the 1911 Act in any case, but it is still appropriate for the avoidance of doubt to make fair transitional provisions phasing any licences out within a year from commencement.

The Orders are believed to deal appropriately with the relevant issues but they can, of course, be amended and/or revoked and replaced as necessary. IPURL includes a number of provisions permitting changes to the law by Regulations, including to make changes required by international conventions or to match EU law, and to adjust exceptions to rights. The last of these is relevant to some of the work being undertaken in the UK at the moment as a result of the Hargreaves Review of intellectual property and growth. Regulations will be brought forward to amend IPURL in due course in the light of this activity or otherwise as appropriate.

ANNEX

*Note: Economic Development Department's (EDD) comments on the points raised in Annex B of the Report are indicated in the third column of the following table, which otherwise copies Annex B of the Report*

Provision	Comment	Question/Proposal	Comments from EDD
<b>Intellectual Property (Unregistered Rights) Application, Transitional Provisions and Savings) (Jersey) Regulations 201-</b>			
<b>Part2</b>			
Reg.2(1)	Complexities arise with regard to the definition of “existing work”; “existing copyright work” and “work”. In common with normal copyright practice the expression “work” is not defined. The relationship of the expressions “existing work” and “existing copyright work” as it plays out elsewhere in the draft regulations could benefit from a tighter definition in this regulation. Equally there is reference elsewhere to other subject matter in which copyright subsists indicating that not only “works” qualify under IPURL.	See the proposal under Reg.19 below	<p><i>It is important to be able to distinguish between existing works and existing works in which copyright subsists. For example, in Regulation 16 it would not be appropriate to provide for all existing works to be deemed to satisfy the qualification requirements as that would include works having their origin in all countries, including non-convention countries. Regulation 16 must therefore apply to only existing works in which copyright subsists before commencement. The UK made these distinctions in its transitional provisions, such as by providing that paragraph 35 of Schedule 1 of the CDPA only applies to works in which copyright subsisted immediately before commencement. The IPURL transitional provisions provide the necessary distinctions by defining an “existing copyright work” and then using this term rather than just an “existing work” where appropriate.</i></p> <p><i>The reference to “other subject matter in which copyright subsists” in Regulation 3(2) is needed because under the 1911 Act sound recordings have copyright, but are not defined as “works”, and so there could be enactments, instruments and documents referring to copyright in things other than “works”. The second part of Regulation 3(2) does then require such references to be construed only as a reference to</i></p>



			copyright under Part 1 of IPURL or “works” in which copyright subsists under Part 1 as it is certainly true that under IPURL there is only copyright in “works”.
Reg.2(3) (c)(ii)	<p>i. It is not clear what is meant by “the photographs forming art of the film”. IPURL defines film as “a recording on any medium from which a moving image may by any means be produced.” Under the 1911 Act films were not protected as such; they were protected both as a series of photographs (artistic works) and as dramatic works. In the draft the possibilities are offered in the alternative; they should be offered as concurrent possibilities.</p> <p>ii. The expression “photograph” is defined as follows: “photograph” means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, <b>and which is not part of a film.</b></p> <p>It would appear that there is a definitional conflict with the use of the expression “photograph” in this context</p>	<p>i. Substitute “and” for “or” between (i) and (ii)</p> <p>ii. How can the definitional conflict of the use of the expression “photograph” be resolved?</p>	<p>i. Existing films may have copyright both as dramatic works and a series of photographs, but some films may not be dramatic works and so may only have copyright in the photographs forming part of the film. The interpretation in Regulation 2(3)(c) cannot therefore indicate that both (i) and (ii) will apply. The use of the word “or” in this definition does not, moreover, prevent both (i) and (ii) applying and this is confirmed in Regulation 10(2) which ensures that there can be copyright in a film as a dramatic work as well as copyright in photographs that form part of a film. (Note that the word “or” is also used in paragraph 2(c) of Schedule 1 of the CDPA and then in paragraph 7, just as in Regulation 10, it is clear that there may be copyright in an existing film both as a dramatic work and a series of photographs.)</p> <p>ii. Regulation 10(2)(b) ensures that the photographs forming part of a film that is an existing work are to be treated as <u>not</u> part of a film. They are therefore not prevented from being within the scope of the term “photograph” as defined in Article 2(1) of IPURL because this Regulation varies the part of that definition that would otherwise require a photograph to be not part of a film in order to have copyright under IPURL.</p>

Reg.3(2) & (4)	There is reference to “document”; it is not clear what this refers to.	Provide clarification as to what is meant by “document”	<i>The inclusion of the reference to “document” is intended to give broad interpretation to this Regulation delivering continuity of law. The phrase “enactment, instrument or other document” is wholly inclusive so that not only legislation but also any agreements, contracts, licences, bequests and so on are covered and can continue to have meaning when there is a direct or indirect reference to copyright under the 1911 Act. The same term is used in the UK transitional provisions in paragraph 4(2), (4) and (5) of Schedule 1 of the CDPA.</i>
Reg.4	It is not clear what is meant by “things in existence” and “things coming into existence” and thus the purpose of the regulation generally is not clear.	Clarify the provision generally	<i>Again, this Regulation is intended to deliver a broad principle about application of Part 1 of IPURL to existing things. The Regulation should not, for example, be limited to just existing “works” as the law needs to be construed in relation to copies of works, infringing copies, agreements and so on. Rather than try and define what is covered by the reference to “things” and potentially leave out something important, it is better to have a general term that can encompass anything. This is the approach that was taken in the UK transitional provisions in paragraph 3 of Schedule 1 of the CDPA.</i>
Reg.5	This set of regulations establishes the general principle for establishing qualification of existing works under IPURL. The provisions need to be read as whole and as such are complex. A flow chart setting out their application is attached as Appendix C.	Is the sequence set out in the flow chart correct?	<i>A flow chart is helpful, although it is hard to include all the relevant detail to ensure that an accurate result is arrived at. The flow chart that has been provided in the report is not, though, in all respects accurate. A revised flow chart is attached hereto. The chart does, though, only cover the rules in Regulations 5 and 16 of the transitional provisions. Other Regulations and IPURL provisions will also be relevant to the copyright status of an existing work.</i>

Reg.6	The purpose of this provision requires clarification.	What element of Part 1 are intended to have effect here? What is the reference to a “work” in the revised definition?	<i>As the explanatory note says, this Regulation ensures that whether or not something is “unauthorised” if done before commencement is to be determined in accordance with the 1911 Act. The definition in this Regulation refers to things done otherwise than “by or with the consent or acquiescence” of the copyright owner, rather than as in the definition in Article 2 of IPURL which refers to things done otherwise than “by or with the licence” of the copyright owner. This definition, to apply to things done before commencement, is the terminology used in section 35(2) of the 1911 Act. The meaning of “unauthorised” is then important to deliver the right meaning in the definition of “publication” in Article 9 of IPURL where paragraph (6) requires unauthorised acts to not be taken into account. The meaning of “publication” is then in turn important to, for example, the meaning of certain exceptions to copyright, such as that in Article 87. The reference to “work” is needed because this is the term that must then be construed in IPURL where there is only copyright in “works”, but Regulation 3(2) will have in any case ensured that other subject matter protected under the 1911 Act reads onto this term.</i>
Reg.7(1)	Reference to “with the law in force”	Is this intended to include foreign law?	<i>The new law is the law for Jersey and so this reference is only to applicable law in Jersey. That would therefore only include foreign law if the law in force in Jersey at the relevant time had provided for authorship to be determined in accordance with the law of another place.</i>
Reg.7(3)	i. The 1911 Act provides that the author of a photograph is the owner of the negative from which the photograph was derived. The proposed revision places the treatment of photographs on the same	i. Is the decision to retroactively change the status of existing photographs justified?	i. <i>Who is the author of a photograph is only changed by this Regulation for the purposes of determining the term of protection. For all other purposes, the author remains as defined in the</i>

	<p>basis under IPURL as other artistic works - retroactively.</p> <p>ii. The question of term in an existing photograph is only relevant where the work photograph qualifies for protection under IPURL.</p>	<p>ii. Should the reference be to “an existing <b>copyright</b> work that is a photograph”?</p>	<p><i>1911 Act for existing photographs. If there were no adjustment to who is the author for the purposes of determining the term of protection, the terms of protection delivered in Jersey would vary from those applying in the UK.</i></p> <p>ii. <i>The reference here is correct in referring to an existing work rather than just an existing copyright work so that this includes works which do not have copyright until on or after commencement. The rule in paragraph (1) of this Regulation would otherwise apply the 1911 Act provision on authorship to these works, including for the purposes of determining term of protection.</i></p>
Reg.10(2)	<p>This provision deals effectively with the issues raised under Reg.2(3)(c)(ii). However, an issue remains as to how a film, made before commencement that was neither an original dramatic work nor a series of photographs (because of the technical medium in which it was made) can qualify for protection under IPURL.</p>	<p>Is there a case for establishing rights under IPURL in an existing work that were it made after commencement would qualify as a film?</p>	<p><i>Changing the type of copyright in existing works that are films would be complicated as issues such as how to determine authorship and first ownership of copyright in a way that is not unfair to those who currently satisfy the rules on these things would need to be set out. Copyright in films as dramatic works and/or a series of photographs does not clearly leave out protection for any films given the broad meaning of the term “photograph”.</i></p>
Reg.11	<p>Protection of broadcasts made before commencement depends on their independent status as either films or sound recordings. This again may subject qualification under IPURL to considerations of a technical nature.</p>		<p><i>It is true that there will be no copyright in a broadcast made before commencement where the broadcast has not been recorded, but, if there is no record of what is to be protected, there seems to be little value in the copyright. It is believed that the broad definitions of what can be film and sound recordings of broadcasts, and so can attract copyright, will essentially mean that existing broadcasts which have been recorded can have copyright.</i></p>

Reg.15		How does this provision relate to Reg. 5(2)(b) – qualification of a foreign work based on place of first publication?	<i>This Regulation means that there is no backdating of the meaning of “publication” for buildings constructed before commencement and so there can be no qualification for copyright for foreign buildings as a result of construction somewhere before commencement. Paragraph 45 of Schedule 1 of the CDPA made the same sort of provision in the UK.</i>
Reg.17	The amendment is explained as maintaining the existing basis of qualification in respect of existing sound recordings and photographs.	Is this the correct policy decision given that it establishes two distinct regimes for works of significant commercial importance? Would it not be simpler to allow for both the new and old bases for qualification?	<i>Providing a second (new) basis for qualification would potentially bring things into copyright which do not currently have copyright and there would then need to be additional transitional provisions to deal with this. The works of foreign provenance Order that is to be made, which will apply copyright to material having its origin in much of the world, will mean that, even with the rule about qualification as in this Regulation for existing sound recordings and photographs, there will be very few existing sound recordings and photographs that do not get copyright protection in Jersey from commencement, even if they have no copyright now.</i>
Reg.19	This – and other regulations – raises again the question of distinguishing between “existing works” and existing copyright works”. There is the potential for confusion.	Would it be appropriate to provide that existing works that only qualify under IPURL pursuant to Articles 21(2)(d) and 22 of IPURL (certain works of foreign origin) are deemed to be existing copyright works? As a consequence all subsequent references to existing works that fall to be dealt with under IPURL and the transitional provisions may be referred to, in the	<i>Regulation 19 is important, specifying the duration of copyright in all existing works and it needs to apply to those which have copyright before commencement, ie those within the definition of “existing copyright works”, and those which have copyright from commencement or later, including as a result of the provision made in the works of foreign provenance Order. As explained above in the comments about Regulation 2(1), it is important to be able to distinguish between these as not all the Regulations should apply to all existing works rather than just existing copyright works. It is not believed that there would be greater clarity by deeming</i>

		interests of clarity, as existing copyright works.	<i>existing works which do not have copyright before commencement to be “existing copyright works”.</i>
Reg.23	This is a difficult provision given that broadcasts made before commencement do not enjoy copyright protection. The proper analysis would appear to be that if the original broadcast did not qualify for protection then the repeat should not either. Alternatively, the repeat broadcast made after commencement should enjoy the full term of protection under IPURL.	How are repeat broadcasts made after commencement to be treated under IPURL?	<i>The option of not giving copyright to a repeat of a broadcast first made before commencement was considered, as was the option of giving a repeat broadcast made after commencement the full term of copyright for a broadcast, but those solutions would respectively lead to fewer works with broadcast copyright compared to the UK and broadcasts with a longer term of copyright than in the UK. The approach taken in this Regulation of giving repeats of broadcasts originally made before commencement in effect copyright for whatever of the term of protection might be left if the original broadcast had attracted copyright is believed to be a reasonable compromise between these two positions.</i>
Reg.28(2) to (4)	These provisions are difficult to understand.	Clarification is needed as to the intent and application of these provisions.	<i>The policy being delivered by this Regulation is quite complicated, but it is believed that, if the rules are followed in the order they are set out, the drafting does deliver the right result on how rights might be limited. The possible limitation on rights that might apply to existing works that are foreign sound recordings is matched by the provision in the works of foreign provenance Order for new foreign sound recordings that are brought into copyright by that Order. It was considered appropriate that the rules should be in the Regulations for existing works, including existing works that only qualify for copyright on or after commencement as a result of the Order. The limitations on rights depend on whether or not countries belong to just the WTO, or the WPPT but not the Rome Convention. Equivalent provision is provided in the UK Orders applying</i>

			<i>copyright to other countries. The Regulation does in addition provide for Guernsey and the Isle of Man to be treated the same way as Rome Convention countries on the understanding that these Islands do or will treat Jersey the same way in their laws about copyright.</i>
Reg.30(1)	The wording should be amended to read: “A provision of Chapter 4 of Part 1 that, following commencement, would permit anything <i>to be</i> done.....”	Is this suggested amendment correct?	<i>Statutes are always speaking. They do not refer to things as done in the future or past unless there is a specific reason for doing so. There is not a specific reason in this Regulation and so it is not appropriate to change the drafting.</i>
Reg.31(1)	The wording of this provision should read: “Where the author of an <i>existing copyright work being</i> a literary, dramatic, musical or artistic work.....”	Is this suggested amendment correct?	<i>The suggestion here is correct and this amendment has now been made to the Regulations.</i>
Reg.31		From a general perspective is this provision in accordance with the transitional provisions associated with the UK Copyright Act 1956? Has its impact on qualifying works of foreign origin been considered?	<i>This provision is in line with the transitional provisions in paragraph 27 of Schedule 1 of the CDPA. Works having their origin in other countries that have copyright under the 1911 Act as a result of Orders in Council that were made under that Act are subject to the provisions in the 1911 Act on reversionary interest, just as works having their origin in Jersey are, and so the provisions in this Regulation will also apply to any such works where the circumstances set out in the Regulation apply.</i>
Reg.33(1) & (2)	These provisions relate to the existence of a statutory licence under the 1911 Act whereby record companies could use a musical work in a sound recording simply by serving notice of such use and paying the royalty. This could only be done for the second or subsequent use of the musical work. The provisions as drafted raise a number of questions.	<ul style="list-style-type: none"> <li>i. Why was the period of 1 year selected?</li> <li>ii. Royalties are to be set according to the ordinary retail selling price of the record. This provision has been outlawed in other contexts as in</li> </ul>	<ul style="list-style-type: none"> <li>i. <i>Terminating any statutory licences under the 1911 Act after a transitional period is reasonable and the term of 1 year matches what was chosen in the UK for terminating similar statutory licences under the Copyright Act 1956 (see paragraph 21 of Schedule 1 of the CDPA).</i></li> <li>ii. <i>It would have been possible for anyone to challenge the 1911 Act provision as</i></li> </ul>

		<p>breach of competition law: is there an alternative basis?</p> <p>iii. How would these provisions apply to foreign works?</p>	<p><i>contrary to any other law in Jersey, including competition law, but that does not seem to have happened. It is likely that there is no activity in Jersey under the 1911 Act provision in any case, but it is still appropriate to bring the provision to an end in an orderly manner as in this Regulation in case there is a statutory licence in existence.</i></p> <p>iii. <i>Where foreign works have copyright under the 1911 Act as a result of Orders in Council made under that Act, this provision of the 1911 Act would in principle apply to them in the same way it applies to works having their origin in Jersey.</i></p>
Reg.35		<p>Why has this right been removed in respect of a person who is still alive after commencement?</p>	<p><i>According to section 5(1)(a) of the 1911 Act, the commissioner is the first owner of copyright in a photograph and so has a right to privacy by virtue of being able to decide not to exercise his or her rights under copyright. Films are, of course, also protected by copyright as photographs under the 1911 Act and this type of copyright is preserved for existing works by Regulation 10. Regulation 18 maintains the 1911 Act rules on ownership for existing works and so the right to privacy in Article 113 is not needed for photographs taken or films made before commencement.</i></p>
Reg.37	<p>This provision concerns agreements made prior to commencement about future ownership of future copyrights; the provision states that any such agreement shall be of no effect. This may have the effect of defeating the intentions of parties who have entered into contract to this effect.</p>	<p>What is the rationale for the non-application of Article 119?</p>	<p><i>This Regulation does not take away from the possible effect of any existing agreements. The intention of the Regulation is to not retrospectively apply any special interpretation to existing agreements, which would be the case if the application of Article 119 were to be backdated.</i></p>



Reg.42	The provision should read: “Any copyright and any term or condition of an agreement relating to the exploitation of <b>an existing</b> copyright work.....	Is this suggested amendment correct?	<i>The condition that the licence or agreement relates to an existing copyright work is imposed by paragraph (a) of this Regulation as currently drafted and so this amendment is not needed to deliver the effect indicated by this suggested drafting change.</i>
Reg.43	The intent of this provision is to extend the life of compulsory licences granted in particular circumstances under the 1911 and which are still extant at commencement shall continue.	Is this provision compatible with international standards regarding permissible compulsory licences?	<i>It is very likely that there are no compulsory licences in Jersey that are dealt with by this Regulation, but it is still appropriate to make provision about them in case any such licences do exist. It is agreed that such compulsory licences are contrary to international standards, although the relevant international treaties and conventions do permit some flexibility regarding bringing law that applies to existing works into line with those standards. It has, however, now been decided that this Regulation should be amended to terminate any existing compulsory licences after a transitional period of up to 1 year from commencement rather than allow them to continue, including for any period of extended copyright.</i>
Reg.46(2)	This references Article 139(3) which does not apply to sound recordings.	Why is this reference included?	<i>The offence defined in Article 139(3) applies to all works and so this will include sound recordings. The reference to Article 139(3) in this Regulation is therefore appropriate.</i>
Reg.47(2)	A literary work that may be licensed under the 1911 Act for the purposes of accessibility may also now involve a typographical arrangement. The latter was not a category of work recognised under the 1911 Act and could therefore have been the subject of a licence.	Is there a case for deeming an existence licence for accessibility to cover the right in the typographical arrangement of the work as well as the work itself?	<i>Regulation 12 provides that there is no copyright in any existing typographical arrangements and so there is no need to have a copyright licence in respect of such existing works in order to do something. If there is an existing licensing scheme which is to be amended to cover new works which can attract copyright in the typographical arrangement, then it would seem appropriate that such a modification should be subject to the requirement to notify it just</i>

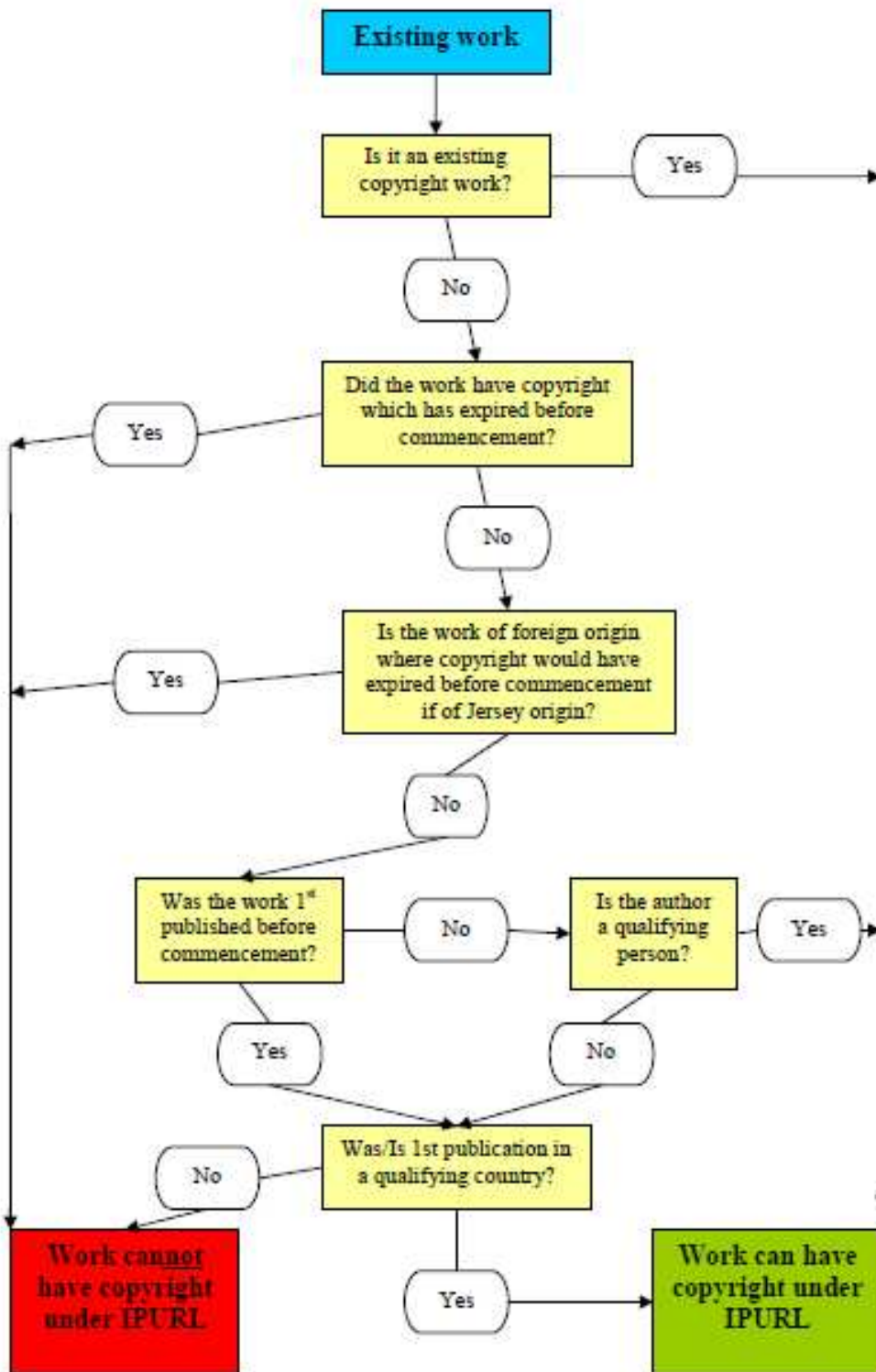
			<i>as any other modification will have to be notified to have effect as indicated in this Regulation. This does not cause any problems for not-for-profit bodies wanting to make accessible copies for visually impaired people as this will be permitted under the exception to copyright in Article 50 until such time as the licensing scheme has been modified and notified.</i>
Reg.48(4)	The wording of this provision could be improved as follows: "The States Assembly shall, following commencement, be in the same position as regards <b>the use of existing copyright work</b> to which Article 182 applies by virtue of paragraph (1) as if it were the holder of a licence granted <b>for that use</b> by, as the case requires, the owner of the copyright in the work or the author."	Is this suggested amendment acceptable?	<i>The drafting suggestion has been considered carefully, but it has not been adopted. Paragraph (1) of the Regulation, which is already referenced back by paragraph (4) and so which must be read in order to understand paragraph (4), is limited to existing works which have copyright. A reference to "use" may be confusing as it is not a term found in Article 182. Providing that a deemed licence permits any act which apart from paragraph (4) would be an infringing act is believed to deliver the desired result.</i>
<b>Intellectual Property (Unregistered Rights) (Works of Foreign Provenance) (Jersey) Order 201-</b>			
Art.1(1)	Consider the following: "WIPO Copyright Treaty" means the WIPO Copyright Treaty done at Geneva, 2nd to 20th December 1996 "WPPT" means the WIPO Performances and Phonograms Treaty adopted at Geneva on 20th December 1996.	Is there any significance in the different terminology?	<i>There is no significance in the different terminology. It is not uncommon for international treaties and conventions to be identified in more than one way. The different terminology is, though, being considered carefully and will, if appropriate, be amended as necessary before the Order is made by the Minister.</i>
Art.1	EEA State is not defined other than in IPURL.	Is it necessary to define EEA State in the Order?	<i>It is not necessary to define "EEA State" as the definition in IPURL will apply.</i>
Art.3	There is recurrent reference to an individual being "resident in" a particular territory.	Are there any requirements attached to the notion of residence (e.g. lawfully, habitually)	<i>The test used here is the same as in Article 21 of IPURL on qualification by reference to author, which is in turn the same as the test in section 154 of the CDPA, so it would not be appropriate to further define it in the Order.</i>

<b>Intellectual Property (Unregistered Rights) (Miscellaneous Provisions) (Jersey) Order 201-</b>			
Art.2(3)(b)	<p>The definition of peripatetic teacher could be improved as follows:</p> <p>“peripatetic teacher” means a person employed by the States to give instruction to pupils of an educational establishment and who are not able to attend such educational establishment in person”.</p>	<p>i. Is this suggested amendment acceptable?</p> <p>ii. Is this provision intended to include remote instruction online?</p>	<p>i. <i>It would not be acceptable to limit the definition of “peripatetic teacher” as suggested as such teachers may have been employed by the States to give instruction to pupils who are not currently enrolled at any educational establishment.</i></p> <p>ii. <i>“Peripatetic teachers” can only undertake the activity covered by the exceptions to copyright benefitting educational establishments, and then, in the case of Articles 58 and 59, only to the extent that the activity is not licensed if such teachers are not covered by a licence. The relevant exceptions do not at the moment permit remote instruction online, but adjusting the exceptions to permit some such use is an issue that the UK is looking at. Changes can be made to IPURL in due course if appropriate by Regulations as permitted by Article 44.</i></p>
Art.3(2)(a)		Can the declaration be submitted in electronic form?	<i>The requirement for a declaration “in writing” and “signed” will be interpreted as provided for in the Electronic Communications (Jersey) Law 2000 with respect to electronic declarations.</i>
Art.3(2)(c)		How are these requirement intended to be verified?	<i>These requirements have applied and worked well in the UK for many years and similar procedures have been followed in Jersey Library even though there is not currently any statutory underpinning. Where copying is being done by librarians for people, which is what this provision is about, signed declarations are kept for some time and so can be checked where a librarian has any suspicion that the same person is seeking more than one copy of something.</i>

Art.3(2)(d)		<p>What is the purpose of this provision (given that students will require the same materials at the same time)?</p>	<p><i>Articles 61 and 62 of IPURL provide a librarian with an indemnity against infringement of copyright where the relevant rules are followed and they make copies for other people claiming to want copies for research or private study. The provisions therefore mirror what an individual can do for themselves under Article 46 of IPURL. Where a number of students require the same material at the same time, any copying should be done under Article 59, or the relevant licensing scheme that can override this exception. Permitting librarians to make copies of the same thing for a number of students under Articles 61 and 62 would therefore undermine right-holders' ability to override such copying under an exception by licensing the copying.</i></p>
Art.8(1)		<p>i. What is meant by an "encrypted transmission".</p> <p>ii. Why are encrypted transmissions excluded?</p>	<p><i>i. Article 4(3) of IPURL is relevant to the meaning of "encrypted transmission".</i></p> <p><i>ii. The broadcasts that are most relevant for placing in an archive in Jersey are the public service broadcasts that are about Jersey or made in Jersey. Encrypted transmissions can, of course, usually only be received after agreeing a contract and that could be negotiated to permit archiving if appropriate, but could also be used to prevent archiving even if provision were made here to permit archiving. If it should at some point seem important to permit archiving of encrypted broadcasts under Article 103 of IPURL, the provision in this Order can be adjusted. Regulations could also be made under Article 44(2) of IPURL if appropriate to prevent a contract from prohibiting enjoyment of the exception in Article 103 if it were to apply to encrypted broadcasts.</i></p>

Schedule 3	This Notice of Seizure requires whoever makes it to specific in detail the nature of the goods seized. It should be sufficient to give a generalised description of the goods in question because precise information as to the nature of the goods in question may not be available at the point and time of seizure.		<i>The power given to right owners to seize infringing goods being sold at car boot sales and similar locations is important given the occasional nature of such places, but it would be unfair to the person selling goods to permit seizure of goods of a general description rather than goods that can be identified as infringing copies or illicit recordings. If right holders wish to use this power of seizure rather than apply to the Court for an order for delivery up under Article 129 or 315, they will therefore need to be able to identify which goods are infringing copies or illicit recordings and not seize goods which are in fact legal.</i>
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Flowchart to determine possibility of copyright in existing works



**The Intellectual property (Unregistered Rights) (Jersey) Law 2011**

**Response from the Economic Development Department to the Report on the Proposed Subordinate legislation written for the Economic Affairs Scrutiny Panel**

**Final Comments for the Economic Affairs Scrutiny Panel**

**General Matters**

The Economic Development Department has produced a comprehensive and detailed response (“the Response”) to the report (“the Report”) earlier produced for the Economic Affairs Scrutiny Panel.

In general, the thoroughness of the Response is to be welcomed given the complexity of the subject matter. Important clarifications has been given both as to the substance of the proposed subordinate legislation and the policy decisions underlying the proposals.

The Response proceeds on a number of bases for answering the issues identified in the Report:

- UK precedent and in particular the analogous provisions of the Copyright, Designs and Patents Act 1988
- Compliance with international standards and requirements
- Detailed application of the provisions of the proposed subordinate legislation
- The need for practical solutions that are as straightforward as possible
- Existing practice within Jersey.

It is important to note that in relation to certain of the proposed regulations within the subordinate the Report had sought to establish that due consultation had been conducted with interested parties. The Response makes clear that on all these issues consultation had indeed been conducted.

The Response acknowledges that copyright law is constantly evolving. Copyright reform is known to be a key agenda item within the European Commission and as the Response makes clear, studies are also underway in the UK. One area that is generally under consideration is the possible extension of exceptions and limitations to copyright. The Response highlights the possibility of making further, incremental changes to IPURL in accordance with Article 44.

**Specific Matters**

The Response contains detailed comments on each of the points highlighted in the Annex to the Report. These are considered in the Annex.

**Conclusion**

IPURL as implemented through the subordinate legislation constitutes a modern and comprehensive legal framework for the development and exploitation of unregistered intellectual property rights which should place Jersey on equal footing with its international trading partners.

## Annex

PROVISION	FINAL COMMENT
<b>Intellectual Property (Unregistered Rights) Application, transitional Provisions and Savings) (Jersey) Regulations 201-</b>	
<b>Part 2</b>	
Reg.2(1)	The Response cites the comparable provision in Copyright, Designs and Patents Act 1988 (“CDPA”). The Report’s proposal (under Reg.19) is rejected. The relationship between the use of the expressions “existing copyright work” and “existing work” is explained. No further comment required.
Reg.2(3)(c)(ii)	The Response links the interpretation of this regulation to that of Reg.10(2) as noted in the Report. Reference is again made to comparable treatment in the CDPA. No further comment required.
Reg.3(2)&(4)	The Response clarifies the use and the scope of the expression “document” with again, reference to the CDPA. The use is intended to include a wide range of documentation and legal instruments. No further comment required.
Reg.4	The Response clarifies the expression “things in existence” and “things coming into existence”. The intent is explained, as under CDPA, to have a broadly applicable provision rather than seeking to specify particular instances. No further comment required.
Reg.5	The Response acknowledges the value of explaining the qualification for protection of existing works through the use of a flow chart. A new flow chart is provided which adds further refinement to that provided in the Report. No further comment required.
Reg.6	A thorough explanation is given in the Response to explain first, that the reference to “unauthorised” as applied to an act occurring before commencement is to be interpreted according to the 1911 Act and second, the impact of this provision on other provisions of IPURL, in particular of “publication”). No further comment required.
Reg.7(1)	The Response clarifies that “author” is to be construed in accordance with Jersey law. No further comment required.
Reg.7(3)	The Response clarifies that the provision in question is to ensure alignment with UK law. It further rejects the Report’s suggestion that the provision refer to existing copyright works to leave open the possibility of including works that do not have copyright until or after commencement. No further comment required.
Reg.10(2)	The Response does not, with respect, respond adequately to the proposal in the Report merely citing potential but unspecified difficulties with the approach suggested.
Reg.11	Again, this is a complex area and the Response does not provide a fully compelling answer. The nature of copyright in films and sound recordings is different in a number of aspects from that in broadcasts. On balance however the position maintained in the Response is probably the most practical.



Reg.15	The Response provides a clarification based on precedent in the CDPA. No further comment required.
Reg.17	The Response points to the necessary balance between adding further transitional complexities and the limited benefit in terms of protection therefrom. No further comment required.
Reg.19	The Response rejects the suggestion, offered to assist with clarity, to deem certain foreign works qualifying for protection under the IPURL as existing <i>copyright</i> works. It is assumed – although not stated as such – that this is to maintain the firm distinction between “existing copyright works” and “existing works”. This perhaps falls short in the event of the level of clarity and simplicity sought in the provisions.
Reg.23	The Response clarifies that the solution adopted was one of considered compromise. This respectfully seems the correct approach.
Reg.28(2)–(4)	The Response justifies the complexity of drafting as referenced in the Report as in line with the corresponding UK provisions. No further comment required.
Reg.30(1)	The proposal in the Report is rejected. No further comment required.
Reg.31(1)	The proposal in the Report is adopted. No further comment required.
Reg.31	The Response satisfactorily answers the questions raised in the Report. No further comment required.
Reg.33(1)&(2)	The Response references the provisions of CDPA as precedent for what is proposed and the approach seems generally sound and reasonable. That said, it is not inconceivable that certain interests may wish to take advantage of the opportunity offered for the one year transitional period if favourable compulsory licence terms are available in Jersey.
Reg.35	With respect, the Response appears to confuse the moral right aspects of copyright with the economic rights. This provision should be revisited.
Reg.37	The Response provides a clear explanation of the intent of the regulation in question. No further comment required.
Reg.42	The Response provides a satisfactory clarification. No further comment required.
Reg.43	The Report challenged the possible conflict of continuing compulsory licences with Jersey’s anticipated international obligations. The Response accepts this and provides for the termination of any such licences within one year from commencement.
Reg.46(2)	The Response provides a satisfactory explanation. No further comment required.
Reg.47(2)	The Response provides a satisfactory explanation. No further comment required.
Reg.48(4)	The Response provides a satisfactory explanation. No further comment required.

<b>Intellectual Property (Unregistered Rights) (Works of Foreign Provenance) (Jersey) Order 201-</b>	
Art.1(1)	The Response takes up the issues raised in the Report as to the use of different terminology; changes may be made prior to the making of the Order if considered appropriate.
Art.1	The Response provides a satisfactory explanation. No further comment required.
Art.3	The proposal in the Report is rejected by the Response based on the model of the CDPA.
<b>Intellectual Property (Unregistered Rights) (Miscellaneous Provisions) (Jersey) Order 201-</b>	
Art.2(3)(b)	The Response rejects the proposed amendment in the Report citing occasions where peripatetic teachers serve pupils who are not enrolled at any educational establishment. This seems logical. The Response also contemplates the possibility of further regulation to allow for the extension of the provision to remote online instruction. Again, this is a sensible approach and one in line with possible developments in the UK.
Art.3(2)(c)	The Response responds affirmatively to the enquiry in the report regarding submission in electronic form. No further comment required.
Art.3(2)(c)	The Response cites experience in both Jersey Library and the UK in support of the original proposition. This is satisfactory. No further comment required.
Art.3(2)(d)	The Response provides a useful clarification of the way the regulation preserves the distinction between the indemnity for a librarian effectively being allowed to do what an individual copyright owner can do and the mass copying of materials under licence from the appropriate licensing agency. No further comment required.
Art.8(1)	Essentially, the Response provides that further provision can be made to allow for the archiving of encrypted broadcasts if and when the decision is taken to do so. No further comment required pending a new policy determination.
Schedule 3	The response provides a full and helpful explanation of the provision in question. No further comment required.