

## Economics of music publishing: copyright and the market

### 1. Introduction

This paper takes an historical approach to analysing the role of copyright law in the economic development of music publishing and in the market for published music in the UK. Music publishing, though a relatively small sector of the wider music UK industry,<sup>1</sup> has considerable consequence as a creative industry. A music publisher is the archetypal intermediary between the creator of a work and the market for its use. The publisher guides the musical composition through the stages of production from manuscript to performance, recording and subsequent distribution. A century ago, music publishers were forced by developments in the production and consumption of music to change their long-established business model from selling a product, sheet music, over which they had complete control, to managing copyrights through licences. It is argued that this paradigmatic shift, which took place in a relatively short space of time in the industry's 400 year existence, presaged a similar process that is now occurring in other creative industries. The history of this transition makes music publishing an interesting case study in the adaptation of a copyright-based industry to new technologies and it has resonance for other creative industries, in which digitization has caused entrepreneurs to alter their business model from sales to licensing.

The adaptation was the entrepreneurial response to exogenous technological innovation in the reproduction of music. As intermediaries, music publishers were not directly involved in the business of producing musical performance.<sup>2</sup> The technological advances that so affected music publishing at this time were the development of the means of mechanical reproduction of music through sound recording and of its distribution via radio (and later film and television). As these mass media technologies reached the market, consumer tastes changed relatively rapidly from home production of music and attending live public performances in concerts and music halls to listening to recorded and broadcast music (Boosey, 1931; Peacock and Weir, 1975; Ehrlich, 1985). These changes were not anticipated by music publishers and, for a while, were resisted. The consumer-led adoption of technologies while the industry attempted to resist them is also the story of the early 21st century record industry's stance on digitization in the record industry (Napier-Bell, 2013).

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<sup>1</sup> The UK music industry's GVA was £3477m in 2012, to which music publishing contributed £402m (12%) (UK Music, 2012).

<sup>2</sup> Some had a printing business which had innovated technologically (see Scherer, 2004); see also section 3 below.

Throughout, copyright law has brought up the rear rather than leading from the front, as is inevitable. Not only can legislators not react as swiftly as entrepreneurs to such fundamental changes, they generally prefer to see the way the market develops before setting a path that might alter the course of events. Today consumers and markets are leading the way and copyright law is struggling to cope, even though it has become more complex in the attempt to keep up with technological advances (Silver, 2013). The main argument of this paper is that copyright did not exert as important an influence as is sometimes claimed on the economic development of music publishing, and that is a lesson for present day discussions on the future of copyright and the creative industries.

These various strands are brought together in this article and presented as evidence of the relative influence of copyright law and markets on business models in UK music publishing. There has been little research to date specifically on the economics of music publishing; previous interest has had its focus more on musical composition and on composers' relations with their publishers (Peacock and Weir, 1975; Baumol and Baumol, 1994, 2002; Scherer, 2004; Montgomery and Threlfall, 2007; Drysdale, 2013). Those sources, however, indirectly provide useful material on music publishing and have been utilised in developing the argument presented here, with the results of the author's own research, which has concentrated mostly on songs. Songs constitute by far the biggest share of the output of UK music publishing both today and did so in the 19<sup>th</sup> century. Systematic data on music publishing, of the sort that would enable testing of economic hypotheses about these changes, have proved hard to find. Accordingly, the points made in the paper are backed up with data that are illustrative, though not amenable to statistical analysis.

The article proceeds as follows: section 2 is on UK copyright law in music and its influence on music publishing; section 3 provides an account of copyright and the market for published music; section 4 analyses the switch to rights management; section 5 looks at the economic organisation of music publishing today and section 6 concludes.

## **2. Copyright law relating to music publishing**

For centuries, the business of music publishing consisted of the acquisition of the copyrights of musical compositions by composers and song writers<sup>3</sup>, organising the printing, publication

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<sup>3</sup> Songs are by far the biggest output of music publishing. Songwriters include both lyricists and composers, each having copyright in their work. Copyright in lyrics seems not to have been so well established. This paper deals mostly with the musical composition.

and sale of sheet music and the printing and hiring of scores and orchestral parts for theatrical and concert performance. Theatrical rights – the grand rights –relating in particular to opera were organised by arrangement with the promoter or impresario and are not dealt with here.<sup>4</sup>

Copyright law in the UK dates back to the 1710 Statute of Anne, conferring on the author the exclusive right in her work, but it was not deemed to apply to musical works until 1777 when the court case of *Bach v Longman* ruled that copyright also applied to printed music. For many years thereafter, however, poor drafting of the law and difficulties in its enforcement enabled piracy of sheet music to flourish alongside the growth of the legal business. The Copyright Act of 1842 protected the sole right of reproduction for musical works<sup>5</sup> but failed to provide summary penalties for misappropriation of copyright and proceedings for damages had to be pursued through the civil courts. Cases mostly failed, however, because delays in the process meant the pirates could not be found, named and taken to court. The Music Publishers Association (MPA) was formed in 1881 and pursued the pirates, who were well known and highly organised but elusive, on behalf of its members. The Music (Summary Proceedings) Act 1902 was supposed to remedy these faults in the law but again failed to provide effective remedies and it was not until the 1906 Musical Copyright Act that the publishers succeeded in eliminating large-scale piracy. Despite these problems, the market for legally published sheet music had grown throughout the 19<sup>th</sup> century, becoming increasingly specialised and highly organised. By the early years of the 20<sup>th</sup> century, however, sales of sheet music to the public, the main source of music publishers' revenue, were falling off.

The main appeal of the pirates lay entirely in undercutting the price of 'legal' copies, usually with considerably inferior quality since the only means of mass reproduction was to set up the printing process all over again but with cheaper materials.<sup>6</sup> Several Parliamentary enquiries and Commissions had taken place during the 19<sup>th</sup> century, in which it was noted

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<sup>4</sup> On this topic, see in particular Rosselli (1984) and Scherer (2004).

<sup>5</sup> The 1842 Act extended the previous copyright term of 28 years (or life if the author were still alive upon expiry) for works published in the UK to 42 years after publication or 7 years beyond the life of the author, whichever was the longest; the 'la Sonnambula case' in 1855 ruled that copyright in a work by a foreign national could be claimed in Britain only if the author was resident in the UK. The 1888 Copyright (Musical Compositions) Act extended the same coverage to foreign as to UK nationals and works following the signing of the 1886 Berne Convention. The Copyright Act 1911 set the copyright term to life of the author plus 50 years. The term in the UK is now life plus 70 years.

<sup>6</sup> Copying by hand also took place, especially in choirs, and was considered a nuisance by the publishers but it was not illegal. Incidentally, it is still unlawful to photocopy sheet music in the UK. For a detailed exposition of the relative costs of printing technologies, see Scherer (2004, 161-2); also Humphries and Smith (1970), Introduction).

that music publishers did not use price reduction as a strategy to counteract the pirates. As with unlawful copying of CDs in the 2000s, the question was asked why the relatively high prices charged by music publishers were not reduced to compete with the pirates. Only one major publisher, Francis Day & Hunter reduced prices in the 1900s as a response to falling sales, while Boosey & Co. and Chappell & Co. maintained theirs at around 2/- for a song<sup>7</sup> (Boosey, 1931; Peacock and Weir, 1975); Novello, by contrast, had always maintained a business model of low prices (Grove, 1887). The reason for the fall in sales in the 1900s, however, was not price-related but was due to a shift in demand as consumers' tastes changed.

For centuries, the demand for music had been for live performance in the home and in public venues, such as churches and theatres. Competition from mass produced mechanical devices came in the first instance from player pianos (pianolas), instruments playing pre-programmed music recorded on perforated paper rolls, developed in the last quarter of the 19<sup>th</sup> century. By the first quarter of the 20<sup>th</sup> century they had been supplanted by gramophones and records. Both 'contrivances' (as the law called them) reproduced music and therefore required the copyright holder's permission. The Copyright Act 1911 (which implemented the 1908 Berlin revision of the Berne Convention) acknowledged that copyright in music protected reproduction by mechanical means as it did in printing. The Act also extended copyright to protect the recording itself, separate from the copyright in the recorded content, that is, the musical composition.

In order to protect the infant industry of sound recording and in response to heavy lobbying by that industry, however, the 1911 Act restricted the exercise of the composer's exclusive right after the first permission for mechanical reproduction of a work had been granted. The composer could negotiate rates for the use of her work in the first instance but was obliged to deal on the same terms for that work with another manufacturer (record label) and could not refuse to license. The Act introduced a statutory remuneration for the composer of a fixed percentage of the retail price of the contrivance for this 'compulsory' use of a musical composition<sup>8</sup> (Boosey, 1931; Peacock and Weir, 1975; Ehrlich, 1985). William Boosey, the

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<sup>7</sup> Two shillings in old money, now 20p in nominal value: 2/- in 1910 was worth over £10 in 2014 terms. All conversions to present day currency values in this article have been made using the Bank of England Inflation Calculator accessible on: <http://www.bankofengland.co.uk/education/Pages/resources/inflationtools/calculator/flash/default.aspx>

<sup>8</sup> The rate was to be reviewed at intervals by the Board of Trade; it was set at 5% of the retail price of a record in 1911 (see Peacock and Weir, 1975, 88-93, for full details). The compulsory licence was removed in the 1988

head of Chappell & Co, who took part in the Royal Commission that drafted the Bill, wrote a detailed account of how the draft was mangled in Parliament by members who were completely uninformed about copyright (including Winston Churchill, then President of the Board of Trade), expressing his disgust with the proceedings in no uncertain terms (Boosey, 1931). No doubt, there is similar disenchantment with the process of changing copyright law today. Thus the 1911 Act introduced the principle of a compulsory licence with remuneration, something that is increasingly advocated these days in one form or another as a means of rewarding creators for digital use (legal or otherwise) of their works (Handke, 2015).

In anticipation of the 1911 Act, the Mechanical Copyright Licences Company Ltd was created in 1910, acting as agent for the collection and distribution mechanical royalties; in 1924 it merged into the Mechanical Copyright Protection Society (MCPS)<sup>9</sup>. The combination of falling sales revenues and the introduction and collection of mechanical rights led publishers to turn their attention to the possibilities of exploiting the performing right as an additional source of revenue. The performing right had been introduced in the UK in the Dramatic Copyright Act of 1833, enabling opera librettists and composers to claim a performing right for the public performance of their work in theatres, then the Literary Copyright Act of 1842 extended the right for non-dramatic musical works. Thus the performing right relating to songs had existed since 1842 but it had not been exercised as UK publishers did not see it as being in their interest to do so (thereby depriving composers of a source of income from royalties, see Drysdale, 2013). SACEM (Société des auteurs, compositeurs et éditeurs de musique), founded in France in 1851, had opened a branch in London by 1870 for the collection of the *petit droits*, as they were known, for the performance in the UK of music by French composers. British music publishers, however, not only failed to exploit performing rights but derided them as having little value (Boosey, 1931).

There were basically two reasons for this stance on the part of UK music publishers: requiring performers and concert organisers to pay the performing right royalty was regarded as a disincentive to the publishers' chosen business model of revenue-generation and advertising by using performers to 'plug' new works (discussed below in Section 4). In

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Copyright Designs and Patents Act (the current law in the UK). The industry maintains the principle voluntarily and the rate was 8.5% in 2014.

<sup>9</sup> MCPS was taken over by the MPA in 1976, later forming part of the PRS/MCPS alliance, though it subsequently split from PRS for Music.

addition, the right had been brought into disrepute in a somewhat extraordinary manner by one Harry Walls' self-styled private enterprise, the Copyright Protection Society Ltd. Walls had cashed in on the 1842 Copyright Act's statutory penalty of 40/- (or £2, the equivalent of over £200 in 2014 terms) for the unauthorised use of copyright works, which he ruthlessly exploited by buying up expiring copyrights that unwitting performers believed were in the public domain, and made a living by taking them to court to obtain the 40/- damages. The 1882 Copyright (Musical Compositions) Act, the so-called 'Walls Act', intended to stop him by requiring a notice stating that the copyright owner retained the performing right to be printed on the title page of every published copy for which it was the case. The 1882 Act failed to alter the amount of the penalty, however, so Walls persisted and a further Act in 1888 was necessary that enabled the judge responsible to decide on the penalty. Now, however, there were works for which the performing right was retained and others for which it was not, and this was not only confusing to performers, it later on also inhibited the bargaining power of the Performing Right Society (PRS) when it was set up in 1914 (Peacock and Weir, 1975).

Part of the problem was that composers and song writers (especially the latter) rarely asserted the performing right, which was virtually impossible to exercise by individuals outside the theatre, and there was anyway ambiguity as to whether the right was included in the composer's contract with the publisher. In the then 'standard' contract, music publishers required the assignment of the copyright to a work from the composer in exchange for a single payment. The 1911 Copyright Act cleared up the confusion on performing rights by ruling that the assignment of the copyright in a work did not include the composer's performing right unless the contract with the publisher specifically stated it.

The PRS was set up by a group of music publishers led by William Boosey as a membership organisation for both composers and publishers to administer the performing right (Boosey, 1931; Ehrlich, 1989; Peacock and Weir, 1975).<sup>10</sup> Once established, PRS followed the SACEM model of blanket licensing, requiring assignment of all works in the composer's repertoire, thereby enabling PRS to issue a licence to perform every work so assigned without further recourse to the composer. Without that, ambiguity would arise about which works were included in the licence, a problem with which PRS struggled in its early years until all the major publishers had joined PRS and assigned to it the performing right to the works they

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<sup>10</sup> In this, PRS deviated from the Continental performing right societies, which had been set up by composers.

published. The unpopularity of the performing right with performers and with business users, a number of whom had to be taken to court to establish the principle of payment for the public performance of music, meant that in its early years, PRS was cautious about the rates it charged, thus restraining its revenues and accordingly its appeal to publishers (Peacock and Weir, 1975; Ehrlich, 1989).

The development of collecting societies altered the relationship between the composer/songwriter and the music publisher since both the mechanical and performing rights were paid directly to each one. Two changes in the relationship between the composer and the music publisher followed from this development. Composers and song writers now had the opportunity to earn income independently of the publisher, enabling them to bargain more effectively with music publishers. The development also led to the eventual establishment of royalty contracts as the industry norm. Both changes assisted the professionalization of composing in the UK as revenues for musical compositions grew (Drysdale, 2013; Montgomery and Threlfall, 2007).

### **3. Copyright and the market for published music**

What was the role of copyright in the market for published music? It has often been said that many of the most frequently performed works were written without the benefit of copyright laws; notable attempts have been made to test this empirically, finding little evidence either way (Baumol and Baumol, 1994; Scherer, 2004). Cultural economists and others have questioned the incentive that copyright offers composers and other creators (Towse, 2001; Kretschmer, 2005). Copyright protects composers as they seek to exploit their works but in doing so they inevitably have to assign their rights to a publisher, for whom the acquisition of the copyright becomes an investment in a profit-making business (Caves, 2000). For the first centuries of music publishing, copyright was non-existent or weak and the publisher bought all rights in a musical work, bearing all the costs and risk of exploiting it. With a royalty contract, composers and song-writers share the revenues of the published work and, of course, the risk as well. Royalty contracts, however, were not uniformly established in music publishing in the UK until the late 1920s (Drysdale, 2013).

Between the demise of the Stationers' monopoly in the 1680s and the *Bach v. Longman* case in 1777, a period of little proprietary protection for music in England, there was nevertheless a thriving music publishing industry, in which well-known houses such as Playford and Walsh (both family businesses of several generations) published works by Purcell, Arne and

Handel as well as collections of popular songs, dances and instruction manuals (see Humphries and Smith, 1970, for lists of music publishers, printers and engravers). Publication of some leading works, such as Handel's oratorios, was financed by subscription (an early version of crowd-funding), while others, usually single ballads, relied on sales revenues. Ballads were often sold on the street by people performing the work, but they were also sold directly by the publisher, as well as in music shops. Popular works performed in the theatre were subsequently published as sheet music for sale to the wider public, such as those from Gay's 'Beggars' Opera' and Arne's settings of Shakespeare songs (still much performed today).

In the 18<sup>th</sup> and early 19<sup>th</sup> centuries, publishing was often part of a wider enterprise that embraced musical instrument making, engraving, printing, publishing and selling music, even composing it.<sup>11</sup> For instance, Thomas Cramer, founder of Cramer & Co was a composer of piano music as well as a publisher and his company was an important producer of pianos. Some publishers continued with these other trades into the 20<sup>th</sup> century: for example, Boosey & Co produced woodwind instruments and flutes at one time and Boosey & Hawkes continued the Hawkes & Co's brass instrument production after the merger in 1930. Boosey & Hawkes had a music shop on Regent Street in London's West End until 2003, selling both instruments and sheet music. Novello & Co. had its own printing business. Several major publishers still have shops for the sale of printed music, records and so on as well as offering online sales. By the mid 19<sup>th</sup> century, music publishers were becoming more specialised, buying in printers' services and other inputs, and concentrating on the promotion and sale of sheet music. Markets were well organised with songs being advertised and even given away in magazines and newsheets. Sheet music was distributed by travelling salesmen, who sold it on commission or on a sale or return basis to music shops and music teachers. Publishers also contracted directly with theatres and music halls, hiring out orchestral parts and vocal scores for the run of performances of a work (Peacock and Weir, 1975; Ehrlich, 1985).

An interesting feature of the music publishing market were the regular so-called 'copyright auctions' which were held in London by Puttick and Simpson from the end of the 18<sup>th</sup> century and into the 20<sup>th</sup> (the last took place in 1931), in which engraved plates of works,

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<sup>11</sup> An example was Longman and Broderip of Cheapside and Haymarket, London who in the 1780s and 90s were musical instrument makers, music sellers, engravers, printers and publishers (see Humphries and Smith, 1970:216).



both instrumental works and operas but predominantly popular songs, were sold (Coover, 1983). As publishers routinely owned the copyright, the rights to reproduce and publish the works could be acquired with the plates by another publisher, who could then use them to print the work. They could command very high prices, some indication of the asset value of a copyright to the publisher. Using the Bank of England Inflation Calculator, I have translated some of the prices reported by Coover (1983) into 2014 values (shown in brackets): for instance, ‘Six Songs’ by Sterndale Bennett sold in 1865 for £324 (£36,360) and his hugely popular ‘May Queen’ for orchestra and chorus composed in 1858 was sold at auction in 1864 for £554-8s (£62,870); it was sold again in 1872 for £1,837 (£185,537), this time with 750 engraved plates, the copyright, libretto and performance rights. The popular song with piano by John Blockley, ‘An Arab’s Farewell to his Favourite Steed’, published in many editions from 1844, sold in 1883 for £640 (£69,505); Charles Coote Junior’s ‘Prince Imperial Galop’ sold in 1875 for £990 (£102,031). Copyrights of ‘ordinary’ works seem to have been frequently bought and sold, not just the hits.<sup>12</sup> Apart from demonstrating the value of a title as a copyright asset, the significance of the auctions is that they enabled entry into and exit from the industry; for example, Novello purchased plates of a range of works in 1849 and 1851 that greatly increased their stock (Humphries and Smith, 1970: 246-7). Only a highly organised ‘thick’ market could have supported such a trade. Indeed, buying up catalogues from other publishers is still a feature of the present day music publishing industry, and it would not be possible without the assignment of rights from composer to publisher.

These prices at auction accrued to the publisher without benefitting the composer, however.<sup>13</sup> As a broad generalization, musical composition, apart from writing for the theatre, supported very few British composers as a sole professional activity until the early 20<sup>th</sup> century; Drysdale (2013) contends that Elgar (born 1857) was the first to rely entirely on his compositions and concert fees. Before that, ‘serious’ composers had to teach, edit, copy music and/or perform, in particular as church organists.<sup>14</sup> Music publishing relied mostly on popular songs, choral music and music for the church. The lyrics to many, probably most, popular titles were written by amateurs, a notable example being Frederic Weatherly, a barrister, who is believed to have written the lyrics for over 3,000 songs, including hits such

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<sup>12</sup> Prices analysed were from repeat sales, though there were relatively few of them and not sufficient for statistical analysis. The British Library holds the Puttick and Simpson auction reports; they are very hard to decipher, unfortunately.

<sup>13</sup> The exception was the few works auctioned after 1911 on which mechanical and performing right royalties were payable (no doubt discounted in the auction price).

<sup>14</sup> Scherer (2004) provides detailed analysis of the similar state of affairs in other European countries.

as ‘Danny Boy’ and ‘Roses of Picardy’<sup>15</sup>. Performers also wrote songs as well as classical composers, a few of whom wrote under a pseudonym when writing for popular tastes. Some publishers specialised in one genre of another; for example, Novello & Co published hymns and choral music at relatively low prices to make them accessible to church choirs and choral societies (Grove, 1887). J. Curwen & Sons specialised in producing music in tonic sol-fa notation, which Curwen (a Congregationalist minister) had invented and promoted in schools in order to improve singing in church.<sup>16</sup>

By the 1850s in the UK music hall was becoming increasingly accessible as incomes and leisure time increased and urban transport developed, and it grew to be the main source of popular entertainment until it was displaced by radio and the cinema in the 1920s. Public concerts were promoted by music publishers Boosey & Co, Chappell & Co and Novello & Co in halls they leased for the purpose in London and elsewhere, each performing the music they published (Boosey, 1931; Peacock and Weir, 1975; Ehrlich, 1985). These venues provided the settings for plugging their sheet music, hiring singers and other performers to perform them and paying them what was known as a ‘royalty’. By the 1880s ownership of a piano or harmonium was widespread and there was a strong demand for sheet music for home entertainment, performing the songs heard in the music hall (Ehrlich, 1985). Sales of over 200,000 were considered to be the hits in the 1890s: ‘Soldiers of the Queen’ sold 238,000 in 1898 during the Boer War (Peacock and Weir, 1975:43). Sir Arthur Sullivan, now mostly known for his operettas with Gilbert, was also the composer of the ‘Lost Chord’ (1877), enormously popular in its day, selling over half a million copies, as well as of ‘Onward Christian Soldiers’ (still a popular hymn).

Plugging was an essential part of the business model of music publishers and was the chief means of advertising ‘novelties’, newly written works aimed at the music hall and home entertainment markets. It could be an expensive affair: Peacock and Weir report that Lawrence Wright spent £1,000 a week (£56,111 in 2014 terms) in seaside resorts in the summer of 1928 plugging the song ‘Among My Souvenirs’ (cf Peacock and Weir, 1975: 43). Plugging, unlike payola in the USA<sup>17</sup>, was not against the law, though eventually it was rather looked down upon in the MPA (Boosey, 1931); however, many singers of high repute, such as Clara Butt, were involved in it. This allowed the publisher to print ‘Sung by...’, often

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<sup>15</sup> [https://en.wikipedia.org/wiki/Frederic\\_Weatherly](https://en.wikipedia.org/wiki/Frederic_Weatherly)

<sup>16</sup> See [https://en.wikipedia.org/wiki/John\\_Curwen#Curwen.27s\\_publications](https://en.wikipedia.org/wiki/John_Curwen#Curwen.27s_publications)

<sup>17</sup> The topic of detailed economic analysis by Ronald Coase (1979).

with a picture of the artiste on the title page of the work, as an endorsement of the work. Plugging was effectively put to an end by the BBC, which refused at one stage to allow performers to announce the works they were performing in live broadcasts in the 1930s. As the BBC became the major client of the PRS and was the most important promoter of music in the UK, that put a stop to it (Boosey, 1931; Peacock and Weir, 1975).

Figure 1, shows the number of song titles from per year between 1880-1960 based on data provided by the British Library.<sup>18</sup> The chart shows strong growth up to 1908 followed by a decline that lasted until the end of 1<sup>st</sup> World War. The leap in 1920 signifies a post war return to normal business and also the large number of increasingly popular American songs that were published in the UK, thereby obtaining copyright protection there (since the USA was not a signatory to the Berne Convention)<sup>19</sup>.

Figure 1 here

Source: Data from British Library (chart by Hyojung Sun)

#### **4. The switch from sales to rights management**

Plugging was the main barrier in the minds of music publishers to exercising the performing right. By the 1920s, however, the PRS was beginning to collect significant revenues from licensing. The more forward looking publishers had joined up early on, though the bigger ones were slow on the uptake: Boosey & Co joined in 1927 but Novello & Co held out until 1934. Only then could PRS to confidently issue a blanket licence that included the main repertoire of published music. PRS' revenues grew considerably. Table 1 shows the growth of gross PRS revenues in reported monetary values, with equivalent 2014 values calculated using the Bank of England Inflation Calculator. The percentage of revenues from the licensing works for broadcasting (solely by the BBC until the 1950s) show how important that source was.

Table 1 here

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<sup>18</sup> The data have been collected in digital form by the British Library and include both song titles deposited with them as well as ones added by recent research, in all 293,098. Data are on publisher, size and number of pages and original price. The author is most grateful to Dr. Rupert Ridgewell, Curator of Music at Music Collections of the British Library, for supplying these data.

<sup>19</sup> Mutatis mutandis, UK publishers had offices in New York in order to obtain copyright protection for their works in the USA.

PRS had decided early on that net revenues (gross revenue minus the administration fee) would be distributed on a 50:50 basis to writer and publisher members. Licence fee income from MCPS and PRS<sup>20</sup> transformed the publishers' business model from reliance on sales revenue, a transformation that was almost entirely driven by market forces. The 1911 Copyright Act had assisted the move to exercising the performing right by clarifying the legal situation; however, clarification was called for only at that point in response to market trends. The performing right, after all, had been on the statute book since 1842. The law per se was not involved in the setting up of the collecting societies in the UK, which was a spontaneous market outcome, founded on private initiative within the industry. The PRS constitution as a self-governing, non-profit cooperative comprised of writers and publishers was chosen by its founders, based on the SACEM model, and it adopted the same system of blanket licensing. Mutual agreements with equivalent foreign collecting societies enabled royalties to be collected from use abroad, further increasing revenues (Ehrlich, 1989). As it became established, the performing right did not unduly disrupt music publishing nor impose high switching costs. It simply provided publishers and writers with an alternative, and growing, source of revenue, replacing that from declining sales.

The growth of the market for sound recordings purchased by consumers, broadcast on radio and television, played on jukeboxes, in clubs, used as background music in restaurants, shops and all other such uses, as well as that for music composed for film and television programmes and advertising, vastly increased revenues from both performing and mechanical rights. Revenues from mechanical rights for the licensing of sound recordings were boosted from the late 1920s on by those from the 'synchronisation' right for the use of music with a moving image. When publishers switched from the buy-out and sales model of the pre-1<sup>st</sup> World War era to royalty contracts, their function changed to managing a bundle of composers' and song-writers' rights to finding performance and recording opportunities. As the market for music and the use of musical rights became more complex so did contracts, making it necessary for composers and song writers, many of whom in popular music are also bands, to get expert guidance from managers, agents and specialised lawyers on drafting publishing, film and recording contracts (Harrison, 2011). The face-to-face manner of doing deals that pervaded music publishing in the 19<sup>th</sup> and early 20<sup>th</sup> centuries accordingly changed fundamentally (Boosey, 1931; Drysdale, 2013).

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<sup>20</sup> Also from 1934 an *ex gratia* payment from PPL, Phonographic Performance Ltd, the collecting society for the record industry.

In a royalty contract, the deal is a risk-sharing one with the royalty rate reflecting the anticipated success of the work and the writer's future prospects. Several types of contracts are now in use, ranging from a single song assignment to get one work published (which may act as a trial for a longer term arrangement) to a long term exclusive deal that could last 10 years; there are also various in-between arrangements (Harrison, 2011). With a royalty contract there has to be greater commitment to promote the work on the part of the writer than when copyrights were bought out (Towse, 1999). In principle, at least, bearing a lower percentage of risk should enable the publisher could take on more composers and songwriters and publish more works. Thus the role of the publisher changed from being a producer of a tangible product to that of a manager of rights, a market maker and in some cases, especially in the classical music sector, a partner in the long term development of a composer's career.

The increased success of the PRS, now perceived as a dominant monopoly, led to conflict with some licensees. The Copyright Tribunal was set up by the 1956 Copyright Act to settle any disputes between it and user organisations, in particular the BBC. As Table 1 showed, revenues from the BBC were especially important and the rates and the basis on which they were set were disputed. The BBC's own monopoly (and monopsony use of music) was soon to be contested by the introduction of commercial radio and television, further increasing income from performing and mechanical rights. The Tribunal, however, seemed to have little idea of how to evaluate rates (Peacock and Weir, 1975; Ehrlich, 1989), a problem that has continued to dog the regulation of copyright in other contexts.

Besides current output by living composers and songwriters, music publishers also have back catalogues to exploit, including works by the deceased, and accordingly benefitted when copyright was extended from 50 to 70 years in the European Union and USA.<sup>21</sup> In many cases, the publishing contract was for the life of the copyright, something that only began to change in recent years (Barr and Towse, 2015). Some composers even went out of and then came back into copyright, including high-earners, such as Elgar, Holst and Delius; the Delius Trust earned £1.5m. in 2014 terms from that extension (Montgomery and Threlfall, 2007; calculation by this author).

The expanded market also enabled increasing specialisation (as Adam Smith foresaw); composers were able to specialise in music for film and television, song writers in various

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<sup>21</sup> In the EU by Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights and in the USA by the Copyright Term Extension Act (CTEA) of 1998. Other countries followed suit.

genres of popular music and so on. Music publishers could also specialise by genre, and by use. For example, in a major entrepreneurial development, at first called ‘library’ music and now known as production music, the publisher contracts composers to write music of various types that can be used ‘off the shelf’ in film, TV programmes and advertisements. The publisher arranges for recordings to be made and keeps them ready for use, while making contacts with potential users. With the growth of TV stations and commercial broadcasters around the world, this has become a significant source of revenues for composers and publishers from the performing and synchronisation rights as well as from upfront payments. Collecting societies also benefitted from expanded markets for licences at home and especially abroad (see Table 2 below), as well as from expansion of the catalogue, and accordingly are able to collect and distribute more revenue to music publishers.

### **5. Present day economic organisation of music publishing in the UK**

By comparison with the many (often family) businesses in music publishing in earlier times, the twentieth century saw increasing concentration in the industry. The present day music publishing industry in the UK is dominated by three ‘majors’, Sony/ATV, Universal and Warner/Chappell, each owned by a holding company with wider interests. Imagem, the largest ‘independent’ publisher, was set up by the Dutch pension fund ABP and media firm CP Masters BV and entered the industry in 2008 by buying up the old established publisher Boosey & Hawkes (with its 26 associated companies) and the Rodgers and Hammerstein copyrights: Imagem then acquired publishing rights from Universal Music (which the EU had required it to divest)<sup>22</sup>. These publishing companies have catalogues covering every genre, classical, pop, rock, jazz and so on, as well as musical theatre and production music. The UK Music Publishers Association stated on its website ([www.mpa.org.uk](http://www.mpa.org.uk)) in 2015 that its 260 members represent 4,000 catalogues. Some of these catalogues are very large, for instance, Warner/Chappell Music has a roster of 650 song writers and claims a catalogue of over one million copyrights ([www.warnerchappell.co.uk](http://www.warnerchappell.co.uk)); from its origins as Chappell & Co (founded in London in 1811) the company developed through mergers and acquisitions into the third largest music publisher worldwide as part of the American company Warner Music. Besides these large-scale enterprises there are also many smaller independent music publishers, some old, some new.

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<sup>22</sup> Information taken from the MPA website [www.mpa.org.uk](http://www.mpa.org.uk) and <https://en.wikipedia.org/wiki/Imagem>.

Another indicator of the size of the industry is the number of titles handled by PRS for Music: 100 million in 2013 (PRS, 2014). According to the BBC4 programme ‘The World’s Richest Songs’, the top ten all time highest royalty earning song titles produced a total income of £185m.<sup>23</sup> The Number One earner was ‘Happy Birthday to You’ with £30m. at the time<sup>24</sup>. A significant source of earnings for these (and other) top titles is cover versions. Cover versions are a cost effective source of royalties for music publishers: they have virtually zero costs and they pay mechanical and performing rights to the original songwriter and publisher.<sup>25</sup> Cover versions are accordingly risk-free for the publisher and, moreover, some earn more than the original. YouTube and other social media sites are now significant in publicising titles, adding to royalties. Though the amount paid for each online and other digital use is very small, the volume is very high. Online royalties are growing fast, though they are still only a small proportion (around 10%) of PRS revenues (Samuel, 2014).

A noteworthy feature of music publishing (that it shares with literary publishing) is the widespread use of foreign sub publishers, a result of the territorial nature of copyright (Harrison, 2011). Regional and local music publishers are viewed as having a better understanding of their markets and they register works with the collecting societies operating in their territory. Sub-publishers work on a percentage of revenues, which varies quite a lot as between companies and countries. The sub-publisher’s share and administrative charges (and any other deductions) from the ‘local’ collecting society result in reductions in the revenue, which is finally repatriated to the writer and publisher. This can work both ways, however, with UK publishers acting on as sub-publishers for foreign companies. New entrants to UK music publishing include companies whose pitch is that they manage rights internationally using their own data systems in order to avoid the deductions of these multiple charges. Table 2 shows the sources of music publishing revenues in the UK in 2012 that demonstrate the increasing importance of foreign revenues for UK music publishers. In the table, collection societies are PRS for Music, MCPS and PPL; foreign affiliates are sub-publishers; direct licensing consists of licences for live performance and synchronisation income (both a

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<sup>23</sup> Broadcast December, 2013: see <http://www.bbc.co.uk/programmes/b01pjrt5>.

<sup>24</sup> Despite its questionable claim to copyright protection which has now been relinquished. <http://www.theguardian.com/music/2015/dec/10/happy-birthday-to-you-song-public-domain-warner-chappell-relinquish-copyright>

<sup>25</sup> Though the original work is usually rearranged enabling the acquisition of a writing credit for the cover version, thus reducing the royalty to the owner of the original.

growing element of the music business). Table 3 then shows the percentage breakdown of the sources of those revenues from the various rights and uses in popular and classical music.

Tables 2 and 3 here

## **6. Conclusion**

The argument in this paper is twofold: music publishing switched its long term and seemingly locked-in business model relatively costlessly in response to changing market forces; and though copyright played an increasingly important role in the transition to rights management, prosperity of the industry was not led by changes in copyright law. The anti-piracy battles of the 19<sup>th</sup> century were won too late to rescue sales revenue and by the time they were over, the market for sales of sheet music was already in decline. It is often said that copyright law and business models go hand in hand: the argument of this paper is that that was not always so. Changes in copyright law in the last 100 years have taken place because of changes in technologies affected the demand side not the supply side of the market. Throughout the 19<sup>th</sup> century there were few technological changes to the production of published music, the main ones being to printing technologies, which reduced costs, and to musical instruments, which affected the type of music demanded and supplied (Ehrlich, 1985; Scherer, 2004). As an intermediary industry, music publishing has limited scope for innovation other than through entrepreneurship, in the case presented here, by adopting a new business model.

The analysis presented here is historical. The history of copyright in music and of music publishing shows that just having rights is not enough: it requires the appropriate business models to exploit them, which UK music publishers chose not to do in the case of the performing right for over 70 years. Conversely, the enactment of rights alone cannot stem market forces; music is a consumer good and consumer choice rules this market. The switch in the consumption of music to mechanical and now to electronic technologies necessitated the adoption of a new business model. The big change in the orientation of music publishing at the turn of the 20<sup>th</sup> century, amplified enormously at the turn of the 21<sup>st</sup>, has been that musical works are no longer used only by people to whom they were sold or hired. Through new media, recorded music has become widely available in secondary markets, in broadcasting, public performance in a multiplicity of venues, on social web sites and so on. Appropriation of revenues from these uses required collective rather than individual action.



Somewhat late in the day, music publishers recognised the value of performing rights and formed institutions for collective rights management, which they all eventually joined, enabling the cost-effective system of blanket licensing to prevail (Handke and Towse, 2007). Collecting societies now exploit rights on a global scale through international agreements and, increasingly, through one-stop-shop multi-territorial licensing. Besides the cost of managing millions of transactions of digital usage of music, multi-territorial licensing requires considerable investment in new data systems (Towse, 2013). A shift to individual licensing could undermine the bargaining power of the collective rights management system which supports smaller enterprises and creators - essentially the same problem faced by PRS in its early days (a case of history repeating itself?).

Music publishing is an old industry that has renewed itself and adapted to new technologies and changes in consumption patterns. Its significant switch from sales to rights management may fairly be regarded as a prototype for the changes with which the creative industries are dealing today. That is not to say that history repeats itself but that it is instructive in understanding survival: businesses that adapt to exogenous conditions survive and may do so without endogenous technical progress. Adaptation may be supported by ex post changes in copyright law but the law inevitably lags rather than leads. The Schumpeterian view that to survive, a business must adapt entrepreneurially is well illustrated in the case of music publishing. It has a message for other creative industries as digital usage spreads and copyright law struggles to be applicable.

The huge outlay on IT investment needed to keep track of digital use suggests that large enterprises in the music industry will benefit from network and scale economies. Large scale enterprises also are better able to pool and spread risk and finance potential losses in superstar markets, such as those of music publishing. Without intervention in the market by competition law, increasing concentration seems to be the future of the creative industries and copyright even appears to assist the process by enabling acquisitions and mergers to take place. Furthermore, it also seems that copyright protection can impede alertness to new business opportunities as exogenous technological innovation shocks markets in the creative industries.

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