# Intellectual Property Office: Extension of public performance rights to foreign nationals

**Introduction**

The Alliance for Intellectual Property is a unique association of 23 organisations representing IP-rich businesses and creators – sectors that continue to grow and outperform the wider economy. Our members include representatives of the audio-visual, music, toy and games, sports rights, branded manufactured goods, publishing, retailing, image, art and design sectors. We share a collective interest in ensuring that Intellectual Property (IP) rights, which deliver such significant benefits to so many individuals across the UK, are recognised by policymakers for the value they deliver, and that a legislative regime exists that enables this value and contribution to be fully realised.

# We are delighted to provide a response to the Intellectual Property Office’s consultation ‘Extension of public performance rights to foreign nationals.

# Summary

# The interaction between the UK’s international copyright treaty obligations and the UK’s IP framework is undoubtedly complex. It is, however, important to recognise that what might appear to be minor changes can have significant impacts on the UK creative industry eco-system particularly in relation to investment. Stability in the regime is vital to support long-term investment decisions and therefore change must be considered very carefully and only in circumstances where there is absolute clarity that such changes are required.

# It is important that the UK recognises its commitments under the international treaties which it ratified whilst ensuring that it retains maximum negotiating flexibility when undertaking bi-lateral negotiations with third countries and to ensure it supports the UK’s creative industries. We believe this can be achieved whilst maintaining its place as a standard bearer for the interpretation and application of these treaties.

# It is our view that no change in the current regime is required to ensure conformity with the UK’s international copyright treaty obligations. There is, therefore, no common agreement that change is required and if any changes were to be made, it would not retain the confidence of many rightsholders. The basis of that view is that:

1. The CPTPP requires countries to ratify the WIPO Performance and Phonograms Treaty.  The UK ratified the treaty many years ago.
2. The UK fulfils its treaty obligations by protecting performers on the basis of reciprocity (triggering of which does not require any actions by the government based on Article 4(2) of the WPPT). The main practical effect is that US performers are not entitled to receive equitable remuneration from sound recording copyright owners in the UK remuneration. That the UK offers more generous protection to sound recording copyright owners (by protecting all sound recording on the basis of the “simultaneous publication criterion without applying reciprocity) is allowed under the WPPT.

# The IPO in its consultation makes a number of references to the impact its options might have in relation to US labels. This fundamentally misunderstands how the current flows of money from UK performance rights operates. The major record labels are in fact global labels with operating companies in the UK. A significant proportion of royalties that get paid to producers for US content is collected by the UK operating company and is spent in the UK investing in British talent. Any change to widen access to the pool of UK royalties will, therefore, have a direct impact on investment by global labels in UK talent.

# We continue to be open to dialogue around the legal advice the Government has received in relation to the basis of the consultation and seeking to find ways to ensure that if it continues to press forward with its changes, they can be subsequently restricted to maintain the status quo which is vital for investment in UK artistry.

# Detailed response

**Option 0: maintain the status quo**

*This option would mean maintaining the effect of existing law. Foreign producers and foreign performers would continue to be subject to different rules on eligibility for PPR. This is the counterfactual against which other options are assessed.*

***Legal basis***

We are very clear that no change to the legislation is required to comply with the UK’s international treaty obligations. We have set out the basis for that view bellow.

**The Rome Convention**

The Rome Convention allows states to grant national treatment to record companies and performers. However, Article 16 of the Rome Convention allows contracting states to limit that national treatment, by filing declarations with WIPO that it will not pay foreign record companies and performers. The UK has already filed such declarations. Accordingly, the UK is not obliged to protect record companies or performers from (a) non-contracting states (such as the US, which has not ratified the Rome Convention), or (b) from states that have ratified the Convention but who do not provide ER to UK performers.

**The WPPT**

As to the WPPT, Article 15 allows contracting countries to file reservations. However, unlike the Rome Convention, the WPPT does not require contracting parties to file a reservation to trigger the application of reciprocity. Instead, under Article 4, a contracting country can match the reservations of another contracting country (or technically speaking can automatically apply ‘material reciprocity’). Accordingly, if foreign right holders are nationals of a country that has made reservations under Article 15, then they are not eligible to enjoy protection in another country irrespective of whether or not that other country has itself filed a reservation.

**The RAAP Decision**

We understand there may also be considerations relating to a legal case called the RAAP decision in the EU. The UK can use its discretion as to whether to fully align its law. The UK law relating to equitable remuneration R (s.182D of CDPA) has been in force for a substantial period of time, including during UK membership of the EU, and there were no complaints about ER reciprocity. Given that the UK has now left the EU, UK courts are free to deviate from the court’s interpretation of how the UK’s international treaty obligations are interpreted.

***Economic impact***

The other options in the consultation could have a significant impact on the UK music industry in particular in the following ways:

1. **Displacement** – It would create a substantial catalogue of essentially free, high-quality, music – with broadcasters, shops, and nightclubs etc. being able to play music without paying licence fees; and potentially stop playing UK music at all.

2. **Many UK artists would lose income** – Material reciprocity would mean that UK performers and artists who play on, for example, US recordings would lose income, because the recordings on which they perform would have no ER protection. UK sessions musicians are high quality and regularly play on US recordings. In addition, many UK featured artists are contracted to US labels. It will also as a result affect UK songwriters.

3. **Loss of investment in UK talent** – Under industry practice, UK affiliates or licensees of global labels keep a substantial share of the performance revenue generated by UK broadcast and public performance. A key function of that revenue is the ability for UK record companies to invest in UK talent. Given that the Competition and Markets Authority (CMA) recently concluded that UK record labels are not making excessive profits, any adverse financial impacts can logically only be offset against future investment.

We would hope that whatever policy change the Government decides to follow, it would use other powers at its disposal (under s 208 orders) to subsequently limit the impacts of these changes and maintain stability in the UK regime.

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