**Extension of rights in sound recordings and performances to foreign nationals**

**UK IPO Consultation**

**BBC/ITV/Sky Joint Response**

# OPTION 0: MAINTAIN THE STATUS QUO

# 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?

The Government has a responsibility to ensure that any changes to law and regulation are necessary and proportionate; seeking to minimise any adverse impact that such changes would have on stakeholders. In its impact assessment, the Government has set out detailed analysis of the potential impacts that each of its proposed options would mean for stakeholders. However, we have not seen any clear legal analysis explaining why a change is required and our understanding is that the case that UK law is inconsistent with the UK’s international obligations is not clear cut and that there is therefore no compelling need to change UK law.

In setting out its reasoned decision following the present consultation, we trust that the Government will provide a further detailed explanation of the legal position. Without the opportunity to comment on this analysis, we remain sceptical that a change to UK law is necessary; a change that could result in an increase in music licence fees and/or disrupt current music licensing arrangements, which would be of significant concern to users of music in the UK.

**OPTION 1: PROVIDE PPR TO PRODUCERS AND PERFORMERS OF SOUND RECORDINGS ON A BROAD BASIS**

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

We would agree with the Government’s position that music licences should not become more expensive for users because any change in the law would not be providing any additional benefits. Users would be paying for the same uses of the same repertoire. To date we have also been assured that this will be the case by PPL and that this change in the law will only affect the distribution of licence fees.

However, the Government estimates US record labels will lose £230 million over 2024- 2033 to US performers. That is not an insignificant sum and other foreign record labels would also lose revenue to performers. Under Option 1, there is a risk that US and other

foreign record labels could seek to recover their lost revenue from UK users at some stage via increased fees from PPL. Any increase in UK users’ costs will likely have a detrimental effect on consumers. For broadcasters, this would be an additional cost at a time of significant financial challenge.

We are aware that other users in other territories (e.g. The Netherlands) have had to pay more as collecting societies chose to increase the size of the pot to share with rightsholders rather than dilute the shares of the rightsholders who were already receiving remuneration.

The Netherlands changed its law in 2021 from material reciprocity for single equitable remuneration for foreign performers and producers to payment on a broad basis akin to Option 1. As a result of this change the Dutch collecting society for sound recordings (SENA) agreed with representatives of public performance users to introduce a surcharge of 12.5% in 2021 and 26.6% in 2022 for PPR to offset the negative economic impacts on national producers and performers on the basis that if they were now to have to pay significant sums to US producers and performers this would inevitably lead to less money for others unless the amount of money available was increased. Broadcasters were initially faced with a 60% rise in fees. This has been negotiated down and whilst the fees now paid by broadcasters are confidential we have been advised that the increases were nevertheless substantial.

The Dutch broadcasters are still using the same repertoire as they did previously. Out of the payments they made before the change in the law US producers were receiving money for the use of US recordings in their webcasts. The Dutch broadcasters argued that the change in the law only affected the distribution of the money and it was not an issue for them if more rights holders had to be remunerated and shares had to be diluted. This did not prevent the fees being increased.

We also note that as regards content that is acquired by broadcasters from the US the value of the commercial sound recordings including performances in that content is baked into the value of that content and the fees that broadcasters pay reflect that. If broadcasters were then required to pay for the performances in the UK they would in effect be making a double payment.

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

The Government suggests that Option 1 is its preferred option. As mentioned above we do have concerns that this will lead to increased music licence fees at a challenging time for the UK creative sector. If the Government wishes to pursue this option, we would urge the Government to take 2 additional steps:

1. the Government should confirm that this change in the law should not have any adverse effect on the cost of licences for users either in explanatory notes to legislation or by way of IPO guidance provided at the time of any law change.
2. the Government should not seek to make any changes to the law which might result in new references to the Copyright Tribunal before carrying out a thorough review of the Copyright Tribunal; both its procedures and – although not relevant in this particular case but long overdue – its jurisdiction.

In relation to the second point, we are aware that the Government’s position is that any increase in licence fees could be challenged by users in the Copyright Tribunal. The BBC has raised with the IPO on many occasions concerns that it has with the effectiveness of the Copyright Tribunal.

The Copyright Tribunal was last reviewed by the IPO in 2007 and the Innovation, Universities & Skills Committee published a report in 2008 commenting on the IPO’s recommendations. That report concluded that reform was long overdue and needed to be made expeditiously to meet the challenge of digital technology. Copyright Tribunal proceedings however remain costly and slow and despite specific recommendations in the report about the appointment of lay members, these recommendations do not appear to have been adopted. In particular, it is unclear how lay members are appointed and whether they are done so on the basis of specific relevant expertise. In our view, the need for lay members at all should be re-considered. The 2007 IPO Review recommended their abolition.

The BBC raised the issue most recently of the Copyright Tribunal within the context of the One IPO Transformation programme but were advised that the Copyright Tribunal was outside the ambit of this review because it was legally and financially separate from the IPO. One of the objectives of the Transformation programme was to provide “outstanding, customer-focussed services” and one of the aims was to significantly improve hearings and tribunals services. It is very disappointing that the Copyright Tribunal fell outside of this review as modernisation is vital for it to remain an effective forum for the resolution of disputes between CMOs and users. We believe there are changes that could be made to its administration and procedure which would make a substantial difference to its efficiency and effectiveness in the interests of all parties concerned. We would welcome the opportunity to discuss how this could be achieved.

Whilst we appreciate this is not relevant to the current situation we would also raise again the issue of the Copyright Tribunal’s jurisdiction which we know the IPO is aware needs to be reviewed. It is though over 5 years since the decision in *BBC and BBC Worldwide Limited v MCPS and PRS (6 November 2018)* which held that the Copyright Tribunal did not have jurisdiction over foreign copyrights and in which Arnold J said that the statutory provisions governing the jurisdiction of the Copyright Tribunal needed to be reviewed and overhauled.

Finally we would note that Option 1 (even if the underlying assumptions are correct) does not meet the Government’s aims of (i) reducing costs to UK users or (ii) increasing revenues for the UK creative industries.

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

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

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

# 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.

Response to questions 4-6

For Option 2 the analysis seems to be based on an overly simplistic view as to how rights are negotiated. Broadcast rights are not negotiated separately to all the other rights that broadcasters require under their music licences. In particular, on demand rights are now crucial to ensure that our services and content are made available as widely as possible. Licence fees are for a bundle of rights which are negotiated as a package. Record labels will not decrease the value of the bundle; if one element of the bundle loses its value through any change in the law, that value will merely be shifted to another element in the bundle. That would be the commercial reality and the labels would seek to recoup in their licensing with us elsewhere. Alternatively, it is possible that if broadcast rights do not need to be negotiated US labels might decide not to negotiate the other rights collectively and we may have to secure those separately with each different label which would be inefficient and costly. It is of course open to any rightsholder to withdraw their rights from a collective rights management organisation on reasonable notice not exceeding 6 months under the Collective Management of Copyright (EU Directive) Regulations 2016.

We therefore consider that in practice there would not be any savings for UK users and, therefore, no corresponding benefits to UK users.

# 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?

Broadcasters are very likely to incur additional administrative and legal costs related to renegotiating licences. We cannot quantify such costs at this stage, but they would likely be significant and if those negotiations were unsuccessful, the costs of a reference to the Copyright Tribunal would be upwards of £250,000.

# 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. Radio and television producers and broadcasters use music that audiences want to listen to or that work editorially for their output. Additionally, the BBC, under its operating licence set by Ofcom, has an obligation to play certain proportions of music from UK

artists on Radio 1 and Radio 2. A change to the remuneration for foreign performers for PPR would not affect either point.

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

As mentioned in our answer to questions 4-6, it seems likely foreign record labels would increase the cost of other rights to offset any lost revenue.

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

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

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

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

**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?**

**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 will cause users to adjust 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?**

**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?**

As Option 3 is a combination of Options 1 and 2, we think that it will face the same or similar issues to those highlighted in our responses above. Additionally, it would be administratively very complicated in practice for both UK users and licensors. It could be practically unworkable with no real benefits to UK users.

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

Our preferred option would be Option 0 but if there is clear and compelling evidence that UK law as it currently stands is inconsistent with the UK’s obligations under international

treaties then we would support Option 1 but only if the Government takes the 2 additional steps set out in answer to Question 3 above.