

**EXPLANATORY MEMORANDUM TO
THE COPYRIGHT, DESIGNS AND PATENTS ACT 1988 (AMENDMENT)
REGULATIONS 2010**

2010 No. 2694

1. This explanatory memorandum has been prepared by the Department of Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose of this statutory instrument is to re-implement article 8(2) of the Rental and Lending Directive¹ by removing exceptions to rights conferred on performers and owners of copyright sound recordings for use of their recordings. The statutory instrument also repeals a mechanism introduced in 2003 whereby some licensing terms for these rights must be notified to the Secretary of State and may be further referred to the Copyright Tribunal for a determination on their reasonableness.

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

3.1 None

4. Legislative Context

4.1 Musical performers and record companies have rights under EU legislation and international treaties to be financially rewarded for use of their recorded performances and recordings.

4.2 Article 8(2) of the Rental and Lending Directive requires member States to provide a right to equitable remuneration for owners of copyright sound recordings and performers when commercially reproduced sound recordings are broadcast or are otherwise communicated to the public. The only permitted limitations to these rights are set out in article 10(1) and 10(2) of that Directive.

4.3. The rights conferred by article 8(2) of the Rental and Lending Directive are implemented by the Copyright Designs and Patents Act 1988 (“CDPA”). The owner of a copyright sound recording has exclusive rights over the playing of that recording in public and its communication to the public. Additionally performers have a right to equitable remuneration in the circumstances set out in section 182D of the CDPA. These rights are administered in the United Kingdom by Phonographic Performance Limited (“PPL”), a licensing body that licenses rights in sound recordings and performances on behalf of record companies and performers respectively in the United Kingdom. These rights are subject to exceptions in sections 67 and 72(1B)(a) and paragraphs 15 and 18(1A)(a) of Schedule 2 to the CDPA (referred to as “the Exceptions”) which allow bodies set up for charitable purposes and other not-for-profit organisations to play recorded or broadcast music in public if certain conditions are met.

4.4 Exceptions exist in the CDPA to facilitate consumer access or are for socially desirable purposes. Sections 67 and 72 are re-enactments of exceptions which existed

¹ Directive 2006/115/EC

under previous copyright legislation. Section 67 is to allow organisations that operate for the benefit of society to be exempt from paying royalties when using recorded music, and section 72 was initially designed to enable those who use a television or radio in a publicly accessible location to which entry is free to avoid paying for a number of copyright licences for that use.

4.5 The Rental and Lending Directive was amended in 2001 by the Copyright Directive² which narrowed the scope of permitted limitations to the rights in article 8(2). Any exception permitted by article 10(1) or (2) may only be applied in certain special cases which do not conflict with a normal exploitation of the subject-matter and do not unreasonably prejudice the legitimate interests of the right holder. This qualification is referred to as the three step test.

4.6 The Copyright and Related Rights Regulations 2003³ implemented the three step test by narrowing the Exceptions. They also introduced sections 128A and 128B of the CDPA which require a licensing body to notify any licence or scheme authorising use of copyright sound recordings which had previously been exempt under section 72 to the Secretary of State who may in turn refer the licence or scheme to the Copyright Tribunal for a determination whether it is reasonable in the circumstances.

4.7 The Exceptions do not apply to rights of composers, lyricists and music publishers, administered by PRS for Music (“PRS”). So whilst a charity or not-for-profit organisation may use broadcast or recorded music without a PPL licence, it still requires a licence from PRS. The Regulations repeal the Exceptions and sections 128A and 128B and amend section 107(5). The amendments made to section 107(5) have been made as, after the Regulations come into force, the offence created in section 107(3) can be committed in circumstances where previously the copyright exemptions being repealed would have applied. Para 1(1)(d) of Schedule 2 to the European Communities Act 1972 provides that an offence may not be created which may involve the imposition on summary conviction of a sentence of imprisonment of more than 3 months.

5. Territorial Extent and Application

5.1 This instrument applies to the United Kingdom.

6. European Convention on Human Rights

6.1 Baroness Wilcox has made the following statement regarding Human Rights:

In my view the provisions of The Copyright Designs and Patents Act 1988 (Amendment) Regulations 2010 are compatible with the Convention rights

7. Policy background

- What is being done and why

7.1 This statutory instrument amends the CDPA by repealing the Exceptions and the referral mechanism in sections 128A and 128B of the CDPA.

² 29/2001/EC

³ SI 2003/2498

7.2 The Exceptions have been of benefit to some charitable and not-for-profit organisations but concern has been expressed from both right holders and music users that the Exceptions in their current form do not balance their interests correctly. The current system is also considered very complex as the Exceptions do not apply to rights of composers and lyricists, administered by PRS for Music.

7.3 The Intellectual Property Office suggested options for reform in its July 2008 consultation document. Further consultation was undertaken during 2009, including holding a number of consultation meetings. The response to the consultation, announcing repeal of the Exceptions, was published on 12 November 2009.

7.4 The impact assessment indicates that the financial costs (i.e. price of licences) to music users of repeal of the Exemptions with a simplified tariff system (based on a flat fee of £81 per organisation⁴) would be £18.7m per year.⁵ However, it is likely that this figure is an over-estimate as the impact assessment was based on assumptions made about the number of charitable and not-for-profit organisations that use recorded and/or broadcast music.⁶ Moreover, PPL has agreed that most organisations will pay far less than £81 per annum, roughly halving the figure. PPL will also not make this charge on charities until 1 January 2012. (Further details will be on PPL's website: www.ppluk.com)

7.5 PPL have agreed to match the voluntary exemptions that PRS for Music offer (including patient areas of hospitals, divine worship and civil registration services) and to fund an independent complaints reviewer. They will also operate a joint licensing system with PRS for Music so that both licences will be obtained through a single application.

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

7.6 The consultation also proposed the repeal of sections 128A and 128B of the CDPA. Any anticipated benefit to copyright licensees from reference to the Tribunal under these sections has not materialised. The assumption that the licensee would not bear the costs of litigating before the Tribunal was made on the basis that the Secretary of State, not the licensee or prospective licensee, referred the case to the Tribunal. However, cases litigated under these provisions have required further input from the licensees, prospective licensees and their representative bodies and therefore they have become parties to the litigation.

7.7 As this referral system has not worked well we are repealing sections 128A and 128B. Prospective licensees, licensees and bodies representative of licensees will continue to be able to make references to the Copyright Tribunal under the CDPA.

⁴ This is in the middle of the range that PPL charge most commercial organisations.

⁵ One-off administrative, negotiation and litigation costs to charitable/not-for-profit organisations would add a further one-off £1.6m (making £20.3m). This figure is still less than the total cost to users of Option 2 (£24.8m) as Option 1 allows for a simple licensing system, offering certainty about costs to music users and less administration, negotiation and litigation costs than under Option 2. See <http://www.ipo.gov.uk/govresponse-musiclicensing.pdf> for details of the options and their costs.

⁶ For instance, there is no data to indicate usage levels so Europe Economics, who carried out the impact assessment, took the mid-point of 50 percent for charities generally, amateur sports clubs, community buildings/rural halls. However, for charity shops music usage was estimated at 90 per cent and religious buildings at 75 per cent, based on information from the Association of Charity Shops and from Christian Copyright Licensing International respectively. There are several reasons why this assumption may be too high. For example, there are many small organisations with charitable status (perhaps with one office and few staff) that are unlikely to use music at all.

There are in addition other measures to assist licensees and prospective licensees, including mediation. PPL and PRS have introduced Codes of Conduct to improve their licensing performance and these offer the possibility of a reference to a complaints reviewer independent of these licensing bodies.

- Consolidation

7.8 Intellectual Property Office publishes a consolidated version of the CDPA on its website which is made available as soon as possible after the statutory instrument is published.

8. Consultation outcome

8.1 The Intellectual Property Office issued a consultation document in July 2008 inviting views on three options for the re-implementation of obligations in article 8(2) of the Rental and Lending Directive. The options were (a) the repeal of exceptions from public performance rights which benefit charitable/not-for-profit/third sector organisations (b) narrowing the exceptions and extending their application to PRS for Music licensing where they continued to apply and (c) replacing the exemptions with a right to equitable remuneration. A wide range of charitable, not-for-profit and other organisations as well as businesses, legal representatives, the music industry and other government departments were notified of the proposals. The formal consultation closed at the end of October 2008. The Government received around 100 responses. Just over half were from charities and not-for-profit organisations. Around 20 were from the music industry. A few were from individuals and a variety of other organisations. The Government published a summary of responses on 11 March 2009.⁷ Further consultation was undertaken during 2009. The response to the consultation announcing repeal of the Exceptions and the rationale for this was published on 12 November 2009.

9. Guidance

9.1 The Government is not issuing guidance. PPL will provide information on licensing on its website.

10. Impact

10.1 The impact on business, charities and not-for-profit organisations is that charities and not-for-profit organisations that do not fall within the voluntary exemptions offered by PPL will require a PPL licence from the date these Regulations come into force. This licence will be available through the joint licensing system operated by PPL and PRS for Music.

10.2 There is an impact on public sector organisations to the extent that their use of broadcast music falls within the exception in section 72(1B)(a) and paragraph 18(1A)(a) of Schedule 2 to the CDPA. Any such organisations will require a PPL licence to continue this use of broadcast music from the date the Regulations come into force unless they are subject to PPL's voluntary exemptions.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on the OPSI website.

⁷ <http://www.ipso.gov.uk/response-musiclicensing.pdf>

11. Regulating small business

11.1 Some small businesses' use of broadcast music was exempt from PPL licensing prior to the amendment of the Exceptions in 2003. The referral mechanism in section 128A and 128B of the CDPA applies to the PPL licensing introduced for these businesses. These sections will be repealed by these Regulations.

12. Monitoring & review

12.1 The Government will continue to monitor how well the new measures work as part of its regular stakeholder engagement.

13. Contact

Antoinette Graves at the Intellectual Property Office (telephone 01633 817777 or enquiries@ipo.gov.uk) can answer any queries regarding the instrument.

THE COPYRIGHT, DESIGNS AND PATENTS ACT 1988 (AMENDMENT) REGULATIONS 2010

Transposition Note

Directive 2006/115/EEC of the European Council and Parliament of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property		
This Directive codifies Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. It provides for a harmonisation of certain rights related to copyright, including the rights of fixation, broadcasting, communication to the public and distribution. The beneficiaries of these rights are performers, producers of sound recordings, film producers and broadcasting organisations.		
Article	Objectives	Implementation
8(2)	<p>Article 8(2) requires Member States to provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers.</p> <p>Recital 16 is relevant.</p> <p>The only permitted limitations to these rights are set out in article 10(1) and 10(2) of the Directive. Article 11 of the Directive 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 (2001/29/EC) (“the Copyright Directive”) inserted article 10(3) into the Directive which contains a test to qualify the permitted exceptions in articles 10(1) and 10(2).</p>	<p>Regulation 3</p> <p>Section 16(1)(c) of the Copyright Designs and Patents Act 1988 (“the Act”) gives a copyright owner exclusive rights over the performance or playing of its copyright work in public. These rights are subject to exceptions, including the exception in section 67 of the Act. Article 10(3) of the Directive was implemented by regulation 18 of the Copyright and Related Rights Regulations 2003 (“2003 Regulations”) which cut down the scope of the exception in section 67. Section 182D of the Act also gives a performer rights to equitable remuneration in the circumstances required by article 8(2) of the Directive. These rights are subject to the exception in paragraph 15 of Schedule 2 of the Act which was also narrowed by regulation 18 of the 2003 Regulations to ensure compliance with article 10(3) of the Directive.</p> <p>Regulation 3 of these Regulations re-implements article 8(2) of the Directive by repealing section 67 and paragraph 15 of Schedule 2 to the Act.</p> <p>Regulation 4</p> <p>Section 72(1B)(a) also contains an exception to the exclusive rights conferred by section 16(1)(c) of the Act which was narrowed by regulation 21 of the 2003 Regulations to implement article 10(3) of the Directive. There is an equivalent exception for performers’ rights in paragraph 18(1A)(a) of Schedule 2 to the Act. Regulation 4 of these Regulations re-implements article 8(2) of the Directive by repealing the exceptions in section 72(1B)(a) and paragraph 15(1A)(a) of Schedule 2 to the Act.</p>

		Regulation 5 The 2003 Regulations introduced the referral mechanism in sections 128A and 128B of the Act which only applies to those who are required to obtain licences following the reduction of the scope of the exception in section 72. Regulation 5 re-implements article 8(2) by repealing these sections.
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Note on over-implementation

These regulations do what is necessary to implement the Directive, including making consequential changes to domestic legislation to ensure its coherence in the area to which they apply insofar as they repeal the exceptions in paragraphs 15 and 18(1A)(a) of Schedule 2 to the Act and sections 128A and 128B of the Act. These regulations do more than is necessary to implement the Directive insofar as the repeals of sections 67 and 72(1B)(a) of the Act give copyright owners an exclusive right over use of their works, rather than a right to equitable remuneration. However, this implementation is consistent with previous implementation of article 8(2) of the Directive in the United Kingdom for copyright sound recordings. It therefore provides the same treatment as for other copyright works. It was also found in the impact assessment that giving copyright owners rights to equitable remuneration as opposed to exclusive rights would be a complex and therefore expensive option.

Annex A Summary: Intervention & Options

Department /Agency: Intellectual Property Office	Title: Impact Assessment of : Review of exemptions to copyright	
Stage: Final Proposal Stage	Version: 0.1d	Date:
Related Publications: EUROPE ECONOMICS REPORT		

Available to view or download at:

<http://www.ipo.gov.uk/pro-policy/consult/consult-closed/consult-closed-2009.htm>

Contact for enquiries: Antoinette Graves

Telephone: 00 44 (0)1633 813876

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

There are certain exemptions in the Copyright Designs and Patents Act 1988 ("CDPA") which allow charitable and not-for-profit organisations to play recorded or broadcast music in public without obtaining a licence for the use of the sound recording and performers' rights in that record or broadcast ("PPL licence"). Government intervention is necessary to achieve horizontal equity with a view to finding a balance for all the interested parties and to address the anomalies that currently exist between rights holders and users.

Also, a mechanism exists under sections 128A and 128B of the CDPA for the Secretary of State to refer certain licences and licensing schemes to the Copyright Tribunal. Right holders and the Chair of the Tribunal have indicated that this process does not work effectively and should be reviewed.

What are the policy objectives and the intended effects?

To achieve the correct balance between the interests of right holders and users in a way which is consistent with EU and international law.

To ensure that the process for the Secretary of State to refer licensing schemes to the Copyright Tribunal is only maintained if it works effectively.

What policy options have been considered? Please justify any preferred option.

The government has already consulted (July 2008) on the options to: repeal the exemptions; recast the exemptions; or repeal the exemptions and introduce a right to equitable remuneration. The consultation also proposed repeal of the provisions which relate to the referral of PPL licences to the Copyright Tribunal.

The preferred option is option 1 on the basis that it simplifies the process, has the broad support of the key stakeholders and is likely to bring about the most efficient outcome to both rights holders and users. Although option 2 gained the most support amongst users, it inherently contains many uncertainties and would be more costly to implement. Option 3 appears to be more beneficial to small users, but it would bring about a more complex, resource-intensive licensing system which perpetuates the difference in the licensing rights.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The safeguards will be reviewed periodically and complaint levels will be monitored regularly.

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

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:

Baroness Wilcox

.....Date: 4th November 2010

Summary: Analysis & Evidence

Policy Option: 1	Description: Repeal the exemptions contained in Section 67 and 72 (1B)(a) and paragraphs 15 and 18 of Schedule 2 of the CDPA
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups' Users: Cost of purchasing PPL licences (£18.7m annual), associated administration costs to users who are no longer exempt (£1m one-off and negotiation costs (£570,000 one-off). PPL: Cost of administration in providing additional licences (£3.7m one-off and £1.9m annual) and negotiation costs (£935,000 one-off).	
	One-off (Transition)		Yrs
	£ 6.3 million		1
	Average Annual Cost (excluding one-off)		
	£ 20.6 million	Total Cost (PV)	£ 196.2 million
Other key non-monetised costs by 'main affected groups' There will be social costs for users who cease playing music because they cannot afford a PPL licence.			

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups' PPL: £18.7m additional revenue obtained on behalf of its members by licensing additional users (£15m direct financial benefit to those members once PPL has deducted collection and distribution costs).	
	One-off		Yrs
	£		
	Average Annual Benefit (excluding one-off)		
	£ 18.7 million	Total Benefit (PV)	£ 174.3 million
Other key non-monetised benefits by 'main affected groups' Securing greater rewards for innovative activity may improve incentives to innovate- indirectly benefitting wider society. As well as ensuring compliance with EU legislation, this option would remove the current complexities surrounding music licensing requirements- making it easier for users to understand and comply.			

Key Assumptions/Sensitivities/Risks
 Not all organisations use music currently. Use varies according to type of organisation- but average use for organisations overall is 56%. This assumes that 90% of currently exempt organisations would continue using music and would purchase a PPL licence. The level of tariff is based on a simplified tariff structure, not the existing tariffs. It is assumed that the licence will not need to be re-negotiated over the 11 year period. There is a risk that users will want to renegotiate more regularly.

Price Base Year 2008	Time Period Years 11	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £-21.8 million
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What is the geographic coverage of the policy/option?	UK
On what date will the policy be implemented?	2010
Which organisation(s) will enforce the policy?	Licensing bodies collect royalties subject to normal legal procedures
What is the total annual cost of enforcement for these organisations?	Not available- administered by private organisations at own expense
Does enforcement comply with Hampton principles?	Yes
Will implementation go beyond minimum EU requirements?	Yes
What is the value of the proposed offsetting measure per year?	£ N/A
What is the value of changes in greenhouse gas emissions?	£ N/A
Will the proposal have a significant impact on competition?	No
Annual Cost (£-£) per organisation (excluding one-off)	Micro/Small/Medium/Large £81
Are any of these organisations exempt?	No- unless PPL/PRS operate discretionary exemptions

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)
Increase of	£	Decrease of	£	Net Impact
				£

Key: Annual costs and benefits: (Net) Present

Summary: Analysis & Evidence

Policy Option: 2

Description: Re-cast the exemptions

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' User: Licensing costs (£18.5m annual), associated administrative costs (£3.3m one-off and £1.7m annual) and negotiation costs (£927,000 one-off and £76,000 annual). PPL: Administration costs (£4.6m one-off and £2.3m annual) and negotiation costs (£927,000 one-off and £185,000 annual). PRS: Financial costs (£1m annual) and administrative costs (£30,000 one-off and £84,000 annual).
	One-off (Transition)	Yrs	
	£ 9.9 million	1	
	Average Annual Cost (excluding one-off)		
	£ 24 million	Total Cost (PV) £ 228 million	
Other key non-monetised costs by 'main affected groups' There will be social costs for users who cease playing music because they cannot afford a PPL licence.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Users: Financial benefit to users who qualify for the re-cast exemption (£1m annual). PPL: Additional revenue obtained on behalf of its members by licensing additional users (£18.5m annually, of which £14.8m would directly benefit those members).
	One-off	Yrs	
	£		
	Average Annual Benefit (excluding one-off)		
	£ 19.5 million	Total Benefit (PV) £ 182.1 million	
Other key non-monetised benefits by 'main affected groups' Securing greater rewards for innovative activity may improve incentives to innovate- indirectly benefitting wider society. There may also be social benefits, as users with a turnover under £20,000 will no longer have to obtain a PRS licence.			

Key Assumptions/Sensitivities/Risks

Not all organisations use music currently. Use varies according to type of organisation- but average use for organisations overall is 56%. This assumes that 85% of currently exempt users would continue using music and purchase a PPL licence. The level of tariff is based on the existing tariff structure, not a simplified tariff structure. There is a risk that disputes will arise between collecting societies and NHS trusts regarding the scope of the exemption within NHS facilities.

Price Base Year 2008	Time Period Years 11	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £ -45.9 million
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What is the geographic coverage of the policy/option?	UK
On what date will the policy be implemented?	2010
Which organisation(s) will enforce the policy?	Licensing bodies collect royalties subject to normal legal procedures
What is the total annual cost of enforcement for these organisations?	Not available- administered by private organisations at own expense
Does enforcement comply with Hampton principles?	Yes
Will implementation go beyond minimum EU requirements?	Yes
What is the value of the proposed offsetting measure per year?	£ N/A
What is the value of changes in greenhouse gas emissions?	£ N/A
Will the proposal have a significant impact on competition?	No
Annual Cost (£-£) per organisation (excluding one-off)	Micro/Small/Medium/Large £238
Are any of these organisations exempt?	Yes- those with a turnover under £20,000

Impact on Admin Burdens Baseline (2005 Prices)		(Increase – Decrease)
Increase of	£	Decrease of £
Net Impact		£

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Summary: Analysis & Evidence

Policy Option: 3

Description: Replace the exemptions with a right to equitable remuneration

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Users: Cost of purchasing licences (£26.8m annual), associated administrative costs (£5.2m one-off and £2.6m annual) and negotiation costs (£1.3m one-off and £347,000 annually). PPL: Cost of administration in providing additional licences (£5.4m one-off and £2.6m annual) and negotiation costs (£1.3m one-off and £268,000 annual).
	One-off (Transition)	Yrs	
	£ 13.2 million	1	
	Average Annual Cost (excluding one-off)		
	£ 32.8 million	Total Cost (PV) £ 324.4 million	
Other key non-monetised costs by 'main affected groups' There will be social costs for users who cease playing music because they cannot afford a PPL licence.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' PPL: Additional revenues obtained on behalf of its members by licensing additional users (£26.8m annual).
	One-off	Yrs	
	£		
	Average Annual Benefit (excluding one-off)		
	£ 26.8 million	Total Benefit (PV) £ 250.1 million	
Other key non-monetised benefits by 'main affected groups' Securing greater rewards for innovative activity may improve incentives to innovate- indirectly benefitting wider society.			

Key Assumptions/Sensitivities/Risks

Not all organisations use music currently. Use varies according to type of organisation- but average use for organisations overall is 60%. This assumes that 75% of currently exempt users would continue using music and purchase a PPL licence. The level of tariff is based on the existing tariff structure, not a simplified tariff structure.

Price Base Year 2008	Time Period Years 11	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £ -74.2 million
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What is the geographic coverage of the policy/option?	UK
On what date will the policy be implemented?	2010
Which organisation(s) will enforce the policy?	Licensing bodies collect royalties subject to normal legal procedures
What is the total annual cost of enforcement for these organisations?	Not available- administered by private organisations at own expense
Does enforcement comply with Hampton principles?	Yes
Will implementation go beyond minimum EU requirements?	No
What is the value of the proposed offsetting measure per year?	£ N/A
What is the value of changes in greenhouse gas emissions?	£ N/A
Will the proposal have a significant impact on competition?	No
Annual Cost (£-£) per organisation (excluding one-off)	Micro/Small/Medium/Large £154
Are any of these organisations exempt?	No- unless PPL/PRS operate discretionary exemptions

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)
Increase of £	Decrease of £	Net Impact £

Key: Annual costs and benefits: (Net) Present

Summary: Analysis & Evidence

Policy Option: 4

Description: Repeal of Section 128A and 128B
(This is an independent option- not an alternative to options1-3)

COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups' No financial data available. There may be an increased risk of costs to copyright users (i.e. in making a direct appeal, legal costs, costs of the winning party if the user loses the case) who will have to refer licensing schemes to the Tribunal if they wish to dispute them (rather than being able to rely on a referral by the Secretary of State). Equally, PPL may risk incurring costs if a user makes a direct appeal to the Tribunal (legal costs and costs of the winning party if PPL loses the appeal).
	One-off (Transition) Yrs [Blank yellow box]	
	Average Annual Cost (excluding one-off) [Blank yellow box]	
	Total Cost (PV)	
Other key non-monetised costs by 'main affected groups' There will be social costs for users who cease playing music because they cannot afford a PPL licence or risk making a direct referral to the Tribunal.		

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups' PPL would save time and money by not having to submit each proposed licensing scheme to the Secretary of State. The Secretary of State would avoid the costs incurred in having to consider PPL's proposed schemes. The Tribunal might also expect to make savings in no longer having to investigate cases referred under section 128A/B referrals.
	One-off Yrs £ [Blank yellow box]	
	Average Annual Benefit (excluding one-off) £ [Blank yellow box]	
	Total Benefit (PV)	
Other key non-monetised benefits by 'main affected groups'		

Key Assumptions/Sensitivities/Risks

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?	UK
On what date will the policy be implemented?	2010
Which organisation(s) will enforce the policy?	N/A
What is the total annual cost of enforcement for these organisations?	N/A
Does enforcement comply with Hampton principles?	Yes
Will implementation go beyond minimum EU requirements?	No
What is the value of the proposed offsetting measure per year?	N/A
What is the value of changes in greenhouse gas emissions?	N/A
Will the proposal have a significant impact on competition?	N/A
Annual Cost (£-£) per organisation (excluding one-off)	Micro/Small/Medium/Large
Are any of these organisations exempt?	No

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)
Increase of	£	Decrease of	£	Net Impact
				£

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

Evidence Base (for summary sheets)

Background

Copyright exists to encourage the creation of, and investment in, creative works. The Copyright, Designs and Patents Act 1988 (CDPA) provides a number of rights to copyright owners and owners of performers' rights, including the right to license the performance or playing of their work in public; this could be by playing of a CD, radio or television in a public place. The CDPA also provides a number of exemptions to the rights it confers to facilitate access or for socially desirable purposes.

Under the CDPA two licences are required for performance or playing of music in public. One covers the rights of the composers and lyricists, administered by the Performing Right Society (PRS) and a second covers the rights of performers and record producers and is administered by Phonographic Performance Limited (PPL).

The consultation relates to two exemptions which apply so that certain users are required to pay for a PRS licence but do not have to pay for a PPL licence. Section 67 relates to certain uses of sound recordings by 'clubs, societies or other organisations', provided that their main objects are 'charitable or otherwise concerned with the advancement of religion, education or social welfare'. Section 72(1B)(a) relates to certain uses of sound recordings in broadcast music by not-for-profit organisations. Here there is an additional limitation that the use must form 'part of the activities' of the organisation and there is no entry fee. There are equivalent exemptions from performers' rights in paragraphs 15 and 18 of Schedule 2 to the CDPA.

These exemptions were last amended in 2003. At this time businesses that played music but did not charge an entry fee (such as offices, shops and cafes) were removed from the scope of the exemptions in section 72 and paragraph 18 of Schedule 2 to the CDPA. These users are now required to pay for a licence from PPL. However, an additional procedure was put in place by sections 128A and 128B of the CDPA whereby PPL were required to notify the Secretary of State of any proposed licence or licensing scheme in this new area and the Secretary of State had to consider whether the scheme should be referred to the Copyright Tribunal to determine whether it is reasonable.

The Problem

There has been concern expressed from both right holders and users that the dividing line drawn by these exemptions is not correctly focussed at present.

Some stakeholders representing right holders have argued that sections of the CDPA which allow for this do not comply fully with European law. They argue that right holders should be able to license all those groups currently covered by the exemptions.

Other stakeholders, representing users of music have argued that there are social arguments that certain groups should be exempt from payment of either copyright licence as the benefits their organisation provides to society outweigh the benefits of remunerating right holders. They argue that many charitable groups – particularly small charities and community groups – run on a low income and provide services which are highly beneficial to those they work with and the wider community. In particular many are assisting sectors of society which are already disadvantaged and a move to increase the costs placed on these groups could be highly detrimental.

The procedures under section 128A and 128B have proved difficult to operate in practice as the scope of the sections was unclear. The Secretary of State referred licensing schemes which

covered uses both in and outside section 72 prior to its amendment in 2003 to the Tribunal. PPL argued that the Tribunal only had jurisdiction to consider licensing schemes relating to uses which were previously exempt. The Tribunal accepted this argument but its decision was reversed on appeal by the High Court and the licensing schemes were referred back to the Tribunal for adjudication. Both licensing bodies and users have expressed concerns about the length of time cases which have been referred to the Copyright Tribunal under sections 128A and 128B have taken.

The Consultation

The Intellectual Property Office consulted on three possible options to re-balance these exemptions, in order to determine which would most accurately reflect the public interest whilst being consistent with EC and international law obligations. The first and third options would be implemented through statutory instrument by regulations made under section 2(2) of the European Communities Act 1972. The second option would be implemented through a combination of regulations made under section 2(2) and a Legislative Reform Order made under section 1 of the Legislative and Regulatory Reform Act 2006.

The consultation sought evidence to gain a clear indication as to the value and costs involved both in terms of the money being paid/received and also the administrative costs of operating the schemes necessary for each of the options.

The changes proposed in the consultation do not introduce government imposed administrative burdens, although PPL would require an application form to be completed when applying for a licence under any of the options.

The Intellectual Property Office also consulted on whether the procedures set out in sections 128A and 128B of the CDPA should be repealed.

Policy Objective

To achieve the correct balance between right holders – encouraging and rewarding creativity – and users (particularly those who provide valuable support/service to vulnerable communities, groups and individuals) and to comply with EC and international law obligations.

Rationale for Government Intervention

It is a basic principle of policy on copyright that, when determining where the appropriate balance lies between rights of the copyright owner and the extent of permitted free use the result should be in the public interest. It is also necessary to ensure that resulting legislation complies with European law and international treaty obligations.

In determining where the dividing line lies the Government must balance a number of often overlapping policy goals, including social, economic and legal objectives and constraints. These include the need to balance the incentives required for the creation of works against the costs to the public of limited access to these works.

There has been concern expressed from both copyright owners and users that the dividing line drawn by these exemptions is not correctly focussed at present. PPL has argued that its members are entitled to equitable remuneration from organisations that are currently exempted by sections 67 and 72 and paragraphs 15 and 18 of Schedule 2 to the CDPA and that these exemptions are in breach of article 8(2) of the Rental and Lending Directive. Small organisations frequently write in to Ministers often unable to understand why they are required to pay any licence fee to PPL or PRS for their very limited use of TV or radio broadcasts or playing of CDs or tapes.

Changes to the scope of these exemptions can only be made through legislation.

We are aware of the significant concerns relating to the operation of sections 128A and 128B. Changes to these procedures can only be made through legislation.

Impact assessment

The government commissioned Europe Economics to carry out a final impact assessment of the options set out in the consultation.

Methodology

The methodology used by Europe Economics is summarised below. For more detail please refer to the full version of the final report at www.ipo.gov.uk/europeeconomicsreport.pdf

The stakeholders affected by a change in policy have been identified as:

- i) Collecting societies (licensing bodies- PPL and PRS);
- ii) Right holders (i.e. composers, lyricists, performers and record producers);
- iii) Users who are currently within the scope of the exemptions and users who were within scope of the exemptions prior to their amendment in 2003.

The pre-consultation impact assessment focussed on charities and not-for-profit sporting clubs. However, potential 'users' in the Europe Economics final impact assessment are more wide ranging and include:

- a) Charities and charity shops;
- b) Sports clubs;
- c) Religious organisations;
- d) NHS¹;
- e) Community buildings;
- f) Rural halls;
- g) PTAs²;
- h) Libraries³.

In calculating the number of organisations potentially affected by a change in policy, Europe Economics has taken steps to avoid double-counting. Furthermore, when determining the proportion of users who would remain exempt under option 2, the economists have accounted for the potential overlap between user sub-groups. For example, the percentage of users within the community buildings group with an income below £20,000 differs from the percentage within the charitable group. However, it is acknowledged that many community buildings will also be registered as charities.

Europe Economics also account for the fact that not all organisations affected by a change in policy currently play music. Consequently, they use the number of charitable and not-for-profit organisations from which PRS currently collects licence fees as a starting point.

¹ We have removed NHS organisations from our final calculations under option 1 or 2. PPL has agreed to mirror the voluntary exemption which PRS already operates for the NHS under option 1. Under option 2, there would be a statutory exemption for the NHS.

² We have not included PTAs in our calculations for all options, as schools currently require a licence to cover non-curricular use of music and this existing licence would also cover music used on the school premises by the PTAs.

³ We have not included libraries in our final calculations for all options as PPL already licence libraries. However, there is a dispute regarding whether broadcast and recorded music is played in public libraries when accessed through library computer terminals using headphones.

In terms of estimating the likely fee structure, assumptions have been made about the tariff currently charged by PPL and the use of music by different types of organisations. The full report also includes a sensitivity analysis to account for alternative scenarios that might occur.

The one-off costs and benefits and the average annual costs and benefits of each option have been categorised as follows:

- a) *Financial*: includes changes in revenue (for collecting societies and right holders) and costs (for users) directly associated with licensing fees.
- b) *Administrative*: includes the costs (e.g. money and time spent) that users incur in obtaining a licence and the costs that collecting societies bear in order to collect payments.
- c) *Negotiation*: costs that may arise if a user is not content with the fees a collecting society has asked for and enters into negotiation to reduce them.
- d) *Legal costs*: if a user requires advice or support from a solicitor (short of pursuing a case before the Copyright Tribunal).
- e) *Litigation*: costs arising from disputes between right holders and users as to whether the licensing terms offered are reasonable. These costs would be borne by the parties bringing an action to the Copyright Tribunal.
- f) *Other*: includes a variety of costs and benefits not already categorised but nonetheless important for quantifying the costs and benefits to society as a whole.

Please note: Following completion of the report by Europe Economics, further information has come to light with regards to the number of organisations impacted under each option. Therefore, we have altered the figures calculated by Europe Economics in a number of places to reflect the revised number of organisations affected (details of which can be found in Annex 2).

Options in relation to the exemptions within sections 67 and 72

There were three options for consideration in the consultation paper and the impact of each has been considered separately.

Option 1 - Repeal the exemptions

Option 1 proposed the removal of the current exemptions entirely, giving right holders (represented by PPL) the exclusive right to license use of their members' music across the areas that are currently exempt under sections 67 and 72(1B)(a) and paragraphs 15 and 18 of Schedule 2 to the CPDA. Although this option goes beyond the minimum requirement in EU legislation (the right to equitable remuneration- see option 3), giving rights holders an exclusive right is both easier and cheaper to operate. It also avoids perpetuating the differences in licensing rights administered by PPL and those administered by PRS. This option also had more broad support amongst stakeholders than option 3, as almost all the representatives of charitable and not-for-profit organisations agreed that it would be preferable to have a simple licensing system with an affordable, flat fee (or banded flat fee) than to have a complex system with limited exemptions which would often be subject to dispute

The Government intends to proceed with this option. However, repeal alone would essentially mean that PPL could set their fees at a level they felt was appropriate and the users would have to either pay such fees or stop playing the music. If a user refused to buy a licence and continued playing the music they could be sued by PPL for infringement of copyright. If the user believed the terms offered by PPL were unreasonable they could take their case to the Copyright Tribunal but would incur the costs associated with this. Therefore, the repeal is based on a number of safeguards being in place to ensure that users are protected i.e. full tariff consultation with the sector, codes of practice for both collecting societies and an independent complaints reviewer to resolve disputes.

In consultation meetings, almost all the representatives of charitable and not-for-profit organisations agreed that it would be preferable to have a simple licensing system with an affordable, flat fee (or banded flat fee) than to have a complex system with limited exemptions which would often be subject to dispute. The impact assessment of option 1 is therefore based on a flat fee licence arrangement. We have written commitment from PPL to the introduction of reasonable tariffs and a joint and simplified licensing system with PRS- reducing the administrative burden associated with the new licensing requirement. Further details of these and other initiatives can be found in the government response.

Impact

The costs and benefits to different groups are set out below.

Right holders represented by PPL

PPL represents those who have rights in sound recordings and performers, licensing the public performance of these works.

The current exemptions apply only to the rights in the sound recording and the performance. This creates the position whereby a user falling within the exemption can play music without obtaining a licence from PPL, to cover these rights, but must still purchase a licence from PRS to cover the rights in the music and the lyrics. Some within the music industry have argued that they believe that the fact that the exemption only covers the PPL administered rights is unfair and may not be compliant with EU law. The Intellectual Property Office accepts that the different treatment of the two groups of right holders may not be ideal.

The major beneficiaries of the repeal would be right holders, principally PPL and its members, who would now be able to license the public playing of their works by charitable and not-for-profit bodies. This would increase the scope to license, resulting in an increase in revenue estimated at £18.7⁴ million annually. However, it is likely that this figure is an over-estimate as the impact assessment was based on assumptions made about the number of charitable and not-for-profit organisations that use recorded and/or broadcast music. There is no data to indicate usage levels so Europe Economics, who carried out the impact assessment, took the mid-point of 50 percent⁵ as the basis for their calculation. There are several reasons why this assumption may be too high. For example, there are many small organisations with charitable status (perhaps with one office and few staff) that are unlikely to use music at all.

Repealing the exemptions would also make it easier for PPL to enforce its members' rights. Having no exemptions at all in this area would reduce disputes over which organisations are entitled to rely on the exemptions and which are not.

Repeal of the exemptions would leave owners of copyright in sound recordings (record companies) with an exclusive right to collect royalties in circumstances which were previously exempt. The repeal would also give performers a right to equitable remuneration in respect of these uses – this is paid to performers by the owners of copyright in the sound recording, via the collecting society, PPL.

An exclusive right would also give right holders the right to refuse the use of their works. This would mean that a collecting society could refuse to license the use of the rights it administers. Although this might be theoretically possible it seems unlikely that PPL would refuse a licence to anyone who wished to play music in the circumstances which are currently covered by the exemptions in sections 67 and 72(1B)(a).

⁵ ie: for charities generally, amateur sports clubs, community buildings/rural halls. However, for charity shops music usage was estimated at 90 per cent and religious buildings at 75 per cent, based on information from the Association of Charity Shops and from Christian Copyright Licensing International respectively.

It is anticipated that, out of all the proposed options, repeal (with safeguards) would actually generate the lowest income for PPL. Assuming that 85% of potential new licensees purchase a licence (based on the current tariff structure) the total financial benefit to PPL would be around £33million. However, introducing a simplified tariff is likely to encourage more of the charitable/not-for-profit users to purchase a licence, say 90%. Using a flat fee of £81 as an example, the total revenue equates to approximately £18.7 million.

The cost to PPL of administering a simplified licensing scheme would be £3.7 million initially, with ongoing administrative costs of approximately £1.9 million. PPL would also incur one-off costs of around £935,000⁶ in consulting and negotiating with users before implementing any new tariff scheme.

Charities and not-for-profit organisations

Abolishing the exemptions will mean that a person playing sound recordings in circumstances previously covered by section 67 or 72(1B)(a) would need to obtain the permission of the right holder to avoid liability for infringement of copyright and performers' rights.

Repeal alone would mean that users who had previously been exempt, and only had to purchase one licence from PRS, would now have to purchase two licences. This would result in paying for two separate fees and dealing with two different organisations and sets of administration.

However, as PPL and PRS have now agreed to operate a joint licensing system with one application process, the administrative costs should be greatly reduced. Europe Economics assumed that it would take organisations one hour to complete an application for a PPL licence in the first year, reducing by fifty percent in subsequent years. If it would take an organisation one hour to complete an application for its first PPL licence, then it should take half an hour to complete the PPL element of a joint PPL/PRS application. In subsequent years, we expect the on-going administration to be marginal and subsumed in the existing effort needed to obtain a PRS licence.

The costs and benefits of this option are based on a simplified licensing system. Nevertheless, the major costs under this option do fall on the users of copyright who are currently exempted by section 67 or 72(1B)(a) and paragraphs 15 and 18(1A)(a) of Schedule 2 to the CDPA. These costs comprise the royalties payable under the PPL licence (estimated at £18.7million annually) and also the administrative costs in completing forms and obtaining the licence in the first place (at an estimated one-off cost of around £1⁷million). One-off negotiation costs in establishing any new tariff are also anticipated at £570,350⁸.

Option 2 - Recast the exemptions

Option 2 proposed that the exemptions could be recast. This would mean re-defining which bodies are exempt. The proposal was to exempt charitable bodies with an annual turnover of less than a pre-set amount, perhaps £20,000⁹. The exemption would also be extended to rights administered by the PRS – who are currently able to license all bodies within this area.

⁶ 5% of £18,709,785 (total licence fees)

⁷ Based on 230,985 organisations taking half an hour (£4.50 in value) to complete the application.

⁸ 5% of £18,709,785 (total licence fees) [935,490] multiplied by the ratio of organisations with income below £20,000 [0.61]

⁹ £20,000 is used by the Charity Commission to define small charities

This would result in an exemption which applied only to those smaller bodies that, possibly, are less able to afford the associated costs of obtaining a licence. PPL would be able to increase their area of licensing but there would also be a decrease in licensing revenue for the PRS.

This option would remove anomalies in this area to provide a clearer policy behind the law, which will be more easily understood by the public. Under this proposal users would be exempt, and would not have to pay for any copyright licences, or would not be exempt, and would have to purchase licences from both PPL and PRS. Whilst this option goes beyond the minimum requirement in EU legislation, as it proposes giving PPL rights holder an exclusive right, it remains simpler and cheaper than operating a system of equitable remuneration (see option 3). It also avoids perpetuating the differences in licensing rights administered by PPL and those administered by PRS.

Although recasting the exemptions was the preferred option amongst users in the written responses, some users confirmed that the existing exemptions often lead to disputes concerning qualification for the dispensation. All charities said that taking legal action to resolve licensing disputes is not seen as a good use of charitable income.

They also expressed concerns regarding the difficulties in defining “turnover” and some felt that an exemption based on turnover would not offer certainty from one year to the next. Furthermore, most charitable/not-for-profit organisations called for the threshold to be increased- substantially in most cases.

Even at the proposed threshold of £20,000 turnover, the final impact assessment indicates that around 60 per cent of organisations (representing approximately 160,000 bodies) which are exempt currently (and use music) would continue to be exempt under Option 2. We consider that this level of free use of music would not represent a fair balance between the interests of right holders and users. A reduction in the scope of the exemption would not solve the problems charitable/not-for-profit users have as they consider that the proposal is too narrowly drawn in its current form.

Introduction of an exemption for the NHS

This exemption would make official the current voluntary exception operated by PRS, as well as retaining the existing exemption from the requirement to purchase PPL licenses if television or radio is played for the benefit of its patients. The NHS would benefit from an exemption from both licensing requirements in patient treatment areas, although a licence would still be required for other uses of music within NHS facilities, such as in restaurants, staff areas and waiting rooms.

As this exemption reflects current practice by PRS in this area, formalising the exemption would have no financial impact on any organisation. However, concern has been expressed that the NHS exception, as currently drawn, could lead to disputes in relation to what constitutes an exempted area. Staff areas and restaurants are particularly problematic as it can be difficult to differentiate them from wards. Although not quantified, such disputes would lead to increased administration and negotiation costs.

Impact

The costs and benefits to different groups are set out below.

Right holders represented by PPL

The effect of this change for PPL would be that the exemptions to the exclusive rights and rights to equitable remuneration it administers would be much more limited in scope. Any public

playing of a sound recording or broadcast containing a sound recording by a charitable organisation with a turnover in excess of £20,000 would cease to be exempt.

PPL would benefit from this extension of its exclusive rights to license the public performance of the works it administers and could set the fees, subject to any referral being made to the Copyright Tribunal. This would lead to an increase in revenue for PPL.

The impact of this option has been calculated against the current tariff structure, not a simplified tariff, as in option 1. This is primarily because the limited scope and operational burdens of this option would offer little incentive for PPL to agree to the introduction of simplified licensing. It is estimated that this option would result in additional PPL revenue of £18.5¹⁰ million. In dealing with the issue of exemption eligibility, PPL would also incur higher administration and negotiation costs in comparison to option 1. The initial cost of administering PPL licensing would be £4.6¹¹ million, with ongoing annual costs of £2.3 million, and negotiation costs of nearly £1¹² million initially, followed by an ongoing figure of £185,000¹³.

Right holders represented by PRS

This option will result in a decrease of revenues for PRS as it will no longer be able to license the public performance of the copyright it administers by small charitable bodies with a turnover of less than £20,000. PRS has indicated that they are collecting approximately £4 million from charities, community buildings, trusts, religious buildings and other voluntary organisations not listed as charities or trusts. This £4 million figure therefore represents the upper bound of revenues PRS could potentially lose under Option 2. However, PRS has also indicated that many of the organisations that fall under their voluntary exemptions are small organisations, so it is likely that a large part of the £4 million is collected from organisations with an income above the £20,000 threshold. It is therefore estimated that PRS would lose approximately £1 million in revenue stream.

PRS operate on a different licensing basis to PPL and do not use turnover as one of the measures for assessing royalty fees. There would be an additional one off cost to PRS of £30,000 to develop systems to meet these new requirements, along with the ongoing annual administration costs of £84,000 in determining qualification for exemption.

Charities and not-for-profit Organisations

These are divided into a number of groups

Charitable/not-for-profit organisations with a turnover of less than £20,000

The small charitable groups who would be exempt from payment of both the PPL and PRS royalties would benefit from adoption of this option as they would no longer have to purchase a licence from PRS.

Any such organisation which falls within the new exemption would be exempt from both the PPL and PRS licences required for the public performance of either broadcast or recorded music. This would result in savings in terms of the licence fee itself and the associated administration costs.

¹⁰ Number of organisations impacted [100,278] adjusted by 15% drop out rate [85,237] multiplied by the typical PPL tariffs (see table 3 in Annex 2)

¹¹ 20% of total revenue collected [3,709,840] increased in proportion to the ratio [equal to 0.24] of the number of organisations with income between £15,000-£20,000 [31,274] over the total number of organisations contacted by PPL [131,552] (those with income between £15,000-£20,000 [31,274] plus those with income above £20,000 [100,278])

¹² 5% of £18,549,201 (total licence fees)

¹³ 1% of £18,549,201 (total licence fees)

Some of these smaller groups might also benefit from being able to use music which previously they were unable to use as they could not afford to pay the relevant PRS licence fee. This could benefit the individuals or communities supported by that organisation, leading to an increase in wellbeing for that group.

This option would introduce the issue of users needing to provide proof of eligibility- so this would still lead to administration costs of £239,000¹⁴. Despite removing the anomaly regarding music licensing requirements, introduction of another qualification measure would also increase the level of disputes between collecting societies and charitable users. It is assumed that no charitable/not-for-profit organisation would take a case to the Copyright Tribunal, as the cost of doing so would be considerable. Therefore, the costs associated with disputes which arise are more likely to take the form of additional negotiation costs (see below).

Charitable/not-for-profit organisations previously within the exemptions in either section 67 or 72(1B)(a) with a turnover of £20,000 or more

These organisations would no longer benefit from the exemptions. All organisations falling outside the new exemption would be required to purchase both PPL and PRS licences covering public performance or playing of copyright in sound recordings, music, lyrics and the performers' rights. Currently they are only required to purchase a licence from PRS. For these groups the effect of this option will be the same as that of repealing the exemptions (option 1). It is estimated that the annual cost to ineligible users would be £18.5 million.

This option would result in higher administration costs given the additional information required when applying for the licence- estimated at an initial £3.1 million¹⁵, with ongoing annual costs of £1.55 million. Furthermore, this option would not only involve initial negotiation costs of nearly £1¹⁶ million for those organisations who are no longer exempt, but it would also result in ongoing negotiation costs of around £76,000¹⁷ as some organisations would fluctuate between the exemption threshold.

Option 3 - Remove the exemptions and introduce a right of equitable remuneration

A right of equitable remuneration is a lesser right than an exclusive right. The holder of an exclusive right can refuse to license use and the user is infringing copyright if they continue playing the music. Where the right holder has a right to equitable remuneration the right holder cannot refuse permission to use the work, provided the user has indicated a willingness to pay equitable remuneration.

Option 3 put forward the idea of giving PPL a right only to “equitable remuneration” in the areas currently exempt. This may appear to be beneficial to smaller users who could argue that, as their use of music is comparatively small, they should only pay a very small royalty. However, it is unlikely that right holders could charge higher royalties under the exclusive rights offered by Option 1 than under equitable remuneration offered by Option 3. This is because under Option 1 disputes about royalty rates could still be taken to the Copyright Tribunal who can determine whether they are reasonable. We consider that it is probable that a reasonable licence fee, as determined by the Tribunal, will be the same as equitable remuneration. A user may refuse to pay the full fee as determined by the relevant licensing scheme if it were a small organisation making limited use of music. It may seek to negotiate a lower fee with PPL- arguing that this is necessary to reach a fee that is equitable to both the user and the right holder. There is

¹⁴ Based on 20% of the total organisations falling within the £20,000 threshold [31,274] (adjusted by 15% drop out rate [26,583]) taking 1 hour (£9 in value) to provide proof of income.

¹⁵ Total number of organisations not qualifying for the exemption [100,278] (adjusted by 15% drop out rate [85,236]) taking 4 hours (£36 in value) to complete an application.

¹⁶ 5% of £18,549,201 (total licence fee expenditure)

¹⁷ See table 4 in Annex 2 for calculation.

concern that this may lead to a large number of disputes between PPL and users regarding what fee is actually “equitable.”

Many charitable/not-for-profit organisations felt that this option would be a complex and resource intensive licensing system to operate, which ultimately provided no certainty that a lower licence fee would be achieved. It would also perpetuate the differences in licensing rights administered by PPL and those administered by PRS.

Impact

The costs and benefits to different groups are set out below.

Right holders represented by PPL

Under this option PPL would be able to license a wider range of users. They would be able to license all charitable and not-for-profit organisations for public performance of either broadcast or recorded music. This would lead to an increase in revenue for PPL.

The new right would not only apply to charitable or not-for-profit organisations. It would also cover those uses that were exempted by section 72 and paragraph 18 of Schedule 2 to the CDPA prior to 2003 and are now covered by the procedures set out in section 128A and 128B and uses that were exempted by section 67 and paragraph 15 of Schedule 2 to the CDPA prior to 2003. That is, all public playing of broadcast music by users, if no entrance fee is charged to the premises where the performance takes place (and sound recordings played by a charitable organisation where the proceeds of any charge for admission are applied solely for the purposes of the organisation).

The right to equitable remuneration is a different right to the exclusive right PPL currently have for public playing of sound recordings. PPL would need to consider the terms of use that they would set to allow for this new right. They may also face an increased number of disputes over the charges they wish to impose as individual organisations seek to negotiate a fee that is equitable for their use.

Although this option attracts the highest potential annual revenue of £26.8¹⁸ million (calculated on the current tariff structure), it also gives rise to the most significant administration and negotiation costs due to the complexities involved. It is anticipated that the initial cost of administering equitable remuneration would be approximately £5.4¹⁹ million (with ongoing average annual costs of £2.7 million), coupled with a one-off negotiation cost of £1.3²⁰ million and ongoing negotiation costs estimated at around £268,000²¹.

Right holders represented by PRS

This option would not make any changes to the position of PRS or its members.

Charities and not-for-profit organisations

These organisations would have to pay both PPL and PRS for the public performance of music. Whilst the PRS licence would be set on the basis of an exclusive right, the PPL permission would be set on the basis of a right to equitable remuneration. This would mean having to pay two separate fees and dealing with two different organisations and sets of administration.

¹⁸ See tables 6/7 in Annex 2 for breakdown

¹⁹ Based on 20% of £26,848,966 (total licence fee income)

²⁰ 5% of £26,848,966 (total licence fee income)

²¹ 1% of £26,848,966 (total licence fee income)

It is possible that the right to equitable remuneration might allow these users to pay a lower fee to PPL, which is equitable in respect of the type of organisation they are and the use they are making of the music. Nevertheless, the annual financial cost to users under this option is anticipated to be in the region of £26.8 million. In addition, any reduction in the licence fee itself would be immediately absorbed by the significant administration involved in obtaining the licence. The initial administrative cost to users is estimated at £5.2²² million, with ongoing annual administrative costs of £2.6 million. Equitable remuneration would also attract one-off negotiation costs of £1.3²³ million and average annual costs of £347,000²⁴.

Commercial users

Those businesses which play music in areas of their business where they do not charge for entry would now be required to pay PPL on the basis of a right to equitable remuneration, rather than an exclusive right. This may mean that they have more scope to negotiate their fees with PPL and pay an amount that is agreed to be equitable. This may result in a decrease in costs for these users, although difficulties in reaching an agreement as to what fee is equitable would cause an increase in administrative costs for the parties to resolve. Again, it is likely that a reasonable royalty under exclusive rights would be the same as one judged to be equitable.

Potential repeal of sections 128A and 128B

If sections 128A and 128B are repealed, the Secretary of State would cease to be involved in the consideration of any licensing scheme proposed by PPL. This would mean that cases would be referred directly to the Copyright Tribunal by potential licensees, licensees or representative bodies under the remaining provisions in the CDPA.

Responses to the consultation from both PPL and users expressed concern about the length of time cases using the referral system in sections 128A and 128B have taken. The supposed benefit from the prospective licensees not being a party to the referral has not protected them from all costs of litigating, as the cases being considered by the Tribunal currently have required further input from the users and, therefore, they have become parties to the litigation. These users are incurring substantial costs, in part because of the length of time the cases are taking.

As there will be other measures to assist users, including the streamlined licensing system for charitable/not-for-profit organisations, the reform of the Copyright Tribunal, mediation, the prospect of a joint PPL and PRS Code of Conduct and a joint independent complaints reviewer, we do not consider this system of referral to the Tribunal necessary and propose repealing the mechanism in sections 128A and 128B.

Impact

PPL

PPL would save time and money by not having to notify the Secretary of State of their proposed licensing schemes (the Secretary of State would also avoid the costs incurred in having to consider PPL's proposed schemes). They could issue these schemes and negotiate with the users and their representatives to reach an agreement. This would remove from PPL the administrative burden of having to submit their schemes for consideration. In addition to reducing legal costs, resolving disputes through negotiation may also take less time than negotiation through the Tribunal, consequently reducing the delays in redistributing royalties to right holders.

²² Number of organisations impacted (adjusted by 25% drop out rate) [193,599] taking 3 hours (£27 in value) to complete an application

²³ 5% of £26,848,966 (total licence fee expenditure)

²⁴ See table 8 in Annex 2 for calculations.

Users

Users may feel that they benefit from the existence of the current procedures in that they do not have to make the referral themselves and therefore do not have to worry about being held liable for not only their own costs but also those of PPL if they are to lose. However, users are also liable for the costs of a case that is referred to the Tribunal by the Secretary of State if they become a party to the case. It is difficult to determine such costs as the cases which have been referred to the Tribunal are ongoing. However, anecdotal evidence suggests that these costs could be in the region of £100,000.

If the Secretary of State referral mechanism is repealed, users would have to bear the cost of making a direct referral to the Tribunal as well as the legal costs if the direct appeal is lost and the user has to pay the costs of the winning party. This is the same position as with other licensing arrangements.

The existence of the current mechanism might also be restricting the pricing of PPL schemes, so this constraint could be diminished if these sections are repealed, potentially resulting in higher pricing. If this occurred, users would either have to accept the higher licence fee, appeal directly to the Tribunal (if feasible) or discontinue using music. However, PPL's commitment to consult with the Third Sector in order to agree affordable and reasonable tariffs should reduce the risk of higher pricing.

Tribunal

As the Tribunal is currently likely to employ more resources than it would for a case referred directly by a User in order to carry out any investigative activities, the Tribunal might expect to make a number of cost savings if it longer had to investigate Secretary of State referrals.

SPECIFIC IMPACT TESTS

Competition Assessment

As the regulatory proposals relate to exemptions specifically for charitable and not-for-profit exemptions, the change does not raise competition concerns.

Small Firms Impact Test

The options under consideration relate to provisions which exempt Third Sector organisations from paying royalties for the public performance of sound recordings and performers' rights. Therefore, the proposals do not impose or reduce costs on small businesses.

Race/Disability/Gender Equality

Sections 67 and 72 exempt charities and not-for-profit organisations from paying royalties for the public performance of sound recordings and performers' rights. There has been very active engagement with Third Sector bodies and representative groups during the consultation process. None of these consultees has been identified as representing the views of groups that operate exclusively to promote disability, race and gender equality, although it is possible that the bodies and users they represent may do so as part of their activities. Extensive work has been undertaken with the not-for-profit sector, and PPL and PRS to ensure that the impact of removing the exemptions is met by the availability of affordable tariffs, a single licensing procedure and a complaints procedure for all affected organisations, regardless of their purpose.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	N/A	N/A
Sustainable Development	N/A	N/A
Carbon Assessment	N/A	N/A
Other Environment	N/A	N/A
Health Impact Assessment	N/A	N/A
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	N/A	N/A
Rural Proofing	N/A	N/A

Annexes

Annex 1- Europe Economics report

New information has come to light since the Europe Economics report was produced and our final impact assessment reflects this.

<http://www.ipo.gov.uk/europeeconomicsreport.pdf>

Annex 2- Organisations impacted under each option (amendments to Europe Economic figures)

Option 1

Table 1- Number of organisations affected under Option 1 (removing PTAs, Libraries and the NHS)

	Total number	Assumed rate of music use (%)	Total number of organisations using music affected by Options 1
Charities	280,000	50	140,000
Charity shops	7,500	90	6,750
All exempt sports clubs	132,880	50	66,440
Exempt sports clubs (charities)	12,080	50	6,040
Exempt sports clubs (non-charities)	120,800	60	60,400
All Community buildings	8,000	50	4,000
Community buildings (charities)	4,050	50	4,025
Community buildings (non-charities)	3,950	50	1,975
All rural halls	10,000	50	5,000
Rural halls (charities)	4,950	50	2,475
Rural halls (non-charities)	5,050	50	2,525
Religious buildings	60,000	75	45,000
All organisations	477,300	56	256,650

Option 2

Table 2- Number of organisations affected under option 2 (removing PTAs and Libraries)

	Total number	Assumed rate of music use (%)	Total number of organisations using music that would remain exempt under Option 2	Total number of organisations using music that would not remain exempt under Option 2
Charities	280,000	50	102,809	37,191
Charity shops	7,500	90	648	6,102
All exempt sports clubs	132,880	50	47,565	18,875
Exempt sports clubs (charities)	12,080	50	4,435	1,605
Exempt sports clubs (non-charities)	120,800	60	43,130	17,270
All Community buildings	8,000	50	2,897	1,103
Community buildings (charities)	4,050	50	1,487	538
Community buildings (non-charities)	3,950	50	1,410	565
All rural halls	10,000	50	4,343	657
Rural halls (charities)	4,950	50	1,818	657
Rural halls (non-charities)	5,050	50	2,525	-
Religious buildings	60,000	75	5,850	39,150
All organisations	477,300	56	156,372	100,278

Table 3- Number of organisations affected and typical PPL fees (under the current tariff structure)

	Total number utilising music with income >£20,000*	Typical PPL fee for Users with income >£20,000	Total PPL revenue from each User category (£)
Charities (net of other Users)	29,232	273.31	7,989,398
Charity shops	5,187	116.20	602,695
All Exempt sports clubs	16,044	273.31	4,384,917
All Rural halls	559	157.11	87,802
All Community buildings	937	273.31	256,162
Religious Buildings	33,278	157.11	5,228,228
TOTAL	85,237		18,549,201

Notes: * This figure has been adjusted by a 15 per cent drop out rate

Table 4- Annual negotiation costs for Users (under current tariff structure)

Round of negotiation	1	2	3	4	5	6	7	8
No. of orgs. taking part	4262	2131	1066	533	266	133	67	33
No. of hrs spent per round	1	1	1	1	1	1	1	1
Cost per hour	£9.00	£9.00	£9.00	£9.00	£9.00	£9.00	£9.00	£9.00
	£38,358	£19,179	£9,590	£4,795	£2,397	£1,199	£599	£300
Total negotiation cost								£76,416

Option 3

Table 5- Number of organisations affected under option 3 (removing PTAs and Libraries)

	Total number	Assumed rate of music use (%)	Total number of organisations using music affected by Options 3
Charities	280,000	50	140,000
Charity shops	7,500	90	6,750
All exempt sports clubs	132,880	50	66,440
Exempt sports clubs (charities)	12,080	50	6,040
Exempt sports clubs (non-charities)	120,800	60	60,400
All Community buildings	8,000	50	4,000
Community buildings (charities)	4,050	50	4,025
Community buildings (non-charities)	3,950	50	1,975
All rural halls	10,000	50	5,000
Rural halls (charities)	4,950	50	2,475
Rural halls (non-charities)	5,050	50	2,525
Religious buildings	60,000	75	45,000
NHS	1,479	100	1,479
All organisations	477,300	60	256,129

Table 6- Financial costs to Users with an income below £20,000 under Option 3 under the current tariff structure (removing PTAs and Libraries)

	Utilising music with income <£20,000 *	Typical PPL fee (5% discount under equitable remuneration) with income <£20,000	Total PPL revenue from each User category
Charities (net of other Users)	71,303	£94.06	£6,706,760
Charity shops	486	£55.20	£26,825
All Exempt sport clubs	35,674	£94.06	£3,355,455
All Rural halls	3,257	£94.06	£306,342
All Community buildings	2,173	£94.06	£204,392
Religious buildings	4,388	£94.06	£412,686
NHS	0		
Total	117,281		£11,012,460

Notes: * This figure has been adjusted by a 15 per cent drop out rate

Table 7- Financial costs to Users with an income above £20,000 under Option 3 under the current tariff structure (removing PTAs and Libraries)

	Utilising music income >£20,000 *	Typical PPL fee (5% discount) income >£20,000	Total PPL revenue from each User category
Charities (net of other Users)	25,793	£259.64	£6,696,895
Charity shops	4,577	£110.39	£505,200
All Exempt sport clubs	14,156	£259.64	£3,675,592
All Rural halls	493	£149.25	£73,599
All Community buildings	827	£259.64	£214,724
Religious buildings	29,363	£149.25	£4,382,485
NHS	1,109	£259.64	£288,011
TOTAL	76,318		£15,836,506

Notes: * This figure has been adjusted by a 15 per cent drop out rate

Table 8 - Annual negotiation costs for Users (under current tariff structure)

Round of negotiation	1	2	3	4	5	6	7	8
No. of orgs taking part	19,360	9680	4840	2420	1210	605	303	151
No. of hrs spent per round	1	1	1	1	1	1	1	1
Cost per hour	£9.00	£9.00	£9.00	£9.00	£9.00	£9.00	£9.00	£9.00
	£174,240	£87,120	£43,560	£21,780	£10,890	£5,445	£2,723	£1,361
Total negotiation cost								£347,119