

**EXPLANATORY MEMORANDUM TO
THE PERFORMANCES (MORAL RIGHTS, ETC.) REGULATIONS 2006**

2006 No.18

1. This explanatory memorandum has been prepared by the Department of Trade and Industry and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 These Regulations amend the Copyright, Designs and Patents Act 1988 (the 1988 Act) to implement the WIPO Performances and Phonograms Treaty (WPPT). That Treaty was specified as a Community Treaty for the purposes of the European Communities Act 1972 (the 1972 Act) by the European Communities (Definition of Treaties) (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty) Order 2005 (SI 2005/3431) (the Definition Order).

3. Matters of special interest to the Joint Committee on Statutory Instruments

None. However a separate memorandum was sent to the Committee for their assistance in relation to the Definition Order.

4. Legislative background

4.1 These Regulations are made under section 2(2) of the 1972 Act.

5. Extent

5.1 This instrument extends to all of the United Kingdom.

6. European Convention on Human Rights

The Minister, Lord Sainsbury of Turville, made the following statement regarding Human Rights: in my view the provisions of the Performances (Moral Rights, etc.) Regulations 2006 are compatible with the Convention rights.

7. Policy Background

7.1 These Regulations are made to enable the United Kingdom to ratify the WPPT in accordance with Council Decision 2000/278/EC on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

7.2 At present the law of the United Kingdom is in compliance with most of the requirements of the WPPT, indeed many of the new obligations were included in Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society. This Directive was implemented by the Copyright and Related Rights Regulations 2003 (SI 2003/2498).

7.3 Although the implementation of the Directive meant that UK law complied with many of the requirements of the WPPT, some were not included in the Directive. In particular, there are no provisions in the Directive (or in UK law)

for the protection of performers' moral rights. This obligation arises from Article 5 of the WPPT.

- 7.4 These Regulations implement Article 5 of the WPPT by inserting Chapter 3 of Part 2 into the 1988 Act. The insertion of subsection (1A) into section 182D of the 1988 Act implements Article 15(4) of the WPPT. UK law is in compliance with the other provisions of the WPPT.
- 7.5 These Regulations also divide Part 2 of the 1988 Act into a number of Chapters and remove certain ambiguities and inconsistencies that arose from the implementation of other Directives relating to copyright and rights in performances.
- 7.6 A copy of these Regulations was made available for members in the papers for the debate on the Definition Order. These debates are available at:

House of Commons, *15th November 2005*
Hansard (Third Standing Committee on Delegated Legislation)

House of Lords, *27th October 2005*
Hansard Vol. 674, Cols 1394-1398.

8. Impact

- 8.1 A Regulatory Impact Assessment is attached to this memorandum.

9. Contact

Karl Whitfield at the Patent Office: tel: 01633 814734 or e-mail karl.whitfield@patent.gov.uk can answer any questions on the Regulations.

Full Regulatory Impact Assessment

Section 1. Title of proposal: Performers (Moral Rights, etc.) Regulations 2006

Section 2. Purpose and intended effect

1. **Objective:** the introduction of moral rights for performers in the United Kingdom, as required by the 1996 WIPO¹ Performances and Phonograms Treaty (WPPT), signed by the United Kingdom in 1997. Their introduction will enable the UK to ratify the treaty, since all the other requirements of the treaty are already in place. This is considered essential to the future protection of UK rights² in the markets of other signatories of the treaty, who must provide similar rights on a reciprocal basis.

2. **Background:** in 1996 the latest two in a long tradition of international treaties concerning copyright and related rights were agreed and both were signed by the United Kingdom soon after. These were the World Intellectual Property Organisation (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty. The treaties sought to take account of new technologies affecting copyright, such as the internet, encryption and digital rights management. Consequently they have become known as the internet treaties.

3. Such international treaties are vital for authors, musicians, performers and the creative industries in general as they ensure adequate levels of protection in overseas markets by requiring contracting parties to provide the same protection for the nationals of other contracting parties as they do for their own nationals.

4. Most of the treaties' requirements were already established in UK law when the UK signed the Treaties in 1997. Further requirements were met when the UK implemented 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, the so-called Infosoc Directive. This implementation came with the The Copyright and Related Rights Regulations 2003 which came into force on 31 October 2003.

5. This left just one substantive aspect of the treaties requiring implementation in the UK, namely moral rights for performers (meaning principally actors and musicians). Unlike copyright or most related rights moral rights protect the reputation and are not economic rights to be sold or traded. The treaties introduce two rights for performers: the right to claim identification in relation to a performance and the right to object to modification or distortion of a performance that would be prejudicial to the performer's reputation. Authors have enjoyed similar rights for quite some time.

6. **Rationale for government intervention:** action is necessary in order to meet an obligation in a treaty that the UK, along with all other Member States of the European

¹ The World Intellectual Property Organisation is a specialist agency of the United Nations with a mandate to manage intellectual property matters, which includes copyright and performers' rights.

² The WPPT also covers economic rights for performers and economic rights for the producers of sound recordings (phonograms). These rights already exist in the UK for at least UK right holders, but would not necessarily be granted to UK right holders in countries party to the WPPT if the UK does not ratify the WPPT as there would often be no obligations on those countries to do so.

Community, has agreed to ratify¹. Not to ratify the treaty would prejudice the interests of United Kingdom performers abroad, and also the interests of the producers of sound recordings in other countries. This is because the WPPT also covers economic rights for performers and economic rights for the producers of sound recordings and, while these rights already exist in the UK for at least UK right holders, they would not necessarily be granted to UK right holders in countries party to the WPPT if the UK does not ratify the WPPT as there would often be no obligations on those countries to do so. There are 55 contracting parties to WPPT.

7. Were the United Kingdom not to ratify WPPT then this could, moreover, prevent the European Community and other Member States from ratifying the treaty as already agreed in a Council Decision, or put the UK in breach of that Council Decision to ratify the treaty, with the risk of infraction proceedings against the UK.

Section 3. Consultation

8. **Within Government:** policy responsibility for intellectual property matters lies with the Patent Office, an Executive Agency of the Department of Trade and Industry. Proposals for the introduction of moral rights for performers have been developed with the knowledge of officials in the Departments of Trade and Industry and Culture, Media and Sport and the Small Business Service.

9. **Public consultation:** a formal consultation on certain principles took place in 1999, and there have subsequently been some informal contacts with interested organisations. This first consultation related to the generality of implementation of WPPT obligation for performers' moral rights and the views were received from a range of interests, both those representing performers and those representing parties who would have to give effect to performers' moral rights.

10. A further formal consultation on draft regulations, open to all interested parties, closed in March 2005 and, in parallel with that exercise, a number of informal meetings were held with the most affected interested parties. Once again views were received from a range of interests, both those representing performers and those representing those who would have to give effect to performers' moral rights, in light of which the draft regulations were revised (see Options, below).

Section 4. Options

11. The introduction of moral rights for performers is necessary if the UK is to ratify the WPPT. However, the treaty sets only the minimum level of rights which contracting states must provide and leaves open a number of possibilities as to the precise scope and form of the rights in UK law. In this respect, five main options were considered:

Option 1 - do no more than required by the WPPT

12. This would mean limiting the rights in scope to the aural parts of performances (the WPPT generally does not cover the audiovisual area), and taking up all of the limitations possible under the WPPT, notably that the right to be identified need not apply to all uses of

¹ Council Decision 2000/278/EC, O.J. No L 89, 11.4.2000, p. 6

performances and that moral rights need not be applied to 'existing' performances (i.e. which have taken place prior to the introduction of the rights in the UK).

13. Option 1 would allow implementation using secondary legislation, through the powers of the European Communities Act (ECA) 1972. Although the WPPT is limited to aural performances, limiting moral rights to live aural performances and excluding them from other parts of such performances would create a complex and uncertain regime; particularly as the aural parts of the performance are normally intrinsically linked with the rest of the performance. Similarly, limiting moral rights to certain types of sound recordings would require users to undertake difficult investigations into the origins of a work to determine whether moral rights attach. This would be the effect if Option 1 is adopted. Performers may feel that it is unfair or illogical if their moral rights are limited to the minimum required by the WPPT (see Option 1 above), e.g. so as to extend only to sound aspects of performances or not apply at all to past performances. However, the interests of a wide range of users of their work, who stand to be affected to a greater or lesser extent depending on the precise nature of the rights granted to performers, have also to be considered.

Option 2 - go beyond the WPPT obligations, but not to cover film

14. This could include applying rights to all the elements of live performances, and not just in respect of the aural parts of performances, and applying moral rights to existing performances, but would not go so far as applying rights where a performance has been recorded as a film.

15. Option 2 could be delivered by secondary legislation as it would amount to matters arising out of or related to the WPPT. Since the powers conferred by ECA do permit provision to be made for matters arising out of or related to the obligations imposed by the WPPT, moral rights can be provided in relation to any type of live performances and to sound recordings of any type of performance regardless of whether that is made directly or indirectly from the live performance. Moreover, moral rights can be provided in relation to some existing performances, specifically those where the performer is alive and still owns the property rights in the recording of the performance. Provision of this type would be consistent with Option 2, but it would be possible to take only some elements of option 2, for example to cover any type of live performance but not to apply rights to existing performances. Option 2 is therefore a collection of further detailed options to select from.

Option 3 - extend the scope of moral rights to all performances, including film

16. In particular this would apply rights to a performance that has been recorded as a film and downstream use of that film, such as by including it in a broadcast or other communication to the public.

17. Option 3 would require primary legislation and there is no realistic prospect of Parliamentary time being found for this in the foreseeable future.

18. A Diplomatic Conference was held under the auspices of WIPO in December 2000 with a view to concluding a treaty on the protection of audiovisual performances which would have introduced moral rights in line with Option 3. However, ultimately no treaty was adopted. This situation may change in the future and, although there is no immediate prospect of any significant progress on such a treaty, it may additionally not be sensible to

follow Option 3 at this time and introduce a regime in the United Kingdom that could be out of line with future international obligations.

Option 4 – apply each of Options 1 to 3 in a similar way to authors’ moral rights

19. In particular, this would mean providing the right to be identified so that it is subject to assertion by the performer, and also with the possibility that the performer can contractually agree to waive moral rights.

20. Option 4 could be added to any of Options 1 to 3 whatever the legislative route used.

Option 5 – rely on existing practice and legislative provision, and encourage greater compliance if necessary, ie a non-legislative option

21. Performers are protected by some statutory provision at the moment, ie they could in some circumstances pursue a common law claim for ‘passing off’ where a person has passed off a performance of theirs as that of someone else’s and in other situations a claim for defamation might apply where a performance has been modified in a way that damages the performer’s reputation. Moreover, many people do already identify performers in programmes, inserts with CDs and so on and this non-legislative recognition of performers’ rights could be encouraged, perhaps by facilitating the drawing up of a code of practice.

22. Option 5 does not require legislation. The existing legislative provision indicated in Option 5 would not give performers clear moral rights in all the situations envisaged by the WPPT. If the UK and other Member States of the European Community ratify the WPPT in line with the Council Decision to do so, the UK could in the future face infraction proceedings were there to be any discrepancy between UK provision on performers’ moral rights and the WPPT. Moreover, the same provisions under the law relating to passing off and defamation would have applied to authors of copyright works, but this did not stop introduction of specific moral rights for authors in the Copyright, Designs and Patents Act 1988. The lack of legislative underpinning would also mean that a code of practice would have least effect on those people who do not currently give effect to moral rights for performers. Performers would be likely to perceive the lack of specific legislative provision as particularly unfair in all these circumstances. Option 5 is therefore not favoured, although a code of practice could still be encouraged to help give practical effect to legislative provision.

23. **Analysis of the options:** the impact on users would be least with Option 5, then Option 1 and greatest with Option 3. With Option 4 added to any of Options 1 to 3, the impact on users would, however, be reduced, particularly as performers would probably not assert their rights in all situations and may waive them in others. Also, authors may feel aggrieved if performers’ rights are not subject to similar conditions as apply to their own moral rights, which would be the case if Option 4 is not combined with whichever of Options 1 to 3 is taken forward. The legislation therefore needs to balance competing interests and to find solutions which are workable and fair to all concerned.

24. The regulations are based upon Option 2 combined with Option 4, by going slightly further than the strict limits of the WPPT and imposing similar conditions to those that currently apply to authors’ moral rights. However, only some of the detailed options within

the scope of Option 2 are delivered by the regulations, in particular the rights do not extend to performances given prior to the regulations coming into force.

25. The details of the draft regulations were revised in a number of areas to address concerns expressed in response to the second consultation exercise:

- to make the regime more flexible, a performer and the person responsible for identifying him may agree between themselves on the way that the performer is to be identified and need not follow the specific methods of identification stipulated in the regulations;
- to simplify the regime, when a performance is given by a group the right for a performer to be identified is not infringed in some circumstances where the group itself is identified and consequently there is no longer any need for assertions to be made in relation to groups;
- to better reflect the reality of relationships between performers and promoters, etc assertions may now be signed on behalf of a performer, e.g. by an agent, manager or union on his behalf, with necessary authority and similar provision has been made for consent and waiver on behalf of a performer;
- for the avoidance of doubt an additional exception has been introduced for modifications which are consistent with normal editorial or production practice and the requirement for a sufficient disclaimer no longer requires it to be given at the time of the act;
- the rights do not apply to any performance given before the regulations come into force, since to do otherwise would require complex and expensive investigations into the identities of a large number of performers sometimes in very old performances.

Section 5. Costs and benefits

26. **Sectors and groups affected:** performers include principally musicians and actors and extend to people performing poetry or other readings and other artists such as mimes. They need not be professional performers, although it is envisaged that professional actors and musicians will be the principal beneficiaries of moral rights.

27. Potentially, performers' rights to be identified could affect a wide range of businesses, particularly since there are many places where live performances could from time-to-time take place, e.g. in hotels, restaurants and bars and at sports grounds. Live performances also take place in non-commercial situations such as at events held by charities or voluntary bodies, and in schools. However, the right is likely to be most relevant to those more directly involved in regularly holding live performances or using live or recorded performances. Business sectors in this category are, e.g., record producers, broadcasters, cable operators, concert halls and theatres.

28. The right to object to derogatory treatment could impact on virtually any sector where performances are used (in any manner), but there seems no reason to believe that activities in many fields would be likely to involve prejudice to the reputation of performers. Again, the potential impact is likely to be greatest on business sectors most directly involved in using the work of performers, such as those exemplified above as falling in this category.

29. **Benefits to performers:** performers will benefit from moral rights in that they will enable them to seek redress (ultimately through the courts) if users of their work fail to identify them in cases where the right to be identified applies, or subject their work to modifications prejudicial to their reputation. It is envisaged that both injunctive relief (a court order to restrain offending activity) and damages would be available to performers.

30. It is difficult to quantify the benefits to performers of moral rights, particularly since they are largely intangible rights aimed at protecting their personality and reputation, rather than being economic rights intended to enable them to obtain payments for the use of their work, although potentially they could waive those rights in return for a payment. Moreover, there have only been a limited number of court actions for infringement of authors' moral rights to indicate levels of damages which might be awarded since those rights were introduced in 1988.

31. It is worth noting that in very many cases performers are already identified with their performances and terms in licences, assignments, etc can already be used to stipulate this. Equally in some circumstances a performer may pursue a common law claim for 'passing off' where a person has passed off a performance of theirs as that of someone else's and in other situations a claim for defamation might apply where a performance has been modified in a way that damages the performer's reputation. However, these options do not give performers clear moral rights in all the situations envisaged by the WPPT.

32. **Costs for performers:** the rights granted to performers arise automatically on giving a performance, and there is no legal requirement for registration of a performance in order to secure rights. Therefore, there will be no costs to performers in obtaining moral rights, although small costs would arise from the necessity to assert the rights. Clearly, however, there may be costs involved in exercising or enforcing the rights, such as legal professional costs.

33. **Costs to users of performances:** there could be additional, recurring, costs for users, such as broadcasters, the music industry, theatrical and orchestral promoters, in identifying performers, but only in circumstances where they do not presently identify performers voluntarily and they become obliged to do so as a result of the regulations.

34. Additional costs might also arise if the effect of either the right to be identified or the right to object to derogatory treatment is that businesses have to alter or discontinue any existing practices or methods of operation. However, no such practices or methods have been identified. There would also be non-recurring costs for users in defending any actions brought by performers for infringement of their moral rights, and in payment of damages resulting from successful actions. Indirect, recurring, costs might arise from insurance against litigation or claims for damages.

35. Given that it is already the practice to name performers in many cases, and the Government is not aware that practices likely to prejudice the reputation of performers are widespread, it seems unlikely that the level of any additional costs identified above would be high.

36. The nature of the potential costs to users is similar whichever of Options 1-3 is considered, but Options 2 and 3 imply progressively higher levels of potential cost since each would further extend the scope of moral rights. Adding Option 4 to one of the other Options 1-3 would reduce costs for users however, and Option 5 would only give rise to an additional cost for users where users who do not currently give effect to moral rights for performers are influenced by a code of practice to do so.

37. During the consultation exercise that closed in March 2005 no detailed comments were received on costs, but several broadcasters and organisers representing broadcasters, producers and the advertising industry pointed out that any increased provision of credits for performers would increase costs, for example by reducing programme content or available advertising time. However, no indication was received that increased provision of credits would actually result from the regulations and several organisations welcomed special provisions for groups and the exceptions to the rights since they would mitigate any increase in costs. The consultation has not, therefore, led the Government to alter its initial estimate that the level of any additional costs will not be high.

38. **Other Costs:** charities, voluntary bodies and other non-business users such as schools might incur costs, e.g. if they become obliged to identify performers where they would not do so at present or if they infringe the right to object to derogatory treatment, but it is not anticipated that the impact on such users would be significant. No evidence was received during the consultation exercise to dispute this conclusion.

Section 6. Small Firms Impact Test

39. Initial soundings with trade associations in the music industry did not identify any negative impacts on small firms and no negative impacts or unintended consequences for small businesses in this or any other sector have been identified during the consultation exercise that closed in March 2005.

Section 7. Competition assessment

40. A simple assessment has been carried out using the competition filter test set out in Cabinet Office guidance. This indicated that the draft regulations would not have a significant effect on competition.

41. Relevant business sectors are performers, record producers, broadcasters, cable operators, and venue operators, including theatres. Between them these markets include a very large number of firms, ranging from individual performers, through public houses, local theatres, small independent broadcasters and record producers to national broadcasters and major international record producers. Since the draft regulations do not address the audio visual area, film & video producers should not be affected.

42. As discussed above, the regulations are not anticipated to have a significant cost impact on any of the markets affected. In addition the markets are not characterised by rapid technological change brought about by these regulations, they are not made up of small numbers of firms, the regulations should not impact on some firms more than others in the relevant markets, nor change the number or size of firms. Equally, ongoing costs should not be greater for new businesses than for existing firms.

Section 8. Enforcement, sanctions and monitoring

43. The regulations provide rights for performers which would be enforced by those performers, ultimately through the courts. However, it is believed that featured performers in particular and groups are currently identified along with their performances in the majority of cases. Therefore relatively few cases are envisaged concerning this right.

Section 9. Implementation and delivery plan

44. Once the regulations introducing moral rights for performers come into force it will be possible for the UK to ratify the WPPT. However, this will only happen once all the members of the European Union are in a position to ratify together.

Section 10. Post-implementation review

45. It is intended that three years after they come into force the Patent Office will review the effectiveness of the regulations. It is envisaged that this will be done by means of contacts with interested parties to assess the costs and benefits and any compliance problems.

Section 11. Summary and recommendation

46. In order to comply with international treaty obligations five different options were considered for the introduction of moral rights for performers depending on whether or not to employ legislation, whether to include some or all aspects of audiovisual performances, whether to apply the rights to existing performances and to what extent the rights should mirror those already provided for authors.

47. Since the rights available are not economic rights the benefits are not readily quantifiable, but the principal benefit is greater certainty of the rights both for performers whose performances are used in the United Kingdom and for the users of their performances. Also, since the provision of these rights will allow United Kingdom and European ratification of the WPPT, provision of these rights is indirectly in the interests of United Kingdom performers abroad, and also in the interests of the producers of sound recordings in other countries given that the WPPT provides rights in this area too. Other countries party to the WPPT will be obliged to grant the rights stipulated in the treaty to UK performers and producers. Implementing moral rights for performers also avoids putting the UK in breach of the Council Decision to ratify WPPT, avoiding the risk of infraction proceedings against the UK

48. No evidence has been produced to show that any additional provision of credits will result from the regulations and so the value of any associated recurring or litigation costs is assumed to be very small or non-existent. This is likely to be because performers are already usually identified with their performances and in some cases already have recourse to litigation where that identification is required by the terms of licences or the like.

49. No additional costs have been identified as resulting from the introduction of the right to object to derogatory treatment. This is likely to be because the only potential costs are those of litigation, insurance against litigation and claims for damages and all of these costs already arise for the relevant business sectors.

50. After consultation with interested parties the recommended option is to use legislation to provide moral rights for all the elements of live performances, but not to go so far as applying rights where a performance has been recorded as a film and not to apply moral rights to existing performances.

Section 12. Ministerial declaration

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs

Signed by the responsible Minister

Lord Sainsbury of Turville

Date 9th January 2006

Contact point: Karl Whitfield
The Patent Office
Room 1.R36
Concept House
Cardiff Road
Newport
South Wales
NP10 8QQ
Tel: 01633 814734
E-mail karl.whitfield@patent.gov.uk