### Introduction

This response is submitted on behalf of the AFM and SAG-AFTRA Intellectual Property Rights Distribution Fund (the **"Fund"**), a trust fund whose general purpose is the receipt and distribution of royalties generated from agreements entered into with collecting societies, rights holders and other third parties by:

* The American Federation of Musicians of the United States and Canada **("AFM")**, a trade union and collective management organisation which represents professional instrumental musicians. AFM was established in 1896 and is the largest union of musicians in the world. It has over 80,000 members, including performers in orchestras, backing bands, festivals, clubs and theatres;
* SAG-AFTRA, a trade union and collective management organisation which represents over 160,000 performers, including recording artists, singers, voiceover artists and other media professionals; and
* the Fund itself.

The Fund has been designated by the AFM and SAG-AFTRA for the collection and distribution of royalties, whether due under local, foreign, or international law or treaties. Within the USA, the Fund collects and distributes royalties generated from the US Digital Performance Right in Sound Recordings Act (DPRA) on behalf of non-featured performers. These include royalties paid by digital satellite radio services, webcasters, and other non-interactive digital services, which are then distributed by the Fund to all US and foreign non-featured performers (including British performers) either directly or under and in respect of reciprocal agreements with PPL and other non-US collecting societies and organisations.

# Option 0

## Question 1. Do you 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? Why or why not? If not, what are the changes needed to bring UK law into line with those obligations?

**Summary**

It is clear that the way in which UK law currently provides PPR to foreign nationals is *not consistent* with the UK’s international obligations under the Rome Convention and the WPPT. Further, unless UK law is amended in advance of accession, the UK will also be in breach of the obligations which it will assume under Chapter 18 (Intellectual Property) of the CPTPP.

The fundamental reason for this inconsistency between UK law and the treaty obligations which the UK has assumed arises from the definitions of ‘qualifying performance’ in section 181 and of ‘qualifying individual’ in section 206 of the Copyright Designs and Patents Act 1988 (**“CDPA”**). The effect of these definitions is that a performance will enjoy protection under Part II of the CDPA *either* by virtue of the place of performance being the UK or another relevant country, *or* by virtue of the *performer being a national or resident* of the UK or another relevant country.

By contrast, the Rome Convention[1](#_bookmark0) requires performances to be protected by virtue of the so-called ‘Points of Attachment’ in Article 4. The first of these in Article 4(a) is based on the place of the performance and so corresponds with the place of performance gateway in s.181 of the CDPA. However, neither the second point of attachment in Article 4(b) (incorporation into a phonogram which is protected under Article 5), nor the third in Article 4(c) (incorporation of the performance in a broadcast protected under Article 6), are laid down as gateways to protection for performers in Part II of the CDPA.

It is important to note that the nationality or residence of a performer is *not relevant* to whether a performance is entitled to protection under any of the Rome Convention points of attachment. For example, a performance will be entitled to protection under Article 4(b) in combination with Article 5(1)(c) if it is incorporated in a phonogram which is first published (including simultaneously published) in a

1 The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome on 26 October 1961.

1

Rome Convention country, regardless of whether the performer is a national of that or of any other Rome Convention country, or indeed is stateless.

Therefore there is a fundamental incompatibility between the CDPA which introduces nationality or residence criteria and the UK’s international obligations to protect performances based on the points of attachment in respect of which the nationality of the performer is irrelevant. Section 208 allows the nationality or residence gateway in section 206 to be extended to other countries, and Orders in Council (discussed further below) have extended protection under Part II to nationals or residents of Rome Convention countries. Because of the mis-fit between the points of protection criteria under the Rome Convention and the nationality/residence criterion under the CDPA, there will necessarily be some cases where protection under Part II is conferred on performances which the Rome Convention does not require the UK to protect,[2](#_bookmark1) but there are many cases – including cases of great practical and commercial importance – where UK law has failed to confer protection on performances which are entitled to protection under the points of attachment in clear breach of the UK’s obligations under that Convention.

As we explain in more detail below, a similar mis-match exists between the CDPA and the UK’s international obligations under the WPPT, and this will also give rise to a breach of the UK’s obligations under the CPTPP if the structural problem in the CDPA is not rectified prior to the UK’s accession becoming effective.

For these reasons, Option 0 would not be compatible with the UK’s international obligations. It is also our firm view, for the reasons which we explain in our responses to the questions relating to Options 1, 2 and 3, that the only Option which would enable the UK to comply with its international obligations is Option 1. Options 2 and 3 would also result in the UK being in breach of its international obligations.

### Detailed analysis of the UK’s international legal obligations and of the CDPA

The Impact Assessment correctly acknowledges that the main international conventions on rights of producers and performers of sound recordings to which the UK is a signatory (the WIPO (World Intellectual Property Organization) Performances and Phonograms Treaty (“**WPPT”**) and the Rome Convention) “*require greater consistency between the treatment of performers and producers than UK law currently provides*”. This is primarily because, as explained above, the point of attachment in Article 4(b) of the Rome Convention requires performances to be protected if the phonograms in which they are incorporated are entitled to protection under the Convention. The CDPA in combination with the current Order in Council[3](#_bookmark2) confers sound recording copyright protection on phonograms first or simultaneously published in a Rome Convention country by virtue of connection with that country, but as explained above, the CDPA imposes an additional and impermissible test of the nationality or residence of the performer in order for the performances incorporated in that phonogram to gain protection. Further, and again as the Impact Assessment confirms, if Option 0 were to be the chosen option, UK law would also “*continue to not be clearly aligned with the international treaties on copyright*”. Accordingly, we agree with the government’s assessment that “*change to the law in this area is necessary for consistency with the treaties on copyright and performers’ rights*” and to comply with the UK’s international obligations.

We explain in more detail below the reasons why the way that UK law currently provides PPR to foreign nationals is inconsistent with the UK’s international obligations.

### Rome Convention

* Articles 4 and 5 require national treatment (i.e. treatment the same as a Contracting State gives to its own nationals) to be granted to performers where a performance:
  + takes place in another Contracting State (the **"criterion of performance"**) (Article 4(a));

2 For example, a performance given by a Rome Convention national in a country outside the Rome Convention which is included in a phonogram first published outside the Rome Convention.

3 See further below.

* + is incorporated in a phonogram which is protected under Article 5 because the producer of the phonogram is a national of another Contracting State (the **"criterion of nationality"**) (Articles 4(b) and 5(1)(a));
  + is incorporated in a phonogram which is protected under Article 5 because the first fixation of the sound was made in another Contracting State (the **"criterion of fixation"**) (Articles 4(b) and 5(1)(b)); or
  + is incorporated in a phonogram which is protected under Article 5 because the phonogram was first published in another Contracting State (the **"criterion of publication"**) (Article 4(b) and 5(1)(c)). This includes a phonogram which was first published in a non-Contracting State but which was also published in a Contracting State within 30 days of its first publication (**"simultaneous publication"**)**.**
* Article 5(3) of the Rome Convention entitles a Contracting State to declare that it will not apply (a) the criterion of fixation “*or, alternatively*” (b) the criterion of publication – i.e. only one of these criteria can be disapplied, not both.
* Article 12 of the Rome Convention provides that both performers and producers of a phonogram are entitled to a single equitable remuneration right to be paid for the direct use of such a phonogram, or its reproduction, for broadcasting or for any communication to the public.
* On ratification in 1963, the United Kingdom filed a declaration which stated:

1. that it would not apply the criterion of fixation; and
2. that, under Article 16(1), it would not grant the protection provided for by Article 12 in respect of phonograms the producer of which is not a national of another Contracting State, *unless the phonogram has been first published in a Contracting State which has not made such a declaration*.

* In doing so, the United Kingdom accepted that it would apply the protection of Article 12 to performances which satisfy the criterion of publication, and by virtue of Article 5(2) this includes cases where there has been simultaneous publication within a Rome Convention country. That protection would be conferred regardless of the nationality of the producer. The declaration does not refer to the protection of performances or mention the nationality of performers. Accordingly, it provides no basis for denying equitable remuneration to performers, except in cases where the phonogram is unprotected in which case the declaration entitles the UK to deny equitable remuneration to *both the producer and the performer(s)* of a phonogram. Protection can be denied to phonograms only when (1) the producer is not a Rome Convention national, and (2) the phonogram was not first (including simultaneously) published in a Rome Convention country.
* Consequently, **any** performer whose performance was incorporated in a phonogram first published in (for example) the United States of America, but which was also published in a Contracting State within 30 days of its first publication, which is the usual practice of the recording industry, should be entitled to a right to equitable remuneration in the United Kingdom *by virtue of connection with the Contracting State of publication*, in respect of that phonogram under the Rome Convention, regardless of the nationality of the performer and regardless of the place of performance.
* The irrelevance of the nationality of performers to entitlement to protection under the Rome Convention is very well known and has been commented on by writers on international copyright and related rights. Dr Silke von Lewinski of the Max Planck Institute in her chapter “Intellectual Property, Nationality and Non-Discrimination” in the WIPO publication “Intellectual Property and Human Rights” (1998) explained that:[4](#_bookmark3)

4 Page 183, section (ccc) Rome Convention.

“Under the Rome Convention, different points of attachment for the protection of performers, phonogram producers and broadcasting organizations are provided for in Articles 4, 5 and 6 of the Rome Convention. *For performers, nationality has not been chosen for practical reasons: very often, performing ensembles such as orchestras, bands or choirs include performers of different nationalities, which would render the application of the point of attachment of nationality too difficult.* Instead of the nationality, the place of the performance is a point of attachment, as are the incorporation in a phonogram which is protected under Article 5 of the Rome Convention, and the broadcast of a performance which is not fixed on a phonogram if the broadcast is protected by Article 6 of the Rome Convention (Article 4 of the Rome Convention).” (italics added)

* Ricketson and Ginsburg in “International Copyright and Neighbouring Rights” (3rd Edition, 2022) say this in relation to the Rome Convention:[5](#_bookmark4)

“19.14 *Points of attachment for protection:* Unlike Berne or the UCC, the nationality of the performer is irrelevant (this is in contrast to the position with respect to producers of phonograms and broadcasting organizations: see further at paras 19.20 and 19.25). Thus, under article 4, contracting states are required to grant national treatment to performers if any of the following points of attachment is satisfied: the performance has taken place in another contracting state, the performance is incorporated in a phonogram which is protected under the Convention (see further article 5, discussed at 19.19ff below, as to the meaning of 'protected phonograms'), or is carried by a broadcast which is protected by the Convention (again, see further article 6, discussed at para 19.25 below, as to what are 'protected broadcasts').”

### WPPT

* Article 1(1) WPPT makes it clear that nothing in the WPPT shall derogate from existing obligations that Contracting Parties to the WPPT (who include the UK, the USA and the EU) have to each other under the Rome Convention (and therefore no terms of or reservations to the WPPT may detract from those rights).
* Under Article 3(1) WPPT, a Contracting Party to the WPPT is required to accord the protection provided under it (including under Article 15(1)) to the performers and producers of phonograms who are nationals of other Contracting Parties. "*Nationals of other Contracting Parties*" is given an extended definition in Article 3(2) and includes any 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 the WPPT also Contracting States to the Rome Convention. Therefore, performers whose performances qualify under the criterion of publication (including simultaneous publication) under the Rome Convention, but reading the Rome Convention provisions onto WPPT Contracting Parties, are entitled to protection under the WPPT, regardless of their own nationality.
* Article 15(1) of the WPPT requires:
  + that performers and producers of phonograms should enjoy the right to a single equitable remuneration for the direct or indirect use of a phonogram published for commercial purposes for broadcasting or for any communication to the public; and
  + that single equitable remuneration should be shared between the phonogram performer and producer.
* Thus for the purposes of the WPPT in the same way as for the Rome Convention, the personal nationality of a performer is irrelevant to the entitlement of a performance to protection under the WPPT. Instead, the extended definition of nationality in Article 3(2) WPPT and its cross reference to the points of attachment under the Rome Convention means (for example) that performers of a performance embodied in a phonogram first published (including by simultaneous publication) in a Contracting Party *are to be treated as nationals of*

5 Page 1218

*that Contracting Party* for the purposes of the WPPT regardless of whether their own individual nationality does or does not coincide with the Contracting Party of first publication.

**CPTPP**

Chapter 18 “Intellectual Property” of the CPTPP contains the following provisions:

* Article 18.7(2)(f) requires Parties to accede to the WPPT if not already a party.
* Article 18.8(1) requires each Party to accord to nationals of other Parties treatment no less favourable than is accorded to their own nationals with regard to the protection of all categories of intellectual property rights covered in Chapter 18. Footnote 4 makes clear that in respect of works, performances and phonograms, this includes “*any form of payment, such as licensing fees, royalties, equitable remuneration, or levies, in respect of uses that fall under the copyright and related rights in this Chapter*.”

As regards the rules for qualification for protection of both record producers and performers, Chapter 18 closely mirrors the WPPT, requiring those rules to be applied as between CPTPP members.

* In particular, Article 18.62(1) second sentence states that “*A performance or phonogram shall be considered first published in the territory of a Party if it is published in the territory of that Party within 30 days of its original publication*.”
* It follows that on accession to the CPTPP, the UK will be obliged to confer the protection required by the Chapter on performances first published in a CPTPP country, regardless of the nationality of the performer. This is of significant practical importance to our members, in view of the widespread practice of US record producers simultaneously first publishing phonograms in Canada, a CPTPP Party.
* Since the UK accords the right to equitable remuneration under its law to performers who are its own nationals, it is obliged to accord that same right to performers who become entitled to protection by virtue of their relevant connection to another Party to the CPTPP. Where a performer becomes entitled to such protection by virtue of (for example) first or simultaneous publication in Canada, the UK would only be entitled to take advantage of the exception in Article 18.8(2) allowing restriction of protection on a reciprocal basis by reference to the law of *the relevant CPTPP Party, which is Canada*. The UK would not be entitled to deprive a performer whose performance becomes entitled to protection in the UK by virtue of first or simultaneous publication in Canada on the ground that *the law of a non-Party such as the USA* confers less protection.

### Current UK Legislation

* UK legislation, specifically the Copyright, Designs and Patents Act 1988 (as amended) (“**CDPA**”) and various orders in council, most recently the *Copyright and Performances (Application to Other Countries) Order 2016* (SI 2016 No 1219), is inconsistent with and in breach of the United Kingdom’s international obligations under the WPPT and the Rome Convention.
* The *Copyright and Related Rights Regulations 1996* (SI 1996 No 2967) (the **"1996 Regulations"**) came into force on 1 December 1996, in order to implement EU Council Directive 92/100/EEC of 19 November 1992 on rental and lending right and on certain rights related to copyright in the field of intellectual property [1992] OJ J 346/61 (the **"1992 Directive"**) (later replaced without substantial modification of the relevant provisions by Directive 2006/115/EC of 12 December 2006 on rental and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28). The 1996 Regulations amended the CDPA and introduced section 182D(1), which provides for a limited right of equitable remuneration for performers where the whole or any substantial part of a “qualifying performance” is played or communicated to the public.
* “Qualifying performance” includes that which takes place in a “qualifying country”, including a country designated by Order made under section 208 CDPA. Under such an Order, the *Performances (Reciprocal Protection) (Convention Countries) Order 1995* (SI 1995 No 2990) (**"1995 Order"**), the United Kingdom granted full protection to performers who are nationals of Contracting States to the Rome Convention and conferred limited rights (not including any right to equitable remuneration) upon performers from a list of non-Rome Convention countries, including the United States of America. This was not compatible with the UK’s obligations under the Rome Convention which as explained above required the UK to confer the equitable remuneration right on all performances first or simultaneously published in a Rome Convention country irrespective of the performers’ nationality. Accordingly, subjecting performers from that list of countries to curtailment of their rights based on their personal nationality was and is a breach of the UK’s obligations under the Rome Convention.
* Paragraph 11(4) of the *Copyright and Performances (Application to Other Countries) Order 2016* (SI 2016 No 1219) (**"2016 Order"**) further states that where a country is listed in Part 2 of the Schedule to the 2016 Order and Article 11 is specified against that country in the Schedule (as is the case for the United States of America, as well as several other countries), and that country has made a declaration that it will:

1. apply the provisions of Article 15(1) WPPT only in respect of certain uses;
2. limit the application of those provisions in some other way; or
3. will not apply those provisions at all,

then the provisions of Part II CDPA shall not apply to protect the right to equitable remuneration to the extent that the declaration under Article 15(3) WPPT is in force in the law of that country in relation to British performances*.*

* In doing so, this legislation fails to confer a right to equitable remuneration upon **any** performer who would meet the criteria for national treatment under the Rome Convention on the basis of first publication (including simultaneous publication) of a phonogram incorporating a performance under Article 5(1)(c) of the Rome Convention. The imposition of the requirement in section 182D that the performance must be "qualifying" imposes restrictions as to the nationality of the performer, which are not permitted under the Rome Convention.

Where the performer is a US national, the effect of the legislation is to make the performer’s right to equitable remuneration subject to a condition relating to US law, when the performer’s entitlement to unrestricted equitable remuneration arises under the Rome Convention by virtue of the connection of the performance with the Rome Convention country where the performance was first or simultaneously published.

* As a matter of the international law of treaties, this is manifestly unsustainable. Assuming that the United States’ reservation under Article 15(3) WPPT relieves the UK of its obligation towards the USA under the WPPT to confer equitable remuneration on performers who become entitled to protection in the UK under the WPPT by virtue of the connection of the performance with the USA, that has no bearing on, and does not relieve or diminish, the obligation of the UK under the Rome Convention owed towards the Rome Convention country of publication to grant unrestricted equitable remuneration to performances embodied in phonograms first or simultaneously published in its territory. Nor (prospectively) will the US reservation under the WPPT or the state of US law to which it refers relieve or modify the international obligations owed by the UK to the CPTPP country within which a performance is first or simultaneously published.
* The 2016 Order also in practical effect provides for a different, and wider scope of protection for US phonogram producers than for US performers. Whilst Article 3(2)(b) of the 2016 Order excludes broadcasting from the scope of sound recording copyright in the case of countries which are parties to the WPPT but not the Rome Convention, this is in practice ineffective to prevent US producers from enjoying sound recording copyrights in the UK which they can enforce in respect of broadcasting, because of the near universal practice of commercial US

producers of simultaneously publishing their recordings outside the USA in the UK, Canada and/or in other Rome Convention countries. Such sound recordings become entitled to copyright in the UK by virtue of s.159(2)(a) in combination with s.159(1)(c) of the CDPA by virtue of first or simultaneous publication in a Rome Convention country and thereby escape the restriction in Article 3 of the 2016 Order which applies only to sound recordings entitled to copyright by virtue of s.159(3) (WPPT countries).

* Even assuming that the UK were entitled to restrict the shared equitable remuneration right to match the scope of the US reservation, the UK has failed to do this in a way which equally restricts the scope of producers **and** performers. The US declaration under the WPPT and US law precludes equitable remuneration for both phonogram producers and performers in respect of broadcasting and communication to the public (with some exceptions) and so it cannot be said that UK law reflects the US declaration “*to the extent that another Contracting Party makes use of the reservations permitted by* [*Article 15(3)*](https://www.wipo.int/wipolex/en/text/295578#P129_17030) *of this Treaty*” (see Article 4(2) WPPT), and therefore the mis-match between protection of producers and performers under UK law is a breach of the UK’s WPPT obligations.
* It should also be noted that UK legislation does not appear to be consistent with the UK’s declaration under the Rome Convention which correctly reflected the principle that if a phonogram is entitled to protection by reason of its first (including simultaneous) publication in a Contracting State then the UK would not be entitled to deny equitable remuneration to the producer or the performer based upon the nationality of the producer. Despite the terms of the UK’s declaration, UK legislation failed to reflect the same principle.
* We are pleased that the government now recognises that changes to UK law are required in order to achieve compliance with the UK’s international obligations and is now considering changes to the law in order to ensure that the UK complies with its obligations under the Rome Convention and the WPPT, as well as with its imminent new international obligations under the CPTPP.

# Option 1

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

It is our view that the impacts of Option 1 will be minimal:

* It will not have a direct impact on music involving UK-only performers, or on performers from countries which already provide PPR to UK performers. To the extent that there is an impact on performers or phonogram producers from countries other than the USA, this is likely to be minimal given that after music from the USA, we understand that music from Ireland, Germany and Sweden which generally qualify for PPR are the next most popular (making up 4% of music played) and no other nationalities represent more than 1%.
* UK record labels and UK artists that work with foreign performers who are not currently eligible for PPR could face some limited costs under this option, but we would expect that to be minimal given that recordings made by UK record labels are likely to be qualifying performances under the current legislation.
* As a result of the errors made when current UK legislation was enacted and the UK’s failure to reflect its declaration under the Rome Convention in its domestic legislation (as we explain in our response to Question 1 above), US record labels have qualified for PPR but US performers have not. Further, the US record companies have to date been paid 100% of the single equitable remuneration that, pursuant to the UK’s international obligations, should have been shared with the US performers. Accordingly, at least since the *Performances (Reciprocal Protection) (Convention Countries) Order 1995* came into force, the US record producers have been paid very substantial sums to which they should not have been entitled by virtue of the fact that they have not had to share the equitable remuneration with performers. We note that the UK government has assessed the “costs” to the US record producers of Option 1 over the period 2024 to 2033 as being £230 million. We disagree that it

is right to view the impact of Option 1 as resulting in a “cost” to the US record producers – rather, the US record producers have received a benefit (which is likely to significantly exceed

£230 million) to which they should not have been entitled for 28 years. We disagree that rectifying this should be viewed as a cost to the US record producers. For the same reason, we disagree that the impact of Option 1 should be seen as a “gain” for US performers – rather, the impact is to prevent the US performers from continuing to suffer loss as a result of the errors in UK legislation.

* We agree with the UK government’s assessment that this option is unlikely to result in substantial costs or risks for UK creators, users or consumers of copyright works and would be unlikely to result in music licences becoming more expensive for UK users – PPL already collects the single equitable remuneration payable and there is no discount given to users for US labels to reflect the fact that only the producers receive the benefit of the payments. All that is required is that this single equitable remuneration is shared between the US record companies and US performers, as it always should have been, and this sharing would have no impact on users or on other performers who are already entitled to PPR under existing law.
* There is unlikely to be any significant impact or increase in the costs of collecting and distributing licence fees. Given that it already collects and distributes the single equitable remuneration, PPL already holds and processes all, or most, of the required data and all that is likely required is an adjustment to its distribution calculations. PPL already collects on a reciprocal basis for our members revenues arising from uses of their performances which fall outside the scope of the US reservation to the WPPT – which extends to “certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under the United States law” – so extending their collection system to include US performers in PPR distributions in the same way as non-US performers would not materially increase distribution costs.
* We do not think that Option 1 is likely to impact the US record companies’ investment in new music given that the UK is just one of many countries which consumes US music.
* Finally, we agree that this option would ensure consistency with the United Kingdom’s international obligations, including under the Rome Convention and WPPT, and its prospective obligations under the CPTPP.

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

Option 1 is the only option which would not result in the UK being in breach of its international obligations for the reasons set out below (note that we disagree with the proposition that Option 3 would be consistent with the UK’s international obligations). It is therefore the only viable option assuming the UK wishes to comply with its international obligations.

Option 1 would also (discounting Option 0, which, like the other Options, would continue to leave the United Kingdom in breach of its international obligations) be the easiest option to implement. It can be achieved by simply amending the definition of “qualifying performance” in the CDPA to reflect the “points of attachment” for performers which are provided for in the Rome Convention, WPPT and CPTPP.

# Option 2

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

As with Option 0, Option 2 would also result in the UK being in breach of its international obligations and consequently would not fulfil the UK government’s policy objective, as stated in its impact assessment, to “*ensure UK copyright is consistent with the requirements of the international treaties on copyright, especially the Rome Convention and the WPPT*”.

What is envisaged by Option 2 – namely, “Amending UK law in order to provide 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” – would require disapplying the criterion of publication

(including simultaneous publication) under the Rome Convention, the WPPT and prospectively the CPTPP, at least in respect of producers and performers where the country of nationality of the producer does not provide PPR for UK nationals. However, Article 5(3) of the Rome Convention allows for the disapplication of *either* the criterion of fixation *or* of publication, but not both.

The fact that the USA, a non-party to the Rome Convention, has made a reservation under the WPPT relating to PPR does not justify in international law the UK failing to honour its obligations under the Rome Convention to the Rome Convention countries in which a phonogram is first or simultaneously published to give protection under UK law to performances first published in those territories.

Accordingly, Option 2 is contrary to the UK’s international obligations.

It is also worth noting that Option 2 would be inconsistent with the UK’s declaration under the Rome Convention (which clearly recognised the need to maintain the criterion of publication in the light of the disapplication of the criterion of fixation). The current form of that declaration includes the wording below which makes provision for the criterion of first (including simultaneous) publication:

“(1) In respect of Article 5 (1) (b) and in accordance with Article 5 (3) of the Convention, the United Kingdom will not apply, in respect of phonograms, the criterion of fixation… (3) In respect of Article 12 and in accordance with Article 16 (1) of the Convention…(b) As regards phonograms the producer of which is not a national of another Contracting State or as regards phonograms the producer of which is a national of a Contracting State which has made a declaration under Article 16 (1) (a) (i) stating that it will not apply the provisions of Article 12, the United Kingdom will not grant the protection provided for by Article 12, *unless, in either event, the phonogram has been first published in a Contracting State which has made no such declaration*.” (emphasis added).

The emphasised words above at the end of the UK’s 1963 declaration correctly reflect the fact that the UK is required to grant protection to phonograms which meet the criterion of publication in Article 5(1)(c) regardless of the nationality of the producer, which is relevant only to the separate and alternative criterion of nationality of the producer in Article 5(1)(a).

An attempt by the UK to deny protection under its laws to phonograms which meet the criterion of publication by specifically denying that protection if the producer has a certain nationality is therefore clearly contrary to the Rome Convention and, additionally, for the reasons we explain in our answer to Question 1 above, would be a breach of the UK’s obligations under Chapter 18 of the CPTPP in relation to phonograms first or simultaneously published in the territory of a CPTTP member such as Canada. We have explained why denial of protection for performances based on the nationality of the performer would breach the UK’s obligations under Chapter 18, but the same logic applies *mutatis mutandis* to a denial of protection on the basis of the nationality of the producer.

# Option 3

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

As the consultation notes, Option 3 essentially involves Option 1 being applied to pre-existing sound recordings and performances, and Option 2 being applied to new sound recordings and performances. For the reasons set out above Option 2 is incompatible with the UK’s international obligations and therefore, Option 3, which would implement Option 2 for new sound recordings and performances, is also incompatible with the UK’s international obligations. It would also give rise to additional administrative costs and complexities in view of the need to keep track of whether performances or recordings had been made before or after the relevant changeover date.

# Preferred Approach

**Question 18.** What is your preferred option and why?

For the reasons given in our responses to the questions relating to Options 1, 2 and 3 above, the only Option which would enable the UK to comply with its international obligations is Option 1. Accordingly,

in our view and working on the assumption that the UK government wishes to comply with its international obligations, it is the only viable option.