


# Summary of Responses to the Consultation on Regulations Implementing Performers' Moral Rights in the UK Resulting from WIPO Performances and Phonograms Treaty Obligations

## Introduction

1. The consultation document was made available via the Patent Office website and was brought to the attention of the organisations listed in Annex A. Responses were received from the organisations listed in Annex B, either in writing only or through informal discussions with Patent Office officials or through both.

2. The consultation document included the text of Articles 5, 15 and 22 of the 1996 WIPO Performances and Phonograms Treaty (WPPT) , which are to be implemented, together with draft implementing regulations amending the Copyright, Designs and Patents Act 1988 (the CDPA), a partial Regulatory Impact Assessment (RIA) and a commentary explaining the draft regulations.

3. General comments were invited and views were sought on four specific areas, as follows:

(a) the desirability of the draft Regulations granting performers' moral rights that are related to those required by the WPPT (see paragraph 19 of the consultation document);

(b) the conditions for groups' moral rights (see paragraph 25 of the consultation document and section 205C in the draft regulations);

(c) the exceptions provided to the right to be identified (see paragraph 29 of the consultation document and section 205E in the draft regulations); and

(d) the partial Regulatory Impact Assessment (Annex B of the consultation document) and in particular any information that would help assess the compliance costs that might arise from providing moral rights for performers (paragraphs 24 to 30 in Annex B of the consultation document).


## Implementation of the treaty requirements

4. Paragraph 19 of the consultation document invited comments on the desirability of the draft Regulations granting performers' moral rights that are related to those required by the WPPT, i.e. providing moral rights in relation to any type of live performances and to sound recordings of any type of performance regardless of whether that is made directly from the live performance (i.e. the performance is first fixed as a sound recording) or indirectly, for example where a recording that is originally a film sound track (and so first fixed as part of a film) is later released as a sound recording of the film sound track.

5. In general comments from companies and organisations representing cinema exhibitors, broadcasters and film and television companies favoured rights whose scope closely mirrored the terms of the treaty, i.e. excluding audiovisual performances. Concerns were expressed about the complications that extending the

rights would bring and that this might prejudice the implementation of any future international treaty including moral rights for audio visual performances.

6. However, most of those groups could accept the extension of the scope of rights that was proposed in the consultation document, i.e. that rights would apply to all live performances and to all sound recordings of performances regardless of whether it is made directly from the performance or indirectly, e.g. as part of a film soundtrack and subsequently produced as a sound recording.

7. On the other hand comments from organisations representing performers were strongly in favour of extending rights to all performances and that, if necessary, primary legislation should be used to secure this. Several organisations also urged the Government to support for international work in this area through the World Intellectual Property Organisation (WIPO) . The granting of rights related to those strictly required by the WPPT that was proposed in the consultation document was welcomed by several organisations. A student organisation with an interest in intellectual property issues proposed negotiating a European Regulation covering moral rights for all performances, without the need for primary legislation.

8. The same organisation suggested that a single website could be provided containing comprehensive information about performances and a registry of performers wishing to be identified could be maintained.

### *Conclusions*

10. In the absence of developments at an international level or in Europe harmonising moral rights in audiovisual performances it seems that the scope of rights proposed by the draft regulations forms an acceptable and workable compromise. Since there is to be an appeal in the case of *Oakley Inc v Animal Ltd and others* at this time it seems sensible to assume that the Government's interpretation of the ECA will be upheld.

## **Right to be identified as the performer**

### *General*

11. Several organisations representing performers suggested that identifying performers using websites and similar technologies could overcome practical difficulties, for example where large numbers of performers are involved. One such organisation cautioned that this should not replace proper use of credits.

12. Organisations representing broadcasters, film and television companies pointed out the costs associated with any additional credits arising from the Regulations, both the costs of providing the credits, irrespective of via websites or more traditional means, and of ascertaining the identities of all performers.

13. Organisations for performers and for producers saw merit in guidelines, codes of conduct and the like to be agreed between performers and users of performances, which they felt should not be prevented by the terms of the regulations.

### *Groups*

14. Particular comments on whether there should be specific provision dealing with groups, and if so how it should apply, were invited in paragraph 25 of the consultation document.

15. Organisations representing broadcasters and film and television companies welcomed special provisions for performances given by groups, pointing out that identifying large numbers of performers or minor contributors is unworkable.

16. Organisations representing musicians were concerned over the presence of special provisions for performances given by groups and questioned the need for such provisions, since they felt that the rights should be individual and not collective and that practical difficulties are surmountable. Several responses suggested that different groups should be treated differently, for example the definition of a group could require e.g. five or more performers or a distinction could be made between e.g. established partnerships and orchestras or sole traders working under somebody else's trading name. One group acknowledged that it is not always reasonable to identify all performers in a live broadcast, contrasting this with recordings issued to the public.

#### *Assertion*

17. Responses from organisations representing performers were unequivocal that the rights should not depend upon assertion, since they claimed this would diminish the status of the rights and the performers would come under pressure not to assert their rights. In addition some of the same organisations thought that assertion would be complex and costly since the Regulations do not identify definitively to whom an assertion should be made. Consequently they suggested that there should be an obligation on those whom assertions are made to pass on notice of such assertions to ensure that performers are identified. In a similar vein the response from organisations representing theatrical production and presentation interests suggested a reference to the producer of a performance, since the reference to "organises and promotes" is unclear.

18. One organisation representing performers considered that assertion by an individual on behalf of a group should be subject to individual performers' consent, e.g. in partnership agreements or orchestra membership agreements. The same organisation thought that the regulations should make it clear whether only the performer can sign an assertion or also an agent, manager or union on his behalf, with necessary authority.

#### *Exceptions*

19. Paragraph 29 of the consultation document sought views on the exceptions provided to the right to be identified in section 205E of the draft regulations.

20. Organisations representing performers expressed concerns over the use of exceptions to the right to be identified, except in limited cases, such as spontaneous performances and where "omission is dictated by the manner of the use of the performance", following the wording of Article 5 of the WPPT. Such organisations also accepted the need for exceptions covering reporting of current events, incidental inclusion, legal and parliamentary reporting.

21. Responses from broadcasters and other users of performances were firmly in favour of the proposed exception where identification is not reasonably practicable, alongside the special provision for groups. One response sought an exception for television programmes or a *de minimis* threshold such that only featured performers are credited. Several responses referred to the need for guidance from Patent Office on the intended meaning of "reasonably practicable".

22. By contrast responses from groups representing performers did not accept the need for an exception where identification is not reasonably practicable, which they suggested would be wider than the terms of Article 5 of the WPPT, i.e. where "omission is dictated by the manner of the use of the performance".

23. Broadcasters and the advertising industry welcomed an exception for performances given for the purposes of advertising to avoid substantial difficulty and potentially significantly increased costs. Several responses sought a widening of the exception to include other promotion, such as trailers, and that the performance is "used for" rather than "given for".

24. Performers' organisations did not accept the need for an exception for advertising, since for example websites could be used to identify performers. Several responses referred to visual credits given on advertising in Japan.

25. One broadcaster and an organisation representing the film industry sought an exception from the right to be identified for purposes of criticism or review.

### *Conclusions*

26. Since apparently it is not always clear who organises or promotes a live performance the responsibility to identify the performer now falls upon the person who produces (or otherwise organises or promotes) the performance.

27. It seems sensible to allow for agreement between a performer and the person responsible for identifying him as to the manner in which he is identified and Section 205C of the regulations has been amended to permit this.

28. There seem to be sound reasons for including special provisions for groups to avoid practical difficulties. However, Sections 205C and 205D have been amended to deliver this in a different way. It is now the case that when a performance is given by a group the right for a performer to be identified is not infringed in some circumstances where the group itself is identified. Consequently there is no longer any need for assertions to be made in relation to groups.

29. Section 205D has been amended to allow for assertions signed on behalf of a performer, e.g. by an agent, manager or union on his behalf, with necessary authority. Similar provision has been made for consent and waiver on behalf of a performer in Sections 205J and 205N.

30. Comments received indicated broad acceptance of the need for certain exceptions to the right to be identified. It is proposed to retain the exceptions where identification is not reasonably practicable and for advertising in view of the practical difficulties

and costs identified. It is also proposed to retain the other exceptions, which mirror those for authors' moral rights.

## **Right to object to derogatory treatment**

### *General comments*

31. Comments from performers' organisations focussed on the limitations of the right: one response suggested that performances communicated to the public and not just broadcast should attract an integrity right, another considered that live performances should be accorded protection against derogatory treatment and that the use or context of an unmodified performance can be derogatory. Several responses preferred the form of words from Article 5 of the WPPT "any distortion, mutilation or other modifications" to the draft regulations choice of "modifications". One organisation agreed that the integrity right should not have a group provision.

32. Comments from broadcasters and producers were cautious about the integrity right: one organisation considered that the integrity right should follow Article 93 of the corresponding German law for films and refer to gross distortions or mutilations; another organisation was concerned that the right could prove inhibitory and possibly tantamount to censorship over some activities; another organisation supported the exclusion of live performances from the integrity right, but sought identification within the regulations of the person responsible for the integrity right.

### *Exceptions*

33. Several broadcasters and one organisation representing the film and television industries sought an additional exception to cover normal editorial practice, along the lines of the wording from the agreed statement concerning Article 5 of the draft WIPO audio visual treaty, which referred to the normal course of exploitation of a performance, such as editing, compression, dubbing, or formatting, in existing or new media or formats, and that are made in the course of a use authorized by the performer, see WIPO document IAVP/DC/34.

34. Several organisations representing broadcasters and producers considered the requirement in Section 205G(4) that a disclaimer should be given at the time of an act to be impracticable. One broadcaster was of the view that the exceptions to the integrity right should mirror the exception to the integrity right for authors in CDPA Section 81, especially Section 81(4).

35. Comments from several broadcaster and a producers' organisation sought to extend the exception in Section 205G(3)(c), which refers specifically to the British Broadcasting Corporation (BBC), to all broadcasters licensed by the Office of Communications (OFCOM) and to other OFCOM or Independent Television Commission (ITC) guidelines.

### *Conclusions*

36. The wording of Section 205F now follows the WPPT by referring to "any distortion, mutilation or other modification". An additional exception has been

introduced for modifications which are consistent with normal editorial or production practice and the requirement for a sufficient disclaimer no longer requires it to be given at the time of the act.

37. The exception in Section 205G(4)(c) (formerly Section 205G(3)(c) in the draft within the consultation document), which refers specifically to the BBC, has not been extended to other broadcasters. This is because there is already an exception for anything done to comply with a duty imposed by or under an enactment, which would include the Acts by virtue of which other broadcasters are licensed and monitored. By contrast the BBC is governed by a Royal Charter and is therefore treated differently in this part of the regulations.

## **Supplementary provisions**

### *Duration of rights*

38. One organisation representing theatrical production and presentation interests supported the duration of moral rights being no longer than economic rights.

### *Consent and waiver*

39. Comments from broadcasters and theatrical production interests considered consent and waiver provisions to be essential. One broadcaster was of the view that obtaining waivers may be time-consuming and expensive, since there is often no direct relationship between broadcasters and performers when collecting societies often license the use of copyright material.

40. In general organisations representing performers strongly opposed waivers, since they felt that for example this could negate the rights in practical terms given the perceived weak negotiating position of performers. One such organisation was of the view that waivers should be limited to specific existing performances and another thought that waivers should not become standard commercial practice, as they felt happens with authors.

### *Parts of performances*

41. One performers' organisation commented that the paternity right should apply to any part of a performance, not just the whole or any substantial part.

### *Conclusions*

42. It seems that the broad thrust of the proposed regulations concerned with duration of rights, consent, waiver and parts of performances form a reasonable compromise between the opposing views of those consulted.

43. As mentioned above in connection with assertion, provision has been made for consent and waiver on behalf of a performer in Sections 205J and 205N. In Section 205N it has been made a breach of a statutory duty to falsely claim to act for a performer and lead to an infringement of his rights. Similarly the defence in Section 205N that a defendant reasonably believed that a person was acting on behalf of a

group when consenting to his conduct or waiving rights has been amended to refer to a person acting on behalf of a performer.

### **Transitional provisions**

44. Comments from one performers' organisation supported the transitional provisions which would apply rights in performances existing prior to the Regulations coming into force, but was disappointed that this would not apply where the performer had died or to some acts where the performer no longer owned the property rights in the recording (see Regulation 9).

45. However, comments from another performers' organisation accepted the difficulties in identifying performers retrospectively and joined with broadcasters and producers' organisations in calling for the retrospective application of rights to be removed.

46. One organisation representing the film industry could see no justification for the application of rights to new works.

### *Conclusions*

47. In light of the practical difficulties in applying the rights to past performances it is proposed that the rights will not apply to performances which took place prior to the Regulations coming into force.

### **Regulatory Impact Assessment**

48. Comments were sought on the Regulatory Impact Assessment in Annex B of the consultation document and in particular on the compliance costs arising from the draft regulations once implemented.

49. No detailed comments were received on costs, but several broadcasters and organisers representing broadcasters, producers and the advertising industry pointed out that any increased provision of credits for performers would increase costs, for example by reducing programme content or available advertising time. One student organisation suggested that this would also be true for charities and schools. Several organisations welcomed special provisions for groups and the exceptions to the rights since they would mitigate any increase in costs.

### **Summary of conclusions**

50. In the absence of developments at an international level or in Europe harmonising moral rights in audiovisual performances it seems that the scope of rights proposed by the draft regulations forms an acceptable and workable compromise. Since there is to be an appeal in the case of *Oakley Inc v Animal Ltd and others* at this time it seems sensible to assume that the Government's interpretation of the ECA will be upheld.

51. Since apparently it is not always clear who organises or promotes a live performance the responsibility to identify the performer now falls upon the person who produces (or otherwise organises or promotes) the performance.

52. It seems sensible to allow for agreement between a performer and the person responsible for identifying him as to the manner in which he is identified and Section 205C of the regulations has been amended to permit this.

53. There seem to be sound reasons for including special provisions for groups to avoid practical difficulties. However, Sections 205C and 205D have been amended to deliver this in a different way. It is now the case that when a performance is given by a group the right for a performer to be identified is not infringed in some circumstances where the group itself is identified. Consequently there is no longer any need for assertions to be made in relation to groups.

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55. Comments received indicated broad acceptance of the need for certain exceptions to the right to be identified. It is proposed to retain the exceptions where identification is not reasonably practicable and for advertising in view of the practical difficulties and costs identified. It is also proposed to retain the other exceptions, which mirror those for authors' moral rights.

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59. As mentioned above in connection with assertion, provision has been made for consent and waiver on behalf of a performer in Sections 205J and 205N. In Section 205N it has been made a breach of a statutory duty to falsely claim to act for a performer and lead to an infringement of his rights. Similarly the defence in Section 205N that a defendant reasonably believed that a person was acting on behalf of a group when consenting to his conduct or waiving rights has been amended to refer to a person acting on behalf of a performer.

60. In light of the practical difficulties in applying the rights to past performances it is proposed that the rights will not apply to performances which took place prior to the Regulations coming into force.

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**Annex A - Organisations to whose attention the consultation document was brought**

Action with Communities in Rural England (ACRE)	Independent Television Commission (ITC)
American Film Marketing Association (AFMA - Europe)	Institute of Directors
Arts Council of England	Institute of Practitioners in Advertising
Arts Council of Northern Ireland	Intellectual Property Institute (IPI)
Arts Council of Wales	International Artist Managers Association (IAMA)
Association of British Bookmakers	International Association of Music Libraries (IAML - UK)
Association of British Concert Promoters	International Federation of the Phonographic Industry (IFPI)
Association of British Orchestras (ABO)	International Visual Communication Association
Association of Independent Music (AIM)	Law Society
Association of London Government	Law Society of Northern Ireland
Association of Professional Recording Services (APRS)	Law Society of Scotland
Association of United Recording Artists	Library and Archive Copyright Alliance
Authors Licensing & Collecting Society (ALCS)	Library and Information Commission
Bar Council	Local Government Association
Benesh Institute of Choreology	Music Managers Forum (UK)
British Academy of Composers & Songwriters	Mechanical Copyright Protection Society (MCPS)
British Association of Record Dealers	Museums Copyright Group
British Beer and Pub Association	Music Choice Europe
British Broadcasting Corporation (BBC)	Music Managers Forum
British Chambers of Commerce	Music Producers Guild
British Copyright Council	Music Publishers Association (MPA)

British Film Institute (BFI)	Musicians Union (MU)
British Horseracing Board	Music Users Council (UK)
British Hospitality Association	National Consumer Council
British Interactive Multimedia Association (BIMA)	National Council for Voluntary Organisations (NCVO)
British Library	National Federation of Retail Newsagents
British Literary & Artistic Copyright Association (BLACA)	National Hairdressers Federation
British Music Rights	National Union of Journalists (NUJ)
British Phonographic Industry (BPI)	National Union of Students
British Photographers Liaison Committee	Newspaper Publishers Association (NPA)
British Retail Consortium	Newspaper Society
British Screen Advisory Council (BSAC)	Nickelodeon UK
British Shops and Stores Association (BSSA)	Northern Ireland Hotels Federation
British Sky Broadcasting Limited	ntl
British Telecommunications plc (BT)	OFCOM
British Video Association (BVA)	Open University Worldwide
Broadcasting, Entertainment, Cinematograph & Theatre Union (BECTU)	Performers Alliance
Business in the Community	Performing Artists Media Rights Association (PAMRA)
Cable & Wireless plc	Performing Right Society (PRS)
Channel 5 Broadcasting	Periodical Publishers Association (PPA)
Channel Four Television	Personal Managers Association (PMA)
Chartered Institute of Journalists	Phonographic Performance Limited (PPL)
Chartered Institute of Patent Agents	Producers Alliance for Cinema & Television (PACT)
Cinema Exhibitors Association	Producers Rights Agency
Commercial Radio Companies Association (CRCA)	Publishers Association
Community Media Association (CMA)	Radio, Electrical and Television Retailers Association
Confederation of British Industry (CBI)	Restaurant Association
Confederation of Information Communication Industries (CICI)	Rivers Consultancy
Consumers Association	Satellite & Cable Broadcasters Group
Convention of Scottish Local Authorities (COSLA)	Scottish Arts Council
Design & Artists Copyright Society (DACS)	Scottish Consumer Council
Directors Guild of Great Britain	Scottish Council for Voluntary Organisations
Directors & Producers Rights Society (DPRS)	Scottish Licensed Trade Association
DMX Music Limited	Sianel Pedwar Cymru (S4C)
Educational Copyright Users Forum	Society of Authors

(ECUF)	
Educational Recording Agency (ERA)	Society of London Theatre
Equity	Spoken Word Publishing Association
Entertainment & Leisure Software Publishers Association (ELSPA)	Student Radio Association
Federation of Small Businesses	TEAMtalk Broadcast
Federation of the Retail Licensed Trade (Northern Ireland)	Telewest
Film Council	Theatrical Management Association
Film Distributors Association	Trade Marks Patents and Designs Federation
General Consumer Council for Northern Ireland	Training Media Copyright Association
GMS (Recordings) Limited	tsg
Hospital Broadcasting Association	Video Performance Limited
Incorporated Society of British Advertisers	Welsh Consumer Council
Incorporated Society of Musicians (ISM)	Welsh Local Government Association
Independent Schools Council	Writers Guild of Great Britain
Independent Television Association (ITVA)	

## **Annex B - Organisations from whom substantive responses were received**

BPP Leeds IP Pro Bono Group  
 British Broadcasting Corporation  
 British Copyright Council  
 British Equity Collecting Society  
 British Film Institute  
 British Phonographic Industry  
 British Sky Broadcasting Limited  
 Cinema Exhibitors' Association  
 Commercial Radio Companies Association  
 Equity  
 Incorporated Society of Musicians  
 Institute of Practitioners in Advertising  
 Law Society of Scotland  
 Music Managers' Forum  
 Musicians' Union  
 Performing Artists Media Rights Association  
 Producers Alliance for Cinema & Television/Producers' Rights Agency  
 Society of London Theatre  
 Theatrical Management Association