EXPLANATORY MEMORANDUM TO

THE COPYRIGHT AND PERFORMANCES (APPLICATION TO OTHER COUNTRIES) (AMENDMENT) (NO. 2) ORDER 2024

2024 No. 1124

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Intellectual Property Office, an Executive Agency of the Department for Science, Innovation and Technology, and is laid before Parliament by Command of His Majesty.

1.2 This Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Declaration

2.1 Feryal Clark MP, Parliamentary Under-Secretary of State for AI and Digital Government at the Department for Science, Innovation and Technology, confirms that this Explanatory Memorandum meets the required standard.

2.2 Chris Mills, Director of Rights Policy and Enforcement at the Intellectual Property Office, confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Aquila Brandon-Salmon at the Intellectual Property Office, telephone: 01633 811154 or email: Aquila.Brandon-Salmon@ipo.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument amends existing secondary legislation relating to the eligibility of foreign nationals for copyright and rights in performances. This instrument, in combination with recent changes to primary and secondary legislation (which come into force at the same time as this instrument), results in a limited expansion in the pool of foreign performers (such as musicians and actors) who qualify for a particular right in UK law. These changes allow the UK to fulfil its commitments in the treaties on performers' rights.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is United Kingdom wide.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is across the United Kingdom.

5. Policy Context

What is being done and why?

5.1 UK law gives performers rights to control, or receive remuneration for, the use of their performances. This includes a right to receive "equitable remuneration" when sound recordings of their performances are broadcast or played in public (such as when recorded music is played on the radio, or in a shop or restaurant).

5.2 A foreign performer only qualifies for this right if they meet certain eligibility requirements in primary and secondary legislation. Recent changes to primary legislation (which come into force in December 2024) expand eligibility for performers' rights generally. This is to bring UK law into line with treaties on performers' rights to which the UK is party, such as the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations ('the Rome Convention') and the WIPO (World Intellectual Property Organization) Performances and Phonograms Treaty ('the WPPT'). This means that more foreign performers qualify for rights in performances under UK law than previously.

5.3 However, for the right to equitable remuneration in particular, these treaties allow parties to take various approaches to eligibility. This instrument amends existing secondary legislation to modify the impact of those changes to primary legislation in respect of the right to equitable remuneration. The combined effect of this instrument and the changes to primary legislation is that more foreign performers qualify for this right than previously, but the overall effect is limited (and less than if the changes to primary legislation were to apply without modification). This expansion in eligibility for the right to equitable remuneration is necessary to allow UK law to comply with the Rome Convention, with which previous law was not fully consistent.

What was the previous policy, how is this different?

5.4 Previously, whether a performer was eligible for the right to equitable remuneration depended on their nationality, place of residence or the country in which their performance took place. This excluded some performers who should have qualified for the right to equitable remuneration under the Rome Convention. This instrument (together with the recent changes to primary legislation) expands qualification for this right so that a performer additionally qualifies if the producer of the sound recording of their performance is a national of, or body incorporated under the law of, the UK, Gibraltar, the Channel Islands, the Isle of Man, Malta or a Rome Convention country.

5.5 This is a limited change, the purpose of which is to resolve this inconsistency between UK law and the commitments in the Rome Convention in a way that minimises disruption and costs to UK creators, copyright owners, and users of sound recordings.

6. Legislative and Legal Context

How has the law changed?

6.1 In the UK, rights in performances are provided by Part 2 of the Copyright, Designs and Patents Act 1988 ('the CDPA'). Section 182D of the CDPA provides performers with the right to equitable remuneration when sound recordings of their performances are broadcast or played in public.

6.2 Part 2 of the CDPA only confers rights in relation to 'qualifying performances'. Previously, under section 181 of the CDPA, a qualifying performance was one that was given by a national or resident of, or which took place in, a 'qualifying country'.

6.3 Section 206 of the CDPA provides that a qualifying country is the UK, a Crown Dependency or Gibraltar, a country that is party to the Rome Convention, or a country designated as enjoying reciprocal protection by an Order in Council made under section 208 of the CDPA.

6.4 The Copyright and Performances (Application to Other Countries) Order 2016 ('the 2016 Order') designates as enjoying reciprocal protection countries that are party to the WPPT (but are not party to the Rome Convention). It also previously restricted how the right to equitable remuneration was applied to countries that were party to either the Rome Convention or the WPPT.

6.5 For countries that are party to the Rome Convention, Article 9 of the 2016 Order provided that the right to equitable remuneration did not apply to the extent that the country elected not to provide an equivalent right in relation to British performances, except that a performance originating in that country (i.e. that was given by a national or resident of, or that took place in, that country) nonetheless qualified if it was contained in a sound recording that was first published (including any publication within 30 days of the original publication) in another country that is party to the Rome Convention and which provides an equivalent right in relation to British performances. In practice, Article 9 of the 2016 Order was of limited effect, and most performances originating in a country that was party to the Rome Convention, and which were broadcast or played in public in the UK, qualified for the right.

6.6 In the case of countries that are party to the WPPT (and which are not party to the Rome Convention), Article 11 of the 2016 Order provided that the right to equitable remuneration did not apply to the extent that the country elected not to provide an equivalent right in relation to British performances.

6.7 However, section 5 of the Trade (Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Act 2024 (the CPTPP Act) substituted (with effect from December 2024) a new definition of 'qualifying performance' in section 181 of the CDPA. This adds two new eligibility Conditions, C and D, to the definition of "qualifying performance". A performance now qualifies if it meets any of the following conditions:

- the performance is given by a national or resident of a qualifying country ('Condition A').
- the performance takes place in a qualifying country ('Condition B').
- the performance is included in a sound recording and
  - the producer of the sound recording is a national or resident of, or a body incorporated under the law of, a qualifying country, or
  - the sound recording is first published in a qualifying country (including any publication within 30 days of the original publication) ('Condition C').
- the performance has not been included in a sound recording, and the performance is broadcast from, or by a broadcasting organisation headquartered in, a qualifying country ('Condition D').

6.8 These changes to the definition of 'qualifying performance' made by the CPTPP Act would, in the absence of amendments to the 2016 Order, result in a substantial broadening of eligibility for the right to equitable remuneration. For example, any performance included in a sound recording that was first published in the UK or in a country that is party to the Rome Convention (and which provides equivalent rights in relation to British performances) would qualify for the right to equitable remuneration, regardless of the nationality of the performer or where the performance

took place. This would result in adverse outcomes for the UK music sector (as set out below). This instrument therefore makes two main changes to the 2016 Order.

6.9 The first, in article 5 of the present instrument, is to maintain the previous effect of article 11 of the 2016 Order. This provides that the right to equitable remuneration applies to a country party to the WPPT but not the Rome Convention only where the performer is a national or resident of, or the performance took place in, that country, and only to the extent that the country provides an equivalent right in relation to British performances.

6.10 The second change concerns the UK, the Crown Dependencies and Gibraltar, countries party to the Rome Convention, and Malta. Previously, most performances given by nationals or residents of, or that took place in, these countries qualified for the right to equitable remuneration. Articles 4 and 6 of the present instrument replace and amend articles 9 and 12A of the 2016 Order respectively to maintain the effect of previous law, with two changes: first, the new articles 9 and 12A now provide that a performance may additionally qualify for the right to equitable remuneration if the producer of the sound recording of the performance is a national or resident of, or a body incorporated under the law of, any of these countries. Second, the previous restriction on eligibility for the right to equitable remuneration for countries party to the Rome Convention (described in paragraph 6.5) no longer applies.

6.11 Article 2 of this instrument also revokes one of the amendments made to the 2016 Order by the Copyright and Performances (Application to Other Countries) (Amendment) Order 2024 ("the 2024 Order") before it takes effect, as that amendment is superseded by article 4 of this instrument.

6.12 Finally, article 7 of the present instrument amends article 13 of the 2016 Order. That article sets out saving provisions, which ensure that, where a person acquires rights as a consequence of that Order, this does not prevent a person from using a work or performance, if they had already begun in good faith to do so (or had in good faith made real preparations to do so), and they had incurred expenditure or liability in connection with doing so. Article 7 of the present instrument amends this provision to ensure that it is clear that it also applies in respect of rights acquired as a consequence of amendments made to the 2016 Order by the 2024 Order.

6.13 These changes (apart from article 2) come into effect on the same date that the changes made by the CPTPP Act to section 181 of the CDPA take effect (and the changes made by the 2024 Order to the 2016 Order take effect).

Why was this approach taken to change the law?

6.14 This instrument is largely aimed at preserving the effect of previous law in relation to the right to equitable remuneration with a limited change in order to comply with the Rome Convention. This approach is considered to best support and balance the interests of creators, rights holders, users, and the public while allowing for consistency between UK law and the UK's international commitments.

7. Consultation

Summary of consultation outcome and methodology

7.1 A public consultation[1] ran from 15 January 2024 to 22 March 2024 and Intellectual Property Office officials met with relevant stakeholders over this period. The consultation sought views on alternative ways of providing the right to equitable remuneration to foreign performers and the rights to foreign producers (e.g. record labels) to license the broadcasting and playing in public of their sound recordings.

7.2 There were 33 written responses to the consultation. Those responding included music and broadcasting sector trade associations, collective management organisations, individual businesses and academics. These responses reflected a range of views.

7.3 Most respondents expressed a clear preference for either maintaining the previous approach (from those who considered the law to be compatible with the UK's international commitments and any changes likely to cause costs and disruption) or providing the right to foreign performers on more generous terms (from those who considered the restrictions on eligibility for the right to be unfair or incompatible with the UK's international commitments, and the impacts of a change to be small). Almost all consultation respondents strongly opposed making eligibility for the rights of foreign producers more restrictive, in line with the previous approach taken for foreign performers, due to anticipated complexity and cost to the UK music sector.

7.4 The approach implemented by this instrument was not specifically consulted on and was identified in light of the evidence and views received at consultation. This involves a more limited change to the law than the options consulted on, allowing the UK to fulfil its international commitments while mitigating or avoiding the costs and disruption arising under the other options. While this results in some additional costs to the UK music sector relative to previous law, these are anticipated to be small. This is considered the best means of both satisfying the UK's international commitments and balancing the interests of creators, rights holders, users and the public.

7.5 The government response to the consultation, which deals with these issues in more detail, is available on gov.uk on the Intellectual Property Office's pages.

8. Applicable Guidance

8.1 The Intellectual Property Office maintains guidance on gov.uk on the protection of foreign works and performances in UK copyright law. This guidance will be updated to reflect this instrument before its entry into force.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A de minimis Impact Assessment is published alongside the government response to the consultation. A full Impact Assessment has not been prepared because the impacts are expected to fall below the de minimis threshold of £10 million per year.

[1] Consultation on Extension of rights in sound recordings and performances to foreign nationals: Extension of public performance rights to foreign nationals - GOV.UK (www.gov.uk) - https://www.gov.uk/government/consultations/extension-of-public-performance-rights-to-foreign-nationals

Impact on businesses, charities and voluntary bodies

9.2 The impact on business, charities or voluntary bodies is estimated to be small, at approximately £1.4 million per annum, with net gains to newly eligible performers and net costs to UK record labels, which now need to distribute a greater share of their UK broadcasting and public playing revenues to these performers.

9.3 These changes could also lead to greater administrative costs to PPL, the UK collecting society that licenses rights on behalf of record labels and performers, due to increased data collection requirements. These are likely to be passed on to record labels, performers and licensees and could impact investment in respective sectors, although these impacts are likely to be small (especially on a per business basis).

9.4 The legislation does impact small or micro businesses. However, no specific action is proposed to minimise the impact of the instrument's requirements on these businesses, as it is expected to be minimal. This is because the changes primarily affect record labels based in other countries and the UK record labels affiliated to those record labels, which are disproportionately larger businesses.

9.5 There is no, or no significant, impact on the public sector because these changes primarily affect private sector organisations such as record labels.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The instrument does not include a statutory review clause because the impacts are below the de minimis threshold and the review requirements of the Small Business, Enterprise and Employment Act 2015 do not apply to Orders in Council.

10.2 The Intellectual Property Office will monitor the impacts of these changes via review of public data (primarily from PPL), informal, ongoing engagement with stakeholders and a retrospective evaluation after a period of no more than five years.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 This instrument has retrospective effect as it applies in relation to performances taking place before the date on which it comes into force (as well as those taking place on or after that date). This is because the rights conferred by Part 2 of the CDPA (including the new section 181 substituted into the CDPA by section 5(2) of the CPTPP Act), and accordingly articles 9 to 12A of the 2016 Order (which this instrument amends), have effect in relation to performances irrespective of the date of performance (see, in particular, section 180(3) of the CDPA and section 5(4) of the CPTPP Act).

11.2 It is for this reason that the instrument relies on the express statutory authorisation contained in section 5(7) of the CPTPP Act to exercise the new power in section 206(4)(za) of the CDPA in relation to pre-existing performances. Section 206(4)(za) was inserted by section 5(3) of the CPTPP Act, and this is the first time the powers in section 206(4)(za) and section 5(7) of the CPTPP Act have been used.

11.3 This instrument is being issued free of charge to all known recipients of the 2024 Order. This is because article 7 of this instrument amends the saving provision in article 13 of the 2016 Order to make it clear the saving provision also applies to rights acquired as a consequence of amendments made to the 2016 Order by the 2024 Order. Although article 7 comes into force at the same time as the 2024 Order, the

amendment made by article 7 would ideally have been contained in the 2024 Order as it relates to amendments made by that Order. A cautious view has been taken that this omission from the 2024 Order may constitute an error, and the use of the free issue procedure is therefore appropriate.

12. European Convention on Human Rights

12.1 The Parliamentary Under-Secretary of State for AI and Digital Government has made the following statement regarding Human Rights:

"In my view, the provisions of the Copyright and Performances (Application to Other Countries) (Amendment) (No. 2) Order 2024 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").