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Submitted to Consultation on extension of rights in sound recordings and performances to foreign nationals Submitted on 2024-03-11 14:17:20

# Introduction

## What is your name?

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# Background

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:

SoundExchange believes that the way that the UK currently provides remuneration to foreign nationals is not consistent with its international obligations under the Rome Convention for the Protection of Performers, and WIPO Performance and Phonograms Treaty (WPPT) because UK law provides for different treatments for performers and producers. There is no basis in the two international treaties for making that distinction.

Article 3 of the WPPT, for example, obliges Contracting Parties, including the UK, to accord the protection provided in that Treaty both performers and producers who are nationals of other Contracting Parties. UK law, as it currently stands, discriminates against performers by restricting their eligibility to proper and adequate remuneration.

This situation has to be changed anyway if the objective of ensuring that UK law is consistent with the international treaties on copyright and related rights to which the UK is party.

# 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:

SoundExchange fully supports Option 1 which would provide National Treatment, a principle that is embedded within international treaties, in particular the WPPT. It is also the principle that prevails internationally as it offers protection for creators more broadly.

SoundExchange administers the US statutory license for sound recording performance codified in the US Copyright Act. This statutory license applies to non-interactive digital audio transmissions and includes services like subscription satellite radio, cable TV radio and webcasting, including when broadcast radio transmits over the Internet. The license also applies to so-called Business Establishment Services (“BES”) for the reproduction of sound recordings to facilitate digital transmission to commercial establishments, such transmissions themselves exempt from remuneration obligations.

We believe the PPR collections and distributions should be made to benefit all performers, without discrimination of the country of residence or on nationality. An option favouring National Treatment would essentially secure such benefits while maintaining tariffs and limiting administrative costs.

Overall, we believe this option would be the most straightforward and easiest to manage for the industry. In our view, National Treatment will not impact the amounts that users currently pay, or tariffs, and will only impact how the money is distributed to performers once collected. In our experience, in territories where National Treatment already applies, the ability to reward the performers for the broadcasting to the public does not appear to be impacted. Under Option 1 therefore, users will continue to pay the same, as the producer’s share will also remain the same.

We believe however that Option 1, although not changing costs to consumers, is in the long-term interests of consumers, as it will enhance incentives for performers to create and be rewarded for original content, and thus increase diversity and choice for consumers.

There is only one noteworthy change: the amounts allocated to previously unprotected performers - which are retained by producers - will now go to those performers.

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

Provide answer here:

SoundExchange administers a statutory license that applies to all commercially released sound recordings regardless of the nationality of the performers or producers, or where the recordings were made or first released. In other words, in the United States, all creators are treated equally as the country applies the principle of national treatment.

SoundExchange sends US royalties to UK performers and producers who register directly with us when content is played on a non-interactive digital source. In addition, we have reciprocal agreements in place with the UK CMO PPL to exchange royalties for our respective performer and producer members.

Under US law, US sound recording performance royalties are allocated 50% to producers, 45% to featured performers (who SoundExchange pays directly), and 5% to non-featured performers. SoundExchange pays the non-featured share to a third-party organization which then distributes that amount on to non-featured musicians and vocalists.

It is worth noting that the WPPT, which the UK has ratified, offers the power to the contracting parties to limit the scope of National Treatment relating to nationals of other contracting parties who have issued reservations under the Article 15(3) of the Treaty. Even if this remains at the discretion of the contracting party, there is no obligation to do so. In fact, this in our opinion should not be encouraged, as it leads to discrimination, it penalises performers and reduces incentives to create original content, and ultimately leads to an unjustified enrichment at the expense of the performers UK consumers wish to listen to.

Albeit this no longer falls in the UK’s jurisprudence, the European Court of Justice issued a relevant decision on 8 September 2020 on the case brought by the Recording Artists Actors Performers Ltd. (“RAAP”) v. Phonographic Performance (Ireland) Ltd. (“PPI”), (C-265/19, EU:C:2020:677). The ruling made clarifications with respect to the application of National Treatment in EU law. It should be underlined that a Court decision stipulates that the EU law, must be interpreted in a manner consistent with the equivalent concepts contained in the Rome Convention and/or the WPPT.

The National Treatment principle is already embedded in the WPPT. What has been a clear outcome of the aforementioned ruling is that a performer who is a national of a Contracting State to that Convention, which the United States is, enjoys National Treatment accorded by the other Contracting States to their own nationals where, inter alia, the performance is incorporated in a phonogram which is protected under the Convention. Thus, we support the National Treatment as the means to provide the best support to the both the US and the UK music industry.

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:

In this delicate ecosystem, it is crucial to bear in mind that licensing a global repertoire will contribute to maintaining a balance of license fees and administrative costs. Introducing a Material Reciprocity option will disturb the broader PPR ecosystem for music performers and producers. We believe that such an option would not be in line with international standards, as the principle that prevails internationally, offering safety for the creators, is National Treatment. Material Reciprocity is the exception to the rule.

More broadly, we believe that adopting Material Reciprocity would be to the long-term detriment of the UK consumer. It would create a distorted and unequal market for creative content, which would be likely over the long-term to have perverse effects, reducing incentives for US performers to create content which appeals to the UK consumer, and thus reducing diversity and choice. At the same time, as noted at paragraph 61, it could reduce revenue available to UK performers thus reducing their incentives as well. Any short-term savings would thus be at the expense of a broad-based creative ecosystem featuring UK and US original content in the long term.

Material Reciprocity will mean that the UK music sector withholds PPR collections and/or the distribution of revenues to foreign producers and performers for the broadcasting and communication to the public. Thus, it would deprive foreign producers and performers to benefit from PPR collections made in the UK on their behalf, simply introducing a discriminatory regime for the music industry.

## 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:

SoundExchange has reciprocal agreements with the UK CMO PPL where SoundExchange is required to exchange royalties for its respective members on the same basis that those members would get if they were directly registered with the UK’s PPL.

SoundExchange acts as the sole collective in the US designated by the US Government to collect and distribute royalties for digital radio. Certain types of eligible digital radio services may play sound recordings without permission of the rights owners so long as they pay SoundExchange a royalty and submit usage data. SoundExchange then pays out on a recording-by-recording basis to phonogram producers (50%) and featured performers (45%).

SoundExchange also pays out the non-featured performer share (5%) to a third-party organization which then distributes on to individual back-up musicians and vocalists. In 2022 alone, SoundExchange paid out nearly $960 million ($959.4 Million) to creators from all over the world, [(https://www.riaa.com/wp-content/uploads/2023/03/2022-Year-End-Music-Industry-Revenue-Report.pdf)](http://www.riaa.com/wp-content/uploads/2023/03/2022-Year-End-Music-Industry-Revenue-Report.pdf)) including $41.2 Million to those in the UK.

The Material Reciprocity Option will require the introduction of new tariff structures, ultimately impacting the costs for the UK CMO, PPL. This would mean increased costs for the new tariffs and potentially increased administrative costs because there will be a lower royalty pool to which PPR can be obtained.

## 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:

SoundExchange does not believe there will be any benefits under this option. We agree with the assessment of paragraph 61 of the consultation, where Material Reciprocity might in the end be at the expense of UK producers who would be facing more costs, ultimately damaging the UK music sector.

Changing the delicate balance with Material Reciprocity may lead to a proportionate increase of medium-term tariffs, objectively harming UK creators and the music sector and leading to a fall of revenues for the UK music.

Assuming a Material Reciprocity principle is introduced, cheaper UK music could be promoted. But, there is a risk that this will incentivize more US music to be played in the UK because (i) users prefer US repertoire due to its popularity and (ii) it will be unprotected – users will not have to pay for it - and consequently, could reduce the amount of the UK music being played. Thus, with a possible introduction of Material Reciprocity: (i) more US music will be played, but creators will not be compensated (worsening the current situation), and (ii) UK producers and performers will lose revenue because their repertoire while being protected, will be played less, thus reducing the portion of remuneration paid to the UK even more.

## 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:

As mentioned in our response to Question 2, SoundExchange administers the US statutory license for sound recording performance codified in the US Copyright Act. The rates (“tariffs”) and terms for each type of user of the statutory license is set by our rate tribunal, the US Copyright Board, generally for 5-year terms. The Copyright Royalty Board determines the amounts that each type of user must pay, as well as the reporting requirements needed to identify which recordings have been used under the statutory license. In total, SoundExchange administers numerous different types of licenses across these various platforms.

In general, SoundExchange receives monthly payments and reports of the usage of sound recordings from its 3,600+ licensees. SoundExchange then matches this usage to its local repertoire database to identify the recordings, performers, and phonogram producers associated to the recordings. We then allocate the appropriate shares to each sound recording and make monthly payments of 45% to featured performers and 50% to producers. We make a 5% payment from our collections to cover non-featured performers. We pay this amount to a third-party organization which then distributes that amount to back-up musicians and vocalists. Our total 2022 distribution was $959.4 Million.

We are concerned that the introduction of a form of Material Reciprocity is designed to restrict the transfer of payments by the UK to foreign nationals leading to cost savings for them and an unfair treatment to foreign nationals. Introducing Material Reciprocity would in essence exacerbate the problem for US creators, both performers and producers, since there would be an incentive to play more American music without compensating them.

It is difficult to see how any form of Material Reciprocity restriction would respect the essence of the rights to property and copyright protections. Actually, the complete opposite is true. US artists and performers would simply be denied the essence of those rights which is to generate revenues or royalties through the exploitation of their intellectual property rights, leading to disproportionate treatment.

More fundamentally, any change by the UK to introduce the notion of reciprocity would also fail the requirement of being strictly necessary. From our perspective, there is no compelling reason, other than economic considerations, to justify reciprocity as a strictly necessary approach in this case.

Reciprocity will amount to an effort to change the current balances to further protect and defend UK performers and producers and the expense of proper, adequate and fair remuneration for US performers and producers.

As mentioned on Question 7, the Material Reciprocity Option will require to introduce new tariff structures, ultimately impacting the broader UK music industry, that will be faced with potentially increased administrative costs.

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

Provide answer here:

SoundExchange does not support Option 2. Overall, Material Reciprocity will decrease the use of the UK repertoire in radio and other public spaces of communication to the public, with US music privileged, possibly causing long term damages to the UK music industry and significant reduction in choice and diversity for UK consumers. We believe that Option 2 proposing Material Reciprocity should not be considered by the UK Government: the prevailing international standard, under the WPPT, is National Treatment.

# 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:

As compared to Material Reciprocity, National Treatment will increase the number of recordings available for licensing in the UK. This would serve to substantially boost the UK music sector’s overall collection figures, increasing the royalty pool from which they pay out to creators. This increase creates efficiencies in these businesses by allowing them to reduce their administration costs (usually a percentage of the collection amount) since the royalty pool is much larger. As a result, if National Treatment will apply instead of Material Reciprocity, not only would US creators be paid, but UK creators could likewise see a net increase in their payments as costs are reduced.

A hybrid approach where National Treatment could apply to pre-existing sound recordings and performances, and Material Reciprocity apply to new sound recordings and performances, will simply create legal uncertainties to the sector and unnecessary administrative burdens. It will also be disproportionate and will not harmonize an already complex sector. It will require establishing new tariff structures for all new sound recordings, ultimately impacting the costs for the UK CMO, PPL.

This hybrid approach is also unlikely to be consistent with the UK’s international treaty obligations. Article 4 of the WPPT obliges the UK, as a Contracting Party to afford National Treatment towards the performers and producers of other Contracting Parties.

An exception to this principle is where a Contracting Party has deposited a notification with the Director General of WIPO, declaring that it will apply National Treatment only in respect of certain uses or that it will limit their application in some other way. The UK has never made such a reservation of that nature and hence the international duty to apply the National Treatment principle is incumbent upon it. Adopting a Material Reciprocity rule for the future would infringe upon that commitment. Furthermore, there is no provision in the WPPT that allows such a mixed approach.

The English courts have also made it clear that, when interpreting national laws and regulations, such measures must be construed and applied in a matter that is consistent with the UK’s international obligations. Since the adoption of a Material Reciprocity standard for the future would clash with the standard that the UK should apply, namely National Treatment, it is highly possible that any change of this kind would be struck down in any litigation brought before the English courts.

Also, there is a risk that new sound recordings and performances will be linked with a qualification criterion based on nationality for performers and producers, limiting their ability to obtain a fair share of their royalties. Therefore, this system will create a fragmentation in the market, as different principles will be applying at different agreements.

From a consumer perspective, this hybrid approach would suffer the same disadvantages over time as Option 2, with the risk of an ossified UK music market in which there was reduced incentive for new original content. Thus, Option 3 will not be at the best interest of the consumer.

## 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:

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:

SoundExchange has reciprocal agreements with the UK CMO PPL where each party is required to exchange royalties for its respective members on the same basis that those members would get if they were directly registered with either SoundExchange or PPL for domestic royalties. Renegotiate new tariff structures for new sound recordings while maintaining the currently negotiated licenses for the pre-existing sound recordings will create important administrative costs. This will simply create confusion in the industry and legal uncertainty. In our view this would be a disproportionate and unjustifiable solution.

A harmonized approach covered only by National Treatment will be the key to ensure legal certainty and consistency for the music industry more broadly

and an appropriate remuneration for producers and performers on an international level.

## 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:

SoundExchange does not believe there will be any benefits under this option and could significantly worsen the current situation. We refer you to Question 8 covering our views on the impact to the UK music industry in case Material Reciprocity is introduced. Per previous responses, we believe this option will be disproportionate and unjustifiable. It could result into confusion and legal uncertainty for the music industry at large, and reduced

long-term outcomes for UK consumers.

## 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:

We refer you to question 9 for our views on the Material Reciprocity option. Per previous responses, we believe this option will be disproportionate and unjustifiable. It could result in confusion and legal uncertainty for the music industry at large, and reduced long-term outcomes for UK consumers.

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

Provide answer here:

SoundExchange does not support Option 3 as we believe it would be disproportionate and can be linked with legal uncertainties, disproportionate administrative burdens for the sector, and reduced long-term outcomes for UK consumers.

# Preferred Option

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

Option 1

Provide answer here:

SoundExchange advocates for the application of the principle of National Treatment both in the US and outside, including in the UK. Our preferred option is Option 1, as this would provide legal consistency and will help remove any barriers existing in the sector. International Treaties, such as the WPPT clearly stipulate that National Treatment shall remain the rule to ensure appropriate remuneration for copyrighted works. We believe Option 1 would resolve administrative complexities and provide legal certainty for the market operators both in the UK and the US, bringing long-term stability, benefits to UK and US performers, and choice and diversity of original content to UK consumers.

# Confidentiality and data protection

## Confidentiality request:

Provide answer here:

N/A