

**CHANGES TO EXEMPTIONS FROM PUBLIC PERFORMANCE RIGHTS IN
SOUND RECORDINGS AND PERFORMERS' RIGHTS
CONSULTATION**

SUMMARY OF RESPONSES

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INTRODUCTION

If you play recorded or broadcast music in public from, for example, CDs, the radio or television you generally need a licence from the Performing Right Society (PRS) and a licence from Phonographic Performance Limited (PPL). These collecting societies may charge a royalty¹ for the use of music in their repertoires. The PRS collect royalties for composers and songwriters and PPL collect royalties for performers and record companies.

Royalties are a way of ensuring that the creators of music benefit from the popularity of their music over time and encourage record companies to invest in music production. At present there are some exemptions from the requirement to obtain a PPL licence for charitable groups and not-for-profit organisations. These exemptions do not apply to the rights that PRS administer².

There has been concern expressed from both right holders and users that the exemptions in their current form do not correctly balance their interests. Therefore, the Intellectual Property Office issued a consultation document in July 2008 suggesting options for the future³:

Option 1 will repeal the exemptions, giving right holders exclusive rights over the public playing of sound recordings in all the circumstances which are currently exempt.

Option 2 will narrow the scope of the exemptions so that they are only available to small charities. It will also extend the exemptions so that they apply to both the PRS licence and the PPL licence. The exemption from both licences may also be extended to some limited uses of recorded music by NHS trusts.

¹ A royalty is a payment for use of copyright material.

² See consultation document at: www.ipo.gov.uk/consult-musiclicensing.pdf

³ Ibid

Option 3 will remove the exemptions but right holders will only be able to charge royalties set at a rate which enables a proper balance between the interests of both them and the users. This is referred to as equitable remuneration.

Referral of PPL licences by the Secretary of State to the Copyright Tribunal

We also suggested removing the mechanism, introduced in 2003, whereby the Secretary of State can refer certain PPL licences to the Copyright Tribunal for adjudication.

Responses

We received around 100 responses. Just over half were from charities and not-for-profit organisations. Around 20 were from the music industry. A few were from individuals and a variety of other organisations⁴.

This paper summarises in a short form these responses and points put to us in consultation meetings.

Next steps

Ministers will consider the consultation responses. The full government response will then be published with the final proposal and a full impact assessment of the chosen option, before the parliamentary summer recess. The decision will be taken in the context of the wider copyright landscape where relevant to determine the proper balance between right holders and users.

The timing of the introduction of the secondary legislation required to implement changes depends on which option is chosen and whether there is any variation to the option as originally proposed in the consultation. It may be possible to progress Options 1 and 3 relatively quickly after the summer recess. Option 2 and any major variations would require further consultation.

⁴ A full list of respondees can be seen in Annex A.

OPTION 1

Right holders

Most collecting societies and organisations representing right holders were in favour of Option 1. Their view was that Option 1 is the best means of complying with EU legislation and international treaties.

They favoured this option because it puts PPL, representing musicians and recording companies, on the same footing as PRS, representing composers and songwriters. Most collecting societies considered that there is no justification to treat their respective members differently as under the present exemptions.

Option 1 allows for no exemptions. Most collecting societies argued that there is no reason for charities and not-for-profit organisations to be exempt from paying for music licences as they are required to pay for other services such as electricity and heating and for the BBC licence fee.

They made the point that Option 1 is a simple system without the need for legal clarification which might be required for the other options. There would be no disputes about exemptions. Most collecting societies said that it should be their choice to support a particular organisation or not by means of a reduced fee or a donation. PRS said that they already have special reduced tariffs for non-commercial uses and PPL said they will be flexible about the level of licensing fees and consider the circumstances of different groups of organisations.

PPL stated that it was unlikely that right holders could charge higher royalties under the exclusive rights offered by Option 1 than under equitable remuneration offered by Option 3. This was because under Option 1 disputes about royalty rates could still be taken to the Copyright Tribunal who can determine whether they are reasonable. Their view was that a reasonable royalty would be, in practice, the same as one judged to be an equitable one.

We asked how many currently exempt organisations would be affected if Option 1 were implemented. It was difficult to gauge exact numbers but PRS' figures may

give some indication. They stated that their total income from non-commercial tariffs combined with income from customers who have identified their status as of a charitable nature or not-for-profit⁵ but who are on a commercial tariff is £12.2 million, representing 61,500 premises. (They said that this is a low proportion of overall PRS income.) However, not all of these will be benefitting from the current exemptions.

We also asked how PPL would calculate the royalties for the formerly exempt organisations. They said that they would consult but that it was unlikely that they would use revenues as a basis. Revenues do not take account of the amount of use including whether users *may* make substantial monies from PPL's music use (as opposed to whether they do). PPL said that they want a simple system and that they take into account whether music is incidental, the context of where the performance occurs and the social purpose of the event. PPL has a concessionary discount for users who are likely to make only incidental use of sound recordings. Without prejudging their consultation, they assume that many users will pay annual fees similar to the fees of £55.33 and £106.66 in PPL's current background music tariffs.

PPL spends around 20 per cent of royalty revenues on administration. The remainder of their income is split fifty/fifty between record labels and performers who qualify for equitable remuneration.

PPL felt that London Economics' impact assessment over-estimated the administration costs for users of this option. The society did not agree that obtaining a licence takes a charitable body the equivalent of half a working day to administer. The costs were also based on the assumption that all organisations affected do in practice use music which may not be the case.

However, Christian Licensing International (who license churches and schools) raised questions about the impact of all the options. They were concerned that the performance of religious music at religious gatherings would be affected adversely. They also stated that royalties collected by PRS and PPL are unlikely to benefit the

⁵ Charities, trusts, voluntary organisations, schools, further education colleges and religious buildings.

Christian artists responsible for much of the music used in churches because of the way royalties are determined (radio play, High Street sales).

The Incorporated Society of Musicians, representing thousands of musicians, did not support Option 1, favouring Option 2 instead because this would exempt small charitable organisations.

Copyright users

Users and their representatives who responded to the consultation used recorded and broadcast music in a wide variety of ways. These ranged from activities where music was essential (such as Scottish country dancing), through activities where music was important but not essential (such as non-commercial exercise classes/therapeutic/religious uses or for shoppers and volunteers in charity shops), to activities where music was incidental (such as music in broadcasts on TVs used in sports clubs).

Most users said that they found it difficult to see how the removal of the current exemption would benefit the wider community as it would impact on the viability of many charitable and not-for-profit organisations. Some claimed that the existing PRS licence was already threatening their survival. There was some resentment about the PRS licence and a body representing community buildings anticipated a strong reaction to a new requirement for a PPL licence.

In meetings with charities and not-for-profit organisations most present⁶ stated that they were not against paying something for a licence but that their difficulties were with obtaining a licence, the level of the fees and a lack of redress. (One organisation claimed it had spent four years negotiating with a collecting society.) It was suggested that a simple flat fee for all would be easy to administer. If PPL and PRS co-operated over joint licensing, costs could be reduced such that the level of the fee should be affordable to all organisations. (A joint licensing system was also suggested in the written responses.)

⁶ A representative from one organisation voiced his disagreement with charities having to pay for a licence.

At present, gaining a licence could be difficult because of disputes over what type was needed. Also, collecting societies sometimes asked for back fees for periods of time prior to the organisation applying for a licence. The potential licensees found it very difficult to prove that they had not been using music from the collecting society's repertoire. There was another concern that collecting societies were seeking royalties for music which was not in their repertoires (for example, it was out of copyright or it was in the repertoire of another collecting society).

There also seems to be an element of over-recovery in that some organisations were paying for licences when their type of use was already covered by the licence held by the community building in which the activity was held. A representative from a carnival organisation said that the fees mounted up because the collecting society demanded fees per entrant, per spectator and from the local council.

Many users viewed the existing PRS licence as a second levy in relation to broadcast music because they had already purchased a TV licence and the broadcaster had already paid PRS (and PPL) royalties. This point was also raised by a representative body for broadcasters. They believed that the cost of collecting societies' licences would discourage use of broadcast music which would decrease audience numbers and thereby broadcasters' revenue. Ultimately, this is not in the collecting societies' interests because the fees they levy from broadcasters are based on revenue.

Charities and sports clubs said that the additional administrative burden of applying for a licence would often fall to the volunteers, whose time was better occupied furthering the aims of the organisation. They also mentioned that once the tariff was agreed it would be helpful to be able to pay by direct debit but this was not possible. A representative for organisations involved in running community halls said that there was so much bureaucracy in applying for a licence and passing the PRS charges through to those who used music in the halls that they felt they were carrying out the collecting societies' administration for them.

Some organisations felt that removal of the exemptions would result in PPL and PRS exploiting charities and not-for-profit organisations. A few clubs commented that the financial burden could not be quantified as they did not know how the licence would be administered and collected (that is, whether it would reflect the PRS system) and they felt that the collecting societies are secretive about the existing scale of fees.

Charities

It was pointed out that charities are being asked to meet more and more of society's needs with less money. One large charity claimed that licence fees could rise to 10 times the current cost if PPL licences are required. They suggested that (based on the impact assessment) the benefit to PPL members is half (or less) of the additional cost placed on charitable organisations. The level of increased costs would require serious consideration as to whether music can continue to be used. It was felt that PPL was unlikely to introduce preferential rates for charities. Some felt that Option 1 would lead to a fall in fundraising and a clear reduction in public benefits from charities' work.

A respondent stated that the additional costs of licensing might threaten charity shops' existence as it would not be seen as a good use of charitable funds to pay for music but removal of music would impact on numbers of volunteers and customers. It was accepted that charity shops have to pay for services like electricity and telecommunications but the charity has a choice over these providers. Also, energy and telecommunication providers are subject to an extra level of regulation, carried out by sector specific regulators. In contrast, the PRS and PPL have a monopoly. Users cannot obtain their licences elsewhere and there is no effective control over the royalties they charge. (Having electricity and heating was also a necessary requirement for health and safety purposes.)

Clubs

Most clubs indicated that they would remove the provision for music and television if Option 1 were implemented, as the cost would be disproportionate to usage levels and might endanger the viability of the club. Some suggested that many clubs would continue playing music out of ignorance or defiance or may resort to playing music that is out of copyright.

Religious organisations

Respondents from religious organisations believed that removal of the exemption would result in a relatively negligible increase in royalties for collecting societies. They anticipated that many such organisations would decide that the expense and paperwork involved in applying for a licence could not be justified, despite music being an intrinsic part of their culture and heritage. Currently PRS has a voluntary exemption for divine worship and civil wedding/partnership ceremonies. Under Option 1 all religious organisations would be required to obtain a licence from PPL.

Libraries

Some organisations representing libraries were concerned about whether they would be affected by any of the options. They stated that they could not support the repeal if libraries are consequently included in a licensing regime simply for making recorded music available via access to PCs. They do not consider that PC users with headphones should be regarded as receiving a public performance.

Individuals (for example, academics, lawyers)

One individual did not think that Option 1 was viable as it removed a defence open to small and worthy organisations and offered no balance. Another was concerned that the option would allow PRS and PPL to set their own levels of fees and that the Copyright Tribunal was no safeguard as it was too costly to use and some users would not know of its existence. It was suggested that there should be a requirement for collecting societies to notify licensees that a Tribunal exists when invoicing.

OPTION 2

Right holders

Some collecting societies said they consider that Option 2 neither complies with EU and domestic legislation nor with international treaties because the exemptions are drawn too widely.

Some collecting societies also expressed the view that Option 2 would be complicated to administer. They stated that there would be debate and possible legal challenge about what constitutes a charitable group. There would also be difficulty in obtaining accurate data about turnover and the definition of turnover. Turnover changes from year to year. Large charities could divide up their functions to get around the law. The complexity could lead to higher running costs than Option 1 for both right holders and users. Furthermore, in PPL's 2004 consultation with licensees PPL said that most licensees did not regard turnover as a suitable basis for licensing because there is little correlation between turnover and use of recorded music.

PPL and PRS felt that the introduction of a statutory limitation may deter collecting societies from operating voluntary discounts and exemptions as PRS does at present for certain uses within the NHS, for example.

PRS was concerned that the redefined exemptions in Option 2 would also apply to PRS licences as well as PPL ones as at present. They estimated that, although they cannot quantify the exact loss from implementation of Option 2, it is likely to be around £12.2 million.

Option 2 also allows for an additional exemption for certain uses of broadcast music in NHS premises. PRS does not think that this exemption is compatible with EU legislation and international treaties because it would be discriminatory and favours a government agency. They said that their current charging policy is more generous than Option 2 would be, with no charges for many parts of NHS properties and many parts of private hospitals.

Copyright users

While many copyright users expressed a preference for the status quo (which is not an option) most of the user respondees to the written consultation preferred Option 2 but amended in various ways. These included:

- raising the threshold – various amounts were suggested (one charity said that organisations may restrict their beneficial impact on society to stay within the parameters)
- basing the definition on the Charities' Act's threshold for requiring full audit of accounts (£100,000 rising to £250,000 in April 2009)
- not including membership subscriptions, grants or donations in the turnover figure (as these are exempt from corporation tax)
- using profit rather than turnover as the threshold to account for the substantial outgoings paid by charities
- index linking the threshold figure and reviewing periodically
- defining a small charity by the number of voluntary staff (rather than paid employees)
- basing exemptions on nature of use not user
(one respondee thought that schools should be included and using use as the determining factor could achieve this).

Concern was expressed that administration of licensing would fall to volunteers who do not have central authorities capable of advising them.

Charities

Charities felt that tariffs should be agreed fairly and equitably including a maximum charge. They said that there were no assurances in the consultation that PRS and PPL would not attempt to cover the cost of the exemption by increasing the charges for others. Therefore, it was felt that there would need to be appeals to the Copyright Tribunal to avoid this. One charity was concerned to see a proposal benefiting the NHS (a statutory public body) at the expense of parts of the charitable and voluntary sector.

Clubs

Clubs said that the exemption should include all voluntary community sports clubs operating on a not-for-profit basis. Those losing out under this proposal claimed they would have to consider abandoning music/television on the premises altogether. A body representing sports clubs welcomed the fact that this Option ended the anomaly between PPL and PRS.

Religious organisations

These organisations felt that the threshold is too low given that most churches (or other local religious communities) needed provision to pay for a priest (or equivalent) and maintenance.

Libraries

Public libraries said that they should be exempt as they do not charge for admission.

OPTION 3

Right holders

Collecting societies were concerned that equitable remuneration is a new concept in the UK and that it is difficult to define what it means in the context of the level of licence fees. Whilst there are rights to equitable remuneration for use of copyright and performers' rights currently, they are limited. This option perpetuates a difference in licensing regimes between PRS and PPL. (PRS would continue to have exclusive rights while owners of copyright in sound recordings and performers would have a system based on equitable remuneration including for use of broadcast music previously covered by the exemptions.)

PPL considered it unfair that users could start using music without obtaining permission from them first (a consequence of moving from exclusive rights to equitable remuneration). They confirmed that they would not refuse a licence if the appropriate fees had been paid and the licensee complied with the terms. PPL thought that the system would be abused by some users.

They also thought that the option would be more expensive for users than Option 1 because of higher administration costs. They feared that there would be many legal challenges. Some of these could be tactical delaying ploys which would result in extra costs for PPL and for the Copyright Tribunal.

There were a number of different views about what factors were important when assessing what constitutes equitable remuneration but PPL made the point that they must offer similar licences to similar licensees to avoid discrimination. They said that a complex tariff is more likely to produce anomalies.

Copyright users

Most users recognised that equitable remuneration would create an administrative burden as organisations would need to provide evidence against the criteria each time a licence was due. They had reservations about how it would work in practice

and the time taken to establish and negotiate fair and reasonable rates. They thought that this option could make it difficult for organisations to budget.

Most agreed that generally the factors listed are relevant in determining the level of fee but they were concerned that it would be a huge task to collect and collate such information. They agreed that guidance would be needed but views were split as to whether this should be statutory or non-statutory. Some thought that non-statutory guidance was not sufficient given the newness of the concept of equitable remuneration. They thought that statutory guidance would act as a framework for negotiations and guarantee fairness. One respondent thought non-statutory guidance would be ignored. They suggested that a panel of stakeholders should determine and agree fair royalty tariffs.

Charities

A few charities saw merit in the equitable remuneration approach if it resulted in organisations benefiting from lower costs than they are currently paying though others thought that this was not guaranteed. Concerns were expressed that volunteers will lack the skills and expertise to administer the system.

Clubs

Some clubs suggested that equitable remuneration should take account of the membership numbers benefiting, the length of the performance and the proportion of playtime over the licence period. One suggestion was that a “choice and purpose” test should be adopted whereby fees are only due if an organisation chooses to use music for the purpose of generating income.

Trade association

One trade association whose members previously benefited from exemptions in s67 of the CDPA before amendment in 2003 responded. They favoured Option 3 because it would introduce equitable remuneration as the basis of payment for these members. They said that the relevant collecting society’s fees had increased by between 200 and 400 per cent since 2003 and were not subject to adequate negotiation.

REFERRAL OF PPL LICENCES BY THE SECRETARY OF STATE TO THE COPYRIGHT TRIBUNAL - potential repeal of sections 128A & 128B of the Copyright Designs and Patents Act 1988

The repeal would mean that the Secretary of State would cease to be involved in consideration of licensing schemes proposed by PPL. Users could make references to the Copyright Tribunal directly but may then be liable for PPL's costs if the PPL licensing scheme is found to be reasonable.

Right holders

Collecting societies said that the system does not work well and that there should be repeal of Sections 128A & 128B. PPL (the main collecting society concerned) said that the dual approach to the Tribunal (that is referred through the Secretary of State) is unnecessary and over-complicated. They said that the Tribunal is not intended to act as investigatory body and that this undermines and compromises its function as an independent arbiter of cases.

PPL think that there is currently uncertainty about:

- Jurisdiction
- How the statutory matters and factors in s128A(6) and (7) are to be interpreted and applied
- How the Tribunal should approach its task of investigating a referred licence
- Whether the Secretary of State is to have a part in proceedings after referral
- Who pays the costs of the collecting society whose tariff has been referred

PPL said that the Sections make negotiation with users/their trade bodies more difficult. They feel that users only have to persuade the Secretary of State that there has been inadequate consultation to gain a referral.

PPL believes that it has incurred unnecessary costs as a result of the Sections. They do not think the costs can be compared with a "traditional" reference as they do not consider that many of the applications to the Secretary of State for a referral would have occurred under the "traditional" regime.

References set tariffs for long periods of time and the tariffs are worth millions of pounds to PPL each year. PPL said that this needs to be weighed against any costs to users in bringing a reference. They noted that many of the parties subject to the current references are large retailers which they see as well able to afford the costs.

Copyright users

Some users agreed that the current system does not work well but think that the sections should be amended rather than repealed.

A legal firm responded that whether there is a need to repeal Sections 128A and 128B depends on the outcome of the current Tribunal enquiry. They did not agree that the new jurisdiction under the Sections should be abolished. To say that the jurisdiction should be abolished because the Sections may be confusing and lead to extra cost is to confuse the principle of the jurisdiction with the detailed rules of operation.

The firm proposed that there should be an inquisitorial jurisdiction under a streamlined procedure. They stated that this would be more likely to get to the heart of the issues in a reference, which often have little to do with fault or liability but rather with fairness and maintaining balance between copyright owners and users. They said that such balance tends to be obscured by the polar positions and obsession with form typical of adversarial proceedings. The firm also commented that such a system would save on costs which, at present, act as a bar to many users.

Annex A- List of respondees

Action with Communities in Rural England
Age Concern Salford
Age Concern Essex
ARCHWAY Committee
Association of Charity Shops
Association of Church Accountants and Treasurers
Association of Independent Music
Astley Independent Methodist Church
Backford Village Hall Committee
Barry Yacht Club
Belmont Brownies
Bowls Club
Bowmoor Sailing Club
British Beer & Pub Association & British Hospitality Association
British Copyright Council
British Gliding Association
British Library
Cancer Research UK
Canterbury Care Centre
Carnival Association
Central Council for Physical Recreation
Charity Commission
Christian Copyright Licensing International
Churches' Legislation Advisory Service
Community Amateur Sports Club
Community Matters
Community Sector Law Monitoring Group
Dart-Totnes Amateur Rowing Club
Dell Quay Sailing Club
Delph Sailing Club
Department of Health
Dinas Powis Scout Group
Dorchester on Thames Sailing Club
Educational Recording Agency
Eversheds
Fareham Sailing & Motor Boat Club
Fine Art Trade Guild
Girls' Day School Trust
Glamhotel
Groombridge Village Hall
Gurnard Sailing Club
Harlow Cricket Club
Hatch Warren Community Association
Haverigg Cricket Club
Heath Hill Surgery

Her Majesty's Court Service
Hospital Broadcasting Association
Hospital Radio Plymouth
Hucknall Cricket Club
Incorporated Society of Musicians
Individuals (12)
League Cricket Conference
Local Government Association
Maidenhead Sailing Club
Midland Sailing Club
Museums, Libraries and Archives Council
Music Producers Guild
Music Publishers Association
Music Users' Council
Musicians' Union
Mylor Yacht Club
National Association for Voluntary & Community Action
National Confederation of Parent Teacher Associations
National Council for Voluntary Organisations
NUS Services Ltd
Oban Sailing Club
Ogwr DASH
Phonographic Performance Limited (PPL)
Performing Rights Society (PRS)
Quay Sailing Club
Radio Remedy, Caithness General Hospital
RadioCentre
Ranelagh Sailing Club
Rowing Club
Royal Yachting Association
Ryde Carnival Association
Sailing Club
Scottish Churches Committee
Scottish Library & Information Council and Chartered Institute of Library &
Information Professionals
Scottish Sports Association
Sussex Village Halls Advisory Group
Tadley & District Citizens Advice Bureau
The Canterbury Care Centre
The Law Society of Scotland
The National Library of Scotland
The Orders of St John Care Trust
The Prince's Trust
The Royal West Sussex NHS Trust
The Salvation Army

The Scout Association
Three New Square
Trust AM, Hospital Radio for Doncaster & Bassetlaw
Tyneside Women's Health
UK Music
Varne Boat Club
Whitby Yacht Club
Wimbledon Park Sailing Club
Working Men's Club & Institute Union Ltd
Ye Pirates Club