

## **British Copyright Council: Consultation on the options for implementing the Beijing Treaty on Audiovisual Performances**

The British Copyright Council (BCC) represents those who create, hold interests, or manage rights in literary, dramatic, musical, and artistic works. The following response has been developed with our membership which include professional associations, industry bodies and trade unions which collectively represents the voices of over 500,000 creators, spanning the creative industries.

These right holders include many individual freelancers, sole traders, and SMEs, as well as larger corporations within the creative and cultural industries. Our members also include collecting societies which represent right holders, and which provide licensed access to works of creativity. A list of our members can be found [here](#).

### **1. Would the extension of moral rights to performances in audiovisual fixations result in any problems for freedom of expression? If so, in what ways and how could this be resolved?**

The essential principle to uphold is that the moral rights of performers, whose performances are captured in films, sound recordings or other audiovisual media, should not receive less protection than performers whose performances are recorded in phonograms or solely in sound media.

The provisions outlined in s205C CDPA (Right to be identified as a performer) already offer comprehensive coverage for individuals whose performances are connected to audiovisual media. The current references within ss 205C (2)(c) and (d) to sound recordings should explicitly encompass "film." With this adjustment, the contractual terms governing the assertion of the right to be identified are typically well addressed by the credit provisions found in contracts (often influenced by collective bargaining terms negotiated under Equity Agreements), although they should remain practical.

Conversely, the provisions within s205F CDPA (Right to object to derogatory treatment of performance) do not yet include the right when a qualifying performance is part of a film or another audiovisual medium displayed in public, broadcast, communicated through other means, or made available to the public. This something we believe the provisions should encompass.

However, for any recognition of moral rights linked to performance given for reproduction on a film the agreed statement concerning the application of Article 5 of the Treaty is both recognised and indispensable.

This statement recognises that “mere use of a new or changed technology or media, as such, does not amount to a modification” to which performers can object on moral rights grounds.

This is important as the audio-visual sector assesses and accommodates new industrial relations practices to distinguish (a) use of AI systems and technologies which are or should be recognised a part of the production and distribution of a film for which a performer is engaged from (b) application of AI technologies beyond the control and responsibility of the direct producer/performer agreements for a particular project.

Finally, the use of new AI systems and challenges (like algorithmic prioritisation) that pose threats to freedom of expression are issues which will need to be addressed when contractual terms are agreed to cover applications directly relevant for agreed projects. Again, distinctions may need to be developed to protect against adaptations of a performance that may be thought derogatory occurring outside or beyond the contractual terms agreed for a specified project and normal exploitation of the results.

For uses beyond those originally envisaged for a specific project licensing options should prevent the abuse of moral rights, building upon protections presently offered under collective bargaining agreements.

In general, the collective bargaining agreements applied to the production of films and television programs throughout the UK's audiovisual sector have already established reasonable regulations for acknowledging the moral rights of qualifying performances, despite the mentioned gaps in the Copyright, Designs and Patents Act 1988 itself.

Therefore, the minor adjustments mentioned should promote the Treaty's ratification and equalise the status of all qualifying performances.

Action on this should then be complemented by collective bargaining and contractual licensing options to address application of AI models or systems beyond those envisaged for a specific film.

**Option 1B: Make the necessary changes and introduce exclusive rights of broadcasting and communication to the public for audiovisual performances. What evidence do you have on the impact of this approach on your organisation or members? How would revenues generated by existing performers rights be affected?**

Some BCC members are of the view that ratification of the Beijing Treaty and its provisions provide the opportunity to ensure that the exclusive rights of audiovisual performers are supported in law beyond the contractual limits of collective bargaining agreements. They view this as both future-proofing performers' rights, especially when addressing the national treatment issues.

There is also a possibility that other countries will interpret the national treatment provisions as not requiring them to pay ER to UK performers where they have a right to ER rather than an exclusive right, so UK performers could be left with no rights in practice in those countries.

On the other hand, other BCC members are of the view that the current system, which supports the negotiation of remuneration for audiovisual performers through contractual agreements, is effective. Given their view that the status quo is working, the government should carefully consider its discretion in making declarations under Article 11 of the Treaty.

It is possible that other parties to the Treaty which elect to introduce a right to equitable remuneration under Article 11, rather than an exclusive right will not interpret the national treatment provision as requiring them to accord the right to equitable remuneration to UK performers, if the UK only introduces an exclusive right. This would place UK performers at a significant disadvantage vis-à-vis their international counterparts by risking their ability to secure remuneration entitled to them from other countries. If collective management options are permitted, and even potentially extended going forwards, this may address concerns from some of our members regarding the application of National Treatment rules and access for UK "qualifying" performers to equitable remuneration pots under national laws of other countries which implement the Beijing Treaty.

Accordingly, government should carefully consider its discretion as regards the various options under Article 11 and seek further evidence before proceeding with any legislative amendments.

**Option 1C: Make the necessary changes and introduce right to equitable remuneration for broadcasting and communication to the public of audiovisual performances**

Some members believe that the only way to secure appropriate and fair remuneration for performers is by granting them equitable remuneration payments for specific uses, alongside the contractual payments received from producers.

Collective bargaining terms already carve out from the assignment of rights to the producer, the right for performers to benefit from the right to receive equitable remuneration under worldwide collective management systems. These members hold the view that the UK ratification of the Treaty must preserve the ability of audiovisual performers to benefit from such equitable remuneration systems and that this can be done without disrupting the distribution of audiovisual works by producers, broadcasters, and other investors in the creation of films and audiovisual recordings.

Other members believe that the current practice of contractual assignment of rights from performers to audiovisual producers works well, paying appropriate and fair remuneration in return for rights to be transferred by contract. These BCC members believe that equitable remuneration systems are unnecessary. They believe that introducing equitable remuneration for audiovisual performers could disrupt longstanding contractual practice and destabilise carefully negotiated agreements.

Producers make substantial investments in performers, regardless of the commercial success of the resulting work. These members think that introducing additional remuneration to a system that producers already believe is fair and appropriate for performers could leave producers with fewer resources to invest in audiovisual works.

Another group of BCC members believes that equitable remuneration, paid by users for certain secondary uses, is fair and an essential safeguard for performers' income. In the context of TV and film, producers can opt to clear the secondary exploitation rights for the first few years for an upfront flat fee, which is not proportionate to the film's success. According to these members, performers often struggle to enforce payment obligations against producers in this context. They believe that ratifying the Beijing Treaty without granting equitable remuneration will result in less coherent and less globally compatible protection for audiovisual performers. This, in turn, would hinder the financial exchange between collective management organisations (CMOs) internationally, to the detriment of all performers, especially at a time when they can least afford it.

This issue has been made more pressing because now that the UK has left the EU, UK performers no longer benefit from the principle of equal treatment of EU citizens and the national law of some countries provides that third country nationals are only entitled to statutory equitable remuneration payments if there is an equivalent reciprocal scheme in their country. UK performers are already losing out on statutory payments they had been receiving when their work is used in some countries. As the impact assessment identifies, the magnitude of this problem depends on how the EU chooses to implement the Treaty.

Traditionally, broadcasting of sound recordings was a secondary use of commercial sound recordings driven by demand from radio services. This contrasts with film, where the initial broadcast window(s) and rights linked to such window(s) remain a vital part of securing production finance for the work. Therefore, contracts governing initial consents to broadcast are key for film.

In the case of secondary uses, CMO systems for revenue collection and distribution provide additional revenue opportunities for audiovisual performers without being disruptive to the film/programme distribution business. The principles of fair remuneration for performers in both instances remains. There is a balance to be struck between contractual agreements and CMO systems.

Within both the film and audiovisual sectors, contractual arrangements have been established (usually linked to collective bargaining agreements) to dictate how and when a producer or distributor of a film or audiovisual fixation is obliged to report to performers about the use or exploitation of their work and when contractual payments should be made. When equitable remuneration systems are applied in the audiovisual field they must ensure revenues are paid in ways which complement rights recognised in law, without disruption to the contractual terms which are negotiated between producers and performers. Further, direct reporting chains, and any administration by CMOs, must remain appropriate and proportionate so as not to become onerous or detrimental to any of the contracting parties.

**25. Feel free to include any further concerns, observations or evidence that are relevant to this option but not adequately covered by the questions above.**

Given the breadth of views likely to be received in response to this question the BCC recommends conducting further conversations with stakeholders to allow the IPO and industry to have sight of and consider the range of perspectives as it pertains to specific matters of implementation.

It is also important that the IPO addresses practical application of any approach selected for the UK with effective application of the National Treatment provisions recognised under Article 4 of the Beijing Treaty.

## **26. Option 1D - the introduction of rights to equitable remuneration for making available on demand, paid by the platforms**

Some BCC members support Option 1D. This approach is being taken in a number of other countries in Europe, including in Spain, where Netflix established its first European production hub, and the rest of the world already, with legislation being discussed in several more. There is consensus among AV performers' CMOs throughout Europe on this issue and it is seen by many as the best way to implement the requirement of Article 18 of the EU CDSM Directive that authors and performers receive "appropriate and proportionate remuneration" when they license or transfer their exclusive rights – which all UK political parties supported.

Therefore, it seems likely this approach will become increasingly commonplace and UK performers will miss out on a share of equitable remuneration payments when their work is made available in countries which have a material reciprocity requirement, if the UK does not introduce statutory remuneration.

On the other hand, other BCC members are of the view that because s 182C already provides for performers (including audiovisual performers) to consent to exercise of the making available right, introducing any statutory right to equitable remuneration for on-demand availability, could potentially create an additional layer of bureaucracy and that a more nuanced and flexible approach recognising how the making available right links to audiovisual use and markets may be necessary to address the UK's diverse needs.

## **37. Are there any potential reciprocity issues under Article 11 that we haven't considered? What evidence do you have to support this?**

Currently, the UK's position is covered by: (a) the contractual terms established when a performance is recorded, specifying fixation and permitted uses; (b) exceptions and limitations under permitted acts, falling outside contractual terms; or (c) in cases where contractual terms are not explicit: (i) contractual requirements to negotiate and agree on further consents (based on collective bargaining agreements); or (ii) the rights provided in the CDPA, which are not linked to or relevant to any specific contract.

The existing stance regarding statutory protection for performers whose work is recorded in audiovisual formats differs from that applied to sound recordings. To some extent, this contrast has been addressed through collective bargaining agreements and tailor-made arrangements between performers and producers. These agreements establish contractual terms that serve two purposes: they provide contractual safeguards for the engagement of performers by producers and broadcasters, and they outline agreed-upon terms for contractual payments when additional uses (such as broadcasting and specific forms of public communication) occur.

Certain BCC members have reservations about the collective bargaining agreement-based system due to the following reasons: it does not apply when contracts are concluded without reference to these agreements (common for foreign and some UK productions), and it does not safeguard performers' rights in other countries or against any entity other than the producer which is the contractual counterparty.

It is essential to carefully consider how national treatment and reciprocity principles would function within a system solely based on contracts. As mandated by the Treaty, the UK should extend national treatment, including the reservations stipulated by Article 4 of the Treaty, to performers from other Treaty-participating countries. Failing to do so could potentially preclude claims for statutory equitable remuneration, especially when other countries exclusively recognise statutory protections.

The UK's film and television industries' global success makes maintaining open channels between the UK and other Beijing Treaty-ratifying nations crucial. It is important to ensure the continuous flow of "equitable remuneration" to performers from uses under those countries' national laws. This will become increasingly significant in a digital era where securing "tracking and tracing" platform and retransmission uses will be more accessible with the involvement of CMOs representing the interests of audiovisual performers.