Is Equitable Remuneration Equitable? Performers' Rights in the UK

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Abstract

British musicians receive "equitable remuneration" when their recordings are played in public or are broadcast. Performers rights' are weaker than those of songwriters, however. This is largely because songwriters are the first owners of their copyrights, whereas performers rarely own the copyright in their sound recordings. This article concerns the remuneration of musicians' labor. It looks at the legislative evolution of performers' rights in the UK and addresses the influence that songwriters, record companies, and the Musicians' Union have had on this area of copyright law. It argues that performers will only achieve legislative parity with songwriters if the ownership and conceptualization of sound recording copyright are reconfigured. This copyright should be awarded to performers for their creative labor, rather than to record companies for their financial and administrative endeavours.

Keywords: equitable remuneration, making available, Musicians' Union, neighboring rights, performers' rights, performing rights, songwriting copyright, sound recording copyright, streaming

Introduction

Each music recording features the work of songwriters and the work of performers. And yet each recording contains three main rights: the copyright in the musical composition, the sound recording copyright, and the performers' rights. There is imbalance here. Songwriters are the first owners of the copyright

in their compositions; they can licence or assign them as they wish. Performers, in contrast, rarely own the copyright in their sound recordings. They are provided with weaker, compensatory rights instead.

This article explores performers' rights within UK law. The focus is on two subjects: the ownership of sound recording copyright, and the performing rights income that is derived from the use of recordings. Performers' rights and performing rights are separate things. "Performers' rights" is the term for the overall legislation for performers. The "performing rights" are two of the principal activities that are controlled by copyright owners: the right "to perform, show or play the work in public" and the right "to communicate the work to the public," which includes broadcast and streaming rights (Copyright, Designs and Patents Act s.16(1)).[1]

At a collective level there are similarities in the performing rights of songwriters and performers. Most British songwriters are members of the Performing Right Society (PRS).[2] Songwriters are guaranteed at least 50% of the distributable income for this use of their works; the other 50% goes to their publishers.[3] PRS earnings are considerable: £461m (US$572m) was distributed in 2015 (PRS 8). Meanwhile, most British recording artists are members of Phonographic Performance Ltd (PPL), the collection society that administers performing rights for sound recordings. Performers receive 50% of the distributable income; the other 50% goes to their record labels. This is the "equitable remuneration" that the two parties share. In 2015, PPL distributed £170m (US$211m) (PPL, "2015" 7).

There are various reasons why PRS income is nearly triple that of PPL. First, PRS covers the use of live and recorded music, whereas PPL only deals with

the latter. Second, songwriters' performing rights are stronger internationally. The US, for example, has little recognition of the performing rights in sound recordings. Third, some areas of performing rights income are not captured by PPL. Streaming is the most significant. The absence of this income is illustrative of the relative weakness of performers' rights.

Songwriting copyright is one of the oldest forms of copyright in the UK. A copyright in musical compositions has been recognized since the case of *Bach v Longman* in 1777; a performing right for the live performances of composers' works was granted via the Literary Copyright Act of 1842; songwriters have enjoyed a copyright in sound recordings, including a public performance right, since the Copyright Act 1911. Performers, in comparison, are legislative outsiders. Their live performances receive little recognition within British law. These performances are not "copies": every live event is unique. Consequently they are recompensed through appearance fees rather than copyright. The situation is different when a recording of a performer's work is played in public or broadcast. Performers are legally entitled to a share of the licensing income. Their performing rights are non-proprietary, however: they cannot be licenced or assigned.

Performers are not expected to own their sound recording copyrights either. In Britain, songwriting copyright and sound recording copyright have been conceptualized differently. Songwriting copyright recognizes musical labor: authorship is awarded to "the person who creates" the work (Copyright, Designs and Patents Act 1988 s.9(1)). Sound recording copyright rewards industry and finance. It was first addressed in the Copyright Act 1911, which determined that "the owner of such original plate [the master copy of the record] at the time

when such plate was made shall be deemed to be the author of the work" (s.19(1)). It was accepted that the owner could be a "body corporate," enabling record companies to claim authorship (ibid.). The subsequent Copyright Act 1956 stated that the "maker" of the sound recording would own the copyright (s.12(4)). The companies again claimed control. The current legislation, the Copyright, Designs and Patents Act 1988 (CDPA), regards the "producer" as the author of this copyright (s.9(2)(aa)). Record companies have argued that they fulfill this duty. The consequences have been profound. The most significant legislative rights for recording artists reflect the fact they seldom own their sound recording copyrights. Performers' rights are inferior to those of songwriters when it comes to control, remuneration, and scope.

The first section of this article outlines the development of performers' rights within British legislation. In addition, it looks at advances in the art of studio recording, noting the failure to appreciate this form of musical labor within copyright law. The following section examines vested interests that have hindered the cause of performers' rights or tactically utilized them for their own ends, addressing in turn songwriters, record companies, and the Musicians' Union (MU). The final section explores contemporary concerns. It addresses streaming royalties and the reasons why they fall beyond PPL's remit. It concludes by looking at proposals that have been made for an overhaul of performers' rights. An argument is made that British performers will only achieve legislative parity with songwriters if they are awarded ownership of sound recording copyright, and if this copyright recognizes creative labor rather than corporate production.

Going Back: The History of Performers' Rights Legislation

1. Civil Law, Common Law, and the first Sound Recording Copyright

Performers' rights are viewed as a lesser form of copyright in British law and in international copyright agreements. They are an appendage to other copyright categories. In Britain, the legislative rights of musicians are primarily an adjunct to sound recording copyright. Internationally, sound recording copyright and performers' rights are grouped together and viewed as secondary to the copyright in musical works; they are dependant on the prior copyright in the composition. The UK has ratified the major international copyright agreements. British performers' rights therefore suffer both forms of separation.

The international agreements are strongly influenced by the mainland European system of civil law. Here the author's right – given to the composers of literary, dramatic, musical, and artistic works – is seen "as a human right with almost mystical overtones" (Porter 2). A lower status is accorded to forms of copyright that are allied to these works, particularly where the first owner is a corporation (Arnold 13). They are separated into a different category, variously described as the "neighboring right" (from the French, *droits voisins*), the "connected right" (from the Italian, *diritti conessi*), or the "related right" (from the German, *verwandte Schutzrechte*). Authors' rights and neighboring rights are addressed by different international conventions. The rights of authors were first covered in the Berne Convention of 1886, while the rights of performers, phonogram producers, and broadcasters were acknowledged in the Rome Convention of 1961.

The UK common law system of copyright has been more amenable to corporate interests. As such, the terms neighboring right, connected right, and related right have not appeared in British legislation. It was the British government who first proposed granting international protection for record manufacturers, promoting the idea at the Berlin Conference for the Revision of the Berne Convention in 1908. The other delegates rebuffed this proposal; arguing that "the subject was on the borderline between industrial property and copyright and might conceivably be held to belong more properly to the former category" (Khan 46). This subject soon appeared within British legislation, however. The Copyright Act 1911 established a copyright in sound recordings. Section 19(1) states, "Copyright shall subsist in records . . . in like manner as if such contrivances were musical works." There was a significant difference, nevertheless, between these two forms. The copyright in musical works was awarded to the musical laborers who created them: the composers were the first owners. In contrast, sound recording copyright was not awarded to the performers on the records. Granting ownership to the record companies entailed a shorter duration of copyright. Songwriting copyright was set at the life of the author plus 50 years; sound recording copyright was to last for 50 years from the making of the master recording (s.3; s.19(1)).

There were economic and creative justifications for awarding the copyright to the companies. The economic rationale for copyright is that it incentivizes the creation of artistic works by enabling copyright owners to "control exploitation and thus to recoup the outlays involved" (Towse 57). It provides a safeguard against free-riding manufacturers, who could otherwise make copies of these works without having to bear the costs of creating them or

the risks of testing them in the market. At the time of the 1911 Act, the record companies were arranging recording sessions as well as financing them. Most performers, meanwhile, were receiving set payments of session or contract fees, albeit that a few "celebrity" artists also received sales royalties (Martland 187). The artists' income was regular; it was the risky investment of the record companies that required protection via copyright law.

Record companies could also claim to be creative. In the early years of the twentieth century, records were marketed as much on the quality of the companies' manufacturing methods as they were on the artists' performances (Osborne 47-50). The companies were patent holders of their various formats; hence the impulse of the Berne Convention to categorize this activity as industrial design. The record companies were also responsible for developing recording techniques; they created the recording studios and recording equipment; and they employed recording personnel. As such, it could be argued that they were creating as well as financing original artistic works.

This was the case that the companies made to the 1909 Copyright Committee, whose investigations influenced the 1911 Act. The Committee's report stated that

> discs and other records are only produced at considerable expenditure by payments to artists to perform, so as to record the song, &c., and by the expenditure of a considerable amount of ingenuity and art in the making of these records ; and that therefore the manufacturers are, in effect, producing works which are to a certain extent new and original, and into which the reproduction of the author's part has only entered to the extent of the giving the original basis of production. Therefore, the Committee

> regard this as one of the things which can be the subject of copyright. (Law of Copyright Committee 26)

2. The Growth of Performing Rights

At the time of the 1911 Act, performing right income was negligible. Although songwriters had held this right since 1842, they had not exploited it, feeling that sheet music sales generated by live performance outweighed income that could be gained via licensing. The 1911 Act expanded the composers' performing right to include the public performance of recordings (s.1(2)(d)). The founding of PRS in 1914 was, in part, a response to this legislation. The initial income of this society was insignificant, however. It was only with the growth of radio broadcasting in the 1930s that licensing income began to rival the sales of sheet music (Ehrlich 70). In 1934, the case of *PRS v Hammonds Bradford Brewery* established that the broadcast of composers' works fell under the performing right. It could therefore by licensed by PRS.

This was also a key period for the performing right in sound recordings. British record companies campaigned for the inclusion of sound recording copyright in the 1911 Act with one aim: to criminalize pirate recordings (Gregory 141). They had not sought any performing right income or control. The Gramophone Company had argued, "when a person has bought a phonogram he should be entitled to play it in public, and not merely in his private room" (Gregory 142). By the 1930s, their thinking had changed. There was a severe decline in record sales, prompted by the general recession and the fact that the public could access music more cheaply via radio broadcasting. In 1933, the

Gramophone Company emerged victorious in a test case brought against Stephen Carwardine & Co, a coffee shop that was playing recordings to its customers. This case established that section 19(1) of the 1911 Act had facilitated a performing right in sound recordings. In coming to his decision, Justice Maugham acknowledged the record companies' artistry but also gave accord to the work of the performers:

> It is not in dispute that skill, both of a technical and of a musical kind, is needed for the making of such a record as the one in question. The arrangement of the recording instruments in the building where the record is to be made, the building itself, the timing to fit the record, the production of the artistic effects, and, perhaps above all, the persons who play the instruments, not forgetting the conductor, combine together to make an artistic record, which is very far from the mere production of a piece of music.

Within six months, the Gramophone Company (now operating as EMI) had joined forces with the other leading British record labels to found PPL, the collection society that would administer their performing rights income.

As the authors of sound recording copyright, the record companies were legally entitled to the entire licensing revenue. PPL decided, however, to allocate a share to performers. SJ Humphries, PPL's Chair, outlined the company's viewpoint in *The Times*: "although no legal right of the performing artist can be admitted, the claim that recognition should in some way be given to the artist in public performance is just and reasonable" (Williamson 177). According to PPL's own history, "This intelligent and far-sighted decision was particularly remarkable because of its voluntarily nature, bearing in mind that there was no

legislative or other external pressure on PPL at the time" (PPL, "Seventy" 15). In its early years, PPL allocated 80% of its income to record companies and 20% to performers. These splits were amended in 1946. Henceforth, 67.5% went to the record companies; 20% to "named" artists (performers who had exclusive recording agreements with record companies); and 12.5% to the MU (this was eventually interpreted as the share for "unidentified" session musicians) (Monopolies and Mergers Commission, *Collective* 3.18).

These performing rights were also receiving international consideration. In 1928, the Rome Revision Conference for the Berne Convention expressed a wish that members consider "the rights of performers" (Khan 7). At a further revision conference, held in Brussels in 1948, it was agreed there should be a separate international convention, "connected" with Berne, to address the "neighboring" rights of performers, record producers, and broadcasters (ibid. 46-7). This decision prompted the 1961 Rome Convention.

3. Copyright Act 1956 and the first British Performers' Rights

The hierarchical categorization of copyrights can be witnessed in UK legislation. The Copyright Act 1956 is separated into a number of parts. The first covers "copyright in original works" and addresses literary, dramatic, and musical works. The second concerns "copyright in sound recordings, cinematograph films, broadcasts etc." Unlike the 1911 Act, it does not use the term "author" to describe the first owner of sound recordings, instead stating that the "maker" will be "entitled to any copyright" (s.12(4)). This "maker" was the manufacturer of the record, rather than the performer who created the recording.

The record companies' ownership of this copyright was nevertheless beginning to be more questionable on both financial and artistic grounds. By the time of the 1956 Act a greater number of artists were on royalty contracts. Their payment was therefore risk-based, being tied to the success of each release. The Act was developed from the Gregory Report of 1951, which recognized the "very high degree of skill (in part technical, in part musical) called into play in recording music" (Gregory 88). Despite this acknowledgement of the performers' artistry, it concluded that recordings "approximate more closely to industrial products than to original literary or musical works" (Gregory 145).

The 1956 Act separates performing rights into two categories: "the performance of the work in public" and "the broadcasting of the work" (s.2(3)). It also provides the first statutory recognition of performing rights for sound recordings (s.12(5)). It offers no recognition of performers' rights, however. British performers were instead first legislated for in the Dramatic and Musical Performers' Protection Act 1925, which made it a criminal offence to record or broadcast their performances without their consent. This Act was consolidated by the Dramatic and Musical Performers' Protection Act 1958, which remained the "principal statute" for UK performers until the CDPA (Arnold 20). Because of this Act, British politicians felt that only "marginal adjustments" were required to ratify the Rome Convention (ibid. 25).

4. The Rome Convention 1961

The authors of the Rome Convention aimed for balance between the interacting rights of performers, record companies, and broadcasters (Arnold 21). It could

be argued that performers deserved the greatest accord: their status as individuals, rather than corporations, giving them greater affinity with the authors of original works. They nevertheless emerged in the weakest position. The Convention gives broadcasters a property right in their programs and has furthered the idea that "phonogram producers" are the authors of sound recording copyright. Performers, in contrast, only have "the possibility of preventing" the unauthorized use of their works (Rome art.7(1)).[4] This is to accommodate countries, such as Britain, that have refused to grant performers "a property right in the nature of copyright" (WIPO *Guide* 7.5).

Performers' rights are not awarded in recognition of the art of recording, but are instead conceptualized in compensatory terms. The theory is as follows: broadcasters and venues use recordings as an inexpensive alternative to live performance; consequently performers deserve some protection and recompense (ibid. 12.17). Record companies have argued that the same exploitation of records negatively affects the sales "prospects of a disc" (ibid).[5] As such, both parties can be granted "equitable remuneration." Article 12 states:

> If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

Countries have differed in their approach to this income. Some, such as Brazil, originally accorded it to performers alone. Others, including Sweden, Germany,

and Austria, decided to split it between record companies and performers. The Intergovernmental Committee for the Convention laid out a "Model Law" in 1974, which recommended a 50/50 division between the two parties (WIPO *Guide* 12.15). Article 12 has nonetheless enabled countries to select from a number of options. In addition, Article 16 allows them to "not apply the provisions" of Article 12. This option was chosen by Britain when it ratified the Convention in 1963. It was also argued that the UK was fulfilling Article 12 on a "voluntary" basis (Monopolies and Mergers Commission, *Collective* 6.20). According to the MU, British governments had deemed PPL's distribution of performing rights' income a satisfactory means of equitable remuneration (ibid.).

The PPL/MU Agreement was not questioned until 1988, when the Monopolies and Mergers (MMC) launched an inquiry into collective licensing. The MMC did "not criticize the MU for the state of affairs" (7.37), but stated, "So far as performers' interests are concerned we do not think the existing arrangements are a satisfactory discharge of the United Kingdom's obligations under Article 12 of the Rome Convention" (ibid.). They found that "the remuneration of named performers under these arrangements is equitable only if chance makes it so, whilst for the unidentified performer even that chance does not exist" (ibid.). The government nevertheless resisted legislating for performers' remuneration at this point.

5. The Copyright, Designs and Patents Act 1988

By 1988, many recording artists had an increased degree of autonomy. Although still commonly signed to record companies, they were given greater control of

the recording process; making decisions about what to record, who to record with, and where to record it. Moreover, the creative input of performers in the record-making process was viewed by many as having equal worth to the contributions of the songwriters. In fact, it could be difficult to divorce or prioritize each of these domains. Recordings had come to be valued as much for their sound quality, timbre, and feel, as for the quality of the compositions. They were not always created after the composition of the work; composition and performance could evolve in tandem during the rehearsal and recording processes. This practice led some legal theorists to suggest that, for popular music, the copyrights of songwriting and recorded performances should be conflated (Bently 179-204).

The CDPA does not consider this possibility, but it does give recording an elevated status. It is influenced by the 1977 Whitford Committee report, which condemned the separation of sound recordings, films, and broadcasts into part II of the 1956 Act (634). As a result, each of these categories is included in part I of the CDPA and given authorial recognition. According to the Committee, the 1956 Act was "unjustified" in classifying recorded performances lower than the "original" copyright in musical composition; they argued there is no "distinction in the quality of the works" (634). The Gregory Report of 1951 had suggested shortening the duration of sound recording copyright to a period of 25 years (89). In contrast, Whitford believed there is "much to be said" for giving sound recordings "the same period of protection" as musical composition (634).

Although the Whitford Committee valued recorded performances, they had little respect for performers' rights. They argued, "to give a performer a copyright . . . in his performance could lead to considerable practical difficulties"

(409). They were therefore disinclined to "grant of any new rights as such" (ibid). The Committee was nevertheless in favour of making civil remedies available to performers. Consequently, performers receive some civil recognition in the CDPA. Their rights are nevertheless distinguished from the rights in musical works and sound recordings by being sequestered in part II of the Act. This part was "studiously (and, in places, cumbersomely) drafted so as to avoid use of the word 'copyright'" (Arnold 35).

Moreover, the value that Whitford accorded to recorded performances does not receive expression in the CDPA. There is no suggestion that performers should receive ownership of sound recording copyright for their musical labor. In the original version of the Act, the authorship of sound recording was instead combined with film and awarded to "the person by whom the arrangements necessary for the making of the recording or film are undertaken" (s.9(2)(a)). This wording is also used to explain the designation of ownership in the current version of the CDPA, which awards authorship to the "producer," thus confirming that this term does not refer to the studio producer's role (s.9(2)(aa)). Speaking to the MMC in 1994, the record companies argued that they are entitled to this copyright.

> The courts had held that the word "undertake" meant "be responsible for," especially in the financial sense but also generally . . . Parliament had intended that copyright should vest in the person who had undertaken the financial responsibility for making the recording. The ownership of that copyright was the reward for the risk they had undertaken.
>
> (Monopolies and Mergers Commission, *Supply* 12.108)

This interpretation is open to dispute. On the one hand, case law has not

determined that funding should be the primary consideration. If anything, legal decisions have been in favor of the party making the "general" arrangements.[6] On the other, record companies rarely bear the financial risk or organizational responsibilities on their own. Artists' recording budgets are now commonly issued in the form of advances. The record companies claw these advances back from the artists' royalties: they are "recoupable." Artists regularly make their own arrangements for recording projects. They hire independent studios and use independent record producers. If the companies' own interpretation of the law is correct, then it could be argued that recouped artists should assume ownership of their sound recording copyrights.

There is, however, no legal case in which an artist has challenged the record companies' on this point. There is not likely to be one either, as the companies have shored up their ownership of sound recording copyright by contractual means. A standard exclusive recording contract will stipulate that the artist must assign their copyright in their sound recordings to the company, commonly for the life of copyright. This could be considered contradictory: why are the companies requesting assignment if they believe they are the first owners of this right? However, given the confusion that surrounds the legislative status of sound recording copyright authorship, presiding justices have stressed "the vital necessity for provision of these rights in such agreements" (*Robin Ray v Classic FM* 627). Unfortunately for performers, these contractual clauses occlude the reasons for assignment. It is not stated whether the original author is the record company, or the recording artist, or both.

6. European Copyright Legislation

As a result of its membership of the European Union (EU), the UK enacted the Rental and Lending Rights Directive of 1992. Consequently, British performers have proprietary rights in respect of their reproduction, distribution, rental, and lending rights. Their performing rights remain non-proprietary, but equitable remuneration has been made mandatory:

> Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them. (European Union art.8(2))

The Directive was incorporated into the CDPA in 1996, which states that the performer will receive payment "from the owner of the copyright in the sound recording" (s.182D(1)). The Act therefore enshrines performing rights income for recording artists, but in the same instance suggests they are not the authors of the sound recording copyright.

PPL administer this income, splitting it equally between copyright owners and performers. They have presented this split as a "voluntary decision" (PPL, "Seventy" 28). Nevertheless, Denmark, France, Greece, Italy, the Netherlands, Portugal, and Spain had previously adopted a 50/50 division. Germany, meanwhile, had decided to give its recording artists a 64% share (Arnold 97).

The figure adopted by PPL is significantly higher than the contemporary record company royalty rate, however, which gives artists approximately 15%-20% of the dealer price for the sale of recordings. Moreover, whereas conventional royalties are used to recoup advances, performing rights income is safeguarded from this process.

The record companies soon used advances in performers' rights for their own ends. In 2003, PPL launched a campaign to extend the duration of sound recording copyright. The trade magazine *Music Week* spearheaded this crusade, laying out instructions in an early editorial: "Let us be clear: this is not an issue which affects just record companies. And if it is presented as such, any attempt at change will be far harder to achieve" ("Why it's Time" 7). Hereafter, artists were placed at the center of this campaign. It was erroneously put forward that legislators had framed the original term of sound recording copyright to reflect the performers' lifespan; the logic followed that with a longer life expectancy its duration should be prolonged ("Out of Copyright" 8). Demands were made that performers' copyrights should be brought "in line with songwriters" ("Government Must" 8). Eventually, the record companies achieved their goal: Directive 2011/77/EU increased the duration of sound recording copyright in the EU from 50 to 70 years. It has been in operation in the UK since November 2013.

Performers have gained too. The Directive similarly extends the term of their equitable remuneration and includes further rewards, each triggered by the conclusion of the former 50-year period of copyright. At this point, if signed artists have not recouped, any outstanding balance on their advances is waived. They are thus entitled to full royalty income for the remaining 20 years. Session

musicians also benefit. Although they do not receive sales royalties for the first 50 years of a sound recording's existence, they are entitled 20% of this income for the added 20 years. Finally, the legislation includes a "use it or lose it" clause.[7] If, after 50 years, a record company is not issuing "sufficient" copies of a recording to the public, their recording agreement with the artist can be terminated, along with their ownership of sound recording copyright (Copyright and Duration of Rights in Performances Regulations s.9). The performers' rights in the sound recordings will continue for the full 70 years, however, enabling musicians to prevent record labels from issuing the recordings without their consent (Bryt and Gallager 15).

Performers have received these rewards because they were placed at the forefront during the campaign to extend the term. These rewards are nevertheless untidy, as are other amendments and absences in performers' rights. They each result from an initial classification. Performers have received these add-ons to legislation because they rarely own their sound recording copyrights. This classification also accounts for the way these add-ons have been shaped. Performers have gained performing rights in their recordings, but the majority of these are non-proprietary; they are not able to assign or license their equitable remuneration rights (Copyright, Designs and Patents Act s.182(D)). This safeguards performers against their record companies, who would otherwise wish to subsume these copyrights within their artists' broader contractual obligations. Nevertheless, it has been argued that this places performers in a weaker position than songwriters, who have been able to negotiate beneficial deals because of proprietorial control (Arnold 47). Moreover, on the occasions when performers have assumed control of their

sound recording copyrights, they have done so for their business acumen and not for their artistry. This copyright is awarded to the "producer" of a recording; it is not given in recognition of musical labor. As a result, it is tied to the date of issue, rather than the life of the author. Although its term has been extended, it remains considerably shorter than the copyright in a musical work, which in the EU currently lasts for the life of the author plus 70 years.

Going Nowhere: Campaigning For and Against Performers' Rights

Sound recording copyright could have been reconceptualized: authorship could have been awarded to performers. This would have required an imaginative leap and legislative pressure, however. No one stepped forward to make this case. The MU would have been best positioned to do so. However, while they have aimed to strengthen performers' rights, they have consistently prioritized live performance over the art of recording. Record companies have also offered support to performers, but largely as a means of strengthening their own rights. The songwriting community, meanwhile, has regarded performers as rivals. It is to these parties that we now turn.

The conflation of performance and songwriting can be overstated. The practitioners form separate fraternities, as can be seen in their competition for performing rights. Gavin McFarlane has noted, "if the performing artistes had been sufficiently well organised at the right time, they might have obtained a right of property in their performances recorded on film or record, but by the time that their representatives were alive to the possibility, the composers, or more accurately the interests behind them, made great efforts to ensure that

new economic benefits from royalties derived from performing rights should not be extended to them" (188-9). These efforts were in evidence during the drafting of the Rome Convention, when songwriters' societies successfully campaigned against the inclusion of performers' property rights (Khan 9-11). They worried that performers might assign their rights to a musicians' union, who in turn might instigate a recording ban, thus depriving songwriters of a stream of income (WIPO *Guide* 7.6). Songwriters also campaigned against the statutory implementation of equitable remuneration for performers. They believed that an allocation of performer income would deplete their own licensing revenue, as copyright users would not wish to increase their overall performing rights payments (ibid. 12.26). A similar ethos could be witnessed during the 21st century campaign for the term extension of sound recording copyright. Songwriters and publishers did not lend their voices to this cause. *Music Week* suggested, "they don't want to rock the boat and prompt a review of copyright which they fear might see parity achieved across the board, in the form of downward harmonisation" ("As MW" 13).

Record companies have also helped to preserve the secondary status of performers, but their influence is more complex. They have promoted performers' rights as a means to their own ends. This can be witnessed in the first British performers' rights legislation, the 1925 Dramatic and Musical Performers' Protection Act, which was instigated by the Gramophone Company. The labels had no legislative protection when their artists' live performances were bootlegged, as this activity did not involve the copying of their original sound recordings. The 1925 Act gave them the means, via their performers, of prosecuting such cases (Khan 170-71). The companies' self-interest is also in

evidence in recent legislation. Their promotion of performers during the term extension campaign drew upon a long tradition, whereby corporations have advanced their copyright interests by proclaiming the rights of their artists (Harkins 637). Expansion of copyright appears more reasonable when tied to the life and work of a human being.

There is also self-interest in the record companies' performing rights largesse. Through the auspices of PPL - the record-company owned collection society - the labels "voluntarily" donated a minority share to performers from 1934 to 1996. When this payment became mandatory under EU law, they "voluntarily" increased the performers' share to 50%. This generosity has made financial sense. Initially at least, the companies did not expect the performing right to be a major source of income. They viewed it instead as a preventative measure, aiming to restrict the amount of recorded music used in radio broadcasts because they felt over-exposure was affecting record sales (Gregory 152). The companies claimed their focus was on making records "for sale to the public for private entertainment in the home"; any performing right income was, relative to the "main business of the company, of little or no importance" (ibid. 144). According to Martin Mills, CEO of the Beggars Group, PPL royalties were traditionally viewed as mere "icing on the cake" (PPL, "2013" 20). Record companies could afford to be generous when there was little to give away.

There were also tactical reasons for the largesse. The voluntary payments helped to stave off legal questioning. This was in evidence during the first phase of PPL distributions: the *ex gratia* 20% accorded to performers from 1934 to 1946. PPL made this payment because they feared the Carwardine case might be overturned (Williamson 177). The Gregory Committee, for example, poured

scorn on the judgment, recalling that the companies had originally regarded the public performance of records as good for business: it gave them free publicity (142). As such, it was not a financial risk for record companies, but instead brought them financial gain. In light of the legal uncertainty, PPL invited negotiations with the MU and other performers' organisations, leading to the *ex gratia* payment. As well as bolstering the record companies' cause, this payment helped it to appear rational. Performers were more obviously affected by the increased public performance and broadcast use of recordings; this cheap use of music was costing them jobs.

MU demands were set to increase. During its 1945 delegate conference, the Union declared its intentions to obtain payment for the public performance and broadcast of records, and to "Acquire some measure of control over the issuing of licences, and the conditions upon which licences are issued by PPL" (Musicians' Union Executive Committee 35). This mission led to the 1946 Agreement with the collection society. The Union entered negotiations in a strong position. They had suffered a dip in membership at the time of the original PPL arrangements, but were now an organization of significant numbers. British record companies were also fearful they might undertake strike action, taking heed of recent events in the US. Between 1942 and 1944 the American Federation of Musicians withheld its members from making recordings. Their aim, successfully realized, was to secure a Union share of record sales income, compensating the fact that recordings were displacing the live performances of its members. It was against this background that the MU emerged with its 12.5% payment from PPL. Such was their power that the Gregory Committee concluded, "the attitude of the gramophone manufacturers

towards the public performance of their records . . . is conditioned very largely by the views of the Musicians' Union" (153).

John Williamson has argued, "In working together the MU and PPL reached a series of agreements that not only controlled the use of recorded music but also ultimately strengthened the position of the musical performer in copyright law" (191). These aims were not always harmonious, however. The best chance for musicians to achieve copyright parity with songwriters was if their recorded performances were valued. The MU did not think in this way. They sought to control recorded music by limiting its use. This idea can be witnessed at the 1945 conference, where a further policy was announced. The Union aimed to "Effect limitation of the extent to which gramophone records may be used for public entertainment" (Musicians' Union Executive Committee 35). Their negotiations with PPL included the demand that the society would only license major music venues if they had an MU agreement to employ live musicians (Whitford 398). They also included "needletime" restrictions, which limited the number of hours recorded music could be played on British radio (Witts 2012).

The Union's early members were not recording artists; they were "pit musicians who played in theatres, music halls and cinemas" (Williamson 169). These members had much to lose by the increased use of recorded music. However, even when a recording contract became the goal of many of its members, the Union still focused on the threatened careers of performing musicians. Into the 1960s they were describing recorded music as an "ever-present menace" (Thornton 42). This attitude can be witnessed in the 1961 Rome Convention, which was influenced by the views of the International

Federation of Musicians (FIM), in which the MU was a dominant force. It espouses the idea that "the disc" is "the enemy of the performer" (WIPO *Guide* XVII). It is also evident in a 1968 report, commissioned by the BBC, which refers to the Union's "out-dated attitude that recording is evil" (Williamson and Cloonan 156).

The MU's stance against recordings was reflected in their collective use of performing rights income. Rather than distributing their PPL allocation to session musicians who played on the records, they placed it in a "special fund," which was utilized for wider Union needs. This was practicable given the poor data available regarding session musicians' work, which was frequently "unidentified" (Monopolies and Mergers Commission, *Collective* 7.36). It was also permissible within the parameters of the Rome Convention: the Intergovernmental Committee allowed funds to be used "for the benefit of the profession as a whole" (WIPO *Guide* 12.17). Nevertheless, the MU actively directed this income *against* the work of session musicians and other recording artists. It was first used to subsidize a series of May Day dances and provide financial support for orchestras, opera societies, and military bands (Williamson 188). Then, in the year of the Rome Convention, the MU launched their "keep music live" campaign ("Timeline"), promoting the "liveness" of performance to imply that recording was dead (Thornton 42). This campaign was financed with money from recordings, consuming a "large proportion" of the fund (Williamson 188).

The Union's methodology was eventually challenged by the MMC. Their 1988 report questioned why "None of these disbursements appears to have been made specifically to the MU members whose work had generated the income

from PPL" (7.36). The MMC suggested instead, "all performers should receive equitable remuneration, directly paid by PPL, specific to each recording's use in broadcasting or public performance" (7.38). The MU contested PPL's control of these funds and regained the right to administer the session musicians' share in 1994. By 1995, the Union was, for the first time, attempting to distribute money directly to musicians for the actual use of their recordings ("Timeline"). This activity was short-lived, however. Their agreement was terminated in 1996, when equitable remuneration became mandatory.

The Union claimed that "for many years" they had "urged the Government to meet its commitments under Article 12 of the Rome Convention on a statutory rather than a voluntary basis" (Monopolies and Mergers Commission, *Collective* 7.37). However, as Williamson has noted, the agreement with PPL meant that record companies and the Union were "hostages to each other's fortune" (180). From the record companies' point of view, the agreement brought administrative help and Union quietude. The MU, in turn, was able to foster its policy on live music, while the income it received eventually reached considerable amounts (£1.3m (US$1.62m) in the year before the MMC report (Williamson 183)). During the run up to the 1956 Act, the Union had argued that performers should have proprietary performing rights. They also "lobbied furiously" with PPL "against any legislative change to their distributions" (Williamson 180). The eventual Act did not alter the PPL arrangements, not least because of fear of "industrial disputes" (Gregory 185). This outcome engendered "stable relations between PPL and the MU for a further thirty years" (Williamson 181). Williamson maintains that, as a result, "the Union was willing to place its case for statutory performers' rights on the back burner" (ibid.). This is reflected in the

1977 Whitford Report, which states, “we have not been asked to consider the grant of any new [performers’] rights as such” (409). The MMC investigation brought the agreement with PPL to an end. In the words of Dennis Scard (MU General Secretary 1990-2000), “the Union’s controls over needletime, employment quotas and the policy of not allowing records to accompany live performance, all disappeared overnight” (Williamson 183). Some things remained, however. To this day the Union campaigns under the slogan “keep music live.”

Going Forwards: Performers’ Rights in the 21st Century

British songwriters will usually assign or licence their rights in their compositions: performing rights will go to PRS; the remaining rights to their publisher. They do so from a position of strength, classified within legislation as the “authors” of their musical works. Assignment of copyright is also common among British recording artists. Their position is weaker and more confused, however. Their record companies request contractual assignment of all rights in the sound recording, but the extent of the performers’ authorship is not made clear. Moreover, this assignment does not relate to musical labor; it instead suggests that the artist may have a role in the arrangement of the recording sessions. Meanwhile, the CDPA indicates that recording artists are entitled to performing rights income because they do *not* own the sound recording copyright. Performers rights are weaker than those of songwriters and record companies within UK law.

This balance of power can be witnessed in relation to streaming income.

One reason why record companies originally gave a "voluntarily" share of PPL money to performers is because performing rights were financially insignificant. This is not the case with streaming royalties; consequently the companies do not want to give 50% of this money away. They have decided that streaming should not be classified among the rights that are equitably administered by PPL. Their classification is contentious, however, and it differs from the British publishers' attitude towards these royalties. The publishers believe that streaming involves both performing and mechanical rights (the rights to reproduce music onto recording formats). Consequently, any streaming income that does reach the collection societies is split 50/50 between the performing right society, PRS, and the Mechanical-Copyright Protection Society (MCPS). The major consequence for songwriters is that MCPS income is recoupable from publishers' advances, whereas at least 50% of their PRS income is not.[8]

Record companies have provided varying accounts about streaming royalties. On some occasions they have maintained that streaming entails a mechanical right only. According to PPL's 2011 Annual Review:

> online revenues remain limited as the majority of online sound recording licensing is carried out directly by rights owners. This reflects the prevailing view of record companies that downloading and on-demand streaming is analogous to the distribution of sound recordings, a traditional record company function. (17)

Classifying streaming in this manner has enabled record companies to circumvent the 50% performing rights royalty and instead pay artists the 15%-20% rate that they apply for recording sales.

At other times, record companies' have claimed that streaming is covered by a particular performing right. This is the "making available" right, which was formulated during the WIPO treaties of 1996 and enshrined in EU legislation in 2001. The activity covered is "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" (Copyright, Designs and Patents Act s.182CA(1)). In British law the making available right is exempt from equitable remuneration (ibid. s.182D(1)). Record companies can instead collect the money themselves and set their own royalty rates. They are also entitled to recoup these royalties from advances. Many companies now opt for a 15%-20% royalty rate, but this has not always been the case. In accordance with other performing rights uses, the Beggars Group initially paid their artists half of the streaming royalties. They reneged on this agreement in 2014. Martin Mills argued that streaming had become "core income" and therefore the company could not afford to pay a 50% share (Smirke).

As the income from streaming has become increasingly important, so has its classification within copyright legislation. Its absorption within the making available right is disputed. As a result, the European Commission is working on a new definition to clarify this "contentious grey area" (European Commission 9). The record companies are campaigning for their own interpretation, but the MU also has a proposal. Horace Trubridge, the current General Secretary, has suggested that income should be split along "performance" and "mechanical" lines:

> We believe that 50 percent of the making available right should be an equitable remuneration right, non-assignable and administered by a

> collecting society, with the other 50 percent being an exclusive right assignable to the record company. This would ensure that performers receive income from digital sales and streaming regardless of whether they have an outstanding balance with their record label. For their part, record labels would be able to recoup their investment from royalties assigned to them under the exclusive right. (Trubridge)

This solution mimics the practice of the songwriters' collection societies. If implemented, however, it would raise the traditional fears of songwriters that any gains for performers are at their expense. They already feel victimized in this area: the approximate split of streaming rights income is 80% to record companies/performers and 20% to publishers/songwriters (Cooke 53). This differs from standard performing rights licensing income, which is usually split evenly between songwriting and recording (ibid. 31). Moreover, although the MU solution is favourable for recording artists, it does not address the fundamental issues of the ownership and conceptualization of sound recording copyright.

Change is possible. Film was introduced to British copyright law later than sound recording (1956 as opposed to 1911), but has encountered greater legislative modification. The 1956 Act awarded ownership to the "maker," clarified as "the person by whom the arrangements necessary for the making of the film are undertaken" (s.13(4); s.13(10)). This wording was retained in the original version of the CDPA, where it was combined with the ownership of sound recording copyright (s.9(2)(a)). The EU Directive that introduced equitable remuneration to British copyright law also transformed the authorship of film. Copyright is now shared between "the producer and the principal director" (Copyright, Designs and Patents Act s.9(2)(ab)). As such, ownership has

expanded beyond the "person" who arranges a production; it additionally recognizes the creative labor of the director. Sound recording has not followed suit, but there is a precedent here for legal reconfiguration.

There are interesting ideas about how it could be achieved. Lionel Bently has argued that copyright law should be modified "to reflect the peculiar features of popular music, in particular the importance of sound" (Bently 196). As such, he proposes "original works of sound" as a new copyright category (ibid.). This copyright would have the same status as songwriting copyright in respect of "duration, moral rights, and what constitutes copyright infringement," but would be awarded to the performers of a recording or, more correctly, the performer-composers: Bently argues that the musical arrangement that arises during the recording process is a form of composition (ibid.). He believes this would "save copyright law from being asked to invent 'musical works' (and, indeed, 'performances') in circumstances . . . where the musical artefact is created in the recording studio (and subsequently marketed, appreciated and consumed) by way of such recording" (ibid.). In his formulation the "original works of sound" copyright would replace the songwriting copyright for recordings and do away with the need for performers' equitable remuneration rights. Sound recording copyright would continue to exist as a "distinct" form of copyright, owned by the "producers" (ibid.).

The great advance of Bently's proposal is that it introduces a recording copyright that recognizes the musical labor of performers. It could, however, be reconfigured. The copyright in musical works could be retained for all types of composition (Bently would only do this for certain types of work: he suggests, "Popular music that is created in the old-fashioned way, where the song is

developed outside the studio and later recorded would generate two works: 'musical work' and 'original work of sound'" (199)). This retention would be practicable for cover versions and other instances where users require the composition rights only. Conversely, the category "original works of sound" could be introduced for all types of music. This would safeguard popular music against a problematic essentialism. It would also facilitate licensing that employs the "work of sound" only, rather than the melodic or harmonic elements of the composition, i.e. some instances of sampling. Moreover, as well as doing away with equitable remuneration rights, the original sound recording copyright could be removed. Record companies would not be the authors of the recording. If performers chose to deal with a record company, they would instead assign or license the rights in the "original work of sound." Whether this would include the performing rights would be up to the musicians. It would make sense, however, to follow songwriters' practice. Performers would assign their performing rights to a collection society, guaranteeing a 50% share of income that could not be recouped.

This modified proposal provides for greater equality between songwriting copyright and recording artists' copyright within UK law. Songwriters and performers are regarded as authors, they enjoy the same exclusive rights, these rights are of the same duration, and they are able to assign or license them as they see fit.[9] Some copyright theorists will baulk at this suggestion, as it will probably result in another extension of the sound recording term (harmonization tends to go upward rather than downward). The benefits are great, however. British copyright will acknowledge the art of recording. Musical laborers will address the balance of power.

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[1] "Performing rights" is used in this article to address these copyright controls in relation to songwriting copyright and sound recording copyright. In Britain, the term "performing rights" is sometimes used for songwriting copyright only, while the term "neighboring rights" is used for the performing rights elements of sound recording copyright. This practice is resisted here because in countries with civil law systems the term "neighboring rights" is used more broadly, referring to all aspects of sound recording copyright and performers' rights. Applying the term "performing rights" to both songwriting copyright and sound recording copyright also highlights the fact that PRS and PPL are covering the same copyright controls, as evidenced by the fact that the two organizations increasingly work together.

[2] PRS and the Mechanical-Copyright Protection Society (MCPS) currently operate under the umbrella name "PRS for Music." Membership of each society is separate, however.

[3] Songwriters regularly take a share of the publisher's PRS income as well. This money is recoupable from their advances.

[4] In 2010, the UK ratified the WIPO Performances and Phonograms Treaty, which accords performers "the exclusive right of authorizing" these rights (Arnold 41).

[5] This argument is far from convincing, given that record companies spend vast sums promoting their recordings to radio in the belief that airplay will encourage sales, yet it stands as their justification for remuneration.

[6] See *Century Communications Ltd v Mayfair Entertainment* (1993), *Beggars Banquet Records v Carlton Television* (1993), *Slater v Wimmer* (2012), *Henry*

Hadaway v Pickwick Group Limited (2015). In the latter case, deputy judge Mellissa Clark reviewed the previous decisions and determined, "These cases make it clear that 'the person by whom the arrangements necessary for the making of the film are undertake,' is a question of fact in each case" (49).

[7] During the lobbying there was talk of sound recording copyright "reverting" to artists. John Smith (MU General Secretary 2002-2017) countered, "reversion is a misnomer – the copyright has always belonged to the record company" (8).

[8] This is because songwriters assign their performing rights to PRS, whereas their mechanical rights are assigned to their publishers. This has also enabled publishers to circumvent MCPS in respect of streaming income (Cooke 45-7).

[9] It is the legislative starting point that is important: giving performers greater power and clarity in their contractual negotiations. Nevertheless, it is expected that performers will be on lower royalty rates than songwriters, dependent on the financial, organizational, and promotional contributions of their record companies. Moreover, absolute legislative equivalence is not intended. Songwriting copyright has a "formalist" conception, whereby one composition can infringe another on the basis of similarities rather than exact parity; in contrast, the "original work of sound" copyright should have a "physicalist" conception, meaning that infringement would only occur if the original recording were utilized without license. This would preserve the "iterative-variative" nature of record making (Toynbee 78). In addition, the authorship of sound recording copyright could be more expansive than songwriting copyright, including the studio producer and other recording personnel if necessary.