

Island of  Guernsey

**Ordinance of the States**

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**The Performers' Rights  
(Bailiwick of Guernsey)  
Ordinance, 2005**

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## **The Performers' Rights (Bailiwick of Guernsey) Ordinance, 2005**

**THE STATES**, in pursuance of their resolution of the 27<sup>th</sup> November, 2002<sup>a</sup>, and in exercise of the powers conferred on them by sections 1 and 3 of the Intellectual Property (Enabling Provisions) (Bailiwick of Guernsey) Law, 2004<sup>b</sup>, hereby order:-

### *Introductory*

#### **Rights conferred on performers and persons having recording rights.**

1. (1) This Ordinance confers rights -
  - (a) on a performer, by requiring his consent to the exploitation of his performances (see sections 2 to 10), and
  - (b) on a person having recording rights in relation to a performance, in relation to recordings made without his consent or that of the performer (see sections 11 to 14),

and creates offences in relation to dealing with or using illicit recordings and certain other related acts (see sections 38 and 41).

- (2) In this Ordinance -

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<sup>a</sup> Article XIX of Billet d'État No. XXIII of 2002.

<sup>b</sup> Order in Council No. XIV of 2004.

**"performance"** means -

- (a) a dramatic performance (which includes dance and mime),
- (b) a musical performance,
- (c) a reading or recitation of a literary work, or
- (d) a performance of a variety act or any similar presentation,

which is, or so far as it is, a live performance given by one or more individuals, and

**"recording"**, in relation to a performance, means a film or sound recording -

- (a) made directly from the live performance,
- (b) made from a broadcast of the performance, or
- (c) made, directly or indirectly, from another recording of the performance.

(3) The rights conferred by this Ordinance apply in relation to performances taking place before the commencement of this Ordinance, but no act done before commencement, or in pursuance of arrangements made before commencement, shall be regarded as infringing those rights.

- (4) The rights conferred by this Ordinance are independent of -
- (a) any copyright in, or moral rights relating to, any work performed or any film or sound recording of, or broadcast including, the performance, and
  - (b) any other right or obligation arising otherwise than under this Ordinance.

*Performers' rights*

**Qualifying performances.**

2. A performance is a "**qualifying performance**" for the purposes of the provisions of this Ordinance relating to performers' rights if it is given by a qualifying individual (as defined in section 47) or takes place in a qualifying country (as so defined).

**Consent required for recording, etc, of live performance.**

3. (1) A performer's rights are infringed by a person who, without his consent -

- (a) makes a recording of the whole or any substantial part of a qualifying performance directly from the live performance,
- (b) broadcasts live the whole or any substantial part of a qualifying performance,
- (c) makes a recording of the whole or any substantial part

of a qualifying performance directly from a broadcast of the live performance.

(2) In an action for infringement of a performer's rights brought by virtue of this section damages shall not be awarded against a defendant who shows that at the time of the infringement he believed on reasonable grounds that consent had been given.

**Consent required for copying of recording.**

4. (1) A performer's rights are infringed by a person who, without his consent, makes a copy of a recording of the whole or any substantial part of a qualifying performance.

(2) In subsection (1), making a copy of a recording includes making a copy which is transient or is incidental to some other use of the original recording.

(3) It is immaterial whether the copy is made directly or indirectly.

(4) The right of a performer under this section to authorise or prohibit the making of such copies is referred to in this Ordinance as "**reproduction right**".

**Consent required for issue of copies to the public.**

5. (1) A performer's rights are infringed by a person who, without his consent, issues to the public copies of a recording of the whole or any substantial part of a qualifying performance.

(2) References in this Ordinance to the issue to the public of

copies of a recording are to -

- (a) the act of putting into circulation in the Bailiwick, Jersey, the Isle of Man or the EEA copies not previously put into circulation in the Bailiwick, Jersey, the Isle of Man or the EEA by or with the consent of the performer, or
- (b) the act of putting into circulation outside the Bailiwick, Jersey, the Isle of Man and the EEA copies not previously put into circulation in the Bailiwick, Jersey, the Isle of Man or the EEA or elsewhere.

(3) References in this Ordinance to the issue to the public of copies of a recording do not include -

- (a) any subsequent distribution, sale, hiring or loan of copies previously put into circulation (but see section 6: consent required for rental or lending), or
- (b) any subsequent importation of such copies into the Bailiwick, Jersey, the Isle of Man or an EEA State,

except so far as subsection (2)(a) applies to putting into circulation in the Bailiwick, Jersey, the Isle of Man or the EEA copies previously put into circulation outside the Bailiwick, Jersey, the Isle of Man and the EEA.

(4) References in this Ordinance to the issue of copies of a recording of a performance include the issue of the original recording of the live performance.

(5) The right of a performer under this section to authorise or prohibit the issue of copies to the public is referred to in this Ordinance as "**distribution right**".

**Consent required for rental or lending of copies to public.**

6. (1) A performer's rights are infringed by a person who, without his consent, rents or lends to the public copies of a recording of the whole or any substantial part of a qualifying performance.

(2) In this Ordinance, subject to the following provisions of this section -

(a) "**rental**" means making a copy of a recording available for use, on terms that it will or may be returned, for direct or indirect economic or commercial advantage, and

(b) "**lending**" means making a copy of a recording available for use, on terms that it will or may be returned, otherwise than for direct or indirect economic or commercial advantage, through an establishment which is accessible to the public.

(3) The expressions "**rental**" and "**lending**" do not include -

(a) making available for the purpose of public performance, playing or showing in public or communication to the public,

(b) making available for the purpose of exhibition in public, or

(c) making available for on-the-spot reference use.

(4) The expression "**lending**" does not include making available between establishments which are accessible to the public.

(5) Where lending by an establishment accessible to the public gives rise to a payment the amount of which does not go beyond what is necessary to cover the operating costs of the establishment, there is no direct or indirect economic or commercial advantage for the purposes of this section.

(6) References in this Ordinance to the rental or lending of copies of a recording of a performance include the rental or lending of the original recording of the live performance.

(7) In this Ordinance -

"**rental right**" means the right of a performer under this section to authorise or prohibit the rental of copies to the public, and

"**lending right**" means the right of a performer under this section to authorise or prohibit the lending of copies to the public.

**Consent required for making available to public.**

7. (1) A performer's rights are infringed by a person who, without his consent, makes available to the public a recording of the whole or any substantial part of a qualifying performance by electronic transmission in such a way that members of the public may access the recording from a place and at a time

individually chosen by them.

(2) The right of a performer under this section to authorise or prohibit the making available to the public of a recording is referred to in this Ordinance as "**making available right**".

**Right to equitable remuneration for exploitation of sound recording.**

8. (1) Where a commercially published sound recording of the whole or any substantial part of a qualifying performance -

- (a) is played in public, or
- (b) is communicated to the public otherwise than by its being made available to the public in the way mentioned in section 7(1),

the performer is entitled to equitable remuneration from the owner of the copyright in the sound recording.

(2) The right to equitable remuneration under this section may not be assigned by the performer except to a collecting society for the purpose of enabling it to enforce the right on his behalf.

The right is, however, transmissible by testamentary disposition or by operation of law as personal or moveable property, and it may be assigned or further transmitted by any person into whose hands it passes.

(3) The amount payable by way of equitable remuneration is as agreed by or on behalf of the persons by and to whom it is payable, subject to the following provisions.

(4) In default of agreement as to the amount payable by way of equitable remuneration, the person by or to whom it is payable may apply to the Ordinary Court to determine the amount payable.

(5) A person to or by whom equitable remuneration is payable may also apply to the Ordinary Court -

(a) to vary any agreement as to the amount payable, or

(b) to vary any previous determination of the Ordinary Court as to that matter,

but, except with the leave of the Ordinary Court, no such application may be made within 12 months from the date of a previous determination.

An order made on an application under this subsection has effect from the date on which it is made or such later date as may be specified by the Ordinary Court.

(6) On an application under this section the Ordinary Court shall consider the matter and make such order as to the method of calculating and paying equitable remuneration as it may determine to be reasonable in the circumstances, taking into account the importance of the contribution of the performer to the sound recording.

(7) An agreement is of no effect in so far as it purports -

(a) to exclude or restrict the right to equitable remuneration under this section, or

- (b) to prevent a person questioning the amount of equitable remuneration or to restrict the powers of the Ordinary Court under this section.

(8) In this Ordinance "**the Ordinary Court**" means the Royal Court sitting as an Ordinary Court; and, for the purposes of this Ordinance, the Ordinary Court -

- (a) has, in relation to functions conferred on it by this Ordinance, jurisdiction throughout the Bailiwick,
- (b) is constituted by the Bailiff sitting unaccompanied by the Jurats, and
- (c) may appoint one or more assessors to assist it in the determination of the matter before it.

(9) In this section a "**collecting society**" means a society or other organisation which has as its main object, or one of its main objects, the exercise of the right to equitable remuneration on behalf of any performer.

**Infringement of performer's rights by use of recording made without consent.**

9. A performer's rights are infringed by a person who, without his consent -

- (a) shows or plays in public the whole or any substantial part of a qualifying performance, or
- (b) communicates to the public the whole or any

substantial part of a qualifying performance,

by means of a recording which was, and which that person knows or has reason to believe was, made without the performer's consent.

**Infringement of performer's rights by importing, possessing or dealing with illicit recording.**

**10.** (1) A performer's rights are infringed by a person who, without his consent -

- (a) imports into the Bailiwick otherwise than for his private and domestic use, or
- (b) in the course of a business possesses, sells or lets for hire, offers or exposes for sale or hire, or distributes,

a recording of a qualifying performance which is, and which that person knows or has reason to believe is, an illicit recording.

(2) Where in an action for infringement of a performer's rights brought by virtue of this section a defendant shows that the illicit recording was innocently acquired by him or a predecessor in title of his, the only remedy available against him in respect of the infringement is damages not exceeding a reasonable payment in respect of the act complained of.

(3) In subsection (2) "**innocently acquired**" means that the person acquiring the recording did not know and had no reason to believe that it was an illicit recording.

*Rights of person having recording rights*

**Exclusive recording contracts and persons having recording rights.**

11. (1) In this Ordinance an "**exclusive recording contract**" means a contract between a performer and another person under which that person is entitled to the exclusion of all other persons (including the performer) to make recordings of one or more of his performances with a view to their commercial exploitation.

(2) References in the Ordinance to a "**person having recording rights**" in relation to a performance are, subject to subsection (3), to a person -

- (a) who is party to and has the benefit of an exclusive recording contract to which the performance is subject, or
- (b) to whom the benefit of such a contract has been assigned,

and who is a qualifying person.

(3) If a performance is subject to an exclusive recording contract but the person mentioned in subsection (2) is not a qualifying person, references in this Ordinance to a "**person having recording rights**" in relation to the performance are to any person -

- (a) who is licensed by such a person to make recordings of the performance with a view to their commercial exploitation, or
- (b) to whom the benefit of such a licence has been assigned,

and who is a qualifying person.

(4) In this section "**with a view to commercial exploitation**" means with a view to the recordings being sold or let for hire, or shown or played in public.

**Consent required for recording of performance subject to exclusive contract.**

12. (1) A person infringes the rights of a person having recording rights in relation to a performance who, without his consent or that of the performer, makes a recording of the whole or any substantial part of the performance.

(2) In an action for infringement of those rights brought by virtue of this section damages shall not be awarded against a defendant who shows that at the time of the infringement he believed on reasonable grounds that consent had been given.

**Infringement of recording rights by use of recording made without consent.**

13. (1) A person infringes the rights of a person having recording rights in relation to a performance who, without his consent or, in the case of a qualifying performance, that of the performer -

- (a) shows or plays in public the whole or any substantial part of the performance, or
- (b) communicates to the public the whole or any substantial part of the performance,

by means of a recording which was, and which that person knows or has reason to

believe was, made without the appropriate consent.

(2) The reference in subsection (1) to "**the appropriate consent**" is to the consent of -

- (a) the performer, or
- (b) the person who at the time the consent was given had recording rights in relation to the performance (or, if there was more than one such person, of all of them).

**Infringement of recording rights by importing, possessing or dealing with illicit recording.**

**14.** (1) A person infringes the rights of a person having recording rights in relation to a performance who, without his consent or, in the case of a qualifying performance, that of the performer -

- (a) imports into the Bailiwick otherwise than for his private and domestic use, or
- (b) in the course of a business possesses, sells or lets for hire, offers or exposes for sale or hire, or distributes,

a recording of the performance which is, and which that person knows or has reason to believe is, an illicit recording.

(2) Where in an action for infringement of those rights brought by virtue of this section a defendant shows that the illicit recording was innocently acquired by him or a predecessor in title of his, the only remedy available against him in respect of the infringement is damages not exceeding a reasonable payment

in respect of the act complained of.

(3) In subsection (2) "**innocently acquired**" means that the person acquiring the recording did not know and had no reason to believe that it was an illicit recording.

*Exceptions to rights conferred*

**Acts permitted notwithstanding rights conferred by this Ordinance.**

15. The provisions of Schedule 1 specify acts which may be done notwithstanding the rights conferred by this Ordinance, being acts which correspond broadly to certain of those specified in Part III of the Copyright (Bailiwick of Guernsey) Ordinance, 2005 ("**the Copyright Ordinance**") (acts permitted notwithstanding copyright).

**Power of Ordinary Court to give consent on behalf of performer in certain cases.**

16. (1) The Ordinary Court may, on the application of a person wishing to make a copy of a recording of a performance, give consent in a case where the identity or whereabouts of the person entitled to the reproduction right cannot be ascertained by reasonable inquiry.

(2) Consent given by the Ordinary Court has effect as consent of the person entitled to the reproduction right for the purposes of -

- (a) the provisions of this Ordinance relating to performers' rights, and
- (b) section 38(3)(a) (criminal liability: sufficient consent in relation to qualifying performances),

and may be given subject to any conditions specified in the Ordinary Court's order.

(3) The Ordinary Court shall not give consent under subsection (1) except after the service or publication of such notices as may be required by rules of court or as the Ordinary Court may in any particular case direct.

(4) In any case the Ordinary Court shall take into account the following factors -

(a) whether the original recording was made with the performer's consent and is lawfully in the possession or control of the person proposing to make the further recording,

(b) whether the making of the further recording is consistent with the obligations of the parties to the arrangements under which, or is otherwise consistent with the purposes for which, the original recording was made.

(5) Where the Ordinary Court gives consent under this section it shall, in default of agreement between the applicant and the person entitled to the reproduction right, make such order as it thinks fit as to the payment to be made to that person in consideration of consent being given.

*Duration of rights*

**Duration of rights.**

17. (1) The following provisions have effect with respect to the

duration of the rights conferred by this Ordinance.

(2) The rights conferred by this Ordinance in relation to a performance expire -

- (a) at the end of the period of 50 years from the end of the calendar year in which the performance takes place, or
- (b) if during that period a recording of the performance is released, 50 years from the end of the calendar year in which it is released,

subject as follows.

(3) For the purposes of subsection (2) a recording is "**released**" when it is first published, played or shown in public or communicated to the public, but in determining whether a recording has been released no account shall be taken of any unauthorised act.

(4) Where a performer is not an EEA national, the duration of the rights conferred by this Ordinance in relation to his performance is that to which the performance is entitled in the country of which he is a national, provided that does not exceed the period which would apply under subsections (2) and (3).

*Performers' property rights*

**Performers' property rights.**

18. (1) The following rights conferred by this Ordinance on a performer -

- (a) reproduction right (section 4(4)),
- (b) distribution right (section 5(5)),
- (c) rental right and lending right (section 6(7)), and
- (d) making available right (section 7(2)),

are property rights ("**a performer's property rights**").

(2) References in this Ordinance to the consent of the performer shall be construed in relation to a performer's property rights as references to the consent of the rights owner.

(3) Where different persons are (whether in consequence of a partial assignment or otherwise) entitled to different aspects of a performer's property rights in relation to a performance, the rights owner for any purpose of this Ordinance is the person who is entitled to the aspect of those rights relevant for that purpose.

(4) Where a performer's property rights (or any aspect of them) is owned by more than one person jointly, references in this Ordinance to the rights owner are to all the owners, so that, in particular, any requirements of the licence of the rights owner requires the licence of all of them.

**Assignment and licences.**

**19.** (1) A performer's property rights are transmissible by assignment, by testamentary disposition or by operation of law, as personal or moveable property.

(2) An assignment or other transmission of a performer's property rights may be partial, that is, limited so as to apply -

- (a) to one or more, but not all, of the things requiring the consent of the rights owner,
- (b) to part, but not the whole, of the period for which the rights are to subsist.

(3) An assignment of a performer's property rights is not effective unless it is in writing signed by or on behalf of the assignor.

(4) A licence granted by the owner of a performer's property rights is binding on every successor in title to his interest in the rights, except a purchaser in good faith for valuable consideration and without notice (actual or constructive) of the licence or a person deriving title from such a purchaser, and references in this Ordinance to doing anything with, or without, the licence of the rights owner shall be construed accordingly.

**Prospective ownership of a performer's property rights.**

20. (1) This section applies where by an agreement made in relation to a future recording of a performance, and signed by or on behalf of the performer, the performer purports to assign his performer's property rights (wholly or partially) to another person.

(2) If on the rights coming into existence the assignee or another person claiming under him would be entitled as against all other persons to require the rights to be vested in him, they shall vest in the assignee or his successor in title by virtue of this subsection.

(3) A licence granted by a prospective owner of a performer's property rights is binding on every successor in title to his interest (or prospective interest) in the rights, except a purchaser in good faith for valuable consideration and without notice (actual or constructive) of the licence or a person deriving title from such a purchaser.

References in this Ordinance to doing anything with, or without, the licence of the rights owner shall be construed accordingly.

(4) In subsection (3) "**prospective owner**" in relation to a performer's property rights means a person who is prospectively entitled to those rights by virtue of such an agreement as is mentioned in subsection (1).

**Exclusive licences.**

21. (1) In this Ordinance an "**exclusive licence**" means a licence in writing signed by or on behalf of the owner of a performer's property rights authorising the licensee to the exclusion of all other persons, including the person granting the licence, to do anything requiring the consent of the rights owner.

(2) The licensee under an exclusive licence has the same rights against a successor in title who is bound by the licence as he has against the person granting the licence.

**Performer's property right to pass under will with unpublished original recording.**

22. Where under a bequest (whether general or specific) a person is entitled beneficially or otherwise to any material thing containing an original recording of a performance which was not published before the death of the testator, the bequest shall, unless a contrary intention is indicated in the testator's will or a codicil to it, be construed as including any performer's rights in relation to

the recording to which the testator was entitled immediately before his death.

**Presumption of transfer of rental right in case of film production agreement.**

23. (1) Where an agreement concerning film production is concluded between a performer and a film producer, the performer shall be presumed, unless the agreement provides to the contrary, to have transferred to the film producer any rental right in relation to the film arising from the inclusion of a recording of his performance in the film.

(2) Where this section applies, the absence of signature by or on behalf of the performer does not exclude the operation of section 20 (effect of purported assignment of future rights).

(3) The reference in subsection (1) to an agreement concluded between a performer and a film producer includes any agreement having effect between those persons, whether made by them directly or through intermediaries.

(4) Section 24 (right to equitable remuneration on transfer of rental right) applies where there is a presumed transfer by virtue of this section as in the case of an actual transfer.

**Right to equitable remuneration where rental right transferred.**

24. (1) Where a performer has transferred his rental right concerning a sound recording or a film to the producer of the sound recording or film, he retains the right to equitable remuneration for the rental.

The reference above to the transfer of rental right by one person to another includes any arrangement having that effect, whether made by them directly or through intermediaries.

(2) The right to equitable remuneration under this section may not be assigned by the performer except to a collecting society for the purpose of enabling it to enforce the right on his behalf.

The right is, however, transmissible by testamentary disposition or by operation of law as personal or movable property, and it may be assigned or further transmitted by any person into whose hands it passes.

(3) Equitable remuneration under this section is payable by the person for the time being entitled to the rental right, that is, the person to whom the right was transferred or any successor in title of his.

(4) The amount payable by way of equitable remuneration is as agreed by or on behalf of the persons by and to whom it is payable, subject to section 25 (reference of amount to Ordinary Court).

(5) An agreement is of no effect in so far as it purports to exclude or restrict the right to equitable remuneration under this section.

(6) In this section a "**collecting society**" means a society or other organisation which has as its main object, or one of its main objects, the exercise of the right to equitable remuneration on behalf of any performer.

**Equitable remuneration: reference of amount to Ordinary Court.**

**25.** (1) In default of agreement as to the amount payable by way of equitable remuneration under section 24, the person by or to whom it is payable may apply to the Ordinary Court to determine the amount payable.

(2) A person to or by whom equitable remuneration is payable may also apply to the Ordinary Court -

- (a) to vary any agreement as to the amount payable, or
- (b) to vary any previous determination of the Ordinary Court as to that matter,

but except with the leave of the Ordinary Court no such application may be made within 12 months from the date of a previous determination.

An order made on an application under this subsection has effect from the date on which it is made or such later date as may be specified by the Ordinary Court.

(3) On an application under this section the Ordinary Court shall consider the matter and make such order as to the method of calculating and paying equitable remuneration as it may determine to be reasonable in the circumstances, taking into account the importance of the contribution of the performer to the film or sound recording.

(4) Remuneration shall not be considered inequitable merely because it was paid by way of a single payment or at the time of the transfer of the rental right.

(5) An agreement is of no effect in so far as it purports to prevent a person questioning the amount of equitable remuneration or to restrict the powers of the Ordinary Court under this section.

**Infringement actionable by rights owner.**

26. (1) An infringement of a performer's property rights is actionable by the rights owner.

(2) In an action for infringement of a performer's property rights all such relief by way of damages, injunctions, accounts or otherwise is available to the plaintiff as is available in respect of the infringement of any other property right.

(3) This section has effect subject to the following provisions of this Ordinance.

**Provisions as to damages in infringement action.**

27. (1) Where in an action for infringement of a performer's property rights it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that the rights subsisted in the recording to which the action relates, the plaintiff is not entitled to damages against him, but without prejudice to any other remedy.

(2) The court may in an action for infringement of a performer's property rights, having regard to all the circumstances, and in particular to -

- (a) the flagrancy of the infringement, and
- (b) any benefit accruing to the defendant by reason of the infringement,

award such additional damages as the justice of the case may require.

**Injunctions against service providers.**

28. (1) The court may grant an injunction against a service provider where the service provider has actual knowledge of another person using their service to infringe a performer's property right.

(2) In determining whether a service provider has actual knowledge for the purpose of this section, the court shall take into account all matters which appear to it in the particular circumstances to be relevant and, amongst other things, shall have regard to -

- (a) whether a service provider has received notice, which may be through a means of contact made available in accordance with section 8 of the Law referred to (as the case may require) in subsection (3)(a), (b) or (c), and
- (b) the extent to which any such notice includes -
  - (i) the full name and address of the sender of the notice, and
  - (ii) details of the infringement in question.

(3) In this section "**service provider**" has the meaning given by (as the case may require) -

- (a) section 17 of the Electronic Transactions (Guernsey) Law, 2000<sup>c</sup>,
- (b) section 17 of the Electronic Transactions (Alderney) Law, 2001<sup>d</sup>, or

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<sup>c</sup> Order in Council No. VIII of 2000.

<sup>d</sup> Order in Council No. XXVI of 2001.

- (c) section 17 of the Electronic Transactions (Sark) Law, 2001<sup>e</sup>.

**Rights and remedies for exclusive licensee.**

29. (1) An exclusive licensee has, except against the owner of a performer's property rights, the same rights and remedies in respect of matters occurring after the grant of the licence as if the licence had been an assignment.

(2) His rights and remedies are concurrent with those of the rights owner, and references in the relevant provisions of this Ordinance to the rights owner shall be construed accordingly.

(3) In an action brought by an exclusive licensee by virtue of this section a defendant may avail himself of any defence which would have been available to him if the action had been brought by the rights owner.

**Exercise of concurrent rights.**

30. (1) Where an action for infringement of a performer's property rights brought by the rights owner or an exclusive licensee relates (wholly or partly) to an infringement in respect of which they have concurrent rights of action, the rights owner or, as the case may be, the exclusive licensee may not, without the leave of the court, proceed with the action unless the other is either joined as plaintiff or added as a defendant.

(2) A rights owner or exclusive licensee who is added as a defendant in pursuance of subsection (1) is not liable for any costs in the action

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unless he takes part in the proceedings.

(3) The above provisions do not affect the granting of interlocutory relief on an application by the rights owner or exclusive licensee alone.

(4) Where an action for infringement of a performer's property rights is brought which relates (wholly or partly) to an infringement in respect of which the rights owner and an exclusive licensee have or had concurrent rights of action -

(a) the court shall, in assessing damages, take into account

-

(i) the terms of the licence, and

(ii) any pecuniary remedy already awarded or available to either of them in respect of the infringement,

(b) no account of profits shall be directed if an award of damages has been made, or an account of profits has been directed, in favour of the other of them in respect of the infringement, and

(c) the court shall, if an account of profits is directed, apportion the profits between them as the court considers just, subject to any agreement between them,

and these provisions apply whether or not the rights owner and the exclusive licensee are both parties to the action.

(5) The owner of a performer's property rights shall notify any exclusive licensee having concurrent rights before applying for an order under section 35 (order for delivery up) or exercising the right conferred by section 36 (right of seizure), and the court may on the application of the licensee make such order under section 35 or, as the case may be, prohibiting or permitting the exercise by the rights owner of the right conferred by section 36 as it thinks fit having regard to the terms of the licence.

*Non-property rights*

**Performer's non-property rights.**

31. (1) The rights conferred on a performer by -
- (a) section 3 (consent required for recording, etc of live performance),
  - (b) section 9 (infringement of performer's rights by use of recording made without consent), and
  - (c) section 10 (infringement of performer's rights by importing, possessing or dealing with illicit recording),

are not assignable or transmissible, except to the following extent.

They are referred to in this Ordinance as "**performer's non-**

**property rights".**

- (2) On the death of a person entitled to any such right -
  - (a) the right passes to such person as he may by testamentary disposition specifically direct, and
  - (b) if or to the extent that there is no such direction, the right is exercisable by his personal representatives.

(3) References in this Ordinance to the performer, in the context of the person having any such right, shall be construed as references to the person for the time being entitled to exercise those rights.

(4) Where by virtue of subsection (2)(a) a right becomes exercisable by more than one person, it is exercisable by each of them independently of the other or others.

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

*Transmissibility and consent*

**Transmissibility of rights of person having recording rights.**

**32.** (1) The rights conferred by this Ordinance on a person having recording rights are not assignable or transmissible.

- (2) This does not affect section 11(2)(b) or (3)(b), so far as those

provisions confer rights under this Ordinance on a person to whom the benefit of a contract or licence is assigned.

**Consent.**

33. (1) Consent for the purposes of this Ordinance by a person having a performer's non-property rights, or by a person having recording rights, may be given in relation to a specific performance, a specified description of performances or performances generally, and may relate to past or future performances.

(2) A person having recording rights in a performance is bound by any consent given by a person through whom he derives his rights under the exclusive recording contract or licence in question, in the same way as if the consent had been given by him.

(3) Where a performer's non-property right passes to another person, any consent binding on the person previously entitled binds the person to whom the right passes in the same way as if the consent had been given by him.

*Remedies for infringement*

**Infringement actionable as breach of statutory duty.**

34. An infringement of -

- (a) a performer's non-property rights,
- (b) any right conferred by this Ordinance on a person having recording rights,

is actionable by the person entitled to the right as a breach of statutory duty.

**Order for delivery up.**

35. (1) Where a person has in his possession, custody or control in the course of a business an illicit recording of a performance, a person having performer's rights or recording rights in relation to the performance under this Ordinance may apply to the court for an order that the recording be delivered up to him or to such other person as the court may direct.

(2) An application shall not be made after the end of the period specified in section 43, and no order shall be made unless the court also makes, or it appears to the court that there are grounds for making, an order under section 44 (order as to disposal of illicit recording).

(3) A person to whom a recording is delivered up in pursuance of an order under this section shall, if an order under section 44 is not made, retain it pending the making of an order, or the decision not to make an order, under that section.

(4) Nothing in this section affects any other power of the court.

**Right to seize illicit recordings.**

36. (1) An illicit recording of a performance which is found exposed or otherwise immediately available for sale or hire, and in respect of which a person would be entitled to apply for an order under section 35, may be seized and detained by him or a person authorised by him.

The right to seize and detain is exercisable subject to the following conditions and is subject to any decision of the court under section 44 (order as to disposal of illicit recording).

(2) Before anything is seized under this section notice of the time and place of the proposed seizure must be given to a police officer.

(3) A person may for the purpose of exercising the right conferred by this section enter premises to which the public have access but may not seize anything in the possession, custody or control of a person at a permanent or regular place of business of his and may not use any force.

(4) At the time when anything is seized under this section there shall be left at the place where it was seized a notice in the prescribed form containing the prescribed particulars as to the person by whom or on whose authority the seizure is made and the grounds on which it is made.

(5) In this section -

"**premises**" includes land, buildings, fixed or moveable structures, vehicles, vessels and aircraft, and

"**prescribed**" means prescribed by regulations of the Department.

**Meaning of "illicit recording".**

37. (1) In this Ordinance "**illicit recording**", in relation to a performance, shall be construed in accordance with this section.

(2) For the purposes of a performer's rights, a recording of the whole or any substantial part of a performance of his is an illicit recording if it is made, otherwise than for private purposes, without his consent.

(3) For the purposes of the rights of a person having recording rights, a recording of the whole or any substantial part of a performance subject to

the exclusive recording contract is an illicit recording if it is made, otherwise than for private purposes, without his consent or that of the performer.

(4) For the purposes of sections 38 and 39 (offences and orders for delivery up in criminal proceedings), a recording is an illicit recording if it is an illicit recording for the purposes mentioned in subsection (2) or (3).

(5) In this Ordinance "**illicit recording**" includes a recording falling to be treated as an illicit recording by virtue of any of the following provisions of Schedule 1 -

- (a) paragraph 5(3) (recordings made for purposes of instruction or examination),
- (b) paragraph 7(4) (recordings made by educational establishments for educational purposes),
- (c) paragraph 15(2) (recordings of performance in electronic form retained on transfer of principal recording), or
- (d) paragraph 20(3) (recordings made for purposes of broadcast),
- (e) paragraph 22(2) (recording for the purposes of time-shifting), or
- (f) paragraph 23(2) (photographs of broadcasts),

but otherwise does not include a recording made in accordance with any of the

provisions of that Schedule.

(6) It is immaterial for the purposes of this section where the recording was made.

*Offences*

**Criminal liability for making, dealing with or using illicit recordings.**

38. (1) A person commits an offence who without sufficient consent -

- (a) makes for sale or hire,
- (b) imports into the Bailiwick otherwise than for his private and domestic use,
- (c) possesses in the course of a business with a view to committing any act infringing the rights conferred by this Ordinance, or
- (d) in the course of a business -
  - (i) sells or lets for hire,
  - (ii) offers or exposes for sale or hire, or
  - (iii) distributes,

a recording which is, and which he knows or has reason to believe is, an illicit recording.

(2) A person who infringes a performer's making available right-

(a) in the course of a business, or

(b) otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the making available right,

commits an offence if he knows or has reason to believe that, by doing so, he is infringing the making available right in the recording.

(3) A person commits an offence who causes a recording of a performance made without sufficient consent to be -

(a) shown or played in public, or

(b) communicated to the public,

thereby infringing any of the rights conferred by this Ordinance, if he knows or has reason to believe that those rights are thereby infringed.

(4) In subsections (1) and (3) "**sufficient consent**" means -

(a) in the case of a qualifying performance, the consent of the performer, and

(b) in the case of a non-qualifying performance subject to an exclusive recording contract -

(i) for the purposes of subsection (1)(a) (making of

recording), the consent of the performer or the person having recording rights, and

- (ii) for the purposes of subsections (1)(b), (c) and (d) and subsection (3) (dealing with or using recording), the consent of the person having recording rights.

The references in this subsection to the person having recording rights are to the person having those rights at the time the consent is given or, if there is more than one such person, to all of them.

(5) No offence is committed under subsection (1) or (3) by the commission of an act which by virtue of any provision of Schedule 1 may be done without infringing the rights conferred by this Ordinance.

(6) A person guilty of an offence under subsection (1)(a), (b) or (d)(iii) is liable -

- (a) on summary conviction, to imprisonment for a term not exceeding 6 months, or to a fine not exceeding level 5 on the uniform scale, or to both,
- (b) on conviction on indictment, to a fine, or to imprisonment for a term not exceeding 10 years, or to both.

(7) A person guilty of an offence under subsection (2) is liable -

- (a) on summary conviction, to imprisonment for a term

not exceeding 3 months, or to a fine not exceeding level 5 on the uniform scale, or to both,

- (b) on conviction on indictment, to a fine, or to imprisonment for a term not exceeding 2 years, or to both.

(8) A person guilty of any other offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months, or to a fine not exceeding level 5 on the uniform scale, or to both.

**Order for delivery up in criminal proceedings.**

39. (1) The court before which proceedings are brought against a person for an offence under section 38 may, if satisfied that at the time of his arrest or charge he had in his possession, custody or control in the course of a business an illicit recording of a performance, order that it be delivered up to a person having performers' rights or recording rights in relation to the performance or to such other person as the court may direct.

(2) For this purpose a person shall be treated as charged with an offence when he is charged or is served with a summons.

(3) An order may be made by the court -

- (a) of its own motion or on the application of or on behalf of Her Majesty's Procureur, and

- (b) whether or not the person is convicted of the offence,

but shall not be made -

- (i) after the end of the period specified in section 43 (period after which remedy of delivery up not available), or
- (ii) if it appears to the court unlikely that any order will be made under section 44 (order as to disposal of illicit recording).

(4) A person aggrieved by an order made under this section by the court, or by a decision of the court not to make such an order, may appeal against the order or decision as against a conviction or, as the case may be, as against an acquittal by that court of an offence.

(5) A person to whom an illicit recording is delivered up in pursuance of an order under this section shall retain it pending the making of an order, or the decision not to make an order, under section 44.

(6) Nothing in this section affects any other powers of a court with respect to forfeiture in criminal proceedings.

### **Search warrants**

**40.** (1) Where the Bailiff is satisfied by information on oath given by a police officer that there are reasonable grounds for believing -

- (a) that an offence under section 38(1) or (2) (offences of making, importing, possessing, selling or distributing illicit recordings) has been or is about to be committed on any premises, and

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- (b) that evidence that such an offence has been or is about to be committed is on those premises,

he may issue a warrant authorising a police officer to enter and search the premises, using such reasonable force as is necessary.

(2) A warrant under subsection (1) -

- (a) may authorise persons to accompany any police officer executing the warrant, and

- (b) remains in force for 28 days from the date of its issue.

(3) In executing a warrant issued under subsection (1) a police officer may seize an article if he reasonably believes that it is evidence that any offence under section 38(1) or (2) has been or is about to be committed.

(4) In this section -

**"Bailiff"** means -

- (a) where the warrant is to be executed in Alderney, the Chairman of the Court of Alderney or, if he is unavailable, a Jurat thereof,
- (b) where the warrant is to be executed in Sark, the Seneschal or his deputy, and
- (c) in any other case, the Bailiff, Deputy-Bailiff, Lieutenant-Bailiff or Juge Délégué, and

"premises" includes land, buildings, fixed or moveable structures, vehicles, vessels and aircraft.

**False representation of authority to give consent.**

41. (1) It is an offence for a person to represent falsely that he is authorised by any person to give consent for the purposes of this Ordinance in relation to a performance, unless he believes on reasonable ground that he is so authorised.

(2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months, or to a fine not exceeding level 5 on the uniform scale, or to both.

**Offence by body corporate, and liability of accessories and abettors, etc.**

42. (1) Where an offence under this Ordinance committed by a body corporate is proved to have been committed with the consent or connivance of, or to be any attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and may be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies to a member in connection with his functions of management as if he were a director.

(3) A person who aids, abets, counsels, commands or procures the commission of an offence under this Ordinance may be proceeded against and punished as a principal offender.

*Delivery up and seizure: supplemental*

**Period after which remedy of delivery up not available.**

43. (1) An application for an order under section 35 (order for delivery up in civil proceedings) may not be made after the end of the period of 6 years from the date on which the illicit recording in question was made, subject to the following provisions.

(2) If during the whole or any part of that period a person entitled to apply for an order -

- (a) is a minor or is under a legal disability, or
- (b) is prevented by fraud or concealment from discovering the facts entitling him to apply,

an application may be made by him at any time before the end of the period of 6 years from the date on which he ceased to be a minor or under a legal disability or, as the case may be, could with reasonable diligence have discovered those facts.

(3) An order under section 39 (order for delivery up in criminal proceedings) shall not, in any case, be made after the end of the period of 6 years from the date on which the illicit recording in question was made.

**Order as to disposal of illicit recording.**

44. (1) An application may be made to the magistrate's court for an order that an illicit recording of a performance delivered up in pursuance of an order under section 35 or 39, or seized and detained in pursuance of the right conferred by section 36, shall be -

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- (a) forfeited to such person having performer's rights or recording rights in relation to the performance as the magistrate's court may direct, or
- (b) destroyed or otherwise dealt with as the magistrate's court may think fit,

or for a decision that no such order should be made.

(2) In considering what order (if any) should be made, the magistrate's court shall consider whether other remedies available in an action for infringement of the rights conferred by this Ordinance would be adequate to compensate the person or persons entitled to the rights and to protect their interests.

(3) The magistrate's court may make such order as it thinks just as to the service of notice on persons having an interest in the recording, and any such person is entitled -

- (a) to appear in proceedings for an order under this section, whether or not he was served with notice, and
- (b) to appeal against any order made, whether or not he appeared,

and an order shall not take effect until the end of the period within which notice of appeal may be given or, if before the end of that period notice of appeal is duly given, until final disposal of the proceedings on the appeal.

(4) Where there is more than one person interested in a recording, the magistrate's court shall make such order as it thinks just and may (in

particular) direct that the recording be sold, or otherwise dealt with, and the proceeds divided.

(5) If the magistrate's court decides that no order should be made under this section, the person in whose possession, custody or control the recording was before being delivered up or seized is entitled to its return.

(6) References in this section to a person having an interest in a recording include any person in whose favour an order could be made in respect of the recording under this section, under section 141 of the Copyright Ordinance, or under the corresponding provision of the Design Right (Bailiwick of Guernsey) Ordinance, 2005 or the Trade Marks (Bailiwick of Guernsey) Ordinance, 2005 (which make similar provision in relation to the infringement of copyright, design right and trade marks).

(7) For the purposes of this section "**magistrate's court**" means the court which made the order for delivery up under section 35 or 39 or, if that court is no longer seised of the matter, or if the recording was seized and detained under section 36 -

- (a) where the application is to be made in Alderney, the Court of Alderney,
- (b) where the application is to be made in Sark, the Court of the Seneschal, and
- (c) in any other case, the Magistrate's Court in Guernsey.

**Forfeiture of illicit recordings.**

45. (1) Where illicit recordings of a performance have come into the

possession of any person in connection with the investigation or prosecution of a relevant offence, that person may apply under this section for an order for the forfeiture of the illicit recordings.

- (2) In this section a "**relevant offence**" means -
  - (a) an offence under section 38(1) or (2) (criminal liability for making or dealing with illicit recordings), or
  - (b) an offence involving dishonesty or deception.
- (3) An application under this section may be made -
  - (a) where proceedings have been brought in any court for a relevant offence relating to some or all of the illicit recordings, to that court, or
  - (b) where no application for the forfeiture of the illicit recordings has been made under paragraph (a), by way of complaint to the Magistrate's Court in Guernsey, the Court of Alderney or (as the case may require) the Court of the Seneschal of Sark.
- (4) On an application under this section, the court shall make an order for the forfeiture of any illicit recordings only if satisfied that a relevant offence has been committed in relation to the illicit recordings.
- (5) A court may infer for the purposes of this section that a relevant offence has been committed in relation to any illicit recordings if it is satisfied that such an offence has been committed in relation to illicit recordings

which are representative of the illicit recordings in question (whether by reason of being part of the same consignment or batch or otherwise).

(6) A person aggrieved by an order made under this section by the court, or by a decision of the court not to make such an order, may appeal against the order or decision as against a conviction or, as the case may be, as against an acquittal by that court of an offence.

(7) An order under this section may contain such provision as may appear to the court to be appropriate for delaying the coming into force of the order pending the making and determination of any appeal.

(8) Subject to subsection (9), where any illicit recordings are forfeited under this section, they shall be destroyed in accordance with such directions as the court may give.

(9) On making an order under this section the court may direct that the illicit recordings to which the order relates shall, instead of being destroyed, be forfeited to the person having the performer's rights or recording rights in question or dealt with in such other way as the court thinks appropriate.

*Licensing of performer's property rights*

**Licensing of performer's property rights.**

46. The provisions of Schedule 2 have effect with respect to the licensing of performer's property rights.

*Qualification for protection, and extent*

**Qualifying countries, individuals and persons.**

47. (1) In this Ordinance -

"EEA" and related expressions shall be construed in accordance with subsection (4),

"qualifying country" means -

- (a) the Bailiwick, Jersey or the Isle of Man,
- (b) an EEA State, or
- (c) to the extent that regulations under section 48 so provide, a country designated under that section as enjoying reciprocal protection,

"qualifying individual" means a citizen or subject of, or an individual resident in, a qualifying country, and

"qualifying person" means a qualifying individual or a body corporate or other body having legal personality which -

- (a) is formed under the law of any part of the Bailiwick or another qualifying country, and
- (b) has in any part of the Bailiwick or another qualifying country a place of business at which substantial business activity is carried on,

and includes the States of Guernsey, the States of Alderney, the Chief Pleas of Sark and the Crown.

(2) The reference in the definition of "**qualifying individual**" to a person's being a citizen or subject of a qualifying country shall be construed -

(a) in relation to the Bailiwick, Jersey, the Isle of Man and the United Kingdom, as a reference to his being a British citizen, and

(b) in relation to a colony of the United Kingdom, as a reference to his being a British overseas territories' citizen by connection with that colony.

(3) In determining for the purpose of the definition of "**qualifying person**" whether substantial business activity is carried on at a place of business in any country, no account shall be taken of dealings in goods which are at all material times outside that country.

(4) In this Ordinance -

"**EEA**" means the European Economic Area,

"**EEA Agreement**" means the Agreement on the European Economic Area signed at Oporto on the 2<sup>nd</sup> May, 1992, as adjusted by the Protocol signed at Brussels on the 17<sup>th</sup> March, 1993,

"**EEA national**" means a national of an EEA State, and

"**EEA State**" means a state which is a contracting party to the EEA Agreement;

and references in this Ordinance to a person being an EEA national shall be construed in relation to a body corporate as references to its being incorporated under the law of an EEA State.

**Countries enjoying reciprocal protection.**

48. (1) The Department may by regulation designate as enjoying reciprocal protection under this Ordinance -

- (a) a Convention country, or
- (b) a country as to which the Department is satisfied that provision has been or will be made under its law giving adequate protection for Guernsey performances.

(2) A "**Convention country**" means a country which is a party to a Convention relating to performers' rights to which the United Kingdom is also a party and which extends to the Bailiwick.

(3) A "**Guernsey performance**" means a performance -

- (a) given by an individual who is a British citizen or resident in the Bailiwick, or
- (b) taking place in the Bailiwick.

(4) If the law of that country provides adequate protection only for certain descriptions of performance, regulations under subsection (1)(b) designating that country may contain provision limiting to a corresponding extent the protection afforded by this Ordinance in relation to performances connected with

that country.

(5) The power conferred by subsection (1)(b) is exercisable in relation to any colony of the United Kingdom as in relation to a foreign country.

**Guernsey ships.**

**49.** (1) This Ordinance applies to things done on a Guernsey ship as it applies to things done in the Bailiwick.

(2) In this section "**Guernsey ship**" means a ship registered in Guernsey under the Merchant Shipping Act 1894<sup>f</sup>.

*Supplemental*

**Interpretation.**

**50.** (1) In this Ordinance, unless the context requires otherwise -

"**Bailiff**", subject to the provisions of section 40(4) (which relates to the granting of warrants in Alderney and Sark), means the Bailiff, Deputy-Bailiff, Lieutenant-Bailiff or Juge Délégué,

"**Bailiwick**" means the Bailiwick of Guernsey and the territorial waters adjacent thereto,

"**broadcast**" : see subsection (2),

"**business**" includes a trade or profession,

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<sup>f</sup> An Act of Parliament (57 & 58 Vict. c. 60).

"**consent of the performer**" (in relation to performer's property rights) : see section 18(2),

"**Copyright Ordinance**" means the Copyright (Bailiwick of Guernsey) Ordinance, 2005,

"**country**" includes a territory,

"**Crown**", except in section 47, means the Crown in right of the Bailiwick,

"**Department**" means the States of Guernsey Commerce and Employment Department,

"**distribution right**" : see section 5,

"**EEA**" and related expressions : see section 47,

"**electronic**" means actuated by one or more of the following types of energy : electric, magnetic, electro-magnetic (including optical), electro-chemical and electro-mechanical,

"**enactment**" includes any Law, Ordinance, Act of Parliament and Order in Council, and any subordinate legislation made thereunder,

"**in electronic form**" means in a form usable only by electronic means,

"**exclusive licence**" : see section 21,

"**exclusive recording contract**" : see section 11,

"**Her Majesty's Procureur**" includes Her Majesty's Comptroller,

"**illicit recording**" : see section 37,

"**lending**" and "**lending right**" : see section 6,

"**licensing body**" and "**licensing scheme**" : see paragraph 1 of Schedule 2,

"**making available right**" : see section 7,

"**Ordinary Court**" means the Royal Court sitting as an Ordinary Court, constituted in accordance with section 8(8),

"**performance**" : see section 1,

"**performer's non-property rights**" : see section 31,

"**performer's property rights**" : see section 18,

"**person having recording rights**" : see section 11,

"**police officer**" means a member of the salaried police force of the Island of Guernsey and -

- (a) in relation to Guernsey, Herm and Jethou, and within the limits of his jurisdiction, a member of the special constabulary of the Island of Guernsey,

(b) in relation to Alderney, a member of any police force which may be established by the States of Alderney and, within the limits of his jurisdiction, a member of the Alderney Special Constabulary established pursuant to section 47 of the Government of Alderney Law, 2004,

(c) in relation to Sark, the Constable and the Vingtenier,

**"qualifying country"** : see section 47,

**"qualifying individual"** : see section 47,

**"qualifying performance"** : see section 2,

**"qualifying person"** : see section 47,

**"recording"** of a performance : see section 1,

**"recording rights"** (in relation to a person having such rights) : see section 11,

**"rental"** and **"rental right"** : see section 6,

**"reproduction right"** : see section 4,

**"rights owner"** (in relation to performer's property rights) : see section 18,

"**sound recording**" means -

- (a) a recording of sounds, from which the sounds may be reproduced, or
- (b) a recording of the whole or any part of a literary, dramatic or musical work from which sounds reproducing the work or part may be produced,

regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced,

"**States**" means the States of Guernsey,

"**uniform scale**" means the uniform scale of fines from time to time in force under the Uniform Scale of Fines (Bailiwick of Guernsey) Law, 1989<sup>g</sup>,

and other words or expressions which are defined in the Intellectual Property (Enabling Provisions) (Bailiwick of Guernsey) Law, 2004<sup>h</sup> or in the Copyright Ordinance have the same meanings as in that Law or (as the case may be) in that Ordinance.

(2) In this Ordinance "**broadcast**" means an electronic transmission of visual images, sounds or other information which -

- (a) is transmitted for simultaneous reception by members

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<sup>g</sup> Ordres en Conseil Vol. XXXI, p. 278.

<sup>h</sup> Order in Council No. XIV of 2004.

of the public and is capable of being lawfully received by them, or

- (b) is transmitted at a time determined solely by the person making the transmission for presentation to members of the public,

and related expressions shall be construed accordingly; but excepted from the definition of "**broadcast**" is any internet transmission unless it is -

- (i) a transmission taking place simultaneously on the internet and by other means,
- (ii) a concurrent transmission of a live event, or
- (iii) a transmission of recorded moving images or sounds forming part of a programme service offered by the person responsible for making the transmission, being a service in which programmes are transmitted at scheduled times determined by that person.

For the purposes of this subsection an encrypted transmission shall be regarded as capable of being "**lawfully received**" by members of the public only if decoding equipment has been made available to members of the public by or with the authority of the person making the transmission or the person providing the contents of the transmission, and "**encrypted**" includes subjected to scrambling or the operation of cryptographic envelopes, electronic locks, passwords or any other analogous application.

(3) The provisions of sections 7(4) to (7) and 23(4) of the Copyright Ordinance (supplementary provisions relation to broadcasting) apply for the purposes of this Ordinance and in relation to an infringement of the rights conferred by this Ordinance, as they apply for the purposes of that Ordinance and in relation to an infringement of copyright.

(4) References in this Ordinance to an enactment or Community instrument are references thereto as from time to time amended, repealed and re-enacted (with or without modification), extended or applied.

(5) The Interpretation (Guernsey) Law, 1948<sup>i</sup> applies to the interpretation of this Ordinance throughout the Bailiwick.

**General provisions as to subordinate legislation.**

**51.** (1) Regulations under this Ordinance -

- (a) may be amended or repealed by subsequent regulations hereunder,
- (b) may contain such consequential, incidental, supplementary and transitional provision as may appear to be necessary or expedient, and
- (c) may contain provision making consequential amendments to this Ordinance.

(2) Any power conferred by this Ordinance to make regulations may be exercised -

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<sup>i</sup> Ordres en Conseil Vol. XIII, p. 355.

- (a) in relation to all cases to which the power extends, or in relation to all those cases subject to specified exceptions, or in relation to any specified cases or classes of cases,
- (b) so as to make, as respects the cases in relation to which it is exercised -
  - (i) the full provision to which the power extends, or any lesser provision (whether by way of exception or otherwise),
  - (ii) the same provision for all cases, or different provision for different cases or classes of cases, or different provision for the same case or class of case for different purposes,
  - (iii) any such provision either unconditionally or subject to any prescribed conditions.

(3) Any regulation made by the Department under this Ordinance shall be laid before a meeting of the States as soon as possible after being made and, if at that or the next meeting the States resolve that the regulation be annulled, then it shall cease to have effect, but without prejudice to anything done under it or to the making of a new regulation.

**Citation.**

52. This Ordinance may be cited as the Performers' Rights (Bailiwick of Guernsey) Ordinance, 2005.

**Extent.**

- 53.** This Ordinance has effect throughout the Bailiwick.

**Commencement.**

- 54.** This Ordinance shall come into force on the 1<sup>st</sup> January, 2006.

SCHEDULE 1

Section 15

RIGHTS IN PERFORMANCES: PERMITTED ACTS

**Introductory.**

1. (1) The provisions of this Schedule specify acts which may be done in relation to a performance or recording notwithstanding the rights conferred by this Ordinance.

They relate only to the question of infringement of those rights and do not affect any other right or obligation restricting the doing of any of the specified acts.

(2) No inference shall be drawn from the description of any act which may by virtue of this Schedule be done without infringing the rights conferred by this Ordinance as to the scope of those rights.

(3) The provisions of this Schedule are to be construed independently of each other, so that the fact that an act does not fall within one provision does not mean that it is not covered by another provision.

**Making of temporary copies.**

2. The rights conferred by this Ordinance are not infringed by the making of a temporary copy of a recording of a performance which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable -

- (a) a transmission of the recording in a network between third parties by an intermediary, or

(b) a lawful use of the recording,

and which has no independent economic significance.

**Criticism, reviews and news reporting.**

3. (1) Fair dealing with a performance or recording for the purpose of criticism or review, of that or another performance or recording, or of a work, does not infringe any of the rights conferred by this Ordinance provided that the performance or recording has been made available to the public.

(2) Fair dealing with a performance or recording for the purpose of reporting current events does not infringe any of the rights conferred by this Ordinance.

(3) Expressions used in this paragraph have the same meaning as in section 35 of the Copyright Ordinance.

**Incidental inclusion of performance or recording.**

4. (1) The rights conferred by this Ordinance are not infringed by the incidental inclusion of a performance or recording in a sound recording, film or broadcast.

(2) Nor are those rights infringed by anything done in relation to copies of, or the playing, showing or communication to the public of, anything whose making was, by virtue of subparagraph (1), not an infringement of those rights.

(3) A performance or recording so far as it consists of music, or words spoken or sung with music, shall not be regarded as incidentally included in a

sound recording or broadcast if it is deliberately included.

(4) Expressions used in this paragraph have the same meaning as in section 37 of the Copyright Ordinance.

**Things done for purposes of instruction or examination.**

5. (1) The rights conferred by this Ordinance are not infringed by the copying of a recording of a performance in the course of instruction, or of preparation for instruction, in the making of films or film sound-tracks, provided the copying is done by a person giving or receiving instruction and the instruction is for a non-commercial purpose.

(2) The rights conferred by this Ordinance are not infringed -

(a) by the copying of a recording of a performance for the purposes of setting or answering the questions in an examination, or

(b) by anything done for the purposes of an examination by way of communicating the questions to the candidates.

(3) Where a recording which would otherwise be an illicit recording is made in accordance with this paragraph but is subsequently dealt with, it shall be treated as an illicit recording for the purposes of that dealing and, if that dealing infringes any right conferred by this Ordinance, for all subsequent purposes.

For this purpose "**dealt with**" means -

(a) sold or let for hire, or offered or exposed for sale or

hire, or

- (b) communicated to the public, unless that communication, by virtue of subparagraph (2)(b), is not an infringement of the rights conferred by this Ordinance.

(4) Expressions used in this paragraph have the same meaning as in section 44 of the Copyright Ordinance.

**Playing or showing sound recording, film or broadcast at educational establishment.**

6. (1) The playing or showing of a sound recording, film or broadcast at an educational establishment for the purposes of instruction before an audience consisting of teachers and pupils at the establishment and other persons directly connected with the activities of the establishment is not a playing or showing of a performance in public for the purposes of infringement of the rights conferred by this Ordinance .

(2) A person is not for this purpose directly connected with the activities of the educational establishment simply because he is the parent of a pupil at the establishment.

(3) Expressions used in this paragraph have the same meaning as in section 46 of the Copyright Ordinance, and any provision made under section 217(2) of that Ordinance with respect to the application of that section also applies for the purposes of this paragraph.

**Recording of broadcasts by educational establishments.**

7. (1) A recording of a broadcast, or a copy of such a recording,

may be made by or on behalf of an educational establishment for the educational purposes of that establishment without thereby infringing any of the rights conferred by this Ordinance in relation to any performance or recording included in it, provided that the educational purposes are non-commercial.

(2) The rights conferred by this Ordinance are not infringed where a recording of a broadcast or a copy of such a recording, whose making was by virtue of subparagraph (1) not an infringement of such rights, is communicated to the public by a person situated within the premises of an educational establishment provided that the communication cannot be received by any person situated outside the premises of that establishment.

(3) This paragraph does not apply if or to the extent that there is a licensing scheme certified for the purposes of this paragraph under paragraph 16 of Schedule 2 providing for the grant of licences.

(4) Where a recording which would otherwise be an illicit recording is made in accordance with this paragraph but is subsequently dealt with, it shall be treated as an illicit recording for the purposes of that dealing, and, if that dealing infringes any right conferred by this Ordinance, for all subsequent purposes.

For this purpose "**dealt with**" means sold or let for hire, offered or exposed for sale or hire, or communicated from within the premises of an educational establishment to any person situated outside those premises.

(5) Expressions used in this paragraph have the same meaning as in section 47 of the Copyright Ordinance and any provision made under section 217(2) of that Ordinance with respect to the application of that section also applies for the purposes of this paragraph.

**Lending of copies by educational establishments.**

8. (1) The rights conferred by this Ordinance are not infringed by the lending of copies of a recording of a performance by an educational establishment.

(2) Expressions used in this paragraph have the same meaning as in section 49 of the Copyright Ordinance, and any provision with respect to the application of that section made under section 217(2) of that Ordinance (instruction given elsewhere than an educational establishment) applies also for the purposes of this paragraph.

**Lending of copies by libraries or archives.**

9. (1) The rights conferred by this Ordinance are not infringed by the lending of copies of a recording of a performance by a library or archive administered by the States of Guernsey, States of Alderney or Chief Pleas of Sark (or by any other library or archive designated by regulations of the Department) which is not conducted for profit, including the Guille-Allés Library, the Priaulx Library and the States Archive Service.

(2) Expressions used in this paragraph have the same meaning as under section 54 of the Copyright Ordinance.

**Copy of work required to be made as condition of export.**

10. (1) If an article of cultural or historical importance or interest cannot lawfully be exported from the Bailiwick unless a copy of it is made and deposited in a library or archive administered by the States of Guernsey, States of Alderney or Chief Pleas of Sark, including the Guille-Allés Library, the Priaulx Library and the States Archive Service (or in any other library or archive designated by regulations of the Department), it is not an infringement of any right conferred by this Ordinance to make that copy.

(2) Expressions used in this paragraph have the same meaning as in section 58 of the Copyright Ordinance.

**States and judicial proceedings.**

11. (1) The rights conferred by this Ordinance are not infringed by anything done for the purposes of proceedings of the States of Deliberation, the States of Alderney or the Chief Pleas of Sark, or for the purposes of judicial proceedings, or for the purpose of reporting such proceedings.

(2) Expressions used in this paragraph have the same meaning as in section 60 of the Copyright Ordinance.

**Tribunals of inquiry and statutory inquiries.**

12. (1) The rights conferred by this Ordinance are not infringed by anything done for the purposes of the proceedings of a tribunal of inquiry under the Tribunals of Inquiry (Evidence) (Guernsey) Law, 1949<sup>j</sup> or a statutory inquiry or for the purpose of reporting any such proceedings held in public.

(2) Expressions used in this paragraph have the same meaning as in section 61 of the Copyright Ordinance.

**Public records.**

13. (1) Material which is comprised in the public records of the Island of Guernsey, the Island of Alderney or the Island of Sark may be copied, and (without prejudice to any other rule of law restricting the disclosure of information) a copy may be supplied to any person, by or with the authority of any person who, in the course of his official duties, has custody of or access to the records or the

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<sup>j</sup> Ordres en Conseil Vol. XIV, p. 45.

information contained therein, without infringing any right conferred by this Ordinance.

(2) "**Public records**" in subparagraph (1) means the records kept for the purposes of or pursuant to its functions by any court, police force, department or committee of the States of Guernsey, States of Alderney or Chief Pleas of Sark or other public authority in the Bailiwick.

**Acts done under statutory authority.**

**14.** (1) Where the doing of a particular act is specifically authorised by a statutory provision, whenever made, then, unless the statutory provision provides otherwise, the doing of that act does not infringe the rights conferred by this Ordinance.

(2) Nothing in this paragraph shall be construed as excluding any defence of statutory authority otherwise available under or by virtue of any enactment.

(3) Expressions used in this paragraph have the same meaning as in section 65 of the Copyright Ordinance.

**Transfer of copies of works in electronic form.**

**15.** (1) This paragraph applies where a recording of a performance in electronic form has been purchased on terms which, expressly or by implication or by virtue of any rule of law, allow the purchaser to make further recordings in connection with his use of the recording.

(2) If there are no express terms -

(a) prohibiting the transfer of the recording by the

purchaser, imposing obligations which continue after a transfer, prohibiting the assignment of any consent or terminating any consent on a transfer, or

- (b) providing for the terms on which a transferee may do the things which the purchaser was permitted to do,

anything which the purchaser was allowed to do may also be done by a transferee without infringement of the rights conferred by this Ordinance, but any recording made by the purchaser which is not also transferred shall be treated as an illicit recording for all purposes after the transfer.

(3) The same applies where the original purchased recording is no longer usable and what is transferred is a further copy used in its place.

(4) The above provisions also apply on a subsequent transfer, with the substitution for references in subparagraph (2) to the purchaser of references to the subsequent transferor.

(5) This paragraph does not apply in relation to a recording purchased before the date of commencement of this Ordinance.

(6) Expressions used in this paragraph have the same meaning as in section 76 of the Copyright Ordinance.

**Use of recordings of spoken works in certain cases.**

**16.** (1) Where a recording of the reading or recitation of a literary work is made for the purpose -

- (a) of reporting current events, or

- (b) of communicating to the public the whole or part of the reading or recitation,

it is not an infringement of the rights conferred by this Ordinance to use the recording (or to copy the recording and use the copy) for that purpose, provided the following conditions are met.

(2) The conditions are that -

- (a) the recording is a direct recording of the reading or recitation and is not taken from a previous recording or from a broadcast,
- (b) the making of the recording was not prohibited by or on behalf of the person giving the reading or recitation,
- (c) the use made of the recording is not of a kind prohibited by or on behalf of that person before the recording was made, and
- (d) the use is by or with the authority of a person who is lawfully in possession of the recording.

(3) Expressions used in this paragraph have the same meaning as in section 78 of the Copyright Ordinance.

**Recordings of folksongs.**

17. (1) A recording of a performance of a song may be made for the

purpose of including it in an archive maintained by a designated body without infringing any of the rights conferred by this Ordinance, provided that the conditions in subparagraph (2) are met.

(2) The conditions are that -

- (a) the words are unpublished and of unknown authorship at the time the recording is made,
- (b) the making of the recording does not infringe any copyright, and
- (c) its making is not prohibited by the performer.

(3) Copies of a recording made in reliance on subparagraph (1) and included in an archive maintained by a designated body may, if the prescribed conditions are met, be made and supplied by the archivist without infringing any of the rights conferred by this Ordinance.

(4) In this paragraph -

**"designated body"** means a body designated for the purposes of section 81 of the Copyright Ordinance, and

**"the prescribed conditions"** means the conditions prescribed for the purposes of subsection (3) of that section,

and other expressions used in this paragraph have the same meaning as in that section.

**Lending of certain recordings.**

18. (1) The Department may by regulations provide that in such cases as may be specified in the regulations the lending to the public of copies of films or sound recordings shall be treated as licensed by the performer subject only to the payment of such reasonable royalty or other payment as may be agreed or determined in default of agreement by the Ordinary Court.

(2) No such regulations shall apply if, or to the extent that, there is a licensing scheme certified for the purposes of this paragraph under paragraph 16 of Schedule 2 providing for the grant of licences.

(3) Regulations may make different provision for different cases and may specify cases by reference to any factor relating to the work, the copies lent, the lender or the circumstances of the lending.

(4) Nothing in this paragraph affects any liability under section 10(1)(b) (secondary infringement: possessing or dealing with illicit recording) in respect of the lending of illicit recordings.

(5) Expressions used in this paragraph have the same meaning as in section 86 of the Copyright Ordinance.

**Playing of sound recordings for purposes of club, society etc.**

19. (1) It is not an infringement of any right conferred by this Ordinance to play a sound recording as part of the activities of, or for the benefit of, a club, society or other organisation if the following conditions are met.

(2) The conditions are -

(a) that the organisation is not established or conducted

for profit and its main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare,

- (b) that the sound recording is played by a person who is acting primarily and directly for the benefit of the organisation and who is not acting with a view to gain,
- (c) that the proceeds of any charge for admission to the place where the recording is to be heard are applied solely for the purposes of the organisation, and
- (d) that the proceeds from any goods or services sold by, or on behalf of, the organisation -
  - (i) in the place where the sound recording is heard, and
  - (ii) on the occasion when the sound recording is played,

are applied solely for the purposes of the organisation.

(3) Expressions used in this paragraph have the same meaning as in section 88 of the Copyright Ordinance.

**Incidental recording for purposes of broadcast.**

**20.** (1) A person who proposes to broadcast a recording of a performance in circumstances not infringing the rights conferred by this Ordinance shall be treated as having consent for the purposes of this Ordinance for the making

of a further recording for the purposes of the broadcast.

(2) That consent is subject to the condition that the further recording -

(a) shall not be used for any other purpose, and

(b) shall be destroyed within 28 days of being first used for broadcasting the performance.

(3) A recording made in accordance with this paragraph shall be treated as an illicit recording -

(a) for the purposes of any use in breach of the condition mentioned in subparagraph (2)(a), and

(b) for all the purposes after that condition or the condition mentioned in subparagraph (2)(b) is broken.

(4) Expressions used in this paragraph have the same meaning as in section 89 of the Copyright Ordinance.

**Recordings for purposes of supervision and control of broadcasts and other services.**

21. (1) The rights conferred by this Ordinance are not infringed by the making or use by the British Broadcasting Corporation or other broadcaster specified in writing by the Department, for the purpose of maintaining supervision and control over programmes broadcast by them, of recordings of those programmes.

(2) The rights conferred by this Ordinance are not infringed by anything done in pursuance of -

- (a) section 167(1) of the Broadcasting Act 1990<sup>k</sup> or section 115(4) or (6) or 117 of the Broadcasting Act 1996,
- (b) a condition which, by virtue of section 334(1) of the Communications Act 2003, is included in a licence granted under Part I or III of that Act or Part I or II of the Broadcasting Act 1996,
- (c) a direction given under section 109(2) of the Broadcasting Act 1990 (power of OFCOM to require production of recordings, etc),
- (d) section 334(3) of the Communications Act 2003.

(3) The rights conferred by this Ordinance are not infringed by the use by OFCOM in connection with the performance of any of their functions under the Broadcasting Act 1990, the Broadcasting Act 1996 or the Communications Act 2003 of -

- (a) any recording, script or transcript which is provided to them under or by virtue of any provision of those Acts, or
-

(b) any existing material which is transferred to them by a scheme made under section 30 of the Communications Act 2003.

(4) In subsection (3), "**existing material**" means -

(a) any recording, script or transcript which was provided to the Independent Television Commission or the Radio Authority under or by virtue of any provision of the Broadcasting Act 1990 or the Broadcasting Act 1996, and

(b) any recording or transcript which was provided to the Broadcasting Standards Commission under section 115(4) or (6) or 116(5) of the Broadcasting Act 1996.

(5) Expressions used in this paragraph have the same meaning as in section 90 of the Copyright Ordinance.

**Recording for the purposes of time-shifting.**

22. (1) The making in domestic premises for private and domestic use of a recording of a broadcast solely for the purpose of enabling it to be viewed or listened to at a more convenient time does not infringe any right conferred by this Ordinance in relation to a performance or recording included in the broadcast.

(2) Where a recording which would otherwise be an illicit recording is made in accordance with this paragraph but is subsequently dealt with -

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<sup>k</sup> An Act of Parliament); as extended to the Bailiwick by the Broadcasting Act 1990 (Guernsey) (No. 2) Order 1991, S.I. 1991 No. 1709.

- (a) it shall be treated as an illicit recording for the purposes of that dealing, and
- (b) if that dealing infringes any right conferred by this Ordinance, it shall be treated as an illicit recording for all subsequent purposes.

(3) In subparagraph (2), "**dealt with**" means sold or let for hire, offered or exposed for sale or hire or communicated to the public.

(4) Expressions used in this paragraph have the same meaning as in section 91 of the Copyright Ordinance.

**Photographs of broadcasts.**

23. (1) The making in domestic premises for private and domestic use of a photograph of the whole or any part of an image forming part of a broadcast, or a copy of such a photograph, does not infringe any right conferred by this Ordinance in relation to a performance or recording included in the broadcast.

(2) Where a recording which would otherwise be an illicit recording is made in accordance with this paragraph but is subsequently dealt with -

- (a) it shall be treated as an illicit recording for the purposes of that dealing, and
- (b) if that dealing infringes any right conferred by this Ordinance, it shall be treated as an illicit recording for all subsequent purposes.

(3) In subparagraph (2), "**dealt with**" means sold or let for hire, offered or exposed for sale or hire or communicated to the public.

(4) Expressions used in this paragraph have the same meaning as in section 92 of the Copyright Ordinance.

**Free public showing or playing of broadcast.**

**24.** (1) The showing or playing in public of a broadcast to an audience who have not paid for admission to the place where the broadcast or programme is to be seen or heard does not infringe any right conferred by this Ordinance in relation to a performance or recording included in -

- (a) the broadcast, or
- (b) any sound recording (except insofar as it is an excepted sound recording) or film which is played or shown in public by reception of the broadcast.

(2) The showing or playing in public of a broadcast to an audience who have not paid for admission to the place where the broadcast is to be seen or heard does not infringe any right conferred by this Ordinance in relation to a performance or recording included in any excepted sound recording which is played in public by reception of the broadcast, if the playing or showing of that broadcast in public -

- (a) forms part of the activities of an organisation that is not established or conducted for profit, or
- (b) is necessary for the purposes of -

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- (i) repairing equipment for the reception of broadcasts,
  - (ii) demonstrating that a repair to such equipment has been carried out, or
  - (iii) demonstrating such equipment which is being sold or let for hire or offered or exposed for sale or hire.
- (3) The audience shall be treated as having paid for admission to a place -
- (a) if they have paid for admission to a place of which that place forms part, or
  - (b) if goods or services are supplied at that place (or a place of which it forms part) -
    - (i) at prices which are substantially attributable to the facilities afforded for seeing or hearing the broadcast, or
    - (ii) at prices exceeding those usually charged there and which are partly attributable to those facilities.
- (4) The following shall not be regarded as having paid for admission to a place -

- (a) persons admitted as residents or inmates of the place,
- (b) persons admitted as members of a club or society where the payment is only for membership of the club or society and the provision of facilities for seeing or hearing broadcasts is only incidental to the main purposes of the club or society.

(5) Where the making of the broadcast was an infringement of the rights conferred by this Ordinance in relation to a performance or recording, the fact that it was heard or seen in public by the reception of the broadcast shall be taken into account in assessing the damages for that infringement.

(6) Expressions used in this paragraph have the same meaning as in section 93 of the Copyright Ordinance.

**Reception and re-transmission of wireless broadcast by cable.**

**25.** (1) This paragraph applies where a wireless broadcast made from a place in the Bailiwick or the United Kingdom is received and immediately re-transmitted by cable.

(2) The rights conferred by this Ordinance in relation to a performance or recording included in the broadcast are not infringed if and to the extent that the broadcast is made for reception in the area in which it is re-transmitted by cable, but where the making of the broadcast was an infringement of those rights, the fact that the broadcast was re-transmitted by cable shall be taken into account in assessing the damages for that infringement.

(3) Where -

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- (a) the re-transmission by cable is in pursuance of a relevant requirement, but
- (b) to any extent, the area in which the re-transmission by cable takes place ("the cable area") falls outside the area for reception in which the broadcast is made ("the broadcast area"),

the re-transmission by cable (to the extent that it is provided for so much of the cable area as falls outside the broadcast area) of any performance or recording included in the broadcast shall, subject to subparagraph (4), be treated as licensed by the owner of the rights conferred by this Ordinance in relation to the performance or recording, subject only to the payment to him by the person making the broadcast of such reasonable royalty or other payment in respect of the re-transmission by cable of the broadcast as may be agreed or determined in default of agreement by the Ordinary Court.

(4) Subparagraph (3) does not apply if, or to the extent that, the re-transmission of the performance or recording by cable is (apart from that subparagraph) licensed by the owner of the rights conferred by this Ordinance in relation to the performance or recording.

(5) The Department may by regulation -

- (a) provide that in specified cases subparagraph (2) is to apply in relation to broadcasts of a specified description which are not made as mentioned in that subparagraph, or
- (b) exclude the application of that subparagraph in relation

to broadcasts of a specified description made as mentioned in that subparagraph.

(6) Where the Department exercises the power conferred by subparagraph (5)(b) in relation to broadcasts of any description, the regulations may also provide for subparagraph (3) to apply, subject to such modifications as may be specified in the regulations, in relation to broadcasts of that description.

(7) Regulations under this paragraph may contain such transitional provision as appears to the Department to be appropriate.

(8) Expressions used in this paragraph have the same meaning as in section 94 of the Copyright Ordinance.

**Settlement of royalties.**

26. (1) An application to settle the royalty or other sum payable in pursuance of subparagraph (3) of paragraph 25 may be made to the Ordinary Court by the owner of the rights conferred by this Ordinance or the person making the broadcast.

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

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

(4) An application under subparagraph (3) shall not, except with the leave of the Ordinary Court, be made within twelve months from the date of the

original order or of the order on a previous application under that subparagraph.

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

**Provision of sub-titled copies of broadcast.**

27. (1) A designated body may, for the purpose of providing people who are deaf or hard of hearing, or physically or mentally handicapped in other ways, with copies which are sub-titled or otherwise modified for their special needs, make recordings of broadcasts and copies of such recordings, and issue or lend copies to the public, without infringing any right conferred by this Ordinance in relation to a performance or recording included in the broadcast.

(2) This paragraph does not apply if, or to the extent that, there is a licensing scheme certified for the purposes of this paragraph under paragraph 16 of Schedule 2 providing for the grant of licences.

(3) In this paragraph "**designated body**" means a body designated for the purposes of section 96 of the Copyright Ordinance and other expressions used in this paragraph have the same meaning as in that section.

**Recording of broadcast for archival purposes.**

28. (1) A recording of a broadcast of a designated class, or a copy of such a recording, may be made for the purpose of being placed in an archive maintained by a designated body without thereby infringing any right conferred by this Ordinance in relation to a performance or recording included in the broadcast.

(2) In this paragraph "**designated class**" and "**designated body**" means a class or body designated for the purposes of section 97 of the Copyright Ordinance and other expressions used in this paragraph have the same meaning as in

that section.

SCHEDULE 2

Section 46

LICENSING OF PERFORMERS' PROPERTY RIGHTS

**Licensing schemes and licensing bodies.**

1. (1) In this Ordinance a "**licensing scheme**" means a scheme setting out -

- (a) the classes of case in which the operator of the scheme, or the person on whose behalf he acts, is willing to grant performers' property right licences, and
- (b) the terms on which licences would be granted in those classes of case,

and for this purpose a "**scheme**" includes anything in the nature of a scheme, whether described as a scheme or as a tariff or by any other name.

(2) In this Ordinance a "**licensing body**" means a society or other organisation which has as its main object, or one of its main objects, the negotiating or granting, whether as owner or prospective owner of a performer's property rights or as agent for him, of performers' property right licences, and whose objects include the granting of licences covering the performances of more than one performer.

(3) In this paragraph "**performers' property right licences**" means licences to do, or authorise the doing of, any of the things for which consent is required under section 4, 5, 6 or 7.

(4) References in this Ordinance to licences or licensing schemes covering the performances of more than one performer do not include licences or schemes covering only -

- (a) performances recorded in a single recording,
- (b) performances recorded in more than one recording where -
  - (i) the performers giving the performance are the same, or
  - (ii) the recordings are made by, or by employees of or commissioned by, a single individual, firm, company or group of companies.

For this purpose a group of companies means a holding company and its subsidiaries within the meaning of -

- (A) in the Bailiwick apart from Alderney, Schedule 8 of the Insurance Business (Bailiwick of Guernsey) Law, 2002<sup>l</sup>, and
- (B) in Alderney, schedule 4 of the Companies (Alderney) Law, 1994<sup>m</sup>.

**References and applications with respect to licensing schemes.**

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<sup>l</sup> Order in Council No. XXI of 2002.

<sup>m</sup> Order in Council No. XXXIV of 1994.

2. Paragraphs 3 to 8 (references and applications with respect to licensing schemes) apply to licensing schemes operated by licensing bodies in relation to a performer's property rights which cover the performances of more than one performer, so far as they relate to licences for -

- (a) copying a recording of the whole or any substantial part of a qualifying performance,
- (b) making such a recording available to the public in the way mentioned in section 7(1), or
- (c) renting or lending copies of a recording to the public,

and in those paragraphs "**licensing scheme**" means a licensing scheme of any of those descriptions.

**Reference of proposed licensing scheme to Ordinary Court.**

3. (1) The terms of a licensing scheme proposed to be operated by a licensing body may be referred to the Ordinary Court by an organisation claiming to be representative of persons claiming that they require licences in cases of a description to which the scheme would apply, either generally or in relation to any description of case.

(2) The Ordinary Court shall first decide whether to entertain the reference, and may decline to do so on the ground that the reference is premature.

(3) If the Ordinary Court decides to entertain the reference it shall consider the matter referred and make such order, either confirming or varying the proposed scheme, either generally or so far as it relates to cases of the description to which the reference relates, as the Ordinary Court may determine to be

reasonable in the circumstances.

(4) The order may be made so as to be in force indefinitely or for such period as the Ordinary Court may determine.

**Reference of licensing scheme to Ordinary Court.**

4. (1) If while a licensing scheme is in operation a dispute arises between the operator of the scheme and -

- (a) a person claiming that he requires a licence in a case of a description to which the scheme applies, or
- (b) an organisation claiming to be representative of such persons,

that person or organisation may refer the scheme to the Ordinary Court in so far as it relates to cases of that description.

(2) A scheme which has been referred to the Ordinary Court under this paragraph shall remain in operation until proceedings on the reference are concluded.

(3) The Ordinary Court shall consider the matter in dispute and make such order, either confirming or varying the scheme so far as it relates to cases of the description to which the reference relates, as the Ordinary Court may determine to be reasonable in the circumstances.

(4) The order may be made so as to be in force indefinitely or for such period as the Ordinary Court may determine.

**Further reference of scheme to Ordinary Court.**

5. (1) Where the Ordinary Court has on a previous reference of a licensing scheme under paragraph 3 or 4, or under this paragraph, made an order with respect to the scheme, then, while the order remains in force -

- (a) the operator of the scheme,
- (b) a person claiming that he requires a licence in a case of the description to which the order applies, or
- (c) an organisation claiming to be representative of such persons,

may refer the scheme again to the Ordinary Court so far as it relates to cases of that description.

(2) A licensing scheme shall not, except with the leave of the Ordinary Court, be referred again to the Ordinary Court in respect of the same description of cases -

- (a) within twelve months from the date of the order on the previous reference, or
- (b) if the order was made so as to be in force for 15 months or less, until the last six months before the expiry of the order.

(3) A scheme which has been referred to the Ordinary Court under this paragraph shall remain in operation until proceedings on the reference are concluded.

(4) The Ordinary Court shall consider the matter in dispute and make such order, either confirming, varying or further varying the scheme so far as it relates to cases of the description to which the reference relates, as the Ordinary Court may determine to be reasonable in the circumstances.

(5) The order may be made so as to be in force indefinitely or for such period as the Ordinary Court may determine.

**Application for grant of licence in connection with licensing scheme.**

6. (1) A person who claims, in a case covered by a licensing scheme, that the operator of the scheme has refused to grant him or procure the grant to him of a licence in accordance with the scheme, or has failed to do so within a reasonable time after being asked, may apply to the Ordinary Court.

(2) A person who claims, in a case excluded from a licensing scheme, that the operator of the scheme either -

(a) has refused to grant him a licence or procure the grant to him of a licence, or has failed to do so within a reasonable time of being asked, and that in the circumstances it is unreasonable that a licence should not be granted, or

(b) proposes terms for a licence which are unreasonable,

may apply to the Ordinary Court.

(3) A case shall be regarded as excluded from a licensing scheme for the purposes of subparagraph (2) if -

- (a) the scheme provides for the grant of licences subject to terms excepting matters from the licence and the case falls within such an exception, or
- (b) the case is so similar to those in which licences are granted under the scheme that it is unreasonable that it should not be dealt with in the same way.

(4) If the Ordinary Court is satisfied that the claim is well-founded, it shall make an order declaring that, in respect of the matters specified in the order, the applicant is entitled to a licence on such terms as the Ordinary Court may determine to be applicable in accordance with the scheme or, as the case may be, to be reasonable in the circumstances.

(5) The order may be made so as to be in force indefinitely or for such period as the Ordinary Court may determine.

**Application for review of order as to entitlement to licence.**

7. (1) Where the Ordinary Court has made an order under paragraph 6 that a person is entitled to a licence under a licensing scheme, the operator of the scheme or the original applicant may apply to the Ordinary Court to review its order.

(2) An application shall not be made, except with the leave of the Ordinary Court -

- (a) within twelve months from the date of the order, or of the decision on a previous application under this paragraph, or

- (b) if the order was made so as to be in force for 15 months or less, or as a result of the decision on a previous application under this paragraph is due to expire within 15 months of that decision, until the last six months before the expiry date.

(3) The Ordinary Court shall on an application for review confirm or vary its order as the Ordinary Court may determine to be reasonable having regard to the terms applicable in accordance with the licensing scheme or, as the case may be, the circumstances of the case.

**Effect of order of Ordinary Court as to licensing scheme.**

8. (1) A licensing scheme which has been confirmed or varied by the Ordinary Court -

- (a) under paragraph 3 (reference of terms of proposed scheme), or
- (b) under paragraph 4 or 5 (reference of existing scheme to Ordinary Court),

shall be in force or, as the case may be, remain in operation, so far as it relates to the description of case in respect of which the order was made, so long as the order remains in force.

(2) While the order is in force a person who in a case of a class to which the order applies -

- (a) pays to the operator of the scheme any charges payable

under the scheme in respect of a licence covering the case in question or, if the amount cannot be ascertained, gives an undertaking to the operator to pay them when ascertained, and

- (b) complies with the other terms applicable to such a licence under the scheme,

shall be in the same position as regards infringement of performers' property rights as if he had at all material times been the holder of a licence granted by the rights owner in question in accordance with the scheme.

(3) The Ordinary Court may direct that the order, so far as it varies the amount of charges payable, has effect from a date before that on which it is made, but not earlier than the date on which the reference was made or, if later, on which the scheme came into operation.

If such a direction is made -

- (a) any necessary repayments, or further payments, shall be made in respect of charges already paid, and
- (b) the reference in subparagraph (2)(a) to the charges payable under the scheme shall be construed as a reference to the charges so payable by virtue of the order.

No such direction may be made where subparagraph (4) applies.

- (4) An order of the Ordinary Court under paragraph 4 or 5 made

with respect to a scheme which is certified for any purpose under paragraph 16 has effect, so far as it varies the scheme by reducing the charges payable for licences, from the date on which the reference was made to the Ordinary Court.

(5) Where the Ordinary Court has made an order under paragraph 6 (order as to entitlement to licence under licensing scheme) and the order remains in force, the person in whose favour the order is made shall if he -

- (a) pays to the operator of the scheme any charges payable in accordance with the order or, if the amount cannot be ascertained, gives an undertaking to pay the charges when ascertained, and
- (b) complies with the other terms specified in the order,

be in the same position as regards infringement of performers' property rights as if he had at all material times been the holder of a licence granted by the rights owner in question on the terms specified in the order.

**References and applications with respect to licensing by licensing bodies.**

9. Paragraphs 10 to 13 (references and applications with respect to licensing by licensing bodies) apply to licences relating to a performer's property rights which cover the performance of more than one performer granted by a licensing body otherwise than in pursuance of a licensing scheme, so far as the licences authorise -

- (a) copying a recording of the whole or any substantial part of a qualifying performance,
- (b) making such a recording available to the public in the

way mentioned in section 7(1), or

- (c) renting or lending copies of a recording to the public,

and references in those paragraphs to a licence shall be construed accordingly.

**Reference to Ordinary Court of proposed licence.**

**10.** (1) The terms on which a licensing body proposes to grant a licence may be referred to the Ordinary Court by the prospective licensee.

(2) The Ordinary Court shall first decide whether to entertain the reference, and may decline to do so on the ground that the reference is premature.

(3) If the Ordinary Court decides to entertain the reference it shall consider the terms of the proposed licence and make such order, either confirming or varying the terms, as it may determine to be reasonable in the circumstances.

(4) The order may be made so as to be in force indefinitely or for such period as the Ordinary Court may determine.

**Reference to Ordinary Court of expiring licence.**

**11.** (1) A licensee under a licence which is due to expire, by effluxion of time or as a result of notice given by the licensing body, may apply to the Ordinary Court on the ground that it is unreasonable in the circumstances that the licence should cease to be in force.

(2) Such an application may not be made until the last six months before the licence is due to expire.

(3) A licence in respect of which a reference has been made to

the Ordinary Court shall remain in operation until proceedings on the reference are concluded.

(4) If the Ordinary Court finds the application well-founded, it shall make an order declaring that the licensee shall continue to be entitled to the benefit of the licence on such terms as the Ordinary Court may determine to be reasonable in the circumstances.

(5) An order of the Ordinary Court under this paragraph may be made so as to be in force indefinitely or for such period as the Ordinary Court may determine.

**Application for review of order as to licence.**

12. (1) Where the Ordinary Court has made an order under paragraph 10 or 11, the licensing body or the person entitled to the benefit of the order may apply to the Ordinary Court to review its order.

(2) An application shall not be made, except with the leave of the Ordinary Court -

- (a) within twelve months from the date of the order or of the decision on a previous application under this paragraph, or
- (b) if the order was made so as to be in force for 15 months or less, or as a result of the decision on a previous application under this paragraph is due to expire within 15 months of that decision, until the last six months before the expiry date.

(3) The Ordinary Court shall on an application for review confirm or vary its order as the Ordinary Court may determine to be reasonable in the circumstances.

**Effect of order of Ordinary Court as to licence.**

13. (1) Where the Ordinary Court has made an order under paragraph 10 or 11 and the order remains in force, the person entitled to the benefit of the order shall if he -

- (a) pays to the licensing body any charges payable in accordance with the order or, if the amount cannot be ascertained, gives an undertaking to pay the charges when ascertained, and
- (b) complies with the other terms specified in the order,

be in the same position as regards infringement of performers' property rights as if he had at all material times been the holder of a licence granted by the rights owner in question on the terms specified in the order.

(2) The benefit of the order may be assigned -

- (a) in the case of an order under paragraph 10, if assignment is not prohibited under the terms of the Ordinary Court's order, and
- (b) in the case of an order under paragraph 11, if assignment was not prohibited under the terms of the original licence.

(3) The Ordinary Court may direct that an order under paragraph 10 or 11, or an order under paragraph 12 varying such an order, so far as it varies the amount of charges payable, has effect from a date before that on which it is made, but not earlier than the date on which the reference or application was made or, if later, on which the licence was granted or, as the case may be, was due to expire.

If such a direction is made -

- (a) any necessary repayments, or further payments, shall be made in respect of charges already paid, and
- (b) the reference in subparagraph (1)(a) to the charges payable in accordance with the order shall be construed, where the order is varied by a later order, as a reference to the charges so payable by virtue of the later order.

**General considerations: unreasonable discrimination.**

14. (1) In determining what is reasonable on a reference or application under this Schedule relating to a licensing scheme or licence, the Ordinary Court shall have regard to -

- (a) the availability of other schemes, or the granting of other licences, to other persons in similar circumstances, and
- (b) the terms of those schemes or licences,

and shall exercise its powers so as to secure that there is no unreasonable

discrimination between licensees, or prospective licensees, under the scheme or licence to which the reference or application relates and licensees under other schemes operated by, or other licences granted by, the same person.

(2) This does not affect the Ordinary Court's general obligation in any case to have regard to all relevant circumstances.

**Application to settle royalty or other sum payable for lending.**

**15.** (1) An application to settle the royalty or other sum payable in pursuance of paragraph 18 of Schedule 1 (lending of certain recordings) may be made to the Ordinary Court by the owner of a performer's property rights or the person claiming to be treated as licensed by him.

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

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

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

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

**Certification of licensing schemes.**

**16.** (1) A person operating or proposing to operate a licensing

scheme may apply to the Department to certify the scheme for the purposes of paragraph 7, 18 or 27 of Schedule 1 (recording of broadcasts by educational establishments, lending of certain recordings and provision of sub-titled copies of broadcast).

(2) The Department shall by regulation certify the scheme if it is satisfied that it -

- (a) enables the works to which it relates to be identified with sufficient certainty by persons likely to require licences, and
- (b) sets out clearly the charges (if any) payable and the other terms on which licences will be granted.

(3) The scheme shall be scheduled to the regulation and the certification shall come into operation for the purposes of the relevant paragraph of Schedule 1 -

- (a) on such date, not less than eight weeks after the regulation is made, as may be specified in the regulation, or
- (b) if the scheme is the subject of a reference under paragraph 3 (reference of proposed scheme), any later date on which the order of the Ordinary Court under that paragraph comes into force or the reference is withdrawn.

(4) A variation of the scheme is not effective unless a

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corresponding amendment of the regulation is made, and the Department shall make such an amendment in the case of a variation ordered by the Ordinary Court on a reference under paragraph 3, 4 or 5, and may do so in any other case if it thinks fit.

(5) The regulation shall be revoked if the scheme ceases to be operated and may be revoked if it appears to the Department that the scheme is no longer being operated according to its terms.