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CONVENTION AND CONSTRAINT IN THE OPERATION OF MUSICAL GROUPS:

TWO CASE STUDIES

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ABSTRACT

The purpose of this thesis is to explore the ways in which Howard Becker's notions of convention and constraint operate in the functioning of selected musical groups. In particular, areas under investigation include the interrelated networks of media, venues, and support personnel, as well as the aesthetic criteria and commercial objectives of the individual musical groups.

The investigation begins with an autobiographical description of my musical background with details of personal and musical involvement as a participant observer in this project. Discussion continues with an evaluation of several theoretical approaches to the study of musical sounds, culture and groups.

Subsequently I present preliminary fieldwork studies and a description of my general findings in terms of Music-related factors and Non-Musical factors. This leads to a detailed discussion of the basic research design used in the two case studies.

The first case study investigates a professional jazz group engagement in Switzerland. This chapter establishes the major parameters of the research design. The chapters which follow investigate additional factors that are incorporated in the research design. These factors include: the law of contract, management of artists, and the songwriting process.

The final chapter is devoted to the case study of a semi-professional rock band which takes into account, over a period of years, the effects of personnel change, musical change, developing consciousness of the legal aspects of the music business and various attempts at establishing a professional musical career.

Finally, the thesis concludes with a summary discussion of the entire research project and a critique of the research design.

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PREFACEA NATURAL HISTORY OF THE RESEARCH PROJECTFormative Stages of Development

The purpose of this natural history of the research project is to present an overview of the entire thesis and justify the logic of its progression through various stages of practical and theoretical development. In the pages which follow I will give a chronological account of the development of the research project followed by a description of the format of the thesis and my reasons for choosing the sequence in which chapters appear.

The development of this research project has been due to a combination of circumstances and opportunities in formal academic settings and professional music situations. Initially I have had a long standing interest in music and sociology and through various activities, the opportunity to combine these two interests occurred when I commenced formal research in the area of the sociology of music.

During the initial stages of my research activity I began reading broadly in the area of music those writings contributed by sociologists and anthropologists. My initial search indicated that very little work had been done in the areas in which I wished to make a contribution and therefore confirmed my instincts that the research project was a worthwhile objective. Apart from one writing by Howard Becker, "The Professional Dance Musician and His Audience" (Becker, 1951), most of the writings in the field of sociology dealt with a limited range of questions regarding the meaning of lyrics and audience reactions to popular groups.

There seemed to be little theoretical perspective if any, which was relevant to looking at the lifestyle, community, or various stages of amateur or professional development that musicians themselves undertook. In effect I discovered that my interests fell within an area which might be described as a twilight zone. That is, the sector of the community which is the breeding and training ground of the professional musician. The pool from which the unknown become known and the remainder plod on content to remain anonymous players existing on the fringe of the more glamorous end of the profession.

Prior to the commencement of formal research, I had significant exposure to this 'fringe element' through playing with a bandleader P.E. I describe this experience in considerable detail in my opening autobiographical statement of the thesis. It was through this initial experience, where I was very much a novice/trainee, that I gained my entree into an important area of the professional music circuit. The significant feature of this particular circuit was the willingness of its members to compromise musical standards and aesthetic objectives in favour of financial goals. The experience made me aware of sectors of musical activity which were less visible than popular local bands playing in a predominantly student orientated environment. Furthermore, the experience was of research value retrospectively, particularly after my academic study had been under way for some time and I was beginning to formulate a plan of preliminary fieldwork. At this stage, retrospective assessment enabled me to identify a broader range of groups and venues (described in detail in the text) more clearly and helped me to see the relevance of less obvious groups and activities.

Some time after the completion of my work with the bandleader P.E. I began working with the popular local Rock Band GR which had a considerable local following in student-orientated environments and with local teenage groups. This new experience, which was still early in my development as a musician, occurred over a period of a year during which time I also commenced formal doctoral research. Consequently, I began making notes of a general nature, some of which appear in the appendix of this thesis. At the same time, I was reading available literature in fields relevant to my research, but there was no emergent theoretical perspective which embraced the wide range of factors relevant to the operation and functioning of musical groups.

I persisted therefore without a concrete theoretical aim for some time, developing my work experience in the world of musical groups, fully aware throughout that while I was a participating musician I was also a sociological observer. I recorded impressions and observations where they seemed sociologically relevant expecting that I would find them useful retrospectively when I discovered a satisfactory research design. This was a formative period and the experiences and impressions recorded at this time were central in identifying a network of "problems" which were featured in my preliminary research design.

The Preliminary Research Design

My preliminary research design was a significant stage of development in this research in that it reflected a synthesis of academic reading and concrete work experience in musical groups. The academic literature available in the field during the early years of my research yielded an essentially eclectic conglomeration of theoretical strands which had roots in anthropological writings of ethnomusicology and a variety of sociological

perspectives. The general conclusions I was coming to at this stage of the research, emerged primarily from fieldwork experience. These conclusions were that the development and operation of a musical group's aesthetic and professional priorities were substantially influenced by a mixture of economic, legal and domestic factors that had nothing to do with either the production of musical sounds or the technical ability to play them; and further that there was a significant interrelationship between those aforementioned factors and factors specifically involving music-making activities.

Consequently I developed what might loosely be described as a programme of analysis which established a dichotomy between music-related and non-musical activities. Hence, initial objectives were to identify: 1) a range of activities which were relevant to the operation and functioning of a musical group that were specifically related to the production and performance of musical sounds, and 2) a range of activities equally relevant to the operation and functioning of a musical group - but which were not specifically music related e.g. personal relationships, domestic conflict, economic priorities in conflict with the musical project etc.

Methodology

The range of activities and problems I discovered which were relevant to this project were derived from participant observation. My direct involvement as a musician with a variety of groups in addition to the principal one of which I was a member, enabled me to collect information from observation and informal interviews with musicians in all these groups. The dialogue I maintained with musicians throughout the period of this research was based upon my relationship to them as a working

musician in the area.

I attempted to remain in contact with musicians working in groups on a variety of different circuits. This range of groups and the venues in which they played is itemised in detail in my presentation of preliminary research findings in the introductory chapter of the thesis.

Documentation of the Field

The research activity culminating in the presentation of preliminary research findings provided an overview of the field in terms of analytic perspective and domains of enquiry. Further to this I prepared additional documentation in the form of a tree diagram which reflected a network of musicians and musical groups in sectors of the area under study. The diagram appears in the appendix of the thesis and is intended to illustrate the movements of many musicians throughout the circuit. Of some importance also is that further to this the diagram provides additional evidence of contact between professional and semi-professional musicians, which is relevant to the spread of information to the latter about legal and economic conventions and constraints.

Identification of the Research Design

I had now identified a 'field' of work and the beginnings of a theoretical framework if not an actual research design. For some time afterwards my activities as a musician developed independently of my theoretical work. While looking for the appropriate model I continued with my now expanding musical work awaiting the opportunity to combine a more developed and more fruitful research design with my relevant fieldwork experience.

The opportunity to finalise my research design occurred when I

was introduced to a relevant theoretical work published by Howard Becker. It was through my reading of Becker's "Art As A Collective Action" (Becker, 1974, pp.767-775) and re-shaping my research design that I was eventually able to establish a suitable working theoretical model.

The eventual research design essentially utilised Howard Becker's notions of 'convention' and 'constraint' as a broad theoretical guideline for the research project. The theoretical perspective he presented provided the fundamental framework within which to incorporate my preliminary fieldwork findings. This not only led to a new stage of my theoretical development, but also gave a significant continuity to the transition from my preliminary research design to this new stage of theoretical development. By this I mean that my preliminary fieldwork had produced a series of significant interrelationships such as that between different types of personnel e.g. (musicians/road crew) and different types of activity (musical and non-musical) which were relevant to the eventual end product.

The transition from a somewhat fragmented conglomeration of multiple interrelationships to a view of all these activities as a series of interrelated networks governed by principles of convention and constraint, produced two results: 1) it provided a framework within which to incorporate and establish meaningful connections between my fieldwork findings and 2) it provided a significant organisational structure which considerably influenced the development of the project. Until the time I actually began to use Becker's theoretical model I was looking at all possible domains of activity without specific goals. Thereafter it became possible to clarify objectives and concentrate on different areas of the research design without fear of losing sight of the overall picture.

The ultimate research design then, generated many categories of analysis which included a wide range of music-related and non-musical factors. Further, it was within Becker's terms, 'convention' and 'constraint', that I was able to identify the network of interrelated factors which I had found (from preliminary research) to be relevant to the operation and functioning of musical groups.

Selection of Case Studies/Identification of New Areas of Research

Having established a research design I then began looking at possibilities for case studies. I chose SP, a semi-professional rock band for one of the case studies primarily because I had a long term familiarity with the group over approximately six years and I had to some extent already established a theoretical perspective through preliminary fieldwork activity which coincided with the time I'd begun working with SP. Further modifications in theoretical development which did not coincide with significant developments within the group were incorporated retrospectively.

For example, throughout my work with SP, the group's professional aspirations and recording experience produced a growing legal awareness regarding songwriting, recording and management contracts. The impact this awareness had on working relationships within the group was gradual. My discovery of the significance of some events therefore led me to expand the research design retrospectively, and consequently this expansion of the research design itself resulted in an overall expansion of the text devoting special research attention to two areas: 1) legal matters regarding recording, songwriting and management contracts; and ownership of original material.

2) The songwriting process itself.

The two chapters in the text which I devote to the two above-mentioned areas, highlight respectively, how legal conventions and the conventions of the songwriting process dramatically affect the working relationships of individual musicians within the group. In particular, the second case study illustrates how these 'conventions' affect professional musicians involved in my 'field' of study and then ultimately, how the evaluations and responses to these legal and songwriting conventions are transmitted to semi-professional musicians on the local scene.

Throughout the period in which I was preparing the chapters on legal conventions, and the case study on SP, I was becoming more actively involved in musical work. This activity was undertaken partially as a consequence of my own interest and desire to become involved in new areas of activity which I had not explored and further, it was also a result of a series of opportunities which presented themselves during this period. Many of the opportunities which now began to present themselves to me were in the area of traditional jazz and songwriting.

Consequently two significant musical experiences occurred which I later incorporated in the thesis. The first was the commencement of a songwriting partnership which received professional studio production in the form of a demonstration tape.. The other was an offer of a professional engagement in Zurich, Switzerland, where I was the resident drummer at the Casa-Bar Jazz Club on two separate occasions. For reasons which I describe in the relevant chapters of the text I decided to make these professional experiences subjects of investigation.

Thesis Format

When I eventually came to the stage of writing up the thesis I decided on a format which divided the manuscript into three sections.

Section I

The first section of the manuscript virtually traces the practical and theoretical developments which have been central in the progression and identification of my eventual research design. Consequently the thesis begins with an autobiographical description of my musical background with details of personal and musical involvement as a participant observer throughout the project. Discussion then continues with an evaluation of several theoretical approaches to the study of musical sounds, culture, and groups including: 'ethnomusicology', the sociology of listening, 'effects' and 'reflection' theory, and a 'phenomenological' approach.

Subsequently I present my preliminary fieldwork findings and a description of my general conclusions in terms of music-related factors and non-musical factors. These include: 1) Music-related factors - composition; musical training and technique; and live performances. 2) Non-musical factors - relationship with spouse; nature and income derived from musical and non-musical work; personality conflicts between group members; socio-legal factors regarding ownership of original material; legal factors regarding recording and/or management contracts.

After presentation of the preliminary research, I then present Howard Becker's perspective on convention and constraint which functions as a broad theoretical guideline within which to incorporate my findings in the preliminary research effort. The research design was then sufficient, in my view, for me to identify the range of interrelated networks which appear to be central to the operation and functioning of the groups under study.

Section II

The second section of the thesis presents the two case studies of musical groups and two additional chapters on legal factors and songwriting.

I present as my first case study a professional jazz group engagement in Switzerland. In spite of its occurrence late in the research process, I have chosen to present this case study first for a variety of reasons which I describe in greater detail in the introduction to R.J. and His Jazzmen. However, generally speaking, the main reason is that this first case study involves considerably fewer variables to account for than the second case study. Consequently, it was possible to establish the major parameters of the research design before taking on the more complex case study of SP, a semi-professional rock band.

The second case study, of SP, the semi-professional rock band, was a far more complex project due to the fact that it covered a number of years during which the band personnel changed as also did its musical direction. Furthermore, the fact that the group undertook to write original material, brought to the forefront additional variables in the research design. These variables could only be adequately described and incorporated in the second case study by prefacing the investigation with two preparatory chapters. For this reason, the two chapters which immediately follow the first case study are on: 1) legal factors and 2) the songwriting process. The chapter on legal factors looks at the historical development of contractual relationships between musicians and recording companies with a view to identifying the ways in which the contractual relationships affect the working relationships between individual musicians within the group itself. The texts of the relevant

law cases discussed appear in an appendix, as they are regarded by musicians and lawyers as 'test' cases. Further documents of some relevance to this chapter and the thesis generally are letters of interest from professional management for the group GR; and a letter of contract for the professional musical engagement in Switzerland. These are also in an appendix.

The chapter on the songwriting process analyses three separate songwriting projects in order to highlight, with some degree of concentration, two features of the songwriting process: 1) the dynamic qualities of the songwriting process itself; and 2) the effect of legal developments on the attitudes of the songwriters towards work habits and eventual ownership of original material.

The work of these two chapters on legal factors and songwriting, substantially contributes to the integration of additional factors incorporated in the research design for the second case study.

The second case study, which is comparatively longitudinal in that it looks at the semi-professional rock band SP over a period of approximately six years, includes all the factors incorporated in the research design and particularly those special areas of law and songwriting which have been discussed in detail in the preceding chapters.

The final chapter of Section II and of the main text of the thesis, reviews the entire project and establishes links between the various sections and generally seeks to justify the progression of the project through its various stages. The thesis concludes with a critique of the overall research design and suggests areas where further research would make a worthwhile contribution.

Section III

This third section of the thesis contains four appendices each of which I have already mentioned in connection with various chapters of the thesis discussed in this natural history of the research project. The appendices contain original data and documentation and for this reason have substantial relevance to this project and are frequently referred to throughout the text of the thesis.

SECTION I

CHAPTER I - INTRODUCTION

CHAPTER I - INTRODUCTION

Approaches to the Sociology of Music

Autobiographical Statement

Review of Literature

Preliminary Fieldwork Findings

Research Design

Approaches to the Sociology of Music

The purpose of this introductory chapter is to identify a broad range of academic approaches to the study of musical experience within a musical community. My initial interest in undertaking this study was encouraged by my readings of an American sociologist/musician Howard Becker. His work, "The Professional Dance Musician and His Audience," featured an analysis of the conflicts some jazz musicians felt when they had to play dance band music instead of jazz in order to earn a living. His article highlights the gap between popular taste and the musical aims of performing musicians. The viewpoint of Becker's article is that of a participating musician whose insights are refined and informed by sociological method. This kind of sociological analysis of professional, artistic, and personal experience became very popular in the U.S.A. during the latter half of the 1960s when I was an undergraduate at University.

My development as a musician and as a sociologist began simultaneously although independently during this period. In later years as a postgraduate I intended to combine the two interests in a serious study in the manner popularised during the University life of my undergraduate days. This project began in 1976 when I began research into sociological and anthropological writings on music. The research was conducted over a period of 3 years after which time I became gradually more active as a professional musician. I now play drums regularly with several groups in a variety of styles including traditional jazz, Rock, Blues and Folk/Rock. The development of this practical experience has been, in my view, as important to the research as the theoretical side of the research.

In this thesis I have attempted to bring the theoretical and practical aspects of my study together in one project. In the forthcoming chapter I

would like to present a range of academic literature and fieldwork experience which have been formative in creating my ultimate research design. The actual sequence of items in this chapter will commence with an autobiographical account followed by a general review of relevant literature featuring a detailed analysis of those works most relevant to the project.

AUTOBIOGRAPHICAL ACCOUNT

In my early school years I had favourable reports on my ability with rhythm. When I reached teenage life my father bought me a drum kit and in my third year as an undergraduate I went to a school of music on a part-time basis to learn elementary rudiments of percussion. On one occasion after my arrival at Keele University I stumbled upon a band rehearsing in one of the campus facilities. I became friendly with the drummer in the band who introduced me to a local jazz musician/dance band leader, 'P.E.'. This individual ran what is known as a 'scratch' band. Such a musical outfit is essentially a very unstable unit with a high turnover in personnel, which is rarely if ever rehearsed, and is essentially put together at the last minute in order to fulfill a booking obligation. The musicians employed for individual engagements varied in calibre and the length of time they worked with the band was very brief. The majority of musicians were borrowed from other bands for the odd booking. They usually left the scratch band when a clash arose between this line-up and their regular musical commitments.

P.E., the bandleader, talked with me at great length about the tragedy and ecstasy of musical life. His most successful period in the full-time professional world occurred during his residency with American Army base Soul bands which worked in Germany. As a brass player he was in his heyday

in the early 'sixties' when the Soul and 'Motown' sound was at its peak of popularity. For personal reasons he returned to Stoke-on-Trent where he played regularly at local venues.

On the occasion I first met him he spoke very fluently about aspects of playing drums which I understood from my training at music school. All the philosophy and attitude toward music and the technical side of it which he described seemed plausible to me. He had playing experience of many instruments including trumpet, keyboard, guitar, vocals and drums. He was first and foremost a frontman (lead vocalist and compere) and consequently a band leader. He could put together bands in a relatively short period of time. Some of them were genuinely competent and attracted a strong following quickly, but equally some of them were very substandard. Whatever the calibre of the band, however, they all worked regularly and for money. I remained impressed with him but wary of his opportunism. After this first meeting with him I did not see or hear of him for several months until one day he arrived on my doorstep at midnight. He walked in with certain determination and asked me if I had a drumkit. He already knew the answer because the other drummer who introduced me to P.E. had told him so. I of course said 'yes'. He then asked "Do you want a job?" I asked what it was about and he replied "Dressing up in monkey suits and playing Jim Reeves to the punters." I laughed and said I couldn't do it because I didn't know how to play. For the next two hours he quizzed me on every aspect of my life and managed to convince me that I could play. He used every technique of persuasion imaginable - he was desperate, and he had no drummer for the next 5 'gigs' (i.e. engagements). He assured me that he would show me the necessary techniques, that there would be several band rehearsals and that he would provide me with a "monkeysuit." I agreed and he noted in his diary when and where the first rehearsal would occur. The following week

I packed up my drumkit and awaited his arrival at 8 p.m. the time when he had agreed to collect me and the kit to transport our gear to the rehearsal. He arrived at midnight with a dinner jacket suit and patent leather shoes. He handed them to me and asked me to try them on - they fitted, to my surprise. He explained that the rehearsal had been cancelled but rescheduled for the following week two days before the engagement. I didn't question the cancellation and the following week he didn't turn up at all.

He arrived unexpectedly another day and explained that his vehicle had broken down and that he had rearranged the rehearsal to occur just prior to the performance time at the venue in which it was to be played. He said that he would pick me up at 6 p.m. on the day of the gig and take me to the venue, by which time we would have two hours to rehearse before starting to play at 9 p.m. I told him that it was impossible for me to learn to play the set in that short a period of time and that he had better find another player for the engagement. He insisted that I would have to play; repeated his time of arrival and left. The following evening he arrived at 8.30 half an hour before we were supposed to be on stage.

He itemized a dozen reasons for his late arrival, demanded that I help him load my kit into the van, grabbed my suit and we were off. We arrived at the venue at 8.45. He then instructed me to set up my kit as quickly as possible and then promised that he would have a word with the landlord about starting late so that we could have a rehearsal. I set up the kit - it was 9.00 o'clock, I changed into stage clothes, came out of the dressing room and P.E. Said, "Get behind that drumkit - we're on!"

I sat nervously behind the kit resigned to total embarrassment. P.E. turned around and said "the first number goes like this": and he sang the drumpart. First he sang the top half of the kit, the ride cymbal and snare drum pattern and then the bottom half of the kit, the bass drum and Hi Hats.

I tried out the rhythm, could barely play it and P.E. said: That's O.K. keep it going," and proceeded to count the rest of the band in.

I of course played through all the stops and breaks and syncopated arrangements until the end of this number. Then P.E. reeled around stage between the bass player and the guitarist. He started off singing then played the guitar and then played the trumpet. His finale was a vocal chorus and then a last verse which he sang facing the band who were struggling with chord sheets and other notation.

P.E. eventually signalled the last 8 bars of the number by twirling his hand behind his head.

To the audience the gesture was not visible, but to the rest of the band it was perhaps the only moment of clarity throughout what was otherwise chaos.

I struggled through the first set, without too much disaster P.E. would turn around and smile when it was all chugging along. I learned later that he was in a good mood that night.

To my surprise the rest of the band did not mind my relative incompetence but they pointed out that my struggle was their routine. Their main concern, it would appear, was that my time was good. Embellishments and the usual paraphernalia of playing beyond the basic beat didn't seem to matter.

The attitude toward the music was, as one might expect, negative, and cynical. Participation in the engagement was justified on purely financial grounds. However, despite this overriding negative attitude there was still quite a bit of assessment taking place. If a musician actually managed to play something tasteful in what was otherwise a substandard repertoire, other players would notice and comment upon it. Equally, if someone played exceptionally badly, that is, with total contempt for the music and performance, then considerable criticism was expressed.

P.E. controlled the band and the audience in the militaristic style characteristic of his musical training experience in Army bands. He expressed all the virtues of good musicianship and responsible band behaviour that he himself lacked and was totally intolerant of anyone's shortcomings except his own. For this the band despised him but for the overall result it had - e.g. regular paid work (in many cases an untaxed income) they were grateful and excused him his faults.

I played eight engagements with the band. The evening of my last performance with P.E. was a disaster. I was being driven home from the venue by the bandleader and we were involved in a serious automobile accident. This accident injured enough members of the band to stop us from working.

This very first professional experience helped me to identify several research objectives particularly in relation to conflicts between aesthetic and financial priorities in musical work. Furthermore the engagement helped me to break down performing inhibitions and the overall experience went some way towards preparing me for the next and far more demanding musical project with a melodic rock band which I will refer to as GR. GR were a local band with a substantial following in the immediate area of Stoke-on-Trent. The group were the complete opposite of my first professional musical experience. They were all local musicians who worked full time in the printing and graphics trade. They had no formal musical training whatsoever and they played what they knew entirely by ear. The majority of their influence came from the well known professional group Genesis which they studied in detail and copied unashamedly. Their aim was to achieve the theatrical and musical dynamics given by the earliest forms of this much admired rock group. Genesis was a group which was borne

out of a public school environment - GR copied the style and the image with a local stamp. Their preoccupations were clearly distinguishable in the roughness of the musical presentation and the lyrics. (see appendix) Whereas Genesis's lyrics were almost entirely concerned with the deeper psychological meanings of emotional feelings GR's lyrics were looking towards motorbike heroism and fighting against a 9-5 day week work routine.

The band never paid themselves any money. All performances and all monies received were used to buy expensive sound and lighting equipment - which added a dimension of mystery and extravaganza to the performance.

In this band the commitment to professionalism was upheld by the firm belief that at any moment a recording contract and a full time professional musical career was on the horizon. Consequently the band experienced considerable turnover in personnel while waiting for the big 'break' which would change their lives. This was mainly due to the fact that during the long wait the musicians working with the band weren't earning any money. My experience was not dissimilar in that I was tempted by other musical situations which resulted in money actually finding its way into my hands.

I left eventually to form another band which I will call SP. This band, in my view, had more realistic aims: a genuine desire to write and perform original material; an ability to perform material by other established artists; and a willingness to compromise objectives so that the band was not only being creative but making money.

As my playing ability improved I began to develop ambitions to play in more demanding but less popular idioms. In particular those musical forms which bordered on jazz. This phase lasted some time until I needed money again which led me to concentrate on club work. Club work was comparatively straightforward. No original material is required. I would simply rehearse chart material and play it as close to the original as possible.

This kind of engagement was only just bearable from a creative musician's point of view. There was no room for originality and absolutely no possibility of 'making it' into the world of recorded music. My personal rationalisation for the work, also shared by many others, was that the sheer discipline of learning the material and the financial compensation for that effort went some way towards developing musical ability as well as putting cash in your pocket.

At this particular point of my career I decided I needed a great deal more of both musical experience and money so rather than commit myself to one band I began to play in several on a sort of session basis. (temporary stand in until permanent member was available)

This was an unusual step in the view of my semi-professional colleagues, who thought that I was angling to leave the existing line-up and form some other band. This of course was not the case - I had no intention of leaving, I simply wanted to take on more work. Although there was the inevitable problem of clashing dates I found after a time that this rarely if ever happened - particularly if the venues in which I worked knew the various bands I played in and checked engagement diaries beforehand.

The average frequency of performance of semi-pro bands in this area was weekly. I found I could play with 2 or 3 bands with the occasional out of town 'dep' job (i.e. stand-in for an absentee musician). During festive seasons this meant a high concentration of engagements for short periods but since I held no full time job as such I was quite able to cope with it. On the occasions when I worked abroad, local bands usually found replacements.

At this stage I developed a deeper understanding of the range of musical activities there were to undertake. Further I was becoming more

acutely aware of the transformation in my own attitude towards musical work as I became more financially dependent on this activity as a source of income. This awareness helped my research considerably in terms of identifying borderlines between economic classifications such as 'amateur', 'semi-professional' and 'professional'.

During this period I was working most evenings during the week. I undertook as many engagements as possible. The most rewarding and challenging for me were the jazz gigs.

The jazz groups I worked with were often composed of professional musicians who were 20 to 30 years older than myself. Their attitude was totally different from musicians of my generation playing jazz/rock fusion; funk; punk; or melodic rock. To begin with they were primarily interested in recreating the original sounds of earlier jazz periods adhering to the original structure and adding their own improvisations to it. The majority of rehearsing for them had occurred years ago when they had learned all the standards. When I expressed an interest in learning to play jazz the majority of the local jazz musicians made it clear that they were unwilling to rehearse exclusively for my benefit. They suggested, alternatively, that I listen to recordings of jazz standards and learn the drumparts from this exercise.

My actual training in the jazz idiom then was not entirely dissimilar to my first experience with P.E. I was told only vaguely what the tune was about just before we played it, and for me, the majority of the arrangement was guesswork. When I got it right the band smiled and when I was in error the bandleader usually made unsympathetic critical remarks.

I played with a bandleader R.J. who used to play with the well known Bob Wallis band in their heyday during the traditional jazz boom of the late 1950s. After performances R.J. would encourage me to listen to

players who had originated the style of traditional jazz. He also emphasised that I must never copy another player but only try to understand the approach, and incorporate this into my playing. R.J. would always be critical of a player who, when soloing, played a tune which was a direct copy of another established player and another established tune. This I would imagine was all too easy to do as a brass player. As I became more familiar with the idiom and recognised other tunes I occasionally noticed when a player might unconsciously play a few bars from a quite familiar tune. It was after this experience that I began to understand what R.J. meant by not copying but incorporating an approach. He stressed that learning by 'feel' was the only true route to becoming a jazz musician. He would also make critical comments about rock music - that it would always be a passing fad: "jazz" he said "is a folk music which will last forever and you can play till the day you die." R.J. is 58, adopts a singing style reminiscent of Louis Armstrong and plays clarinet and saxophones.

My first professional engagement of any standing was with R.J. in Zurich, Switzerland. We played a one month residency in an international jazz club called the Casa-Bar. The engagement was for 30 consecutive nights beginning at 8 p.m. and ending at midnight. The rules and regulations on this engagement were far different from my semi-professional experiences. There were strict starting and finishing times; explicitly defined conditions regarding length of intervals and behaviour expectations of musicians during the interval; explicit instructions regarding dress and playing of instruments in the club prior to starting times.

This latter condition was a very noticeable difference in overall expectations of the behaviour of musicians. In my semi-professional experience players were forever tuning up and practising sections of the evenings performance in the venue despite the fact that members of the audience were present in the venue before the actual performance was due to commence. Furthermore, many of the semi-professional engagements

contained interval spots of an indefinite period which often created bad relations between audience and performers as well as managers and performers.

The bandleader R.J. acted with complete authority. He called out the numbers to be played and counted them in. There was never any on stage debate as to "what shall we play next?" - as was typical of semi-professional engagements. Further more the bandleader was paid additional money as compared with the rest of the band whereas in semi-professional outfits the money was always divided equally.

The other major difference between this professional experience with R.J. and my other semi-professional experiences was that the nature of the contract (which provided for large quantities of drink for musicians) was such that the salaries of band members were potentially influenced by the bar takings in that a bonus was awarded to the band for any bar takings over a certain figure. Consequently when members of the audience offered to buy the band drinks they were never refused for this very reason. This volume of alcohol purchased by audiences in addition to what was already being provided free by the venue meant that alcohol consumption had to be planned very carefully. It was very easy over a period of 30 consecutive engagements to reach acute intoxication any occasion of which the bandleader was within his rights to dismiss a musician. Hence, there was a borderline 'catch 22' situation where the combination of social obligation and partial payment for work done was creating pressure to consume alcohol at a rate which could easily lose an individual musician his job.

This last jazz experience I have described had considerable impact on me both in terms of my research and musically. The experience was my first full time professional musical engagement and its importance to this

research is such that it forms the basis of my first case study.

I have now given a short synopsis of my background and experience relevant to this project. These experiences have helped to form what I think might be classed a sociological perspective. At the very least the experience as a participating musician has enabled me to identify a broad range of target areas of musical life which may be of relevance to a sociological investigation.

In the light of working as a musician for some time and reading a range of relevant literature I would now like to review some of the literature which has been formative in the development of the project. Each of the items I will discuss has either influenced my thinking with regard to a choice of direction, or it highlights an area of concern which I have tried to take into account when creating my research design.

The literature that I have read and will now present was being studied concurrently while working as a musician. These inter-related activities helped me to clarify target areas for preliminary fieldwork investigation which occurred as preparatory work to the development of my research design.

I will now present a discussion of relevant literature.

REVIEW OF LITERATURE

As mentioned earlier in this chapter the purpose of this section is to review literature which either has direct relevance to the research design or stands as a reference point which signifies a point of departure. Therefore some of this discussion will contain only brief references to works whereas other parts of my discussion will present more detailed analyses.

The majority of sociological studies completed before Bennet (1980) rely primarily upon 'effects' or 'reflection' theory; an analysis of music's capacity to 'reflect' political and social undercurrents or an examination of music's potential effect upon a listener's subsequent social behaviour. A recent and important work in this area is Simon Frith's Sociology of Rock (1978) which I will discuss in some detail later. Prior to this, in a similar area of research, is a collection of writings by Denisoff and Peterson, The Sounds of Social Change: Studies in Popular Culture (1972). This anthology of writings features primarily content analysis of lyrics, and various discussions of 'pop' culture and the ways in which different age groups come to terms with it. One contrasting article which appears in the volume is of special relevance to my research. Howard Becker "The Professional Dance Musician and His Audience, (1951)". The work distinguishes itself from the remainder of the anthology in that its focus is on the musicians themselves; their attitudes towards work, aesthetic objectives, and their relationship with audiences. Through this network of concerns Becker explores some of the general pressures upon individual jazz musicians who must confront conflicting commercial and artistic goals. Other works such as W. B. Cameron's "Sociological Notes on the Jam Session," (1963) and Leroi Jone's Blues People (1963) investigate professional and aesthetic conflicts

of musicians' life-style and work.

The above mentioned works are fairly modern. However there are sociological works on music of an earlier vintage which I would like to mention briefly. There is Max Weber's long standing treatise The Rational and Social Foundations of Music (1958) which compares the development of Western and Eastern forms of music in terms of harmonic structure. However, the direction of Weber's discourse falls outside the scope of this project.

Additionally Theodor Adorno's Introduction to the Sociology of Music shares an essentially similar analytic position to that of reflection theorists. In his work he incorporates reflection theory as a means of identifying conflicts of social structure within musical forms and in this capacity he views this relationship (between social structure and musical forms) with the more general aim of identifying class antagonism. In 'Classes and Strata' he describes this domain:

"As a matter of principle, instead of searching for the musical expression of class standpoints one will do better so to conceive the relation of music to the classes that any music will present, the picture of antagonistic society as a whole - and will do it less in the language it speaks than in its inner structural composition. One criterion of the truth of music is whether greasepaint is found to cover up the antagonism that extends to its relations with the audience - thus involving it in the more hopeless aesthetic contradictions - or whether the antagonistic experience is faced in the music's own structure.....Intra-musical tensions are the unconscious phenomena of social tensions."
(T. W. Adorno, 1976, p.69)

Although this has not been an objective of my research, Adorno's work has focussed my attention, to some extent, on the economic and legal factors which create some degree of status conflict in songwriting. Additionally, role conflict is evident in the performance situation which is related to the structure of the musical form.

There is some work in another tradition of the sociology of music which deals with the sociology of listening. Alfred Schutz identifies common phenomenological points of reference between listener and composer.

Additionally Hatch and Watson explore the social organisation of a listening cult and discuss the ethnomethodological features of blues enthusiasts.

In yet another area, Peterson and Berger focus on the production side of the music business and argue that diversity in popular musical forms is inversely related to the degree of market concentration or that the 'oligopolistic' nature of the music business creates cycles of homogeneous musical formats followed by periodic bursts of creativity.

With regard to the works mentioned on the sociology of listening and the production side of the music business, neither is particularly related to my research except in very general ways. However, the two approaches have brought my attention to the matter of how musicians listen to music when playing as opposed to when learning. Further, vis-a-vis the production side of the music business, the development of stylistic trends has undoubtedly been a factor influencing the aesthetic priorities of musical groups discussed in this project.

Anthropological writings of ethnomusicologists have provided me with additional dimensions of research direction as well as having had some impact on other sociological research projects in recent years. Ethnomusicologists have suggested important links between the terms of a musical style and the terms of its society and culture. In John Blacking's How Musical is Man? he describes a fundamental approach:

"It is not enough to identify a characteristic musical style in its own terms and view it in relation to its society..... We must recognise that no musical style has 'its own terms'; its terms are the terms of its society and culture and of bodies of the human beings who listen to it, and create and perform it. We can no longer study music as a thing in itself when research in ethnomusicology makes it clear that musical things are not always strictly musical and that the expression of tonal relationships in patterns of sound may be secondary to extra-musical relationships which the tones represent. We may agree that music is sound that is organised into socially accepted patterns and that music making may be regarded as a form of learned behaviour and that musical styles are based on what man has chosen to select from nature as part of his cultural expression rather than on what nature has imposed on him. But the nature from which man has selected his musical styles is not only external to him; it includes his own nature - his psychophysical capacities and

the ways in which these have been structured by his experiences of interaction with people and things, which are part of the adaptive process of maturation in culture. (J. Blacking, 1973 p.25)

In broad theoretical terms this might be described as a 'blending' of the 'musicological' and the 'ethnological' in some kind of holistic perspective (Merriam 1964). In A. P. Merriam's, Anthropology of Music he describes some of the scope of Ethnomusicology:

".....the single most difficult problem in ethnomusicology (is) whether the aim of our studies is to record and analyse music, or whether it is to understand music in the context of human behaviour. If the former point of view is taken then the primary orientation of the fieldworker will be toward recording an adequate sample of music sound in order that this may be returned to the laboratory for analysis. The basic aim is to produce an accurate structural analysis of music taken, and the study is primarily based upon a fact gathering, descriptive approach. If, on the other hand, the aim is to understand music in the context of human behaviour, the fieldworker becomes almost automatically an anthropologist, for his first concern is not more upon the recorded sample than it is upon much broader questions of the use and function of music, the role and status of musicians, the concepts which lie behind music behaviour and other similar questions." (A. P. Merriam, 1964, p.42)

An approach in the field of Sociology which has been considerably influenced by ethnomusicology is Derrick Wright's work which initially conceptualises a broad theoretical scope and develops a useful range of terminology. To begin with, Wright distinguishes between two types of meaning; the purely musical and the 'extra musical.' Purely musical meaning refers specifically to the relationship between musical sounds inherent in the musical work. This dimension of musical meaning is perceived through a listening experience rather than by examination of musical scores. Extra-musical meaning, on the other hand, covers a broad range of the music's identity. This includes: technical descriptions of relationships between sound; identification of music in terms of non-musical objects or sensations such as natural surroundings, human emotion and in popular idioms, drugs, sex and political events. Wright

stresses that these meanings are not mutually exclusive but are interrelated and form the basis of a musical culture.

Another important book in the field which has registered the impact of ethnomusicology is Whose Music? A Sociology of Musical Languages (1977) by Jon Shepherd, Trevor Wishart and Graham Vulliamy. In their book of essays they express a view of sounds as symbols in culture. Initially they establish important relationships between the "underlying epistemology of the modern Western world" and a sociologically based aesthetics of music. Beyond this there is an attempt to blend musicological or technical study of music structure with the study of music as a functioning part of complex industrial society.

One of the very important discussions in Whose Music? appears in Trevor Wishart's article, "Musical Writing, Musical Speaking." The article in part discusses the effect of technology on the accessibility of music in the learning situation. He also discusses the way technology makes possible the creation and transmission of musical ideas which are apprehended outside the scope of conventional musical notation. Essentially Wishart identifies the conflict between learning processes based upon analytic notation and those which in his terms "are not mediated via notation but rather through aurally-based musical praxes e.g. direct sound recording."

"The 20th century discovery of the techniques of direct sound recording, has enabled musical praxes which are not mediated via notation (at least not in some overwhelming way) to be captured and distributed in their entirety and has hence shattered the hegemony of the notationalist view of music.

In the tradition of jazz and rock musics, the filtering mechanism of a notation procedure has been bypassed and elements such as subtle pitch inflexion (especially deriving from the blues), complex rhythmic nuance, timbre control and inflexion, and subtle control of dynamic balance, acoustics and acoustic balance (made possible in the modern electronic recording studio) have returned to the foreground of musical concern for people involved in these essentially aurally-based musical praxes." (Shepherd, Virden, Vulliamy and Wishart, 1977, p.137)

Hence the learning process in many jazz and rock formats is complicated by the lack of notation or an institutionalised procedure of training, but enhanced by the availability of sound reproduction. The learning process is more of an intuitive small group event rather than a highly disciplined exercise in sight. Musical development can occur at an individual level by ear and memory and at a group level by an intuitive understanding of one another's impulses. Over time patterns develop, expectations emerge; complexity and discipline appear as natural by-products of musical development. In this manner music can be learned by "feel" and compatibility amongst musicians in the group context is a very necessary priority.

This finding points toward research needed on those musicians who have experienced the more widely available formal training at an institutional level and have made a transition to more popular musical formats which have a different range of priorities not necessarily expressed in direct notational forms. Andrew Chester compares the difference in terms of the 'extensional' nature of European music to the 'intensional' form like non-European musics; the former featuring complexity through diachronic and synchronic development of theme through rhythmic syncopation and harmonic modulation (see Andrew Chester's: "Second Thoughts on a Rock Aesthetic: The Band." in NLR No. 62 pp. 78-79).

The development of musical ability and expression which relies considerably upon intuitive dimensions has become far more recognisable in recent years as the musical idioms in which such abilities occur have entered the mainstream market through technological developments in the recording industry. As many of the skills employed are developed in groups contexts and are expressed in situations with fairly specialised social expectations it has therefore become of interest to many branches of the social sciences. One book in particular, Ways of the Hand (1978) by David

Sudnow, gives a phenomenological account of the procedures by which an individual acquires improvisational skills on the keyboard through visual, tactile, and aural dimensions of learning. The book appears to be considerably influenced in its methodology by Harold Garfinkle and Maurice Merleau-Ponty.

Essentially, Ways of the Hand gives an intense recollection of three stages of musical development. Initially, in the first chapter entitled 'Beginnings', the author describes a fragmentary and mechanical acquaintance with the keyboard. That is, the player must find places and patterns for fingers in ways which develop an association between the visual/tactile sensation and the sound produced. Words and pictures illustrate the delicate progression of this relationship which inevitably, after time, instills a 'feel' for the instrument. The second chapter is appropriately titled: "Going for the Sounds." At this stage when one has overcome the technical limitations of visual and mechanical location of the hands an automatic ability to hear and locate sounds develops relieving the player of technical preoccupation. Finally, "Going for the Jazz" ostensibly consolidates the aims of this project and ultimately seeks to apply the learning experience in some meaningful musical context. However, although the author has described an imaginative look at critical borderlines between early learning experiences, self-discipline and the individual moments of spontaneous improvisation, there is an expressed unwillingness to deal with the subject in relation to musical groups. In fact he claims in the preface to his bibliography:

"I have sought to delineate the jazz musician's practical accomplishment inspected and described in Merleau-Ponty's terms with 'no body but himself to consult'" (David Sudnow, 1978, p.154)

This is my primary reason for describing this work in some detail here for although Sudnow describes a newly recognised musical ability he does not examine the skill in relation to the group situation for which it is intended. In my view, if one is to understand improvised music as made by jazz musicians it must eventually be viewed in relation to musical groups. Hence, although this is my point of departure, as one of my case studies is on a professional jazz group, Sudnow's work has broken ground, as it were, and my research has developed considerably from the work he has done.

In my previous discussion of Whose Music? I mentioned technology as an important development affecting the way in which musicians learn and communicate new ideas. The impact of technology has had great on the development of music. Its main effect has been to increase the accessibility of music in the form of recordings and sheet music to a wider group of consumers. Many of the aesthetic directions taken by artists have been a direct result of the availability of technology - its ability to reproduce in great quantity and its capacity to create new sounds. However, technology has had as many positive as negative consequences for the music industry. Music in the media has helped to create mass culture and in some instances change the meaning and function of art. In Simon Frith's Sociology of Rock there is interesting analysis of this point in relation to Theodor Adorno's work, Introduction to the Sociology of Music, and in relation to Walter Benjamin's work "The Work of Art in the Age of Mechanical Production." Frith states:

"Even in the 1930s Adorno's sour view of mass culture was complemented by Walter Benjamin's celebration of the positive possibilities of the "Work of Art in the Age of Mechanical Reproduction." Benjamin argued that the technology of mass production was a progressive force, the means of which the traditional 'aura' of art would be

broken by which artists would become democratic producers, their work shared with a community in which everyone would be an expert. The technology of the mass media had changed the relationship of the masses to art and opened up new possibilities for cultural work: creation had become a collective rather than an individual process..." (Simon Frith, 1978, p.196)

Another very important book offering considerable analysis of the consequences of technology in the music industry is David Harker's One For The Money: The Politics of Popular Song. In his chapter on "Electricity" he gives a very useful synopsis of changes in the commercial operation of the music business as a result of technological developments in sound production. He also shows how it has limited the scope of many musical projects: Initially he discusses the first changes brought about by amplified music:

"Singers soon came to realise that the mike, (microphone) and the amplifier enabled them to produce more noise than an unamplified band... ..Big bands came to be economic albatrosses, and were undercut by small groups and solo artists. In fact, we can date the rise of the solo performer in North America from the early 1940s." (David Harker, 1980, p.32)

Subsequently he discusses how advanced technology in studio production created musical projects which could not be performed to the same technical standard as achieved on records:

"One of the long term consequences of technologically sophisticated recording was the relative demise of the live performance group during the later 1960s and early 1970s. Those same technological developments which, helped in Britain by hire purchase, led to a significant democratization of music making, also led to the eventual removal of the commercially successful groups from live performance altogether. The Beatles' first LP cost £400 to produce. By the time of Revolver, however, their exploitation of the new electronics in the studio made reproducing the same sound on stage all but impossible. After Sergeant Pepper, which took four months and £25,000 to make, live performances were totally impossible outside the more sophisticated studios. So, if technology allowed the Beatles to free themselves from the mangling of the rickety PA systems in the world's stadiums, it also allowed them to be free of the vital feedback gained by playing for live audiences. In turn, while audiences were able to listen to significantly more complex music on record, they were simultaneously forced back into what was almost a totally privatized experience, symbolized by the alienation involved in using hi-fi stereo earphones." (David Harker, 1980, p.35)

This technological development which consequently placed periodic restrictions on live performances during certain musical eras had other consequences for new live bands. Harker describes this clearly later in the same chapter.

"In Britain, Jimmy Saville's Teen and Twenty Club in Manchester was one of the first to play records in between live bands; but the dominant trend since then has been to exclude live artists from discotheques, and to employ ever more sophisticated technology - light shows, stereo, and such like - in purpose built clubs. In turn this has meant the employment opportunities for new bands have withered. Either they take a risk, and invest in high cost equipment, so as to break into the posher clubs, or they continue to play at a loss in pub back rooms, or as support groups at concerts." (David Harker, 1980, p.36)

I mention this point of Harker's here because later in my case study I devote considerable attention to the experience of playing live in discotheques; the battle between DJs and the live band, and the role of the Performing Rights Society and Musicians' Union in securing the work for live groups at these venues.

Two studies particularly relevant to this project are the already mentioned The Sociology of Rock by Simon Frith and On Becoming a Rock Musician (1980) by H. S. Bennet. The Sociology of Rock is a fairly recent example of mainstream sociological analysis of music utilising 'effects' or 'reflection' theory; that is analysis of music's capacity to 'reflect' political and social undercurrents or alternatively an examination of music's so-called 'effect' upon a listener's subsequent social behaviour.

The opening chapters establish, albeit in more contemporary terms, a well established connection between youth culture, music, and manipulative entrepreneurs. However, the ways in which people use music, whether for fun or profit, provides only a partial key to its identity. I have tried to show in previous discussion that music stands in relation to a complex artistic and creative tradition central to its development. This aspect

of music's identity is I suspect difficult to define in relation to rock music, however, I think H. S. Bennet has developed this perspective considerably. For this reason I believe it stands as an excellent complement to Frith's work on rock.

The middle section of Frith's The Sociology of Rock, despite some duplication of Tony Palmer's All You Need Is Love (1977) and Tony Hatch's So You Want To Be In The Music Business, (1976) gives a nearly socio-legal analysis of the music business. In particular, one chapter features a discussion of the music press (an area in which Frith has considerable expertise) and another chapter gives a lucid description of radio programming.

The remaining chapters of the book turn to the subject of music, albeit with the following limitation:

"Most rock musicians lack formal musical training and so do almost all rock commentators. They lack the vocabulary and techniques of musical analysis and even the descriptive words commonly used - harmony, melody, riff, beat, etc. - are only vaguely understood and applied. As a sociologist I share this ignorance and this vagueness - this chapter will not contribute anything to the musicology of rock." (Simon Frith, 1978, p.176)

Both Frith and H. S. Bennet in On Becoming a Rock Musician agree on this latter point. However my fieldwork and my professional experience playing in groups contradicts this conclusion. In my findings at least one member of a rock musical group has had some kind of formal training which has given that individual a special capacity to organise the arrangements, communicate and interpret ideas, and generally transform untrained ability into a viable musical unit. However, further to this, although it may be that many rock musicians lack the conventional vocabulary of musical analysis they certainly have some techniques of analysis or they simply would not be able to organise a repertoire,

communicate new ideas, or duplicate old ones. The rock musician's technique results from a phenomenon which I have already mentioned and is described by Trevor Wishart in his essay, "Musical Writing, Musical Speaking," published in Whose Music? A Sociology of Musical Languages. I would like to repeat Wishart's comment here because it is of such special relevance to this point of musical technique:

"The twentieth-century discovery of the techniques of direct sound-recording has enabled musical praxes which are not mediated via notation (at least in the same overwhelming way) to be captured and distributed in their entirety and has hence shattered the hegemony of the notationalist view of music... In the traditions of jazz and rock musics, the filtering mechanisms of notation procedure have been by-passed and elements such as subtle pitch-inflexion (especially deriving from the blues), complex rhythmic nuance, timbre control and inflexion, and subtle control of dynamic balance (made possible in the modern electronic recording studio) have returned to the foreground of musical concern for those people involved in these essentially aurally-based musical praxes."

(Shepherd, Virden, Vulliamy and Wishart, 1977, p.137)

It would seem then that the issue of musical knowledge, language

and communication in rock is greatly influenced by technological devices which have helped to create a less tangible, but nevertheless, viable form of musical communication. However, this is not to say by any means that this is the primary form of communication or that it occurs only outside conventions of established terminology, but rather that there has been in recent years a mix or crossover of techniques of musical communication.

I think that this crossover of techniques of musical communication is an area which requires further research. Unfortunately it is outside the scope of this project but I do feel that the matter of language and communication of musical ideas in the musical project should not be overlooked or dismissed as irrelevant to contemporary popular musical idioms.

Finally, Frith's discussion of Black music is sympathetic. However, more might have been said about the pioneering efforts of black musicians in the area of electric music. Musicians such as Wild Bill Davis, Ray Charles,

Miles Davis, and Herbie Hancock made substantial contributions to the development of successful white rock music. (See Joachim Berendt, 1965 *The New Jazz Book*, p.44)

I have discussed Frith's book in some detail because I think it completes, to some extent an area of research (along with Harker's One for the Money) establishing a general relationship between the conduct of society and the musical forms which become popular at any given point in time. However, it is also now well established that rock music is an idiom of multiple origins and it is greatly influenced in its development, communication and expression by technology and its association with other musics. For this reason further research has been proceeding in terms of its ethnology and its musicology.

I would now like to discuss in more detail a work already referred to which has very significant relevance to mine in that it is an interpretive study employing the method of participant observation.

The book by H. S. Bennet, On Becoming a Rock Musician follows in the tradition of Howard Becker's study on Jazz "The Professional Dance Musician and His Audience". (as well as his other interpretive studies e.g. *On Becoming a Marijuana User*). Becker's work on Jazz however, has been superseded by a sprinkling of unpublished American Ph.D. theses on musical communities and related areas (see Etzkorn 1959; Schockett 1964; Delcour 1967; and Faulkner 1968;).

In my view Bennet's book is an original contribution to the Sociology of Music in that it looks at the lifestyle and operation of local musical groups. Fuller discussion of his work will help to clarify my own research objectives in that my work in some respects follows on from Bennet's.

What Bennet's book looks at successfully are the people who play

in local bands - the still unsuccessful or never-to-be-successful rock 'player' who has the gear, is known to the community as a public user of this equipment and has ambivalent ambitions about playing music professionally. It is a community of rock music 'users' on a par with Becker's drug 'users' as opposed to 'addicts' (see Becker's "On Becoming a Marijuana User). This is immediately apparent in Bennet's opening description of a 'rock musician':

"... Becoming a rock musician is not a process which is steeped in the history, theory and pedagogy of prestigious academics; nor is it a learning experience which is guided by an informal tradition of teachers and teachings. Becoming a rock musician is not even a process of apprenticeship." (H.S. Bennet, 1980, p.3)

The title, in my opinion, which uses the words ...rock musician, is somewhat inaccurate. 'Rock player' would be the more accurate description. I will give reasons for this criticism later. However, what Bennet has studied in some detail is nevertheless, of direct importance to my own work. For this is the community of media-struck enthusiasts who help to sustain some of the now dwindling aura and mystique (eroded by the emergence of the recorded music venue as opposed to live music venue; see Harker "Electricity" as discussed previously in One for the Money) upon which the industry of rock music thrives. What we see on the television screen and/or on stage with an audience of many thousands is totally inaccessible and there are consequently tangible reproductions - they are the look alike/be alike community of borderline amateur/semi-professional rock players but not, I suspect, rock musicians. Even in popular usage "rock musician" is a professional status accorded to those who have recorded singles, or albums that have been given media attention or those who have played in an established band that has received some degree of national press coverage. The product sold by "rock musicians" is available for the scrutiny of music journalists

and critics of the profession and it is generally assessed in terms of overall musical quality, originality and ability. Equally scrutinised is the production quality of the record and anything less than technological perfection is criticised very heavily.

"Rock musicians" are very few and those that there are earn a very high income and have an enormous, capital-intensive operation behind the production, distribution and sale of their sounds. This background industrial edifice to the music press alludes but which never quite filters through the media image of the individual performer, is enormously steeped in the pedagogy, theory and history of the musical establishment. Behind many seemingly simple rock songs that reach the charts either in this country or America, there is considerable professional attention devoted to the recordings by studio technicians and session musicians whose background of musical training is often quite substantial.

What Bennet is looking at are primarily amateur players many of whom have learned their craft by playing along to records of their choice in their front room. This is not to say that occasionally an exceptionally talented, totally untrained genius doesn't emerge. However, the majority of 'professional' musicians who are working as "rock musicians" on contract either in clubs, cabaret, or discos have had some kind of training or apprenticeship. The ones who actually go on tour, who 'make it' to the audiences of thousands backing the established artists are some of the best session musicians in the business. They have had without doubt substantial training. A group that manages successfully to create a marketable media image but who do not have the musical ability to play to a professional standard are

usually given training. Further, if this is not possible, then they are produced with the aid of session musicians and every technological trick is used to complete the lie in the live performance situation. There are many occurrences of television performances where miming is not only an advantage but a necessity. Bennet says: "Nobody flunks out of professional Rock music." (H.S. Bennet, 1980 p.3) On the contrary professionals "drug", "drink" and "write" themselves out of Rock music. By contrast what Bennet is writing about is not a professional community.

Bennet's opening chapter, "Group Definition and Redefinition" introduces us to the field. It essentially concludes that the 'players' interviewed have come from primarily middle-class family backgrounds which have provided sponsorship in the form of musical instruments; that throughout a period of trial and error and workouts in the parental home, "...an assemblance of non-musicians can convert itself into a rock group (no matter how poor the quality of their performance) without any recognisable human guidance." (H.S. Bennet, 1980, p.27) Consequently he concludes that in terms of ability "local rock band practice is a case of the blind leading the blind." (H.S. Bennet, 1980, p.70) Certainly the 'players' under investigation are ambiguously defined when the activity that this collection of individuals produces is referred to as some form of "career" leading to becoming a "Rock musician". That is to say, what is unclear is the varying degrees of professional achievement which rock musicians must undergo in order to attain the obvious socioeconomic classifications such as "amateur", "semi-professional", or "professional".

Although it is useful to look at the development of a rock musician from the standpoint of a social process occurring outside certain conventions of pedagogy and recruitment it is in my view all the more

essential to establish economic parameters if one insists on identifying a career 'mode' of activity. Furthermore, if the rock playing does become a serious professional activity, then I think there is certainly a more serious tie up with the conventions of pedagogy than Bennet has indicated. There may have been a few individual musicians who arrived on the professional rock music scene without musical training. But this occurred during a short boom period - and those that arrived untrained were to become trained quickly out of necessity simply because it is not possible to operate professionally in either the studio or live performance situation unless one has a basic knowledge of one's craft. Whether this is acquired through word of mouth or through an institutional framework it is still a basic knowledge of chord structures, rhythms, time signatures, etc. The kind of musician Bennet describes who learns exclusively through intuition and trial and error is a very costly type of musician. Unless that individual is exceptionally talented to the point where he can be trained very quickly, he is unlikely to achieve professional status.

Furthermore, as I have mentioned previously, my own fieldwork in a similar social setting to Bennet's contradicts his finding of the "blind leading the blind." In my experience the "getting the group together" is generally supervised by at least one individual with musical training of some description with at least a knowledge of chords and rhythmic structure. This can make a substantial difference enabling a talented group of listeners to produce a coherent musical unit.

The remainder of Bennet's first chapter describes the process of status degradation as a consequence of individual musician developing abilities at different rates. "Rock Ecology" the next chapter describes routine information about equipment and performing and is highlighted with

revealing dialogue. Basically it describes musicians who would prefer not to shift and relocate their own equipment because of the physical strain and the damage to their image of being a 'rock' star. Secondly it describes in some detail the different kinds of work offered including those 'gigs' where you are paid a fee and must play what is requested by the listening audience as opposed to those venues where groups play their own material for admission fees. He goes on to point out that a regularly working band is more likely to stay together and that a newly formed outfit will quickly overexpose themselves locally and will need to seek work outside their locality in order to sustain levels of work for the group.

In the chapter "Technology and the Music" Bennet looks at the purely professional end of the rock music business. For what occurs in the studio is the transformation of the raw sound through complex electronic equipment. The cost of this production is very high and requires great expertise and is consequently beyond the scope of amateurs and most semi-professionals. Furthermore, the behaviour, attitudes and level of expertise required for the recording project are vastly different from the sample with which Bennet has been working.

The next chapter "Realities of Practice" illustrates the preoccupation with the reliability of group members in view of the fact that most initial rehearsing is only potentially a money making activity. Bennet emphasises that groups copy popular recorded material and often disagree over the accuracy of individual renditions of instrumental parts. More could be said about the process of writing original material (I will devote a chapter to songwriting later in the text). In his chapter on "Playing" he summarises the difficulties of

acoustics; the interaction between support personnel (roadies, sound mixers, lighting technicians) and the musicians vis-a-vis the control over sound; and the difficulty encountered in achieving the sound quality of recorded music in the live performance situation. Finally in "Other people's Music" Bennet covers the technical side of instrumentation as well as conflicts which occur over musical identity when musicians are forced to play music other than their own. Furthermore he goes on to present a typology of musician's identities based on their abilities with notational skills.

In my opinion Bennet's book is an important contribution in the field of sociology of music as it is really the first contemporary complement to Becker's work on Jazz. My reasons for describing the book in detail are for purposes of clarification of my own project. Essentially Bennet deals with many of the same problems and questions that I have encountered in my own research. However, apart from my work being located in the Midlands region of another country, my research field is very much in the category of the "semi-professional" group of musicians. The group I have studied have regular contact with professional musicians and the expectations, habits, and behaviour are influenced considerably by their relationship with that group. Further there are instances of transition from semi-professional to professional work which is a matter of my own personal experience as a working musician as well as that of many other musicians under study.

I have now completed my review of the literature which I feel has been most relevant to my project. The detailed discussions of particular works have occurred where they produced substantial impact on my thinking. The literature has helped to create the scope for my eventual research. In particular it confirms my own findings from professional musical life that factors of cultural milieu, technology, musical ability, relationships between the musicians in the group context, the role of management and venues, and the individual and group objectives of musicians involved in any given musical project, have all, taken together, a significant affect on the operation and functioning of a musical group.

My objective, subsequent to the groundwork presented thus far, was to create a research design which embraced many of the factors mentioned and I will present a framework of analysis derived from Howard Becker's "Art as Collective Action"(1974 pp767-776) However, prior to the application of this framework presented in Becker's article I feel it is necessary to present the results of my own preliminary fieldwork investigation as these findings were influential in shaping the overall research design based upon Becker's work.

Preliminary Fieldwork Findings

Before I commence with a detailed discussion of my preliminary fieldwork I would like to preface that discussion with a brief comment on musical forms.

Musical Forms

It seems useful to distinguish between three critical areas of musical form, which in some respects share a common language, but which have entirely different historical, sociological, and commercial points of reference. Western Orthodox music which includes: classical, 'serious', orchestral, and symphonic music. Jazz which includes: blues, ragtime, New Orleans, Dixieland, swing, bebop, cool and modern jazz. Pop which includes: rock n' roll, soul, progressive rock, funk, jazz/rock, disco-funk, new wave punk rock, reggae, heavy metal, and futurist music.

The difficulty with these categories however, is that they are partially a product of commercial invention designed to facilitate the organisation and sale of records rather than the identification of musical idioms. Consequently, when I began to identify different musics in my preliminary fieldwork investigations, I looked to identify groups not only in terms of the above-mentioned commercial categories provided by the recording industry but also in terms of the venues in which various groups played. At this stage I began observing 16 bands playing in four different types of local venues: Working Men's Clubs; Public Houses; Colleges and Universities; and Ballrooms. I had a casual professional involvement with some of these groups. Nearly all the groups were semi-professional.

Fieldwork Findings

After a period of observing bands form and split up it appeared that a consistent range of conflicts in the domestic, working and musical life

of individual musicians had a significant influence not only the practical operation of a given musical group but also upon the stylistic and aesthetic goals the music group aimed to achieve. These conflicts which were of a highly personal nature, unrelated directly to either musical skill or the production of musical sound, but nevertheless affecting the working of the group as a whole - these I have come to refer to as non-musical factors. Very general categories (which I will elaborate upon later) include the relationship with spouse or partner; the income derived from musical and non-musical work; personality conflicts between members of a given musical group; and legal factors regarding ownership of original material, recording and/or management contracts.

Alternatively, other factors have a more direct relationship to the production of musical sound - these I refer to as music-related factors. They include composition, musical training, technique and performance. I will now discuss these factors in some detail.

Non-Musical Factors

As mentioned earlier, these include:

- a. relationship with spouse or partner
- b. income derived from musical and non-musical work
- c. personality conflicts between group members
- d. legal factors regarding ownership of original material, recording and/or management contracts

a. Relationship with spouse or partner

To begin with factor (a) in some situations the spouse or partner's attitude to musical involvement can be quite crucial. For example in some situations the spouse will seek to limit the musical partner's activities in a semi-professional outfit. I experienced this difficulty in my own musical group and I will describe the matter in some detail. Initially, our bass player/vocalist joined the outfit for primarily

musical reasons. He had been doing the pub and club circuit for quite some time and although it was financially rewarding, he found it musically unstimulating. He was an unusually talented player, and additionally had a powerful singing voice. When Bob joined the band his wife Sue, raised no objection. Quite soon the band became popular in a variety of jazz/rock venues. On several occasions Sue attended engagements and although the night might have gone well for the band she did not feel at ease in the social milieu. She complained that the venues in which we played were uncongenial from the standpoint of clientele and decor. As the band grew more popular more discontent was expressed. Eventually she claimed that despite the band's popularity Bob himself was not earning enough at any given engagement. Comparatively speaking Bob's earnings were considerably higher when playing with his duo on the pub and club circuit. Nevertheless the band's local reputation had improved enormously and fees were going up all the time. Bob's wife however, for whatever reasons, insisted that for the amount of time he was away from her, financial compensation was inadequate. This persistent line on band earnings eventually led everyone to a more commercial attitude toward the selection of material to perform. What was essentially a jazz/rock band intending to display some degree of technical virtuosity and a preference for high powered instrumental arrangements was swiftly tailoring its repertoire to include "top 40" chart material for a more broadly based appeal. As the band became more successful and the earnings grew, Bob's wife began to complain about the time factor. The conflict became clear cut - Bob's wife was fighting the band for Bob. She won. When Bob left it took the band nearly six months to replace him, and during that period we had to redefine musical and practical priorities within the limits of the existing line up. Hence the spouse of an individual musician can dramatically affect the development of a musical unit

on both stylistic and practical levels.

b. The income derived from musical and non-musical work

As regards factor (b) the area of domestic and financial arrangements may influence an entire band's output. The domestic lives of many semi-professional musicians follow unconventional patterns and although suited to certain individuals for a time they can become a source of conflict. Our keyboard player John in the same group was an ex-professional musician who returned from Germany to his home town to marry the woman who had had his child and to study for the L R.A.M. degree. He refused to undertake any form of employment other than practising the piano and making internal improvements on his recently purchased property. His wife was marginally sympathetic and more or less tolerated his inability or unwillingness to make a consistent financial contribution to the family income. She worked during the day while he looked after the child and when she returned home she looked after the child while he attended rehearsals, or performed locally. Although this arrangement seemed to work for a time, she began to resent what she felt was her limited involvement with the child's development, owing to her having to work during the day. She felt at least that the domestic and work situation should be shared - taking turns on an annual basis with a day job. At least this would give the opportunity for an improved social life - and a chance with the slightly more flexible routine (the child was now of school age) of the domestic environment, to develop her own artistic interests. John (keyboard player) objected and his wife eventually left him, sued for divorce and possession of the child. John filed a suit for maintenance and possession of the child. They settled out of court. John relinquished possession of the child and his wife conceded the matrimonial home. The mortgage which was heretofore paid by

John's wife was now entirely John's responsibility and he was forced on to the labour market. John was unable to find any form of employment other than labouring jobs. This put great stress on his hands which were often cut and bruised from the work. Throughout this period he frequently missed rehearsals, and often considered having to sell his instrument. These consequences affected the band considerably. Rehearsals were cut back to a minimum, new material was under-rehearsed and John found the tempo of already existing numbers too swift for his underpractised hands. In the opinion of regular fans, the band had lost its vitality. John's lead work suffered and his playing fell into a kind of routine backing that was less than inspiring. Critics continued to suggest musical solutions to what were otherwise practical problems. At this point it was necessary to consider other players. John was now without transport and soon to be without his musical equipment. We auditioned a local keyboard player who had all the qualities that our current keyboard player lacked except the quality of his musicianship. He had transport, and abundance of equipment, a stable domestic life, successful integration between work and musical activity. It was necessary for the band to choose between practical and aesthetic qualities. They chose the latter, at least for the time being.

c. Personality conflicts between band members

Personality conflicts between band members often manifest themselves in the form of some kind of stage rivalry. Competitive anxiety can sometimes produce overplaying, laborious soloing, or lack of co-operation in following agreed arrangements. This difficulty seemed to be more apparent in groups of mixed sexes, and conflicts were substantially exacerbated when established couples in the groups changed partners. One particular instance of rivalry I remember quite clearly. It is a matter of speculation as to whether the behaviour was unconscious or outwardly

vindictive but after a short period of time the conflict created so much instability in the band that the group disbanded. In this instance we had a line up of 5 instruments: guitar, keyboard, saxophone, bass and drums. There were two members of the band who sang. The repertoire was primarily instrumental but the band decided to do several vocals as a way of providing contrast in a set. The bass player had the stronger voice but the keyboard player who had less vocal talent had great enthusiasm for singing. The evening would degenerate into an unspoken competition between the two singers. At one time during band meetings the two players would simply undermine each other's performance through passing and almost playful commentary. But then, for some reason, the competitive edge manifested itself musically. When the keyboard player was singing, the bass player would change the bass line in the middle of the chorus or 'hook' of the song. Equally the keyboard player would retaliate by playing the wrong chords when the bass player was singing. Now in actual fact this manifestation probably occurred through accident. That is, perhaps on one occasion either player may have accidentally played the wrong part and the other player thought it was intentional. Because of this, as time went on the playing through the vocal numbers became gradually more chaotic. Eventually, bickering and musical mistakes occurred on stage simultaneously and at that point the group decided to disband.

d. Legal Factors

Finally there is a range of legal factors which can effect the attitudes of semi-professional musicians towards ownership of original material, management contracts and consequently their musical work habits. It appears that these attitudes are very much shaped by the legal encounters of their

professional musician friends who have recounted mishap and misfortune. For example, I have interviewed two professional musicians known locally who have regular contacts with the semi-professional music scene in Staffordshire. They are WK, formerly with a group known as Paladin, and HD who is currently with the Climax Blues Band. WK was contractually bound, over a number of years, under an exclusive agreement with the Braun Agency in London. The agency were at that time, managing the Groups Uriah Heep and Paladin. Uriah Heep became successful and the agency channelled the majority of their promotion funds into this group rather than into Paladin. Promises of tours and equipment never materialised for the latter and the group disbanded for lack of work. Each individual musician, however, was withheld from undertaking any other professional musical venture and WK had to abandon professional music for many years. After this time he became involved in semi-professional music and the story of his legal mishap became well known to the younger aspiring musicians. It is difficult to say precisely how his personal experience influenced other musicians with whom he associated but it is safe to say that his legal problem had created an awareness of such matters amongst local musicians. In some respects it made certain musicians more individualistic and conscious of ownership.

I know of one group, the members of which were all close associates of WK. Although they were semi-professional, and had no management contract or even recording company interest they were nevertheless perpetually arguing about royalties and who should be credited with which parts of which number in the forthcoming, yet never to arrive, recording contract. After some degree of argument it was suggested the band should follow the contractual pattern of the well known Climax Blues Band whereby band

members all held equal shares of royalties. A player, HD claimed that this was Climax's policy and that it made for better inter-personal relations in the group as well as encouraging greater involvement by all in the songwriting project. However, since the initial writing of this chapter, it is interesting to note, the alternative management which the band is now under has encouraged the band to negotiate separate contracts rather than a group contract, awarding only those individual musicians royalties who had made an original contribution. Evidently this led to considerable rivalry on the songwriting side of the bands' work - with each musician vying for his compositions to be performed on forthcoming recordings so that he would have a greater share in the royalties from the album. The outcome of this battle was that the management, then Warner Bros., took executive decisions on all compositions written by musicians in the band. This resulted in the band splitting up and reforming. Likewise in the semi-professional outfit discussed earlier, individual players insisted on personal copyright which caused many disagreements over ownership of original material. Eventually, one member of the group was asked to join a professional outfit and the remaining members reformed the group and established a policy of equal shares in any potential royalty agreements.

Apart from this kind of influence from external professional associations the semi-professional outfit is often held by some manner of a formal agency contract which will stipulate various constraints and conditions for any venue in which they may play. The conditions will often require standards of dress; repertoire; times of arrival and departure; duration and number of individual sets. A group which is bound by such contractual terms will obviously have different working

habits from those groups which are not. It would seem a useful task therefore to document the impact of such constraints. Additionally, it is worth noting that the Musicians Union plays relatively little direct role among the semi-professional groups. Very few, if any were members and those that were, continually expressed fear of expulsion through non-payment of dues. Furthermore, the majority of venues undercut M.U. rates and many musicians felt they would be out of work if they demanded M.U. conditions. Nevertheless the M.U. is responsible for creating work for semi-professional groups by requiring minimum employment of live musicians at venues holding a music licence.

Music-Related Factors

I have now completed my discussion of non-musical factors which in my view have substantial influence on the operation and functioning of musical groups. I would now like to focus attention upon another range of factors which are more directly related to the problem of producing musical sound - I have referred to these as music-related factors. These include:

1. Composition 2. Musical training and Techniques 3. Live Performance.

1. Composition

This is perhaps the most significant music-related factor in relation to the study of musical groups insofar as it brings into view creative work habits of individual musicians as well as the stylistic priorities of a musical group. My interviews with the aforementioned groups generated the following outline of questions which I believe to be of relevance to any subsequent study of musical groups.

I. Methods of Composition

- a. Does the group begin with chords, lyrics, melody lines, or bass lines?

- b. Does the group work as a whole, individually or in pairs?
- c. What role do technological devices play in transmitting ideas, influencing the creative process?
- d. To what degree is the music structured?
 - 1. Are musical patterns rigidly adhered to?
 - 2. What scope is there for improvisation?
 - 3. What is the relationship between vocal and instrumental sound?
- e. Is the band a backing band for a vocalist?
- f. Does the vocalist(s) play an instrument in the live performance?

In addition to the questions in the above outlines it would seem obvious that the whole business of composition is greatly influenced by a musician's training and musical skill. Hence I will now consider musical training and technique.

2. Musical Training and Technique

Musical training varies considerably and very little of it occurs formally in the experience of the majority of musicians who played in the bands I interviewed. There is, however, in the dialogue of most musicians' 'talk about music' some apparent conflict between learning processes based upon analytic notation and those which in Wishart's terms "are not mediated via notation but rather through aurally-based musical praxes e.g. direct sound recordings". (see earlier discussion of his work) Trevor Wishart, 1976. The process of learning technique by ear or 'feel' seems to mean a trial and error process by which one arrives at a suitable pattern of sound. This is subsequently committed to memory and applied in the relevant musical arrangement. To be sure, musical groups which rely on 'feeling' music as a way of learning and organising sound, will feature different musical priorities in their habits of composition than those who have at least a working familiarity

with methods of analytic notation. In a majority of instances, musicians who have learned primarily by 'feel' will have developed specific techniques of instrumentation which are particularly suited to some styles. Thus group members will invariably express a preference for material which in terms of one instrumentalist, "falls under the fingers easily."

3. Live Performance

Finally of some significance in the operation of the musical groups in question is the matter of stage performance. It has been argued by many musicians and sociologists that due to increasing standards of perfection in the recording studio the live performance is becoming gradually more technology-intensive so as to make the professional operation of the live performance extremely capital intensive. In order to compensate for lack of acoustic quality greater emphasis has been placed upon the quality of stage presence or the stage act. Certainly this was confirmed by the experience of GR (one of the bands under study) which entered the Melody Maker Rock Competition sponsored by major recording companies in the U.K. Initially unknown bands were screened for musical competence alone. Subsequent competitions however, were explicitly judged for quality of stage presence. In the second round of the competition at a well known venue in Birmingham (Barbarellas) several bands which displayed remarkable creative and technical talent with original material were bypassed for bands which were the least imaginative musically but had a memorable stage presence. Hence, given this pressure to create an identity on stage several topics came to the forefront of discussion during conversations with musicians:-

1. What is the character of the bands' stage presence?
2. Do group members try consciously to project a stage image?

3. How do individual band members view their role or responsibility on stage?

These topics are primarily of interest to the serious semi-professional outfit which seeks a professional career. However they are of importance to sociological investigation in that they reveal an important dimension of group concern vis a vis the organisation of the sound. For example a guitarist must learn to play and move at the same time. Depending on how much priority is placed upon actual movement on stage this may well influence a band's selection of material, perhaps, choosing a less complex repertoire which will allow greater concentration on movement.

I would now like to conclude my discussion of the target areas which I feel may be the concern of my sociological investigation. After some period of years of this kind of investigation I began working as a drummer in resident bands at the Bridge Street Arts Centre in Newcastle-under-Lyme and the Rose and Crown in Etruria. Both venues attracted my interest because of their aims in promoting 'live' music in the Staffordshire area. Additionally both establishments featured different musical events nightly and gave me access to a wide range of musicians of varying background, age and experience. During this period I became involved with a number of working bands and decided to study two groups with whom I had direct involvement as a musician.

As part of my preliminary fieldwork I compiled a 'free diagram' study of local groups within a given sector of the 'rock' and jazz/rock music circuit in the North Staffordshire area. The aim of the documentation was to identify the scope of the field of study as well as the general format, complexity, and the technique of local musical projects. The diagrams which appear in the appendix of this thesis reflect the individual movements of 47 musicians throughout 30 groups within the local circuit

over a 10 year period between 1971 and 1981. The chart deals primarily with semi-professional groups, but special notation appears where an individual musician or an entire band leaves to take up professional work. The chart is additionally useful from the standpoint of collecting biographical material and generally charting an individual musician's stylistic preference and musical growth. It has been particularly useful in identifying the source of context of any non-notational stock of phrases used for labelling musical forms or mechanical procedures of musical communication. The chart also provided, albeit minimally, statistical dimensions of instrumentalists' movement throughout the music scene. One of my case studies is selected from this survey.

I will now discuss my research design.

Research Design

I have now completed my discussion of preliminary research activities. They have provided a useful basis for clarifying my ultimate research objective which is now to be based upon Howard Becker's writing: "Art as a Collective Action (ASR 1974)." In the forthcoming project description I shall deal with Becker's major points in detail and attempt as much as possible to relate previous fieldwork to the guidelines he suggests. To begin with, Becker's article features the concept of 'convention' which is viewed as interchangeable with sociological concepts such as norm, rule, shared understanding, custom, or more generally referring to the ideas and understandings which generate co-operative activity. This concept forms the core of his generalised plan for the study of social organisation - one which I shall use for the purpose of this research project.

"...We can study social organisations of all kinds by looking for the networks responsible for producing specific events, the overlaps among such cooperative networks, the way participants use conventions to co-ordinate their activities, how existing conventions simultaneously make co-ordinated action possible and limit its forms it can take, and how the development of new forms of acquiring resources makes change possible."

(Becker, 1974, p.775)

I will now elaborate on this. The term convention, as one might expect, has very broad meaning, and Becker uses it to identify systems of interrelations and interdependence which ultimately control the artist.

"Conventions place strong constraints on the artist. They are particularly constraining because they do not exist in isolation but come in complexly interdependent systems, so that making one small change often requires making changes in a variety of other activities. A system of conventions gets embodied in equipment, materials, training available, facilities and sites, systems of notation and the like, all of which must be changed if any one segment is."

(Becker, 1974, p.722)

Further, Becker goes on to clarify this concept of convention vis-a-vis the artist's relations of production with regard to two areas: available resources, and co-operation with other participants.

"By accommodating their conceptions to available resources conventional artists accept the constraints arising from their dependence on the co-operation of members of the existing art world. Wherever the artist depends on others for some necessary component he must either accept the constraints they impose or expend the time and energy necessary to provide it some other way." (Becker, 1974, p.770)

Hence, relations of co-operation are circumscribed by conventions which limit and structure the scope of the artistic end product. However, relations of co-operation do not exclusively involve other artists - but another kind of participant as well.

"Participants in the art world regard some of the activities necessary to the production of art as "artistic", requiring the special gift or sensibility of an artist. The remaining activities seem to them a matter of craft, business acumen, or some other ability less rare, less characteristic of art, less necessary to the success of the work, and less worthy of respect. They define the people who perform these special activities as artists and everyone else as (to borrow a military term) support personnel." (Becker, 1974, p.768)

This now more or less explains the two-tiered network of productive relations which together form the collective activity of the art work. A final feature of collective action which Becker claims is crucial to its identity as a social system or social structure is its frequency.

"We might want to use such terms as social organisation or social structure as a metaphorical way of referring to those recurring networks and their activities. In doing so, however, we should not forget their metaphorical character and inadvertently assert as a fact implied in the metaphor what can only be discovered through research. When sociologists speak of social structure or social systems the metaphor implies (though its user neither proves nor argues the point) that the collective action involved occurs "regularly" or "often" (quantifier, being implicit, is non-specific) and, further, that the people involved act together to produce a large variety of events." (Becker, 1974, p.775)

At this stage I wish to state my research plan in relation to these guidelines. The aim of the project then, will be to identify in the form of case studies, the 'conventions' and 'constraints' operating in the functioning of two regularly performing musical groups. The 'conventions' will be identified as Becker suggests in relation to the activities required for the successful completion of the end-product, namely songwriting and/or live performance.

These activities include:

- a. acquisition of and maintenance of instruments, amplification and auxillary technical devices
- b. methods of notation and composition
- c. learning to play the required music on the given instrument
- d. times and places for rehearsal
- e. advertisement for performance
- f. publicity and sale of tickets
- g. recruiting an appreciative audience
- h. Interaction of the musicians in the live performance
- i. the songwriting process
- j. the legal structure of the music business and its effect on the songwriting project
- k. cues in arrangements and improvised passages
- l. dress, stage appearance

Further, the execution of these activities involves support personnel and availability of resources. In particular, attention will be paid to the role of:

1. Managers of Venues
2. Agents, Publishers, Management
3. Recording Engineers
4. Sound Mixers
5. Lighting Engineers
6. Road Crew

From my period of research I have selected two groups to study, both of which I have played in - "SP" a rock group and "RJ and His Jazzmen," a traditional/mainstream jazz group. I have chosen these two groups because of ease of access, personal familiarity, and most importantly, the fact that I am established in both bands and have been for some time. The other, and no less important factor is the contrast in styles and the fact that SP are a semi-professional rock band, whereas RJ and His Jazzmen are a professional outfit. The distinction here is purely economic in that all players in SP are occupied with full time employment in addition to their music, whereas the musicians in RJ and His Jazzmen are occupied with this activity on a full-time basis. I have been working with both groups playing full time with RJ and His Jazzmen when club dates arise in Switzerland and with SP whenever I am available in this country.

The primary method of research for this project has been participant observation. The role of the participant observer is a complex one involving tensions and conflict between personal involvement through participation, and maintaining some degree of objectivity in observation. However, I think the conflict is manageable with some degree of self-awareness as well as an understanding that there will be areas of the field to which I will not have access. During the course of research I have tried to take note of the following guidelines:

1. an account of my own personal degree of involvement and what appears, in my view, to be a 'stake' in the outcome of any group activity.
2. an account of those aspects of group activity to which I cannot relate or do not understand.
3. careful descriptions of rehearsals, habits of composition, preparations for performance.
4. details of all business dealings with venues, contracts, equipment hire, involvement of support personnel.

5. descriptions of live performances in terms of
 - a. practical elements i.e. transporting and setting up of equipment
 - b. interaction between band personnel
 - c. the execution of the live performance

In my conclusion of this thesis I will give a more theoretical account of how I have used this methodology and why I have felt it necessary to use it in this way.

I will now begin my discussion of my first case study - a professional jazz group.

SECTION II

- CHAPTER I - A PROFESSIONAL JAZZ GROUP - CASE STUDY I
- CHAPTER II - LEGAL FACTORS REGARDING OWNERSHIP OF ORIGINAL MATERIAL,
RECORDING AND MANAGEMENT CONTRACTS
- CHAPTER III - SONGWRITING
- CHAPTER IV - SP - A SEMI-PROFESSIONAL ROCK BAND - CASE STUDY II

CHAPTER I - A PROFESSIONAL JAZZ GROUP - CASE STUDY I

Introduction

Autobiographical Account

Research Design

Conclusion

Introduction

So far musical projects have been investigated, albeit minimally, in terms of their economic parameters, social conventions, practical objectives, and to some degree aesthetic criteria. They have been seen to be an essentially group activity which provides scope within its structure for individual expression and achievement. The purpose of this investigation is to identify conventions and constraints which operate in the functioning of musical groups. I will present my research findings through two case studies.

The first case study is an investigation of a professional traditional jazz group which I will refer to as RJ and His Jazzmen. I have selected this group for a case study because of my involvement with it as a professional drummer. At the time of accepting the engagement - a one month residency in the Casa-Bar, Zurich, Switzerland in December, 1981 - I was uncertain of its value in terms of research goals, but I was sure of its value as a professional musical experience. Nevertheless, I intended to make notes of an autobiographical nature which I felt would be useful retrospectively to my research. On the second occasion of accepting a one month residency in Zurich (May, 1982), I was certain that both musical and research objectives would be furthered and on this occasion I made more extensive notes, in the light of my previous experience, as to the nature and scope of the field.

There have been several distinct advantages in studying this particular jazz group. Firstly, it was an essentially acoustic ensemble having no technically complex electronic equipment designed to augment sound. Secondly, because the residency was a professional engagement over a period of two months, I was able to have close contact with the entire group and there were no extraneous factors such as day jobs or

domestic obligations which might have interfered with identifying an established routine. Furthermore; the repertoire which the group played was composed of well known jazz classics that were performed as close to the 'original' recording as possible. In the terms used by Bennet, the musical outfit might be referred to as a 'copy group.'(Bennet, 1980 p. 153)

For this reason two variables (i) and (j) are not topics of investigation as indicated in my list of variables in the previously discussed research design. There was no 'songwriting', as such, because the entire repertoire was composed of already recorded material. Further, there were only minimal legal issues regarding the musical performance as there was no contest over the ownership of intellectual property e.g. the rights to the song. These matters require detailed analysis which I have undertaken in my second case study. Further there is considerable groundwork in preparation for that task which has been presented in chapters two and three.

Consequently, the operation of the research design without variables (i) and (j), has considerably simplified the task of my first case study. However, this has been a useful exercise in that it has given me an opportunity to operate the research design with fewer complications on the first occasion of its use.

In the following pages I will present an autobiographical account of my interest and development in jazz, followed by an analysis of the residential engagement at the jazz club in Switzerland. The findings will be presented in terms of the research design outlined in chapter one with the exception of categories (i) and (j). They are:

- a) acquisition and maintenance of instruments, amplification, and auxillary technical devices
- b) methods of notation and composition

- c) learning to play the required music on the given instrument
- d) times and places for rehearsal
- e) advertisement for performances
- f) publicity and sale of tickets
- g) recruiting an appreciative audience capable of listening to and responding to the group
- h) interaction of the musicians in the live performance
- i) not applicable
- &j) not applicable
- k) dress, stage appearance

In terms of these categories of analysis I will seek to identify the 'conventions' and 'constraints' which operate in the functioning of this particular jazz group.

Autobiographical account

An interest in Jazz

In recent years there has been a distinct tendency to mix elements of jazz and rock to create new musical forms. The "crossover" influence has had some impact on the development of many musicians of my generation and in particular a great many musicians in my current field of study. Before playing jazz my level of musical development had been limited to select areas of rock music. In my discussions with most rock players, jazz was something to be avoided for two reasons: 1) It was difficult to play e.g. fast tempo and many key changes, and 2) It was difficult to make money playing professionally in this idiom. However, the vanguard of the jazz/rock scene, the jazz musicians who brought electronic sounds into jazz and blended it with rock were all very experienced in the realms of jazz. It seemed obvious to me then that in order to play crossover music successfully, it was necessary to have a foundation in jazz as well as rock. From my own personal point of view I was influenced by the album notes of recordings made by a top jazz/rock session drummer - Bernard Perdie. He claimed that the route to

developing one's feel and technique was greatly facilitated by learning to play the broadest range of styles possible. This was to my mind an attitude different from many more prejudiced notions expressed by my colleagues. Another guideline for musical development which influenced me considerably was that expressed by R.J. the bandleader of the group forming the subject of this case study. In one of his pedagogical moods he said to me: "Don't copy the technique you hear but adopt the attitude - its all in the attitude to the music you play." The attitude expressed by Bernard Perdie was one I chose to adopt. I found that very few musicians shared this view. Many of the players I associated with, particularly semi-professional musicians, had very strong prejudices. The semi-pro jazzers refused to play anything rock orientated, and the semi-pro rock players refused to play things that were jazz orientated. Nevertheless players from both sectors were enthusiastic about crossover music - the jazz/rock influence which helped to create the disco sound.

Curiosity and the desire for new experience led me to begin playing traditional and modern jazz. I sought the advice of established jazz musicians in the locality. Their advice to me was to listen to recordings and try to learn style and technique from established artists. Many of them although keen to play were unwilling to rehearse for my sake. This I attributed to the players' having become so familiar with the format of jazz (through years of playing and they were all many years older than myself) that rehearsals at this stage were unheard of. Further to this I was also known locally as a rock player, and I am certain that in the minds of some of the jazz musicians with whom I spoke, a musical association with rock players was taboo. I later discovered that this attitude was upheld by most jazz audiences and players and I felt pressure

to conceal my rock background when in the presence of such company. This experience was not entirely consistent however, since there were players I met on the professional jazz circuit who recognised the value of experience in rock music. These musicians claimed that my background in rock helped to bring a freshness, drive and energy to the rhythm section. This is not to say that there weren't conflicts and problems, disagreements about what I played, but rather that there was not the kind of unyielding prejudice I experienced on so many occasions.

Breaking In

My first opportunity for experience with a jazz group came with some degree of calculation. There was a benefit concert being organised for a local charity. For reasons beyond my understanding, the organiser of the charity benefit concert asked numerous players to participate in the event - mostly jazz musicians. As I was particularly keen to play on this occasion I arrived earlier than the other musicians and set up my drum kit to be sure that I would at least have an opportunity of sitting in. As it turned out a core of musicians had formed to play on this particular occasion and most of them were expecting another drummer to turn up. However, the confusion and lack of explicit arrangements, which often surrounds unpaid musical engagements, gave me an opportunity to bargain for at least a short sit in with the jazz group. The other drummer arrived and was quite happy to use my kit. He did the first set and I did the next. I was advised to use brushes and play unobtrusively - which I did. Several days later the trumpet player from this group telephoned me. He said that he liked my unobtrusive Harlem-type 1940s drum sound (basic and non-technical). He offered me several unpaid engagements.

These performances went reasonably well and the trumpet player organised several additional 'unpaid' learning experiences with a trio. I continued to sit in with the trumpet player's band and it was understood by the other members of the group that I wasn't being paid so that the group fee was unaltered. Until I began playing with them they had been working without a drummer and they were enjoying the extra cash. I went along with this business of playing as an unpaid guest for some time. The audience numbers started to grow and the manager of the venue knew that I wasn't getting paid. He also acknowledged, albeit indirectly, that my being there, regardless of my musical contribution was helping audience numbers to improve - if only because now there was a complete band. The manager tried to compensate me with free drinks and occasionally a discreet cash sum was pushed into the palm of my hand.

The jazz group were trading on my novice status and enthusiasm for playing. I was getting valuable experience and exposure. The manager was getting a five piece band for a little more than the price of a four piece.

I played a string of engagements with this band and when the hard core members of this jazz group had had large quantities of alcohol in the evening they would make sarcastic comments about my playing in a rock band. It was clear that on some level my rock music activity was objectionable.

I persevered until I began to have offers from other groups to stand in for their absent regular drummers. This kind of work was referred to as a 'dep' (deputy) job.

At one stage I was working with a Blues band and we had a gig at the local University with a well established jazz group - the SCC's. I knew the

drummer very well and I also knew he was planning to leave the country. After the evening's work I approached the band leader of SCC and asked him for the job. He made no commitment and only took down my phone number. I was under financial stress at the time and I really pressurised him for the job. SCC had a lot of "high society" work - debutante balls, weddings of daughters of military establishments, private parties given by captains of industry etc. The engagements were always very well paid - far better than the fees for playing rock music. The bandleader from SCC telephoned me eventually and asked whether I thought I could settle down to playing jazz (as opposed to thrashing rock). I of course accepted, with the implicit understanding that when their regular drummer returned I would resign.

I "depped" regularly for this group SCC which helped me out of a financial difficulty. On one occasion the trombone player couldn't make it and they asked a full-time professional trombone player to stand in. He was the first professional player with whom I had had contact and through him I was asked to do a lot of dep work for other bands. Eventually I met R.J. and after doing some five jobs with him he asked me to play at a jazz club, the Casa-Bar in Zurich. This was the first full-time professional engagement I'd ever been offered. It took me a week to decide whether or not to do it. My very first consideration was the financial viability of the venture. It meant placing all my current work in jeopardy. I decided to take the risk mainly because although I had a lot of work that was various in kind I hadn't anything lined up that was permanent.

The payment offered for the residency was 75 Swiss francs per day including accommodation. Individual musicians were required to finance their own journey to the venue. The Casa-Bar in Zurich, Switzerland is a well known

jazz club and had been operating for thirty years. The club features traditional jazz groups, as this style of music, the managers claim, is the most popular for European tourists and residents in the locality. The resident band, that is the band which performs there most regularly, is a band which had its heyday in the traditional jazz boom in this country in the 1950s and early 60s.

According to Swiss law foreign employees may only work in the country for six or eight months of the year depending upon the nature of their employment. They must reside outside the country for a period of 4 months before they are permitted to return to work and live in Switzerland.

This very practical constraint dramatically shapes the lives of the musicians of the resident band. It also creates 6 months work a year for other bands. Three of them are given to R.J. and the remaining 3 to other bands recruited by the bandleader.

The accommodation provided comprised a three bedroomed flat above the club. One bedroom is taken by the bandleader and the remaining two rooms are occupied by three musicians with two musicians sharing at any one given time. The times of playing were between eight and twelve midnight with three twelve minute breaks. Breaks between sets were monitored carefully by the management and late starts were accumulated and subtracted in cash terms from bonus awards if they were achieved during the month.

During the intervals the musicians were discouraged from sitting down in the venue unless there was a minimum of 40% of the house seating available. This was not a rule but an expectation. The reason for this practice was that the barstaff were paid entirely on commission for the drinks they served. If seats were taken by musicians rather than customers it immediately cut into the salary of the barstaff. There was a curious

relationship that developed between the band and the barstaff. In addition to the salary of each musician there was a potential pay bonus which was paid to the band if the monthly bartakings were over 70,000 francs. It was therefore in the interests of the band that the barstaff served quickly and efficiently.

If the venue was poorly attended or there were complaints made about the quality of service; the band and the barstaff had reason to complain about each other. The barstaff would occasionally complain that the music was too loud or unpopular and that it was affecting their income negatively. Alternatively, the band would sometimes complain that barstaff were serving drinks too slowly or inefficiently and therefore reducing the band's potential for earning a bonus.

The bonus factor had other effects on the relationship between band members and barstaff. The original contract of employment stipulated that musicians were to receive a quota of free drinks throughout the evening. These were to be served by barstaff to band members upon request. The barstaff had little incentive to do this, however, particularly as the evening trade picked up. The barstaff would obviously prefer to spend their time serving drinks from which they would derive a commission than attend to a band member. Further, the band member would be considering the potential effect of customer loss on his bonus potential if by chance a sale was missed while a barman was serving up his free drink. Consequently if the club was crowded during the interval, and barstaff were either unwilling or unable to stop serving customers in order to bring musicians their quota of free drinks, the band members were encouraged indirectly to go to the bar next door. Although this meant purchasing a drink, it did

also mean that one could sit down and relax without the feeling of depriving anyone of their income.

We were officially due to arrive at the venue at 7.30 p.m. in order to start at 8.00 p.m. prompt. However the usual routine was to arrive ten minutes before showtime. Upon arrival drinks were offered to the band and if a musician turned down a drink at any time of the night he was considered by the management to be suffering from illness. The engagement was particularly conducive to alcoholism; there was certainly a tendency to become one during the course of the month!

The audience were generally attracted to the club by the sounds of the band playing as they passed by the club. Enthusiastic barstaff quickly ushered potential clientele from the door to their seats whereupon they were required to buy a drink at rates even the Swiss thought high. The pressure to buy drinks was largely responsible for the turnover in the club. The entire audience of approximately 150 changed nearly 3 times in the evening.

The band never played beyond midnight. Contractual agreement stipulated that any overtime was to be paid for at a higher rate. The only occasion we played beyond midnight was New Year's Eve when we played until 1.00 a.m. Further to the contractual restrictions on playing beyond midnight there were licensing laws for that particular club which prohibited loud music after midnight. This was not the case in all venues in the area. Consequently in order to compete with later music venues, the band leader played solo piano for an additional 2 hours for which he received extra money.

As a rule the band would hang around in the club after playing, socialising with each other or those of the club clientele who spoke English. Strictly speaking, free drinks were only available until midnight but more

often than not the band were given at least one drink after midnight.

The atmosphere during the actual performance was intense and full of excitement. The audiences were always very appreciative, religiously applauding individual solos. As the night progressed and the audiences became even more wound up by drink, their enthusiasm became aggressive with dancing and wild screaming not dissimilar to rock audiences in this country. The enthusiasm for jazz in Switzerland is one reason why there is a regular rota of jazz bands working in Zurich. Another reason, however, is that English jazz musicians are poorly paid by Swiss standards and their moderate expectations therefore explain their popularity with Swiss music venues.

Furthermore, foreign musicians are not only cheaper but are considered more authentic than Swiss musicians and very few of the venues will employ Swiss musicians for this reason. Additionally, the Swiss venues are reluctant to employ foreign musicians who live permanently in Switzerland as they are then considered to be local. During my stay in Switzerland I heard of several musicians who married native Swiss and discovered that although the legal bar to their permanent residence and employment in that country had been lifted, the local venues would no longer employ them because they were no longer considered 'foreign' musicians.

Now that I have briefly introduced the setting for this professional engagement I would like to begin looking at the activities through which to begin identifying the 'conventions' and 'constraints' operating in this jazz group.

Research Designa) Acquisition of, and maintenance of, instruments, amplification and auxillary technical devices

The band members had their own instruments well before being contracted for this engagement. The problem of transporting them to the venue was greatly alleviated by the fact that the engagement was for a jazz group; an essentially acoustic ensemble. The bass player did however use an electric fender jazz bass as opposed to a string bass (i.e. a double bass). He also hired the necessary amplification for the engagement from a local music shop near the venue in Switzerland. Consequently he had then only to transport one guitar from London to Zurich. The actual amplification he used was a 100 watt amplifier which was more than adequate for the performance.

If he had used an acoustic string bass the cost incurred in transporting such an instrument would have made the job uneconomical. Furthermore there were considerable constraints regarding space on stage. The stage was extremely small and could barely accommodate 5 players. Apart from the advantages of space conservation there were other advantages of a musical nature. The electric bass guitar lends itself to other types of jazz-based music more fluently than a string bass. Although a string bass provides more traditional tonal qualities known to jazz it is very difficult to play on it what is known as crossover or fusion music. As a result of the bass player's equipment and of course his ability it was possible to vary the evening's playing format more widely, I suspect, than otherwise. The major drawback of his equipment as in the case of all electronic equipment was the tendency for there to be periodic breakdowns - twice during the month the bass guitar cut out in the middle of a number due to electrical faults.

The banjo/guitar player had to bring two instruments but his equipment was amplified through the house P.A. along with the vocals. The advantages of the moderate amplification were that it enabled the group to perform a broader range of material than if we had been exclusively acoustic. The acoustic guitar was equipped with a pick up which went straight into the P.A. The Swiss like guitars but are very partial to banjos. Many banjo solos are expected throughout the evening and they are very enthusiastically received. The banjo player in fact brought two banjos so that when strings broke he could get through a number without having to repair strings immediately.

The trombone player had only his trombone to bring and this was a fairly easy matter. He rarely used amplification - it was hardly necessary as the microphones used for the vocals picked up the brass sound on the periphery and helped to throw it out. The feature player R.J. (saxophone/clarinet/vocals), brought with him a clarinet and saxophone - again relatively easy to transport. Although he used amplification for his voice he only periodically used amplification on soft clarinet features such as "Jacqueline" (Sidney Bechet).

There were occasional moments throughout the month when the wind players overused the vocal microphones to amplify their equipment. This usually occurred when either of the front line instruments felt the other was drowning them out or if the audience were particularly enthusiastic and encouraged the player to play at greater volume. Invariably, the management and barstaff complained when the band increased in volume regardless of whether the audience were enjoying or encouraging them to do so. The employees of the establishment found it difficult to converse with customers when the band played too loud. The barstaff consequently

sold fewer drinks and there was some degree of customer dissatisfaction.

The bandleader (sax/clarinet) insisted that volume was necessary to play loudly at the beginning of the evening so that passing trade would hear live music in the club and be drawn in. Subsequently as the evening progressed the gradual increase in volume and intensity of playing was, in the mind of the band leader, a "way of winding people up" and "getting them into the music." Further, he argued that the more enthusiastic the audience became the more they would drink. The entire month was riddled with periodic arguments over band volume. Evidently, all bands playing there had similar difficulties.

Finally, as the drummer, I had the most complex arrangements regarding equipment. A drum kit, is of course expensive and difficult to transport. When I was originally asked to do the residency I anticipated having to transport my equipment. The bandleader in fact offered to drive me to Switzerland with the drum kit tied to the car roof. This, however, seemed inordinately complicated and expensive and I was fortunately able to arrange a loan of equipment from the resident drummer of the club. This meant I only had to bring my snare drum, bass drum pedal and cymbals.

Apart from the basic drumkit the only other item I used on the job was an electronic drum synthesiser. I never used this during any of the ensemble playing. I only used this on my drum solo. I was required to play a 20 minute drum solo every evening and it was during this period that I used the synthesiser - more as a sort of gimmick sound, e.g. jazz with a bit of contemporary spice. The other members of the band and the audience welcomed the diversion of a synthesiser

sound as long as I restricted its use to my solo.

This completes my discussion of acquisition and maintenance of instruments, amplification and auxillary technical devices, and I will now focus my discussion on methods of notation and composition.

b) Methods of Notation and Composition

Methods of notation varied from player to player, but each one had a songbook with collections of chord charts and bass lines for each number. During the time we were there, we played some seventy numbers but the actual songbooks of the trombone player, bandleader, and guitar player contained over 300 numbers. Most of the material was played from memory, unfamiliar in structure and expectation only to me as I was a generation behind in playing experience and familiarity with the idiom. When the bandleader called a number that anyone was unsure of they simply consulted their chord book and followed it. This, however, created some disturbance on several occasions between the bandleader and different players in the band. In the majority of disagreements numbers in question were standard and the chord charts, structure and sequence were settled without question. However, on some numbers different parts were in different keys, and the bandleader's way of playing it was different from the written notation of other players. Technically speaking the bandleader should have provided the music on all numbers so that there was no ambiguity over chord structures and arrangements. This was a considerable fault in the entire musical organisation of the engagement. The bandleader's chord book was in conflict with the guitarist/banjo player's and this of course had something to do with the choice of keys in which to play certain numbers. It became necessary consequently for the guitarist and bandleader to

meet regularly to discuss differences. However, in many instances the bandleader would simply play the part incorrectly. If anything did go wrong it was considered, in his view, invariably to be someone else's fault. At the beginning of the month, the bandleader seemed to create many confrontations which encouraged a degree of uncertainty. It was argued by some that he was using the dissimilarity in people's methods of notation to retain his authority over the band.

In contrast to the others I had no methods of notation, and there were no written drum parts. The bandleader was nevertheless fairly decisive in the kind of drum part he wanted on each number. In some instances he was uncertain what he wanted me to play and he might suggest different approaches to certain numbers on different nights. I often found, however, that I was caught between conflicting demands - between the rhythm section and the front line - as to how they wanted me to play. Occasionally the bandleader might directly object to what the other members of the band would suggest for a drum part on individual numbers. Sometimes he would say to me: "Don't listen to what they tell you to play, play what I want you to play - I'm the bandleader!"

c) and d) Learning to play the required music; times and places for rehearsal

Learning to play jazz was always presented to me as a mixture of mysterious visitation (genetic or spiritual) and some kind of total dedication to achieving unobtainable goals. Listening has always been the key piece of advice. Different jazz players have said different things. The independent study of technique at textbook level was always considered a necessary evil. Transforming technique gained through, first and foremost - listening; and subsequent to this, playing

live with different musical groups. Nearly every jazz musician I've spoken to was old enough to be my father and it was not uncommon for them to give professional advice. I did, of course, actively seek their advice whenever they were prepared to give it. Here are some of the comments made to me.

A. How do you learn to play jazz?
Sax Player: Listen to it!

A. What would you advise a drummer to learn in order to develop his ability?

Session Jazz Drummer: Play in as many different bands as you possibly can. Don't ever tie yourself down to one kind of band. Listen to records of course, watch how musicians play in the live gig. Also listen to the sounds of engines, machines, clocks, industrial conveyor belts, etc.

R. J. Bandleader: When you're learning to play listen! but don't copy! Never copy another player's technique, melody lines, notes, - copy his attitude, his approach, the way he is feeling the music. This is where you learn the most. There's nothing worse than listening to a solo which is initially original sounding and then all of a sudden a line or two from a well worn tune drops in - something everyone recognises immediately. Maybe it'll happen for only a few bars, but it will ruin the solo.

A. What about learning from music books?

R. J. You can't learn anything from books!

Unsolicited. Bass Player in Zurich: You're doin' all right now, the thing you've gotta do is listen to some o' these old jazz records so you pick up all the little fills and stops and all that bit. You ought to learn to read as well so you can do the shows and the cabaret thing - there's a lot of bread in all that game. By the way dear boy I do believe it's your round.

To the majority of players, reading music disrupted one's ability to feel the music. A loose structure with plenty of room for improvisation enabled the soloist to play as he felt. Most of the material we did had plenty of room for this.

With regard to rehearsals, in my years of playing jazz there have never been any. However, the groups I have worked with have all rehearsed during previous formative periods. Therefore I think my

experience is unusual and partly due to the age difference between myself and other players. When I first approached local jazz musicians to discover possibilities for joining a group, rehearsals were something of a taboo. Consequently all my learning came from listening and doing what I was told to do only minutes before a number was played, with the expectation that I would forever remember the arrangement. Even in Zurich, which was ostensibly a professional engagement there were no rehearsals. In my contract that was sent to me by the bandleader it was stated specifically that all rehearsals that were called by the bandleader were to be attended unpaid. Certainly, some of the sparks that flew on stage could have been avoided if the band had had a rehearsal but the thought of rehearsal during the day was absolutely taboo. The closest the band came to a rehearsal was drinking or eating together before performing when the bandleader would say what was wrong or right or what changes might be made in a particular number. Everyone did take note very carefully and did their best to oblige the bandleader's requests or for that matter the request of any other player who had reasonable criticism.

The business of rehearsal in Zurich was also hampered by the fact that the management really didn't want anyone in the club unsupervised during the day. Presumably there was some worry that the ease of access to alcohol might be a temptation. Hence the fact that a rehearsal had to be supervised by the management of the club, in addition to the fact that the musicians viewed such an activity as unpaid work, was a great discouragement to the organisation of a rehearsal. In fact the standing joke, at the time, for any musical

errors was the threat of a band rehearsal at 9 a.m. the next morning.

Nevertheless there was still another kind of rehearsing that went on in the form of 'chat' which I grew to see as far more significant preparation for the evening's performance than I originally realised. Quite often it would occur late at night after the performance. The musicians would swap chord books and go through numbers and try to sing them to one another. This might go on for some time. Occasional references to different numbers in the band's repertoire would be the subject of criticism and one player or another might be advised with regard to his playing. As a rule the bandleader encouraged everyone to simplify his part.

Cassettes were sometimes used - particularly with me. The bandleader recorded five hours of jazz classics for me to listen to. The other band members would hang around while I was listening and point things out. I was forever being warned about not copying other players and creating my original style, but this was to be achieved through playing unobtrusively and playing all the arrangements correctly.

e) and f) Advertising for performance; Publicity and sale of tickets

In my experience of jazz groups the venue advertises the band in terms of the lead vocalist or instrumentalist usually brass (although sometimes guitar and keyboard) and this individual arrives with his backing band which he makes a fuss over while the audience make a fuss over him. In some instances the star player or bandleader may have an additional share of the money compared to everyone else. For that he is responsible for bookings, publicity, musical notation and arrangements, and the general on-stage responsibility of fronting

the band. When it is a good night and the audience is with you the bandleader has an enjoyable time along with the rest of the band. If the venue is bad, the audience unresponsive, or if the band plays badly, the bandleader gets the majority of the criticism from the audience and the management. I think it is a genuinely difficult role to play.

With regard to the gig in Zurich, the band was billed as R. J. and his Jazzmen. There was no question about this as R. J. had acquired this engagement through his former association with the resident band, and his many years of playing in Germany on the jazz circuit. In Germany and Switzerland he is well known. In this country he is not a bandleader and apparently has no desire to be. The actual transformation in his personality given the change in role, is quite dramatic. Likewise, it was for another player who changed his role from bandleader to front line musician. On the first occasion we went to Zurich the trombone player was a bandleader in this country. In fact R.J. regularly worked as a sax and clarinet player in his band. When I spoke to R.J. over the telephone regarding the line up in Zurich he said to me that he was taking P.A. (Trombone player) to Zurich because P.A. had given him so much work in this country. P.A. has been a bandleader for years and runs a band called P.A. and His Allstars. He employs approximately 15 musicians who do different jobs with him as and when they are available. R.J. worked with him regularly for six months prior to going to Zurich. Since P.A. went to Zurich they hardly ever play together. In this case the roles reversed with R.J. being the bandleader and P.A. being the backing musician. The ramifications

of this role-reversal I will discuss later. However, for now, let me say that all the advertising was in R.J.'s name. The Casa-Bar prepared a special placard and in their showcase window several pictures of R.J. were displayed.

The band was advertised in the local press and in the national press. There were usually two write-ups throughout the course of the engagement invariably featuring R.J. and a brief mention of other players in the band. Apart from this there was the odd mention on radio broadcasts but there was no sale of tickets for performances.

I will now discuss aspects of the audience and its relationship to the band.

g) Recruiting an appreciative audience capable of listening and responding to the group

The audience at the Casa-Bar has been cultivated and recruited over a period of 30 years of jazz groups performing in this venue. Currently the main draw locally is the resident band. It is this outfit, once famous in England, who have cultivated the greatest local following. They perform in the club 6 months out of the year.

R.J. performs at this venue approximately 3 times a year and has done so for the last 7 years. His crowd of supporters has been cultivated over the years as well, but it is not as strong an audience as that of the resident band. Discussion of the difference requires several factors to be taken into consideration. First and foremost, consistency of playing dates in the venue. Secondly the relationship between barstaff management and the band can greatly affect audiences. Thirdly and perhaps most important are the differences in jazz following. The resident band plays strictly New Orleans jazz.

R.J. and His Jazzmen is a predominantly traditional jazz outfit although additionally the band will play mainstream, Blues and Jazz funk. Audience recruitment is therefore affected by these factors of taste. The other dimension of audience recruitment is the musicians' involvement in the local social scene and their willingness to relate to customers in the Casa-Bar. The management are particularly keen to have band members fraternise with customers particularly when customers buy them drinks. There is also a lot of tourism in the area and English speaking business clientele are grateful to have English speaking musicians to chat to. All these factors together help to create audience atmosphere and contribute to audience recruitment.

Another dimension of audience recruitment was the preparation and sale of audio tapes. The first edition of these tapes was recorded 5 years ago. When we play at the venue R.J. contacts the recording studio where the tapes were made and orders up to one hundred. Now, in the particular instance, these tapes feature jazz standards as played by R.J. and His Jazzmen and R.J. has retained the copyright. That is, the musicians who backed him in the recording of the tape were simply paid a session fee and were not offered royalties on any further sales of the tape. Since the actual changeover in personnel in his band is so great, every time he sells the 90 minute cassette copies there is a different line up with him. I remember on one occasion a customer who purchased a copy of the tape wanted autographs of the entire band who were ostensibly R.J. and His Jazzmen. Because R.J. had copyright and there was no mention of the original players on the tape he simply handed the cassette copy around to the existing band and asked them to sign it. He offered the band nothing for promoting the tape or actually signing it. However, he did offer a commission to anyone who sold the tape to a club customer.

The tape served an additional purpose in publicising the band. That is, a member of the audience could take the tape and play it to friends who might then be persuaded to attend for an evening at the club. At the very least, the sale of the tape certainly helped to make people more aware of the bands' existence and invariably this had an impact on audience numbers.

There was always some spillover from the audiences attending the resident band engagements. We always took over the very next day after they had completed their monthly residency. Consequently the audience they built up during their stay would more than likely come the next night expecting the usual band to be in residence. Inevitably some of them would be disappointed and would not attend the club on future occasions until the resident band returned. However, some of the audience became devoted fans of R.J. and His Jazzmen.

Audience numbers were affected therefore by several factors: Confusion as to which band was playing; curiosity about the new band playing once they discovered there was a change; the relationship between the band and the audience; the relationship between musicians, barstaff, and management; the sale of pre-recorded tapes; and media publicity.

During the course of the month there was an initial surge of audience attendance motivated by the confusion, curiosity, and musical style factors. Then, over the next two weeks, the R.J. and His Jazzmen audience would begin to develop more selectively and a hard core of regulars and newcomers would establish a pattern. Audiences were reasonably consistent in numbers throughout the week except for Saturday night when it was so crowded it was difficult to get off

the stage. People would begin to arrive between 8.30 and 9.30 p.m. There would be a gradual build up between 9.30 and 11.00 p.m. when audience numbers would peak. At approximately 11.30 p.m. audience numbers would begin to taper off as individuals would travel home by trams -local transport- which ceased operating at midnight.

h) Interaction between the musicians and the structure of the live performance

I will now discuss this area in comparatively greater detail as it appears to have considerable impact on the overall operation of this musical group.

The performance started promptly at 8.00 p.m. Depending on the mood of the bandleader, he would either ask the band what they wanted to start with or simply announce the first number. (usually "Rosetta"). This was a medium tempo tune which gave the band a chance to loosen up and gradually ease into the evening's performance. If there were a large audience during the first set the material he selected would tend to be more on the up-tempo side. However, more often than not, what determined the numbers we played was how energetic he felt, what he had had to eat, and when he had eaten it. Whether or not he had slept that afternoon, or whether he had been drinking. Food and alcohol late in the day always slowed him down. In which case we did a lot of slow tempo material in the first spot. It was, nevertheless, well received. The bandleader's mood affected everyone dramatically and we could always tell by his behaviour in the first set whether the night was going to be fairly easy going or fraught with arguments about arrangements.

At the very beginning of the evening the hardcore alcoholics were propped up at the bar applauding almost everything in a hilariously enthusiastic way. A few of the local prostitutes would come in for a quick drink before work. The atmosphere had a combined quality of indignity and desperation about "starting work." It was always at this time that arguments about volume occurred. As mentioned earlier the band is basically acoustic and not very loud to begin with but alas, the club is small. The management wanted some kind of volume to attract passing trade. The barstaff wanted little volume so they could hear the requests for drinks. Also in the early part of the evening when there were very few people in the club some of the customers complained about volume levels. Although the band would play at volume levels primarily to attract crowds from the streets, the other extreme of trying to play especially quietly at the beginning of the evening would make the band behaviour tense and would affect the fluidity of the music. Initially this problem affected the choice of material, until after the first week, the bandleader had a full scale confrontation with the manageress and the barstaff. He claimed that the volume levels would have to be tolerated in the earlier part of the evening in the interests of filling the club and the overall quality of the music. After that, we all simply carried on without further attention to volume. It never really became very loud.

The first set, known to some people in the trade as the "dinner" set where people are still feeling pretty delicate from just eating or feeling their way through the first few drinks, was always beset with these tensions. Like the first few hours of any job it was the most

difficult to get through. It was also the longest of all the sets, lasting an hour and 15 minutes, whereas the remaining sets lasted only 45 minutes.

After the first set everyone in the band except the bandleader went next door for a drink. In many ways, this behaviour followed a pattern of an 'employees' only bar where there was considerable criticism or general 'bitching' about the bandleader. Usually the content of the comments had to do with whether the bandleader had made some criticism of someone's playing which would be followed by some snide remark about his playing.

The bandleader spoke fluent German and spoke to the audience in both English and Swiss German. Only one other player in the band spoke fluent German. However many of the Swiss spoke English.

There were occasions when the band returned late from their interval visit to the Castel Bar next door. This created a great amount of anxiety for the bandleader and in fact it became a counterweapon for the band if he became too unreasonable during playing time. It was also at this particular point as well that the band members had to be very careful as to how much they drank. Upon arrival for the first set musicians were handed a drink. Then, during the interval everyone had a drink next door at the Castel Bar. Further the barman, who liked the band personnel using his bar, would quite often distribute free an expensive round of "Schnapps" which could not be refused without causing insult. This was intended to be consumed along with Swiss beer which together formed what is known as 'Swiss Scotch.' The two drinks together are extremely potent. By the time the band returned to the Casa-Bar a round of drinks had been prepared

by the barstaff awaiting the beginning of the second set. Furthermore, the band was usually bought a round of 'shorts' during the set by a customer several times during the evening. Consequently it was very easy to overdrink. There was a firm rule, however, that was stated at the beginning of the engagement. Drunkenness was immediate grounds for dismissal. Everyone was reasonably cautious and I think what happened was that everyone's level of tolerance for alcohol simply increased by the end of the month.

There was an additional practical aspect of this engagement which encouraged heavy drinking - the total convenience of the accommodation situated above the club. After work it was unnecessary to travel more than a couple of hundred feet to arrive at the flat.

The necessity of drinking and playing together was that the band as a whole played better if they had a little to drink because it reduced tension, and generally made everyone ease up on the instruments and relax. The trouble was, of course, in trying to keep a check on it and not allowing the social situation to encourage drinking beyond one's ability to play. There were several occasions during which the band played badly because they all had had too much to drink. The bandleader would sense this, but since he was a drinker himself he couldn't be too critical of it. Of course on those evenings when the drinking became excessive he generally selected numbers that were less complicated, and so easier to play. For the brass and reed section, too much drink made the lips go numb and they just couldn't play certain notes. For the rhythm section, chords were missed, beats were dropped and bass lines wavered.

During the second spot of the evening one could tell how the rest of the night was going to turn out. The audience numbers increased to their maximum. The band had, by then, settled into their drinking pace for the night; and the bandleader had completed his routine 'keeping everyone in line,' effort. Also the volume had settled to a comfortable level by then and people were beginning to get a bit wound up. Every number featured solos from every instrument except the drums. A drum solo was a feature of the third spot. The audience applauded the solos enthusiastically and in many ways, for the players, it became a habit to expect this. If for any reason one of the players didn't get his usual applause he would feel personally affronted and it might put him in a bad mood until the next solo when the audience applause would bring him out of it. In some instances, on a bad night when the audience wasn't responding as well as usual, the front line members would actually solicit the applause. After a while it became laborious. At first so much audience response would encourage each player to play better and still better until a plateau of achievement had been reached beyond which they could go no further. It couldn't get better. The novelty of periodic and momentary stardom began to wear off. Like an adrenalin drug more and more was required to bring on the 'high' feeling, but the supply which was all created socially and through musical ability couldn't be increased in doses - you could only stay at the same level. This encouraged all the musicians, eventually, to look around town for a 'blow'. A new setting, a new audience, and a new group of players would be temporarily uplifting. Of course any other musicians present at our venue would also 'sit in'. Those that weren't working were always desperate to play -

and the band was always sympathetic and invited them to join in. The only player on that circuit who I spoke to who wasn't keen on sitting in was the bandleader, R.J. I asked him quite casually once whether or not he was going down to a local venue, the Bascillus Club, one Sunday afternoon for a 'sit in'. He simply said "why should I play if I'm not getting paid for it. I'd have to get outta bed, shave, put on my stage gear and play for nothin' - no it's a waste of time."

As far as letting people sit in was concerned, only those musicians personally known to the bandleader were given this opportunity. Usually it was the front line. The bandleader preferred people sitting in who didn't play his instruments, clarinet/saxophone, but he always let those who did play those instruments have the opportunity. Sometimes several guest players including clarinet, trombone and trumpet would climb on stage and we would have a fantastic sound if they could 'get it all together' and play some 'fat unison passages'. If it didn't come together, the 'blow' could be disastrous and tedious - but this rarely happened. Occasionally, a guest spot would bring a competitive element into the playing and on certain evenings individual musicians played some absolutely stunning performances.

I remember on one evening the new trombone player who came on the second months residency found a rival Dixieland jazz band resident $\frac{1}{4}$ of a mile from us at a competing venue the 82 club. They were called The Harlem Jazz Band. He introduced himself while in band uniform, and asked to sit in. They liked what he played and so they asked him to come along any time he liked. On one occasion I went along to that club to watch L.D. the trombone player, sit in with this band. The band were on different terms and conditions than at the Casa-Bar. Their evening's

work didn't actually start till 9.30 p.m. and also they were booked for five hours a night instead of four. Consequently they were always playing a good couple of hours after we had finished. Quite often, L.D. would race down to this club (as if he hadn't had enough) at this point and join in as soon as the regular trombone player came off stage. Their regular trombonist didn't seem to mind that L.D. was up there playing for however long he wanted. The regular trombone player seemed to be glad of the rest and was quite happy to let another player work a couple of hours while he sat quietly chatting to customers and drinking. In fact on this one particular occasion the bandleader became so annoyed with his trombone player's continued absence that at the end of the evening he announced L.D. as being the member of his band rather than the regular player.

The Harlem Jazz Band were an all American black Jazz band - "the real thing." L.D. was so impressed by playing with them that he couldn't stop talking about it for days. He also managed, through his playing with them to draw some of their regular audience to see him playing with us in the Casa-Bar. In that respect, sitting in can be good for business.

At this particular point in my discussion of the "interaction between musicians and the structure of the live performance," I would like to focus on the 3rd or middle spot of the performance which featured individual players in some special capacity. This was a favourite time for the musicians and audience and always created an exciting atmosphere. After my discussion of this 'feature' of the live performance I will then go on to discuss problem areas of interaction and the live

performance. Following this I will complete this section with a short note on 'dress' restrictions - item K. Finally I will conclude the chapter with an overall theoretical view of this case study.

The third spot of the night was the high spot of the evening. Everyone in the club had by then had quite a lot to drink, the place was full, the musicians were warmed up, and everyone was generally in a good mood. This was the feature spot where everybody did their speciality act. Nearly everything in the set was up-tempo and then we would do a trombone feature. This is when we would bring the crossover or fusion element into the band's playing. The bandleader would walk off stage and allow L.D. the trombonist to be the feature front line player and we would do a funky version of "Night Train." The rhythm section would kick it off, and basically the trombone would carry the whole thing through. It was a contrast to more traditional material and it always went extremely well. Then, R.J. would come back on stage to do a really sensitive Sidney Bechet tune called "Jacqueline". This developed even more interest cooling things down with even greater contrast. Then we would begin building up again with a racy guitar or banjo feature. The audience would be getting more and more wound up. This was followed by the drum solo. The bandleader had a plan for introducing this spot which always created a lot of excitement. We would begin playing "Bei Mir Bist Du Schon". Gradually one by one each player would leave the stage until there was only myself and R.J. left, whereupon he would do a short clarinet solo while I kept up a Gene Krupa type of rhythm on the tom toms. After the short solo he would blow a long wailing note in the upper register of the clarinet and then he would stop, reach up to the ceiling and switch on a spotlight aimed at me.

The audience would applaud him as he moved off stage, which he did very slowly. I would drop the rhythm to something very quiet until he actually finished climbing down from the stage. Then I would do a very explosive roll around the kit. In particular I would play the synthesiser which the audience hadn't heard before and this always drew their attention. The solo then proceeded through a series of techniques which began with a jazz rhythm, developed into a Latin American Rhythm, moving on to a rock thym, disco, funk, ending on an almost modern day fusion of punk/funk and Reggae until it gradually crept into 6/8 polyrhythm which built up in intensity and then stopped. I would then start a Mammy Daddy Roll, very slowly build it into a fast double stroke triplet roll until the entire kit was going in counter rhythms. I would cue the band in and then they would walk on stage, with R.J. the last to arrive. The bandleader would count the band in while I continued and then we were all in.

The first time I did the solo at the Casa-Bar I was quite pleased with it. The bandleader wasn't. He always thought I could do better and I remember thinking at the time that the audience liked it and it was good enough. But he really pushed me to achieve something quite different which in the end was very much an improvement. He said to me on the third or fourth day "we've gotta get together on your solo and work something out." This was about as close as anyone came to having a rehearsal and it basically meant that you sat in the bar with a few drinks while he told you how to improve your technique. His first criticisms were that the solo lacked calculated organisation - it was too spontaneous. He would say: "Sometimes, it comes off with all that spontaneous bit when you're in the right frame of mind and everything

is going o.k. but other times it seems to be all over the place with you almost looking like you don't know what's going to happen next. The thing to do is get a balance between that spontaneous thing and building it up gradually. You see that's the difference between jazz and rock. In rock you explode all the time - that's no good in jazz - you've got to take it from simple beginnings and build up the intensity gradually and wait for the audience to come with you." I remember feeling a bit annoyed at this point but I thought I'd hear him out. I asked him to describe how he thought the whole thing ought to go. To my surprise he had in fact listened to my solos quite carefully and could identify each segment of it and more or less suggested a re-organisation. He suggested the following:

"When the two of us are on stage together and you play that Gene Krupa type of rhythm on the tom toms - that's great. And when I come off stage and you burst into a roll and play the synth, that's showmanship - the audience like that. But you can get a lot more applause out of them if you build it up gradually. After you've done that whole exploding bit drop the volume and tempo of the rhythm, just keep it goin' in your feet and do something light around the tom toms, soft rolls 3 against two that sort of thing. Then put a little bit of steam into the thing and build up the tempo. Then as you build it more, start to drive it into those heavier Rock beats. Build it up to a crescendo and drop it back to that slow jazz thing and they'll clap. Then stop. Look at em' hard and start that Daddy Mammy roll. Build it all around the kit then go into the 6/8 thing and let em have it."

I followed R.J.'s guidelines and found that some of it worked and other things did not. However, the overall effect was some improvement. I found the business of being left on stage on my own for 20 minutes a bit daunting but I became used to it and I tried to inject as much energy into it as possible. I remember the first night I did my solo, however, and the bass player came to the part where he walked off stage and he turned to me and said as he was going: "Keep it going for as long as you can cock, I'm just goin' next door for drink!" They never did that

but I remember believing him the first time he said it. I had worked out a signal to cue the band to come back on stage. It was a rhythm on the cowbell which, when I reached the point of exhaustion, I played very loudly. The band, who were all standing round the bar, settling into a drink would jump to their feet. I remember on several occasions I left the cue too long. My hands and wrists were starting to tense up trying to keep this fast double stroke triplet roll going round the kit while I waited for the band to climb on stage. Consequently I used to start the cue a lot earlier to give the band a few extra minutes without driving myself to total exhaustion. When the band came in at the end we did two choruses then a final 8 bar break at the end. When that was over I could relax. That was always the end of the third spot and it was a relief to have it out of the way. I always needed a drink after that and the whole band went next door.

The bandleader classed the drum solo as a pretty important feature of the night and really pushed me to work it up as much as I could. In some ways I felt the other soloists had it easier, only ever having to carry the can for 16 or 32 bars at a time. The bass player was a borderline alcoholic and R.J. used to give him a lot of solos when he thought he was hitting the bottle too much - it kept him on his toes, boosted his morale a bit, and occasionally laid him off the drink.

The band would comment on my solo. They encouraged me and compared it favourable with others they had heard. In many jazz groups I have played with the solo seems to be almost as important as the ensemble playing. And this is, I feel, why there is so much structured solo work. It's all very democratic. Everybody has a chance to play his own thing and then when it's time to do the ensemble playing there's no ego battle

the way there is sometimes in a Rock band. Everybody buckles down to doing the job right.

I was of course curious to hear about the other drummers who had been there in the past and who were playing elsewhere locally. I heard stories about drummers' solos which were performed in an entirely different way to the kind of thing I wanted to do. Their previous drummer had done quite a bit of show work, cabaret and generally had had more professional experience. His approach to the solo was completely different and one which is used evidently by quite a few drummers. They usually start off with a simply rhythm which they play on each drum. Then, while still playing they get up from the kit and carry on playing on different surfaces, e.g. floors, table tops, bar glasses, human anatomy and so on. The audience evidently loved this kind of thing.

The last spot of the night varied in quality and attendance. Many people left after the third spot in order to catch local transport which ceased after midnight. At the weekend people would remain in the club long after the band had stopped playing. Often during the week the band would really over-indulge drinking just before the last spot because everyone viewed the nights work as over. This was a natural feeling which was the inevitable consequence of everybody's feature being over. However, the bandleader quite rightly didn't always see it this way for several reasons. Firstly, because he was bandleader and discipline had something to do with the job; secondly, the night's work for him did not end until 2 hours after we all finished. I do believe he would have been in a better mood on some of those evenings if he hadn't had to play piano for two hours after every job. Nevertheless,

he wanted the money so he did it.

At the end of nearly every performance which was at midnight on the dot, the audience invariably asked for an encore which we wanted to do but we couldn't for several reasons. The first was that the bandleader was absolutely firm about overtime rates which had to be double. Secondly the law stated that loud music could not be played in the club after midnight. This caused the management some consternation because they lost a lot of business to the club down the road which had a licence for loud music until 2 a.m. The piano playing was light contrast and although the audiences appreciated it, it didn't always hold them. I was required to put a blanket around the drum kit to prevent individuals from the audience trying to play the kit.

On several occasions guest musicians would come in after hours to play the piano acoustically. They were usually young Swiss people who were trying to attract custom for their normal gigs elsewhere. R.J. was always keen to let them play and the management were always happy about this because they were popular and held people drinking in the club after hours. The guests were never paid, although the management used to give them a drink on the house.

Zurich was very heavily populated with street musicians who worked in pairs and sometimes in groups. They used battery-operated amplification and played mostly loud rocking blues or Rock'n'Roll. I remember at first thinking how fortunate I was to have the job in the Club until I realised that they quite often earned far more than I did just by playing on the street. The majority of these buskers came from England and America for a few months at a time. It transpired that there was

quite a demand for this sort of thing because there were so few working Swiss musicians who would be willing to accept the comparatively reduced standard of living they would have if they played music professionally. Consequently, the Swiss musicians who came into the club were all engaged in some other profession and only played music as a hobby, or as R.J. put it "for the birds and the social life."

During the course of the residency several points of friction occurred apart from arguments over chords and arrangements. As I mentioned earlier, on the first residency in December, P.A. came along - an already established bandleader in this country. As I said the roles between R.J. and P.A. were now reversed. Yet whereas R.J. could cope with it in this country P.A. couldn't in Switzerland. In fact, within the first week he had an identity crisis. He kept wanting to announce all the numbers, count the band in, and tell everyone what to do. This of course got on R.J.'s nerves and everyone else's and they fell out over petty things like where the other ought to stand on stage and how many solos were to be taken in any given number. In my view there was no contest, R.J. was clearly the star of the show and he very often had to rouse applause for P.A.'s solo work. The residency, however, unfortunately resulted in a permanent separation of their professional association. Evidently, a member of the audience approached P.A. with a serious offer of a residential engagement in Northern Germany and P.A. told this individual that R.J.'s band was called P.A. and his Allstars. When R.J. heard about this he hit the roof. According to R.J., P.A. was trading on his patch and would never be asked to work with him again.

The personal lives of the musicians and the intensity of the work

situation had an extreme impact on the group as a whole. In many instances pressures caused deep seated depression and anxiety and in the cases of long term employees of the club, the work of playing in the Casa-Bar changed peoples lives. Graham Collier in "Inside Jazz" speaks of the unstable lifestyle of the jazz musician and how certain kinds of work situations are incompatible with stable family life.* The pattern seems to be that while in Zurich, musicians who are there on a regular basis conduct a lifestyle of serial monogamy which in some respects is tantamount to polygamy. The wife and children remain in England and the musician is kept indirectly by a female in Switzerland. The situation arises out of periodic separation caused by the residency in addition to the financial necessity of finding a resident partner in Switzerland. There is virtually no possibility of bringing a family to the country by virtue of the financial expense and Swiss law. Swiss law would not permit an individual to enter the country for work unless special arrangements were made prior to arrival. Consequently, finding work for a spouse is virtually impossible. Further, even if the relationship breaks down through periodic separation Swiss law will not permit a foreigner to reside in the country as an employee for more than six months a year. Consequently, even if an individual wanted a permanent life in Switzerland he could legally work there for more than 6 months a year only if he married a Swiss National. The greater likelihood is that while working alone in that country an attachment forms and upon returning to England one simply reunites with the family. Initially, it is in the interests of the musician to keep the relationship with a new partner on a strictly casual basis - but this rarely happens.

* See Graham Collier, Inside Jazz, Quartet Books Ltd., London, 1973

Consequently the situation creates a great deal of marital breakdown and destroys the possibilities of stable family life. If one continues in this line of work a double life is required unless you make a complete break with roots in this country to live permanently in Switzerland. The problem with this is that even if you decide to remain permanently within the country and marry a national then your employment opportunities are restricted to the trade with which you came to the country. It is then illegal to work as anything other than a musician. Further in the case where you become resident in Switzerland, many clubs will not employ you because you are no longer an international musician in the eyes of a club manager, but a local musician. The lifestyle is thus very demanding and disrupting. From the employment point of view, as far as the professional musician is concerned, once he is committed to the residency on a regular basis his regular work in this country tends to be given to someone else. Furthermore, when a musician does return to this country and looks for work he finds that it takes a long time for people in the business to register in their minds that he has returned and consequently by the time work begins to resurface from his home base, the next month in Switzerland emerges and he is off again. After 6 months of this you are classed as either unreliable or unavailable and the usual outcome of the in-between periods is that you end up cooling your heels in England waiting for the next engagement.

The other disadvantage, if you have a family is that very often it is necessary to be working abroad during holiday periods. One player's alcoholism and the breakdown of his marriage was largely the result of playing in Switzerland at the Casa-Bar. He led a double life for as

long as he could and now he and his wife are separated. He is committed to the residency in Switzerland over Christmas and is therefore unable to spend it with his family. Furthermore, the woman he now lives with in Switzerland is continually pressurising him to return to Switzerland even when he isn't working, whereas his children pressurise him about his absenteeism. The whole syndrome drives him to fits of intense depression. There really isn't enough work at the Casa-Bar or anywhere else in Zurich for him to make a permanent transition from the marital home and even if he did he would then be resident in Switzerland and the club then would not employ him. He's burned his bridges as it were with regard to stable work in the U.K. and he lives a life where he periodically moves from place to place.

Other individuals thrive on this kind of existence. Many of the players in other bands at the Casa-Bar prefer a floating existence without a secure base and are grateful for having an excuse not to establish one. In some instances the Casa-Bar residency provides an escape for some musicians who have already been separated or divorced. As far as I was concerned I was single and unattached at the time and therefore without similar pressures. Band members strongly advised me to stay that way.

The problem and lifestyle of being a professional jazz musician became even more apparent if I compare the personnel on the first and second engagements. The first time I went it was December. The bandleader had been offered the residency on short notice after a long break from doing the club on a regular basis. Consequently the bandleader didn't have enough time to get all professionals on the job and it was necessary

to bring two semi-professionals along - myself and the guitarist/banjo player. The difference between us, however, was that I could do the entire month and I had no family to bring over with me. In fact the month of December was split between two different guitarists. The first guitarist who was semi-pro brought his girlfriend over and would only do half the month at the venue. The second guitarist brought his wife and child. The trombone player, who has his own band and is by all accounts a professional was not considered as such by the bandleader or the bass player who classed the behaviour of bringing one's spouse to the venue as unprofessional behaviour. I thought this was unreasonable, as marital partners had a rough time during separation. As it turned out, during the month of December I was pressurised by both the guitarists who brought family with them, to stay in a single hotel room at their expense. They found it was cheaper to put me up in a single hotel room and for the family to stay in the flat than for the family to book a double hotel room during the course of the residency. Both guitarists utilised my cooperation to make the job into a holiday for them. Neither could view it any other way given that the cost of an additional partner in Zurich meant you would save very little money. Furthermore once the Swiss management found that one of the guitarists had brought his wife and child over they attempted to deduct some of his payment for additional facilities used in the accommodation provided for the musicians. From the bandleader's point of view this was one complication to avoid. Of course in my mind it was clear that this kind of attitude would create a kind of personal and professional availability for the pro jazz gig.

As a result of all this complication the bandleader deliberately selected individuals for the next period in Zurich who had no family or had no intention of bringing any partner with them. In this case the personnel were: a trombone player, who although married to a working wife and with a family, had sympathy from his partner, sufficient to cope with his prolonged absence and the domestic stress which the separation might create; myself, who was single, and the banjo/guitarist who had recently been separated from his wife. Additionally there was the bass player from the previous engagement with his periodic living together arrangement, and R.J. who was single.

The three bedroomed flat was occupied by 4 of us, the bass player stayed with his girlfriend. The trombone player and the banjo player shared one room primarily because they were both cigarette smokers and I stayed in the other room. On the previous visit I was expected to share one of the bedrooms. However, R.J. did explain to me that I was expected to "shack up with some bird" and leave the room free for the other individual. Life in the accommodation provided, established a certain routine. As the flat was directly above the club and opening hours were until in the region of 3 a.m. nightly the band didn't usually retire for the night until 4 a.m. People certainly waited until R.J. finished his piano playing at 2 a.m. and usually a few of us were still drinking or hanging around while we waited for him to finish. If people were not in the club they were drinking in the flat and listening to tapes of their favourite jazz musicians. At 3 o'clock in the morning players began to look at chord books with favourite numbers along with tales of great performances with great players in various parts of the world.

The listening side of my musical development was greatly expedited by the bandleader who had prepared 5 hours of tapes of the earliest jazz classics. I would listen to these players an average of 3 hours a day while I was reading or resting or even going to sleep. The psychological impact it had on the band and me was very positive. In their minds it helped to bridge the generation gap, showed my genuine appreciation of the roots of "their" music and more generally speaking, filtered into my playing gradually over the month. The bass player commented, however, at one point that although he thought I had learned the style very well I was beginning to sound more and more like the drummers on the tapes and less and less like the drummer that was me. In effect he was commenting that I was copying too much and losing my musical individuality. R.J., the bandleader, on the other hand felt what I was doing was right.

This now completes section (h). Although it has been a lengthy discussion I feel it reveals more of the character of the group. I would like to remind the reader that categories (i) and (j) are not applicable to this study and I am now about to discuss item (k).

k) Dress and Stage Appearance

The management of the venue required all resident bands to dress in uniform - a tee shirt bearing the name of the band and dark trousers. There was no possible deviation from this uniform, much to the annoyance of band members. From the management point of view, as well as the bandleader, it made the business of visual identification far easier in the crowded venue. Also regular barstaff found it easier to locate and identify individual musicians which changed in groups from month to month. Apart from these very practical concerns, the band uniform

provided a sense of visual unity which, in the minds of band members, was for the benefit of the audience.

This now completes the operation of the research design in relation to my first case study. I would now like to make several concluding remarks regarding the overall scheme.

CONCLUSION

At this point I would like to look at my original research objectives and attempt to identify areas of my fieldwork experience in theoretical terms.

To begin with I would like to restate segments of my analytic framework which I have taken from Becker and begin to apply them directly to the fieldwork experience. In "Art as a Collective Action" Becker states:

"....We can study social organisations of all kinds by looking for the networks responsible for producing specific events, the overlaps among such cooperative networks, the way the participants use conventions to co-ordinate their activities, how existing conventions simultaneously make coordinated action possible and limit forms it can take, and how the development of new forms of acquiring resources makes change possible."³

The networks responsible for producing the residency at the Casa-Bar are several. Firstly, there is the network of the local professional/semi professional jazz scene from which players are recruited. This network yields a consistent range of musicians who would be available for the gig. R.J. plays regularly on this network as a bandsman rather than a bandleader and it is through his experiences on this circuit that he finds adequate personnel for his work in Switzerland. What is interesting to note are certain factors governing the selection of personnel for the first line-up in Switzerland. As it turned out, virtually all the players who came on the very first gig, apart from myself and the bass player, were all regular players in P.A.'s band. It was in many respects, therefore, a convention of reciprocity that P.A. was asked along with the rest of the players in his band to do the performances as well. In fact I distinctly recall my conversation with R.J. when he was describing the line up:

A. "What's the line up for the gig?"

R.J. "I think you know all the players on the gig. At least you've played with them once before locally. We'll have G.J. on guitar and banjo, and M.D. taking over from him half way through. There'll be T.T. on bass, whom you don't know, you and me and I've decided to have P.A. I've decided to have P.A. because he's given me so much work over the past few months."

One of the reasons for P.A.'s identity crisis in Switzerland was partially the fact that suddenly his status was reduced from band-leader to bandsman, and he now stood alongside all his former employees as an equal rather than as a superior. All the while he was in Switzerland he made the regular point: "these are my lads R.J. is using, and this is my band." It was a convention of professional etiquette, therefore, that R.J. immediately reversed his role when we returned to this country. On one particular occasion I was intending to book R.J. and His Jazzmen at a venue where we had formerly played with P.A. under the banner of P.A. and his Allstars. R.J. said we couldn't possibly do the engagement as R.J. and His Jazzmen, as this would be a profound violation of professional convention. This convention therefore created a constraint and consequently the convention created an alternative course of action. R.J. insisted that the only way we could do the gig at this particular venue (Bridge Street Arts Centre) was if we played another venue first which was unknown to P.A. and from there it would then be possible to claim that the band had been booked at Bridge Street Arts Centre as a result of this prior performance elsewhere. As it turned out the gig elsewhere was at Manchester but we didn't actually play at Bridge Street Arts Centre.

In this particular example of R.J. and His Jazzmen and P.A. and his Allstars, there is clearly an overlapping of networks which are beset with certain kinds of conventions. In particular, the sequence of events

illustrates how "existing conventions simultaneously make coordinated action possible and limit the forms it can take...." It was possible therefore for R.J. as a bandsman to recruit an entire band from the personnel involved with another bandleader. However, it was also necessary to recruit the bandleader as well. This created some status conflict in another country which was only barely tolerable and the conventions operating did in fact limit the forms in which R.J. could operate when he returned to this country.

Other networks responsible for producing the engagement at the Casa-Bar were the management and the barstaff each of which had some degree of control in levels of cooperation, in producing the actual event. The management created the terms and conditions of actual employment of the venue and the barstaff were a determining factor in the overall wage of the band. There were clearly points of conflict and mutual interest which enabled the residency to occur.

Convention and Constraint

Becker goes on to elaborate the way in which certain conventions restrict activity as well as enable its occurrence.

"Conventions place strong constraints on the artist. They are particularly constraining because they do not exist in isolation, but come in complexly interdependent systems, so that making one small change often requires making changes in a variety of other activities. A system of conventions gets embodied in equipment, materials, training available, facilities and sites, systems of notation and the like, all of which must be changed if any one segment is."³

The initial constraint I came up against when wanting to learn to play jazz was having been established in a Rock band. There was considerable opposition to the holding of joint identities in local semi-professional circles. However, as I pointed out, this was of no consequence or interest to professional musicians who simply wanted players who could do the job

for the fee offered.

Other constraints based on conventions were operative. In particular the actual musical format of traditional jazz had to be played in its original versions and the systems of notation had to be standardised where they were different. (see p.71 on methods of notation). One of the events which occurred in the second month which did seem to alter several things in the way that Becker describes was that the banjo player was a very weak soloist. This created a problem because it was a convention of the jazz format that many solos in many numbers were expected. The audience were also particularly responsive to the banjo and when the player concerned refused to play solos the bandleader had the bass player do long solos on nearly every number. Consequently R.J. gave the bass guitarist many more solo sections.

Other conventions, laws, or conditions of contract of employment created various constraints as well. There were many occasions for example, when R.J. was playing the piano between the hours of 12 p.m. and 2 a.m. and one of the musicians in our band or even a guest musician would have liked to accompany him. However, because of the licensing hours of the venue R.J. had to play acoustic piano unaccompanied. I strongly suspect that if there had been no licensing laws a "jamming" session would have occurred which would have lasted through the early hours of the morning.

Another constraint to which R.J. held the band quite rigorously, was overtime. On New Year's Eve which was the one occasion when the club was permitted a full live sound after midnight, the band were very keen to play, I suspect indefinitely. R.J. had contracted for one

additional hour and would not allow the band (much to the disappointment of both the band and the audience) to play beyond 12.15 a.m. This in fact caused tremendous irritation and ill-feeling between the audience and the players who, apart from R.J. were entirely in sympathy with them.

Becker claims that small changes within a system of conventions in one area will create the need for change in other areas. I think my fieldwork experience bears this out. In the traditional jazz outfit the musical ensemble is basically acoustic. However, in view of the ease of transporting electronic equipment (particularly in the case of electric bass) and achieving a greater variety of sound, electric instruments were incorporated into the traditional jazz setting. In some instances this caused volume problems, in that wind players played louder than usual in order to keep pace with the volume dimensions of electric instruments. Alternatively the use of electric equipment influenced the actual choice of material. There were more "mainstream" numbers included in the set than there would otherwise have been and we did in fact feature a funky version of a jazz number as a result of the electric bass. Further it was possible to do a few blues numbers which featured electric guitar. The presence of these electric instruments did go some way towards circumventing traditional conventions but my personal interest in electronic and funky developments in jazz did go some way towards actually bringing these numbers about. Another factor in persuading the other members of the band to do some blues and funky material was that the Castel Bar next door, where we usually ended up for a drink, always played piped-in funky jazz music.

CONCLUSION

In my view, Becker's overall perspective in his analysis of "Art as a Collective Action" has proved to be useful in that it has helped to

focus analytic attention on a range of factors which might have otherwise been missed. It seems clear that cooperative networks and conventions play a significant role in the production process and that the relationship between convention and constraint create systems of interrelationships which control artists as individuals and in groups. It does seem reasonably clear on one level that there are certain dimensions of convention which have specific location vis-a-vis the production of musical sound (e.g. the correct chords, bass lines, correct arrangements, etc.) as well as those conventions that have to do with personal feelings and expectations in a professional relationship (e.g. reversal of roles as bandleader and bandsman) as well as the practical needs and expectations of the venue in which one performs. Non-musical factors such as the latter can have as much to do with the final production of musical sounds as can the actual physical act of playing together.

It seems clear, however, that this multiplicity of factors is enormously complex and that any form of determinism would only restrict one's view of the totality of the musical project.

In the pages that follow I would like to investigate conventions created by legal structures which have influenced the creative process in songwriting. After this I will look in some detail at creative songwriting projects which have been influenced due to the increase of awareness of the legal structure facing the creative artist today. This awareness has also affected the attitude and outlook of the serious semi-professional band looking towards landing a management and recording contract. After investigating these areas in the next two chapters I will then discuss a semi-professional Rock band in a manner similar to

the work I have just completed. The analysis featured in that final chapter will be far more complex due to the fact that it is a forward looking original group. The jazz group, although technically and musically more experienced, restricted its creative expression to the spontaneity of improvisation in the appropriate area of the musical structure. The solo spot, as it were, was highly individualistic, but it did not create the same kind of political and legal problems as that of my second case study which attempted to write and market original material.

CHAPTER II - LEGAL FACTORS REGARDING OWNERSHIP OF ORIGINAL MATERIAL,
RECORDING AND MANAGEMENT OF CONTRACTS

Introduction

Christie v Davey

Copyright Law and the Musician

Instone v Schroeder Music Publishing Company Limited

Clifford Davis Management v WEA Records Limited

Page One Records and Another v Britton and Others

Denmark Productions Limited v Boscobel Productions Limited

Conclusion

Introduction

As mentioned earlier the investigation of the jazz group has been useful in trying out the research design as the factors to which the design is applied are somewhat less complex than those that will be taken into account in looking at the second case study - SP - a semi-professional Rock Band. The main reasons for this are due to legal developments over the past fifteen years regarding the law of copyright vis-a-vis songwriting and the recording of original material. As regards a jazz group like the one studied, the material recorded and played is unoriginal and therefore not subject to levels of negotiation in the group context as it is in those groups looking for a contract to record and promote original material. In this respect the semi-professional Rock Band which has as its goal a professional career, is a more complex group to study and we must therefore take into account additional factors. The actual factors involve the law of copyright and the creative songwriting process. Both areas of concern currently regulate many musical working relationships amongst semi-professional groups. For this reason I shall devote a chapter to each of these factors prior to presenting my final case study.

Another legal issue which affects the developments of semi-professional Rock groups is the law of nuisance regarding noise. This invariably affects the developments of repertoire since the ability to rehearse material is crucial. Bands which are restricted in this way are less likely to be prolific songwriting units. The decibel level of a rehearsing Rock Band can be an inhibiting factor in its success then

and consequently, unless there is some kind of sponsorship either in terms of an individual's home or a Pub or Club, Rock bands have difficulty in developing their repertoire to a marketable standard.

It is interesting here to note that in earlier historical periods even classical musicians had problems with regard to the noise of their profession. The very first case I will discuss, *Christie v. Davey*, illustrates the difficulty that even the most respectable and accredited professional musicians had in 1892. I will now describe that case in detail for several reasons. The first being that the case highlights an instance, where regardless of amplification and all the technological apparatus which surrounds the production of contemporary 'pop' and Rock music, the problem of the volume connected with the musician's craft of whatever style, has been a perpetual source of conflict. Furthermore, the case of *Christie v. Davey* illustrates something which is perhaps more important; that there are underlying judicial and social attitudes towards the production of certain kinds of musical sounds and, that there are overwhelming aesthetic prejudices which have been carried through the ages as to what has been classed as 'music'. That is to say, that in the absence of institutional credentials, such as degrees from academics of music, anything produced in the way of sounds was at one time classed primarily as noise. As I hope will be seen from the case as it unfolds, the prejudices which are apparent in the legal mind have in many ways diminished the bargaining power of popular musicians in the marketing of their craft. That because of the lack of an institutional framework to act on behalf of rock musicians, they have for some time been exploited without sympathy or respect for their abilities until quite recently when legal confrontations have

occurred to produce a new legal awareness of the value of their craft.

I shall now describe in detail the text of the case involving professional music teachers and performers, the Christie family and the opposing party living immediately adjacent, a Mr. Davey.

CHRISTIE V. DAVEY (1892)

In 1892, when music was still far from being amplified, a Mr. Davey found his neighbours, the Christies, who lived in the adjoining household, and were practising music teachers, to be a problem. Evidently, Mr. Davey found the actual sounds coming from the adjacent household to be very distracting and causing him disruption in his personal life. After some communication with the Christie family over a period of time he decided that the only way he could cope with the disturbance was to begin creating one himself. It was at this point that Mrs. Christie, a teacher of pianoforte, whose home and place of work adjoined that of Mr. Davey, filed for an injunction to restrain Mr. Davey from making annoying and interfering noises of a kind that were detrimental to the professional activities of the Christie household. Until this time the parties involved had been living side by side harmoniously until the arrival of a Miss Kennedy, a musician friend of the Christie family who added to the already lengthy schedule of practising. The activities of the Christie household, then, not only involved Mrs. Christie's lessons to pupils, but also, her son's late night practice of the violocello, her daughter's practice of piano and giving of violin lessons; and now, in addition, the practising of Miss Kennedy. Mrs. Christie's daughter and the friend, Miss Kennedy, were orthodox

musicians and were described as medallists of the Royal Academy. It would appear however, that despite such laudable qualifications, the defendant, Mr. Davey, had reached a critical threshold of tolerance for these activities. On the 30th of September, 1892 he wrote a letter of complaint to Mrs. Christie which I will quote in part:

"During this week we have been much disturbed by what I at first thought were the howlings of your dog, and, knowing from experience that this sort of thing could not be helped, I put up with the annoyance. But, the noise recurring at a comparatively early hour this morning, I find I have been quite mistaken, and that it is the frantic effort of someone trying to sing with piano accompaniment, and during the day we are treated by way of variety to dreadful scrapings on a violin, with accompaniments. If the accompaniments are intended to drown the vocal shrieks or teased catgut vibrations, I can assure you it is a failure, for they do not. I am at last compelled to complain, for I cannot carry on my profession with this thump, thump, scrape, scrape, and shriek, shriek, constantly in my ears. It may be a pleasure or source of profit to you, but to me and mine it is a confounded nuisance and pecuniary loss, and if allowed to continue, it must most seriously affect our health and comfort." (Christie v. Davey 1892 p.318)

The Christie household chose to ignore Mr. Davey's complaint and his unprofessional assessment of their talents. At a later stage Mr. Davey began to respond to the sounds coming from the Christie household with what he considered musical accompaniment. That is to say when he heard them practising he would knock on the adjoining wall, keep the beat on trays, whistle and shriek in a manner which Mr. Davey felt was imitative of the sounds coming from the Christie household. Mr. and Mrs. Christie then brought the matter to the attention of their solicitors. The Christies' solicitors wrote to Mr. Davey informing him that in their view his behaviour was retaliatory and 'outrageous;' that his so-called musical sensitivity was questionable, and that the original letter Mr. Davey had sent to the Christies was so insulting that it did not deserve a reply. Consequently, under threat of obtaining a court

injunction, the solicitor urged him to discontinue these activities as it was interfering with the Christies professional life. On the 13th of October, 1892 Mr. Davey replied to the letter of the Christie's solicitor's with the following text:

"Your favour of the 12th to hand in re Christie, in which you talk of 'outrageous systems of annoyance &c., hammering and beating trays &c.' This I emphatically deny. I have a perfect right to amuse myself on any musical instrument I may choose, and I am quite sure I should be the last person to do anything knowingly to annoy my neighbours. What I do is simply for recreation's sake, and to perfect myself in my musical studies. You express your opinion about my letter, which is quite contrary to my own. I see nothing coarse or insulting in it; but I look upon it as showing my desire to be on friendly terms with my neighbours, for I wrote in quite a jocular manner. However, each one to his taste. Your third paragraph questions my musical taste. Well I believe from my past musical training, that I am qualified to distinguish the difference between music and noise. Now, seriously I put it to you, is it not most excruciating to have constant repetitions of the five-finger exercises, and only receiving the higher notes of the vocal efforts? I do not for one moment think there are not gradations, but they don't reach me. I am quite thankful, I can assure you, for your eminently legal opinion as to your clients' non-responsibility for the thinness of the party wall..... It is my intention during these winter months to perfect myself on the following instruments - Viz., flute, concertina, cornopean, horn and piano, which my child is learning to accompany me. I used to play them at one time, both in a church band and an amateur troop; but I have been out of practice lately, but I hope soon to regain my former proficiency." (Christie v. Davey, 1892 pp. 319-321)

On the 20th of October a writ was issued whereby the plaintiff (Christie) claimed an injunction to restrain the defendant (Davey) from making any noise in a manner to annoy the plaintiffs. The action came to trial and in the judgment of the court, it was pointed out that:

"The plaintiff's family consists of the husband, who, perhaps fortunately for himself, is very deaf; the wife, who is admitted to be a skillful musician and an excellent pianist; and a daughter, a young lady who has received a good musical education and has taken a very good musical degree." (Christie v. Davey, 1892 p.324)

Subsequently it was determined that the amount of actual playing and practising was not excessive and within the rightful domain of gainful

employment. Consequently an injunction was granted to restrain the defendant Mr. Davey, from "making noises in his house so as to vex and annoy the plaintiff."

Concluding Remarks

It would appear from the text of this case that the extensive musical qualifications of the professionally trained musicians were a significant factor in the final decision. For this reason two issues here are at stake. One of them is the law of nuisance, and the other which is clearly embedded is some aesthetic valuation of music. For on the one hand, Mr. Davey insists that what is played in the Christie household is something less than music, e.g. "dreadful scrapings on the violin," "vocal shrieks," or "teased catgut vibrations." On the other hand, the plaintiffs insist that what Mr. Davey produces is still less valid as music, or rather that it is 'noise'. Now it would appear that Mr. Davey is being antagonistic and that the Christie's superior qualifications and degrees in music give their judgment as to what constitutes music far greater weight. However, it is perhaps this kind of judicial and social attitude toward institutionally accredited music and musicians playing other kinds of music. For years the majority of pop and jazz music was classified by the institutionalised musical establishment as nothing other than noise. To be sure, the noise of Mr. Davey in 1892 was far less distinguishable as a musical form than anything of the pop variety commercially available in the mid Twentieth Century. Nevertheless the weight of the musical establishment's criticism of so-called pop did much to discredit the practice of pop and jazz music as a legitimate professional occupation. A musician's status and viability were dependent upon demand in commercial terms alone.

There were no institutions or degrees to guarantee his craft. This is not to suggest that Mr. Davey was a budding pop musician held back from stardom; but rather that until fairly recently there was no institutional recognition of individual musical skill and consequently the pop musician had very little bargaining power when he entered into contractual obligations with publishers, management, and record companies. It was more often the case than not that management and recording contracts were so unfairly written that as soon as the musicians could afford to get out of them they did.

The combined judicial and social attitudes which have carried over from earlier historical periods may have been one of the factors which left unconventional musicians with very little leverage in the contracts over their work. Certainly, when various kinds of music boomed in popularity and recording companies and managements were fighting over the rights to the material of the artists, the highly disadvantageous position of individual musicians became very apparent to the legal profession. One consequence of well known test cases has been the systematic review of the law(s) of copyright as they relate to popular recording artists most notably in the field of Rock music.

In the pages that follow, I will discuss the law of copyright in relation to the legal structures within which the music industry operates to negotiate the mutual and conflicting interests of musicians, management and publishers. In this connection I will discuss several leading cases of contract law which illustrate judicial attitudes towards relations of musical production.

Copyright Law and the Musician

The law of copyright was ushered into its initial stages of existence, in this country in 1556, when by virtue of the Star Chamber Decree, the Chartered Stationers' Company was invested with constitutional powers to act on behalf of religious and secular institutions in the regulation and distribution of printed matter. Membership of the company was compulsory for all individuals connected with the printing trade which included bookbinders and booksellers. The company's role apparently was to register the 'right to copy' and control domestic and foreign distribution of any form of printed matter. The author's implied rights were comparatively insignificant although guaranteed by 'common' law. According to R.F. Whale in his discussion of the law of copyright:

".....copyright for some 150 years was quite simply the right to copy and, except for the implied right to publish, nothing else. It was accordingly not an author's right but a publisher's right, and indeed it was the booksellers (publishers) who created this right for themselves as a necessary protection for their business. It was this right that the Statute (Statute of Anne) adopted and limited in 1709, and although under that statute the author became entitled to hold copyright, the right protected was still essentially the publisher's right to copy." (R.F. Whale, 1970, p.18)

Copyright law, then, which appears to have been heavily weighted in favour of protecting the interests of publishers against financial loss rather than the authors* has led to interesting examples of exploitation of musicians by music publishers. The two cases I will now discuss were heard within weeks of each other in 1974. They are typical examples of publishing agreements offered to unknown artistes. The first case I will discuss is Instone v. A. Schroeder Music Publishing Co. Ltd.

CASE I - INSTONE V. A. SCHROEDER MUSIC PUBLISHING CO. LTD.(1974)

In the case of Instone v. A. Schroeder Music Publishing Co. Ltd. (1974)

* It is interesting to note in a comparative context that whereas English copyright law seeks to incorporate concepts of real 'property' and identifies the author's work as a separate entity with all the implications of commodity production, German and French copyright law aim at protecting the author's exclusive relationship to his work.

1 ALL ER a young composer of 'pop' music, Anthony Gordon Instone, (also known as Tony Macauley), the plaintiff, and his collaborator Mr. McLeod, approached Schroeder Music Publishing Co. in the hopes of getting into the production side of the record industry. In the course of their dealings with a Mr. Schroeder, the composer signed a contract assigning to the publishing company exclusive copyright 'for the whole world' in all existing compositions as well as works produced during a five year period. The contract further stipulated that the publishers would pay Instone the sum of £50 as an advance against royalties received by the publishers. If and when the £50 had been recouped through royalties the publishers then agreed to pay another £50 to Instone. Assuming all went well and an average of more than 20 transactions occurred per year yielding a total sum greater than £5000 over a five year period then the agreement would be automatically renewed. However, the publishing company was under no obligation whatsoever to publish the writer's works or take any steps to exploit the composer's material during the five year period. Consequently the only payment which Instone was guaranteed during the entire period was £50. Furthermore, the composer had no right, at the end of the five year period, to recover the copyright of a composition not used by the publishers. The inequitable conditions of this agreement were further compounded by the stipulations that:

- 1) the publishers could, at any time, terminate the agreement with one month's notice and
- 2) the publishers had the right to assign the entire agreement or the rights to any particular composition to any other party of their choosing.

These conditions were not reciprocal.

The court judged in favour of the composer on the grounds that there was unjustifiable restriction of trade in that:

- a) there was no obligation on the defendants to exploit anything composed by the plaintiff throughout the five year period and
- b) that the restrictions combined a total lack of obligation on the side of the publishers with a total obligation on the side of the composer.

In the words of the actual judgment:

"The contract was therefore restrictive of the ability of the plaintiff to turn to account his compositions to an extent and in a manner that was against the public interest...."
(Instone v. Schroeder, 1974, p.172)

A. Schroeder Music Publishing Co. appealed against this decision

and in the case of A. Schroeder Music Publishing Co. Ltd. v. A. Macauley the court ruled against the appeal.

REMARKS

The contract which the composer signed occurred without legal consultation. As we can see it was written entirely in favour of the publishers whereby they retained virtually complete control over the composer's material. In effect what this case exemplifies is a practice known as 'shelving.' The combined effect of being under no obligation to 'exploit' or 'place' the material on the market along with the proviso that the publishers could restrict the artists from going elsewhere to sell his material is indirectly, a method by which a publishing company takes material off the market or figuratively speaking - puts it on the shelf. In effect, this technique has been used as a device, for a long time, to reduce competition in critical areas of the music business. With such methods recording and publishing companies have been able to back more than one horse as it were, and then shift the bet to the winning runner or effectively eliminate competitive opposition from the race.

Musicians at this particular point in time had very little awareness

of contract law or the more complex aspects of business organisation vis-a-vis the recording industry. Consequently, many talented and creative musicians had careers destroyed or held to a virtual standstill. The Musicians Union, however, has taken active steps to publicise a general legal knowledge of business practice in this area and most professional musicians today acquire legal representation in all negotiations of contracts. Further it has been through the periodic links between semi-professional musicians that a greater awareness of the legal implications has been aroused. This awareness, as I hope to show later, has had considerable impact on the attitudes of musicians towards songwriting and the structure of actual musical groups.

I would now like to discuss another case of a similar type which occurred only one week after the previous case was heard by the court of appeal. The fact that both cases occurred within such a short space of time along with this second case involving a very well known group 'Fleetwood Mac,' brought considerable public and professional attention to the matter of contract law and the law of copyright. The first case I discussed illustrated how a songwriting contract constrained the artist and was deemed by the judiciary to be 'restrictive of trade.' The second case illustrates an example of an infringement of copyright, however this time involving a combined publishing and management agreement.

CLIFFORD DAVIS MANAGEMENT LTD. V. WEA RECORDS LTD. AND ANOTHER (1974)

On the 27th of September, 1974 a writ was issued on behalf of the plaintiffs Clifford Davis Management Ltd., bringing an action against WEA Records Ltd., and CBS Records Ltd., claiming an injunction restraining the defendants from infringement of copyright in the compositions of Anne

Christine McVie and Robert Lawrence Welch - two members of a pop group known as 'Fleetwood Mac'. The record entitled "Heroes are Hard to Find" was released in the United States and sold 150,000 copies. The album in question combined 11 compositions by McVie and Welch. The defendants, WEA and CBS Records sought to distribute the album for sale in England. An interim injunction was granted on the 8th of October, 1974. The defendants appealed against the injunction which was discharged according to the judgment of Lord Denning MR. The conditions of this case were not dissimilar to the one previously discussed, *Instone v. Schroeder Music Publishing Company*. Again, this particular case, *Clifford Davis Management Ltd. v. WEA Records Ltd.* originates in an unfair copyright agreement.

Initially, Clifford Davis who formed himself into the limited company: Clifford Davis Management Ltd., was engaged by written agreement to act as agent and manager of the pop group 'Fleetwood Mac' of Fleetwood Mac Promotions Ltd. In January of 1971 Clifford Davis Management Ltd. secured a publishing contract with two of the group members: Anne Christine McVie and Robert Welch. The publishing agreement was a professionally prepared document of a standard format which the individual musicians signed without having received independent legal advice. The agreements gave Clifford Davis Management Ltd. English and world copyright in any composition throughout a five year period - renewable for a further five years at the publisher's option. An initial consideration of one shilling was to be paid for each composition with additional royalties payable for those works Clifford Davis chose to exploit. Yet he was in no way bound to publish any of the work submitted. It was agreed that Anne

Christine McVie would produce at least one composition per month which could be rejected without payment, at the discretion of the publisher. Furthermore, the management had the right to assign the copyright of the works to any third party.

The group became successful and did several tours of America. However, personal disagreements between Clifford Davis and the group eventually led to their disassociation. Clifford Davis Management Ltd. subsequently assembled a completely new group of five musicians which he promoted on tour in America under the same name 'Fleetwood Mac'. The original group brought an action against their former manager, Clifford Davis, and were granted an interim injunction restraining Clifford Davis from promoting a competitive group under the same name. Subsequently, the original group worked for new management in America and produced the aforementioned record album entitled 'Heroes are Hard to Find.' Upon the album's intended release in England, former manager Clifford Davis tried to retaliate, as one might expect, and proceeded to invoke the original publishing agreement claiming that his company was entitled to copyright of this album despite his now lack of professional involvement with the group. Nevertheless he succeeded in obtaining an interim injunction preventing the distribution and sale of 'Heroes are Hard to Find,' in England. After an unsuccessful attempt to have the injunction discharged, the original 'Fleetwood Mac' sought to overrule the injunction in a Court of Appeal. In October of 1974 it was determined in the judgment of Lord Denning that:

"The agreement is of the same class as the agreement considered by the Court of Appeal in *Instone v. A. Schroeder Musical Publishing Co. Ltd.* and by the House of Lords last week. (*Macauley v. A. Schroeder Publishing Company Ltd.*)"
(*Clifford Davis v. WEA Records* 1974 p.239)

Hence, in a similar context to *Instone v. A. Schroeder*, the contractual restrictions were considered to be unjustifiably restrictive of trade in that the agreement required exclusive obligation to one individual over a 'long term of years'. The critical features of this inequitable agreement are summarised in Lord Denning's judgment.

".....1) That the terms of the contract were manifestly unfair. Each composer was tied for ten years without any retaining fee and with no promise to anything in return save for a promise by the publisher to use his best endeavours. Such a promise was so general as probably to be of little use to the composer.....2) That the property (the copyright in every one of the works over ten years) was transferred for a consideration that was grossly inadequate. It was one shilling for each work. It is true that if the publisher chose to exploit a work, he was to pay royalties but if he did not do so, he got the copyright for it.....3) That the bargaining power of each of the composers was gravely impaired by the position in which he or she was placed vis-a-vis the manager4) That undue influences or pressures were brought to bear on the composers by or for the benefit of the manager. The manager did not condescend to say how the agreements came to be signed. But from the internal evidence much can be inferred. They were cyclostyled and hence came from a stock of forms. They were very long and full of legal terms and phrases. Hence they were drawn up by lawyers. Some spaces had been filled in by typewriters, others left blank. Hence done by clerks in the office. Both the composer and the publisher signed in the presence of the same witness. It may be inferred that the manager took a stock form, got the blanks filled in and asked the composer to sign it without reading it through or explaining it. One thing is clear from the evidence. The composer had no lawyer and no legal advisers. It seems to me that if the publisher wished to exact such onerous terms or to drive so unconscionable a bargain, he ought to have seen that the composer had independent advice.

For these reasons it may well be said that there was such inequality of bargaining power that the agreement should not be enforced and that the assignment of copyright was invalid and should be set aside." (*Clifford Davis v. WEA Records*, 1974, pp.240-241)

As can be seen this far, the popular musician has been ensnared in a variety of agreements which are clearly unbalanced from the point of view of fairness to the artist. This has to some extent been a result

of conventions established in the original laws of copyright which assign the ownership of intellectual property in real economic terms, to the publisher rather than the author. This goes some way to explaining the expectations of Publishers, and in some respects it has set the trend for management agreements as well. One might assume, the musical project, in the eyes of management, is more or less viewed as a form of property potentially yielding a return of the principal investment. It might also be argued that this view is not entirely unreasonable given the technological developments of sound and light production which have made the promotion process of 'pop' groups progressively more capital intensive. From the standpoint of individual musicians however, these aims, which are partially of mutual interest, may well conflict with a broad range of professional opportunities relevant to the goals of artistic development rather than in the interest of mutual financial gain; alternative opportunities may present themselves which are financially advantageous only to the artist. Consequently the musician's contract with management is now facing a great deal more scrutiny than in previous years. Furthermore, the publicity surrounding these events has made the professional musician all the more aware of his legal position. This has produced some degree of reaction in the management sector.

In many instances management seek to eliminate opposition to their control by signing up members of a given group on totally independent contracts rather than on a group basis. In this case each musician must negotiate on his own behalf rather than on the strength of the entire group and it is easier for management to limit claims and conditions on a sort of divide and rule basis. It is my general view, although further

research is needed here, that this newer approach may be of benefit to management initially, however, all too often it leads to the break-up of the band. The unequal terms upon which each musician is individually signed can instigate a breakdown of a good working relationship. In one example a nationally known band were signed on a group contract basis so that each player benefitted equally from royalties of any song published and recorded. From a group point of view each member felt at ease to contribute musical ideas freely for the benefit of the entire musical project. In later years, however, when management of the group changed hands, they were signed individually and solely for their independent musical contributions. This, of course, led to immediate conflict over the ownership of songs and consequently members of the band began to work separately. Furthermore, each player would be obviously, financially motivated to want to feature as much as possible of his original material on forthcoming recordings so as to collect the greatest possible share of royalties from record sales. The musicians would argue as to whose material was best, each making grandiose aesthetic claims for the superiority of their own material, whilst emphatically denying financial incentives. Ultimately the conflict would yield a deadlock which would leave the group suitably vulnerable for management to intervene and take a decisive role in the conflict.

In the case of this aforementioned band which had switched from a group contract with split royalties to individual contracts, the lead guitarist/vocalist and the saxophone player/vocalist monopolised the majority of the writing until the bass player eventually came up with a song which the band agreed to do - it was very successful and reached the top ten in American music charts. However, this success created great

disturbance within the band. The bass player's role suddenly reversed from that of being a backing musician to that of being a front man. The band of course objected and he eventually left to form a band of his own. Replacement auditions were held and bass players from semi-professional Rock bands were potential candidates. Although the replacement player eventually selected was already professional and working with another band, the interaction that this professional outfit had with members from the semi-professional circuit brought the subject of copyright, songwriting and royalties to the forefront of discussion on the semi-professional scene.

My major aim here has been to illustrate to what extent the action and reaction of management in the area of professional music can upset or establish conventions which in some instances affect the attitude and group interaction on the semi-professional scene. This I will discuss in a later chapter in greater detail, however I would like to continue now with my discussion of legal cases in order to illustrate another dimension of management control - the personal service agreement.

Page One Records and Another v. Britton and Others (1967)

Another level on which the management side of the music business seeks to restrict and control the musicians is through personal service agreements. Here control of musicians is achieved through the role of agent and personal manager. An interesting case in this context is the case of Page One Records Ltd. and Another v. Britton and Others (trading as "The Troggs") and Another (1967) 3 ALL ER. This particular case features a personal management contract in which a group known as "The Troggs" signed an agreement in February of 1966 appointing

Larry Page of Page One Records to manage all affairs relevant to their professional careers. A term of the contract was that The Troggs would not engage any other person, including themselves to act as manager or agent. The agreement also stated that the plaintiff Larry Page, would be paid a commission of 20 per cent, of all money received by the Troggs throughout the period of the contract. Several months later in May of 1966 an additional recording contract and copyright agreement was signed with the plaintiff. The Troggs were to receive 20 per cent royalties. Subsequent to this a 3 year publishing contract was signed with Dick James Music Ltd. assigning first option of world copyright on all musical compositions. The Troggs then became very successful. Approximately one and a half years later "The Troggs" became interested in new management. In their efforts to extricate themselves from the management and publishing contracts they informed Page One Records Ltd. via their solicitors, that they were in breach of contract on the ground that The Troggs had not been made aware that there was a business connection between management - Page One Records Ltd., and publisher - Dick James Music Ltd. As it was the intention of The Troggs to enter into contractual obligations with Harvey Block Associates Ltd. in a way that was in breach of the agreements with Page One Records Ltd., the plaintiffs began action against The Troggs and motioned for an interlocutory injunction restraining The Troggs from engaging new management.

The legal action against The Troggs is essentially a response to the breakdown of a personal services agreement. Hence, the matter falls within the area of contract law. The remedy prescribed by a court of law is either to award 'damages' i.e. financial remuneration,

or an injunction restraining either parties from entering a service agreement with someone else. As a general rule the courts will not enforce a personal service agreement where either party no longer wishes to be held by it. In the more traditional terms of legal description, the courts will not grant an order for 'specific performance' of 'positive covenants' in contracts for personal services. Cheshire and Fifoot's Law of Contract (8th edition) clarifies the judicial outlook:

"Since it is undesirable, and indeed in most cases impossible to compel an unwilling party to maintain continuous personal relations with another, it is well established that a contract for personal services is not specifically enforceable at the suit of either party." (Cheshire and Fifoot, 1979, p.608)

This general view leads to another important point relevant to this case. That is, the relationship between 'negative stipulation' and 'positive covenants.' Contracts are generally two dimensional in that they contain 'positive covenants' - obligations to be fulfilled; and 'negative stipulations' - restrictions imposed upon either party; usually limiting their involvement with third parties. The most common form of a personal service contract is marriage. Since the court will not enforce personal service contracts, they will also not enforce 'negative stipulations' which indirectly coerce a party to fulfill a personal service contract he or she no longer wishes to perform. In the case of THE TROGGS, Page One Records persuaded the musicians to sign contracts with two negative stipulations relevant to the case.

- 1) that they would not engage any management other than Larry Page
- 2) that they would not manage themselves.

Hence, in the judgement of the court it was shown that the 'negative

stipulations' of the original agreement were indirectly coercive in the manner previously mentioned. To wit:

"For the purposes of consideration of equitable relief, I must, I think, look at the totality of the arrangements, and the negative stipulations on which the plaintiffs rely, are, in my judgment, no more or less than stipulations designed to tie the parties together in a relationship of mutual confidence, mutual endeavour and reciprocal obligations." (Page One Records v. Britton 1967, p.826)

However, injunctions in cases of personal service agreements are additionally considered on the basis of a still broader legal principle which takes into account whether the defendant who is restrained by an injunction is indirectly coerced, by threat of penury, to continue working for a party with whom he no longer wishes any further association. Cheshire and Fifoot summarise the matter as follows:

"If for instance, A agrees to give the whole of his time to the services of B and not to serve anybody else in any capacity whatever, an injunction will not be granted, for its inevitable result would be to compel A to work for B or otherwise starve." (Cheshire and Fifoot, 1979, p.610)

In the case of The Troggs this broader rationale for refusing the injunction did seem to apply. Evidently the plaintiff Page One Records Ltd. made a point of the naivete, inexperience, and simple mentality of The Troggs and their consequent need for supervision and management. The court took judicial note of this fact and it was partially on this basis that the injunction was refused. I quote from the text of the judgement.

"Indeed, it is the plaintiffs own case that The Troggs are simple persons of no business experience, and could not survive without the services of a manager. As a practical matter on the evidence before me, I entertain no doubt that they would be compelled, if the injunction were granted on the terms that the plaintiffs see, to continue to employ the first plaintiff as their manager and agent." (Page One Records v. Britton, 1967 p.827)
Consequently, it would appear that the court dismissed the injunction

on the grounds that The Troggs would be indirectly forced into a

relationship of an undesirable and highly personal nature due to the facts that:

- 1) the injunction would prevent The Troggs from undertaking alternative management, or from managing themselves, and
- 2) that in the face of these closed options, their simple mentality, lack of business experience and general need for supervision would give them no alternative, from the standpoint of survival other than to remain with Page One Records Ltd.

It seems apparent from the proceedings of this case and others that financial arrangements based upon personal service agreements are to some degree uncertain. Apart from the undesirability of enforcing such an agreement unsatisfactory to either party, it would be extremely difficult for a court of law to supervise such a relationship; particularly if it is of a highly personal nature.

As mentioned earlier, one of two remedies are available for breach of such agreements: 1) damages e.g. financial compensation, or 2) an injunction restraining the party from entering a similar agreement with others. The latter, course, however, may be seen indirectly to coerce a party to remain bound to the plaintiff who anticipates profit from the continued association. The judicial attitude here is quite unsympathetic. Alternatively, an entrepreneur may seek an injunction in order to protect expected profits based upon earlier joint business activities which may be jeopardised if the defendant party enters into association with another party which will be competitive with the plaintiff's and defendant's original joint venture. The judicial attitude in these circumstances seems to be substantially more sympathetic vis-a-vis awarding an injunction. In the case of Warner Brothers Pictures Inc., v. Nelson (1936) Warner Bros. was awarded an injunction preventing film actress Bette Davis from appearing in another film production. The injunction was awarded partially on the basis that Bette Davis might

appear in competitive films at a time which would depreciate the value of previously made Warner Bros. films that were in the market for sale or hire but had not yet been shown.

Concluding Remarks

This then is a further example of the way in which management has played a fairly important role in the musical project. It is worth noting that the level of involvement and financial remuneration in this capacity is somewhere equivalent to the earnings of the actual band member. In effect the personal manager is like an additional member of the band.

I would like to point out at this stage that the kind of group contract offered between a band and management would imply to a greater or lesser degree a personal services agreement between the actual musicians themselves. That is to say that each musician is very much tied to playing with each other exclusively unless special permission is granted to undertake work with another band. This kind of contractual arrangement, not entirely unlike marriage, places a great amount of emphasis on maintaining the quality of the personal relationships within that working group. This is one reason why even successful groups who have been together for a long time apparently undergo intense periods of hostility. In some instances when the personal relationship breaks down irretrievably the personal services agreement must be terminated even though such an action may cause serious financial loss.

The frustration created by restriction of musical interaction with third parties may lead members of a professional group to seek some kind of outlet on the semi-professional scene on a strictly casual basis. This kind of activity which occurs often in the form of 'sitting-in' or 'jamming' creates lines of communication which significantly influence the semi-professional music circuit.

The case I have just discussed illustrates the judicial attitude towards personal service agreements involving musicians and management.

One feature of the case was that there had been a deviously contrived connection between management and publishers which was unknown to The Troggs (or perhaps it would be more realistic to say - not understood by The Troggs.) In this next case I will discuss a similar disagreement involving a connection between management and publisher.

CASE 4 - DENMARK PRODUCTIONS LTD. V. BOSCOBEL PRODUCTIONS LTD. (1968)

This next case involves the principal instigator of the events in the case of The Troggs - Larry Page. He appeared in court once again through his involvement with the well known pop group "The Kinks." This case shows, among other things, the critical ties between management and publisher through copyright agreements. In the case of Denmark Productions Ltd. v. Boscobel Productions Ltd., the pop group The Kinks were embroiled in a battle between themselves and Larry Page through various levels of management and publishing contracts. Originally, two entrepreneurs, inexperienced in the pop industry became interested in managing a then unknown pop group called The Kinks. In view of their inexperience they involved the comparatively more experienced Larry Page who was, at that point in time, employed by a large American publisher of pop music, headed by Edward Kassner, and called the Edward Kassner Music Publishing Corporation. In 1963, Edward Kassner and Larry Page formed the plaintiff company, Denmark Productions Ltd. through which Larry Page conducted all his activities. In 1964, Wace and Collins, the original entrepreneurs, formed the defendant company, Boscobel Productions Ltd., and contracted with The Kinks to be their 'Personal Managers' entitling them to exclusive publishing rights and 40% of the group's gross earnings. On February 26,

1964, an agreement between the plaintiffs, Denmark Productions and the defendants Boscobel Productions Ltd., provided that:

"(1) The (plaintiffs) will through Mr. Larry Page, one of its directors act jointly with the (defendants) as manager of The Kinks in the same manner and to the same extent and subject to the same liabilities as if the (plaintiffs) had joined in the said three agreements as a manger jointly with the (defendants). (2) This agreement shall subsist for the duration of the said agreements. (3) The (defendants) shall during the subsistence of this agreement pay to the (plaintiffs) by way of remuneration for their services hereunder 10 per cent of the gross earnings earned by The Kinks from all sources..... (6) The (defendants) hereby assign to the (plaintiffs) all their rights of placing any and all musical compositions or lyrics for musical compositions that are written wholly by The Kinks or by any one or combination of them."(Denmark Producatons v. Boscobel Productions, 1968, p.845)

In effect, Larry Page, through Denmark Productions Ltd., agreed to act as personal manager for the pop group, an area in which Wace and Collins had no expertise, for 10% of the gross earnings and the right to assign or place all musical composition to a publishing company. The idea was for Page to channel all the publishing rights to the Edward Kassner publishing company of which Page was an employee, and the head of which, Edward Kassner, was Page's partner in the plaintiff company Denmark Productions Ltd. There was however, the possibility of indirect profit to Denmark Productions Ltd., if the Kassner Publishing Company enhanced the group's reputation through its efforts.

"All his (Raymond Davies, leader of The Kinks) compositions were handed over to the Kassner organisation in accordance with Mr. Page's obligation to his employer Kassner, and it was significant that Mr. Page's remuneration for that activity was largely increased in August, 1964." (Denmark Producatons v. Boscobel Productions, 1968, p.845)

This agreement obtained for some time during which The Kinks became quite successful earning a gross salary of £90,000 per year and a world-wide reputation. However, despite such notable achievements there

was considerable personal tension within the group itself, and in particular between Raymond Davies, singer-songwriter of the group itself, and their personal manager, Larry Page. During a peak point of The Kinks' career while engaged in an important tour of the United States, there occurred a substantial breakdown between management and The Kinks. I quote the following passage from the text of the court proceedings issued in a statement of facts from the judgment of Harman L.J.

"In the early part of 1965 it was proposed that The Kinks should undertake a tour of the United States of America. They were advised that such a tour was immensely important to them, the American market being far the biggest outlet both for performances and for recording. Kassner, in particular, was in favour of the venture because it would enhance his publishing profits. There had been, however, great stresses between the members of the group (on one occasion there had been a fight on the stage in Cardiff), who behaved in a thoroughly prima donna-ish manner and it needed all Mr. Page's tact and care to keep it together. He did, in the early days anyhow, the lion's share of the promotion activities, the defendants attending to the book-keeping side. Raymond Davies was unwilling to go to America, but was eventually persuaded by Mr. Page to go on the footing that Mr. Page himself should go as personal manager. Apparently, on a foreign tour young pop musicians took with them not only a tour manager, who acted as a kind of courier, but also a personal manager, who was there to look after them in their personal difficulties, to smooth over the troubles arising from day to day, to collect money at the box office, to ward off the dragons of the revenue, to see that the programme of engagements was either kept or cancelled as the case might be, and generally to act as a kind of guide, philosopher and friend to the members of the group.

Mr. Page was anxious to go on the tour, having possibly in his mind that he might pick up other business there; that was in fact what he did, as he was entitled to do, The Kinks having no exclusive rights to his services. It was agreed between him and the defendants after some discussion that he, rather than they or some nominee of theirs, should perform this most important task.

The tour was planned to last from June, 28, 1965 to July 10, 1965, and was of a most arduous nature, involving a number of one-night stands and, in particular, three days at Los Angeles.

Things did not go at all smoothly and the tour was afterwards described by Mr. Page in a trade paper as having been a disaster, but the judge's impression was that on the whole it did not go too badly. Raymond Davies was particularly unhappy and demanded that his wife should be flown out to help and comfort him and that was arranged by Mr. Page by cable and she arrived on the night of July 3 at Los Angeles. Mr. Page in the meantime had decided that his other activities made it desirable for him to return to England. On July 3 he told the other members of the group of that, but not Raymond Davies. He gave as his reason that that would only produce an outburst of temperament by that young man. He, therefore, departed on the morning of July 4, just before the group were due to take an aeroplane to San Francisco, where the remaining activities of the tour were to be performed. His departure was a great shock to Raymond Davies, who relied on the advice and countenance of Mr. Page in his distress, and the whole group held an indignation (sic) meeting on the airfield on the morning of July 4 and then and there decided to have no more to do with Mr. Page and to get rid of his services if they could. The question whether any of the group objected to Mr. Page's departure when he told them of it was not explored at the trial except with Michael Avory who said that he had no objection because he thought that Mr. Page had important matters pending in London. The judge found that Mr. Page left for some private reason which he had not revealed." (Denmark Productions v. Boscobel Productions, 1968, pp.845-846)

Subsequently when the group returned to London they engaged Wace, of the defendant company, Boscobel Production Ltd., to act on their behalf in helping The Kinks to extricate themselves from legal ties with Larry Page. Wace organised a solicitor who encouraged The Kinks to repudiate their agreement. This move, on the part of Wace, was, as we shall see, a significant intervention complicating the termination of the contract binding Larry Page to The Kinks.

On September 2, the solicitor representing The Kinks sent a letter to the plaintiffs, Denmark Productions Ltd., expressing The Kinks' dis-satisfaction with Larry Page and their intention to have no further dealings with him. The solicitor claimed, that The Kinks were unaware that Boscobel Productions Ltd., had assigned to Larry Page via Denmark Productions Ltd., both composer's and management rights under the

agreement of February 12, and that these agreements were not binding because The Kinks were "infants." This claim was not accurate. A copy of the same letter was sent to Boscobel Productions Ltd. terminating the agreements of February 12, 1964. However, in the copy of the letter to Boscobel Productions Ltd. a statement was added suggesting that a new contract with Boscobel Productions Ltd. be drawn up assigning full management and publishing rights to Boscobel and renouncing any obligation to Larry Page. Consequently, Denmark Productions Ltd. threatened legal action in the event of a breach of contract. Subsequently, Boscobel Productions Ltd. informed Denmark Productions Ltd. that The Kinks had now terminated the original contract linking the two companies and that furthermore, they had now renegotiated a new contract which excluded obligations to Denmark Productions Ltd.

Denmark Productions Ltd. received no payment after June, 1965 and they filed for an injunction restraining Boscobel from placing the rights to compositions with anyone but themselves. They also claimed for the original 10% management fee. The court, however, dismissed the injunction on the grounds that the contract between Boscobel and Denmark had been 'frustrated.' That is to say that since the original contract between The Kinks and Boscobel Productions Ltd. had been terminated (due to The Kinks refusal to have any further association with Larry Page) the related contract between Denmark and Boscobel could no longer be fulfilled. However, the 'doctrine of frustration' only applies when the performance of a contract becomes impossible through factors for which neither party was responsible. Consequently, on appeal it was determined that the doctrine of 'frustration' did not apply because in fact, the defendants had assisted in terminating the contract when Wace, of Boscobel Productions Ltd. had intervened, introducing The Kinks to a solicitor for the purpose

of repudiating the original agreement in order to eliminate Larry Page. Further to this, the appeal decision awarded Denmark Productions Ltd. 10% (the usual management fee) during the period of June, 1965 to September, as damages for wrongful dismissal as co-managers. As far as the injunction restraining Boscobel Productions Ltd. from assigning publishing rights to anyone but the plaintiffs was concerned, this was again dismissed as the claim for these rights were of benefit to a third party (the publishing company of which Kassner was the head and Page the employee) and not of direct benefit to the plaintiffs in their form as Denmark Productions Ltd.

The case between The Kinks and Larry Page illustrates, through the text of this case, the role played by management. Essentially there are two functions: The role of agent and the role of personal manager. The agent's role, apart from keeping the group name as well known in professional circles as possible, is to be a clearing house for all enquiries concerning the group, to accept bookings selectively, to negotiate fees and generally deal with any problems arising in the terms of the contract and negotiations with managers of venues. The other role of personal management service, such as Larry Page has been involved in vis-a-vis The Kinks and The Troggs, involves taking charge of a group's entire career, recording dates, contracts and all manner of personal difficulties that may occur in the band. For this extra service they claim a considerably larger percentage of monies earned.

Conclusion

The various cases I have discussed employ doctrines of 'frustration', 'undue influence', 'restraint of trade', and the law of 'copyright' in negotiating the conflicting interests of musicians and management. In an overview, it would appear, in some fundamental respect, that the aims of management have been to divest the artist of rights and control of his work, so as to ensure a return on their investment. Hence, in some superficial way the relations of musical production seem to encourage a view of the performing artist, in this context, as some kind of private property owned and displayed for profit. This characteristic of the relationship between musician and management is partially held in check by legal constraints. There is perhaps another, less obvious factor which militates against the total ownership of the music and musician by management. This, I think is in the nature of the art form's necessity for an almost ritual event of the 'live' performance. Although the musical product yields its greatest source of income in recorded and written form, its authenticity, or validity is very much dependent upon the music being on view in the live performance. In this context the musical product is being produced and consumed in the same moment; there is an inextricable association between the musician and his music. Consequently the entrepreneur has difficulty in entirely alienating the musician from the product of work.

Finally then, the areas of commercial law relevant to musicians more or less stipulate limits as to how much of an artist's rights over his 'intellectual' property can be taken in exchange for capital. It would appear that over the past decade the courts of law have taken an increasingly sympathetic view. Certainly the Musicians Union has played

an important role in advising and informing contemporary musicians of their rights. As a consequence of many court decisions current management and publishing contracts now require independent legal advice for all musicians before final commitment.

This series of legal confrontations has consequently created new conventions regarding the expectations and obligations between contracted parties with regard to songwriting. This has consequently affected the attitude of professional and semi-professional musicians towards the songwriting process which I would now like to discuss in some detail. Subsequent to this I will then look at the operation of a semi-professional Rock group which contains an interesting mixture of amateurism and professionalism.

CHAPTER III - SONGWRITING

Songwriting Project I - GR, A Semi-professional Rock Band

Songwriting Project II - SP, A Semi-professional Rock Band

Songwriting Project III - A Songwriting Partnership

Summary of Songwriting Project III

Conclusion

CHAPTER III

SONGWRITING

SONGWRITING PROJECT 1A Semi-Professional Rock Band - GR

To begin with, I would like to classify this particular songwriting group GR - as a serious semi-professional group. By this I mean that kind of group which seriously seeks a professional musical career performing and recording original material. In my experience I have found that the majority of groups which fall into this category adopt a model - an already existing professional group which provides stylistic reference points to copy. Although the intention is to use the model as inspirational, many groups make the mistake of copying too closely.

This particular unit tended to write songs in a group as a whole although with more ceremonial and ritual rather than practical input on the part of the majority of the players. Technological devices were very influential and were strongly featured in the songwriting process as I will now illustrate.

Songwriting always began with an evening spent with the group listening to Genesis - the model group. We would assemble at the synthesiser player's house and sit in a very small room with low lighting. The wall shelf featured a range of sound equipment including a record deck, reel to reel tape deck, and cassette deck. These units were linked in a sequence so that at the touch of a switch it was possible to change the music from either the disc recording or to tape recordings. It meant immediate comparisons of mood and feel and technical structure. The beginning of the evening was then spent shifting from one sound to the other in sometimes erratic but sometimes

systematic fashion. The procedure generated ideas. One tape would carry a new recording of interest to the band; the other a recording of the band itself in a live performance situation, and the disc would represent yet another musical development the band wished to incorporate into its style. The process was somewhat like a kind of lateral musical thinking.

After about 45 minutes of this the guitarist would then pick up an acoustic guitar and begin to play out a series of chords. A few of them may have been copied from the segments of music we had been listening to but they were never played in any recognisable sequence. At this point another guitarist would join in and they would try out a few melodic ideas which would eventually be used to create a number. The rest of the band would sit and listen. Everyone was expected to attend these ritual sessions including the road manager, lighting crew, and sound mixers. Regardless of musicianship all present were encouraged to pass judgment. Eventually a musical dialogue would occur between the guitars. For every sequence of chords one guitarist came up with the other would try to continue the melodic flow as if to complete a musical sentence. People in the group would pass comments of an encouraging or critical nature. This might go on for $\frac{1}{2}$ an hour in the most casual sort of way with lots of distractions like cups of tea, toast and horseplay. Then if nothing particularly inspiring came out of it someone would start playing the music tapes again.

The process would alternate until some kind of consistent sequence of chords emerged which eventually created some form of a structure. Then the vocalist would be asked to try to sing a melody line over the chord sequence. They would ask me to tap a rhythm. The guitarist would often

hear a series of drum fills in his mind which he would sing to me spontaneously while this event was ongoing. This process might occur several times before a song was put together. The first session always involved the entire group. The second session only involved the musicians. The third session again, included the entire group.

The songwriting sessions were as much a creative experience as they were a confirmation of individual commitment to the group. Over a period of months the attendance of group members was seen as a barometer of enthusiasm for the material that was being written. Individual musicians did not have the desire to write alone. If group morale was low new material was not written.

The next phase of the songwriting process involved commitment to a chord structure and a melody line. This was always a very critical stage in the development of the number. Invariably there were a variety of sequences which didn't always fit together - almost like sections of different songs with complete changes in rhythmic and melodic feel. Somehow they needed to be linked together and the very first attempts to do so was in the lyric. Band members took it in turns to write the lyric. The actual content and shape of the lyric would rarely, if at all, develop in relation to the actual musical sounds established thus far. Further, the lyric was invariably professed to be the contents of a dream. This was an acceptable creative format in which to work. It was immaterial whether or not the lyrics were in fact really dream content. However, it was easier from a creative point of view to reject or alter lyrics without offending the 'dreams' as it were, because after all, - it was only a dream. No real responsibility for the lyric content was ascribed to the individual. It helped to preserve

the aura of creativity being semi-religious; sent from above. The writer was merely expressing the vision sent - anyone was entitled to receive visions.

When the lyric was presented handwritten on paper it was passed around the group. Comments were exchanged and details as to where and when the dream occurred were always noted. It was accepted that a day dream was on a par with a night dream. The dream lyric almost always dealt with motorbike heroism, rebellion against rigid expectations of working life, or dissatisfactions with family life.

At this stage, usually while everyone in the group was scrutinising the lyrics, the vocalist would try to fit various lines of the lyric to the music. The music established thus far was never altered in favour of the lyric. The lyric was always changed in order to fit the melody.

The central idea or meaning of the dream passage was always considered of crucial importance and although the lyric might have needed changing the central meaning was preserved. This practice was, as I was later to discover unusual as far as songwriting projects went. In most other experiences, 'meaning' or the 'idea' was always subservient to the music. In this particular group however, meaning was of prime importance. One explanation for this was the style of music the group chose to work in, which to some extent produced segments of melodic themes held together by a stock of guitar phrases providing links between what often appeared to be completely different songs. Remembering the changes required concentration. From the audience point of view the musical and lyrical meaning only came through after many listenings. The music was not danceable and was generally written to appeal to a sit down audience. The thread of meaning therefore was often the only method of demarcation

of individual songs. Very often, members of the audience who weren't entirely familiar with the material would say they weren't sure where one song ended and the next began. One comment passed to me was that the entirety of the live performance seemed to be one long number. Hence the meaning or the end of the idea, as it were, was one important point of demarcation.

The music was always highly structured with dynamic changes in rhythm and melody. Further, the song idea was always physically, dramatically or theatrically portrayed while the number was actually being played. This particular method of presentation was part of the character of the established band, Genesis, who used all manner of electronic equipment and theatrical presentation to put across the story line of the song. This was one other reason why the meaning of the dream passage was held to be so important.

After the central idea was worked out and the lyric fitted to the melody line it was then ready for the group rehearsal. It was during these sessions that the most creative and dynamic features of the song were developed. The song was not only a musical sound with a vocal line in front but also a theatrical production involving, of necessity, the correct live mix, the correct use of lighting and the appropriate stage movements.

The vocalist did not play an instrument and the saxophone player was the actor and interpreter of the song dialogue. If anger was to be expressed he would develop a movement routine and facial expression which portrayed this meaning. The vocalist would move on stage in a manner subordinate to his expressive gesticulations but essentially he would be concentrating on singing. The pair together forged an extremely

dynamic stage act which in later years brought the band considerable success.

First and foremost the instrumental backing had to be arranged. This always took the greatest amount of time and involved the greatest amount of dispute. The other side of the songwriting, e.g. the theatrics, lighting etc. were relatively easy and allowed for a great deal of spontaneity and improvisation. The music however, was very highly arranged and required absolutely perfect rendition. For this reason negotiation during the actual decision of arrangements could be a lengthy process.

All the parts for individual players were written on the guitar or sung. There was no method of notation. The lead guitarist had some degree of classical guitar training and was, so he said, still having classical guitar lessons. He insisted that although the feel of the music we were playing was entirely different from classical training influences, the lessons nevertheless provided him with a kind of technique which he could use in other ways - most notably in playing fast runs in critical passages that required build up.

Very often, the parts which were suggested (mainly communicated through singing) for individual instruments were technically beyond the scope of individual players. This meant that practice sessions were very lengthy. An individual player might have to spend an hour or so learning his part before he could play it adequately enough even to try it in the ensemble playing. It was never certain which ideas that were suggested for a given number, would actually work in the ensemble playing. Often then, an entire day's rehearsal would be spent learning parts to songs which then were never used. On some occasions the guitarists would

work out harmonic patterns and the rhythm section yet other patterns which, after each musician had learned his part, would not fit together to the satisfaction of the group. When this happened variations on the individual patterns were tried. Sections of patterns were altered to see if they would sit more comfortably or more compatibly with whatever was in conflict.

The rhythm section although carefully worked out and with no room for improvisation still had, in the creative stages, tremendous scope. The band would allow or encourage elaborate fills, rhythmic explosions and dynamic exchanges between bass and drums. However, whatever was decided, it had to be played exactly as written for each and every musical performance.

In this way over a period of weeks the music was gradually structured to create a number. The process took many long hours and was largely hampered by the fact that virtually the entire group had no musical training. For this reason there were often arguments over timing and numbers of bars preceeding or indicating forthcoming changes in the musical structure. Some of the musicians' methods of counting were in terms of timed bars, e.g. crotchets. Other musicians natural sense of division fell into either 2 bar or 4 bar segments. Consequently if one member of the band counted something in there was bound to be confusion. This lack of even basic training created enormously long and exhausting rehearsals yet it also produced a tremendous amount of inventiveness. When ideas were translated, communicated and eventually played 'in' together they sounded impressive. Certainly impressive enough to attract enough interest to get a recording deal. See appendix for letters from prospective management.

I have now completed my discussion of the songwriting tactics of GR. Essentially the material begins with chord sequences, followed by melody lines, lyrics and then bass lines and drum parts. The group worked primarily as a whole including non-musical personnel. However, they also worked in a musicians-only subgroup. The technological devices used were disc and tape sound recordings which were played in a kind of lateral and fragmented way as a method for stimulating ideas. The music was highly structured with fairly rigid patterns. However there was scope for improvisation in the theatrical dimension of the performances.

The actual location of the vocals was an interesting feature of the music because of the dynamic role played by the theatrical input. The vocals were sandwiched somewhere between the instrumental backing and the theatrical performance. Or alternatively one might say that the instrumental backing and the vocals were subservient to the theatricals.

This band was I think an unusual group with great ambition and tremendous inventiveness and a flair for drama which had been inspired by Genesis. What was even more interesting about this band to me was that Genesis is primarily a band formed by individuals from Public School background, whereas GR was composed of individuals from the industrial Midlands of no special educational background. Yet the identification with Genesis was so very strong. However, the message through the lyric was entirely different and consequently the band did in fact have an original appeal. However, when people in the business describe the band it was always referred to as Genesis type.

I left GR after approximately two years for a variety of reasons.

The main reason was that I had evolved too much with the band. That is, when I joined my actual technique was very basic and most of what I developed in the way of expertise was in relation to the musical repertoire. I had developed a series of working rhythmic patterns which automatically played themselves out at appropriate points in the music when required. I felt the need to undertake more varied experience and at the time I left, a popular brand of rock/jazz fusion was developing on the local music scene. It featured drum rhythms more prominently than other forms of music and I was naturally attracted to the prospect of playing in this style. An opportunity arrived to form such a band. When I first began playing in it I found it so exciting that I lost interest in GR. At that time there were a lot of tentative offers to GR for a recording contract but nothing ever quite came to fruition. I must confess that I did hang on to the drumseat in that band longer than I should have because I thought a professional situation would soon present itself. As it turned out, I left and GR replaced me shortly after. Approximately 5 years later the band was offered finance on an independent recording label and produced 2 LPs both of which received considerable press coverage. The first LP sold reasonably well and the second one 'stiffed' as it is termed in the business (no sales). The band split up shortly thereafter. Their local following had grown astronomically and few venues in the area could cope with their attendance figures.

SONGWRITING PROJECT 2

A Semi-Professional Rock Band - SP

The next band I played in I formed from beginnings with other players interested in a similar musical venture. The first version of the band

featured original material written only by the guitarist/vocalist who had written and performed this material with other local bands which had now split up. It seemed to be a convention of the more advanced semi-professional players to retain the privilege to perform numbers they had written and performed with other bands, in any new band they might form. This was often an arguing point with bands which split up and reformed. When songs were a joint writing project it was difficult to assess who had the right to perform the number with a new outfit. Sometimes players would perform a number they knew someone else had written in another band because it had developed local popularity. If the original artist happened to be in the audience some attempt would be made to acknowledge the writer. Failure to make this acknowledgement public would occasionally cause arguments between players of previous bands. This problem was avoided by performing established already published material. This way as one moved from band to band there was no need to abandon acquired expertise with a given range of material because it belonged to someone else in the band. If it was recorded and known to the public anyone could play it.

The band which I now played in was known as SP and began with an essentially simple line up. A guitarist/vocalist, bass, drums and saxophone. The majority of the numbers we did were American-style soul pieces with a few original instrumental numbers written by the guitarist. He was the front man/band leader and more or less wrote all the arrangements and showed everyone their parts.

This version of the band lasted only a short time. Dissatisfaction occurred fairly swiftly and new personnel were acquired. In the next version of the band we selected a guitarist who had no ability for singing

and the repertoire was consequently composed of unoriginal instrumental material and a few original pieces which were essentially loosely structured arrangements with extended guitar or saxophone solos. The way this original material came about was fairly drawn out. I had a reel-to-reel taperecorder with what is known as a sound-on-sound facility. The tape deck enables you to play each sound independently of each other yet on playback the sounds are synchronised so that they sound as if they had been played simultaneously. The songwriting procedure thus occurred by the guitarist playing the bass along with me on the drums so as to create a rhythm track. This first track would be very simple and basic yet it would provide the scaffolding, as it were, to hang melodic ideas on. Subsequently the bass player would then switch to guitar and try to come up with an original sound and arrangement which he would subsequently play to the rhythm track. Once that was established, it was played to the band who then created their parts in a kind of improvised ensemble type of playing. Here the band would be working with a kind of simple structure which was fairly easy to follow and add to. Once the group learned the basic arrangement, individuals would then begin to throw out ideas. When everyone agreed on the part each was to play then the entire arrangement would be learned.

There was little incentive apart from individual ambition to be tremendously involved in the creation of instrumental numbers. The possibilities of attracting serious recording company interest was minimal. One only has to look at the market to realise that the majority of record sales are of songs rather than instrumentals. In many ways this end of the job was seen as donkeywork in order to get a reasonable set together to begin performing live.

Several other attempts were made at copying instrumental numbers to add to the repertoire. Most of them however, required technique beyond our ability and equipment in the way of effects and keyboards not at our disposal. However, we persevered, each member attempting to learn the parts they heard from the record. Rehearsals often meant assembling in different rooms with the bass and drums working out their parts separately from the front line. The rehearsal usually followed the format then of ensemble playing occurring in the latter half. The interesting point here in relation to the songwriting efforts of the band, is that the material copied provided an essential structure and knowledge of chords, arrangements, and rhythm that was used in the writing of new material. It seemed to me to be very often the case that sections of recorded material were copied and then subsequently changed in various ways to incorporate segments of individual ideas. Certain members of the band found it amusing the way an individual songwriter would try to pass off a new song as entirely his creation, when it was obvious where it was taken from. As the group progressed it became a standard form of joke to trace new ideas back to points of departure from its source.

This particular line up of instrumental players lasted about six months until there were changes in personnel. The personnel change brought a different perspective to the band. Several of the players had become disillusioned with serious attempts to attract record company interest with entirely instrumental sounds. The alternative was to begin writing numbers to feature a vocalist. The procedure was entirely different and new skills needed to be acquired. At this particular point in time the band had a keyboard player, bass, drums, guitar and saxophone. A major

commitment to writing vocal numbers was undertaken and the bass player and keyboard player elected to sing new material. Many rehearsals were planned and early in the evening they were disrupted for various reasons just as headway was being made. Nearly everyone in the band had full-time work commitments which made the entire process of songwriting a somewhat fragmented process which occurred a few evenings a week. Progress seemed to be very slow and without consensus on what was being written. At this particular stage the matter of overall professional outlook brought certain aesthetic and commercial expectations into critical confrontation. The band was obviously split into two frames of mind over the matter of creativity and the music business. We could either attempt to write material that was entirely original in every way that involved all the individual musical idiosyncracies of every writer or alternatively we could write with formula in mind. The former approach was the most satisfying for the obvious reason that the writer could satisfy himself first and worry about audience response later.

Audience response was an important issue. No one likes to play to an unenthusiastic audience - or shall I say for the majority of musicians, "going down well" is a sign of achievement. But equally important was sounding original. The purely aesthetic and the purely commercial were two continuously conflicting objectives. The compromise which each musician was willing or wanting to make was very much dependent on his current financial position and the overall view he had of musical activity in his professional life. In my findings semi-pro groups that were 'copy' groups that played 'chart' material in Pubs and Clubs only, were concerned with financial objectives primarily. The players in this kind of group could only justify their musicianship in terms of financial compensation

and they were therefore compelled to play music which was reliably approved by local audiences. To be unique and original was a struggle. You had to build your own following and many listenings by an audience (to acquire familiarity with the material) was required before a stable following materialised. Patience and financial backing (either in the form of a secure job or a sympathetic spouse) was necessary.

Many hours of discussion preoccupied the band in their attempt to identify a songwriting objective. In the end the band decided to follow a tactic undertaken by many professional bands. This was to hire a 24 hour rehearsal facility in a country setting with no distractions other than songwriting for one week. The farmhouse we chose was located in Devon. It was a secluded thatched group of buildings one of which was designed for accommodation and the other of which was for rehearsal. The rehearsal room was available for use any time of the day or night. Individual band members brought wives and or girlfriends and we did nothing but write songs from 10 o'clock in the morning till about 2 a.m. The entire process was extremely productive and exhilarating. The aim was to develop an entire new set of material which was original, backing a frontline vocalist, and would ultimately attract the interest of a recording company. This objective was, for a semi-professional band, the most far reaching in terms of creative energy invested, amount of spare time committed, and financial investment. The financial investment in this kind of approach was greater than would appear at the outset. An attempt to launch a serious original vocal band involved not only booking engagements at a loss because of the desire to promote original material, but also

financial outlay was required for the preparation of demonstration tapes in a professional recording studio. Further to this it is sometimes necessary to hire either equipment and/or session musicians in order to add commercial backing sounds which can, in many instances, now only be produced by the use of very expensive keyboards and synthesisers. This equipment and the expertise to operate it is more often than not outside the scope of most semi-professional bands and therefore must be hired for the production of singles or albums on a fee basis.

The songwriting project then begins to tailor itself to the financial capabilities and level of expertise of the group. In the numbers we produced at the farmhouse several areas of potential were exploited. These were in terms of instrumentation and backing vocals.

The format of the songwriting project followed a routine pattern which established itself within the first 8 hours. There had been no prior discussion as to role and responsibility. However there seemed to be an intuitive knowledge of individual skill and expertise within certain areas.

Initially, shortly after arrival, we began with a straightforward jam session which lasted for nearly two hours. We have found in the past that this kind of activity will stimulate ideas. At the very least we were able to establish a 'feel' which enabled us to indicate to one another, upon completion of a chord structure, the kind of sounds desired. We put the entire jam session on tape and played it back as a guide and a reference point for later use. At this stage we split up into groups or worked separately. My role was very much organiser and lyricist. I generally pushed everyone to keep working,

encouraged completed material to be arranged for the ensemble. The initial song ideas came from the guitarist, bass player (who also played guitar) and keyboards player. They would come up with at least a chord structure. Subsequently, we would begin putting a melody line to this. I would record this on a cassette recorder and take this to another room and work on lyrics. My methods for writing lyrics were simply to listen to the chord structure and melody line very frequently until I became familiar with the mood of the song. To me every song has a mood which is inherent in the choice of sounds put together. I think this mood is very much a personal reflection of the writer's state of mind at the time and although he is unaware of this expression in terms of words it is expressed in terms of sound. I have seen it as partially my job to write words which reflect the mood of the writer. My personal relationship with him is therefore very important - to know what he's thinking and feeling and to express it in the lyric in some way he can identify with yet at the same time does not hit too close to a personal experience.

When the words were completed I would cyclostyle copies of the lyrics for the entire band. I would then go over the melody line with the writer and make sure that the words fit the tune. Often changes in odd words were suggested and in some instances the melody might be changed to fit the lyrics. In the majority of cases however, the melody line would always take priority over the lyric. In those cases where the melody was changed to fit the lyric, it was usually because the writer of the melody chose to work it that way around. Words were always seen to be interchangeable and easily dispensible. The actual construction of the melody line with the backing chords was seen

inevitably as a more complex procedure.

This process carried on for the entire week during which time we wrote 8 songs. That is, we wrote, rehearsed and made ready for performance a completely new repertoire. During the period of constructing the arrangement, the group often had to work in pairs in order to learn new parts. However, this was accomplished fairly efficiently. There was a great deal of carryover from the jazz/rock arrangements of creating a great deal of room for improvisation. Most of the songs contained elaborate sections for soloing. I was to discover later that inventiveness in this area was the least commercial approach to what was an established singles market. The instrumental feature invariably came in the wrong place, went on for too long and basically killed the 'hook' or the payoff. However, each number carried some of the inventiveness and originality of each player which was in some way satisfactory to him. These priorities seemed to reign regardless of whether the music was comprehensible to the public, danceable, or inventive enough in its crude form to awaken the attention of recording companies.

The experience of playing the numbers live awakened everyone to the limitations of the material. The band split up shortly after, due to conflict between vocalists which I will discuss in greater detail in the next chapter.

When the band re-formed there was a great deal of interest in writing a number for the singles market. The new players who re-formed the group had been playing with various individuals for some time and were now ready to try to write and perform a range of commercial material.

After a period of 6 months several numbers were written and performed successfully. The actual writing of the material occurred in a similar pattern of melodic ideas played on a cassette tape recorder and passed around. However, in this version of the band the actual songwriting process was not quite as systematic as in the example at the farmhouse. In this particular band there was a splinter group which performed in the clubs under a different name. It was here that the basis of many songs had been worked out. The trio which composed myself, the guitarist and the bass player played clubs when the normal band were not performing. It happened quite often that before we began the set (and the set here was simply copy arrangements of chart material), we would work on a particular number for the regular band. We would just simply play through as a trio what we had rehearsed as a six piece. Only this time we would suggest completely new approaches, melodic ideas, and rhythms, which we would then present as alternatives to the rest of the band.

After many months we eventually selected two tracks which we recorded as a single. I wrote the lyrics on both tracks, and each track was written independently with a different guitarist. The production of this record completely changed the outlook of the band.

To begin with we employed the services of a professional session keyboard player who actually produced the band sound for this single. Before we went into the studio we spent several rehearsals with him rewriting the number to conform more exactly to the commercial expectations of the industry and the listening public. The first major change was in the arrangement. Verses were shortened and the chorus was rewritten in a more dramatic fashion. In fact the preparation for the studio recording

was almost like learning a new number.

The financial and legal arrangements regarding the production of the record changed the outlook of the band vis-a-vis songwriting. The producer, who was not paid straight cash for his services, settled for a percentage on record sales in any future recording or publishing deal we might obtain. Further the studio engineer was similarly paid a very much reduced fee in exchange for a percentage of any success we might have had. There was no written agreement - it was all verbal commitment - however, many professional projects operate on this basis. The expectation was of course that if this particular deal didn't get off the ground then everyone was obliged to help out any of the other parties involved vis-a-vis their projects. As it turned out the vocalist did several free sessions for the studio engineer helping out another band he was trying to produce. Similarly I assisted the producer in a songwriting project, which in fact developed to a more serious commitment.

What changed everyone's outlook was the preparation of the record label which carried the names of the original writers. Until this experience the general mood of songwriting had been based upon friendship and artistic compatability. Now suddenly, through working in a professional environment, the subject of money, royalties, copyright came to the forefront of the group's attention. Although we agreed as a group to split all profits from songs written by SP there was now a recognition of new conventions which were brought to the forefront of group awareness. The convention was that although groups might agree to an equal split on songs they recorded and promoted, the original writer would be the sole beneficiary of any royalties from cover versions made by other groups if say at some future date the group split up and other artists wanted

to use the number. Or even during the time the group was together, another artist working in another country might wish to use the song. The royalties on 'covers' (other artists performing your material) can be quite considerable. The original writer, if he can persuade the group to agree, that he is that person, is in an extremely advantageous position vis-a-vis the potential income of the record if it is a success.

Members of this group only became aware of this possibility through the production of the single and it did in some way affect everyone's outlook on songwriting. Now it became less of a group project and more self-interested. Occasionally, an argument would surface. I remember after one set we performed at a local venue and a member of the audience came to compliment us on a number we had performed, and the vocalist, standing there with myself and the guitarist, announced "I'm glad I wrote that one." The guitarist immediately objected, "What do you mean, I wrote the chords on that number. You never would have finished it if it hadn't been for me."

This was an attitude which only surfaced after the record was produced. In many ways the new knowledge acquired contributed to conflicts in the band as a viable working unit. People became progressively more possessive about their creative efforts and were more insistent on retaining their original idea rather than yielding to modifications which might be imposed on the original writer by the rest of the group.

The experience of songwriting with this group was much more dynamic for me because the players were far more advanced than in GR. From the history of individual playing experience each of the players

in SP had played in a variety of bands whereas GR had been working with virtually the same personnel for nearly six years. Furthermore, the individual players had far greater musical training at their disposal. In fact most of the players had a minimal amount of school training in music. This had a great deal of influence on the way we worked. We were far more experimental than a band which had none of this expertise. I think this was mainly because ideas could be tried out and dropped without too much effort. With GR every new idea meant learning new technique which lengthened the songwriting process considerably.

The group SP always began with chords followed by melody lines, then lyrics. Finally during the ensemble playing the arrangements would be created allowing for a degree of improvisation and solos where appropriate. It was always at this stage that the group worked as a whole putting finishing touches and individual stamp on the actual number. Prior to that the scaffolding of the numbers was put together by individuals and pairs.

Technological devices played an important role in the creation of songs. The main value of these has been to communicate ideas and permit an individual player to concentrate on creating ideas in relation to it or working up interpretations of the musical structure through repeated listenings. Apart from this there was the obvious use of the normal electronic range of amplification.

The main development which occurred as a result of this activity was a fundamental transition from the normal route of writing instrumental arrangements to writing songs. For all of us this was an essentially new skill to learn and by the time we had completed our period of work

we were nowhere near achieving a commercial product.

When the band split and re-formed with new personnel

the songwriting effort developed quite considerably.

The final production of the single was a more realistic commercial achievement and it sold very well locally. The record was also played on commercial radio and given several reviews in the local press. The break up of the band yet again was partially due to the conflicts over songwriting and ownership of original material. It was this aspect of new consciousness of relations of production which was the divisive ingredient. It was perhaps a professional reality that a semi-professional band was unable to cope with.

SONGWRITING PROJECT 3

A Partnership

Shortly after the record by SP was completed the producer approached me to help him prepare instrumental material for a demonstration tape he was intending to submit to negotiate a deal with record producers. He asked me to create a rhythm track for three numbers which we did. After working on these over a period of a week we began discussing the songwriting project we had worked on with SP. This discussion led to our trying out writing a song together. He had never done this before and liked my lyrics from the number we attempted with SP so that he was quite keen to try working with me. I was of course motivated by the idea for several reasons. SP was going through a slack period of minimal motivation (as all semi-professional bands do) and I had no full-time job at the time and I was looking for a way of making money.

The first song went reasonably well and he was enthusiastic enough about it for me to continue, particularly since he persuaded me that our

joint efforts would appeal to a publishing company. Further, that we would be able to obtain a substantial advance and that through his contacts in the business he would be able to sell the songs to other established groups or record and promote the material himself. I learned a great deal about songwriting from this project. In my dealings with professionals as a lyricist I found that there were many 'ground rules' or as we shall see it now 'conventions.' There were clearly unstated 'rules of the game' as well as explicitly legal expectations that created status and control over the musical project.

When we began writing there were no expectations discussed. As with all my experience with semi-professionals everyone worked on faith. However in the studio of the keyboards player's home procedures and expectations were revealed to me as being of an entirely different variety. A phone call to a vocalist requesting participation in a songwriting project was casual yet not without an immediate offer of percentages on sales of the record if it was a hit. This was the most frequent introductory comment, if there wasn't already some other point on which to negotiate, namely previous favours. If the material produced sold and money was made, cash was then paid immediately for work done. Percentages were offered in lieu of session fees. Session fees were preferred by players because it was tax free cash in hand with no strings. However, a percentage offer could be more attractive if the actual session player involved thought the material had potential. If the writer had no money, he had to pay on the strength of promises and favours. If the music sold and cash changed hands then favours were no longer owing. This system

of payment in cash, favours, or percentages produced a network of musicians who were perpetually tied to each other through debts of various kinds. It also involved studio engineers and music producers of various descriptions who bartered with studio time in exchange for sessions, for example on jingles for business advertisements.

After the first song was written, A. played it to producers of record companies who showed interest. 'Showing interest' as I discovered later was better than no interest but basically it meant dangling a carrot, as it were, that a lot of people were after. Basically it kept you writing without finance 'up front' and it meant that the producer would get first look in at anything you came up with in exchange for his enthusiasm - along with hundreds of other writers for whom the carrot dangles.

Once A. had this interest he approached me with a 'deal'. This took me by surprise but shook me a little bit more out of my semi-pro mentality. 'Deals' were always discussed in the afternoon over bottles of wine. The deal was this. We were to split the royalty of all sales of all songs 50/50. This was the standard legal right of songwriters. (When this information filtered into many members of the semi-pro scene it split bands up. Musicians stopped working in groups. They began to pair off.) However, the 'music', as it was clearly explained to me, belonged to him and the 'words' belonged to me. Henceforth during any future work we did either of us were at liberty to sell our part of the song to anyone else. It seemed to me absurd at this stage to be worrying about this kind of legal right when we hadn't even written the songs yet. However, it was on this basis that operations seemed to occur and copyright and rights to use of material were discussed before starting work. I had nothing to lose and agreed.

Another convention seemed to emerge, however, and that was that each song that began with the lyrical idea, to which a melody line was put - was to be credited to me as being the main writer. If on the other hand the melody line came first, then he was credited as being the main writer. This was not a matter involving cash but simply a matter of status in the business.

The first few songs took shape while working on them together developing ideas in relation to each other so that we were both there writing on the spot. In later stages I suggested we used cassette/tapes whereby he would work up a melody line to which I would write a lyrical line. This system worked quite well. The final arrangement of the song however was jointly undertaken.

Generating ideas for songs followed a pattern not dissimilar to that of GR. We would listen to recorded material for hours, shifting around from one style of music to another. However, what was critically different about this songwriting partnership was that it was uncertain whether we were writing a series of songs that were to be 'original' compositions for a completely new group to be formed by the keyboard player or whether we were simply writing songs to be sold to established artists. In fact this became a conflict in the project which lasted a period of 9 months. Essentially A. wanted to write songs which he would record on an album featuring a line up of musicians of his choosing. It was mooted in the business that this was a better way of getting songs off the ground. In order to achieve this goal it would be necessary to adopt a series of songs that were similar in style. Alternatively we were conscious of selling a song to a particular group that was already established. In view of this latter

expectation it meant concentrating on producing a demonstration tape of many varied styles. That is to say a publishing company is more likely to give an advance to songwriters capable of writing for many different markets to whom they might sell than a songwriter or partnership that was writing for only one market.

Midway through the project a well known vocalist from an established band began working on the demonstration tapes. It was clear that he was interested in leaving his current professional obligations to undertake a new project of his own with A. A. was quite keen to involve him in the songwriting project with a view to forming a new band and getting a recording deal. After working with us on two songs, D. the vocalist, expressed great enthusiasm for the project and although he was initially paying off previous favour to A. there came a time when his 'account' as it were stood in credit and D. wanted a percentage. At this stage 'people in the business' (a well worn phrase amongst the pros) were taking greater interest and A. negotiated with D. A. asked for D. to contribute material if he wanted percentages. D. contributed one song which we all wrote jointly. D. wanted to be cut in for a third of the project and A. insisted that this was unfair unless he wrote more of the material. D. argued that his established voice and current no. 8 hit in the American charts justified this percentage. A. disagreed and felt that unless he was contributing one third of the material then he shouldn't have one third of the take. This seemed reasonable to me. However, from the singers point of view, his interpretation of the melody was viewed as his contribution. A. presented terms which were the following. An equal split on all material sold where all three had made equal

contributions. Where A. and myself wrote the song which D. sang then we would retain copyright and obtain royalties on sales in all markets and D. would obtain a hefty session fee. D. agreed. However I could see he felt somewhat dissatisfied about the arrangement.

The songwriting continued then with a fairly consistent pattern. First chords and melody line, then lyrics and then vocals. All the material was recorded on a Portastudio which is a compact recording studio with a 4 track mixing deck incorporated in the actual recording instrument. A. would lay down the backing track and then take the Portastudio to the vocalist's home studio and in an afternoon they would have recorded and mixed the vocal track. Finally additional arrangements would be made and embellishments would be added as needed.

Two of the best tracks in this project were taken to Startling Studios (Ringo Starr's own studio) where they were 'mastered' (recorded on a 24 track studio with session musicians). The studio time and engineer were given as a favour. Session musicians were actually paid in cash.

A demonstration tape of 5 numbers was put together. (See appendix, a cassette copy of this tape). The tape was then taken to record companies and publishers. We thought we had certain success on the horizon but many criticisms regarding the music were forthcoming.

The major criticism of the tape was the deviation from the formula. While we were being creative as it were, we hit on ideas which we felt followed reasonably closely to a singles format. We discovered, however, that virtually every single in the top ten followed an almost identical formula, which we were close to, but not quite there. Several features of this formula I will describe now.

- 1) The verses were to be of determinate length, 30 seconds.
- 2) The chorus was to contain the title of the song and be repeated.
- 3) The format was verse/chorus/verse/chorus/middle 8 - out.
- 4) The number was not to last more than 3 minutes and 30 seconds.

One of the problems was that the more we worked on a number the more it would improve. Often then, the strongest part of the song occurred in the latter part of writing it. Consequently, the Middle 8 often contained the 'hook' which is the climax of the build up. Hence many of the numbers had the climax in the wrong place for formula commercial success. Although the number may have succeeded in this form a publishing company would not be able to sell a song that wasn't in formula format.

Further, in our demo tape the song title did not occur in the correct place. Often it occurred in the verse or the middle 8 and it should have been hammered out as a 'hook' in the chorus.

The result of the project was a discovery of the formula. The companies expressed great interest and asked us to rewrite. However, by that stage, 9 months had passed, I had to go to work in Switzerland and A. was booked solidly for sessions writing advertising jingles.

Summary of Songwriting Project III

This was a songwriting partnership which had as its goal securing a publishing contract which would pay an advance and make the promise of an attempt to get our material 'covered' (sold to established artists). The material we wrote was received with great enthusiasm by people in the business as well as objective listeners. The conflict which ultimately arose was in the arrangement and structure of the material. To rewrite the material and demo would have been an expensive operation both in terms of time and capital outlay for use of equipment. Other work priorities made the creative project difficult if not impossible to complete. The singer D. had now made his departure from the established band and was currently on salary with new management to form a new band which required the writing of new material. To use material that he had worked on with A. and myself would be financially unsound as the new band would lose considerably in terms of royalties. This fact also contributed to the demise of the project.

The majority of the songs began with melody lines, chords, followed by lyrics and then bass lines. Technological devices played a more critical role in the development of this songwriting project than ever before in my experience. Nearly all the tracks were recorded with an electronic rhythm unit (as opposed to live drums) which contained not only pre-programmed rhythms but a facility for programming rhythms and altering tones and sounds. Fill-ins were also programmable and the simulation of a drum sound expedited the entire songwriting effort. Through the use of the rhythm unit it was possible to capture the 'feel' although not the

technique required for the 'master tape.'

An additional item of equipment was the Portastudio which enabled the project to remain in the control of one individual - A. It also meant that participating musicians had no need to travel, saving time and expense. Additional equipment used were Roland synthesisers and a Microcomposer. This enabled several keyboards to be played simultaneously operated by one individual. The astonishing fact was that in a small 9' x 12' room it was possible to have at one's disposal a full band sound which could be altered reasonably quickly by one individual in order to achieve professional musical objectives.

The music in this project was very highly structured and one of the indirect aims of the exercise was to discover the formula expectations of a certain end of the music market. In this kind of musical project improvisation occurs at the creative level only. Master copies of completed numbers were to be programmed exactly as they sounded in the demo-tape.

The musical backing was in fact designed to feature a vocalist. However the end-product did emphasise a strong keyboard sound. To some extent this dominated the vocal and this may have been one shortcoming of the final product. The relationship between the actual vocal and instrumental sound was always complimentary but the entire backing was arranged and in many numbers played entirely by one individual.

Finally, the songwriting partner A. has had extensive classical training as well as broad experience playing in the Rock field. His ability and expertise in this area makes him a successful session musician. Certainly his training and background inspired the song writing project towards a traditional style of Rock music.

Conclusion

The experience of working in three separate songwriting projects gave me a view of the creative process and a way of recognising some of the conventions and constraints which operate in the functioning of groups. Before going on to the next chapter which looks at the band SP, I would like to present the reader with an understanding of the legal structure affecting musicians and the creative songwriting process which is invariably linked to some cognisance on the part of songwriters, of the legal implications of the work they do.

The awareness of the legal structure and the consequential status hierarchy amongst musicians in terms of the professional industry shapes the creative habits of musicians to some extent. The information comes direct to professional musicians through the Musician's Union and through any solicitor who may be operating on their behalf. Alternatively, to other musicians, namely semi-professionals the information comes via the media or via contact with other professionals.

The legal structure recognises either a songwriter or songwriting partnership. A partnership can be any group of individuals and in the case where serious expectations of publishing or recording contracts are involved then the terms upon which individuals are contributing ideas is a subject of negotiation. Most semi-professional groups subscribe to the view that there is joint ownership of original material regardless of the writer or subgroups of writers who may actually come up with the original idea. Without this expectation few serious semi-professional groups would ever stay together long enough to succeed professionally. Consequently, in the semi-pro

field this is more or less a convention - shared ownership of all publicly performed material. Amongst professional musicians the matter of ownership of copyright and expectations of royalties is a matter of negotiation. In my experience of the field this is a negotiation which occurs prior to commencement of work. Here conventions and constraints are involved. If one is confronted with a session which is paid in cash there is no possibility of becoming creatively involved in the work with an expectation of future financial gain. This may be a real constraint if the artist who is on the session feels motivated to contribute ideas. Occasionally what does happen in a session is that an artist who is in fact hired solely for mechanical contribution rather than a creative one may have ideas which he contributes to the musical project at hand. If they are taken up the employer may feel obliged to offer percentages on the outcome of final product but this is not an expectation that the contributing session musician can have.

It would appear that one explanation why the negotiation proceedings occur so rapidly with professionals is simply that they are working under pressure and for short periods. Semi-professional bands who have serious ambitions toward group contracts are often engaged in this activity for a period of years during which time negotiations can be conducted at varying stages of success. Matters of the kind discussed in professional circles are rarely discussed in semi-professional circles and it is considered lack of faith and an attempt to reduce group morale if such matters are brought to serious scrutiny within the group.

The absence of notions of separate ownership of original material

gives semi-professional groups greater flexibility in the way they write. Very often a group rehearsal begins with a simple melodic idea intended to be used as a basis for a song and the group as a whole will construct an arrangement spontaneously in that setting. This however, is not a frequent occurrence in my experience. The usual pattern is a fairly well worked out sequence presented to the group, prepared either by one or two individuals.

Songwriting serves a purpose for semi-professional groups apart from satisfying a creative urge or the ambitions of those groups seeking a professional contract. It is in some instances, as with GR a ceremonial and ritual activity which gives credence and confirmation to the group. Apart from this the procedure varies from group to group and depending on the kind of market aimed for. Generally speaking however, in the two groups SP and GR the conventions and constraints differed in fundamental ways. With GR greater creative outlet was given in the earlier stages, with each musician writing his individual part, whereas subsequently when that was settled the part had to be played exactly as agreed upon in the rehearsal. Deviations, or improvisations were unacceptable and seen as detrimental to the overall stability of the group in the live performance situation. With SP there was less creative opportunity for individual instrumentalists in the elementary stages of songwriting. The expectations were fairly clearly laid out within a narrow format which was compatible with the number. However, there was considerable scope for improvisations during the live performance. It was possible for an individual player to change the mood of the musical scenario without inhibiting the other players and without creating annoyance and a sense of instability.

The final chapter of the thesis proceeds with the analysis of SP - a semi-professional rock band. It is my view that, having now discussed the legal structure affecting musicians and the songwriting process in relation to law, professional musicians and semi-professional musicians, that it will help to clarify the additional levels of complexity which I believe are operative in this particular semi-professional group and other groups of similar construction.

CHAPTER IV - SP, A SEMI-PROFESSIONAL ROCK BAND - CASE STUDY II

Introduction

Autobiographical Account

New Directions

Research Design

Conclusion

Introduction

The previous chapters have developed the parameters of an argument which I feel now constitutes a valid framework for the analysis of a musical group. A musical group is a collective operation modified and controlled in its ways of thinking and acting by conventions and constraints. The actual degree to which these conventions are based upon aesthetic or practical objectives depends upon the ambitions of individual group members and their degree of involvement with attempts to market their product. The methods of marketing and the resulting individual gain either in terms of cash or status is not a matter entirely controlled by group consensus but also by external factors such as the legal establishment and the expectations of professional musicians.

In this chapter I have chosen SP a semi-professional group which features a variety of musical styles including jazz/funk/soul/rock. It is a serious semi-professional group with ambitions for securing a recording contract for a professional musical career. The ambitions of the group, however, have changed over time with periodic changes in personnel and the changing opportunities confronting the band.

I have chosen this group for a variety of reasons, the main one being that I have been playing in it as the drummer for six years and I have collected a great deal of fieldwork experience as a result. The other is that the group is a semi-professional group which has had considerable contact with professional musicians in the area; has made a record and played radio and television dates. The group has also been written up in local newspapers and its most successful

adventure has been to play Ronnie Scott's Club in London. In many ways then this chapter charts the successes and failures of this particular group.

At the core of the semi-professional music scene there is a collection of groups aiming at professional goals. For this reason there is a great deal of contact with professional musicians who keep a close watch on the more serious end of this semi-professional market. There is occasionally recruitment and some professional musicians seek personal involvement if they think the band is soon to be successful and will want either management, production, or possibly a session player for a period. Apart from this there is always the possibility of recruitment of one musician out of a band for professional work. This, however, rarely happens, but occasionally when it does it is enough to disrupt an entire band. It certainly keeps all the musicians on their toes and when the pros come down - you play your best.

I will try as much as possible to incorporate factors which I have now covered in previous chapters in the analysis of this group. At this particular point I would now like to restate the objectives and factors involved in the analysis of this group before commencing a short autobiographical statement regarding the formation of the band, followed by a descriptive analysis of the group's work in terms of the following categories of my research design outlined in Chapter One.

- a) acquisition and maintenance of instruments, amplification, and auxillary technical devices
- b) methods of notation and composition
- c) learning to play the required music on the given instrument

- d) times and places for rehearsals
- e) advertisement for performance
- f) publicity and sale of tickets
- g) recruiting an appreciative audience capable of listening to and responding to an audience
- h) interaction of musicians in the live performance
- i) the songwriting process
- j) the legal structure of the music business and its effect on the songwriting process
- k) cues in arrangements and improvised passages
- l) dress, stage appearance

Further, the execution of these activities has involved support personnel and availability of resources. In particular, attention will be paid to the role of:

- 1. Managers of Venues
- 2. Agents, Publishers, Management
- 3. Recording Engineers
- 4. Sound Mixer
- 5. Lighting Engineers
- 6. Road Crew

Autobiographical Account

As mentioned previously, I left GR in order to form SP which initially was a band composed of individuals wanting to play a funk/soul/rock fusion music featuring a more dynamic rhythm part. Musically, this was the major attraction for me. Another feature of the group attracted me and that was to play to a dance audience. To a jazzer this was the bane of his existence. I remember on one occasion with the jazz group in Switzerland at the Casa-Bar when a couple got up to dance and R.J., the band leader turned around in the middle of his solo to address and band and said in no uncertain terms: "I really can't stand that - being reduced to a dance band; it really makes me feel there's no point in any of this!"

At the point I joined SP, however, I felt differently about dance audiences. All the engagements I did with GR were to serious rock music lovers who had no interest in dance whatsoever. However, in my

view the dance audience in contemporary contexts (e.g. disco rather than formal) indicated a successfully driving rhythm section to which an audience could respond. For me, when people got up to dance it meant that I was getting through. To others it meant they were being ignored in favour of audience self-indulgence. In my view dance was a genuine and positive response to the music and a way the audience could participate in the whole business of music making. At Bridge Street Arts Centre, Newcastle-under-Lyme, where we played regularly, a dancing audience became a barometer of success. A dance band in the funk/rock world was not a pejorative notion as it was to some in Becker's jazz world.

The real test of a good funky/rock band was a performance at a venue combining a disco and a live group. The disco has always been a threat to the live working musician. For venues with a dance floor it has become economical to hire a good D.J. with a stock of the latest dance records rather than a group. An audience often preferred such an arrangement, particularly the men. Where there was no live group there was no competition for female attention. The audience could easily indulge itself in creating an atmosphere of stardom on the dance floor.

Many dance venues had live groups performing because of the Musicians Union campaign to keep music live and their success in requiring all music venues to employ live musicians a minimum number of evenings per week. At those venues where management were simply fulfilling union obligations, the structure of the evening was such that the live group was required to duplicate the same format of sound frequency of numbers played as the D.J.

In this case as the last record on the disco finished the live group came on with an actual chart number played as close to the original as possible. The gap between numbers had to be virtually the same as would have been left by the D.J. and if people left the dance floor while the band was playing it was grounds for dismissal.

Occasionally there was something short of violence in the personal relationships between D.J.'s and bands that played at recorded music venues. The D.J.'s could sometimes be very patronising and make bands feel as though they were being done a favour by being allowed to play - which in actual fact they were. Alternatively some D.J.s were very sympathetic and made personal efforts to promote local groups.

Nevertheless if a band succeeded in winning audience applause and response on the dance floor the band could feel quite victorious. Certainly it was easier to play those venues which had no disco present. The experience however, which attracted me most to this kind of music was an unusual local music scene at a particular pub in the area. Once a week there was an event called Rock Workshop. This musical group was spearheaded by a drummer, who as I have mentioned earlier, had previously been bound in a contract agreement which meant his band could not work professionally nor could he work for anyone else. The duration of the contract was for five years and, since the band had split up, the drummer of whom I speak had to undertake another kind of work - namely running a Pub. This combination of events helped to create one of the most progressive developments on the music scene of all those I had experienced. The drummer, who

had a considerable passion for playing could not seriously involve himself in undertaking a professional musical commitment. Furthermore, as he was unable to leave his Pub consistently he could not really commit himself permanently to even a semi-professional band. His enthusiasm was therefore tempered by practical limitations and he created this 'workshop' at a local pub.

The workshop enabled many different musicians to sit in. The structure of the evening was such that the resident band would play a first set which was reasonably well rehearsed but had plenty of room for improvisation. During the second set many other musicians were invited to sit in. There were certain well known numbers on this circuit of 'jammers' as it were, which were used as a basis for what can only be described as 'blowing' in almost the same sense as on the jazz scene. What was different, however, was that some jam situations followed no explicit arrangement at all. Often the jam would commence with a rhythm from the drummer sitting in at the time or a spontaneously contrived chord sequence in a particular key. These were often laborious and could quite often go on for far too long except on the odd occasion when everything would click and something quite unusual and memorable would come out that took the audience by surprise. The 'jam' spot was frequented by many drummers who were often encouraged to come along for a jam and become familiar with the resident set as well. This was because so many of the 'workshop' nights had to be played by a substitute drummer. It was, in fact, my experience with this workshop which transformed my interest in music to something completely different from what I began with in GR. The experience of sitting in regularly and occasionally substituting

for the resident drummer made me rethink my rhythmic approach. Also, the chance to improvise, or shall I say the responsibility to improvise so consistently was a new experience for me and I wanted to incorporate this development into my new musical venture with SP. It was here also that I met the players who were to form the band with me.

Many musicians came to this venue. It was perhaps the most exciting event of live music in the week partially because many professional musicians would come down for a 'blow'. Further, it was often here that the contact between the pro and the semi-pro occurred and all the influences, both musical and non-musical occurred. Frequent visitors to the venue were professional musicians some of whom were recruited from this network of semi-professional musicians. (see appendix and the recruitments illustrated in the diagram).

The nights when the 'pros' came down were always highly charged in atmosphere. When they sat in with everyone their presence virtually taught performance technique and attitude they have now. Also all the conflicts that they knew of in professional outfits were discussed openly. This gave many musicians a legalistic view of the business.

From this contact with other musicians, SP was created. The first line-up of the band included lead guitar, bass, drums, and saxophone. All the players were refugees, as it were, from previously split up bands. The outfit we originally put together rehearsed for one month and did one performance after which the band split up. The material we rehearsed was composed of several original compositions and 50% unoriginal material. Subsequent to this premature demise, the band remained an instrumental outfit for nearly a year before we attempted to make it a

group featuring a vocalist.

During the period when the band was primarily an instrumental outfit we concentrated on copying relatively simple rock/jazz material of a variety popular in the United States. Most of it featured Saxophone and we took Grover Washington and Ronnie Laws as stylistic reference points. As mentioned earlier a great deal of our time was spent rehearsing in separate rooms, learning our parts from records. Ensemble playing came much later in the rehearsal period. The band always rehearsed at my home. This was mainly because it was easily accessible, and there were no problems regarding noise and, as rehearsals went on late, this was a distinct advantage. Further to this I in particular wanted to avoid setting up and taking down a drum kit which took far longer to manoeuvre than other musical equipment.

The band secured a residency at a local venue which we played weekly. During this stage we copied the Rock Workshop format while we were still preparing new material. Although we had a 'jamming' spot it was never as exciting as the one at the Rose and Crown and I think that the jam spot created some degree of instability in the band. Occasionally individual members would complain that the jamming 'thing' lowered the tone of the band. That, the group wasn't really a group and what was the point. A certain kind of competitiveness also occurred when band members felt a jam had appealed more to the audience than had the resident group itself.

After about six months the regular venue at which we played - The Bear Hotel - dissolved almost entirely into a jam. The players who were paid were the players who brought the equipment. Eventually we became

disillusioned with the inconsistency of the event. Furthermore the lack of band identity made it difficult if not impossible to book the group at any other venue. We simply didn't know who would turn up to play. Eventually, the original Rock Workshop split up because the keyboard player was offered a professional engagement which took him away from the regular commitment to the Workshop event. The keyboard player was a central figure in this event as his backing created the scaffolding for all the 'jamming' whether based upon a rehearsed number or was totally improvisational. When he left, another keyboard player replaced him and the drummer who started the Workshop resigned. His own Pub had no become too great a commitment. At this point the remaining players of Rock Workshop approached our stable core of sax, bass, guitar and drums and suggested an amalgamation. There was some argument as to whether the band was to be called SP or continue in the trade of a workshop. The decision however to amalgamate under the new name of SP was indicative, in my view, of the desire to have a more professional performance rather than an unpredictable evening of improvisation. The band featured a mixture of Workshop material and SP material. That line up lasted approximately 6 months. The main conflict was with the vocalist who wanted the band to feature him entirely rather than a split set where half the numbers were instrumental and the other half vocal. Further to this, the keyboard player which we did eventually find became unreliable and we were uncertain that he would turn up to play at any given performance. His situation was hampered by domestic disputes, lack of income, and periodic unstable employment which damaged his hands (as mentioned in Chapter One). The other

members of the band although aware of his problem were unsympathetic. They were all engaged in stable middle class professions and led comparatively comfortable lifestyles. Their transport was reliable and the equipment used was of a professional standard.

NEW DIRECTIONS

SP was influenced by many of the improvisational moods known to jazz. The music relied for its intensity and excitement on fairly technical displays of musicianship and an ability to react spontaneously. For the musicians this was tremendously exciting. And for a time when it was in vogue it was tremendously exciting for the audience. However, it was not of any great excitement to an audience listening on record. And for this reason, though it was enjoyable to play live, those musicians who remained in this idiom were unlikely to succeed professionally. Record companies were not interested in jazz/rock instrumental music. (See the letters in the appendix).

This interest in the instrumental form was not a commercial attitude and for this reason the vocalist was justified in his departure from the band. With the objective of succeeding professionally he worked with a new group of musicians in writing original songs. Meanwhile SP continued with an instrumental repertoire and the odd guest vocalist who would stand in with the band to do a well known number such as "Ain't No Sunshine" by Bill Withers; a slow blues such as "Stormy Monday" or "My Girl" by the Temptations. This carried on for many months. We all noted that whenever the vocalist arrived to do his 'stand in' the audience would become more responsive to the instrumental numbers.

This was a very successful outfit. The band always had enthusiastic audiences. There were no problems vis-a-vis a vocalist. The band could indulge in their instrumental virtuosity and the odd vocalist who came down to stand in did so for only one or two numbers. There was no conflict. Everyone was happy, we had plenty of local engagements and a good time was had by all. However, band members with professional aspirations did become dissatisfied with the professional prospects of a primarily instrumental group. It was at this point that the band decided to transform itself into a vocal-centred band. The scenario at the farmhouse described in the previous chapter deals explicitly with this songwriting effort. Shortly after we completed our stay at the farmhouse we began to perform in public the songs we had written there. They went reasonably well. However, both the bass player and the keyboard player could sing and there was considerable rivalry as to who was the lead vocalist. As it was, the bass player had the stronger voice and was more popularly received than the keyboard player. The keyboard player, however, resented this and expressed his dissatisfaction often by playing the wrong chords while the bass player was singing. I put this forward as an explanation for the musical disturbances for the following reason. The keyboard player was excellent. He never made mistakes throughout other numbers that were far more complex. Further, whenever it was suggested by one player that we do a number that the bass player sang, the keyboard player objected. Or at least he suggested very strongly that we do a number that he sang rather than one that the bass player sang. As it turned out, whenever we did a song that the bass player sang there

were always mistakes made by the keyboard player. They were very possibly unconscious but they only occurred when the bass player was singing - particularly in difficult passages which ultimately made the vocalist sound as though he had sung the wrong note.

Consequently, the bass player began to react directly at first. They would sometimes argue in the middle of a number. The bass player would turn and growl at the keyboard player and the keyboard player would come back with some kind of cryptic and insulting comment implying the bass player had no business insinuating he had made a mistake. The outcome was that the bass player began to play very loudly when the keyboard player began to sing. This battle went on for nearly two months until the other members of the band could no longer tolerate it and the band split up. Both players were forced into a position where either had the responsibility of electing to leave. However, they forced the remaining band to decide between them. At this point, the vocalist from the previous Rock Workshop outfit, V. telephoned me to ask whether or not I would be interested in joining himself, the keyboard player H. and a new guitarist. We had a meeting but this time there were six of us.

We decided to amalgamate. The same argument about the name of the band emerged. The other three wanted to go by a new name and our three wanted to retain the name SP. In my mind it was of little consequence whether it was a new name or an old one. From my viewpoint it was purely a matter of business. The established name was easier to sell to new venues with regard to getting work. Managers of Venues always took a dim view of paying new bands anything like a reasonable fee in the event that they weren't any good or didn't draw a crowd. A

band which played regularly and whose name appeared regularly in the local press was easier to negotiate with. Particularly with new venues.

The others eventually yielded and we began working under the name of SP. Many things began to happen that were positive. We began a series of engagements that were very successful and we eventually attracted the interest of a Midlands TV Rock Program entitled Look Hear. The producer came to see the band and offered us a television spot for a $\frac{1}{2}$ hour program called "This Is". The program never materialised but promises of future TV dates were made. Prior to this we made a record. In the first week we sold 600 and we sold the remaining copies in dribs and drabs. We were initially so enthusiastic about the material that we advertised the record immediately. The local radio stations picked up on it and used it in their regular program. The record also impressed people in London and on the basis of this we were able to secure a booking at Ronnie Scott's in London. The local press wrote up the event and a coachload of supporters from Newcastle-under-Lyme followed us down to the gig at Ronnie Scott's. The performance went marvellously well and we were all enthusiastic about making another record.

A few months later the keyboard player left the country to take up a post as managing director of a computer company. The other players of the band simply accepted this although it meant the band was now a 5 piece. Subsequently, the saxophone player left due to a conflict over musical styles. The vocalist had decided that saxophone was no longer a legitimate feature of the band and that there should be less saxophone

and more vocal material.

As I saw the band numbers dwindling I remained fairly uninvolved at this stage as regards selection or departure of personnel. I was at a stage where I was finding the business of playing in one band exclusively, constraining, and I began to take on work with other groups. Further, my financial circumstances were very different from those of the rest of the band. I relied on fees from performances to pay bills whereas their fees were simply beer money. I needed to play in more groups - I couldn't afford to play professionally less than twice a week. For the semi-pro bands I played in, most of them were only interested in playing once a fortnight. This meant it was reasonably easy for me to play in several bands at once. I was also becoming involved in work with jazz groups and that made up the cash difference when semi-pro Rock work wasn't sufficiently forthcoming.

However, this other work that I had now taken on was not entirely approved of by the rest of the band who to some extent saw it as disloyalty and self-interest as opposed to financial survival. This to me was a fundamental difference between the semi-professional outlook and the professional point of view. While the semi-professional had other sources of income, he could afford to maintain certain aesthetic preferences and ideals regarding personnel. Although I was not a full-time professional except for a few months in Zurich, for some considerable time 60% of my income came from activities relating to music. I couldn't afford to play exclusively with a band that only played once a fortnight.

I have now completed my autobiographical discussion of the band SP. As I hope will be seen this was a band of varying ambitions depending on personnel and for this reason it was really many different bands. The point, however, is that there has been a core of individuals, namely the guitarist, saxophone player and myself, who have, through the majority of years, remained together.

The band's priorities have changed over the years. Initially the first versions of the group, which were spawned by the workshop's improvisational approach, sought to achieve entirely aesthetic goals through instrumental virtuosity. As the musicians became more experienced and greater confidence began to develop, a commercial interest coincided with this development of expertise. For many players who started as semi-professionals the drive to become professional only developed after the novelty of the once a week night out with the band had worn away. A new drive, to free oneself from the day job and to undertake a professional career as a creative musician soon became the inspiration of many musicians on the semi-pro scene. However, this wonderful and glorious state of being, which so many aspired to was barely within reach. To achieve it was like winning the pools.

Consequently the mixture of enthusiasm for trying to succeed and the ambivalence towards the prospect of that success, as one notches up various degrees of failure, was a continuous preoccupation among many semi-professional musicians. This syndrome hit more solidly and more harshly as the musicians became older and it was clear that with mortgages, children and a steady job the prospect of professional opportunity providing the security of a day job became less likely. At this point in time the music business had changed

a great deal. There was a time when a regularly performing semi-pro band that was original and had a powerful stage act might be signed up by a record company for a reasonable amount of money with certain retainers and guarantees of income. However, in the recession the likelihood of this was less than ever before. Further, if such an offer had been made, the amount of money offered would be so little that if a semi-professional were to throw away a secure income on such a gamble for success he might well have been placing an entire family in jeopardy.

In view of these factors the emphasis for many semi-professional players changes dramatically at certain times of their career. The emphasis moves away from the drive to piece together a successful performing band that will be picked up by the media, entrepreneurs and the like. The emphasis then turns to songwriting which is still a safe bet for anyone with a day job and in the over 30 category. A publishing company will give advances to songwriters without requiring the writer to undertake a full time contract. Further if the song is covered (i.e. recorded and played) by an established group there is potentially a great deal of money to be made. The equipment required, which I described in the songwriting project involving a session keyboard player, is virtually now within the range of a non-professional musician. This means that a semi-professional can now produce a demo-tape of the quality expected in professional circles on equipment available through retail musical outlets. There is still, however, the problem of the skills required to produce demonstration tapes of a certain standard. The trading power of semi-professional musicians is not quite the same as in professional circles and the financial expectations and obligations are different.

I would now like to present a descriptive analysis of the band's work in terms of the categories of my research design outlined in Chapter One.

Research Design

Acquisition and maintenance of instruments, amplification, and auxillary technical devices

All the equipment used by the band was purchased by the individual players themselves from earnings derived from their normal day jobs. In some instances individual players who were still very young might have taken out hire purchase agreements in order to pay for their equipment. Under few circumstances, to my knowledge, in this country did parents provide offspring with the finance for their equipment. This contradicts the findings in American musical settings where H.S. Bennet has found considerable sponsorship on the part of parents or benefactors. Technical devices required for performances were phase units, and echo devices. Occasionally the band would share these. Sometimes the saxophone player would allow the guitarist to use an echo unit in exchange for the use of a phase unit.

The purchase and improvement of equipment was a peculiar status symbol which had various restraints attached to it. That is to say, in musical circles, it was considered ungainly to have a musical instrument which was of a quality not equivalent to the owner's ability. That is, a novice bass player for example, who owned a fretless Olympic gass guitar was considered foolish if not arrogant to own the classiest musical instrument of that variety without having the technique to match it.

Certain kinds of instruments had a distinct reputation for their commercial association with certain kinds of music. The kind of equipment you owned therefore classed you as regards musical style.

If you were seen playing one particular brand of guitar you were a funk player and if seen on stage with yet another brand of instrument you were immediately assumed to be a heavy rock player.

Sitting in therefore was to some extent restricted by the kind of equipment used by the visiting player. Although loan of equipment was occasionally a possibility certain instruments were considered unsuitable to loan for a sit in. Guitarists preferred not to allow other players use their equipment in a jam unless they knew the person quite well. Bass players were usually fairly easy going about loaning the equipment to someone sitting in. It was usually taboo to all kinds of wind players to loan saxophone or trumpet although I have seen it done. Drummers of course always loan equipment for sitting in usually without reservation. Keyboard players were a bit fussier than guitarists and it depended very much whether or not they had additional synthesizers and effects rigged up with special settings for different numbers.

Joint ownership of equipment is another phenomenon of semi-professional group life. The serious semi-professional group will often spend all the money they earn from performances on equipment for the band. This feature of semi-pro band life often gives the group the quality of an exclusive club for which you pay membership fees. When a band split up, which they often do, the jointly owned equipment is sold and the money divided. If a member is leaving then his share of the band is bought out by the other members of the band. Replacement personnel are then in a weak position when they join the established group who have considerable joint ownership of musical equipment. In some instances the new member may be asked to contribute

an equivalent share of the jointly owned gear or alternatively the remaining members of the band who have bought out the original player may decide to keep the ownership between themselves and retain a privileged economic position within the group.

The joint pooling of band earnings for the purchase of lights, P.A. and various other necessities is a practice which splits up many groups when individuals begin wanting cash in hand for their efforts. This conflict of priorities can seriously undermine the overall quality of the show. A semi-professional group which seeks recognition as a potential professional outfit experience great pressure from their followers to create the same quality of sound and lighting that audiences regularly witness when they see a professional group. The difference being, of course, that the management or record company of a professional group bears the expense, whereas the semi-professional group must finance this themselves. When band members agree on joint purchases of equipment it generally creates long term working commitments difficult to terminate.

Methods of Notation and Composition

Methods of composition were as described in the earlier chapter on the subject of songwriting. However, it seems appropriate to describe in this section, the procedure for recording a single as there were many new skills learned and expectations and constraints imposed on the group which heretofore the band had not experienced. Many were related to composition.

The major decision to record a single was prompted by the original core of SP. The other party with whom we amalgamated

raised no objection - in fact their consent was needed as the record was going to be jointly financed by the group. The choice of material was in dispute, however, as different writers would obviously want their material to be featured on the record. The number which we thought most suitable to record was Lucky Spin. (See appendix for copy of the record and details of lyrics). My ambition to record this number was purely commercial and with the full understanding of my legal position as being one of its writers. I did emphasise however, that any profits made on the record were to be shared equally regardless of who wrote the actual song.

Our decision to write and finance our single came from the experience of attempting to acquire prestigious engagements. There were, for example, several television programs that featured local bands of no particular fame other than a local reputation. When inquiries were made regarding the possibility of such television performances we discovered that television producers were unwilling to feature any band which did not have at their disposal at least a single for sale to the general public. When Michael Appleton's (BBC producer of many programs featuring Rockbands) secretary was asked for reasons for adopting this policy she stated that if television viewers saw a band they liked their immediate response was to attempt purchase of a record, but if none was available in record shops then the television station would be inundated with requests for recordings of the number they had heard on television.

Apart from this, credibility was the other factor involved in producing your own record. Whether it was radio or television or

prestigious venues you were after, it was easier to sell a band that could turn out a 45 rpm record than one that had none at all.

In the last five years this practice has become standard for the promotion of semi-professional bands. This is perhaps another indication of the recession, promotion in terms of recorded material must now be financed by the band members themselves.

Some recording studios were willing to help a group if they thought the recording had potential.- trading additional studio time in exchange for percentages of successful material. This was in fact the case with our band. Our producer and recording studio engineer had worked together on many projects before and consequently they agreed jointly to share an interest in the successful outcome of the recording in exchange for production services and additional recording time. As I have mentioned in earlier chapters, the vocalist did a 'favour' in the form of a free session and I assisted the producer in work on his songs.

Rehearsals prior to studio work involved considerable restructuring and rearranging of the numbers selected for recording. The first procedure was clarification and simplification of all instrumentation. In particular the rhythm was altered, and new drumfills were written to introduce specific melodic passages. The first run through gave the number a total running time of 4 minutes 50 seconds. The producer reduced this to 3 minutes 15 seconds. The next procedure, which I had never experienced before, was perhaps the most difficult for all of us. This was playing and recording our parts individually and separately rather than as an ensemble. This meant a whole variety of musical cues which had imbedded themselves

in the subconscious were suddenly eliminated. The drum part for example had to be played precisely without the melody line to follow. The entire rhythm track had to be laid down first and without listening to anything other than the bass and rhythm guitar it was necessary to create all the dynamics and feeling that would come across in the ensemble playing. This was a new skill that I had to learn. What was even more difficult about following this procedure was that it had to be absolutely faultless. That is, it would have been difficult if not impossible to overdub or 'drop in' on the final take to correct for imperfections.

On the actual day of the recording the guitarist, bass player and drummer (myself) assembled in the studio quarters set apart for recording. There was an elaborate procedure for getting a drum sound. A practice I always thought was inordinantly lengthy and added unnecessarily to the cost of production. After the sound check and sound balance was completed we then put on headphones in order to hear ourselves and the other players at a volume and balance that was easiest to play to. Then the producer introduced an additional sound into my headphones - what is known as a 'click' track. This is an electronic metronome which is intended to stabilise the time of the actual rhythm track.

There are two schools of thought on click tracks. Some recording engineers, and/or musicians feel that the click track centralises the pulse and makes a more uniform recording. Others in the profession claim that a 'click' track encourages a rigid kind of playing, destroys some degree of spontaneity and basically interrupts the fluidity of musicianship during the recording.

We did several takes of the rhythm track. Some with a 'click' track and a few without. The actual take took 3 minutes and 30 seconds. Each time a mistake was made it cost money. The pressure was quite strong to get it right as quickly as possible. We chose one of the takes without a click track.

In my experience of studio work rhythm tracks are the most difficult to complete as any minor error in time, accidental knocks on the drum kit or beats in the wrong place or on the wrong drum make the track virtually impossible to use. Likewise for the accompanying instruments, missed chords, wrong notes, etc. effectively eliminate the 'take' as unusable. For this reason many studios are now using synthesised drum units which effectively simulate the sound and technique of drums without any mistakes. Further some of the sounds currently in use which are electronic percussion sounds rather than acoustic drum sounds make the drum unit a new form of drum sound for recording which in many instances is used in conjunction with a live drummer in the studio. Instead of playing to a 'click' track he plays to a drum machine.

No system of notation was used in the recording studio project but had such methods been used in conjunction with an accomplished ability to read and play with a 'feeling' for the music, the overall cost of the project would have been reduced considerably. In place of this efficiency there was a considerable amount of what might generously be called 'composing.' Several takes of each track were examined by the group and different bass lines, guitar rhythms and drum patterns were suggested and modified after each take. After comparisons and revisions we then finally decided on the feel, tempo

and structure of the track and proceeded to try to play it as perfectly as we could. After this was accomplished the remaining instruments would play their parts to the completed rhythm track. The vocals were added on last.

The basic procedure was technical and compositional all at once. Given that we were not employing any kind of written notation and that the entire piece was put together from memory there was considerable flexibility - more I suspect than one might expect from a piece that was played from written parts.

The procedure for recording the additional sounds involved each player separately playing to the basic track. After each 'take' the player would come into the control room to listen to the results. The rest of the group were present during the playback. We followed the general procedure of using the best of three takes. Occasionally a member of the group would disagree with the outcome of the performance and request a different sound or emphasis. On a few occasions we were in disagreement over choice of tracks or the way a certain part should be performed. In this instance it is useful to have a producer on hand who will act as an arbitrator or in instances of unresolvable disagreements he will take an 'executive' decision in the interests of completion of the project without overuse of studio time.

The use of notation varies considerably and although there was virtually none used in the recording situation it was quite often the case that lyric sheets and chord charts were used in rehearsals and at some gigs. These however, were only ever used temporarily as an aid to assist the eventual memorisation of material. Live performances required too much stage movement and physical expression to enable a musician to work from written notation. Furthermore, it was generally

held to be the case that the group sound was more unified and expressed greater feeling if everyone played from memory.

Learning to play the required music on the given instrument

The majority of learning which occurred did so through the experience of playing in different bands featuring both original and unoriginal material. All the players in the band had music tuition at some point in their lives. Both guitarists had tuition on their actual instrument and I have had tuition on the drums. From my experience, however, of attitudes towards tuition and development of musical skills in a strictly educational environment, there seems to be a combination of prejudices and mysticism. In SP there appeared to be a reasonably balanced and healthy attitude toward the development of technique in an educational context. Its value was seen for what it was. On the other hand there was a strong feeling against excessive technique and it was claimed that the overuse of technique which is suitable for certain kinds of music such as instrumental jazz/rock and various forms of modern jazz, was not really suitable for developing an overall feel for less specialist types of music.

In the minds of most musicians there is a distinction drawn between feel and technique. Those who have great technique sometimes place less emphasis on 'feel' whereas those who have limited technique sometimes place greater value on the feel of the music. A musician with a degree in music is viewed with as much awe and apprehension by untrained musicians as much as the trained musician stands in awe of the successfully competent musician who is entirely untrained. Along with all this underground argument about musical education (and I say underground because those who have it often question its value and those who do not

have it feel uneasy about not having formal training) is a kind of snobbery which interferes with the compatibility of musicians of different technical standards.

In the case of SP there was considerable compatibility with regard to musical ability and training which is one reason why I think the band has enjoyed a reasonably long playing life.

In the actual case of learning to play the required music in the band's repertoire several techniques were employed. The most usual was sheer repetition. Initially this involved repetition of chord structures and basic arrangements. When the chords were mastered then the rhythm section was added. A series of rhythm ideas were then tried out until the right feel was achieved. If it involved new patterns then repetition in the ensemble playing was the most widely used way of learning. In more complex numbers where there was perhaps new technique to learn before an overall feel for the sound could be acquired, a taperecording would be made of the material to be learned and members of the group would work individually on their own parts from a copy of the original recording. This way the laborious process of repetition for the sake of learning could proceed at individual rates.

There were, however, problems with this method. When individual musicians take taped recordings of the musical sounds to which they will practice they invariably create a new part for the song as compared with the one that was perhaps originally desired in the group setting. This phenomenon occurs as a result of the fact that while playing to the tape one's technique is developing and changing but the tape is not responding to the musician playing to it. I remember that R.J., the band leader in Zurich, commented on a similar practice of learning by

playing to records. He said to me, "Never try to learn by playing to records." When I asked why this was a bad thing he said: "When you play to records you learn your technique without being an ensemble player. The band on the record doesn't respond to you! You're doin' all sorts of things and the record is staying the same - its an artificial situation and it can make a player insensitive and difficult for him to play with a band."

The learning situation occurs most successfully in the ensemble playing situation. Although rehearsals may take longer it is often agreed that the best results are achieved in this way.

Times and Places for Rehearsals

Rehearsals occurred in between work and leisure which were usually at weekends or in the evening. Personal domestic commitments influenced the frequency of this activity as well as the importance of the forthcoming performance dates. As I have mentioned earlier I have always held rehearsals at my home for the reason that I prefer not having to take down the drum kit which in my view takes considerably longer than other musical equipment. Furthermore, because I often rehearse other groups I find it easier to accommodate the rehearsal facility.

Rehearsal of groups is very problematic generally, however, I suspect more so in Great Britain than in the U.S.A. where there are many more wide open spaces. Rehearsals are usually very loud for the domestic environment and unless a detached property is owned by one of the musicians it is impossible to rehearse consistently without complaint. I converted my cellar into a sound insulated studio. Even with a ton of sand in the ceiling and sound insulation on all surfaces I still need to

be reasonably careful of disturbing my neighbours.

Although the pattern of rehearsals varies with the importance of forthcoming engagements and conflicting domestic commitments, the majority of inspiration for new material seems to come later in the rehearsal session rather than earlier. Consequently, if the new ideas do occur later in the rehearsal, which happens to be in the evening, then it does create conflict in the neighbourhood.

One reason for late rehearsals is the creative cycle which may have its peak in the early hours of the morning which are the hours when people associate with playing music, or entertainment. The other reason may be for those who have stable domestic situations, that this is viewed as the 'night out with the lads' and individuals are capitalising on the freedom from domestic responsibilities for as long as possible. Alternatively, some of the musicians may encourage rehearsals long into the night because they have no domestic commitments at all and the camaraderie of rehearsals is an escape from loneliness. To be sure a mixture of motives not entirely musical is behind the duration of rehearsals.

Another matter which receives attention at rehearsal times is band policy regarding the business operation of the musical outfit. There is a great deal of discussion around this area and discussion focusses on several topics in particular:

- 1) stage dress
- 2) lighting
- 3) fees for gigs, venues to play; the value of doing local gigs as opposed to the value of doing gigs outside the area
- 4) addition of other players
- 5) choice of musical material

These will be topics I will discuss under different headings later in

this chapter but I will say now that a considerable amount of time was spent discussing these issues in SP and far less actually doing anything about them. The constraints against action were several, which I will discuss in detail later however, but for now I will simply mention them; they are:

- 1) ambivalence about success
- 2) financial limitations of the band budget
- 3) fear of incompatibility
- 4) lack of time for learning new technique

Advertisement for performance; Publicity and sale of tickets

The manager of one of our local venues advised us at one point on how to promote and publicise the band. His advice was to organise networks of fans through personal contact so that there would eventually be some kind of build up on a local level. "The social thing" he would say, was the most important.

It was surprising to me how much of what he said was in fact true. Making oneself available to audiences on a social basis was an important way to develop band publicity through word of mouth. At our venues this meant a variety of activities ranging from circulating amongst the audience socially to throwing late night parties at a musician's home; or organising post-performance excursions to other late night drinking establishments. This kind of activity was expensive and time consuming to say the least but it did have the desired effect. Although on some occasions I would wonder how many of the fans who attended the performance did so for the musical event or the social events which occurred afterwards.

Once a regular following was established it was then possible to attract work at other venues when managers of other establishments could come to see the band playing to a full house, As the band

begins to circulate locally with a following then it is possible to approach other out of town venues with some degree of confidence.

Another method of advertising and promoting a band is through the local press. Usually the local daily has a column on local groups as well as features on any national 'name' groups which might be visiting the area. Getting this kind of publicity is difficult, however, and many groups are after it. I pursued such publicity over a period of two years before I actually got it. The article which did feature a write up of the band was in fact written at a time when several factors came into play which impressed the newspaper editors. Secondly a personal favour to the actual writer helped to sway the decision to publish a feature about the band.

I had approached the press on nearly 20 previous occasions about an article on SP. We had just completed a single which was now out on release in local record shops and on local juke boxes. We had a professional photograph of the band which gave the band a clear and commercial image. Further, we had just been offered a gig at Ronnie Scott's in London; and the serious interest of Birmingham Midlands television for a TV spot. Finally, we had a regular engagement at the Bridge Street Arts Centre. On three occasions our guest spot featured a folk guitarist who was also the music editor for the local newspaper.

Obtaining publicity for the band was achieved in several ways. The primary method was sheer persistence. Other helpful factors included having a good photograph of the group, a poster, and a record or an exceptionally well recorded demo-tape. Most serious venues and media

will not look at a group unless these minimum requirements are met.

Recruiting an appreciative audience capable of listening to and responding to the music

As mentioned in the previous section advertising occurs in many forms and consequently recruitment of the audience is the successful result of advertising.

At the beginning of acquiring a band following it is really very necessary to establish a hard core of audience enthusiasts who will 'get the audience going.' This refers to many things including attendance, applause, and dancing. The extravert members of the audience are willing participants in the live 'musical' event which includes a considerable degree of interaction between the band and the audience. There is a conscious attempt on the part of the band to manipulate the audience into a frenzy - if possible. An ex professional drummer describes the method used by a professional band on tour:

K. The object of course was to drive them out of their heads - if we could.

A.W. For what reason?

K. It sold records - lots of them. It didn't matter what was on the record at that point. The record just reminded them of this frenzy.

A.W. How was this achieved?

K. The management had that one sussed out. They even had a team of psychologists work out and calculate how to drive them out of their minds. The whole thing worked on formula with numbers which accelerated gradually over the entire performance. The build up over the night was with speed, volume and intensity. The stage act was important - we got 'em clapping their hands and shakin' their heads until they were going wild.

This particular individual often spoke about the method in great detail in subdued moments when many semi-professional musicians were

hanging around waiting eagerly for words of wisdom.

Our front man in SP tailored his stage act with these objectives in mind. During a period when he worked regularly with the aforementioned drummer he was virtually coached in his stage presentation.

The stage presentation is critical at rock performances and it is for this reason a hard core following is a necessary asset. Hard core followers will attend every performance and will respond to the demands of the bands stage performance. This will give the band credibility and encourage the rest of the audience to participate and make the night a success. It is interesting to note that the structure of the audience's participation is markedly different from the jazz gig which also employs a degree of calculation (although less conscious) in their attempts to whip up audience participation. Audience participation in the case of jazz is through applause which suggests judgement of each players solo in virtually every number. The band is aware of audience presence which is felt in terms of their role as judges of musicianship. In the rock band the relationship is reversed where the band becomes the judge of the audience's ability to participate in the rock event. The front man in a rock band will pass judgement on a variety of activities of audience participation. In SP there was a dialogue between the audience and the band which took the shape of heckling. The front man would provoke the audience if they did not respond adequately. Likewise the audience would behave provocatively towards the band if they felt the group had fallen below standard.

This kind of familiarity creates a show for the one time attender and creates an aura of casualness amongst regulars. It can be achieved through personal contact and the cultivation of a hard core

of followers.

Interaction of Musicians in the live performance

Interaction between musicians is another important area of development apart from the actual musical repertoire. The interaction between the musicians in the live performance helps to create the stage act and the dynamic relationship between performers and audience. The ability to relate to each other on stage in a dramatic way seems to account for at least 40% of the band's success in achieving recognition from the public. This however, is a matter of spontaneity and it takes tremendous familiarity and sympathy to present it successfully. Furthermore in many respects the interaction requires additional levels of coordination and physical control which are beyond the more basic ability to play one's instrument. To leap in the air for example while playing the finale chord pattern on guitar so that you land on your feet during the last chord of the bar is a skill which one might conceivably practice or alternatively perfect through trial and error.

In SP there was always considerable argument over the significance of stage presence. Some of the players argued that the stage presence was of little consequence in the overall success of the band and that playing good music well was the main attraction. "The music will sell itself" was the usual objection to any discussion of 'choreographing' or staging the events during the musical performance. These comments were usually made by the chord players in the band who were perhaps the most restricted in that some of the arrangements were complex and they felt it unnecessary to acquire the ability or the energy for drama while actually playing the arrangements. In GR this problem

was solved by actually having an individual who concentrated on theatrical interpretation while everyone else concentrated on playing the music.

In SP several of the movements which have eventually been adopted in order to create stage dynamics also functioned as musical cues. Accents or syncopations involved considerable physical movement prior and during the actual playing of the musical inflections.

Initially all cues for changes in the music were musical. However when we first played as a group we all listened carefully giving no particular physical representation on stage to the actual changes in the musical score. With newer material the band was relatively static on stage until the number was well played in, but with the other material which had been played for some time the familiarity with the technique required enabled players to manifest anticipated changes in the musical scenario in terms of physical movement of the entire body thus creating a more dramatic visual performance altogether.

Endings are extremely important to most musical performances. If they are poorly executed then this can damage the overall impact of the performance of a given piece or song. Endings therefore require special interaction amongst the entire band in order that the final sound is played in unison. Nothing sounds less professional than a number which ends with an extra beat, an extraneous run of notes or an incomplete bass line. Even if there are mistakes in the ensemble playing in the very last bar the band should at least play a final unison sound with a distinct end. There are several ways to

achieve this with varying degrees of flexibility and we have always used a mixture. Some of the methods require more interaction between musicians than others.

The most fluid and dramatic ending, which requires the greatest amount of interaction, is what can only be described as the "crash, bang, wallop," ending. This ending is usually employed in an up tempo number and is specifically designed to create frenzy and excitement. The last four bars lead up to a unison note which is held by the bass guitar while the lead guitar goes into a wild run shortly followed by the drums, the other guitar and bass guitar. Eventually the entire band are rocketing an improvised blend of careening crescendoes which must eventually resolve in one unison note. The character of this kind of ending is totally improvisational and requires one specific cue to bring the band to some kind of attention after the thing has been running wild from between 15 and 45 seconds. With SP the organising cue came from the drums featuring a series of short sharp rolls with the final beat being an accent on the rim of the snare. At this point the entire band would turn around toward me so that we are all looking at each other in a circle. I would play one final signifying roll around the kit beginning with the snare and ending on the bass drum, after which time I would raise my arms above my head hold for approximately 1 second and bring them down on the cymbals. The band would follow that cue to create, after what seemed like frenzied chaos, one impressive unison sound.

Other cues which were primarily musical did not rely directly on visual signs but there was always a considerable amount of nodding and winking going on to awaken everyone's attention to specific changes in the song or an ending.

Occasionally there is a kind of verbal stage interaction which goes on where the front man projects a character onto individual musicians in the group. This kind of stage patter is always a delicate procedure and I have known bands to split up over what the front man has said about an individual musician. The presentation of other band members in a humorous and flattering way is a very difficult knack to achieve. Most 'frontmen' I have worked with have ended up unintentionally insulting a band member while attempting a comical stage presence. In SP the band front man was fairly straightforward, referring to other band members only when the subsequent number in the set was going to feature that individual or individuals in particular.

The Songwriting Process

The songwriting process has been described in some detail in the previous chapter. In this particular section of the chapter on SP I would like to make an overview commentary on the factors involved in the development of songwriting in the group.

There is a fundamental difference in the objectives and aims of instrumental songwriting and 'vocal' songwriting. In basic ways the songwriting project shapes the expectations of the band vis-a-vis each other and the audience. When the band was an instrumental group the focus of attention was on individual virtuosity. Technique was at a premium and all arrangements featured dynamic solo work. However, in this category, although the band might achieve local popularity with a strong following the overall expectations of achieving professional goals was very limited. One simply has to look at the percentage of vocal numbers featured on record charts as opposed to instrumental ones

to see that this is so. Although, instrumental numbers are always more satisfying to play than vocal numbers, from an instrumentalist's point of view, the degree of popularity is considerably smaller. Instrumental compositions are generally speaking far more complex, require greater concentration and musical understanding to appreciate and for this reason original instrumental material must be, by and large, an aficionado's cult. It is this activity which follows the tradition of jazz and for this reason many rock instrumental groups are erroneously referred to as jazz/rock.

The vocal songwriting project has far greater scope and far greater market for commercial success. The comparative simplicity of instrumental arrangements and the focus of audience concentration upon one individual simplifies its appeal and makes the commercial image visually and aurally more accessible.

The major motivation for SP to undertake vocal rather than instrumental material was primarily to achieve commercial ambitions as well to have greater immediate appeal for local venues. Vocal material which sounded like popular radio airplay gave us greater appeal with most venues.

Once the decision, however, was taken to become a vocal band, this new priority changed the outlook and expectation of the band as a whole. To begin with there were very definite identity problems when more than one player wanted to be the lead vocalist. This was, as I have previously described, one of the reasons for the band to split and re-form. The other change in priority was the scope for improvisation of the instrumental backing. The band instrumentalists were now required to exercise considerable constraint.

Virtuoso soloing was kept to a minimum and individual instrumentalists now had to play a supportive rather than leading role in the creation of the overall sound.

The legal structure of the music business and its effect on the songwriting process

The legal structure of the music business identifies individuals or groups as owners of what is essentially 'intellectual' property. From a purely business point of view, the fewer owners the larger each individual share of any profits that might accrue.

As we all became more familiar with the business side of the musical project the issue of ownership of material developed into a major concern. As I have described in some detail in the previous chapter on songwriting, the knowledge of the implied and explicit ownership of original material, changed the working habits of the group considerably from an especially sympathetic working relationship to a more competitive and possessive approach. Much of this change was in anticipation of successful professional achievements and not necessarily founded on concrete offers of recording contracts. However, after successful performances or when there have been positive audience responses to particular numbers, there are occasionally expressions of possessiveness regarding original material written.

The legal structure also goes some way towards affecting the bargaining position a group has with a recording studio. A semi-pro group in the process of making a record may bargain for some of its studio costs by offering the studio management or engineer a percentage of the successful single. The bargaining power a group has on this basis is of course very much dependent on how the studio engineer evaluates the potential of the record. A 'couple of points' as the

saying goes (2% of the total 12% a group might get on a record deal) can mean the difference of three or four hundred pounds in the overall cost of making the first record.

The overall effect of the music business as such is a double edged sword in relation to songwriting. On the one hand it can create competitiveness and productivity in the songwriting process and alternatively it can create divisiveness. In my experience of serious semi-professional groups there appears to be a pairing off where individuals work in partnerships of two. This is certainly a trend with many professional acts where a partnership is formed between two musicians who write all the material and then hire session musicians for the live and recorded ensemble work. In SP, increased awareness of copyright law discouraged group writing. As new material was completed, ownership was established. An effort was made to feature an equal percentage of each songwriter's material in the groups repertoire.

Cues in Arrangements and Improvised Passages

In the instrumental versions of the group there were considerably more cues of a purely musical nature to arrange. Many of the numbers were in odd time signatures with unusual instrumental segments; sometimes changes in time signatures. One number in particular began in 6/8, changed to 4/4 then to 11/8 and then back to 6/8 again. In complex arrangements such as these, cue passages would be written such as a sequence of notes played in unison or a melodic 'interlude' repeated over four bars. In this kind of complex arrangement, listening was the key factor in identifying cues. Improvised passages, however, always had a special character and very often a visual cue would be used as a way of signifying the end of the passage. Alternatively, a visual cue might indicate to

the other chord player, that the unison passage which stood as the cue for the next sequence of sounds was to be played. Occasionally a drum fill of a special kind was the cue for transition. If this were to come at the end of a guitar solo that was essentially improvisational then a visual cue from the guitarist would trigger off my drum cue for the rest of the band.

Cues for songs were comparatively more visual. The melody line was much more straightforward and the arrangements far less complex. There might be a sequence of anticipated notes or accents to be played in unison and just before these were to occur, the band would look around at each other perhaps a bar before we were to play them.

Other negative cues had no other character than that of a shout. If the rhythm was too fast or slow something was simply said. If someone played the wrong chords then there would be signs of disapproval. When the band first began and mistakes were made band members were usually pretty upset about it, but as more experience was gained it became taboo to display aggression about misplayed numbers.

Dress, Stage Appearance

Dress and stage appearance has always been a controversial subject in band policy, a subject most highly charged with mixed emotion. There are many schools of thought on this matter. Two are particularly relevant to this group because there is an element of choice. The band members can either wear, on stage, what they want, or what they think the audience would like to see them wearing. On the one hand they create and impose their identities to be accepted or rejected by the audience. On the other hand they may dress to please an audience. After this decision is taken then the argument shifts to the question of what pleases an audience. Some members of the band

believe that an audience wants to see a group that looks like the audience. From this viewpoint the audience can identify with the band and they attach more personal meaningfulness to our original material. The other argument interprets the desires of the audience as wanting to see something quite different from themselves - that they essentially experience a fantasy impression of the band which ought to be encouraged by wearing eye catching, light reflecting fantastical costumes embodying a kind of inaccessible media image.

Most of the bands I have worked with experience some controversy regarding stage appearance. In Switzerland for example, the management, and consequently the band leader required uniform dress. Some of the members of SP argued that uniformity of band dress helped to create the impression of band unity. Others argued that such similarity of clothing was stereotypical of 'club' bands. Club bands in the mind of the serious semi-professional were those bands that 'sold out' and were 'copy' groups as Bennet terms it. With regard to individual, yet highly styled, light reflecting clothing, many musicians in the group raised objection on the grounds that it was not only expensive stage clothing but also that it type-cast you as a cabaret artist.

As the band SP was very much divided on the issue of appearance, the band members would arrive wearing such radically different kinds of clothing that there was weight to the argument about not 'looking' like a unified band. However, the discussion turned ultimately to a debate over priorities - music or vanity. Those who wanted to remain anonymous and without a marked image created by stage appearance held something tantamount to a 'purist' view that music was the sole vehicle of expression and all attempts to mix in domains of meaning other than musical were

detrimental to the entire aesthetic outcome of the project. There were other motives for this view however. In semi-professional groups the majority of income is considered a sideline untaxable income. The anonymity of the band and the player protects the secrecy of this income. It is well known amongst semi-professional musicians that some individuals have eventually been investigated by the Inland Revenue.

Individual priorities regarding anonymity for tax purposes has far reaching effects on band policy in relation to promotion and stage appearance. Those musicians who opt for the anonymity approach choose to conceal their identities and this goes some way towards restricting promotional efforts. Obviously someone who chooses this evasive approach will have a different attitude towards the publicisation of his name and image through stage appearance.

The economic factor is also significant in that stage clothing is expensive and money spent on appearance might otherwise be spent on musical equipment. In the case of SP this issue was never resolved.

Managers of Venues

Managers of venues have one objective only and that is to show a profit at the end of the evening. There are very few, who in my opinion will run a club at a loss in order to promote more esoteric forms of music. However, there are a few exceptions.

The majority of venues which we played at, whether they were pubs, clubs or University ballrooms, found the majority of profits through the sale of alcohol. Apart from University and college ballrooms the promise of a return booking had more to do with the cash level of bar takings than with anything else. With regard to the University and college

venues, social secretaries utilising student funded budgets were able to use a different criterion of musical taste than quantity of alcohol consumed. Consequently, approaching the different venues for gigs required a different kind of promotion appeal.

In the minds of most venue managers jazz or jazz-related music appeals to middle and upper middle income groups who have a primarily specialist taste and would be infrequent attenders. However, the clients who do attend jazz performances tend to buy more expensive drinks even though fewer actually attend.

When SP first performed as a jazz/rock instrumental band our repertoire had specialist appeal. The venues at which we could play were limited and although the 'audience' following we had were enthusiastic they were small in number. Furthermore they were not particularly wealthy. When we changed to a vocal band, however, our audience following changed and grew by a substantial margin. Subsequently the venues we could play at successfully grew in number. In the eyes of venue managers we were classed as middle of the road soul/rock.

The other factor that is of concern to managers of venues apart from quantities of alcohol consumed is the clientele a band will attract. Managers want people to drink expensively, and at the end of the evening not to hang around the bar waiting to be asked to leave or be on the verge of starting a fight. As soon as fights begin to break out at a performance audience numbers drop and the manager seeks to change the band.

As an established band in the area it is easier to find bookings at a reasonable fee. New bands are usually given a trial booking on unpopular nights for little or no fee whatsoever. Colleges and

Universities may give an unknown band a booking if Social Secretaries are harrassed regularly to listen to a demo-tape which, if they like it, might result in a booking at a very low fee. However, once a few successful gigs are achieved then word gets around on a circuit. In all attempts at getting work for an unknown band, posters, photographs and other publicity material are essential. After playing in local venues for some time the next big break will be when a semi-professional group is asked to support a professional group. Getting this kind of engagement is only achieved through constant promotion efforts and staying regularly in touch with venue managers. Usually one person in the band takes responsibility for such efforts. Very often it is the individual player who has the least active role in the songwriting side of the group activity.

Occasionally venue managers may take an active management role in the life of a semi-professional band, that is, help them to get more prestigious gigs at other venues in exchange for a promise to play regularly at his venue for the same fee.

The contractual arrangements between ourselves and venues were primarily on written agreements unless we were personally very familiar with the manager in which case a verbal agreement was adequate. There is quite a range of variation in the contractual expectations of venues. When the splinter group from SP played at working men's clubs there was a written contract which stipulated starting times, length of breaks, stage dress and finishing times. There was also an unwritten expectation about repertoire which was a matter negotiated by an agent. The clubs had their own social secretaries and they handled their own promotion in the venue. These engagements always had a set fee.

Alternatively, there were venues which worked on 'fee based upon popularity' basis. They tended to cater for bands that were serious semi-professionals attempting to write and perform original material. Initially, groups of this kind were expected to play for small amounts of money until popularity grew at which point new fees were negotiated. The venue and the group would undertake jointly the promotion of the band. The usual distribution of responsibility was that managers would publicise the band within the venue and advertise in the local press. The band on the other hand would be responsible for producing posters and making contacts with various social networks such as local educational institutions and any other centres of social activity which may hold a recruitable audience.

Colleges and Universities always worked with a written contract agreement which stipulated many of the expectations required of professional groups, including times of arrival. However, these engagements were usually better paid than most and were worth the extra effort.

Agents, Publishers and Management

Agents and Managers perform a representational service in terms of acquiring work and attempting to promote the band. In the case of club venues agents tend to monopolise bookings and it is only through being on agents' books that you can get this kind of work. Few semi-professional groups have managers unless they are taken on by an individual as a 'hobby' in which case their role is to represent the band in a promotional capacity. The stage at which a semi-professional band does acquire management is usually transitional and there is either a recording contract in the process of negotiation or a series of very important bookings lined up leading to such a contract.

Publishers are usually involved after a recording deal is signed unless the record company is signing the band for publishing rights as well. However in those instances where individual partnerships are specifically formed for the purpose of songwriting rather than performing a publishing agreement may be the first stage of professional involvement.

Agents, Publishers and Management service mainly professional groups and therefore a detailed examination of their role is not entirely relevant to this investigation except where they become involved in preliminary transitional stages between semi-professional and professional work. My fieldwork experience most directly relevant occurred when I was with GR. The letters which appear in the appendix of this thesis give an indication of the kind of involvement an agent might have. But even the individual who is represented in the letters was taking on GR more or less as a 'hobby' as he confesses later to his ignorance of the 'pop' music business. Really he did very little for the band except write encouraging letters. However, I was certain he would be ready to take a more active role if the band ever became very successful through our own efforts. It is interesting to note the line in his letter which states "I'm not a cigar smoking, stick-with-me-and-I'll-make-you-a-star" type of agent. It is ironic because many years later another manager who then was the owner of his own independent record label and eventually secured GR a recording contract, was precisely a character of that type.

With regard to SP we did at various stages approach agents for bookings but without any success. The agents that handled the clubs weren't interested when we were a vocal band because our repertoire was original material. The agents which handled the more prestigious venues would not have us on their books unless we had a recorded album

and consequently this motivated us to record at least our own single.

Recording Engineers

Recording engineers are perhaps the most important individuals in the music business and the individual who can make or break recording's chances of success. Usually they are musicians who have decided against the profession of playing but can bring their expertise into the musical projects of other groups. As one engineer put it "we can make an inferior musician sound mediocre and a mediocre musician sound brilliant." That comment alone perhaps explains the gap one often experiences between the recorded and live performances of familiar sounds. In face the engineer can create dynamics when there aren't any and adjust the pulse or tempo of individual instruments in order to create an entirely different 'feel' from the one performed. The engineer is potentially another musician in the group and he more than anyone influences the final outcome of the recording.

It is usual in the business for a recording engineer to work with a producer although occasionally a recording engineer will himself be a producer or vica versa. Like individual musicians, different recording studios develop their own style of sound. In the case of SP our recording engineer had previously worked with Steel Eye Span, Maddy Prior, and the Strawbs. The stamp of that kind of sound is evident on the recording we made.

As I mentioned earlier the contractual arrangement was entirely verbal and the offer of percentages on unusual success was given in exchange for additional studio time and a more than routine service. This was negotiated by our producer. The engineer did also offer to act as an agent on behalf of SP in securing a substantial recording deal which would of course involve him in the production and recording

of any material we were signed up to do. He made some attempts to secure us a record deal as I understand he does with any group which he feels might be promising. Indirectly these efforts are of mutual interest. More importantly, however, the psychological boost of enthusiasm and willingness to participate in the musical project beyond the expected role is of great benefit to the group.

The producer and the recording engineer work together to create the best possible psychological environment for musical performance. The object being of course to obtain the best possible performance in the time allotted in the group's budget. Invariably the recording studio situation is very high pressure which must be kept in a low key. A soothing voice when retakes are needed because of error can make the difference between hypertension and subsequent inability to perform or a cool headed determined approach to get it right the next time. Very often an individual musician is in the recording situation on his own and the rest of the group are listening behind the recording desk. Sometimes it is difficult to tell how you are doing until you finish the take, whereupon the recording engineer negotiates consensus of opinion amongst the group and then diplomatically feeds back the result to the performer who must either repeat his efforts under still greater pressure than before (because of the 'time is money' factor) or is given a sign of approval ending the ordeal.

In this capacity the recording engineer is the conductor/master technician and arbitrator all at once. The best ones are capable of fulfilling all these roles simultaneously whereas others take a passive role in some of these areas and are then unable to unify and consolidate the group's efforts into the best possible product.

Sound Mixers, Lighting Engineers and Road Crew

These are essential members of professional groups and luxury personnel for the semi-pro group. They take the strain of the overall technical problems of performances off the musicians and they can create critical dynamics which give the band a professional image. Lighting suggests and interprets moods which convey an extra dimension of meaning in the musical performance. It can give the front line additional presence and poise it might otherwise lack and it can accentuate dynamics in rhythm and harmonic arrangements. The lighting technician must have an ear for the music and a coordinated ability in order to make lighting changes on anticipated notes in the bar or at various other finite points where there is a dynamic change in the musical sound.

The sound mixer is to the live performance what the recording engineer is to the studio. He can make a band sound fantastic or positively ruin it with poor balance, extraneous electronic noises, and misuse of volume. The sound mixer can control a range of dynamics and special effects as well as volume imbalances which may appear during the live performance. It is surprising how often, and how remarkably unconsciously players will increase the volume of their instruments entirely out of balance with the rest of the band. Here is where a sound mixer is invaluable. He can control the overall balance and distribution of sound so that the instruments are tonally compatible and are featured in the appropriate places.

Road crew shift the equipment and assist the sound engineer in the general layout of the rig. Although many road crew are primarily muscle power they are very often in training to do lighting or sound mixing.

SP only rarely had support personnel and when they were used they were arranged on a per engagement basis. The venues in which we played usually did not require the same degree of extravagance which apart from anything else adds to the overall image of professionalism. However, on the occasion when representatives from record companies, radio stations, or television companies have attended gigs we have employed such personnel.

The personnel is very difficult to find. A good sound mixer is like gold-dust. This one individual alone can dramatically influence the quality of the true performance. It has often been our experience that we would have been better off controlling the sound ourselves than putting the matter in incapable hands. Apart from this there was the additional expense for the services of support personnel which, depending on the fee and importance of the performance, was a determining factor in our decision to employ support personnel.

This concludes my discussion of the semi-professional rock band SP in relation to the categories identified in the research design.

Conclusion

At this point I would like to return once again to my original research design and attempt to identify in theoretical terms an overview of the fieldwork experience presented in this chapter.

To begin with I would like to restate segments of my analytic framework which I have taken from Becker and again apply them directly to the fieldwork described in this chapter. In "Art as a Collective Action" Becker states:

".....We can study social organisations of all kinds by looking for networks responsible for producing specific events, the overlaps among such cooperative networks, the way the participants use conventions to co-ordinate their activities, how existing conventions simultaneously make co-ordinated action possible and limit forms it can take, and how the development of new forms of acquiring resources makes change possible."
(Becker, 1974, p.775)

The networks responsible for the operation and maintenance of a serious semi-professional band such as SP are varied and in some ways more complexly interrelated than the jazz group I investigated earlier. With the jazz group the venue was the focal point of activity in that this was the only place we played. There was a straightforward contract of employment with specific expectations in terms of financial remuneration, times of playing, dress, accommodation, and behavioural expectations in the working environment. In this respect, the musical event was more accessible to analysis and the parameters of operation were far easier to identify.

In one important respect the two case studies, the jazz group and SP are not strictly comparable in that the jazz group study was one of extended engagement by a casual line-up. The study of the rock group SP was conducted over a considerably longer period. It may well have been therefore, that a local jazz group studied in a similar fashion to SP might well have revealed additional and perhaps similar features to those of SP.

With SP as well as other similar semi-professional groups the parameters of operation or the co-ordinates of activity were comparatively speaking, created for the purposes they served. The engagements, the audience following, equipment, negotiations with venues, style of music and presentation are all open to creative exploration - the main objective being to create an original and marketable sound.

The networks or institutions in relation to which these creative activities occur vary in the degree of importance and involvement in the musical project. The media are the obvious and most powerful

indirect influence on the activities of the semi-professional group. "Pop" music programs on radio and television are as much the 'professional' publication of latest developments 'in the field' as it were, as it is entertainment for the average listener. It is interesting to note that television rental and video tape hire are now tax deductible for the private professional music teacher. It is considered professional material necessary to the practice of their occupation.

The media provide the models for the copy groups and the points of departure for the creative original group. When musicians watch programs such as "Top of the Pops" the comments made revolve around production, equipment, quality of musical arrangement, whether the group's appearance was recorded live or mimed, whether the full band was in view or just the front line artist. Every musician I ever spoke to about a program called "Old Grey Whistle Test" dreaded the thought of playing live in a studio with no audience. However, the camera always revealed and explored images of performers and equipment that would not otherwise have been possible while attending the live event. The network of the media therefore provides an enormous amount of information.

Educational institutions and less formal educational experiences (e.g. private tutors) are another important network. They provide at least a working knowledge of musical notation which develops ability for absorbing and expressing new musical ideas. Some of these networks actively destroy creative ability and others enhance it tremendously. The relationship between an individual and his musical education is so unique that it is impossible to develop a serious analysis of a meaningful nature relevant to this investigation. I wish only to say that musical education exists in some profusion, is utilised by some and rejected by others.

Another important and effective network are music shops. They of course provide the range of instruments, published music, and records which are essential ingredients of the trade. In some instances these shops regulate the development of creative musical invention by constantly offering new technological devices to create original sounds. For those musicians who adopt this route to the creative musical project, the creation when achieved will be closely dependent on new technology. This is an alternative, and a popular one, arguably less complex than undertaking the task of learning new musical technique in order to create new musical forms.

Another role performed by music shops is the dissemination of information about local musicians and musical groups. Often a music shop is a 'grapevine' centre for local musicians and following.

The most important network affecting the development and operation of SP was Rock Workshop. This weekly jamming event introduced many different musicians to each other on a casual basis and in many instances with regard to changes in band personnel or forming new bands altogether, it greatly facilitated regrouping musicians who wanted to commence new musical projects. At this particular centre of activity musicians had the opportunity to see variations in ability and stylistic preferences without the responsibility of formal auditions. It also brought on many new players who were just beginning or perhaps even had the abilities which were realised by the sheer spontaneity of the jamming situation.

Additionally, Rock Workshop was the event which created the most direct lines of communication between the professional and semi-professional musicians. Many of the conventions, ideas, trends, use of equipment and

style of playing were communicated by the interactions occurring through this meeting point. The quality of this interaction and the significance of exchanges between members of semi-professional groups and professional musicians have been described in detail.

A local musicians' network is of great importance and it is established through playing with different groups at different points in one's musical career. The tree diagram in the appendix illustrates movement and change within the network and one can see how closely interrelated the musicians are as they form and reform with more or less the same musicians but in different groupings. Although some recruitment occurs, as mentioned, through events like Rock Workshop, and some through advertisements in local press, the majority of recruitment occurs through word of mouth and along the lines of the network such as the one illustrated in the appendix. An individual local musician's semi-professional history is known locally and this goes some way toward creating a musical identity in terms of technical ability and style.

Another network of considerable importance is the 'equipment' network which services the changing needs of a semi-professional band. Occasionally P.A. equipment breaks down, amplifiers malfunction or a band will acquire an engagement for which their equipment is unsuitable. Members of other bands usually make their equipment available on an exchange-favour basis which is quite a substantial sharing of resources in the musical community. Without such cooperation the cost of many engagements would be prohibitive.

The other important network, or perhaps 'circuit' is a better word, is that created by agents, managers of venues and the local press. All three groups of individuals are involved in the professional life of the

working band. An agent will put forward the established name of a Pub/club band which will then become known as a reliable audience satisfying musical outfit. Alternatively managers of disco venues looking for local bands with popular appeal will choose to book established bands that have played in local venues, established a following, and whose names appear regularly in the local press. SP will have many bookings annually at venues where we have been referred. This is one reason why it can become difficult to leave bands or disband. The time it takes to re-establish the reputation one had is considerable. Often where venues are familiar with the players in a new band who were at one time in an established popular band, some attempt would be made to point this out in advertising such as:

"Tonight Still Life: featuring J.K. Tell ex.No Mystery band," etc.

The networks described are similar to any professional grouping which requires changes in personnel or exchanges of resources in order to maintain economic viability. As Becker states, these networks facilitate the co-ordination of activity in a way which would be otherwise make semi-professional musical life very difficult.

Convention and Constraint

Becker goes on to elaborate the way in which certain conventions restrict activity as well as enable its occurrence.

"Conventions place strong constraints on the artist. They are particularly constraining because they do not exist in isolation, but come in complexly interdependent systems, so that making one small change often requires making changes in a variety of other activities. A system of conventions gets embodied in equipment, materials, training available, facilities and sites, systems of notation and the like, all of which must be changed if any one segment is."

The most significant convention which operates in the functioning of many semi-professional groups, and certainly in the group studied, is the adoption of an attitude which shapes the driving force of the group and the persistence necessary to create a viable musical outfit. This attitude increases in intensity as the band becomes gradually more successful. The attitude is simply that professional work must eventually be achieved in order to free oneself from the constraints of the day job. What evolves eventually is a routine which is potentially dangerous to physical health and the stability of normal domestic life. That is, the continuation in the day job, which provides a secure base while undertaking gradually more and more musical engagements. The 18 hour day is not unusual when musicians try very hard to make the transition from semi-professional life to professional life living for trying to 'make it' is an attitude which can drive everyone in a band to overcommit themselves. Yet this is what is expected. This is the convention which taxes body and soul when 5 gigs in a week expand the weekly work schedule from 40 to 85 hours.

Another significant and purely legal convention is that created by the Performing Rights Society and the Musicians Union. This being that live music must be heard in venues with a music licence. Although the policy creates work for local professional musicians, job satisfaction

is minimal if the main purpose of the venue is to play recorded music e.g. a disco. This convention creates a certain undercurrent of antagonism between D.J.s and band members, the D.J. producing his sound and image through secondary sources and the band competing with considerably more personnel, equipment and skill. Per man the D.J. earns more for the night than any of the individual musicians.

Band earnings are still another issue about which there is some degree of convention. With SP the band money was always divided equally which is contrary to some professional outfits where the individual band member's wage may be some percentage less than that of the band leader. Furthermore, the band owned very little of the equipment used jointly. This of course varies with other semi-professional outfits as some clearly choose to take none of the band earnings and to use all financial gain from performances to promote the band and purchase necessary sound and lighting equipment. One problem with this procedure is that if the band decides to split up there can be argument over the ownership of equipment.

Conventions regarding the use of notation were fairly straightforward. The band used self-styled forms of notation during rehearsals but only as an aid to memory. It was felt that the group as a whole played with more 'feeling' and were able to concentrate on projecting stage presence when unencumbered with the business of reading musical notation.

Sitting-in is a rare occurrence in Rock groups and one most closely associated with jazz. The band, SP, on rare occasions permitted sitting in and such activity was reserved for those engagements which were attended primarily by musicians. Even then, 'guest' musicians

sat in only after the full repertoire had been played. On these occasions where sitting in occurs musical instruments are usually provided by the person who joins the ensemble except in the case of drums.

Finally the quality and type of musical equipment is viewed with certain scrutiny by both audience and musicians. Certain kinds of gear have a distinctly rock image and others a distinctly jazz image. There is direct and indirect pressure to conform to the commercial image suggested by certain kinds of equipment.

Another general feature of convention which Becker describes has particular application to some of the debate in SP regarding stage dress and stage appearance. Becker states:

"Participants in the art world regard some of the activities necessary to the production of art as "artistic", requiring the special gift or sensibility of an artist. The remaining activities seem to them a matter of craft, business acumen, or some other ability less rare, less characteristic of art, less necessary to the success of the work, and less worthy of respect." (Becker, 1974, p.768)

The initial priority of the band is the musical convention of artistic expression. Anything apart from this, such as stage appearance or non-musical behaviour, was viewed essentially as self-demeaning and pandering to commercial objectives. To do this in an obvious way was considered by some members of the band to be an activity which undermined the authenticity of the music. This conflict, however, is apparent in one form or another with most semi-professional bands. The artistic achievement and expression becomes gradually compromised in favour of commercial objectives. In my view, however, it is the inability to rationalise the necessary compromise that eventually destroys the chance of success for many

semi-professional groups. With the exception of a handful of 'pop' superheroes the majority of successful professional musicians who are currently playing their 'own' thing, as it were, quite happily did someone else's 'thing' for quite a while before the opportunity arose to complete their own artistic projects.

Constraints

The primary constraint which faced the group and which faces many others is the joint ownership of musical equipment and musical repertoire. As time passes and more joint finance is invested in the overall equipment pool, the more difficult it becomes to change personnel or in fact to leave a musical group. This, however, is a feature of semi-professional group life. In professional contexts equipment such as lighting, P.A. sounds systems, sound mixers, cable and recording equipment would not be owned by actual members of a band, but rather the actual company sponsoring the promotion of the group.

The other item jointly owned in progressively greater quantity is original musical repertoire. A set of 15 or 20 original songs which have been responsible for developing a substantial following may reflect years of writing, rewriting and rehearsing. A band which has learned them well and can perform them adequately from memory is difficult to replace without a considerable amount of extra work which for the semi-professional, would necessarily occur during 'unsocial' hours. These factors militate against individual musical development. That is to say opportunities to undertake new musical experiences which may in fact broaden horizons and abilities are restricted because of the costs involved in changing one's musical

commitments.

This last point leads to the next perhaps obvious constraint and that is the compartmentalisation of semi-professional musical life. By this I mean that there are restrictions on the manner in which a semi-professional musician can work because of the other economic commitments he must undertake in order to survive. Certainly as the semi-professional musician ages, develops a family life and greater domestic responsibilities, he is unable to take certain risks for the sake of achieving professional status that he might have taken in earlier years. That is to say, if the musician is employed in some other capacity which earns a progressively greater income, then a starting salary which might be offered to commence a professional contract might not be competitive with the musician's current income from his day time employment. And further, even if the musician decided to gamble, giving up his secure day-job for a professional music contract, there are risks that the work offered may only be temporary. There is little guarantee of the now current employment still being there to return to if professional musical life fails.

In view of the increasing risks that might affect an individual musician who undertook a professional musical engagement, the attitude towards the musical work the semi-professional might undertake becomes progressively more compartmentalised. That is to say a semi-professional musician's life is restricted to the constraints of family and work obligations. The following is a sample list of restrictions that any semi-professional might mention when approached for regular work. They are presented in the form of dialogue which I have recorded over the years. Although they are only general comments they reflect considerably

general domains of constraint.

In reply to the question:

"Would you be interested in playing at the Bear Hotel on a regular basis?"

A sample of replies which reflect constraint are as follows:

- 1) "Well if I play in the band I can only play once a fortnight."
- 2) "I can't do the next two Thursdays because we've a works 'do' on next week and "in laws" are visiting the following week."
- 3) "I can only rehearse once a week but not on Wednesdays because my wife has art classes and it's my turn to look after the kids."
- 4) "No I wouldn't be interested in doing that venue it's too far to travel."
- 5) "Yes I'd like to do that one as long as we don't have to play after midnight I've got an early start in the morning."

Another variety of constraint which is expressed regularly is in the form of a preference for low pressure venues.

- 1) "Let's play at the Bear Hotel. I know it's not a lot of money but at least we can play what we want, and it always goes down well."

As time goes on the list becomes more and more conditional. Many musicians can become more and more specialised in their abilities to perform and gradually more particular about where and when they will perform.

Other factors contribute to constraint that are peculiar to semi-pro life. If the band does change personnel, new personnel may, for obvious reasons, want to change the name of the band. This can be very costly in that immediately a new reputation needs to be established. This may cost a band bookings and generally speaking cause a loss of

income to already established band members.

Additionally, choice of equipment (unless you can afford more than one instrument) typecasts you in the minds of musicians and audiences as to what kind of player you are. I remember for example, when I started playing jazz I used to bring my normal drum kit which I used for the Rock music with SP. Immediately I was reprimanded: "You can tell he's a Rock drummer, look at the size of that kit!" My playing was always light and simple when I played jazz but for those unfamiliar with my technique, the presence of what looked like a kit for a Rock band raised expectations. Likewise for guitar and bass. A double bass would never do for a Rock performance but it is interesting to note that an electric bass guitar is coming into greater use in jazz circles because of its practical advantages.

Finally, the other real constraint which dramatically affects the semi-professional musician is the disco. The disco has changed the semi-professional musician's work considerably. The disco venue is pressurised by the Musicians Union to employ live musicians. These venues invariably choose semi-professional groups because they are cheaper. Ironically, although the pressure for live music has been a campaign for musicians by the Musicians Union, surprisingly few of the musicians who undertake this work are Musician's Union members. This is one reason why semi-professional music groups are chosen, they will work for less than Musician's Union rates. The Musician's Union plays a very small role in the lives of semi-professional groups largely because semi-professional musicians' economic needs are not primarily achieved through playing music. Consequently the disco venue gets a

band which has neither the gear nor the expertise to compete with the technically perfect sound of the club disco console and recorded music. Furthermore, the audience that come to a disco venue are not particularly interested in seeing a live group and this, along with the competitive disadvantage of technical limitations and limitations of expertise, puts the live musicians in a very weak bargaining position. Consequently, many semi-professional musicians prefer not to work in venues with discos, which are increasing in number. Professional groups are too costly and now the new trend is to hire videos of professional groups.

This now concludes my analysis of SP. I will now present a final summary of the entire thesis in the forthcoming conclusion.

CONCLUSION

The purpose of this investigation has been to identify a new direction in the area of sociological research on music. At the time I commenced my research most studies available were content analyses featuring popular expressions of musical craft; its effect on culture or its capacity to reflect aspects of modern day culture. Little had been written about the musicians themselves apart from journalistic glorifications of media-famed artists of popular music. The purpose of this investigation is to look at the less glorious dimensions of the craft and its practitioners; the in-between stages, as it were, between amateurism and professionalism, namely: the semi-professional musician. This has not been a study from which broad generalisations about semi-professional musical life might be made. Rather it has been a study which I hope raises the kind of questions which would be relevant to any study of a similar nature in an entirely different setting. Until many studies of this kind are undertaken in many different areas throughout this country, the U.S.A. and elsewhere it will be difficult to establish universal feature of non-professional musical life but I hope to have made a useful contribution towards this end.

In this concluding chapter I would like to discuss in an overview, central themes of this project. To begin with I will discuss the nature and scope of my methodology - participant observation. Following this I would like to relate the conduct of my research to originating influences described in Section I. In particular my objective will be to show how I have incorporated, refined or departed from the original

ideas of others which have helped to shape my research. Subsequent to this I will attempt to evaluate the research design which I have appropriated from Howard Becker's "Art as a Collective Action," and show how I have used it in this project. Finally I will discuss my own findings from case studies and the questions these might raise for additional research.

Participant Observation

The methodology employed in this research project has been participant observation. Many of my analyses based upon observation, were made retrospectively, and many were made concurrently with the activity in which I was involved. A sample of the latter appears in the appendix of this thesis in the form of a diary. Many of my observations, however, were not conducted with intent to uncover information or substantiate theory. If I had approached the field on this basis alone it would have been difficult to achieve the level of involvement with the musical projects I have described throughout this investigation. It was often the case that I only became aware of the relevance of group activity in relation to theory after some time had passed. Although retrospective analysis may be undermined by defective or selective memory I have tried to guard against this tendency by making notes as soon as possible after the event occurred.

At the time I commenced this research project I did so with two major objectives: to work as a musician and to understand that activity from a sociological point of view. Consequently, my work has been a combination of two independent yet mutually influencing activities.

Although my musical colleagues knew of my interest in writing about music and musicians, this was never a focal point of my relationship with them. My interaction with them was strictly as a musician and for this additional reason a majority of my sociological observations were noted and analysed retrospectively. Furthermore, it is almost certain, in my mind, that if any of the musicians with whom I worked felt that I was making a calculated investigation of their involvement in a musical project there would be an interruption in the natural flow of the group's musical development. In their eyes I was not a viewer but a doer like them and from my point of view what I learned sociologically from the process of participation and acting as a musician has been of greater value to this project than if I had been a non-participant observer. This comment is not intended to denigrate other research projects in this area which employ different methodologies. Rather it is a statement of personal preference based on an assessment of my own abilities and limitations.

Section I Originating literary influences

The thesis began with an investigation of general developments in the field primarily of a theoretical nature. The purpose of the review of this literature and my preliminary fieldwork experience was to identify relevant trends of thinking which apply to this project.

To begin with I looked at 'reflection' and 'effects' studies; analyses of music's capacity to 'reflect' political and social undercurrents or an examination of music's potential effect upon a listener's subsequent social behaviour. The work in this area was primarily concerned with an analysis of the end-product. Usually

the lyrics of songs provided the greatest potential for analysis of this kind. In my own work I found this theoretical perspective useful but in a different way. In particular I have tried to show how different musical formats reflect the attitudes and expectations of musicians. For example a group which choose to play entirely instrumental arrangements with no vocal features have a very selective attitude towards their professional activity. A musical unit of this kind either consider themselves virtuoso instrumentalists with a chance of entering a highly competitive and limited market or they have elected to exempt themselves from professional activity altogether and resign themselves to an amateur or casual semi-professional status. Alternatively, a musical group intending to feature a vocalist has greater commercial potential. In either event there appears to be a reflexive relationship between professional outlook and choice of musical forms.

I have also adapted the 'effects' approach to my study, particularly in conjunction with some of the objectives expressed in ethnomusicological studies which emphasise a study of musical forms in relation to the terms of the society and culture within which it occurs. Consequently my somewhat refined 'effects' approach seeks to establish relationships between domestic legal and technical factors which have a combined influence on the format style and structure of a musical group's repertoire.

The sociological work of Derrick Wright, (1975) in which he distinguishes between purely musical factors and those factors outside the domain of sound production has been a considerable organisational step in the development of my research design. In many respects he has incorporated

the research objectives suggested by ethnomusicologists. His work has helped me to organise my preliminary fieldwork experience and bridge the gap, as it were, between the general influences of non-musical factors (as identified by ethnomusicologists) and the identity of actual musical expressions given by various musical groups.

(Shepherd, Virden, Villiamy and Wishart, 1977)
 Trevor Wishart's article "Musical Writing, Musical Speaking," identified the influence of technology in the creative and learning process. His identification of aurally-based musical praxes has been useful in discussing the development of musical expertise from an amateur level to various grades of a professional standard. Wishart's explanations have also gone some way towards explaining aspects of the songwriting process as well as intuitive methods of learning and communication of musical sound.

With regard to musical learning David Sudnow's Ways of the Hand (Sudnow, 1978) gave a substantial individual account of the learning process as it applies to keyboard playing. However, I have tried to carry the matter somewhat further by examining musical learning and expression (in group contexts).

Learning and communication of music within musical groups is a practice which is significantly assisted by technology. This has been substantially investigated by the authors of Whose Music?, Shepherd, Villiamy & Wishart. However, technology has produced a range of other factors which has significantly influenced musical projects. These additional factors have not only been identified by the authors of Whose Music? but also by Simon Frith in Sociology of Rock, (Frith, 1978) David Harker in One for the Money, (Harker, 1980). Frith highlights issues from the

earlier writings of Walter Benjamin, "The Work of Art in the Age of Mechanical Reproduction," (1975) in which Benjamin foreshadows changes in the use, value, meaning and function of art when it becomes accessible to a mass market. Further to this Harker identifies the relative demise of various musical forms as well as complications created for live performances as a result of technological innovation in the recording studio. Furthermore, he goes on to describe the gradual decline in demand for live music as a result of the discotheque - another consequence of technological development. These factors which overlap the categories of musical and non-musical influence on musical projects have been viewed in some detail throughout my discussion of songwriting and the case studies.

Finally the most important sociological work relevant to this project was Bennet's On Becoming a Rock Musician (Bennet, 1980) in that he incorporates a majority of these factors in his investigation of non-professional rock musicians. My work has similarities to Bennet's - certainly its originating influence in Becker's writings is a common point of reference. However, my field of research has, in contrast to Bennet, focussed more directly on semi-professional musicians and the borderlines between semi-professional and professional musicians.

Preliminary fieldwork and the research design

The literature discussed has been useful in forming a very general distinction between music-related and non-musical factors operating in the functioning of musical groups. During my preliminary fieldwork activity I attempted to identify subcategories of this general distinction. They were:

Non-musical factors: relationship with spouse or partner; income derived from musical and non-musical work; personality conflicts between group members; legal factors regarding ownership of original material, recording and/or management contracts.

Music-related factors: composition; musical training and technique; live performances.

These sets of subcategories were compiled from interviews and participant observation study. However, the purpose of these categories and subcategories was to provide reference points for a more elaborate research design. Subsequent to this fieldwork exercise I compiled a genealogical chart which illustrates the movements of 47 musicians through various musical groups over a 10 year period. Although the diagram only deals with a very small percentage of the overall practising population of musicians in the area, it nevertheless has provided a wider background for the choice of a group for one of my case studies. Additionally it provides some documentation of contact between semi-professional and professional musicians. For this reason the chart appears in the appendix.

The Research Design

At this stage it was necessary to develop a research design which facilitated the investigation of a musical group's process of creation, production, and performance of a given musical project. Howard Becker's descriptions of 'convention' and 'constraint' in his theoretical writing "Art as A Collective Action" provided an essential basis upon which to build an analysis.

Becker explains 'convention' and 'constraint' in relation to a range of variables such as 'cooperative networks,' and 'complexly interdependent systems' all of which regulate artists' relations of production; the development of support personnel, and the scope of the artistic end

product. In part of his discussion Becker describes the complex impact of change upon the entire functioning of the group:

"Conventions place strong constraints on the artist. They are particularly constraining because they do not exist in isolation, but come in complexly interdependent systems, so that making one small change often requires making changes in a variety of other activities. A system of conventions gets embodied in equipment, materials, training available, facilities and sites, systems of notation and the like, all of which must be changed if any one segment is." (Becker, 1974, p.722)

My research corroborates this statement without reservation. However, I think it is useful to note that the dimensions of change which may set off the chain reaction which Becker describes, can occur at the level of individual artist, an entire working group, or through an entire community of artists. Further, that the factor which motivates change may come in the form of either increased awareness, new levels of technical expertise, and/or new opportunities which carry specific economic constraints. Moreover, that motivation for change and development of artistic convention is in some way regulated by 'necessity.' That is the necessity for either artistic achievement or financial remuneration. The necessity for achieving either goal is a matter of considerable debate and eventual compromise. Computability within a group is partially dependent upon the musical groups ability to negotiate conflicting levels of individual compromise.

Section II

Two Case Studies

This section presents two case studies. The first is an empirical work study of a professional jazz group. As a first study it was useful insofar as it gave me a fairly controlled setting to study, with many constant features. The constant features were: the venue, the accommodation, the personnel in the band, the club expectations and the repertoire of unoriginal material. These factors vary considerably in the second case study and for this reason I chose to study the professional group first. The other constant factor (in the first case study) was that for the period of time we were at the venue in Switzerland the entire group was solely occupied with the profession of music making. This range of factors simplified the study enormously and gave me a chance to think through and consolidate the operation of my theoretical model.

Virtually all the factors which were constant in the study of the professional jazz group were variable in the study of the semi-professional group and indeed the transition from the study of one to the study of the other required extensive preparation which is the purpose of the two chapters preceeding the second case study of the semi-professional group SP. The major differences between the two groups under study was the fact that one performed exclusively unoriginal material for which there was little prospect of selling in a commercial jazz recording market; the other group performed almost exclusively original material for which there was considerable possibility of succeeding in the commercial rock music market. This possibility creates different parameters of group activity and the actual legal structure of the music industry and the channels through

which information regarding this structure is transmitted are of great importance. For this reason, as preparation for the study of a group that would be writing original material, it was necessary to make the reader aware of the history of contracts regarding musicians in the songwriting and recording business so that I could locate the source of events of a completely external nature which had some considerable influence on the operation of convention and constraint in this semi-professional group.

The legal structure, as I have mentioned, has had quite an impact on the way in which individuals and groups write material and for this reason I have written a special chapter on songwriting. This chapter not only illustrates the methods of three songwriting projects but also the way the music industry influences the structure of the creative working unit and distribution of labour within the songwriting project.

The final chapter then consolidates the development of methodology and the theoretical framework to produce what I believe to be an original case study of a semi-professional musical group which is viewed in relation to the concepts of 'convention' and 'constraint'. The analysis takes into account the historical development of the band; explanation and documentation of musical change; the influence of professional musicians; the relationship between the band and its audience; the influence of the legal structure upon the songwriting project; and the relationship between managers of venues, agents and performing expectations associated with different engagements.

Several major areas of influence and conflict affect the working life of professional and semi-professional bands. I would like to

mention them here for two reasons. One is that they are general and I feel that they may have wider application than the groups I have investigated. The other is that they are of particular concern to individual musicians and for this reason they form a core, as it were, of convention and constraint.

Restrictions upon playing with other bands

In jazz there seems to be little restriction and considerable interchange between band members of different groups. However, with semi-professional groups in rock more of a sense of band loyalty is required. Although members of the rhythm section may more easily work in other bands, members of the front line are restricted in this because of the image they have created with the main band. All too often when a front line member of the band appeared with another group some feedback questioning whether the band was SP or some other group, created some degree of bad feeling not only for the group SP but also for the group temporarily joined by the band member. There is doubtless group rivalry and for this reason there is some expectation of a kind of herding behaviour.

Conflicts over Venues

To some extent the kind of venue a group plays in determines the kind of material a group is expected to play. Some venues, such as art centres, colleges, universities, and select pubs feature up-and-coming local bands playing original material. Groups are often in conflict over the image which becomes associated with them if they play in the wrong kind of venue for the material they wish to project. Equally, managers of venues are concerned not to have a "clubby" band in a venue that is intended for trendy up-and-coming rock groups. Alternatively managers

of pubs and clubs working with a different clientele don't want a band that plays only original material that no one has ever heard before.

If a band decides to do both kinds of venues e.g. the trendy original band venue and the club 'top 40' copy group venue then the band must work in two different names. SP did this at one stage when a certain segment of the band worked the clubs under the name of NL.

There may be considerable argument over the choice of venues in which a group plays. Fears of not being accepted by the audience and the concern that the band may not be consistent in the public image they portray, are major arguments used in disagreements over choices of places to play.

Contact with professional musicians

Professional musicians carry an aura to the venue of any musical performance they attend, and for the semi-professional group which attracts professional attention either in the form of listeners or in the form of participating in a jamming situation, they are clearly an advantage to have around. If they are around members of the audience notice, and word of mouth communicates that certain professional musicians are regular attenders, and/or sit in with such and such a group. This builds up audience numbers.

Further to this, the association with the professional musician may lead to a crucial 'support' engagement at a prestigious venue. Alternatively, the professional musicians may give advice or simply communicate information about the business which can shape the work habits of the local musicians. This effect I have already described

previously in some detail.

The role of agents

The kind of agent a band has is very much an indicator of the type of work they are doing. A semi-professional band with an agent is more than likely to be working the clubs. Alternatively by the time a semi-professional band playing exclusively original material has an agent they are likely to be on the way to a recording contract. They would also have a very large following. In short to have an agent for a club band is a necessity. To have one for an original band is an indicator of incipient national promotion.

Making a record

This is still the best form of promotion available. Many serious semi-professional groups now record their own singles and occasionally albums. It is fairly easy to recoup the cost from the sale of the record at local performances. A record in hand is very persuasive promotion for any new venues which may offer possible bookings. Certainly it is not possible to get any major London venues without one and a group without at least a single will not be considered for television. A new development for Rock groups is to prepare a video demonstration tape and many new firms are offering this service cheaply.

Conflicting identity: Work and Music

As the band becomes gradually more successful, the day job takes on the identity of a prison sentence to be terminated in due course. The musical activity is usually kept secret from the people at work. It is feared that employers will frown on the activity of being a musician. They often do, and if they find out that an employee does work as a musician the information will be used to explain any short-

comings in the quality of their employees' work regardless of whether or not the musical activity bears any relationship to these. Furthermore, the volume of work taken on by a semi-professional musician is potentially a source of taxation and there is usually a conflict over the publicity side of the musical activity. This is one reason why many of the musicians who work semi-professionally have stage names other than their own. Professionals may choose stage names for a range of different motives.

The relationship between front man and members of the band

In the jazz group I studied the bandleader and the front man were one and the same individual. He was also paid twice the fee of any other member of the band. In the semi-professional Rock group the lead vocalist was the front man but there was never any question of his having any greater financial remuneration for his work. The band always split the money equally. However, he did have the final say in what material was to be performed and he was for all intents and purposes the star of the show, with us as his backing band. When the group was a purely instrumental line-up everyone was equally in the front line.

Aesthetic criteria for playing well

In the semi-professional rock band the criteria for playing well were considered to be achieved by adherence to agreed arrangements rather than spontaneous moments of improvisation. If the band played with energy and 'feeling' in addition to that then this was considered exceptional. With the jazz group adherence to agreed arrangements was the norm, beyond which one was expected to produce magical moments of spontaneous improvisation.

Joint purchase of equipment and ownership of original musical material

In the jazz group these factors did not apply simply because there were no items of equipment owned as a group. No one has ever worked with any one group long enough for that to happen. There certainly was no question of jointly written original material. With the rock band the Public Address sound system, and lighting rig was purchased at considerable expense with money from engagements. Further to this, 90% of the material was written jointly, which makes the business of splitting up very expensive and time consuming.

Some serious semi-professional groups do nothing with their performance fees other than channel it back into more elaborate sound and lighting equipment which will enhance the live performance. I have heard numerous musicians complain about working with bands which offered no immediate financial compensation. As one musician put it, "I had to pay to play with that band!"

A Critique of the Research Design

Now that I have completed the presentation of my research findings I would like to make some concluding evaluation of the research design which I have appropriated (or misappropriated as the case may be) from Howard Becker's work "Art as A Collective Action."

In my estimation the overall design has worked extremely well. Where there have been limitations on its application or misuse of its concepts - I, myself can only be to blame. Becker's theoretical model raises many questions, however, and I would now like to discuss his research design in the light of my own findings with a view to identifying possible modifications which may be relevant to further research in this area.

In his opening comments, in "Art As A Collective Action," Becker identifies his point of departure from other studies by focussing on organisation and systems specifically in relation to the people whose collective actions constitute these organisations or systems. In particular he identifies 'cooperation' and 'cooperative links' as key theoretical factors which identify interrelationships between:

"....conceiving the idea for the work, making the necessary physical artifacts, creating a conventional language of expression, training artistic personnel and audiences to use the conventional language to create and experience, and providing the necessary mixture of those ingredients for a particular work or performance." (Becker, 1974, p.768)

However, there is another sphere of influence which goes some way towards shaping the nature of these interrelationships and that is the legal prescriptions regarding the ownership of intellectual property. This legal factor has many consequences for the social organisation of interrelationship which Becker describes, in particular with reference to leadership, allocation of responsibility and intermediate managerial tasks such as coordinating producers and consumers of an artistic work. Furthermore, and this is perhaps the most important of my findings; the social and economic character of collective artistic production is directly influenced by the legal prescriptions governing its practice. For example, semi-professional musicians often write material in groups until they become aware of the laws of copyright which award 50% of the publishing royalties to the writer of the music and 50% to the writer of the lyrics. When serious semi-professional groups become aware of these laws of ownership it usually changes their working habits. My research indicates such changes in terms of 'pairing off' where two musicians

in the group work exclusively and then present new material as 'their' song. Also, in some instances, musicians in a group will decide to work completely alone in order to insure full control of the copyright over words and music.

In professional circles, songwriting partnerships of two individuals are often formed and all publishing royalties are shared equally between them. Further, additional musicians required for live performances are recruited on a session basis. If specialist instrumental expertise is required in the recording studio, session musicians will either require a hefty session fee or alternatively a percentage of royalties from future sales of the recording.

Another point of interest in Becker's article is his emphasis on the necessity of a division of labour. Becker gives examples of how different art forms develop a 'consensual' definition of the situation which prescribes activity. He then goes on to describe how participants in an art world distinguish between certain activities as "artistic" and how other activities are regarded as less worthy of the "artistic" label. Such individuals are viewed as support personnel. Becker states:

"...what is taken, in any world of art, to be the quintessential artistic act, the act whose performance makes one as an artist, is a matter of consensual definition." (Becker, 1974, p.769)

This conclusion, in my experience, is not always the case. Numerous musical composers of so-called commercial hits, believe that lyricists are not really artists involved in musical composition unless they are playing a musical instrument central to the composition itself. Alternatively, they are viewed as 'support' personnel. In many instances by consensual definition composers of music look upon

composers of lyrics as comparatively unartistic and of lesser value to the musical project. However, by law, the lyricist is the owner of 50% of the publishing rights to any song, which leads to one of two alternatives when the musician becomes aware of the legal situation: a straightforward elimination of lyricists from the song-writing process or a veritable reassessment of the artistic talents offered by the lyricist.

In Becker's discussion of 'conventions' he describes these as terms of cooperation which exist to "dictate the form in which materials and abstractions will be combined." (p.771) With regard to music he refers to primarily aesthetic criteria such as harmony or modal scales. These conventions are undoubtedly influential in determining the dimensions of artistic endeavour. However again, the law of copyright shapes these activities to some extent. Many orchestras will not perform modern symphonies because of expensive royalties which must be paid. Alternatively compositions are chosen from the realm of non-living artists or published compositions which are sufficiently old to be no longer subject to the laws of copyright.

Finally Becker points out that conventions exist not only to establish the dimensions of artistic activity and the terms of co-operation, but also to reinforce an existing arrangement of 'ranked statuses, a stratification system." Directly and indirectly the established conventions undermine in aesthetic terms, competing sets of artistic skills and conventions which may pose a threat to the established hierarchy, and marketing structure of the artistic profession.

"Where new people successfully create a new world which defines other conventions as embodying artistic value, all the participants in the old world who cannot make a place in the new one lose out."
(Becker, 1974, p.774)

This latter point is especially relevant to this critique for the following reason. Within the realm of musical groups I have studied there is a continuous cycle of threats and opportunities which usher in or destroy whole sets of conventions and cooperative networks. This continuous cycle is created by an interrelationship between at least two if not more general factors. 1) technological invention and 2) popular taste. The first factor consistently changes the labour structure of the music industry. For example the arrival of the portable recording studio, drum machines and synthesisers. Secondly, popular taste changes with fashion bringing into obsolescence certain conventional musical skills acquired in relation to a specific musical market.

With swiftly changing conventions and cooperative networks the legal matters regarding ownership of original material and publishing rights plays a considerable role in determining not only working relationships between individual musicians but also the conventions and artistic dimensions of the musical project.

Consequently legal factors significantly affect the working relationships between artists and support personnel by virtue of the economic status the law ascribes to the individual practitioners. For example, if the artist is both the writer and the lead performer (e.g. vocalist), he will have greater control and responsibility in the organisation of co-workers and support personnel. If the songwriter and the lead performer are different individuals within the same group then a different structure of relationships occurs.

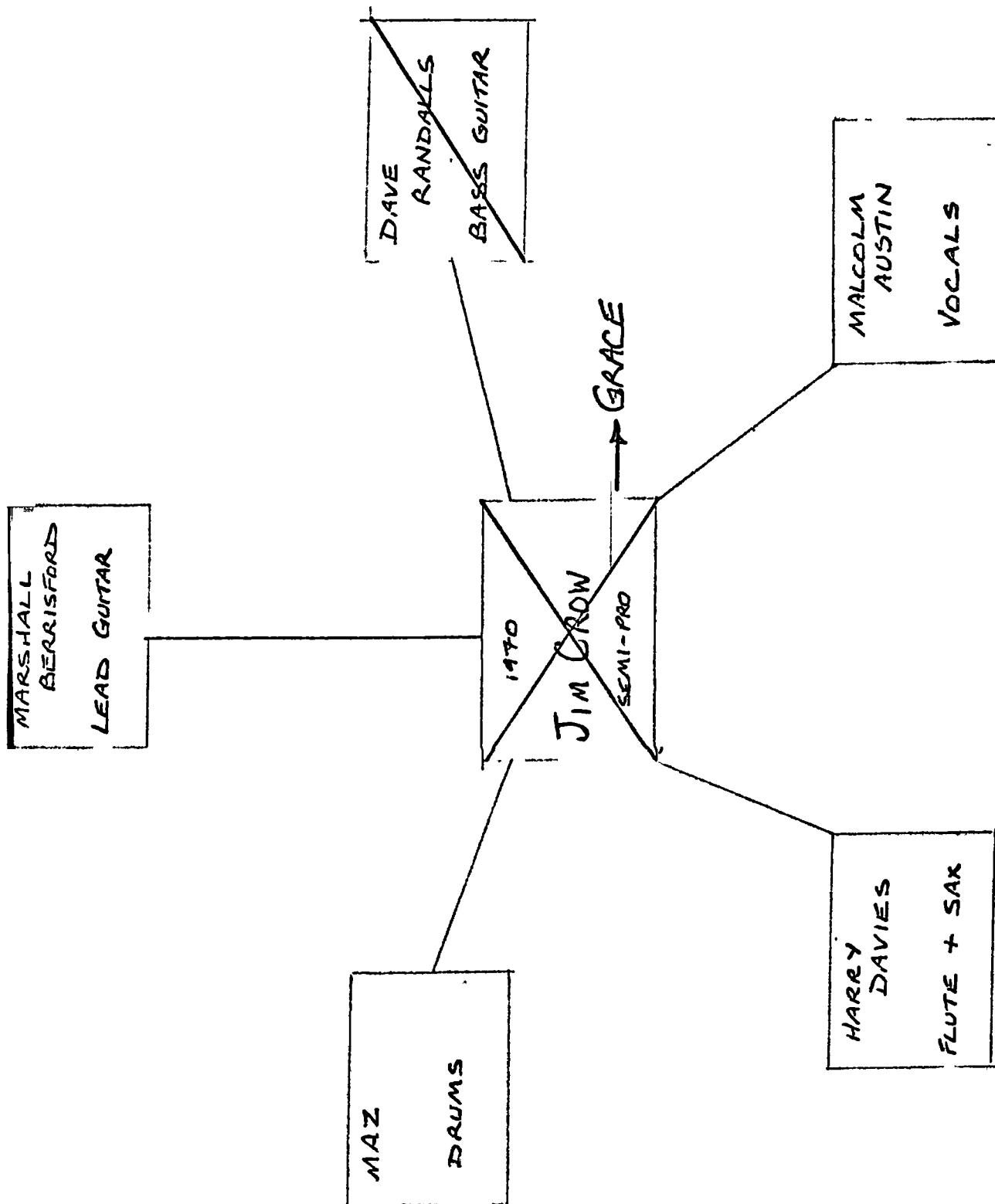
In conclusion, then, the modifications which I would suggest in the research design investigating convention and constraint within musical groups would be such as to include a view of 3 factors in an assessment of the network of relationships and cooperative links governed by convention and constraint. These are: 1) the legal position of individual artists in relationship to the ownership of the eventual artistic product. 2) the level of consciousness the group members have of ownership. 3) the importance the individual and/or group place upon the ownership of artistic material.

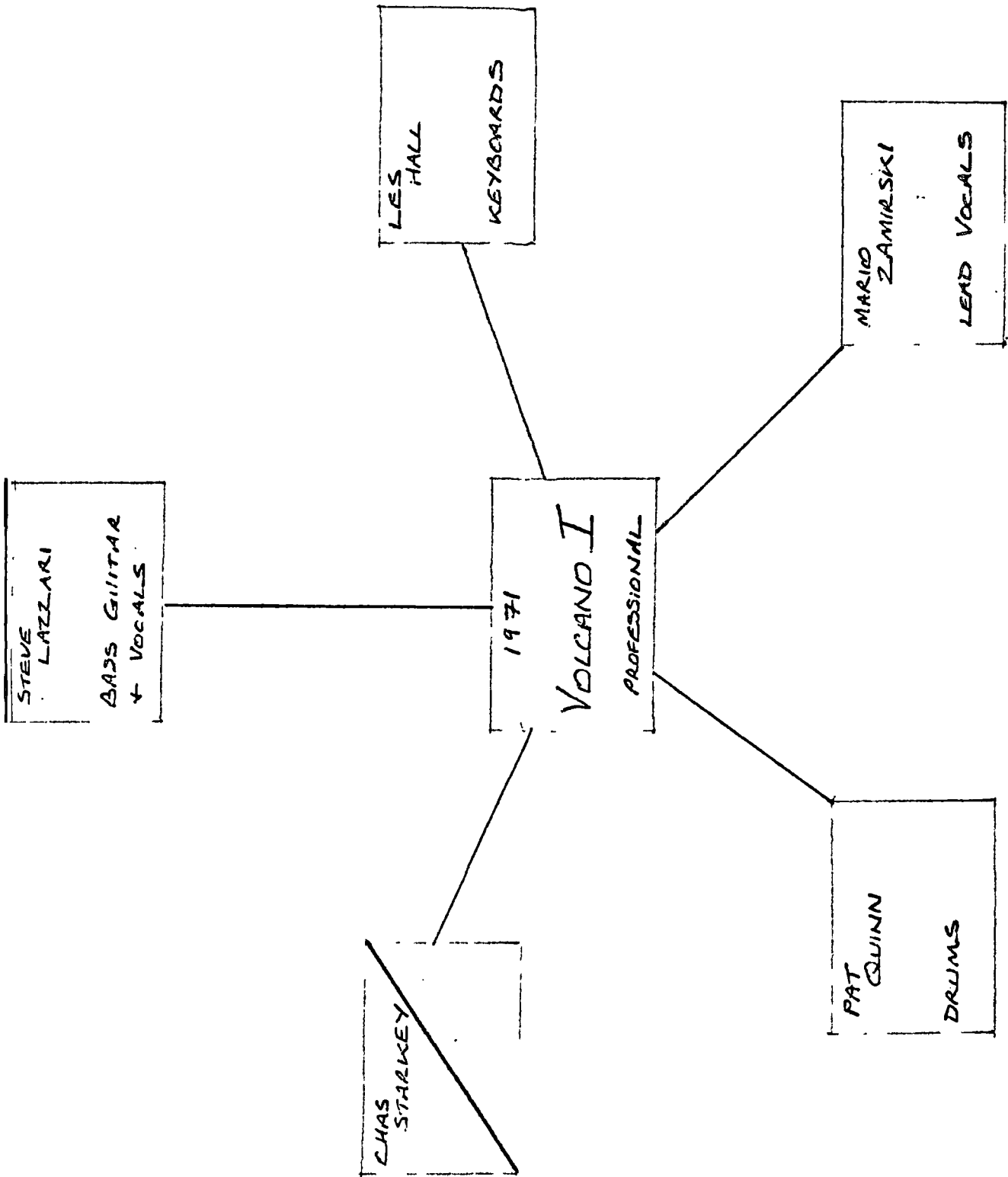
Finally, throughout this thesis I have attempted to identify parameters of convention and constraint as they are operative in two musical groups. In my view, however, many more research projects of this kind would be necessary in order to establish fully the efficacy of this approach.

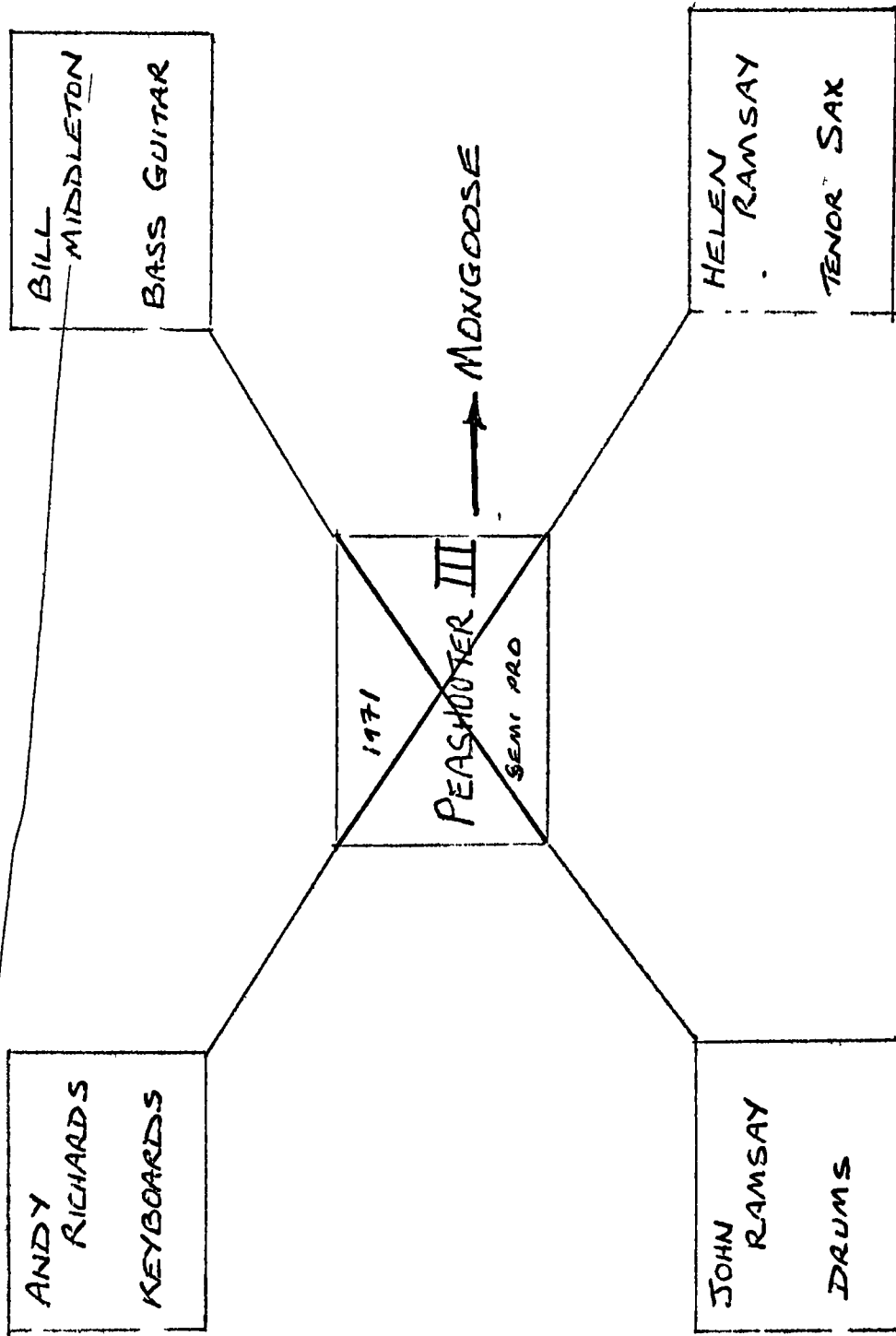
APPENDIX I

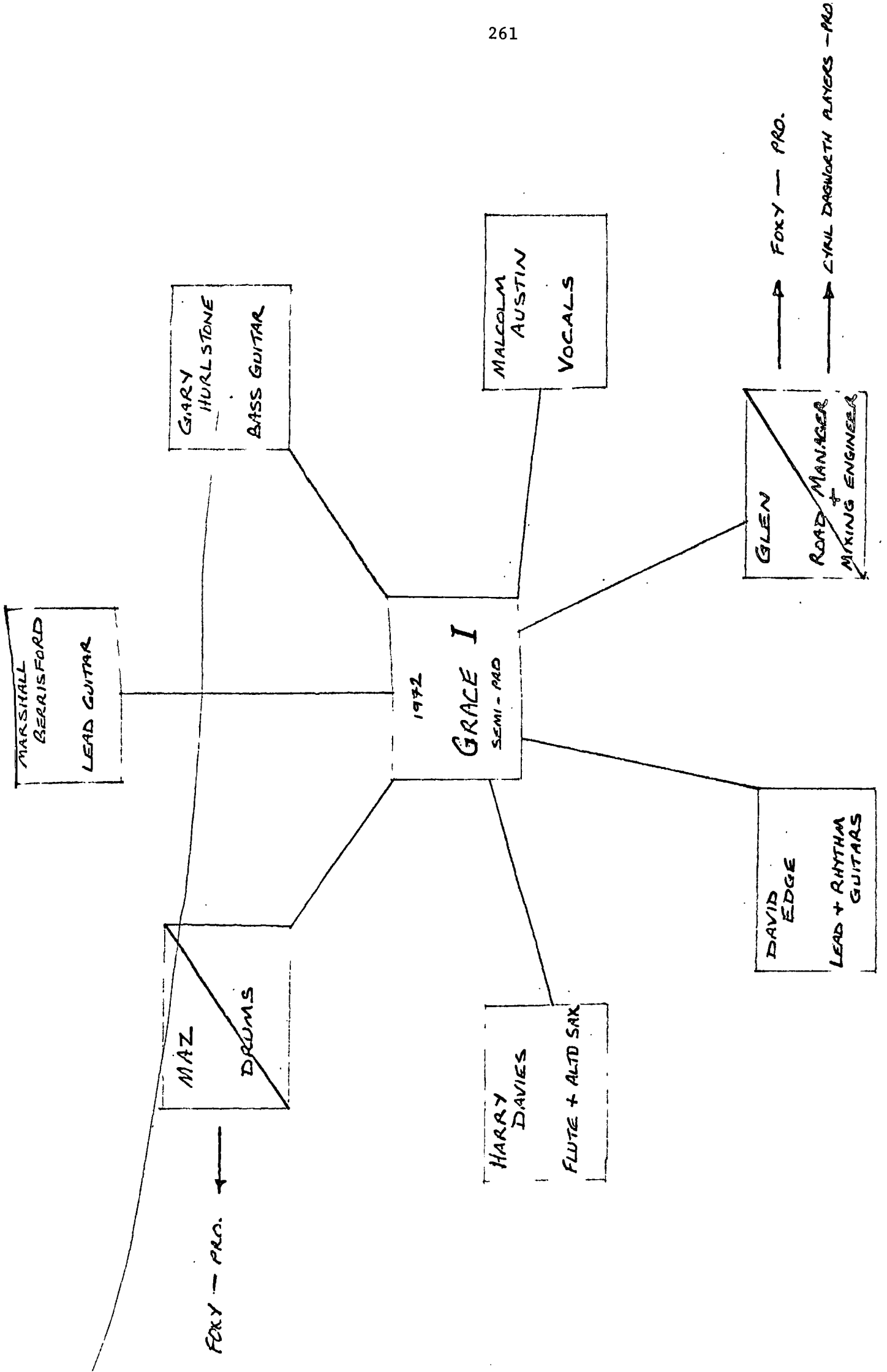
TREE DIAGRAM OF PRELIMINARY FIELDWORK

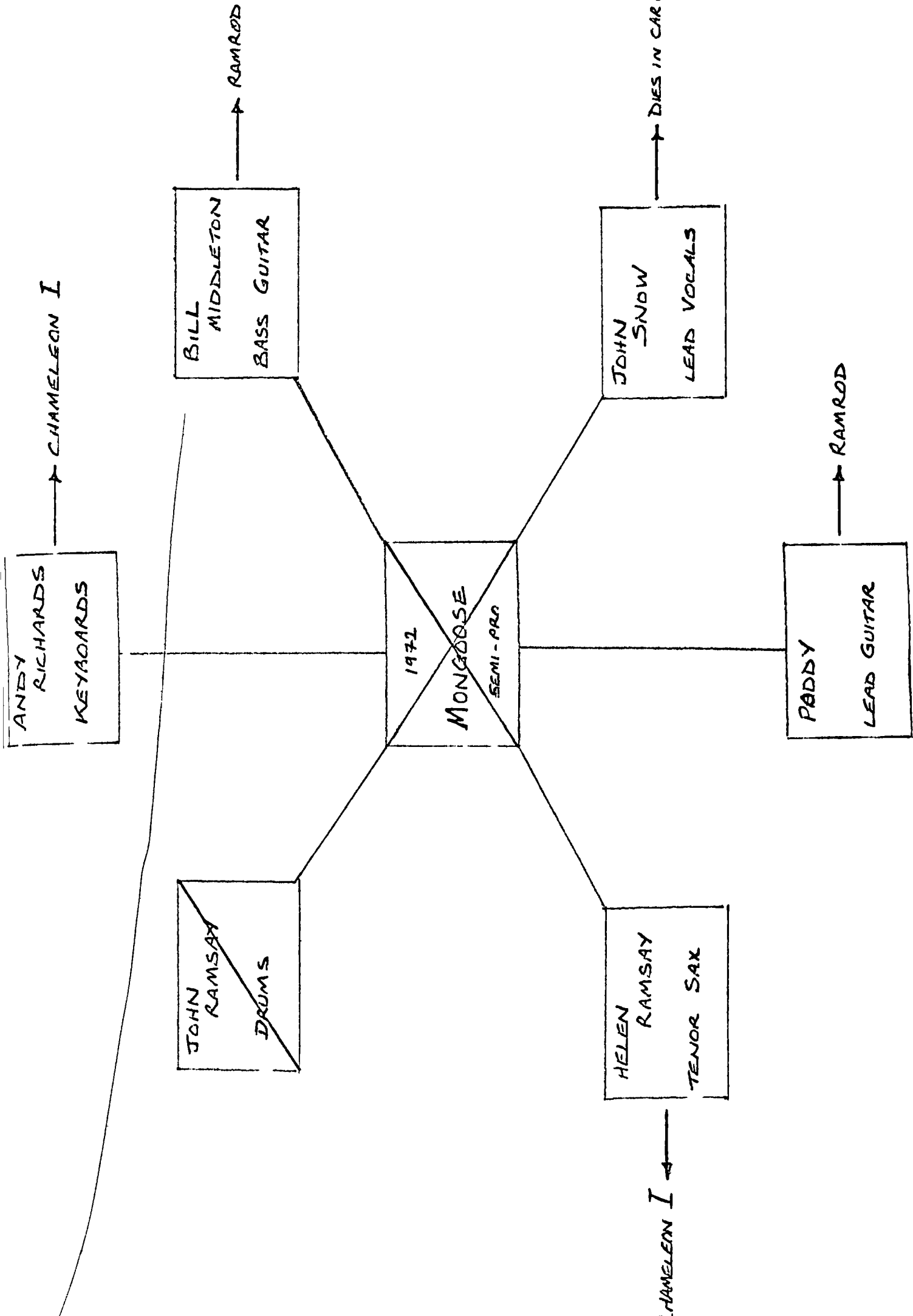
The following series of diagrams represent a history of local bands within a given sector of the 'rock' and 'jazz/rock' music circuit in the North Staffordshire area. The diagrams reflect the individual movements of 47 musicians throughout 30 bands within the local circuit over the period 1970-1979. The chart deals primarily with semi-professional groups. There is indication where an individual musician or an entire band leaves the semi-professional circuit to take on professional work

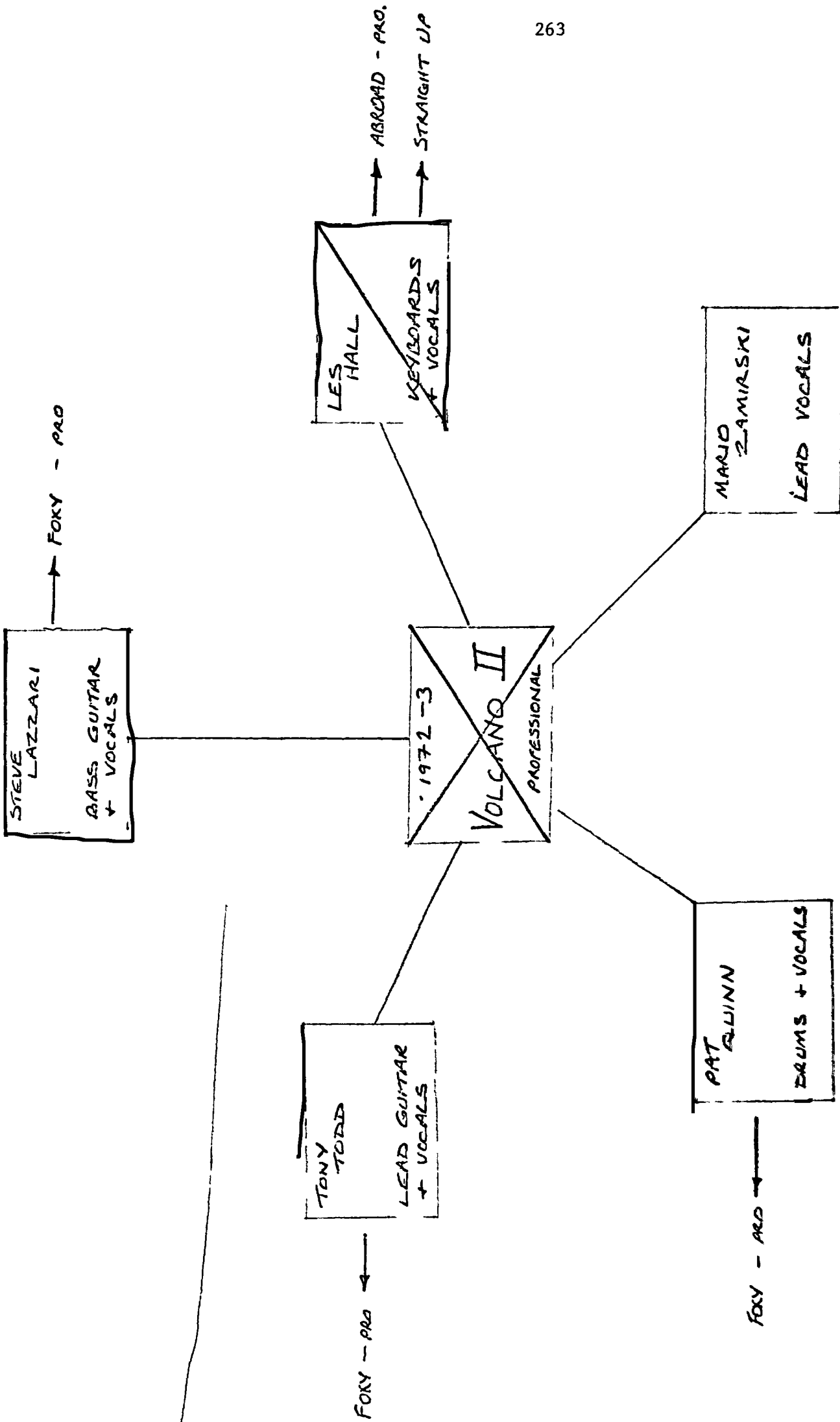


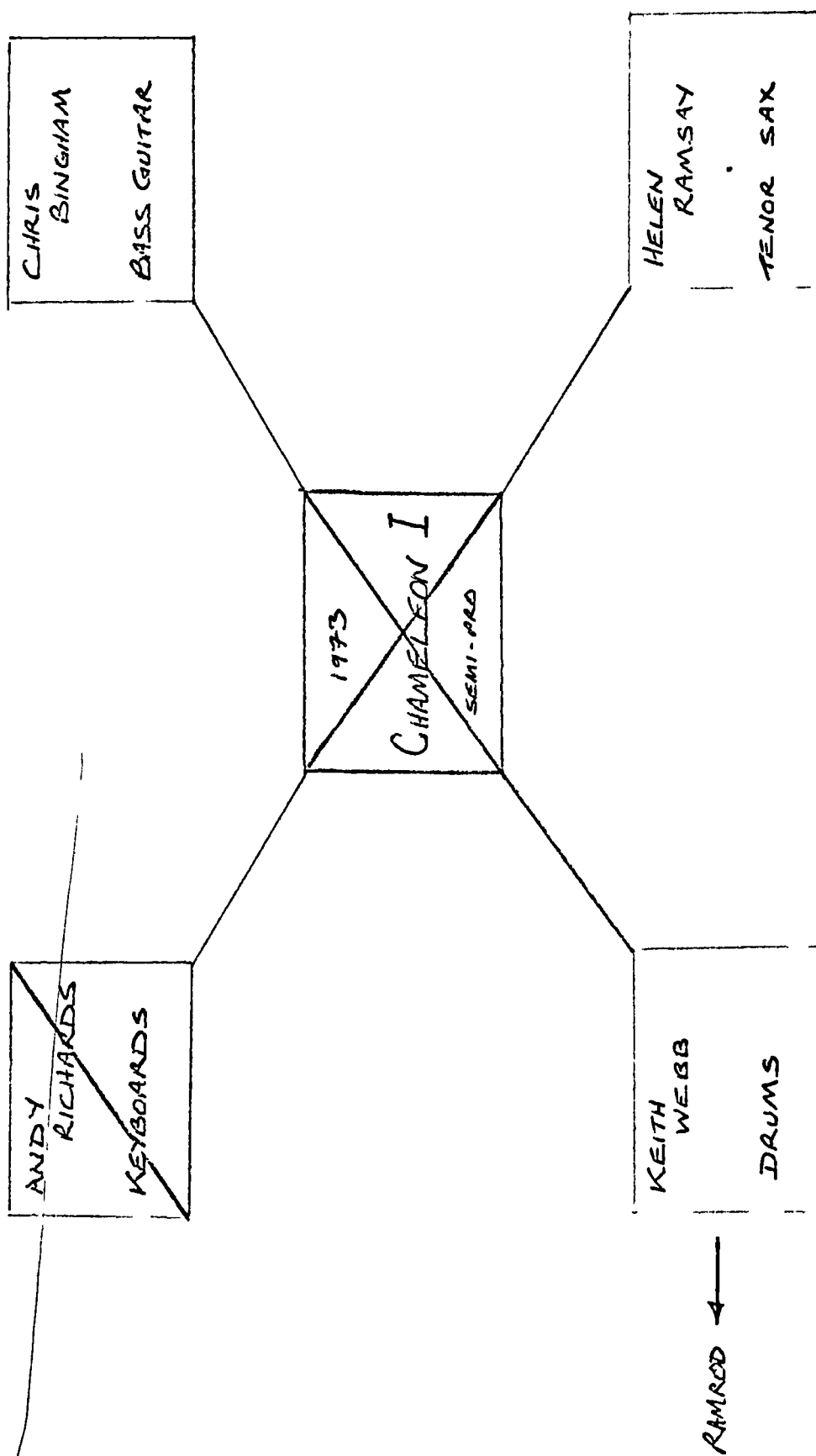


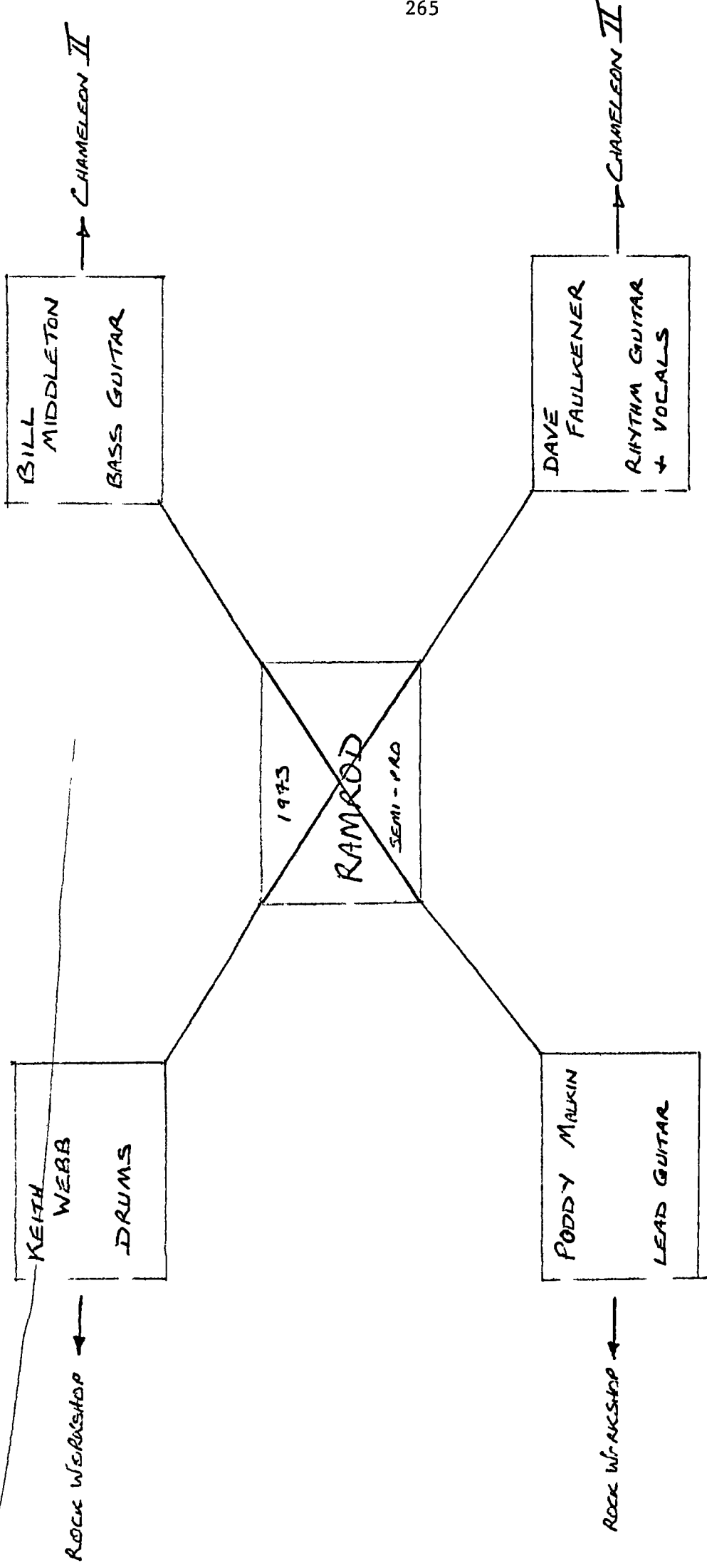












- EDDIE POLLIT
LOVE ORCHESTRA
- SAVASANA
- ODB - PRO.
- INSIDE OUT

~~TONY GREENWOOD
DRUMS~~

MALCOLM AUSTIN
VOCALS

DAVID EDGIE
GUITAR

MARSHALL BERRISFORD
GUITAR

1974
GRACE II
SEMI-PRO

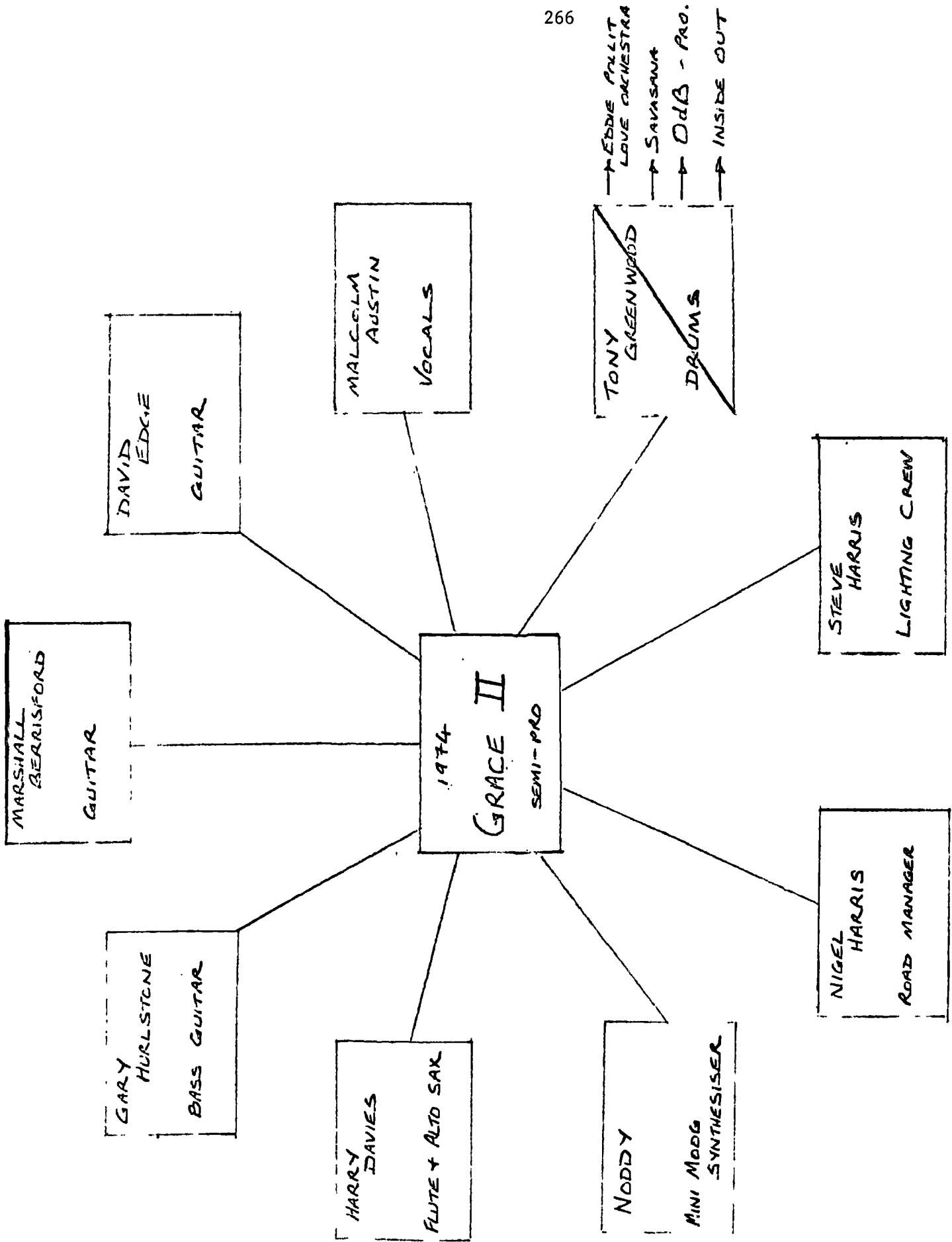
STEVE HARRIS
LIGHTING CREW

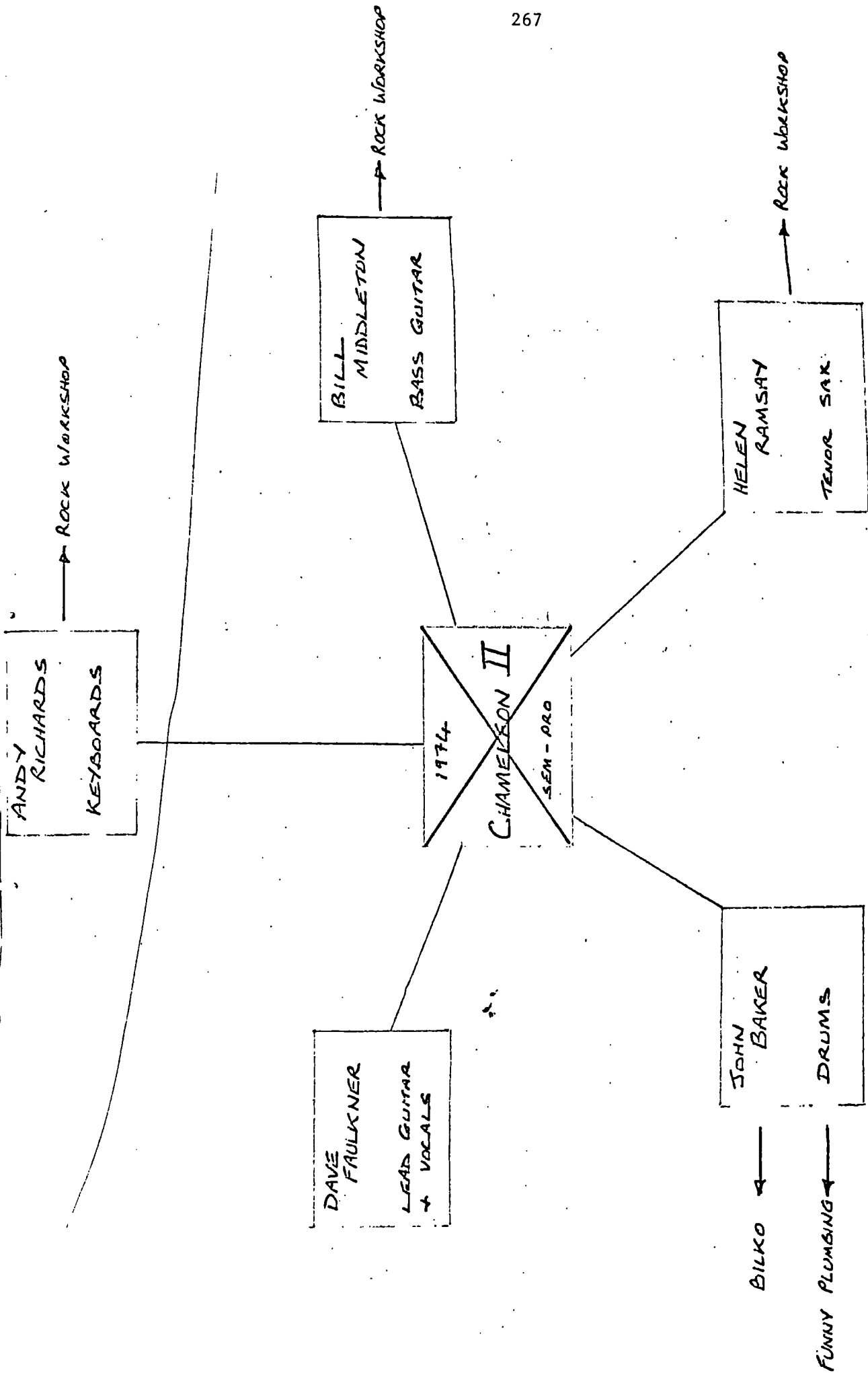
NIGEL HARRIS
ROAD MANAGER

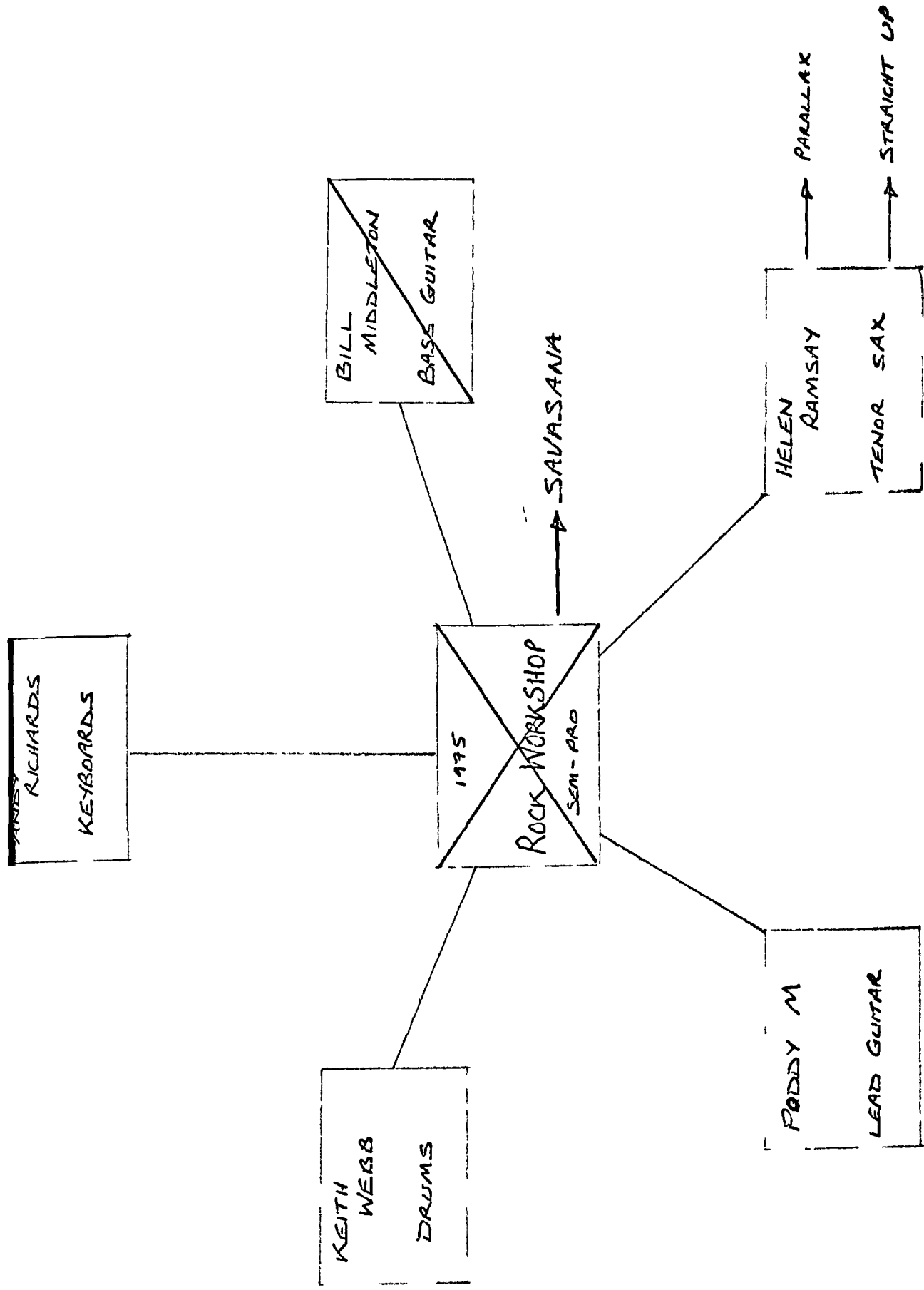
GARY HURLSTONE
BASS GUITAR

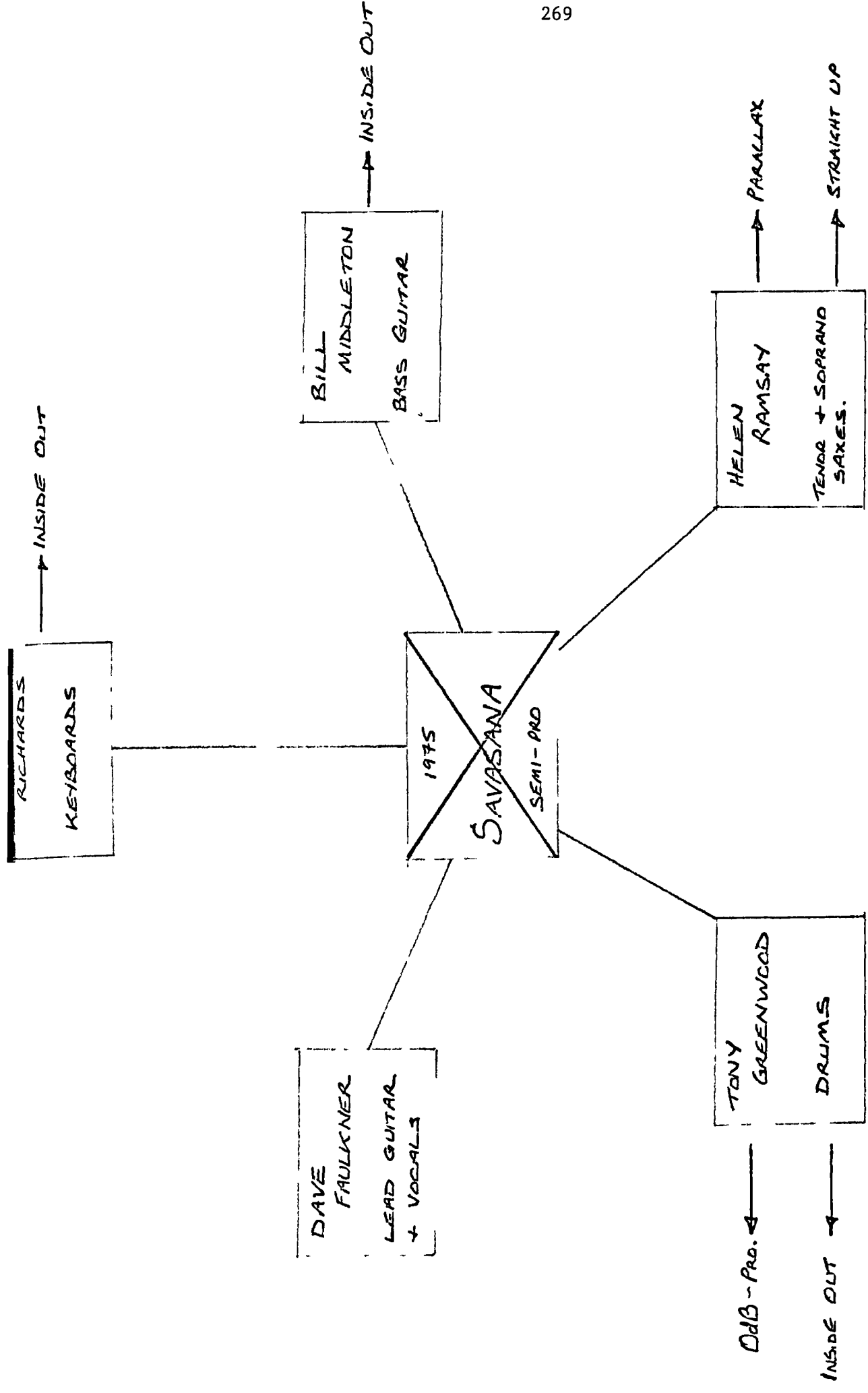
HARRY DAVIES
FLUTE + ALTO SAX

NODDY
MINI MOOG
SYNTHESISER









RICHARDS
KEYBOARDS

INSIDE OUT

DAVE
FAULKNER
LEAD GUITAR
+ VOCALS

1975
SAVASANA
SEMI-PRO

BILL
MIDDLETON
BASS GUITAR

INSIDE OUT

TONY
GREENWOOD
DRUMS

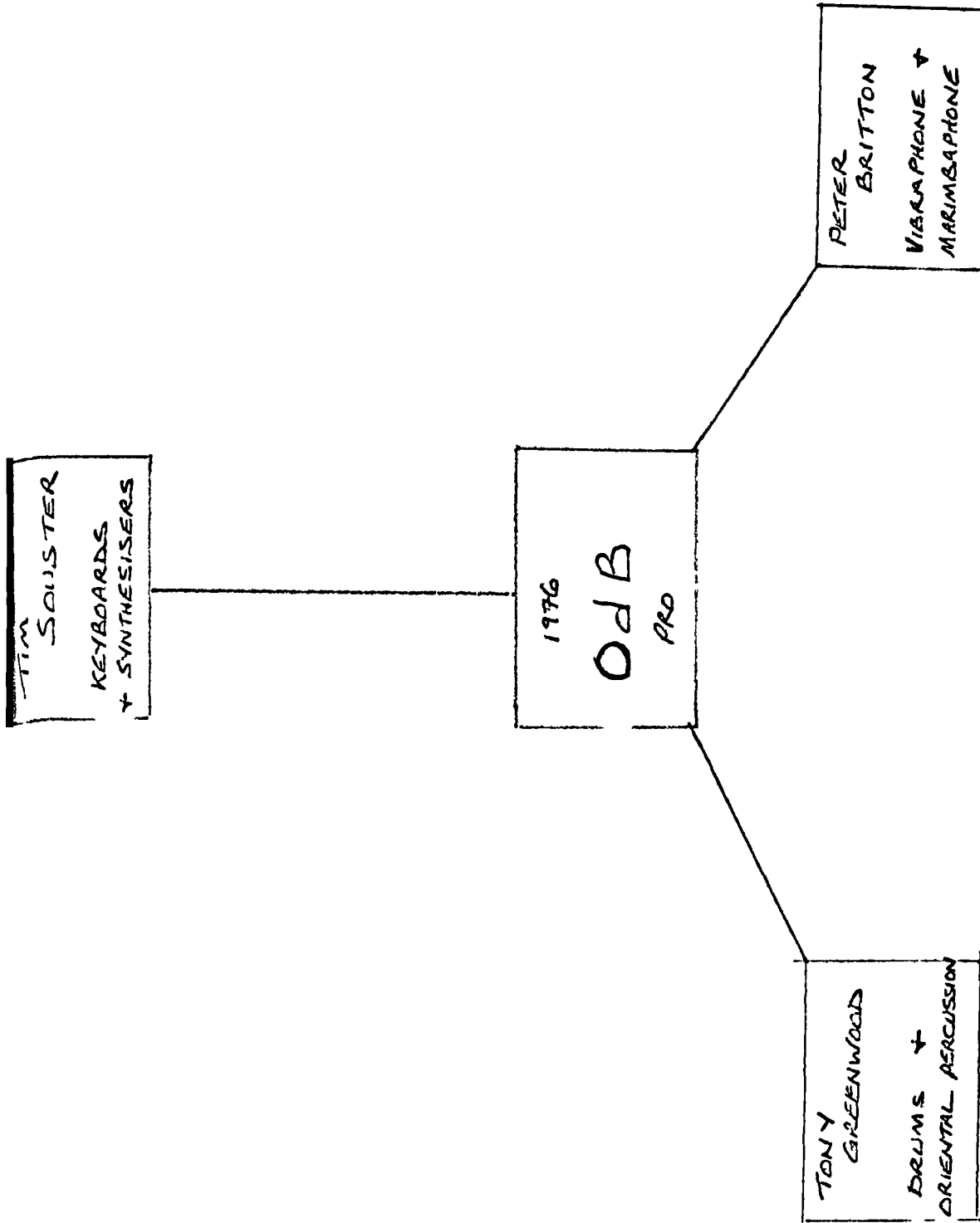
HELEN
RAMSAY
TENDR + SOPRANO
SAXES.

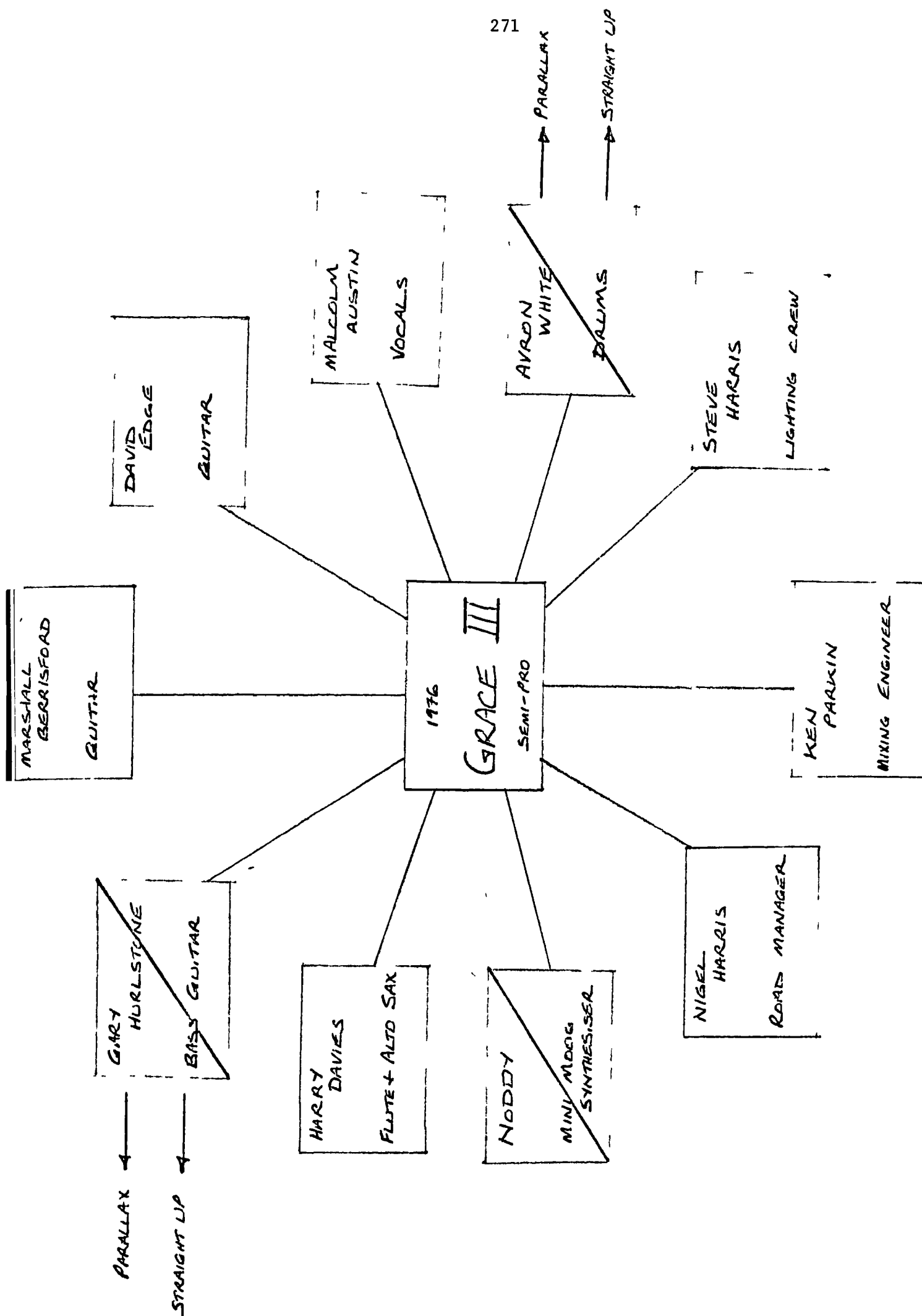
ODB - PRO.

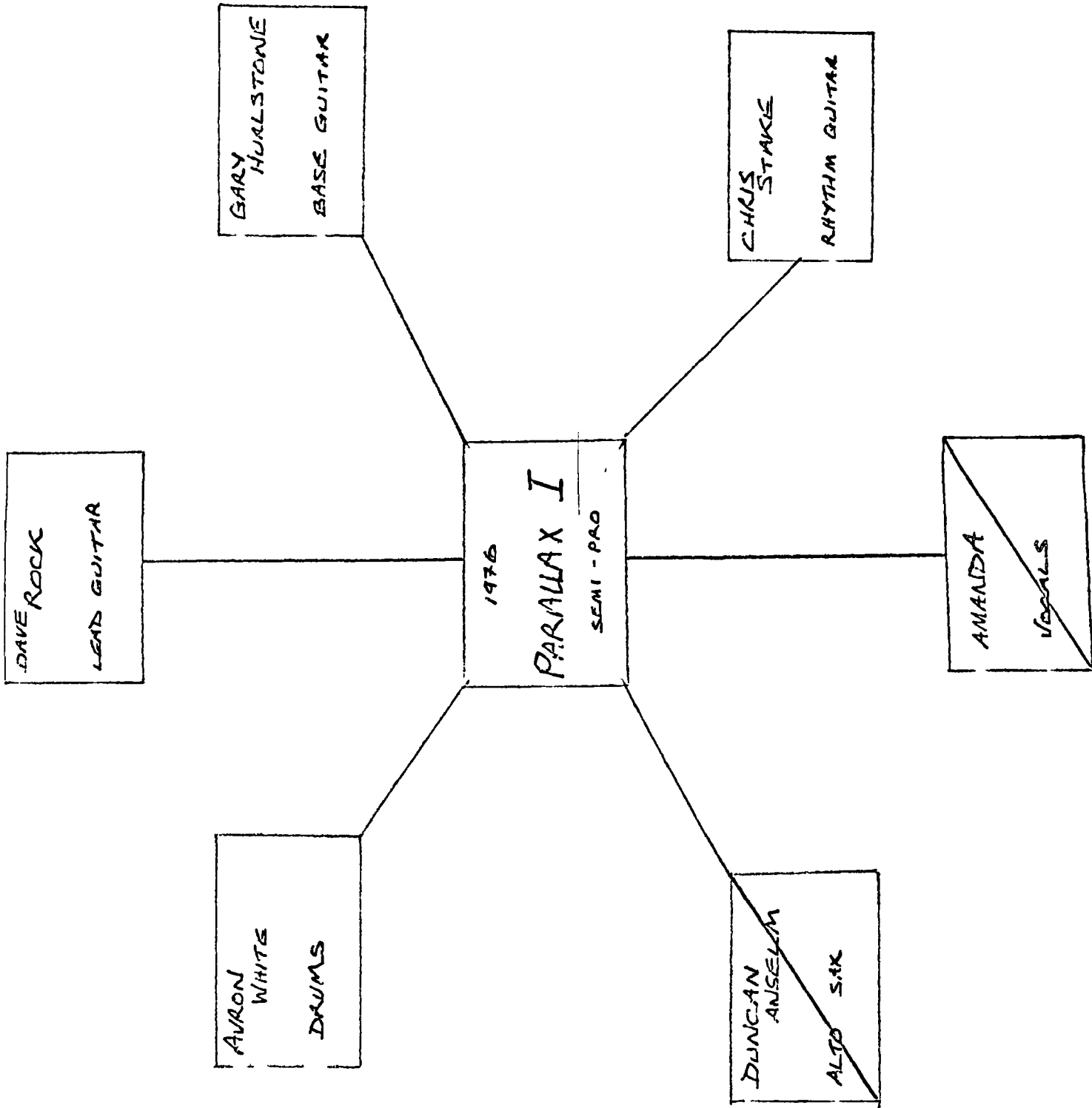
INSIDE OUT

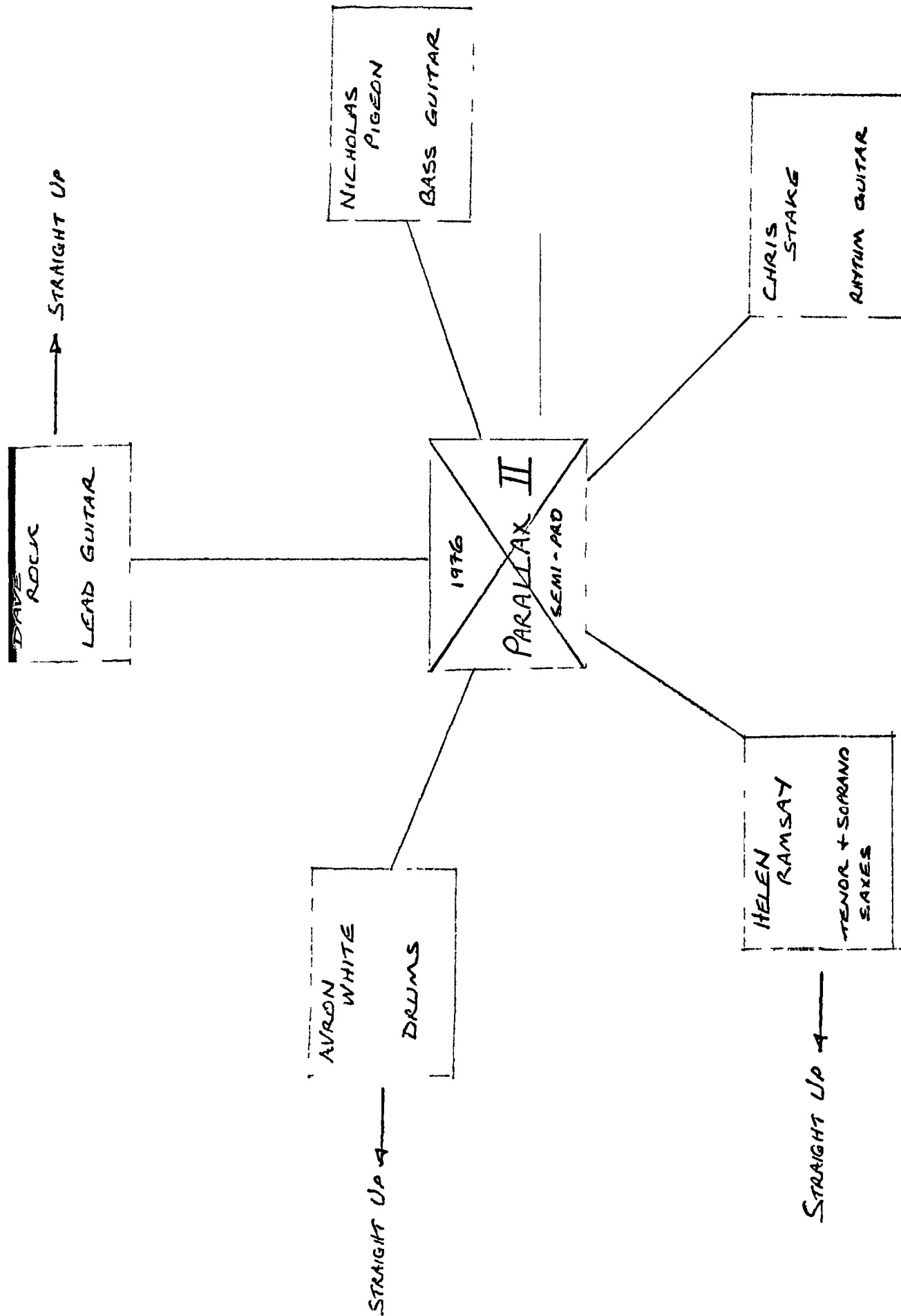
PARALLAX

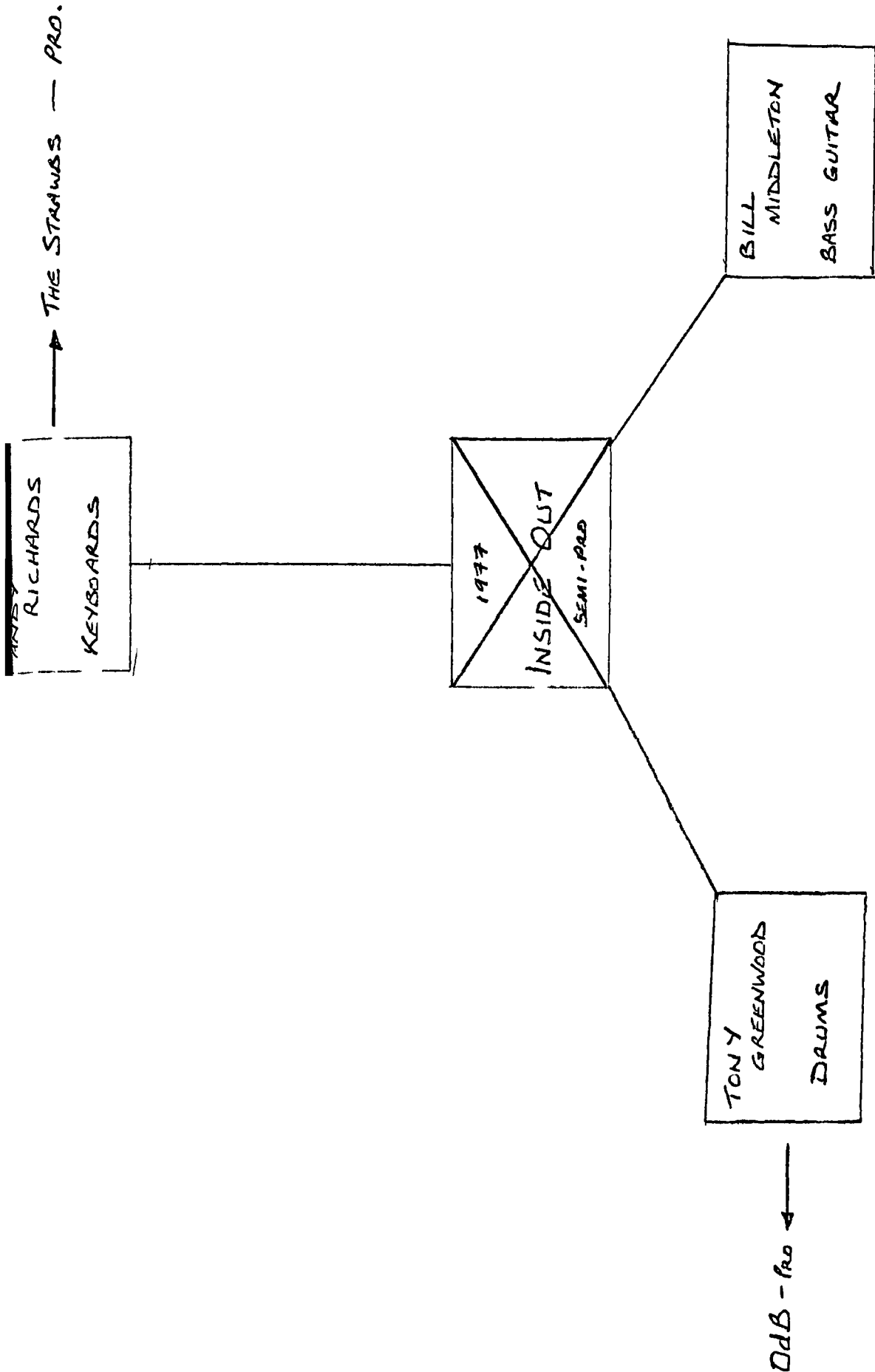
STRAIGHT UP

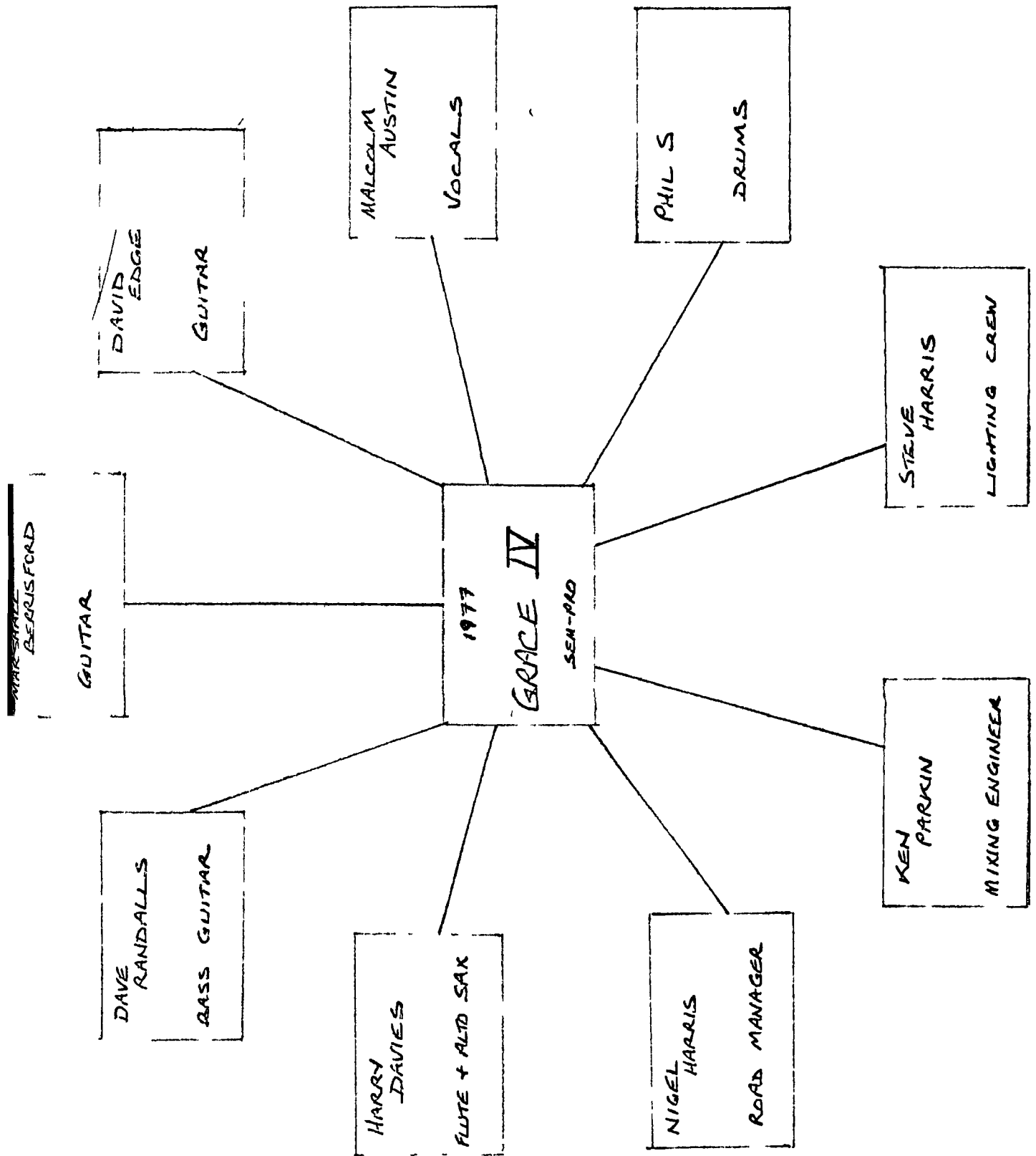


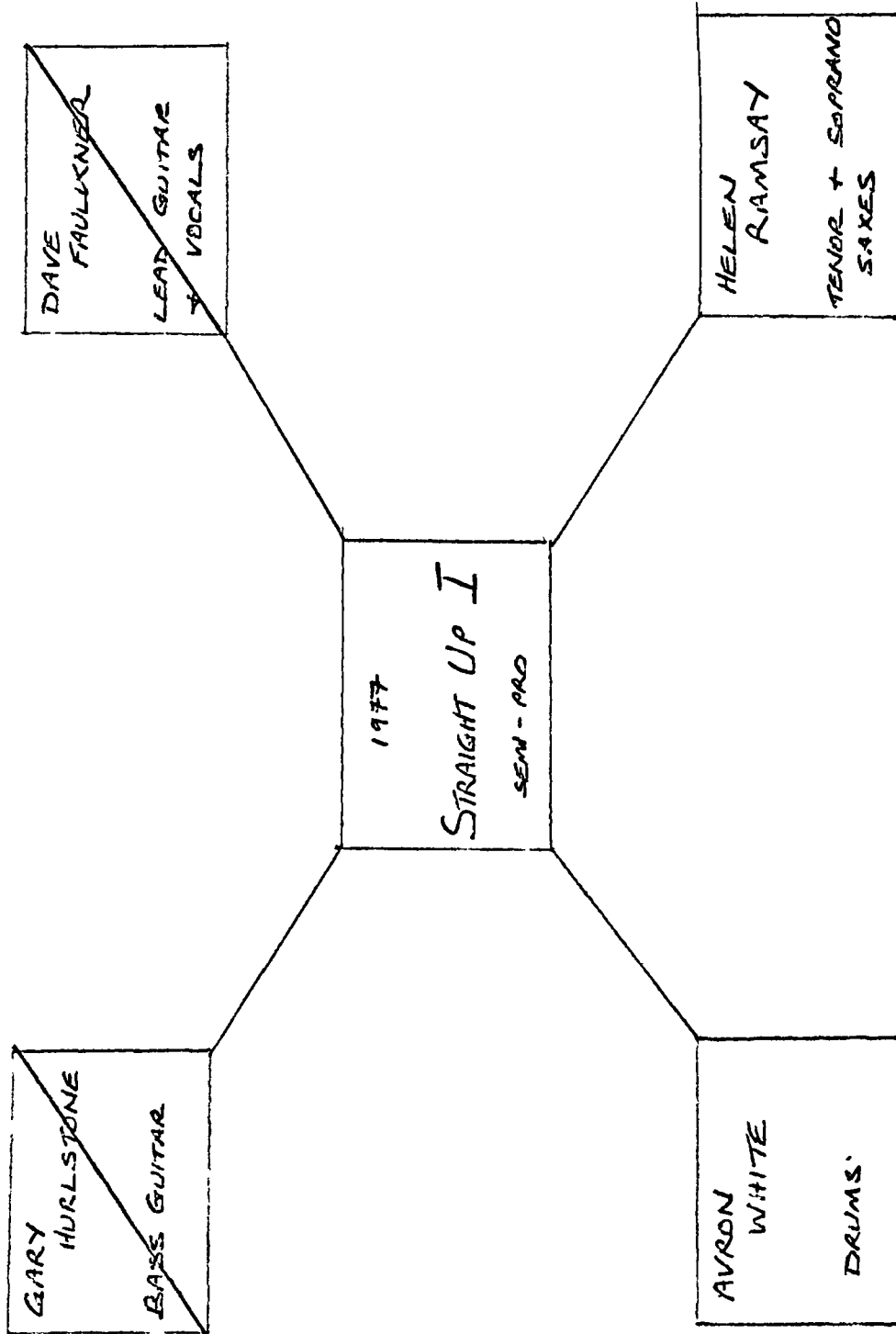


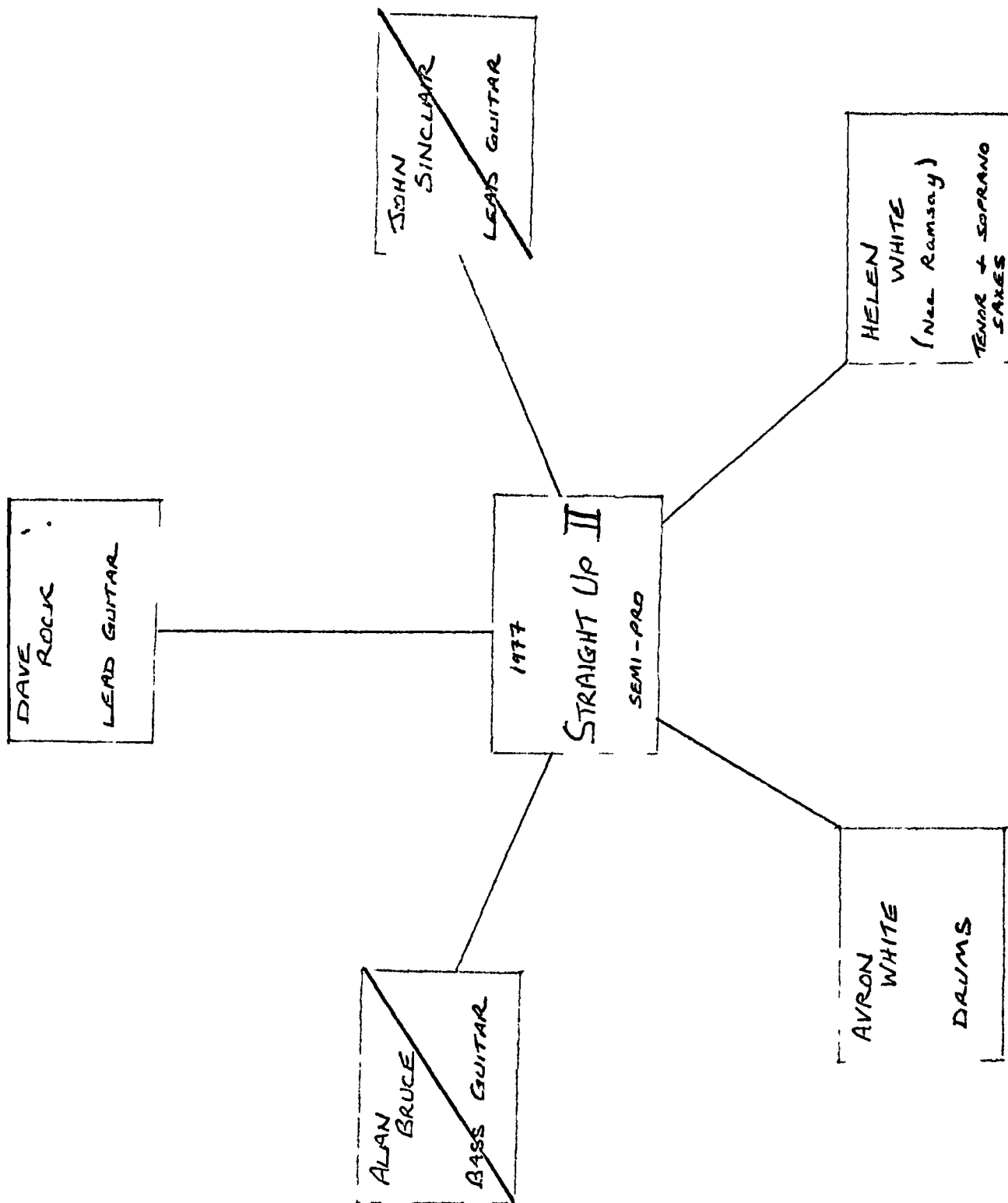


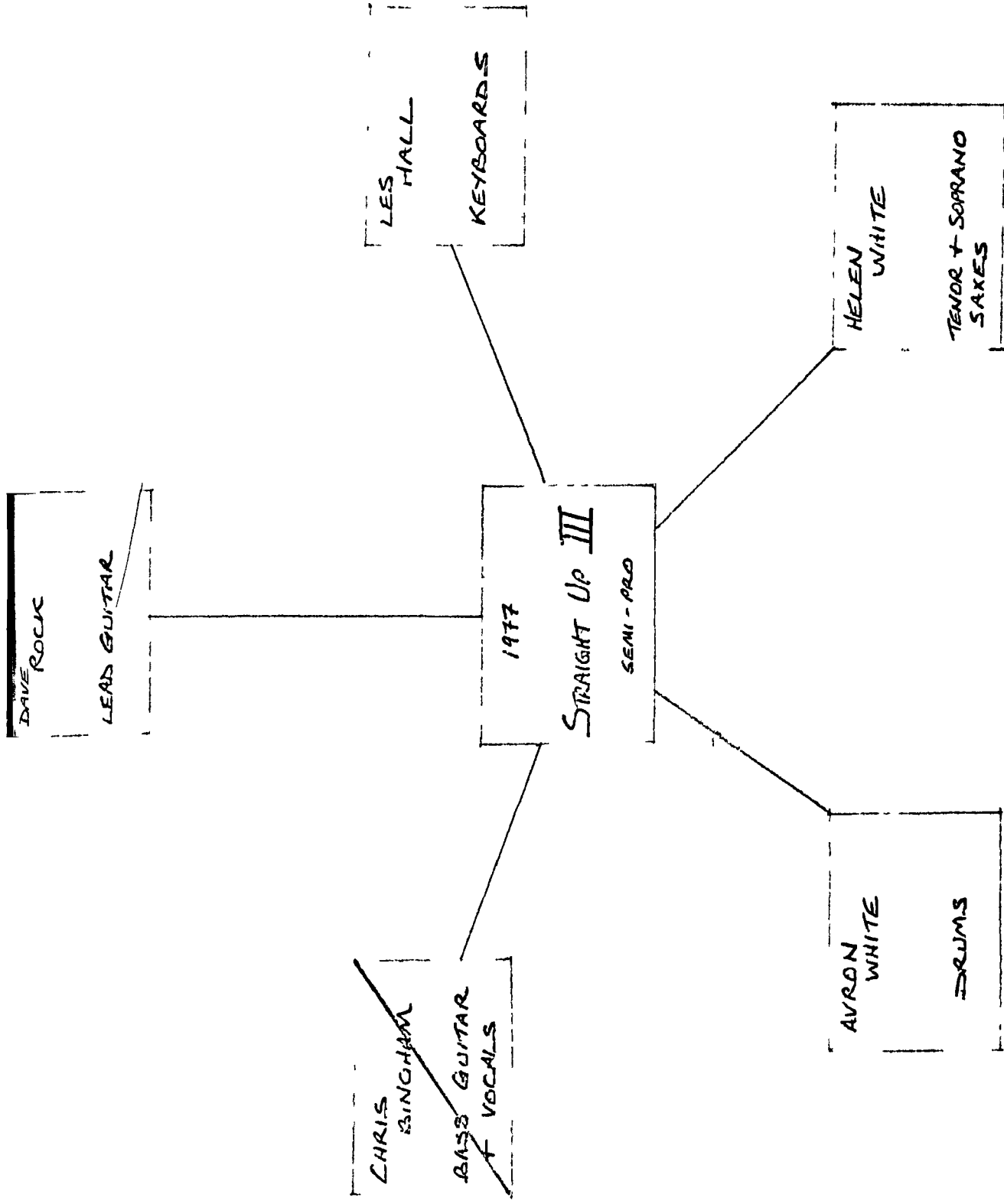


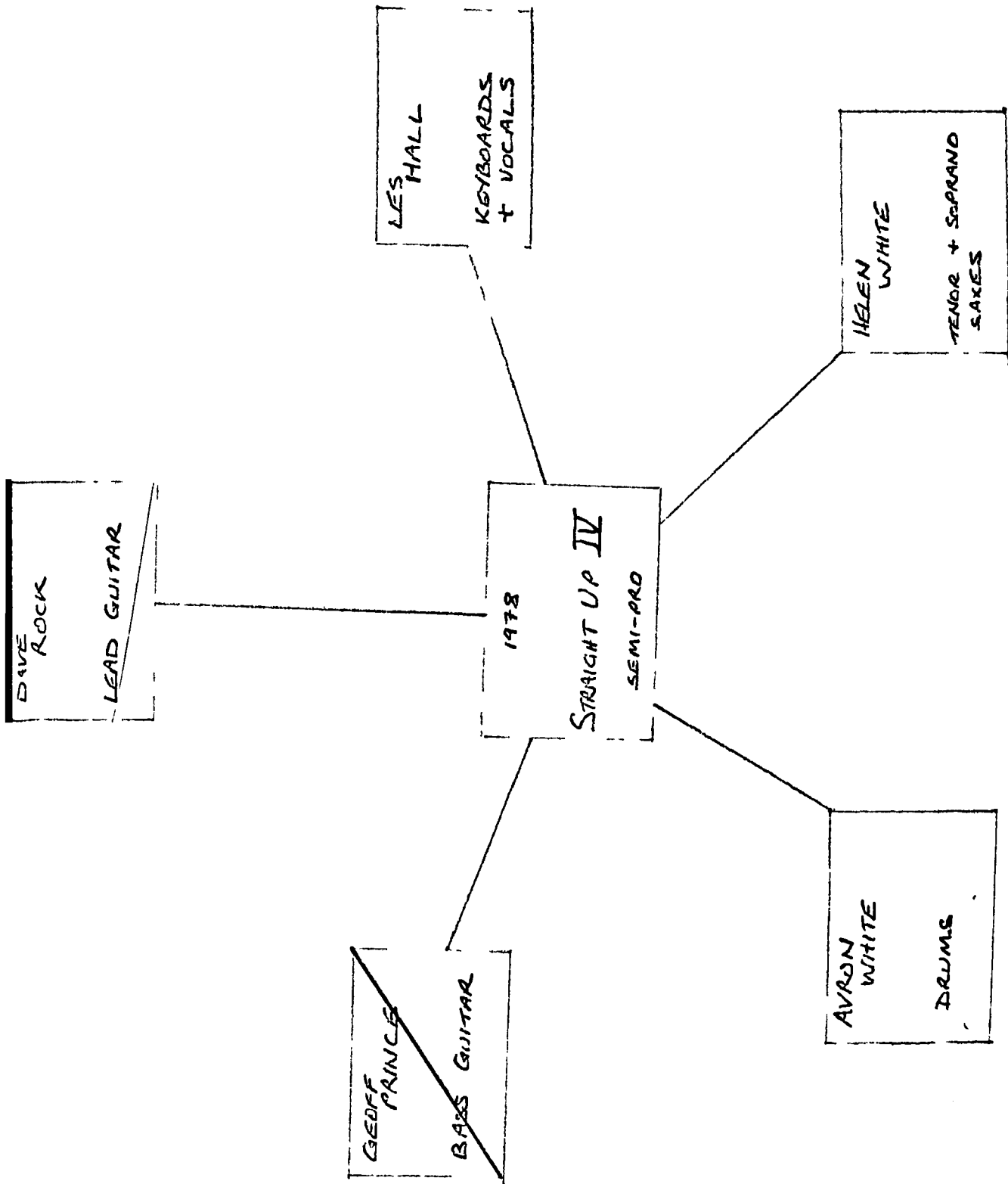


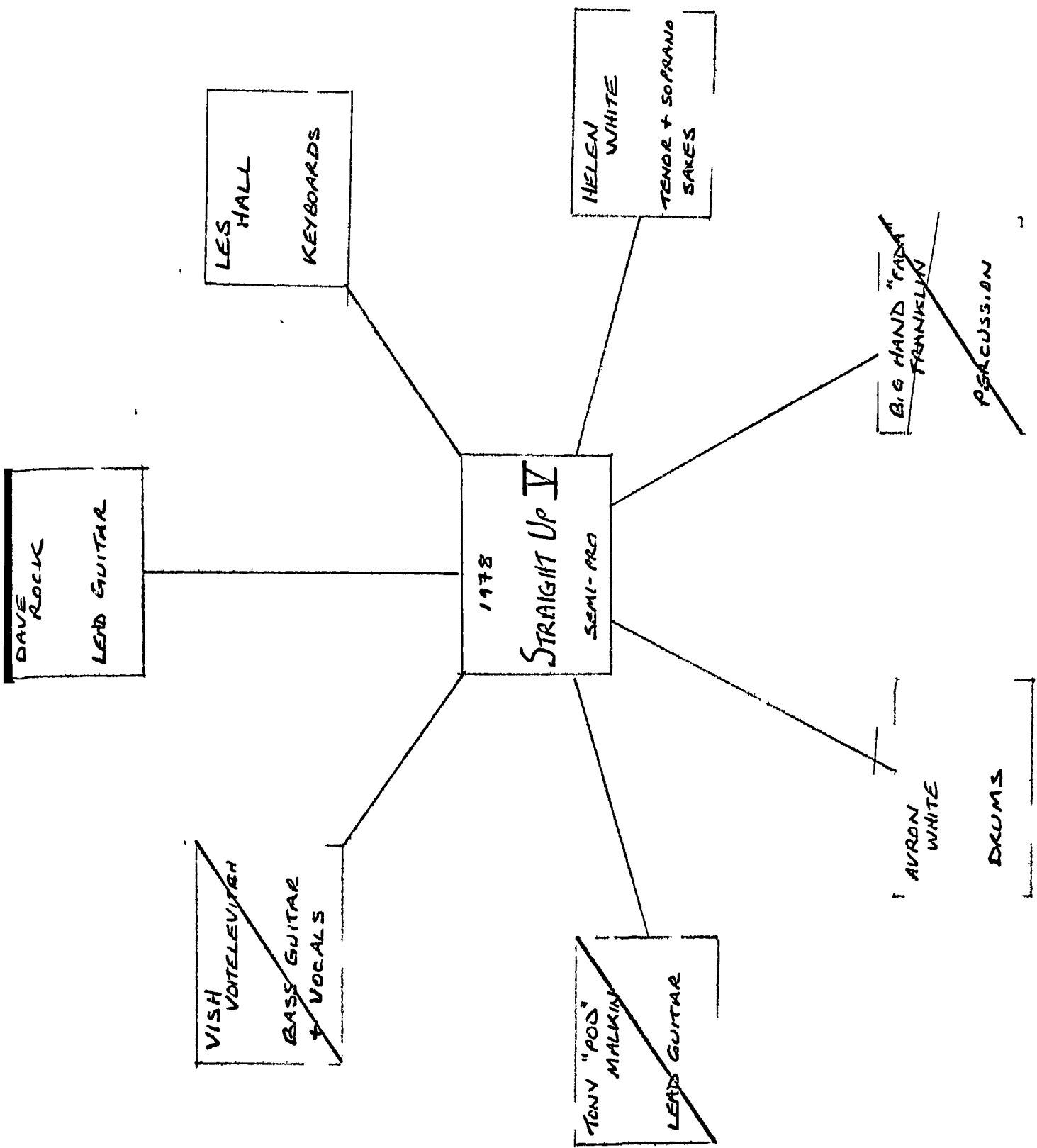


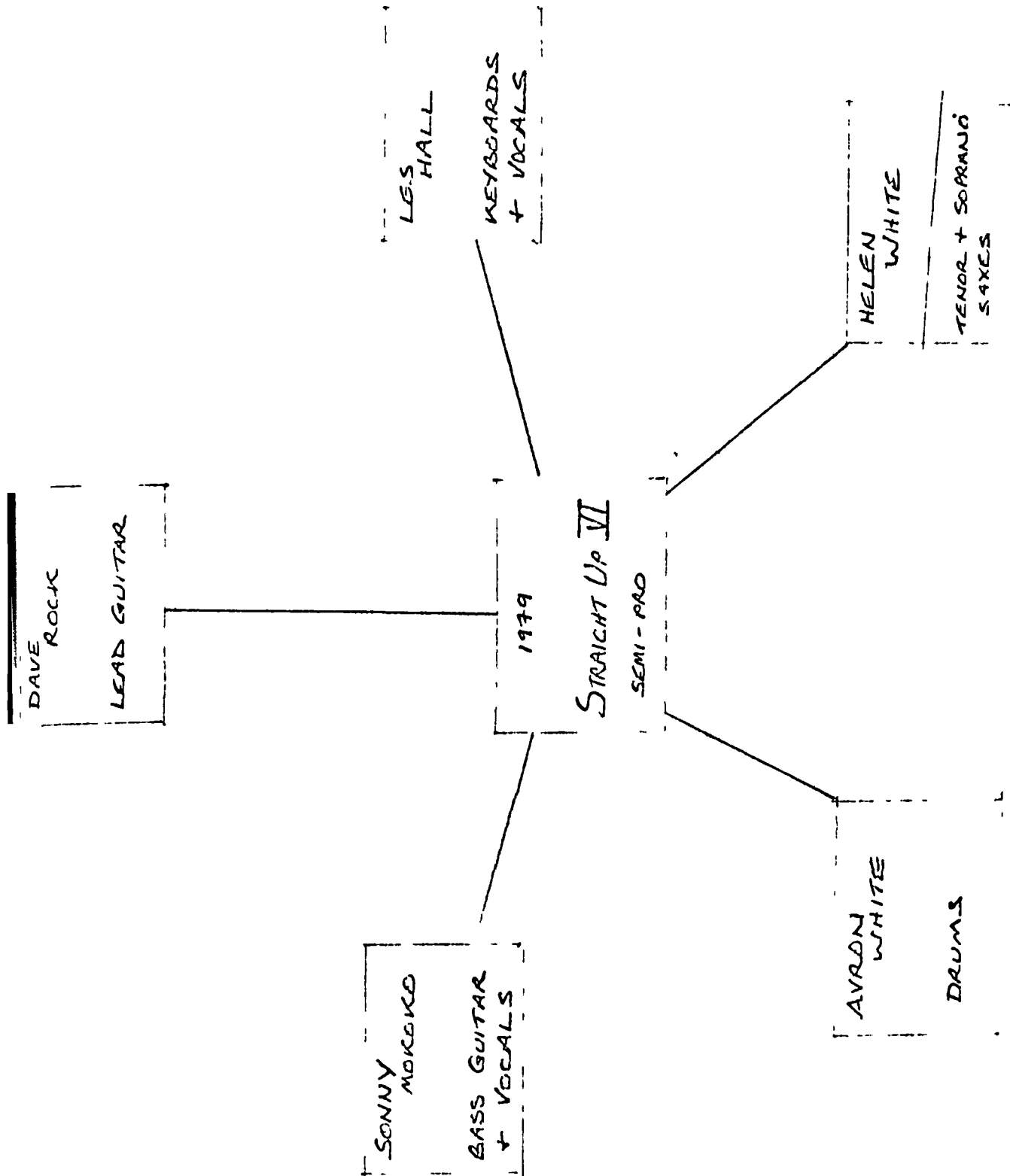












APPENDIX IIDIARY

- Entry 1 - GR, General Notes
- Entry 2 - GR, General Notes
- Entry 3 - GR, Gig at Crewe College of Further Education
- Entry 4 - GR, Keele University, - A Benefit Gig
- Entry 5 - GR, Newcastle College of Further Education
- Entry 6 - GR, Melody Maker Competition
- Entry 7 - GR, The Birmingham Heat - Melody Maker Competition
at "Barbarellas"
- Entry 8 - Notes on a casual Jam Session with a view towards
forming a group
- Entry 9 - Feel and Structure
- Entry 10 - Conflicts between Players: Star Tripping

DIARYENTRY 1 re: GR

Today's rehearsal went as usual. The bass player and guitarist arrived shortly after I did and the three of us had a short discussion concerning recording contracts. The bass player/songwriter pointed out that recording companies now sign up individual musicians in the group on separate contracts rather than group contracts as a whole as this enables the recording company to have more control over the functioning of the group. Presumably under this system a record company can cancel an individual's contract without losing the whole group. Furthermore a group is unable to escape contract commitments by disbanding and reforming as each individual musician is legally bound to original performance and production schedules. The bass player seemed to think that this sort of arrangement was justifiable leverage for recording companies to sack anyone "who wasn't pulling their weight." This theme of relative contribution to the group effort is a regular pre-occupation amongst the musicians in the group. There was dissatisfaction brewing with the synthesiser player who the band felt was making little or no musical contribution. The complaint seemed to be that although he sets up his equipment at each rehearsal and performance, he in fact rarely plays it. His responsibility in the group's performance was largely the preparation and instrumentation of pre-recorded tapes used in the group's musical repertoire. The band discussed the possibility of jointly purchasing a P.A. (Public Address) system used for vocals.

DIARYENTRY 2 re: GR

The most difficult hurdle to overcome in a Rock group after establishing a satisfactory musical repertoire is financing adequate equipment to amplify the music at sufficient volume to fill a venue which will accommodate between 300 and 1,000 people. The problem initially is that an unknown group is not a viable commercial risk to any potential venue unless they can produce approximately £800 worth of P.A. equipment, and furthermore, a group is unlikely to have the funds to purchase such equipment until they have been playing commercially on a regular basis for some time. This situation leaves few options available. The most common solution among groups I am familiar with is entering a joint contract for a hire purchase agreement. This involves a long term financial commitment, which, from reports of establishments that offer such agreements, usually outlives the group and resolves itself in unpleasant legal action. Occasionally one member of the band is wealthy enough to buy the equipment for the band or sometimes a relative of the group member acts as a financier. Both instances are quite rare. Failing any of the above-mentioned a group may borrow equipment from friends in other bands that already have it or simply rent the gear from a firm which provides such a service. The drawbacks of borrowing equipment are both the risk of having to replace expensive gear that may be damaged during transport and performance or the possibility that the loan of the equipment will fall through at the last minute just before the performance. Alternatively hiring equipment on a casual basis is very expensive. Remarkably, GR succeeds in borrowing equipment from other bands and has done so on three successive occasions. The performance at Tiffany's and

the one at Crewe were performed with equipment borrowed from a mutual friend of the band.

On a local University gig we borrowed a P.A. from a friend who played with a professional group. I arranged to borrow the equipment for the performance. His attitude toward the request was one of sympathy and respect for a group such as GR which over the years had begun to gain some degree of popular appeal. This is to say that the individual's interest in loaning the equipment was to some degree out of professional courtesy rather than entirely based on friendship. Groups often disband and reform; lost individual musicians or simply decide to expand their repertoire to include another instrument. As with all professional groups personal contact and favours are important ways of creating potential opportunities in the broader musical circuit in the face of inevitable disruption and reorganisation or musical groups.

The synthesiser player, and more generally beheld by the rest of the group as head technician, arrived with the Road Manager, whose responsibility was to mix the live performance sound and organise other road crew. I drove to Leek, some 15 miles from my base location, with the synthesiser player in order to collect sound equipment we were to borrow. We unloaded the equipment at Keele University Union Ballroom at about 2.30 in the afternoon. I left them shortly thereafter to collect my equipment and they proceeded to set up the P.A. When I returned 3 hours later at 5.30, the P.A. had still not been successfully rigged up. The Road Manager had just acquired 100 metres of "multicord" (a heavy duty line cord for linking up the mixing desk with the P.A. over long distances) which he was unable to incorporate in the rig. It wasn't successfully rigged until the owner

of the P.A. had arrived to provide assistance. Clearly the Road Manager and the synthesiser player did not have a sufficient understanding of electronics to cope with an unfamiliar P.A. system. Furthermore, the owner of the P.A. who subsequently came to the gig complained about the technical handling of his equipment (a wrong connection could create costly damage) and more or less implied that he would feel uncomfortable about future loans to GR. This constituted a genuine loss, leaving GR with still fewer alternatives with regard to borrowing equipment. The Road Manager blamed the difficulties on the quality of the equipment loaned.

The remaining few hours before the gig were spent mostly in the dressing room where the guitarists were going over the most recent musical changes in various songs of the set. Friends and strangers flowed in and out of the dressing room bringing drinks and words of encouragement. Yet, despite the appearance of a casual atmosphere tension was mounting. We were informed by the Social Secretary of the Students' Union that we would now be going on stage a half an hour later than planned. A professional group would not tolerate this change in plan but we just simply agreed. The reason for the change in plan was that a decision was taken that more people would attend the performance after the bar had closed.

Ten minutes before showtime the guitarist began to panic and imposed a series of last minute checks on equipment and details of musical arrangements.

The final moment arrived and we all gathered by the stage entrance. The synthesiser player put on the pre-recorded tape which is our cue for assembling on stage. The tape is fairly long and loud which gives

us time to plug in and make any minor adjustments before playing. The tape ends with the sound of a thundercrack - the lights flash on; a smoke screen goes up and we're on. Dave starts the set with 4 bars of a solo introduction and I follow with a roll around the kit and then we're all in. The bass player hit the first note on his bass guitar and his amplifier blew. On stage it baffled everyone - it seemed as though the entire sound went dead. Here I should point out that the sound on stage to the musicians' ears is very different from what the audience hears. Unless the group has very expensive monitors actually on stage, individual musicians are unable to hear much more than what they are playing on their own instrument. Consequently it is necessary to memorise songs and sing them in your head so you know where you are in the song. What can be heard on stage is what sounds like a faint background sound which, depending upon the acoustics in the room is distorted in some way by echo or some other reverberation. It calls for very careful listening. When the bass player's amplifier blew absenting perhaps the most audible sound (the bass guitar) in these circumstances, one has the unalterable sensation that the rest of the group has stopped playing and that one is idiotically soloing to an audience of 500. Fortunately, the mishap wasn't as bad as it sounded on stage. The bass was still coming through on the P.A. and the audience simply experienced a drop in volume. The number went down reasonably well. The vocalist apologised to the audience for technical difficulties. We fortunately had a spare amplifier; rigged it up in a matter of minutes and were off and away with the next number. The audience applauded wildly so I'm told - but it is difficult to hear applause on stage as well. It has something to do

with the nature of the ballroom acoustics. The remainder of the set went down very well and we were cheered on for two encores. We only did one, however, because we only had one number left in our repertoire!

The booking of a gig is another problem which calls for an entirely different range of talents. I arranged the Keele gig and was pleased that for my first venue of this nature it was a financial success for both the Student's Union and the band. It is important to bear in mind the interests of the venue particularly in the initial stages of the band's progress. A band that performs well but doesn't attract a sufficient audience or asks for a fee that leaves only a minimal profit margin for the venue is unlikely to be booked for a return gig.

When I first approached the Social Secretary of the Student's Union I asked for £50 for the gig which he thought was too high to ensure the Union a reasonable profit margin. However, since he had heard us rehearse and liked our set he was reasonably enthusiastic about coming to some sort of an agreement. We agreed finally on a no risk percentage split of the door takings. The band was to take 70% and the Union 30%. I still had to put this arrangement to other members of the band for their approval. They were not convinced, initially, that this was a worthwhile arrangement. After some discussion it was concluded that the opportunity to play at Keele outweighed adhering to a firm flat-rate policy. Much to our surprise and that of the Social Secretary we packed the Union ballroom and came out with twice the amount we were originally asking for. Furthermore we were promised a return booking.

The Social Secretary informed me only a week later that word had got out that GR played Keele University on a percentage basis and that since our appearance 20 or 30 bands from in and around the Stoke-on-Trent area, Birmingham, and Manchester had telephoned to request gigs on a similar basis. The Social Secretary contemplates establishing a band hiring policy on this basis alone for future performances at Keele. He claims to be offering only a 60/40 split to other bands rather than 70/30 as with GR.

It is interesting to note that despite our success with this particular arrangement the band were unwilling to contract on that basis again and all future bookings would occur on a flat rate basis.

DIARYENTRY 3 re: GRGIG: CREWE COLLEGE OF FURTHER EDUCATION

Until this engagement we were able to transport our gear in individual vehicles operated and owned by members of the band. This time, because of the distance factor we hired a large transit van and transported the group and all its equipment in one movement. We arrived at the stage door around 5.00 p.m. - 6 hours before we actually went on stage. It took 12 of us four and one-half hours to unload and set up all the equipment. Fortunately we were able to borrow another group's P.A. The owners of the equipment came to the venue to supervise the installation of their sound equipment. The owners who did the sound for us that evening claimed to enjoy the exercise and felt they learned a great deal about their equipment which they now heard from an audience point of view rather than from the stage point of view. The band paid them a fee which was a token gesture for what was considered a favour. The pair were however, angling to hire their P.A. out on a fee basis for all our gigs which the band agreed to. However, they did stipulate that their own band would have to take priority and if there was a date clash then their services were not available. This is one reason why the hire/borrowing of equipment from other bands is unreliable. The band may be altogether willing to cooperate and provide good service and equipment but if a booking comes in for their band at the last minute, perhaps a day before our performance date, the sound equipment service would be cancelled.

As the hour of our performance grew nearer we began to panic at the lack of numbers apparently in the venue. This, however, improved dramatically some 5 minutes before showtime. The gig went down still better than previous engagements. A small group of followers assembled requesting autographs.

DIARYENTRY 4 re: GRKeele University - A benefit gig

The band has more or less agreed at my insistence to do benefit engagements. I always felt this was good publicity and created goodwill amongst the public generally. Also a performance like this can be useful if the band is interested in trying out either newly rehearsed material or newly acquired sound equipment. This was the case in both areas. We were eager to try out something new in a fairly low pressure atmosphere. The organisation we did this for were about to have their annual weekend social and they were desperately short of funds. I offered the Treasurer a 50% discount to be confirmed after I had acquired approval from the rest of the band. The organisation then began to advertise our band and loathe to my discovery another band as well. My first reaction was that I had been deceived. Certainly if there was enough money to hire two bands there was enough to pay our band the normal rate. At this stage it was too late to back out simply because they had already advertised our band. As it turned out the other band were playing for no fee and we just about covered our expenses.

Our mixing unit was finally complete and we were anxious to try it out. The equipment didn't work and the engagement therefore served its purpose however the sequence of events surrounding the booking and expectations for the evening made me realise the importance of a more explicit written agreement.

DIARY

ENTRY 5 re: GR

NC College of Further Education

This engagement came up suddenly and unexpectedly through an agent with whom the band had some dealings with several years ago. The agent (DD) who has organised major concerts in the area has been reluctant to have much to do with GR and this booking was therefore a consequence of exceptional circumstances. DD's reluctance to book GR stems from the band's earlier experience with him where they questioned his attempts to exploit the band. In his earlier dealings with the band he has booked GR for an engagement and paid a very low fee. Because the band was unknown at the time it was necessary to forfeit financial remuneration for the prospect of publicity.

The NC College booking came through DD's hands quite fortuitously. The social secretary had already decided on GR as their support group for their major presentation. The social secretary was unable to contact the group directly (and here this is a reflection of bad publicity on the part of GR) and he therefore contacted the agent in his effort to locate us. When the agent contacted GR he gave the impression he was short of a band and thought GR might be able to fill in. After the performance however the social secretary told us the actual situation and it transpired that the agent wasn't doing us a favour at all.

We arrived at the venue with a borrowed P.A. system. The main band were on stage setting up their gear. Since they were all professional and on the road they had been there since 2.00 p.m. that afternoon. We were unable to arrive until 6.00 p.m. because of day job commitments. The

main band left very little stage room for us which made our performance difficult. The performance was reasonably well received.

DIARYENTRY 6 re: GRMelody Maker Competition

GR decided to enter the annual Melody Maker competition which offers to the winners a complete sound system and a recording contract. Although we had no real expectation of actually winning we thought the pressure would help us to consolidate our act.

The Melody Maker "heat" as it is called took place in Derby at a local Pub called Cleopatra's. We arrived around six o'clock which was halfway through the Folk section of the contest. Another band from Stoke-on-Trent, S, had already arrived and were seated amongst the other competing musicians. The atmosphere was intense as the majority of the audience at the time were competing musicians. We reported our arrival to the judges who placed us last on a list of 11 competing bands in the jazz/Rock section. This was perhaps the best possible place to be on the list for the obvious reason that a judge's memory will tend to shorten as the evening wears on with a total of 25 performances to evaluate over a period of six hours. Each competing group or individual musician is given 5 minutes to set up his gear and do a sound check with the mixing engineer. The performer(s) then have 10 minutes to play. If they exceed the limit points are deducted from their total score. The majority of the group's performing that evening were very loud and acrobatic on stage attempting unsuccessful imitations of Peter Townsend. The mood projected was often one of arrogance and contempt for the audience which was intended to echo the fame and over confidence, in borrowed form, from the successful late sixties bands which in their prime often hurled visual and verbal

abuse as a kind of stage act. Several of the contestants openly complained about the format of the contest which I suspect only went against them.

We anxiously awaited our spot as our friends and rival band from Stoke - S - went on to play a successful and unpretentious funky jazz/Rock number. By the time they went on the Pub had filled up with a local audience. They were received well and complimented by the judges after their performance. GR's chances seemed slim at this point but after going on and performing a faultless rendition of the strongest number in the repertoire, we knew we were at least in the running. The judges announced the results $\frac{1}{4}$ of an hour after the end of our performance. Both S and GR were chosen to be put forward to the semi-finals in Birmingham.

DIARYENTRY 7 re: GRThe Birmingham Heat - "Barbarellas"

After our success in Derby word got around locally, both local bands were sponsored a coach to take them and supporters to the Melody Maker Competition in Birmingham. The contest rules stipulated that contestants must arrive at 5.00 p.m. Everyone from all over the region did just that only to discover that the venue was unprepared to receive participants. Several hundred musicians sat around on floors and tables after travelling, in many instances, for hours. The bar was not open, no food was available, and the P.A. had not yet arrived. The atmosphere was precariously moody. Eventually the P.A. did arrive and the show was beginning to get underway. I panicked when I saw the drum kit that was provided. The floor tom-tom was missing and evidently it had been stolen from the venue the night before. GR, ironically enough, this time were placed first on the list which meant if anyone was going to have to do something about an incomplete drum kit, it would have to be me.

The competition began with the Folk session first. Then GR opened the Rock contest. The other band from Stoke played shortly thereafter. Both bands were well received and many of the others were remarkably talented. Judges however, chose the two least imaginative bands of the evening as the winners. What the winners lacked in musical imagination, style or expertise, they made up for in their stage presence (e.g. costumes and dialogue with the audience). The evening and its disappointments were briefly discussed by members of the band and the evening was quickly forgotten.

DIARY

ENTRY 8 re: Notes on a casual Jam Session with a view towards forming a group

This evening's meeting began with a jam which the guitarist and I quite enjoyed and the piano player didn't like. He complained about its lack of structure and undisciplined nature. I had suggested earlier before the jam, that we might work on a few numbers which would more or less be extrapolations from the jam context. The guitarist agreed that this might be a useful venture but the piano player was sceptical and reaffirmed his opinion that we should devote the majority of our energies to achieving note perfect renditions of recorded material. We then rehearsed a difficult number by John McLaughlin entitled Arjen's Bag. The tune is in $\frac{11}{8}$ and although the feel of the number is improvisational the consensus has been to play it as close to the recording as possible. There is clearly a division of priorities developing in the attitude of those attending these meetings. Some want to formalise the session whereas others would prefer to explore musical potential in a more creative context (this includes myself and the guitarist). This kind of split often breaks a musical group and can well develop into a situation composed of incompatible extremes where those who favour a thoroughly disciplined musical context appear as authoritarian, uncreative and insensitive and those who favour a less structured context appear as adolescent, undisciplined and are sometimes labelled "ego-tripping" musicians. Ultimately a balance needs to be achieved.

Later in the evening we played with a bass guitarist who more or less casually dropped in for a jam. He knocked on the door during our

moment of self indulgence and inquired whether we were "seriously" working on something or whether we were prepared for a jam. We were in fact being seriously self-indulgent but we urged him to participate. Then suddenly the guitarist already present asked him if he would join in on a number we had been working on - Arjen's Bag in $\frac{11}{8}$. I thought this was unfair because this is an especially difficult time and feel which counts in a half-beat and we don't really play it properly ourselves without a struggle. The newcomer could hardly play the tune. Shortly thereafter we dropped it and the bass player played a sequence in $\frac{4}{4}$ which we cruised along on for quite some time. Both guitarists played interesting tunes but without much structure or necessarily any compatibility. The session was reasonably satisfying and we agreed to have another the following week.

Many jam sessions of this kind occurred on what was for me then an amateur music scene where people were simply trying out their favourite home practiced 'party piece', as it were, to see if they fitted in with anyone else's. When it did everyone enjoyed the ensemble improvisation and there was always some talk of getting a band together. This usually meant that everyone felt that they'd got a piece of the action. By that I mean that everyone felt that they had had their turn to take a leading role while others backed him. It always struck me as good manners, etiquette or being polite about everyone having his turn. Nobody was seriously thinking of performing so there was no pressure to achieve anything other than personal satisfaction. It was fun, undisciplined, and self-indulgent.

DIARYENTRY 9 re: "FEEL and STRUCTURE"

Every musical situation in which I am currently involved is ushered in by some preliminary concept (conscious or unconscious) of 'feel' or 'structure'. Jam sessions preclude any conscious recognition of structure other than some initial agreement on key after which musicians proceed in a spontaneous manner. The shape, tempo, and general character of the mood i.e. peaks and low spots are more or less in the hands of the rhythm section which can either drive the music into a pattern of crescendoes or drop it to low volume and delicate phrasing. In a jamming situation a drummer's role is very influential. Pulling out the rhythm or dropping intensity will quickly put an end to a guitar or keyboard solo. Likewise a drummer can choose between competing front liners for a solo spot by simply giving rhythmic backing to the soloist of his preference. But all throughout this musical performance not a word is spoken and the music proceeds until either someone stops playing or the music has a natural end. A good jam has a natural end which is considerably tight and a well understood conclusion based upon the proceeding edifice of established musical patterns spontaneously created during improvisation. Alternatively a bad jam is simply broken up by one who stops playing implying disapproval. The question of "feel" here is an unspoken assumption and principal guideline for discourse. Its referents are the 'telepathic', the indescribable convergence of 'wavelengths', a general knowledge of logical possibilities, and a fundamental sensitivity to the elasticity of harmonic structure. The jam is not reproducible and for this reason its commercial potential is considered minimal.

DIARYENTRY 10 re: Conflicts between playersStar tripping

In one particular band I saw, which was a kind of jazz/rock/blues/funk band there was obvious conflict between the keyboard player and the saxophone player. This conflict inevitably arises out of each of the musicians wanting to play the lead melody line - to have lead voice, as it were. The keyboard player's synthesiser was equally capable of simulating a saxophone sound. Consequently what often happens is that the saxophone and keyboards will play the line as a unison passage or in harmony and this is when a kind of volume battle can occur. The only reason why the guitarist didn't enter the competition is because he was already the lead vocalist.

There is a curious relationship in the politics between the lead player in instrumental bands and vocalists in bands. Musicians invariably wish to excel or display their ability in some kind of setting, which to a large extent is the result of music educational aims that seek to create virtuosos. In semi-professional bands where there is no financial compensation to keep the performing ego in check there is very often a battle which ensues which creates what is known as 'drowning out' syndrome or 'startripping' as one musician put it. The result is invariably the same as each musician attempts to express his individuality through volume or excessive embellishment. This is really where I think the Rock scene has so much to learn from jazz in that over the years they have developed a kind of 'musical diplomacy' which is the sort of periodic 'show and tell' of individual musical technique. For example trading four bar sequences between just two

players in the band while the rest of the band stops playing or plays very simple backing. This gives everyone in the band a chance to feature specialist technique in a concise format. When there is no recognition of this need, then bands work it out unconsciously either through overplaying, laborious soloing or excessive volume.

APPENDIX III

MISCELLANEOUS DOCUMENTS

Agents reaction to GR

Agents reply to SP

Lyrics by GR

Letter of contract from Bandleader R.J.

Tel: FRILFORD HEATH (086 739) 837

ARRANGER · MUSIC CONSULTANT · COMPOSER

MANOR FARMHOUSE
DRY SANDFORD
ABINGDON
OXFORDSHIRE

21st May

Dear Avron,

Thank you very much for sending me your tape. Jill & Max did indeed say lots of nice things about you, but I tend to be very sceptical about such reports -- whoever they're from! -- till I hear the group for myself.

Having said all that, let me say that I'm very impressed. It's very rare indeed that I hear a group such as yours that has such a strong immediate impact. Basically I love the sound and the material and I'm very keen to take it further. Before I get on to detailed reactions to the music, let me just outline some practical difficulties which have to be overcome.

If you do well in the MM contest finals, and I'm quite sure you will, you will probably get a lot of tentative interest which may or may not lead to something. Unfortunately, at the present time it is impossible for me to do much by way of seeing you, or record companies, as I am fully committed until next Thursday, when I go to France for about a week. I am saying all this to try to discourage you from taking any rash steps without a lot of thought, and without letting me try to generate some interest in you round the business, and lay some firm foundations.

I should add at this point that I am not trying to tie you up to me on some vague promises -- I'm not the cigar-smoking "stick-with-me-and-I'll-make-you-a-star" type, and I hope anything my sister-in-law says is some kind of personal recommendation! I also know from personal experience how bewildering the music business is until you get right into it, and how distrustful one tends to be of everyone you meet.

What I am saying is this: I am very interested and very enthusiastic; you're obviously not the one-hit wonder type of band; your future strength is going to lie in a rather longer-term programme of gigs and albums, and in the development of an 'act', in the best sense of the word -- indeed as you yourself have outlined your ideas, which seem to fit perfectly with the music.

All this is going to take a lot of hard work, and a fair bit of disappointment and disillusionment along the way -- but I think it could all be well worth while, and the first stage, it seems to me, is to generate record-company interest and then get you a gig somewhere down south where the company men can see you -- this they will definitely want to do.

At this stage, let me change tack a bit and say something about myself, for reasons that will become apparent. You probably know of me, apart from Jill, that is, through 'Eye Level', which, as you may not know, was not really representative of the things that I like to be involved with. I've been becoming more and more restless over the past few months to change direction myself, and this has also been the case with my producer, Gordon Chambers, who is also a director of my publishing company. We have both been throwing ideas at each other about management, promoting new acts, and all sorts of

COMPOSER : CONDUCTOR : ARRANGER

TYTHE BARN COTTAGE
MILTON
ABINGDON
OXON17th May,

Dear Avron,

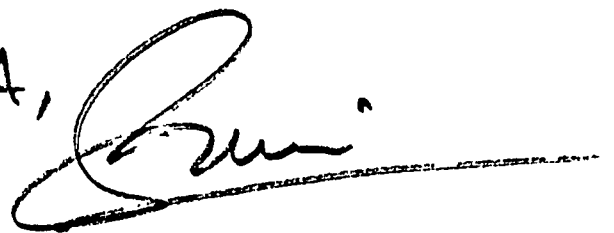
A quick note before departing on holiday!
Thanks for the letter & the tape, which I have
now thoroughly 'heard'!

An interesting band, certainly, but my first
reaction is rather that I have heard most of
it before! Sorry to be so direct, but the jazz-
rock thing is difficult to market unless there
is something really original there.

However, I've left the tape with colleagues
in the office for their assessment and will
come back to it upon my return in June.
Who knows? It could be just what
Everout's Cooking for!

Best of luck with it all, and keep at it!
Be in touch anon.

All the best,



THE HALL CLOCK CHIMED 8.30

BRINGING GEORGE TO LIFE

TRYING NOT TO HEAR THE CLOCK HE COVERED UP HIS
FACE

OH GOD PLEASE RELEASE ME FROM THIS RATRACE.

YOU'D BETTER GET UP

YOU'D BETTER GET UP GEORGE OR YOU'LL BE LATE

GOT TO GET UP, GOT TO GET OUT

THERE'S NO ESCAPE THIS IS MY PLACE THIS IS MY FACE

GOT TO GET UP GOT TO GET OUT...

"
"

TAKING HIS TICKET FROM THE MACHINE ON THE WALL

GEORGE MADE HIS WAY DOWN TO THE ESCALATORS

HE THEN REALIZED HE'D SEEN NO ONE AT ALL — AT ALL

PERHAPS THEY'RE LATE HE SAID THEY'LL BE HERE LATER.

AND THOUGH IT WAS STILL A BREEZE SEEMED TO DRIFT IN HIS
FACE.

RIDING DOWN LET THE JOURNEY BEGIN

THE FACES ON THE POSTERS ARE GRINNING AT HIM

WHILE DOWN ON THE PLATFORM THERE'S NO ONE AROUND.

AND OUT OF THE TUNNEL AN UNEARTHLY SOUND.

LOOKING AT THE STATION CLOCK ON THE DAMP

AND BROKEN WALL

THE TRAIN WAS LATE OR HAD IT GONE SHOULD

HE GO ON HOME

SUDDENLY HE FELT A BREEZE DRIFT ACROSS

Monday 2nd Nov. 1981

36, Quarry-Dow
GREENFIELD - HOLYWELL
CLWYD CH8 7HQ

Dear Mr. White, - AURON

please accept this letter as a contract
excuse please the handwriting my typewriter is out-of-
order.

I engage you for the dates 1st DECEMBER 1981
untill 3RD JANUARY 1982 inclusive and all days
between ~~at~~ (except 25 Dec) as Drummer in my
Band to play at Casa-Bar MÜNSTERGASSE 30
8001 ZÜRICH, SWITZERLAND. The hours of work are
between 8 1/2 pm & Midnight (local time) and any
overtime will be the subject of extra payment. I
will pay you 75 Swiss franks per day for this
period Tax having been deducted at source.
Your accommodation (less food) will be provided in
addition. You will arrange and provide for your
own journey into Switzerland. You should also
provide dark trousers to work in, and a white
shirt should this be required during the engagement.
Rehearsals will only be called when necessary
and will be attended without extra payment.

Would you please acknowledge receipt of
this letter and signify your acceptance of the terms
and conditions.

Sincerely

APPENDIX IVLAW CASES

Christy v Davey

Instone v Schroeder Music Publishing Company Limited

A. Schroeder Music Publishing Company Limited v Macaulay

Clifford Davis Management v WEA Records Limited

Page One Records and Another v Britton and Others

Denmark Productions Limited v Boscobel Productions Limited

Warner Brothers Pictures Inc. v Nelson

NORTH, J.
1892
In re
COLCHESTER
TRAMWAYS
COMPANY.

words, the liquidator can be called a "creditor of the company" in respect of his costs in the winding-up. His claim to those costs has arisen since the winding-up order was made. He is entitled, no doubt, to have his general costs of the liquidation paid first out of the general assets of the company. But these deposits are not general assets of the company; they are only made assets for a particular purpose, and, in my opinion, I have no jurisdiction to order the general costs of the liquidation to be paid out of them. I can find nothing in the judgment in the *Lowestoft Case* (1) to shew that the Master of the Rolls would have given the liquidator his costs if there had been meritorious creditors. But the point with which I have now to deal was not decided then. The costs of the creditors must be paid out of the fund, and also those costs of the liquidator which I have mentioned. The residue will be divided among the creditors named in the special certificate in proportion to the amounts of their debts.

Ingle Joyce:—The Crown raises no objection to that.

Solicitors: *Atkinson & Dresser; Richard Tree; Haré & Co.*

W. L. C.

NORTH, J.

1892

Dec. 6, 7,
8, 10.

CHRISTIE v. DAVEY.

[1892 C. 3775.]

Injunction—Noise—Playing on Musical Instruments—Reasonable Use of House
—Malice.

The giving of musical lessons by a teacher of music, the lessons extending over seventeen hours in a week, in a house separated from the adjoining house by a party-wall, there being also from time to time practising on the piano and violin, and singing, and in the evening musical performances for the entertainment of the persons living in the house, and occasionally musical parties, and frequent practising on the violoncello as late as eleven at night:—

Held, not to constitute a legal nuisance of which the occupier of the adjoining house was entitled to complain.

But an injunction was granted to restrain the occupier of the adjoining house from causing or permitting any sounds or noises in his house, so as

to vex or annoy the occupier of the first house, the Court being satisfied that he had been making noises on musical instruments and otherwise maliciously for the purpose of annoying the occupier of the first house.

TRIAL OF ACTION.

The object of the action was to obtain an injunction to restrain the making of noises in the Defendant's house.

The Plaintiffs were Mr. J. F. Holder *Christie* and his wife, who resided at No. 68, *Angell Road, Brixton*; the Defendant was Mr. H. Fitzer *Davey*, who resided in the house which immediately adjoined the Plaintiffs' house, the two houses being "semi-detached." Mrs. *Christie* was a teacher of music and singing. She taught music at a high school, and also took private pupils, some of whom came to her house for their lessons. Her daughter, who was a medallist of the *Royal Academy of Music*, lived in the house, and she gave lessons on the piano and the violin, some of these being to pupils who came to the house. A Miss *Kennedy*, who was also a medallist of the *Royal Academy*, came to reside in the Plaintiffs' house on the 27th of September, 1892. The Plaintiffs had a son, who also lived in the house. He was during the day engaged in business, and did not return home till late in the evening. He was in the habit of playing the violoncello up to eleven o'clock at night; but he was only an amateur. The Defendant was an engraver on wood. The Plaintiffs had occupied their house for three years, and up to the 30th of September, 1892, the relations between them and the Defendant had been harmonious. No complaint had been made on either side. On the 30th of September the Defendant wrote to Mr. *Christie* as follows:—

"During this week we have been much disturbed by what I at first thought were the howlings of your dog, and, knowing from experience that this sort of thing could not be helped, I put up with the annoyance. But, the noise recurring at a comparatively early hour this morning, I find I have been quite mistaken, and that it is the frantic effort of some one trying to sing with piano accompaniment, and during the day we are treated by way of variety to dreadful scrapings on a violin, with accompaniments. If the accompaniments are intended to drown the vocal shrieks or teased, catgut vibrations, I can assure you it

NORTH, J. is a failure, for they do not. I am at last compelled to complain, for I cannot carry on my profession with this constant thump, thump, scrape, scrape, and shriek, shriek, constantly in my ears. It may be a pleasure or source of profit to you, but to me and mine it is a confounded nuisance and pecuniary loss, and, if allowed to continue, it must most seriously affect our health and comfort. We cannot use the back part of our house without feeling great inconvenience through this constant playing, sometimes up to midnight and even beyond. Allow me to remind you of one fact, which must most surely have escaped you—that these houses are only semi-detached, so that you yourself may see how annoying it must be to your unfortunate next-door neighbour. If it is not discontinued I shall be compelled to take very serious notice of it. It may be fine sport to you, but it is almost death to yours truly.”

In consequence of the tone of this letter Mr. *Christie* returned no answer to it. The Plaintiffs alleged that on the very same, or the next, day the Defendant commenced a series of noises in his house whenever the playing of music was going on in the Plaintiffs' house—such as knocking on the party-wall, beating on trays, whistling, shrieking, and imitating what was being played in the Plaintiffs' house. This conduct, it was said, continued up to the 12th of October.

The Plaintiffs consulted their solicitors, and they, on the 12th of October, wrote to the Defendant as follows:—“We have been consulted by Mr. and Mrs. *Christie* in reference to the outrageous system of annoyance which you have adopted towards them in hammering and beating trays against the party wall between your house and theirs, and making other offensive noises whenever any music is going on in their house. Your letter to Mr. *Christie* on the subject was brought to us at the time; but the tone thereof was so extremely coarse and insulting that we advised our client to treat it with the contempt which it appeared to us to deserve. It may be that, if you are not of a musical nature, the sound which may reach you from our clients' house owing to the thinness of the party wall (for which, by the way, they are not responsible), is not very agreeable to you; but at the same time you must remember that our clients have to carry

on their profession, as well as yourself, and, moreover, we have yet to learn that it is an unreasonable use of a private house to play the pianoforte or sing. Your own complaint that the music interferes with the exercise of your profession is, we understand, quite unfounded, as we believe the fact is that you have converted the upper storey of your house into an office, where you could not possibly hear what is going on on the ground floor next door. On the other hand, your disgraceful proceedings are the cause of very much discomfort and annoyance to our clients, and seriously interfere with their professional pursuits and engagements, and, therefore, unless you at once give us an undertaking to discontinue them, you will compel our clients (much as they would wish to avoid quarrelling with their neighbours) to adopt the only remedy which appears to be open to them—namely, to take proceedings against you in the Chancery Division to obtain an injunction to restrain the continuance of the conduct you have seen fit to adopt.”

The Defendant, in reply to this letter, wrote on the next day as follows:—“Your favour of the 12th to hand *in re Christie*, in which you talk of ‘outrageous system of annoyance, &c., hammering and beating trays, &c.’ This I emphatically deny. I have a perfect right to amuse myself on any musical instrument I may choose, and I am quite sure I should be the last person to do anything knowingly to annoy my neighbours. What I do is simply for recreation’s sake, and to perfect myself in my musical studies. You express your opinion about my letter, which is quite contrary to my own. I see nothing coarse or insulting in it; but I look upon it as shewing my desire to be on friendly terms with my neighbours, for I wrote in quite a jocular manner. However, each one to his taste. Your third paragraph questions my musical taste. Well, I believe, from my past musical training, that I am perfectly qualified to distinguish the difference between music and noise. Now, seriously, I put it to you, is it not most excruciating to have constant repetitions of the five-fingered exercises, and only receiving the higher notes of the vocal efforts? I do not for one moment think that there are no beautiful gradations; but they don’t reach me. I am quite thankful, I can assure you, for your

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NORTH, J. eminently legal opinion as to your clients' non-responsibility for the thinness of the party wall. I do remember that your clients have to carry on their profession as well as myself, and this has made me shew more forbearance than I otherwise should have done. But, while making all allowances for the privilege of those who rent private houses, I have yet to learn that the same principle does not apply to me as well as to them. I now come to the most serious part of your letter, in which you say that my complaint of the music interfering is quite unfounded. You have the two opinions, mine and your clients'; one of us is evidently (to say the least of it) departing from the truth, and it is not I. The sounds reach up to my room most clearly, and my assistants are constantly complaining to me about it. We have the most difficult portraits to reproduce, requiring great thought and the most delicate treatment. This is my *spécialité*, and, if the thing were (I mean the noise) only now and then, I should not have thought of complaining; but it is almost intermittent (*sic*), morning, noon, and night, and perhaps the thinness of the party wall acts as a conductor and carries this terrible noise right up to my studio. I am given to understand that your clients have no carpet on the floor, nor pictures on the walls, consequently there is nothing to deaden the sounds, as in other private houses. Your clients' predecessor was a very musical person indeed; but, his place being properly furnished, the sound did not reach here to any extent; but here everything is done to increase the sound, and I have yet to learn that I am compelled to be a martyr because my neighbour is musical. Lastly, you say that I interfere with your clients' professional pursuits. Just so; this is simply reversing my complaint, and what is sauce for the goose is sauce for the gander. I have not complained without reason, for I cannot sit downstairs either to read a book or converse with friends or clients, as the case may be, but what this atrocious hubbub drowns all efforts to hear, and is continued on to midnight and after, and often commences a little after 8 A.M. When illness was in my house no cessation took place, and to my mind your clients have lately carried it so far as to shew that it is done maliciously; so you will, I have no doubt, see that, as I am the party wronged, and have the right

of complaint on my side, I shall positively refuse to give any undertaking that I shall cease my musical performances. To shew my willingness to meet the convenience of my neighbours, I am perfectly willing to compromise the matter by their agreeing to have one part of the week and me the other. I will give them the choice, leaving the Lord's Day as it really ought to be, a day of rest, neither of us using it as a day of musical recreation, but absolute rest. Here is a case in point now—while I am writing this up in my studio there is some one next door making frantic efforts to reach an upper note. It is intolerable; the house is no longer a private house, but a public one, pupil after pupil coming and practising, and letting out their pianos for practising only, sometimes two pianos going at the same time. It is my intention during these winter months to endeavour to perfect myself on the following instruments—viz., flute, concertina, cornopean, horn, and piano, which my child is learning to accompany me. I used to play them at one time, both in a church band and an amateur troupe; but I have been out of practice lately, but hope soon to regain my former proficiency."

The writ in the action was issued on the 20th of October, 1892, and by it the Plaintiffs claimed an injunction to restrain the Defendant, his servants and agents, from (1.) playing concertinas, horns, flutes, pianos, and other musical instruments; (2.) blowing whistles; (3.) knocking on trays or boards; (4.) hammering; (5.) shrieking or shouting; (6.) making other loud noises in such manner as to cause annoyance or injury to the Plaintiffs, or either of them, as occupiers of their house, and from otherwise using the Defendant's adjoining house in such manner as to cause annoyance or injury to the Plaintiffs, or either of them; and damages for the Defendant's wrongful acts. The Plaintiffs gave notice of motion for an interlocutory injunction, and the Defendant delivered a notice which he called a "notice by way of counter-claim," by which he asked for an injunction to restrain the Plaintiffs from making noises in their house by giving lessons, practising or playing upon pianos, violins, violoncellos, or other musical instruments, or singing in an unreasonable manner or at unreasonable times, or from

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otherwise causing or permitting loud noises to be made in the house in such a manner as to cause nuisance, annoyance, or injury to the Defendant as occupier of the adjoining house; and damages for wrongful acts of the Plaintiffs in making or permitting such noises.

The trial of the action was advanced, and it was agreed that the Defendant's notice should be treated as a counter-claim properly delivered.

The evidence, as the Court held, shewed that the lessons given by Mrs. Christie and her daughter to pupils who came to the house occupied altogether seventeen hours in the week. On two days in the week, Wednesday and Saturday, no lessons were given. The Plaintiffs' daughter and Miss Kennedy practised at times. The Plaintiffs sometimes had musical parties in the evening, and at other times Mrs. Christie and the other ladies played the piano in the evening for the amusement of the family. The Plaintiff's son was in the habit of practising the violoncello in the kitchen after ten o'clock at night till eleven o'clock, and sometimes a little later, and on one occasion when he was unwell he had practised in his bedroom upstairs. He occasionally practised for a short time on Sunday afternoon and evening.

The Plaintiffs adduced evidence in support of their allegations as to the noises which they heard in the Defendant's house in the period from the 1st of October to the issue of the writ.

The witnesses said that the Defendant had what they described as "mock concerts" for the purpose of annoying the Plaintiffs.

The Defendant and his witnesses denied that there had ever been any knocking on tea-trays, or hammering on the wall in his house, or that he had ever had any "mock concerts." They said that there had been no noise except that produced by playing of the concertina and other musical instruments, and such hammering as was incident to the Defendant's business of an engraver. The Defendant had been for some years in the habit of having a musical evening once a week, on which occasions friends came to spend the evening at his house.

Covens-Hardy, Q.C., and *Uppjohn*, for the Plaintiffs:—

The Defendant's own letter shews, and the evidence confirms this, that he deliberately and maliciously made noises for the mere purpose of annoying and vexing the Plaintiffs, and interfering with their reasonable enjoyment of their house. In such a case the Court will interfere by injunction to protect the Plaintiffs. Indeed, even in cases in which there has been no malice, the Court has restrained the making of noises which have caused serious annoyance and injury to a plaintiff: *Gaunt v. Fynney* (1); *Ball v. Ray* (2); *Broder v. Saillard* (3); *Reinhardt v. Mentasti* (4). The Defendant has, to use the words of Lord Selborne in *Gaunt v. Fynney* (5), been acting in a manner "which, beyond fair controversy, ought to be regarded as excessive and unreasonable." "A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree."

As regards the Defendant's counter-claim, the evidence shews that the Plaintiffs have not been making any unreasonable use of their house. The Defendant has entirely failed to make good his allegations.

C. Liffelton Chubb, for the Defendant:—

No reported case at all like the present is to be found in which an injunction has been granted. The Plaintiffs in fact seek to restrain the Defendant from making a noise, in order that they may be the better able to make a noise themselves. They admit that music is almost continually going on in their house. Plaintiffs who thus act themselves are not entitled to prevent their neighbour from playing on any instrument he likes. The evidence shews that the Plaintiffs' case is *de minimis*. The Defendant had been suffering annoyance for some years, and it was greatly increased after Miss Kennedy came to live with the Plaintiffs. The Plaintiffs have exaggerated every sound which in any way interfered with their music; they were, as Lord Selborne said in *Gaunt v. Fynney* (6), "prepossessed

(1) Law Rep. 8 Ch. 8, 12.

(2) *Ibid.* 467.

(3) 2 Ch. D. 692, 700.

(4) 42 Ch. D. 685.

(5) Law Rep. 8 Ch. 12.

(6) *Ibid.* 13.

NORTH, J. listeners." The Plaintiffs are not entitled to absolute silence in their neighbour's house.

[NORTH, J.:—Is there a legal nuisance? *Harrison v. Good* (1).] In *Tod-Healy v. Benham* (2), it was questioned whether *Harrison v. Good* was right in limiting the term "nuisance" in a covenant to that which is a legal nuisance. But those cases depended on covenant.

[*Cozens-Hardy*, referred to *German v. Chapman* (3).]

Even if a man is carrying on a legitimate trade, this will not justify his causing a nuisance to his neighbour: *Broder v. Saillard* (4).

[NORTH, J., referred to *Kemp v. Sober* (5).]

The Plaintiffs are making an unreasonable and excessive use of their house. There has been no acquiescence on the part of the Defendant. There has been nothing more than forbearance by him.

NORTH, J.:—

In my opinion the Plaintiffs are entitled to the injunction for which they ask. They have lived for three years in a semi-detached house, and, from the description given to me of the way in which sounds are heard between the houses, I think the party-wall cannot be very substantial. The Plaintiffs' family consists of the husband, who, perhaps fortunately for himself, is very deaf; the wife, who is admitted to be a skilful musician and an excellent pianist; and a daughter, a young lady who has received a good musical education and has taken a very good musical degree. She teaches the pianoforte and violin, but she does not sing. The mother and the daughter have musical pupils, some at home and some abroad. I have no reason to conclude that there has been of late any increase in the number of the pupils or in the extent of the lessons. [His Lordship referred to the evidence on this point, and continued:—] Miss *Christie* practises to some extent; Mrs. *Christie* does not; and the

(1) Law Rep. 11 Eq. 338.

(2) 40 Ch. D. 80.

(3) 7 Ch. D. 271.

(4) 2 Ch. D. 692.

(5) 1 Sim. (N.S.) 517.

Plaintiffs occasionally have musical parties in the evening, and they also have music in the evening for their own enjoyment.

On the 27th of September Miss *Kennedy* came to stay in the Plaintiffs' house, and it has been suggested that this led to the Defendant's writing the letter of the 30th of September. I do not know whether it did; but I find it difficult to reconcile that suggestion with the terms of the letter. Miss *Kennedy* has a contralto voice, and in that letter the Defendant complains that he hears only the higher notes of what is sung in the Plaintiffs' house, and that the lower notes do not reach to him. However that may be, Miss *Kennedy* came to the Plaintiffs' house on the 27th of September. She is a very skilful musician and is a medallist of the *Academy of Music*, and she has come to *London* for the purpose of continuing her musical studies. From the evidence I think that she has not practised much at home, though no doubt she performs a certain amount of music during the week in the house. The Defendant lives in the adjoining house. He has a wife and a small child. He and his family are said to be musical, and for some years past they have been in the habit of having a musical evening once a week. I cannot find in the evidence any suggestion that those musical evenings have been conducted in a manner open to any objection. The music does not seem to have been of a very high class, but there is nothing to lead me to suppose that it was not good music of its class. On the 30th of September, moved by some cause or other, the Defendant wrote a letter to Mr. *Christie*. [His Lordship read the letter, and observed that though the parties had lived next door to each other for three years, no complaint had ever been made previously, either by the Plaintiff to the Defendant or by the Defendant to the Plaintiff.]

This letter was certainly written in a tone calculated to set up the backs of the Plaintiffs' family. The letter was received by Mr. *Christie* on the 1st of October. The next letter was written by the Plaintiffs' solicitor to the Defendant on the 12th of October. During the interval, according to the Plaintiffs' evidence, unusual noises had proceeded from the Defendant's house which interfered with the comfort of the Plaintiffs' family, and to some extent with the pupils' lessons, and also with Miss *Kennedy's*

NORTH, J. composition and practice. This went on to such an extent that Mr. *Christie* instructed his solicitors to write the letter of the 12th of October. I agree entirely with the suggestion of Mr. *Clubb*, that very possibly the Plaintiff and his witnesses might feel disposed, after the Defendant's letter of the 30th of September, to regard what was done in his house with more critical ears than if no such a letter had been written. [His Lordship read the letter of the 12th of October, and the Defendant's reply.]

In that reply the Defendant took his stand upon a different ground from that which he has now adopted. If the Defendant had been doing nothing but what he had done before, or if there had been an increase of noise in the carrying on of his business, I should have expected him to say so. But I find neither the one nor the other asserted in his letters. There is no denial of the Plaintiffs' allegations; but the Defendant asserted that he had a perfect right to make the noises complained of, and that what he was doing was done for his own recreation. [His Lordship commented upon the evidence as to what had taken place in the Defendant's house, and said that he came to the conclusion from the Plaintiffs' evidence, which in substance he trusted, that in the interval between the 1st of October and the issue of the writ in the action the noises made in the Defendant's house were of a very different character from those which had been previously made. On this point he accepted the evidence of the Plaintiffs' witnesses, and did not accept that of the Defendant so far as it was opposed to that of the Plaintiffs'. He came to the conclusion that the noises complained of did not arise, as had been suggested, in part from anything which had been done in the due course of the Defendant's trade. His Lordship continued:—]

The result is that I think I am bound to interfere for the protection of the Plaintiffs. In my opinion the noises which were made in the Defendant's house were not of a legitimate kind. They were what, to use the language of Lord *Selborne* in *Gaunt v. Fynney* (1), "ought to be regarded as excessive and unreasonable." I am satisfied that they were made deliberately and maliciously for the purpose of annoying the Plaintiffs. If

(1) Law Rep. 8 Ch. 12.

what has taken place had occurred between two sets of persons NORTH, J. both perfectly innocent, I should have taken an entirely different view of the case. But I am persuaded that what was done by the Defendant was done only for the purpose of annoyance, and in my opinion it was not a legitimate use of the Defendant's house to use it for the purpose of vexing and annoying his neighbours. I am not satisfied with the Defendant's attempts to explain away the Plaintiffs' statements. This being so, I am bound to give the Plaintiffs the relief which they ask.

I now come to the Defendant's counter-claim. He complains of that which, if his statements were true, would be a terrible nuisance in fact, and I am not prepared to say that it would not also be a legal nuisance calling for the interference of the Court. The Defendant says that the noise of musical instruments in the Plaintiffs' house goes on from morning till night—thirteen hours a day—Sunday included. In my opinion, there is no evidence of any such a nuisance as that. There is clear evidence of what has been done in the Plaintiffs' house. Mrs. and Miss *Christie* have pupils at home for periods amounting in the whole to seventeen hours in a week. To some extent their hours overlap. On Mondays the lessons occupy four and a half hours; on Tuesdays two and a half hours; on Wednesdays there are none; on Thursdays they occupy three hours; on Fridays six hours; and there are none on Saturdays. In my opinion, the giving of lessons for seventeen hours a week in the house of musicians, who gain their living by the exercise of their profession, does not give the Defendant any legal ground of complaint. Nor do I think that the additional circumstance that Miss *Kennedy* plays and sings sometimes, and Miss *Christie* practises sometimes, and that the Plaintiffs occasionally have musical performances in the evening, will create a legal nuisance. I cannot see what legal objection there is to that. I am for the moment not considering the son's playing on the violoncello. The profession which the Plaintiffs' family practise is a perfectly legitimate and proper one, and I cannot omit to notice the fact that for three years not a single complaint was made by the Defendant to the Plaintiffs. I asked counsel whether they were aware of any case in which it has been held that the carrying on of a ladies' school

NORTH, J. is a nuisance which the Court will restrain. There are, no doubt, cases in which the Court has restrained the carrying on of a ladies' school in breach of a covenant; but, so far as I know, there is no case in which it has been held that, apart from contract, the carrying on of a ladies' school is a nuisance which can be restrained by injunction. The existence of a ladies' school would, I think, in all probability cause more annoyance to the occupier of the adjoining house than has been caused by the Plaintiffs to the Defendant. Neither on authority nor on principle can I see any ground for saying that what has been done in the Plaintiffs' house has gone beyond a legitimate use of the house. If there were the slightest ground for believing that what has been done by the Plaintiffs' household had been done maliciously, for an improper purpose, I might have regarded the case with a very different view. But, in my opinion, there is no foundation for such a suggestion, and I can see no ground for granting an injunction against the Plaintiffs. So far I have left out of consideration the playing of the violoncello by the Plaintiffs' son. He has for some years learnt the violoncello and has had lessons away from home. It seems to be his habit to go down into the kitchen and there practise the violoncello from ten o'clock to eleven at night. I am willing to believe that he may often have played as late as a quarter-past eleven. On one occasion only, when he was unwell, was there any playing in his bedroom, and that was in the daytime. I do not think that there was anything unreasonable in what he has done. But I will say this for his guidance in future, that it would be only reasonable that he should cease playing at eleven o'clock, or as soon as possible afterwards. I do not mean that he is not to finish a piece which he is actually playing and to stop precisely at eleven; but I think he should not begin any fresh piece after eleven. I do not believe that his playing has been open to any objection, nor do I believe that the Defendant really thinks so.

I will grant an injunction to restrain the Defendant from making noises in his house so as to vex or annoy the Plaintiffs. But this order is not to prevent the Defendant from using his house for the legitimate purposes of his business, nor from

continuing his musical evenings as they were conducted before NORTH, J. the 1st of October.

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Minute of order as drawn up by the Registrar:—

That the Defendant, his servants and agents, be perpetually restrained from causing or permitting any sounds or noises in his house so as to vex or annoy the Plaintiffs, or either of them, or the occupiers of their house. But this order is not to prevent the Defendant from using his house for the legitimate purposes of his trade or profession of an engraver, nor from continuing his musical evenings as carried on before the 1st of October, 1892.

Solicitors: *Sole, Turner, & Knight; Brown & Woolnough.*

W. L. C.

In re ADAMS.

ADAMS v. ADAMS.

[1892 A. 363.]

NORTH, J.

1892

June 1;
Dec. 20.

Infant—Maintenance—Contingent Interest—Income—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 43.

Maintenance can be allowed for children out of the income of a share of residue bequeathed in trust for such of them as shall attain twenty-one, or, being daughters, marry, until such time as the interest of one of them becomes vested.

Semble, the whole income would belong to children who had attained a vested interest.

In re Jeffery (1) and *In re Barton's Will* (2) considered.

THIS was an originating summons to determine whether the trustees of the will of *John Gregory Adams* were authorized under sect. 43 of the *Conveyancing Act, 1881*, to apply the income of one-third of the residuary estate bequeathed in trust for the children of the testator's brother, *Thomas Adams*, in equal shares, in case they attained twenty-one, for the maintenance and education of such children.

The testator's brother, *Thomas Adams*, died in 1882. The testator's will was dated March, 1887. He devised and bequeathed his estate not otherwise disposed of to his executors and trustees upon trust for sale and conversion into money, and

(1) [1891] 1 Ch. 671.

(2) [1892] 2 Ch. 93.

Certiorari granted. Costs awarded to the applicant out of central funds.

Solicitors: Hambury, Gery, Brooks & Weston (for the applicant).

N P Metcalfe Esq Barrister.

Instone v A Schroeder Music Publishing Co Ltd

COURT OF APPEAL, CIVIL DIVISION
RUSSELL, CAIRNS LJ AND GOULDING J
26th, 27th, 28th, 29th JUNE, 2nd, 3rd JULY, 17th OCTOBER 1973

Trade - Restraint of trade - Agreement - Restrictions during continuance of agreement - Exclusive services agreement - Agreement between song-writer and music publishers - Writer undertaking to provide exclusive services to publishers - Writer assigning to publishers copyright in existing works and works to be composed during five year period - Publishers under no obligation to publish writer's works - Writer entitled to £50 advance on royalties and further advances of £50 on recoupment by publishers of previous advance from royalties received.

The plaintiff, a young song-writer, entered into an agreement with the defendants, a worldwide organisation of music publishers, whereby the defendants engaged the exclusive services of the plaintiff for a period of five years. Under the agreement the plaintiff assigned to the defendants full copyright for the whole world in his existing works and in future works composed during the five year period on payment of certain royalties from the amount received by the defendants in the United Kingdom and foreign territories from the exploitation of those works. It was stipulated that the defendants would pay £50 to the plaintiff as a general advance against royalties to be received by the defendants and on recoupment of the £50 from royalties received to the plaintiff's account the defendants would advance a further £50 and so on, the defendants advancing a further £50 after each recoupment. In the event of the royalties and advances paid to the plaintiff exceeding £5,000 the agreement would automatically be extended for a further period of five years. The defendants could at any time terminate the agreement by giving the plaintiff one month's notice. The defendants also had the right to assign the agreement or any particular work of the plaintiff with all rights and obligations mentioned in the agreement to any other person but the plaintiff was not entitled to assign his rights under the agreement. There was no obligation on the defendants to exploit any composition of the plaintiff. It was contended on behalf of the plaintiff that the agreement was oppressive and therefore void as being against public policy and was an unreasonable restraint of trade and that the plaintiff was not bound by it.

Held - (1) A contract which required provision of exclusive services, or exclusive provision of wares, during the continuance of the contract, was capable of being against the public interest, and therefore unenforceable, unless the restrictions could be justified as being reasonable, although it was far less likely that restrictions on trade during the continuance of a contract would be inimical to the public interest than those after the contract had come to an end (see p 177 c to g and p 178 a, post); dicta of Lord Pearce and Lord Wilberforce in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1967] 1 All ER at 727, 730, doubted.

I must say that I shudder at the idea that that can be done, although it is said that it is done quite generally. It seems to me to be elementary justice that particularly a mere witness before justices should at any rate be told what is passing through the justices' minds, and should have an opportunity of dealing with it.

Lord Parker CJ was dealing with someone who was, as he puts it, 'a mere witness', and other passages in his judgment suggest that he would not have felt quite so strongly in regard to somebody who had been a party in the form of a complainant, and was then bound over without warning; but for my part I see no real distinction between a complainant and a witness. Neither comes to court expecting to receive any penalty or to be the subject of a binding-over, and Lord Parker CJ's dictum, with which the other members of the court agreed, seems to me to be equally appropriate to someone who is a complainant and witness as someone who is a witness simpliciter. The position is different in the case of a defendant. That case was specifically before this court in *R v Woking Justices, ex parte Gossage*, where a defendant who had been acquitted was subsequently bound over without any prior warning, and where the complaint of that defendant when made to this court was dismissed because this court held that a defendant of necessity is given not only a great deal of indication of the allegations against him, but also has the opportunity to be represented by counsel, cross-examine witnesses, and to call evidence. Accordingly it is now established that an acquitted defendant may be bound over without having been given prior warning. But in this case we are not dealing with an acquitted defendant, we are dealing with a complainant-cum-prosecution witness in respect of whom there ought, on authority, to be such a warning given.

The only special point in this case is whether an adequate warning was conveyed by the fact that the justices before they embarked on a hearing of the case asked the parties if they were willing to be bound over. For my part I can see no substance in any argument that that made a difference in the present case, because the applicant was still given no real chance to state his case against being bound over. In order to give him such a chance the justices would necessarily have had to return to that matter at the end of the hearing and after they had disposed of the information against the defendant.

I think that that incident, which is the only distinguishing feature from the other cases to which I have referred, is of no relevance, and in the end it seems clear to me that the justices here failed in their duty in not warning the applicant that they had a binding-over order in mind. I might add that I think it is high time that this particular error should be eradicated because it is the easiest thing in the world for justices who contemplate binding over to say what they have in mind and ask the intended recipient what he has to say. They ought to observe that rule. If they do not their conclusion is liable to be upset on certiorari, as is the decision of these justices. I would allow the order to go.

BRIDGE J. I agree.

MAX J. I agree.

I wonder whether your Lordships would think it proper to give the applicant his costs out of central funds under s 5 of the Costs in Criminal Cases Act 1973. The difficulty is that assault cases in magistrates' courts under s 42 of the Offences against the Person Act 1861 seem to be part civil and part criminal proceedings and it is not clear whether the costs arise out of a 'criminal cause or matter'.

(ii) The restrictions were unreasonable in that (a) there was no obligation on the defendants, express or implied, to take any step to exploit anything composed by the plaintiff in the ensuing five years and (b) in those circumstances the maximum payment to which the plaintiff would have been entitled to was the initial £50; the restrictions combined a total lack of obligation on the defendants' side with a total obligation on the plaintiff's side to commit his entire production of compositions for as long as five years with no right, even at the end of the five years, to recover the copyright of a composition not used by the defendants. The contract was therefore restrictive of the ability of the plaintiff to turn to account his compositions to an extent and in a manner that was against the public interest (see p 178 c f and h, post).

Notes

For agreements in restraint of trade, see 38 Halsbury's Laws (3rd Edn) 20-21, paras 13, 15, and for cases on the subject, see 45 Digest (Repl) 443-449, 271-297.

Cases referred to in judgment

Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1967] 1 All ER 699, [1968] AC 269, [1967] 2 WLR 871, HL, Digest (Cont Vol C) 985, 132d.
Gaumont-British Picture Corp Ltd v Alexander [1936] 2 All ER 1686, 45 Digest (Repl) 443, 268.
Hornwood v Millar's Timber and Trading Co Ltd [1917] 1 KB 305, [1916-17] All ER Rep 847, 86 LJKB 190, 115 LT 805, CA, 45 Digest (Repl) 441, 259.
Milsted (W.H) & Son Ltd v Hamp and Ross and Glendinning Ltd [1927] WN 233, 71 Sol Jo 845, 34 Digest (Repl) 56, 281.
Rely-A-Bell Burglar and Fire Alarm Co Ltd v Eisler [1926] Ch 609, 95 LJCh 345, 135 LT 186, 45 Digest (Repl) 504, 919.
Robinson (William) & Co Ltd v Heuer [1898] 2 Ch 451, 67 LJCh 644, 79 LT 281, CA, 45 Digest (Repl) 484, 712.
Wallis v Day (1837) M & W 273, [1835-42] All ER Rep 426, Murp & H 22, 6 LJEx 92, 1 Jur 73, 150 ER 759, 45 Digest (Repl) 490, 774.
Warner Brothers Pictures Inc v Nelson [1936] 3 All ER 160, [1937] 1 KB 209, 106 LJKB 97, 155 LT 538, 45 Digest (Repl) 218, 203.
Young v Timmins (1831) 1 Cr & J 331, 1 Tyr 226, 9 LJOs Ex 68, 148 ER 1446, 45 Digest (Repl) 452, 328.

Appeal

The defendant, A Schroeder Music Publishing Co Ltd, appealed against the judgment of Plowman J dated 26th July 1972 whereby in an action by the plaintiff, Anthony Gordon Instone, against the defendant, it was declared that an agreement in writing between the parties dated 12th July 1966 was void, and the defendant's counterclaim for specific performance of the agreement was dismissed. The facts are set out in the judgment of the court.

Robert Gatehouse QC and G N Butler for the plaintiff.
 Michael Kempster QC and Stephen Tumm for the defendant.

Cur adv vult

17th October. RUSSELL LJ read the following judgment of the court. The first question in this appeal is whether a contract made in 1966 between the plaintiff and the defendant which required the plaintiff composer to confer on the defendant the entire copyright for all countries in his future compositions during a period of five years with, in certain events, extension to ten years is one which can be sustained or one which the court, mindful of the public interest in the freedom of individuals to

decline to enforce. The plaintiff at the time of the contract was a young man, aged about 21, of good education: he had already composed some light songs of the pop variety, some in collaboration with a Mr McLeod, and had entered into individual agreements with music publishers by which he assigned the copyright in an existing composition in exchange for a share in royalties (or in the proceeds of sale of sheet music) earned by its exploitation. He was not dependent on these compositions for his livelihood. As a composer he was not then well known, though we understand he now is. The defendant is an English company engaged in musical publishing: it is the wholly-owned subsidiary of an American company known as January. January has other wholly-owned subsidiaries in (for example) Germany and Scandinavia. A Mr and Mrs Schroeder are the sole shareholders in January and the sole directors of January and of all its subsidiaries—known as affiliates.

It was the hope of the plaintiff and Mr McLeod when they approached Mr Schroeder that through him they might get into the production side of making gramophone records, though in the event this did not, or at least not directly, happen. What did happen was that the plaintiff signed an agreement with the defendant company in the following terms:

"THIS AGREEMENT is made the 12th day of July 1966, BETWEEN A. SCHROEDER MUSIC PUBLISHING CO. LIMITED whose registered office is at 14 Essex Street, London, W.C.2. (hereinafter referred to as "the Publisher") of the one part and ANTHONY INSTONE a/k/a TONY MACAULAY of 8 Lonsdale Square, Islington, London, N.1. (hereinafter referred to as "the Composer") of the other part witnesses that in consideration of ONE (1) SHILLING now paid by the Publisher to the Composer (the receipt of which the Composer hereby acknowledges) it is agreed as follows:—

1. Subject as hereinafter mentioned this Agreement shall remain in force for a period of five (5) years from the date hereof (hereinafter called "the said term")

2. (a) The Publisher engages the exclusive services of the Composer and the Composer will render the same to the Publisher during the said term. (b) The Composer shall obey and comply with all lawful orders and directions in relation to his services hereunder given to him by the Publisher and shall use his best endeavours to promote the interests of the Publisher. (c) The Composer will not during the said term directly or indirectly work for render services or be affiliated to or be interested in or connected with any person firm or corporation engaged in the music publishing business other than the Publisher nor will he during the said term carry on or be concerned in whether alone or in partnership any music publishing business. (d) The Composer will not divulge to any person except as may be required by the Publisher any confidential information relating to the business of the Publisher.

3. (a) The Composer HEREBY ASSIGNS to the Publisher the full copyright for the whole world in each and every original musical composition and/or lyric including but without prejudice to the generality of the foregoing the title words and music thereof written and/or composed created or conceived by the Composer alone or in collaboration with any other person or persons and whether in his own name or under a nom-de-plume at any time during the said term or at any time prior to the date hereof insofar as such latter compositions and/or lyrics are still owned or controlled by the Composer directly or indirectly PROVIDED HOWEVER that if the Composer shall be or become a member of The Performing Right Society (hereinafter referred to as "P.R.S.") and while he remains a member of P.R.S. then the performing rights in such compositions and/or lyrics which are written composed created or conceived by the Composer during the period of such membership are hereby assigned to the Publisher to the full extent permitted by the rules of and subject to the prior rights of P.R.S. Provided nevertheless that in the event of the performing rights for any reason ceasing to be vested in P.R.S. the same shall thereupon automatically vest in the

a Publisher and the Composer his personal representatives or assigns will do such acts and things and execute all such deeds and documents (if any) as may be required for the further and better assurance of such performing rights to the Publisher. (b) In this Agreement references to musical works and/or lyrics shall include the part or parts thereof (if separate and divisible) written composed or conceived by the Composer. (c) In this Agreement reference to "performing rights" means (i) the right of performing the said work in public, (ii) broadcasting the said work, (iii) causing the said work to be transmitted to subscribers to a diffusion service and (iv) authorising other persons to do any of the said acts in relation to the copyright in the said work.

b 4. Where a musical composition and/or lyric to which this Agreement applies is a "work of joint authorship" as defined by Section 11 of the Copyright Act 1956, the Composer will procure that his co-author or co-authors as the case may be will join with him in doing such acts and things and executing such deeds and documents as may be necessary to vest the copyright in the said work in the Publisher.

c 5. In respect of each work hereinbefore referred to the copyright in which has been assigned by the Composer and his collaborators (if any), the Publisher will pay to the Composer and his collaborators (if any): (a) on all piano copies sold and paid for (after the first 500 copies) in the United Kingdom of Great Britain and Northern Ireland and Eire a royalty of 10% of the marked selling price; (b) 50% of all net royalties received by the Publishers in respect of mechanical reproduction of the said works and of all net synchronisation fees; (c) in the event of the said works being published in any country outside the United Kingdom and Eire, 50% of the net royalties received by the Publisher from persons authorised to publish the said works in such foreign territories.

d 6. (a) Fees in respect of performing rights shall be divided as to 50% to the Composer and his collaborators (if any) (hereinafter referred to as "the Composer's Share") and 50% to the Publisher. (b) If the Composer is not a member of P.R.S. and the Publisher receives from P.R.S. all or part of the Composer's share of performing fees the Publisher will pay the same to the Composer and his collaborators (if any). (c) If the Composer shall be or become a member of P.R.S. and while he remains such member all performing fees shall be divided between the parties hereto in accordance with P.R.S. rules for the time being in force subject to the agreement of the parties hereinbefore contained varying the divisions as permitted by such rules so that 50% of such fees are for the Composer and his collaborators (if any) and 50% for the Publisher.

e 7. For the purpose of Clause 5 hereof all copies which may be distributed to the trade and profession for the purpose of exploiting and popularising the said work and all professional copies and orchestral arrangements and also all recordings, productions of the words music or any portion thereof in any newspapers, selections, albums, magazines and other periodicals and all mechanical or other medley arrangements shall be free of all royalty or other payment to the Composer.

f 8. (a) The Publisher shall pay the sum of £50 to the Composer, which shall be a general advance against royalties payable by the Publisher under this Agreement and to be recouped therefrom but in no case shall the Publisher be entitled to the return of any part of such sums. Upon the recoupment by the Publisher of said general advance payment of Fifty (£50) Pounds, the Publisher agrees to pay another Fifty (£50) Pounds, which is to be treated as a general advance as described herein. This same procedure shall continue throughout the said term hereof; i.e. as each general advance of Fifty (£50) Pounds is recouped in full by the Publisher, the Publisher shall pay to the Composer the sum of Fifty (£50) Pounds, etcetera. (b) The Publisher will render to the Composer semi-annually statements showing the amount of royalties due to the Composer as at

a 31st December and 30th June in each year. Such statements shall be delivered within 60 days of the relevant date and shall be accompanied by a remittance for such sum (if any) as may be shown to be due to the Composer.

b 9. (a) If during the said term the total of the Composer's royalties hereunder and all advances thereon (if any) shall equal or exceed £5000 then this agreement shall automatically be extended for a further period of five (5) years and for the purpose of this Agreement the said period of five (5) years shall be deemed to be included in and be part of the said term. (b) The Publisher may at any time during the said term terminate this Agreement by giving to the Composer one month's written notice to that effect. Such termination shall be without prejudice to the rights of the parties in respect of any antecedent breach of this Agreement and the Publisher's obligations to pay royalties hereinbefore provided for.

c 10. (a) The Composer will forthwith submit to the Publisher every composition and/or lyric written and/or composed created or conceived by him alone or in collaboration. The Composer warrants to the Publisher that the copyright in all such works will pass to the Publisher free from any adverse claims or rights from any third party and that all such works submitted to the Publisher will be the original work of the Composer and his collaborators (if any). (b) The Composer will indemnify the Publisher against all claims damages and demands and against all costs incurred in the institution or defence of any actions or proceedings relating to the said works submitted to the Publisher.

d 11. The Composer agrees that if and when any copyright in any musical composition or lyric written or composed by him prior to the date hereof which is not owned or controlled by him at the date hereof shall revert back to him during the said term, then he will forthwith assign such copyright to the Publisher. The terms of this Agreement shall then apply to such copyright as if it had been assigned under Clause 3 hereof.

e 12. (a) The Composer will execute a standard song writer's Agreement in respect of each and every work the subject of this Agreement. Such song writer's Agreement shall be in the form annexed hereto and initialled by the parties (hereinafter referred to as "the song writer's Agreement"). (b) For the avoidance of doubt it is agreed that any assignment required under Clauses 4 or 12 [sic] hereof shall be in the form of the song writer's Agreement.

f 13. In the event of any breach of the terms or conditions of this Agreement by the Composer the Publisher shall be entitled to suspend and withhold payment of royalties (including the general advances provided for in para. 8 hereinabove) until such breach has been remedied. If the Composer shall fail to remedy any such breach within One month of written notice by the Publisher requiring him so to do all royalties then or thereafter due under this Agreement shall cease to be or shall not become (as the case may be) payable.

g 14. Any notice under this Agreement shall be sufficiently served if sent by registered post, in the case of the Composer to his last known address or in the case of the Publisher to its registered office. In such cases the notice shall be deemed to have been served 24 hours from the time of posting the same unless the notice be posted on a Saturday when it shall be deemed to be served 48 hours thereafter.

h 15. For the avoidance of any possible doubt and without in any way limiting the assignment hereinbefore contained it is hereby declared that the copyright hereby assigned includes: (a) the right to renew and extend the copyright and the ownership of such renewed and extended copyright. (b) the right to make and publish new adaptations and arrangements and to make such additions and adaptations and alterations in and to the words and/or music as the Publisher may desire and to provide and translate the lyric thereof in any and all languages of the world.

described as the pejorative sense, viz as one which must be justified as reasonable to be enforceable. It is undoubtedly a contract restrictive of trade. Depending on the terms of the particular exclusive contract for work it must, we should have thought, always be for decision whether a contract restrictive of trade was in the pejorative sense a contract 'in restraint of trade' requiring justification. Lord Pearce warned against the danger, in this field, of the court, where there are no circumstances of oppression, substituting its own views for those of current commerce as displayed by current practice and for those of the parties to the contract as to what was appropriate and reasonable and consonant with public interest. In particular he accepted that where a man sells the whole or a substantial part of his output to one person it might be argued that the court can investigate the reasonableness; but he strongly warned against the dangers that so wide a power of investigation would admit in the shape of litigious abuse. He sought a classification of contracts between those which appeared to aim at sterilisation of a man's work or output ability and those which aimed at its absorption. This attempted division is referred to in Mr Heydon's work, *The Restraint of Trade Doctrine*¹. It is in this context that Lord Pearce says² that if during the contract one party is 'too unilaterally fettered' so that the contract loses its character of a contract for the regulation and promotion of trade and acquires the predominant character of a contract in restraint of trade, the court should consider whether it is reasonable. Lord Wilberforce³ referred to exclusivity contracts as still an uncertain field, in which there might be some exorbitance or special feature. We have been rather puzzled by an approach to restrictions on trade during the currency of exclusive contracts which appears to deny to them the quality of restraints on trade requiring justification as reasonable, unless there is discovered something oppressive, or 'too unilateral', or exorbitant; for the very discovery would appear to pre-empt the decision on reasonableness. Rather than attempt to classify some situations involving restrictions on trade as 'restraints of trade' and other situations as not, we would prefer a quite general approach to all such situations. We are not (with respect to Lord Pearce's views) afraid that that would lead to litigious abuse. In many if not most cases of exclusive contracts the contents of the contracts and the situation will make it obvious as a matter of common sense that the public interest cannot be adversely affected.

We approach this question in this case therefore on the footing that a contract which requires provision of exclusive services, or exclusive provision of wares, during the continuance of the contract, is capable of being against the public interest and therefore not enforceable. We were referred to some authorities. In *Gaumont-British Picture Corp'n Ltd v Alexander*⁴ Porter J accepted that possibly a restraint on activities during the existence of a contract could be unjustifiable; that was a case in which a salary was paid for the exclusive services of an artiste, *Warner Brothers Pictures Inc v Nelson*⁵ was a case in which the defendant entered into a contract to give her services as an actress exclusively to the plaintiffs for a period which could be extended annually at the option of the plaintiffs to a total of eight years. The main argument related to the remedy sought of an injunction restraining the defendant from giving those services to anyone else; unjustifiable restraint of trade was not pleaded and was not much argued; the defendant under the contract was to receive an increasing salary as the contract continued. Branson J⁶ considered that there was 'no room for the application of the doctrine of restraint of trade' when the covenants are all concerned with what is to happen during the employment. As indicated, we would not

- 1 [1971], especially at pp 70, 71
- 2 [1967] 1 All ER at 727, [1968] AC at 328, 329
- 3 [1967] 1 All ER at 730, [1968] AC at 333
- 4 [1936] 2 All ER 1686
- 5 [1936] 3 All ER 160, [1937] 1 KB 209
- 6 [1936] 3 All ER at 163, [1937] 1 KB at 214

16. (a) The Publisher shall have the right to assign this Agreement and all rights and obligations hereunder to any person firm or corporation and shall also have the right to assign any or all rights in a particular work. (b) The Composer will not assign his rights under this Agreement without the Publisher's prior written consent.

17. The Composer will at the Publisher's request at any time during the said term or thereafter execute any other document and do all other acts or things which may hereafter be required for vesting in the Publisher the rights and benefits hereby expressed to be assigned and conferred.

IN WITNESS WHEREOF the Composer has hereunto set his hand and seal and the Publisher has caused its common seal to be hereunto affixed the day and year first above written.

Now we have the situation in this case not of a restriction of trade activities after employment or engagement had ceased, but a restriction involved during the continuance of an exclusive services contract: the plaintiff, because he is bound to submit all his compositions made during a period, and their copyright, to the defendant for exploitation by the defendant, binds himself not to trade his intellectual property in any other way during that period. Having so bound himself by contract he has deprived himself of the ability to turn his products to account elsewhere, even if the defendant decides, perhaps by an erroneous judgment of public taste, that a composition of the plaintiff is no good or otherwise will not justify the expense by the defendant involved in its promotion.

The most recent comments in this regard of the House of Lords are to be found in *Esso Petroleum Co Ltd v Harper's Garage (Sturport) Ltd*¹; this of course was a case with very different facts, being a garage 'solus' agreement. Certainly one thing appears plainly from the opinions there expressed; that too wide a restraint of trade is held not enforceable because it is against the public interest that it should be: see Lord Reid², Lord Hodson³, Lord Pearce⁴ and Lord Wilberforce⁵. In the course of the opinions expressed Lord Reid⁶ remarked that the restriction necessarily involved during the period of a contract of exclusive services was not an objectionable restriction on trading activities except in unusual circumstances such as were found in *Young v Timmins*⁷. In that case a brass founder in the Birmingham area agreed without time limit to manufacture in his field only for X, except for orders in the then relatively remote area of London; the contract envisaged in terms that X need not order his requirements from that brass founder at all; the contract was held unenforceable on the ground of inadequacy of consideration; the decision was approved by Lord Reid not on that ground but on the ground that it involved a restraint of trade unacceptable in the public interest: see also per Lord Pearce⁸. That contract could be, if a label was necessary, defined as either oppressive or as containing such a serious imbalance of obligations as to afford no justification, in the public interest, for that which might result in a sterilisation of the work capacity of the brass founder and his potential employees. In the *Esso* case⁹ Lord Morris of Borth-y-Gest spoke of a case in which A willingly agrees to serve B on reasonable terms for a few years and give his whole working time to B, as a case which would not be described as a contract in restraint of trade. Here he refers to 'a contract in restraint of trade' in what may be

- 1 [1967] 1 All ER 699, [1968] AC 269
- 2 [1967] 1 All ER at 707, 709, [1968] AC at 298, 301
- 3 [1967] 1 All ER at 720, [1968] AC at 318
- 4 [1967] 1 All ER at 724, [1968] AC at 324
- 5 [1967] 1 All ER at 734, [1968] AC at 340
- 6 [1967] 1 All ER at 705, [1968] AC at 294
- 7 [1831] 1 Cr & J 331
- 8 [1967] 1 All ER at 727, [1968] AC at 329
- 9 [1967] 1 All ER at 712, [1968] AC at 307

a repudiation was accepted by or on behalf of the plaintiff. This question does not strictly arise on the basis of our opinion on the earlier point. It is however desirable to express a view thereon.

b It arises in this way. Ordinarily in a publishing agreement of this nature the English publisher will exploit the work in foreign countries through sub-publishers in those countries. Each sub-publisher will exploit in the foreign country on terms of keeping a proportion of the proceeds of exploitation in that country. It was accepted that it was an implied term of the contract between the plaintiff and the defendant that sub-publishing abroad would be so arranged by the defendant that the 50 per cent which the plaintiff would get from the defendant under the contract would be not less than 25 per cent of the proceeds accruing to the foreign sub-publisher—that is to say that the defendant would get not less than 50 per cent of the foreign country net 'take' with that result. The Schroeders have a system of centralised control of the activities of the affiliates through January: in the result exploitation in for example Germany and Scandinavia was arranged with the local affiliates through January, accounting and payment being made by the affiliate. To January, by January to the defendant, and by the defendant to the plaintiff for 50 per cent of what it received from January. What happened for a period was this. Suppose the German affiliate to receive £100 from exploitation in a particular period, and suppose the affiliate's share was to be 30 per cent: it would forward £70 to January. Now according to the evidence on the Schroeder side it was always intended that the end result should be the same as if the defendant had directly licensed the affiliate at a share of 50 per cent—which would have been an acceptable arrangement from the composer's viewpoint: it was intended therefore that January should gross up the £70 received from the German affiliate in the example given to 100 per cent of the foreign take before sending to the defendant 50 per cent thereof, that is to say, £50. Had this been done the plaintiff would in due course receive from the defendant £25 or 25 per cent of the foreign take. But what actually happened was that only 50 per cent of the actual receipts by January were accounted for to the defendant: thus in the example the defendant received only £35 and accounted to the plaintiff for only £17.50 instead of £25. According to the evidence on the Schroeder side this was due to a failure by an employee of January to understand or comply with instructions to gross up the foreign receipt to £100 before remitting half to the defendant, and this error was not discovered in the January organisation for some time, resulting in sums totalling a not very considerable amount of £200 not reaching the plaintiff. This clearly involved breach of contract.

c In connection with this matter there were undoubtedly a number of very strange circumstances on the Schroeder side which might have been indicative of a deliberate plan to defraud the plaintiff of his full entitlement to a share of foreign exploitations and later to dishonestly cover up the situation by falsified documents. On the other hand they might be attributable to a combination on the Schroeder side of remarkable muddle allied with a feeling (not shared by the plaintiff) that the matter was in the course of proper readjustment and consequently not of great importance. The judge did not find fraud on the Schroeder side, and in our view it would be quite wrong for us in the circumstances to make such a finding on a paper trial.

d Consequently we must approach this question of repudiation on the footing that the failure to account properly in respect of these foreign royalties was due to an accident at the January end, which was discovered by Mr Villar of January, and which was in the course of being rectified when a Mr Hertzog, an accountant experienced in these matters, went to investigate the January accounts in America on the plaintiff's behalf.

e Those acting in England on the plaintiff's behalf had been concerned whether the plaintiff was being properly treated under the contract. Not to put too fine a point on it, the plaintiff was trying to get out of his contract. The plaintiff's advisers were uncertain whether the plaintiff was getting half of a full 50 per cent of the take

a agree with that generalisation, though we would agree, having particular regard to the provisions for salary, that there was no unjustifiable restriction on trade. In other cases it has been pointed out—as we think quite correctly—that there is a great difference between cases of restrictions on trade during an employment or engagement and those after the contract has come to an end: see for example *William Robinson & Co Ltd v Heuer*¹; *Rely-A-Bell Burglar and Fire Alarm Co Ltd v Eisler*². It is far less likely that a restriction during the continuance of a contract would be inimical to the public interest. Then there are cases such as *Horwood v Millar's Timber and Trading Co Ltd*³ where the clerk's bargain with a moneylender was such as attempted so extensively to deprive him of his personal freedom of action in his personal life that it would not be enforced by the court: and *W H Milsted & Son Ltd v Hamp and Ross and Glendinning*⁴ in which *Eye J* refused to enforce a contract as being wholly one-sided. Contrast *Wallis v Day*⁵ where there was a provision for the reference of disputes to arbitration.

b What then of the present contract? Two matters in combination appear to us conclusive in support of the view formed by Plowman J that this contract should not be upheld against the plaintiff. The first is that there is no obligation on the defendant either express or implied to lit a finger to exploit anything composed by the plaintiff in the ensuing five years: this was accepted by counsel for the defendant, who agreed that the matter must be judged as it would have fallen to be judged at the end of say four years, when a considerable output of compositions (which he was obliged to turn over to the defendant and could not turn to account otherwise than through the defendant) all lay stuffed in a drawer in the defendant's office to which they had been consigned, on delivery, by the defendant, for any reason whatever. Secondly, in those circumstances the maximum payment which the plaintiff would have been entitled to be the initial £50. Now it is true that Mr Platz gave evidence from experience in the music publishing trade that he would not expect a provision in such a contract imposing obligations on the publisher to attempt to exploit compositions. But we find unacceptable a combination of that total lack of obligation on the one side, with a total obligation on the other side to commit his entire production of compositions for as long as five years, and with no right even at the end of five years to recover the copyright of a composition not used by the defendant. And if attention is to be paid to accepted standard practice, which is of course relevant to be considered, it is to be observed that Mr Platz in cross-examination was asked:

'Q It really is unfair as a matter of publishing practice in your experience for the publisher to say to a young man of 21 or 22, "I am going to tie you up for five years as long as it suits me to do so, but you can never get out of this contract against my will for the whole of that five years"—that is unfair? A I would say I have never heard of it; I would not say it was unfair—it would depend on the circumstances.'

c Despite the guarded terms of this answer it does tend to show that this contract was not in accordance with standard practice.

d We therefore would uphold the decision that this contract is restrictive of the ability of the plaintiff to turn to account his compositions to an extent and in a manner that is against the public interest.

e Plowman J also in the alternative would have held on the facts that there had been conduct on the part of the defendant which was reasonably taken by the plaintiff to indicate an intention on the part of the defendant to repudiate the contract, which

1 [1898] 2 Ch 451
2 [1926] Ch 609 at 612
3 [1917] 1 KB 305. [1916-17] All ER Rep 847
4 [1927] WN 233
5 [1911] 1 WLR 771 [1881e47] All ER Rep 426

a in, e.g. Germany, and had been assured that all was in order in that regard; this was in fact before the error had been discovered on the Schroeder side. Not wholly satisfied on this point Mr Hertzog was sent to investigate in New York at January. He was not told by Mr Villar that the mistake (the failure to gross up to 100 per cent before sending half to the defendant) had been discovered and was in the course of being remedied. The crucial question, it seems to us, was whether Mr Hertzog was fairly faced in America with an assertion that the departure from the Schroeder obligations—that is to say the failure to credit to the defendant 50 per cent of the total foreign country take—was intentional. It is true that the failure was not drawn to Mr Hertzog's attention and that he discovered it. But it is, we consider on the evidence, also true that he did not confront Mr Villar with a challenge on this particular point, so that Mr Villar was not given an opportunity to explain that a mistake had been made which was in the process of readjustment. When Mr Hertzog reported his discovery of incomplete accounting, presumably by telephone or telex, to the plaintiff's advisers they wrote on 7th May 1970 a letter in the following terms:

'As you are aware we act for Mr. Macaulay [that is the professional name of the plaintiff] and we have already written you with details of our client's claim and complaints. It has been indicated to our client by his accountants in New York that in relation to sub-publishing the local publisher retained 25% of income arising and accounts to New York 75% of which sum 50% (i.e. 37% of income arising) is remitted to A. Schroeder Music Publishing Co. Ltd. in London [i.e. the defendants] and the writer receives the appropriate share of that sum. In addition, our client is led to understand that where there is any form of "withholding tax" this is dealt with in such a way as to reduce the monies remitted to England by the total of such tax. Our client is most concerned at this since it amounts to an unfair, unreasonable and unconscionable diminution of the monies paid to the writer. We must ask to hear from you with your client's observations as a matter of urgency.'

Before they received an answer, after receiving Mr Hertzog's full report, the plaintiff's advisers by letter dated 12th May 1970 purported to accept a repudiation by the defendant of the contract on these grounds. The letter was in these terms:

'Further to this matter we are writing again on counsel's advice and particularly in the light of the audit being carried out in New York. Our client's auditor has reported that as a result of a series of devices the monies which should be paid to our client have been substantially reduced. It was represented to our client prior to entering into the contract and as an inducement to him that your clients being an international organisation would pay royalties on a basis that would be more beneficial than if he entered into a contract with an English publishing house since by entering into a contract with your clients the royalties payable to our client would be computed upon the income received by each individual sub-publisher in the various territories throughout the world where your clients had a wholly owned publishing company and not merely upon monies eventually received in England. The arrangements operated by your clients are not at arms' length, provide to them secret profits and result in their granting sub-publishing licences in their own interest and contrary to the interests of our client. Your clients have indeed gone to the length on several occasions of denying that these arrangements exist, but it has now been admitted that the facts are not in accordance with your clients' representations. In these circumstances and by virtue of the matters set forth in our letter to you of 22nd April, your clients' conduct entitles ours to set aside and rescind the contract. Our client has been advised that he is no longer bound to your clients and free to pursue his own interests for the future conduct of his career. We must

a re-assign all copyrights assigned to them and account to our client fully and properly in respect of the income arising from such copyrights to date.'

We consider that the more reliable part of Mr Hertzog's evidence is that given by reference to his contemporaneous report. That does not satisfy us that he confronted Mr Villar with a discovered system by which the plaintiff was being deprived of his proper share of foreign royalties and that Mr Villar had justified the system having that result as proper. It does not appear to us that when the plaintiff's advisers received Mr Hertzog's detailed report the reasonable inference based on facts was that the defendant was intending to repudiate the contract in respect of the admittedly vital aspect of the proper share of the plaintiff in foreign earnings. Had Mr Hertzog sufficiently probed the details it would—on the hypothesis of no deliberate or fraudulent intention—have been revealed to him that there had been a mistake which was in course of readjustment. The later letter on behalf of the plaintiff purporting to accept the hoped for repudiation was not in our view justified as such. Nor in our view does the fact that thereafter the response from the defendant did not disclose the true state of affairs (the error in calculation or grossing up), and that from the defendant's side it was long before this emerged, alter the fact that there was not in appearance a repudiation capable of acceptance as such. And in this connection we repeat that fraud and a fraudulent cover up, as distinct from an almost nonsensical muddle between the Schroeders, the defendant, and Mr Villar in America, cannot be found.

We would not therefore have agreed with the judge's conclusion that the contract, if enforceable, was repudiated. As, however, we agree with him that the contract was unenforceable as being in restraint of trade it follows that in our opinion the plaintiff was entitled to succeed in his action.

In the result, as we understand it, the situation is this. Insofar as the plaintiff has actually executed assignments of copyrights in his compositions to the defendant, that remains effective, and the defendant is entitled to the copyright on the agreed terms as to the plaintiff's share of royalties etc. Insofar as the contract would otherwise have operated as an assignment of copyright in future compositions only under s 37 (1) of the Copyright Act 1956, the contract being unenforceable the section does not operate.

We accordingly dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: Malkin, Cullis & Sumpston (for the plaintiff); Wright & Webb (for the defendant)

S A Hattceca Esq Barrister.

premium as a condition of granting a licence to assign (c f s 144 of the Law of Property Act 1925); for to withhold consent on such grounds would be held to be unreasonable. Yet oddly enough under the terms of the proviso, if valid, he may demand the surrender of the residue and thus obtain for himself the value of the premium (if any) obtainable on an assignment, or he may cause the tenant to lose what may in certain cases—as here—be the valuable chance of obtaining a reasonable price for tenants' fixtures, fitted carpets and so forth.

The issue raised by para 12 was reserved before the learned county court judge, who was bound by the judgment given by Hilbery J in *Adler v Upper Grosvenor Street Investment Ltd*¹—a decision which, of course, can be questioned in this court and as to which I, too, have doubts. The question was, however, not argued here in this case—where the tenant has succeeded without it. So, it suffices to say that nothing in this judgment should be construed as indicating anything other than that the point taken in the above cited para 12 remains fully arguable here on some further occasion.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Radcliffes & Co* (for the Church Commissioners); *Max Bitel Green & Co* (for the tenant).

Wendy Shockett Barrister.

A Schroeder Music Publishing Co Ltd v Macaulay

HOUSE OF LORDS

LORD REID, VISCOUNT DILHORNE, LORD DIPLOCK, LORD SIMON OF GLAISDALE AND LORD KILBRANDON

15th, 16th JULY, 16th OCTOBER 1974

Trade—Restraint of trade—Agreement—Standard form agreement—Restrictions during continuance of agreement—Exclusive services agreement—Agreement between song-writer and music publishers—Writer undertaking to provide exclusive services to publishers—Writer assigning to publishers copyright in existing works and works to be composed during period of years—Publishers under no obligation to publish writer's works—Writer entitled to £50 advance on royalties and further advances of £50 on recoupment of previous advance from royalties received—Publishers alone entitled to terminate agreement by notice—Whether doctrine of restraint of trade applicable to agreement—Whether agreement in unreasonable restraint of trade.

The plaintiff, a young and unknown song-writer, entered into agreement with the defendants, a music publishing company, whereby the defendants engaged his exclusive services for a period of five years. The agreement was in the standard form used by the defendants. Under it the plaintiff assigned to the defendants the full copyright for the whole world in each original musical composition and lyric created or conceived by him alone or in collaboration with any other person at any time during the period of the agreement or at any time prior to it insofar as the works were still owned and controlled by the plaintiff. The defendants agreed to pay £50 to the plaintiff as a general advance against royalties payable by them under the agreement and to recoup therefrom the £50. When it was recouped, the defendants were to advance the plaintiff a further £50 which would be recouped in the same way. The procedure was to continue throughout the five year period. If during that

¹ [1957] 1 All ER 229, [1957] 1 WLR 227

- a* period the total of the plaintiff's royalties and advances equalled or exceeded £5,000 the agreement was to be automatically extended for a further period of five years. The defendants could at any time terminate the agreement by giving the plaintiff one month's written notice. There was no corresponding provision in favour of the plaintiff. The defendants had the right to assign the agreement, or any particular work of the plaintiff, with all rights and obligations mentioned in the agreement to any other person but the plaintiff could not assign his rights under it without the defendants' prior consent. The defendants were under no obligation to publish any of the plaintiff's compositions. The plaintiff sought a declaration that the agreement was contrary to public policy, as being in unreasonable restraint of trade, and void. The defendants contended, *inter alia*, that the doctrine of restraint of trade was inapplicable to their standard form agreement as contracts which had passed into accepted and normal currency of commercial relations did not require justification under a public policy test of reasonableness.

Held—(i) A distinction had to be made between standard form contracts made freely between parties bargaining on equal terms and a standard form contracts, such as that made between the defendants and the plaintiff, which had not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party, but had been dictated by the party who enjoyed superior bargaining power. Contracts of the former kind raised a strong presumption that their terms were fair and reasonable. When the contract was of the latter kind, however, no such presumption applied and the court had to consider all its provisions to see whether the bargain made was fair, i.e. whether the restrictions were both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract (see p 622 *f*, p 623 *b* and *h*, and p 624 *a* to *h*, post); dicta of Lord Pearce and Lord Wilberforce in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1967] 1 All ER at 723, 729, 730 explained.

- (ii) The restrictions in the agreement between the defendants and the plaintiff were not fair and reasonable in that they combined a lack of obligation on the part of the defendants, who were not required to publish any of the plaintiff's compositions, with a total commitment on the part of the plaintiff with the result that for a period of years his work would be sterilised and he could earn nothing from his abilities as a composer if the defendants chose not to publish. It followed that the contract was in unreasonable restraint of trade and that the plaintiff was entitled to the declaration sought (see p 622 *a b* and *h* to p 623 *b* and *j* and p 624 *g* and *h*, post).
- g* Decision of the Court of Appeal sub nom *Instone v A Schroeder Music Publishing Co Ltd* [1974] 1 All ER 171 affirmed.

Notes

For agreements in restraint of trade, see 38 Halsbury's Laws (3rd Edn) 20-21, paras 13, 15, and for cases on the subject, see 45 Digest (Repl) 443-449, 271-297.

- h* Case referred to in opinions

Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1967] 1 All ER 699, [1968] AC 269, [1967] 2 WLR 871, HL, Digest (Cont Vol C) 985, 132a.

Appeal

- j* This was an appeal by A Schroeder Music Publishing Co Ltd against an order of the Court of Appeal¹ (Russell, Cairns LJJ and Goulding J) dated 9th November 1973 dismissing their appeal against the judgment of Plowman J dated 26th July 1972, whereby in an action by the respondent, Tony Macaulay (formerly called Anthony Gordon Instone), against the appellants, it was declared that an agreement between

¹ [1974] 1 All ER 171

the parties dated 12th July 1966 was void, and the appellants' counterclaim for specific performance of the agreement was dismissed. The facts are set out in the opinion of Lord Reid. a

Michael Kempster QC and Stephen Tumin for the appellants.
Robert Gatchouse QC and G N Butler for the respondent.

Their Lordships took time for consideration. b

16th October. The following opinions were delivered.

LORD REID. My Lords, the appellants are publishers of music. The respondent is a writer of songs. On 12th July 1966 they entered into a somewhat elaborate agreement under which the appellants engaged the exclusive services of the respondent for a term of five years which in a certain event was to be extended to ten years. In 1970 the respondent raised the present action claiming a declaration that the agreement is contrary to public policy and void. He also made various alternative claims which your Lordships have found it unnecessary to consider. Plowman J made the declaration claimed and his decision was affirmed by the Court of Appeal¹. c

In 1966 the respondent was aged about 21. He and a Mr McLeod had collaborated in writing a few songs, but it appears that none of them had been published. He obtained an interview with Mr Schroeder who, with Mrs Schroeder, controls an American music publishing corporation with world wide connections. The appellant company is a subsidiary of the corporation. The respondent wished to get a different kind of contract but agreed to sign this agreement which is in the appellants' standard form with a few alterations. d

It is not disputed that the validity of the agreement must be determined as at the date when it was signed and it is therefore unnecessary to deal with the reasons why the respondent now wishes to be freed from it. The law with regard to the validity of agreements in restraint of trade was fully considered by this House in *Esso Petroleum Co Ltd v Harper's Garage*² and I do not intend to restate the principles there set out or to add to or modify what I said myself. I think that in a case like the present case two questions must be considered. Are the terms of the agreement so restrictive that either they cannot be justified at all or that they must be justified by the party seeking to enforce the agreement? Then, if there is room for justification, has that party proved justification—normally by shewing that the restrictions were no more than what was reasonably required to protect his legitimate interests. In this case evidence on the second question was scanty and I turn first to the terms of the agreement. The agreement contains 17 clauses. It must of course be read as a whole and we must consider the cumulative effect of the restrictions contained therein. I think it best to set it out in full omitting only those parts which deal with performing rights, because neither party founded on them in argument, and some formal matters. The relevant parts are as follows: e

'1. Subject as hereinafter mentioned this Agreement shall remain in force for a period of five (5) years from the date hereof (hereinafter called 'the said term').

'2. (a) The Publisher engages the exclusive services of the Composer and the Composer will render the same to the Publisher during the said term. (b) The Composer shall obey and comply with all lawful orders and directions in relation to his services hereunder given to him by the Publisher and shall use his best endeavours to promote the interests of the Publisher. (c) The Composer will f

¹ [1974] 1 All ER 171

² [1967] 1 All ER 699, [1968] AC 269 g

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a not during the said term directly or indirectly work for or render services or be affiliated to or be interested in or connected with any person firm or corporation engaged in the music publishing business other than the Publisher nor will he during the said term carry on or be concerned in whether alone or in partnership any music publishing business. (d) The Composer will not divulge to any person except as may be required by the Publisher any confidential information relating to the business of the Publisher.

b 3. (a) The Composer HEREBY ASSIGNS to the Publisher the full copyright for the whole world in each and every original musical composition and/or lyric including but without prejudice to the generality of the foregoing the title words and music thereof written/or composed created or conceived by the Composer alone or in collaboration with any other person or persons and whether in his own name or under a nom-de-plume at any time during the said term or c at any time prior to the date hereof insofar as such latter compositions and/or lyrics are still owned or controlled by the Composer directly or indirectly . . . (b) In this Agreement references to musical works and/or lyrics shall include the part or parts hereof (if separate and divisible) written composed created or conceived by the Composer . . .

d 4. Where a musical composition and/or lyric to which this Agreement applies is a "work of joint authorship" as defined by Section 11 of the Copyright Act 1956, the Composer will procure that his co-author or co-authors as the case may be will join with him in doing such acts and things and executing such deeds and documents as may be necessary to vest the copyright in the said work in the Publisher.

e 5. In respect of each work hereinbefore referred to the copyright in which has been assigned by the Composer and his collaborators (if any), the Publisher will pay to the Composer and his collaborators (if any): (a) on all piano copies sold and paid for (after the first 500 copies) in the United Kingdom of Great Britain and Northern Ireland and Eire a royalty of 10% of the marked selling price; (b) 50% of all net royalties received by the Publishers in respect of mechanical reproduction of the said works and of all net synchronisation fees; (c) in the event of the said works being published in any country outside the United Kingdom and Eire, 50% of the net royalties received by the Publisher from f persons authorised to publish the said works in such foreign territories.

g 6. (a) Fees in respect of performing rights shall be divided as to 50% to the Composer and his collaborators (if any) (hereinafter referred to as "the Composer's Share") and 50% to the Publisher . . . (c) If the Composer shall be or become a member of P.R.S. and while he remains such member all performing fees shall be divided between the parties hereto in accordance with P.R.S. rules for the time being in force subject to the agreement of the parties hereinbefore contained varying the divisions as permitted by such rules so that 50% of such fees are for the Composer and his collaborators (if any) and 50% for the Publisher

h . . . 8. (a) The Publisher shall pay the sum of £50 to the Composer, which shall be a general advance against royalties payable by the Publisher under this Agreement and to be recouped therefrom but in no case shall the Publisher be entitled to the return of any part of such sums. Upon the recoupment by the Publisher of said general advance payment of Fifty (£50) Pounds, the Publisher agrees to pay another Fifty (£50) Pounds, which is to be treated as a general advance as described herein. This same procedure shall continue throughout the said term hereof; i.e. as each general advance of Fifty (£50) Pounds is recouped in full by the Publisher, the Publisher shall pay to the Composer the sum of Fifty (£50) Pounds, etcetera. (b) The Publisher will render to the Composer semi annually statements showing the amount of royalties due to the Composer as at 31st December and 30th June in each year. Such statements shall be delivered j

within 60 days of the relevant date and shall be accompanied by a remittance for such sum (if any) as may be shown to be due to the Composer. a

'9. (a) If during the said term the total of the Composer's royalties hereunder and all advances thereon (if any) shall equal or exceed £5000 then this agreement shall automatically be extended for a further period of FIVE (5) years and for the purpose of this Agreement the said period of FIVE (5) years shall be deemed to be included in and be part of the said term. (b) The Publisher may at any time during the said term terminate this Agreement by giving to the Composer one month's written notice to that effect. Such termination shall be without prejudice to the rights of the parties in respect of any antecedent breach of this Agreement and the Publisher's obligations to pay royalties hereinbefore provided for. b

'10. (a) The Composer will forthwith submit to the Publisher every composition and/or lyric written and/or composed created or conceived by him alone or in collaboration. The Composer warrants to the Publisher that the copyright in all such works will pass to the Publisher free from any adverse claims or rights from any third party and that all such works submitted to the Publisher will be the original work of the Composer and his collaborators (if any). (b) The Composer will indemnify the Publisher against all claims damages and demands and against all costs incurred in the institution or defence of any actions or proceedings relating to the said works submitted to the Publisher . . . c

'12. (a) The Composer will execute a standard song writer's Agreement in respect of each and every work the subject of this Agreement. Such song writer's Agreement shall be in the form annexed hereto and initialled by the parties (hereinafter referred to as "the song writer's Agreement"). (b) For the avoidance of doubt it is agreed that any assignment required under Clauses 4 or 12 hereof shall be in the form of the song writer's Agreement. d

'13. In the event of any breach of the terms or conditions of this Agreement by the Composer the Publisher shall be entitled to suspend and withhold payment of royalties (including the general advances provided for in para. 8 hereinabove) until such breach has been remedied. If the Composer shall fail to remedy any such breach within One month of written notice by the Publisher requiring him so to do all royalties then or thereafter due under this Agreement shall cease to be or shall not become (as the case may be) payable. . . e

'15. For the avoidance of any possible doubt and without in any way limiting the assignment hereinbefore contained it is hereby declared that the copyright hereby assigned includes: (a) the right to renew and extend the copyright and the ownership of such renewed and extended copyright. (b) the right to make and publish new adaptations and arrangements and to make such additions adaptations and alterations in and to the words and/or music as the Publisher may desire and to provide and translate the lyric thereof in any and all languages of the world. f

'16. (a) The Publisher shall have the right to assign this Agreement and all rights and obligations hereunder to any person firm or corporation and shall also have the right to assign any or all rights in a particular work. (b) The Composer will not assign his rights under this Agreement without the Publisher's prior written consent. g

'17. The Composer will at the Publisher's request at any time during the said term or thereafter execute any other document and do all other acts or things which may hereafter be required for vesting in the Publisher the rights and benefits hereby expressed to be assigned and conferred. h

Clauses 1 and 9(a) determine the duration of the agreement. It was to last for five years in any event and for ten years if the royalties for the first five years exceeded £5,000. There is little evidence about this extension. Five thousand pounds in j

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a five years appears to represent a very modest success, and so if the respondent's work became well known and popular he would be tied by the agreement for ten years. The duration of an agreement in restraint of trade is a factor of great importance in determining whether the restrictions in the agreement can be justified but there was no evidence as to why so long a period was necessary to protect the appellants' interests. Clause 2 requires the respondent to give the exclusive services to and obey all lawful orders of the appellants. It is not very clear what this means. Read b in conjunction with cl 2(c) it probably does not prevent him from doing non-musical work so long as that does not interfere with his obligations to the appellants. I do not attach importance to this clause as being at all unduly restrictive. Clause 3 is of importance but I shall return to it later. Clauses 5 to 8 deal with remuneration. Some parts are not very clear but it was not argued that this was an unreasonable basis for the remuneration of a composer unknown when the agreement was made. c Clause 9(b) entitles the appellants to terminate the agreement but there is no corresponding provision in favour of the respondent. I shall have to deal with this later. Clause 10(b) could be rather oppressive but no serious objection was taken to it and the same may be said of cl 13. Clause 16 appears to me to be important. There may sometimes be room for an argument that although on a strict literal construction restrictions could be enforced oppressively; one is entitled to have regard to the fact d that a large organisation could not afford to act oppressively without damaging the goodwill of its business. But the power to assign leaves no room for that argument. We cannot assume that an assignee would always act reasonably.

The public interest requires in the interests both of the public and of the individual that everyone should be free so far as practicable to earn a livelihood and to give to the public the fruits of his particular abilities. The main question to be considered e is whether and how far the operation of the terms of this agreement is likely to conflict with this objective. The respondent is bound to assign to the appellants during a long period the fruits of his musical talent. But what are the appellants bound to do with those fruits? Under the contract nothing. If they do use the songs which the respondent composes they must pay in terms of the contract. But they need not do so. As has been said they may put them in a drawer and leave them there. f No doubt the expectation was that if the songs were of value they would be published to the advantage of both parties. But if for any reason the appellants chose not to publish them the respondent would get no remuneration and he could not do anything. Inevitably the respondent must take the risk of misjudgment of the merits of his work by the appellants. But that is not the only reason which might cause the appellants not to publish. There is no evidence about this so we must do the g best we can with common knowledge. It does not seem fanciful and it was not argued that it is fanciful to suppose that purely commercial consideration might cause a publisher to refrain from publishing and promoting promising material. He might think it likely to be more profitable to promote work by other composers with whom he had agreements and unwise or too expensive to try to publish and popularise the respondent's work in addition. And there is always the possibility h that less legitimate reasons might influence a decision not to publish the respondent's work.

It was argued that there must be read into this agreement an obligation on the publisher to act in good faith. I take that to mean that he would be in breach of contract if by reason of some oblique or malicious motive he refrained from publishing work j which he would otherwise have published. I very much doubt this but even if it were so it would make little difference. Such a case would seldom occur and then would be difficult to prove.

I agree with the appellants' argument to this extent. I do not think that a publisher could reasonably be expected to enter into any positive commitment to publish future work by an unknown composer. Possibly there might be some general undertaking to use his best endeavours to promote the composer's work. But that

would probably have to be in such general terms as to be of little use to the composer. But if no satisfactory positive undertaking by the publisher can be devised, it appears to me to be an unreasonable restraint to tie the composer for this period of years so that his work will be sterilised and he can earn nothing from his abilities as a composer if the publisher chooses not to publish. If there had been in cl 9 any provision entitling the composer to terminate the agreement in such an event the case might have had a very different appearance. But as the agreement stands not only is the composer tied but he cannot recover the copyright of the work which the publisher refuses to publish.

It was strenuously argued that the agreement is in standard form, that it has stood the test of time, and that there is no indication that it ever causes injustice. Reference was made to passages in the speeches of Lord Pearce and Lord Wilberforce in the *Esso* case¹ with which I wholly agree. Lord Pearce said²:

'It is important that the court, in weighing the question of reasonableness, should give full weight to commercial practices and to the generality of contracts made freely by parties bargaining on equal terms.'

Later Lord Wilberforce said³:

'The development of the law does seem to show, however, that judges have been able to dispense from the necessity of justification under a public policy test of reasonableness such contracts or provisions of contracts as, under contemporary conditions, may be found to have passed into the accepted and normal currency of commercial or contractual or conveyancing relations. That such contracts have done so may be taken to show with at least strong prima force that, moulded under the pressures of negotiation, competition and public opinion, they have assumed a form which satisfies the test of public policy as understood by the courts at the time, or, regarding the matter from the point of view of the trade, that the trade in question has assumed such a form that for its health or expansion it requires a degree of regulation.'

But those passages refer to contracts 'made freely by parties bargaining on equal terms' or 'moulded under the pressures of negotiation, competition and public opinion'. I do not find from any evidence in this case, nor does it seem probable, that this form of contract made between a publisher and an unknown composer has been moulded by any pressure of negotiation. Indeed, it appears that established composers who can bargain on equal terms can and do make their own contracts.

Any contract by which a person engages to give his exclusive services to another for a period necessarily involves extensive restriction during that period of the common law right to exercise any lawful activity he chooses in such manner as he thinks best. Normally the doctrine of restraint of trade has no application to such restrictions: they require no justification. But if contractual restrictions appear to be unnecessary or to be reasonably capable of enforcement in an oppressive manner, then they must be justified before they can be enforced.

In the present case the respondent assigned to the appellants 'the full copyright for the whole world' in every musical composition 'composed created or conceived' by him alone or in collaboration with any other person during a period of five or it might be ten years. He received no payment (apart from an initial £50) unless his work was published and the appellants need not publish unless they chose to do so. And if they did not publish he had no right to terminate the agreement or to have any copyrights re-assigned to him. I need not consider whether in any circumstances it would be possible to justify such a one-sided agreement. It is sufficient

¹ [1967] 1 All ER 699, [1968] AC 269

² [1967] 1 All ER at 723, [1968] AC at 323

³ [1967] 1 All ER at 729, 730, [1968] AC at 332, 333

a to say that such evidence as there is falls far short of justification. It must therefore follow that the agreement so far as unperformed is unenforceable.

b I would dismiss this appeal.

b VISCOUNT DILHORNE. My Lords, I have had the advantage of reading the speech of my noble and learned friend, Lord Reid, in draft. I agree with it and for the reasons he gives, I, too, would dismiss this appeal.

c LORD DIPLOCK. My Lords, the contract under consideration in this appeal is one whereby the respondent accepted restrictions on the way in which he would exploit his earning-power as a song-writer for the next ten years. Because this can be classified as a contract in restraint of trade the restrictions that the respondent accepted fell within one of those limited categories of contractual promises in respect of which the courts still retain the power to relieve the promisor of his legal duty to fulfil them. In order to determine whether this case is one in which that power ought to be exercised, what your Lordships have in fact been doing has been to assess the relative bargaining power of the publisher and the song-writer at the time the contract was made and to decide whether the publisher had used his superior bargaining power to exact from the song-writer promises that were unfairly onerous to him. Your Lordships have not been concerned to enquire whether the public have in fact been deprived of the fruit of the song-writer's talents by reason of the restrictions, nor to assess the likelihood that they would be so deprived in the future if the contract were permitted to run its full course.

e It is, in my view, salutary to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning-power, the public policy which the court is implementing is not some 19th century economic theory about the benefit to the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable. Under the influence of Bentham and of laissez-faire the courts in the 19th century abandoned the practice of applying the public policy against unconscionable bargains to contracts generally, as they had formerly done to any contract considered to be usurious; but the policy survived in its application to penalty clauses and to relief against forfeiture and also to the special category of contracts in restraint of trade. If one looks at the reasoning of 19th century judges in cases about contracts in restraint of trade one finds lip service paid to current economic theories but if one looks at what they said in the light of what they did, one finds that they struck down a bargain if they thought it was unconscionable as between the parties to it, and upheld it if they thought that it was not.

g So I would hold that the question to be answered as respects a contract in restraint of trade of the kind with which this appeal is concerned is: was the bargain fair? h The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract. For the purpose of this test all the provisions of the contract must be taken into consideration.

j My Lords, the provisions of the contract have already been sufficiently stated by my noble and learned friend, Lord Reid. I agree with his analysis of them and with his conclusion that the contract is unenforceable. It does not satisfy the test of fairness as I have endeavoured to state it. I will accordingly content myself with adding some observations directed to the argument that because the contract was in a 'standard form' in common use between music publishers and song-writers, the restraints that it imposes on the song-writer's liberty to exploit his talents must be presumed to be fair and reasonable.

Standard forms of contracts are of two kinds. The first, of very ancient origin, are those which set out the terms on which mercantile transactions of common occurrence are to be carried out. Examples are bills of lading, charterparties, policies of insurance, contracts of sale in the commodity markets. The standard clauses in these contracts have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade. Contracts of these kinds affect not only the actual parties to them but also others who may have a commercial interest in the transactions to which they relate, as buyers or sellers, charterers or shipowners, insurers or bankers. If fairness or reasonableness were relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable.

The same presumption, however, does not apply to the other kind of standard form of contract. This is of comparatively modern origin. It is the result of the concentration of particular kinds of business in relatively few hands. The ticket cases in the 19th century provide what are probably the first examples. The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with other providing similar goods or services, enables him to say: 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it.'

To be in a position to adopt this attitude towards a party desirous of entering into a contract to obtain goods or services provides a classic instance of superior bargaining power. It is not without significance that on the evidence in the present case, music publishers in negotiating with song-writers whose success has been already established do not insist on adhering to a contract in the standard form they offered to the respondent. The fact that the appellants' bargaining power vis-à-vis the respondent was strong enough to enable them to adopt this take-it-or-leave-it attitude raises no presumption that they used it to drive an unconscionable bargain with him, but in the field of restraint of trade it calls for vigilance on the part of the court to see that they did not.

LORD SIMON OF GLAISDALE. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Reid and Lord Diplock. I agree with them and I would therefore dismiss this appeal.

LORD KILBRANDON. My Lords, I have had the advantage of reading the speeches prepared by my noble and learned friends, Lord Reid and Lord Diplock. I agree with their conclusions, and like them would dismiss this appeal.

Appeal dismissed.

Solicitors: *Wright & Webb* (for the appellants); *Malkin, Cullis & Sumption* (for the respondent).

Christine Ivamy Barrister.

Clifford Davis Management Ltd v WEA Records Ltd and another

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR AND BROWNE LJ

b 18th, 21st OCTOBER 1974

a *Equity - Undue influence - Inequality of bargaining power - Assignment of copyright - Validity - Circumstances in which assignment invalid - Agreement to assign unenforceable because of inequality of bargaining power - Relationship between parties - Composer of music and business manager - Manager procuring composer to enter into agreement -*
c *Composer not receiving independent advice - Terms of agreement manifestly unfair - Agreement requiring composer to assign to manager for nominal sum copyright in all compositions for period of ten years - Whether assignment valid.*

d The plaintiff was the manager of a 'pop group'. Two members of the group, M and W, were talented composers who wanted to get their songs published. The plaintiff persuaded them to sign publishing agreements with him. Although M and W were experienced performers and were of full age, they were not experienced in business. The agreements were in a standard form. They were long documents which had been professionally drafted. Neither M nor W received independent legal advice before signing. The agreements bound M and W for a period of five years, which could be extended for a further five years at the plaintiff's option, to *e* assign to the plaintiff the English and world copyright in any work composed by them. The consideration for the assignment was to be 1s per work, though royalties were payable by the plaintiff if he chose to exploit the works. M promised to deliver at least one composition a month. Under the agreements the plaintiff had the right to reject any work without payment, but even when he chose to retain a work he was under no obligation to exploit or to do anything with it. Further, the agreements gave him the right to assign the copyright of the work to any third party. *f* Subsequently the plaintiff and the group split up. The group acquired a new manager. M and W wrote new songs for the group which were recorded in an album of records. Arrangements were made for the defendants to distribute the album in England. The plaintiff brought an action in which he sought an interim injunction restraining the defendants from infringing his copyright in the songs composed by M and W *g* by selling, distributing or otherwise dealing with the album.

h **Held** - The defendants had succeeded in establishing a prima facie case that the agreements between the plaintiff and M and W were unenforceable in that they had been made in circumstances in which there was inequality of bargaining power since (i) at the time when the agreements were made M and W were members of a pop group of which the plaintiff was the manager, (ii) M and W had received no independent legal advice before signing the agreements and (iii) the terms of the agreements were manifestly unfair. It followed that there was a prima facie case that the assignments of copyright under the agreements were invalid. The plaintiff was not therefore entitled to an interim injunction (see p 240 *e* to p 241 *e*, post).

j *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 and dictum of Lord Denning MR in *Lloyds Bank Ltd v Bundy* [1974] 3 All ER at 765 applied.

Notes

For undue influence in relationship to transactions inter vivos, see 9 Halsbury's Laws (4th Edn) 174, para 298, 17 Halsbury's Laws (3rd Edn) 672-681, paras 1297-1312, and for cases on the subject, see 12 Digest (Reissue) 125-142, 687-820.

For agreements in restraint of trade, see 38 Halsbury's Laws (3rd Edn) 20, 21, paras 13, 15, and for cases on the subject, see 45 Digest (Repl) 443-449, 271-297. a

Cases referred to in judgments

Eso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1967] 1 All ER 699, [1968] AC 269, [1967] 2 WLR 871, HL, Digest (Cont Vol C) 985, 132a.

Lloyds Bank Ltd v Bundy [1974] 3 All ER 757, [1974] 3 WLR 501, CA.

Schroeder (A) Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616, [1974] 1 WLR 1308, HL; *affg sub nom Instone v A Schroeder Music Publishing Co Ltd* [1974] 1 All ER 171. b

Interlocutory appeal

By a writ issued on 27th September 1974, the plaintiffs, Clifford Davis Management Ltd, brought an action against the defendants, WEA Records Ltd and CBS Records Ltd, claiming (i) an injunction restraining the defendants by their servants, agents or otherwise from infringing the plaintiffs' musical and literary copyright in the compositions and writings of Anne Christine McVie and Robert Lawrence Welch by manufacturing, publishing, releasing for sale, selling, distributing or in any other manner dealing with a record album bearing the title 'Heroes are Hard to Find'; (ii) delivery up of all infringing records and all plates or other originals thereof; and (iii) damages. On 8th October 1974 Forbes J in chambers granted the plaintiffs an interim injunction in the terms of the injunction claimed in the writ. The defendants sought to have the interim injunction discharged but the judge refused to discharge it. The defendants appealed against that refusal. The facts are set out in the judgment of Lord Denning MR. c

F M Drake QC and *Harold Burnett* for the defendants. e

David Hunter QC and *R Neville Thomas* for the plaintiffs.

LORD DENNING MR. There is a pop group of four or five musicians called 'Fleetwood Mac'. The group take their name from two of their members, Michael Fleetwood and John McVie. The group have formed themselves into a limited company called Fleetwood Mac Promotions Ltd. The members are the directors and shareholders of it. I will call them 'the group'. The manager of the group was Clifford Adams, known as Clifford Davis. He has now turned himself into a limited company: Clifford Davis Management Ltd. He and his wife are the sole shareholders. I will call it 'the manager'. f

The manager, by a written agreement, had agreed to act as agent and manager for the group. The group was successful. They made several tours to the United States of America and were well known there. In January 1974 the manager fell out with the group or they fell out with him. He went his own way; they went theirs. On his side he formed a new group of five musicians. He called them 'Fleetwood Mac', and sent them on a tour of the United States. The original group brought an action against the manager for passing-off. On 12th July 1974 Goff J granted an interim injunction until trial. g

The original group, having broken off from their old manager, worked under new management. Two of them were talented composers. They wrote and composed new songs and put them to music. They made arrangements with well-known firms in the United States to record them and distribute the records. These firms have made a record album called 'Heroes are Hard to Find'. It contained 11 songs. It has been released in the United States and has sold 150,000 copies. Now the firms in the United States, through their English subsidiaries, wish to release this record album for sale in England. It is very important, they say, that this should be done quickly, within two weeks—else it will lose its impact. h

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a The old manager, Clifford Davis, now seeks to prevent this record album being sold in England. He claims that his company is entitled to the copyright in this album 'Heroes are Hard to Find', even though it was produced by the group after he ceased to have anything to do with them. He has brought this action against the makers and distributors, through their English subsidiaries. He seeks to stop the sale and distribution in England. The judge in chambers granted an interim injunction. The defendants sought to have it discharged. The judge refused to discharge it. The defendants appeal to this court.

b The words and music of the 11 songs were composed by two talented members of the group. One of them is Christine McVie. She joined the group in July 1970. The other was Mr Robert Welch. He joined the group in January 1971. They are both of full age and are experienced performers and composers. But several months after they had joined the group, the old manager got each of them to sign a publishing agreement with him. Mrs McVie signed hers on 1st January 1971. Mr Welch signed his on 21st December 1972. Under each publishing agreement the manager (that is the old manager through his self-same company) described himself as 'the publisher'. Under each agreement, the composer was to write and compose songs. The publisher was to be at liberty to publish them. If he did so, the composer was to get 10 per cent of the retail price of the sheet music and 50 per cent of the royalties on the records. So far so good. It was fair enough. But when each of the publishing agreements is examined, it is found to contain some amazing provisions. It gives the publisher, alias the manager, a stranglehold over each of the composers. It does it by means of the copyright. In every work which the composer produces over a period of ten years, the copyright is vested in the publisher. I will not read the agreements in full. I will summarise the provisions. (1) Each composer bound himself to the publisher for five years, but the publisher could extend the term at his option for another five years, making it ten years in all. (2) The composer for the whole of those ten years was tied hand and foot to the publisher. Whenever he composed a work he was bound to submit it to the publisher, who at once became entitled to the copyright in it. The composer assigned to the publisher the copyright in every one of his works. Not only the English copyright but the copyright throughout the world. Each was expected to be very productive. In the case of Mrs McVie, she promised to deliver to the publisher at least one complete musical composition a month. (3) The publisher was not bound to publish any of the works. At any rate, he did not give any positive undertaking to do so. All he did was to promise Mrs McVie that he would use his best endeavours to launch her works to the fullest extent. There was no such promise to Mr Welch; but it may perhaps be implied. (4) The publisher had the right for six months to reject any work without payment. If he did not reject it, he was held to have retained it. But even when he retained it, he was not under any positive obligation to exploit it or to do anything with it. If he thought it was not good enough for him to publish, he could put it in a drawer and forget about it; or he could burn it. He did not have to pay anything for it, except that he had to pay Mrs McVie the sum of 1s and to pay Mr Welch a sum left blank in the form. No doubt it was also intended to be 1s. (5) The manager had the right to assign the copyright of the works to any third party. He could assign it to anyone he chose no matter that the assignee knew nothing about the trade or about publishing and had not the means to publish it. The composer had no say in it at all.

j Now the question arises: is the court bound to enforce this assignment of copyright at the suit of the publisher alias manager? The agreement is of the same class as the agreement considered by the Court of Appeal in *Instone v A Schroeder Musical Publishing Co Ltd*¹, and by the House of Lords² only last week.

¹ [1974] 1 All ER 171

² Sub nom *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616, [1974] 1 WLR 1308

An agreement such as this is not an agreement which is 'in restraint of trade' strictly so called. It does not preclude a man from exercising his trade at all. But it is an agreement which is 'restrictive of trade' in this sense, that it requires a man to give his services and wares to one person only for a long term of years to the exclusion of all others. Lord Reid said¹ that such restrictive agreements do not normally require to be justified; but he did add the important qualification. Wherever such agreements contain—

'contractual restrictions [which] appear to be unnecessary or to be reasonably capable of enforcement in an oppressive manner, then they must be justified before they can be enforced.'

Lord Diplock² urged the courts to be vigilant. They should look into the provenance of such agreements. He made it clear³ that if one party uses his superior bargaining power so as to 'exact . . . promises that were unfairly onerous', or 'to drive an unconscionable bargain', then the courts will relieve the other party of his legal duty to fulfil it. He gave this pertinent example. A strong concern prepares a new standard form containing terms which are most unfair—and dictates to the customer: 'Take it or leave it.' The customer is in a weak position. He has no real option but to accept. The courts may decline to enforce it or, at any rate, may decline to enforce any term which is unfair to the customer, such as an exemption clause.

Reading those speeches in the House of Lords, they afford support for the principles we endeavoured to state at the end of last term about inequality of bargaining power. It was in *Lloyds Bank Ltd v Bundy*⁴. *Instone's case*⁵ provides a good instance of those principles. The parties there had not met on equal terms. The one was so strong in bargaining power and the other so weak that, as a matter of common fairness it was not right that the strong should be allowed to push the weak to the wall.

In the present case I would not presume to come to any final opinion. It is only interlocutory. But there are ingredients which may be said to go to make up a case of inequality of bargaining power. The composers can urge these points. (1) That the terms of the contract were manifestly unfair. Each composer was tied for ten years without any retaining fee and with no promise to do anything in return save for a promise by the publisher to use his best endeavours. Such a promise was so general as probably to be of little use to the composer. See what Lord Reid said in *Instone's case*⁶. And the tie of ten years for a composer seems to me just as unfair as a tie of 21 years in a solus agreement for a garage: see *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*⁷. (2) That the property (the copyright in every one of the works over ten years) was transferred for a consideration that was grossly inadequate. It was 1s for each work. It is true that if the publisher chose to exploit a work, he was to pay royalties; but if he did not do so, he got the copyright for 1s. (3) That the bargaining power of each of the composers was gravely impaired by the position in which he or she was placed vis-à-vis the manager. Each composer was in a group which was managed by him. They wanted to get their songs published. It was their ladder to success. In order to get the songs performed—and to get them published—they were dependent on the manager. Their needs and desires were dependent on his will. He could say Aye or No. He was skilled in business and finance. They were composers talented in music and song but not in business. In negotiation they could not hold their own. That is why they needed

¹ [1974] 3 All ER at 622, [1974] 1 WLR at 1314

² [1974] 3 All ER at 624, [1974] 1 WLR at 1316

³ [1974] 3 All ER at 623, 624, [1974] 1 WLR at 1315, 1316

⁴ [1974] 3 All ER 757 at 765, [1974] 3 WLR 501 at 508, 509

⁵ [1974] 3 All ER 616, [1974] 1 WLR 1308

⁶ [1974] 3 All ER at 621, 622, [1974] 1 WLR at 1313, 1314

⁷ [1967] 1 All ER 699, [1968] AC 269

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- a manager. (4) That undue influences or pressures were brought to bear on the composers by or for the benefit of the manager. The manager did not condescend to say how the agreements came to be signed. But from the internal evidence much can be inferred. They were cyclostyled and hence came from a stock of forms. They were very long and full of legal terms and phrases. Hence they were drawn up by lawyers. Some spaces had been filled in by typewriters, others left blank. Hence done by clerks in the office. Both the composer and the publisher signed in the presence of the same witness. It may be inferred that the manager took a stock form, got the blanks filled in and asked the composer to sign it without reading it through or explaining it. One thing is clear from the evidence. The composer had no lawyer and no legal advisers. It seems to me that, if the publisher wished to exact such onerous terms or to drive so unconscionable a bargain, he ought to have seen that the composer had independent advice.
- c For these reasons it may well be said that there was such inequality of bargaining power that the agreement should not be enforced and that the assignment of copyright was invalid and should be set aside. In any case, the balance of convenience is all in favour of discharging the injunction. The defendants are responsible concerns. They are ready to keep an account of their sales. If the publisher is right, he will be adequately compensated in damages.
- d On those grounds, I would allow the appeal and discharge the injunction.

BROWNE LJ. I agree. As Lord Denning MR has said, we are dealing in this case with an interlocutory matter. We therefore only have to be satisfied that there is a prima facie case, that these agreements may be unenforceable. The final decision will, of course, be made at the trial. For the reasons given by Lord Denning MR I am satisfied, as he is, that there is such a prima facie case.

Counsel for the defendants also raised a point about repudiation, but he was not asked to address us on this point, which, however, remains open for the future if he wishes to rely on it.

f So far as balance of convenience is concerned, again I entirely agree with Lord Denning MR. I assume that the offer made in the letter from the solicitors to the first defendants dated 1st October 1974 that all royalties arising from the sales of this album will be paid to a suspense account and held there until the dispute has been settled still stands.

Accordingly I agree that this appeal should be allowed and the injunction discharged.

g *Appeal allowed; injunction discharged; undertaking given in letter of 1st October 1974 that royalties arising out of sale of album 'Heroes are Hard to Find' would be placed on a suspense account until dispute settled, reaffirmed by counsel for the defendants.*

Solicitors: Harbottle & Lewis (for the defendants); Clintons (for the plaintiffs).

Wendy Shockett Barrister.

[CHANCERY DIVISION (Stamp, J.), July 21, 24, 25, 1967.]

Injunction—Restraining breach of contract for personal services—Management agreement between group of musicians and manager—Professional careers of group to be advanced—Personal and fiduciary character of services to be rendered by manager—Reputation of agreement by group for alleged breaches—Injunction sought by manager to restrain group until trial from engaging new manager—Grant of interlocutory injunction would compel group to continue to employ manager and thus enforce rendering of personal services by manager—Whether injunction should be refused as tantamount to specific performance of a contract for personal service.

By written agreements made in 1966 a group of four musicians ("The Troggs"), who were the first four defendants, appointed the first plaintiff, among other things, to manage on their behalf all their affairs relating to their professional careers for five years. One term of the management agreement was that The Troggs would not engage any other person to act as manager or agent for them and would not act themselves in such capacity. It was in evidence before the court, that a director of the first plaintiff had personally ensured that the resources of the plaintiffs had been given to The Troggs in fullest measure, and he deposed that their present success was due in substantial part to the work performed on their behalf by him and both the plaintiffs. The Troggs had become an established group, earning as much as about £400 for a night's engagement. By letter, received by the first plaintiff in June, 1967, The Troggs notified the plaintiffs that the agreements had been materially breached by the plaintiffs and were determined, and The Troggs claimed return of all moneys received by reason of the agreements. On the evidence the court found that a prima facie case of breaches justifying The Troggs in repudiating the agreements had not been made out. The court took judicial notice of the fact that such groups as The Troggs, if they were to have any great success, must have managers; they were persons of no business experience and would not survive without the services of a manager. The plaintiffs brought an action and moved for an interlocutory injunction to restrain The Troggs until trial from engaging as their managers for conducting their affairs relating to their professional careers in entertainment anyone other than the first plaintiff. On motion for an interlocutory injunction,

Held: an interlocutory injunction would compel in effect The Troggs to continue to employ the first plaintiff, and thus would amount to enforcing the performance by the first plaintiff of a contract for personal services, that is to say, a contract for rendering management services of a personal and fiduciary character, the totality of obligations under which almost amounted to a partnership or joint venture; accordingly, the interlocutory injunction would be refused (see p. 897 letters B and I, p. 828, letter A, and p. 826, letter D, post).

Lumley v. Wagner ([11 E.R. Rep. 368] and *Warner Brothers Pictures Inc. v. Nelson* ([100 E.R. 100] principle applied).

[As to injunctions to restrain breach of contracts for personal service, see 21 HALSBURY'S LAWS (3rd Edn.) 153, 385, para. 810, note (k), p. 388, para. 815, note (g); and for cases on the subject, see 28 DIGEST (Repl.) 822, 823, 671-680; 829, 730.]

Cases referred to:

Johnson v. Shrewsbury and Birmingham Ry. Co., (1853), 3 Do G.M. & G. 914; 22 L.J.Ch. 821; 43 E.R. 358; 28 Digest (Repl.) 829, 875

Pickering v. Ely (Bishop), (1848), 2 Y. & C.Ch. Cas. 249; 12 L.J.Ch. 271; 63 E.R. 109; 28 Digest (Repl.) 822, 673.

Warner Brothers Pictures, Inc. v. Nelson, [1930] 3 All E.R. 160; [1937] 1 K.B. 209; 106 L.J.K.B. 97; 155 L.T. 538; 28 Digest (Repl.) 823, 680.

Motion.

An action was begun by the plaintiffs, Page One Records, Ltd. and Dick James Music, Ltd., by writ dated June 26, 1967, whereby the first plaintiff and the second plaintiff each claimed injunctions and damages against the first four defendants (who were four musicians trading as and herein called "The Troggs") and injunctions and damages against the second defendants (the "defendant company"), Harvey Block Associates, Ltd. By notice of motion dated June 26, 1967, the plaintiffs gave notice of motion for the following interlocutory injunctions sought by the first plaintiff—(i) an injunction that The Troggs and each of them be restrained until trial from engaging as their managers or agents or personal representative in the branches of the entertainment industry referred to in cl. 1 of the agreement of Feb. 1, 1966, or from engaging as their managers conducting all their affairs relating to their professional careers in any medium of professional entertainment, every person, firm or corporation other than the first plaintiff; (ii) an injunction restraining each of The Troggs acting as a group from publishing or causing to be published any music performed by them otherwise than through the medium of the first or second plaintiffs; and (iii) an order that the defendant company be restrained until trial from inducing or procuring any breach or further breach by The Troggs as a group or otherwise of agreements between the plaintiffs and The Troggs for the management of The Troggs by the first plaintiff or the publication by either plaintiff of the music of The Troggs in accordance with four written agreements hereinafter mentioned.

On Feb. 1, 1966, The Troggs entered into a written agreement ("the management agreement") with the first plaintiff under which The Troggs appointed the first plaintiff to be their manager to manage on their behalf all their affairs relating to their professional careers in any medium of professional entertainment and, without prejudice to the generality of that description, in certain specified branches of the defendants' industry. The agreement was to be world-wide and to continue for a period of five years. It provided that the first plaintiff

"shall at all times during the subsistence of this agreement use [its] best endeavours (a) to advance the professional career of [The Troggs] . . . and give [The Troggs] the benefit of its knowledge and experience to that end. (b) To secure suitable work and engagements for [The Troggs] in the furtherance of . . ."

their professional careers, and the management agreement further provided that during the period of agreement The Troggs would not

"engage any other person firm or corporation to act as managers or agents for [The Troggs] nor act themselves in such capacity."

The management agreement provided that The Troggs would pay the first plaintiff a sum representing twenty per cent. of all moneys and other considerations received by The Troggs during the period of the agreement.

On Apr. 22, 1966, each of The Troggs entered into an agreement with the first plaintiff. This was called a probationary sole agency agreement. At the end of the probationary period of twenty-six weeks it was replaced by a not dissimilar agency agreement whereby The Troggs appointed the first plaintiff as their personal representative, agent and manager in the same branches of the entertainment industry as were covered by the management agreement and for the same

A period of five years. It was agreed that the first plaintiff would make available to The Troggs for the purposes of that agreement, the personal services of either Mr. Lavy Page or Miss Angela Howard. The Troggs agreed that throughout the period covered by that agreement the first plaintiff should be their sole and exclusive manager, agent and personal representative, and that they would not during the period engage any other person, firm or corporation, to act for them and would not themselves act in such capacity.

B On May 24, 1966, the first plaintiff, by a further agreement, engaged The Troggs to make records for sale or lease by the first plaintiff, and The Troggs agreed not to make records for anyone else. The Troggs were to receive a royalty of twenty per cent. of the moneys received by the first plaintiff in respect of those records. The copyright in the records was to be that of the first plaintiff.

C On Jan. 3, 1967 each of The Troggs entered into an agreement with the second plaintiff, Dick James Music, Ltd., called "the publishers", under which, for a nominal consideration, each of The Troggs assigned to the publishers the copyright throughout the world in each and every musical composition of that Trogg for a period of three years. The publishers' agreement contained a provision for payment of royalties to the composer and each Trogg thereby bound himself not to offer any musical compositions to any other publisher, unless the second plaintiff had first refused it.

D His Lordship (STAMP, J.), intimated, in regard to these agreements, that there was no evidence from the trade that any of them was otherwise than fair or reasonable or that better terms could have been obtained elsewhere. His Lordship read a passage from an affidavit of Mr. Page, a director of the first plaintiff, to the effect that he had personally ensured that the resources of both plaintiffs had been given to The Troggs in fullest measure, and that their present success was due in substantial part to the work performed on their behalf by himself and both plaintiffs; His Lordship found as a fact that The Troggs had become an established group and that they were, at the time of the issue of the writ, on occasions earning £400 for a night's engagement. On the evidence of Mr. Page, supported by an account exhibited by the administrative manager of the first plaintiff, the takings of the group from concerts were as follows—for May, 1966 £670; in August, 1966, over £4,000; in December, 1966, £5,000; in March, 1967, £7,000, and finally in May, 1967, nearly £7,600. In addition royalties were coming in from the sale of records.

E On June 19, 1967 the first plaintiff received an undated letter signed by each of The Troggs which read as follows:

"We have been advised by our solicitors on advice of our counsel that the following agreements: 1. The management agreement dated Feb. 1, 1966; 2. The agency agreement dated Apr. 22, 1966; and 3. The recording agreement dated [May 24, 1966], between you and The Troggs have, as a result of your actions, been materially breached and renounced by you. Accordingly you are hereby advised that the agreements are determined and we hereby demand the return to us of all moneys received by you."

F On the same day the second plaintiff received a letter, also signed by each of The Troggs in the following terms:

"On the advice of our solicitors and on our counsel's advice we have terminated all agreements between The Troggs and [the first plaintiff]. In as much as you are a controlling party of [the first plaintiff] and by reason of the breach of the fiduciary relationship between [the first plaintiff] and The Troggs you have renounced and determined the various agreements between the undersigned and you. Demand is hereby made that you return all moneys received and that you re-assign all copyrights to the undersigned as a result thereof."

G Mr. Harvey and Mr. Block of the defendant company had been approached

A plaintiff. Immediately prior to June 19, 1967, Mr. Harvey and Mr. Block of the defendant company had put itself forward as the agents of The Troggs, denied that the defendant company had any authority to do so or any authority to act outside the United Kingdom. The defendant company did not produce any written evidence of the terms of its engagement, though the defendant company's intention, if no injunction were granted, to enter into contractual obligations with The Troggs inconsistent with the obligations entered into by The Troggs with the first plaintiff was not denied. The Troggs claimed to be entitled to disregard the agreements with the first plaintiff. They claimed that they were never informed that Mr. Page and the first plaintiff were in any way connected with the second plaintiff. On this His Lordship intimated that he was satisfied that the existence of a connexion between the first plaintiff and the second plaintiff was not concealed from The Troggs. In the evidence on behalf of the defendants, filed on the motion, there were other allegations, both general and particular, including one of cheating The Troggs. On these His Lordship said that he saw no purpose in referring to that evidence in any detail; it was sufficient to say that, as regards the particular allegations, the plaintiffs had satisfied him that they were unlikely to be made good at the trial.

B C. A. Settle, Q.C., and J. E. Williams for the plaintiffs.
Sir Andrew Clark, Q.C., and R. Shulman for The Troggs.
S. L. Newcombe for the defendant company.

C STAMP, J., having referred to the four agreements with The Troggs, and having intimated in regard to the management agreement that the last few words of the passage quoted at p. 823, letter I, ante, were relevant to a defence put forward by the defendants and, after reviewing the evidence on the motion, having made the findings of fact hereinbefore stated, continued: The defendants have not, in my judgment, established a prima facie case for the view that there were such breaches by the first plaintiff of its duty to The Troggs as to justify The Troggs in repudiating the agreements which they made with the first plaintiff.

D If all that I had to do was to determine whether the first plaintiff had made out a prima facie case of breach of contract entitling it to damages, I would hold that it had, entitling the plaintiffs to make a heavy claim for damages against the defendants. It does not follow, however, that because the plaintiffs have made out a prima facie case for succeeding in recovering damages in the action, that they have made out a prima facie case, or any case, for an interlocutory or any injunction. The plaintiffs, relying on *Lumley v. Wagner* (1) and the cases which have followed it, claim, as regards the first plaintiff, an order that the first four defendants and each of them be restrained until trial from engaging as their managers or agents or personal representatives in the branches of the entertainment industry referred to in cl. 1 of the agreement of Feb. 1, 1966, or, from engaging as their managers conducting all their affairs relating to their professional careers in any medium of professional entertainment any person firm or corporation other than the first plaintiff; and further, an injunction restraining each of The Troggs acting as a group from publishing or causing to be published any music performed by them otherwise than through the medium of the first or second plaintiffs. Then, for an order that the defendant company be restrained until trial from inducing or procuring any breach or further breach by The Troggs as a group or otherwise of agreements between the plaintiffs and The Troggs for the

E and having referred to the four agreements with The Troggs, and having intimated in regard to the management agreement that the last few words of the passage quoted at p. 823, letter I, ante, were relevant to a defence put forward by the defendants and, after reviewing the evidence on the motion, having made the findings of fact hereinbefore stated, continued: The defendants have not, in my judgment, established a prima facie case for the view that there were such breaches by the first plaintiff of its duty to The Troggs as to justify The Troggs in repudiating the agreements which they made with the first plaintiff. If all that I had to do was to determine whether the first plaintiff had made out a prima facie case of breach of contract entitling it to damages, I would hold that it had, entitling the plaintiffs to make a heavy claim for damages against the defendants. It does not follow, however, that because the plaintiffs have made out a prima facie case for succeeding in recovering damages in the action, that they have made out a prima facie case, or any case, for an interlocutory or any injunction. The plaintiffs, relying on *Lumley v. Wagner* (1) and the cases which have followed it, claim, as regards the first plaintiff, an order that the first four defendants and each of them be restrained until trial from engaging as their managers or agents or personal representatives in the branches of the entertainment industry referred to in cl. 1 of the agreement of Feb. 1, 1966, or, from engaging as their managers conducting all their affairs relating to their professional careers in any medium of professional entertainment any person firm or corporation other than the first plaintiff; and further, an injunction restraining each of The Troggs acting as a group from publishing or causing to be published any music performed by them otherwise than through the medium of the first or second plaintiffs. Then, for an order that the defendant company be restrained until trial from inducing or procuring any breach or further breach by The Troggs as a group or otherwise of agreements between the plaintiffs and The Troggs for the

A management of the Troggs by the first plaintiff or the publication by other plaintiff of the music of The Troggs in accordance with the terms of the four written agreements which are referred to at pp. 823 and 824, ante.

B Counsel for The Troggs submits that even if the plaintiffs had throughout acted impecably towards The Troggs, no such injunction as is asked for ought to be granted. He advances three propositions on behalf of The Troggs. (i) That specific performance is never granted to enforce a contract for personal services. (ii) That an injunction is never granted which would have the effect of preventing an employer discharging an agent who is in a fiduciary position vis-à-vis the employer. He emphasises that here the first plaintiff, as manager and agent of The Troggs, is in the position of an employee. (iii) That an injunction is never granted at the suit of the party against whom the party to be restrained could not obtain specific performance. It is urged—and, in my judgment, correctly—that The Troggs could have no action for specific performance of the management or agency agreements against the first plaintiff.

C The present case is clearly distinguished, in principle, from such cases as *Lumley v. Wagner* (2), for there the only obligation on the part of the plaintiffs seeking to enforce the negative stipulation was an obligation to pay remuneration and an obligation which could clearly be enforced by the defendants. Here, however, the obligations to the first plaintiff, involving personal services, were obligations of trust and confidence and were obligations which, plainly, could not be enforced at the suit of The Troggs. Here, indeed, so it seems to me, the totality of the obligations between the parties are more a joint venture almost approaching the relationship of partners than anything else, involving mutual confidence and reciprocal obligations on all sides.

D For the purposes of consideration of equitable relief, I must, I think, look at the totality of the arrangements, and the negative stipulations on which the plaintiffs rely, are, in my judgment, no more or less than stipulations designed to tie the parties together in a relationship of mutual confidence, mutual endeavour and reciprocal obligations. Those considerations, in the view of *KNIGHT BRUCE, L.J.*, in *Johnson v. Shrewsbury and Birmingham Ry. Co.* (3), and *Pickering v. Bishop of Ely* (4), on which he relied in the former case, distinguish *Lumley v. Wagner* (2). I quote from the judgment of *KNIGHT BRUCE, L.J.* (5):

E "It is clear in the present case that, had the defendants been minded to compel the plaintiffs to perform their duties against their will, it could not have been done. Mutuality therefore is out of the question, and, according to the rules generally supposed to exist in courts of equity, that might have been held sufficient to dispose of the matter; cases however have existed where, though the defendant could not have been compelled to do all he had undertaken to do by the contract, yet as he had contracted to abstain from doing a certain thing the court has interfered reasonably enough.

F "A case (6), lately much referred to on this point is that of a Gorman singer, who, having found probably that more could be obtained by breaking her promise than by keeping it, determined to obtain the larger sum and accordingly to break her promise. She could not be compelled to sing as she had contracted to do, but as she had contracted not to sing at any other place than the one specified in the agreement, she was (and very properly in my opinion) restrained from singing at any other place. There all the obligations on the part of the plaintiff could have been satisfied by the payment of money, but not so those of the defendant. Here the parties are reversed. Here all the obligations of the defendants can be satisfied by paying money; but not so the obligations of the plaintiffs, who come here for the purpose in effect of compelling the defendants, by a prohibitory or

(2) [1843-60] All E.R. Rep. 368; (1852), 1 Do G.M. & G. 604.
(3) (1853), 3 Do G.M. & G. 914.
(4) (1843), 2 Y. & C.Ch. Cas. 249.
(5) (1853), 3 Do G.M. & G. at p. 927.

A mandator of injunction, as the plaintiffs could not be compelled to do. correlative acts are such as the plaintiffs could not be compelled to do.

B Apart altogether, however, from the lack of mutuality of the right of enforcement, this present case, in my judgment, fails on the facts at present before me on a more general principle, the converse of which was conveniently stated in the judgment of *BRANSON, J.*, in *Warner Brothers Pictures Inc. v. Nelson* (7). *BRANSON, J.*, stated the converse of the proposition and the proposition, correctly stated, is, I think, this, that where a contract of personal service contains negative covenants, the enforcement of which will amount either to a degree of specific performance of the positive covenants of the contract or to the giving of a decree under which the defendant must either remain idle or perform those positive covenants, the court will not enforce those negative covenants.

C In the *Warner Brothers* case (8) *BRANSON, J.*, felt able to find that the injunction sought would not force the defendant to perform her contract or remain idle. He said:

D "It was also urged that the difference between what the defendant can earn as a film artiste and what she might expect to earn by any other form of activity is so great that she will in effect be driven to perform her contract. That is not the criterion adopted in any of the decided cases. The defendant is stated to be a person of intelligence, capacity and means, and no evidence was adduced to show that, if enjoined from doing the specified acts otherwise than for the plaintiffs, she will not be able to employ herself both usefully and remuneratively in other spheres of activity, though not as remuneratively as in her special line. She will not be driven, although she may be tempted, to perform the contract, and the fact that she may be so tempted is no objection to the grant of an injunction."

E So it was said in this case, that if an injunction is granted The Troggs could, without employing any other manager or agent, continue as a group on their own or seek other employment of a different nature. So far as the former suggestion is concerned, in the first place, I doubt whether consistently with the terms of the agreements which I have read, The Troggs could act as their own managers (9); and, in the second place, I think that I can and should take judicial notice of the fact that these groups, if they are to have any great success, must have managers. Indeed, it is the plaintiffs' own case that The Troggs are simple persons, of no business experience, and could not survive without the services of a manager.

F As a practical matter on the evidence before me, I entertain no doubt that they would be compelled, if the injunction were granted on the terms that the plaintiffs seek, to continue to employ the first plaintiff as their manager and agent and it is, I think, on this point that this case diverges from the *Lumley v. Wagner* case (10) and the cases which have followed it, including the *Warner Brothers* case (11): for it would be a bad thing to put pressure on The Troggs to continue to employ as a manager and agent in a fiduciary capacity one, who, unlike the plaintiff in those cases who had more to pay the defendant money, has duties of a personal and fiduciary nature to perform and in whom The Troggs, for reasons good, bad or indifferent, have lost confidence and who may, for all I know, fail in its duty to them.

G On the facts before me on this interlocutory motion, I should, if I granted the injunction, be enforcing a contract for personal services in which personal services are to be performed by the first plaintiff. In *Lumley v. Wagner* (10), *LORD SR. LEONARDS, L.C.*, in his judgment, disclaimed doing indirectly what he could not

(7) [1936] 3 All E.R. 160 at p. 105; [1937] 1 K.B. 209 at p. 217.
(8) [1936] 3 All E.R. at p. 167; [1937] 1 K.B. at p. 219.
(9) Cf. p. 823, *letter I, ante*.
(10) [1843-60] All E.R. Rep. 368; (1852), 1 Do G.M. & G. 604.

...society, and in the present case, by granting an injunction I would, in my judgment, be doing precisely that. I must, therefore, refuse the injunction which the first plaintiff seeks. The claim of the second plaintiff seems to me to be inextricably mixed up with the claim by the first plaintiff and no separate argument has really been addressed to me on the basis that the second plaintiff might succeed although the first plaintiff failed to obtain an injunction at the trial.

Motion dismissed.

Solicitors: *Stephenson, Harwood & Tatham* (for the plaintiffs); *Timothy Hardacre* (for the first defendants); *Prentice Kirkwood & Co.* (for the second defendants).

[Reported by *PATRICIA JOHNSTON, Barrister-at-Law.*]

PRACTICE DIRECTION.

PROBATE, DIVORCE AND ADMIRALTY DIVISION (DIVORCE).

Nullity—Evidence—Medical inspectors' evidence—Written statement—Affidavit—Evidence Act, 1938 (1 & 2 Geo. 6 c. 28), s. 1 (2)—Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619), r. 25 (1).

Practitioners are reminded that under s. 1 (2)* of the Evidence Act, 1938, a court may accept a documentary statement admissible under subs. (1) notwithstanding that the maker of the statement is available but not called as a witness, if having regard to all the circumstances of the case the court is satisfied that undue expense would otherwise be caused; and are asked to consider in suits for nullity on the ground of incapacity making use of this provision to submit the report of the medical inspector appointed by the court without requiring his presence as a witness. Since the Evidence Act, 1938, only applies to evidences of fact and since curability is probably a matter of opinion, the provisions of the Act would, no doubt, be inapplicable in those rare cases where curability is in question; but in such cases practitioners should consider whether, in order to spare the medical inspector, his evidence could conveniently be given on affidavit under Matrimonial Causes Rules, 1957, r. 25†.

Though such methods of proof may be particularly relevant to undefended cases, there might well be defended cases where they would also be appropriate. The practice suggested above may be specially applicable to cases tried outside London, since in London the lists can generally be fixed in such way as to avoid inconvenience to medical inspectors.

Where an application to admit a report is made before the trial, it can be dealt with under r. 25 (1) (c) of the Matrimonial Causes Rules, 1957, or in the case of an affidavit, under r. 25 (1) (b).
By the direction of the President.

COMPTON MILLER,
Senior Registrar.
Oct. 31, 1967.

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[COURT OF APPEAL, CRIMINAL DIVISION (Lord Parker, C.J., Winn, L.J., and Cooke, J.), October 10, 1967.]

Criminal Law—Burden of proof—Self-defence—Provocation—Resistance to violent felony—Direction to jury—No burden of proof on defence—Matter to be disproved by prosecution.

Criminal Law—Trial—Summing-up—Evidence—Failure of defence or prosecution to call witness in whose defence accused alleges that he acted—Undesirability of comment.

Where there has been a killing, or the infliction of violence that does not prove fatal, in circumstances where the defendant puts forward a justification such as self-defence, provocation, or resistance to a violent felony, it is essential that the matter should be so put to the jury that there is no danger of their failing to understand that none of the issues of justification are properly to be regarded as defences; further, if such justification is referred to by the judge as a defence, it is particularly important that he should make it clear to the jury that no onus in respect of the justification rests on the accused, but that the matter is one which the prosecution must disprove before a verdict of guilty is justified (see p. 830, letters B to D, post).

POURCEAN: where neither the prosecution nor the defence call a witness, in whose defence against a violent crime the accused alleges that he acted and whom the prosecution at one time contemplated calling, it is undesirable for the trial judge to comment on the defence not having called the witness (see p. 830, letter I, and p. 831, letter D, post).

[As to self-defence and defence of others, see 10 HALSBURY'S LAWS (3rd Edn.) 743, para. 1429; and for cases on the subject, see 15 DRAST (Repl.) 994, 995, 9768-9784.

As to the content of a summing-up, see 10 HALSBURY'S LAWS (3rd Edn.) 424, para. 780.]

Application.

On May 2, 1967, at the Central Criminal Court before BLAIR, J., and a jury, the applicant, Paul Francis Howard Wheeler, was arraigned on an indictment containing two counts; one charged him with murder of John Robertson Tuckerman on Dec. 7, 1966, and the other charged the accused with robbery with violence of John Robertson Tuckerman on the same day. The applicant was convicted on May 10, 1967, (i) of manslaughter and (ii) of simple larceny. He was sentenced to five years' imprisonment concurrent in respect of the larceny, to eighteen months' imprisonment concurrent in respect of the robbery, making five years in all. He applied for leave to appeal against conviction of manslaughter and for leave to appeal against sentence.

The facts, summarily stated, were that the applicant was spending the night with his common law wife, Wendy Gravestock, in Tuckerman's flat. The prosecution's case was that the applicant had attacked Tuckerman with a view to the theft of the latter's wallet, though the applicant had no reason to think that Tuckerman had money on him. Tuckerman had been hit by the applicant three or possibly four blows on the side of his head or neck with a whisky bottle, which was partly filled and the applicant had kicked him in the face with his bare feet. The medical evidence showed that the probable cause of death was asphyxia from blood, as a result of Tuckerman's having turned over onto his face after his nose had been fractured by the kick, which caused a good deal of bleeding. The applicant's account of the matter was that he was sleeping with Wendy Gravestock on a mattress in the hall of the flat, when about 2 a.m. in the morning of Dec. 7, 1966, Tuckerman came to the mattress, pulled back the bedclothes

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[COURT OF APPEAL]

DENMARK PRODUCTIONS LTD. v. BOSCOBEL
PRODUCTIONS LTD.

[1965 D. No. 1969]

C. A.

1968
March 25, 26,
27, 28, 29;
May 1, 2, 3;
June 28

HARMAN,
SALMON
and
WINN L.JJ.

Contract—Implied term—Musical group and manager—Whether implied term manager should do nothing to forfeit their confidence.

Contract—Frustration—Personal services—Contract to co-manage musical group—Performance of contract through personal manager—Refusal of group to be managed by personal manager—Whether contract frustrated.

Contract—Repudiation—Refusal to accept—Contract to co-manage musicians—Remuneration by percentage of earnings—Repudiation by co-managers—Action for an account—Whether remedy of an account available—Whether sole remedy damages.

Master and Servant—Wrongful dismissal—Form of relief—Contract to co-manage musical group repudiated—Whether tantamount to wrongful dismissal—Whether action for an account misconceived—Whether sole remedy damages.

Injunction—Breach of contract—No damage—Contract to assign musical compositions to plaintiff company—Musical compositions exploited by plaintiff company's director—No benefit to plaintiff company—Whether injunction lay.

By agreements between the defendants and each member of a group of pop musicians each member of the group appointed the defendants his personal manager for five years and the defendants agreed to do their best to promote the musicians and manage performances. Each member gave the defendants an exclusive right to the placing of any musical compositions which he might compose.

Each member agreed to pay the defendants 40 per cent. of his gross earnings. By an agreement between the plaintiffs and the defendants it was agreed that the plaintiffs would jointly with the defendants manage the group and in consideration of their services as co-managers the defendants agreed to pay the plaintiffs 10 per cent. of the group's gross earnings. The defendants further agreed to assign to the plaintiffs their rights of placing the musical compositions of the group or any one of them. One of the directors of the plaintiffs owned a music publishing firm and his object was that he should through the plaintiffs obtain the rights of placing the musical compositions of the group, which were valuable. However, the plaintiffs did not receive any benefit from the exploitation of those rights. At the date of the agreements the group was unknown, but within a short time thereafter they became very successful and achieved world-wide popularity.

The defendants performed their obligations under their contracts with the group through the services of the other director of the plaintiffs, who was himself a former pop musician and who acted as their personal manager. He persuaded the group to undertake a tour of the United States of America for three weeks in June and July, 1965, and agreed to go with them as their

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personal manager. When two-thirds of the tour had been completed he left them in America and returned to England, having told every member of the group except their leader of his proposed departure. When the leader learnt of the personal manager's departure he was indignant and the group decided while still in America to have nothing further to do with him. Upon their return to England they approached the defendants with a view to ridding themselves of the personal manager and the defendants introduced them to a solicitor for that purpose. On September 2, 1965, the solicitor wrote to the plaintiffs, saying that the pop group would have nothing more to do with the personal manager, and to the defendants determining their agreements with the defendants but suggesting the negotiation of fresh contracts provided any obligations to the plaintiffs were renounced. In reply to a letter from the plaintiffs' solicitors threatening legal proceedings in the event of any breach by the defendants of their contract with the plaintiffs the defendants wrote on September 14, 1965, that their contract with the group had been determined and that they had decided to negotiate a fresh contract with them with a special clause that their management responsibilities could not be farmed off. The plaintiffs received no payments after June, 1965.

In an action by the plaintiffs claiming an account of the group's earnings after June, 1965, and payment of 10 per cent. to them, and an injunction to restrain the defendants from placing the musical compositions of the group with anyone but themselves, Widgery J. held that the refusal of the group to have anything to do with the personal manager made the further performance of the contract between plaintiffs and defendants impossible, and he dismissed the plaintiff's action on the ground that their contract had been frustrated.

On appeal by the plaintiffs:—

Held, allowing the appeal, (Per Harman and Salmon LJJ., Winn L.J. not relying on these grounds), (1) that the doctrine of frustration applied to contracts which became impossible of performance through some supervening event for which neither party was responsible, but since the defendants, by introducing the group to a solicitor and seeing the solicitor on their behalf with a view to ridding them of the personal manager, had assisted them to determine their contracts, the defendants could not rely on frustration (post, pp. 853A-C, 863A-B).

Constantine (Joseph) Steamship Line Ltd. v. Imperial Smelting Corporation Ltd. [1942] A.C. 154; [1941] 2 All E.R. 165, H.L. (E.), applied.

(2) That by their letter of September 14, 1965, the defendants had repudiated their contract with the plaintiffs, which repudiation was tantamount to a dismissal of the plaintiffs as co-managers, and that since the sole remedy for wrongful dismissal was an action for damages the claim for an account after September 14, 1965 was misconceived and failed; but that the plaintiffs were entitled to an account between June, 1965, and September 14, 1965, for until that date the contract was alive and subsisted (post, pp. 854A-C, F-G, 863F-H).

Goodman v. Pocock (1850) 15 Q.B. 576, *French v. Brookes* (1830) 6 Bing. 354 and *Fewings v. Tisdal* (1847) 1 Exch. 295, applied.

(3) That the claim for an injunction to restrain the defendants from placing the musical compositions of the group with anyone but the plaintiffs was misconceived and failed because the plaintiffs derived no benefit from the exploitation of those rights

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and the object of the claim was to benefit a third party, albeit that he was a director and shareholder of the plaintiffs (post, pp. 850A-B, 861F).

Per Winn L.J.: The relationships between the group and their personal manager required a high degree of mutual confidence between them, and there was an implied term in the contract between the plaintiffs and defendants that the personal manager through whom the plaintiffs would exercise their managerial functions would do nothing which he could reasonably foresee would destroy that confidence; since the personal manager should reasonably have foreseen that his desertion of the group in the United States would destroy their confidence, he and through him the plaintiffs were in breach of that term, which disabled them from performing the services for which they were to be paid remuneration, and, accordingly, discharged the contract between the plaintiffs and defendants as from September 14, 1965, when the defendants intimated that they would no longer perform it (post, pp. 856H, 857A-D, F, 858A-B).

Page One Records Ltd. v. Britton [1968] 1 W.L.R. 157; [1967] 3 All E.R. 822 considered.

Per Salmon L.J.: Although the relationship between the group and their personal manager was of a confidential nature, there was no implied term that the manager should do nothing to destroy their confidence in him; there might be an implied term that he should take all reasonable steps to preserve their confidence, but there had been no breach of that term (post, p. 853E-F, H).

Decision of Widgery J. reversed.

APPEAL from Widgery J.

The following statement of facts is taken substantially from the judgment of Harman L.J.

In December, 1963, there were three young men, Raymond Davies, David Davies, and Peter Quaife, who had been performing together for about two years as musicians and singers in a pop group. They were unknown to the public and had achieved no success. They called themselves "The Kinks." The music of pop groups was enormously profitable to its producers, partly by live performances on the stage, and perhaps even more by the sale of records and other profitable activities. All groups attracted and required the services of numerous hangers-on acting as managers or producers or agents of various sorts. The Kinks were no exception in that respect. In December, 1963, they came under the notice of one Wace, himself only about 21, who was anxious to occupy himself in the management of such a group. He had an associate, one Collins, who was a stockbroker in active practice, but who was also anxious to manage pop artistes. Neither of them knew the first thing about how to conduct such an activity. At that juncture Wace became acquainted with one Larry Page and sought to interest him in the group. Mr. Page was in a different position to the other two: he had himself been a pop singer and at the end of 1963 was in the employment of an American organisation (Edward Kassner Music Publishing Corporation) owned or run by Mr. Edward Kassner, very large publishers of pop music in the

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United States. The vehicle for Mr. Page's activities was the plaintiff company, Denmark Productions Ltd., formed in 1963 and in which Mr. Page and Mr. Kassner each had a half interest. Mr. Page had also had some experience of management of pop artistes. Wace took him to hear The Kinks play and he immediately recognised their abilities. As a result the three (Page, Wace and Collins) agreed to manage the group and a letter came into existence written by Mr. Page on behalf of the plaintiffs and addressed to Collins under which it was agreed that Page should act as co-manager with the others of the group for a consideration of 10 per cent. of the group's gross earnings. That was a temporary arrangement and was discussed with the group, or at least with its leader Raymond Davies, who was aware that the managers between them were asking for 40 per cent of the group's gross earnings. Mr. Page began to be active in promoting the group, i.e., making them known in the right quarters and securing engagements for them, for which purpose he appointed yet another agent, one Howes. Meanwhile Wace and Collins caused to be formed the defendant company, Boscobel Productions Ltd., to act as "personal managers" of the group. A solicitor was engaged who caused an agreement dated February 12, 1964, to be drawn up with each of the three members of the group under which the member or "performer" appointed the defendants, called "the personal manager," sole and exclusive manager for all the performer's activities in connection with entertainment for five years and with an option to extend. Under those agreements the performer bound himself not to enter into any other exploitation of his talents and to perform all contracts and engagements to the best of his skill and ability. The personal manager for his part agreed through the board of directors (Wace and Collins) to advise the performer to the best of his skill and ability as to the suitability of contracts and engagements and the best terms to be accepted, and to do his best to promote the name and reputation of the performer and to appoint an agent or agents for the arrangement of appearances. Under clause 10 the personal manager became responsible for the publication and presentation of all the compositions of the performer, who was forbidden to publish or present them to anyone else. Under clause 12 the personal manager was to collect the earnings of the performer and was entitled to retain 40 per cent., out of which he had to pay the agents' fees. The personal manager might determine the agreement on 12 months' notice.

In fact, all performances were by the group and not by individual performers, but musical composition was that of one or other of them, the only important one for the present purposes being Raymond Davies, in whose favour at a later date royalties on his compositions were released from the scope of the agreement. When those agreements were made none of The Kinks was of age. At about that time another young man, Michael Avory, joined the

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A group and also entered into agreement with the defendants in the like terms.

The present action was based on an agreement between the plaintiffs and defendants dated February 26, 1964, which recited the three agreements of February 12 and provided, inter alia,

"(1) The [plaintiffs] will through Mr. Larry Page one of its directors act jointly with the [defendants] as manager of The Kinks in the same manner and to the same extent and subject to the same liabilities as if the [plaintiffs] had joined in the said three agreements as a manager jointly with the [defendants]. (2) This agreement shall subsist for the duration of the said agreements. (3) The [defendants] shall during the subsistence of this agreement pay to the [plaintiffs] by way of remuneration for their services hereunder 10 per cent. of the gross earnings earned by The Kinks from all sources. . . . (6) The [defendants] hereby assign to the [plaintiffs] all their rights of placing any and all musical compositions or lyrics for musical compositions that are written wholly by The Kinks or by any one or combination of them."

Mr. Page and Mr. Kassner set great store by clause (6). It was not directly profitable to the plaintiffs, but enabled them through Mr. Page to channel all the compositions of Raymond Davies through the Kassner publishing organisation which was what Mr. Kassner wanted since it was a source of great profit to him. It might also have been a very good bargain for Raymond Davies and the group, and thus indirectly to the plaintiffs if it enhanced the group's reputation. Mr. Page said that without that right, 10 per cent. commission would have been unacceptable.

The Kinks were a great success; their earnings rocketed from nothing to £90,000 per annum and by the end of 1964 their reputation was world-wide. In particular Raymond Davies was a most successful composer of songs, one of which, "You really got me," became "Top of the Pops" in England in August, 1964. All his compositions were handed over to the Kassner organisation in accordance with Mr. Page's obligations to his employer Kassner, and it was significant that Mr. Page's remuneration for that activity was largely increased in August, 1964. Raymond Davies was aware that Kassner's were handling his compositions and, indeed, he assigned them over, one by one himself, and that was very profitable to him.

In the early part of 1965 it was proposed that The Kinks should undertake a tour of the United States of America. They were advised that such a tour was immensely important to them, the American market being far the biggest outlet both for performances and for recording. Kassner, in particular, was in favour of the venture because it would enhance his publishing profits. There had been, however, great stresses between the members of the group (on one occasion there had been a fight on the stage in Cardiff), who behaved in a thoroughly prima donna-ish manner and it needed all Mr. Page's tact and care to keep it together. He did, in the early days anyhow, the lion's share of the promotion

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activities, the defendants attending to the book-keeping side. Raymond Davies was unwilling to go to America, but was eventually persuaded by Mr. Page to go on the footing that Mr. Page himself should go as personal manager. Apparently, on a foreign tour young pop musicians took with them not only a tour manager, who acted as a kind of courier, but also a personal manager, who was there to look after them in their personal difficulties, to smooth over the troubles arising from day to day, to collect money at the box office, to ward off the dragons of the revenue, to see that the programme of engagements was either kept or cancelled as the case might be, and generally to act as a kind of guide, philosopher and friend to the members of the group.

Mr. Page was anxious to go on the tour, having possibly in his mind that he might pick up other business there; that was in fact what he did, as he was entitled to do, The Kinks having no exclusive rights to his services. It was agreed between him and the defendants after some discussion that he, rather than they or some nominee of theirs, should perform this most important task.

The tour was planned to last from June 28, 1965, to July 10, 1965, and was of a most arduous nature, involving a number of one-night stands and, in particular, three days at Los Angeles. Things did not go at all smoothly and the tour was afterwards described by Mr. Page in a trade paper as having been a disaster, but the judge's impression was that on the whole it did not go too badly. Raymond Davies was particularly unhappy and demanded that his wife should be flown out to help and comfort him and that was arranged by Mr. Page by cable and she arrived on the night of July 3 at Los Angeles. Mr. Page in the meanwhile had decided that his other activities made it desirable for him to return to England. On July 3 he told the other members of the group of that, but not Raymond Davies. He gave as his reason that that would only produce an outburst of temperament by that young man. He, therefore, departed on the morning of July 4, just before the group were due to take an aeroplane to San Francisco, where the remaining activities of the tour were to be performed. His departure was a great shock to Raymond Davies, who relied on the advice and countenance of Mr. Page in his distress, and the whole group held an indignation meeting on the airfield on the morning of July 4 and then and there decided to have no more to do with Mr. Page and to get rid of his services if they could. The question whether any of the group objected to Mr. Page's departure when he told them of it was not explored at the trial except with Michael Avory who said that he had no objection because he thought that Mr. Page had important matters pending in London. The judge found that Mr. Page left for some private reason which he had not revealed.

Some of the remaining engagements were cancelled, but four of them were kept and the tour ended on July 10 without any notable further upset. Raymond Davies and his brother returned to

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London on July 11 and promptly told Wace, who met them, that they wanted to be rid of Mr. Page if they could. The other members of the group returned 10 days later and they all agreed on that and applied to Wace as their manager to help them. He took their part, feeling according to him that Mr. Page had let them down, and at the beginning of August he introduced them to a solicitor to advise them how best to free themselves from Mr. Page and his 10 per cent.

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The solicitor advised the group that the way to get rid of Mr. Page was to repudiate their agreement with the defendants, and on September 2, he wrote a letter to the plaintiffs in which he alleged that his clients, members of the group, were extremely dissatisfied with Mr. Page and intended to have no more to do with him. The reasons he gave were, first, that the assignment by the defendants of rights under the management agreements of February 12 to Mr. Page was unknown to his clients and not binding on them on that ground and because his clients were infants. The members of the group, however, had in fact known all along that Mr. Page had been associated with the defendants' directors as their manager and they had in fact accepted him as such. The group's solicitor further objected that the assignment of the composers' rights to the plaintiffs was unknown to and not binding on them. On the same day the group's solicitor sent a copy of that letter to the defendants, claiming to be free of the agreements of February 12, 1964, but suggesting that they might be resumed if the obligations to Mr. Page were renounced. The defendants did not reply to that letter. On September 8, 1965, the plaintiffs' solicitors wrote to the defendants threatening legal proceedings in the event of the defendants breaking their agreement. On September 14 the defendants replied by letter to the plaintiffs' solicitors as follows:

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" We received your letter of September 8, and we would like to point out that there is no quarrel between our company and your clients, Denmark Productions Ltd., and as far as we are concerned there has been no breach by us of the above agreement. We have had a letter from Mr. Michael Simkins, solicitor, representing The Kinks, stating that our agreement with them is determined, which, in view of the fact that The Kinks have offered to re-negotiate a contract with us on much the same lines as the last, with a special clause saying that we must not farm off any of the management responsibilities, we have decided to accept the fact."

By this action the plaintiffs, treating the contract as alive and subsisting, claimed an account of the earnings of The Kinks after June, 1965, since when the plaintiffs had not received any remuneration, payment of 10 per cent. of those earnings as moneys due to the plaintiffs for remuneration, and an injunction restraining the defendants from placing the musical compositions of The Kinks or any of them with anyone but the plaintiffs. Widgery J. held that The Kinks were justified in refusing to have anything more to do with Mr. Page after his desertion of them in the United States, and that their refusal to have anything to do with him made the

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further performance of the contract between the plaintiffs and defendants impossible. He accordingly, dismissed the plaintiffs' action on the ground that their contract with the defendants had been frustrated. The plaintiffs appealed.

Alan Campbell Q.C. and Michael Kempster for the plaintiffs.
Robin Dunn Q.C. and Andrew Bateson for the defendants.

The following cases, in addition to those referred to in the judgments, were cited in argument: *Stratford (J. T.) & Son Ltd. v. Lindley*¹; *Bettini v. Gye*²; *Lumley v. Gye*³; *Morgan v. Manser*⁴; *Boston Deep Sea Fishing and Ice Co. v. Ansell*⁵; *British & Beningtons Ltd. v. North Western Cachar Tea Co. Ltd.*⁶; *Portage v. Cole*⁷; *Hochster v. De la Tour*⁸; *Omnium d'Entreprises v. Sutherland*⁹; and *Heyman v. Darwins*.¹⁰

Cur. adv. vult.

June 28. HARMAN L.J. asked Salmon L.J. to deliver the first judgment.

SALMON L.J. in the course of stating the facts, said: There is no doubt, as the judge has found, that although the Kinks might not have been familiar with all the details of the agreements of February 12 and February 26, 1964, they understood their contents broadly and approved them. Indeed, these written agreements did no more than put into legal form, rather clumsily, what the Kinks had previously accepted. In my view, the Kinks were bound under the agreements of February 12 to allow the defendants to carry out most of their managerial obligations under these agreements through Mr. Page, and that is what happened for about 18 months until July, 1965. The defendants' managerial duties under the agreements could be carried out only by some person. Clause 4 of the agreements designated the defendants' directors as the persons to carry out certain advisory duties. The other clauses of the contracts are silent as to the persons who should carry out on the defendants' behalf the managerial duties to which they refer. The defendants would have been entitled to appoint any competent person to carry out these duties. It was, however, understood that they would carry out most of these duties through Mr. Page; and they did so. [His Lordship after stating further facts leading up to the Kinks' return from the United States of America continued]: Since the defendants were contractually bound to the plaintiffs to act jointly with Mr. Page as personal manager of the Kinks, Mr. Wace should have told Ray

¹ [1965] A.C. 269; [1964] 3 W.L.R. 541; [1964] 3 All E.R. 102, H.L.(E.).

² (1876) 1 Q.B.D. 183.

³ (1853) 2 E. & B. 216.

⁴ [1948] 1 K.B. 184; [1947] 2 All E.R. 666.

⁵ (1888) 39 Ch.D. 339, C.A.

⁶ [1923] A.C. 48, H.L.(E.).

⁷ (1669) 1 Wms. Saund. 319.

⁸ (1853) 2 E. & B. 678.

⁹ [1919] 1 K.B. 618, C.A.

¹⁰ [1942] A.C. 356; [1942] 1 All E.R. 337, H.L.(E.).

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Davies to be separately advised by a solicitor, but instead went to see a solicitor, Mr. Simkins, on the Kinks' behalf and enquire whether it would be possible to get rid of Mr. Page, and, if so, how. [His Lordship read the letters of September 2 and 8, 1965, and continued]:

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On September 14, 1965, the defendants wrote to the plaintiffs' solicitors a most important letter the first two paragraphs of which I must read.

ed to in the & Son Ltd. Morgan v. Ansell⁵; Tea Co. Ltd.⁶; d'Entreprises

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"We received your letter of September 8, and we would like to point out that there is no quarrel between our company and your clients, Denmark Productions Ltd., and as far as we are concerned there has been no breach by us of the above agreement. We have had a letter from Mr. Michael Simkins, solicitor, representing The Kinks, stating that our agreement with them is determined, which, in view of the fact that The Kinks have offered to re-negotiate a contract with us on much the same lines as the last, with a special clause saying that we must not farm off any of the management responsibilities, we have decided to accept this fact."

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In my view, this letter, although couched in quite friendly terms, is a clear notice that the defendants regard themselves as no longer bound by their agreement with the plaintiffs and that as from the date of the letter that agreement is at an end. In short, the letter, in my judgment, was a clear repudiation of their agreement with the plaintiffs.

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The plaintiffs did not, however, elect to treat the contract as at an end. They brought this action on the basis that the contract was alive and claimed, inter alia, an account of the gross earnings of The Kinks and payment of 10 per cent. of their earnings, due, it is alleged, under the contract from June, 1965, until judgment.

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For reasons which will presently appear, I think the plaintiffs are entitled to an account and payment of 10 per cent. from June, 1965, until the date of repudiation, that is to say until September 14, 1965. Even if the repudiation was wrongful (as I am inclined to think it was), the plaintiffs, only remedy in respect of the period after September 14, 1965, would sound in damages for loss of earnings—and these have not been claimed. The only damages claimed are on the nebulous basis that, if Mr. Page had been retained as The Kinks' manager, their gross earnings would have been greater than they in fact were, and that, accordingly, 10 per cent. of their earnings would have represented a larger figure than it now does. This claim, which is really ancillary to and dependent upon the supposed right to remuneration under the contract after September 14, 1965, is misconceived. I gather, however, from what Mr. Campbell has said that the plaintiffs are not very interested in the 10 per cent. or in the damages either. What really concerns them is (a) the right which they allege they acquired under their agreement to place all songs and lyrics written by The Kinks, and (b) the injunction which they seek to enforce that right. No court would, however, grant such an injunction when for years these songs and lyrics have been placed elsewhere under legally binding

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contracts with third parties. I can understand the anxiety of Mr. Kassner on this score. He is one of the two shareholders in the plaintiffs. His American music-publishing corporation might have made large profits out of Ray Davies's songs and lyrics. But the plaintiffs, who are quite distinct from their shareholders, would have had no legal interest in those profits nor is there any evidence that they would have obtained any commission from placing the songs and lyrics for publication with Mr. Kassner's corporation. This part of the plaintiff's claim also is misconceived.

The defendants raised a number of defences to the action. First, that the plaintiffs were in fundamental breach of their agreement which had thereby been determined. Secondly, that the plaintiffs were unable to perform their part under that agreement. Thirdly, by an amendment on the day before the trial began, that the agreement had been frustrated. Fourthly, that the contracts of February 12 with the members of the group ended in April, 1965, and with them the contract with the plaintiffs because of fresh contracts entered into on that date between The Kinks and the plaintiffs for tax-avoidance purposes. Fifthly, that the infancy of The Kinks made the February contracts unenforceable. The last two defences were rejected by the judge and there is no cross-notice in respect of these findings.

As I have already indicated, the defendants' letter of September 14, 1965, was a clear repudiation of the agreement of February 26, 1964.

"It is now well settled that a rescission or repudiation, if given for a wrong reason or for no reason at all, can be supported if there are at the time facts in existence which would have provided a good reason":

*per Devlin J. in Universal Cargo Carriers Corpn. v. Citati.*¹ Accordingly, if the plaintiffs had through Mr. Page committed a fundamental breach of the contract of February 26, 1964, the defendants would, in my view, be entitled to rely on that breach in order to justify the repudiation contained in their letter of September 14.

A question in this case which has been much debated is whether Mr. Page's conduct in America amounted to a fundamental breach by the plaintiffs of their agreement with the defendants. In their defence the defendants made five complaints relating to Mr. Page's conduct in the United States (including a complaint about his return to England), and one complaint relating to his conduct after his return to England. The defendants alleged that all the conduct complained of amounted to a fundamental breach of contract by the plaintiffs. The judge held that all these complaints, save the one relating to Mr. Page's return to England, were "unfounded and not justified at all." He decided, however, that Mr. Page's departure for England on July 4, 1965, caused the plaintiffs to commit a breach of their contract with the defendants. The basis of that finding is rather obscure. The defendants had alleged

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¹ [1957] 2 Q.B. 401, 443; [1957] 2 W.L.R. 713; [1957] 2 All E.R. 70.

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in their defence that it was part of the duty of the personal manager of a group to accompany it throughout any foreign tour, and also that there was an express agreement between the plaintiffs and the defendants that Mr. Page should accompany The Kinks throughout this particular American tour. Neither of those allegations was accepted by the judge. He concluded, however, that if

“Mr. Page left early it was for him to justify his action either by showing that the defendants consented or that he had some other adequate reason to return I am satisfied that he came home for some private reason of his own, which he has not disclosed to me.”

And this the judge found amounted to a breach of contract by the plaintiffs. I find this puzzling, but assuming a breach, did it go to the root of the contract between the plaintiffs and the defendants, so as to entitle the defendants to treat it as discharged? Yes, said the judge, if Mr. Page by leaving the United States had put the defendants in fundamental breach of their agreements with The Kinks, so that The Kinks could repudiate those agreements and refuse to allow the defendants to carry out their duties as their personal manager through Mr. Page. The judge thought that at first sight it would seem a strong thing to hold that Mr. Page's conduct went as far as this. I respectfully agree with him. In the end, however, he came to the conclusion that it did. He based this conclusion on his appreciation of The Kinks in the witness-box.

It was not, he said, until he saw them that he began to appreciate the seriousness of what Mr. Page had done. He found that

“Mr. Page knew the group intimately and could have foreseen their reaction and by his conduct destroyed the trust which was vital to the continuance of a performer-personal manager relationship between them.”

The judge thought that if Mr. Page had been in direct contractual relationship with The Kinks, they would have been entitled to dismiss him because of his conduct in America. But what did it amount to? He was, as the judge found, under no obligation to stay to the bitter end of the tour. He told each member of the group, other than Ray Davies, that he was going home. There is no evidence that any of them objected. The only one asked about it said that he did not object. The onus is on the defendants to prove fundamental breach. All that can be laid against Mr. Page is that he did not tell Ray Davies, admittedly the leader of the group, about his decision to return to England. I am bound to say that I find it very strange that this can in reality constitute a fundamental breach of contract in any event, and, in particular, against the background of all that Mr. Page had done for the group. I hesitate to differ from the judge, for he had the advantage of seeing The Kinks, which I have not enjoyed; and he founded this part of his judgment on the view he formed of them. Mr. Wace, however, not only saw them in the witness-box, but had known them very well indeed for a long time. He had been acquainted certainly before he went off to see Mr. Simkins with all the facts

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about the American tour which were revealed in court and probably a good many more. Evidently it never occurred to him that Mr. Page's conduct in going home without telling Ray Davies amounted to a serious breach of contract, otherwise he could not have been a party to the defendants' letter of September 14 which in effect said that they put no blame upon the plaintiffs. Nor, apparently, did it occur to Mr. Simkins, for, if it had, he would not have put forward the ridiculous grounds for terminating the contract set out in his letter to the defendants of September 2. Mr. Wace and Mr. Simkins must have known much more about the personality of The Kinks than the judge had any chance of gleaning from his observation of them in the witness-box. It is very difficult indeed for me to accept a finding in the defendants' favour that there has been a fundamental breach of contract by the plaintiffs through Mr. Page when the defendants, knowing all the material facts, by their letter of September 14, 1965, negatived any such breach, and when the evidence does not, in my view, appear to establish any such breach. I have no doubt that, as Ray Davies said in evidence, he got into a state in which he hated Mr. Page and wanted no more to do with him. But emotions such as these can be induced in "pop artistes" by trivialities which fall far short of a fundamental breach of contract on the part of those who induce them.

The judge thought that the plaintiffs' breach through Mr. Page, although fundamental, did not discharge the contract because it was not accepted by the defendants. In this I think that he was mistaken, because if it was a fundamental breach, the defendants would, in my view, have been entitled to rely upon it to justify their repudiation of September 14, 1965—even although a breach was not mentioned in and indeed was disavowed by that letter. The fact that a breach was disavowed in that letter merely puts a difficulty, which I am unable to overcome, in the way of finding in favour of the writer of the letter that there was in reality such a breach. If, however, there was such a breach, it could, in my view, be relied on in justifying the repudiation contained in the letter: *Citati's case*.²

The judge found in the defendants' favour on the ground that the agreement of February 26, 1964, was frustrated. The main plank of the defendants' on frustration was that this doctrine applied, whether or not The Kinks' repudiation of the agreements of February 12, 1964, and refusal to continue with Mr. Page as personal manager was justified. The judge rejected that plank as unsound. I agree with him. He found, however, that the contract was frustrated on the ground that The Kinks were entitled to reject Mr. Page as their personal manager and also to repudiate the agreements of February 12. I think that in such circumstances a fundamental breach would have been the true answer to the plaintiffs' claim, and would make it unnecessary to consider the

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thorny topic of frustration. Besides, *Constantine (Joseph) Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.*³ puts difficulties in the way of frustration. This was a doctrine evolved by the courts to meet the case in which a contract became impossible of performance through some supervening event, not reasonably foreseeable when the contract was made and for which neither contracting party was in any way responsible. The defendants, through their director Mr. Wace, certainly took a prominent part in helping The Kinks to terminate the contracts of February 12, the termination of which is an essential part of the frustrating act of which the defendants now complain. I do not think that frustration can be successfully relied upon by the defendants, and it may be that, for the reason I have indicated, it was not set up until the very last moment.

When in this court it appeared that the defendants were unlikely to uphold the judgment in their favour on the ground of frustration, a new point was taken on their behalf. It was suggested that, as the relationship between a group such as The Kinks and their personal manager was ex hypothesi of a confidential and personal nature, a term must of necessity be implied into the contracts of February 12 and 26 that Mr. Page should do nothing to destroy The Kinks' confidence in him; that in breach of this term he had destroyed their confidence and thereby made performance of the contracts impossible in that, although ready and willing, he was unable to act as The Kinks' personal manager. For my part, I think that the suggested term is far too wide. I think that almost anything a manager might do, however harmless or trivial, could induce hatred and distrust in a group of highly temperamental, jealous and spoilt adolescents. The highest that one could, in my view, put any such implied term would be that Mr. Page should take all reasonable steps to retain the group's confidence. But I do not consider it matters much how one puts the term. However one puts it, it would go to the root of the contract since its breach is said to have made the contracts impossible of performance. The argument is that the plaintiffs through Mr. Page were in breach of this term, (however the term is formulated), and thereby disabled themselves from performing the agreement of February 26, 1964. It follows that the breach of such a term would justify the defendants' repudiation of September 14. As Devlin J. pointed out in *Citati*,⁴ it is hardly necessary in such a case to rely upon impossibility of performance, for it is so much easier to rely upon the fundamental breach as justifying the contract's discharge. I am not, however, satisfied that there was any real breach unless one puts the obligation upon the plaintiffs as high as an absolute duty to ensure that Mr. Page should retain the goodwill and confidence of The Kinks—and this I am not prepared to do.

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³ [1942] A.C. 154; [1941] 2 All E.R. 165, H.L.(E.) ⁴ [1957] 2 Q.B. 401, 443.

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I have dealt fully, and, I am afraid, at length, with all these matters because they were strenuously argued before us for many days. In the end, however, they are in reality of little consequence. It has long been well settled that, if a man employed under a contract of personal service is wrongfully dismissed, he has no claim for remuneration due under the contract after the repudiation. His only money claim is for damages for having been prevented from earning his remuneration: *Goodman v. Pocock* ⁵; *French v. Brookes* ⁶; *Fewings v. Tisdal*.⁷ A managing director, for example, engaged at £10,000 a year, who has ten years of his service agreement to run, is dismissed without cause. He cannot sit in the sun for ten years drawing his salary on the basis that he is ready, able and willing to serve as managing director if only the company would allow him to do so. His sole money claim is for damages and he must do everything he reasonably can to mitigate them. The same principle applies in the present case. The plaintiffs were engaged by the defendants under their agreement to render personal services to The Kinks, in return for which the plaintiffs were to receive 10 per cent. of The Kinks' gross takings for a certain period. The defendants, certainly with the full approval and possibly at the request of The Kinks, repudiated that agreement by the letter of September 14 and thereby prevented the plaintiffs from rendering any services and earning remuneration under the agreement. After September 14, 1965, the plaintiffs' only possible money claim was for damages—and no such claim has been made. It matters, not, therefore, whether the repudiation was wrongful or justifiable, nor whether there was a fundamental breach, frustration or something by which the plaintiffs disabled themselves from performing the contract. The only difference it would make if there were a true frustration or if the plaintiffs had disabled themselves from performing the agreement of February 26, 1964, is that they would not be entitled to remuneration beyond September 2, 1965. As it is, I think that the plaintiffs are entitled to remuneration up to September 14, 1965, the date of the repudiation. But that is all that they can recover in this action. I would, therefore, order an account of The Kinks' gross earnings between June, 1965, and September 14, 1965, and payment to the plaintiff company of 10 per cent. of that amount. To this extent only I would allow the appeal.

WINN L.J. The contracts between The Kinks and the defendants dated February 12 required the defendants to provide managerial services for each of The Kinks through their board of directors. It was not, therefore, strictly a performance of these contracts to provide such services through the activities of Larry Page. Plainly The Kinks and each of them knew at all material times

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⁵ (1850) 15 Q.B. 576.
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that Mr. Page was to perform and was performing such manager-
 ial services as they were entitled by their contracts with the defen-
 dants to receive and they welcomed his doing so. It follows that
 The Kinks must be taken to have waived any objection which they
 might as a matter of strict right have taken to this mode of
 performance of the defendants' obligations: on the other hand, it
 does not, in my opinion, follow that The Kinks ever became con-
 tractually bound to maintain such a waiver, or to accept through-
 out the term of the contracts with the defendants the managerial
 services provided by Larry Page as a performance of the defen-
 dants' obligations to serve them as manager. However, I think
 that having once accepted the position that Larry Page was, sub-
 stantially, performing the obligations of the defendants under
 their contracts, The Kinks could not without good cause have
 refused to accept this mode of performance without first giving a
 reasonable notice of their intention to revert to the strict terms of
 the contract: cf. *Panoutsos v. Raymond Hadley Corpn. of New*
*York*⁸ and *Rickards (Charles) Ltd. v. Oppenheim*.⁹

A great deal of the undoubted difficulty which the court faces
 in resolving the disputes between the two parties before it stems
 from the lamentably clumsy design adopted when the contracts
 of February 12 and 26, 1964, were drafted and executed: for the
 simple reason that no direct contractual nexus was set up between
 The Kinks and either Larry Page or the plaintiffs the whole situa-
 tion, as a matter of commercial relationship, was bedevilled. In
 substance the plaintiffs in this action are complaining that without
 warrant The Kinks refused to allow them to continue to earn
 the remuneration which the defendants had agreed to pay them:
 the action had inevitably to be framed as a claim against the
 defendants based on the literal terms of the contract of February
 26, 1964, and an assertion that that contract had never been
 determined. This version of the position is attractively but
 deceptively simple.

The plaintiffs, by an express term of their contract with the
 defendants, could only perform that contract by a designated
 agent, Larry Page. It is, of course, obvious that no one could
 compel The Kinks by legal proceedings to continue to accept
 Mr. Page as their manager. The reality of the situation contrived
 in February, 1964, was that the plaintiffs never secured by their
 contract with the defendants anything more than an expectation,
 or spes, that The Kinks would continue to accept the services of
 Larry Page, with the result that they, the plaintiffs, would receive
 from the defendants as remuneration for those services the agreed
 payment of the equivalent of 10 per cent. of the gross earnings of
 The Kinks. I do not, however, doubt that the defendants were
 bound not to do anything to destroy that expectation. The factual
 question is: who or what destroyed the expectation?

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⁸ [1917] 2 K.B. 473, C.A. ⁹ [1950] 1 K.B. 616; [1950] 1 All E.R. 420, C.A.

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Wherever a contract provides for the rendering of services by A. to B. which are so specifically personal that A. is the only person who is qualified to render them and B. the only person to whom the services can be of any use, any such event as the death of A. or of B. or the inability of A. to render or of B. to utilise such services for a period of time substantial in relation to the contemplated period of performance will make the contract impossible to be further performed in accordance with its terms. The result in law is apt sometimes to be described by saying that the contract is frustrated by supervening impossibility of performance, or by such a fundamental change of circumstances that the parties are entitled to say "non haec in foedera veni": it is, at least, equally satisfactory, as an explanation, to say that, since remuneration depends upon services rendered, where those services have not been rendered the remuneration has not been earned.

It must, of course, be recognised that in such a situation, where A. has agreed to render personal service to B., A. may be entitled to be paid damages in lieu of remuneration, even though he has not in fact rendered services for a relevant period if he has remained ready, able and willing to render the services and his services have been refused without any reason or for a reason which does not justify a refusal further to perform the contract.

There are, therefore, three questions to be answered in the present case:

- (1) Did the plaintiffs remain able, ready and willing to continue to render managerial services through Larry Page? I think not.
- (2) Did The Kinks break any contractual obligation when they refused any longer to accept the managerial services from Larry Page? I think not.
- (3) Did the defendants commit any breach of their contract with the plaintiffs? I think not.

The services which Larry Page was to render to The Kinks in performance of the plaintiffs' contract with the defendants dated February 26 were defined by clause 1 as

"acting generally with the defendants as manager of The Kinks in the same manner and to the same extent and subject to the same liabilities as if the [plaintiffs] had joined in the three agreements of February 12 as a manager jointly with the defendants."

The contract was to subsist only "for the duration of that contract of February 12," which might have been a mere 12 months. I entirely agree with the judge that "The relationship between a performer and his personal manager required a high degree of mutual confidence." The observations of Stamp J. in *Page One Records Ltd. v. Britton*¹⁰ are very much in point and I adopt them. I think, as presumably did the judge in the present case,

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that this requirement of confidence was clearly established by the evidence, and, further, is manifestly implicit in the relationship in question. I, therefore, am expressing the same opinion as the judge, although he did not put this into explicit language, that it was part and an essential part of the contractual obligation to which I have referred that Larry Page should retain the confidence of The Kinks, and no less an essential part of the contractual duty of the defendants to The Kinks that whomsoever they might put forward to perform the managerial services he should retain the confidence of The Kinks. As I see it, this obligation arose by force of the contract, on its proper construction; alternatively, by force of a term required to be implied in the contract in order to give it the efficacy and meaning which the parties to it undoubtedly intended; it may be that this obligation could take either of two forms: (1) that Larry Page would so conduct his activities as co-manager as to ensure the retention of the confidence of The Kinks; or (2) that Larry Page would do nothing which he foresaw or should have foreseen would lose that confidence.

For the purposes of the present appeal, I am satisfied to adopt, and think it safer to adopt, the latter of these two views, although I am by no means sure that the former could not be sustained.

The judge found as a fact, with ample justification from the evidence and from the whole narrative which it had afforded him of the relationship between Larry Page and The Kinks during the 15 months from the spring of 1964 to the summer of 1965, that "Mr. Page knew the group intimately and could have foreseen their reaction." The judge was referring to the reaction to be expected from The Kinks and more particularly from their leader Ray Davies when they learnt that he had left them in California a week before the end of their tour in the United States. This finding, accompanied by the further finding that Larry Page "destroyed the trust which was vital to the continuance of the performer-personal manager relationship between them" amounts, in my judgment, to a finding that the essential term, to which I have referred, had been broken. It is to be regretted that the distinct possibility that The Kinks' resentment of Mr. Page's behaviour and the hatred inspired in Ray Davies may have been due in a substantial degree to jealousy was neither expressly rejected by the judge nor effectively canvassed in evidence, nor, indeed, raised at all except with one of The Kinks, Avory, the junior member.

If, then, as I think was the case, the plaintiffs were in breach of that term, which was in its nature a continuing obligation and not an obligation for an isolated performance, it follows, in my opinion, that if and so long as the relationship of confidence stipulated for did not exist, Larry Page himself and the plaintiffs, who could only perform the contract through him, were unable to perform the services for which and in consideration of which the defendants had contracted to pay remuneration. In my view, once

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he had destroyed the confidence formerly reposed in him by The Kinks, Larry Page was no less disabled from performing the contract, unless and until he regained that confidence, than if he had become ill or even died; that disability was likely to endure for a period substantial in relation to the residue of the contractual period, even if it did not extend to the whole of that period. This disability was brought about by Larry Page in breach of the term of the contract requiring him to do nothing which he should have foreseen would have destroyed the essential foundation of mutual confidence. In my opinion, this discharged the contract between the plaintiffs and the defendants.

I recognise that there is considerable force in another view of the matter which did not appeal to the judge. He did not think that any condition or term had been so broken by the plaintiffs as to constitute a repudiation of the contract. To my mind too it seems, although I do not say this with confidence, that this case does not turn in any shape upon repudiation. Further, having regard to the terms of the defendants' letter of September 14, 1965, in which they stated that they had no quarrel with the plaintiffs, albeit they made it plain that they would no longer be bound by the contract, I entertain doubt whether the contract was thereby determined; on the whole I do not think that it was.

Both Harman and Salmon L.J.J. take the view that another, different, repudiation, viz., the letter of the defendants of September 14, 1965, operated upon the contract between the plaintiffs and the defendants so as to alter the rights of the plaintiffs to recover by reliance upon the contract, converting those rights from remuneration into a claim for damages. Therefore, naturally and respectfully, I recognise that it is very probable that my own view as to the effect on contractual obligations of a repudiation is wrong. Nevertheless, I feel it right to state, with all proper diffidence, my own concept of repudiation.

It seems to me that the process of ending or indeed of varying a contract by repudiation is the converse of that of making the same contract; each process operates by offer and acceptance, or their equivalents; each is essentially bilateral. Where A. and B. are parties to an executory contract, if A. intimates by word or conduct that he no longer intends, or is unable, to perform it, or to perform it in a particular manner, he is, in effect, making an offer to B. to treat the contract as dissolved or varied so far as it relates to the future. If B. elects to treat the contract as thereby repudiated, he is deemed, according to the language of many decided cases, to "accept the repudiation" and is thereupon entitled (a) to sue for damages in respect of any earlier breach committed by A. and for damages in respect of the repudiation, (b) to refrain from himself performing the contract any further.

On the other hand, if B. elects in such a situation, or is taken by reason of silence to have elected, *not* to treat the contract as

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at an end, he may require A. to perform any contractual obligations as they fall due in the future (provided that he himself performs any simultaneous or precedent obligation), including, as a particular example, the making of payments for which the contract provides. In such a case the contract remains in force for the advantage or disadvantage, as events fall out, of either party: it is no anomaly or departure from this concept that B. should retain the right, recognised in *Citati's* case,¹¹ of relying upon any contractual breach by A., other than the repudiation which, ex hypothesi, he has waived, as an answer to a claim by A. In its simplest form this proposition may be illustrated thus:—A., having contracted to supply by instalments goods complying with a specification, intimates that he does not intend to make any further deliveries complying with that specification: B. requires him to fulfil the contract: if B. subsequently finds that A.'s goods whenever they may have been delivered do not comply with the contract description, he may then refuse to take any more or to pay the contract price for them and he can obtain adjustment of any price he has already paid.

B.'s rights, in the hypothetical situation stated, do not depend, on analysis, on there having been any repudiation by A. which he might have but did not treat as entitling him to determine the contract: he is able to assert immunity simply because A. has not performed the contract and, therefore, cannot enforce it. For my own part, I do not regard a contract of employment as sui generis, but as a type of bilateral contract to which the same principles apply.

I regard this case as falling to be decided on the footing that the plaintiffs have not since a date in 1965, which may not be very easy to fix, performed any of the services for performance of which they would have earned remuneration, nor have they been able to perform such services through Larry Page nor have the services been wrongfully rejected. It is a truism for which no authority is required that interdependent promises cannot be severed, so as to require performance of one promise unless the other which affords the consideration for it is itself performed. The matter is well put in *Chitty on Contracts* (22nd ed.), Vol. 1, (1961), p. 540, para. 1258, in these words:

“ . . . it is necessary to discover the relation to one another of the two promises which form the contract. They may be either independent or dependent. Promises are said to be independent when the obligation of one party is absolute and not conditional upon performance by the other of his part of the bargain. They are said to be dependent when the obligation of one party depends upon the performance, or the readiness and willingness to perform, of the other.”

I would only add for myself that there must be ability to perform as well as readiness and willingness to perform.

In the preceding paragraph the learned author said:

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“Failure of performance, whether total or partial, may in certain circumstances entitle the other party to the contract to treat the contract as discharged.”

I would not myself wish to adopt the criterion of the judge, who considered that the contract had been frustrated. I think that he may well have used that expression because it had been put forward in the defence. I prefer his alternative way of expressing the result of the conduct of Larry Page when he said that “the contract could then be truly said to be impossible of performance. . . .” Before he used those words the judge had expressed himself in terms with which I respectfully concur, although I myself would prefer to omit the epithet “fundamental” which he employs:

“ . . . if the nature of the breach and the circumstances in which it was committed were such as to entitle the group to refuse to be managed by Mr. Page thereafter, and if they did in fact so refuse, the breach was of such a fundamental character as to entitle the defendants to treat the contract as discharged.”

I have no doubt myself on the evidence that the term requiring Larry Page to do nothing which he should have foreseen would destroy the trust reposed in him by The Kinks was broken; the breach which he committed when he left them in the United States was itself alone destructive of the trust reposed in him by The Kinks; by that breach the defendants were discharged from further obligation to pay for services which Larry Page had become incapable of rendering in accordance with the contractual stipulation undertaken by the plaintiffs.

Undoubtedly, as was apparent throughout the hearing of this appeal, an essential question for the decision of the judge was whether The Kinks were entitled to refuse to be managed by Larry Page after he left them in the United States. Whether or not they were so entitled does not depend on any contract between them and the plaintiffs, since there was none. It depends upon the contractual obligation they owed to the defendants, but, in my judgment, whether or not that obligation bound them to continue to accept Mr. Page depends on the answers to the two questions:

(1) Did they genuinely feel that they could and would no longer repose such confidence in Larry Page as was requisite for his former relationship with them?

(2) Was this feeling due solely or mainly to the single fact that Mr. Page left them in the United States before the end of their tour?

I would answer each question in the affirmative and therefore say that they ceased to be so bound. I see no reason at all to differ from the judge’s view:

“The truth of the matter is that The Kinks were saying that they would have nothing more to do with Mr. Page . . . There is no doubt that these young men and particularly Ray Davies have a bitter distrust of Mr. Page, who, in their

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I do not myself read those last five words as comprising any reference to Mr. Page's activities on behalf of other performers.

I do not propose to repeat anything said by Salmon L.J. about the facts found by the judge or those revealed by the evidence, but it is essential that I should express my concurrence with the judge in the finding which I think he impliedly made, without (unfortunately) expressing it—there is ample evidence, in my view, that this was the reality of the matter—that the loss of confidence which The Kinks experienced occurred in the United States before they had knowledge of, or alternatively was not in any material degree produced by, any jealousy about Larry Page's professional interest in another group or act called "Sonny and Cher". The date at which the contract between the plaintiffs and the defendants was discharged is not very easy to pinpoint, but I think the right view is that it should be placed at the later of the two dates (1) when The Kinks declared formally by a solicitor's letter that the breach with Page was absolute, that is to say September 2, 1965, (2) when the defendants intimated that they would no longer perform the contract with the plaintiffs, videlicet September 14, 1965. I, therefore, say: on September 14, 1965.

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HARMAN L.J. I found this action both interesting and difficult. It concerns the activities of a group of young men, all infants at the time when the action was brought, and by then enjoying a great popularity as a pop group under the style of "The Kinks." [His Lordship stated the facts substantially as set out above and continued:]

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Raymond Davies was aware that Kassner's were handling his compositions and, indeed, he assigned them over, one by one himself, and that was very profitable to him. In this action, however, this is an irrelevance. The placings of Raymond Davies' compositions, though no doubt the prime object of Kassner, was of no profit to the plaintiffs and the action so far as it seeks to enforce this right is entirely misconceived. [His Lordship stated the facts relating to the American tour and subsequent events and continued:]

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The statement of claim treated the contract of February 26 as still on foot, alleged that the plaintiffs were ready and willing to continue to perform their obligations under it, and that in breach of it the defendants had failed to render the accounts for which they were liable. The relief demanded was in substance an account on the footing of the agreement. The defence was a much-amended document. As first delivered, it alleged a number of breaches by Mr. Page as personal manager of the group on and after their American tour. The second of these was an allegation that he had left the group at the end of the second week of the tour and returned to England. Two other breaches were alleged

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which the defendants failed to prove, as indeed they failed in respect of two further breaches added later by amendment. Paragraph 5 alleged that the plaintiffs had repudiated the agreement or were in fundamental breach of their duties as joint manager and that the agreement was thereby determined and that their repudiation had been accepted. By paragraph 6 they alleged that the plaintiffs were unable to perform the services required of them and were, therefore, disentitled to their remuneration. The defence further alleged that the agreements of February 12 had been discharged on the ground of the infancy of the members of the group or repudiated by them and that the defendants had accepted such repudiation. Amendments were informally made to this document during March and May, 1967, after the action had been set down, and in particular on the eve of the trial on May 22 it was pleaded in the alternative that the refusal by The Kinks to allow Mr. Page to act as their manager caused a frustration of the contract.

It was on this last plea alone that the defendants succeeded. The judge held that the refusal of The Kinks to continue to accept Mr. Page as their personal manager was justified by his desertion of them in the United States. He held that this was an event which cut at the root of the agreement of February 26, 1964, that the continued acceptance of Mr. Page as manager by the group was a condition precedent to or the substratum of the agreement, and that the justified withdrawal by The Kinks of their acceptance caused the agreement to be frustrated.

The judge rejected all the other complaints against the conduct of Mr. Page which were brought forward in the statement of claim and rejected, moreover, the plea of infancy. None of these matters has been seriously relied upon in this court, and the defendants' case stands or falls on the fact of Mr. Page leaving the group in the United States. The judge did, I think, come to the conclusion that this event was such a fundamental breach by the plaintiffs of their obligations as to amount to a repudiation of the whole contract. Further, he held that, if there was such a repudiation, there had been no acceptance of it by the defendants, who in a letter of September 14, 1967, stated that they had no quarrel with the plaintiffs.

I cannot accept the judge's conclusion that the agreement was frustrated. It never apparently occurred to anyone advising the defendants right down to the eve of the trial that such a plea was available. The doctrine of frustration of contracts is usually connected with charter-parties and the carriage of goods by sea. The frustrating event is something altogether outside the control of the parties—a war, a famine, a flood or some event of that sort—so that if the parties had thought to provide for it they would at once have agreed that on its happening the contract must come to an end. I have never heard the doctrine applied to an event

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such as this which depends on the action of one of the parties in connection with the contractual duty of the other of them to a third party. Moreover, the defendants had contractual rights with the group and took no steps to maintain them, but assisted them by acquiescing in an arrangement in which they continued to be employed as managers of the group but without liability to the plaintiffs. It seems to me that the importation of this doctrine only complicates the matter and confuses the issue and that the defence of frustration will not lie.

It is at this point that my brethren, whose judgments I have had the advantage of reading, part company. They do indeed arrive at the same or substantially the same result but by different roads, and I must express my own opinion. The basis of it seems to me to be this, that The Kinks under the agreements of February 12 were entitled to the personal services of Wace and Collins as their personal managers and were not bound to accept any substitute. They did, however, up to the end of the American tour accept the services of Mr. Page and treated the provision of his services as though it were a performance of the agreements of February 12, but as I see it they were not bound to continue to do so and they made it clear enough by their letter of September 2 that this was the attitude they were taking. The defendants accepted this decision and made it clear to the plaintiffs and Mr. Page by their letter of September 14 that they considered themselves no longer bound by the contract of February 26. This in effect was tantamount to a dismissal of Mr. Page and, through him, the plaintiffs from their employment by the defendants in the performance of duties of personal manager.

I am, therefore, of opinion, and in this I concur with my brother Salmon, that the true cause of action of the plaintiffs was for damages for wrongful dismissal and that the action as framed for an account is misconceived. An employee dismissed in breach of his contract of employment cannot choose to treat the contract as subsisting and sue for an account of profits which he would have earned to the end of the contractual period: he must sue for damages for the wrongful dismissal and must, of course, mitigate those damages so far as he reasonably can.

Whether such an action would have succeeded in the present case I find it unnecessary to decide. It was the letter of September 14, 1965, which made clear the defendants' decision no longer to be bound by their obligations under the agreement of February 26. It seems to me that up to the receipt of that letter the plaintiffs were entitled to treat the agreement as still on foot and are entitled to an account accordingly but no further. I, therefore, find myself broadly speaking in agreement with my brother Salmon and would allow the appeal to that limited extent but no further.

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WARNER BROTHERS PICTURES INC. v. NELSON.

[KING'S BENCH DIVISION (BRANSON, J.), October 14, 15, 16, 19, 1936.]

Master and servant—Contract of service—Film actress—Negative stipulations—Enforcement by injunction.

By a contract in the usual form in the industry, a prominent film actress undertook during the term of the employment not to render any services for or in any other photographic stage or motion picture production or business of any other person or engage in any other occupation without the written consent of the producer:—

Held: (i) where the enforcement of such negative covenants did not amount to a decree of the specific performance of the positive covenants? or to obliging the employee to remain idle or perform the positive covenants, they can be enforced by injunction.

(ii) the granting of such an injunction was discretionary and should be limited to what is reasonable in all the circumstances of the case.

(iii) in the circumstances of this case an injunction to enforce the negative stipulations should be granted limited in area to the jurisdiction of the court and in time to the duration of the contract or 3 years whichever period should be the shorter.

[EDITORIAL NOTE.] This case carries the question of the standard contract between film companies and their star artistes a stage further. In the recent case of *Gaumont-British Picture Corporation, Ltd. v. Alexander* (1) it was held that the contract, though exceptionally stringent in its terms, was not against public policy, and that the various restrictions upon the activities of the artiste during the term of the engagement were not invalid as being in unreasonable restraint of trade. The present case deals with the further question whether the court in the exercise of its discretion will enforce the restrictive stipulations by injunction, and subject to certain limitations the stipulations were so enforced.

AS TO ENFORCEMENT OF CONTRACT OF SERVICE BY INJUNCTION, see HALSBURY, Halsbury Edn., Vol. 22, pp. 169, 170, para. 282; and FOR CASES, see DIGEST, Vol. 28, pp. 445, 446, Nos. 653-663.]

Cases referred to:

- (1) *Gaumont-British Picture Corpn., Ltd. v. Alexander*, [1936] 2 All E.R. 1686; Digest Supp.
- (2) *Doherty v. Allman* (1878), 3 App. Cas. 709; 28 Digest 364, 14.
- (3) *Lumley v. Wagner* (1852), 1 De G.M. & G. 604; 28 Digest 452, 706.
- (4) *Lord Stratheona S.S. Co. v. Dominion Coal Co.*, [1926] A.C. 108; 28 Digest 455, 724.
- (5) *Davis v. Foreman*, [1894] 3 Ch. 654; 28 Digest 453, 714.
- (6) *Kirchner & Co. v. Grubur*, [1909] 1 Ch. 413; 28 Digest 454, 715.
- (7) *Chapman v. Westerby* (1913), 58 Sol. Jo. 50; 28 Digest 454, 716.
- (8) *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416; 43 Digest 55, 564.
- (9) *Ehrman v. Bartholomew*, [1898] 1 Ch. 671; 43 Digest 34, 297.
- (10) *Mortimer v. Beckett*, [1920] 1 Ch. 571; 28 Digest 446, 663.
- (11) *Rely-a-Bell Burglar & Fire Alarm Co., Ltd. v. Eisler*, [1926] Ch. 609; 43 Digest 72, 757.
- (12) *Robinson (William) & Co., Ltd. v. Heuer*, [1898] 2 Ch. 451; 43 Digest 54, 560.
- (13) *Attwood v. Lamont*, [1920] 3 K.B. 571; 43 Digest 20, 131.
- (14) *Grimston v. Cuninghame*, [1894] 1 Q.B. 125; 28 Digest 434, 572.
- (15) *Donnell v. Bennett* (1883), 22 Ch. D. 835; 28 Digest 452, 707.
- (16) *De Francesco v. Barnum* (1890), 45 Ch. D. 430; 34 Digest 41, 171.

(17) *Woberhampton & Walsall Ry. Co. v. London & North Western Ry. Co.* (1873), L.R. 16 Eq. 433; 28 Digest 453, 713.

(18) *Silver v. Gatti* (1893), 37 Sol. Jo. 776; 42 Digest 913, 86.

ACTION for a declaration and injunction. The defendant, Mrs. Nelson, a film actress, professionally known as Miss Bette Davis, entered into a contract with the plaintiffs, dated Dec. 27, 1934, to appear in films for the plaintiff company. The contract was in the standard form used in the film industry. The plaintiffs alleged that the defendant intended to appear in a film for another company, and they brought an action for a declaration that the contract of Dec. 27, 1934, was a valid contract, and for an injunction to restrain the defendant from acting for any other company in breach of that contract. The defendant, in her defence, alleged that the plaintiffs had committed breaches of the contract and had repudiated it, and that she was entitled to treat it as at an end. An *ex parte* injunction had been granted on Sept. 9 and an *interim* injunction until the trial of the action on Sept. 16, 1936.

Sir Patrick Hastings, K.C., Norman Birkett, K.C., and Frank Gahan for the plaintiff.

Sir William Jowitt, K.C., J. D. Cassels, K.C., and J. L. S. Hale for the defendant.

Sir Patrick Hastings, K.C.: The question is whether the courts will grant an injunction to restrain a person who has entered into a restrictive covenant prohibiting her from working for others during the course of the employment from breaking the provision. The form of contract is a very stringent one, but has been held not to be against public policy (*Gaumont-British Picture Corpn., Ltd. v. Alexander* (1)). Clause 9 of the contract, which is a negative stipulation such as the courts will enforce by injunction, is relied upon. In a business of this sort it is essential that the attendance of the artiste at the required time shall be secured and that she shall be required to stay until the scene is finished. It is necessary that the terms and regulations shall be strict. The courts will not grant specific performance of a contract of service; but that has for a long time been subject to the limitation that, when a person engaged by reason of special qualification enters into a contract prohibiting him or her from working for anyone else, the negative stipulation would be enforced by injunction. The only cases where an injunction is refused are those where damages are a sufficient remedy, but that is not so here, for it is impossible to estimate them. [Counsel referred to *Lumley v. Wagner* (3), *Donnell v. Bennett* (15), *Grimston v. Cuninghame* (14), *Ehrman v. Bartholomew* (9), *Mortimer v. Beckett* (10), *Rely-a-Bell Burglar & Fire Alarm Co., Ltd. v. Eisler* (11), *Robinson (William) & Co., Ltd. v. Heuer* (12), *Whitwood Chemical Co. v. Hardman* (8), *Chapman v. Westerby* (7).]

Sir William Jowitt, K.C.: No evidence for the defence being called,

it is admitted that the defendant has broken her contract. The contract is a very stringent one and can be enforced in such a way as to put the artiste in economic difficulty. The term "slavery" has been used in reference to such a contract (*De Francesco v. Barnum* (16), per Fry, L.J., at p. 438). If the contract is not against public policy, still it is such that it ought not to be enforced by injunction. The negative stipulations are only the corollary of the positive and are too wide as prohibiting her from entering any kind of employment whatever. Severance in the present case is impossible and on this point and on the point that the contract is unenforceable, the case of *Atwood v. Lamont* (13) is relied upon. [Counsel referred to: *Lumley v. Wagner* (3), *Wolverhampton & Walsall Ry. Co. v. L. & N.W. Ry. Co.* (17), *Whitwood Chemical Co., Ltd. v. Hardman* (8), *Silver v. Gatti* (18), *Davis v. Foreman* (5), *Ehrman v. Bartholomew* (9), *Robinson (William) & Co., Ltd. v. Heuer* (12), *Kirchner v. Gruban* (6), *Chapman v. Westoby* (7), *Mortimer v. Beckett* (10), *Rely-a-Bell Burglar & Fire Alarm Co., Ltd. v. Eisler* (11).]

BRANSON, J.: The facts of this case are few and simple. The plaintiffs are a firm of film producers in the United States of America.

In 1931 the defendant, then not well known as a film actress, entered into a contract with the plaintiffs. Before the expiration of that contract the present contract was entered into between the parties. Under it the defendant received a considerably enhanced salary, the other conditions being substantially the same. This contract was for 52 weeks and contains options to the plaintiffs to extend it for further periods of 52 weeks at ever-increasing amounts of salary to the defendant. No question of construction arises upon the contract, and it is not necessary to refer to it in any great detail; but in view of some of the contentions raised, it is desirable to call attention quite generally to some of the provisions contained in it. It is a stringent contract, under which the defendant agrees "to render her exclusive services as a motion picture and/or legitimate stage actress" to the plaintiffs, and agrees to perform solely and exclusively for them. She also agrees, by way of negative stipulation, that:

she will not, during [the term of the contract] render any services for or in any other photographic, stage or motion picture production or productions, or business of any other person . . . or engage in any other occupation without the written consent of the producer being first had and obtained.

With regard to the term of the contract there is a further clause, cl. 23, under which, if the defendant fails, refuses or neglects to perform her services under the contract, the plaintiffs:

have the right to extend the term of this agreement and all of its provisions for a period equivalent to the period during which such failure, refusal or neglect, shall be continued.

In June of this year the defendant, for no discoverable reason, except that she wanted more money, declined to be further bound by the agreement, left the United States and, in September, entered into an agreement in this country with a third person. This was a breach of contract on her part, and the plaintiffs on Sept. 9 commenced this action, claiming a declaration that the contract was valid and binding, an injunction to restrain the defendant from acting in breach of it, and damages. The defence alleged that the plaintiffs had committed breaches of the contract which entitled the defendant to treat it as at an end; but at the trial this contention was abandoned and the defendant admitted that the plaintiffs had not broken the contract and that she had; but it was contended on her behalf that no injunction could as a matter of law be granted in the circumstances of the case.

At the outset of the considerations of law which arise stands the question, not raised by the pleadings, but urged for the defendant in argument, that this contract is unlawful as being in restraint of trade. The ground for this contention was that the contract compelled the defendant to serve the plaintiffs exclusively, and might in certain circumstances endure for the whole of her natural life. No authority was cited to me in support of the proposition that such a contract is illegal, and I see no reason for so holding. Where, as in the present contract, the covenants are all concerned with what is to happen whilst the defendant is employed by the plaintiffs and not thereafter, there is no room for the application of the doctrine of restraint of trade. A similar contract came before the courts in the case of *Gawmont-British Picture Corporation, Ltd. v. Alexander* (1) and was upheld by POYNER, J. I respectfully agree with his view.

I turn then to the consideration of the law applicable to this case on the basis that the contract is a valid and enforceable one. It is conceded that our courts will not enforce a positive covenant of personal service; and specific performance of the positive covenants by the defendant to serve the plaintiffs is not asked in the present case.

The practice of the court of chancery in relation to the enforcement of negative covenants is stated on the highest authority by LORD CAIRNS, L.C., in the House of Lords in *Doherty v. Allman* (2), at p. 719. His Lordship says:

My Lords, if there had been a negative covenant, I apprehend, according to well settled practice, a court of equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific perform-

sance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves.

That was not a case of a contract of personal service; but the same principle had already been applied to such a contract by LORD ST. LEONARDS, L.C., in *Lumley v. Wagner* (3). At p. 619, LORD ST. LEONARDS, L.C., used the following language:

Wherever this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other; and although the jurisdiction is not to be extended, yet a judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity.

This passage was cited as a correct statement of the law in the opinion of a strong board of the Privy Council in the case of *Lord Strailson S.S. Co. v. Dominion Coal Co.* (4), at p. 125, and I not only approve it, if I may respectfully say so, but am bound by it.

The defendant, having broken her positive undertakings in the contract without any cause or excuse which she was prepared to support in the witness box, contends that she cannot be enjoined from breaking the negative covenants also. The mere fact that a covenant, which the court would not enforce if expressed in positive form, is expressed in the negative instead, will not induce the court to enforce it. That appears, if authority is needed for such a proposition, from *Davis v. Foreman* (5), *Kirchner v. Gruban* (6), and *Chapman v. Westerby* (7). The court will attend to the substance and not to the form of the covenant. Nor will the court, true to the principle that specific performance of a contract of personal service will never be ordered, grant an injunction in the case of such a contract to enforce negative covenants if the effect of so doing would be to drive the defendant either to starvation or to specific performance of the positive covenants: see *Whitwood Chemical Co. v. Hardman* (8), where LINDLEY, L.J., said, at p. 427:

What injunction can be granted in this particular case which will not be, in substance and effect, a decree for specific performance of this agreement? See also *Ehrman v. Bartholomew* (9), where the injunction was refused, first, on the ground that it was doubtful whether the covenant applied at all, and, secondly, on the ground that to grant it would compel the defendant wholly to abstain from any business whatsoever, and *Mortimer v. Beckett* (10), where there was also no negative stipulation.

The case of *Rely-a-Bell Burglar & Fire Alarm Co., Ltd. v. Eisler* (11), which was strongly relied upon by the defendant, falls within the same

category as *Ehrman v. Bartholomew* (9) and *Chapman v. Westerby* (7). RUSSELL, J., as he then was, said on p. 615, after citing those two cases:

It was said on the other side that there were points of distinction. It was said that the covenants in those two cases were so framed that the servant, if the covenants were enforced, could make his living neither by serving nor by carrying on business independently; whereas in the present case the covenant only prohibited serving. Therefore, it was said, he was still free to start in business on his own account, and it could not be said, if an injunction were granted in the terms of the covenant, that he would be forced to remain idle and starve. That distinction seems to me somewhat of a mockery. It would be idle to tell this defendant, a servant employed at a wage, that he must not serve anybody else in that capacity, but that the world was still open to him to start business as an independent man. It seems to me that if I were to restrain this man according to the terms of the covenant, he would be forced to remain idle and starve.

Had it not been for that view of the facts, I think that the learned judge would have granted an injunction in that case. The conclusion to be drawn from the authorities is that, where a contract of personal service contains negative covenants, the enforcement of which will not amount either to a decree of specific performance of the positive covenants of the contract or to the giving of a decree under which the defendant must either remain idle or perform those positive covenants, the court will enforce those negative covenants; but this is subject to a further consideration. An injunction is a discretionary remedy, and the court in granting it may limit it to what the court considers reasonable in all the circumstances of the case. This appears from the judgment of the Court of Appeal in *William Robinson & Co., Ltd. v. Heuer* (12). The particular covenant in that case is set out at p. 452, and provides that

Heuer shall not during this engagement, without the previous consent in writing of the said W. Robinson & Co., Ltd., . . . carry on or be engaged either directly or indirectly as principal, agent, servant, or otherwise, in any trade, business, or calling, either relating to goods of any description sold or manufactured by the said W. Robinson & Co., Ltd. . . . or in any other business whatsoever.

There are passages in the judgment of LINDLEY, M.R., which bear so closely on several aspects of the present case that I shall refer to them. He begins his judgment on p. 454 by saying that the result at which he is arriving is that justice requires that some injunction should be granted. He goes on to say at pp. 455 and 456:

This defendant is avowedly breaking his agreement, and the question is whether he should be at liberty to do so.

There was a question raised as to whether that agreement was or was not illegal, and as to that LINDLEY, M.R., says:

There is no authority whatever to show that that is an illegal agreement—that is to say, that it is unreasonable, and goes further than is reasonably necessary for the protection of the plaintiffs. It is confined to the period of the engagement,

and means simply this—"So long as you are in our employ you shall not work for anybody else or engage in any other business." There is nothing unreasonable in that at all.

That seems to me to apply very precisely to the present case. LINDLEY, M.R., continues:

When, however, you come to talk about an injunction to enforce it, there is great difficulty. The real difficulty which has always to be borne in mind when you talk about specific performance of or injunctions to enforce agreements involving personal service is this—that this court never will enforce an agreement by which one person undertakes to be the servant of another; and if this agreement were enforced in its terms, it would compel this gentleman personally to serve the plaintiffs for the period of ten years. That the court never does. Therefore an injunction in these terms cannot be granted, although the agreement to serve the plaintiffs and give his whole care, time, and attention to their business, and not to engage in any other business during his engagement, is valid in point of law. But the plaintiffs do not ask for an injunction in the terms of that agreement.

Before parting with that case, I should say that the court proceeded to sever the covenants in that case and to grant an injunction, not to restrain the defendant from carrying on any other business whatsoever, but framed so as to give what was felt to be a reasonable protection to the plaintiffs and no more. The plaintiffs waived an option which they possessed to extend the period of service for an extra 5 years and the injunction then was granted for the remaining period of unextended time.

It is said that this case is no longer the law, but that *Attwood v. Lamont* (13) has decided that no such severance is permissible. I do not agree. *Attwood v. Lamont* (13) was a case where the covenants were held void as in restraint of trade. There is all the difference in the world between declining to make an illegal covenant good by neglecting that which makes it contrary to law and exercising a discretion as to how far the court will enforce a valid covenant by injunction. The latter was done in the Court of Appeal in *Robinson v. Hever* (12); the former in *Attwood v. Lamont* (13).

The case before me is therefore one in which it would be proper to grant an injunction unless to do so would in the circumstances be tantamount to ordering the defendant to perform her contract or remain idle or unless damages would be the more appropriate remedy.

With regard to the first of these considerations, it would, of course, be impossible to grant an injunction covering all the negative covenants in the contract. That would, indeed, force the defendant to perform her contract or remain idle; but this objection is removed by the restricted form in which the injunction is sought. It is confined to forbidding the defendant, without the consent of the plaintiffs, to render any services for or in any motion picture or stage production for anyone other than the plaintiffs.

It was also urged that the difference between what the defendant can earn as a film artiste and what she might expect to earn by any other form of activity is so great that she will in effect be driven to perform her contract. That is not the criterion adopted in any of the decided cases. The defendant is stated to be a person of intelligence, capacity and means, and no evidence was adduced to show that, if enjoined from doing the specified acts otherwise than for the plaintiffs, she will not be able to employ herself both usefully and remuneratively in other spheres of activity, though not as remuneratively as in her special line. She will not be driven, although she may be tempted, to perform the contract, and the fact that she may be so tempted is no objection to the grant of an injunction. This appears from the judgment of Lord St. LEONARDS, L.C., in *Lumley v. Wagner* (3), where he used the following language on p. 619:

It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant J. Wagner from performing at any other theatre while this court had no power to compel her to perform at Her Majesty's Theatre. It is true, that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement. The jurisdiction which I now exercise is wholly within the power of the court, and being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce. The effect too of the injunction in restraining J. Wagner from singing elsewhere may, in the event—[that is a different matter]—of an action being brought against her by the plaintiff, prevent any such amount of vindictive damages being given against her as a jury might probably be inclined to give if she had carried her talents and exercised them at the rival theatre: the injunction may also, as I have said, tend to the fulfilment of her engagement; though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly.

With regard to the question whether damages is not the more appropriate remedy, I have the uncontradicted evidence of the plaintiffs as to the difficulty of estimating the damages which they may suffer from the breach by the defendant of her contract. I think it is not inappropriate to refer to the fact that, in the contract between the parties, in clause 22, there is a formal admission by the defendant that her services, being "of a special, unique, extraordinary and intellectual character" gives them a particular value, "the loss of which cannot be reasonably or adequately compensated in damages" and that a breach may "cost the producer great and irreparable injury and damage," and the artiste expressly agrees that the producer shall be entitled to the remedy of injunction. Of course, parties cannot contract themselves out of the law; but it assists, at all events, on the question of evidence as to the applicability of an injunction in the present case, to find the parties formally recognising that which is now before the court as a matter of

evidence, that in cases of this kind injunction is a more appropriate remedy than damages.

Furthermore, in the case of *Grimston v. Cunningham* (14), which was also a case in which a theatrical manager was attempting to enforce against an actor a negative stipulation against going elsewhere, *WILLS, J.*, granted an injunction, and on p. 130 he used the following language:

This is an agreement of a kind which is pre-eminently subject to the interference of the court by injunction, for in cases of this nature it very often happens that the injury suffered in consequence of the breach of the agreement would be out of all proportion to any pecuniary damages which could be proved or assessed by a jury. This circumstance affords a strong reason in favour of exercising the discretion of the court by granting an injunction.

I think that that applies to the present case also, and that an injunction should be granted in regard to the specified services.

Then comes the question as to the period for which the injunction should operate. The period of the contract, now that the plaintiffs have undertaken not as from Oct. 16, 1936, to exercise the rights of suspension conferred upon them by cl. 23 thereof, will, if they exercise their options to prolong it, extend to about May, 1942. As I read the judgment of the Court of Appeal in *Robinson v. Heuer* (12), the court should make the period such as to give reasonable protection and no more to the plaintiffs against the ill effects to them of the defendant's breach of contract. The evidence as to that was perhaps necessarily somewhat vague. The main difficulty that the plaintiffs apprehend is that the defendant might appear in other films whilst the films already made by them and not yet shown are in the market for sale or hire and thus depreciate their value. I think that, if the injunction is in force during the continuance of the contract or for three years from now, whichever period is the shorter, that will substantially meet the case.

The other matter is as to the area within which the injunction is to operate. The contract is not an English contract and the parties are not British subjects. In my opinion all that properly concerns this court is to prevent the defendant from committing the prohibited acts within the jurisdiction of this court, and the injunction will be limited accordingly.

Solicitors: *Denton, Hall & Burgin* (for the plaintiffs); *Manton, Morris, King & Co.* (for the defendant).

[Reported by A. KIRKHAM HAMILTON, Esq. *Barrister-at-Law.*]

K.B.D.]

R. v. MINISTER OF HEALTH, *Ex parte* HAMPTON URBAN DISTRICT COUNCIL.

[KING'S BENCH DIVISION (Lord Hewart, L.C. J., du Parcq and Goddard, JJ.), October 14, 1936.]

Local Government—Order adjusting boundaries—Letter adjourning decision on amalgamation—Subsequent order for amalgamation of authorities—Whether second order barred—Local Government Act, 1929 (c. 17), s. 47 (1).

Proposals under the Local Government Act, 1929, s. 46, were submitted to the Minister of Health by the Middlesex County Council. In Aug., 1933, the Minister wrote to the county council saying (*inter alia*) that he could not resist the conclusion on the present evidence that Hampton should be included in a larger area and going on to suggest that the proposals made should be modified by the formation of one large borough. The letter then confirmed certain alterations of the boundaries of Hampton. In Feb., 1934, an order was made in respect of the alteration of boundaries. In Nov., 1935, the Minister gave notice that he intended to make an order amalgamating Hampton with certain other areas:—

Held: in the circumstances the Minister had made no previous decision or order in respect of the proposals made under the Local Government Act, 1929, s. 46, and he was not barred from making an order now by the provisions of sect. 47 (1) of that Act.

EDITORIAL NOTE. A first general review of the local government areas is ordered by the Local Government Act, 1929, s. 46, and this is to be followed by subsequent periodical reviews; but it is provided that from the date of the original review there shall be no subsequent review within a period of ten years. The question, therefore, was whether the letter of August, 1933, and the order of 1934 constituted the first review, or whether it was merely a postponement of the review followed by a purely subsidiary order.

FOR THE LOCAL GOVERNMENT ACT, 1929, ss. 46, 47, see *HALSBURY'S COMPILATION OF THE STATUTES OF ENGLAND*, Vol. 10, pp. 916-918.]

Case referred to:

R. v. Minister of Health, Ex p. Purfleet Urban District Council (1935), 99 J.P. 413; Digest Supp.

APPLICATION to make absolute rules *nisi* for *certiorari* and for prohibition.

On Aug. 31, 1931, the Middlesex County Council after the necessary conferences with the local authorities in accordance with the Local Government Act of 1929, ss. 46 and 47, made a report which contained certain proposals suggesting certain changes in the districts under the county council and which contained, *inter alia*, proposals to amalgamate the urban districts of Teddington and Hampton Wick and the amalgamation of the urban districts of Hampton and Sunbury-on-Thames. Objections were submitted to the Minister of Health by the local authorities affected thereby, including the Hampton Urban District Council. On Aug. 4, 1933, the Minister of Health wrote to the county council the letter set out below, and on Feb. 23, 1934, the Minister made an order which, *inter alia*, provided for a transfer of a small part of the urban district

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