

Screening Regulatory Impact Analysis

**General Scheme of the Copyright and Related Rights (Amendment) Bill
2024**

Department of Enterprise, Trade and Employment 2024

1. Description of Policy Context, Objectives and Options

Policy Context

The context is the judgement of CJEU Case C-265/19, delivered in September 2020, for Recorded Artists Actors Performers (RAAP) v Phonographic Performance Ireland (PPI) and the State; and associated High Court Judgement 2021 IECH 22, delivered in February 2021.

In January 2019, 4 questions were referred from the Commercial Court (High Court) to the CJEU. In its judgement, delivered in September 2020, the CJEU found against Ireland in relation to the incorrect transposition of the Directive, specifically in relation to the sharing of royalties between producers and music performers. The matter then returned to the High Court which subsequently delivered a judgement in February 2021, reflecting the CJEU's findings.

The Department of Enterprise, Trade and Employment (DETE) analysed the judgements of both the CJEU and the High Court in detail in order to determine the most appropriate way to address their findings. This involves amendments to the copyright legislation. The preparation of these amendments has involved detailed and extensive legal advice from the Department's Legal Advice Unit, the Office of the Attorney Counsel, and from external Counsel of the Bar.

RAAP is a collective management organisation (CMO) on behalf of performers and PPI is a CMO on behalf of music producers. Music producers own the copyright of recorded music, and music performers are entitled to a share of the royalty payments as per their *performers' rights* as set out in the legislation.

The essence of the original High Court case taken by RAAP in 2016 against PPI and the State related to the distribution or sharing of royalties between music producers and performers. The Minister, Department, and State were named as co-defendants in the proceedings as it was alleged by RAAP that the State had failed to correctly implement a 2006 Copyright Directive.

Objectives Pursued

To amend the Copyright and Related Rights Act 2000 (as amended) (hereafter referred to as 'the Copyright Act') to take account of the CJEU and associated High Court judgements. Specifically, the purpose of these amendments is to make the Copyright legislation compliant with:

- (i) Ireland's obligations in terms of its international obligations (specifically Article 4(1) and Article 15(1) of the World Intellectual Property Organisation Performances and Phonograms Treaty ('the WPPT'), and the International

Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations ('the Rome Convention'); and

- (ii) To correctly transpose the EU Directive (Rental and Lending Directive 2006/115/EC) by clearly setting out the manner or details of how performers and producers will share royalty payments in the absence of an agreement between them.

Specifically, these amendments would involve the following amendments to the Copyright Act:

- (i) **Section 287 *Definition of qualifying person***. Currently, section 287 of the Copyright Act provides that "qualifying country" means (a) Ireland, (b) another Member State of the EEA, or (c) to the extent that an order under section 289 so provides, a country designated under that section. To date no country has been designated under section 289.

This section needs to be amended in order to ensure that the right to equitable remuneration under Directive 2006/115 (the Copyright rental and lending Directive) is granted to both performers and phonogram producers who are nationals of Member States of the European Union and to those who are nationals of other contracting parties to the WPPT, and the Rome Convention, in order to comply with the CJEU judgment.

- (ii) **Section 208 *Right to equitable remuneration for exploitation of sound recording***. The amendment to section 208 sets out a new process which must be adhered to for the division of the single equitable remuneration payment between the music performers and the producer (copyright owner), i.e., the parties.

Article 8(2) of Directive 2006/115 stipulates that Member States must ensure that the single equitable remuneration is shared between the relevant performers and the producers of the recorded music. It also stipulates that Member States must lay down the conditions for the sharing of the remuneration in the absence of an agreement between the parties.

These amendments ensure that Ireland properly transposes Article 8(2) of the Directive and ensures that the legislation clearly sets out the manner in which the remuneration is shared between performers and producers, in the absence of agreement. Should the performers and producers not be able to reach an agreement on the division of a single equitable remuneration between them, two further options would then be open to them. The first is that, if no agreement is reached, the default position is that both parties receive an equal share of the payment.

The second is that, if either party is unhappy with that scenario (the equal share), either party may then apply to the Circuit Court for a determination as to how the single payment should be divided between them.

The proposed amendment also substitutes the Circuit Court for the Controller of the Intellectual Property Office of Ireland, and adds criteria to facilitate the Circuit Court when making the order.

- (iii) A new provision under Section 208 ***Right to equitable remuneration for exploitation of sound recording***. This is to provide for a transitional provision for any referrals currently before the Controller to the Circuit Court. Any referrals commenced and not completed before the coming into operation of this amended section, under the authority of the Controller, may be carried on or completed by the Circuit Court.

Policy Options

Option 1: Do nothing/No policy change.

To leave the Copyright Act unamended would mean that Ireland remains noncompliant with international obligations, specifically the WPPT and the Rome Convention, as effected in domestic copyright law.

In addition, Ireland has been found, by the CJEU, to have incorrectly transposed Copyright Directive 2006/115/EC by not adequately providing for the sharing of royalty payments between music producers and performers, in the absence of an agreement between them, in domestic copyright law.

These two issues must be rectified by amending the Copyright Act.

Option 2: Amend the sections of the Copyright Act as outlined above.

To amend the Copyright Act, as outlined above, would mean that the legislation is compliant with international obligations, specifically the WPPT and the Rome Convention.

In addition, Copyright Directive 2006/115/EC would be adequately transposed into domestic copyright law.

Preferred Option

The preferred option is Option 2.

Identification of Costs, Benefits and other impacts of any options that are being considered.

The amendments are required further to the CJEU judgment in order to ensure that Ireland complies with its obligations under EU law. These provisions are not policy proposals of the Department but are required pursuant to the CJEU judgment and the associated High Court judgement. There are no costs, benefits, or other impacts of either option (as above) being considered.

Consultation

The Department wrote to the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media in 2023 to outline the proposed amendments to the Copyright Act as a result of the CJEU judgement, and to request any observations. No observations were received on foot of that correspondence.

The Department has not engaged with the parties to the litigation that led to the CJEU case, namely the two CMOs concerned (RAAP and PPI) in relation to these proposed amendments. The reason is that the original proceedings are still live and unresolved and still before the High Court. The Department's priority has been to restore the Irish legislation to compliance with obligations of EU law. This proposal is not an original policy initiative of the Department – its driving purpose is to restore compliance with EU law.

Since the CJEU judgement was delivered in September 2020, and the associated High Court judgement in February 2021, the Department's preparation of this legislative amendment has involved highly detailed and very extensive engagement with the Office of the Attorney General.

Enforcement and Compliance

The Department has no role in the enforcement of copyright legislation. It is for rightsholders themselves to bring proceedings before the appropriate court, as set out in the copyright legislation, should they believe that their rights have been infringed.

Review

The amendments to the Copyright Act would ensure compliance with both international copyright obligations and EU copyright law. The Department will conduct a post enactment report 12 months upon enactment of the legislation.