A HAWKSMERE SPECIAL BRIEFING

Legal and business issues in the music industry

1998 review and analysis

By Patrick Isherwood

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Introduction

1.1 The UK music industry has become an accepted and valued part of the country's business establishment. It combines creativity with commercial success and is a substantial contributor to the UK's earnings from invisible exports. It is a complex industry whose activities are underpinned and sustained by a framework of legal rights and remedies which are themselves part of an international network of rights.

1.2 This Briefing looks at the industry and its key elements. The starting point is the legal framework which is looked at in Chapter 2 by reference to the rights of recording artists, record companies, composers and music publishers.

1.3 **Chapter 3**: looks at the contractual framework by reference to a series of key contracts which govern the daily life of the industry.

Chapter 4: shows how the rights which are expressed in the various industry agreements are administered collectively and looks at the bodies which carry out that exploitation and protection on behalf of rights owners.

Chapter 5: takes a brief look at music and the media and explains how the official industry chart is compiled.

Chapter 6: deals with a number of miscellaneous matters with an eye to the future as a bewildering range of different means of distributing recorded music, the Internet among them, become available.

1.4 The Appendices fill in some of the business details by reference to sales and distribution data and charts which seek to express in readily understandable pictorial form the sources of income and the means of its collection.

1.5 The unifying factor in all of this is the existence of rights, whether arising from contracts or springing from the very act of creativity. It is the nurture and preservation of those rights which gives the music industry its lifeblood and that is why they are defended so vigorously against pirates and those who seek to benefit from the creative efforts of others.

1.6 Inevitably, in a short report of this nature there are bound to be omissions, some of which are deliberate. Also, I have not attempted to disguise an editorial slant, particularly when discussing recording agreements. Nonetheless, it is hoped that the report succeeds in presenting a reasonably balanced view.

PATRICK ISHERWOOD
January 1998

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The legal framework: the role of copyright

2.1 Copyright is a right of property which is enjoyed by the authors of creative works and those deriving rights from them. UK copyright law is contained in the *Copyright Designs and Patents Act 1988* ('the 1988 Act') which came into force on 1 August 1989.

- *Copyright is international in character and is enforced through a system of international conventions.*
- *Unlike other intellectual property rights, such as patents and trademarks, copyright comes into existence automatically when a work is completed. In the UK and many other countries it does not have to be registered to be enforced. However, in the United States it should be noted that as far as the copyright in records and music is concerned, there is a requirement of registration in order for copyright to be enforced through the courts.*
- *The European Union ('EU') has a significant influence over national laws within the Community and many of the recent copyright developments in the UK have been in response to EU Directives.*

2.2 Copyright gives its owners exclusive rights in their work. Although it is essentially defensive in character, it provides the legal framework for commercial exploitation of copyright works.

Copyright protects a wide range of works. Those which are relevant to the music industry are:

- Sound Recordings (which will be described as 'records' in this Briefing)
- Songs and Musical Compositions
- Literary Works
- Films (including videos and music videos)
- Broadcasts

2.3 *Performances* of works protected by copyright are also protected from unauthorised copying or exploitation, an activity which is commonly known as 'bootlegging'. In this regard the rights of recording artists can be enforced by the artists themselves or by record companies with which they have exclusive recording agreements.

- *It is important to remember that there is a clear legal distinction between the copyright in records, which is usually owned by record companies, and the quite separate and distinct copyright in the songs and musical compositions they contain.*
- *Likewise there is a separate copyright in the visual element of music videos.*
- *The definition of a sound recording in the 1988 Act is very wide. The intention behind this was to cover all known formats of recorded music, for example compact discs and any formats which might be invented within the foreseeable future.*

2.4 Copyright comes into existence at the time when a work is created. It is necessary therefore to establish who the owner of the work is at that point. This is a quite separate issue to that of ultimate ownership which may depend upon specific contractual arrangements.

The basic rule of *first* ownership of copyright which is found throughout the 1988 Act is that the 'author' is the first owner. In broad terms the author is the person who created the work.

- *In practice it is not difficult to establish the author of a literary work, a play or a song or musical composition. The only disputes which tend arise in these situations are between conflicting claimants for the authorship of a particular work. In those circumstances the court will carefully analyse the contribution of claimants in order to establish whether they are entitled to the whole of the copyright in a particular work or a share of it as a joint author.*

2.5 Because a number of people (some individuals, some corporate) are usually involved in the creation of records, for example the artist, an independent producer and the record company itself, the 1988 Act provides that the author is the person who is responsible for *making the arrangements* for the record to be made. This brings records into line with films and broadcasts where the same provision has applied for many years.

- *The issue which arises in these circumstances is as to what is meant by the 'making of the arrangements' in relation to records. The days when record companies recorded in their own studios with full physical control over the recording process are long gone. In many cases record companies may be only peripherally involved in the creative process.*

- *However, record companies usually pay recording costs and related costs and therefore should a dispute ever arise as to the ownership of copyright at the point of creation, it is likely that the court would deem the record company to have made the arrangements and to be the first owner of copyright.*

- *The position is usually covered in recording agreements which nearly always provide that the record company will own the copyright in records created pursuant to their terms. In this sense a recording agreement should perhaps be regarded as the instrument whereby records are commissioned by record companies, ie the triggering events in the whole process.*

- *The provision has not created any practical difficulties in relation to films and broadcasts, notwithstanding the fact that a wide range of individuals and entities are involved in their creation. Again the test would appear to be one of who has paid for the film or broadcast to be made.*

- *First ownership does nothing more than establish a chain of title. Basically, the copyright in any copyright work can ultimately be owned by whoever the parties wish to own it. Moreover, copyright is divisible and it is not uncommon for rights to be vested in different entities in particular territories or indeed for the copyright itself to be divided up.*

2.6 The copyright in records lasts for 50 years from the end of the calendar year in which the record is made or, if *released*, 50 years from that point. In theory this means that records might have in excess of 50 years of copyright protection where, for example, they are recorded and not released until much later, but in practice the majority of records are made with the intention of commercial release and issued within a reasonable period of their being made. An issue as to the length of protection is only likely to arise where there is material which was not thought suitable for release at the time the record was made but which become commercially viable after, for example, the death of an artist. Recent regulations bring within the definition of release, the public performance of a record.

2.7 Copyright in a *song or musical composition* lasts for 70 years from the end of the calendar year in which the author dies. The period was extended from 50 years (the original position in the 1988 Act) on 1 January 1996 by way of a Statutory Instrument. This was part of a series of measures imposed by the EU, the purpose of which was to 'harmonise' copyright protection within the Community.

- *It should be noted that the owner of the copyright in a song or musical composition may not necessarily be the author. It is common for authors to assign their copyright for a period of time to music publishers or other third parties. Offshore arrangements however, are much less common in the music industry than in the film industry.*

- *The harmonisation of periods of protection for records brought certain countries such as Germany into line with the UK which had previously enjoyed a much longer period of protection. The general principle behind harmonisation was to harmonise up to the highest or longest period of protection rather than the lowest.*

- *The change in the law brought back into copyright a number of musical compositions which had entered the public domain (the expression which is used to describe works in which copyright has expired). This has given rise to some practical difficulties and could have an impact on infringement actions relating to these re-enfranchised works.*

- *An important element in copyright is its international quality. The rights of copyright owners in other countries can be enforced in national courts as a consequence of international conventions which have existed for more than a century. These conventions are based upon the concept of reciprocity of national legislation. Thus, for example, an owner of a German copyright whose rights are infringed in the UK can sue in the UK courts, as can a UK copyright owner in Germany.*

There are a number of different ways in which copyright can be infringed. Broadly speaking, these can be divided into *primary* and *secondary* infringement.

- *Infringement is the doing of something (or the involvement in such activities or their consequences) which is the exclusive preserve of copyright owners.*

The acts of *primary* infringement are:

- *Copying the work*
- *Issuing copies of the work to the public*
- *Performing, showing or playing the work in public*
- *Broadcasting the work*
- *Making an adaptation of the work*

The acts of *secondary* infringement are:

- *Possessing an infringing copy in the course of business*
- *Selling or letting for hire an infringing copy or exposing or offering it for sale or hire*
- *Exhibiting an infringing copy in the course of business or distributing it*
- *Distributing an infringing copy otherwise than in the course of business to such an extent as to affect prejudicially the owner of the copyright*
- *Providing the means for making an infringing copy or importing possessing or selling for hire an article specifically designed or adapted for making copies.*

- *It is important to make the distinction between primary and secondary infringement when dealing with offenders. Primary infringement is more or less a strict liability offence, ie the state of mind or intention of the infringer is immaterial.*
- *The only defence to an act of primary infringement is found in Section 97 (1) of the 1988 Act, whereby a defendant will not be liable to pay damages (although other forms of relief such as injunctions are available against him) if he can satisfy the court that at the time that he committed the alleged act of infringement he was not aware that copyright existed in the work(s). In practice it is almost impossible to convince a court of this, since ignorance of the law is no defence, ie it is no good at all for the defendant to say that he did not know anything about copyright. However, the recent changes to the law which have brought back into copyright protection works in which copyright had expired, might in particular circumstances provide a defence under the section.*
- *Plaintiffs will fail in copyright infringement actions where they are unable to prove their ownership (or title) to the work(s) in issue.*

Primary infringement

2.9 *Copying* is the most obvious infringing act. In order to constitute infringement it must be of the *whole* or a *substantial* part of a work. This can take a number of forms. It might involve widespread duplication of records for the purpose of selling illicit copies to the public. This form of commercially-driven unlawful activity is usually described as 'piracy'.

2.10 Copying is often a constituent part of other infringing acts, such as broadcasting, for example where copyright material belonging to a third party is used without permission in the creation of a new programme.

- *Copying must be of the whole or a substantial part of the work. It is well established that the test of substantiality is **qualitative** rather than quantitative, ie infringement will be found even if only a few seconds are actually copied, as is often the case with sampling. The test is often whether what has been copied is a key or essential element of the work.*

- *Sampling is a commonplace activity in the modern record industry, whereby sequences of notes, or a particular riff or key passage are incorporated into a new record, which is itself a copyright work. It is necessary to obtain a licence for each and every sample and there is no obligation on the part of a copyright owner to grant such a licence. The terms of any licence will depend upon a number of factors and may take the form a fixed royalty or, more commonly, an override (or discrete royalty) related to sales of the record in which the sample is used.*

Issuing of copies of a work to the public covers a situation in which an infringing or unlicensed copy is distributed or put into circulation by somebody. It should be distinguished from the act of selling, which is an act of secondary infringement.

- *This provision was introduced into the law by the 1988 Act and affords wider protection than was hitherto available to, inter alia, the owners of the copyright in songs and musical compositions.*

2.12 *Performing or showing the works in public* covers a wide range of public acts, the most obvious of which is the use of records (or songs) in clubs or other public venues. It is necessary to obtain a licence for any such use, even for such activities as the provision of recorded music as part of an aerobics class or the accompaniment to synchronised swimming. In the 1990s the use of commercially available recorded music (as opposed to specially commissioned 'muzak') is universal.

2.13 *Broadcasting* covers both the use of the work as a record, ie in music based programmes, and the incidental inclusion of records in other programmes, for example on the

soundtrack of documentaries or plays. In practice, broadcasters in the UK enter into agreements with record companies and music publishers either globally through industry wide negotiated agreements, or in some cases with individual copyright owners.

2.14 *Making an adaptation* adds little to the scope of copying as an infringement but is significant when read in conjunction with the moral rights authors now enjoy in their work.

- *Acts of primary infringement are also committed by persons who 'authorise' others to commit the infringing act. There have not been any cases defining what constitutes 'authorisation' under the 1988 Act but decisions under the 1956 Act in relation to a similar provision demonstrated a narrow construction by the courts as to what constitutes 'authorisation'. The BPI and MCPS ultimately failed to persuade the House of Lords that the provision of a twin cassette facility, specifically designed to enable the copying of what were described in advertising material as 'your favourite cassettes' constituted authorisation. The reason for the decision was the lack of proximity between the alleged authoriser and the ultimate infringers and the fact that there was no control over the activities of the end users. In practice it is difficult to see how such control could be found in any normal consumer situation.*

2.15 Copying is defined as 'reproducing the work in any material form', which includes storage of a work in any medium by electronic means. This definition reflects the fact that copyright protection does not exist in ideas as such but rather the expression of such ideas in a material or permanent form.

Secondary infringement

2.16 *Importing a copy*: the importation into the UK of infringing copies is a copyright infringement in its own right. The offence covers not only copies made in infringement of copyright in their country of origin but also copies which have become infringing copies by virtue of their importation.

- *The record industry operates territorially, an arrangement which does not infringe EU law. This means that rights owners may differ from territory to territory. Thus, records which may have been made perfectly legally in their country of manufacture become infringing copies if circulated outside the territory to which the rights applied. For example, it is illegal to import into the UK Canadian or Australian records without the licence of the copyright owner in the UK. In looking at the issue of what constitutes infringing copies, the court will look at the situation which would apply to the records had they been manufactured in the UK. If that act would have constituted an infringement then the records are infringing copies.*

2.17 *Possession in the course of business* means that copyright is infringed simply by having infringing copies in your possession, without a requirement that they are actually offered for sale. Thus, *storage* is enough.

2.18 *Sale or hire or exposure for sale or hire* is also widely defined so as to cover almost any situation in which the infringing copies are made available for sale in the course of business.

- *What constitutes 'the course of business' will be a question of fact in each case. The courts have tended to take a pragmatic view of trading in these situations.*

2.19 *Exhibition or distribution in the course of business* covers a range of activities in the retail chain as part of a general statutory objective to provide a means of redress against all persons involved in dealing with infringing copies.

2.20 *Distribution otherwise than in the course of trade and to the detriment of the copyright owner* is a sweeping-up provision which narrows the ability of potential infringers to argue that something was not an infringing act due to the fact that it was not carried out in the course of business.

- *An essential ingredient of all the secondary acts of infringement described in this chapter is that there is an onus on the Plaintiff (the copyright owner) to prove that the Defendant had the necessary 'guilty knowledge' ie that he believed or had reason to believe that he was involved with infringing (as opposed to legitimate) copies of the work.*

- *The test is a subjective one which must be applied to each defendant, not by reference to some 'model' defendant. Attempts by the music industry to persuade Parliament to impose an objective standard or attribute a particular required standard of behaviour of all defendants, failed.What this means in practice is that the court will look at all the circumstances of a particular defendant's involvement before taking a view. Defendants deny guilty knowledge as a matter of course, which means that plaintiffs have to demonstrate on the balance of probabilities that it was in fact present. Factors which are relevant to the court's consideration of this aspect are the price of which the end product was being offered for sale, the circumstances of the sale, and the way in which a defendant has acquired the illicit product. If it can be demonstrated that a defendant was offering compact discs for sale at £5 per unit in circumstances where the same discs cost two or three times that amount in the shops, then it will be open to a plaintiff to invite the court to accept that no defendant could possibly have thought that he was dealing with legitimate copies. Obtaining product from sources other than record companies or accredited distributors is another factor which plaintiffs argue should put defendants on notice.Although the defence of a lack of guilty knowledge rarely succeeds, it can be the subject of extensive pleadings and subsequent cross-examination at trial.*

2.21 It is also an offence to make or import into the UK, possess in the course of business or sell or let for hire or offer to so sell, an article *specifically designed or adapted to make infringing copies.* This provision is directed at so-called 'engines of fraud' but it is not likely to be of much practical application given that most means of duplication in the music industry can be used for perfectly legitimate purposes.

- *The provision would capture a mould for reproducing a sculpture or a template or other master for printing counterfeit bank notes.*
- *A related provision is found in section 296 of the 1998 act which makes it an offence to make or otherwise deal in equipment which circumvents copy protection devices or circuitry incorporated within copyright protected works. Thus, where a code is incorporated into a compact disc which makes it impossible to copy or restricts the number of copies which can be made (and thereby limits the efficacy of a compact disc as a master for making infringing copies), the provision of a specific antidote to that circuitry would be caught by section 296.*
- *It is important to remember that all the provisions described in 2.16 – 2.21 require guilty knowledge of the use to which the equipment or device will be put in order to sustain an action for infringement.*

Remedies for copyright infringement

2.22 Copyright owners have a wide range of potential remedies for infringement but the most common are *injunctions and damages.*

- ***Injunctions*** *can be interlocutory or permanent. An interlocutory injunction requiring a defendant to stop doing something (or on occasions making him take some positive action) can be obtained early in proceedings, often at their outset. The court will consider affidavit evidence supported by legal argument. Sometimes, such injunctions can obtained 'ex parte', ie in the absence of the defendant. Permanent injunctions however, can only be obtained after a full trial or upon the default of the defendant.*

2.23 In infringement actions the most important initial consideration upon discovery of the unlawful activity is to stop it happening, both in the short term and in the long term. Provided that a copyright owner can demonstrate that he owns the requisite rights and that a prima facie act of infringement has taken place or is threatened, he can apply for an immediate interlocutory injunction. On these occasions the court will consider the prima facie case and assess the *balance of convenience,* ie the advantages and disadvantages of granting an injunction as opposed to not granting it. Part of that exercise involves the court satisfying itself that a plaintiff can meet a cross undertaking for damage suffered by a defendant if any injunction does not stand up at trial.

2.24 In the long term, damages to compensate for the loss suffered by the copyright owner can be sought alongside a permanent injunction against the unlawful activity.

- *An alternative to damages is to seek an account of a defendant's profits from his unlawful activity. A plaintiff is entitled to elect at trial which remedy he will pursue although an account of profits will only be ordered at the discretion of the trial judge.*

- *Additional statutory damages under 97(2) of the 1988 act will only be awarded where the infringement is particularly flagrant or the benefit to the defendant is not adequately reflected in the profits he has made.*

2.25 Further remedies available to copyright owners include *delivery up* and/or *destruction of infringing copies* and the delivery up of equipment which has been used for making them. Again, these remedies are within the discretion of the court which will look at

the particular circumstances before ordering them. Thus, the court may be reluctant to order the delivery of expensive plant or equipment in circumstances where its use is minimal within the context of the defendant's overall business. However, if a defendant has behaved flagrantly, the fact that he may have spent substantial amounts in acquiring the means to infringe will not discourage the court from making an appropriate order.

- *The rights enjoyed by copyright owners can also be exercised by exclusive licensees, who for these purposes stand in the shoes of the copyright owner.*

2.26 All of the above remedies are available in civil proceedings. In addition, infringement of copyright is a *criminal offence* which carries with it a liability to imprisonment and/or fines. For the past 12 years the UK music industry has tended to pursue infringers through the criminal courts with the assistance of the police and local authority trading standards officers. Judges who were once reluctant to impose substantial custodial sentences have been increasingly willing to do so in recent years, thereby recognising copyright infringement as a form of theft.

- *It should be recognised that if an infringer has a lot of money which can be traced (an unfortunately rare event), a copyright owner needs to consider very carefully whether to bring a civil action in order to recover damages. Fines imposed in criminal cases are paid to the Crown and not to the copyright owners whose rights have been infringed.*

2.27 At one time the UK music industry sought a range of interlocutory orders on a regular basis. These included the following:

- *An Anton Piller Order*: this entitled a plaintiff to seize from a defendant infringing copies and any documents evidencing the infringing activities.
- *A Mareva injunction*: which freezes a defendants assets so as to prevent their disposal pending the trial of the action.
- *A Sarwar order*: requiring a defendant to answer certain questions pursuant to his allegedly infringing activities.

- *All of the above orders can be obtained ex-parte, their primary objective being to preserve evidence and assets and to require early disclosure of material facts relating to infringing activities. In recent years these remedies have tended to be used more sparingly than was once the case, partly because the exercise of them has been subject to stringent procedural requirements which make them extremely costly to enforce and also the fact that criminal warrants can be exercised effectively by the police and other statutory authorities in order to achieve the same end.*

2.28 *Section 100* of the 1988 Act introduced a statutory right for copyright owners to use a degree of self-help in protecting their copyrights by seizing infringing copies in circumstances where the trading activity was ephemeral. One of the difficulties of utilising the normal remedies in the 1988 Act is that it takes time to do so and therefore such remedies are not always effective against itinerant traders, for example those trading from a market stall or street pitch. Section 100 addresses this. In practice the rights is used sparingly in circumstances where it is impossible or impracticable to bring conventional civil or criminal proceedings.

Fair dealing

2.29 There are circumstances where in which copyright works can be used without the authority of the copyright owner. *Sections 29 and 30* of the 1988 Act provide a defence of 'fair dealing' provided that the work has been used for:

- *Criticism or review of that or another work; or*
- *Reporting current events; or*
- *Private study.*

- *To satisfy the requirements of the sections only short extracts will usually be permitted. Television companies have laid down voluntary guidelines in relation to news and sport of a maximum of 30 seconds. As with substantiality however, the test is likely objective rather than subjective. This provided the reasoning behind the court allowing Channel Four to use a substantial number of extracts from the film 'A Clockwork Orange'.*
- *Where the work is used for the purposes of criticism or review (of that or another work) it must be accompanied by 'sufficient acknowledgement' identifying the work and the author. However, no acknowledgement is needed when a record is used to report a current event, for example the death of a recording artist.*
- *Copyright is not infringed by its incidental inclusion in another work, for example a record playing in a background while an interview is being filmed for television.*

Home taping

2.30 Home taping, otherwise known as 'private copying', is the making of a copy of a copyright work for personal as opposed to commercial use. The 1988 Act makes no distinction between private and commercial activities for the purpose of *primary infringement*. **This means that home taping is illegal.**

2.31 In the 1970s and 1980s attempts were made by the music industry to persuade the UK government to recognise that, as there was no practical action which could be taken in relation to home taping (nor would it have been politically acceptable to sue domestic users making copies of records that they had bought), there was a good case for saying that copyright owners should receive some compensation for such use. The proposal was that home taping should be legalised in return for a royalty (sometime called a 'levy') on blank recording tape and recording equipment. Having decided to introduce such a measure the government changed its mind and took no action in the 1988 Act. In taking no action it ignored comments in the House of Lords in the *Amstrad* case to the effect that law which is unenforceable in practice is bad law.

2.32 However, a number of other countries in Europe have introduced legislation and there is now a recommendation by the European Commission that a similar measure should

be introduced into the legislation of countries like the UK who, at present, have no such provision. Therefore it is likely that a form of royalty will be introduced into UK legislation in order for the UK to comply with its Treaty obligations.

- *Home taping of TV programmes is legal provided it is down for time-shift purposes and any copies thereby made are destroyed within 28 days.*
- *It is not illegal to tape live performance for personal use although the copyright in any songs or musical compositions included in a performance are thereby infringed.*

2.33 The international record industry organisation IFPI has been involved in the development of a code, the object of which is to limit the number of copies which can be made from a compact disc or digital audio tape. Also, utilisation of the code on CDs and digital audio tapes would make it impossible to make any copies from the *first copy*.

- *Attempts in the 1980s to perfect a spoiler device which would inhibit illegal recording were unsuccessful since it proved technically impossible to devise a signal which did not derogate the musical signal on the records.*

Intervention of Europe

2.34 Copyright has long been international in nature. This is particularly important in the media sector, the business of which is international. For almost a century national governments have been required by international treaty obligations to make sure that the level of protection given to copyright works is in line with the parameters set out in the conventions.

2.35 The EU has introduced a new dimension into the national picture. It is no longer possible for governments to plan copyright law simply by reference to legal traditions

or political preferences. The extension of the period of copyright protection, the introduction of a rental right for the owners of copyrights of songs and musical compositions and the extension of the rights of performers have all come about as a consequence of the UK's obligation to comply with EU Directives. It seems increasingly likely that much of the impetus for change in copyright legislation will come from this source.

- *Copyright is a monopoly right. UK copyright legislation has attempted to strike a balance between the rights of copyright owners and the users of copyright. Thus, copyright must be seen in the context not only of the rights of its owners but also of competition law and the public interest in having reasonable access to copyright works.*

Collective action

2.36 The international music industry has a long tradition for taking collective action against infringers or *pirates* as such people are usually described.

2.37 The process starts with organised campaigning for adequate copyright laws internationally. These activities are co-ordinated by IFPI, the international trade organisation which has its administrative headquarters in London. IFPI is a federation of record industry associations. It assists its members by advising on appropriate legislation, providing funding for legislative initiatives and on occasions taking direct action in key territories. In addition it has taken a leading role in fighting piracy in the Far East, Africa and most recently Eastern Europe.

2.38 In the UK, the *British Phonographic Industry ('BPI')* co-ordinates anti-piracy activities on behalf of its record company members. The *Mechanical Copyright Protection Society ('MCPS')* performs a similar role for composers and music publishers and the two organisations frequently work together. BPI also works closely with local authority trading standards departments and the police to co-ordinate criminal proceedings, particularly against the manufacturers of illicit product.

- *BPI has an anti-piracy unit which investigates pirate activity and prepares cases for enforcement.Also, it prepares expert forensic advice for BPI members and for those bringing enforcement actions.Part of that service is the giving of expert evidence in court.*
- *As is mentioned elsewhere in this report , less use is made these days of the various interlocutory civil remedies than was once the case.However, those rights remain and are available in appropriate circumstances.*
- *Section 105 of the 1988 Act assists in the conduct of representative piracy actions involving a wide range of repertoire owned by many different companies.This is achieved by the provision of certain presumptions of copyright ownership which will apply in circumstances where adequate wording has been displayed on the face of records and their packaging.There is no specific authority as to what wording will be adequate for these purposes but the following is likely to meet the requirements of the section:*

P EMI Records Limited 1998

The copyright in this sound recording is owned by EMI Records Limited

or

P EMI Records Limited 1998

The Copyright in this sound recording is owned by Isherwood Management Limited and licensed exclusively in the UK to EMI Records Limited.

Moral rights

2.39 The concept of moral rights, which are quite separate from copyright, (although there is a close relationship between them) was introduced into UK law in the 1988 Act. These rights had their origin in European jurisprudence where, traditionally, there has been far more emphasis upon the rights of authors and creators.

2.40 Moral rights are found in Chapter IV of the 1988 Act and broadly speaking fall into three categories:

- *The right of paternity*
- *The right of integrity*
- *The right not to have the work falsely attributed*.

2.41 The so-called right of *paternity* which extends to the authors of copyright musical works or the directors of films gives that person the right to be identified as the author. In practice this means that the work must carry some visible notice to that effect, for example a credit. This has not presented the music industry with any problem since it was already common practice to credit songwriters and arrangers on the face of records. It has had far more impact in the printed media, particularly in relation to photographers or the creators of other literary or artistic works.

2.42 The so-called right of *integrity*, is the right not to have a work subjected to 'derogatory treatment' by a third party. As yet there is little authority as to what will constitute derogatory treatment but one activity which might so do is any treatment which diminishes the stature of the work by parodying it.

- *This right is potentially significant for record companies who normally take advantage of an opportunity the Act provides for the right to be waived by recording artists. A clause to this effect is now commonly inserted in recording agreements. Failure to make such provision could render a record company liable to recording artists in circumstances where, for example, a track is licensed to a third party for a purpose of which the artist does not approve or is used by a third party in a derogatory way in circumstances in which the licensor record company has no physical control over the project. Recording agreements already contained clauses limiting rights of exploitation in certain cases, for example in relation to multi-artist compilations, and the existence of this new right requires some extension to those provisions.*

2.43 The right not to have a work *falsely attributed* is the least likely to occur in practical terms but would address a situation in which a third party has sought to benefit from the reputation of a creator by attributing that person's name to a particular work in order to make it more commercially attractive.

The rights of performers

2.44 The rights of performers in relation to the exploitation of their performances have been extended greatly in recent years. Prior to the 1988 Act these rights were found in a series of criminal statutes which were referred to as the *Performers' Protection Acts*. These acts made it a criminal offence to record, other than for personal use, performances given in concert, on radio or television or otherwise in public.

2.45 The sale of illicitly made performances is widely known as *bootlegging*. The penalties under the Performers' Protection Acts were not adequate to discourage such activities. As a result performers and record companies acting on their behalf attempted to bring civil proceedings based upon the provisions of the Acts. This led to a period of great uncertainty as to whether the Acts conferred civil remedies exercisable by performers or record companies which held exclusive recording rights.

2.46 The 1988 Act brought performers into line with *copyright owners*. Section 180 conferred a specific right on performers by requiring their consent to the exploitation of their

performances. That right was also given to *record companies* having recording rights. This means that both performers and record companies can bring proceedings against bootleggers.

- *Record companies can bring proceedings in their own right, not just on behalf of their exclusively contracted artists. The significance of this is that many recording artists do not object to bootleg recordings circulating among fans whereas record companies are always concerned by the availability of any product which might detract from the sales of commercially produced records.*
- *It was a case involving the Elvis Presley Estate which decided that record companies could not bring actions under the Performers' Protection Acts and another case involving the Estate of Peter Sellers which restored the civil right of action which had been in some doubt throughout the 1980s. All of the uncertainty however, was removed by the provisions of the 1988 Act.*

2.47 The rights of performers in relation to the exploitation of their performances have been extended further by the provisions of *The Copyright And Related Rights Regulations 1996* which came into force on 1 December 1996. It is now an offence not only to make a recording of a performance without consent but also to *make a copy* of such works or issue copies to the public. The definition of issue includes unauthorised *hire or rental* of copies, thus conferring a *rental right* on performers in relation to copies of recordings of their performances.

- *Record companies were given the right to prohibit unauthorised hire or rental of records in the 1988 Act. The 1996 Regulations extended this right to the owners of copyright in songs and musical compositions and performers, thereby complying with an EU Directive on rental rights.*

2.48 Another important aspect of the 1996 Regulations was to give performers *a right to equitable remuneration* where their performances are exploited. This means that recording artists are entitled to payment when, for example, their records are played on the radio. Prior to this very significant change in the law, contracted artists had to rely upon any rights in their recording agreements and ex gratia payments made to them by Phonographic Performance Ltd ('PPL'). Now, PPL is under a statutory obligation to pay part of the income its derives from broadcasting and public performance to recording artists.

- *For these purposes the term 'recording artist' includes both signed artists and also session musicians who are hired to play on records.*

2.49 The legal remedies now enjoyed by performers where there is an infringement of their rights are similar to those described above which may be exercised by record companies and others owning copyright in records.

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The music industry: the contractual framework

Record company obligations

Music publishing agreements

Management agreements

Producer agreements

chapter 3

The music industry: the contractual framework

3.1 The working life of the music industry is regulated by a number of key agreements. At the heart of the industry are:

- *Recording agreements;*
- *Publishing agreements;*
- *Management agreements;*
- *Producer agreements.*

3.2 In addition, there are further agreements which are negotiated at industry level between bodies representing record companies, music publishers, artists, broadcasters, background music suppliers, multi-media companies and others.

- *In this context, the question is often asked as to what role copyright plays in these practical commercial arrangements? The answer is that copyright underpins the commercial activities of the music industry and copyright is at the heart of the interrelated rights which arise as a result of the creation of works.*

3.3 Most *recording agreements* provide for the record company rather than the artist to own the copyright in records made under the agreement. This comes about for a number of reasons:

- Copyright is one way in which record companies can attempt to recoup (or recover) in the longer term their investment in recording artists, such investment being particularly heavy at the outset of the careers of new artists;
- Record companies have usually paid the up-front recording costs and other costs associated with launching an artist and creating product. Part of that process will have involved the payment of advances which the record company will hope to recoup from sales income. In those circumstances it is important that record companies have a secure interest in the records which are made;
- Record companies are in a far better negotiating position at the outset of an artist's career.

3.4 There have been suggestions in recent years, notably in the high-profile litigation between *George Michael* and *Sony,* that it is inappropriate for record companies to own copyright for its entire term (at least 50 years) in circumstances where the record company has recouped all its expenses. There is some logic in this argument but ownership of rights is so central to the business philosophy of the record industry internationally that it seems unlikely that record companies will allow any dilution of copyright ownership without being required to do so by the courts.This does not prevent the re-negotiation of recording agreements during their course to provide for recording artists to own copyright through management or other corporate vehicles and to license recordings to record companies.This is still a relatively rare arrangement.

3.5 Most recording agreements are substantial, complex documents. However, there are a relatively small number of *key elements* which are described in the paragraphs which follow.

3.6 The main obligation upon *artists* in recording agreements is for them to provide their exclusive recording services for the period of the contract and to comply with a series of practical directions which are imposed to enable recording projects to come to fruition.

- *Exclusivity is the cornerstone of any recording agreement. In one sense such a provision is no different from that which is found in any contract for services (or employment arrangement) save in the very important sense that virtually all the rights to determine the length of the contract lie with the record company. Unlike, for example, the contracts of footballers which are finite, recording agreements can go on indefinitely and certainly are capable of covering the likely active recording life of most artists. It was in that context that George Michael likened his recording agreement to 'slavery'.*
- *Therefore recording agreements are by their nature in restraint of trade and that is one reason why they are closely scrutinised by the courts.*

3.7 The way most recording agreements are structured is through a series of options, exercisable by the record company and usually calculated by reference to the delivery of *albums*. Thus, an artist will be given a deal which covers a specified number of albums to be delivered within specified (although in practice flexible) time limits. However, just because the contract provides for a four album deal this does not actually mean that the record company will have an obligation to record and pay for four albums. This is because it will probably have the right to terminate the agreement at any point during the cycle, ie after one, two or three albums.

- *Sometimes recording agreements for new, unproven, artists provide for the delivery of one or more **singles**, but this is not common where record companies are looking to develop the career of an artist or act.*
- *There are almost no circumstances in which artists can terminate recording agreements without taking the matter the court. Most of the landmark legal decisions over the last twenty five years have concerned 'contract busting' by artists who have sought to demonstrate that the terms of their agreement are unfair.*
- *It is a matter of fine judgement for an artist as to whether he should go for a long or short contractual period. Although a multi-album deal may not be fulfilled, it might have an impact upon the advance paid for the first album. In practice most record companies are looking for a long term career (as opposed to a singles deal where all of the potential profits are in the short term) and will seek a medium-term commitment.*
- *One advantage of a longer artist commitment may lie in the royalty levels which can be negotiated together with the size and timing of advances. It is not an uncommon during negotiations for an artist to offer additional periods of commitment in return for larger advances, often of an escalating nature.*

Record company obligations

3.8 The main obligation of the *record company* under a recording agreement is to fund the making of records and to pay royalties from their sales.

- *There is no such thing as a standard royalty, save that royalties are almost always expressed these days as a percentage of the price to dealers (the wholesale price) rather than a percentage of the retail price. However, rates vary from around 7% to 20%, depending upon the status of the artist.*
- *Most contracts do not contain a particularly specific release commitment by record companies, an omission which has been criticised by the courts. This should be contrasted with the quality warranties given by artists, although in practice only the warranty in relation to the technical quality of records delivered is likely to be enforceable, artistic quality being a largely subjective issue.*

3.9 *Advances* against royalties are usually paid at the outset of each option period (although they may in some circumstances be paid in installments in order to encourage good husbandry on the part of artists). The level of such advances are a matter for individual negotiation but often escalate as each option is exercised. Advances are usually non-returnable but are recoupable from the royalty payable on sales income.

- *It is common to cross-collateralise recoupment (ie spread the recovery of expenses) between different albums although this does not necessarily result in deduction from advances for the second and subsequent option periods.*
- *Advances are important not only as means of providing ready cash but as one way of offsetting the delay which can often arise in relation to royalty accounting. Most royalty accounting is either quarterly or half-yearly, typically two or three months after the end of each accounting period.*

3.10 The key to the financial arrangements in recording agreements is that, although record companies make a significant up-front investment, particularly in new artists, almost all that investment is potentially recoupable. Thus, not only recording costs are recovered. Video costs (or more commonly 50% of them) are also recoupable. Some recording agreements provide for recoupment of marketing expenditure, for example in the promotion of records.

- *While this recoupment may seem unfair in relation to the ultimate ownership of long-term rights, the simple fact is that in relation to most artists record companies do not recoup. Most recording projects are unsuccessful and therefore record companies do look to the successful artists to subsidise the rest of their business.*

3.11 The payment of royalties extends long beyond the end of the active life of a recording agreement, as record companies re-release catalogue product and/or licence tracks or whole albums to third parties. Given the economics of the business this does not necessarily result in any money being paid to recording artists, for example if they are unrecouped. However, where recoupment is not a problem, the constant re-cycling of catalogue to service an ever widening audience for recorded music can be a useful source of long-term income for 'retired' artists.

3.12 Most major recording agreements provide for *world wide rights.* While it can be an advantage to be distributed internationally by the same group of companies, specific licensing for particular territories also has advantages. In practice most record companies will wish to enjoy the opportunities to license world wide and artists negotiating recording agreements for the first time are rarely in a position to argue with such a provision.

3.13 Another important ingredient in recording agreements is adequate *audit* provisions which enable an artist to have some degree of control over a record company's accounting performance. In practice, since an audit involves significant costs risks (an artist will have to pay the costs of an audit unless a prescribed shortfall is found), it can be difficult for less and successful artists to exercise their rights in this regard.

- *A common feature in successful relationships between record companies and artists, is a constant evaluation and re-negotiation of the key terms of their agreement, particularly the financial terms. What may be fair at the outset of an agreement may become unbalanced in the context of its performance. This usually means that record companies will offer to increase the number of royalty 'points' or adjust the periodic advances. However, it should be noted that re-negotiations of this kind rarely result in a reduction of royalties or advances.*

3.14 A question arises as to whether recording agreements may be forced to go the way of agreements between football clubs and their players? The trend in football, which is itself increasingly a part of the entertainment industry, has been towards freedom of contract. A consequence of the Bosman ruling has been that football clubs can no longer charge a fee for a player once his contract has expired.

3.15 This development seems unlikely to affect recording agreements. The main reason for this that the key to freedom in football contracts is the expiry of the contractual arrangement. There is nothing to stop a club renewing a contract or entering into lengthy contracts in the first place. However, long agreements carry a financial commitment to pay the agreed salary and bonuses, a situation which is not found in recording agreements which are built around a series of options, not a fixed term. Because of this structure, record companies enjoy the benefit of secure, long-term agreements but have the ability at prescribed points to terminate the arrangements.

- *So far the European Commission has shown little interest in recording agreements. If this changes in the future the main areas of focus may well be the term of exclusive agreements and the one-sided nature of the termination provisions.*

- *The history of UK court decisions from the early 1970s to 1994, was one of unfair practices being outlawed, one by one, by the courts. The George Michael case was a watershed in that it marked the first significant occasion when an artist failed when challenging the validity of an agreement. The judgement has had the undoubted effect of discouraging contract busting cases.*

3.16 A clause which has become commonplace in recording agreements is one to the effect that an artist has to take *legal advice* on the contract. The intention behind such clauses (and record companies paying for legal advice for new artists) is to narrow the range of issues which might be raised by the artists as to the fairness of the contract.

- *While such provisions may be flattering to lawyers, they do not address the fact that most new artists are likely to find themselves in a take it or leave it situation at some point during negotiations. No matter how skilful and effective their lawyer, they are unlikely to be able to overturn or even modify to any significant degree the key clauses which could in due course be the target of a challenge in court.*

Music publishing agreements

3.17 Songs and musical compositions enjoy their own copyright. Writers of songs on successful hit records enjoy a significant source of income from the recording and performance of their songs.

3.18 For the last twenty five years or more it has been commonplace for recording artists to write their own songs. Indeed, there are relatively few successful long-term artists who do not write. Dance music is an exception but this area of the record industry is repertoire rather than artist led. In any case dance artists are often also producers and writers.

3.19 Historically, income streams from writing and recording have been separate. It is unusual therefore for record companies to own the copyright in songs or for music publishers to own the copyright in records. Major multi-national music companies have recording and publishing interests but these tend to be run as quite separate profit centres.

- *However, particularly in the US, record companies have sought to gain some advantage from the artist/writer relationship by the implementation of so-called controlled composition clauses. The way these clauses operate is to provide for a lower publisher/composer royalty for those artists who write their own material. Such clauses are less commonplace in the UK where they are strongly resisted by music publishers and their representative organisations.*

3.20 Most songwriters sign up with music publishers whose job it is to secure income from the licensing of the songs and collect income, internationally, on behalf of the writer from a wide-range of exploitation.

3.21 Songs earn income from a number of different sources:

- Recording;
- Performance in public;
- Licensing into films and broadcasts;
- Incorporation into music videos;
- Multi-media applications.

3.22 Whenever a song is recorded a *mechanical royalty* must be paid in respect of every record sold (or in some cases in respect of every record which is pressed or manufactured). In most countries this royalty is fixed either by statute or through negotiations between bodies representing record companies and music publishers.

- *In the UK negotiations take place on a regular basis between the BPI on behalf of record companies and MCPS on behalf of music publishers. The current rate is 8.5% of dealer price. This was fixed however, not through negotiation but by the Copyright Tribunal in a reference which took place in 1991-92. It followed the abolition of the statutory recording licence which had existed since 1911 and which had fixed the rate at 6.25% of the retail price.*

- *In the Copyright Tribunal reference MCPS argued that the UK rate should be brought into line with a higher rate which applied throughout most of Europe. The European rate, which was close to 9.5% of the dealer price, had developed independently to the UK rate in circumstances in which composers and music publishers in Europe had been in a much stronger negotiating position than in the UK, not the least because of the absence of statutory rates in most territories. MCPS failed to convince the Tribunal however, that EU law and/or industry practice dictated that there should be a harmonisation of the rate throughout Europe. Rather, the Tribunal looked to the particular circumstances of the UK industry.*

3.23 Songwriters usually assign rather than license their rights to music publishers. However, there may be circumstances where they retain the ability to approve specific licensing proposals, such as the inclusion of a song into a film, which can provide an extremely lucrative source of income where films are successful and/or involve sound track albums. Most publishing agreements follow a similar structure to recording agreements, with for example:

- Advances;
- Option periods;
- Minimum commitments;
- Royalty payments.

Unlike recording agreements, there is rarely any recoupment other than of the *advances*.

3.24 Because, by and large, music publishers do not have the same level of marketing and origination costs as records companies, they will pay a much higher percentage of the income they receive from the exploitation of songs through to the writer. This will

normally be between 60% and 80% of income, a 70/30 split in favour of the songwriter being common in today's industry.

3.25 Much of the actual income earned by songwriters and publishers on their behalf is actually collected by collecting societies rather than the publishers themselves. The most lucrative sources of income, other than recording income are *broadcast and performance income*.

- *The agreement between the Performing Rights Society ('PRS') and its members provides for 50% of the performance income collected by it to be remitted to the writer directly, rather than via the music publisher so this income cannot be used by publishers to offset the advances paid by them to writers.*

3.26 As is the case with the record industry, music publishing is international with collecting societies in all the major territories. It is now commonplace for record companies to negotiate 'one-stop' deals with the societies in Europe rather than pay mechanical income on a territory by territory basis. Thus, collecting societies are in competition with each other to secure business from record companies. The largest collection societies in Europe are *GEMA* (in Germany), *STEMRA* (Holland), *SACEM* (France) and *MCPS*.

Management agreements

3.27 One of the problems facing a new artist or act is finding a manager. In most cases there is probably no shortage of people prepared to act as a manager but finding somebody with sufficient skills and experience to deal with the sometimes complex negotiations in which recording artists can be involved, is not easy. It can be as difficult an exercise as securing a recording agreement. For this reason it is not uncommon for acts to be managed initially at least by someone who knows them or is associated with them, for example a relative or friend.

3.28 One of the things an experienced manager can do is to assist an act in getting a recording agreement. Contacts within record companies, particularly the A and R departments, can be a vital factor in getting demo tapes heard in a sympathetic environment. However, there are a number of potential pitfalls in a management arrangement and it is vital to resolve these key issues at the outset of a relationship.

3.29 A central issue in any management agreement is the management fee. This is usually expressed as a percentage of earnings. The percentage itself (normally in the *15-25*% range) is not usually a problem. Of far more importance is fixing the income to which it will apply.

Will all recording income be brought in?

What will happen to tour income?

Will a manager receive any income after the agreement ends?

It is important from an artist's point of view that, as far as is possible, the percentage should be levied on *net* income rather then gross income, particularly tour and related income.

3.30 Another key area is the *commitment* of the manager. How much time will he devote to managing? It is important that the manager is available to take part in key negotiations. Also, if a manager is part of a corporate team, it is vital to secure an acceptable level of personal commitment by way of a 'key man' provision.

3.31 Another potentially difficult area is in relation to *expenses*. It is necessary to establish which expenses should be regarded as overheads of the manager's business and which can be charged against the income of the act. Also, it is important to establish clear guidelines as to the circumstances in which approval will be required from the act for particular expenses or levels of expenditure and which can be incurred on their behalf by the manager without such approval. If these areas are not resolved at the outset and clearly set out in a management agreement they may provide a fertile area for dispute.

3.32 Accounting procedures should also be established together with an effective right of audit. It is sensible to avoid any possibility of the mixing of funds and to operate an act's affairs through separate accounts in its name.

- *Management agreements are no different to any other commercial contracts. Terms need to be clear and as fair as can be achieved. It should be remembered however, that they fall into a class of contracts where a fiduciary or special relationship has been held to apply between the parties, imposing heavier burdens of honestly, integrity and good faith upon managers.*
- *Career direction should be agreed if possible. History is full of examples of artists who have lost direction due in part to management short comings or inadequacies.*

3.33 A further area which needs particular attention is the length of the contract and the right to future income a manager will enjoy after its termination in respect of work produced during the course of the contract, subsequent work and specific contracts negotiated by the manager.

3.34 The worst agreements from an artist's point of view are those which give a former manager a meal ticket for life. As always in contracts of this kind the objective should be a fair balance between the interests of the parties. A manager will need to have in mind the fact that there is no guarantee that a contract will be extended and that circumstances could arise where an act which he has developed and which has achieved success may decide upon a change of management at the very point when they are beginning to earn serious money.

- *Some degree of fairness in the circumstances can be achieved, for example, by the application of an override on future income for a defined period.*

Producer agreements

3.35 *Producers* are frequently engaged to take responsibility for the production (or in the broader sense the *creation*) of records. These days most producers are independent, ie they are not employed by record companies as was once the case, and therefore it is important to have a producer agreement which sets out very clearly the obligations of the producer and the financial arrangements between the parties. The starting point is clarity in the relationship of the contracting parties, ie is the producer contracting with the record company or the act?

- *The term 'record producer' is used in some countries (and historically was used in the UK) to denote the record company which released the record (or more pertinently manufactured it).*

3.36 These days the term is used to refer to the creative controller of a recording project, the nearest equivalent to the director of a film or television programme. Production involves overall supervision of the recording project in the studio and, usually, mixing (or re-mixing) thereafter. Sometimes record companies will hire a third party to mix the tracks laid down in the studio, for example if they are unhappy with the results which have been achieved or in search of a particular sound. It is important in those circumstances that the rights of the producer over his creative work are clearly defined.

3.37 Most of the elements of a producers contract are practical and deal with, inter alia, the following:

- What is being produced, for example the number of tracks;
- The timetable for the project;
- The budget for the project;
- What is the record company expecting to be delivered?

3.38 The financial arrangements for the producer will usually involve an element of advance payment against a royalty calculated on sales, in exactly the same way as artist royalties. In practice, although the record company will be responsible for up-front funding of the producer costs, in the long term record companies will seek to recoup these from the royalties paid to the artist. Strangely, producer royalties are often expressed in

terms of retail rather then wholesale price. If this is the case the percentage will need to be adjusted to reflect the higher base price.

3.39 It is crucial for record companies to ensure (or the artist if he is responsible for hiring the producer and then licensing the finished product to the record company, perhaps retaining copyright in it), that the issue of *copyright ownership* and any rights arising from it, are dealt with in the producer agreement. The reason for this is that the definition of the *author* in the 1988 Act (which is described in Chapter 2), means the first owner of copyright is the person responsible for making the arrangements for the record to be made. In purely practical terms that person is often the producer.

- *Producers often assist in the development of material in the studio and may be entitled to a share of the copyright in the musical compositions which arise. This is a matter which will usually need to be sorted out between the producer and the act, although it is possible to provide for it in the agreement between the producer and the record company in circumstances in which the act writes their own material.*

- *Whatever the legal position of 'authorship', the producer will often regard himself as the creative force behind a project. In this, there is plenty of room for dispute as most acts feel the same way. It is important therefore to have a provision in the arrangement which entitles the record company to remix without the producer's consent and to obtain a waiver of any moral rights to which a producer might be entitled.*

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Collective administration and protection of rights

Record industry bodies

Phonographic Performance Limited

Performing Right Society

Mechanical Copyright Protection Society

IFPI

Other groups

Copyright Tribunal

chapter 4

Collective administration and protection of rights

The music industry is one in which individualism flourishes and the rewards for success are substantial. It is a highly competitive industry with a significant emphasis being placed on market share.

Nonetheless, it also an industry which acts collectively in the protection of rights, in their administration and on occasions in their commercial exploitation.

Record industry bodies

4.1 There are two major organisations which represent the interests of UK *record companies*. The *BPI* is a trade association, a company limited by guarantee whose members are UK record companies and others having related interests in recorded music. Incorporated in 1973, the BPI's current membership is in the region of 150.

4.2 The BPI has its offices in the West End of London. Its business is conducted by a small full time staff under its long-serving director general John Deacon. Policy matters are decided by an elected Council of Management, comprising senior executives from a wide range of record companies, including all the 'majors'. Other areas are the province of specialist committees, for example the Rights Committee which deals with legal and related matters and the Public Relations Committee.

4.3 Among the areas of work the BPI deals with are the following:

- The collection and distribution of official record industry sales statistics and related market information;
- Co-ordination of anti-piracy activities;
- Negotiation of collective agreements, for example with music publishers and the talent unions;
- Dealing with matters relating to the public profile of the record industry and public relations generally;
- Monitoring legal developments and advising members on those which impact upon their business, for example tax measures.
- Participation in the record industry charts, which are produced by CIN;
- Co-ordination of the annual BRIT Awards.

4.4 The BPI is not a rights body. It does not take assignments from its members or collect money from the exploitation of rights. Rather, it is largely funded by subscriptions from its members, calculated by reference to turnover. It provides the forum for discussion of matters of industry concern and acts for its members in matters in which they have a common interest. Among its more controversial areas of activity is in maintaining a voluntary code of conduct in relation to the charts, a responsibility which gives rise to the investigations of alleged irregularities (often in relation to marketing activities) and the application of sanctions against members which have infringed the code.

- *The UK record industry comprises a wide range of companies, from the so-called majors (Polygram, EMI, BMG, Warners, Sony and MCA) to very small record companies, many of which have only a few titles in their catalogue. At one time there were a number of quite large independent record companies which formed a second tier in the BPI's membership. However, over the past fifteen years most of these companies have been absorbed into major companies where they operate as labels within the corporate group. Examples of these companies are Island (now part of Polygram), Chrysalis (now part of EMI), A & M (now part of Polygram) and Virgin (now part of EMI). Although these former independent companies are now part of corporate groups, nevertheless they tend to retain an element of their previous identity, for example in the kind of music they promote.*

4.5 As a matter of policy the BPI does not become involved in *price* related matters. This is one area in which any collective organisation has to be extremely careful in the light of UK and EU *competition law.* In the mid 1980s the European Commission commenced an investigation of record company activities in relation to their dealings with retailing chains in order to see whether there was any preferential treatment of particular retailers. However, having conducted a substantial 'audit' of the BPI's activities in this regard, the matter was not pursued.

Phonographic Performance Limited

4.6 *Phonographic Performance Limited ('PPL')* is the record industry licensing body. It represents a very substantial number of record companies, far more than the BPI, in the licensing of records for broadcasting and public performance as well as for a wide range of other business uses.

4.7 PPL was incorporated in the 1930s. Unlike the BPI it takes assignments of a range of rights:

- Broadcasting
- Public performance
- Dubbing for background music services
- Multi media applications
- Digital diffusion

It negotiates collective agreements with broadcasters and other representative bodies as well as with individual licensees.The present turnover from these licensing activities is in excess of £40 million per annum.

4.8 PPL also protects the rights of its members and brings legal actions against infringers. Unlike the BPI, it does not employ a full-time anti piracy staff but rather relies upon information from its field agents and the goodwill of its licensees who draw potential infringements to its attention.

- *PPL has a number of tariffs which apply to different uses of its repertoire. Most of its broadcasting agreements involve global payments by broadcasters but annual tariffs are paid by, for example, organisations which use music as part of their business, such as retail outlets, restaurants, leisure centres, clubs and public houses.Where a commercial outlet purchases its music from third parties, PPL licences the third party for the provision of the service and also issues annual licences to the end users, ie the sites, for the performance of the repertoire.*

- *When PPL members assign their rights they can choose between assigning all the relevant rights set out in the Membership Agreement, which include multi media use and digital diffusion, or they can restrict the assignments. Virtually all record companies assign broadcasting, public performance and dubbing rights.*

- *In 1983 BPI set up a commercial dubbing licence for background music suppliers. PPL took over the administration of that licence in 1985 and has subsequently licensed the users direct, having taken an assignment of the dubbing rights of its members. More recently, background music has been supplied by way of satellite broadcasts, which are also licensed by PPL. The tariffs for the background music service and the satellite services are both the subject of Copyright Tribunal references. In November 1997 the Tribunal fixed the rate for satellite delivered music services and will consider the rate for commercial dubbing in 1998.*

Performing Right Society

4.9 *The Performing Right Society ('PRS')* represents music publishers, song writers and composers in relation to the public performance and broadcasting of their work.

4.10 PRS was founded in 1914 and has several thousand members, many of whom are songwriters and composers.The other main category of members are music publishers to whom songwriters and composers are also contracted.As is the case with PPL, PRS takes an assignment of the rights of its members and represents them in collective negotiations with users, including broadcasters.

4.11 PRS operates through a General Council and a number of committees and working groups. The members of the General Council are the directors of PRS and are elected for a three year term. The Council is divided equally between writer members and publisher members.

4.12 PRS has a wide range of tariffs (over forty) and over five hundred different rates which reflects the great variety of ways in which music is used.

4.13 The main PRS broadcasting agreements are with the BBC (for television and radio), independent television, independent radio and satellite radio and television broadcasters.

4.14 After the deduction of administrative expenses, by far the greatest element of which is in computer technology for storing usage data, PRS distributes its net income to its members. Its method of distribution in relation to live concert events has recently been criticised by a number of its members as a result of which PRS has examined its internal structures and made certain changes to them. Part of the general administrative upheaval within PRS has come about as a result of much closer co-operation with MCPS, its sister organisation, and the setting up of a common database and shared executive structure.

- *From time to time UK collecting bodies have been the subject of investigation by the Monopolies and Mergers Commission in relation to some of their activities. PPL was the subject of an investigation in 1988 as a result of which certain changes were implemented. More recently, the MMC reported in February 1996 on the activities on PRS, again making certain recommendations for change. However, by and large, the UK collecting societies have come out of these investigations with some credit, without any finding of wide spread abuse on their part.*
- *PRS's income from its licensing activities exceeds £186 million.*

Mechanical Copyright Protection Society

4.15 *The Mechanical Copyright Protection Society ('MCPS')*, derived its name from the fact that it was set up in order to license so-called 'mechanical' activities in relation to music. In consequence the performing right and mechanical right in the UK were administered quite separately, in contrast to the position in most European countries where one society licenses both rights. The mechanical right relates to the incorporation or synchronisation of music or songs into mechanical contrivances, such as records and films (including videos). More recently, MCPS has become increasingly involved in licensing multi-media applications, including computer software.

- *As is the case with PRS, MCPS has publisher members and writer/composer members, both categories of membership being represented on its Board.*
- *A major area of MCPS's activities has been and remains the negotiation of mechanical licenses with record companies. Historically, this activity was carried on within the framework of the statutory recording license and more recently has been in the unregulated environment which came about as a result of the 1988 Act. Much of its day to day collecting activity is in relation to licenses with record companies.*
- *MCPS's current turnover exceeds £130 million, much being derived from broadcasters and film companies.*
- *There has been an overlap between the licenses granted by PRS and MCPS to broadcasters. PRS has negotiated global licenses with broadcasters for the actual performance of music. Much of that performance is in music-based programming, for example music radio. However, the performance licence also includes any music synchronised onto the soundtrack of programs, for example documentaries and films. MCPS licenses the synchronisation of music onto those documentaries or films in return for a quite separate payment.*
- *Over the past two years MCPS has been forging closer ties with PRS. The two organisations now share a chief executive and many senior executive staff and are looking to combine their computer systems.*

4.16 In addition PRS and MCPS, the *Music Publishers Association* is a discrete body representing music publishers (as opposed to composers and writers) in a number of areas of common interest. The MPA tends to become involved in matters which do not involve licensing/collection but rather which are aimed towards a promotion of the profile of the music publishing industry.

4.17 Two American publisher umbrella organisations, ASCAP and BMI have UK operations. Basically this means involvement in signing up UK writing talent and in royalty administration.

IFPI

4.18 *IFPI* is an international record industry body based in London. Its members are the national groups of record companies (such as the BPI) as well as individual record companies in a number of countries. IFPI acts as a forum for debating issues of *international* industry concern; promoting legal reform in territories where rights owners are inadequately protected; and co-ordinating international anti-piracy operations.

4.19 IFPI also acts as an intermediary for the negotiation of certain international broadcasting arrangements, for example pan European licensing of music videos. It is not however, a licensing body as such or a collecting society. Rather, it liaises with such bodies internationally, provides advice on international comparisons through its extensive database and offers assistance in negotiations when requested to do so.

4.20 IFPI has a Board which consists of senior record industry figures from around the world, including the US and the UK. The Board is responsible for formulating policy measures and overseeing the work of the IFPI Secretariat. Board decisions and other matters of principal are considered by the IFPI Council, the members of which are the various national groups.

- ***The Record Industry Association of America ('RIAA')*** *is the trade association which represents the combined interests of the US record industry. It has been particularly active in recent years in campaigning for changes in US copyright law, the provisions of which are generally less favourable to record companies then is the case in the UK and in Europe. Most recently, RIAA persuaded Congress to introduce protection against unauthorised digital diffusion of records. An extension of the period of copyright protection for songs and musical compositions is currently under consideration (January 1998).*

Other groups

4.21 Within the UK music industry there are a number of other representative organisations which look after the interests of particular sectors of the market. These include:

- *International Managers Forum ('IMF')*
- *The Association of Professional Recording Studios ('APRS')*
- *The British Association of Record Dealers ('BARD')*
- *The Association of United Recorded Artists*

4.22 The *IMF* was set up in September 1992 to provide a forum for discussion between managers and also further education and business training for current or prospective managers. It lobbies politically on matters of concern to both managers and creative performers. It also aims to raise awareness of the importance of the music industry to the economy and of creative talent to that industry.

4.23 *APRS* looks after the interests of professional recording studios (of which there are a substantial number within the UK, the UK being one of the main international centres for recording). Among the many areas in which the APRS is involved is political lobbying.

4.24 *BARD* has a wide involvement in record industry matters, including a participation in the *BRIT* Awards and the record industry charts which is described in more detail in Chapter 5 of this report.

4.25 *AURA* represents the interests of professional recording artists and studio producers. It is especially concerned with collecting and distributing the new remuneration payable under The Copyright and Related Rights Regulations 1996.

Copyright Tribunal

4.26 Music industry licensing bodies are by their nature monopolistic, particularly in areas where individual record companies have assigned particular rights to them. A measure of control over their activities is provided by the *Copyright Tribunal* which in its present form was created by the 1988 Act. Previously, the Performing Right Tribunal had exercised a narrower jurisdiction, limited to broadcasting and public performance licences entered into by licensing bodies pursuant to the 1956 Copyright Act.

4.27 The Copyright Tribunal has jurisdiction over *licensing schemes* promulgated by licensing bodies (the most prominent being PRS, PPL and MCPS) and *individual licences* granted by licensing bodies to other end users of music. Licensees who are

not satisfied with the financial or other terms of an existing or proposed licence (or have been refused a licence altogether) or the application of a licensing scheme can refer the licence (or lack of it) or the scheme to the Tribunal for adjudication.

- *The jurisdictional clauses of the 1988 Act are not particularly well drafted and can lead to confusion, for example over what constitutes a licensing scheme. Although on the face of it, PPL operates a licensing scheme in relation to commercial dubbing for the purpose of background music services, the Copyright Tribunal held in 1996 that PPL's licensing arrangement in this area did not constitute such a scheme. The other consequence in jurisdictional terms is that, whereas with licensing schemes a reference to the Tribunal can take place at any time, references of licences are more limited to particular points, for example when a licence is proposed or refused.*

- *The first major reference to the newly constituted Tribunal concerned the BPI/MCPS mechanical licence in respect of which hearings took place between 1990 and 1992, including a three week hearing in September 1991.*

4.28 In most cases, licensees have to pay at the rate proposed by the licensing body until the Copyright Tribunal decides otherwise. This can cause hardship, particularly for a new or growing business where the reference takes some time to come to a hearing. However, in the long term Tribunal decisions are normally backdated to the date of the serving of the reference, which means that where there has been an overpayment this must be refunded or otherwise taken into account in the future by the licensing body. However, there is an exception to this basic rule. Where a licensee requires a *broadcasting* licence from PPL, for conventional terrestrial broadcasting, satellite broadcasting or cable diffusion, it can obtain a *statutory licence* by complying with the detailed procedure laid down by Section 135A of the 1988 Act. This section was introduced into the 1988 Act by virtue of Section 175 of the Broadcasting Act 1990. Provided that such licensees pay at a rate of *their own determination* and comply with any reasonable conditions laid down by the licensing body, they can operate on this basis until the Copyright Tribunal adjudicates to the contrary. However, should that rate be lower than that adjudicated by the Tribunal, the Tribunal is obliged to backdate its decision to the date of the reference.

- *The provisions of Section 135A were the direct result of the MMC report into PPL's licensing activities. They do not apply to PRS or other collecting societies.*

4.29 The Copyright Tribunal consists of a full-time, legally-qualified Chairman (at present a former practising solicitor) and two part-time legally-qualified deputy chairmen (QCs who are still practising at the Bar). Each sits with either two or three lay members, drawn from a panel which is recruited from a wide range of business, professional and academic sources.

- *The Tribunal can make its own rules of procedure but broadly follows a similar procedure to the High Court, although generally the pleadings are less extensive and couched in more everyday language than in the more formal pleadings of the court.*
- *Among applicants to the Copyright Tribunal are radio broadcasters, satellite television broadcasters, satellite radio broadcasters, background music operators, jukebox operators and the body which represents UK ballrooms.*
- *Expert economic/financial evidence is a key feature in most Tribunal hearings. Generally, the Tribunal will take a pragmatic, common-sense approach to references in an attempt to achieve a fair balance between the interests of the parties.*

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Music and the media

The charts

Music radio

chapter 5

Music and the media

The charts

5.1 The official record charts which include the weekly top 40 singles chart which is broadcast by BBC television and Radio 1 FM are commissioned by Chart Information Network Limited ('CIN').That company is owned by the publishers of *Music Week,* the BBC and the BPI. CIN funds the research for the charts, which since 1994 have been compiled by Millward Brown, an independent research company. Between 1983 and 1994 the Gallup Organisation produced the chart having taken over from the British Market Research Bureau ('BMRB').

5.2 There has been an 'official' chart since 1969. BMRB compiled it from data entered by a selected panel of record retailers into diaries which were then analysed, collated and weighted by BMRB so that the panel reflected the total UK dealer universe.The whole point of a sample is that it should be representative in every sense and the policy during the 1970's and early 80's was to obtain data from as many shops as possible in order to eliminate any statistical inconsistencies and also make it more difficult to influence the chart by marketing and other targeted sales activities. On 1 January 1983 Gallup introduced a computer database system whereby sales information was logged into a series of specially commissioned 'Dataport Retailers' which were installed in a representative sample of record retailers.The data was then transmitted to Gallup's main computer for analysis and weighting. Because the hardware was relatively expensive, the chart panel was very much smaller then had latterly been the case under the BMRB diary system and therefore it was necessary to maintain strict security over it. However, the system was designed to be flexible by way of adding further Dataport machines and also utilising the facility whereby Gallup could draw information from computerised data-storage systems employed by shops in their normal business, for stock control and other purposes. As a consequence the panel grew substantially and has continued to do so since Millward Brown took over the contract.

5.3 UK charts produced by CIN are based entirely upon *sales* during the seven day period, ie Sunday – Saturday, immediately preceding the publication of the charts. It is the most up to the minute and probably the most accurate barometer of record sales anywhere in the world. However, a number of factors including the fragmented and diverse nature of the market, the buying patterns of fans and the marketing strategy of record companies and retailers, has produced a volatile, fast-moving singles chart in which records come and go at a far faster rate than has historically been the case.This has caused concern

among record companies in particular since the chart is an important sales tool (as well as a reflection of actual sales) and a means by which *albums* could be promoted.

- *The original purpose of the charts (or the 'Hit Parade' as they used to be called in the dark ages) was to measure popularity. For many years sales were synonymous with popularity. However, it has been argued consistently for over 20 years that sales is only one means of establishing popularity, another reliable means being a measurement of airplay for the records in question.*
- *Against this background, a number of countries adopt different means of measuring popularity. The US Billboard charts, for example, are based upon a mixture of sales and airplay. Increasing weight is being given to sales which has resulted in a faster entry into the singles charts, although not necessarily a faster moving chart. The US singles chart still moves very slowly when compared to its UK equivalent. Countries such a Germany have introduced a further measure of stability (and to some extent artificiality) into the singles chart by introducing a two or four week moving average. This has the effect of slowing down movement.*
- *Discussions take place on a regular basis within the BPI in an attempt to address the problems of a chart which many perceive to be out of control. Such criticisms are met with the argument that the chart does nothing more then measure sales and that sales patterns are to some extent the product of record company marketing activities and the fact that the UK has one of the most efficient distribution systems in the world.*

Music radio

5.4 One of the consequences of the changes in the market for recorded music of which chart volatility is but one element, is that radio stations are now much less dependent on the singles chart in determining their playlists then has historically been the case.

5.5 Many commercial radio stations have adopted a US format of 70's – 80's – 90's programming which features relatively heavy rotation of a core catalogue of records which tend to be at the safer end of the musical spectrum and therefore less likely to

explore the frontiers of modern recorded music than, for example, Radio 1. Records which 'cross over' into the mainstream market, ie are bought by the general public rather then fan-based segments of it, often receive substantial airplay on these stations (and coincidentally tend to hang around the charts longer then most other singles).

5.6 *Virgin Radio*, the only other national popular music station is weighted towards rock music and therefore tends to be more influenced by the albums chart then the top 40 singles.

5.7 Another relatively recent phenomenon is the 'Gold' station, largely playing music from the 1960s and 1970s. Sixties music does not find its way onto the play lists of most commercial stations but rather has been marginalised on the medium waveband despite a consistent interest in it as is indicated by the very substantial number of re-issues by popular artists of the day and compilations of sixties hits and radio favourites.

5.8 One of the other consequences of the diffusion and lack of stability of the singles market has been the decline in popularity of *Top Of The Pops* ('TOTP'). At one time exposure on this weekly showcase was an absolute guarantee of further success in that records nearly always moved up in the chart after being on TOTP. Conversely, failure to get exposure could seriously impede or destroy the sales potential of a single. This is no longer the case. TOTP has made a number of changes over the past three years to refresh and refocus its format.

- *What all this means is that it is harder than it ever was to assess popularity which is now based upon a variety of factors, of which record sales is but one. Nevertheless, it is still not possible for any artist or act to say that they are truly popular without achieving hit records, whatever impact they may have in other areas.*

Miscellaneous matters

Distribution of recorded music

Distribution of records

Licensing by record companies

chapter 6

Miscellaneous matters

Distribution of recorded music

6.1 This subject will be dealt with in another report which will look at the Internet in the context of the music industry debate as to the best means of distributing recorded music to potential purchasers. For many years the UK record industry has been aware of the significant potential of new technology to its business. Indeed, the record industry has a justified reputation for taking advantage of technology rather then resisting it. However if things are not properly managed, the ability to distribute music via a number of different technological routes could undermine the retail-based nature of the industry.

6.2 Among the ways in which music can be distributed to end-users are the following:

- Conventional sales of 'product' across the counter
- By way of conventional broadcasting via radio and television
- By way of discrete or customised 'radio jukeboxes' broadcast via cable and/or satellite
- By computer interface
- Down telephone lines or fibre-optic cables
- Via microwaves
- Via the Internet.

6.3 All of these means enable recorded music to be supplied to end users. Historically the core audience for recorded music have been the purchasers of records. Despite the advent of new technology and competition from other leisure-based industries, record sales are showing no signs of diminishing. On the contrary, the latest BPI figures indicate steady growth in that market. The latest sales profile for the UK industry can be found in Appendix 1 of this report.

6.4 The central debate in *business* terms for the international record industry is how far it wishes to remain an industry which provides product to its customers in the context of it being part of the information industry by virtue of the ability to distribute recorded music via all or any of the means set out above. The role the Internet will play in the distribution of recorded music is at the heart of that business debate. At present, although music can be distributed via the Internet, the process is very slow and the quality far

below that which can be obtained from either compact discs (or other sound carriers) or FM or digital broadcasting. At present therefore, the Internet seems more appropriate for advertising and marketing then the actual distribution of music. However, the indications are that technology will soon develop to the point where the Internet will offer a viable alternative for the acquisition of recorded music. Moreover, information in relation to records can also be distributed via computer interfaces so that potential 'purchasers' will be able to print inlay cards and the like to a standard which compares favourably with those which are presently available with commercial records.

6.5 In assessing the business opportunity this presents, the international record industry not only has to consider the impact upon its conventional business and whether Internet distribution constitutes replacement business or is merely servicing a different market, but also whether the *security* of the Internet is such as to protect records from piracy. As was described in Chapter 2, copyright is designed to provide copyright owners with a wide range of legal remedies, some of which can be exercised very swiftly, against infringers. Copyright has been used internationally against pirates whose activities threaten the financial well-being of the established industry around the world. Whether such copyright is capable of protecting against Internet infringement or, more to the point, responding quickly enough to unauthorised activity, is currently a subject of some uncertainty. In particular, there would no point at all in having a protective provision which would be capable in principle of offering protection if the right could not be enforced on a timely basis.

6.6 Thus, it is most unlikely that where technology affords any viable medium for distribution, that the international industry will embrace it enthusiastically unless it is satisfied that there is a proper legal framework for protection and enforcement in place.

Distribution of records

6.7 The Internet provides a means of distributing records, ie providing them to end users. The various other new technological means of distribution achieve the same end. Historically however, distribution has been concerned with the physical transfer of product from warehouses into the shops. This established system involves the capacity to respond very quickly to the requirements of retailers. The system in the UK is one of the fastest and most efficient in the world.

6.8 There are more than *2500* outlets selling records in the UK. Of these about *500* are independent retailers. There has been a growing concentration of sales among major chains, some of which are specialist retailers, others, like Woolworth, more general retailers.

- *There are over 800 Woolworth shops compared to a little over 600 outlets in the WH Smith/Our Price/Virgin group. A recent development which is causing specialist retailers some concern is the trend towards supermarkets, such as Asda and Sainsbury, selling albums. The supermarket outlets concentrate upon chart albums which they tend to sell at a significantly lower price than most other retailers.*

- *Another contentious area is in relation to discounts and free goods supplied to retailers, particularly the major chains. One of the consequences of this is that new singles are priced much lower in their first week of release and chart albums and new album releases (where demand is high) are sold at a lower price than catalogue product.*

6.9 Most record companies have a clearly defined returns policy and will accept a specified number of returns. On occasions retailers can exchange unsold product for new product. How many returns will be permitted by a record company will depend upon a number of factors including the *nature of the product* and the *buying power* of the retailer. TV advertised albums which tend to sell in large quantities over a relatively short period of time are often supplied on a *sale* or *return* basis in order to encourage retailers to carry large stocks.

- *The huge demand for new product from key acts requires a high level of efficiency on the part of distributors, ie those responsible for getting records from warehouses into the shops. The recent Oasis album 'Be Here Now' shipped a record number of copies in its first few days on sale as part of a carefully planned promotional campaign by the record company.*

- *The leading distributors are set out in Appendix 1. In addition to the major companies which engage in distribution of their own and other product, there are a number of independent distributors of which the largest is Pinnacle.*

Licensing by record companies

6.10 The sale of records is the most important source of income for record companies and recording artists. However, there are other important income streams:

- From licensing other record companies in the UK and throughout the world
- From licensing third parties such as film companies and broadcasters
- From special projects and merchandising

6.11 UK record companies license other record companies around the world to release and exploit records.These licensees can be part of a corporate group or third party licensees. A key element of such agreements is that licensees will remit a percentage of *sales* income to the Licensor.Whether a percentage of other income is also remitted will depend upon the agreement and the scope of the rights which are granted.

6.12 Record companies also license whole albums or individual tracks for exploitation by third parties.There is a thriving business in the UK for hits compilations of recent singles.

6.13 Third party licensing is an established method for licensing *back catalogue.* This takes the form of both single-artist and multi-artist compilations.

- *There are standard rates for licensing singles for inclusion in hits compilations. The royalty range is normally 15-20% of the dealer price on each unit, pro-rated between the tracks. However, some artists or tracks can command a premium.*
- *Multi-artist hit compilations are less common in the US.*
- *TV advertising is a key ingredient in the marketing of all categories of compilation.*

6.14 Licensing by individual record companies in compilations and other media, for example the inclusion of records in films and on film soundtrack albums should not be confused with the *collective licensing* described elsewhere in this report.The position is very similar as regards the licensing of songs and musical compositions where a number of specific areas of exploitation, film synchronisation among them, are excluded from the

blanket rights administered by the collecting societies. Further, these rights are not within the jurisdiction of the Copyright Tribunal.

6.15 Licensing is a part of what is sometimes described as *secondary* exploitation of rights. *Primary* exploitation is the sale of records. Thereafter, other areas of exploitation are secondary or ancillary. Over the past thirty years the various sources of secondary exploitation of records and videos has become an important element of income for record companies, music publishers and recording artists.

- *Music videos are used as part of an armoury of promotional tools used by record companies. However, the further exploitation of videos whether on television or in long-form compilations put together for retail sale, provides another significant source of income.*

Profile of UK record industry

Trade deliveries 1996

Record company market share 1996

Leading distributors 1996

The UK record industry in the world market

appendix 1

Profile of UK record industry

Trade deliveries 1996

	Units (millions)	Value (£m)
Singles	78.3	120.0
LPs	2.4	9.2
Cassettes	46.2	158.9
CDs	159.7	789.1
Total albums	208.3	957.2
TOTAL VALUE		**£1077.2m**

Notes:

- The 1996 sales performance represented an increase of **6.1%** over 1995
- At constant values 1996 was one of the best sales years ever. The only years since 1960 where the sales value (as opposed to number of unit sales) was higher were **1978 1979 1988 1989 and 1993**.
- In **unit** terms more albums were sold in 1996 than in any previous year.
- In **unit** terms more singles were sold in 1996 than any previous year other than **1978 1979 and 1982**.
- Total releases in 1996 were **5809**. There has been a steady increase in the number of releases over the past decade. For example there were **3932** releases in 1989. If one takes the number of **formats** the release figure was **9776 (1.7 formats per title)**.

Record company market share 1996

	Singles (%)	Albums (%)
Polygram	19.2	20.4
Sony	16.3	12.4
BMG	10.8	8.3
Warner Music	10.2	9.6
EMI	10.1	11.8
Virgin	9.0	10.7
MCA	4.8	3.1

Leading distributors 1996

	Singles	Albums
EMI	19.1	23.4
Polygram	18.5	19.6
BMG	15.9	14.6

Source: BPI Statistical Yearbook 1997

The UK record industry in the world market

In 1996 the UK had a **6.8%** share of the world record market.The leading nations were **United States (30.9%) Japan (17.0%)** and **Germany (8%)**.

In the **singles** market the UK share was **17%** which put it in third place behind Japan and the United States.This reflected the buoyant UK singles market and the fact that singles have much less of a place in the US.

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Glossary of frequently used terms

appendix 2

Glossary of frequently used terms

The 1988 Act	The Copyright, Designs and Patents Act 1988 which came into force on 1 August 1989.
BIEM	An organisation which negotiates collectively on behalf of continental European music publishers.
BPI	The trade association for the UK record industry.
Bootlegging	Unauthorised recording of performances by artists for commercial purposes.
CIN	The company which produces the official record charts.
Copyright Tribunal	The body set up to adjudicate in disputes between licensing bodies and users of copyright works.
Dealer price	The price charged by record companies to dealers. This is different to the price dealers charge their customers. Royalty payments to artists are usually fixed by reference to dealer price (often net of discounts) as are mechanical royalties paid by record companies to MCPS.
Dubbing	A term often used to describe copying of records, for example for use in background music services or synchronisation into films or the soundtracks of TV programmes.
Home taping	Unlawful copying of copyright protected works for private (as opposed to commercial) purposes.
Infringement	A term used under the 1988 Act to denote unlawful use of copyright works.
Interactive	A game or other product in electronic form that allows the user to determine the content displayed from a series of options within the computer programme while the programme is being played, either on a CD Rom, cartridge or other digital carrier, or down a wire or cable.
MCPS	The company which administers composers' mechanical rights.

Mark up	A term used to describe the means by which a price such as a dealer price is adjusted to reflect the ultimate price upon which a particular royalty is calculated.
Multi-media	Any recreational, educational or information-containing computer programme (normally interactive) that contains text, still and/or moving images, music and/or other sounds.
Neighbouring rights	A term used most often in continental Europe to describe rights, equivalent to copyright or ancillary, enjoyed by the copyright owners in records, films and broadcasts.
Option Period	A standard recording agreement clause giving record companies a series of options to extend the term of the agreement.
PPL	The main record company licensing body.
PRS	The organisation which administers composers' performance rights.
Performers' rights	Rights similar to copyright, now found in the 1988 Act.
Performing rights	The legal term under copyright law which prevents unauthorised public performance or broadcasting of records or songs.
Piracy	Organised infringement of copyright for commercial purposes.
Public domain	A term used to describe the status of a work which does not enjoy copyright protection, or a work upon which copyright protection has expired.
Recording commitment	The obligation on artists found in record agreements, to deliver finished work.
Royalty	A percentage of income paid to artists and others enjoying rights under copyright.
Sampling	Taking a part of a record and incorporating it into another. Without a licence from the owner of the copyright in the original record this normally infringes copyright, even where only a tiny amount is utilised.
Sound recordings	A term under the 1988 Act used to define all types of record.