

GUERNSEY STATUTORY INSTRUMENT

2020 No. 118

GREFFE  
ROYAL COURT

- 8 DEC 2020

GUERNSEY

**The European Union  
(Performers' Rights) (WPPT)  
(Brexit) (Bailiwick of Guernsey)  
Regulations, 2020**

*Made*

*8<sup>th</sup> December, 2020*

*Coming into operation*

*8<sup>th</sup> December, 2020*

*Laid before the States*

THE POLICY & RESOURCES COMMITTEE, in exercise of the powers conferred on it by section 5(1) and 11 of the European Union (Brexit) (Bailiwick of Guernsey) Law, 2018<sup>a</sup> and upon receipt of the certificate required under section 5(3), hereby makes the following Regulations:-

**Amendment of the Performers' Rights Ordinance.**

1. As a consequence of the withdrawal of the United Kingdom from the EU and in order to implement the WIPO Performance and Phonograms Treaty, the Performers' Rights (Bailiwick of Guernsey) Ordinance, 2005<sup>b</sup> is amended as follows -

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<sup>a</sup> Order in Council No. I of 2019, as amended.

<sup>b</sup> Recueil d'Ordonnances Tome XXX, p. 89; as amended by Ordinances No. XXXIII of 2013 and No. IX of 2016.

(a) after section 8(9) insert –

"(10) For the purpose of subsection (1) "**commercially published**" includes making available online."

(b) in section 17(1) after the words "this Ordinance" insert ", save for the Moral Rights (see section 46G)".

(c) after section 46 insert –

*"Moral rights: right to be identified as performer*

**Right to be identified as performer**

**46A.** (1) Whenever a person —

- (a) produces or puts on a qualifying performance that is given in public,
- (b) broadcasts live a qualifying performance,
- (c) communicates to the public a sound recording of a qualifying performance, or
- (d) issues to the public copies of such a recording,

the performer has the right to be identified as such.

(2) The right of the performer under this section is —

- (a) in the case of a performance that is given in public, to be identified in any programme accompanying the performance or in some other

manner likely to bring the performer's identity to the notice of a person seeing or hearing the performance,

- (b) in the case of a performance that is broadcast, to be identified in a manner likely to bring the performer's identity to the notice of a person seeing or hearing the broadcast,
- (c) in the case of a sound recording that is communicated to the public, to be identified in a manner likely to bring the performer's identity to the notice of a person hearing the communication,
- (d) in the case of a sound recording that is issued to the public, to be identified in or on each copy or, if that is not appropriate, in some other manner likely to bring the performer's identity to the notice of a person acquiring a copy,

or (in any of the above cases) to be identified in such other manner as may be agreed between the performer and the person mentioned in subsection (1).

(3) The right conferred by this section in relation to a performance given by a group (or so much of a performance as is given by a group) is not infringed —

- (a) in a case falling within paragraph (a), (b) or (c) of subsection (2), or
- (b) in a case falling within paragraph (d) of that

subsection in which it is not reasonably practicable for each member of the group to be identified,

if the group itself is identified as specified in subsection (2).

(4) In this section “**group**” means two or more performers who have a particular name by which they may be identified collectively.

(5) If the assertion under section 46B specifies a pseudonym, initials or some other particular form of identification, that form shall be used; otherwise any reasonable form of identification may be used.

(6) This section has effect subject to section 46C (exceptions to right).

#### **Requirement that right be asserted**

**46B.** (1) A person does not infringe the right conferred by section 46A (right to be identified as performer) by doing any of the acts mentioned in that section unless the right has been asserted in accordance with the following provisions so as to bind him in relation to that act.

(2) The right may be asserted generally, or in relation to any specified act or description of acts —

- (a) by instrument in writing signed by or on behalf of the performer, or
- (b) on an assignment of a performer's property rights, by including in the instrument effecting the assignment a statement that the performer

asserts in relation to the performance his right to be identified.

(3) The persons bound by an assertion of the right under subsection (2) are —

(a) in the case of an assertion under subsection (2)(a), anyone to whose notice the assertion is brought

(b) in the case of an assertion under subsection (2)(b), the assignee and anyone claiming through him, whether or not he has notice of the assertion.

(4) In an action for infringement of the right the court shall, in considering remedies, take into account any delay in asserting the right.

**Exceptions to right.**

46C. (1) The right conferred by section 46A (right to be identified as performer) is subject to the following exceptions.

(2) The right does not apply where it is not reasonably practicable to identify the performer (or, where identification of a group is permitted by virtue of section 46A(3), the group).

(3) The right does not apply in relation to any performance given for the purposes of reporting current events.

(4) The right does not apply in relation to any performance given for the purposes of advertising any goods or services.

(5) The right is not infringed by an act which by virtue of any of the following provisions of Schedule 1 would not infringe any of the rights conferred by this Ordinance—

- (a) paragraph 3(2) (news reporting),
- (b) paragraph 4 (incidental inclusion of a performance or recording),
- (c) paragraph 5(2) (things done for the purposes of examination),
- (d) paragraph 11 (States and judicial proceedings),
- (e) paragraph 12 (Tribunals of inquiry and statutory inquiries).

*Moral rights: right to object to derogatory treatment*

**Right to object to derogatory treatment of performance**

46D. (1) The performer of a qualifying performance has a right which is infringed if —

- (a) the performance is broadcast live, or
- (b) by means of a sound recording the performance is played in public or communicated to the public,

with any distortion, mutilation or other modification that is prejudicial to the

reputation of the performer.

(2) This section has effect subject to section 46E (exceptions to right).

**Exceptions to right**

46E. (1) The right conferred by section 46D (right to object to derogatory treatment of performance) is subject to the following exceptions.

(2) The right does not apply in relation to any performance given for the purposes of reporting current events.

(3) The right is not infringed by modifications made to a performance which are consistent with normal editorial or production practice.

(4) Subject to subsection (5), the right is not infringed by anything done for the purpose of —

- (a) avoiding the commission of an offence,
- (b) complying with a duty imposed by or under an enactment, or
- (c) in the case of the British Broadcasting Corporation, avoiding the inclusion in a programme broadcast by them of anything which offends against good taste or decency or which is likely to encourage or incite crime or lead to disorder or to be offensive to public feeling.

(5) Where —

- (a) the performer is identified in a manner likely to bring the performer's identity to the notice of a person seeing or hearing the performance as modified by the act in question, or
- (b) the performer has previously been identified in or on copies of a sound recording issued to the public,

subsection (4) applies only if there is sufficient disclaimer.

(6) In subsection (5) “**sufficient disclaimer**”, in relation to an act capable of infringing the right, means a clear and reasonably prominent indication —

- (a) given in a manner likely to bring it to the notice of a person seeing or hearing the performance as modified by the act in question, and
- (b) if the performer is identified at the time of the act, appearing along with the identification,

that the modifications were made without the performer's consent.

**Infringement of right by possessing or dealing with infringing article**

**46F.** (1) The right conferred by section 46D (right to object to derogatory treatment of performance) is also infringed by a person who —

- (a) possesses in the course of business,

(b) sells or lets for hire, or offers or exposes for sale or hire, or

(c) distributes,

an article which is, and which that person knows or has reason to believe is, an infringing article.

(2) An “**infringing article**” means a sound recording of a qualifying performance with any distortion, mutilation or other modification that is prejudicial to the reputation of the performer.

*Moral rights: supplementary*

**Duration of Moral Rights**

**46G.** (1) A performer's rights under sections 46A and 46D (“**the Moral Rights**”) in relation to a performance subsist so long as any other performer's rights arising under this Ordinance subsist in relation to the performance in accordance with section 17.

(2) In subsection (1) “**performer's rights**” includes rights of a performer that are vested in a successor of the performer.

**Consent and waiver of rights**

**46H.** (1) It is not an infringement of the Moral Rights to do any act to which consent has been given by or on behalf of the person entitled to the right in question.

(2) Any of the Moral Rights may be waived by instrument in writing signed by or on behalf of the person giving up the right.

(3) A waiver —

- (a) may relate to a specific performance, to performances of a specified description or to performances generally, and may relate to existing or future performances, and
- (b) may be conditional or unconditional and may be expressed to be subject to revocation,

and if made in favour of the owner or prospective owner of a performer's property rights in the performance or performances to which it relates, it shall be presumed to extend to the performer's licensees and successors in title unless a contrary intention is expressed.

(4) Nothing in sections 46A to 46L shall be construed as excluding the operation of the general law of contract or estoppel in relation to an informal waiver or other transaction in relation to the Moral Rights.

**Application of provisions to parts of performances**

46I. (1) The right conferred by section 46A (right to be identified as performer) applies in relation to the whole or any substantial part of a performance.

(2) The right conferred by section 46D (right to object to derogatory treatment of performance) applies in relation to the whole or any part of a performance.

**Moral rights not assignable**

46J. The Moral Rights are not assignable.

**Transmission of moral rights on death**

46K. (1) On the death of a person entitled to a Moral Right ('the deceased') —

- (a) the right passes to such person as the deceased may by testamentary disposition have specifically directed,
- (b) if there is no such direction but the performer's property rights in respect of the performance in question form part of the deceased's estate, the right passes to the person to whom the property rights pass,
- (c) if or to the extent that the right does not pass under paragraph (a) or (b) it is exercisable by the deceased's personal representatives.

(2) Where a performer's property rights pass in part to one person and in part to another, as for example where a bequest is limited so as to apply —

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

any right which by virtue of subsection (1) passes with the performer's property rights is correspondingly divided.

(3) Where by virtue of subsection (1)(a) or (1)(b) a right becomes exercisable by more than one person —

- (a) it is, in the case of the right conferred by section 46D (right to object to derogatory treatment of performance), a right exercisable by each of them and is satisfied in relation to any of them if he consents to the treatment or act in question, and
- (b) any waiver of the right in accordance with section 46H by one of them does not affect the rights of the others.

(4) A consent or waiver previously given or made binds any person to whom a right passes by virtue of subsection (1).

(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 the deceased's estate as if the right of action had subsisted and been vested in the deceased immediately before death.

#### **Remedies for infringement of moral rights**

46L. (1) An infringement of a Moral Right is actionable as a breach of statutory duty owed to the person entitled to the right.

(2) Where —

- (a) there is an infringement of a Moral Right,
- (b) a person falsely claiming to act on behalf of a

performer consented to the relevant conduct or purported to waive the right, and

- (c) there would have been no infringement if he had been so acting,

that person shall be liable, jointly and severally with any person liable in respect of the infringement by virtue of subsection (1), as if that person had infringed the right.

(3) Where proceedings for infringement of a Moral Right, it shall be a defence to prove—

- (a) that a person claiming to act on behalf of the performer consented to the defendant's conduct or purported to waive the right, and
- (b) that the defendant reasonably believed that the person was acting on behalf of the performer.

(4) In proceedings for infringement of the right conferred by section 46D the court may, if it thinks it an adequate remedy in the circumstances, grant an injunction on terms prohibiting the doing of any act unless a disclaimer is made, in such terms and in such manner as may be approved by the court, dissociating the performer from the broadcast or sound recording of the performance."

- (d) in section 50(1), insert in the appropriate place –

""**Moral Rights**" has the meaning given in section 46G,".

**Interpretation.**

2. In these Regulations–

"WIPO Performance and Phonograms Treaty" means the treaty signed by the member states of the World Intellectual Property Organization was adopted in Geneva on 20 December 1996.

**Citation and commencement.**

3. These Regulations may be cited as the European Union (Performers' Rights) (WPPT) (Brexit) (Bailiwick of Guernsey) Regulations, 2020 and shall come into force on the day on which they are made.

Dated this 8<sup>th</sup> day of December, 2020



DEPUTY P. T. R. FERBRACHE

President of the Policy & Resources Committee

For and on behalf of the Committee

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EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations give partial effect to the WIPO Performance and Phonograms Treaty, by introducing moral rights for performers.

These Regulations come into force on the day on which they are made.