# INTRODUCTION

[BPI (British Phonographic Industry)](http://www.bpi.co.uk/) is the trade body for the UK’s recorded music industry. Our membership consists of the three ‘major’ record companies, Sony Music Entertainment UK, Universal Music UK and Warner Music UK, and nearly 500 independent British music companies. We administer BRIT Certified Platinum, Gold and Silver Awards, co-own the Official Charts, and own and organise the annual BRIT Awards with Mastercard and Mercury Prize with FREE NOW.

BPI champions the UK’s world-leading recorded music industry, both at home and abroad. The UK is the third largest recorded music market in the world and the second biggest exporter of recorded music globally after the United States, with an estimated 1 in 10 tracks streamed globally being by a UK artist. Part of the reason for this success is the health of the UK industry in producing new and popular talent, as well as the reputation of longer established artists. In addition to the economic contribution this brings, our global standing reflects the esteem in which UK music is regarded and how it should be valued.

Developing new talent is at the heart of the purpose of record labels. Our members provide the investment and creative support required to enable artists to realise their creative vision, make brilliant music and reach as big an audience as possible by developing fanbases around the world.

However, there is intensifying global competition internationally for the UK music industry, with major new markets with large populations now adopting streaming such as India, Latin America and parts of Africa. At the same time, domestic markets are growing fast around the world, with British artists competing for attention with acts from South Korea (K-Pop), Japan (J-Pop) and Latin America.

The prevalence and growth of new markets can be helpfully demonstrated by China, which historically has sat outside of the top ten recorded music markets in the world, based on revenue, but in the past few years has entered the top five - overtaking the established French market. This heightened competition affects the whole market – whether independent or major. In the recent Top 20 Global Recording Artist Chart for 2023 - which is calculated by IFPI using worldwide sales across streaming, download and physical music formats - the UK had just one artist feature, Ed Sheeran in eleventh place. In this same chart for 2022, there were no UK artists in the Top 5, with Harry Styles in eighth place, Ed Sheeran at tenth and the Beatles at number 19, making up just three UK artists in total. A British artist has not taken the number one spot in this chart since Ed Sheeran in 2017. By comparison, North American, Latin American and South Korean artists are dominating this chart year on year.

This increasing competition sits in the context of a growing global recorded music market – with Goldman Sachs predicting that the recorded music industry alone will go from being valued at $28.2 billion in 2023 to $50.1 billion by 2030. With this forecast, now is the moment of opportunity for British music to penetrate new markets and claim a significant share of global growth. This can only be done though through the investment made by record companies into new talent and new music which is fundamental to the music ecosystem and the UK’s success.

# EXECUTIVE SUMMARY

BPI does not support the IPO's intention to amend the existing public performance rights (PPR) framework. We believe there is no legal imperative, as it is our view that the UK is already treaty compliant. Nor is there a policy rationale for this change, as there would be negative consequences for the UK music industry, and any presumed and unjustified benefits for music users would be at the direct expense of UK music creators.

As stated by the IPO in this consultation, the Government’s aims for PPR are to:

* Ensure that UK law is consistent with the international treaties on copyright and related rights to which the UK is party.
* Reduce costs to UK broadcasters and other users of foreign music, if this can be done without significant costs to the UK creative industries or UK consumers.
* Increase revenues for the UK creative industries, if this can be done without costs to UK users and consumers.

Taking each of these aims in turn, we would make the following overarching observations, which will be further reflected in our comments on each of the options.

* The UK is already operating consistently with its treaty obligations, and as such we do not agree with the IPO’s assessment that these changes are required.
* We are not clear what policy imperative there is to alter/decrease costs to broadcasters: especially as any cost savings that arise (in relation to lowering or removing the cost of playing US repertoire, for example) would likely benefit commercial radio stations and harm the UK music industry and reduce consumer choice.
* This would amount to a subsidy by the creative industries for the broadcast sector. Any such policy position should require a clear evidential basis and we have seen no such evidence. Commercial broadcasters already significantly underpay for music rights compared to the actual value. The cost of music to commercial broadcasters is a small percentage of their revenue for what are highly profitable international businesses, this is not a sector that justifies or deserves a subsidy, they should pay fair market value for their use of music.
* However, a reduction in UK investment into new talent and new music (which we envisage under options 1-3) would have an overall negative impact on the creative industries. It would reduce the UK’s competitiveness globally, which in part derives from new talent and new music creation, on jobs supported by UK labels and the wider music ecosystem which also relies on new investment (e.g. new featured artists, session musicians and live performance).
* By the same token, in respect of the costs to consumers of the respective models, we anticipate any impact to be negligible or nil in direct terms, but a reduction in UK investment would reduce consumer choice.
* The current arrangements provide a balanced outcome, whereby consumers and users of music benefit from access to music on broadcast platforms, as well as investment into new music. Disrupting this balance comes with risk to investment in new music with negative impacts on consumers and users of music in the medium to long term. Furthermore, given the importance of copyright to the future growth of the UK’s music sector – and the gold standard system the UK has long safeguarded, it is questionable that a material change such as this

could be implemented via a trade bill with at best, tenuous links to the policy outcomes being considered.

In the remainder of this response, we provide commentary on each of the options outlined in the consultation and accompanying impact assessment.

Please note that throughout this response, we will generally refer to US rightsholders/producers/labels and US performers because the impact of any option will overwhelmingly relate to US-related rights given the scale of the US market, its preponderance in music broadcast and public performance in the UK, and the lack of equivalent performance rights in the US.

# OPTION 0: MAINTAIN THE STATUS QUO

It is BPI’s strong view that when both the legal and economic impacts are accurately taken into account, option zero should be the preferred option to best maintain the future health of the UK music industry. BPI is concerned that option zero appears not to be under active consideration. If any of the other options should be the Government’s preferred option, steps should be taken to mitigate the risk to the UK music sector, restricting the impact to minimise to as close as possible effect of maintaining the status quo via secondary legislation.

We do not agree with the IPO’s assessment that *“the treaties on copyright and performers’ rights require greater consistency”.* In summary this is because The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) requires countries to ratify the WIPO Performance and Phonograms Treaty, which the UK has already ratified well over 20 years ago.

The Government now seems to suggest that UK legislation does not meet the WPPT standards as regards to the protection granted to performers and phonogram producers, and therefore the law has to be changed, without providing a satisfactory legal basis for this position. We consider this fear to be entirely legally unfounded.

The UK fulfils the 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.

While it may be more common for the rights of producers and performers to be aligned, we do not consider that Contracting States are obliged to do so to comply with their treaty obligations. Whilst Rome and WPPT provide a minimum level of protection in the form of a remuneration right, the UK has chosen to provide for the communication to the public (including broadcast) and PPR in respect of the sound recordings to be exclusive rights reserved to the copyright holder (or exclusive licensee). By protecting the performances embodied on those sound recordings by way of remuneration right, the UK complies with its obligations whilst also allowing for the application of that protection to be limited as allowed under both Rome and WPPT as described below.

*Rome Convention*

* Article 4 of the Rome Convention obliges contracting states to grant national treatment to performers when a “*performance is incorporated in a phonogram which is protected*” under the convention.
* Article 5(1) determines three criteria for the eligibility of the producers of phonograms for national treatment: nationality, fixation and first publication.
* Article 12 establishes the principle of the right to a single equitable remuneration for broadcast and communication to the public.
* Article 16(1)(a) establishes the ability for contracting states to disapply or curtail the application of Article 12 by filing a declaration with WIPO. The UK is not obliged to protect producers or performers from non-contracting states (Article 16((1)(a)(i)), or from contracting states that do not provide the same level of protection as the UK does (Article 16(1)(a)(iv)).
* The convention is drafted to allow a contracting state to prevent itself from being disadvantaged and the UK has taken appropriate steps to do so by exercising the rights to curtail the application and filing a declaration with WIPO accordingly.
* In the case of non-contracting states, such as the US, there is no obligation to protect producers or performers as they are not “qualifying” under the terms of the Rome Convention.

*WIPO Performances and Phonograms Treaty (WPPT)*

Eligibility for the protections granted under WPPT is determined by reference to the criteria for eligibility established in the Rome Convention, where the Contracting Parties to each are the same (Article 3).

Article 15(1) creates a right for a single equitable remuneration to be paid to performers and producers for broadcasting and communication to the public. Article 15(3) introduces the ability for signatories to limit or disapply 15(1) by notifying the Director General of WIPO. Article 4 provides for national treatment, but at the same time allows for the automatic application of material reciprocity where another contracting state makes use of its Article 15(3) reservations.

The US, the market to which this issue is most relevant given the scale, has ratified WPPT but only provides for the right to a single equitable remuneration in relation to a limited subset communication to the public uses under the Digital Millennium Copyright Act (such as satellite radio and non- interactive streaming). It remains the case that, in the US, there is no protection for the broadcast, public performance or wider communication to the public rights. On the basis of material reciprocity, the UK is not obliged (but may elect) to extend WPPT’s national treatment obligations to US rightsholders.

It may be more common for the rights of producers and performers to be aligned; we do not consider that Contracting States are obliged to do so to comply with their Treaty obligations. Whilst Rome and WPPT provide a minimum level of protection in the form of a remuneration right, the UK has chosen to provide for the communication to the public (including broadcast) and public performance rights in respect of the sound recordings to be exclusive rights reserved to the copyright holder (or exclusive licensee). By protecting the performances embodied on those sound recordings by way of remuneration right, the UK complies with its obligations whilst also allowing for the application of that protection to be limited as allowed under both Rome and WPPT.

Furthermore, and significantly, we understand that maintaining the status quo is not under serious consideration because the IPO underestimates the wider consequences on the health of the UK music sector (and thus contribution to the creative industries) under option one. We will set out more detail on this below but the fact that several millions of pounds of UK-retained revenue related to foreign PPR would be at stake even under option one (let alone the far more damaging options two and three) means option zero should be considered, not only because there is no need to change the status quo, but because it is the only option that does not cause harm to the sector. As a result, we believe IPO has significantly underestimated the potential impacts of options one, two and three when set against its aims for PPR.

It is BPI’s strong view that when both the legal and economic impacts are accurately taken into account, option zero should not only be under active consideration, but the preferred option to best maintain the future health of the UK music industry. If any of the other options should be the Government’s preferred option, steps should be taken to mitigate the risk to the UK music sector, restricting the impact to minimise as close as possible the effect of maintaining the status quo via secondary legislation.

# OPTION 1: ‘PROVIDE PPR TO US PRODUCERS AND PERFORMERS’

BPI notes that under this option all producers of sound recordings that are entitled to PPR in the UK would need to pay, by operation of the statute rather than contract, a share of PPR revenue to the performers involved in the recording.

IPO concludes in the consultation that: “*In practice we expect these impacts to be concentrated on music owned by US record labels*”. This assessment fails to take account of the fact that, at present through inter-group arrangement, a significant proportion of PPR revenue associated with US repertoire played in the UK is retained by UK labels and invested in UK talent.

So, while it is certainly true that US record labels would be adversely impacted, as noted by the IPO, this conclusion underestimates the amount of revenue retained in the UK, and the knock-on impact this would have to UK investment in UK talent and new music. As a result, this option would have a concentrate impact on UK record labels, a fact which the consultation ignores.

*How value flows currently*

As the diagrams in our appendix show, when considering global music companies – i.e. US-based labels with UK affiliates or UK licensees (which amount to the vast majority of the repertoire/revenue in question) - PPL pays the relevant PPR income through to the UK company. This is then split with their US owner according to that company’s own intra-company arrangements (in the case of majors) and/ or according to licences between independent labels. The UK label or group retains a significant and material share of this with the remainder being paid through to the US label, which in turn pays eligible featured artists according to their contractual terms.

The UK label therefore benefits from retaining a share of the US PPR revenue, which it can use to support investment in UK talent and new music.

*Impact of Option 1*

This option does not generate any new value; rather it exports a proportion of the value generated in the UK market to territories from which no such value is received.

For the BPI’s global music company members, the label would no longer be the recipient of its current share of relevant PPR revenues (as a portion would be paid to non-UK eligible artists), but only an ‘equitable share’ of it. In effect, this would likely mean that that the global label group would receive 50% (assuming ER on a 50:50 basis), of which the UK label would be receiving a share of a smaller starting sum.

It is worth noting that eligible US featured artists are already remunerated in respect of PPR – with the label paying through under the terms of contracts – while no UK featured artist or session musician receives any equivalent PPR in relation to the broadcast or playing of UK repertoire in the US. Based on long experience and an understanding of the current US political climate, no real prospect exists of this changing in the foreseeable future. However, clearly any leverage the UK currently holds would simply be given away with no benefit in return for the UK, if we were to adopt option one.

Even if in theory this option might in some cases benefit US musicians, it would not achieve a desirable public policy outcome for the UK. It also would not meet the objectives included in the Impact Assessment, such as reducing costs for users or increasing revenues for UK creative industries (by risking reduced investment by UK record labels). In fact, it would adversely affect the UK market. No new value will be created and therefore the practical outcome would be a transfer of value from the UK music industry (and UK artists, by way of investment) to the benefit of US artists.

*Impact on UK investment*

The UK-retained revenue is used to support investment into new talent and new music creation, which delivers multiple cultural and economic benefits to the UK music industry and UK plc. UK record labels invested £494.8 million to support artists’ careers and development in 2021 through A&R, marketing and promotion – more than double their investment in 2016.1 Artist remuneration has outpaced industry revenue increases and artist royalty rates have increased to an average and all time high of 26% on traditional advance/royalty deals.2

As the 2023 Competition and Markets Authority’s (CMA) market study on music streaming concluded, labels are not earning excess profits so any reduction in income risks having a negative impact on this crucial investment pool that is the bedrock for:

* Supporting new talent, including meeting label ambitions to diversify the talent pipeline.
* Creation of new music, thus refreshing and keeping the UK music sector competitive
* Sustaining export success – with innovation and new music engaging fans globally, with the UK the world’s second largest exporter of recorded music
* Supporting innovation in the creation and distribution of music
* Creating high value jobs within record labels, across multiple disciplines

1 https:/[/www.bpi.co.uk/news-analysis/uk-record-labels-investment-in-talent-and-new-music-doubles-over-past-five-years](http://www.bpi.co.uk/news-analysis/uk-record-labels-investment-in-talent-and-new-music-doubles-over-past-five-years)

2 https:/[/www.gov.uk/government/publications/music-creators-earnings-in-the-digital-era](http://www.gov.uk/government/publications/music-creators-earnings-in-the-digital-era)

* Supporting the wider music ecosystem: new music underpins the success of other parts of the sector, from live venues and festivals to physical manufacture and retail, to studios and UK broadcasters and digital platforms.

The impact would also fall adversely on UK independent labels, increasing costs in relation to overseas repertoire and disincentivising investment in the UK.

There is increasingly strong competition between the record labels, as noted by the CMA. Maintaining this strong competition ensures better outcomes for artists, as labels are encouraged to differentiate and improve contract terms and offering.

Currently the amount of PPR revenue relating to US repertoire received by an artist is a matter negotiated between the artist and their record label during contract negotiations. Should the amount of PPR paid to US artists be mandated at a certain level, a valuable competitive metric between record labels will be lost. Currently, record labels compete to offer the best terms to artists, regarding all potential revenue streams, including PPR. A mandatory change would remove the incentive for the record labels to compete on this particular parameter when seeking to ensure their artists receive the most appealing contract terms and choose to work with them over their competitors.

Finally, changes to current arrangements would also require significant and lengthy contract renegotiations with many artists in respect of which there is already a contractual right to UK- generated PPR, which would unnecessarily divert resources, time and expense (for both the artist and the record label). Ultimately if those negotiations fail, the unintended consequence is that the label will be paying twice and/or that the inability for the label to collect all PPR renders a previously negotiated contract no longer commercially viable for the label.

# OPTION 2: PROVIDE PPR TO PRODUCERS AND PERFORMERS OF SOUND RECORDINGS ON MATERIAL RECIPROCITY TERMS

Where material reciprocity applies, broadcasters and venues are able to use non-protected sound recordings without paying a performance royalty, thereby incentivising the use of such non-protected, repertoire. It is reasonable to expect that licensees, as a means of reducing their licence fee, would make greater use of the vast amount of high-quality sound recordings which would become non- protected. This would not only result in lower revenue from broadcasting and public performance for both UK producers and UK performers but also narrow the opportunities for local repertoire and the artists featured on it to reach consumers and grow audiences.

BPI’s key concerns related to this option is as follows:

* Option two has the potential to severely impact both UK and US markets.
* The IPO concludes that new artist investment would be affected in the US, and we agree this is a risk, both in the US and for the choice available to UK consumers. However, for similar reasons to those set out above in respect of option one, this assessment underestimates the impact on UK investment that supports UK performers.
* The UK retained revenue would unquestionably fall away given the enormous impact on US rightsholders of nearly £1billion, according to the IPO’s calculations.
* British session musicians could lose out as they frequently play on US recordings – material reciprocity would mean they lose ER protection and earnings.
* British featured artists are also contracted to US labels in some cases – and so would also lose ER protection.
* In addition to these deleterious effects, we note that the IPO does identify that there could be negative impacts arising from increased relative administration costs for PPL, representing a larger share of a reduced income pool.
* PPL would no longer be able to collect licensing income in respect of a huge amount of sound recordings which are currently protected, most notably in respect of US sound recordings. It is unlikely that the operating costs could be reduced by a corresponding amount (or at all) resulting in far higher operating costs as a proportion of collections/distributions, which costs will be borne by UK rightsholders.
* This would be accompanied by costs associated with licence renegotiations, potentially extending into costly Copyright Tribunal references and increased administrative costs arising from additional complexity, all of which would ultimately be borne by UK rightsholders at a time when there will also be downward pressure on licence fees.
* Furthermore, we believe that the points relating to the potential drive towards the playing of more US repertoire are under-estimated and do not fully consider the incentive that would be provided to play more unprotected and cost-free repertoire. Even those seeking to be respectful of rights, would find themselves at a competitive disadvantage to those broadcasters or public performance venues who did not.
* We have identified a multitude of negative effects, with no clear public policy upside:
  + By encouraging the playing of US repertoire at no cost, an intervention akin to option two would subsidise the business model of commercial radio – effectively a significant transfer of value from the UK music sector to the radio sector. It is not clear what public policy objective is being met in supporting commercial radio, particularly by damaging the UK’s world-leading music sector.
  + Public performance income is a significant revenue stream for UK artists and labels. If US music was free to play, then the impact on this revenue would be devastating. Venues would be commercially incentivised to play only US music. We expect a wholesale move by retail, hotel and hospitality users (as well as other public performance sectors) to either exclusively use US repertoire or, best case, majority use.
  + If the amount of repertoire played skews towards US repertoire (which is inevitable in this scenario), this reduces the revenue to UK rightsholders (and associated investment and ecosystem benefits outlined in relation to option one) and crucially UK artists, as they would see a decline in income from broadcast and public performance in the UK and an associated knock-on via reduced exposure of radio play, which is key to driving fan engagement.
  + The lack of protection for US repertoire would exercise downward pressure on PPL licence values for the remaining repertoire, exacerbating already negative impacts on income for UK rightsholders and artists.
  + By leaving the US repertoire unprotected and therefore incentivising its use, option two would also impact negatively on UK songwriters, composers and music publishers. While PRS would collect the same amount of money on behalf of the songwriter community, more of that money would be distributed to the rightholders of the

musical works used in the US sound recordings, which are more likely to be US rather than UK talent.

* + Finally, option two would potentially deliver commercial radio a financial advantage over public service broadcasters, especially the BBC, which has a series of commitments to showcase British music.

The music industry is already a high-risk business, in which the majority of investment does not return a profit. Between reduced return on investment, the implementation of an incentive for broadcasters and venues to not use UK music and the high stakes, it is all but certain that we would see reduced investment in UK talent and cost cutting measures to mitigate the lost revenues.

The application of material reciprocity introduces the undesirable precedent into the UK creative industries that music can or should be free. To knowingly create a system in which there is a vast pool of substitutional commercial music available at no cost undermines the value of music overall and incentivises music users to choose to not pay for their use of music.

It is a policy approach that would actively remove value from, diminish and jeopardise the future of a sector that has been repeatedly highlighted by the Government (and across Parliament) as a priority sector for growth.

# OPTION 3: APPLY OPTION 1 TO PRE-EXISTING SOUND RECORDINGS AND PERFORMANCES, AND OPTION 2 TO NEW SOUND RECORDINGS AND PERFORMANCES

* We have outlined our position in relation to options one and two above – and our concerns about them if applied individually would apply equally if they were to be applied as a package to pre-existing and new recordings respectively.
* Option three does not, as IPO suggests, benefit UK labels given the impacts outlined above.
* This hybrid option would therefore cause significant damage to health of UK ecosystem and globally.
* It would also be extremely complex to administer, likely creating confusion and additional admin cost and confusion for creators. In reality it would mean introducing option two gradually, with added layers of uncertainty.

The implementation of a hybrid system with national treatment applied to some sound recordings and material reciprocity applied to others would introduce significant administrative complexity and confusion, along with an increase in costs and enforcement difficulties.