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MUSIC MANAGER'S FORUM SUBMISSION TO THE GOWERS REVIEW OF INTELLECTUAL PROPERTY

Submitted by David Stopps for and on behalf of the Music Managers Forum UK.

PART ONE

INTRODUCTION

The Music Managers Forum UK wishes to thank the Treasury for the opportunity to participate in this call for evidence. As we are fundamentally a music trade body, we can only respond to the parts of the review which refer directly to the music industry. We intend to present our submission in two parts. In the first part we highlight the most pressing issues of the day some of which are listed in the 'General Questions' and the 'Specific Issues' of the review. In the second part we intend to refer specifically to the General Questions and Specific Issues. The Music Managers Forum is a member of the British Copyright Council which has produced an excellent and highly informed submission responding to the General Questions and Specific Issues. In general we agree with the BCC submission and will only respond to the General Questions and Specific Issues by way of a reference to our Part One submission or if we have anything additional to say on a particular question or topic. We would be grateful if the review would accept our part two submission at a later date.

The Music Manager's Forum UK represents featured artist music managers and through them the featured artists (performers and creators) themselves. These featured artists are those that are the source of over 95% of the economic activity in the global music industry. Featured artist music managers are uniquely placed to comment on music industry issues, as they are the only group of professionals that deal with every aspect of the music industry and the copyright system as it applies to music on a daily basis. Music managers are responsible for every aspect of the artist's career including interfacing and negotiating with phonogram producers, music publishers, making arrangements for touring, sponsorship, merchandising, and ensuring that all the available income streams, including those from collection societies, are properly managed. Managers are generally remunerated on a commission

basis (usually in the region of 20% of income actually received by the artist) so income streams affecting the artist also directly affect those of the manager. The Music Managers Forum UK is one of 15 Music Managers Forums around the world, which collectively are part of the International Music Managers Forum, which is also based in the UK. The IMMF participates as an NGO at WIPO processes in Geneva.

1. GENERALLY

We are very pleased that the treasury is undertaking this important review. The music industry is currently in a crisis period with creators (songwriters and composers) and performers (recording artists) being squeezed to the point where it will be difficult for all but the most successful to make a living from their endeavours.

At one end of the creative chain there are creators and performers, without whom there would be no music industry, and at the other end, consumers. The difficulties occur in all that happens between these primary groups.

Indeed there is much empathy between consumers and creators/performers. Most creators and performers have an idealistic and cultural view of the world, which they wish to share with as many people as possible who might be interested in their creations and performances. It is the process by which that is achieved that concerns us most at this technologically revolutionary period we find ourselves in.

The consumer is not generally interested in who the phonogram producer (record company) is. Neither are they particularly interested in who the publisher or digital music service provider is. Rather, the consumer is interested in the direct activities of the creators and artists themselves. The consumer wishes to acquire recordings (audio and audio-visual) for their personal use and enjoyment, share that music with family and close friends and be able to go and see their favourite creators/performers in a live environment.

There needs to be far more consultation with these two primary end groups by government in order to achieve a fair balance in both the physical environment and the new digital environment. Due to the lobbying power of very well funded phonogram producer organisations such as IFPI and the BPI successive governments have come to regard these organisations as 'the music industry'. Nothing could be further from the truth. These organisations represent phonogram producers who wish to exploit the creators/performers works to their maximum financial advantage. **In order to create a balance government should pay far greater attention to creator's and performer's organisations such as BACS (The British Association of Composers and Songwriters), the MU (Musicians Union) and indeed ourselves.**

The UK music industry in global terms has indeed been very successful in the past 50 years but we maintain that this is almost entirely due to the extraordinary amount of talent that this country seems to produce. Whether it's something in the water, the weather or the culture we don't know, but what

we do know is that ever since the time of Shakespeare Britain has produced highly original writers, composers, lyricists, poets, actors and musicians completely out of proportion with its population in world terms. It is of prime significance that government fosters, protects and nurtures this raw talent and ensures that creators and performers are incentivised and that they receive a fair portion of the pie as we move forward.

There are some in the British music industry that claim that the music industry can regulate itself and that we do not need government intervention. We take entirely the opposite point of view. Whenever self-regulation takes place it is always the creators and performers that get squeezed because they are seen as a soft target. We need regulations in law that protect creators and performers rights if creativity is to be nurtured and allowed to flourish in the 21st century.

2. ROYALTIES IN THE DIGITAL ENVIRONMENT

The most serious practical issue currently facing creators and performers is the amount of remuneration they are receiving from digital downloads, limited downloads, on-demand streaming, premium webcasting and general webcasting. Physical distribution of recordings and digital distribution of recordings are fundamentally different processes. With digital distribution the phonogram producer does not have the following costs:

1. The cost of manufacturing the CD.
2. The cost of manufacturing the CD booklet.
3. The cost of the jewel case or digi-pack.
4. Warehouse and storage costs
5. Vehicle delivery costs
6. Retail costs such as window displays and positioning costs.
7. The cost of field staff selling in to stores
8. The costs of processing sale or return stock or damaged/faulty stock

Despite this the major phonogram producers are insisting on applying the same royalty rate structure as in the physical world which in real terms means that on a 79p iTunes download the performer can expect around 3-5p as a royalty and on a £3 real tone download the performer can expect somewhere in the region of 11p. This means that in the future, other than the handful of very successful performers and creators, it will be very difficult for performers and creators to make even a basic living. This business model is simply not sustainable for the vast majority of performers and creators. Because the consumer can now cherry pick recordings rather than being obliged to purchase an album of perhaps 12 tracks it is essential that the phonogram producers share their huge savings as listed above with the creators and performers. The PRS/MCPS alliance are quite rightly demanding a new mechanical/performance royalty of 12%, which is entirely reasonable under the circumstances. Some phonogram producers are even applying a format reduction in the royalty to replace the packaging deduction of old. This is again an example of phonogram producers exercising their dominant position against the comparatively soft target of the creators and performers. This policy will push aspiring performers to follow a do it yourself model or to sign

to smaller independent phonogram producers who operate on a 50/50 profit sharing basis. With a 50/50 net receipts deal performers can receive up to four times as much from digital delivery than they would with one of the major phonogram producers. The smaller independents, however, do not have the marketing resources of the majors, which will result in the overall music industry becoming smaller.

The telecoms such as T-Mobile, O2 and Vodaphone and on-line music services such as I Tunes, Napster and AOL, due to their sheer size, are also operating in a dominant position.

The Music Managers Forum has launched its 'Know More' campaign to inform interested parties and consumers as to the imbalance that creators and performers are currently experiencing in the digital environment.

We call for an industry norm in regard to digital royalties for performers of 50% of net receipts.

3. THE VALUE OF THE INTERNET FOR CREATORS AND PERFORMERS

Whilst the development of the internet has thrown up many issues which national government, the EU and the international community need to be constantly addressing, it has also opened many opportunities for creators and performers to do it themselves. It is now possible for creators and performers to have their own website from which they can provide information on upcoming shows and record releases and sell their recordings directly to the consumer. However, due to a lack of resources, which record producers and publishers can provide, this approach inevitably has limitations. With this model the creator/performer, bypassing record producers and publishers, will generally rely heavily on the collection societies and it is essential that government monitor and regulate the fair governance and efficiency of these organisations.

4. THE BOARDS OF COLLECTION SOCIETIES SHOULD ACCURATELY REFLECT THE RIGHTS THEY ADMINISTER

In the UK music industry we have several national collection societies four of which are monopolistic. In such situations it is essential that the board structure of these monopolies accurately reflect the rights the society administers. Only one of these societies fulfils these criteria this being the Performing Right Society (PRS). This collection society with 6 creators and 6 publishers on the board is a shining example of how the board of these societies should be structured to ensure a fair and balanced approach to the distribution of income.

Contrast this with Phonographic Performance Ltd (PPL), which is wholly owned and controlled by the phonogram producers even though it is supposed to be administering equitable remuneration to performers and copyright owners. If the PPL/AURA/PAMRA merger goes through PPL are intending to re-structure their board but with only 4 performer representatives (including only 1 member representing featured performers) out of a total

board of 16. This is mere window dressing. The balance of power is still very much with the phonogram producers.

The Copyright and Related Rights Regulations 1996 gave performers the unwaivable right of equitable remuneration in the public performance of their sound recordings. Two serious abuses have resulted. The first is that hundreds of thousands, if not millions of pounds, of performers money has been spent on anti-piracy campaigns without the performers' permission. Performers are powerless to approve or deny such expenditure of their own money. The second is that the vast amount of public performance income collected by PPL from non-qualifying performers (mainly American performers) all goes back to the phonogram producers instead of being shared with qualifying (UK) performers, as it clearly should be. This has resulted in a huge loss of income for British performers. It has been suggested that such non-qualifying income represents in the order of 25% of all performer money collected by PPL.

Over 90% of all income collected by PPL is due to featured performers. Very few records are played on the radio or elsewhere because of session musicians or record companies, and yet the PPL has allocated only 1 featured performer representative on its new board out of a total of 16.

In the Copyright and Related Rights Regulations 2003 performers were granted the exclusive right of making available which was an important additional right performers received from the WIPO WPPT Treaty. Performers would very much like PPL to represent them in monetising this right but with the current board structure this is impossible.

We call on government to introduce regulations which ensure the democratic operation of monopolistic collection societies.

Please see our recent submission to the OFT concerning the proposed PPL/PAMRA/AURA merger attached.

5. USE IT OR LOSE IT

One of the issues that concern us is the practice of phonogram producers to insist on assignment of copyright in recordings for life of copyright and then to fail to actively exploit those copyrights, even though the performer is expected to pay for all of the recording costs in audio recordings and usually 50% of the costs in promotional audio-visual recordings, from the performers audio royalties. The records on view in record retailers are just the tip of the iceberg. Most performers recordings are sitting in phonogram producer's vaults and are not available to the public. The phonogram producer sits on these copyrights hoping for some windfall use such as inclusion in a film. The performer is powerless to do anything about this. It is effectively keeping art from the people and puts the phonogram producer in the position of being in restraint of trade.

It should also be noted that in the literary world the copyright is returned to the author if the book goes out of print.

We call for assignment of copyright to be limited to 25 years so that after this term the copyright is returned to the original performers who can re-assign it or make the recording available to the public themselves. We also call for evidence that the phonogram producer is actively marketing and seeking exploitation opportunities for the performers work during the assignment period. If the recording is deleted for more than say 2 years the copyright assignment should cease to be valid.

In the United States assignment is limited to 35 years but the term of protection of copyright in sound recordings is 95 years rather than 50 years in the UK.

6. TERM OF COPYRIGHT EXTENSION

The MMF feels that the time is right to have a fundamental review of the duration of copyright and related rights protection for sound recordings.

It is difficult to understand why creators (songwriters) should enjoy life plus 70 years and performers (recording artists) should only enjoy protection for 50 years from first fixation of a recording.

If as managers we are able to secure a synchronisation license in a film or advertisement for one of our artist's works, the film or advertising company will generally value the composition equally with the recording. i.e. The compensation for the composition will generally be the same as that for the recording. Public opinion would also probably reflect the same weight of importance between the song writing on the one hand and the recording and performance on the other when it comes to the success of a particular recording in popular culture.

*Let us take an example of two twin sisters, Susan and Estelle who together make a recording at the age of 17 and release it to the public. Susan performed on the record as the singer and Estelle wrote the song. The copyright in the recording will expire when Susan is 67 years old. **This is exactly the time of life when any income for the performer would be of greatest importance.** With life expectancy increasing across Europe every year (Italy has the longest life expectancy of any country in the world - when the term for recordings was first set in the British 1911 Copyright Act life expectancy was only 50 years and 8 months), it is quite reasonable to assume that both Susan and Estelle will continue into their eighties. (In this example Susan will cease to receive any income when she is 67 but Estelle will go on receiving income until her death. Not only that, but Estelle's heirs will continue to receive income for a further 70 years after her death whereas Susan's heirs will receive nothing. If we assume that both Susan and Estelle die at the age of 85, Susan's income lasted 50 years from first release and she died penniless whilst Estelle's income lasted 138 years and she had a*

comfortable retirement especially as the song was used in a major film when she was 70 years old.

It is simply unacceptable that compositions should enjoy a term of protection up to three times longer than that for performances. If copyright were introduced today there could be no possible justification for such discriminatory treatment. The reason is entirely historical. Sound recording was in its infancy when the first international copyright provisions were drafted more than 125 years ago.

The argument that a shorter term of protection benefits consumers is simply not borne out in practice. Phonogram producers continue to sell recordings that are in the public domain at the same price as when they were protected by copyright. In most cases, the only difference is that when a fixed performance falls in to the public domain, the phonogram producers make a larger profit and the performers miss out completely, receiving nothing. The phonogram producer also has the advantage that they usually own the artwork on an album which enjoys the same term of copyright as compositions, so even if the recording falls in to the public domain the artwork does not.

An extension of sound recording copyright will also take thousands of musicians off means tested benefits and greatly lessen the burden of the state. The state will benefit both from a reduction in benefits paid to poor musicians, and from increased taxation of rich musicians and phonogram producers.

Many countries enjoy a longer term of protection than is recommended in the EU. For example: USA (95 years), Mexico (100 years), Japan (70 years), Brazil (70 years). Turkey (70 years) and Columbia (80 years). **We call for copyright in sound recordings to be harmonised with that of literary and musical works. i.e. 70 years after the death of the last surviving featured performer or the sound producer (recording supervisor) on the recording.** This would also harmonise the term with that applicable to films wherein copyright protection is 70 years after the death of the last surviving principal (author/director/leading actor as applicable).

Conditional upon such extension there should also be a limitation on the term of assignment or license of 25 years, coupled with a 'use it or lose it' principle applied to licenses or assignments of rights.

In the USA there is currently a limitation of assignment of 35 years.

At present a phonogram producer will usually demand that a performer assigns the entire copyright in the performer's performance for life of copyright which in the EU is currently 50 years. Performers usually sign such agreements when they are unknown or just starting to attract attention, which is a further example of record companies abusing their dominant position. If after some years the performer's career goes through a period of low sales the phonogram producer will usually delete certain albums, as it is not

profitable for them to continue to make them available at retail. This is effectively keeping art from the people.

The performer will often approach the phonogram producer to see if it is possible to have the master recordings back (possibly paying the record producer an override percentage) or if it is possible to license their own recordings back from the phonogram producer either for their own use or to license on to third parties. This is often denied, despite the fact that the performers, if recouped with the phonogram producer, will usually have paid all of the cost of the recordings from their royalties. The phonogram producers would prefer to sit on the recordings hoping that some windfall use such as a film-use or some revival of interest in that particular genre of music comes along. There is no obligation or incentive for the record producer to actively exploit the recordings. **In this case the performer is denied an income even if the recordings are still protected by copyright and the consumer is denied access to the performer's recordings.**

This 25 year limitation of assignment would provide a huge boost for the music industry in general. Every 25 years there would be a huge flurry of activity around a particular artist's recorded work which would result in new investment in that work, marketing activity and new consumer interest and awareness. It is true that copyrights may move around between different phonogram producers but the UK music industry as a whole will receive a boost and become much bigger.

This change would enhance competition and cultural diversity and bring great benefit to government, phonogram producers, creators, performers and consumers. It would also operate a 'use it or lose it' safety valve which would unlock access to recorded works every 25 years.

We would be open to discussions concerning some participation by non-featured performers (so-called session musicians or singers) in a 25 years limitation of assignment or license. Perhaps they can be paid again at the then prevailing rate every 25 years. There could also be some direction of funding to musical activities for the benefit of the public (rather like the 'cultural funds' which authors' collection societies routinely deduct from authors royalties which they administer) in discussions concerning such an extension and limitation of assignment or license.

We would also favour harmonised legislation which would prohibit all assignment of copyright and provide that any transfers should only be by license as is the case in Germany, Austria and Spain.

7. ENFORCEMENT

Whilst we support strong and effective enforcement of copyright we are concerned about some of the heavy-handed practices being used by the major phonogram producers in the digital environment, which alienates consumers and reflects badly on creators and performers.

Blatant copyright infringement in the physical world such as market traders manufacturing, distributing and selling counterfeit copies of CDs and DVDs should be effectively policed by trading standards officers. Penalties should be substantial and include prison sentences for serious offenders. Similarly in the digital environment anyone commercially exploiting illegal downloads should be dealt with in a similar manner.

The problem the music industry is facing in regard to piracy in the UK is that Trading Standards officers are not empowered or obliged to prosecute counterfeiters on the basis of copyright infringement which leads to artists and phonogram producers and publishers having to rely on trade mark law in order to successfully prosecute such criminals. Performers who engage in touring and other live work have a particular problem with 'bootleggers' selling counterfeit merchandise on the public streets outside venues where the performer is appearing, as the audience approach and leave the venue. Merchandise is usually items of clothing such as T shirts and printed material depicting or referencing the artist's name, logo, photograph or album artwork.

The complete failure of successive governments to implement sections 107A and 198A CDA88 which would give Trading Standards officers the duty to enforce copyright law is the main barrier to effective enforcement. This should be combined with the implementation of the incentivisation scheme whereby Trading Standards Officers can recoup a percentage of the costs of prosecutions from assets seized under the Proceeds of Crime Act 2002.

The most obvious solution would be to prosecute offenders for the criminal offence of copyright infringement. However copyright infringement is expensive to prove. Every single time an action is brought for copyright infringement, if the accused demands it, the prosecution has to prove who owns copyright in the recordings. This means producing huge quantities of documents to establish every license or assignment of copyright covering a period of perhaps decades, irrespective of whether there is any genuine doubt about ownership.

As things currently stand, all any infringer has to do is say that he will put the prosecutor/plaintiff to proof of copyright ownership, and huge amounts of work have to be done. This expense, which can run into thousands of pounds for each album infringed, is a considerable disincentive to prosecution, especially of small-scale infringers.

By contrast, a trade mark registration costs about £600 in Trade Mark Registry fees plus about the same in trade mark agent's fees for preparing the application. Once you've got a trade mark registration, proving ownership is simply a matter of producing the registration certificate, which can be used in all infringement proceedings.

The 1994 Trade Marks Act was intended to make it easier to prosecute infringers. Under the previous law, the prosecution had to prove that an infringer intended purchasers to think that the infringing goods were genuine.

This led to infringers escaping conviction by selling goods as "genuine fakes". So following introduction of the 1994 Act, Trading Standards Officers switched from copyright to trade mark law as the principal weapon against IP criminals. Since, for obvious reasons, infringing recordings do not use the record companies' trade marks, the prosecution had to rely on the infringing use of performers' registered trade mark names such as Robbie Williams, David Bowie or The Beatles.

For a couple of years, they enjoyed some success, but in 1999 an infringer called Johnstone raised two technical defences: that in order to be guilty of criminal infringement, the prosecution had to prove that he was also guilty of civil infringement; and that he had used the performers' name simply to indicate that the recordings featured performances by the named performers and not "in a trade mark sense", i.e. to indicate a trade connection with the performers. These defences, which are based on the provisions of the earlier 1938 Trade Marks Act which the 1994 Act entirely repealed and replaced, were rightly rejected by the trial judge, and the accused appealed. The Court of Appeal, and then the House of Lords, allowed the appeal and held that the accused should have been allowed to put the defences to the jury. One is bound to wonder whether the court's decisions were in any way influenced by the knowledge that a finding in the prosecution's favour would have resulted in Trading Standards Officers being under a duty to take action against record

pirates under the criminal provisions of the Trade Marks Act 1994 which a under the CDPA 1988 they are not obliged to do. There is a long history of judicial hostility towards merchandising by performers and others, for example in the application of the "trafficking" provisions of the 1938 Trade Marks Act in the Hollie Hobby case (1984) and in passing off cases involving merchandising by performers such as *Lyngstad v Anabas* (1977) which concerned rights to control Abba merchandise. Certainly there are remarks in the House of Lords judgments in the Johnstone case which suggest that the judges think it improper and abusive for performers to seek to use trade mark law to protect their trading rights, when the law provides other (less effective) remedies in the form of copyright and performers' rights. such outdated and irrational hostility towards the perfectly reasonable efforts of performers to avail themselves of commercial rights which are routinely enjoyed by all other traders is frankly unacceptable, and has no place in a modern intellectual property environment.

The day before the House of Lords decided that performers could not use trade mark law to prevent the unauthorised sale of their recordings, the Court of Appeal held that Arsenal Football Club could use trade mark registrations of their name and club crest to prevent the unauthorised sale of hats, scarves and other memorabilia. So we have the ludicrous position that performers can, (and Trading Standards Officers are under a duty to), use registered trade marks to prevent the sale of unauthorised merchandise such as T-shirts and baseball caps, but not to prevent the release of bootleg sound recordings, which represent their core business.

This review offers the opportunity to rectify this absurd and discriminatory position in the following ways:

(a) Bring Trading Standards Officers duties in respect of copyright infringement and infringement of performers' rights into line with trade mark infringement.

(b) Make ownership of copyright or performers' rights easier to prove for example by introducing a presumption that copyright notices are correct, so that the defendant would have to prove on the balance of probabilities (alternatively would have to raise a reasonable doubt) that the person named in the copyright notice was not the true owner of copyright. Alternatively, the successful plaintiff in a copyright infringement action (whether civil or criminal) should be entitled automatically to a declaration that X is the owner of certain copyrights, so that in future cases it would not be necessary to prove the entire chain of copyright from scratch, but merely to confirm on affidavit that no relevant change in ownership of the recordings had taken place since the earlier case. There may be other solutions but the important issue is the principle of making copyright infringement easier to establish, so that there is no longer such a need to rely on trade mark infringement.

(c) The Trade Marks Act 1994 should be amended so that different names are adopted for the civil and criminal contraventions. The word "infringement" should be confined to describing the civil wrong, and "misuse of trade mark" or something similar be used to define the criminal offence. The wording of section 92 (5) of the Trade Marks Act 1994 should therefore be amended to substitute for the word "infringement" the words "contravention of this section" or "misuse of trade mark under this section" or something similar.

(d) Most importantly the decision of the House of Lords in R v Johnstone should be reversed by statute in the following respects all of which represent the clear intention of Parliament in passing the 1994 Act:

That, contrary to the HoL decision in Johnstone, it is not necessary to prove civil trade mark infringement in order to prove criminal offence of misuse of trade mark - i.e. the criminal provisions of the Trade Marks Act 1994 are entirely "stand-alone".

That accordingly it is not necessary in a criminal prosecution under section 92 TMA 94 to prove that the misuse of the trademark complained of is use "in a trade mark sense".

Further that it is not necessary in a civil infringement case under section 10 TMA 94 to prove that the infringing use is use "in a trade mark sense".

That the existence or availability of other remedies (eg copyright infringement, infringement of performers' rights, infringement of recording rights, passing off, registered design or design copyright) does not prejudice or diminish the right of a trade mark

proprietor to take action for civil infringement or criminal misuse of his registered trade mark.

As a much less satisfactory alternative, a provision that any use of a registered trade mark or a confusingly similar mark, by a defendant, either in criminal proceedings within the provisions of section 92 (1) (2) or (3) TMA 94, or in a civil case within the meaning of section 10 TMA 94, shall be deemed to be use "in a trade mark sense".

As a further less satisfactory alternative we might look for a provision that any use by an alleged infringer whether civil or criminal of the registered trade mark owned or used by a performer or group of performers shall be deemed to be use "in a trade mark sense" notwithstanding that such use may also correctly describe the identity of performers whose performances are recorded on unauthorised goods.

8. ILLEGAL FILESHARING

Whilst any illegal use of copyright is undesirable there is a world of difference between criminal activity to circumvent copyright law for financial gain and music lovers sharing files without permission for no commercial gain. Recent developments, which involve phonogram producers suing children and grandmothers, could well be counterproductive. In a recent survey by research company The Leading Question it was discovered that regular illegal file-sharers spent £5.52 per month on music compared with those music fans that did not illegally share files who spent only £1.27. It would therefore seem that the record companies are actually suing their best customers. Only by improving public awareness of the importance and benefits of a thriving copyright regime will the mindset in the public consciousness change.

We call for the principles and importance of copyright to receive higher priority in school education and for it to become a compulsory part of the school curriculum. We also call for the BBC to take a far more responsible position in measures to improve the understanding of copyright in the public at large.

9. DRM and TPM

Digital Rights Management (DRM) and Technical Protection Measures (TPM) urgently need regulation. Whilst a degree of DRM is essential we have recently seen some very heavy-handed approaches from some phonogram producers which make the consumer angry and in one recent case have caused huge problems for one of the major phonogram producers. Sony-BMG made headlines last year when it was discovered that the company had infected 8 million CDs comprising 51 titles with copy-restriction technologies that covertly installed themselves, hid themselves from users, exposed users to vulnerability to hackers and viruses, and monitored user activity. The company spent months denying that this was a problem and refusing to release an effective uninstaller. An estimated 500,000 networks were infected, including many government and military networks. The company has settled one class action suit, but still faces government suits in the US, Canada,

Ireland and Italy. As a result Sony-BMG have removed all restrictive TPM from their physical CDs but still apply it to digital downloads.

DRM can be very useful as a way of identifying works, providing marketing data and tracking purchasing trends etc and we fully welcome this kind of DRM use. Highly restrictive TPM regimes, however, cause huge levels of resentment from consumers who tend to blame the performer, who in the vast majority of cases has no say at all as to whether restrictive TPMs are applied to their work or not. So here you have a situation where both the creator/performer and the consumer are unhappy and feel disenfranchised and powerless.

Also as we all know there is 'the analogue hole' wherein if a sound carrier or digital file are played through any digital decoding device such as a CD player or MP3 player the music being played can be recorded on to another analogue device. This analogue copy will automatically remove all DRM and TPM restrictions. With the quality of music and audiovisual players constantly improving and recording devices also improving it is already very difficult to tell the difference between the digital original and the analogue copy. This drives a coach and horses through all DRM and TPM technology. The use and development of DRM and TPM technologies cannot be left completely to the market. There must be some oversight to remedy and prevent current and future abuses.

We call for all DRM and TPMs to be clearly labelled on the product and the packaging so that they are identified to the consumer before the purchase is made. e.g. If a CD will not play on a personal computer or there are other restrictions, the consumer should be made aware of that prior to purchase.

10. INTEROPERABILITY

The entire music industry seems to be united in the need for some kind of move towards compatible operating systems in regard to online dissemination of music. Any help government can give to achieve this would be of major importance. At present if a download is purchased from Apple's I Tunes, for example, it cannot be played on a Windows MP3 player and vice-versa. There are similar issues developing for high definition television. Whilst it is essential to maintain a free market the issue of interoperability is a major concern to the entire industry.

Competition in the music industry should be between tracks (songs/ recordings) rather than between delivery systems. Non-interoperability makes for a restriction of choice for consumers and is anti-competitive. The legislation that is about to be enacted in France is a very brave move to ensure interoperability and deserves careful study.

We call for the government to assist in any way it can to achieve interoperability across digital regimes.

11. AUDIO VISUAL RIGHTS

Whilst the Music Mangers Forum represents the interests of both creators and performers it is in the area of performer's rights that there is the most need for action. Nowhere is this more acute than in the area of audiovisual performers rights. It was a major disappointment for audiovisual performers worldwide that in December 2000 the WIPO Diplomatic Conference on an Audio Visual Treaty failed which has resulted in the continuance of a severe lack of balance in the arena of copyright and related rights, but we have seen that in other EU member states it is perfectly possible for member states to introduce national laws to give enhanced protection to audio-visual performers. At present in the UK if a performer makes a recording and the recording is played on the radio, the performer gets paid their equitable remuneration on the public performance. If that same performer then combines the same recording with visual images then no remuneration is payable. The most striking example of this is where the performer appears in a promotional video. In this example the performer is not only performing on the audio recording as a musician or singer, but is also appearing in the video as an actor or actress. In other words the performer is performing twice as much. Yet as soon as the performance becomes audiovisual the performer gets nothing with all performance income going to the audiovisual copyright owner, which in the case of music is usually the phonogram producer. This imbalance needs urgent government action.

In the above example it is a controversial point as to whether in the case of a promotional video this is an audio-visual work in the same sense as a feature film or television programme. The collection society VPL which is again wholly owned and controlled by the record companies is not prohibited from doing the right thing and sharing the public performance from these videos with the performers, especially as the performer will have paid between 50-100% of the cost of making the video. Instead they choose to pay themselves 100% of the income and the performers get nothing.

We call on the government to take urgent proactive measures to influence the European Commission and WIPO to seek to achieve an international audiovisual treaty. In the mean time the UK Government should introduce national legislation to implement performers rights for audio-visual performers as has been done in Germany and elsewhere.

12. THE INTRODUCTION OF A PUBLIC PERFORMANCE RIGHT IN SOUND RECORDINGS IN THE ANALOGUE ENVIRONMENT IN THE UNITED STATES

When the WIPO internet treaties (WPPT and WCT) were agreed in 1996 there was an opt-out provision in regard to the public performance of sound recordings. The United States alone decided to exercise this opt-out provision, which has subsequently resulted in a huge loss of income for UK performers and copyright holders. The USA represents some 35% of the world music industry.

We call on government to apply as much pressure as possible on the US government to introduce a public performance right in sound recordings in the analogue environment.

13. THE VALUE OF AN UNWAIVABLE RIGHT OF EQUITABLE REMUNERATION AND THE PROBLEMS ASSOCIATED WITH ASSIGNABLE EXCLUSIVE RIGHTS

One of the success stories of recent copyright legislation is the right of equitable remuneration for performers in the public performance of sound recordings. The reason for this success is that it has provided an income stream for performers that cannot be assigned or waived by contract. Contrast this with the recently introduced moral rights for performers (as obligated by the WPPT treaty and the subsequent EC's Information Society Directive), and the exclusive right of making available. The former can be waived in contract and the latter is assignable which at present renders both meaningless. When a new performer or performer/creator engages in negotiations for a recording agreement they have a very limited and unequal bargaining position. Both the waiving of the performer's moral rights and the assignment of the performer's right of making available are completely non-negotiable as far as the record company is concerned. Performers need a collection society like PPL (if it had balanced governance) to which they could assign their exclusive right of making available BEFORE they start negotiating a recording agreement. Only then could this important right provide a new income stream in the digital environment for performers. A parallel exists here with the PRS. It is accepted by publishers that songwriters will always assign their public performance rights to the PRS usually before they negotiate a publishing agreement and publishers accept that this is the normal procedure. Creators and performers need moral rights that are unwaivable in contract and exclusive rights that are not swallowed by contracting parties in a dominant position. Certain exclusive rights should only be assignable to a collection society.

We call on government to legislate rights for creators and performers that cannot be waived or assigned in contract. Also any assignment of copyright should be illegal, transfer always being by license. Certain exclusive rights should only be assignable to a collection society.

14. FAIR DEALING

We are very concerned that the drafting of Section 30 of the CDPA 1988 concerning fair dealing is inadequate to protect the legitimate commercial rights of performers and creators. There has recently been an instance wherein a company called Classic Rock Productions Ltd have released numerous DVDs or DVD sets purporting to be 'critical reviews' for blatant commercial gain. By way of example, they have released a 49 minute DVD entitled 'Inside Pink Floyd 1975-1999' which includes 22 minutes of Pink Floyd music interspersed with some mediocre comment by unknown musicians. None of this footage has been licensed and the overall quality of the DVD is extremely poor. This is just one of five DVDs released by Classic Rock Productions about the band Pink Floyd.

The intent of Section 30 of the CDPA was surely for non commercial purposes. This loop hole will be exploited by many other companies unless steps are taken to correct this clear injustice. If the Gowers review is taking oral evidence we would suggest contacting Shuki Sen who manages Pink Floyd and Tony Smith who manages Genesis and Phil Collins both of whom have first hand experience on this issue.

15. HOME COPYING LEVIES

We all know that whatever legislation is in place consumers will still want to record music at home and share it with their friends and family. Most of our EU partners and countries such as Canada have for many years successfully operated home copying levies on hardware and/or media. Britain was supposed to introduce a home copying levy in the eighties but the government of the time changed its mind at the last minute. As a result performers, creators and copyright owners have suffered by losing a very valuable income stream. With DRM and TPM being rendered largely ineffective due to the analogue hole it is essential that the government re-examine the potential of home copying levies.

Last year almost €500,000,000 was collected in the EU from home copying levies. Every country in the EU is operating a home copying levy regime with the exception of three member states, Luxembourg, Ireland and the United Kingdom. In the 2001 Information Society Directive it clearly states that fair compensation must be provided for rightsholders.

We call for the government to introduce home copying levies on hardware and media without delay to compensate creators, performers and copyright owners for the domestic copying of their works.

For a highly informed view of the way home copying levies are working worldwide we would suggest contacting Tarja Koskinen-Olsson who is considered to be the world's expert on this issue. The Netherlands also carry out annual worldwide research in to how such levies are working which may be helpful. We would be happy to provide contact information if required.

16. BLANKET LICENSING

Generally the anarchy due to the possibilities of the new technology suggest that systems of blanket licensing for the use of music would enable easy access to all music for consumers, but would ensure compensation for creators, performers and copyright holders. A voluntary user license analogous to the BBC license may be worthy of consideration in future years.

The role of collection societies will be central to the viability of any of these schemes making the regulation of collection society governance and efficiency paramount.

17. CONCLUSION

Whilst the Music Managers Forum represents managers and artists of some of the most successful British artists such as Robbie Williams, Pink Floyd Snow Patrol, The Gorillas and Phil Collins our organisation also represents many managers and artists who are finding it hard to make even a basic living from their creative endeavours. It is those creators and performers that need government help and protection in order to develop in to the successful artists of tomorrow.

Creators and performers need the government to introduce reform of contract law in order to give greater protection for the 'underdog' in music business contract negotiation as occurs in the legal regimes of many of our EU member state partners. We have seen with the equitable right of remuneration in sound recordings that this can be done in the UK. This right is unwaivable in contract which has meant a genuine guaranteed income stream for performers that cannot be swallowed by record producers in a dominant position. Contrast this with the recently introduced moral rights for performers and the exclusive right of making available both of which are in effect meaningless as they are waivable or assignable in contract. We would also like to see assignment of copyright outlawed so that any such transfer is only by license as is the case in Germany, Austria and Spain.

The extension of the copyright term of protection for sound recordings must be brought in line for the term enjoyed by creators and home copying levies should be brought in without delay. The operation of Fair Dealing also needs to be examined and re-drafted so as to outlaw commercial use.

The reform and regulation of the governance of collection societies is of fundamental importance, particularly if they are monopolies. Collection societies will become ever more important as we go forward into the digital environment of the future, making such regulation essential.

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Lucilia Falsarella-Pereira
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16 March 2006

Dear Lucilia

Submission on behalf of the Music Managers Forum
to the Office of Fair Trading concerning the merger of Phonographic
Performance Ltd, AURA and PAMRA.

The Music Managers Forum UK wishes to thank the OFT for allowing us to comment on the above proposed merger.

INTRODUCTION

The Music Manager's Forum UK represents featured artist music managers and through them the featured artists (performers and creators) themselves. These featured artists are those that are the source of over 95% of the economic activity in the global music industry. Featured artist music managers are uniquely placed to comment on music industry issues, as they are the only group of professionals that deal with every aspect of the music industry and the copyright system as it applies to music on a daily basis. Music managers are responsible for every aspect of the artist's career including interfacing and negotiating with phonogram producers, music publishers, making arrangements for touring, sponsorship, merchandising, and ensuring that all the available income streams, including those from collection societies, are properly managed. Managers are generally remunerated on a commission basis (usually in the region of 20% of income actually received by the artist) so income streams affecting the artist also directly affect those of the manager. The Music Managers Forum UK is one of 15 Music Managers Forums around the world, which collectively are part of the International Music Managers Forum (IMMF), which is also based in the UK. The IMMF participates as an NGO at WIPO processes in Geneva.

IN FAVOUR OF THE MERGER

The Music Managers Forum warmly welcomes the proposed merger.

One of the problems that PPL, AURA and PAMRA have experienced in recent years is the difficulty they have experienced in collecting foreign income in regard to the public performance in sound recordings, for both British performers and copyright holders.

As PPL is owned and controlled by the UK record companies some foreign collection societies have refused to pay through performance royalties as they say that PPL represent copyright holders and do not represent performers. Similarly, AURA and PAMRA have in some cases been told that as neither organisation represents ALL performers, foreign collection societies will not pay through. By combining AURA and PAMRA under the umbrella of PPL, PPL will be able to speak with a united voice representing both copyright holders and all performers when dealing with foreign collection societies. We understand that PPL is able and willing to take legal action if necessary against any foreign collection society who refuses to cooperate. This will greatly increase income for both performers and copyright holders in the UK and is to be enthusiastically welcomed.

It should also be noted that since the current chairman and CEO took over at PPL the organisation has become a far more efficient collection society. The PPL's CatCo data base for recorded works has been introduced and developed and is currently one of the best databases for recorded music in the world.

The Music Managers Forum's view is that in the music business competition should be between tracks (songs/recordings) and not between collection societies.

GOVERNANCE OF PPL

Whilst we are very much in favour of the merger we are very concerned about performer representation on the PPL board.

PPL is owned and controlled by the UK record companies. This has caused the following all of which have been highly detrimental to British performers:

1. ANTI-PIRACY CAMPAIGNS

For many years the PPL have spent millions of pounds of performer's money on anti-piracy campaigns without performer's permission.

Because the PPL board is controlled by the record companies performers have been powerless to approve or prohibit this happening. Performers have been unable to approve the essential and reasonable campaigns or prohibit the onerous and wasteful campaigns.

2. NON-QUALIFYING INCOME

The UK's Copyright and Related Rights Regulations 1996 granted equitable remuneration in the public performance of sound recordings against the copyright holder rather than the user. This was a somewhat eccentric interpretation of the EC Rental and Lending Directive as the right was supposed to be set against the user on behalf of both performers and copyright holders. This has, however, turned out to have advantages. Because the right is against the copyright holder the radio stations and other users are obliged to pay the public performance fee even if the performers on a particular recording are non-qualifying performers. All American performers and recordings (unless the recording was made in a qualifying country) are non-qualifying because the USA opted out of the equitable remuneration right in the 1996 WIPO WTTP treaty. The US did, however, subsequently introduce a public performance right in digital public performance only. In other EU member states where the right was introduced against the user rather than the copyright holder, radio stations and other users are not obliged to pay anything for non-qualifying recordings. This has the effect of encouraging radio stations and other users to play non-qualifying recordings rather than qualifying recordings which in practical terms means that US recordings get far more play than they would if the right had been applied against the copyright holder.

PPL, rather than paying the income which it allocates to non-qualifying performers to qualifying performers, or even sharing it pro-rata between the UK qualifying performers and the copyright owners as it should, pays all this income to the record companies.

PPL allocates to non-qualifying performers a very substantial part of the income, which it collects (estimated to be in the region of 25% of all PPL performer income which equates to around the order of £10M per annum). PPL ALLOCATES income to non-qualifying performers even though it is clear from the moment of allocation that they are by definition not entitled to receive such income. PPL then PAYS this income to the record company that released the recording in question. This misdirection of income has had a highly detrimental effect on UK performers. **Again, because the board is controlled by the record companies, performers were and are powerless to stop this happening.**

Ironically, before the 1996 Copyright and Related Regulations, PPL DID split the funds allocated to non-qualifying performers on a pro-rata basis between qualifying performers and the copyright holders, but after the 1996 regulations, which were supposed to strengthen the position of performers, they decided to transfer all of this income to the copyright holders.

In fact, because PPL charge a 'blanket' license fee to users which enables a user (such as the BBC) to use any of the recordings on PPL's

data base for a fixed annual license fee, **there is no such thing as “income attributable to non-qualifying performers”, at the point of collection.** i.e. Income collected from users is not reduced in any way to take account of the fact that some performers do not qualify.

The fees paid by users are not based on a set fee per track play, multiplied by the number of track plays made by each user. Thus the earnings allocated to any individual track are not arrived at by aggregating together a large number of small fees paid each time it is played. Rather, the vast bulk of a track’s earnings are calculated by apportioning to it an equitable share of very large funds paid by large-scale users in respect of blanket use of the entire PPL repertoire.

It follows that “a track’s income” is an artificial concept, albeit a necessary one, arrived at by a very complex set of internal accounting rules and conventions, which attempt to estimate the equitable relative share of PPL’s total income attributable to each track.

It follows further that the characterisation of any part of “a track’s income” as “attributable to non-qualifying performers” is entirely artificial, in fact it is an oxymoron, and is calculated merely to divert a portion of income from performers to record companies.

Whilst the distribution system operated by PPL assesses the relative earnings of each track with reasonable fairness, for the reasons given above, it distorts the relative shares paid to performers on the one hand and copyright holders on the other.

What should happen is that PPL should first deduct its administration costs from its annual gross income and then split the balance remaining, its net distributable revenue (NDR) 50/50 between performers and copyright holders. The performer’s share of NDR should then be distributed exclusively among qualifying performers according to the use profile of the tracks on which they have performed. The copyright owners’ share of NDR should then be distributed among record labels in the same way. This is surely the logical application of PPL’s interpretation of equitable remuneration as being 50% of income received. Since PPL collects its income on a lump sum basis, it is logical (and equitable) to apply the 50/50 division between copyright owners and performers at the lump sum level, rather than at track level. This would make it much easier for performer representatives to plan and control the distribution of income to performers.

Non-qualifying (US) performers would still not be paid under this system, but the benefit of not paying them would accrue entirely to qualifying performers. This would be entirely fair as qualifying performers receive no income from the analogue public performance of their recordings in USA, which represents around 35% of the world market. It is impossible to

justify a system which transfers the entire benefit of non-qualifying performances to record companies. No collection society which was equally run by performers and record companies would apply the system as applied by PPL.

Further, with the situation at present where all the so called non-qualifying income is going to the record companies, this means that record companies' public performance income from non-qualifying public performance is substantially increased. This provides a direct incentive for record companies to market their American artists and recordings rather than British artists, as they will receive increased public performance income. This is clearly detrimental to all British and other qualifying performers.

3. VPL

VPL is PPL's sister company which collects public performance income from audio-visual performances.

The administration of this company operates in the same building as PPL and shares much of its administration with PPL. Many of the officers and directors of PPL are also directors of VPL. Like PPL, VPL is owned and controlled by the record companies and is a monopoly. All the income from the public performance of audiovisual works collected by VPL goes to the record companies and is not shared with the performers even though the performers, (in the case of promotional videos) will generally have paid between 50% and 100% of the costs of making the video.

Whilst it is true that performers do not have a right to equitable remuneration in audio-visual performances (due to the failure of the WIPO Diplomatic Conference on an Audiovisual Treaty in December 2000) VPL can arguably therefore choose freely whether to share this income with performers or not. It is certainly not prohibited from doing so.

There is also controversy as to whether or not a promotional video is in fact an audiovisual work in the same sense as a film or a television programme. Does a sound recording cease to be such when it is linked with visual images? Can it not be both? A collecting society which was equally run by record companies and performers would recognise, at the very least, that this was an area of doubt, and resolve that doubt equitably, by paying performers a share of VPL income.

We understand that this is the solution adopted elsewhere in the EU where the local counterparts of VPL and PPL are not separated as they are in the UK. In practice, the two UK companies are operated as a single business. We do not believe that there is any market reason why the businesses of VPL and PPL are separated in the UK, and as noted above, the separation is entirely technical and superficial. In our view the principle effect, if not the object, of operating VPL as a separate business

is to obstruct or prevent performers from claiming a share of the income collected by VPL.

Because there is no performer representation on the VPL board, it allocates all the income collected to the record companies. The irony here is that if a band or recording artist makes a promotional video they are effectively performing twice as much, as a musician or singer on the audio track and as an actor or actress in the video. Yet as soon as the audio-only track is linked with visual images they get no public performance income at all.

VPL also refuses to share with performers so-called 'dubbing' income where they license works on CDs and DVD's for public performance for such uses as aerobic classes etc.

4. DIGITAL RIGHTS

Because PPL is now in a monopolistic position performers are looking to PPL to collect performance income in the digital arena which is developing and changing on an almost weekly basis. In particular, performers need PPL to collect income for performers from the new exclusive right given to performers of making available for all interactive digital delivery as defined in the Copyright and Related Rights regulations 2003. Because PPL is run, owned and controlled by the record companies performers are in a hopelessly weak position. Performers would very much like PPL to represent them in monetising this right by assigning their exclusive right of making available to PPL BEFORE they enter into negotiations for a recording agreement with a record company thus monetising this right in a meaningful way. With the current board structure of PPL this is impossible.

We understand that if this merger goes through PPL are intending to re-structure their board with 4 performer members out of a total of 16 on the PPL board, with those same 4 performer members together with 2 PPL executive directors also forming a performers' sub-committee to be titled the Performer's Board dealing with performers' affairs. The vast majority of PPL's income comes from the public performance of featured performer's works and yet only one seat on this new board is allocated to a featured performer representative out of a total of 16. There is also to be no independent budget for the Performer Board, no right to hire or fire performer staff, and no right to independent legal, accounting and PR advice. Most importantly there is to be no control by performer representatives of 50% of the net distributable income. All this is window-dressing to mask the fact that the record companies are still very much in control.

PPL are currently sitting on considerable reserves, some of which is money due to qualifying performers who cannot be traced and some is unallocated pre-1996 money. Perhaps one of the conditions of this merger should be that PPL agree to fund performers from these unallocated funds through a Copyright Tribunal reference (or some other independent arbitration process) on the contentious issues of PPL's distribution policy, principally the issues of

governance and income allocated to non-qualifying performers. This could also deal with the contentious issues regarding VPL income.

Regulations regarding the proper democratic governance of PPL are essential if this collection society is to become a monopoly. We would also like to see the equitable distribution of non-qualifying income applied both in the future and retrospectively.

Yours sincerely

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