



**INTELLECTUAL**  
PROPERTY OFFICE

# **Consultation on the Implementation of Directive 2011/77/EU Amending Directive 2006/116/EC on the Term of Protection of Copyright and Certain Related rights**





# Contents

Summary .....	<b>1</b>
Purpose of the Consultation.....	<b>2</b>
How and when to Respond.....	<b>3</b>
Important Note Regarding Publication of Responses .....	<b>4</b>
The Directive - Options and Proposals.....	<b>5</b>
<b>Annex A:</b> Directive 2011/77/EU.....	<b>12</b>
<b>Annex B:</b> Draft Statutory instrument and Transposition Note .....	<b>17</b>
<b>Annex C:</b> Consultation Phase Impact Assessment.....	<b>38</b>
<b>Annex D:</b> Consultation Response Form.....	<b>51</b>
<b>Annex E:</b> Consultation Code of Practice Criteria .....	<b>63</b>
<b>Annex F:</b> Organisations to which this Consultation has been Sent.....	<b>64</b>

## Summary

1. This consultation relates to the details of the implementation of Directive 2011/77/EU. The Directive requires the UK to implement an extension to the length of copyright term in sound recordings. Comments on the proposed approach to implementation are requested from interested parties. The views of parties on the principle of introducing an extension to copyright term in the UK were considered in the lead up to the adoption of the Directive and are not the subject of this consultation.

2. The Directive came into force on 1 November 2011 and requires Member States to implement its provisions by 1 November 2013. In addition to the extension of the copyright term in sound recordings and performers' rights in a sound recording from 50 years to 70 years, and the harmonisation of the copyright term for co-written musical compositions with words, the Directive also includes specific provisions for performers: a session fund for artists; a "clean slate" provision which means that producers are not entitled to make any deductions from the contractual royalties due to featured performers after 50 years; and a "use-it-or-lose-it" provision whereby the rights in the performance may revert to the performer if the record company does not exploit the music track in the extended period. These measures will be implemented by Regulations which amend the Copyright Designs and Patents Act 1988 and will apply to the United Kingdom.

## Purpose of the Consultation

3. The aim of this consultation is to consult all interested parties, including musicians, record producers, lyricists and composers and those who represent these interested parties to seek their views on the Government's proposals for implementing the Directive.

4. The full text of the Directive is included at Annex A. Member States are required to make provisions to implement the Directive in their national laws. A draft Statutory Instrument and accompanying commentary is included at Annex B, which also includes a draft Transposition Note setting out how individual provisions of the Directive are implemented. Comments on these documents are also welcome. A Regulatory Impact Assessment is included at Annex C, which details the financial implications.

## How and when to Respond

5. The Government welcomes responses to the issues raised in this consultation document from any individual, organisation or group. Responses to the specific questions which are raised in this document are particularly welcomed. It is not necessary to respond to all the questions; you are welcome to provide answers only to those issues of most interest or relevance to you.

6. While the Government will note all responses, it will not be in a position to note each one individually and will not commit to respond to comments on an individual basis

7. This consultation will run for 8 weeks and the closing date for responses is 4 March 2013. A response can be submitted by letter or email or by using the response form included at Annex D to this document.

To ensure that your response to this consultation is received and considered by the IPO please send to:

Nick Ashworth  
The Intellectual Property Office  
Room 3B49  
Concept House  
Cardiff Road  
Newport  
NP10 8QQ

E-mail: [TermDirectiveConsultation@ipo.gov.uk](mailto:TermDirectiveConsultation@ipo.gov.uk)  
Fax: 01633 817777

8. Please could you also indicate in what capacity your response is being submitted. If you are responding on behalf of a representative group, please also give a summary of the people and organisations that you represent. If you choose to comment on the Regulatory Impact Assessment [Annex C], we would be particularly grateful for any information or analysis, especially statistical data, which parties can supply to update the likely economic impact of the changes.

9. It would be helpful if respondents could bear in mind that this consultation is not about whether the requirements of the Directive itself are appropriate. The Directive has been agreed, is in force, and cannot be changed at this time. Respondents should also note it is Government policy that transposition of an EU Directive into UK law should not go beyond the minimum requirements of the Directive (so called "gold plating") except where not to do so would adversely affect UK interests.

### Next Steps

We will analyse submissions to the Consultation and the Government will publish a response within six weeks of the end of the consultation period. i.e. by 15 April 2013.

## Important Note Regarding Confidentiality and Data Protection

10. We will publish all formal responses to this consultation. Including respondents' names and other relevant details on the IPO website.

11. Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want other information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

12. In view of this, if you consider information you have provided to be confidential, it would be helpful if you could explain to us why this is the case. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the IPO.

13. The IPO will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

### Complaints

14. If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

John Conway  
Consultation Coordinator  
Better Regulation Team  
Department for Business, Innovation and Skills  
1 Victoria Street  
London SW1H 0ET

Tel: 020 7215 6402  
Email: [john.conway@bis.gov.uk](mailto:john.conway@bis.gov.uk)

A copy of the Code of Practice on consultations is attached at Annex E.

## The Directive - Options and Proposals

**In the text that follows, reference to an “Article” are to Articles of Directive 2011/77/EU; references to a “Regulation” are to regulations in the draft Statutory Instrument in Annex B (“the Regulations”); and references to a “Section” are to Sections of the Copyright, Designs and Patents Act 1988 (CDPA).**

### Article 1

15. Article 1 sets out the amendments to be made to Directive 2006/116/EC on the term of protection of copyright and certain related rights.

#### Article 1(1)

16. Article 1(1) provides that the term of copyright protection for a musical composition with words shall not expire until 70 years after the death of the last surviving author of the music or the lyrics, provided that the music and the lyrics were specifically created to be used together.

17. Currently under UK law, unless a work is a work of joint authorship (as defined in section 10 CDPA) the duration of copyright in a musical composition is 70 years from the end of the calendar year in which the author (if his identity is known) dies. Thus, where a musical work is the product of a collaboration between a composer of the music and the author of the lyrics to be sung with the music, separate periods of protection will apply in relation to the music and the lyrics. This situation contrasts with the position in some EU Member States where musical compositions with words enjoy a single term of protection calculated from the death of the last surviving author. The Directive regards this distinction as an obstacle to cross-border collective management of such rights (see Recital (19)) and therefore requires that the same harmonised term should apply in all Member States.

18. Regulation 4 inserts into the CDPA a definition of “Works of co-authorship” as new Section 10A(1), and implements this part of Article 1(1) of the Directive, which provides that this measure should apply to a musical composition with words. We have implemented this on the basis that it applies to a work comprising a musical work and a “literary work” since the reference to “words” used in the Directive may be construed more narrowly than the definition of “literary work” which is defined more broadly in Section 3(1) of the CDPA to include “any work...which is written, spoken or sung”.

19. The Directive qualifies the type of work it is aimed at with the words “provided that both contributions were specifically created for the respective musical composition with words”. The Regulations implement this using the following drafting: “where the two works are created in order to be used together”. This requirement connotes that the work must have been the result of a collaborative process between the authors with the music and lyrics being written for each other (as opposed to a situation where, say, a piece of poetry written in 1950 by Mr A is set to music by Mr B in 1960 in which event such works would continue to enjoy separate periods of protection).

20. The reference to “author” in the new definition will include references to cases of joint authorship where this is relevant by virtue of Section 10(3). For example, the music and lyrics may each be a work of joint authorship. In order for a work to qualify as a work of joint authorship, the contribution of each author must be “not distinct” from that of the other author. This is in contrast with works of co-authorship where the music is contributed by one author and the lyrics by another.

21. New subsection 10A(2) is intended to clarify the legal status of a “work” of co-authorship. Unlike a work of joint authorship, a “work” of co-authorship is not a single copyright work for the purposes of the CDPA but is made up of separate works each of which has its own author and each of whom has the sole right to authorise or prohibit acts in relation to that work.

22. Regulation 5 amends Section 12(8), by extending to works of co-authorship the rules on duration of copyright which apply to works of joint authorship, thus completing the implementation of Article 1(1).



## Article 1(2)

23. Article 1(2)(a) distinguishes the fixation of a performance in a phonogram from the fixation of a performance not contained in a phonogram and extends the length of term of a performer's rights in a phonogram that has been published or communicated to the public, from 50 to 70 years.

24. The CDPA does not use the term "phonogram", but refers to "sound recording" which is defined in Section 5A(1). A phonogram is defined in Article 3(b) of the Rome Convention<sup>1</sup> as "any exclusively aural fixation of sounds of a performance or of other sounds". For the purposes of implementing the Directive the Regulations utilise the term "sound recording" or "sound recordings" as opposed to "phonogram".

25. Regulation 6 implements Article 1(2)(b) by amending Section 13A to extend the period of copyright protection in a sound recording that has been published or communicated to the public, from 50 to 70 years. The reference in Regulation 6 to Section 191HA(3) points forward to the new provisions under which the copyright in a sound recording may expire during the extended term in certain circumstances.

26. Regulation 7 implements the second part of Article 1(2)(a) through amendment to Section 191(2). The term "sound recording" is defined in Section 211 as having the same meaning in Part II of the CDPA as in Part I (Section 5A). The drafting attempts to track the wording of the Directive in drawing a distinction between a sound recording of a performance and any other recording of a performance (such as a film). Whilst the Directive is aimed at protecting musical performances it does not exclude non-musical performances and so the provisions will also extend, e.g. to a sound recording of a recitation of poetry or a reading from a book. Regulation 7(1)(b) amends Section 191(2) by extending the duration of performers' rights in a sound recording from 50 years to 70 years.

27. Article 1(2)(c) inserts a number of new paragraphs into Article 3 of Directive 2006/116/EC:

28. New Paragraph (2a) provides that 50 years after the publication or communication to the public of a sound recording a performer may terminate a contract transferring or assigning his rights to the producer if at the end of that period the producer does not offer sufficient copies of the recording for sale or does not make the recording available to the public. The performer must give proper notice to the

producer who shall have a period of one year to offer copies of the recording for sale and to make the recording available to the public. In the event that the producer does not carry out both these acts the contract may be terminated and the producer's rights in the phonogram shall expire. Where a phonogram contains the fixation of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with applicable national law. This right to terminate may not be waived by the performer.

29. The provisions contained in Regulation 8 implement Article 1(2)(c) of the Directive by inserting new Section 191HA into the CDPA. The decision to locate these provision (and new Section 191HB) following Section 191H CDPA was taken on the basis that the new provisions are concerned with specifying the rights of a performer in relation to a sound recording where he has assigned his rights in the recording to the producer. Since Sections 191A to 191M are concerned with various aspects of performers' property rights (Section 191G, in particular, spells out the consequences which flow where a performer has transferred his rental right in a sound recording to the producer) this appears to be the most appropriate home for the new provisions.

30. New Section 191HA is headed "Assignment of performer's property rights in a sound recording" and the provisions of new Section 191HA are expressed to apply where a performer "has assigned" certain rights concerning a sound recording to the producer. The Directive is drafted in terms which specify where the performer has "transferred or assigned" his rights etc. We have considered whether it is necessary to copy out this terminology in order to give effect to the Directive and whether any distinction is intended to be drawn in the Directive between the two expressions or whether they are interchangeable. The term "transfer" would seem to include both a transfer of ownership of the rights by assignment (which, under Section 191B(3) must be in writing) and a transfer by operation of law. Section 191G (which is concerned with where a performer has "transferred" his rental right in a sound recording) implements Article 5 of the Rental/Lending Rights Directive, which similarly states where the performer has "transferred or assigned" his rental rights (although it is clear in that context that a transfer need not be by assignment since the transfer may occur by operation of law as a result of the presumption in Section 191F, so it would appear that the use of "transfer" in this context is appropriate).

<sup>1</sup> Rome Convention for the Protection of Performers. Producers of Phonograms and Broadcasting Organizations

31. Given that the “remedy” afforded to the performer where the producer has failed to exploit the sound recording in sufficient quantities is to terminate “the agreement” with the producer (the so called “use it or lose it” provision - see Article 1(2)(c) first paragraph and Recital (8)) we have taken the view that we should implement the measure using the term “assigned” rather than “transferred” (or, indeed, “transferred or assigned”) since this is the only relevant form of transfer for the purposes of the new provisions in the Regulations .

32. New Section 191HA(1) sets out the circumstances in which a performer may exercise the various new rights set out in the subsequent subsections. The Directive states that these rights apply “where the performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer”. The rights in the fixation of a performance referred to equate to the performers’ property rights (defined in Section 191A as the reproduction right, the distribution right, the rental and lending right and the making available right). We have considered how to transpose this provision; whether the new rights should be capable of being exercised where there has been only a partial assignment of rights (for example where only the reproduction right, the distribution right and the making available right have been assigned to the producer) or whether they should only be exercisable where the performer has assigned all his property rights to the producer?

33. Given that the so- called “use it or lose it” provision applies where there is a failure by the producer to make sufficient copies of the sound recording available for sale or available for download over the internet (the making available right – see Section 182CA) and is not concerned with a failure to make the recording available for rental or hire, it would seem illogical to require that the new rights could only be triggered where the performer has assigned all his property rights (including the rental/lending right). In view of this we have provided that the rights set out in Section 191HA may be exercised where the performer has assigned to the producer his reproduction rights, his distribution rights and his making available rights or in circumstances where he has assigned all his performer’s property rights. It may, of course, be the case in practice that rental rights are always included where the other rights are assigned to a producer but we did not consider that it should be a condition of the exercise of the new rights that this should be the case.

34. Subsections (2) to (5) of new Section 191HA implement paragraph 2a inserted by Article 1(1)(c). The Directive states that the right to terminate may be exercised where the “producer” fails to exploit the sound recording. We have considered whether it would be appropriate to make reference to the “producer” in the Regulations (defined in Part 1, Section 178 CDPA as the person by whom the arrangements necessary for the making of the sound recording are made), or whether it would be more appropriate to refer to the owner for the time being of the copyright in the sound recording which would cover the original producer of the sound recording or his assignee. A copy out approach to implementation would point to the former but we consider that if the original producer has assigned his rights to a third party he would not be in a position to comply with any notice served on him under the “use it or lose it” provision and so a reference to the “producer” alone could severely limit the scope of the new rights. It is considered that such a restrictive interpretation of the Directive could not have been intended and so we have inserted a provision in Section 191HA(5) which states that references to the “producer” shall include the person for the time being entitled to the copyright in the sound recording, that is the person to whom the performer’s rights were originally assigned or any successor in title of his.

35. The Directive provides that the right to terminate the agreement may be triggered where the recording is not offered for sale “in sufficient quantity”. There is no indication in the Directive as to the meaning of this term other than in Recital (8) which refers to “within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations” (“the Rome Convention”). Article 3(d) of the Rome Convention defines “publication” as the offering of copies to the public in “reasonable quantity”. Neither expression is particularly helpful in indicating the level of sales which might or might not be sufficient for these purposes. Whilst it is Government policy to implement EU Directives using a copy-out approach we consider that given the ambiguity of this phrase and the fact that the penalty for not meeting the condition of issuing “sufficient quantities” is termination of the contract we think it may be advisable to provide a clear meaning for the phrase. This could take the form of an objective test and refer to a quantity which can reasonably be regarded as sufficient, having regard to current and likely future demand. This might be pertinent where, say, a performer plans to perform on tour and wishes to have copies of his CDs available to sell at the performances and to meet the demand reasonably expected to be generated as a result of those performances.

## Q1. Should the Regulations provide a clear definition of the term “sufficient quantities”? If so, what specific text do you think we should use?

36. The Directive provides that the performer may terminate the contract if the producer “does not offer copies of the phonogram for sale in sufficient quantities or does not make it available to the public etc”. Thus if, for example, the producer has made the sound track available for download on the internet but has failed to produce sufficient hard copies of CDs for sale, the performer may give notice that he wishes to terminate the agreement. The Directive goes on to specify the mechanism for terminating the agreement if the producer then fails to carry out “both” acts of exploitation within the 12 month notice period. The drafting of the Directive is ambiguous since on one reading it may infer that if the producer carries out just one of the acts of exploitation the performer may not terminate the agreement. This, however, appears to run counter to the right (which is expressed in the alternative) set out in the first sentence of paragraph 2a (inserted by Article 1(2)(c) of the Directive). We consider that the correct interpretation is that, on receiving notice, the producer has to carry out both acts to prevent termination of the agreement. Taking this proposition as the starting point to interpretation, it would follow that in the first instance, a failure to perform one of the acts is sufficient for the agreement to be terminated. The alternative interpretation, that by doing one of the acts, the agreement cannot be terminated, would produce an inconsistent result between the two stages of the procedure. Accordingly, we consider that the most sensible construction of the Directive is that the producer is required to do both acts and if he fails to do one or the other or fails to do both, the agreement may be terminated. This is reflected in new Sections 191HA(2) and (3) inserted by Regulation 8.

37. In providing for the performer to terminate the contract with the producer the Directive refers to a specific point in time, i.e. 50 years after the phonogram was lawfully published or, failing such publication, 50 years after it was lawfully communicated to the public. We have interpreted this provision to mean that the performer may exercise the right to terminate at any time after the point in time as defined by the Directive.

**Corrigendum:** In new Section 191HA(2) of the Copyright Designs and Patents Act 1988 (CDPA) as provided for by Regulation 8 of the draft Statutory Instrument we have calculated the 50 year period after which the performer may issue a notification to the producer in a way that we now consider may be inconsistent with the provisions

of Article 3(2) of the Directive. In this regard, we propose (subject to Parliamentary Counsel agreement) to amend the draft Regulations in order to bring them into line with the Directive and with Section 13A(2) CDPA to provide that the 50 year period begins on the date of publication of the sound recording or, in the absence of publication, 50 years from the date on which the sound recording is played in public or is communicated to the public. This proposed amendment will not be subject to further consultation.

## Q2. Do you agree with the interpretation of the period of time during which the performer may exercise the right to terminate the contract?

38. Section 191HA(3) provides for what happens if the agreement is terminated. Recital (8) of the Directive states that the rights in the fixation “should revert” to the performer i.e. those rights to distribute/make available to the public which he has assigned to the producer. The final sentence of Recital (8) (which is echoed in paragraph 2a) provides “The rights of the phonogram producer in the phonogram should therefore expire in order to avoid a situation in which those rights would coexist with those of the performer in the fixation of the performance while the latter rights are no longer transferred or assigned to the phonogram producer”. We have interpreted this to mean that the copyright in the sound recording would expire at this point (hence the reference to this subsection inserted by Regulation 6(a)), the intention being that the performer would then be free to exploit the sound recording himself.

39. A sound recording may have several performers, some of whom may each enter into individual contracts with the producer assigning various rights in the fixation of their performance and others who may enter into a joint contract to do so. Once any individual performer has exercised his right to cancel his contract it would still be necessary for him to reach agreement with the other performers on the sound recording before he can exploit the sound recording.

40. In order to exploit the recording a performer (“P”) would require to “clear” the rights of any other performers (“OPs”) who appear on the sound recording whose rights will also have been assigned to the producer of the sound recording. Such rights would need to revert to their respective owners before they could be re-assigned to P in order to be exploited by P. The Directive does not prescribe a mechanism for how the rights of other performers might be “unpicked” in order to arrive at a situation where a performer might exploit the recording. Paragraph 2a of the Directive provides that where

a sound recording contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment “in accordance with applicable national law”. This suggests that such matters would be determined by the law of contract in each member state rather than our prescribing new measures.

41. We consider that the way that this will operate if there are multiple performers on a sound recording is as follows. If P terminates his contract with the producer, the producer would no longer be legally entitled to exploit the recording. Depending on the terms of their contracts with the producer this may constitute an event entitling the OPs to terminate their contracts with the producer. Alternatively, such OPs may exercise their statutory right to terminate under the new provisions. Even if the OPs are legally entitled to cancel their contracts in such circumstances, there are then various steps which have to be taken before P can exploit the recording, namely that the OPs have to terminate their contracts and then have to agree to assign their rights to P (or agree jointly with P to exploit the sound recording). It appears therefore in practice, that where there are multiple performers P will need to act jointly with the OPs in exercising the right to terminate the contract under the use it or lose it provision (in which case each of the performers on any sound recording would issue notices to terminate their individual contracts under the Regulations).

### **Q3. Do you agree with our analysis of how the provisions of the Directive will operate where there are multiple performers in a sound recording?**

42. We have considered whether the performer’s right to terminate discussed above should be assignable or transmissible to his heirs in the event of death (see Section 191B and the treatment of performers’ non-property rights in Section 192A). The Directive is silent on this point so any such measure would potentially amount to gold plating and would require justification. However, in the absence of such a provision it is difficult to see how the performer’s rights might be “unlocked” (particularly in circumstances where there are multiple performers) so as to permit a performer to exploit a recording.

### **Q4. Should the performer’s right to terminate the contract be assignable and/or transmissible?**

43. New Section 191HA(4) provides that an agreement is of no effect in so far as it purports to exclude or restrict the right of a performer to terminate his agreement under this provision. This implements the third sentence of paragraph 2a which provides the right to terminate may not be waived by the performer.

44. The definition of “assignment of rights” in new Section 191HA(5) follow the wording in section 191G(91) and is intended to cover the case where the performer contracts with the producer via his service company or through a collective entity.

45. *New Paragraph (2b)* (inserted by Article 1(2)(c) of the Directive provides that where a performer has transferred or assigned his rights in a sound recording to the producer in return for a single payment, the performer shall receive an annual supplementary payment from the producer for each full year following the 50th year after the publication or communication of the sound recording. This right cannot be waived. The Directive stipulates that payment should be made for “each full year”. The Directive appears to peg the obligation to pay a supplemental remuneration to each full year following the 50th year after the date on which the phonogram was published. However, the difficulty with this is that depending on the actual date, this construction could result in the period during which supplementary remuneration will be paid exceeding 70 years (in some cases by as much as 11 months and 30 days). We consider that this cannot have been the intention and that the right should be aligned with the computation of the duration of performer’s rights which according to Recital (15) of the 2006 Directive should be calculated from the first day of January of the year following the relevant event (this is reflected in section 191(2) of the CDPA). This also flows through to the date upon which the performer can exercise the right to terminate the agreement with the producer under Section 191HA(2). Thus the right to terminate in section 191HA(2) will be exercisable at the end of the period of 50 years from the end of the calendar year in which the recording was released etc and the right to supplementary remuneration in Section 191HB is similarly pegged to periods of 12 months from that date.

## **Q5. Do you agree with our approach in calculating the period after which the supplementary remuneration becomes payable?**

46. *New Paragraph (2c)* (inserted by Article 1(2)(c) of the Directive) provides that the overall amount of the supplementary payment shall correspond to 20% of the annual revenue received from the reproduction, distribution and making available to the public of the sound recording. Furthermore, paragraph 2(c) provides that a producer shall be obliged to supply to performers on request any information they require in order to secure payment of the remuneration.

47. New Section 191HB implements paragraphs 2b and 2c. The Directive provides that the “overall amount” which the producer must set aside for payment of the supplementary remuneration is 20% of the annual revenue from the reproduction, distribution and making available of a particular sound recording. The Directive is quite specific in terms of the type of exploitation of the sound recording by reference to which the supplementary remuneration is calculated. This amount is intended to be divided between all the “non-featured” performers on the recording (who generally do not receive recurring royalties under their contracts of assignment - see Recital (9) of the Directive). The Directive does not specify what proportion of the annual payment will be received by each performer – it provides that the annual sums will be paid over to relevant collecting societies who will then distribute the sum amongst their members according to their rules (see Recital 12 and paragraph 2d). New Section 191HB(3) implements this provision. The drafting of this provision assumes that a performer will be a member of a relevant collecting society whose rules will oblige the collecting society to distribute the supplementary remuneration in accordance with its rules. We do not consider it necessary to prescribe such measures in legislation. In considering how to reflect the legal relationship between the performer, the collecting society and the producer and the need for any enforcement mechanisms we considered whether it was necessary for the performer to assign his right to the collecting society in order to give effect to the provision in paragraph 2d of the Directive (there is a similar precedent in section 191G(2)). However, since the purpose of any “assignment” would be just to enable the collecting society to collect the performer’s money on his behalf we did not consider that it was necessary to go as far as transferring ownership of the entitlement to achieve that. Accordingly, under new section 191HB the legal ownership of the entitlement to supplementary remuneration will remain with the performer (and he will be able to enforce the same in an

action for breach of statutory duty). It is, of course, possible that the participants may enter into contractual arrangements reflecting the statutory arrangements.

## **Q6. What will be the position where multiple performers on the same sound recording are members of more than one collecting society (if such a situation can arise) or where performers are not members of a collecting society?**

## **Q7. The Regulations specify that the producer must pay to the collecting society the sum set aside in respect of the supplementary remuneration. What would you consider to be a reasonable period of time by which the producer must comply with this provision?**

## **Q8. New Section 191HB(7) provides that the right to receive an annual supplementary payment should be transmissible or assignable, although the Directive is silent on the matter. Do you agree that the Regulations should include this provision?**

48. The Directive specifies that the sums to be taken shall be calculated from the revenue received from the reproduction, distribution and making available of the sound recording therefore no account shall be taken of revenue which the producer has derived from the rental of phonograms or from the single equitable remuneration received for broadcasting and communication to the public.

49. We have provided that the request for information in new subsection 191HB(5) should be in writing, given that failure to comply with the request could result in a court order. Subsection (5) provides that if the producer does not provide the information requested, the performer may seek a court order. The Directive assumes that the producer (as defined) will be in possession of the relevant information. If the amount of the annual payment for each performer is to be calculated, and distributed by the collecting society in accordance with its rules it may be the case, at least in some

instances, that the collecting society will be better equipped to provide the information than the producer. It would be helpful to understand a little more about how the process might work in practice. It may be that an extra provision is required to provide for the producer who is not able to supply the requested information to refer the request to a collecting society or for the request to be made to such a body in the first place.

### **Q9. Is the producer (rightsholder) the party best placed to provide the information required by the performer to secure payment of the annual remuneration?**

50. *New paragraph 2e* provides that where a performer is entitled to recurring payments no advance payments or contractually defined deductions shall be deducted from payments made to the performer after 50 years following the publication or communication to the public of a sound recording.

51. In contrast to new paragraph 2(b) this provides for performers who are entitled to a recurring payment. Any advance payments are usually deducted from such payments until repaid in full. Any such deductions may not be made following the 50th anniversary of the release of the recording. Subsection (9) of new Section 191HB implements this provision of the Directive.

#### **Article 1(3)**

52. Article 1(3) defines the date on which protected sound recordings will qualify for protection under the provisions of the Directive, i.e. 1st November 2013. In effect, any sound recording published, made available or communicated to the public on or after 1st January 1963 shall be protected under the provisions of the Directive

53. Article 1(3) also defines the date on which musical compositions of co-authorship (as defined in Article 1(1)) will qualify for protection under the provisions of the Directive. Protection shall extend to any such composition where the music or the lyrics are protected in at least one EU Member State on 1st November 2013, some of which already provide similar protection for these types of works. This will have the effect in some Member States, including the UK, of reviving copyright in certain works.

## **Savings and Transitional provisions**

### **Article 1(4)**

54. Regulation 16 implements Article 1(4) paragraph 1 which provides for the preservation of the effect of certain pre-existing agreements for the duration of the extended term.

55. Article 1(4) paragraph 2 provides that Member States may permit the modification of contracts entered into prior to implementation of the Directive and which entitle a performer to recurring payments (see also Recital 16) following the 50th year after the sound recording was published. We have not included this provision in the Regulations since to do so would go beyond the minimum requirements of the Directive.

### **Q10. Should the Regulations incorporate the optional provisions of Article 1(4) paragraph 2? What is the business case for doing so?**

56. The provisions in Part III of the Regulations are largely based on the transitional and savings provisions contained in the Duration of Copyright and Rights in Performances Regulations 1995 Regulation (SI 1995/3297) (the "1995 Regulations"). In relation to copyright, the Regulations must deal with two separate issues, namely ownership of the copyright during the extended term and ownership of the revived term of copyright in works of co-authorship. The Directive does not stipulate who such owners should be but we have followed the approach taken in the 1995 Regulations.

57. There is also a question as to whether we should (following the 1995 Regulations) include Regulations 19 and 20 (which impose compulsory licences in respect of revived copyright thereby cutting down the rights of the owner of the revived copyright) or whether these might amount to gold plating. There is no provision in the Directive which requires such a measure.

58. Subject to the outcome on the issue whether the right to receive an annual payment/to terminate a agreement should be transmissible by testamentary disposition (see paragraphs [42 and 47] above) it may be necessary to include a provision corresponding to Regulation 30 of the Copyright and Related Rights Regulations 1996 (SI 1996/2967) so that where a performer has died prior to commencement of the Regulations his heirs may nevertheless exercise those rights.

### **Q11: We have included transitional provisions in line with the Copyright and Related Rights Regulations 1996 (SI 1996/2967)1995. What are your views on the inclusion of these provisions?**

# Annex A: Directive 2011/77/EU

## DIRECTIVES

### DIRECTIVE 2011/77/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 27 September 2011

#### amending Directive 2006/116/EC on the term of protection of copyright and certain related rights

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53(1), 62 and 114 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Acting in accordance with the ordinary legislative procedure <sup>(2)</sup>,

Whereas:

(1) Under Directive 2006/116/EC of the European Parliament and of the Council <sup>(3)</sup>, the term of protection for performers and producers of phonograms is 50 years.

(2) In the case of performers this period starts with the performance or, when the fixation of the performance is lawfully published or lawfully communicated to the public within 50 years after the performance is made, with the first such publication or the first such communication to the public, whichever is the earliest.

(3) For phonogram producers the period starts with the fixation of the phonogram or its lawful publication within 50 years after fixation, or, if it is not so published, its lawful communication to the public within 50 years after fixation.

<sup>(1)</sup> OJ C 182, 4.8.2009, p. 36.

<sup>(2)</sup> Position of the European Parliament of 23 April 2009 (OJ C 184 E, 8.7.2010, p. 331) and Decision of the Council of 12 September 2011.

<sup>(3)</sup> OJ L 372, 27.12.2006, p. 12.

(4) The socially recognised importance of the creative contribution of performers should be reflected in a level of protection that acknowledges their creative and artistic contribution.

(5) Performers generally start their careers young and the current term of protection of 50 years applicable to fixations of performances often does not protect their performances for their entire lifetime. Therefore, some performers face an income gap at the end of their lifetime. In addition, performers are often unable to rely on their rights to prevent or restrict an objectionable use of their performances that may occur during their lifetime.

(6) The revenue derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society <sup>(4)</sup>, as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property <sup>(5)</sup>, should be available to performers for at least their lifetime.

(7) The term of protection for fixations of performances and for phonograms should therefore be extended to 70 years after the relevant event.

(8) The rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity,

<sup>(4)</sup> OJ L 167, 22.6.2001, p. 10.

<sup>(5)</sup> OJ L 376, 27.12.2006, p. 28.

within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, copies of a phonogram which, but for the term extension, would be in the public domain, or refrains from making such a phonogram available to the public. That option should be available on expiry of a reasonable period of time for the phonogram producer to carry out both of these acts of exploitation. The rights of the phonogram producer in the phonogram should therefore expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance while the latter rights are no longer transferred or assigned to the phonogram producer.

- (9) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer or assign to the phonogram producer their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, some performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance and made any contractually defined deductions. Other performers transfer or assign their exclusive rights in return for a one-off payment (non-recurring remuneration). This is particularly the case for performers who play in the background and do not appear in the credits (non-featured performers) but sometimes also for performers who appear in the credits (featured performers).
- (10) In order to ensure that performers who have transferred or assigned their exclusive rights to phonogram producers actually benefit from the term extension, a series of accompanying measures should be introduced.
- (11) A first accompanying measure should be the imposition on phonogram producers of an obligation to set aside, at least once a year, a sum corresponding to 20 % of the revenue from the exclusive rights of distribution, reproduction and making available of phonograms. 'Revenue' means the revenue derived by the phonogram producer before deducting costs.
- (12) Payment of those sums should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred or assigned their rights to the phonogram producer in return for a one-off payment. The sums set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Such distribution should be entrusted to collecting societies and national rules on non-distributable revenue may be applied. In order to avoid the imposition of a disproportionate burden in the collection and administration of that revenue, Member States should be able to regulate the extent to which micro-enterprises are subject to the obligation to contribute where such payments would appear unreasonable in relation to the costs of collecting and administering such revenue.
- (13) However, Article 5 of Directive 2006/115/EC already grants performers an unwaivable right to equitable remuneration for the rental of, *inter alia*, phonograms. Likewise, in contractual practice performers do not usually transfer or assign to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under point (b) of Article 5(2) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenue which the phonogram producer has derived from the rental of phonograms, of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying.
- (14) A second accompanying measure designed to rebalance contracts whereby performers transfer their exclusive rights on a royalty basis to a phonogram producer, should be a 'clean slate' for those performers who have assigned their above-mentioned exclusive rights to phonogram producers in return for royalties or remuneration. In order for performers to benefit fully from the extended term of protection, Member States should ensure that, under agreements between phonogram producers and performers, a royalty or remuneration rate unencumbered by advance payments or contractually defined deductions is paid to performers during the extended period.
- (15) For the sake of legal certainty it should be provided that, in the absence of clear indications to the contrary in the contract, a contractual transfer or assignment of rights in the fixation of the performance concluded before the date by which Member States are to adopt measures implementing this Directive shall continue to produce its effects for the extended term.
- (16) Member States should be able to provide that certain terms in those contracts which provide for recurring payments can be renegotiated for the benefit of performers. Member States should have procedures in place to cover the eventuality that the renegotiation fails.
- (17) This Directive should not affect national rules and agreements which are compatible with its provisions, such as collective agreements concluded in Member States between organisations representing performers and organisations representing producers.



- (18) In some Member States, musical compositions with words are given a single term of protection, calculated from the death of the last surviving author, while in other Member States separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, an opera is often the work of a librettist and a composer. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.
- (19) Consequently, the harmonisation of the term of protection in respect of musical compositions with words the lyrics and music of which were created in order to be used together is incomplete, giving rise to obstacles to the free movement of goods and services, such as cross-border collective management services. In order to ensure the removal of such obstacles, all such works in protection at the date by which the Member States are required to transpose this Directive should have the same harmonised term of protection in all Member States.
- (20) Directive 2006/116/EC should therefore be amended accordingly.
- (21) Since the objectives of the accompanying measures cannot be sufficiently achieved by the Member States, inasmuch as national measures in that field would either lead to distortion of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Union legislation, and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (22) In accordance with point 34 of the interinstitutional agreement on better law-making<sup>(1)</sup>, Member States are encouraged to draw up, for themselves and in the interests of the Union, their own tables which will, as far as possible, illustrate the correlation between this Directive and their transposition measures, and to make them public.
- following persons to survive, whether or not those persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, provided that both contributions were specifically created for the respective musical composition with words.’.
- (2) Article 3 shall be amended as follows:
- (a) in paragraph 1, the second sentence shall be replaced by the following:
- ‘However,
- if a fixation of the performance otherwise than in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier,
- if a fixation of the performance in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 70 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.’;
- (b) in the second and third sentences of paragraph 2, the number ‘50’ shall be replaced by ‘70’;
- (c) the following paragraphs shall be inserted:
- ‘2a. If, 50 years after the phonogram was lawfully published or, failing such publication, 50 years after it was lawfully communicated to the public, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them, the performer may terminate the contract by which the performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter a “contract on transfer or assignment”). The right to terminate the contract on transfer or assignment may be exercised if the producer, within a year from the notification by the performer of his intention to terminate the contract on transfer or assignment pursuant to the previous sentence, fails to carry out both of the acts of exploitation referred to in that sentence. This right to terminate may not be waived by the performer. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with applicable national law. If the contract on transfer or assignment is terminated pursuant to this paragraph, the rights of the phonogram producer in the phonogram shall expire.

HAVE ADOPTED THIS DIRECTIVE:

#### Article 1

#### Amendments to Directive 2006/116/EC

Directive 2006/116/EC is hereby amended as follows:

- (1) The following paragraph shall be added to Article 1:

‘7. The term of protection of a musical composition with words shall expire 70 years after the death of the last of the

<sup>(1)</sup> OJ C 321, 31.12.2003, p. 1.

2b. Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer for each full year immediately following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public. The right to obtain such annual supplementary remuneration may not be waived by the performer.

2c. The overall amount to be set aside by a phonogram producer for payment of the annual supplementary remuneration referred to in paragraph 2b shall correspond to 20 % of the revenue which the phonogram producer has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of the phonogram in question, following the 50th year after it was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.

Member States shall ensure that phonogram producers are required on request to provide to performers who are entitled to the annual supplementary remuneration referred to in paragraph 2b any information which may be necessary in order to secure payment of that remuneration.

2d. Member States shall ensure that the right to obtain an annual supplementary remuneration as referred to in paragraph 2b is administered by collecting societies.

2e. Where a performer is entitled to recurring payments, neither advance payments nor any contractually defined deductions shall be deducted from the payments made to the performer following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.'

(3) The following paragraphs shall be added to Article 10:

'5. Article 3(1) to (2e) in the version thereof in force on 31 October 2011 shall apply to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected, by virtue of those provisions in the version thereof in force on 30 October 2011, as at 1 November 2013 and to fixations of performances and phonograms which come into being after that date.

6. Article 1(7) shall apply to musical compositions with words of which at least the musical composition or the lyrics are protected in at least one Member State on

1 November 2013, and to musical compositions with words which come into being after that date.

The first subparagraph of this paragraph shall be without prejudice to any acts of exploitation performed before 1 November 2013. Member States shall adopt the necessary provisions to protect, in particular, acquired rights of third parties.'

(4) The following Article shall be inserted:

*'Article 10a*

#### **Transitional measures**

1. In the absence of clear contractual indications to the contrary, a contract on transfer or assignment concluded before 1 November 2013 shall be deemed to continue to produce its effects beyond the moment at which, by virtue of Article 3(1) in the version thereof in force on 30 October 2011, the performer would no longer be protected.

2. Member States may provide that contracts on transfer or assignment which entitle a performer to recurring payments and which are concluded before 1 November 2013 can be modified following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.'

*Article 2*

#### **Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 November 2013. They shall forthwith inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 3*

#### **Reporting**

1. By 1 November 2016, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive in the light of the development of the digital market, accompanied, where appropriate, by a proposal for the further amendment of Directive 2006/116/EC.

2. By 1 January 2012, the Commission shall submit a report to the European Parliament, the Council and the European Economic and Social Committee, assessing the possible need for an extension of the term of protection of rights to performers and producers in the audiovisual sector. If appropriate, the Commission shall submit a proposal for the further amendment of Directive 2006/116/EC.

*Article 4*

**Entry into force**

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

*Article 5*

**Addressees**

This Directive is addressed to the Member States.

Done at Strasbourg, 27 September 2011.

*For the European Parliament*

*The President*

J. BUZEK

*For the Council*

*The President*

M. DOWGIELEWICZ

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# Annex B: Draft Statutory Instrument and Transposition Table

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## STATUTORY INSTRUMENTS

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**2013 No. 0000**

**COPYRIGHT**

**RIGHTS IN PERFORMANCES**

The Copyright and Duration of Rights in Performances  
Regulations 2013

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	<i>1st November 2013</i>

The Secretary of State, being a Minister designated<sup>(a)</sup> for the purposes of section 2(2) of the European Communities Act 1972<sup>(b)</sup> in relation to measures relating to the protection of copyright and rights in performances, in exercise of powers conferred by that section and section [ ] of the Enterprise and Regulatory Reform Act 2013<sup>(c)</sup>, makes the following Regulations:

### PART 1

#### Introductory Provisions

##### **Citation and commencement**

1. These Regulations may be cited as the Copyright and Duration of Rights in Performances Regulations 2013 and come into force on 1st November 2013.

##### **Interpretation**

2. In these Regulations “the Act” means the Copyright, Designs and Patents Act 1988<sup>(d)</sup>.

##### **Scheme of the Regulations**

3. The Act is amended in accordance with the provisions of Part II of these Regulations, subject to the savings and transitional provisions in Part III of these Regulations.

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(a) SI 1993/595.  
(b) 1972 c.68.  
(c) 2013 c.[ ]  
(d) 1988 c.48.

## PART II

### Amendments to the Copyright, Designs and Patents Act 1988

#### Copyright

##### Works of Co-authorship

4. After section 10 (Works of joint authorship) insert—

##### “Works of co-authorship

**10A**—(1) In this Part a “work of co-authorship” means a work produced by the collaboration of the author of a musical work and the author of a literary work where the two works are created in order to be used together.

(2) References in this Part to a work or the author of a work shall, except as otherwise provided, be construed in relation to a work of co-authorship as references to each of the separate musical and literary works comprised in the work of co-authorship and to each of the authors of such works.”.

##### Duration of copyright in literary, dramatic, musical or artistic works

5. In section 12(8) (Duration of copyright in literary, dramatic, musical or artistic works) after “joint authorship” insert “or a work of co-authorship”.

##### Duration of copyright in sound recordings

6. In section 13A (Duration of copyright in sound recordings), in subsection (2)—

- (a) after “subsections (4) and (5)” insert “and section 191HA(3)”, and
- (b) in paragraphs (b) and (c), for “50” substitute “70”.

## Rights in Performances

##### Duration of rights in sound recordings

7.—(1) In section 191 (Duration of rights), in subsection (2)—

- (a) in paragraph (b), after “a recording of the performance” insert “, other than a sound recording,”, and
- (b) after that paragraph, insert “, or
  - (c) if during that period a sound recording of the performance is released, 70 years from the end of the calendar year in which it is released,”.

(2) In subsection (3) of that section after “subsection (2)” insert “and sections 191HA and 191HB”.

##### Rights in relation to an assignment of performers’ property rights in a sound recording

8. After section 191H (Equitable remuneration: reference of amount to Copyright Tribunal) insert—

##### “Assignment of performer’s property rights in a sound recording

**191HA**—(1) This section applies where a performer has assigned the following rights concerning a sound recording to the producer of the sound recording—

- (a) reproduction, distribution and making available rights, or
- (b) performer's property rights.

(2) If, at the end of the period of 50 years from the end of the calendar year in which the sound recording is released, the producer has failed to meet one or both of the following conditions, the performer may give a notice in writing to the producer of the performer's intention to terminate the agreement—

- (a) condition 1 is to issue to the public copies of the sound recording insufficient quantities;
- (b) condition 2 is to make the sound recording available to the public by electronic transmission in such a way that a member of the public may access the recording from a place and at a time chosen by him or her.

(3) If at the end of the period of 12 months beginning with the date of the notice, the producer has not met conditions 1 and 2 above, the agreement terminates and the copyright in the sound recording expires with immediate effect.

(4) An agreement is of no effect in so far as it purports to exclude or restrict the right to give a notice under subsection (2).

(5) In this section—

“assignment of rights” includes any arrangement having that effect, whether made directly between the parties or through intermediaries,

“producer” includes the person for the time being entitled to the copyright in the sound recording,

“sufficient quantities” means [such quantity which can reasonably be regarded as sufficient, having regard to current and likely future demand by the public for copies of the sound recording].

### **Payment in consideration of assignment**

**191HB**—(1) A performer (a “non-featured performer”) who, under an agreement relating to the assignment of rights referred to in section 191HA(1) (an “assignment agreement”), is entitled to a non-recurring payment in consideration of the assignment is entitled to an annual payment from the producer for each relevant period.

(2) In this section, “relevant period” means—

- (a) the period of 12 months beginning at the end of the period of 50 years from the end of the calendar year in which the sound recording is released, and
- (b) each subsequent period of 12 months beginning with the end of the previous period, until the end of the period of 70 years from the end of the calendar year in which the sound recording is released.

(3) The producer gives effect to the entitlement under subsection (1) by remitting to a collecting society for distribution to the performer in accordance with its rules an amount for each relevant period equal to 20% of the gross revenue received during that period in respect of the reproduction, distribution and making available rights of all non-featured performers in the sound recording.

(4) The amount required to be remitted under subsection (3) is payable within [insert period] of the end of each relevant period and is recoverable by the collecting society as a debt.

(5) Subsection (6) applies where—

- (a) the non-featured performer makes a written request to the producer for information in the producer's possession or under the producer's control to enable the performer—
  - (i) to ascertain the amount of the annual payment to which the performer is entitled under subsection (1), or
  - (ii) to secure its distribution by the collecting society, and
- (b) the producer does not supply the information within the period of 90 days beginning with the date of the request.

(6) The performer may apply to the county court, or in Scotland to the sheriff on summary application, for an order requiring the producer to supply the information [and the procedure for breach of an order shall proceed in like manner as for a contempt of court].

(7) The entitlement under subsection (1) is transmissible by testamentary disposition or by operation of law as personal or moveable property; and it may be assigned or further transmitted by any person into whose hands it passes.

(8) An agreement is of no effect in so far as it purports to exclude or restrict the entitlement under subsection (1).

(9) Where a performer (whether or not a non-featured performer) is entitled under an assignment agreement to recurring payments in consideration of the assignment, the payments must, from the end of the period of 50 years from the end of the calendar year in which the recording is released, be made in full, regardless of any provision in the agreement which entitles the producer to withhold or deduct sums from the amounts payable.

(10) In this section—

“producer” has the same meaning as in section 191HA, and

“collecting society” has the same meaning as in section 191G.”.

## PART III

### Savings, transitional and review provisions

#### Introductory

##### **Introductory**

**9.**—(1) References in this Part to “commencement”, without more, are to the date on which these Regulations come into force.

(2) In this Part—

“the 1988 provisions” means the provisions of the Act as they stood immediately before commencement (including the provisions of Schedule 1 to the Act continuing the effect of earlier enactments); and

“the new provisions” means the provisions of the Act as amended by these Regulations.

(3) Expressions used in this Part which are defined for the purposes of Part I or Part II of the Act have the same meaning as in that Part.

#### Copyright

##### **Copyright: interpretation**

**10.**—(1) In the provisions of this Part relating to copyright—

- (a) “existing” in relation to a work, means made before commencement; and
- (b) “existing copyright work” means a work in which copyright subsisted immediately before commencement.

(2) For the purposes of those provisions a work of which the making extended over a period shall be taken to have been made when its making was completed.

(3) References in those provisions to “moral rights” are to the rights conferred by Chapter IV of Part I of the Act.

### **Duration of Copyright: application of new provisions**

**11.** The new provisions relating to duration of copyright in sound recordings and works comprised in works of co-authorship apply—

- (a) to sound recordings and works of co-authorship made after commencement;
- (b) to existing sound recordings in which copyright subsisted immediately before commencement; and
- (c) to works of co-authorship of which the musical work or the literary work were on commencement protected as copyright works in an EEA state under legislation relating to copyright or related rights.

### **Extended and revived copyright**

**12.** In the following provisions of this Part—

- (a) “extended copyright” means any copyright which subsists by virtue of the new provisions after the date on which it would have expired under the 1988 provisions; and
- (b) “revived copyright” means any copyright in a musical or literary work comprised in a work of co-authorship which subsists by virtue of the new provisions after having expired under the 1988 provisions or any earlier enactment relating to copyright.

### **Ownership of extended copyright**

**13.—**(1) The person who is the owner of the copyright in a sound recording or in a work comprised in a work of co-authorship immediately before commencement is as from commencement the owner of any extended copyright in the sound recording or work, subject as follows.

(2) If he or she is entitled to copyright for a period less than the whole of the copyright period under the 1988 provisions, any extended copyright is part of the reversionary interest expectant on the termination of that period.

### **Ownership of revived copyright in works of co-authorship**

**14.—**(1) Where Regulation 11(c) applies, the person who was the owner of the copyright in a musical or literary work comprised in the work of co-authorship immediately before it expired (the “former copyright owner”) is as from commencement the owner of any revived copyright in the work, subject as follows.

(2) If the former copyright owner has died before commencement, or in the case of a legal person has ceased to exist before commencement, the revived copyright shall vest in the author of the work or his or her personal representatives.

(3) Where revived copyright vests in personal representatives by virtue of paragraph (2), it shall be held by them for the benefit of the person who would have been entitled to it had it been vested in the author immediately before his or her death and had devolved as part of his or her estate.



### **Prospective ownership of extended or revived copyright**

**15.**—(1) Where by an agreement made before commencement in relation to extended or revived copyright, and signed by or on behalf of the prospective owner of the copyright, the prospective owner purports to assign the extended or revived copyright (wholly or partially) to another person, then if, on commencement the assignee or another person claiming under the assignee would be entitled as against all other persons to require the copyright to be vested in him or her, the copyright shall vest in the assignee or his or her successor in title by virtue of this paragraph.

(2) A licence granted by a prospective owner of extended or revived copyright is binding on every successor in title to the prospective owner's interest (or prospective interest) in the right, except a purchaser in good faith for valuable consideration and without notice (actual or constructive) of the licence or a person deriving title from such a purchaser and references in Part 1 of the Act to do anything with, or without, the licence of the copyright owner shall be construed accordingly.

(3) In paragraph (2) "prospective owner" includes a person who is prospectively entitled to extended or revived copyright by virtue of such an agreement as is mentioned in paragraph (1).

### **Extended copyright: existing licences, agreements, &c.**

**16.**—(1) Any copyright licence, any term or condition of an agreement relating to the exploitation of a copyright work, or any waiver or assertion of moral rights, which—

- (a) subsists immediately before commencement in relation to an existing copyright work, and
  - (b) is not to expire before the end of the copyright period under the 1988 provisions,
- shall continue to have effect during the period of any extended copyright, subject to any agreement to the contrary.

(2) Any copyright licence, or term or condition relating to the exploitation of a copyright work, imposed by order of the Copyright Tribunal which—

- (a) subsists immediately before commencement in relation to an existing copyright work, and
  - (b) is not to expire before the end of the copyright period under the 1988 provisions,
- shall continue to have effect during the period of any extended copyright, subject to any further order of the Tribunal.

### **Revived copyright: exercise of moral rights**

**17.**—(1) The following provisions have effect with respect to the exercise of moral rights in relation to a work comprised in a work of co-authorship in which there is revived copyright.

(2) Any waiver or assertion of moral rights which subsisted immediately before the expiry of copyright shall continue to have effect during the period of revived copyright.

(3) Moral rights are exercisable after commencement by the author of a work as with any other copyright work.

(4) Where the author died before commencement—

- (a) the rights conferred by—
  - (i) section 77 (right to identification as author or director); or
  - (ii) section 80 (right to object to derogatory treatment of work),

are exercisable after commencement by his personal representatives, and

- (b) any infringement after commencement of the right conferred by section 84 (false attribution) is actionable by his personal representatives.

(5) Any damages recovered by personal representatives by virtue of this Regulation in respect of an infringement after a person's death shall devolve as part of his or her estate as if the right of action had subsisted and been vested in him or her immediately before his or her death.

(6) Nothing in these Regulations shall be construed as causing a moral right to be exercisable if, or to the extent that, the right was excluded by virtue of paragraph 23 or 24 of Schedule 1 on the commencement of the Act or would have been so excluded if copyright had not previously expired.

**Revived copyright: saving for acts of exploitation when work in public domain, &c.**

**18.**—(1) No act done before commencement shall be regarded as infringing revived copyright in a work.

(2) It is not an infringement of revived copyright in a work—

- (a) to do anything after commencement in pursuance of arrangements made before commencement at a time when copyright did not subsist in the work, or
- (b) to issue to the public after commencement copies of the work made before commencement at a time when copyright did not subsist in the work.

(3) It is not an infringement of revived copyright in a work to do anything after commencement in relation to a work comprised in a work of co-authorship made before commencement or made in pursuance of arrangements made before commencement, which contains a copy of that work or is an adaptation of that work if—

- (a) the copy or adaptation was made before commencement at a time when copyright did not subsist in the work in which revived copyright subsists, or
- (b) the copy or adaptation was made in pursuance of arrangements made before commencement at a time when copyright did not subsist in the work in which revived copyright subsists.

(4) It is not an infringement of revived copyright in a work to do after commencement anything which is a restricted act in relation to the work if the act is done at a time when, or is done in pursuance of arrangements made at a time when, the name and address of a person entitled to authorise the act cannot by reasonable inquiry be ascertained.

(5) In this Regulation “arrangements” means arrangements for the exploitation of the work in question.

(6) It is not an infringement of any moral right to do anything which by virtue of this Regulation is not an infringement of copyright.

**Revived copyright: use as of right subject to reasonable royalty**

**19.**—(1) In the case of a work in which revived copyright subsists any acts restricted by the copyright shall be treated as licensed by the copyright owner, subject only to payment of such reasonable royalty or other remuneration as may be agreed or determined in default of agreement by the Copyright Tribunal.

(2) A person intending to avail himself of the right conferred by this Regulation must give reasonable notice of his intention to the copyright owner, stating when he intends to begin to do the acts.

(3) If he does not give such notice, his acts shall not be treated as licensed.

(4) If he does give such notice, his acts shall be treated as licensed and a reasonable royalty or other remuneration shall be payable in respect of them despite the fact that its amount is not agreed or determined until later.

(5) This Regulation does not apply if or to the extent that a licence to do the acts could be granted by a licensing body (within the meaning of section 116(2) of the Act), whether or not under a licensing scheme.

(6) No royalty or other remuneration is payable by virtue of this Regulation in respect of anything for which a royalty or other remuneration is payable under Schedule 6 to the Act.

### **Revived copyright: application to the Copyright Tribunal**

20.—(1) An application to settle the royalty or other remuneration payable in pursuance of Regulation 19 may be made to the Copyright Tribunal by the copyright owner or the person claiming to be treated as licensed by him.

(2) The Tribunal shall consider the matter and make such order as it may determine to be reasonable in the circumstances.

(3) Either party may subsequently apply to the Tribunal to vary the order and the Tribunal shall consider the matter and make such order confirming or varying the original order as it may determine to be reasonable in the circumstances.

(4) An application under paragraph (3) shall not, except with the special leave of the Tribunal, be made within twelve months from the date of the original order or of the order on a previous application under that paragraph.

(5) An order under paragraph (3) has effect from the date on which it is made or such later date as may be specified by the Tribunal.

## **Rights in performances**

### **Rights in performances: interpretation**

21.—(1) In the provisions of this Part relating to rights in performances

“existing protected performance” means a performance in a sound recording in relation to which rights under Part II of the Act (rights in performances) subsisted immediately before commencement,

“a new right” means a right arising by virtue of Regulation 8 in relation to an assignment of a performer’s property rights in a sound recording.

(2) References in this Part to performers’ rights are to the rights given by section 180(1)(a) of the Act.

### **Rights in performances: application of new provisions**

22. The new provisions relating to the duration of performers’ rights in sound recordings and rights in relation to an assignment of performers’ rights in a sound recording apply—

- (a) to performances taking place after commencement; and
- (b) to existing protected performances.

### **Extended performance rights**

23. In the following provisions of this Part “extended performance rights” means rights under Part II of the Act which subsist by virtue of the new provisions after the date on which they would have expired under the 1988 provisions.

### **Entitlement to extended performance rights and new rights**

24.—(1) Any extended performance rights or any new right are exercisable as from commencement by the performer or (if he has died) the person entitled to exercise those rights by virtue of section 191B(1) of the Act, [or, in the case of a new right, by virtue of section 191HA( ) or 191HB(7) of the Act inserted by Regulation 8] .

(2) Any remuneration or damages received by a person’s personal representatives by virtue of a right conferred on them by paragraph (1) shall devolve as part of that person’s estate as if the right had subsisted and been vested in him or her immediately before his or her death.

**Extended performance rights: existing consents, agreements, &c.**

**25.** Subject to the provisions of Regulation 8, any consent, or any term or condition of an agreement, relating to the exploitation of an existing protected performance which—

- (a) subsists immediately before commencement, and
- (b) is not to expire before the end of the period for which rights under Part II of the Act subsist in relation to that performance,

shall continue to subsist during the period of any extended performance rights, subject to any agreement to the contrary.

**Review**

**26.**—(1) Before the end of each review period, the Secretary of State must—

- (a) carry out a review of regulations 4 to 25,
- (b) set out the conclusions of the review in a report, and
- (c) lay the report before Parliament.

(2) In carrying out the review the Secretary of State must, so far as is reasonable, have regard to how Directive 2011/77/EU of the European Parliament and of the Council of 27<sup>th</sup> September (which is implemented by means of regulations 4 to 25) is implemented in other Member States.

(3) The report must in particular—

- (a) set out the objectives intended to be achieved by the regulatory system established by those regulations,
- (b) assess the extent to which those objectives are achieved, and
- (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(4) “Review period” means—

- (a) the period of five years beginning with the day on which regulations 4 to 25 come into force, and
- (b) subject to paragraph (5), each successive period of five years.

(5) If a report under this regulation is laid before Parliament before the last day of the review period to which it relates, the following review period is to begin with the day on which that report is laid.

Date

Parliamentary Secretary for Business, Innovation and Skills  
Department for Business, Innovation and Skills

### **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations amend the Copyright, Designs and Patents Act 1988 (“the Act”) and implement the provisions of Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights ( OJ L265, 11.10.2011, p. 1).

A full impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector is available from the Intellectual Property Office, Concept house, Cardiff Road, Newport, NP10 8QQ and is annexed to the Explanatory Memorandum (together with a transposition note) which is available alongside the instrument on [www.legislation.gov.uk](http://www.legislation.gov.uk)

## DRAFT TRANSPOSITION TABLE

### Directive 2011/77/EU of the European Parliament and of the Council of 27th September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights

<i>Article</i>	<i>COPY OUT (YES/ NO)</i>	<i>IF NO – REASON FOR ELABORATION</i>	<i>NATIONAL PROVISION</i>
Article 1(1)	No	<p>Article 1(1) provides that the term of copyright protection for a musical composition with words shall expire 70 years after the death of the last surviving author of the musical composition or the lyrics, provided that the music and the lyrics were specifically created for the musical composition with words. It is clear from recitals (18) and (19) that this is intended to apply to musical compositions (for example an opera) where the composer writes the musical score and a librettist writes the libretto.</p> <p>In substance this approach to the duration of copyright in such co-authored works mirrors the existing provision in the Copyright Designs and Patents Act (“the Act”) which apply to works of “joint authorship” (where the contribution of each author to the jointly created work is not distinct from that of the other author). We have therefore drafted the provision so that it mirrors the approach taken in the Act with regard to works of joint authorship and in order that the two provisions dovetail together.</p>	<p>1. Regulation 4 inserts a new section 10A into the Act which defines a “Work of co-authorship” (following the definition of a work of joint authorship in Section 10).</p> <p>2. Subsection (1) provides that a work of co-authorship means a work produced by the collaboration of the author of a musical work and the author of a literary work where the two works are created in order to be used together. The references to “musical work” and “literary work” correspond to the references to “musical composition” and “lyrics” used in the Directive but utilise terminology already defined in the Act.</p> <p>Subsection (2) renders it clear that references to “a work” in the Act shall be construed in relation to a work of co-authorship as references to each of the separate musical and literary acts comprised in the co-authored work. Therefore if a third party wished to adapt the lyrics of such a work it would be necessary for him to obtain the consent of the lyricist but not the composer of the music. This differs from the legal status of a jointly authored work which is treated as a single work for all purposes under the Act.</p>

			<p>3. Regulation 5 inserts an amendment to section 12(8) of the Act. It applies the rules which pin the duration of copyright in works of joint authorship to 70 years after the death of the last surviving author to works of co-authorship.</p>
Article 1(2)(a)	No	<p>Article 1(2)(a) distinguishes a fixation of a performance in a “phonogram” (where the rights are extended so as to expire 70 years from the date of the first publication or the first communication to the public, whichever is the earlier) from a fixation of a performance not contained in a phonogram (i.e. a film) (where the rights continue to expire after 50 years).</p> <p>This Article amends the provisions of the original Directive on the term of protection of copyright (DIRECTIVE 2006/116/EU) (“the 2006 Directive”) which have already been implemented into UK Law and so it is not necessary or appropriate to copy out the entire provision – it is merely required to amend the Act so as to extend the duration of copyright in relation to a phonogram from 50 years to 70 years.</p>	<p>Regulation 7 inserts amendments to section 191 of the Act relating to the duration of rights in performances. The amendment draws a distinction between performances in a “sound recording” (which is the term defined and used in the Act which equates to the term “phonogram” in the Directive) where the term of protection is 70 years and a recording of a performance “other than a sound recording” where the term remains 50 years from the appropriate date.</p>
Article 1(2)(b)	Yes		<p>Regulation 6 inserts amendments to section 13A of the Act relating to the duration of copyright in sound recordings and substitutes “70” for “50” years. The cross reference to new Section 191HA(3) inserted into subsection (2) is necessary because that provision provides for circumstances in which copyright in a sound recording expires before the expiry of the 70 year term. This provision is explained below in the context of</p>

			Article 1(2)(c) 2a.
<p>Article 1(2)(c) 2a</p>	<p>No</p>	<p>Paragraph 2a provides that 50 years after the publication or communication to the public of a phonogram, a performer may terminate the contract under which he assigned his rights in the fixation of the recording to the producer if the producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means. The performer is required to give notice to the producer of his intention to terminate and may terminate the agreement if the producer fails to carry out both acts of exploitation within a year of the notice. If the contract is terminated then the rights of the phonogram producer in the phonogram will expire. The right to terminate may not be waived by the performer. Where a phonogram contains the fixation of a plurality of performers they may terminate their contracts in accordance with applicable national law.</p> <p>This article confers the right upon a performer to reclaim his rights in the fixation of a performance where a producer has failed to exploit the recording by producing copies of the recording in sufficient quantity or making it available for download on the internet during the extended period of protection following the expiry of the 50 year initial period. In transposing this provision we have been mindful of the need to ensure that the drafting of the provision is sufficiently precise so as to ensure that the circumstances in which the rights can be exercised are clearly determined and the</p>	<p>Regulation 8 inserts new section 191H into the Act. The new section applies where the performer has assigned the performers’ property rights listed in subsection (1) to the producer.</p> <p>Subsection (2) provides that at the end of the period of 50 years following the release of the sound recording, the performer may serve notice to terminate the agreement if the producer has failed to issue copies of the recording in sufficient quantity or to make it available by electronic transmission (which corresponds to the terminology already used in the Act and equates to “making available by wire or wireless means” used in the Directive).</p> <p>Subsection (3) provides that if the producer has not exploited the recording by both means one year after the notice the agreement expires and the copyright in the sound recording expires with immediate effect.</p> <p>Subsection (4) provides that the right to terminate may not be excluded or restricted by agreement and any such agreement will be of no effect (thus effectively implementing the provision that the right to terminate may not be waived by the performer).</p> <p>We have taken the view that the reference to performances where there is a plurality of performers being able to “terminate their contracts...in accordance with applicable national law” as a reference to their terminating such contracts in accordance with the existing law of contract. We have taken the view that prescribing measures to deal with such circumstances would</p>



	<p>consequences of an exercise of those rights is sufficiently clear for both performers and producers.</p> <p>The Directive is ambiguous in a number of respects and so it would lead to uncertainty if we adopted a copy out approach.</p> <p>First, it is not clear whether paragraph 2a requires the performer to have transferred the entirety of his rights to the producer (which equate to the performers' property rights defined in section 191A of the Act as the reproduction right, the distribution right, the rental and lending right and the making available right) in order to trigger the right to terminate or whether it can apply when there has been only a partial assignment of his rights. Given that the right to terminate is expressed to apply where there is a failure by the producer to make available sufficient copies of the sound recording available for sale or for download over the internet and is not concerned with a failure to make the recording available for rental or hire, it would seem illogical to require that the right could only be triggered where the performer has assigned all his property rights (including his rental and lending right) so in transposing the provision we have provided that the right to terminate may be exercised where the performer has assigned either all his rights or his reproduction right, his distribution right and his making available to the public right.</p> <p>Secondly, the Directive states that the right to terminate may be exercised where "the producer" fails to exploit the recording. In the Act, the</p>	<p>amount to gold plating which may not be justifiable.</p>
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		<p>“producer” is defined as the person by whom arrangements necessary for the making of the sound recording are made. However, the original producer may have assigned his rights in the recording to a third party and so may not be in a position to comply with any notice served upon him. We consider that on a purposive interpretation of the Directive it must be intended that references to “the producer” should include not just the original producer but his assignees so that the rights conferred upon the performer may be effectively exercised.</p> <p>Thirdly, the Directive is ambiguous in the respect that it provides the right to terminate may be triggered where the recording is not offered for sale in “sufficient quantity”. Recital(8) refers to “within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (“the Rome Convention”). The Rome Convention defines “publication” as the offering of copies to the public in “reasonable quantity”. We consider that neither expression is particularly helpful in indicating the level of sales which might or might not be sufficient for these purposes. Given that this is the trigger for the exercise of the performer’s right to terminate the contract we consider that there should be sufficient precision so that the performer is clear as to the circumstances in which he can terminate the contract. We have asked stakeholders to confirm whether elaboration on what might constitute “sufficient quantity” would be helpful.</p>	
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		<p>Fourthly, the Directive is ambiguous as to the circumstances in which the performer can terminate the agreement. On a purposive interpretation we have concluded that the performer may serve notice to terminate if the producer fails either to offer for sale sufficient copies of the recording <u>or</u> fails to make it available to the public and may terminate the agreement if at the end of one year the producer has failed to carry out <u>both</u> acts of exploitation (i.e. it will not be sufficient for him to avoid termination of the contract by either making copies available for sale or by making the recording available for download on the internet.)</p> <p>Finally, the Directive provides that if the contract is terminated “the rights of the phonogram producer in the phonogram shall expire”. Recital (8) states that the rights in the fixation “should revert” to the performer i.e. those rights to distribute/make available etc which he has assigned to the producer. The final sentence of Recital (8) (which is echoed in paragraph 2a) provides “the rights of the phonogram producer in the phonogram should therefore expire in order to avoid a situation in which those rights would coexist with those of the performer in the fixation of the performance while the latter rights are no longer transferred or assigned to the phonogram producer”. We have interpreted this as meaning that the copyright in the sound recording would expire at this point, the intention being that the performer would then be free to exploit the sound recording himself.</p>	
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<p>Article 1(2)(c)2b</p>	<p>No</p>	<p>A copy out approach has not been adopted as for the sake of clarity and ease of understanding we have divided the proposition into three shorter subsections whilst retaining the substance of the provision.</p>	<p>Regulation 8 inserts new section 191HB into the Act. Subsections (1) and (2) implement the first sentence of paragraph 2b by providing that a performer who has assigned his rights to a producer in consideration of a non-recurring payment is entitled to receive an annual payment from the producer following the expiry of the initial 50 year term. Paragraph 2b provides that the remuneration will be payable for each full year “immediately following the 50<sup>th</sup> year after the phonogram was lawfully published or, failing such publication, the 50<sup>th</sup> year after it was lawfully communicated to the public”. Since the 2006 Directive provides that terms of protection shall be calculated from the first day of January following the relevant event (see Recital (15)) we have taken the view that the intention of the Directive is that the commencement date for the entitlement to receive the supplementary payments should correspond to the extended period of the term of protection which is computed from the first of January after the relevant event as opposed to the actual date upon which a recording is released in any year.</p> <p>Subsection (8) provides that an agreement is of no effect insofar as it excludes or restricts the right to that payment. This implements the final sentence of paragraph 2b.</p>
<p>Article 1(2)(c)2c and 2d</p>	<p>No</p>	<p>These paragraphs provide: (a) the amount of the supplementary remuneration which the producer must pay (20% of the annual revenue received in respect of the reproduction, distribution and making available of the</p>	<p>Regulation 8 inserts new section 191H into the Act.</p> <p>Subsection (3) makes provision for the payment by the producer to a collecting society of the annual payment (equal to 20% of the gross revenue received in respect of the reproduction,</p>

	<p>phonogram) (paragraph 2c),</p> <p>(b) that the supplementary remuneration must be administered by a collecting society (paragraph 2d), and</p> <p>(c) that producers must provide information on request to performers any information necessary to secure payment of that remuneration (paragraph 2c).</p> <p>We have not adopted a copy out approach as we consider that there are various elements which warrant elaboration in the interests of ensuring that the rights conferred on a performer are clearly defined and enforceable as a matter of law. The areas where we have made such additional provision are as follows;</p> <p>(a) we have provided that the obligation to make payment upon the producer will be satisfied by his remitting the amount to a collecting society and that the amount will be recoverable by the collecting society as a debt since we assume there will be no contractual nexus between the producer and the collecting society which could otherwise form the basis for enforcement proceedings for recovery of the annual payment,</p> <p>(b) We have provided that the amount to be received by the performer will be payable in accordance with the rules of that collecting society,</p> <p>(c) We have provided that the annual payment should be payable within a certain time period (we will consult on what the appropriate period should be),</p> <p>(d) we have provided that the request for information should</p>	<p>distribution and making available rights of all non-featured performers in the sound recording) for distribution to the performer in accordance with the rules of the collecting society.</p> <p>Subsection (4) provides that the amount shall be payable within a certain period and shall be recoverable by the collecting society as a debt</p> <p>Subsection (5) sets out the procedure and time limit for the provision of information by the producer at the request of the performer</p> <p>Subsection (6) provides that the performer may apply to court for an order to enforce the provision of information</p> <p>Subsection (7) provides that the right to receive the annual payment may pass to a performer's heirs as part of his estate in the event of his death.</p>
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		<p>be in writing and that if the producer does not supply the information within 90 days of the request the performer may apply to court for an order for enforcement, and</p> <p>(e) We are consulting on whether the right to receive an annual payment should be transmissible to the heirs of a performer who dies prior to the expiry of the 70 year term of protection. The Directive is silent on this point.</p>	
Article 1(2)(c)2e	No	<p>The drafting of the national provision differs slightly from the Directive in the following respects. Since we have inserted a definition of a Non-featured performer for the purposes of new Section 191HB and it is considered that there may be some circumstances where a non-featured performer is entitled to a recurring royalty we have, for the avoidance of doubt, clarified that the reference to a performer may include a non-featured performer. We have also sought to simplify the drafting by providing that <b>all</b> payments under the agreement shall be paid in full regardless of any provision in the Agreement entitling the producer to withhold or deduct sums instead of referring to “advance payments nor any contractually defined deductions”.</p>	<p>See New section 191HB(9) inserted by Regulation 8 which provides that where under an assignment agreement a performer is entitled to recurring payments the payments must from the end of the 50 year period be made in full regardless of any provision in the agreement entitling the producer to make deductions or withhold sums.</p>
Article 1(3) paragraph 5	No	<p>This provision is framed as an amendment to the 2006 Directive and so it would be nonsensical to copy out this provision into national legislation. In substance the provision provides that the extended term of protection for copyright in sound recordings and the extended period of term in relation to performers’ rights</p>	<p>Regulation 11(a) and (b) provide that the new provisions relating to the duration of copyright in sound recordings apply to sound recordings made after commencement (defined in Regulation 9(1) as the date when the Regulations come into force which is proposed to be 1<sup>st</sup> November 2013) and also to existing sound recordings in</p>

		<p>together with the additional rights conferred on performers under the Directive will apply to sound recordings and fixations of performances which are still protected as at 1 November 2013 and to those fixations of performances and phonograms which come into being after that date. It is also necessary for the purposes of clarity and determining who is entitled to exercise the extended rights and additional performers' rights to specify who is entitled to ownership of the extended rights and additional rights and the impact of such extension on any existing licences and agreements.</p>	<p>which copyright subsisted immediately before commencement.</p> <p>Regulation 22 provides that the new provisions relating to the duration of performers' rights in sound recordings and rights in relation to an assignment of performers' rights in a sound recording will apply to performances taking place after commencement and to existing protected performances.</p> <p>Regulations 13, 15 and 16 prescribe who is to be the owner of the extended copyright in a sound recording and provide that any existing licence or agreement in relation to the work shall continue to have effect during the period of any extended copyright, subject to any agreement to the contrary. Regulation 24 makes provision as to who is entitled to exercise the extended and the additional performers' rights.</p>
Article 1(3) paragraph 6 (first sub-paragraph)	No	<p>This provision is framed as an amendment to the 2006 Directive and so it would not be appropriate to copy out the provision in national legislation. In substance it provides that the extended term of copyright which applies to works of co-authorship will apply to such works where either the music or the lyrics are protected in at least one Member State on 1<sup>st</sup> November 2013 and to such works which come into being after that date. As a transitional provision the drafting of this provision needs to reflect the terminology adopted in the national legislation which defines a "work of co-authorship". It is also necessary for the purposes of clarity and determining who is entitled to exercise the rights during the extended term of copyright to provide who is</p>	<p>Regulation 11(a) provides that the new provisions relating to duration of copyright in works comprised in works of co-authorship apply to works of co-authorship made after commencement.</p> <p>Regulation 11(c) provides that those new provisions also apply to works of co-authorship of which the musical work or the literary work were on commencement protected as copyright works in an EEA state under legislation relating to copyright or related rights.</p> <p>Regulations 14, 15, 17, 18, 19 and 20 make provision as to the rights in the case of any work in which a revived copyright subsists.</p>

		entitled to the copyright in any work comprised in a work of co-authorship which has expired but which as a result of this provision has been revived.	
Article 1(3) paragraph 6 (second subparagraph)	No	This provision entitles Member States to adopt “necessary provisions” to protect the acquired rights of third parties in relation to acts of exploitation of the works carried out before 1 <sup>st</sup> November 2013. It is not appropriate to copy out this provision as the Directive requires Member States to adopt their own provisions with a view to achieving this result.	Regulation 18(1) provides that no act done before commencement shall be regarded as infringing revived copyright in a work.  Regulation 18(2) provides that it is not an infringement of revived copyright in a work to do anything after commencement in pursuance of arrangements made before commencement at a time when copyright did not subsist in the work and regulations 18(3) and (4) make similar savings in relation to acts of exploitation performed before 1 <sup>st</sup> November 2013.
Article 1(4) first paragraph	No	This provision is framed as an amendment to the 2006 Directive and so it would not be appropriate to copy out the provision in national legislation. In substance it provides that an assignment agreement between a performer and a producer entered into before 1 <sup>st</sup> November 2013 will continue in force during the extended period of the performers rights. This substance is reflected in the national provision	Regulation 25 provides that any term of an assignment agreement which subsists immediately before commencement and is not expressed to expire before the end of the period for which rights subsist under Part II of the Act shall continue subsist during the period of any extended performance rights but this is expressed to be subject to any agreement to the contrary.
Article 1(4) second paragraph	No	This provision appear to confer a Member State option entitling Member States to make provision in relation to assignment agreements which were entered into prior to 1 <sup>st</sup> November 2013 which entitle a performer to recurring payments for their modification following the 50 <sup>th</sup> year after the phonogram was published or communicated to the public.	We are consulting as to whether to incorporate such provision.



# Annex C: Consultation Phase Impact Assessment

<b>Title:</b> Impact Assessment of: Directive 2011/77/EU of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights  <b>IA No:</b>  <b>Lead department or agency:</b> Intellectual Property Office <b>Other departments or agencies:</b>	<b>Impact Assessment (IA)</b>	
	<b>Date:</b> 18 Sep 2012	
	<b>Stage:</b> Consultation	
	<b>Source of intervention:</b> EU	
	<b>Type of measure:</b> Secondary legislation	
<b>Contact for enquiries:</b> Tel:		
<b>Summary:</b> Intervention and Options		<b>RPC Opinion:</b> Amber

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
-£17.97M	-£17.97M	£1.2m	No

**What is the problem under consideration? Why is government intervention necessary?**

Performers and record producers enjoy rights in recordings of their performances and sound recordings respectively. These rights, harmonised at European level, last for 50 years. After this term of copyright expires, performers and record producers no longer receive a source of income from sales or from royalties. The EU has approved a directive to extend the period of protection for sound recordings (not including AV performances) to 70 years. Government intervention is required as copyright term protection is governed by acts of parliament through EU competency; the UK is bound to implementation of the Directive by 1 Nov 2013. The directive also harmonises the rules concerning the term of protection for musical compositions with words.

**What are the policy objectives and the intended effects?**

To enhance the welfare of all performers by improving their sources of potential income throughout their lifetime and to distribute income to those previously excluded due to contractual agreements. Record companies will also benefit from royalties that accrue from the extended term of protection. Harmonising the rules concerning co-authored works should also provide greater legal certainty to users and rightsholders.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

The Directive has been agreed at EU level and will provide an extension of the term of protection for sound recordings which more closely reflects the lifespan of performers. The inclusion of permanent measures for performers will ensure that they benefit from an extension to their rights in respect of new and existing recordings. The Directive gives clear instructions to Member States governing the length of the extension, the rights that need to be adjusted or provided for and the distribution of these income sources. All will need to be covered by Regulations in order that they are legally binding and harmonised. Non-compliance with the Directive will lead to infraction proceedings and the risk of legal action by disadvantaged businesses.

**Will the policy be reviewed?** It will be reviewed. **If applicable, set review date:** November 2016

Does implementation go beyond minimum EU requirements?			No		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	<b>Micro</b> Yes	<b>&lt; 20</b> Yes	<b>Small</b> Yes	<b>Medium</b> Yes	<b>Large</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b> N/A	<b>Non-traded:</b> N/A	

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

Signed by the responsible Minister:

Date:

## Summary: Analysis &amp; Evidence

## Policy Option 1

## Description:

## FULL ECONOMIC ASSESSMENT

Price Base Year 2011	PV Base Year 2011	Time Period Years 20	Net Benefit (Present Value (PV)) (£m)		
			Low: -£21.65m	High: -£14.28m	Best Estimate: -£17.97m

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	£9.1m	20	£12.0m	<b>£163.6m</b>
High	£10.1m		£36.0m	<b>£473.7m</b>
Best Estimate	£9.6m		£24.0m	<b>£318.7m</b>

**Description and scale of key monetised costs by 'main affected groups'**

The cost of this option is £318.7M over 20 years (the length of the copyright extension). The main groups are the costs to licensing authorities/Collecting Societies (£41M), UK content distributors (£256M) lost sales in the public domain (£12M) and transitional cost of adapting to the new system (£9.6M). Further evidence of the costs of this option may emerge during the consultation process.

**Other key non-monetised costs by 'main affected groups'**

Public Domain Broadcasters, who only use recordings and performances that are out of copyright, will not be able to expand their repertoire for a further 20 years until tracks fall out of protection. This might reduce their ability to attract new audiences. This cannot be quantified. Record companies who specialise in re-mastering and releasing records in the public domain will be prevented from expanding their repertoire. This cannot be quantified. There will also be a small cost for setup for PRS which we are unable to quantify further.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	20	£11.7m	<b>£150.4m</b>
High	Optional		£35.0m	<b>£451.1m</b>
Best Estimate	£0.00		£23.3m	<b>£300.7m</b>

**Description and scale of key monetised benefits by 'main affected groups'**

The benefit of this option is £300.7M over 20 years (the length of the copyright extension). The main groups are the benefits to performers (£126M), record companies (£126M) additional sales revenue (£11M) and additional PPL administration fees (£38M). Further evidence of the benefits of this option may emerge from the consultation process.

**Other key non-monetised benefits by 'main affected groups'**

Performers will have the ability to terminate the contract with a producer if the record producer fails to market or exploit a track, which could provide a cultural benefit by widening the available stock of recordings available for exploitation. The extension may incentivise record companies to digitise back-catalogues potentially increasing availability to consumers. The additional income generated by the 20 year extension or protection could help record companies invest in new talent. Finally, the status of performers in society could be improved by providing greater recognition of their work. There will also be a non-quantifiable benefit for member of PRS who will benefit from the enhanced provision for co-authored works, but this is likely to be very small

Key assumptions/sensitivities/risks

Discount rate (%) 3.5

- The figures have been discounted over 20 years rather than the standard 10 years as the benefits of the Directive will have effect over the whole period of extended copyright protection.
- Estimates of high costs are proportionately greater than the estimates of high benefit than the estimates of low cost are to low benefits. For this reason, the net of the high cost and benefit forms the low estimate, and vice versa, the net of low cost and benefit forms the high estimate.

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: £20.4m	Benefits: £19.3m	Net: -£1.2m	No	

## Background

Both record producers and performers enjoy rights in their sound recordings and recorded audio performances. These rights can either be exclusive rights or rights to receive equitable remuneration for the commercial use of recorded performances and sound recordings:

- Performers' exclusive rights in their performance (the right of reproduction, distribution, rental and 'making available' online) are usually transferred to the producer of the sound recording. Performers also have moral rights: that is the right to be identified as the performer in a performance (subject to asserting that right) and the right to object to modifications made to performances that are prejudicial to the performer's reputation.
- Record producers also have exclusive rights of reproduction, distribution, rental/lending and 'making available' on line in relation to their sound recordings.

Under EU law, an equitable remuneration is paid by the user and shared between the record producer and performer when a sound recording published for commercial purposes or a copy of that recording, is used for broadcasting by wireless means or for any communication to the public. In the UK, this is achieved by record producers receiving an exclusive right over the public performance and broadcasting of their sound recordings. Record producers are then required to pay equitable remuneration to the performers when their recorded performances are played in public or communicated to the public off-line. In the UK these revenues are split 50/50 between the producers and the performers. Performers can only transfer this right to receive equitable remuneration, and then only to a collecting society; most performers and record producers exercise these rights to royalties for broadcasting and public performance through collecting societies (as this makes administration of multiple tracks much easier). In the UK, PPL is the collecting society that collects revenues on behalf of performers and producers of sound recordings.

All rights in sound recordings and performances last for 50 years from the date of making the recording of the performance or sound recording or, if later and within 50 years of the date on which the recording was made, 50 years from the date of release. If there is no publication of the recording in that 50 year period but the recording is lawfully communicated to the public in this period, the 50 year term runs from the date it is first lawfully communicated to the public. This means that over a period of 50 years, performers receive remuneration each time their work is played on air or in public places and, if the contract permits, they also receive royalties from sales. Once the term of protection expires, the recordings fall into the public domain and performers and record producers can no longer charge royalties for the use of their rights in the recordings. The performers' moral rights also expire when the term of protection expires.

Performers and record producers play an important role alongside composers and lyricists in creating new musical works. Currently composers and lyricists enjoy protection for their lifetime and 70 years after their death and it is argued that the term of protection for performers should better reflect their status by being increased (although not as long as the creators of the underlying works).

In July 2008, the European Commission published a draft Directive proposal that copyright term for sound recordings and performers' rights be extended from 50 years to 95 years. The proposal also included a number of provisions aimed at benefiting performers – but some of these were merely transitional and would not apply to new works.

In April 2009 the European Parliament voted in favour of amendments to the Commission proposal providing an extension to 70 years. The amendments also included permanent benefits for performers and other provisions intended to help artists whose works were no longer commercially exploited after the initial 50 year period.

The benefits for performers provided in the Directive take the form of:

- Extension of copyright protection from 50 to 70 years.
- A fund for session artists. Where 20% of revenues (from the exclusive rights of distribution, reproduction and making available of phonograms) made in the period 50 to 70 years are paid to

those 'session musicians' who only received a one-off fee at time of recording (potentially forfeiting years of royalties if the track became successful).

- A 'use-it-or-lose-it' provision. This provides the possibility to ensure that rights in the performance will revert to, and be retained by, the performer if the record producer/performer does not exploit the track in the extended term
- A 'clean slate' provision. This will mean that contracts, which require performers to pay all their royalties to their record label until they have paid back the costs of making the track in the first place, are no longer enforceable after the expiry of the original 50 year term.
- Harmonising the rules concerning the calculation of the term of protection for musical compositions with words. Currently in the UK, if a lyricist and composer collaborate on a song so that one writes the lyrics and the other writes the music, the music and lyrics will attract their own copyright (expiring 70 after death of the particular author). If the two authors work together such that they both jointly write the music and lyrics and their contributions are not separable they are treated as joint owners of copyright and both the music and lyrics are protected for 70 years after the death of the last surviving pair. In some other Member States songs are treated as a single work with a single term of protection, calculated from the death of the last surviving author (i.e. the composer of the music or the lyricist).

A small blocking minority of Member States held firm against the European Parliament's proposal; however in September 2011 a change of position by some Member States removed the block and the Directive was approved by the Council of Ministers.

The Directive (as written and agreed by Member States) is designed to achieve a set period of protection of 70 years, linked to a defined act such as the date of release or recording; it also gives the provision of additional measures to enhance the remuneration possibilities for musicians whilst also providing certainty to those who wish to exploit works in the public domain. In addition, the provision to harmonise the term of protection for musical compositions with words will help to simplify the collective licensing arrangements across member states, as the current inconsistency in copyright protection in the EU causes problems with regards to the distribution of royalties.

### Consultation

Following publication of the Commission proposal in July 2008, the UK Government carried out an informal consultation, based on the Commission's impact assessment. This consultation resulted in some 80 comments. There was strong support for an extension from those representing record companies and producers. A large number of responses, from members of the public, argued against extension and pointed to the lack of access to older recordings.

## **Impact Assessment**

### Methodology

The stakeholders affected by the Directive have been identified as:

- Performers (both featured artists and non-featured artists)
- Record producers<sup>1</sup> and their representative bodies
- Phonographic Performance Limited (PPL) - collecting society administering rights in sound recordings and performances
- PRS for Music - collecting society administering rights in music and lyrics - who are affected by the Harmonisation proposal
- Consumers

<sup>1</sup> Record Producers will, in many cases work for Record Companies, in these cases it is the Record Company that will be the beneficiary of any revenues generated by the terms of the Directive.

- Record companies specialising in public domain music
- Broadcasters of public domain music
- Lyricists, composers and music publishers
- Content distributors and broadcasters

A comprehensive economic analysis has been conducted, which uses industry's own figures where possible, to generate an accurate benefit versus cost example for each policy option. Detailed analysis of the figures is attached in Annex A.

A stakeholder consultation was also launched and the findings have fed into this assessment. The results of this analysis are more qualitative, but represent the views of the multifarious stakeholders.

### Specific Impact Tests

The statutory impact tests on race, disability and gender were considered and the policy options are not deemed to adversely impact any particular group. The Small Firms Impact Test was also considered and the results of the consultation and policy options are considered in the following evidence base.

### Impact on performers

Performers will be able to benefit from revenue streams relating to their work for a period that equates more closely to their life expectancy. This is in contrast to the present position, in which others can exploit a performer's work for financial gain during his or her lifetime after the initial 50 years with no financial reward to the artist.

It is estimated that around 700 members of PPL lose copyright in their sound recordings each year<sup>2</sup>. In 2011, annual disbursement to PPL's 60,000 members amounted to £130M<sup>3</sup>; administrative fees amounted to £23million<sup>4</sup>

Performers will benefit from the opportunity to gain remuneration for an additional 20 years when their sound recording or performance is played in public or otherwise communicated to the public. More famous featured artists will have most to gain given the popularity of their work but other artists, featured and non-featured, will benefit from the measures. .

During negotiations on the proposal the overriding issue was that performers would not benefit greatly from term extension owing to the fact that they usually assign their exclusive rights to the record producer, which may never generate enough royalties to repay the fees and advances already made. By including a 'clean slate' provision, record companies will no longer be able to enforce contracts which require royalty payments to go to the label beyond the original 50 year term to repay initial costs in producing the recording. The European Commission estimates that performers receive between 5%-15% of net royalty revenues, as per their contract, depending on their bargaining power. This measure will ensure that this percentage of the additional royalties (for reproduction, distribution, rental and 'making available' online) is channelled towards performers in the extended 20 year period, thereby enhancing their receipts.

Royalties derived from sound recordings in the UK are split 50:50 between the record producer and the rights-holding recording artist.

The Commission has assumed that the licence fees paid by users of sound recordings will be unaffected as they are not calculated on a 'per track' basis. This assumption would result in lower royalty payments to any individual as the same pool of money would need to be divided between a large group of right holders. The additional income accruing to UK performers is estimated to be between £3.1m - £9.5m per

<sup>2</sup> Source: UK House of Commons Committee for Culture, Media and Sport, May 2007, "New Media and the Creative Industries". <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmcomeds/509/509i.pdf>

<sup>3</sup> Source: PPL Annual Review 2011 "Distributable Revenue"

<sup>4</sup> Source: PPL Report of the Directors and Financial Statements for the year ended 31 December 2011 "Cost of collection and distribution"

annum, in net present value terms with a best estimate value of 6.3M. These revenues are calculated by dividing the additional earnings to performers estimated as between £189.4M and £63.1M with a best estimate of £126.3M and dividing them by the length of extension of 20 years (e.g.  $\text{£}126.3\text{M}/20 = \text{£}6.3\text{M}$ ) These additional earnings were calculated by taking the number of performers going out of copyright (700 pa for the first 10 years; 1325 pa for the remaining 40 years of the current term) and multiplying them by the annual revenue per performer of (£2183). The revenues were calculated from the PPL annual review 2011. In its impact assessment of the proposal for a directive to extend the term of copyright in sound recordings, the European Commission found that up to 89.5% of all income distributed to performers goes to the top 20% of earning performers.<sup>5</sup> We expect that if we were to break down these figures further we would see a more disproportionate distribution of revenues with the top 1% of earning performers receiving the largest share. However we have found no evidence to support a further breakdown of the revenue distribution. On this basis the distribution of these revenues would be skewed towards the top 20% of earners and the best estimate is calculated as follows:

For the top 20% of earners:

£5,489,500 (90% of Best Income of £6,315,000) divided by 10,200 (20% of 51,000 - the number of performer members) = £557

For the rest of performers:

£631,500 (10% of Best Income of £6,315,000) divided by 40,800 (80% of 51,000 - the number of performer members) = £15

The high and low estimates are calculated as 50% either side of the best estimate.

This gives a spread as follows:

Mean annual revenues by performer income distribution, Net Present Values<sup>6</sup>

	High income	Best income	Low income
Top 20% earners	£835	£557	£278
Rest of performers	£23	£15	£7

All performers who assigned their rights for a one-off payment will benefit from a permanent session fund, to which record companies must contribute 20% of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms. Although the ability for member states to exempt small record companies from contributing to the session fund would remain in place, the criteria has been narrowed so that it would only apply to microenterprises (reducing potential scope for record companies to avoid payment by reducing their size and dividing responsibility).

The use-it-or-lose-it measure would also provide a mechanism whereby: if in the extended term the record producer (a) does not offer copies of the phonogram for sale in sufficient quantity or (b) does not make it available online, the performer can serve notice to terminate the contract under which he transferred or assigned his rights to the record producer. The record producer then has one year to both offer copies of the recording for sale in sufficient quantities and offer it online. If the record producer fails to do so, the producer's rights in sound recording expire. The performers' rights to request this transfer cannot be waived. If the sound recording contains more than one recorded performance, each performer terminates their contract on transfer or assignment in accordance with the applicable national law.

If after termination of the contract a public domain specialist, for example, wanted to exploit the recording of a performance, they would still require a licence from the performer who would retain their right to control reproduction, distribution, rental and 'making available' on line. The performer would however

<sup>5</sup> Source: Commission Staff Working Document accompanying the Proposal for a Council Directive amending Council Directive 2006/116/EC as regards the term of protection of copyright and related rights - available at [http://ec.europa.eu/internal\\_market/copyright/docs/term/ia\\_term\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/term/ia_term_en.pdf)

<sup>6</sup> Based on total annual revenues accruing to performers and the number of performer members of PPL

lose his entitlement to receive equitable remuneration for public performance and broadcasting during the extended term as this right can only be exercised through the producer.

The permanent nature of these measures guarantees that it offers equal treatment and consequent benefits for both future and current performers.

### **Impact on record producers (other than those specialising in public domain music)**

Record producers will benefit from the preservation of their rights (e.g. to reproduce and sell recordings in the extended term) and also to receive royalties for public performance and broadcasting for the additional 20 year period, estimated at £6.3M per annum, NPV, in the best case. As revenues are split equally with the performers, record producers/companies will gain by the same amount as performers (calculations provided in the Impact on Performers section above).

There is also an estimated benefit of £10.6M (NPV over 20 years) to record companies in terms of additional sales revenue being generated by the extended copyright. This estimate is derived from an annual estimate of £720,000 additional annual UK sales revenue (£10.6M NPV over 20 years) and is taken from a 2006 PWC<sup>7</sup> report into the effect of copyright term extension on sound recordings.

Under the use-it-or-lose-it provision, record producers will be forced to assess the merits of existing sound recordings in their back-catalogue and decide whether to market such tracks or risk the performer(s) asking for their rights to be returned. This may operate so that only high-volume marketable music was held on catalogue and will allow the movement of revenues from niche products towards the performers, with the possibility that they will exploit themselves or seek deals with the smaller, public domain labels; we cannot monetise this impact at this time.

Record companies will need to set aside monies equal to 20% of revenues generated from sales of the recording in the extended period for the session fund. Using the figures above this would equate to a cost to record companies of £2.6M NPV over 20 years (20% of £10.6M additional sales)

The additional income generated by the 20 year extension of protection could help record companies invest in developing new talent. Although the risk remains that some record companies might be less inclined to invest in new acts if they are able to rely on old, popular recordings to generate revenue, this risk is assessed to be low when taking the market as a whole.

Record companies may also use the additional revenues to digitise back-catalogues and increase the availability of music.

### **Impact on PPL**

Regardless of whether there are any changes in licence fees to accommodate the additional royalties payable in the extended term, PPL will need to cover its costs in administering and distributing royalties. The one-off transition cost estimate which was provided by PPL on 'first-look' basis<sup>8</sup> was £9.1M to £10.1M - we have taken £9.6M as the mid-point of this estimate.

The additional variable administration cost to PPL has been best estimated at £40.9 M (NPV over 20 years); high and low ranges are 20.8M and 61.4M. These best estimates are based on additional administration costs of years 1 to 10 of the extension of £0.2M per annum and 11-20 of £0.5M per annum – these values are derived from the numbers of members going out of copyright in the calculations above and multiplying them by the annual variable administrative cost by member of £352. The administrative cost themselves are taken from the PPL annual report 2011<sup>9</sup>.

PPL charge an administration fee of 14.9%<sup>10</sup> on royalty collections and as a result we estimate a benefit to PPL of £37.6M (NPV over 20 years) based on a low of £18.8M and a high of £56.6M. This is derived

<sup>7</sup> The Impact of Copyright Extension for Sound Recordings in the UK. <http://www.ipso.gov.uk/report-termextension.pdf>

<sup>8</sup> By email to IPO Sep 2012

<sup>9</sup> <http://www.ppluk.com/About-Us/Who-We-Are/Annual-Reports/>

<sup>10</sup> <http://www.ppluk.com/About-Us/Who-We-Are/Annual-Reports/>

by applying 14.9% to the total additional earnings for performers and record companies generated by the term extension.

### **Impact on companies specialising in public domain music**

Specialists can continue to exploit works already out of copyright, but will be prevented from extending their repertoire to the more popular music of the 60s and 70s until the expiry of the additional term unless they obtain copyright clearances. Income could still be generated from work which falls out of copyright in the extended term if the performer(s) ask for the rights to be returned and they seek an agreement with another company to exploit their rights under licence. However, many tracks could remain in copyright during the extended term. If tracks were successfully released under the use-it-or-lose-it provision, specialists would only avoid paying royalties for the sound recording, however, permission and a licence would still be required from the performer(s) and as now, fees would still be payable to the lyricist and composer if the music and lyrics are still in copyright.

There will be some lost revenues to public domain record sales. We estimate that the effect of that lost revenue to be £792,000 pa or £11.7M (NPV over 20 years). This figure has been derived using the £720,000 estimate of additional sales<sup>11</sup> and applying a price elasticity calculation. The 14.3 % price difference between in copyright and out of copyright works would encourage more sales therefore the lost revenue is larger than that gained by the record companies. This figure was taken from a study by Stevans and Session in 2005<sup>12</sup> on the effect of music downloading on the consumer expenditure of recorded music.

The measures, including the harmonisation of the term of musical compositions with words, address the problems surrounding retrospective application of copyright. It has been amended to ensure protection for those already exploiting out of copyright works which fall back into copyright as a result of the harmonisation.

Currently, publishers of musicals and operas often experience demands for a reduction in royalty payments when one element of the musical composition with words is already out of copyright. Public domain users will have to wait longer for musical compositions with words to fall into the public domain, reducing the negotiation tool afforded by the separate protection currently given to the composition and lyrics.

There will be no additional costs to Public Domain Broadcasters who continue to use their existing play lists but there may be additional costs if they wish to expand their play lists into tracks which will remain in copyright for longer. It has not been possible to quantify these here. This sector may also fail to attract new audiences and advertising revenues if they do not expand their play lists.

### **Impact on consumers**

The impact on the retail price of music is unclear. Those purchasing licences from PPL could suffer if higher license fees are charged to offset the additional royalties needed to pay performers and record producers. If record companies utilise the additional revenue gained to digitise back-catalogues, this would provide consumers with a wider choice. These options cannot be monetised.

### **Impact on creativity**

The increased term of protection could increase funding for new bands by supplying extra revenue and improve the status of performers, giving greater recognition to the importance of their contribution and encouraging creativity. The Gowers review pointed out that because such revenues are so far in the future, the discount that people place on the expected revenue reduces this creative incentive to near zero. Creative output based on 'mash-ups' and sampling would be restricted as less material would be available out of copyright. It is not possible to monetise these effects.

### **Impact on society**

<sup>11</sup> [The Impact of Copyright Extension for Sound Recordings in the UK.](http://www.ipso.gov.uk/report-termextension.pdf) <http://www.ipso.gov.uk/report-termextension.pdf>

<sup>12</sup> <http://ideas.repec.org/a/kap/jcopol/v28y2005i3p311-324.html>



The European Commission argued that aligning the term of copyright protection with that of the US (95 years) would prevent a diminution in cultural diversity as it would avoid the creative efforts being channelled towards repertoire that appeals to the US market- where there is scope for higher returns. It should be noted that the revenue system in the US is different to that in Europe. It could also be argued that, because of its size, the US market would always be attractive regardless of any disparities in copyright protection. Therefore, on balance, a negative impact on society caused by term extension to 70 years is unlikely.

### **Impact on lyricists and composers**

The heir to a lyricist/composer who creates music compositions with words would benefit from an additional period of protection if the other lyricists/composer dies later. The number of revenue generating works where this will happen is believed to be small, therefore a significant monetary effect is unlikely.

### **Impact on PRS and music publishers**

As the process of creating songs is often collaborative, a single term of protection for musical compositions with words across member states may simplify licensing arrangements including cross-border use. There will be some small set up costs required to adjust the reporting mechanism but this is unknown at present and is estimated to be a low one-off cost. Similarly, the commercial value of music publishers' repertoire would be preserved for longer if the term of protection is harmonised, but the volumes of significant revenue generating works that benefit from the gains made in this regard are expected to be low and cannot be quantified.

### **Content distributors and broadcasters**

The content Industry will be liable to pay royalties for use of copyrighted material (eg rental, communication to the public and broadcasting royalties). These royalties are, as noted earlier, split 50:50 between performers and record companies/producers. Taking the PWC (2006)<sup>13</sup> estimate of copyright holders per annum being retained in copyright by the Directive (700 members) and multiplying this by the mean annual revenue per PPL member (£2183)<sup>14</sup> we derive an annual cost to content distributors of £1.5M which equates to a best estimate of £256.5M NPV over 20 years. High and low estimates are in the range £354.8 and £128.3M.

### **Risks and Assumptions**

The numbers of PPL members losing copyright per annum has been assumed to have an even distribution. This should not change the totals over the time period, but the yearly distributions will be unnecessarily smooth.

We have made an assumption that revenues remain stable and based our figures on the latest information available for 2011. If sales and use of material vary significantly in the next 20 years then the total benefits will change accordingly.

The figures for transitional costs are based on a very broad estimate by PPL and may vary considerably. This would have an effect on the total costs of the measure.

### **Direct Costs and Benefits to Business Calculations**

As this is a European measure it is out of scope for OIOO.

We have calculated that this will have a net cost to business of £17.97m over 20 years. This extension is in accordance with the EU proposal to extend copyright term. We have considered that performers are treated as businesses.

For the purpose of Impact Assessments the overall high estimate is normally calculated by subtracting the lowest cost figure from the high benefit figure. For this exception this is not possible as the estimates

<sup>13</sup> The Impact of Copyright Extension for Sound Recordings in the UK. <http://www.ipo.gov.uk/report-termextension.pdf>

<sup>14</sup> <http://www.ppluk.com/About-Us/Who-We-Are/Annual-Reports/>

of benefits and costs are linked and therefore inseparable. For this reason the high estimate must be attained by subtracting the high cost estimate from the high benefit estimate (and likewise for the low estimate).

Calculating the estimates in this manner leads to a further complication. The new high estimate is of a lower value than the low estimate, since the estimate for high cost is proportionally larger to the estimate for the high benefit estimate, than the low cost estimate is to the low benefit estimate. For this reason, the costs and benefits described in the above text as high, contribute to the low estimate, likewise the costs and benefits describe as low contribute to the high estimate.

It is not possible for this exception to result in a net benefit for to increase copyright will result in consumers paying more and collecting societies incurring extra cost finding and redistributing any revenues gained.

Further evidence of the costs and benefits of this option may emerge from the consultation process.

### **Summary**

The Directive has been agreed in Europe and requires implementation. The Directive states a clear extension of term of protection and also provides for additional measures designed to enhance the financial benefits to performers. It also has one provision to harmonise the term of protection for a specific class of works (co-authored works).

UK Acts of Parliament govern the regulation and therefore Government legislation is required to implement the Directive into UK law. The suite of powers already provided for within UK law and harmonised EU law mean that there is only a small scope for implementation of the Directive whilst complying with rules preventing 'gold-plating' and restricting the ability to interpret meanings within the Directive.

The Impact assessment shows a net cost to business of £1.2M per year, which is unavoidable as revenue flows from businesses and consumers to pay performers for their lengthened rights provided by the extension. The principle distributional effects of the Directive will result in a net transfer from mid-income consumers to a few high income performers and a small number of rights owners.

The directive must be take effect in UK law by 1 November 2013 in order to comply with the requirements of the directive.

A summary of the monetised costs and benefits is below:

<b>Total Costs and Benefits (£, NPV over 20 years)</b>			
	<b>High Estimate</b>	<b>Best Estimate</b>	<b>Low Estimate</b>
Additional Performers Earnings	189.4M	126.3M	63.1M
Additional Producers Earnings	189.4M	126.3M	63.1M
Additional earnings form Sales	15.9M	10.6m	5.3M
Additional Administration Fees gained by PPL	56.6M	37.6M	18.8M
PPL one-off Transition Cost	10.1M	9.6M	9.1M
Additional Administrative Cost to PPL	61.4M	40.9M	20.8M
Lost revenues from sales of public domain recordings	17.5M	11.7M	5.8M
Additional Cost to Content Distributors	354.8M	256.5M	128.3M

## Annex A – Financial Analysis

### Copyright extension IA, figures for best estimate, ranges & sources

[Range given by numeral, source by letter]

	<u>Best Estimate</u>	
PPL members losing copyright 2007-2016	7,000	a
PPL Annual disbursement to members, 2011	£127,639,000	b
PPL Registered Members, 2011	60,000	c
PPL Administrative Costs, 2011	£23,248,000	d
Discount Rate (as per HM Treasury Green Book)	3.5%	e
Percentage of PPL revenues going to performers	50%	1 f
Percentage of PPL revenues going to Record Companies	50%	f
Percentage of PPL membership, performers	85%	f
Percentage of PPL membership, Record Companies	15%	f
PPL cost-to-income ratio	14.9%	2 g
PPL Fixed Costs, i.e. Not rising with repertoire size	£1,881,000	3 h
Performers who receive 90% of music revenue	20%	i
Performers who receive 10% of music revenue	80%	i
Annual additional UK sales from 20 year extension, Nominal	£720,000	4 j
Performer's share of record sales revenue	8%	l
Price difference between in-© and out-of-© records	14.3%	6m
Price Elasticity of Demand for recorded music	1.10	7n
PPL Percentage of Revenue from Exports	16%	8o
Percentage of PPL Exports from non European countries	4.7%	9p

Assume that average revenue constant.

Range details, by footnote numbers (sources in electronic documentation):

1: [25%-75%], 2 [10%-20%], 3 [£0-£2.8m], 4 [£0.36m-£1.44m], 5 [£0.62m-£2.46m],  
6 [0%-15%], 7 [0.85-1.35], 8 [3.6%-12.1%], 9 [6.7%-20%]

#### Sources:

- a. UK House of Commons Committee for Culture, Media and Sport. May 2007. (Page 78) "New Media and the Creative Industries".
- b. PPL annual accounts. 2008. (page 50), "Amount to be distributed to members and performers"
- c. PPL Annual Report 2011 (Page 4): Record company members = 8,500; Performer members = 51,500.
- d. PPL annual accounts. 2011. (page 8), "Total Cost of Collection and Distribution"
- e. HM Treasury Green Book
- f. Assumption, substantiated by PwC (2006) report which splits revenues 50/50.

- g. PPL Annual Accounts. 2001-2008. (page 50). "Cost to income ratio": trend reduction from 24.% in 2001 to 16.6% in 2003, falling to 14.6% in 2007 and also 14.9% in 2011.
- h. Based on PPL Annual Accounts. 2008. (page. 56, 57). range goes from no fixed costs (implied by constant cost-income ratio from 2007-2008) to £2.8m which is an IPO estimate of the PPL distinct fixed costs in the accounts (£1.881m for depreciation, land and vehicles), plus an approximate expenditure on building overheads and IT systems maintenance.
- i. European Commission; (EU FIGURES)  
[http://ec.europa.eu/internal\\_market/copyright/docs/term/ia\\_term\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/term/ia_term_en.pdf)
- j. PwC report. 2006. Page 4. Estimate of total NPV revenue over 50 years equals £m. (range offered: £7.2m - £82.3m over 10 years, but PwC high estimate assumes no public domain music sales and excludes losses)
- k. PwC report. 2006. (page 3). Estimate of total NPV revenue over 50 years equals £4.1m-156.1m (with their discount rate this is a nominal rate of between £1.23m-£46.85m). Again top estimate excludes losses.
- l. Based on EU Madrid meetings 18/11-09
- m. Range between 0% difference and 15% difference tested for. Best estimate based on a mean Price of in-© £6.99, mean Price for out-of-© £5.99, difference £1, or 14.3%
- n. Source: Adjusted Stevans and Sessions (2005: 321) medium estimate at 1.1, with a 0.25 deviation either way. Price Elasticity of Demand: Range from 0.85 (inelastic, lower price leads to lower revenues, pre-2000 US experience PeD=0.64), through 1 (no change in revenue, higher demand with low price), to 1.35 (elastic, lower price leads to higher revenues, US post-2000 experience PeD=1.4).  
-Stevans, Lonnie K. and David N. Sessions. 2005. "An Empirical Investigation Into the Effect of Music Downloading on the Consumer Expenditure of Recorded Music: A Time Series Approach." *Journal of Consumer Policy* 28(3): 311-24
- o. PPL Annual Accounts. 2003-2011. In 2011 this equalled 16%.
- p. PPL annual accounts 2003-2011. In 2011 this equalled 4.7%. "Rest of World" percentage of countries which will not be extending term due to EU regulation

# Annex D: Consultation Response Form

## Consultation response form

The Intellectual Property Office is seeking information upon the proposed extension to the Patent Opinions Service. The responses to this consultation, together with other evidence, will help shape these proposals.

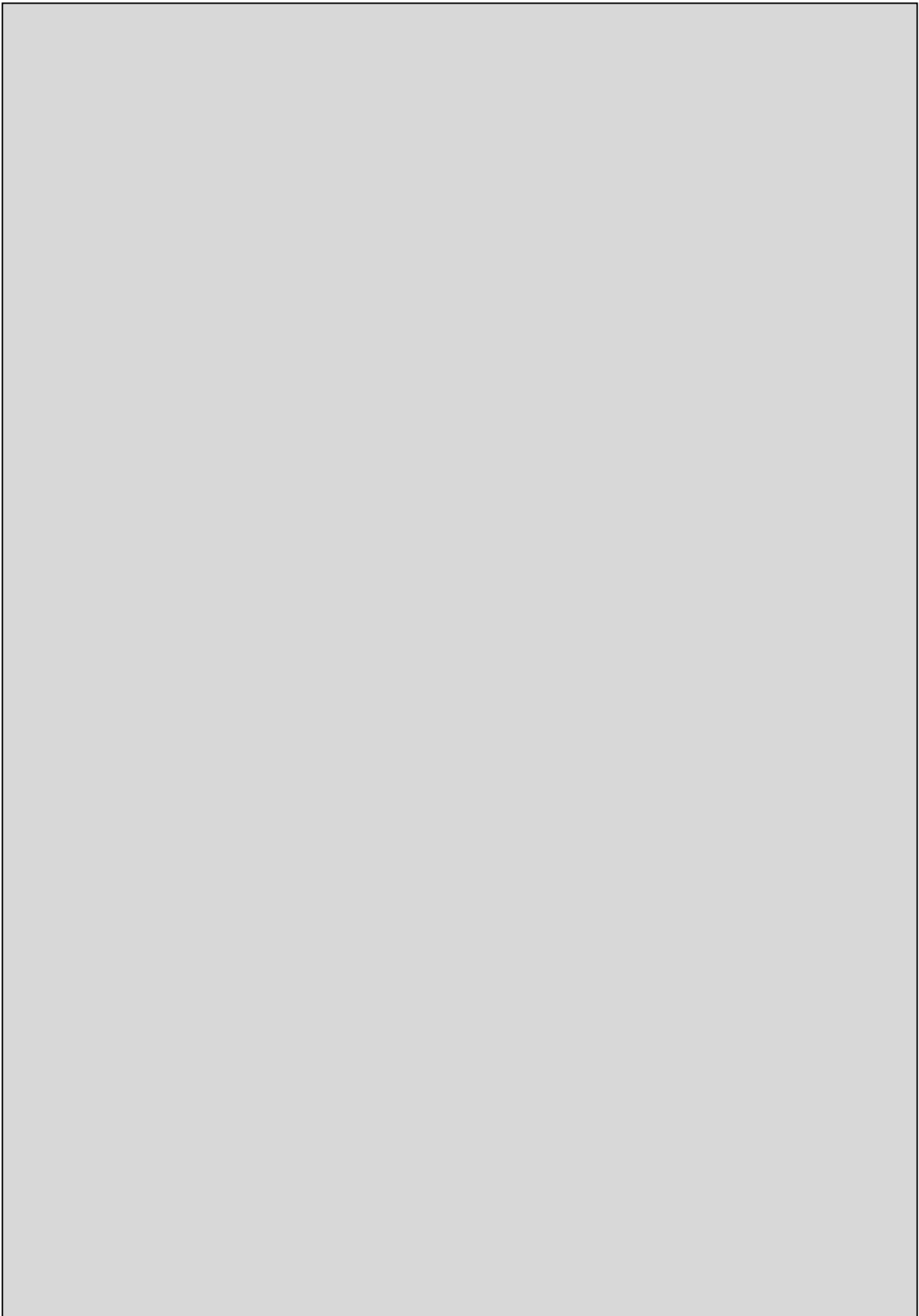
On this form, please provide your responses to the questions outlined in this document. You do not have to complete the whole form – please answer the questions relevant to you. Please Note: this consultation forms part of a public exercise. As such, your response may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). We plan to publish responses on our website when they are received.

If you do not want part or the whole of your response or name to be made public, please state this clearly in the response, explaining why you regard the information you have provided as confidential. If we receive a request for disclosure of this information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system cannot be registered as a formal request for confidentiality.

# Consultation on the implementation of Directive 2011/77/EU amending Directive 2006/116/EC on the Term of Protection of Copyright and Certain Related Rights

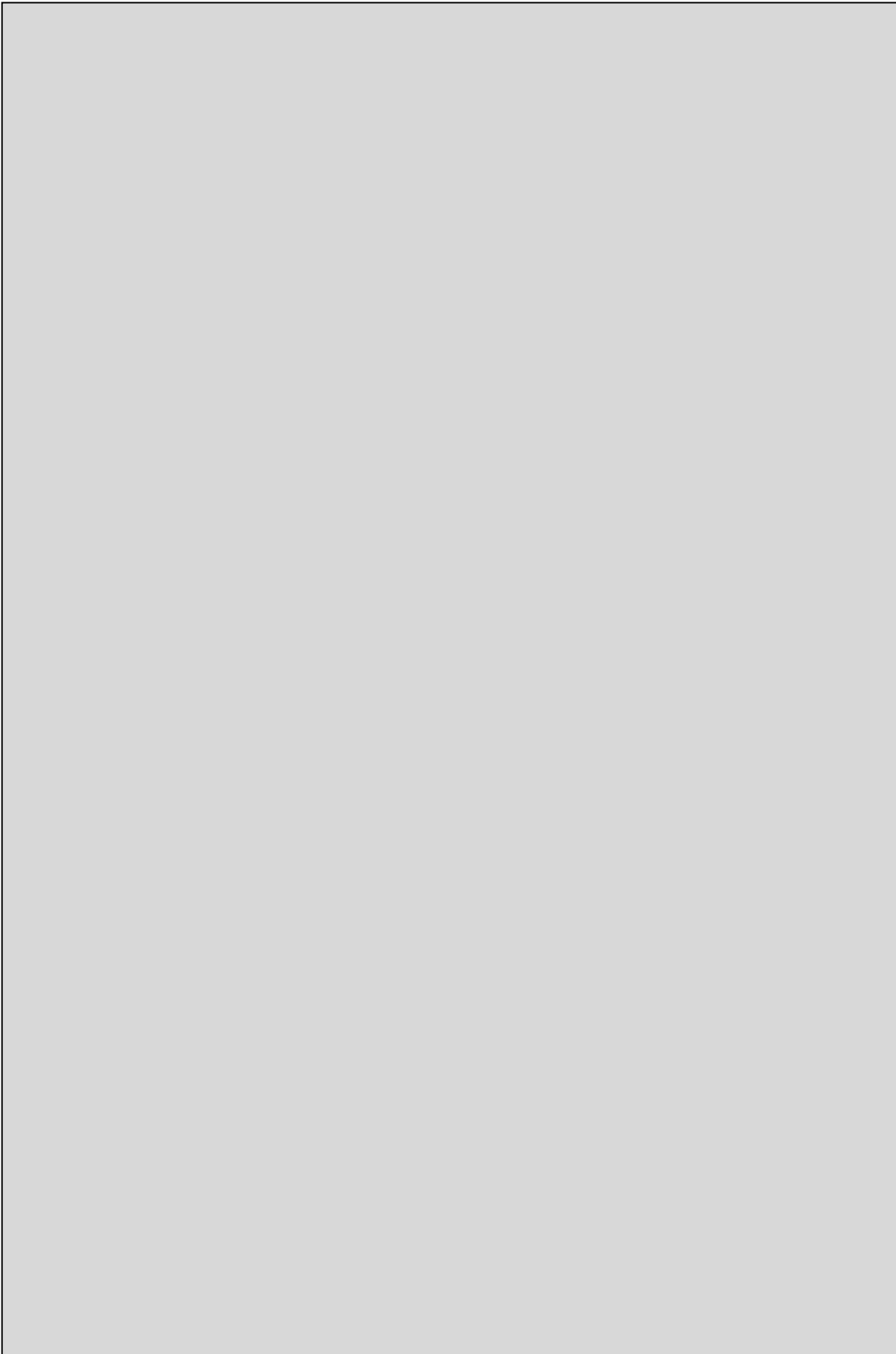
1. *Should the Regulations provide a clear definition of the term “sufficient quantities”? If so, what specific text do you think we should use?*

*2. Do you agree with the interpretation of the period of time during which the performer may exercise the right to terminate the contract?*





**3.** *Do you agree with our analysis of how the provisions of the Directive will operate where there are multiple performers in a sound recording?*



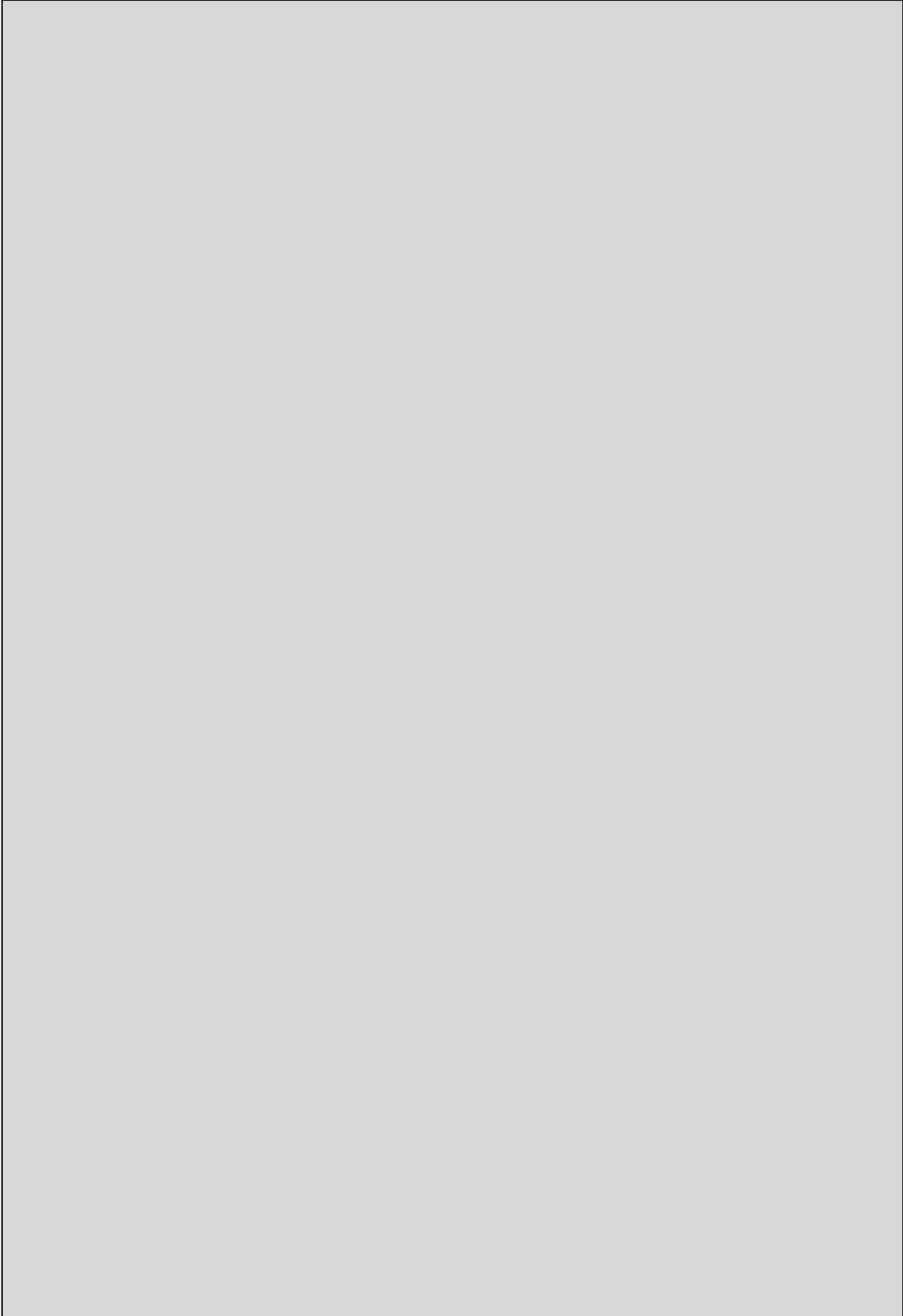
4. *Should the performer's right to terminate the contract be assignable and/or transmissible?*

**5.** *Do you agree with our approach in calculating the period after which the supplementary remuneration becomes payable?*

**6.** *What will be the position where multiple performers on the same sound recording are members of more than one collecting society (if such a situation can arise) or where performers are not members of a collecting society?*

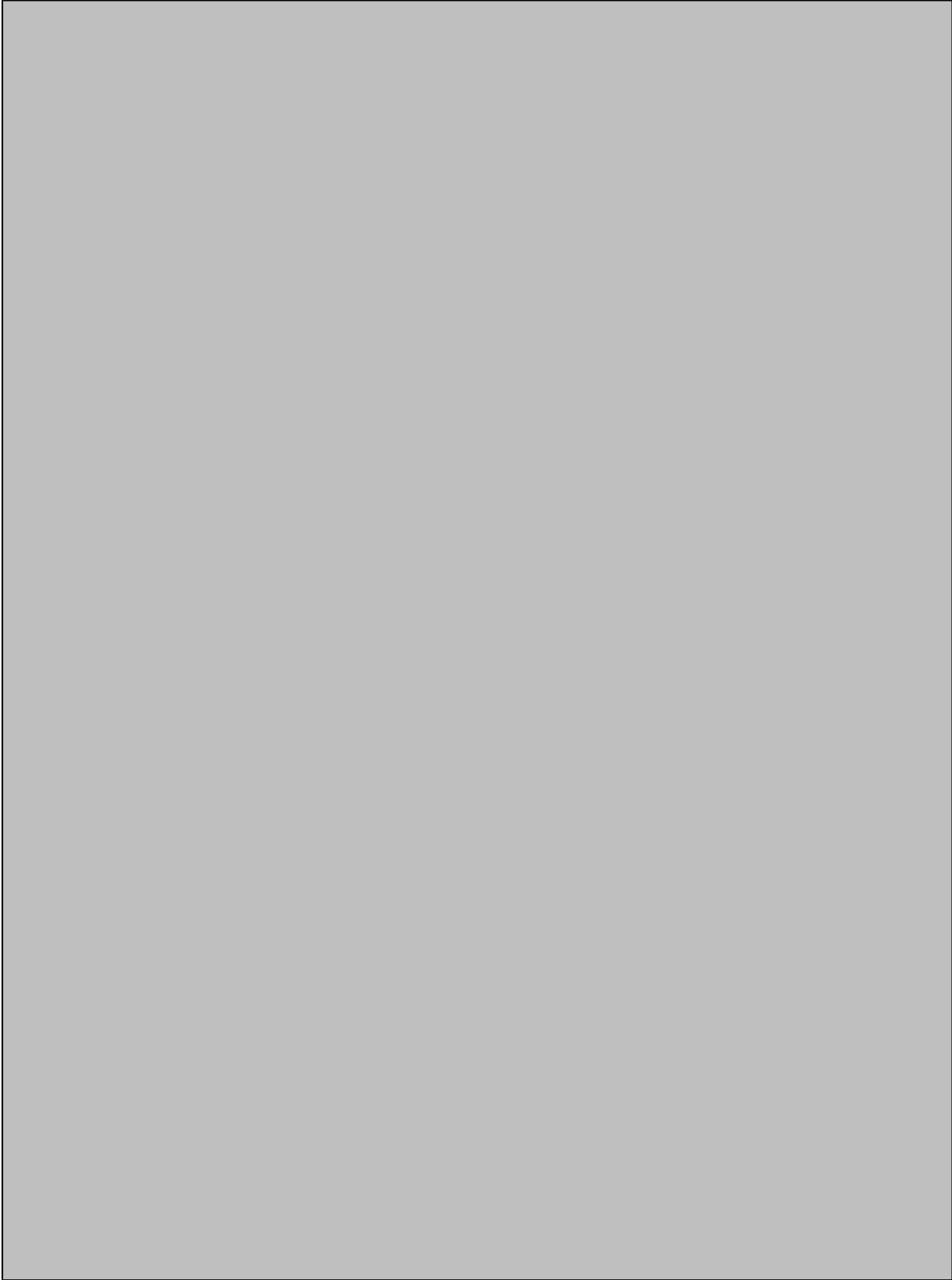
*7. The Regulations specify that the producer must pay to the collecting society the sum set aside in respect of the supplementary remuneration. What would you consider to be a reasonable period of time by which the producer must comply with this provision?*

**8.** *New Section 191HB(7) provides that the right to receive an annual supplementary payment should be transmissible or assignable, although the Directive is silent on the matter. Do you agree that the Regulations should include this provision?*



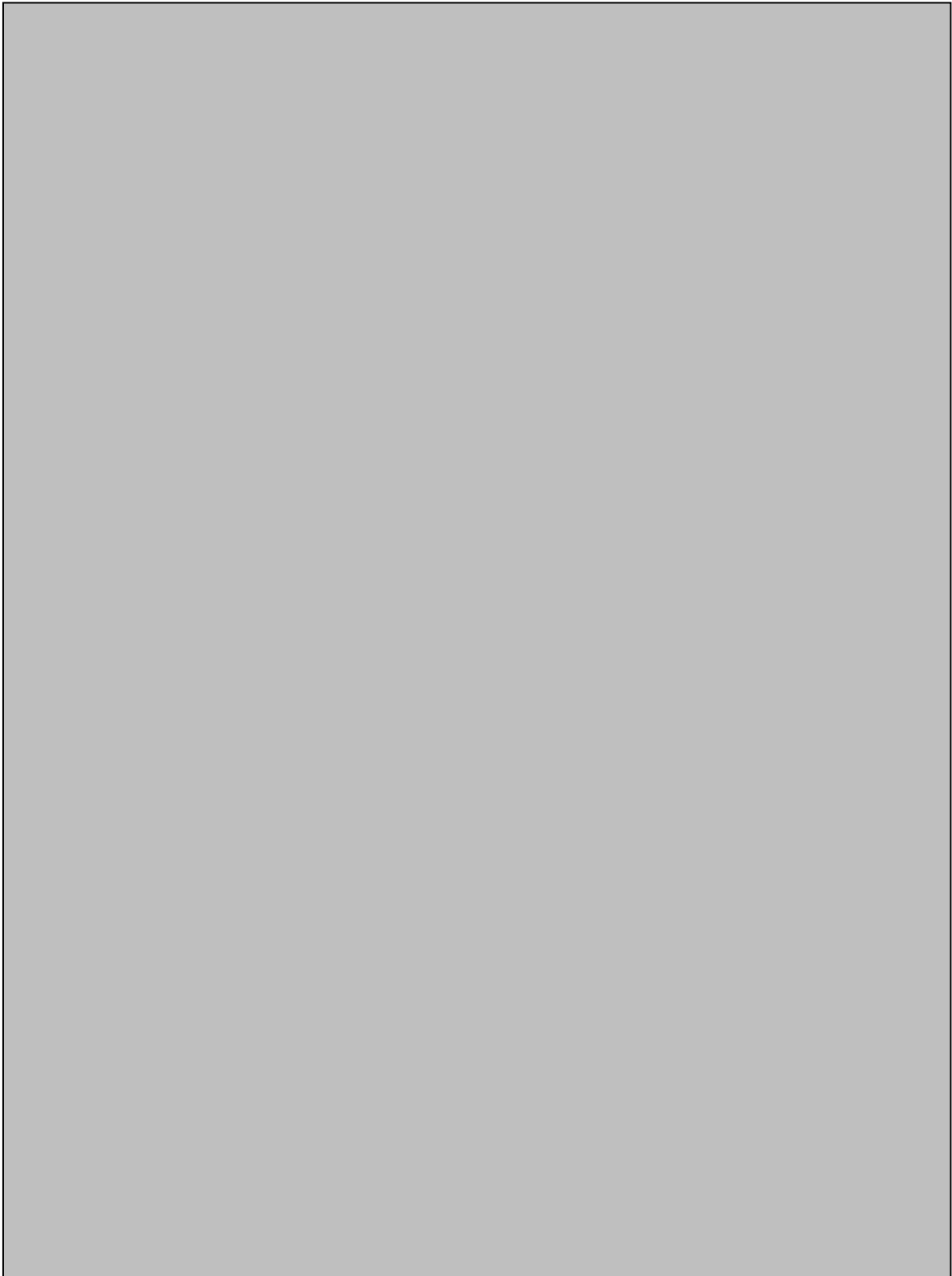
**9.** *Is the producer (rightsholder) the party best placed to provide the information required by the performer to secure payment of the annual remuneration?*

**10.** *Should the Regulations incorporate the optional provisions of Article 1(4) paragraph 2? What is the business case for doing so?*





**11.** *We have included transitional provisions in line with the Copyright and Related Rights Regulations 1996 (SI 1996/2967) 1995. What are your views on the inclusion of these provisions?*



# Annex E: Consultation Code of Practice Criteria

This consultation has been drawn up in line with the Government's Code of Practice on consultations.

The Code sets out the approach Government will take to running a formal, written public consultation exercise. While most UK Departments and Agencies have adopted the Code, it does not have legal force, and cannot prevail over statutory or other mandatory external requirements (e.g. under European Community Law).

The Code contains seven criteria. They should be reproduced in all consultation documents, and are therefore set out below. Deviation from the code will at times be unavoidable, but the Government aims to explain the reasons for deviations and what measures will be used to make the exercise as effective as possible in the circumstances.

## The Seven Consultation Criteria

1. **When to consult: Formal consultation should take place at a stage when there is scope to influence the policy outcome.**
2. **Duration of consultation exercises: Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.**
3. **Clarity of scope and impact: Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.**
4. **Accessibility of consultation exercises: Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.**
5. **The burden of consultation: Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.**
6. **Responsiveness of consultation exercises: Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.**
7. **Capacity to consult: Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.**

# Annex F: Organisations to which this Consultation has been sent

The Consultation has been sent to individuals and organisations who have previously registered an interest in being informed about copyright matters, including the following organisations representing those mainly affected by this regulation:

British Copyright Council (BCC)

Music Managers Forum

Music Publishers Association (MPA)

Musicians Union

Music Users Council

Performers Rights Alliance

PPL

PRS for Music







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**Published: November 2012**  
DDU/I100



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