**Consultation 15 January 2024**

**Extension of public performance rights to foreign nationals**

**Response from Andrew Yeates – Director of IP and Business Affairs – 560 Media Rights Limited**

**Introduction.**

560 Media Rights represents the producers of films and television productions to enable to collection of secondary rights payments linked to film and television distribution around the world.

In this context, effective application of the National Treatment and Most Favoured-Nation Treatment provisions established under the International Treaties for the recognition and protection of copyright and related rights which have been ratified by the United Kingdom, is crucial.

The National Treatment obligations with respect to rights recognised under multilateral agreements, combined with minimum levels of protection set out in the agreements are a vital part of the gains which can be secured for WIPO members which sign up to the agreements.

An increasingly digital world is creating new pressure points for application of the traditional differences between the wide national treatment obligations adopted under Article 5 of the Berne Convention for the protection of literary and artistic works and the more limited national treatment provisions which have to date been recognised for provisions relating to neighbouring rights.

The distinction was clearly reinforced by the wording used in Article 3 of the 1994 TRIPS Agreement concerning National Treatment[[1]](#footnote-1).

The focus under the TRIPS Agreement, the Rome Convention and the WPPT is therefore applying the scope of National Treatment provisions to the rights specifically guaranteed, and the limitations specifically provided for, under the relevant Agreement.

Differences of approach across WIPO Members to recognition of rights relevant for neighbouring rights owners, including rights of producers of phonograms, rights of performers (including fixations in sound recordings or in audio-visual media) and in broadcasts, have traditionally created on-going strains for international co-ordination. These strains may in practice now act as barriers to “raising the bar” for protections in ways which will in practice deliver fair remuneration for use to be secured by such rights owners in the digital world. This is particularly true for practical recognition and enforcement of secondary rights.

This issue makes the questions raised under the current consultation of real interest and concern to the right owners represented by 560 Media Rights.

***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?

**Potentially, but greater clarity would be helpful for the status of performers who are not “qualifying individuals” as currently defined in the CDPA, but who are performers who give a performance in a “qualifying country” as currently defined in the CDPA.**

It is appreciated that this concern is being addressed at one level by the changes proposed to s 181 and to s 206 CDPA under the provisions of Article 5 in the Trade (Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Bill[[2]](#footnote-2).

However, practical development of the provisions under the powers for the creation of Orders in Council under s 206 (4) CDPA (as amended) will be important and are relevant to the replies given to the questions below.

Against these proposed developments, it is worth referring again to the way in which the National Treatment provisions included in the TRIPS Agreement, the Rome Convention and the WPPT do form a crucial basis for potential gains for the rights holders or the qualifying countries and individuals or “nationals” of the WIPO members who have ratified these multilateral agreements.

It has been generally accepted that the provisions in Article 3.1 TRIPS, Article 2 of Rome and Article 4 of the WPPT apply national treatment provisions to the neighbouring rights specifically recognised under the relevant instrument (and not beyond).

There are suggestions that the wording used in Article 2.2 of the Rome Convention may apply to the minimum protection specifically guaranteed by the provisions of the Rome Convention.

However, the approach taken towards neighbouring rights under Article 3.1 TRIPS is carried forward to the exemption from Article 4 - Most Favoured Nation Treatment provisions. This provides “Exempted from this (most favoured nation) obligation are any advantage, favour, privilege or immunity accorded by a Member in respect of the rights of performers, producers of phonograms and broadcasting organisations not provided under this (TRIPS) Agreement”.

In essence this seems to suggest the importance of the UK looking to raise standards internationally by looking **distinctly** at rights recognised separately under each of the TRIPS Agreement, the Rome Convention, the WPPT and (potentially) the Beijing Treaty when interpreting National Treatment provisions in the future.

The approach taken in s 159 CDPA linked to Part 1 works with **separate** provisions identifying: -

1. where a country is a party to the Berne Convention or a member of the World Trade Organisation;

2. where a country is a party to the Rome Convention so far as it relates to sound recordings and broadcasts; and

3. where a country is a party to the WPPT so far as relating to sound recordings – is helpful.

**Keeping doors open for effective recognition of rights linked to signatories of the different international instruments (including limitations applied by signatories) will be important to ensure delivery of the key policy objective linked to the current consultation. Namely, to ensure that UK copyright law is consistent with the requirements of the Rome Convention and WIPO (World Intellectual Property Organization) Performances and Phonograms Treaty (WPPT).**

In view of this, and the clarification issue described above, Option 0 – do nothing – does not seem appropriate. This does not mean that the reservations applied by Member States which have ratified WPPT and/or the Rome Convention should be ignored, but rather the UK recognition of the specific rights recognised by the provisions of the Rome Convention and WPPT properly set out.

This will allow for future development of the framework should Member States change their national laws in ways that will change or amend the reservations they may currently have lodged with WIPO.

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

This option would mean that all producers of sound recordings that are entitled to PPR in the UK would need to pay an equitable share of the PPR revenues to the performers involved in the recording.

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

Recognition of the rights or performers whose performances are fixed in sound recordings, alongside the rights of the producer of such sound recordings reflecting the National Treatment provisions within each of Rome Convention and WPPT is the right way forward.

The assumption that the change will not lead to any overall change in music licensing prices for UK broadcasters and those that play music in public seems fair.

The choice of music repertoire will not change and therefore the result will mainly be some redistribution of way in which allocated equitable revenue shares are allocated and paid for some sound recordings produced in qualifying countries when the sound recording is broadcast or publicly performed in the UK. The allocation as between producers of the sound recordings and performers whose performance are fixed in the recordings will then reflect the practice for sound recordings (and performances fixed in them) which are made and published in the UK.

PPL will be best placed to comment upon the monetised costs referred to in the impact assessment.

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

**Addressing the changes proposed under Option 1 is important to ensure that the UK has the right framework in place to reflect the National Treatment provisions within each of the Rome Convention and WPPT.**

**However, this should not disrupt the correct analysis of countries which will comprise “qualifying countries” under s 206 Copyright Designs and Patents Act 1988 (as amended) (CDPA) and the mechanism in place for Orders in Council to be made under s 208 CDPA to provide that a country is designated under that section as enjoying reciprocal protection, and the extent of that reciprocal protection.**

This will remain vital to properly reflect full application of WPPT terms or the terms of other IP Chapter provisions under relevant International Free Trade Agreements to which both the UK and countries which are potentially “qualifying countries” are parties.

In this respect it would appear that further review and potential updating is required to the provisions of The Copyright and Performances (Application to Other Countries (Amendment) Order 2021[[3]](#footnote-3). It is to be hoped that relevant stakeholders will have an opportunity to comment specifically on changes proposed to the scope of that Order to ensure that “gaps” in protections afforded to UK right owners as recognised by countries who apply key restrictions in recognition of such rights under local national laws do not secure a “one way” advantage for their own nationals.

The purpose behind the UK approach should be to seek to raise the bar for copyright and related rights’ protection for all right holders on an international basis in the increasingly digital world ahead.

The monetary focus in the Impact Assessment links to the transfer of revenues between the UK and the USA.

This is not the best example for assessing the potential benefits in application of National Treatment provisions to support the policy objective of ensuring the UK copyright law is consistent with the requirements of the Rome Convention and WPPT.

The USA is not a signatory to the Rome Convention and the notification given to WIPO by the United States of America when seeking ratification of WPPT[[4]](#footnote-4) is important when considering any Order in Council under s 206.4 CDPA as far as the United States of America is concerned.

In an increasingly digital world, the market distinctions between exercise of broadcasting and communication to the public of sound recordings which do not also involve “making available” the sound recordings in ways relevant to Article 14 of WPPT are becoming less defined.

In practice PPL licensing in the UK is embracing both elements of broadcasting and making available on demand and this triggers remuneration being due to many sound recordings which first published in the USA or published within the UK within 30 days of the publication in the US.

**Option 2: Provide PPR to producers and performers of sound recordings on material reciprocity terms - Questions**

This option would mean that foreign producers and performers would only qualify for PPR where and to the extent that **the country of nationality of the producer** provides PPR for UK nationals. This change would be applied to both pre-existing and future sound recordings.

**The Impact Assessment states that this Option is not favoured.**

However, it does not fully explain why and how this Option would meet the primary policy objective of ensuring that **UK copyright law** is consistent with the requirements of the Rome Convention and WPPT.

For the reasons outlined in 6, 7, 8 and 9 of the Legislative Background sections of the Impact Assessment it would seem that the “material reciprocity” approach under Option 2 **linked only to the nationality of the producer of a sound recording** (and ignoring the mirror test for recognition of performers rights) would not fully comply with the provisions in the Rome Convention and (by cross reference to Rome in Article 3.2 WPPT) the WPPT.

This is relevant when addressing how the UK currently treats “its own nationals” with regard to the right of equitable remuneration provided for in Article 15 of WPPT and whether there is a unified interpretation of what is meant by “nationals” under the National Treatment provisions of Rome and WPPT and the UK application of “country of nationality of the producer” and what is meant by “UK nationals”.

S 206 CDPA – applicable for PART 2 performers rights (as currently amended) provides definitions of “qualifying country” alongside **separate** definitions of:

“qualifying individual” – a citizen or subject of, or an individual resident in a qualifying country - and

“qualifying person” – a qualifying individual **or a body corporate or other body having a legal personality** which (a) is formed under the law of a part of the Untied Kingdom or another qualifying country; and (b) has in **any qualifying country** a place of business in which **substantial business ac**

This contrasts with parallel provisions relevant to sound recordings included in s 159 CDPA – Application of Part 1 to countries beyond the scope of s 157.1 CDPA.

159. 1. Where a country is a party to or a member of the World Trade Organisation, this Part, so far as it relates to literary, dramatic, musical and artistic works, films and typographical arrangements of published editions

(a) applies in relation to a citizen or subject of that country or a person domiciled or resident there as it applies in relation to a person who is a British citizen or is domiciled or resident in the United Kingdom,

(b) applies in relation to a body incorporated under the law of that country as it applies in relation to a body incorporated under the law of a part of the United Kingdom, and(a)applies in relation to a citizen or subject of that country or a person domiciled or resident there as it applies in relation to a person who is a British citizen or is domiciled or resident in the United Kingdom,

(c) applies in relation to a work first published in that country as it applies in relation to a work first published in the United Kingdom.

2. **Where a country is a party to the Rome Convention**, this Part, so far as it relates to sound recordings and broadcasts—

(a) applies in relation to that country as mentioned in paragraphs (a), (b) and (c) of subsection (1), and

(b) applies in relation to a broadcast made from that country as it applies to a broadcast made from the United Kingdom.

3. **Where a country is a party to the WPPT**, this Part, so far as relating to sound recordings, applies in relation to that country as mentioned in paragraphs (a), (b) and (c) of subsection (1).

Therefore, clarification of the status of the definition of “qualifying person” used in s 206 and applied for performers in the context of ongoing application of the national treatment rules needs to be reconciled with the scope of the conditions set out in s 159.1 (a) (b) and (c)?

This seems important to help trace the way in which these provisions link to the following National Treatment Articles:

1. Express reference of application of national treatment to performers in Article 4 of the Rome Convention.

2. Express reference to application of national treatment to producers of phonograms under Article 5 of the Rome Convention.

3. Article 3 of TRIPS – Each Member shall accord to the **nationals** of other Members treatment no less favourable than it accords to its own **nationals** with regard to the protection of intellectual property, subject to the exceptions already provided in …. The Rome Convention….**In respect of performers, producers of phonograms** and broadcasting organizations, **this obligation only applies in respect of the rights provided under this Agreement**.

4. Article 3 WPPT – 1. Contracting Parties shall **accord the protection provided under this Treaty to the performers and producers of phonograms who are nationals of other Contracting Parties**.

2. The **nationals** of the other Contracting Parties shall be understood to be those performers or producers of phonograms who would meet the eligibility for protection under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that Convention.

This therefore cross refers back to **the separate provisions** applied to “performers” under Article 4 of Rome and to “producers of phonograms” under Article 5 of Rome.

It would seem that some might question whether the words “performers **or** producers of phonograms” might suggest an “either or” approach to meeting eligibility. However the

distinct separation of rights under Articles 4 and 5 of Rome would seem to suggest otherwise.

5. Article 4 WPPT – Each Contracting Party **shall accord the nationals** of other Contracting Parties, as defined in Article 3.2, **the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and the right to equitable remuneration provided for in Article 15 of this Treaty.**

This final express reference to Article 15 is important for recognising the principle of the application of National Treatment recognition despite the fact that, after this, reservations can be applied under Article 4.2 – “The (national treatment) obligation under paragraph 1 does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15.3 of this Treaty”.

This last point seems vital when considering the impact of the reservation under Article 15 made by the USA when ratifying WPPT[[5]](#footnote-5).

**In summary, it would seem that this technical issue of providing for the consistency between UK copyright law and the requirements of Rome and WPPT (and indeed other International IP Chapter Free Trade Agreement provisions relevant to copyright National Treatment recognition) should be addressed in addition to the merits, or otherwise, of following a “material reciprocity” approach for the application of rights in sound recordings in the future.**

**Material Reciprocity**

Turning to the issue of material reciprocity, the principle of continuing to promote rights of copyright owners being recognised and applied on a reciprocal basis across WIPO Member States which ratify International Copyright Treaties is becoming ever more important in a digital world.

The practical issue of whether changes to provide rights of broadcasting and public performance to foreign producers and performers on material reciprocity terms will actually have an effect on what the Impact Assessment refers to as “US music”, needs more detailed analysis than that provided in the Impact Assessment.

Reasons include:

Rights in the “musical works” included in sound recordings which may be produced within the US may well be owned by UK right owners.

US record companies often operate through UK based subsidiaries.

US record releases are generally released within the UK within 30 days of the US release or through local UK offices of labels of companies with head offices in the US.

Streaming and making available of recordings on demand within the US and the UK within 30 days of a US record release needs to be factored into impact.

Broadcasters favour blanket licensing of rights to broadcast and publicly perform the full PPL catalogue and are unlikely to pick and choose catalogue for radio and tv broadcast (particularly if selection of what to play is based upon the music included in a sound recording, rather than more specialist consideration of the relevance of the art and originality in a specific sound recording).

**Question 4.** How will/ should licence prices for the broadcasting and public playing of recorded music change under this option?

**For the reasons outlined above, it is not envisaged that the revised “material reciprocity” recognition suggested would meet either of the policy objectives of “reducing costs to UK for users of foreign music where this can be done without significant costs to UK creators of consumers” or “increase revenues for the UK creative industries where this can be done without significant costs to UK users or consumers”.**

In practice, since the relevant broadcasting and performance rights in sound recordings and performances fixed in them are administered collectively via PPL, broadcasters and public performance premises need to secure a licence from PPL to “play music”.

Whilst the size of repertoire represented by PPL will be one criterion for agreeing licence fees, the practical realities of the way in which UK/US releases happen in practice and the interest and popularity of the key releases will mean that that such repertoire remains of interest to broadcasters and those making programmes for broadcast.

The blanket nature of PPL licences is a major benefit for licensees. In many cases the interest in broadcasting or public performance of a particular recording is driven by market forces outside the control of the broadcaster or the performance venue playing popular recordings of relevant genres of music.

Even if the arguments to suggest that material reciprocity rules meant that equitable remuneration payments for “non-qualifying US recordings” were no longer necessary, the practicalities of simultaneous releases and the need for broadcasters to have reassurance that relevant rights have been secured, would outweigh any possible advantages for arguing around whether or not a particular recording was or was not covered by a PPL licence.

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

Significant savings are not envisaged.

The nature of UK broadcasting increasingly involves both traditional broadcasting and making available programmes on demand. Licences will still be required for making available on demand of any “non-qualifying US recordings”.

Therefore, practical separation of rights in such “non-qualifying US recordings” to address equitable remuneration payments allocated purely for broadcasting and communication to the public which does not involve making available on demand is not likely to result in major changes in use of the music and performances which are synchronised with or fixed in the relevant sound recordings and for which many PPL licensees have “blanket agreements” in place under current arrangements.

**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?

PPL has well established systems in place for the allocation of relevant licensing revenues as between UK producers and performers whose performances are fixed in such recordings.

Payments are currently made to US producers from collected licence fees.

Making internal adjustments to split relevant licence fees between US producers and the performers logged on the database as having their performances fixed in such recordings would seem to be a matter for PPL to apply the allocation rules for UK releases more generally across its current distribution activities.

PPL will be best placed to provide detail, but huge levels of internal disruption seem unlikely.

**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?

As explained above, there will be little enthusiasm for major renegotiation over possible (but not clear) carve outs of repertoire from blanket licences.

PPL administration costs may be affected, but the effect will be reduced due to the licensee stance.

**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?

No, for the reasons touched on above.

There will clearly be a knock on for foreign producers affected. Revenue streams for distribution of the equitable remuneration directly to relevant performers will affect current revenue flows.

However, once again the issue of ensuring that the UK maximises application of National Treatment provisions under Rome and WPPT for the benefit of UK right owners remains the core issue.

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

See response to question 8.

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

Please see answers related to Option 2 questions which would also apply to Option 3.

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

The blanket nature of PPL licences is a major benefit for licensees. In many cases the interest in broadcasting or public performance of a particular recording is driven by market forces outside the control of the broadcaster or the performance venue playing popular recordings of relevant genres of music.

Even if the arguments to suggest that material reciprocity rules meant that equitable remuneration payments for “non-qualifying US recordings” were no longer necessary, the practicalities of simultaneous releases and the need for broadcasters to have reassurance that relevant rights have been secured, would outweigh any possible advantages for arguing around whether or not a particular recording was or was not covered by a PPL licence and whether different distribution rules should be applied to allocation of equitable remuneration as between “pre-existing sound recordings and performances and to “new” sound recordings.

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

No major savings are envisaged because of the perceived benefits of blanket licensing agreements offered by PPL.  
  
**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?

PPL currently allocates the equitable remuneration secured from broadcasting and public performance for UK and other “qualifying” releases between the producer, featured artists and non-featured artists whose performances are fixed in a relevant “pre-existing” sound recording. This system already applies for new UK sound recordings as they are released. It is not envisaged that this would change or affect benefits for recipients under the Option 3 as outlined.  
  
**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?  
  
**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?

No, for the reasons outlined above concerning the benefits for licensees of blanket licensing offered via PPL.  
  
**Question 16.** How might the costs on foreign (especially US) record labels under this option indirectly affect the UK music industry or UK consumers?  
  
**Question 17.** Do you have any other comments on Option 3?

The digital environment creates pressure for greater transparency and ease of access to licensing.

Option 1 would appear to be the least complex way of now ensuring clearly that UK copyright law is consistent with the requirement of the Rome Convention and WPPT.

**However, this should not disrupt the correct analysis of countries which will comprise “qualifying countries” under s 206 Copyright Designs and Patents Act 1988 (as amended) (CDPA) and the mechanism in place for Orders in Council to be made under s 208 CDPA to provide that a country is designated under that section as enjoying reciprocal protection, and the extent of that reciprocal protection.**

This will remain vital to properly reflect full application of WPPT terms or the terms of other IP Chapter provisions under relevant International Free Trade Agreements to which both the UK and countries which are potentially “qualifying countries” are parties.

In this respect it would appear that further review and potential updating is required to the provisions of The Copyright and Performances (Application to Other Countries (Amendment) Order 2021[[6]](#footnote-6). It is to be hoped that relevant stakeholders will have an opportunity to comment specifically on changes proposed to the scope of that Order to ensure that “gaps” in protections afforded to UK right owners as recognised by countries who apply key restrictions in recognition of such rights under local national laws do not secure a “one way” advantage for their own nationals.

The purpose behind the UK approach should be to seek to raise the bar for copyright and related rights’ protection for all right holders on an international basis in the increasingly digital world ahead.

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1. Article 3.1 TRIPS - Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection (3) of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. [↑](#footnote-ref-1)
2. <https://publications.parliament.uk/pa/bills/cbill/58-04/0153/230153.pdf> [↑](#footnote-ref-2)
3. <https://www.legislation.gov.uk/uksi/2021/1258/made/data.pdf> [↑](#footnote-ref-3)
4. <https://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_8.html> [↑](#footnote-ref-4)
5. <https://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_8.html> [↑](#footnote-ref-5)
6. https://www.legislation.gov.uk/uksi/2021/1258/made/data.pdf [↑](#footnote-ref-6)