Written evidence submitted by Dr Hayleigh Bosher

Evidence for Economics of Music Streaming
Dr Hayleigh Bosher

Dr Hayleigh Bosher is a Senior Lecturer in Intellectual Property Law at Brunel University London and the author of Copyright in the Music: A Practical Guide to Exploiting and Enforcing Rights and Law, Technology and Cognition: The Human Element in Online Copyright Infringement. Hayleigh is also a Legal Consultant specialising in Intellectual Property, Media and Entertainment Law, and Co-Host of the Podcast *Who's Song Is It Anyway?* The Podcast, publishing from January 2021, involves conversations with artists and people from the music industry on creativity and copyright.

How can policy favour more equitable business models?

1. **Implement a system of equitable remuneration** for the communication to the public right, where PPL distributes royalties, determined by the copyright tribunal. Implementing a right akin to the equitable remuneration currently available for rental.

2. **Require more transparency from record labels**, which is necessary for artists. Claims for data information could be made under the current UK data protection law, section 45 Data Protection Act 2018, which says that data controller (label) must grant the data subjects (artists) access to the personal data.

3. **Copyright should revert back to the creator after a period of time.** Under US law[1] creators can, in certain circumstances, terminate a transfer or assignment of their copyright 35 years later. For songs created on or after 1 January 1978, the creator can send a notice to the person or company that they assigned their rights to and terminate the agreement. This is a unique rule under US law and does not apply in any other country, but we could certainly look at implementing something similar.

4. **'Playlisters' should be regulated by the UK Advertising Standards Agency in the same way as influencers.** Playlisters get paid to create playlists that directly impact the discovery of music. The ASA provides specific guidance for influencers, which says that the code applies to branded content posted social media when the person is paid in some way, regardless of how many followers the person may have.

5. Seeking legal advice on **contracts** that cannot be reasonably negotiated should not protect labels from claims of undue influence, which should instead, in these

[1] US Copyright Act 1976 s 203.

circumstances, focus on the disadvantage to the signing artist. In addition, the measures of required transparency, allowing the copyright to revert back to the artist after a period of time and equitable remuneration, will go some way to rebalancing this contractual arrangement.

Copyright Law Can Apply to Streaming as a Broadcast, Record Labels Should Not Treat Streams as Sales

It has been noted in this Streaming Inquiry so far, that in some ways steaming can be akin to radio when the user passively listens to an algorithmic playlist, but it is different when the user makes their own selection. Moreover, from a technical perspective, the radio broadcast and online streaming are two different technologies.

However, from a copyright law perspective, we can treat a stream as a broadcast because both mechanisms are captured by copyright as communicating work to the public, that is the essence of why a license is needed by the radio station or the streaming service. Section 20(2)(a) of the Copyright Designs and Patents Act (CDPA) 1988 confirms *"communication to the public by electronic transmission, and in relation to a work include - (a)the broadcasting of the work."*

In fact, the origins of communication to the public are found in the development of the copyright holder's right to restrict performance of their work. At international level, the Rome Convention introduced the concept, providing that creators: *"shall enjoy the exclusive right of authorizing the communication of their works to the public by radio-diffusion."* The word *"radiodiffusion"* is not a word in English, but is a word in French. The text was originally drafted in French and then translated into English. In French, the word *"radiodiffusion"* refers to the emission of signals through of electromagnetic waves. The word *"radiodiffusion"* translates directly into English as *"broadcasting",* but this is not the chosen word in the legislation, suggesting it was intended to be broader than merely broadcasting technology. The WIPO Guide to the Copyright and Related Rights Treaties stated that *"radiodiffusion"* was synonym of *"broadcasting",* but the WIPO Guide to the Berne Convention recognised that the wording was clunky: *"Slightly muddled in its terms, the text was like broadcasting itself – in its infancy."*

Thereafter, the WIPO Copyright Treaty (WCT) 1996 rationalised and synthesised protection by establishing full coverage of the communication right. The intention was to provide a technology-neutral right, where the technical means by which the communication was made was irrelevant, in order that any future technical development be included within the provision. The aim of the WCT 1996 was to address the new forms of communication offered by the internet by granting works the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public could access them from a place and at a time individually chosen by them.[2]

[2] WCT 1996, Article 8.

In a recording contract, the label defines a stream as an electronic sale. This is a real example taken from a record deal: *"Electronic Sales": the dissemination or transmission by any non-analogue and non-physical means of Records where the orders for such sales, rentals or distributions are made electronically (directly or indirectly) by the individual consumer and such sales are fulfilled electronically."* The model of treating streams as sales could be undermined by declaring them as broadcasts, explained further in the next section.

Equitable Remuneration

The committee has heard from several witnesses that equitable remuneration could be a solution for the current financial struggles that artists and songwriters are facing. The proposal involves a licence granted to PPL which would then distribute royalty payments to artists and songwriters.

PPL currently has the right to license the online transmission of radio, television and certain types of online streaming services, including live streaming and customised streaming. However, currently, PPL does not license music services that offer downloads or on-demand streams of individual music tracks, such as Spotify and Apple Music, or services that enable the upload of content by the general public, such as YouTube and Facebook. (Although there are other licences in place for platforms such as Facebook and TikTok).

The difference between these categories may appear arbitrary, and it comes down to the technicality in the legal definition of broadcast, which excludes internet transmission. The reason we need to exclude internet transmission is to avoid unintentionally capturing all online activity. The law distinguishes between sounds over the internet and sounds over satellite broadcast. There are exceptions to this rule[3] such as transmissions taking place simultaneously on the internet and by other means – this allows for radio stations to include their internet transmissions as a broadcast. Broadcasts also do not need to be live in order to count as broadcasts, and moreover, the law accommodates for users to choose a time to receive the broadcast – encompassing on-demand.

Therefore, the fact that streaming services use a combination of user selection and algorithmic playing of music, could be considered a broadcast for the purposes of copyright. A fourth exception could be added to the CDPA 1988 to include streaming as a broadcast, therefore treating it as radio, and as a result allow PPL to collect licences and distribute royalties. This would also prevent the labels from treating the streams as sales for the purposes of the recording contracts, as mentioned above. The risk with this approach would be determining streaming for the purposes of law that encapsulates the activities of music streaming services such as Spotify, without unintentionally including other online transmission. Moreover, if the law is too technologically specific, we will find ourselves in the same position should the technological medium of streaming evolve.

Therefore, it does seem appropriate for the government to consider legislating for equitable remuneration for the purposes of streaming. The CDPA 1988 already provides a right to equitable remuneration for exploitation of sound recording of performers rights, and for the

[3] Section 6(1A) copyright designs and patents act 1988.

rental of copyright and performers rights. Under section 182D CDPA 1988 the performer is entitled to equitable remuneration when the sound recording is played in public or the recording is communicated the public. In relation to the rental right, equitable remuneration is provided under sections 93B (for copyright) and 191G (for performers rights) of the CDPA 1988. The government could introduce equitable remuneration for communication to the public. The amount of equitable remuneration for artists should be determined by the Copyright Tribunal.

The Digital Single Market Copyright Directive

I agree with the unanimous evidence so far in the Inquiry that Brexit is catastrophic for artists and the music industry, and pretty much the whole country… However, there are criticisms of the Copyright Directive[4] that the UK can avoid. Some of the artists' evidence glorified what they called the Copyright Directive as a way to protect their IP. However, I believe there has been some misinformation about what they Directive can actually achieve for artists and songwriters. The main limitation of Article 17 of the Directive is the wording that platforms, such as YouTube - which the law intended to capture - merely need to make their *"best efforts"* to obtain authorisation. They would argue that their current system of Content ID would be adequate to meet this threshold. Although of course, the true impact of the Directive will depend on the chosen wording of its transposition into the Member States national laws.

Nevertheless, even if the *"best efforts"* requirement was able to push YouTube to licence rights from the music industry, in the same way *TikTok* does, artists are still left in the same inequitable position in regard to the lack of transparency and receiving a low percentage of the income, if any. The proposed solution of equitable remuneration for communication to the public would, however, extend to platforms such as YouTube which the law clearly recognises is an act performed by these services. It is recommended that the government follow the approach that the EU Directive was trying to achieve in limiting this requirement to large sharing platforms and avoid over regulation of online activity.

Record deals

Record deals are notoriously favourable to the record company, and it is true that many of the labels recoup their investment from the royalty, which means a long time before an artist will be remunerated, if ever. There are two limitations on contracts that go some way to protecting artists: restraint of trade and undue influence.

Restraint of trade

This is a general principle of contract law that means that people are allowed to practise their trade, and therefore any contract that restricts a person's right to practise their trade needs to be justified. In these situations, the terms of the agreements cannot restrict any more than is necessary. For example, in the case *Macaulay v Schroeder*[5], the court held that the contract was one-sided and that this was in restraint of trade because it was

[4] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.
[5] Schroeder Music Publishing v Macaulay (Formerly Instone) [1974] 1 W.L.R. 1308.

unreasonable to tie the composer to the publisher for potentially ten years, during which his work could be sterilised if the publisher chose not to publish, without any opportunity to recover his copyright. Therefore, the contract was held to be invalid. Another example of a successful restraint of trade case came after Holly in the case involving the group Frankie Goes to Hollywood, their contract included a clause stating that if a member left the group, they could not work for another record company. The court set out that it is for record labels to be able to justify the length and one-sidedness of their contracts, which the label was not able to do in this case.

Undue Influence

A court might set aside an agreement if there has been undue influence – where a person in a position of dominance has used that position to obtain an unfair advantage for themselves, and as a result caused damage, loss or injury to the person relying on their authority or aid. There are two parts to this assessment: the person must have influence over the other; and they must have used that influence to gain a transaction that was disadvantageous. After a number of cases in the courts, it is generally recognised that there is a position of influence and that is why artists are required to take legal advice before signing a contract. (Often the label will advance a contribution of the lawyer's fee to ensure this, of course recouping this from the royalties later on.)

The issue is that there is currently an accepted industry standard, so when reviewing these contracts, it is difficult to negotiate a significantly better deal that would step outside of the norm. The negotiation power of the artist at the time of signing is extremely limited. Therefore, it could be argued that taking independent legal advice does not automatically protect the label from claims of undue influence, and as such the focus of the question in these circumstances should be the extent of the disadvantage to the artist.

'Playlisters' should be regulated in the same way as influencers

Playlisters earn revenue by creating playlists that directly impact the discovery of music. The means of their earnings are currently not transparent, to either the artists or the consumers. It is recommended that this activity is regulated by the UK Advertising Standards Agency (ASA) which does currently work with social media platforms and influencers. The ASA provides specific guidance for influencers[6], which says that the code applies to branded content posted social media when the person is paid in some way, regardless of how many followers the person may have.

[6] https://www.asa.org.uk/uploads/assets/uploaded/3af39c72-76e1-4a59-b2b47e81a034cd1d.pdf