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Submitted to Consultation on extension of rights in sound recordings and performances to foreign nationals Submitted on 2024-03-22 15:52:42

# Introduction

## What is your name?

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# 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:

We do not consider the way UK law currently provides PPR to foreign nationals to be consistent with the UK’s international obligations, including those in the Rome Convention and the WPPT.

The Copyright Designs and Patents Act 1988 (as amended) (CDPA) gives the producers of sound recordings a full copyright in their sound recordings. This includes the right to receive PPR. These rights are extended to foreign producers, if the producer is a national or resident of a “ qualifying country” or if the recording is first published in a qualifying country (which includes a country party to the Rome Convention and the WPPT). “ First published” includes any publication withing 30 days of the original publication. As this effectively applies to all recordings, all sound recordings are eligible for PPR.

Performances, on the other hand are granted lesser rights. Where PPR is concerned, revenues for exploitation are collected by the producer of the recording. When the recording is played in public or communicated to the public (other than by provision “ on-demand” ) the performer is entitled to receive “ equitable remuneration” from the owner of the copyright in the sound recording.

Where the foreign performer is concerned, in order to qualify for payment of PPR, the performer must be a “ qualifying individual” (being a citizen or subject of, or resident in a “ qualifying country” ) or the performance must have taken place in a “ qualifying country” . A “ qualifying country” includes the UK and countries designated as providing reciprocal protection.

In short, as noted in the consultation document, while all foreign producers of sound recordings enjoy the right to PPR, only some foreign performers do. The Rome Convention

This arrangement under UK law is not in accordance with the Rome Convention (Rome). Article 5 of Rome provides that each Contracting State shall grant national treatment to the producers of phonograms, including where the phonogram was first published in another Contracting State [Article 5.1(c)].

“ First published” includes publication within 30 days of actual first publication in another Contracting State [Article 5.2].

Article 4 of the Convention provides that each Contracting State shall grant national treatment to performers including where “ the performance is incorporated in a phonogram which is protected under Article 5 of this Convention” .

It is clear that, while UK law complies with Article 5 of Rome, there is a failure to comply with Article 4, in that UK law fails to extend national treatment of the right to PPR in all cases in which the sound recording is protected.

The WPPT

The arrangement in the UK also falls foul of the obligations of the UK under the WPPT.

Article 4 WPPT provides that each Contracting Party shall accord national treatment to the nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals, including the right to equitable remuneration provided for in Article 15 (PPR).

Article 3(2) defines the beneficiaries of protection. It states: “ The nationals of other Contracting Parties shall be understood to be those performers or

producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that Convention” .

Accordingly, the WPPT obliges the UK to extend to performers the rights granted in Article 15 WPPT (PPR) to the nationals of all Contracting Parties to the WPPT, according to the criteria laid down in Rome (including Article 4 thereof).

The failure of the UK to comply with its international obligations is noted by the Hon. Mr Justice Richard Arnold at para 2.38 of “ Performers’ Rights” where he says:

“ It may be noted that the requirement that the performance be given by a qualifying individual or take place in a qualifying country does not comply with art.4 of the Rome Convention or art. 3(2) of the WIPO Performance and Phonograms Treaty since it does not allow for the possibility of qualification by reference to a phonogram protected under art.5 of the Convention or a broadcast protected under art. 6 of the Convention. As a result, there will be instances in which performances are incorrectly denied protection.”

Changes needed to bring UK law into line with these obligations

We consider that the immediate change needed to bring UK law into line with its obligations under the WPPT, could be effected by an amendment to Section 181 CDPA adding the following to the existing conditions for qualification:

“ A performance is a qualifying performance for the purposes of the provisions of this Part if it is incorporated in a sound recording which qualifies for copyright protection under Part 1 of this Act.”

We suggest however that, in addition to this change, which addresses the most obvious need to align the CDPA with the WPPT, there are further amendments that need to be made to the CDPA, to make it compliant with the WPPT.

Article 15 (1) WPPT provides that performers and producers shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

The single sum to be paid by users is to be shared between performers and producers. It is paid by the user for the benefit of both sets of rightsholders. The CDPA does not reflect this. It grants the producers a full copyright in their sound recordings, subject to a compulsory licence in favour of users for the broadcasting and public performance of the recordings. The producers’ CMO is empowered to collect the remuneration payable by users, without reference to the entitlement of the performers. The performer on the other hand is granted only a fragmented stand-alone entitlement to claim a payment by way of equitable remuneration from the owner of the copyright in the sound recording. While it is clear from the Treaty that the remuneration is due from the users, the entitlement of the performer under the CDPA may only be claimed from the producer. Two different rights are granted - a superior right for the producer and a separate, subordinate right for the performer to claim against the producer.

The legal nature of the right is therefore incorrectly transposed in the CDPA. This is important for a variety of reasons, a detailed explanation of which is beyond the scope of this submission, but at very least because a shared right would imply certain rights for each party. These would include the right to negotiate inter se the terms of the sharing of the revenues, the deductions to be made therefrom as costs of administration, the terms for the granting of licences, the manner of distribution between performers and producers, and the sharing of information. This impact is obscured in the UK because of the dominance of PPL, which, while it is a CMO representing both performers and producers, is effectively governed by its major stakeholders, who are

multi-national music producers. There is effectively no independent voice to assert the rights of performers and no rules to underpin the methodology governing the sharing of the remuneration.

As to the methodology for sharing, Article 15(2) WPPT provides that Contracting Parties may enact national legislation that, in the absence of agreement between the performer and the producer of a phonogram sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

In circumstances in which the producer has complete control over the setting and collection of the single payment, the fair and equal sharing of the payment cannot be ensured unless minimum conditions are laid down concerning the administration of the right. Where there is an inherent conflict between the interests of the two sets of rightsholders, this is necessary in order to prevent producers from exploiting their superior legal position. The CDPA contains no such conditions. At very minimum, we suggest that the legislation should specify that, in the absence of agreement between them, the revenue should be equally shared between performer and producer, subject only to the deduction of properly incurred expenses of collection and administration.

As currently provided, the right is heavily weighted in favour of the producer of the sound recording, allowing the producer to collect the remuneration and to effectively set the terms under which it will “ share” the remuneration with the performers. This is not what was intended by Article 15 WPPT, nor is it reflective of the practice in almost all developed countries. It enables PPL to make deductions from the performer share of the revenues for which no provision is made in the CDPA. For example, PPL allocates revenues to “ non-qualifying performances” and diverts these revenues to producers, in addition to the producers’ own share in the revenues (see PPL Distribution Rules No. 10.2). It also makes a deduction from the shared monies for funds determined to represent acts of reproduction by broadcasters (called “ dubbing” ), for which no provision is made in the CDPA and pays these funds only to producers (see PPL Distribution Rules No.10.3).

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# 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?

Yes

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

Provide answer here:

No

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:

N/A

## 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:

N/A

## 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:

N/A

## 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:

N/A

## 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:

N/A

## 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:

N/A

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

Provide answer here:

We do not favour this option, taking the view that it would result in destabilisation of existing licensing terms which, over many years, have delivered predictable revenues for producers and performers. We agree with the UK government that removing protections for pre-existing sound recordings could undermine business certainty for the music sector, and particularly for performers, who depend heavily on revenues from broadcasting and communication to the public of their performances.

# 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:

N/A

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

N/A

## 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:

N/A

## 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:

N/A

## 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:

N/A

## 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:

N/A

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

Provide answer here:

We do not favour this option. We have the same reservations concerning the application of Option 2 to new sound recordings and performances as are set out in our response to Option 2 above.

# Proposed approach Preferred Option

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

Option 1

Provide answer here:

Our preferred option is Option 1. The reasons include:

1. It complies with the WPPT.
2. It corrects the existing misalignment of the rights of performer and producers, treating them equally, as envisaged by international law and practice. It would prevent the continuance of the existing practice of PPL whereby it artificially allocates revenues to “ non-qualifying performances” and diverts those revenues to producers, in addition to paying the producers’ own share.
3. It does not threaten a reduction in existing licensing revenues for Irish performers in respect of their UK rights.

# Confidentiality and data protection

## Confidentiality request:

Provide answer here: