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# Introduction

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Background

Eligibility for rights in sound recordings and performances in UK law What are the issues to be addressed?

Option 0: Maintain the status quo - Questions

## Question 1 Do you consider the way UK currently provides PPR to foreign nationals to be consistent with the UK's international obligations, including those in the Rome Convention and the WPPT? Why or why not? If not, what are the changes needed to bring UK law into line with those obligations?

Provide answer here:

As is clear from the CPTTP Bill, the IPO has recognised that the current system of qualification of rights in performances is non-compliant with Rome and the WPPT. This is because these treaties provide that performers are to be protected by reference to the place that the performance takes place (Rome, Art 4) or whether the performance is embodied on a phonogram protected under Art 5 (which offers three potential points of attachment - nationality of record producer; place of first publication; and place of fixation (though the UK entered a declaration that it would not apply place of fixation). The nationality of the performer is, in fact, irrelevant under Rome, and probably irrelevant under the WPPT: on the latter compare Reinbothe and von Lewinski, The WIPO Treaties 1996, p 271; Goldstein and Hugenholtz , International Copyright: Principles, Law and Practice 4th ed 2019 158; Ficsor, WIPO Guide, PPT3.1-PPT3.3; with Ricketson and Ginsburg (2d ed), 1246, [19.48] (nationality an additional, not alternative requirement under WPPT).

The effect is that British law is at present more generous than is required in so far as it confers rights by reference to nationality (etc) of performers; and narrower than it is obliged to be under the conventions. Some of the discontinuities between owners of copyright in sound recordings and performers arise precisely because of the failure to confer performers right on performers where the performance is embodied on a phonogram produced by a national of a contracting state or first published in a contracting state.

The proposed shift in the CPTPP Bill is thus very welcome, even if it necessarily adds very considerable complexity, by increasing the number of connecting factors.

When we turn to issues of material reciprocity in the existing law, or specifically the 2016 statutory instrument:

1. I am surprised by the reference in article 3(2)(b) to "broadcasting", which appears to exclude this right for non-Rome, WPPT countries. I looked to see if Copinger (18th ed) commented on this, but p [289], [3-341] seems to overlook it. As far as i can tell there are only three post-2016 amending orders, so article 3(2)(b) still exists. That said, I don't see any basis in the WPPT for excluding broadcasting, so this is a bit of a puzzle. Whether PPL is conscious of it is not at all clear.
2. It is difficult to understand why the various material reciprocity provisions permitted under Art 16 of Rome in relation to Art 12 and Art 15(3) WPPT in relation to Art 15(1) should have been made applicable to performers claims only. What could be the rationale for penalising foreign performers but permitting the foreign owners of sound recordings in those countries still to claim from the UK? It hardly provides the country with an incentive to change its law, which is the normal argument for material reciprocity.
3. I find the provisions in art 9-11 of SI 2016/ pretty difficult to follow and, in turn, it is quite hard to discern whether they really are compliant.

The scope of Article 9 SI 2016/1219 is ambiguous. The title, at least, refers to Art 16(1)(a)(i), but Article 9 itself refers to Art 16(1)(a). Is the Article is meant to apply only to a Rome country that by declaration excludes payment of the single equitable remuneration altogether (as for example Australia's declaration does) or to such a country that operates any exclusion under Art 16(1)(a) (many countries confine the right to circumstances where the producer of the sound recording is a national of a Contracting State).

Although it is not spelt out, the provision appears to apply to rights in any performance that takes place in such a country or is by a national (etc) of such a country (mirroring the current definition of qualifying performance). However, the article 9 (of SI 2016/1219) then goes on indicate that the exclusion will not apply if the recording embodying the performance was first published in a Rome country where no such declaration applied. (Presumably that qualification is recognition of the connecting factor under Art 4(b) and 5(1)(c) of Rome, which is very odd given that this connecting factor is ignored for qualification itself). The effect seems to be that the exclusion (prima facie - see below) applies to a British performer who performs in Australia or an Australian performer, such as Kylie, wherever she performs unless the recording of the performance is first published in a Rome country that does not make a declaration under Art 16(1)(a) [or possibly just Art 16(1)(a)(i).

Article 9 of SI 2016/1219 states that "the provisions of Part 2 of the Act shall not apply to grant the protection provided for under Article 12 of the Rome Convention" when it would surely be simpler to say CDPA s 182D(1) does not apply (since I don't think there are other relevant provision in Part II).

However, the Article also limits its application to situations where the relevant law in practice excludes 'British performances' (that is " to the extent that the declaration referred to in paragraph (1) is in force in the law of the country in relation to British performances").

This provision is important because not all declarations are withdrawn (as Costa Rica's has been, for example); some sit on the WIPO register even after practice has shifted. For example, with respect to Australia, the declaration seems no longer to be operative/relevant as the Copyright Act 1968 confers public performance rights and communication to the public rights on the holders of copyright in sound recordings (s. 85(1)(b), (c), though subject to s.

108) and relevantly - but not critically - performers are usually regarded as joint authors of a sound recording of a live performance (s.22(3a)). The Copyright (International Protection) Regulations extend these rights to circumstances where recordings are made, or first published in a Rome or WPPT country (including where the performance embodied took place in a WPPT country - reg 4(1A)), however these regs 6 and 7 of these Regulations specify that the public playing/broadcasting rights only apply to foreign beneficiaries if they are listed in schedule 3 as countries providing remuneration for secondary uses. The UK is so listed; the US is not.

One can see from this that not only is Article 9 obscure, it is incredibly difficult to apply because it requires a detailed understanding of the law of the relevant country (including secondary legislation). That is not so difficult for Australia with its open-access mindset (I used some textbooks to guide me and Austlii for the detail). I would not know how to begin such an analysis for Azerbaijan or Congo.

Article 10 of SI 2016/1219 is specific in its application to Australia, Chile, Costa Rica, Korea and Macedonia, all members of Rome and WPPT, and which had included declarations under both. I note that Costa Rica has now withdrawn its declarations (though article 10 doesn't seem to have been amended by subsequent Orders). I am not sure what the basis of excluding all these rights from Rome countries is, given the fundamental principle of national treatment contained in Rome, Art 2(1). (Though it should be acknowledged that this is a controversial issue - compare Ficsor, WIPO Guide,

[RC-2.2]-[RC-2.7], [PPT-4.5]; Masouye, WIPO Guide To the Rome Convention and the Phonograms Convention (1981), 19-20 (both treating Art 2(1) of Rome as requiring full assimilation); with Ricketson and Ginsburg (2d ed), 1247-9, [19.49]; Reinbothe and von Lewinski, The WIPO Treaties 1996, p 285 and note 27; von Lewinski, International Copyright Law and Policy (2008), pp 201-202, 241-243, [6.26]-[6.27], [7.34]-[7.40] Goldstein and Hugenholtz , International Copyright: Principles, Law and Practice (4th ed 2019) 92 (who understand Art 2 as requiring national treatment only for minimum rights in the treaty, anticipating the position taken in TRIPS and WPPT Art 4).

[As regards Australia, you might want to consider whether there is an issue under Art 18.8 of the CPTTP, in particular, by assessing what counts for note 3 as an "otherwise permissible derogation from national treatment with respect to those rights". On one view lending is not required so the derogation is permissible absent Art 18.8, so is otherwise permissible].

Article 10(4)(c) of SI 2016/1219 which applies material reciprocity in relation to the 'PPR' does however seem in line with Rome and the WPPT. The only objection here are the linguistic obscurities that I mentioned in relation to Art 9 of SI 2016.1219.

Article 11 is, of course, that of most interest and important, applying as it does to WPPT countries that are not party to Rome (such as the United States, New Zealand, India, Singapore and Hong Kong). Art 11(3)(b) seems fine insofar as national treatment under the WPPT is limited to the specific rights in the Treaty; but again you should consider the impact, if any, of Art 18.8 CPTTP, where eg New Zealand is concerned.

Article 11(4) of SI seems fine, subject to what I have already said about wording and difficulties with application.

Talking about the complexities of ascertaining the term of protection of performers' rights, Laddie et al (5th ed, 2018], [27.85], highlight the complexity of the necessary enquiries. I think it safe to say that the same objection could be made to these provisions. You might try and find out whether, and how far, PPL's lawyers confront these complexities, given that they will have the benefit of being able to discuss details with there corresponding CMOs in foreign states; or whether, instead, they work by rules of thumb. The costs of working through these issues for every performance might well be a very substantial hidden cost in the system. Although I accept there may also be arguments against, there is something to be said for the CJEU's RAAP ruling that required Member States of the EU (and thus, for a short while before departure, the UK) to apply full national treatment to foreign performers, irrespective of treaty status, declarations, etc.

# Option 1: Provide PPR to producers and performers of sound recordings on a broad basis - Questions

## Question 2 Do you agree with the assessment of the impacts of Option 1? If you disagree, why?

Provide answer here:

I would like to see some closer analysis, both of the US case and other foreign music industries (eg India).

How much of the money currently transferred to US copyright owners is in fact distributed, directly or indirectly, to performers? It is notable that the revenues from statutory licences

## Question 3 Do you have any other comments on Option 1?

Provide answer here:

It is not quite clear what you have in mind. But I presume (i) expanding the qualifying criteria for performers (as with the CPTTP Act); and (ii) eliminating the provisions on material reciprocity in Arts 9-11 of the 2016 Regulations. With respect to the former, in the CPTTP Bill, there are more connecting factors

now for performers than sound recording producers. Some thought might need to be given to how performers are to exercise the right if (when) there is no exclusive right in the sound recording.

You state: "While the international treaties on copyright allow parties to apply material reciprocity in respect of PPR, they require greater consistency between the treatment of performers and producers than UK law currently provides". Given that the rights can be given to performers, phonogram producers or both, I wonder why you say this. Is it because that Art 15(1) gives the right to both performers and phonogram producers? I note that Ficsor, WIPO Guide, 252, PPT-15.8, states:

“while the Rome provision leaves freedom as to whether the right to remuneration is granted to performers only, to producers only, or to both categories of beneficiaries, Article 15(1) of the WPPT provides that both performers and producers of phonograms must be beneficiaries of the single equitable remuneration. Concerning the collection and the sharing of the remuneration, Article 15(2) of the WPPT contains more detailed rules than what appear in the second sentence of Article 12 of the Rome Convention..."

I find the policy of apply MR to just performers incomprehensible, but I cannot see that it is precluded by Rome or the WPPT, so I'd like to understand the basis for the claim you make.

Option 2: Provide PPR to producers and performers of sound recordings on material reciprocity terms - Questions Question 4 How will/ should licence prices for the broadcasting and public playing of recorded music change under this option? Provide answer here:

US record producers would still be entitled to claim in circumstances covered by the DPRA. This does not cover playing in public (not as "transmission" defined) or traditional broadcasting. But it does cover subscription uses. The DPRA, however, is fiendishly complex. Take a look at David Nimmer's "Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right" (2000) 7(2) UCLA Ent Law Review 197.

Currently, PPL gains £ 17 million pa from the United States. It is hard to estimate or even guess the extent of equivalent subscription services in the UK.

Initially, I would not expect a unilateral change in PPLs charges. PPL's arrangements with eg the BBC would simply continue (so that there would be more money from all other recipients). In due course, when the arrangements come up for renewal, it might be that suitably-informed licensees such as the BBC would seek to renegotiate the amount to reflect the changes, and it could be that the parties or the Copyright Tribunal would reduce the sum to reflect the changed coverage. Certainly, that would be reasonable.

## Question 5 What would be the benefits of savings for UK broadcasters or those that play music in public under this option?

Provide answer here:

For the provisions to have cost-reducing effects, it is important that users can easily ascertain precisely which sound recordings are exempt in relation to particular acts. Given the variety of derogations (in numerous countries), this may be hard to achieve. It may well be that it is more efficient for most users to continue to pay for a blanket licence from PPL and to leave to it the detailed analysis as to who the monies are to be distributed to.

## Question 6 What would be the benefits or costs in terms of increased or reduced remuneration to UK record labels and performers under this option?

Provide answer here:

If blanket licence fees do not change in response to the shift, it is possible that a higher proportion of the amounts collected would go to UK record labels and performers: there would be fewer people sharing the same cake.

## Question 7 What upfront and ongoing administration and legal costs (such as the costs of renegotiating licences) might arise under this option? Can you quantify these?

Provide answer here:

There will clearly be costs associated with change, and, of course the CPTTP change in connecting factors with bring further complexity and cost.

Currently, it is presumed that PPL has to carry out the complex material reciprocity analysis needed under arts 9-11 of SI 2016 before it determines distribution of revenues to foreign performers sources. If material reciprocity is applied to sound recording copyrights, the task might in fact be slightly simpler.

## Question 8 Do you think this option will cause users to reduce the amount of UK music they play? If so, why, and to what extent will this effect take place? How will this affect the UK music industry?

Provide answer here:

It is conceivable the some services might emerge to cater to niche markets of non-UK music, broadcasting or playing eg Motown or country and western music. Some consideration might be given to whether similar services might emerge for music from India or other countries that excluded equitable remuneration completely. Of course, these services will need to pay PRS revenues in relation to underlying compositions.

## Question 9 How might the costs on foreign (especially US) record labels under this option indirectly affect the UK music industry or UK consumers?

Provide answer here:

If US labels have reduced revenues, they might try to make up this elsewhere, eg by increasing the price of other goods or services where reciprocity is not permitted. One obvious mechanism would to be to increase prices for streaming, though how amenable streaming services would be to such a change is not clear. It is not obvious that the US labels would specifically target the UK market (though, of course, they might).

## Question 10 Do you have any other comments on Option 2?

Provide answer here:

The proposed change would be unusual in that it would see the UK decrease the levels of protection on offer, even if this is only to some 'foreigners.' In 1988, Bill Cornish bemoaned what he called 'the canker of reciprocity': [1988] EIPR 99. He asked rhetorically:

"does not self-interest, when properly estimated, dictate that reciprocity should be used as sparingly as possible, and that the apparently more generous offer of national treatment has much to commend it?"

I wonder how the United States will respond to what looks to be a very targeted attempt to avoid paying US record companies and artists.

# Option 3: Apply Option 1 to pre-existing sound recordings and performances, and apply Option 2 to new sound recordings and performances - Questions

## Question 11 How will/ should license prices for the broadcasting and public playing of recorded music change under this option?

Provide answer here:

With material reciprocity only being applied to new recordings, there would be at best a slow shift in the pricing of a blanket licence. One would need to consider, for different user groups, whether they were only using new recordings, or only old recordings, or where use was of a mix of old and new, the relative proportions.

For those only using new recordings (at least of US producers) on a non-subscription basis, licence rates would be expected to fall quickly. For those using old recordings, one would expect no change.

For those using a mixture, it may be difficult for users to decide precisely when to renegotiate, and (if necessary) for the Copyright Tribunal to determine what rates would be reasonable.

## Question 12 What would be the benefits of savings for UK broadcasters or those that play music in public under this option?

Provide answer here:

The savings would be most obvious for those who play or broadcast new music.

## Question 13 What would be the benefits or costs in terms of increased or reduced remuneration to UK record labels and performers under this option?

Provide answer here:

There might be incentives for some users to focus on new/post transition US recordings, and thus a shift away from use of UK-originated materials. This could have negative effects on UK labels and performers, but it would be hard to guess the extent.

In so far as the terms of blanket licences were not renegotiated, it might be that going forward there would be more "pie" for UK labels and performers.

## Question 14 What upfront and ongoing administration and legal costs (such as the costs of renegotiating licences) might arise under this option? Can you quantify these?

Provide answer here:

I am not in a position to say anything else helpful here.

## Question 15 Do you think this option will cause users to reduce the amount of UK music they play? If so, why, and to what extent will this effect take place? How will this affect the UK music industry?

Provide answer here:

It might. See Question 13.

## Question 16 How might the costs on foreign (especially US) record labels under this option indirectly affect the UK music industry or UK consumers?

Provide answer here:

I am not in a position to ascertain how reduced income for US labels (because half the money on existing recordings goes to performers, and material reciprocity is applied for new recordings) would impact, if at all, on the UK. I speculated earlier on whether US record labels would try to recoup the

decline in revenues by increasing other prices. If so, this could impact on UK consumers, but in ways it is impossible to estimate.

## Question 17 Do you have any other comments on Option 3?

Provide answer here:

This area is startlingly complicated. A bifurcated regime of the sort proposed here seems to add extra complications and possibly present some strange incentives.

As with the reciprocity option more generally, you need to think about not just savings to UK users, but (i) broader aspects of promoting international standards and (ii) specific relations with the US.

# Proposed approach Preferred Option

## Question 18 What is your preferred option and why?

Option 1

Provide answer here:

It is clear that the present law needs to be amended as it does not comply with international norms on points of attachment.

It is less obvious to me that international norms mean that material reciprocity cannot be applied to performers even though it is not being applied to phonogram producers, so I would like to see that proposition elaborated. What seems clearer is that applying material reciprocity in this way arbitrarily privileges record producers over performers, and will have no impact on the target countries incentives to change its laws (given that the same revenues accrue to the record companies that would in the UK be shared between record companies and performers). The existing approach thus seems to me unjustifiable as a matter of equity and policy, rather than international law.

As regards using material reciprocity at all (Option 2 and 3), I think one key question is whether it \*could\* change US attitudes to the scope of the DPRA. I think the obvious answer to that is 'no.' The domestic interests in the US are just too strong to allow for a broad communication to the public right (for phonograms/performers). So applying material reciprocity will not have the effect that the US changes its law.

# Confidentiality and data protection

## Confidentiality request:

Provide answer here: