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Music Copyright in the Digital Age
Creators, Commerce and Copyright
An Empirical Study of the UK Music Copyright
Industries

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Submitted in fulfilment of the requirements for the
Degree of Doctor of Philosophy

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April 2016

ABSTRACT

Copyright markets, it is said, are ‘winner takes all’ markets favouring the interests of corporate investors over the interests of primary creators. However, little is known about popular music creators’ ‘lived experience’ of copyright. This thesis interrogates key aspects of copyright transactions between creators and investors operating in the UK music industries using analysis of various copyright related documents and semi-structured interviews with creators and investors. The research found considerable variety in the types of ‘deal’ creators enter into and considerable divergence in the potential rewards. It was observed that new-entrant creators have little comprehension of the basic tenets of copyright, but with experience they become more ‘copyright aware’. Documentary and interview evidence reveals creators routinely assign copyright to third party investors for the full term of copyright in sound recordings: the justification for this is questionable. An almost inevitable consequence of this asymmetry of understanding of copyright and asymmetry of bargaining power is that creators become alienated from their copyright works. The empirical evidence presented here supports historic and contemporary calls for a statutory mechanism limiting the maximum copyright assignment period to ten-years.

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ACKNOWLEDGEMENTS

Although conducting doctoral research is a largely solitary pursuit it is important to acknowledge the help and support that was provided by a number of people from within and beyond the academic realm.

My original supervisory team of Martin Cloonan, Ronan Deazley and Andreas Rahmatian were supportive and encouraging throughout. Latterly, Martin Kretschmer's clarity of focus brought an invaluable new perspective to the (longer) second half of the project.

My colleagues in 'The CREATTIC' enriched the experience academically *and* socially. From the wider CREATE family Professor Ruth Towse provided schooling in the key concepts of cultural economics and much-needed encouragement towards the end of the project.

Courtesy of my generous Lord Kelvin/Adam Smith Scholarship I was fortunate to be able to travel widely to present my research. Martin Cloonan and John Williamson were redoubtable travelling companions on three continents. Our walking tour of downtown São Paulo is perhaps the most memorable, and certainly the most terrifying, experience of my time as a doctoral student. Matt Brennan should also be mentioned in dispatches for precision navigation in the most testing of circumstances. But it wasn't all walking tours and football matches! The perceptiveness of John's industries insights were only matched by his generosity in sharing his ideas. Always at least two steps ahead, and gracious enough never to point it out! And as a supervisor and as a friend, Martin's support throughout the study went above and beyond the call of duty.

Thanks must go to the anonymous interviewees willing to give up their time to submit themselves to being the subject of academic research usually for nothing more than a cup of tea in return. And without the Rolodex of 'The Mayor of Byres Road' many of these connections would not have been made at all.

Finally, Ian Barr's editing skills and attention to detail were required and employed in every draft, article, book review and the final thesis. Any errors are, of course, my own.

AUTHOR'S DECLARATION

I declare that, except where explicit reference is made to the contribution of others, this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Kenneth W. Barr

April 2016

PART 1

CHAPTER 1. INTRODUCTION: MUSIC COPYRIGHT IN THE DIGITAL AGE

'Music Copyright in the Digital Age: Creators, Commerce and Copyright, an Empirical Study of the UK Music Copyright Industries' is an interdisciplinary doctoral research project conducted across the Department of Music and the School of Law at the University of Glasgow and funded by the Lord Kelvin/Adam Smith PhD Scholarship scheme. Focusing on the UK copyright regime, the thesis scrutinises the role of copyright in the complex nexus that exists between popular music creators and investors in the digital age. The study considers the ramifications of the growth of music streaming services and the live music sector in the context of the so-called 'digital crisis' facing the once-dominant recording industry.

1.1 COPYRIGHT IS DEAD?

When faced with the challenge of finding a way to open this PhD thesis, by coincidence I came upon a blog headline announcing: "Steve Albini declares copyright dead!" (Albini 2015) This was an arresting idea. Could this be a sign that four years of PhD research into music copyright in the digital age had been a fool's errand? To salve my anxiety I was compelled to probe the story more rigorously.

Steve Albini is an American musician, sound engineer and record producer of some repute. He is also a prominent critic of the contemporary music business as evidenced in a number of withering invectives on various aspects of how the music industries operate. His essay, *The Problem With Music* (Albini 1993) presents a scatological account of the problems facing artists operating within the major label system of the early 1990s; a period that can be considered a commercial high water mark for the Anglo-American recording industry as the Compact Disc brought a windfall of unprecedented dimensions (Laing 2004, Samuel 2015).

Over 20-years later, in a keynote speech at Primavera Sound Festival in Barcelona, Albini described the "corporatised" music industries as "parasites". Within this address he turned his attention to the copyright regime that underpins

these supposedly ‘parasitic’ music industries. Admittedly, Albini’s words were far less emotive than the hyperbolic ‘click bait’ headline suggested, but the underlying sentiment remained:

That old copyright model of the person who wrote something down owns it and anyone else who wants to use it or see it has to pay him, I think that model has expired. (Albini 2015)

A logical implication of the death of copyright would be that the contemporary music ‘copyright industries’ (Wikström 2013), namely, the music publishing industry and the recording industry face an existential threat. If this is the case it has considerable ramifications, not only for the shareholders and executives within music companies but also for rank and file employees, primary creators and indeed everyone involved in the complex ecology of the music industries.

The suggestion that copyright is dead, or dying, is commonplace among those with pragmatic and/or principled objections to its locus in the cultural environment. The pragmatists perceive copyright to be an arcane relic of an obsolete business model. Moreover, the obituary of copyright plays well with those who are ideologically opposed to copyright’s underlying principles of private property in the expression of ideas (Lessig 2004, Albini 2015). But invoking visions of the demise of copyright is not solely the preserve of copyright sceptics.

A narrative predicting the impending collapse of copyright is also a favoured rhetorical device of the copyright industries themselves. Without a strong copyright, it is argued, investors would not be able to generate profits to invest in the creation of new art, free-riding tech companies would capture value that is generated by the music industries, creators would be disincentivised and, ultimately, the supply of music would be threatened. Geoff Taylor, Chief Executive of BPI¹, articulates the importance of countering online piracy with stronger copyright legislation, “If we falter and lack the courage to act, we risk creating a serious cultural deficit in the UK. The voices of a generation of new bands and artists simply won’t get signed and won’t be heard” (Taylor 2010).

At corporate and institutional level the music industries have sought to push for a stronger, longer copyright regime. Indeed, UK Music, an organisation that;

¹ BPI, formerly British Phonographic Industry, is the trade organisation that lobbies on behalf of the UK recording industry.

“Promotes the interests of record labels, songwriters, musicians, managers, publishers, producers, promoters and collecting societies through high profile campaigns and events” (UK Music 2015) was established in 2008 with the express lobbying goal of achieving term extension in sound recordings (Harkins 2012). It is of no little significance, and is no coincidence that most changes to copyright law at UK and European level closely correspond with the objectives of the music industries lobby. The *Digital Economy Act 2010*, *EU Term Extension for Sound Recordings 2013* and the successful challenge to the UK ‘private copying exception’ (Savvides 2015) are among the most significant recent lobbying victories for the industries.

Just as copyright’s scope and term have seen significant expansion in recent years, so too has the academic study of copyright. The launch in 2013 of the CREATE research consortium of seven UK universities² to which this project is affiliated, demonstrates a focus on the empirical study of copyright and the creative industries. Indeed, in the final months of writing this thesis the 10th Annual conference of European Policy for Intellectual Property (EPIP) and the Society for Economic Research on Copyright Issues (SERCI) conferences were held in Glasgow.

Having devoted almost 4 years to the study of copyright as part of a PhD research project, it is clear to me at least that, to paraphrase Mark Twain, reports of copyright’s demise have been greatly exaggerated.

1.2. AIMS, APPROACHES AND REFLECTIONS ON THE STUDY

AIMS OF THE STUDY

For the avoidance of doubt, the findings of this study support the notion that copyright is far from dead. That copyright remains of considerable enduring importance to ‘the industry’ is something of a statement of the obvious. Yet even in

² “CREATE is the RCUK Centre for Copyright and New Business Models in the Creative Economy, based at the University of Glasgow. The Centre brings together an interdisciplinary team of academics from law, economics, management, computer science, sociology, psychology, ethnography and critical studies within a consortium of seven UK universities (Glasgow, East Anglia, Edinburgh, Goldsmiths University of London, Nottingham, St Andrews, and Strathclyde), and over 80 industry, public sector and civil society partners.” (CREATE 2016)

light of the considerable focus that has been trained on music copyright generally, there remain opaque areas. Specifically, in the context of this study; music streaming and live performance and their relationship to copyright. As the recording industry struggles to find effective strategies for adapting to the new digital landscape in which it operates, data generated by the music industries suggests interactive music streaming (BPI 2016) and live music (UK Music 2015) are growth areas in commercial terms and, arguably, in terms of their cultural significance. But while the scale and influence of these sectors is expanding, very little is known about the copyright dimensions of these phenomena. Moreover, both streaming and live music remain highly dependent on the recording industry's capacity for identifying, developing and marketing popular music talent. There is therefore a problematic inconsistency between the ailing commercial fortunes of the recording industry and the enduring significance of record companies as vital industrial and cultural institutions in the digital age. This music industries context and these potentially problematic tensions serve as the setting for this study.

However, the study represents something of a counterblast to the academic tendency to primarily consider how copyright serves *corporate* interests. Central to the narrative of this research is an investigation into how copyright affects the economic, cultural and social experience of popular music practitioners. By shifting the focus from what copyright does for investors, to an empirical study of how copyright qualitatively shapes the experiences of creators, the research seeks to assist in filling a considerable knowledge gap in the exiting literature. In doing so, the intention is to make an original contribution to an under researched area in the field of popular music studies. This is approached in three ways:

1. By means of a document analysis and critique of royalty data relating to creators' copyright income from digital and live music sources.
2. Through a document analysis and critique of contemporary music copyright contracts relating to creators' activities in the music publishing and recording industries.
3. By employing a semi-structured interview technique with creators and investors operating in the diverse structures of the UK popular music industries, the study seeks to gain phenomenological insights into creators' experiences of music copyright hitherto largely unseen in existing scholarly literature.

With a particular focus on nascent digital markets and the curiously overlooked copyright dimension of live performance, the thesis offers a distinctive glimpse of creators and investors attitudes to the UK music industries in the period between late 2011 and early 2015. The creator perspective is one that is largely ignored in critiques of 'the business' of music. In the literature, the rank and file musician is often, inadvertently it must be said, reduced to the role of a somewhat hapless stooge offered 'take it or leave it' terms in return for entry to the 'winner takes all' lottery that is the music industries. These simplistic binaries obscure the complexity and nuance that this study seeks to expose and bring to the foreground.

APPROACHING THE INDUSTRIES

At this point it is perhaps worth offering some reflections on my research 'journey'. Researching and writing any doctoral thesis is an expedition, an adventure, a battle and, at some points, an ordeal. Like many scholars that identify as being part of the loosely connected field of study that is popular music studies, I came to academia from the music industries. Some from that career path wish to analyse an aspect of their experience in a way perhaps not possible from within the industries, others seek refuge in academia, while others are no doubt waiting until their musical genius or showbiz acumen propels them to their rightful station. As a full-time tour manager in the 'noughties', and latterly a part-time artist manager, when I set out on this PhD journey I considered myself something of an industries 'insider'. I soon found out I was more 'outside' than 'inside' and probably viewed with suspicion by both industry and academia!

However, there is considerable disconnect between my experiences of the industries and those that are often portrayed as sites of exploitation (in the negative sense), rancour and discord that emerge in some elements of the literature, where corporate dominion over creators is the nature of the beast. These are not the music industries as I knew or know them. The music industries I recognise are characterised far more by cooperation and seeking after common goals, but also by an exciting diversity of objectives and ambition. Therefore, in acknowledging my own pre-existing attitudes to the music industries while maintaining a scholarly dispassion, this study seeks to avoid hackneyed conceptions of creators and investors locked in attritional conflict. In doing so, it is hoped that a balanced, nuanced and empirically accurate understanding of the experiences of creators and investors has been achieved.

1.3 STRUCTURE OF THE THESIS

Including this introductory chapter, the thesis comprises eight related chapters in a three part structure: Part One sets out the context and approach, while Parts Two and Three present the empirical findings of the study.

After the Introduction, Chapter Two provides a literature review that assesses what is already known about the research subject and identifies significant knowledge gaps ripe for research. In addition to this, it provides a theoretical footing for the discussion that is sustained through the remainder of the study. The review locates the study within a wider milieu of academic enquiry into copyright in the popular music industries. An existing literature that is both voluminous and instructive was found in a wide variety of disciplines and methodological approaches. However, the review argues that existing critiques of creators' experience of music copyright transactions are largely based on theoretical and historical rather than empirical research of contemporary subjects. In effect, little is known about how creators understand the commercial dimensions of the copyright that they create when they write, record and perform a piece of music. Going some way to correcting this imbalance towards the theoretical, is the stated aim of this doctoral study.

Chapter Three sets out the primary research question and a number of subordinate questions that drive the remainder of the study. The chapter then outlines the tripartite methodological approach that was employed. Central to the research design is the analysis of key documents relating to creators' copyright transactions in the digital and live music realms. The examination of contemporary royalty statements and contracts which is largely absent in existing scholarly literature provides insights into creators' experiences of copyright. In addition to this document analysis, the study draws on interviews with creators with varying amounts of experience and investors operating at different levels in corporate settings. This adds a phenomenological dimension to the study by probing and evaluating creators' and investors' attitudes to copyright. The strengths and limitations of the methodology design are critiqued at the end of the chapter.

Chapter Four is the first empirical section of the study and draws heavily on data from the document analysis thread of the methodology. The main argument advanced here is that copyright sources may be modest but potentially significant

income streams for creators, even at grass-roots level. Moreover, creators are likely to encounter serious obstacles in accessing transparent and coherent information relating to their copyright income, thus limiting their capacity to make informed decisions as to how their works should be exploited in the market. The findings of this chapter shape and inform the discussion and analysis found in chapters six and seven.

Chapter Five shifts the focus to contemporary recording and music publishing contracts, a data source largely absent in the existing literature. From these sources it is possible to model the key dimensions of a copyright contract in respect of commitment and reward. The chapter finds *publishing* contracts to be more favourable to creators in respect of commitment and reward than *recording* contracts, reflecting the relative risk involved in each industry. However, the argument advanced here is that these contracts contain far more latitude for negotiation than is reported in much of the literature. Nevertheless, the potentially lengthy post-term retention of copyright presents potential problems for creators, an issue that is more fully interrogated in chapter seven.

Chapter Six adds a human dimension to the study by introducing material drawn from interviews with creators and investors as well as less structured interactions with stakeholders. The discussion builds on the notion that the author is the key decision-maker in copyright transactions. The argument here is that ‘take it or leave it’ characterisations of copyright transactions are accurate when applied to collectively negotiated copyright transactions but somewhat overstated when applied to individually negotiated copyright transactions. The conclusion drawn is that there is significantly more subtlety and nuance in such negotiations than the existing literature suggests, even for new entrant creators.

Chapter Seven examines the long-term ramifications of the types of contract creators are likely to enter into at the start of their careers when their understanding of copyright is likely to be limited and their motivation to enter the industry is likely to be high. The main thrust of the argument here is that while the motivations and incentives of creators and investors may be closely aligned at the outset of the agreement, over time it seems likely that these may become increasingly disparate resulting in a ‘real-world’ manifestation of ‘principal-agent’ problem. The chapter closes by proposing some potential remedies to what appears to be an enduring problem of creators becoming alienated from

copyrights that are of little commercial interest to the companies that come to control them.

Chapter Eight, the concluding chapter, brings together the main themes and findings of the study in order to offer a succinct appraisal of the role of copyright in creators' experience of the music copyright industries. Further, this concluding chapter identifies areas in need of additional research and proposes methodological approaches that might be employed in pursuing these research goals.

CHAPTER 2: LITERATURE REVIEW

2.1 INTRODUCTION

PURPOSE AND STRUCTURE OF THE LITERATURE REVIEW

The purpose of the literature review is to ask what is currently known about copyright's role in the complex relationship between creators and investors. With both descriptive and critical functions, the review is crucial in teasing out relevant threads in the academic literature as well as identifying knowledge gaps. The review is also essential in constructing a definitional and theoretical framework for the study.

As the review proceeds the discussion 'tapers' from consideration of broad aspects of the music copyright industries to an increasingly sharpened focus. In the process, the critical edge of the review is progressively honed. The review first locates the thesis within popular music studies, an expanding field of study rather than a discipline in its own right, and queries the purpose of popular music studies research (Frith 2000, Williamson and Cloonan 2007, Harkins 2012).

The focus then turns to the *Copyright Designs and Patents Act 1988* (CDPA) and the so-called 'bundle of rights' (Frith 1988, Rahmatian 2011) that is central to existing understandings of copyright's foundational role in what can accurately be defined music 'copyright industries' (Throsby 2001, Laing 2003, Wikström 2013).

Building on this, the review examines the nexus of corporations, companies and individuals that make up the music copyright industries: major music companies,

record labels and music publishers (Negus 1992, Hesmondhalgh 1998, Negus 1999, Strachan 2007). These researchers provide valuable empirical insight into the workings of UK Independent labels and micro-labels and the extent to which they present commercial and ideological opposition and critiques of the 'mainstream' of major labels.

A closer examination of the copyright transactions between the creators and investors that make up these industries is then conducted. The literature on the philosophical, economic and historical underpinnings of copyright collecting societies (Peacock and Weir 1975, Taylor and Towse 1998, Kretschmer 2002, Albinsson 2014, Barr 2015) provides an instructive basis for this study. That said, in this area, and in the case with copyright contracts (Yanover and Kotler 1989, Evans 2003, Greenfield and Osborn 2007), there is an observable dearth of qualitative, empirical studies of what these copyright transactions mean to contemporary creators.

The dominant narrative in the literature finds creators offered contracts on 'take it or leave it' basis (Macmillan 2000, Greenfield & Osborn 2002) in 'winner takes all' (Kretschmer 2005, DiCola 2013) markets where copyright is primarily of benefit to large corporate investors and 'superstar' creators. While such characterisations are useful when taking a broad view of labour markets and the distribution of income, they reveal little about the more prosaic aspects of music copyright as a means of incentivising and rewarding creators. However, an emergent strand of mixed-method and qualitative research (Schlesinger and Waelde 2012, FMC 2013, Phillips and Street 2015) provides both valuable insights and methodological exemplars of how research can illuminate human experiences of music copyright.

The final part of the review considers the music copyright industries in the digital age and finds a number of conflicting narratives that require further investigation. The growth of music streaming and the 'live' sector (Page and Carey 2009) while the recording industry wrestles with the challenges of the music 'service' age (Goldstein 1994, Burkart and McCourt 2004, Styvén 2007) are of particular interest here. These shifts present considerable challenges and opportunities to the music copyright industries and the creators that are an essential yet curiously neglected human component of these industries. Hitherto, much of the debate around these issues has been conducted in the trade and popular press and in the Blogosphere. While a literature has emerged that addresses these nascent trends and

technologies (Barr 2010, Byrne 2012, Barr 2013, Wikström 2013, Marshall 2015) the copyright dimensions of such studies and what all this means for creators of music remains limited.

The review concludes with a synopsis of the main findings and identifies areas in need of further research that feed into the research questions of the thesis. In summary, a tendency in the literature towards binaries that are appropriate and instructive when the industries are viewed at a macro-level comes at the expense of qualitatively evaluating the nuance of creators' experience in the contemporary UK music industries. Therefore, this study provides an opportunity to add an empirically based qualitative dimension that is largely absent in these existing studies.

2.2: MAPPING THE FIELD

POPULAR MUSIC STUDIES: A MULTI-DISCIPLINARY 'FIELD OF STUDY'

As a graduate of a popular music studies masters programme and a member of the International Association for the Study of Popular Music (IASPM), it is my hope and intention that this work will make an original contribution to knowledge in the field of the cultural industries and specifically popular music studies. The study of popular music as a self-consciously organised and focused activity is a comparatively recent development with IASPM being founded as recently as 1981. As a field of study rather than an academic discipline in its own right, popular music studies is an inherently multidisciplinary endeavour (Cloonan 2005). The eclectic range of presenters and papers given on the global IASPM conference circuit are evidence of a broad church.

It is quite appropriate then that the primary criterion of the Lord Kelvin/Adam Smith Scholarship that funded this doctoral research stipulates projects must be interdisciplinary in nature. The project was based in the Music and Law Departments of The University of Glasgow. However, the literature that the study draws on originates in a great many fields and disciplines beyond music and law. Indeed, throughout the project there were frequent visits to many of the 12 floors of the Glasgow University Library. The library's 'My Reading History' function reveals that over the course of the study sources covered aspects of: law, music, economics, sociology, fine arts, psychology, history, anthropology and social

sciences. This serves to demonstrate that rather than operating within a discrete area, there is a high degree of interplay and exchange among texts from a wide array of disciplines.

However, diverse as these sources are, they are brought together in this study to serve the common goal of constructing a fuller understanding of the music copyright industries. Simon Frith, without doubt a pioneer in the field, suggests that the job of the popular music scholar is, “to develop an account of the contemporary music industry that is empirically accurate and theoretically instructive” (Frith 2000: 390). Williamson and Cloonan draw on Frith’s statement to emphasise the importance of not simply accepting what they view as convenient oversimplifications of the complex set of endeavours that make up the music *industries*, rather than a singular, homogenous entity, stating, “as academics we should be suspicious of attempts to push square pegs into round holes...and be looking to continually challenge over-simplified models of ‘the industry’” (Williamson & Cloonan 2007: 319).

Frith’s commitment to empirical accuracy and theoretical instructiveness serves as a model of excellence for this study and also provides a simple but effective paradigm for evaluating the literature in this literature review. In doing so, it is possible to avoid the dangerous over-simplifications that Williamson and Cloonan warn against, and thus bring depth and nuance to the relevant issues around music copyright in the digital age.

2.3 THE ‘BUNDLE OF RIGHTS’: MUSIC COPYRIGHT INDUSTRIES

The *Copyright Designs and Patents Act 1988* (CDPA) is the central UK legislation that underpins many of the creative and commercial activities of popular music creators and investors in relation to copyright. Perhaps as testament to the malleability of copyright law, the CDPA remains the key piece of legislation³ for creators, investors and consumers over 15 years after the catalytic entry of Napster into the music industry landscape in 1999 and the ensuing so-called ‘digital revolution’ discussed in the introductory chapter. Moreover, while the

³ The *Digital Economy Act 2010* was specifically intended to curtail infringing activity and harness the potential that digital technology presents but does not supersede the *CDPA 1988* as the key piece of UK copyright legislation.

sovereignty of copyright may have been challenged by the facility for music to be transmitted freely in a boundless digital sphere, the exploitation of copyright in musical works and sound recordings remains a foundational element of the music industries.

Copyright subsists in any work that satisfies three basic requirements. Firstly, it must be a 'work' that attracts copyright. As defined in the CDPA in music this extends to musical works and sound recordings (Rahmatian 2011: 36)⁴. Secondly, the work must be original inasmuch as it results from the authors' "skill, labour and judgement" (*Ibid*: 38) and be sufficiently different to any other copyright work. Finally, 'fixation' must occur in the sense that the original work is notated or recorded in some 'fixed' expression (*Ibid*: 42). Upon satisfying these three criteria the author of the work becomes the owner of an exclusive 'bundle of rights'. It is the author's *exclusive* right to decide how the various elements of this bundle are subsequently exploited, if at all. It is upon this 'bundle of rights' that the music copyright industries are constructed (Frith 1988, Laing 2003, Wikström 2013).

A 'BUNDLE OF RIGHTS'

In the literature, the issue of what copyright *does* and what it is supposed to achieve, has attracted a prodigious level of scholarly attention to the philosophical and moral justifications of copyright (Arnold 1997, Kretschmer & Kawohl 2004, Rahmatian 2011). It is however, important to recognise that since its inception copyright as a legal system has been justified on the grounds that it provides an incentive to create. The extent to which copyright provides an incentive to *create* is perhaps the most contested issue in copyright scholarship. In spite of its contentious nature Peter DiCola suggests copyright's efficacy as an incentive has been subject to surprisingly little empirical study. Of the incentive theory advocates and opponents he suggests, "each side offers anecdotes, but no data" (DiCola 2013: 2). While proving or disproving the incentive principle lies beyond the scope of this thesis, this assumption continues to shape copyright policy in the 21st Century⁵. This study operates on the premise that creativity (in the sense of

⁴ Rahmatian explains that since 1988 the sound recordings and other "entrepreneurial works" such as films and broadcasts have been considered authored copyright 'works' even though such works are largely produced technical processes (Rahmatian 2011: 36).

⁵ The *Statute of Anne* the world's first codified copyright system contains the clear incentive assumption, "for the encouragement of learned men to compose and write useful books" (Statute of Anne) (for a commentary of the Statute of Anne see Deazley 2008a). This type of rationale

creating music) is governed by a complex set of intertwined intrinsic and extrinsic motivations that cannot be neatly attributed to one underlying motive force (Frey 1997, Towse 2001a).

Of far more relevance here is the question: what does the CDPA do for contemporary creators? While the question may be loaded with the same philosophical and moral dimensions, these are left for other scholars to grapple with. Instead, the intent is to perform a far more literal reading of copyright law and conduct an investigation of ‘copyright in action’ in order to gain a better understanding of copyright as it shapes the experiences of popular music creators in the contemporary music industries.

Music copyright’s ‘bundle of rights’ subsists in the musical work (in more casual parlance ‘the song’) and the sound recording of the song. These are the two core “texts” (Hesmondhalgh 2007: 17) produced by the music industries and also two of these industries’ most valuable commodities. The CDPA states that:

The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom—

- Copy the work
- Issue copies of the work to the public
- Rent or lend the work to the public
- Perform, show or play the work in public
- Communicate the work to the public
- Make an adaptation of the work or do any of the above in relation to an adaptation

(CDPA 16 (1))

This ‘bundle of rights’ affords the owner the *exclusive* right to perform, and crucially, the right to stop anybody else from performing these acts without permission. The Act states, “Copyright is transmissible by assignment, by testamentary disposition or by operation of law, as personal or moveable property” (CDPA s90 (1)). It is the transferability of these rights, by way of assignment or by

continues to be used to justify copyright as a driver of cultural production. The *Gowers Review of Intellectual Property* (Gowers 2006) states, “The ideal IP system creates incentives for innovation”.

license (Rahmatian 2011: 204) that makes copyright an effective and potentially valuable economic mechanism.

The assignment and subsequent exploitation of these rights has given some scholars cause to characterise the music industries as a set of “copyright industries” (Wikström 2013). In the context of this chapter and this study however the single most significant element of the CPDA is that the author of a work initially holds *all* of the rights that subsist in their musical works and sound recordings. The Act states explicitly: “The author of a work is the first owner of any copyright in it...” (CDPA 11 (1)). This clause positions the author in control of the copyright in their work and the entire ‘bundle of rights’ at the outset.

Theoretically at least, this makes creators the explicit beneficiaries of the CDPA by virtue of the fact that they hold all of the rights that subsist in their musical works. They are also the key decision-makers as to how these rights are subsequently exploited. However, there is an almost universal scepticism in the academic literature that this ‘bundle of rights’ is of meaningful value to any but the most successful superstar creators. This disconnect between an apparently strong ‘bundle of rights’ conferred upon creators in law and the apparently weak position creators occupy in ‘winner takes all’ (Kretschmer 2005) copyright markets represents a central theme of this study.

WINNER TAKES ALL

‘Winner takes all’, where the few ‘hits’ are outnumbered by a great many more ‘misses’ is a feature of the cultural industries. This shall be discussed further in due course. However, copyright also rewards creators in ‘winner takes all’ patterns, that is to say a small minority of ‘winners’ generate and collect the majority of copyright income. A number of compelling quantitative studies draw on data that illustrate the skewed nature of musical creators’ income from copyright (Kretschmer and Hardwick 2007, DiCola 2013⁶). Kretschmer and Hardwick draw on data contained in the Monopolies and Mergers Commission report into performing rights (MMC 1996). This remains perhaps the most comprehensive insight available into the copyright income of UK musical creators. The report shows that around 10% of writers receive 90% of the income generated.

⁶ DiCola (2013) is closely linked to the Future of Music Coalition (FMC 2013) project and draws on much of the same research.

More recently, DiCola (2013) draws on survey data from a sample of 5000 musicians based in the USA, though not all of the ‘musicians’ in the study would necessarily be regarded as creators of copyright ‘works’⁷. However, DiCola finds, in keeping with much of the literature, that copyright directly benefits the relative few highest earning musicians. He writes:

Rather than providing marginal incentives to create to all musicians at all times, copyright law mostly affects the revenue of the highest-income musicians in a direct fashion. This is not a surprise given the prevalence of winner takes all markets in the entertainment industry. (DiCola 2013: 49)

Leaving the incentive issue aside, the pattern DiCola describes suggests strongly that commercially successful artists benefit disproportionately from copyright. Cultural economist, Ruth Towse describes the disconnect between the apparently strong position the creator occupies in the copyright law as first owner of a ‘bundle’ of potentially valuable rights and the low valuation of their works in the marketplace:

Copyright is said to ‘reward’ creators but how much reward they reap in practice depends upon the market valuation of their work and that may be very low. (Towse 2004: 63)

In this study and much of the other literature the sense emerges that copyright’s role is primarily as a mechanism that benefits a few ‘star’ creators’ but primarily serves the commercial needs of the music copyright industries. As Jason Toynbee observes, “To change this situation we may need to abolish capitalism” (Toynbee 2006: 97). In other words, it is not copyright that contains the iniquity; rather this is a feature of the capitalist system that copyright serves.

THE THREE PILLARS OF THE MUSIC INDUSTRIES

The terms ‘music business’ (Talbot 2002), ‘music industry’ (Wikström 2013) and ‘music industries’ (Williamson & Cloonan 2007, Jones 2012) are used more or less interchangeably and in *most* cases unproblematically throughout much of the literature. But rather than a homogenous *industry* the music *industries* are a broad and intertwined network comprising multiple sectors and scales of operation.

⁷ “By “musician” we mean to refer to singers, instrumentalists, songwriters and composers, recording artists, live performers, and teachers of all types and in all genres...” (DiCola 2013: 3)

Williamson and Cloonan describe the music *industries* as, “those cultural industries which are primarily concerned with the creation, management and selling of music, either as a physical/digital product, a performance, or as a bundle of intellectual property rights” (Williamson and Cloonan 2007: 305). The danger, as these authors perceive it, is not simply one of linguistic imprecision. Rather, they provide numerous examples where ‘music industry’ is used as rather inexact shorthand for accounts of the ‘recording industry’. They argue convincingly that to conflate the music industry with the recording industry is to potentially relegate all other music industries to a supporting role irrespective of their significance.

Moreover, such a simplistic characterisation conceals the potential conflicting interests of each sector. Paul Harkins (2012: 640) argues that the unified, if superficial, façade presented by organisations such as UK Music⁸ and the Association of Independent Music (AIM)⁹ permeates the output of trade organisations in order to maximise lobbying impact. Building on Williamson and Cloonan’s work, Harkins demonstrates the need for academics to divert their attention from the recording industry and recognise the importance of other sectors. Keith Negus writes, “...beyond the conventionally described recorded music industry... a much wider range of investors, regulators, stakeholders, entrepreneurs, activists, and beneficiaries are increasingly intervening in the networks of music production” (Negus 2014: 130). Here Negus illustrates the multifaceted nature of what is an immensely complex *set* of industries.

While it is not possible to reflect or interrogate the full complexity and diversity of the music industries in this thesis, a useful and widely employed way of conceiving the music industries is to understand them as comprising three core pillars: the recording industry, the music publishing industry and the live music industry (Hull 2004, Hesmondhalgh 2007). Therefore throughout this study reference is made to music *industries* when speaking of the industries in the broad sense while identifying the particular branch of these industries specifically as the recording industry, the publishing industry or the live music industry as appropriate.

⁸ “UK Music is a campaigning and lobbying group, which represents every part of the recorded and live music industry” (UK Music 2016)

⁹ “AIM is a trade body established in 1999 to provide a collective voice for the UK’s independent music industry” (AIM 2016)

THE MUSIC COPYRIGHT INDUSTRIES

The music industries are considered a core component of the cultural or creative industries. The terms cultural and creative industries are used more or less interchangeably in much of the literature: for example, *cultural* (Hesmondhalgh 2007) and *creative* (Caves 2000). Exploring the chronology, semantics and politics of this cultural/creative industries nomenclature any further is beyond the scope of this study¹⁰. For convenience the term *cultural* industries shall be used here.

The cultural industries have been identified by a number of common characteristics that are said to distinguish them from other industries. Richard Caves (2000) and Hesmondhalgh (2007) provide touchstone works in this field and are highly instructive in offering a comprehensive account of what distinguishes the cultural industries from others. Both of these authors introduce a set of common problems inherent in these industries and a common set of responses employed to counteract these. Figure 2-1 shows Hesmondhalgh's model of these.

Figure 2-1: Hesmondhalgh's Distinctive Features of Cultural Industries

Problems:

- Risky business
- Creativity v Commerce
- High production costs and low reproduction costs
- Semi-public goods: the need to create scarcity

Responses:

- Misses offset against hits by building repertoire
- Concentration, integration and co-opting publicity
- Artificial scarcity
- Formatting: stars, genres and serials
- Loose control of symbol creation: tight control of distribution and marketing

(Hesmondhalgh 2007: 18)

¹⁰ The term "creative industries" has been closely (in some respects quite negatively) associated with New Labour and the British Government under Tony Blair from 1997-2008 (Schlesinger 2007) so the term cannot be considered neutral or entirely unproblematic, however, in the context of this study fixating on the distinction is of little direct relevance.

Central to Hesmondhalgh's overview are ideas of risk and control. While these are by no means unique to the cultural industries, certain problems and responses are particularly pronounced in the cultural sectors. On a fundamental level, copyright is used to exert control by creating false scarcity in 'non-rival', 'non-excludable' public goods (Towse 2010: 28): musical works and recordings. That is to say, one person having an mp3 file containing a song doesn't stop somebody else having an identical copy. Copyright's exclusive rights allow the rights holder to prohibit others from accessing or consuming works without permission.

But even assuming that copyright law is effective in creating this false scarcity, the high failure rates of the texts produced in the cultural industries and the music industries in particular, leave investors exposed to the vagaries of a market where failure is endemic. As cultural industries, the music industries are, "risky business" (*ibid*: 18). According to Caves, an overarching law of the cultural industries is "nobody knows" (2000:3), that is to say nobody knows what products or texts will be popular. Caves estimates that the "stiff ratio" (*Ibid*: 61) of commercial failures in the recording industry might be around 80%, other accounts proffer a rate as high as 90% (Kretschmer *et al* 1999). As Hesmondhalgh suggests, in such a market 'hits' are required in order to offset such losses. "Building repertoire" (Hesmondhalgh 2007: 18) or, more specifically, acquisition of copyright 'catalogue' by way of contract with primary creators, is a central strategy of the music copyright industries.

Where many scholars consider cultural/creative industries to be appropriate and largely synonymic overarching categorisations for the music industries, Patrik Wikström (2013) rejects the suitability of both. Wikström discards both of these terms and instead argues that the music industries are better understood as a "copyright industry". According to Wikström, using the term 'creative' implies an industry that can be defined primarily by *input* of creators, a notion he rejects. The term 'cultural' industries, as Wikström would have it, implies *output* and a focus on the "text" as proposed by Hesmondhalgh (Hesmondhalgh 2007: 2). Wikström considers this "too inclusive" as musical texts could, by this definition be ascribed the characteristics of "functional objects" such as cars or furniture rather than "communicative" cultural artefacts like musical texts (Wikström 2013: 13). Ultimately, Wikström overstates the case by overlooking the communicative aspects of functional objects. In popular music the Fender Stratocaster guitar or

the Technics SL1200 turntable, for example, seem to be indisputably ‘functional’ *and* ‘communicative artefacts’.

In essence, Wikström’s position develops David Throsby’s view that the generation of intellectual property might be the most effective way of differentiating cultural from non-cultural industries. Again, this is somewhat problematic inasmuch as virtually any industry producing virtually anything might lay claim to generating some form of intellectual property¹¹ thus rendering the distinction impossibly inclusive. Throsby concludes that such a distinction allows the terms ‘cultural industries’ and ‘copyright industries’ to be used, “...more or less synonymously” (Throsby 2001: 112). Where Throsby is satisfied by the synonymic nature of these terms, Wikström is not, and seeks to apply the term, “copyright industry” specifically to the music industries. In the context of this study, the term ‘copyright industries’ is borrowed from Wikström and Throsby without concurring entirely with their underlying theorisations. Dave Laing perhaps most succinctly and incisively sums it up when he writes:

Copyright has had a profound impact on the economic and aesthetic dimensions of popular music, to the extent that the music industry is something defined as one of the “copyright industries”. (Laing 2003: 481)

To conclude this section, the recording industry and the music publishing industry are, in this study, understood to be the core music copyright industries. The focus now turns to the types of companies that populate these industries.

2.4 COPYRIGHT INDUSTRIES CONSTITUENTS

The music copyright industries comprise a diverse nexus of operators and enterprises, including major multinational music companies, large independent firms, micro-enterprises and DIY creators. The common factor across all strata of these industries is that all are engaged in the production and exploitation of copyright works. Though, as shall be demonstrated, not all conceive of their activities in this way.

¹¹ The *Gowers Review of Intellectual Property* (2006) classifies intellectual property as: copyright, designs, patents and trademarks.

THE MAJOR MUSIC COPYRIGHT COMPANIES

The term, 'major record company', although commonly used in academic, trade and popular media, conceals the sheer scope of the activities of the so-called 'Big 3' record companies: Sony Music, Universal Music Group and Warner Music Group. The 'Big 3' are not involved simply in the production and sale of recordings; hence the term is something of a misnomer. They should more correctly be recognised as major music *copyright* companies that own, or at least control, expansive catalogues of sound recording and music publishing copyrights¹². The recording and music publishing industries are oligopolies (Hull 2004: 121). That is to say, a few large conglomerates that dominate the market share within each industry. Indeed, in recent years the number of large participants has diminished as 'the Majors' have reduced from the 'Big 6' of the early 1990s (BMG, EMI, Polygram, Sony, Universal, Warner) to the 'Big 3' (Marshall 2012a: 67). The reduction in number is the result of a series of takeovers and mergers and, most recently, due to the breakup of the EMI conglomerate.

Within their recorded music arms, each of the Big 3 has a multitude of sub-labels that capitalise on the prestige of historic brands. Under the Sony banner are famous names including Columbia, Epic and RCA. Universal's label 'stable' includes Capitol, Island and Polydor. Warner Music has Atlantic, Parlophone and Reprise. The powerful symbolism of these historic labels is no doubt highly valuable, but more significantly, the formation of these cabals of labels reveal that the acquisition of vast copyright catalogues is at the heart of the corporate strategy of these major music companies. In the context of the contracts that are discussed in this thesis, it is important to note that in the process of these mergers and takeovers, copyright agreements and contracts are routinely transferred to a new owner without consultation or approval of the primary creator.

That a creator can be "alienated" (Rahmatian 2011: 215) from works in this way is central to the music copyright industries business model of acquiring 'catalogue'. However when combined with potentially unfavourable bargaining positions and

¹² This useful understanding of the majors as music copyright companies somewhat conceals the true nature of their position within an even larger corporate framework. Sony Music is part of the Sony Corporation a company that began as a radio repair concession in a Tokyo department store in 1945 (Sony 2015). Universal Music Group is part of the French media company Vivendi (Vivendi 2015). Warner Music Group is now part of the privately owned Access Industries which has interests in natural resources and chemicals, media and telecommunications, technology and e-commerce, and real estate (Access Industries 2015). These are vertically and horizontally integrated conglomerates across a broad range of cultural and non-cultural sectors.

contractual terms, this alienation can become problematic for creators as they effectively lose control of works that they have created. A great many scholars have critiqued major record companies as agents of corporate dominion over creative labour (Macmillan 2002, Greenfield and Osborn 2004, Hesmondhalgh 2007, Stahl 2012) and this raises issues that are relevant to this study. Chief among these is the extent to which the majors' power to act as 'gatekeepers' to the mainstream industries endures in the digital age. It is said that those that do get through the 'gate' have little bargaining power and are offered 'take it or leave it' (Yanover and Kotler 1989: 219) terms that heavily favour the investor. Aside from those commentaries that draw on inherently adversarial high-profile court cases (Yanover and Kotler 1989, Evans 2003, Stahl 2011) little is empirically known about the human interactions between creators and investors that shape music copyright contracts that are *not* contested in court.

INDEPENDENTS AS COPYRIGHT COMPANIES

Just as the music industries are a multifaceted network of industries, similarly, the recording industry is an industry of many layers and dimensions. Where there are now, as has been said, only the 'Big 3' major record companies, there are innumerable independent record companies ranging from the 'micro-labels' (Strachan 2007) to the independent label groups such as Beggars Group. Between these two extremes of scale lie innumerable *independent* operations of varying scale, structure and outlook.

The distinction between major and independent record company has been an enduring concern of popular music scholars since the academic study of the music industries began. Keith Negus's unpacking of the "romance of independence" (Negus 1992: 16) rather debunks narratives that uncritically valorise independents. Writing in 1999, Negus observed that:

...the absorption of independent labels has become a feature of the music business throughout the twentieth century and has become increasingly institutionalised through a series of joint ventures, production, licensing, marketing and distribution deals which have led to the blurring of the 'indie/major' organisational distinctions and belief systems. (Negus 1999: 35)

In practice, the majority of independent companies are primarily motivated by commercial objectives and have been seen as testing grounds for new genres and movements that subsequently became the mainstream (Negus 1992: 18). And just as independents have been held up as pioneers of artistic freedom and political resistance they have also been responsible for some of the most anodyne Pop committed to record. Much of the output of independent labels like PWL and Jive¹³ demonstrates that there is nothing inherently oppositional or transgressive about an independent. Independent record companies continue to produce massive mainstream global hits such as Adele's *21*, the biggest selling album of 2011 (Jones, A 2011)¹⁴¹⁵ on Beggar's Group label XL Recordings.

Just as independents are not necessarily driven by underlying ideologies, neither are they inherently 'artist friendly'. Indeed, Hesmondhalgh suggests independent record companies can at once be, "...guardians of diversity and innovation" while also being, "...guilty of breathtaking rip-offs of their artists" (Hesmondhalgh 1998: 256). In the United States Chess Records, King Records and Morris Levy's appropriately named Roulette Records (Dannen 1990: 31) are examples of independent record companies that brought a host of seminal creators in the history of Popular Music to prominence while simultaneously embezzling them on an epic scale. It was not only in the USA that independents demonstrated such rapacious tendencies. UK court cases involving independent labels *ZTT v Holly Johnson* and *Silvertone v Mountfield* (Evans 2003)¹⁶ illustrate that *independent* and *equitable* cannot be assumed to be synonymous.

But this is not to say that independent record companies *cannot* genuinely provide more equitable ways of doing business in the recording industry. A literature, mainly journalistic, has grown up around the UK "Indie" labels of the late 1970s and 1980s. In many respects the term "indie" as applied to British music is now merely a genre classification suggesting a type of conservative guitar based Rock

¹³ PWL was responsible for a string of Hi-NRG hits in the 1980s and 1990s by artists such as Sinitta and Sonia. Jive Records was part of Zomba label group and enjoyed stratospheric success with artists such as Backstreet Boys, N-Sync and Britney Spears.

¹⁴ At the time of writing Adele's *25* had become the fastest selling UK album of all time.

¹⁵ Taylor Swift is another independent label artist who enjoys stratospheric commercial success. Interestingly both wield sufficient power to shape debates around music streaming by withholding or 'windowing' content. Swift has also spoken out against the rates paid to creators by streaming services (Sherwin 2015).

¹⁶ *ZTT v Johnson* (1990) saw arose from Holly Johnson's desire to leave Frankie Goes to Hollywood. The dispute related to the enforceability of his contract. *Silvertone v Mountfield* (1993) was a contractual dispute between The Stone Roses and their record and publishing companies.

but historically it was in some instances more ideologically loaded with the politics of opposition to big business and the traditions of the established recording industry.

Richard King's *How Soon is Now* and David Cavanagh's *The Creation Records Story: My Magpie Eyes are Hungry for the Prize* bolster the somewhat threadbare academic literature examining these key UK independent labels. Labels such as Rough Trade, Beggars Banquet, Mute and 4AD were essential to the 'DIY Ethic' of the Punk and Post-Punk movements in the UK that briefly challenged the hegemony of the majors in the late 1970 and early 1980s (Hesmondhalgh 1998, Cavanagh 2001, King 2011). These texts are certainly anecdotally entertaining to those with an interest in the UK Indies, but what these journalistic accounts lack in academic rigour they partially compensate by providing a useful insight into the experiences and attitudes of the creators in their dealings with record companies that is often absent in academic texts.

Indeed, almost inadvertently they provide some of the most probing insights into the way copyright was assigned and exploited at such labels. A number of these record companies operated on very different contractual bases to the majors' royalty split system. A 50/50 profit share was commonplace and the copyright would routinely revert to the artist after a fixed term (Cavanagh 2000: 40).

However, this *laissez faire* approach to contracting brought considerable problems for some labels. In the case of Factory Records, contracts were art objects with serial numbers (King 2012: 201) that in some instances allowed copyright to revert to artists after only six months thus rendering their 'catalogue' more or less worthless when the label ran into the financial difficulties that ultimately led to its collapse (Hesmondhalgh 1998: 261).

Hesmondhalgh questions the extent to which independent labels can offer genuine opposition to the hegemony of the Majors for a prolonged period, "...the independent record company is only potentially a site for resistance- and then perhaps a limited one at that." (Hesmondhalgh 1998: 272). As the example of Factory Records shows, just like their major counterparts, independent record companies are heavily reliant on exploitation of copyright in order to survive. The less organised and the commercially reckless have perished. Indeed, historically it appears to be the more 'copyright aggressive' independent record companies that succeeded, while those less inclined to acquire long assignments and licenses

were less well equipped to survive the vagaries of the industry (King 2012: 434). History shows that larger independent labels have expanded horizontally with the acquisition of other labels much in the way the majors have throughout the history of the industry. Beggars Group's acquisition of labels: 4AD, Matador and Rough Trade Records to add to its existing labels Young Turks and XL Recordings suggests a strategy of spreading risk across vast catalogues in the hope of ameliorating the unpredictable nature of a business where "nobody knows" (Caves 2000: 3) what is going to be a hit or a costly 'flop'.

MICRO-LABELS

The 'DIY Ethic' of the late 1970s that spawned these now legendary UK 'Indie' labels was premised on an upsurge of grass roots 'democratised' musical production, fanzines, independent record shops and independent distribution networks. Buzzcocks' self-released 1977 EP *Spiral Scratch* and the, "incipient, viable cottage industry it left in its wake" (King 2012: 18) is regarded as a significant catalyst for this movement and one of its most successful exemplars. However, for many of the labels that emerged in the wake of *Spiral Scratch* commercial success was a poisoned chalice leading ultimately to the collapse of top-heavy independents including Factory and Rough Trade. To the outsider, it appears that many of those who survived and those that came after, did so by adopting the copyright focused strategies of the majors rather than opposing them.

Robert Strachan (2007) identifies a stratum of record label that consciously operates outside the 'copyright-centric' focus of the major/indie recording industry. Strachan's research looks at contemporary 'micro-labels' operating in the late-1990s and early-2000s. He finds these 'DIY' enterprises are not beholden to the usual set of challenges and responses which are ordinarily a core feature of the music industries described by Caves (2000) and Hesmondhalgh (2007). In consciously curtailing their commercial ambitions, Strachan argues that these micro-enterprises insulated themselves from the vagaries of the 'mainstream market'. Strachan writes;

While the limited ambitions common among micro-labels may negate the possibility of spectacular financial success, they simultaneously cut out the potential for fantastic failure. What practitioners are left with is a mixture of realistic pragmatism framed within a distinct set of discursive positions

which both highlight and heighten the importance of their small-scale cultural production. (Strachan 2007: 261)

In effect, these companies borrow much of the ideological ethos of their Post-Punk predecessors, while consciously occupying a position on the margins rather than offering a challenge to the majors. Drawing on the work of Bourdieu (1996) Strachan suggests, that these small-scale producers shun the *economic* capital of large-scale production in favour of *symbolic* capital. In doing so, these operators, as Strachan would have it, are consciously critiquing the globalised music industries.

However, Strachan's assertion that micro-labels, "...are not integrated within the structures of the media and music industries yet they are engaged with a similar set of practices: the sale, promotion and distribution of recordings" (Ibid: 247) becomes problematic in the context of increasing convergence of small-scale and large-scale producers into the same digital spaces such as social media and digital music platforms. As shall be discussed more fully in due course, the proliferation of platforms such as Spotify, SoundCloud and YouTube makes it questionable whether even the smallest 'micro' enterprise can remain fully independent of these 'large-scale' structures, irrespective of any ethos they may espouse. Moreover, whether the creators or producers are aware of it or not, the type of 'micro' activity Strachan describes generates copyright in exactly the same manner as the established music copyright companies. In this regard, even micro enterprises can be considered part of the music copyright industries.

THE ART OF MUSIC PUBLISHING

Aside from the recording industry, the second main pillar of the music copyright industries is music publishing. In simple terms music publishing is the business of exploiting the copyright in the song as opposed to the recording of a song. As Hull observes, "without the song, there would be nothing to perform or record" (Hull 2004: 69) but what may appear to be a truism illustrates the expanse of the publishing industry's activities. In almost every conceivable use of a song the publisher will be able to generate revenue. When the song is performed in public or recorded, when the recording is broadcast, downloaded, streamed, the publishing industry is collecting income and the owner of the copyright in the underlying musical work will, or should, generate income.

As an industry music publishing is conspicuously and surprisingly under-researched given its position as the *original* music copyright industry and its enduring position as a central pillar of the music industries. This is a symptom of the academic bias towards the recording industry that Williamson and Cloonan (2012) identify in their work. The main monographs examined in this review (Negus 1992/1999, Caves 2000, Hesmondhalgh 2007, Wikström 2013) devote somewhat limited attention and provide varying degrees of insight into the publishing industry and its evolution over time. Indeed, the most comprehensive literature available is that generated by various industries bodies. There are a number of excellent ‘music biz’ handbook sources describing the ‘nuts and bolts’ of how music publishing operates (Harrison 2008, Gammons 2011, Riches 2012).

The limited canon of academic literature devoted to music publishing can be divided into two main types. The first deals with the philosophical and historical development of copyright in music through case law, various copyright acts and international treaties (Kretschmer and Kawohl 2004, Kessler 2011, Towse 2015). The other main strand of the literature examines shifts in the core business models of music publishers in response to technological and industrial changes.

The history of copyright, and in turn the music publishing industry, is inextricably linked to technology and the industry has been particularly skilled at adapting to “disruptive innovations” (Christensen and Raynor 2003). Live performance, sound recording, radio, television, digital sampling and now digital streaming have all been transformed from technologies that threatened the revenues of the industry into lucrative income streams for music publishing. This has been achieved largely through lobbying for changes to copyright law and the establishment of various collection societies. The Music Publishers’ (MPA) was established in 1881 to, “watch over the general interests of the music publishing trade...(and to) communicate with the proper authorities on all matters connected with copyright whether home, colonial or international” (MPA 2016). Aside from the reference to the colonies, this 1881 mission statement of the MPA is remarkably similar to the objectives of today’s music industries’ lobbying groups.

Copyright in musical works was first established in the UK as a result of technology changing the way in which music was reproduced. The case of *Bach v. Longman* 1777 saw a composer, Johann Christian Bach, successfully challenge the reproduction of “multiplying copies” (Kawohl and Kretschmer 2004: 34) of his

work. In effect this ruling provided the foundation of the music publishing industry as a copyright industry. In the pre-recording era, music publishing was the dominant pillar of the music industries specialising in selling sheet music to domestic consumers (Peacock & Weir 1975: 150). It is well documented that recorded music overtook the publishing industry and became the dominant strand of the music industries for most of the 20th century (Williamson and Cloonan 2012: 14). In response to the growth of recorded music and broadcasting, the mechanical copyright and the performing right were established, largely in response to lobbying of publishers and creators (Peacock & Weir 1975: 33). In doing so, the live music sector, the recording industry and radio were gradually transformed from threats to the industry into lucrative earning opportunities.

As recording, broadcast, live music and now digital technologies have developed, so too has the publishing industry by altering its core business from one concerned with selling physical objects to one concerned primarily with licensing intangible music copyright. Towse argues that ultimately this process is closely analogous to the 'digital crisis' that the record companies are currently failing to deal with effectively:

A century ago, the industry changed its business model from selling a product, sheet music, to managing rights, that is, to dealing with an ephemeral output protected by copyright, something that other creative industries now struggle with... This paradigmatic shift, which took place in a relatively short space of time in the industry's 400-year existence, was a fundamental change that occurred first in this industry in a process that is now universal in all the creative industries as digitisation alters the business model from sales to licensing. (Towse 2015: 2)

The contemporary challenges Towse refers to are those the recording industry is struggling to successfully harness, namely the digitisation of recorded music. As the revenues of the recording industry have declined considerably and as music has become experienced increasingly through digital means (Williamson & Cloonan 2012, Wikström 2013, Samuel 2015, Ingham 2015a), music publishing appears to be a buoyant market and largely impervious to challenges presented by digitisation (Mulligan 2014, Samuel 2015).

This enduring importance of the publishing industry as a lucrative pillar of the music copyright industries makes the relative lack of attention it has received all the more surprising and problematic. This will be revisited when discussion turns to how the literature accounts for these copyright companies' dealings with individual creators.

2.5 COPYRIGHT LAW IN MUSIC INDUSTRY PRACTICE: COPYRIGHT TRANSACTIONS

The construction of the copyright industries discussed in the previous section is dependent on copyright transactions between creators and investors. Copyright transactions are defined in the methodology of this thesis as: *transactions where a creator assigns or licenses control of copyright works to a collecting society or investor*. Towse illustrates another important feature of the rights market, "...the law provides only the institutional framework for market transactions; it does not control rates of payment." (Taylor & Towse 1998: 632). In effect, for copyright to become financially valuable some kind of transaction has to occur. On the supply side, that is to say transactions between primary creators and third party rights holders and organisations, these market transactions fall into two categories: collectively negotiated and individually negotiated rights transactions.

COLLECTIVELY NEGOTIATED RIGHTS TRANSACTIONS

The first type of copyright transaction examined here is collectively negotiated rights transactions involving collecting societies. In the UK the relevant collecting societies are, PRS (Performing Right Society), MCPS (Mechanical Copyright Protection Society and PPL (formerly Phonographic Performance Limited)¹⁷.

PRS (Performing Right Society): Collects on behalf of composers and publishers when musical works are performed in public, online or broadcast.

¹⁷ PRS (Performing Right Society) founded 1914 to collect on behalf of composers and publishers) and MCPS (Mechanical Copyright Protection Society). MCPS (Mechanical Copyright Protection Society) founded in 1924 (a merger of two mechanical copyright societies established in 1910 in preparation for the 1911 Copyright Act) to collect mechanical royalties for composers and publishers when their work is mechanically reproduced. PPL (formerly Phonographic Performance Limited) formed in 1934 by the major record companies to license the performance of recorded music in public.

MCPS (Mechanical Copyright Protection Society): Collects on behalf of composers and publishers when musical works are mechanically reproduced.

PPL (Phonographic Performance Limited) Collects on behalf of record companies and performers when sound recordings are played in public or broadcast ¹⁸.

The precedent for these societies was set in 1847 when Ernest Bourget, a composer, sued a Parisian café proprietor after being charged for his evening's drinks. The problem, it was argued, was one of equity. The music performed at the café had been penned by Monsieur Bourget, but while he was obliged to pay for drinks, the proprietor was under no obligation to pay him for his music. The disgruntled composer argued successfully that the proprietor was unfairly 'free-riding' by attracting customers with the promise of musical entertainment. This case established the principle of a performing right in musical works, and as a consequence the first collecting society, (Société des Auteurs, Compositeurs et Éditeurs de Musique) was founded in 1851 (Albinsson 2014).

These societies represent both creator *and* investor in a way that in other spheres of the music industries might be considered to be a 'conflict of interest'. Moreover, in the UK at least, they are natural monopolies with no competitor societies operating in the market. Taylor and Towse detail the primary functions of collecting societies as being:

- to license the works in which they hold the copyright for the specific uses
- to monitor use and collect revenues
- to distribute the revenue royalty to members of the society

(Taylor & Towse 1998: 634)

The principal justification for the establishment of these societies and for allowing them to operate as monopolies is to reduce transaction costs (Coase 1960: 15) in issuing licenses and collecting revenues (Towse 2004: 64). The labour intensive

¹⁸ It was not until comparatively recently that performers had the right to "equitable remuneration" for their recorded performances. Previously PPL distributed a share of its revenue to the Musicians' Union who administered it "for the benefit of all musicians". A comprehensive account of the development of performers' rights can be found in Arnold (1997) and Williamson (2015).

process of licensing every use of a musical work on an individual basis would, without the societies, be hugely inefficient. Indeed, it would be largely impossible in practice for individual creators to perform this function. Where society membership holds a number of obvious benefits for creators, there are also inherent costs. Upon joining the society, a creator has little or no influence over how their works are subsequently licensed or what level of reward they shall receive. (Kretschmer 2002: 140). In recent times this has become particularly pertinent as collecting societies' dealings with music streaming services (Barr 2010, Barr 2013, Ingham 2013, Marshall 2015) and the live music sector have come under scrutiny (Barr 2015).

At the heart of these interrogations lie the issues of accountability and transparency. Achieving a balance between preserving confidential information relating to licensing deals, while at the same time being transparent to members and the public has been problematic since the inception of the PRS. In his history of the society Cyril Ehrlich described the PRS of the late-1970s as displaying, "Secretiveness, which stemmed originally from creditable motives, had become obsessive, leaving members poorly informed, and outsiders suspicious." (Ehrlich 1989:145). The Monopolies and Mergers Commission report of 1996 found that, "PRS failed to consult the membership adequately and that its policies and procedures were not sufficiently transparent" (MMC 1996). Contemporary debates surrounding rates paid by Spotify and other streaming services to PRS suggest these failures may not have been fully resolved.

It appears that collecting society income is likely to be of increased significance to many creators in the digital age as sales diminish and licensing opportunities grow in both the digital and live music spheres, issues that shall be addressed in due course. But aside from the annual statements issued by the societies plotting overall trends across various sectors of their business, there is a shortage of data emerging from these societies. Indeed much of what is known about collecting society membership income is still based on the Monopolies and Mergers Commission Report 1996 (MMC 1996) alluded to earlier. This report was conducted after Irish Rock group U2 challenged the society's accounting practices (Towse 1997, Kretschmer 2002). From this came a great deal of data relating to the income of individual writer members in the year 1994 indicating that earning

patterns were heavily skewed in favour of an elite few writers (Kretschmer and Hardwick: 2007).

To date this remains the most comprehensive and granular quantitative dataset on collecting society income and it is still cited in contemporary studies (Harkins 2012). However, as it is over 20 years old and the music industries have undergone seismic changes in the interim, it appears there is significant scope for original academic research in this area. While this study does not update these quantitative data, it does make a contribution in terms of qualitative evaluation of creators' income from and attitudes to collecting societies.

INDIVIDUALLY NEGOTIATED RIGHTS TRANSACTIONS

The other type of copyright transactions featured in the study is individually negotiated transactions between primary creators and the music copyright companies identified earlier, namely, record contracts and publishing contracts. These contracts turn the exclusive rights that subsist in copyright works into direct financial incentives to creators and investors (Kretschmer et al 2010: 18) Michael Jones writes that contracts are, "...a relationship first and foremost between capital and a form of labour" (Jones, M: 126).

There are few empirical accounts of what is contained within a contemporary recording or publishing contract, no doubt due to the difficulty of obtaining access to such potentially sensitive documents. More commonly, the 'nuts and bolts' of what is contained within a contract only emerges in full public view when submitted in evidence during a contractual dispute. How these exceptional cases relate to the great majority of contracts that are *not* disputed is unclear. However there is a good deal of literature that draws on these sources in order to examine music copyright contracts from a theoretical and historical viewpoint (Yanover and Kotler 1989, Caves 2000, Evans 2003, Greenfield and Osborn 2007, Kretschmer et al 2010, Jones 2012).

The most convincing of these are those accounts that detail and critique the *standardised* rather than *standard* elements of contracts. (Tschmuck 2010: 261). Certain elements are thought to be present in most: exclusivity (the creator may only produce musical works and recordings for the investor during an agreed term), options (the investor will usually have the unilateral option as to whether to continue with the agreement), royalty rate (the creator will usually be paid a royalty

based on a percentage of the value of sales after initial costs have been recouped). What is key to note here is the asymmetrical nature of these agreements inasmuch as they are structured to serve the needs of the investor rather than the creator (Greenfield & Osborn 2007: 5)

Just as investors *spread* risk by accumulating broad repertoires, it seems in other respects they *transfer* risk to creators via the built-in asymmetry of contracts. However, the transference of risk does not flow only in one direction, from investor to creator. In a market where failure is said to be endemic, advance payments made by investors to creators against future royalties appears to be 'risk-bearing' on the part of the investor. However, in the literature advances are frequently presented as 'loans' from the investor to the creator where the creator is in 'debt' to the rights company (Toynbee 2004: 134, Wikström 2013: 144). The extent to which this can accurately be considered 'debt' and where the risk lies is more rigorously investigated in the empirical body of the study.

An important theme in the literature is the evolution of contracting practices to become more 'artist friendly' in response to changing business models and the high-profile court cases already mentioned. Negus (1992: 44) suggests that, over time, publishers have become less active in promoting and administering the copyright in their catalogues thus resulting in artists and their managers seeking and receiving a larger share of publishing revenues than the traditional 50/50 division.

However, while the growing power of the creator and their representatives was likely a contributing factor in the evolution of contracts, it appears that a far greater motive force was the series of high-profile court cases alluded to already (Yanover and Kotler 1989, Evans 2003). Andrew Evans (2003) plots the numerous responses to specific cases from *Schroeder v Macaulay* (1974) to *Panayiotou v Sony Music* (1994). Evans unpacks each of the cases and its outcome in relation to a series of factors: bargaining power of each party; duration of the term of the agreement; the exclusivity and the extent of the contract; obligation of the company to exploit the works and availability of legal advice in the context of the Doctrine of Restraint of Trade. Quoting the presiding judge in the appeal of *ZTT v Johnson* 1989, Evans states that in the UK the courts have, 'recognised that the relative bargaining position of the parties to such contracts should necessitate consideration of the fairness of the process to which agreements are formulated,

and may thus protect as Dillon LJ said “young men in fairly humble circumstances and of little business experience” (Evans 2003: 10). Evans’ work is highly instructive in explaining how and why contemporary music contracts have evolved in favour of creators in the ‘post-Schroeder’ era.

Indeed as suggested by Yanover and Kotler (1989) and Evans (2003), overtly inequitable terms can see the contract deemed unenforceable or even void¹⁹. A contract deemed void or even partially unenforceable could prove costly to the investor, particularly given that the cost of bringing such a court action suggests the contested contract will be particularly valuable. The axiom, ‘where there’s a hit there’s a writ’ can easily be reversed, ‘where there *isn’t* a hit, there is unlikely to be a writ’. Indeed, this somewhat frivolous couplet reiterates the main reason that very little is known about the more prosaic aspects of music copyright contracting.

Perhaps the most useful theorisation of music industries contracts is found in Macaulay’s (2003) idea of the “paper deal” and the “real deal” (Macaulay 2003: 45) and the disparity between what is written in the contract and the ‘real world’ expectations and behaviour of those bound by it. Drawing on Macaulay, whose work included contracts from a broad range of industrial sectors, Greenfield and Osborn (2007) transpose these ideas onto music industries contracting and find these agreements to be highly “relational” in the sense that to function they are heavily reliant on the unwritten relationship between the creator and the investor. Of music industries contracts they write:

It is a contract that cannot adequately function at the level of solely a ‘paper deal’. It can only work (because of both the subject matter and the lack of contractual enforcement) if the relationship is intact. (Greenfield and Osborn 2007)

While these authors draw on many of the usual historical contract disputes seen in the literature, their theorisation of music contract reveals the largely unanswered questions, empirically at least, about the nature of the relationship between creator and investor in the negotiation and execution of music copyright contracts. Again,

¹⁹ Some elements of an unenforceable contract may be enforceable, for example an artist may be released from any obligation to deliver more works while the record company retains control of copyright in existing works. Whereas, “If such an agreement is truly void, it would follow no assignment of such copyright would have taken place” (Evans 2003: 3).

this is a loose thread in the literature that is picked up in this study by examining contracts and interviewing creators and investors.

2.6: 'TAKE IT OR LEAVE IT' AND MUSIC INDUSTRY BARGAINING

In spite of what Evans (2003) suggests is a greatly improved contracting landscape for creators, 'take it or leave it' characterisations of negotiations between creators and investors remain commonplace in the literature (Macmillan 2000, Greenfield & Osborn 2002). Caves asserts that, "contracts reflect both the uncertainty of success and the inability of young performers to supply inputs other than their time and talents" (Caves: 62). In effect Caves is foregrounding the weak bargaining position of the creator. Hesmondhalgh describes how the weak position of the fledgling rights holder is exacerbated by massive oversupply of labour and new entrants' willingness to enter into unfavourable deals, "symbol creators are permanently competing with one another for recognition and rewards" (Hesmondhalgh 2007: 72) Fiona Macmillan suggests that, "due to imbalances of resources and oversupply of labour the rights company can offer terms on a 'take it or leave it' basis" (Macmillan 2000: 99). While it seems entirely plausible that such inflexible negotiation strategies may take place in *some* instances, to characterise the lion's share of transactions conducted on this basis without supporting empirical evidence is questionable.

In broad terms it seems reasonable to conclude that investors are likely to wield significantly more power than creators in copyright transactions. Matt Stahl's, assertion that the creator is "...a master in some areas and a servant in others" (Stahl 2012: 3) reflects the, often paradoxical, nature of a creators' experience that concurs with the idea of cultural industries strategies of "tight/loose control", where the record company, for example, has tight control over distribution and marketing of the product but loose control over the creative activity of the creator (Hesmondhalgh 2007: 18). In effect, the power of music industries gatekeepers or intermediaries lies in their control of the barriers to entry. It is not possible to replay the gatekeeper/cultural intermediary argument in this thesis, but it is important to note that while the concept of 'gatekeeper' is strongly contested by a number of scholars, in the context of this research there is a recurring sense that record

company executives in particular are perceived by creators, perhaps erroneously, as 'gatekeepers' to a world they seek to enter²⁰.

However, it has been suggested in various accounts that recent technological developments may have strengthened the bargaining position of a larger constituency of popular music creators by *lowering* these barriers to entry. This process of so-called, "disintermediation" and "democratisation" of the music industries (Alexander 1994, Jones 2002, Bockstedt et al 2005) was predicted, by some, as offering a means of bypassing the traditional gatekeepers to the industries. The principal thrust of such arguments suggested that affordable and accessible digital technologies of production and dissemination of music would allow creators to engage with disaggregated global audiences without the assistance of the traditional gatekeepers and intermediaries. It followed that this process would allow niche creators producing niche products to service niche "long tail" (Anderson 2006) markets. From this arises a narrative that suggests record companies' era of dominance had ended. As recently as 2013 Patrik Wikström contended, "In the new music economy, the record label is no longer in the driver's seat; it is the artist, or the artist/manager, who is." (Wikström 2013: 147)

Contrary to these predictions, a number of studies have challenged the extent to which any meaningful 'disintermediation' of the music industries has, so far, occurred (Kretschmer 2005, Wallis 2006, Hesmondhalgh 2009). Although modes of delivery and consumption of music may have changed, the continued dominance of the 'Big 3' music companies and the proliferation of new but familiarly dominant platforms such as iTunes, YouTube, Spotify and SoundCloud make it reasonable to concur with David Hesmondhalgh's prediction that, "the dominance of oligopolies of vertically integrated corporations, based on systems of copyright ownership and exploitation-are likely to remain intact" (Hesmondhalgh 2009: 58).

But this is not to say the proliferation of affordable digital technologies has had no effect on the relationship between creators and investors. To look forward briefly to the interview data included in the thesis, in the words of one of the interviewees, in the late 1960s and early 1970s, "You didn't decide when you were ready to make

²⁰ For more on the Gatekeeper/Intermediary discussions see: Hirsch 1972, Negus 2002, Negus 2014, Powers 2015.

a record, the record company did” (Anonymous Creator 2014). In the second decade of the 21st Century, there is a widely available technological infrastructure that makes the creation of a recording and its commercial release a viable option for most creators. It is of course true to say that recording certain types of music remains costly. For example, where large numbers of live performers playing simultaneously are required recording costs have not been reduced markedly by digital technology. On the other hand, some genres, particularly in electronic music, may be composed, produced and delivered to mass audiences on personal computers costing under £1000 with only a few items of additional studio ‘outboard’ equipment’ ²¹.

On balance it seems doubtful that the traditional or nascent corporate structures of the copyright industries are likely to be toppled by the forces of digital “disintermediation” in the near future. However, a more nuanced appraisal of the situation makes it quite reasonable to query the extent to which the facility to bypass the traditional structures of the music industries, strengthened the bargaining position of creators in historically one-sided copyright transactions.

WHERE ARE THE CREATORS?

An overriding sense that emerges in much of the literature is that the creator is absent from a great deal of the discussion, or plays a passive role in the industries and copyright transactions. Therefore, it seems that there is both an opportunity, indeed a necessity to contribute to filling this gap in the literature by employing ethnographic methods in order to gain a fuller understanding of the creator’s attitudes and experiences of transaction in which they are actually a key player.

There are, of course, numerous incisive studies that investigate the mechanisms and dynamics at work in the ‘lived experience’ of primary creators and the cultural intermediaries they engage with (Finnegan 2007, Strachan 2007, Hesmondhalgh & Baker 2009, Coulson 2012). These texts foreground rather than conceal the interplay between the amateur and professional creators. Ruth Finnegan describes the setting in which many of the creators operate:

²¹ Creator Calvin Harris recorded most of his debut album *I Created Disco* on a Commodore Amiga personal computer. *I Created Disco* reached Number 8 in the UK Album Chart in 2007 albeit released by a subsidiary of major music company Sony/BMG (Future Music 2012) and Harris is now one of the most commercially successful major label and major publisher creators in the world.

Overlaps and interactions between the (relatively) 'amateur' and the (relatively) 'professional' are also of interest in themselves. For the world of professional music in Britain, with its famous orchestras, opera centres and pool of high-status performers, is often pictured as an autonomous and separate one. Yet when one looks more closely, it quickly becomes obvious, not only that there are degrees of 'professionalism' but also that professional music feeds directly on local 'amateur' activities and would be impossible to sustain without them. (Finnegan 2007: 16)

The application of ethnographic approaches to the study of music copyright, particularly in respect of creators operating on the indistinct boundaries between 'professional' and 'amateur', is an academic path that has largely been unexplored. Moreover, qualitative investigations into creators' experience of and attitudes to copyright are exceptionally rare.

Two studies of UK-based creators stand as exceptions to this: Schlesinger and Waelde (2012) and Phillips and Street (2014/2015²²). Schlesinger and Waelde engage with creators in a variety of fields but their research features musical creators of varying levels of experience that operate in a "...hinterland of cultural production" (Schlesinger and Waelde 2012: 26). Phillips and Street's statement of intent is closely aligned with the aims of this study:

Our focus on these musicians is partly because they have been overlooked, but more importantly because of where they sit, precariously balanced between aspiration and achievement, between the amateur and the professional. This is the context in which they are developing and negotiating attitudes to copyright. To what extent and what way does copyright matter to them? (Phillips and Street 2015: 347)

Aside from standing as methodological exemplars, the findings of each of these studies are instructive. While maintaining that copyright is not an irrelevance to these creators Schlesinger and Waelde observe that, "holding rights seldom equates to making any significant amount of money" (Schlesinger and Waelde 2012: 26). Rather, creators are engaged in "portfolio work" (Ibid: 21) with numerous income streams to which copyright income could contribute. Phillips and

²² Street and Phillips (2014) is a CREATE working paper that became part of Phillips and Street (2015) quite late in this research so both are cited here.

Street's study supports the finding that for creators on the margins, copyright income is likely to be modest. Moreover, they find that creators' knowledge and understanding of copyright is likely to be gained on an 'ad-hoc' basis and is a product of, "experiences, networks and identities" (Phillips and Street 2015: 355).

What both of these studies strongly suggest is that musicians' attitudes to, and experiences of, copyright are nuanced and resistant to the simplistic characterisations that are a feature of the more generalised literature that dominates the canon. They also provide methodological examples of how research into creators' experience of copyright can be conducted. However, each leaves sufficient room for a study of creators' experiences of music copyright in the digital age.

2.7 THE 'NEW' MUSIC INDUSTRIES

MUSIC COPYRIGHT IN THE DIGITAL AGE

The final part of the literature review identifies the most important aspects of contemporary music industries discourses in respect of the idea of the 'new' music industries. This is achieved through the prism of two vaunted narratives: the decline of the recording industry and the transition from industries selling music *products* to industries providing music *services*.

The year 1999 and the emergence of file-sharing platform Napster (Witt 2015: 114) serves as convenient and useful shorthand for the watershed between the 'old' music industries and the 'new' music industries. Of course such 'big bangs' seldom occur without warning. Napster was a product of a wider process of digitisation of culture that began long before 1999. The compact disc was a digital technology and also the source of the pristine digital files that populated illegal file sharing platforms. In this sense, digitisation provided the recording industry with its biggest windfall before ultimately feeding its *bête noire* Napster and the other file sharing services. And far from emerging out of a clear blue sky, the music industries *did* see fully digitised music services on the horizon long before they arrived. Submissions by the International Managers' Forum (IMF) to the 1994 Monopolies and Mergers Commission report on *The Supply of Recorded Music* (MMC 1994) illustrate this. It was the opinion of the IMF that Direct Digital Broadcasting, a somewhat archaic description of what is now known as interactive

music streaming, "...would eventually replace physical sound carriers as the means of delivery of sound recordings" (MMC 1994: 214). Some 22 years later, this prediction appears to be coming to fruition. Though how fruitful it will be for investors and creators remains unclear as the recording industry continues to struggle with the challenges of the fully digitised delivery of recorded music.

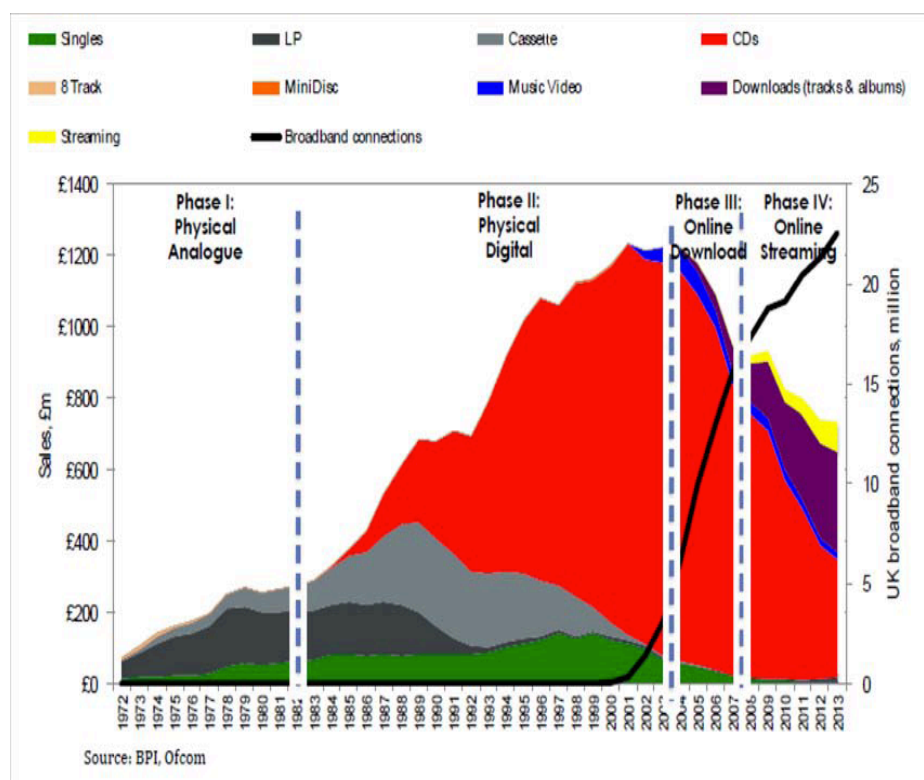
THE RECORDING INDUSTRY IN (TERMINAL) DECLINE

That the recording industry's revenues have been in decline since the early 2000s seems beyond doubt. Among the boldest prognoses of the record industry's future is Williamson and Cloonan's:

In this sense we regard the current volume as something of an obituary for the recording industry as significant in and of itself. In reality, its significance was only ever as part of a broader set of music industries within which it was economically dominant for a comparatively brief period. (Williamson & Cloonan 2012: 12)

The brief period these authors refer to is that between the recording industry overtaking the publishing industry as the economically dominant pillar of the UK music industries in the mid-1920s and when it was replaced by the live music industry around 2008 (Page and Carey 2009). The economic macro-data certainly suggests the recording industry's decline has been steep and sustained. Characterisations of a recording industry in crisis are supported by instructive longitudinal data (Samuel 2015) reporting the retail value of UK recorded music since the early 1970s (Figure. 2-2).

Figure 2-2: Retail Value of UK Recorded Music (Samuel 2015)



The graph shows two radically opposing trends in the recording industry. Firstly, the sheer scale and duration of the windfall generated by the so-called ‘CD replacement cycle’ when consumers replaced their vinyl collections with CDs from the mid-1980s to the late-1990s (Laing 2004). It is not difficult to see why, within the industry at least, this period is now viewed as something of a ‘golden age’. However this boom stands in stark contrast to a second trend, the plateau and steep decline from around 2001 that has only recently begun to be arrested. The return to growth, albeit marginal, suggests the recording industry may finally be harnessing some of the potential of digital music (Malt 2014). However, in absolute terms and real terms, the financial value remains greatly diminished. Quantifying the extent of the decline is challenging given the often opaque revenue measuring methodologies and inconsistent reporting of trade organisations. However consensus in the literature suggests something of the order of 40-60% seems like a reasonable ‘ballpark’ estimate (Marshall 2012b, Negus 2014, Ingham 2015a, Samuel 2015).

Negus observes that this decline and attendant narratives of crisis have occurred chiefly in the retail sector of the recording industry (Negus 2014: 114). Meanwhile, other revenue streams are reported to be sites of rapid growth within the recording industry and beyond. The licensing of recorded music, particularly in

'synchronisation' to moving pictures in films, commercials, television and games is an example of such a growth sector. Though to somewhat temper any suggestion that 'syncs' are likely to restore the fortunes of the recording industry in the near future, the core business of major record companies is still the sale of (or at least providing access to) recorded music to domestic consumers (Vivendi 2015: 176)²³.

Indeed, in spite of the commercial decline and Williamson and Cloonan's prediction of the industry's imminent demise, there is little evidence that the recording industry's role as tastemaker and gatekeeper has waned commensurately. Marshall mounts a compelling and convincing challenge to the notion that the recording industry is in terminal decline, not by invoking financial statistics but by demonstrating the enduring cultural significance of the recorded music text:

Put simply, the vast majority of people have heard the vast majority of popular music through recorded music...it is the record that defines the popular song... (Marshall 2012a: 90)

Rather than a decline in symbolic or cultural significance, the recording industry's woes appear to be a reflection of their inability to exploit the copyright in their works as effectively in the digital age as they were in the pre-digital age.

THE MUSIC SERVICE AGE

Samuel includes in his data in Figure 2-3 the proliferation of UK broadband connections and there appears to be a clear correlation, rather than causality, between the upward trend in fast internet connections and the downward trend in sales of recorded music. The recording industry has been eager to make causal connections between illegal downloading and the decline in fortunes described previously (Taylor 2010). Just as the industry has laid the blame squarely at the door of online pirates, some academic studies have dismissed such suggestions. Among the most strident and extreme of these is the suggestion that the impact of file sharing on record sales has been, "...statistically indistinguishable from zero." (Oberholzer-Gee and Strumpf 2005: 1). A far more convincing appraisal of the downturn points to a confluence of many factors. Dave Laing's is among the more

²³ To provide some context, in 2014 Vivendi reported that Universal Music Group generated around €1.4bn in physical sales worldwide and €1.6bn in digital sales compared with only €635m from licensing recorded music. Their recording division was worth €3.6bn compared with a publishing division worth €673m.

persuasive of these 'moderate' perspectives, he attributes the downturn to the end of the 'CD replacement cycle' (Laing 2004: 87) coupled with, "...the almost total failure of the record companies to organise an online market for their products" (Ibid: 84). Laing is referring to the recording industry's failure to engage with digital music until long after Napster has established the digital music paradigm in 1999 and Apple had monetised it through the iTunes store launch in 2003 (Wikström 2013: 102). In 2016 it appears that the recording industry is far more engaged with legitimate digital music products and services than was once the case.

Jeremy Silver likens the response of the recording industry to digitisation to the five stages of grief: denial, anger, bargaining, depression and acceptance. Silver details how the industry exhibited each of these behaviours but notes acceptance appears imminent.

After twenty years of music online, acceptance is finally arriving and there is a new hunger to embrace almost every new technological innovation with music, before any other form of content can get to it. The music industry is more optimistic and more outward facing than it has been for a long time. (Silver 2012: 114)

The proliferation of digital technologies of dissemination and the 'consumption' of recorded music appears to have reached 'critical mass' in the second decade of the 21st century. As physical sales have plummeted from their early century peak, the abundance of digital platforms, both licensed and unlicensed, first by way of download through Napster, Soulseek, LimeWire, Pirate Bay, iTunes, and followed by full access-based music services YouTube, Spotify, Deezer, Beats Music, Tidal, SoundCloud and Apple Music illustrates the extent to which the recording industry is becoming a service industry as opposed to an industry concerned with selling music products.

In academic literature the idea of the "celestial jukebox" (Goldstein 1994) where music could be accessed by way of cloud-based technologies rather than owned is now over 20-years old. Much of the literature that drew on this idea theorised and hypothesised the potential development and ramifications of these technologies and an access-based recording industry (Einhorn 2002, Burkart and McCourt 2004, Styvén 2007, Wikström 2013). In 2016, the prominence of digital services such as Apple Music, SoundCloud, Spotify, Tidal and YouTube

demonstrates that streaming has moved beyond these theorisations to become the dominant means by which audiences engage with recorded music. Within this march of the digital services it appears that streaming is in the ascendancy (Dredge 2014, BPI 2016) as digital sales stall and show signs of decline for the first time (Titcomb 2015).

As is the case in music industries and copyright discourse, this transformative technology-induced process has not come without attracting a substantial volume of divergence of views, particularly in respect of the ramifications of this paradigm shift for copyright creators and copyright investors. Spotify, as the most prominent streaming service has attracted the highest level of attention by a considerable distance. Early characterisations of Spotify offering a fully licensed antidote the perceived threat of illegal downloading (Ahmed and Mostrous 2009, Page 2009) soon gave way to reports of infinitesimally small payments to creators (Ingham 2013, Peoples 2015). Similarly the opacity Spotify's deals with record companies (Singleton 2015), publishers and collecting societies have attracted intrigue and criticism for short-changing creators. These disputes are well documented elsewhere (Barr 2013, Marshall 2015) and is not possible to replay them here.

Far more relevant is consideration of what the proliferation of services like Spotify, as well as others operating entirely different business models such as YouTube and SoundCloud, means to creators. A great many bloggers have attempted to unravel what Spotify pays creators using various data sources and analytic approaches (Faza 2010, The Trichordist 2014). In addition to this a number of creators have even published figures from their own collection society and record company royalty statements. Singer Songwriter James Blunt tweeted, "I get paid £00.0004499368 per stream. Beers are on me! Cheers @Spotify," (Dredge 2015) suggesting that creators are indeed very poorly remunerated by Spotify and other streaming services. These, albeit rather crude analyses and anecdotes clearly have serious ramifications for creators operating in a recording industry dominated by streaming services. Yet very little is understood about what streaming means to creators when a more holistic view is taken of their position as active participants in the music industries rather than somewhat passive components of a corporate machine.

Therefore, a central aim of this study is to examine and more fully understand what the 'real world' ramifications are of the proliferation and dominance of music

services such as Spotify, SoundCloud and YouTube. In the context of the main themes of this review; the ‘bundle of rights’, ‘winner takes all’ markets, ‘take it or leave it’ negotiations, and collectively and individually negotiated rights transactions, there is considerable scope and indeed a necessity for these factors to be rigorously scrutinised.

2.8: CONCLUSION

To recap briefly, the main threads of the argument advanced in this review were as follows:

- The CDPA confers on creators a potentially valuable exclusive ‘bundle of rights’ on music creators. However, in ‘winner takes all’ markets creators often become alienated from these works by way of various collectively and individually negotiated copyright transactions.
- This transfer of copyright from creator to investor is central to the music copyright industries’ model of acquiring and exploiting vast catalogues of copyright works as a strategy for spreading risk in markets where ‘nobody knows’ patterns of demand suggest the great majority of works will fail and must be offset by a small number of ‘hits’.
- Contracts between creator and investor are the central means of controlling copyright in musical texts, yet aside from what has been gleaned from a relative few high-profile and inherently adversarial court cases very little is known is about creators’ ‘lived experience’ of music copyright transactions.
- Finally, the review found that narratives of a recording industry in crisis fail to sufficiently account for the enduring cultural significance of record companies as tastemakers and gatekeepers to the industry. Moreover, it appears that after a prolonged period of resistance, music companies are embracing the opportunities presented by digitisation and music streaming in particular. However, very little is currently empirically known about what these shifts mean for individual creators of popular music in the UK.

In addition to these main findings, the review found the existing literature to contain a preponderance of theory-based literature and quantitative empirical studies, often drawn from macro-data generated by the music industries. However, there exist relatively few notable qualitative, empirical exemplars on copyright (Schlesinger & Waelde 2012, Street & Phillips 2014/Phillips & Street 2015) and

directly relevant issues (Negus 1992/1999, Strachan 2007, Hesmondhalgh & Baker 2011). It is in this academic milieu that this study aspires to reside. This body of literature does not settle for convenient and somewhat clichéd binaries of art being crushed by commerce, and of creators and investors being engaged in an adversarial struggle. Writing 20 years ago, Negus warns of the dangers of subscribing to such polarised simplifications:

The work of people in the industry should not be dismissed as the activities of automated cogs in a machine, cynical bureaucrats or well intentioned but gullible puppets... The industry needs to be understood as both a commercial business driven by the pursuit of profit and a site of creative human activity from which some great popular music has come and continues to emerge. The problem is trying to bring the two together: most theorists have tended to come down on the side of the corporate machines or the human beings. (Negus 1996: 36)

In this spirit, it is a stated aim of this study to attempt to bring a balanced, nuanced and dispassionate approach to the study of creators and their experiences of music copyright in the digital age.

CHAPTER 3: METHODOLOGY

3.1: INTRODUCTION

The literature review chapter considered what is already known about music copyright in the digital age. In the concluding section of the review specific attention was paid to music streaming and live music. These iterations of the 'new' music industries have been the site of considerable commercial growth as recording industry revenues have concurrently declined on a potentially catastrophic trajectory. From the review it was possible to identify key knowledge gaps in the literature and consequential research issues. The methodology chapter identifies the core research questions and sets out the strategy employed to systematically interrogate the main factors.

STATEMENT OF THE PROBLEM

The Post-Napster era has seen seismic changes in the production, dissemination and consumption of popular music. The ramifications of this period of “disruptive innovation” (Christansen and Raynor 2003) are fiercely contested as creators, investors, legislators, consumers and scholars grapple with the unique challenges of the digital age and its impact on popular music. Central to much of this discourse is the role of copyright as a driver of cultural production and its effectiveness in an age where the ‘copy’ is no longer a physical object but an intangible digital file.

In spite of the ongoing, and arguably intensifying, debate that surrounds music copyright in the digital age, the literature review demonstrated that little is known about copyright as it affects the majority of individual creators financially and commercially. The most significant empirical studies of music copyright rely primarily on quantitative data harvested from trade organisation statistics and surveys of memberships of collecting societies and unions (MMC 1996, Kretschmer 2005, Kretschmer and Hardwick 2007 DiCola 2013). These studies are effective in constructing a broad overview of copyright and artist labour markets. They are, however, methodologically unsuited to providing detailed and nuanced insight into copyright’s influence on the ‘lived experience’ of these key stakeholders: the primary creators of musical works and sound recordings.

While these quantitative studies provide a valuable foundation for this study, the literature review identified a nascent body of qualitative ‘socio-cultural’ texts devoted to the issue of music copyright in a UK context. The approaches employed by Schlesinger and Waelde (2012) and Phillips & Street (2015) in particular serve as exemplars to this study. Nevertheless, the review exposed considerable and problematic knowledge gaps particularly in respect of creator attitudes to transacting and exploiting the copyright that subsists in their musical works and recordings. The *Copyright, Designs and Patents Act 1988* confers a *potentially* valuable set of exclusive rights on primary creators, yet little is known about the extent to which they are aware of these rights and how they decide to exercise them, if at all.

PURPOSE OF THE STUDY

The purpose of this qualitative research project was to use a selection of data collection methods in order to gain insight into what copyright 'means' to creators. The specific emphasis of the project was to explore how copyright shapes the decisions creators make in respect of the commercial exploitation of their musical works and performances. The study relied on three methods of enquiry: collation and analysis of secondary sources; document analysis; and in-depth interviews with key stakeholders. Each method is more rigorously justified in due course.

In pursuing these aims and employing these methods the thesis makes three original contributions to knowledge in the field of popular music studies, namely:

- An empirical analysis of the financial value of primary creators' copyright transactions in the music streaming and live music realm
- An empirically based critique of the most significant dimensions to contemporary music copyright contracts
- The identification and critique of key factors influencing creators' decision-making in respect of copyright transactions

While the fundamental purpose of doctoral research is to make an original contribution to knowledge within a discipline or recognised field of study, it seems that, increasingly, the satisfaction of purely academic criteria is an insufficient goal for scholarly research. It is common for the wider 'impact' of a study to be queried. While the impact of this study will be for others to evaluate, the work was underpinned by a desire to generate findings with practical applications and implications for creators, investors and policy makers by providing an enhanced understanding of creators' experience of music copyright.

RESEARCH QUESTIONS

The significant knowledge gaps in this field of study identified in the literature review enabled the formulation of the following overarching research question...

- How does music copyright shape the commercial decision-making of Popular Music creators in the UK?

In order to tackle the primary research question, it was necessary to consider three subordinate but critical questions:

- What are the key commercial decisions creators have to make in respect of their music copyright?
- What level of reward might creators derive from the various income streams generated by copyright?
- How does the interplay between copyright and contract influence the conditions within which creators operate?

In addition to answering these specific questions this qualitative research design had a number of other broader goals. These were to:

- engage in an exploration of often overlooked and previously under-researched aspects of the creators' 'lived-experience' of copyright.
- construct a detailed account of interviewees' attitudes to music copyright transactions and income streams.
- tease out unseen and unexpected aspects of the interplay between creators, investors and music copyright.

THE SCOPE OF THE RESEARCH: DEFINITIONS

In order to contain the scope of the research to a scale manageable and appropriate for a PhD thesis, the study was limited to an investigation of creators and investors operating with the UK popular music market. This did not exclude subjects born outside the UK (and indeed a number of overseas interviewees took part) but these were domiciled in the UK and eligible for membership of PRS for Music. It follows that the legal context of the study was also limited to the UK copyright regime as enshrined in statute in the *Copyright, Designs and Patents Act 1988*. But this did not necessarily exclude data relating to a number of contracting companies based in other territories.

The term 'popular music' was not used here to denote a musical genre or a particular aesthetic. More precisely, popular music here denotes a business model rather than a style of music. This business model is based primarily on the exploitation of copyright in musical works, sound recordings and performances (Wikström 2013: 13). The particular focus of this study is business-to-consumer (i.e. sales, streaming, live performances) aspects of these industries rather than business-to-business transactions (i.e. licensing to broadcast, TV, synchronisations etc.), though these are discussed tangentially when appropriate.

The scope was further narrowed by containing the study to "supply side" issues (Kretschmer *et al* 2010: 2) and the relationship between primary creators and third party investors engaged in the creation and dissemination of music copyright 'texts'. As such the thesis operated on the assumption that creators and investors are the two primary players in bringing musical 'texts' to market. Therefore, the research focused on the key interactions between creator and investor while remaining cognisant of the broader ecology of the music industries. In practice, the deals negotiated between these two parties are often brokered and negotiated by managers, lawyers and other "intermediaries" (Negus 2014: 123). However, the key relationship being examined here was the transfer of copyright *from* creator *to* investor. Therefore these stakeholders were the focus of the study.

The focus of the research concentrated on 'creators', a term that, without careful qualification, can be problematic due to the wide array of subjective interpretations of the notion of what creativity and hence the creator is. As a proviso it is important to note that no value judgment is being made as to other operators in the musical realm who might also be described as 'creators' or 'creative'.

A 'creator' here was taken to be the author of a musical work within which copyright subsists, for convenience: *songwriters*. The scope was further limited to songwriters that also perform their works in live settings *and* in recorded format. This consciously exclusive and somewhat convoluted definition served the important methodological end of concentrating the focus on creators with interest in the full suite of copyright's 'bundle of rights' in the song and the recording of the song. Although this definition employs a strategic artifice, this type of creator is far from uncommon.

The subject sample was further narrowed by limiting it to creators qualified for membership of the collecting society PRS for Music²⁴. This was for two reasons: firstly, satisfying the membership criteria indicates that even prospective members are creators of music copyright. Secondly, it ensured capturing a sample of creators with some degree of commercial intent.

While the principal focus of the study was creators operating in the UK popular music market under UK copyright law, central in this music industries 'ecosystem' are the investors who serve as gatekeepers and intermediaries between creator and audience. One shortcoming found in the qualitative literature was that it largely excludes the voices of investors. This study consciously sought to include investors' contributions in order to gain insight into attitudes to copyright from the other side of the copyright transaction.

Again, a strategically narrowed understanding of the term 'investor' was used here. The music industries are widely considered to be core copyright industries (Laing 2003: 481, Wikström 2013: 12). 'Investors' were defined in this study as individuals whose business or employment is primarily, or at least significantly, concerned with the exploitation of music copyright. In this respect the term 'investor' is used to connote an individual with some element of executive responsibility for talent recruitment and, by association, copyright acquisition at a music copyright company. While the term 'record executive' or 'publishing executive' may invoke images of cigar-chomping Svengalis, here it is stripped of such clichéd connotations. Instead, a more literal understanding of the term is used simply to mean key decision-makers operating within a range of music companies, large and small.

3.2: JUSTIFYING A QUALITATIVE APPROACH

CHARACTERISTICS OF QUALITATIVE APPROACH

The research employed an avowedly qualitative approach from the outset. In support of this, a multifaceted qualitative research design was employed in order to address research questions that focus on the experiences and perceptions of

²⁴ "You should join PRS as a writer to receive royalties if the music you have written is currently: broadcast on radio/TV, used online, performed live in concert, otherwise played in public" (PRS 2015a)

individuals and to bring granular detail to a complex and under-researched area of study. Throughout the project the approach was reassessed, revised, and at some points regretted! With the benefit of experience and hindsight, these key methodological decisions are critiqued at the end of this chapter.

The definition of 'qualitative research' is, of course, excessively broad so, again, definitions must be contained. The overarching approach employed here sought to employ, "... a broad approach to the study of social phenomena; the approach is naturalistic, interpretative, and draws on multiple methods of inquiry" (Rossman & Rallis 1998: 7). The phenomenon being interrogated in this study was the effect of copyright, "an artificial and institutional phenomenon, a statutory right to be claimed and lost in accordance with the requirements of the legislation" (Deazley 2008), on primary creators operating in the UK. As the study was largely interpretative it did not set out to test a rigid predetermined hypothesis, nor did it seek to apply an overarching critical approach to the subject area. Rather, it sought to derive emergent insights and meanings from empirical research into key aspects of interplay among creator, investor and copyright.

VALIDATING THE RESEARCH

As a fledgling academic researcher it soon became clear that methodological design attracts considerable scrutiny not only in the final assessment of the thesis, but whenever work is presented for peer review, at industries events, at academic conferences and even in 'après conference' small talk. Furthermore, different audiences respond differently to particular methodological approaches. The presentation of a conference paper based on Chapter 5 of this thesis at three different events provides an example of this disparity.

The paper, on music publishing contracts, was presented at a SPAN (Scottish Pop Academic Network) seminar, SERCI (Society of Economic Research on Copyright Issues) conference and at a music publishing workshop held at Birkbeck College, University of London, involving academics, practitioners and policymakers. These events happened over a three-month period so contained largely the same material but the responses were very different. The popular music studies audience of SPAN, and mainly devotees of qualitative research, were primarily interested in the practicalities of identifying subjects and accessing documentary data. This led to a mutually beneficial discussion of research design and methods.

Other responses to the methodology in particular were less gratifying. Where the economists of SERCI literally guffawed at the notion of basing a research paper on a small sample of interviews and contracts, the industries and policymaker audience at Birkbeck responded with cool indifference rather than open contempt. This serves as a reminder that presenting qualitative socio-cultural research at the altar of ‘evidence-based policy’ can be a thankless task and continues to be so²⁵. ‘Evidence’ in such contexts appears to serve largely as a euphemism for quantitative studies using ‘big data’. However, the aim of this study was to contribute to the discourse around music copyright in the digital age rather than directly drive policy or alter the behaviour of major corporations. In short, the aim of the study was to add a new dimension to the conversation.

CONDUCTING ‘BACKYARD’ RESEARCH

The reasons for choosing to make this contribution to the research were numerous and reflected both the gaps revealed in the literature review but also reflect this researcher’s own underlying interests in the music industries. These were laid out in some detail in the introduction but in the interests of rigour, it is important to interrogate these further here. It is of paramount importance that the qualitative researcher must recognise their own position in the world they seek to investigate and, “make clear who you are and what assumptions drive the study” (Rossman & Rallis 1998: 27). In turn, the researcher’s own subjectivity must be openly acknowledged and explored.

As already discussed, many popular music studies scholars have a music industries background. In the case of this project, the researcher was both an academic and a part-time practitioner and might therefore be described as a (somewhat peripheral) ‘partial insider’ examining an environment and subject that they themselves are or at some time have been part of.

This ‘partial insider’ status was considered beneficial to the project in allowing access to subjects and data that might otherwise have been inaccessible, and also in providing a degree of prior knowledge that could be valuable in purposively identifying areas of enquiry, subjects and informants. To some extent this proved to be the case, but in other respects it perhaps served as an impediment inasmuch

²⁵ The Voices of CREATE project was established in 2015 with the specific objective of providing a welcome platform for ‘socio-cultural’ research across the CREATE consortium projects.

as, quite frustratingly, subjects were often happy to engage informally but unwilling to participate formally in the study.

There is of course also a significant danger of the researcher's bias, preconceptions and prejudices unduly influencing the trajectory of the research. This type of "backyard" (Creswell 2003: 184) research potentially compromises the researcher's capacity to engage in dispassionate scholarly analysis as well as potentially undermining the reader's confidence in the validity of findings. Creswell identifies eight strategies that may be employed to strengthen the validity and credibility of a qualitative research project. To varying extents, each of these strategies was formally and informally applied throughout the research as indicated here (italics represent this author's responses to Creswell's strategies):

- "Triangulate: different data sources of information"

...This methodological strategy generated an iterative conversation between: the existing academic and industries discourse, the document analysis data and the interview data.

- "Member-Checking: report findings back to participants in order to gauge their view of the accuracy of the research"

...Interview subjects were provided with transcripts of the interviews and invited to comment and revise their contributions before publication (only two made very minor clarifications).

- "Rich, thick description: Transport the reader to the research setting in order to give the discussion an element of shared experiences"

The interview data provided insight into the attitudes and experiences of creators and investors that allowed the narrative to be expressed by insiders from a perspective seldom seen by outsiders.

- "Clarify bias: This self-reflection creates an open and honest narrative that will resonate well with readers"

The researcher stated his position as both an academic and a practitioner since this presented a potential bias while endeavouring to ensure that a dispassionate and balanced approach was taken at all times.

- "Present negative or discrepant information: presentation of contrary or differing information adds to the credibility of the project"

In some instances the creator and investor informants displayed contradictory positions that are not compatible with a neat and cohesive 'worldview'. Rather than attempt to conceal these inconsistencies it was important to critically engage with them. The numerical data also revealed inconsistent findings; again these are queried and interrogated.

- “Prolonged Time in the Field: this develops an in-depth understanding of the phenomenon being studied and, in turn, lends credibility to the narrative”
The researcher’s experience was valuable in constructing a broad understanding of the music industries. This was augmented by attendance at music industries conferences and trade events in order to observe and engage with industries discourse at first hand.
- “Peer Debriefing: review and interrogation of the study methods that will enhance the accuracy and also bolster credibility of the research”
The supervisory element of the PhD ensured the research was constantly reviewed and challenged. In addition to this, presentation of early findings at academic conferences provided an important means of testing the methods and the findings.
- “External Auditor: to scrutinize and test the methods, findings and conclusions of the project”
Annual reviews and viva voce involving external examiners ensure the research and its findings are scrutinised, audited and amended as appropriate.

In summary, this set of criteria was used throughout the data-gathering and writing phases of the project in order to rigorously test the assumptions and analysis made in the research.

3.3: DATA COLLECTION STRATEGY

In essence, the research employed a tripartite methodology that drew on secondary sources and attendance at various music industries events, primary source document analysis and stakeholder interviews. These contain three widely-employed underlying qualitative research methods: “observing behaviour”, “examining historical traces and records” and “listening to (or interrogating) informants” (Nage Hesse-Biber & Leavy 2011: 5).

Method 1: Music Industries Observation

The broad base of the research was based on the collation of secondary sources such as trade press, industry positioning documents as well as attendance at music industries conventions and seminars. This method combined *observing behaviour* and *examining records* in order to construct a balanced and nuanced overview of the attitudes of key industries stakeholders.

Method 2: Document Analysis

Collection and analysis of creator's copyright related financial documents including collecting society distribution statements, royalty statements, live performance settlements and contracts. This facet of the research strategy is wholly based on the *examining records*.

Method 3: Semi-Structured Interviews

This *listening to (or interrogating) informants* element of the data collection came in the form of semi-structured interviews with key stakeholders: creators and investors, namely rights company owners/executives. A core aspect of the selection criteria was that interview subjects must, at the time of interview, be active participants in the music industries.

CHRONOLOGY OF THE RESEARCH

The most intuitive way to have conducted the research would have been chronologically, that is to say: first collate and critique the secondary sources, then perform the document analysis of copyright related data and finally conduct the interviews. In practice the project required a significant degree of flexibility in the chronology of data collection for a variety of reasons. Principal among these was the difficulty in accessing documentary data and securing interviews with suitable subjects.

Gaining access to financial documents was the biggest challenge throughout the project due to the confidential and potentially sensitive nature of the contents. Understandably not all creators are willing to share such information. Consequently, the door had to be left open to data that emerged late in the project. Where it may have been preferable to set a narrow date range, it quickly became apparent that this would have proved excessively restrictive. Similarly, accessing informants presented significant challenges, diversions and delays. Identifying and

approaching subjects was time consuming and often fruitless. Indeed, the final sample here, while adequate, represents a small fraction of the subjects formally and informally approached, illustrating the difficulty in securing interviews and other data concerned with a subject as potentially sensitive as copyright.

Another difficulty for a Glasgow-based researcher studying the UK music industries is geographical. The centre of activity is undoubtedly London meaning the travel time and cost of multiple research trips to London had to be taken into consideration to maximise the value of each trip. A recurring difficulty with the interviews was the frequency with which interviewees would reschedule or cancel, often at short notice resulting in costly 'downtime'. Interviews were often scheduled around conferences or British Library visits to avoid the possibility of entirely fruitless trips in the event that interviews fell through. On reflection it would perhaps have been more efficient and effective to have spent an extended period in London and to some extent have become immersed in that metropolitan milieu rather than organising single trips with multiple objectives. A lesson learned among a number of others that are more fully critiqued at the end of this chapter.

DATA COLLECTION METHOD 1: MUSIC INDUSTRIES OBSERVATION

The first pillar of the data collection strategy took a 'broad-brush' approach in order to compose a picture of the industries environment within which the study operated. In essence this involved the observation of the music industries as they communicated at corporate level with the wider world by way of various platforms.

The lobbying activities of the UK music industries have become increasingly coordinated and strategic in the 21st Century. The emergence of UK Music, "a Whitehall-facing organisation" (UK Music 2015) coupled with the increasingly 'academic' appearance of its output is clearly geared towards shaping narratives in music industries debates²⁶. UK Music's Measuring Music reports present an annual overview of the GVA (Gross Value Added) of the UK music industries and provide a synopsis of the state of the UK music industries from an economic perspective, complete with its own methodology. Individual bodies such as BPI,

²⁶UK Music's Music Academic Partnership initiative was launched in March 2015 to generate "ground-breaking collaborative research" (UK Music 2015) though it appears much of the focus is on providing work experience to students and career development of students.

PRS for Music and PPL also publish their own reports crammed with infographics illustrating trends in the sector. As gatekeepers to troves of valuable data and arbiters of what information is released, such bodies wield significant power in shaping the debates that unfold in the trade press and online media.

The emergence of carefully curated and highly partial music industries information channels has coincided with the proliferation and growth of industries conferences and conventions such as SxSW (Austin, USA), Midem (Cannes, France), The Great Escape (Brighton, UK), CMU (New York, USA), GoNorth (Inverness, UK), Wide Days (Edinburgh, UK) and a multitude of other similar events. Such forums further illustrate the seemingly inexorable expansion of discourses around the music industries. Indeed, these events have become a branch of the music industries which take over entire cities and towns to the extent that they combine the characteristics of trade convention with those of a music festival.

Although conspicuously self-serving, these sources and events are valuable in providing insight into how the industries perceive themselves and how they, publicly at least, perceive the challenges and opportunities contained within the increasingly digitalised music economy. As such, the first part of the data collection involved tapping into these rich sources. This process was divided into two distinct sections: desk-based research and attendance at industries events and conventions.

DESK-BASED RESEARCH

The desk-based exercise was designed to lay a sound footing for the subsequent empirical data collection methods. This drew on the annual reports of the relevant music industries trade organisations and collecting societies and the music industries media channels that, to a significant extent, critique and analyse much of this material.

Industries Sources

- *UK Music: The Economic Contribution of the Core UK Music Industry*
- *IFPI Annual Report*
- *BPI Annual Report*
- *PRS, MCPS, PPL Annual Statements.*
- *Annual Statements of Large Music Copyright Companies*

Music Trade Media

- *Music & Copyright*
- *Music Week*
- *Billboard*
- <http://www.completemusicupdate.com>
- <http://www.musictank.co.uk>
- <http://musicindustryblog.wordpress.com>

INDUSTRIES EVENT ATTENDANCE

Attending music industries events was certainly one of the most enjoyable parts of the research project, and the benefits of attending such events were manifold. Firstly, they allowed observation and engagement with ‘real-time’ debates rather than those filtered through social media, trade press and scholarly writing. It is at these events that changing industries agendas are often initially articulated²⁷. Attendance at such events was also invaluable when broadening the scope of the study beyond one’s own ‘back yard’. For example the issue of a ‘safe harbour’ (Ashcroft 2015) for digital platforms and the definitional conundrum around music streaming and the ‘making available’ right (Trubridge 2015) were being discussed at such events far in advance of them becoming the ‘buzz’ issues they are at the time of writing.

Determining which events might be most useful to attend was a speculative process, and inevitably some were of more value than others. Larger international conventions had a wide array of panels and keynotes from established names, new-entrant stakeholders and everything in between. Smaller regional events perhaps had less depth and variety of participant but provided greater scope for ‘networking’ and engagement with stakeholders. These smaller events also allowed the opportunity to sit on a panel with the Chief Executive of a UK collecting society and this in turn led to the release of data for the research project²⁸. Another example of the benefit of the smaller events was an ad-hoc discussion with the owner of a UK digital distributor who provided insights into his dealings with large digital music services.

²⁸ Unfortunately the data shared relating to membership income remains under embargo at the time of writing but is referred to in general terms in the study.

Music Industries Events Attended

- South by South West, March 2013: Austin, USA
- Wide Days, April 2013: Edinburgh
- Go North, June 2013: Inverness
- CREATE/UK Music Event, September 2013: London
- PRS for Music Business Insights Day, November 2013: London
- Next Steps for the UK Music Industry: Digital Strategies, IP Protection and the Value of Live, April 2015: London

While this was perhaps the least verifiable element of the methodology, it served as an important means of keeping abreast of developments in the industries ‘on the ground’. These sources were invaluable in revealing changes in attitude and approach in the rapidly altering digital music environment. Just as technologies and business models change rapidly in the digital age, so too do attitudes within industry. For example, in 2009 the recording industry could be described as publicly hostile, or at least sceptical, towards the idea of interactive music streaming. By contrast, at the time of writing in late 2015, all of the data demonstrates that music streaming has rapidly become the dominant means of accessing recorded music²⁹. Over the course of the research project the debate around streaming has evolved to such an extent that the question of ‘what if’ streaming becomes dominant in the future is now largely redundant: in many respects, the future is now!

In short, this first data collection method was effective in ensuring the research remained relevant to the prevailing industries conditions. Furthermore, this phase of the research was crucial in tackling the central research questions inasmuch as it provided context for the industrial environment within which stakeholders were operating.

PROJECT ADVISORY BOARD

At the outset of the research a project advisory board was established. This comprised a number of academics as well as industries stakeholders and lobbyists as listed in Table 3-1.

²⁹ In terms of consumer engagement rather than in terms of financial value, this distinction is further developed in due course.

Table 3-1: MCDA Advisory Board

Name	Position³⁰
Professor Simon Frith	Tovey Chair of Music, University of Edinburgh
Keith Harris	Director of Performer Affairs, PPL
Professor Martin Kretschmer	Professor of Information Jurisprudence, University of Bournemouth
Benjamin Mitra-Kahn	Economic Advisor, IPO
Will Page	Chief Economist, PRS for Music
John Preston	Ex Chairman BMG BPI
Jeremy Silver	Entrepreneur, Media Clarity
Alyn Smith	MEP
Saskia Walzel	Senior Policy Advocate, Consumer Focus
John Williamson	Manager, Belle & Sebastian

The purpose of the advisory board was to serve as a sounding board for ideas and approaches relevant to the research and also to assist in the dissemination of findings. The first meeting of the board was in January 2013. The second meeting of the advisory board took place in September 2013. Throughout the project there were also less formal but very fruitful engagements with the advisory board members individually and at various academic and industries events.

DATA COLLECTION METHOD 2: DOCUMENT ANALYSIS

Where the opening phase of the research drew heavily on secondary sources in order to create a context for the project, the second main pillar of the research methodology drew on primary, empirical source material. This principally involved collecting and analysing financial and contractual documents that were directly related to the collectively and individually negotiated copyright transactions creators enter into. In essence this was a ‘bottom-up’ ‘follow the money’ approach.

This component of the research was devised in order to shed new light on aspects of copyright transactions that are largely unreported and as such almost entirely

³⁰ These were the positions of each board member at the time of first being approached. Notably, Will Page subsequently became Chief Economist at Spotify. Professor Kretschmer became 2nd supervisor on the doctoral research replacing Professor Ronan Deazley.

overlooked by academic scholars. In addition to revealing new data, this part of the methodology facilitated a critique of the existing academic literature as well as the secondary source material identified earlier.

Drawing on data of this kind deviates considerably from the approaches commonly used in much of the existing literature inasmuch as it relies on 'real world' documents relating to copyright transactions as a primary source. The decision to seek such data was one of the key methodological decisions made in the project and, on reflection was certainly the most ambitious element of the research design. Ultimately, the decision to pursue this line of inquiry was made in the knowledge that the resulting picture would be far from complete. On balance, it was estimated that composing an admittedly incomplete sketch was of greater value than eschewing such documentary sources altogether. The challenges of data collection are examined shortly.

There are myriad ways in which musical works and sound recordings reach an audience. Invariably these involve some type of copyright transaction between the rights holder and the copyright user. Table 3.2 outlines the main creator-to-audience interchanges that take place in the contemporary music industries and identifies their relationship to the ownership/access dichotomy identified in the literature review. There are also myriad digital providers in the market. These appear and disappear rapidly and their business models change frequently. The examples selected here, iTunes, Spotify, SoundCloud and YouTube, are market leaders in their particular niche of the digital music market in terms of user numbers and longevity. Given the unpredictable nature of the market, these platforms were selected because they appeared most likely to be still operating by the time the thesis had been submitted.

Table 3-2: Routes to Market and Relationship to Copyright

Creator/Audience Interchange	Copyright Transaction Type	Copyright Industry	Ownership/ Access	Provider
Live Performance	Collectively	Publishing	Access	UK Gigs and Concerts
Physical Sale	Individually & Collectively	Records & Publishing	Ownership	Physical Distributor
Download	Individually & Collective	Records & Publishing	Ownership	iTunes
Audio Stream	Individually & Collectively	Records & Publishing	Access	Spotify
Download/ Audio Stream	Individually & Collectively	Records & Publishing	Ownership & Access	SoundCloud
Video Stream	Individually & Collectively	Records & Publishing	Access	YouTube

Table 3.3 denotes the relevant collecting society that issues licences for each route to market. The table also includes broadcast and public performance³¹ as these are potentially valuable income streams for creators, albeit ones over which they have little direct control. Although data was collected on these sources, ultimately it was decided not to include them in the final study.

³¹ In this context public performance means the public performance of recorded music in public places rather than public performance of live music. Except where otherwise stated the term 'live' is used throughout the study to refer to live performance of music and the live music industry.

Table 3-3: Routes to Market and Relevant Collecting Society

Route to Market	PRS	PPL	MCPS
Live	✓	×	×
Physical Sales	×	×	✓
Digital D/L	✓	×	✓
Audio Stream	✓	×	✓
Video Stream	✓	×	✓
Broadcast	✓	✓	✓
Public Performance	✓	✓	×

Tables 2 and 3 limit the scope of the types of copyright transaction addressed in this study. In addition to these there are, of course, numerous other types of copyright transaction that could have been included such as ‘production’ music, grand rights, sale and hires of sheet music. But these are of limited relevance to this study and would have widened the scope of the study excessively. It is, however, worth noting that these are areas that have, by and large, escaped the attention of academic scholarship.

DOCUMENTS SOUGHT AND COLLECTED

The documentary data was collected by approaching creators and their representatives in a ‘snowball’ type approach on the basis that any data shared would be treated with absolute confidentiality. Collecting this type of data proved far more challenging than anticipated at the outset, but it was possible to collect a useful volume of material. Tables 3.4 and 3.5 identify the documentation that was sought for the purposes of documentary analysis. These were organised into two distinct categories: collectively negotiated and individually negotiated copyright transactions and identified in the literature review. Subsequent to this, the documents were classified according to the copyright transaction that each document related to.

Table 3-4: Collectively Negotiated Income Documents

Collectively Negotiated Transaction	Organisation and Role	Documents Sought	Documents Collected
Performing Right	PRS: Collects and distributes on behalf of composers and publishers when a musical work is performed in public. Distributes to members quarterly	PRS Distribution Statements, Live performance settlement statements	12 x PRS Statements 8 x Live settlements
Mechanical Reproduction	MCPS: Collects on behalf of composers and publishers when musical works are mechanically reproduced by record companies or used in TV,	MCPS distribution statements	2 x MCPS
Performance Right	PPL: Collects on behalf of record companies and performers when sound recordings are performed in public	PPL distribution statements	8 x PPL statements

Table 3-5: Individually Negotiated Income Documents

Individually Negotiated Transaction	Types of Company and Role	Documents Sought	Documents Collected
Recording Contract (Sound Recordings)	Record Company: Identification, production and marketing of sound recordings	Recording contracts & royalty Statements	5 x Independent Record contracts 4 x Royalty statements 4 x digital distributor statements
Publishing Agreement (Musical Works)	Publishing Company: Identification, development and marketing of musical works	Publishing agreements & royalty statements	1 x major publishing contract 3 x independent publishing contracts Music Publishers Association Template Contract No royalty statements collected

As intimated earlier, and shown in Tables 3 and 4, some data were easier to locate and harvest than others. The most easily accessible were distribution statements from collecting societies and within this, PRS statements proved to be the most easily accessed, followed by PPL statements and then MCPS statements. This can be partly explained by virtue of the fact that PRS membership was the baseline criterion for inclusion in the study. Most creators with any genuine commercial intent will at least qualify to join PRS even if they have not done so. As such there are significantly more PRS writer members than individual members of the other societies³².

PPL represents the rights holder in the sound recording, so again most creators who commercially release recorded music are at some point likely to join this

³² PRS writer members 90,331 (PRS for Music 2014a). PPL 65,000 performer members (PPL 2015) MCPS writer members 19,624 (PRS for Music 2014a)

organisation in order to receive income from these copyrights³³. As discussed in the literature review, individual creators have few options other than to join these societies in order to collect income from a variety of uses. Ultimately, this data source was not used in the study as it became apparent that this society plays no role in licensing of recorded music in the digital realm.

MCPS membership, on the other hand, is a far smaller constituency. Membership was historically unnecessary for artists who did not have record deals³⁴. This may change in the digital age as the number of uses increase along with any rise of DIY artists penetrating the mainstream without the assistance of a record company. Only two MCPS statements were collected and these made no reference to any of the services examined in this study. For that reason this data was also discounted.

Where PRS data proved comparatively easy to harvest, documents relating to individually negotiated record contracts and publishing contracts was far more difficult to obtain. Indeed, the paucity of literature drawing on this type of data suggests that this is not the first research project to encounter such obstacles. The challenge was to find creators who have access to this type of material and who were willing to allow access to it. Given that 'signed' artists constitute a small proportion of the creative community it can be understood that securing the sample was disproportionately challenging. An added difficulty was that often creators that are signed to record companies and publishers do not themselves have access to the dataset. Record company accounting is notoriously haphazard and unreliable and some record companies simply do not account to the creators (Goldberg 2000). Digital music aggregators generate a far more transparent data source on the financial value of recorded music and these were of considerable use in this study.

In order to supplement the data, the three UK collecting societies, PRS for Music, MCPS and PPL were approached with a view to accessing anonymised artist earnings data with varying degrees of success. MCPS did not demonstrate any interest in sharing data. PPL was more positive about the possibility of sharing

³³ PPL membership is open to: "Anyone who owns (or is the exclusive licensee of) the rights for when recorded music is broadcast or played in public in the UK can join PPL as a recording rights holder member; and/or Anyone who has performed on recorded music can join PPL as a performer member" (PPL 2016).

³⁴ MCPS membership is open to creators whose compositions are; "Commercially released by a record company (not a record company that you own), or recorded into a radio or TV programme, or recorded in an audio-visual or multimedia production, or used online" (PRS for Music 2015a)

data but this did not materialise. PRS for Music did indeed generate anonymised data relating to distribution of earnings across their writer membership. At the time of writing this remained under embargo so cannot be used in the thesis. It did however reveal interesting and useful insights into the overall distribution of income that informs the discussion in later parts of the thesis.

USING THE DATA

The data gathered from this collection method features primarily in Chapters 4 and 5 of the study. The royalty statements were illuminating in revealing noteworthy aspects of the amounts creators earn from the copyright in their creative activities. Key to answering the research questions was the identification of what information was fully visible and what was fully or partially obscured. Establishing what data *is* and *is not* available to creators is both a methodological challenge and a key finding of the research.

Collecting society information was a particularly rich source of data relating to a wide array of uses. For example a PRS distribution statement reveals an itemised account of the income creators (and publishers) receive when a musical work is broadcast on radio and TV, performed at a concert, streamed on Spotify or, indeed, sold on iTunes. While the relative value of downloads and streams continue to attract the attention of industries commentators and academics alike, the issue of copyright in live performance is consistently overlooked. One of the most illuminating findings of this study is that income from live performance can be *the* most valuable copyright income stream for grass-roots creators.

It must be stressed that the primary aim of the study was not to quantify the value of music copyright in financial terms. Rather, the intent was a more qualitative analysis of the significance of copyright to creators and the meanings it held. There have been numerous attempts within the academic realm and in the Blogosphere³⁵ to compare and contrast the financial value of copyright in the digital age. Many of these employ a comparative approach to assess the relative financial value of different routes to market. 'X number of Spotify streams is equivalent to Y iTunes downloads which is equivalent to Z physical sales' is the type of analysis employed. In some cases these studies then extrapolate the

³⁵ A particularly comprehensive example of this type of Blogosphere analysis can be found at: Information is Beautiful (2015)

number of streams, downloads, sales *et cetera* that a creator would require in order to earn the minimum wage or national average salary. While such approaches undoubtedly hold an anecdotal attraction the lack of nuance in analysis leads to inappropriate comparisons and misleading conclusions. Most significantly they fail to recognise the fragmentary nature of incomes and employments for the majority of creators in music. Rather than generating income from a single source, musical creators (and other types of creators) are likely to engage in 'portfolio' work (Hesmondhalgh and Baker 2011, Schlesinger and Waelde 2012) where income is generated through a variety of different activities.

In addition to studying royalty statements, examining contemporary music copyright contracts was vital in providing insight into the commitment and rewards contained in these agreements between creator and investor. By observing the scope and term of such agreements it was possible to understand something of the motivations of each party and the underlying power relationships that shaped these deals. Most significantly these contracts revealed much about the ways in which copyright is assigned and licensed from creators to third party investors. While much of the contract data is reported in Chapter 5 of the study, the 'life of copyright' dimension of recording contracts forms the basis of the main argument advances in Chapter 7.

DATA COLLECTION METHOD 3: SEMI-STRUCTURED INTERVIEWS

The final pillar of the methodology was semi-structured interviews. These were carried out later in the data collection phase and as such were informed by the findings of the previous two methods. Semi-structured interviews are a widely used qualitative data collection method where the researcher seeks to gain perspective on the subject's 'lived experience' of particular events or phenomena. The value of this method is the opportunity to, "reveal depth, detail and nuance", (Rubin & Rubin: 129) about key aspects of the research area.

As with collecting documentary data, securing interviews with suitable informants proved challenging. Again, convincing participants that taking part in the research was worthwhile was in some cases difficult. Interviews are time consuming and can be awkward for both interviewee and interviewer. The personally and

commercially sensitive nature of the subject matter coupled with the perception of copyright as something abstruse and confusing doubtless discourages participation. Even quite experienced interviewees were quite bashful about their knowledge of copyright. There were also potential authenticity issues surrounding the discussion of copyright, as artists are often particularly uncomfortable when talking about commercial aspects of their art. For many, conversing about business and money is 'uncool'. It is worth noting that although 20 interviews feature in this study, a great many more subjects were approached without resulting in interviews. This proved to be a time-consuming but ultimately fruitless aspect of the data collection process

On balance, however, the rewards of employing semi-structured interviews outweighed the difficulties, namely the opportunity to make an original contribution to the field by revealing rich insights not generally found in the existing literature. As indicated in the literature review, the prevailing narrative that copyright is only of benefit to an elite group of creators (Wallis 2004, Hesmondhalgh 2007, DiCola 2013) is not built on a base of qualitative empirical research. Moreover, such assumptions do not correspond with the findings of this study. Here the emphasis was placed on the individual creator as the central figure in copyright decision-making. In taking this approach, the project goes some way towards rectifying an overlooked academic knowledge gap in this field of study.

INTERVIEWEE SELECTION

The interviewees came from two groups identified as 'creator' and 'investor'. For the purposes of the study a particularly narrow definition of these terms was strategically applied. In the initial phase of the project, a far wider cross section of investor types, including artist managers, music lawyers, concert promoters among others, was considered. This was found to be unmanageably diffuse; hence the decision was made to focus on a narrower band of investors whose commercial activities are most directly linked to copyright.

Creator: an author of musical works who performs these works in a live and recorded context and who fulfils PRS for Music 'writer member' eligibility criteria.

Investor: an individual holding some degree of executive responsibility for talent recruitment within an organisation directly involved in the acquisition and exploitation of copyright in musical works and/or sound recordings.

The small sample size of 20 interviewees was selected “purposively” (Nagy Hesse-Biber & Leavy: 45) in order to gain insight into the attitudes, processes and approaches of individuals who are most likely to operate on each side of music copyright transactions. The researcher started by approaching music industries ‘insiders’ known to him who could serve as ‘fixers’ for the first interviews. Then a ‘snowball sampling’ process was used whereby subjects would assist identification, introduction to and engagement with more participants. In addition to this, attendance at industries events also presented opportunities to engage with potential subjects.

This was a study of active practitioners rather than lobbyists or policymakers “who usually speak about copyright on behalf of the music industry” (Street and Phillips 2014: 5). By design, very few of the subjects were accustomed to being interviewed about the commercial aspects of their endeavours and certainly not about copyright. While industries chief executives and lobbyists increasingly share common vocabularies with academics, creators often talk about copyright in far more oblique ways. In many instances they talk about copyright without explicitly talking about copyright! The challenge for the researcher was to identify relevant common threads and narratives in these often meandering accounts of music copyright transactions.

Emma Webster (2011) acknowledges that the potential challenges of interviewing subjects who are known to the researcher, “can be problematic as it may be difficult to report negatively about friends or colleagues” (2011: 69). Similarly, it can be difficult to report positively about one’s own friends and colleagues! The biggest challenge of interviewing a subject that is well known to the interviewer is when the responses contradict what the interviewer believes to be ‘true’. But ultimately this is useful inasmuch as it reminds the researcher that there is no such thing as ‘truth’. Keith Negus describes interviews as such:

Interviews are very specific social encounters between individuals which occur at particular times and places. The relationship which develops (or does not develop) during the encounter will decisively influence any

material derived from an interview. Interviews are not about ‘extracting’ information or truths that are waiting to be revealed. Instead, an interview is an active social encounter, through which knowledge of the world is produced via a process of exchange. This involves communication, interpretation, understanding and, occasionally, misunderstanding. (Negus 1999: 11)

This evaluation of the purpose of interviews is both instructive and reassuring. Each of the interviews featured in this study was conducted under circumstances that were unfamiliar to the researcher and/or the subject. They were mainly conducted in public spaces such as coffee shops, hotel lobbies, bars or the subject’s workplace. But what is most important to recognise is that semi-structured interviews are fluid social exchanges to be interpreted by the researcher, albeit within clearly defined criteria, in order to construct an understanding of what the interviewee is saying, and in this case what copyright ‘means’ to creators.

CREATOR SAMPLE

In the creator category four distinct types were identified according to the copyright transactions each had entered into.

- Category A: No copyright transactions
- Category B: Collectively negotiated rights transactions only
- Category C: Collectively & individually negotiated transactions
- Category D: Multiple individually negotiated transactions

Once the interviews had been conducted, it became apparent that such narrow categorisations were of limited use due to the small sample. That said, they provide a potentially fruitful framework for future research involving larger samples in surveys, interviews and case studies assuming that a means of identifying such a sample could be found. However, for the purposes of this study these categorisations allow the distinction to be made between *less experienced* (A and B) and *more experienced* (C and D) creators as shown in Table 3-6.

CREATOR INTERVIEWEES

Table 3-6 Interviewee Types/Role/Name List

	CREATOR TYPE	Type of Transactions	Name
Less Experienced	A	No copyright transactions	Harvey
			Pete
	B	Collectively negotiated transactions only	Esther
		Collectively negotiated transactions only	Jennifer
		Individually negotiated transaction only	Anton
More Experienced	C	Collectively & Individually Negotiated Transactions	Craig Sean Mario
	D	Collectively and multiple individually negotiated rights transactions	Tom Marc Chris

INVESTOR SAMPLE

The investor sample also sought informants that were, at the time of interview at least, actively engaged in an executive role with a record company or music publisher. Again, these interviews were designed to construct an illustrative account of these stakeholders' experiences and attitudes rather than make any claims of representativeness.

As suggested earlier, the term 'executive' can be loaded with certain stereotypes based on (invariably male) executives of the 'golden age' of the recording industry

such as Chris Blackwell, Clive Calder, Clive Davis and Walter Yentikoff, to name a few of the more prominent ‘moguls’ (Dannen 1990, Murphy 2015). Even accounts of the instigators of the ‘right on’ UK indie boom of the late 1970s and early 1980s describe “madmen and mavericks” (King 2012) playing by their own set of rules. Here the term ‘executive’ is used far more literally and more prosaically to connote an individual with some degree of executive responsibility within a record company or music publisher. The primary selection criterion applied to these subjects was that each in some way engaged in soliciting and negotiating copyright transactions with creators. For convenience, these subjects are referred to throughout as Investors. Investment is not limited to financial input; it may also include the investment of time and expertise.

Selecting appropriate investor informants presented a considerable methodological challenge due to the complexity of the music industries ‘ecology’, with diverse operations varying significantly in scale and commercial strategy.

RECORD COMPANIES

Interviews were sought with “The Big 3’ major record companies: Sony, Warner and Universal. Of course these are more than simply record companies. They are at once dominant forces in the music industries oligopoly while being much smaller cogs in even larger corporate machines.

In addition to the Big 3 majors, in the UK there are a number of large independent record label groups and label groups that, while operating independently of the majors, have a stable of record labels. As discussed in the literature review, Beggars Group is the most prominent example of a vertically and horizontally integrated independent label group involved not only in records but also operating publishing companies as well as booking agencies and other activities. Interviews were therefore sought with representatives of independent label groups.

The third type of record company featured is the ‘standalone’ independent record company, that is to say, companies that are not horizontally integrated into the recording industry. In the digital age it appears that record companies increasingly diversify into an ever wider range of activities as a response to declining sales revenues.

The final category of sound recording investors is ‘micro-labels’ (Strachan 2007) that appear to operate a quite different business model from major and independent record companies, particularly in respect of copyright in sound recordings. In the digital age, this type of record company appears to offer a route to market for creators that is far less formal and, indeed, less likely to involve a written contract than the traditional record ‘deal’. For that reason this category was considered of potential value to the study.

MUSIC PUBLISHERS

Unlike the recording industry, music publishing appears to be less stratified between major and independent. Large independent publishing companies such as Iagem and Music Sales control large and apparently lucrative catalogues and operate alongside the publishing arms of the ‘Big 3’ majors. There are also smaller, specialist music publishers that operate on a far smaller scale operated by one or a few individuals. For this reason the distinction was made between ‘large publishers’ and ‘small publishers’. It should be noted that penetrating the music publishing industry was a significant challenge throughout the study and as such only two interviews were conducted. There was however a significant degree of engagement with music publishers at a number of the events attended over the course of the study. Table 3-7 identifies the investor interviewees.

TABLE 3.7: Investor interviewee Role/Name

Copyright	Type of Company	Name/Role
Sound Recording	Major Label	Jack/Director of Business Operations
Sound Recording	Independent Label Group	Olivia/General Manager
Sound Recording	Independent Label Group	Bobby/Director of European Operations
Sound Recording	Standalone Independent	Matt/A&R
Sound Recording	Micro Label	Irvine/Owner
Sound Recording	Micro Label	Dave/Owner
Musical Work	Large Publisher	Billy/Head of Copyright
Musical Work	Small Publisher	Andrew/ Owner

INTERVIEW PROTOCOL

The interviews lasted between 45 minutes and 75 minutes and generated many hours of material as well as hundreds of thousands of words. All but one was carried out face-to-face, with the one being conducted by telephone. The interviews were recorded on digital audio to two devices and backed-up as soon as possible after the interview. Transcripts were made of each interview and the subject was offered a copy of the written transcript for review and further comment.

Originally, it was hoped that the interviewees would be named in the thesis but after some consideration it was decided that the most effective way of accessing suitable interview subjects would be to anonymise their contributions. In line with the conditions of ethical approval, participants had the option of withdrawing from the study at any point.

INTERVIEW QUESTIONS

The interviews drew on a strict protocol in order to ensure a high degree of consistency across the sample. Based on the literature review and the preliminary findings of data collection methods one and two, a set of questions was devised for creators and a different set devised for investors (Appendix B). A test for any academic researcher using interviews as a data collection method is to ask questions that are sufficiently probing to draw out illuminating insights, while ensuring the questions are suitably accessible and stimulating to subjects. It is also a challenge to devise questions that strike a balance between being specific enough to draw out relevant answers, yet open enough not to direct the respondent in any particular direction or what might be perceived as 'preferred' responses.

It was assumed that the investor group would, in the main, have a more sophisticated technical understanding of copyright and the surrounding issues than the creator group. This was largely borne out in the study, with some notable exceptions. On the whole the investors were far more at ease discussing copyright and commercial aspects of their activities than creators. Therefore, the creator interview questions were less technical than the investor questions, shorter in length but more numerous.

In most instances the interview was the first and only direct interaction between the researcher and subject. For both groups the questions tapered from opening 'grand tour' (Creswell 2003) questions, inviting the subject to locate themselves with the music industries followed by an increasingly focused line of inquiry. This was done in order to allow the interviewee to warm to the topic, as well as to reveal something of their perception of their own position in the music world and create some degree of rapport between researcher and subject. Looking back, however, a relaxed, enthused interviewee did not necessarily result in the best material. In a number of cases the less comfortable interviews turned out to be more fruitful, if not the most enjoyable or satisfying at the time.

Although the semi-structured interviews commenced based on a strict interview protocol, in practice the interviews were more conversational than overtly interrogative. While great care was taken to ensure each subject answered each question, the order of the questions was adapted on an ad-hoc basis and in many instances the subject had effectively answered the question before it was asked. Similarly, later in an interview a subject might make reference to an earlier question.

CODING AND ANALYSIS

The results of the interviews were highly disparate in terms of the vocabularies used by the subjects; very often subjects talked about copyright without explicitly talking about copyright. For example creators described a sense of ownership over their works without necessarily associating that with copyright. Conversely, investors used the word 'rights' expansively to include genuine assignments of copyright but also in a far looser sense as in 'the right' to a share of live concert income or merchandise income which has little to do with copyright per se. These varied lexicons coupled with the meandering course many of the interviews took made coding the interviews a challenge. Keyword searches were not especially helpful and it was not always easy to map responses to specific questions. Therefore, the transcripts were coded loosely according to broad themes that emerged from the initial analysis.

3.4: POTENTIAL ETHICAL ISSUES

The research design and data collection methods were scrutinised and approved by The University of Glasgow College of Arts Ethics Committee. Informed consent outlining the purpose and procedures of the study was sought from participants before any data collection commenced and participants could withdraw from the process at any time. Participants were able to request clarification of any issues and receive copies of their contribution and the finished project. A number of subjects made comments and amendments to their contribution but the majority did not. The following ethical issues for each data collection method were identified.

ETHICAL CONSIDERATIONS: INDUSTRIES OBSERVATION

The first strand of the methodology presented fewest ethical problems as it focused chiefly on secondary material that had already been published and on public statements of trade bodies and similar organizations. These “unobtrusive measures” (Berg 2004: 209) presented few ethical challenges. The main ethical consideration in this phase of the research came at industry conferences or seminars. It was not uncommon for representatives of organisations and individuals to speak ‘off the record’ or for a ‘Chatham House Rules’ caveat to be attached to discussion at particular events. In these instances, the content of such events may be reported but not attributed.

ETHICAL CONSIDERATIONS: DOCUMENT ANALYSIS

The ethical issues in the document analysis were far more complex and potentially problematic. In some respects this was an unobtrusive measure as it may simply require the creator to provide a digital file or document often by email with no further involvement in the study. However, the contents of these documents reveal highly personal details of the participants’ income and the type of copyright transactions they have entered into. Any breach of confidentiality could potentially upset or embarrass the participant and also might be commercially damaging to the participant.

The highly sensitive nature of these documents required that they be collected on the condition that they are stored securely in physical or digital format and used

only for the purposes of fully anonymised academic research. Where the contributor of the documentation is also an interview subject, the data was not cross-referenced or linked in the discussion. Although this would certainly have been useful and revealing it presented too great a risk of participant confidentiality being compromised.

ETHICAL CONSIDERATIONS: SEMI STRUCTURED INTERVIEWS

Interviews are by definition obtrusive in that they require personal interaction between interviewer and interviewee. The subjects of this project were all adults and not considered to be from vulnerable or special needs populations. Much of the subject matter is relatively benign inasmuch as it relates to general attitudes to aspects of music copyright. However, a great deal of the data gathered was potentially sensitive. In a number of interviews comments along the lines of ‘...and this is anonymous, right?’ indicated the subject was moving into more delicate areas of discussion. As with the documentary data, the interviews were transcribed and anonymised on the understanding that they would only be used for academic research purposes. Interviewees were offered a digital copy of recorded interviews and asked for any further comment or revisions. Similarly, participants were given the option of withdrawing at any stage of the project; none chose to exercise this option.

On balance, the strict ethical parameters of the study did not particularly constrain the research. Rather, the guarantee of anonymity was a positive selling point and the overarching objective throughout the study was to ensure that all contributions were only identifiable by the researcher and the participant.

3.5 SUMMARY OF METHODOLOGY

STRENGTHS, LIMITATIONS AND ALTERNATIVE APPROACHES

The iterative and reflexive nature of this study has been highlighted throughout this chapter, but it is useful to identify the key strengths and limitations of the methodology as well as alternative approaches that might have been applied.

The main strength of this qualitative methodology design was the extent to which it facilitated a more intimate and nuanced view of popular music creators’

experiences of and attitudes to copyright than was previously available in the literature. By focusing on 'real world' documents rather than industry approved macro data and interviews with active stakeholders rather than lobbyists, the study enters largely uncharted academic territory. At the time of writing no studies had been uncovered that employ the type of document analysis undertaken here.

In respect of the interviews, the small, but growing, number of interview-based studies of creators and copyright (Hesmondhalgh and Baker 2009, Schlesinger and Waelde 2012, Street and Phillips 2014) left sufficient room for this study to address the specifics of the commercial aspects of music copyright. Moreover, the focus of these studies and a number others is solely on creators or micro-producers (Strachan 2007).

Looking back on the project, there were ways in which the methodology could have been executed differently. On a practical level it would undoubtedly have been more efficient in terms of finances and time management to have spent a prolonged period in London rather than organising one-off trips with multiple objectives. This was undoubtedly a lesson learned.

Reflecting on the interviews, these were in some ways the most rewarding as a researcher but also the most stressful and often fraught with anxiety. Returning to Negus's description of the interview as "very specific social encounters", it can be said that each interview had its own idiosyncrasies. The premise for most of these interviews was to meet a stranger in a strange place and ask potentially awkward, probing questions for approximately one hour. For both parties there is significant potential for such encounters to be somewhat uncomfortable.

Numerous external factors made each interview feel like it went well or not so well. It would be disingenuous to suggest that interviews are not at least subconsciously graded based on the basis of how it 'felt' rather than what content was generated. However, again looking back, the content often bore no relation to how the interview felt. What emerged in the transcription was that the interviews that felt terrible at the time were sometimes among 'the best' in terms of insight and revelation. Again, this was a lesson learned by the researcher.

Something else that the novice researcher learns is that certain methodological patterns in other studies exist for specific reasons, usually the availability of data or in this case the relative unavailability of data. With the benefit of hindsight, it

would certainly have been a more straightforward approach to focus primarily on interviews rather than including document analysis. Accessing documentary data was a significant challenge throughout. As an academic researcher it is often difficult to 'sell' the idea of being a subject of research to potential participants. This difficulty is exacerbated when the data request is for information relating to income and contracts. A subject or provider of data is perfectly entitled to ask 'what's in it for me?' and this is not an easy question to which a satisfactory answer can always be provided.

On reflection, one potential means of answering the 'what's in it for me' issue would be to explicitly offer something in return. In return for sharing information the subject could be provided with a critical analysis of the data they provided. This *quid pro quo* could have considerable benefit for subjects in terms of commercial strategy and decision-making. The offer of what is effectively consultancy is beyond the traditional remit of the dispassionate academic researcher, and was not employed in this study. However, one of the main lessons learned during this research project was that, in order to ameliorate the data deficits that hinder progress in this field, unconventional experimental approaches must be employed.

To say something about alternative approaches that may have been employed, the inclusion of a quantitative layer of survey data to the study would have had two main benefits. Firstly, it would have generated a potentially statistically significant dataset that might add weight to the findings of the more granular data analysis. The second benefit of such an approach would have been that it might have helped contain the scope of the study. Conducting a survey and then selecting interview subjects from the survey sample is a common approach in the study of the music industries. An example of this strategy is the type of multi-method research carried out by Future of Music Coalition into Artist Revenue Streams that combines a review of secondary sources, with a quantitative survey of around 5000 musicians and in-depth interviews with musicians (Future of Music Coalition: 2013).

On a more modest scale, but more copyright focused, Phillips and Street (2015) conducted a survey combined with follow-up interviews in their study. Again, with the benefit of hindsight, containing the potential sample in this way would avoid the need for 'snowball' sampling, which was found throughout the study to be an inefficient and time-consuming means of identifying subjects. The difficulty with

such survey research, however, comes not only in identifying and accessing an appropriate survey sample but also in achieving a meaningful response rate.

In short, innumerable methodological approaches could have been applied in this doctoral research project. Just as the creators in this research seem to learn about copyright from mistakes, misjudgements and, ultimately, experience, the same can be said of the fledgling researcher conducting academic research. However, there comes a time when the researcher must commit to a research strategy and accept the 'opportunity costs' of forgoing other approaches. On balance, the tripartite methodology selected was judged to be the most effective in tackling the main research question and the subordinate questions posed in this thesis.

PART 2 THE ‘PAPER DEAL’

CHAPTER 4: THE COMMERCIAL FOOTPRINT OF MUSIC COPYRIGHT

4.1 INTRODUCTION TO ‘THE PAPER DEAL’

The purpose of Part 2, the first empirical phase of the thesis, is to set out and analyse the relevant documentary data gathered over the course of the research (For an anonymised example of the types of documents consulted and analysed here see Appendix A). This part draws primarily on data collection method 2: document analysis. Where Stewart Macaulay’s work on the complex relationship between the “paper deal” and the “real deal” (2003: 44) provides an instructive basis for much of the discussion throughout the thesis, this section is primarily concerned with the “paper deal”. But where Macaulay’s focus is limited to contracts; here the scope is widened to include collecting society distributions, record company royalty statements and digital music distributor data. Crucially, the study examines the information sources on offer to creators in order to better understand creators’ lived experience of music copyright in the digital age.

OVERVIEW OF CHAPTERS 4 & 5

These closely related chapters operate in harness but draw on different data sources. Chapter 4 examines what creators get paid when their copyright is collectively administered in two settings: digital and live. These sectors appear to be buoyant at a time when recording revenues have contracted significantly. However, the heavily mediated nature of the copyright value chain in both sectors has resulted in considerable obfuscation of how creators are rewarded. This chapter seeks not only to shed light on these murky issues but also critique the extent to which creators are able to access information relating to the exploitation of copyright in their works.

In Chapter 5 the focus shifts to core issues around the contractual transfer of copyright to third party investors in the form of record and music publishing deals. The use of ‘real world’ examples of contemporary recording and music publishing

contracts as primary source material was an approach found to be largely absent, or at best threadbare in the texts on music copyright contracts (Greenfield and Osborn 2007, Jones 2012, Marshall 2012b). In this study, however, empirical methods are used to model the commitment and rewards contained with music copyright contracts between creators and third party investors.

The broader purpose of the chapter is to build a context for the subsequent interview-based chapters and, in turn, these later chapters add a phenomenological dimension to what is reported and argued here. The consciously ‘bottom up’ approach employed provides an illustrative insight into the quality of information available to creators and its usefulness in informing their copyright decision-making. While these ‘paper’³⁶ documents do not have a ‘voice’ as such, they tell an important story of the immensely complex interplay between creator, investor and copyright.

SUMMARY OF FINDINGS

These chapters contain a number of important arguments and findings. Chapter 4 presents ‘real world’ examples of the financial value of different types of copyright transactions and the differing levels of payment that trickles down to creators. The data presents two contrasting pictures of copyright in the digital and live sectors. In the digital streaming sphere the payments received by creators are, in the main, infinitesimally small when viewed on a ‘per-use’ basis. However, when viewed from a wider perspective, it appears that even the types of niche creator whose data is examined here can generate sums that may make a meaningful contribution to their portfolio of copyright income.

Nevertheless, it is apparent that the underlying mechanisms governing digital payments are byzantine in complexity and utterly opaque beyond the ‘per-stream’ rates reported to creators. In contrast, the “hidden” (Brennan 2012) income generated from copyright in live performance is, by comparison, straightforward, transparent and lucrative.

Chapter 5 finds considerable variety in the types of copyright contracts a creator may be offered or, notionally at least, *choose* to enter into. As with many aspects of copyright, contracts are, in some instances, mind-bendingly complex,

³⁶ It is another manifestation of the increasingly digitised nature of a career in music that almost all of the so-called ‘paper’ documents were shared with the researcher in digital form.

impenetrable documents. A simple observation that can be made is that publishing contracts appear to be far more 'artist friendly' than recording contracts for reasons that can be attributed to the relative risk of each sector and the relative desirability of each type of contract to creators. Keith Negus (1992: 44) argues convincingly that this is a reflection of publishers doing less for their money than record companies. Music publishers may disagree!

In this chapter copyright contracts are reduced to their key elements in terms of commitment and reward. The ramifications of entering into different types of deal are likely to vary greatly and the decisions the creator makes at the 'front-end' of the deal are likely to shape the character of the 'back-end' of the deal. In this process it is apparent that the often lengthy post-term retention of copyright in these contracts creates significant potential for "principal-agent problem" (Towse 2010: 277) to emerge, with little scope for the creator (in this case 'the Principal') to remedy this invidious outcome. This ramifications of this problem shall be shall be fully explored in Chapter Seven of the thesis.

4.2 ROUTES TO MARKET & COPYRIGHT TRANSACTIONS

There are myriad routes to market for musical works and recordings thereof. In keeping with the original funding proposal, the primary focus here is on creator-to-fan exchanges in the digital and live music spheres. Table 4-1 provides an overview of these creator/audience interchanges as examined in the study. It follows that the scope of this chapter is limited to a discussion of these routes to market and the providers listed.

Table 4-1: Key Creator/Fan Interchanges

CREATOR/ FAN INTERCHANGE	MODEL	COPYRIGHT TRANSACTION	COPYRIGHT INDUSTRY	PROVIDER
Physical Sale	Ownership	Individually & Collectively	Records & Publishing	Retailers
Download	Ownership	Individually & Collective	Records & Publishing	iTunes
Audio Stream 1	Access	Individually & Collectively	Records & Publishing	Spotify
Audio Stream 2	Access	Individually & Collectively	Records & Publishing	SoundCloud ³⁷
Video Stream	Access	Individually & Collectively	Records & Publishing	YouTube
Live Performance	Access	Collectively	Publishing	UK Gigs and Concerts

It is noteworthy just how expansive copyright's influence is over each of these routes to market and the wide variety of ways in which copyright is transacted and administered. In reality, for music to be used in any of these settings the permission of the copyright holder must be sought and, in most instances, a licence issued in return for payment. Table 4-1 supports Simon Frith's observation that, "In the industry's own jargon, each piece of music represents 'a basket of rights'; the company task is to exploit as many of these rights as possible..." (Frith 1988: 57). The focus of this study slightly modifies Frith's focus on the company and retrain it on the creator.

Copyright transactions can be divided into two types: collectively negotiated and individually negotiated (Kretschmer *et al* 2010: 45). The former are transactions negotiated, licensed and administered by collecting societies and digital distributors. The latter, are those transactions between creators and record companies and music publishers where the rewards on offer are less standardised. The self-release route is also examined here, as this allows for an examination of the so-called 'disintermediation' of the relationship between music creators and fans in the digital age. A fuller justification of the selection of Interchanges and Providers can be found in the Methodology chapter.

COLLECTIVELY ADMINISTERED TRANSACTIONS

Table 4-2 maps each route to market to the relevant collecting society that administers the underlying copyright in the works and recordings.

³⁷ SoundCloud is an outlier in this group as unlike all of the others it makes no observable contribution to the income of music creators suggesting it is operating without licensing works.

Table 4-2: Route to Market & Collective Transactions

ROUTE TO MARKET	PRS (Musical Work/ Publishing)	MCPS (Musical Work/ Publishing)	PPL (Sound Recording/ Performers' Rights)	Aggregators/ Digital Distributors
Physical Sales	✗	✓	✗	✗
Digital D/L	✓	✓	✗	✓
Audio Stream	✓	✓	✗	✓
Video Stream	✓	✓	✗	✗
Live Concert	✓	✗	✗	✗

The striking and perhaps surprising feature is the extent to which the societies of publishers and songwriters dominate while PPL, the society of record companies and performers, plays no part in the licensing of digital music platforms. That PPL does not license or collect income for record companies and performers in the digital sphere is indicative of how the recording industry conceptualises digital music very differently to the music publishing industry. In short, the music publishing industry treats digital music platforms as a licensing opportunity while the recording industry treats digital sales and streams as a direct replacement for music. This apparently subtle conceptual distinction has significant ramifications for the way in which creators are paid. These are discussed in full later in this chapter.

It follows then that the societies featured in this study are limited to those relating to the copyright in the musical work: PRS and MCPS. While the PPL's remit does not extend to the digital and live spheres that are the focus of this study, an emergent class of music aggregators, digital distributors and rights management companies such as EmuBands, CD Baby or TuneCore collectively administer copyright in sound recordings in a way that is very similar to the activities of the collecting society. For that reason this study extends the definition of collectively negotiated copyright transaction to include such services.

THE RECORD DEAL

In Chapter 5, the scope shifts towards individually negotiated copyright contracts, but first it is necessary to discuss how the content of these contracts influences

what creators are paid when recorded works are purchased or streamed on digital platforms. As discussed, the collecting societies of publishers and songwriters (PRS and MCPS) play a significant role in licensing in the digital sphere. Conversely, record companies have consciously excluded their works from collective management in the digital realm.

When recorded music is broadcast, revenues are split equally between record company and performers on the principle of 'equitable remuneration'. This principle ensures that performers receive half of any income generated by the public performances of recorded music on radio broadcast for example. In law this type of use is defined as "communication to the public" (CDPA s. 20 (2a)). The equitable remuneration right cannot be waived by creators in record contracts and is therefore not recoupable against any contractual expenses (Trubridge 2015). In this respect the principle of equitable remuneration is directly comparable to the inalienable 50% 'writer's share' of performing rights income as an aspect of copyright law that overtly protects the financial interests of individual creators.

Conversely, digital income, and in particular, music streaming is considered to be covered by the "making available right" (CDPA s20 (2b))³⁸ a subsection of the communication to the public right that is not distributed on the principle of equitable remuneration. This holds a number of advantages for record companies in their strategic exploitation of copyright. Chief among these is the 'making available right' which is assignable by the performer to the record company. Therefore, income *can be* held as recoupable against any contractual expenses incurred in the production and promotion of the recordings. In effect this means until the artist has recouped, they will see no income from these sources. Again, an apparently subtle nuance in how certain acts are defined and conceived has potentially problematic consequences for creators (McGugan 2015)³⁹.

However, there is also an altogether reasonable justification of why record companies continue to treat music streaming as loosely analogous to sales. The

³⁸ The wording of the law is as follows, "the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them."

³⁹ The ongoing and unresolved debate around the 'making available right' is an area where PPL's influence could grow significantly in the event that digital use of sound recordings are redefined to bring them into line with other aspects of the 'Communication to the Public' (CDPA S.20.), namely broadcast. This could result in digital use, streaming in particular, being administered collectively on the principle of 'equitable remuneration' an approach advocated by the Musicians' Union (Trubridge 2015)

substantive body of industry-generated data shows streaming is replacing sales (physical and digital) as the dominant mode of ‘consuming’ recorded music (BPI 2016). Therefore, the industry continues to treat streaming revenue sources in the same, or similar, ways to sales derived income (Mills 2014). For the time being at least, the recording contract remains the key document governing the level of pay creators receive when their recorded performances are exploited in the digital sphere.

THE PUBLISHING DEAL

The other individually negotiated copyright transaction examined in Chapter 5 is the music publishing agreement. Again, it is important to note that individual and collective transactions do not operate entirely discretely of each other. Indeed, as Tables 4-1 and 4-2 illustrate, much of the income generated by the music publishing industry is negotiated, licensed and administered collectively by PRS and MCPS. The publishing contract will dictate how these revenues are shared between publisher and writers.

However, in the case of the performing right (in digital *and* live performance), half of the income, the so-called ‘writer’s share’ is considered both inalienable and non-recoupable (Riches 2012: 130). In effect the publisher may only derive a return from the 50% ‘publisher’s share’. In this respect writers’ income is protected in a way the performers’ is not protected in the ‘making available right’. This is a clear example of how copyright categorises and differentiates between authors and performers and assigns unequal values to their contributions much in the way described by Jason Toynbee (2004: 123). Again, a subtle nuance in copyright law, or how the way in which the industries treat different types of rights can have demonstrable ‘real world’ ramifications for different *types* of creators.

‘DIGITAL DIY’ AND SELF-RELEASE

The established route to market for Popular Music creators has historically been to sign a record deal and a publishing deal and join the collecting societies. Indeed, ‘signing a deal’ is a dream held by many creators for a variety of commercial and symbolic reasons. Not having one or both of these agreements in place has historically served as an apparently insurmountable barrier to entry to the mainstream industries. However, in the digital age, there is a route to market that

to some extent conforms to the predictions of “disintermediation” and “de-industrialisation” (Jones 2002: 223) discussed in the literature review. The musical creator no longer ‘needs’ the support of a record company or a music publisher to reach a disaggregated global audience. The aggregators offer access to the mainstream music services including iTunes, Spotify, Deezer, Apple Music and the rest. In effect they provide a route to market that is, by and large, free of the traditional barriers to entry. The ‘DIY creator’ can see their music available alongside superstar artists in a way that was simply not possible in the age of physical distribution and the limited rack space of High Street retail. Ultimately these aggregator services provide a route to market that did not exist in the pre-digital age.

Furthermore, the music aggregators, or digital distributors as some prefer to be known, perform the role of a quasi-collecting society on behalf of unsigned creators in respect of sound recording rights. They reduce transaction costs for creator and music platforms and collect and distribute income, core functions of collecting societies. They also allow creators to retain the bulk of the royalties generated by their works. But like any other decision in respect of copyright, this route involves a trade-off between potential costs and potential benefits. The obvious drawback of this route is the absence of investment that might be offered by a traditional label in the form of advances, tour support or marketing budgets for example. It also lacks much of the “symbolic capital” (Bourdieu 1984: 242) that comes with signing to a label, the significance of which becomes fully apparent in the interviews with primary creators.

The extent to which the self-release route represents an autonomous ‘make or buy’ decision or a coping strategy for creators that cannot secure a record or publishing deal is examined in greater detail in later chapters. In this chapter, the focus is on the financial ramifications of following the self-release route.

4.3 COPYRIGHT TRANSACTIONS & MICROPAYMENTS

It is dangerous to make predictions, particularly about the future. Notwithstanding the streaming services apparent inability to turn a profit (Ingham 2015a, Peoples 2015), there is strong evidence to suggest the battle between ownership and access models is being won by access-based services such as Spotify and YouTube (Dredge 2014). The launch of Apple Music streaming service is perhaps

the most compelling indication that sales-based models are becoming increasingly anachronistic. It remains the case at the time of writing, however, that in 2015 the retail value of sales of recorded music (£808m) far exceeded the value of music streaming (£251m) (BPI 2016). Therefore sales cannot be consigned to history just yet.

The following section looks at what the music creators get paid when their works and performances are consumed or, more appropriately, *accessed* on digital platforms. Some discussion of physical product is also included for context. PRS distribution statements comprise the bulk of the data analysed here⁴⁰. This is supplemented by: record company royalty statements, digital distributor royalty statements as well as live concert costings and settlements.

On surveying a variety of income sources and accounting systems it is notable that the ‘per play’, ‘per download’ or ‘per stream’ mode is a common feature of how societies, aggregators and record companies report income to creators. Typically, lump sums from each provider are attributed to specific songs and the number of streams or downloads are itemised. In lieu of any other income data it is hardly surprising then that ‘per-play’ analyses dominate the debate around such services. The origins of these approaches can be traced back to Lady Gaga’s supposed £100 for a million plays and a leaked collecting society distribution statement (Leach 2010). The appropriateness of a rigid ‘per-play’ approach has been challenged, not least by the streaming services (Spotify 2015). Indeed, to suggest Lady Gaga’s ‘Poker Face’ generated only £100 was demonstrably misleading and inaccurate (Barr 2010). However, in the narrow context of streams and downloads it seems reasonable to make qualified ‘per-stream’ comparisons between services and business models.

With that caveat in place, the focus now turns to the income generated for creators by the copyright in musical works (the underlying songs) and sound recordings. Beginning with a brief discussion of physical sales and copyright the narrative then moves on to a more detailed investigation of the digital delivery of recorded music.

⁴⁰ By definition, a PRS writer member has written a song that has been commercially exploited in some way. There are thousands of potential scenarios in which PRS licenses the use of members’ copyright. To get a sense of the scope of their activities, PRS for Music operate in excess of 40 different tariffs. The April 2014 PRS distribution shows that the society licensed 2,387 separate usage sources. There were over 78m unique performances during the quarter, comprising 1,054,940 distinct works (PRS for Music 2014b).

PHYSICAL SALES

Although the main focus here is on digital and live music, a brief overview of copyright and physical sales is useful in order to better understand the ‘old music industry’ as it were. In the sale of physical products, copyright’s main function is to afford the rights holder the *exclusive* right to reproduce and sell the recorded performance and to stop others from doing so. Historically the core business of the record company was to sell recordings to fans and then share the proceeds with creators, usually on a contractually agreed royalty basis⁴¹. In this process copyright’s main function was to protect the exclusive right to exploit the recording. In simple terms the record company would produce, manufacture and distribute recordings for sale to consumers. The creator’s share of any profits is entirely governed by the terms of the contract. Therefore, collecting societies have no direct role to play in licensing the sale of recorded music.

However, when a musical work is mechanically reproduced on a physical format the record company must pay the composers and publishers that own the copyright in the song being recorded. It is here that collecting societies, namely MCPS, play a significant role. MCPS is the oldest of the UK collecting societies and was set up by music publishers in specific response to the 1911 Copyright Act where the principle of a mechanical reproduction right was established (Towse 2015). The principle being that a licence was required by record companies to reproduce a work from a publisher’s catalogue. This Act and the foundation of a collecting society is a classic example of the music publishing industry’s proficiency at adapting their business model to suit the prevailing technological landscape. Establishing this right, at a stroke, turned recorded music from a threat into a profitable ally of the music publishing industry *and* songwriters.

As with most copyright transactions the key considerations are *permission* and *payment*. Receiving permission to mechanically reproduce songs on physical formats is a relatively straightforward process. Where the recording artist is also the songwriter, the record contract will generally include a clause stating that the creator will automatically allow for MCPS to issue a licence. For ‘cover versions’ (songs by writers other than the recording artist) it is slightly more complex. Unlike

⁴¹ In the early days of the popular music industries ‘buyout’ contracts were commonplace (Towse 2015). For more on the economics of buyout and royalty contracts see Kretschmer et al (2010: 24-28).

in the USA, the UK does not operate a compulsory licensing system for published works (Rackow 2002)⁴². Instead, a system of 'First Licence Refusal' (PRS for Music 2015a), as a society rule rather than a copyright law, allows members to control the first licence issued in respect of a particular work (PRS for Music 2015b). As the licensing of 'cover versions' is a core activity of the music publishing industry it is standard industry practice to automatically license all recorded versions of published works in their catalogue, provided the works have not been altered in any way (Gray 2014).

In the physical realm the rate of payments for mechanical licences is also relatively straightforward. This amounts to 8.5% of 'Published Dealer Price' (the wholesale price) or 6.5% of 'Retail Price' (the price paid by the consumer) if the dealer price is unavailable (PRS 2015d). Identifying the dealer price is far from straightforward given that it varies according to record company, format, artist and discounts offered to retailers (MMC 1994: 141), with retailers operating a mark-up of between 29-36% on average (*Ibid*: 150). UK Chart rules state that the dealer minimum is £6 for a CD (Official Charts Company 2015). Using this as a reference point, the mechanical licence would be 51p. Similarly, for a CD retailing at £10 the mechanical licence fee would be 65p.

MCPS licenses are issued on different bases depending on the type of record company seeking to mechanically reproduce works. AP1 licences are primarily aimed at larger established record companies and AP2 is designed for smaller independents and micro labels. The main differences between the two types of licence is that AP1 licence holders pay after the records have been manufactured⁴³ and shipped (net of returns) whereas AP 2 licences must be paid in advance and is based on records actually manufactured. Ultimately, in both instances, the publisher and the songwriter will share the income generated from these mechanical licences.

⁴² In the USA once a work has been recorded for the first time, it is effectively available to any record company to manufacture 'cover' at a statutory rate. Patrick Rackow (then of BASCA) argues there is a common misconception that this is also the case in the UK: "In the UK many creators (and more than one music lawyer) seem to believe that the same rule applies: when a song has once been recorded, it is available for all to cover. This is not the case. Whilst in practice it may seem that once you license your mechanical right to MCPS you lose control, you can, if you notify them, restrain the issuing of mechanical licences in respect of your works" (Rackow 2002).

⁴³ A conversation with a music manager whose career began in the late 1960s revealed that music publisher would regularly audit record pressing plant order books and warehouses in order to ensure the number of records actually being pressed corresponded with the mechanical royalties they were receiving.

Crucially, however, unlike performing rights, publishing contracts show mechanical royalties to be entirely recoupable. Therefore, in the event that the writer has an outstanding balance with the publisher, all mechanicals will be charged against this. In the event that this balance is cleared, the writer will then receive a royalty on their mechanical income. To return to the theme of decision-making, the creator has no influence over these rates. Moreover, what they ultimately stand to gain is dependent on the type of individually negotiated agreement they have with their publisher.

DOWNLOADS & STREAMING: PERFORMING RIGHTS

While the copyright element of physical music sales was found to be relatively straightforward, this first foray into the mechanisms of digital music and copyright reveals a far higher level of complexity. The digital sale contains many of the same characteristics as the physical sale inasmuch as it is a transaction involving the sale of a product, albeit an intangible one. The consumer makes a one off payment and they subsequently 'own' the work. The rights holder extracts all of the value from the transaction at the point the consumer purchases the file. The owner of the file may play it as often as they please without having to pay any more for the privilege. Music streaming, on the other hand, generates a micropayment for rights holders every time the song is listened to.

Somewhat confusingly, however, when a digital file is purchased and when a music file is streamed it is considered to represent both a sale *and* a performance of the work (Lindvall 2014). In this respect the digital music file can be likened to Schrödinger's Cat in that it exists in two apparently incompatible states at once. A download is a product while a stream is a service, yet in terms of copyright both are considered to represent a hybrid of both. What this means in terms of copyright income is that each time a music file is legally downloaded or streamed, a payment is made to the owner of the copyright in the song and the owner of the copyright in the recording of the song.

DIGITAL MECHANICALS

To add another thread to an increasingly convoluted copyright melange, digital sales and streams are also considered to be mechanical reproductions of a musical work. It was not possible to access a meaningful sample of MCPS

statements during the course of the research but it is however possible to estimate the MCPS dimension to these digital uses using Online Music Licence (OML) splits published by PRS for Music (PRS for Music 2015e):

- Permanent Download services (e.g. iTunes) – 75% to MCPS and 25 % to PRS
- On-demand streaming services (e.g. Spotify) – 50 % MCPS and 50 % PRS

Using these splits the table data contains estimates of the MCPS element of the digital transactions examined. Again, it is important to remember the distinction between the inalienable 50% that is a feature of performing rights income and the contractually recoupable mechanical copyright.

One inconclusive aspect of the relationship between mechanical copyright income from digital sources is the absence of a clear mechanism for collecting such income. As MCPS membership criteria are more stringent than those of PRS and their membership is also smaller⁴⁴ it remains unclear what happens to mechanical royalties generated by creators that are neither recording artists signed to a record company or signed with a publishing company. This begs the question where does the revenue generated by non-members end up?

Another problematic issue surrounds how much YouTube pays in mechanical royalties, if indeed it pays anything at all to unsigned creators. This ‘follow the money’ research found no evidence or reference to any YouTube payments of mechanical royalties. Secondary sources were also inconclusive, though one journalistic account casts doubt on whether YouTube currently pay any mechanical royalties (Lindvall 2013). This therefore remains an unanswered question.

⁴⁴ A writer may join the MCPS if: “Commercially released by a record company (not a record company that you own), or recorded into a radio or TV programme, or recorded in an audio-visual or multimedia production, or used online” (PRS for Music 2016). These higher entry requirements are reflected in the membership numbers of each society. As of December 2014 MCPS had 19,624 writer members compared with 90,331 PRS writer members (PRS 2014a)

MICROPAYMENTS

The following tables draw on the PRS statements of two *unpublished*⁴⁵ and one *published* PRS writer members. The intention is not to find a definitive ‘per-stream’ rate for the various services featured here, as it is apparent that many variables shape what creators receive from these sources. Rather, the aim of this approach is twofold. Firstly, it is helpful in making the infinitesimally small micropayments more comprehensible. Secondly, and more importantly, it provides an illustrative sense of the types of sums creators might reasonably expect to derive from different digital platforms operating differing underlying business models: ‘ballpark’ figures for want of a more scientific expression. Given the multifarious nature of the potential web of income sources that may be derived from digital sales and digital streams, a ‘follow the money’ approach is something of a challenge but PRS statements provide revealing insights.

Perhaps the most notable feature of a PRS distribution statement is that it is an impressively detailed document containing itemised information about a vast range of uses both domestically and internationally. It is testament to the expansive nature of their activities and the hugely significant role the society plays in licensing the copyright in musical works. It is difficult to conceive of ways in which individual creators, or even music publishers could practicably carry out the work done by PRS for Music⁴⁶. However, as granular as these statements are, the creator has little scope to query the underlying licensing mechanisms governing rates of pay due to ‘Non-Disclosure Agreements’ (NDAs) between PRS, digital music platforms and corporate rights holders. In reality, creators have little option but to take the data and payments they receive at face value.

Publicly available Spotify data for the most popular songs wholly written by each creator were used to select the songs featured here⁴⁷. The three digital platforms featured are iTunes, Spotify and YouTube, the market leaders in each of their

⁴⁵ The terms *published* and *unpublished* are used in italics to denote that the terms are being used to differentiate between writers that have entered into publishing agreements and those that have not. In non-italic form the terms are used more literally i.e. made public in recorded or live setting.

⁴⁶ The emergence of rights management companies seeking to compete with collecting societies such as Kobalt suggest that the collecting societies natural monopoly status may imminently be challenged, particularly in relation to digital revenues (Ingham 2015b).

⁴⁷ The Spotify Desktop platform reveals a play count for all tracks exceeding a thousand plays. Tracks that fall below this are reported as “<1000”. At the time of writing the top performing songs were: Creator 1- 9462 Creator 2- 44,840 Creator 3- 263,144. An aggregate of their 3 top performing songs was: Creator 1: 17,126 Creator 2: 100,714 Creator 3: 611,822

distinct business models (See Methodology Chapter). It is important to note that the PRS data were also surveyed for any SoundCloud income as this platform was frequently mentioned in the interview sections of the study⁴⁸. However, it did not appear in any of the data, suggesting that in spite of numerous stories relating to the imminent monetisation of the platform (Dredge 2015, PRS 2015), this income has, so far, failed to trickle down to creators⁴⁹.

⁴⁸ SoundCloud is estimated to be the world's second largest music platform (after YouTube) with 175m unique users per month. That this activity is largely unlicensed is of obvious concern to the music copyright industries. However, a number of the creators featured in this study were enthusiastic users of the platform.

⁴⁹ PRS for Music (2015c) announced a licence agreement with SoundCloud though at the time of writing no further details have emerged.

PRS Writer Member 1: is an ‘unsigned’ DIY creator without a record or publishing deal. This writer member has self-released a number of singles and received a small amount of radio airplay and one synchronisation in an independently produced motion picture. In addition to this the creator has performed live extensively in small headline shows and larger support and festival slots. Table 4-3 presents a sample of their digital income collected by PRS.

Table 4-3: Creator 1 Performing Rights Income

Service	Song	Performances	Total PRS Received	Ave. PRS Per Play	Estimated MCPS	Ave MCPS Per Play	Combined Per Play	X 1k	X 10k	X 1m	X 10m
iTunes	1A	2	£0.0238	£0.0119	£0.0714	£0.0357	£0.0476	£47.60	£476	£47600	£476k
	1B	2	£0.0238	£0.0119	£0.0714	£0.0357	£0.0476	£47.60	£476	£47600	£476k
	1C	1	£0.0119	£0.0119	£0.0357	£0.0357	£0.0476	£47.60	£476	£47600	£476k
Spotify ¹	1A	17 (Single Single)	£0.0067	£0.00039	£0.0067	£0.00039	£0.00078	£0.78	£7.80	£780	£7800
		315 (Dual Single)	£0.1919	£0.00061	£0.1919	£0.00061	£0.00122	£1.20	£12.00	£1220	£12200
	1B	5 (Single Single)	£0.0020	£0.00040	£0.0020	£0.00040	£0.0008	£0.80	£8.00	£800	£8000
		198 (Dual Single)	£0.1204	£0.00061	£0.1204	£0.00061	£0.0012	£1.20	£12.00	£1220	£12200
	1C	3 (Single Single)	£0.0012	£0.00040	£0.0012	£0.00040	£0.0008	£0.80	£8.00	£800	£800
		26 (Dual Single)	£0.0159	£0.00061	£0.0159	£0.00061	£0.00122	£1.20	£12.00	£1220	£12200
YouTube		n/a									

PRS Writer Member 2: has done ‘handshake deals’ with two small independent labels and released two albums along with a number of singles and EPs. In addition to these releases the creator is an active live performer with numerous headline appearances in the UK and abroad as well as slots at a number of festivals. The creator remains ‘unsigned’ for publishing and therefore retains 100% of all publishing income. Table 4-4 presents a sample of their digital income collected by PRS.

Table 4-4: Creator 2 Performing Rights Income

Service	Song	Performances	Total PRS Received	Ave. PRS Per Play	Estimated MCPS	Ave MCPS Per Play	Combined Per Play	X 1k	X 10k	X 1m	X 10m
iTunes	2A	7	£0.0823	£0.0118	£0.2469	£0.0353	£0.0471	£47.10	£471	£47100	£471k
	2B	0	£0	£0	£0	£0	£0	£0	£0	£0	£0
	2C	1	£0.0124	£0.0124	£0.0372	£0.0372	£0.0496	£49.60	£496	£49600	£496k
Spotify	2A	141 (Single Single)	£0.0363	£0.00025	£0.0363	£0.00025	£0.0005	£0.50	£5	£500	£5000
		1423 (Dual Single)	£0.5983	£0.00042	£0.5983	£0.00042	£0.00084	£0.84	£8.40	£840	£8400
	2B	49 (Single Single)	£0.0131	£0.00027	£0.0131	£0.00027	£0.00054	£0.54	£5.40	£540	£5400
		442 (Dual Single)	£0.1827	£0.00041	£0.1827	£0.00041	£0.00082	£0.82	£8.20	£820	£8200
	2C	96 (Single Single)	£0.0242	£0.00025	£0.0242	£0.00025	£0.0005	£0.25	£2.50	£250	£2500
		1116 (Dual Single)	£0.04723	£0.00042	£0.04723	£0.00042	£0.00084	£0.84	£8.40	£840	£8400
YouTube	2A	106 (Online)	£0.0100	£0.000094	Unknown	Unknown	£0.000094 ¹	£0.09	£0.94	£94	£940
	2D	176 (Online)	£0.020	£0.00011	Unknown	Unknown	£0.00011	£110	£0.11	£1.10	£1100
		469 (UGC)	£0.0311	£0.000066	Unknown	Unknown	£0.000066	£0.07	£0.66	£66	£660

PRS Writer Member 3: has a publishing contract with an independent publisher based in the USA. This writer member has signed a number of contracts of varying types with small and large UK independents. These have resulted in significant record sales, network radio play, live concert and festival appearances and synchronisations in major Hollywood movies. Table 4-5 presents a sample of their digital income collected by PRS.

Table 4-5: Creator 3 Performing Rights Income⁵⁰

Service	Song	Performances	Total Received 50% (100%)	Ave. Per Play	Estimated MCPS	Ave MCPS Per Play	Combined Per Play	X 1k	X 10k	X 1m	X 10m
iTunes	3A	3	£0.0232 (£0.0464)	£0.0077 (£0.0155)	£0.0696 (£0.1392)	£0.2320 (£0.0464)	£0.0309 (£0.0619)	£30.90 (£61.90)	£309 (£619)	£30900 (£61900)	£309k (£619k)
	3B	1	£0.0075 (£0.0150)	£0.0075 (£0.0150)	£0.0225 (£0.0450)	£0.0225 (£0.0450)	£0.0300 (£0.0600)	£30.00 (£60.00)	£300 (£600)	£30000 (£60000)	£300k (£600k)
	3C	2	£0.0122 (£0.0244)	£0.0061 (£0.0122)	£0.0366 (£0.0732)	£0.0183 (£0.0366)	£0.0244 (£0.0488)	£24.40 (£48.80)	£240 (£488)	£24400 (£48800)	£244k (£488k)
Spotify	3A	88 (Single Single)	£0.0116 (£0.0232)	£0.00013 (£0.00026)	£0.0116 (£0.0232)	£0.00013 (£0.00026)	£0.00026 (£0.00052)	£0.26 (£0.52)	£2.60 (£5.20)	£260 (£520)	£2600 (£5200)
		1150 (Dual Single)	£0.2361 (£0.4722)	£0.00021 (£0.00042)	£0.2361 (£0.4722)	£0.00021 (£0.00042)	£0.00042 (£0.00084)	£0.42 (£0.84)	£4.20 (£8.40)	£420 (£840)	£4200 (£8400)
	3B	4 (Single Single)	£0.0005 (£0.0010)	£0.000125 (£0.00025)	£0.0005 (£0.0010)	£0.000125 (£0.00025)	£0.00025 (£0.0005)	£0.25 (£0.50)	£2.50 (£5.00)	£250 (£500)	£2500 (£5000)
		141 (Dual Single)	£0.0291 (£0.0582)	£0.00021 (£0.00042)	£0.0291 (£0.0582)	£0.00021 (£0.00042)	£0.00042 (£0.00084)	£0.42 (£0.84)	£4.20 (£8.40)	£420 (£840)	£4200 (£8400)
	3C	16 (Single Single)	£0.0044 (£0.0088)	£0.00028 (£0.00056)	£0.0044 (£0.0088)	£0.00028 (£0.00056)	£0.00056 (£0.00112)	£0.56 (£1.12)	£5.60 (£11.20)	£560 (£1120)	£5600 (£11200)
		227 (Dual Single)	£0.0470 (£0.0940)	£0.00621 (£0.0044)	£0.0470 (£0.0940)	£0.00621 (£0.0044)	£0.0124 (£0.0248)	£1.24 (£2.48)	£12.40 (£24.80)	£12400 (£24800)	£124000 (£248000)
YouTube	3A	439	£0.0200 (£0.0400)	£0.000046 (£0.000092)	Unknown	Unknown	£0.000046 (£0.000092)	£0.05 (£0.09)	£0.50 (£0.90)	£46 (£92)	£460 (£920)
	3B	174	£0.0100 (£0.0200)	£0.000057 (£0.00011)	Unknown	Unknown	£0.000057 (£0.00011)	£0.06 (£0.11)	£0.60 (£1.10)	£57 (£114)	£570 (£1140)
	3C	0	£0	£0	Unknown	Unknown	£0				

⁵⁰ As this writer has entered into a publishing agreement their distributions are shared 50/50 with the publisher. The 50% 'writer's share' is paid directly to the writer. The remaining 50% is paid to the publisher and shared with the writer according to contract (70/30 split in writer's favour but recoupable against advances). 100% figure shown for purposes of comparison with other writer members.

DOWNLOADS & STREAMING: SOUND RECORDINGS

As discussed, in the case of recorded music the relevant collecting society PPL has no role to play. Instead, the record companies have strategically retained control of their rights in the digital domain and chosen to negotiate individual agreements with music services. In the case of streaming this goes far beyond simply licensing their extensive catalogues to these platforms⁵¹. For the purposes of presenting the data here, this is considered a type of ‘quasi-collectively negotiated’ income stream as it is highly but not entirely standardised since it is very likely that different record companies have negotiated different rates with each platform. The returns are reported and distributed to creators on a micropayment basis that is heavily premised on collecting society reporting.

Royalty Statement: Creator 4 is a recording artist signed to a UK independent company that operates within a larger label group. The accounting practices of record companies are notoriously haphazard (Goldberg 2000, Quirk 2009), but in this case the itemised accounting was found to be highly illuminating. In this specific instance the contract is a ‘50/50’ deal meaning the contracted creator is entitled to half of any money paid by digital services. However, the creator is ‘unrecouped’ by a considerable margin, so any income from these digital sources is set against the balance of the expenses accrued in recording and marketing their recordings. Table 4-6 and 4-7 presents a sample of digital income collected by their record company.

⁵¹ The leaked contract between Sony and Spotify (Singleton 2015) reveals that ‘per stream’ income represents only part of payments received by labels from streaming services. In addition to per stream rates, Major record companies also receive significant advance payments and equity in these services. It is doubtful whether income from these sources is shared with artists.

Table 4-6: Creator 4 Sound Recording Digital Income

Service	Song	Sales	Total Received	Ave. Per Play	X 1k	X 10k	X 1m	X 10m
Download	4A	38	£21.28	£0.56	£560	£5600	£560k	£5.6m
	4B	19	£10.70	£0.56	£560	£5600	£560k	£5.6m
	4C	10	£5.45	£0.55	£550	£5500	£550k	£5.5m
Service	Song	Streams	Total Received	Ave. Per Play	X 1k	X 10k	X 1m	X 10m
Digital Stream	4A	1320	£6.65	£0.0050	£5.00	£50	£5000	£50k
	4B	1215	£6.27	£0.0052	£5.20	£52.00	£5200	£52k
	4C	2066	£10.42	£0.0050	£5.00	£50	£5000	£50k

Table 4-7: Creator 4 Sound Recording Digital Income

Service	Song	Sales	Total Received	Ave. Per Play	X 1k	X 10k	X 1m	X 10m
Download	4A	26	£18.34	£0.71	£710	£7100	£710k	£7.1m
	4B	7	£4.39	£0.62	£620	£6200	£620k	£6.2m
	4C	6	£4.36	£0.72	£720	£7200	£720k	£7.2m
Service	Song	Streams	Total Received	Ave. Per Play	X 1k	X 10k	X 1m	X 10m
Digital Stream	4A	2650	£12.55	£0.0047	£4.70	£47	£4700	£47k
	4B	2906	£12.34	£0.0042	£4.20	£42.00	£4200	£42k
	4C	3773	£17.15	£0.0045	£4.50	£45	£4500	£45k

Digital Distributor Statement: Creator 5 is a self-release artist who has no recording or publishing contract in place. As such all of the income reported by the distributor is paid in full to the creator. Table 4-8 and 4-9 present a sample of digital income collected by their digital distributor.

Table 4-8: Creator 5 Sound Recording Digital Income

Service	Song	Sales	Total Received	Ave. Per Play	X 1k	X 10k	X 1m	X 10m
Download	5A	60	£30.69	£0.51	£510	£5100	£510k	£5.1m
	5B	89	£46.69	£0.52	£520	£5200	£520k	£5.2m
	5C	68	£36.34	£0.54	£540	£5400	£54k	£5.4m
Service	Song	Streams	Total Received	Ave. Per Play	X 1k	X 10k	X 1m	X 10m
Digital Stream	5A	2523	£12.67	£0.0050	£5.00	£50	£5000	£50k
	5B	1436	£7.73	£0.0054	£5.40	£54	£5400	£54k
	5C	896	£5.01	£0.0056	£5.60	£56	£5600	£56k

Table 4-9: Creator 5 Sound Recording Digital Income

Service	Song	Sales	Total Received	Ave. Per Play	X 1k	X 10k	X 1m	X 10m
Download	5A	20	£10.96	£0.55	£550	£5500	£550k	£5.5m
	5B	13	£7.33	£0.56	£560	£5600	£560k	£5.6m
	5C	12	£6.65	£0.55	£550	£5500	£550k	£5.5m
Service	Song	Streams	Total Received	Ave. Per Play	X 1k	X 10k	X 1m	X 10m
Digital Stream	5A	2188	£10.80	£0.0049	£4.90	£49	£4900	£49k
	5B	1517	£7.75	£0.0051	£5.10	£51	£5100	£51k
	5C	961	£4.85	£0.0050	£5.00	£50	£5000	£50k

MAKING SENSE OF MICROPAYMENTS

The data presented here show that the financial value of a digital sale far exceeds that of a digital stream. On this basis, a business constructed on the sale of a 79p or 99p download is one that holds many attractions for signed and unsigned

creators alike. However, as these tables show, for these niche creators at least, downloads represent a tiny fraction of the overall digital traffic seen on their PRS and recording royalty statements. Trends in the data for each creator featured indicate that the gap between streams and sales as a proportion of digital transactions continues to grow. In microcosm, this pattern mirrors trends seen on a macro level in the recording industry where digital revenues stalled and began to fall rapidly (15%) in 2014 for the first time. At the same time streams increased even more steeply (65%) (Titcomb 2015). While these two trends *may* be unrelated, it seems they again lend credence to the growing sense that streaming is becoming the dominant means of accessing recorded music. In light of the relative value of downloads and streams illustrated here, this presents potentially significant challenges for creators and investors alike.

The rates of pay offered to creators by digital streaming platforms is one of the most contentious and emotive issues surrounding music copyright in the digital age. What can be stated with a considerable degree of confidence is that the income derived from these digital sources generates an infinitesimally small sum for creators. These rates have been characterised as unsustainable for rights holders and exploitative of creators in particular.

Fairness is not something that can be easily quantified and this study makes no judgement as to whether the rates of pay received by creators are fair or otherwise. It is, however, worth noting that music-streaming services are particularly profitable. Rather, the most successful seem to be operating as loss leaders for other enterprises; YouTube for Google and its associated advertising, and iTunes for Apple hardware. As stand-alone music services such as Spotify, SoundCloud or Tidal grow in terms of revenue, so too do their losses.

Perhaps the most striking feature of the itemised micropayment system is its fiercely democratic character. Popularity, or lack of it, is measured in 'plays' that are made public by music services, presumably as a means of trumpeting the popularity of the song, the artist and indeed the service. This, in turn, dictates, or at least it should dictate, what creators are paid. It is clear that in order to generate meaningful income from such sources, tens of millions of streams are required. In many of the attacks on music streaming such as those relating to Lady Gaga, the symbolic figure of 'one million' or 'ten million' is invoked to illustrate just how derisory the rates of pay offered by streaming services are. But what is most

striking about investigations into digital music streaming is just how much the rules of the game have changed. It is the achievability of hundreds of thousands or millions of streams, even for niche creators, that suggests music streaming can be viewed as a positive contributor to such creators' copyright income streams.

RECALIBRATING THE 'METRICS'

In the 'physical' age success was often measured in silver, gold and platinum discs representing tens of thousands, hundreds of thousands and in very rare cases millions of sales. In the 'Golden Age' of 'Indie' successful careers and businesses were constructed around the sale of hundreds or thousands of physical records (Cavanagh 2000). In the digital sphere such 'metrics', as industry pontificators are wont to describe them, are no longer applicable. The album format, the dependable cash cow of the recording industry from the early 1970s until the early 2000s (Samuel 2015: 29) has been 'unbundled' in the digital realm. This consumer preference for cherry-picking single tracks has its origins in the file-sharing platforms of Napster, SoulSeek, and Limewire and was cemented in consumer consciousness by iTunes. The effect of this fragmentation of the album format has been aesthetically and commercially profound. Aesthetically it has led to debates around the sanctity of the album format as a work of art.

The commercial impact is far more relevant in this study. Table 4-10 contains publicly available Spotify data relating to a selection of Scottish artists⁵² of varying levels of critical acclaim and commercial success and indicates just how much the metrics have shifted from the norms of the 'physical age'.

⁵² Each artist has been shortlisted for the Scottish Album of the Year Awards at some point since its inception in 2012. (Scottish Album of the Year Award 2016)

Table 4-10: Scottish Album of the Year Nominees Spotify Plays

Artist	Most Streamed Song	Aggregate of Top 10 Songs
Belle & Sebastian	12m	63m
Calvin Harris	352m	2.3bn
Chvrches	61m	179m
Emeli Sande	69m	225m
Errors	359k	1.0m
Holy Esque	178k	351k
Honeyblood	2.2m	4.6m
Kathryn Joseph	124k	255k
The Pastels	492k	1.3m
Young Fathers	3.1m	11m

The industry appears committed to devising methods for finding equivalence of individual streams and downloads to album sales (Osborne 2016). In the UK ‘Album Equivalent Sales’ are 10:1 ratio for downloads (10 digital sales is equivalent to 1 album sale) and 1000:1 for streams (1000 streams is equivalent to 1 album sale)⁵³. What these figures illustrate is that it is not beyond the realms of possibility that even creators operating at the margins of the mainstream can accrue streaming figures into the hundreds of thousands, millions and even tens of millions. Such numbers would be unachievable in physical or even digital sales. In this context the rates of pay generated by these growing streaming uses found in Tables 3-8 appear to be far more positive than much of the existing literature would suggest. If the metrics are recalibrated to show what is achievable in terms of streaming traffic it follows that meaningful sums can be generated. Moreover,

⁵³ “Album Equivalent Sales (AES) comprise Track Equivalent Albums (TEA) and Streaming Equivalent Albums (SEA), along with digital and physical album sales. Track Equivalent Albums takes all singles (over 99 per cent of which are digital downloads) and, using a ratio of 10 to 1, converts these into an equivalent number of albums for a given period (in this case one year). By the same token, Streaming Equivalent Albums represent the total number of streams divided by 100 (the ratio used by The Official Charts Company to convert streams into a digital track equivalent when collating the Official Singles chart) and then again by 10 to replicate the approximate average number of tracks on an album.” (BPI 2015)

they suggest that discussions of Lady Gaga's one million streams are increasingly irrelevant⁵⁴.

While it remains the case that streaming income alone may not sustain the grass-roots or even the mid-range creator, it is also reasonable to infer that creators generating volumes of traffic on Spotify will also be generating copyright income elsewhere. This may be on other streaming services, live performance rights, broadcast and public performance income, synchronisations and a host of other income streams. Copyright's 'bundle of rights' represents a 'portfolio' of income streams. This idea shall be more fully developed in due course. But it is important to acknowledge that by recalibrating the 'metrics' of what is reasonably achievable, an altogether more optimistic outlook on music streaming as a mean of monetising copyright is possible.

BUT IS IT FAIR?

The 'fairness question' is one that cannot be answered here. However, the opacity of digital licensing remains a considerable challenge to creators (and academic scholars) wishing to understand how much they are earning from copyright and where the income is coming from. Simply establishing *if* a service is paying creators is a challenge, quite apart from the issue of *how much* they are paying.

This section of the study has demonstrated that while download payments seem relatively consistent across the sample on both the musical work and the sound recording side, streaming rates are far more inconsistent. What the data also show clearly is that not all digital streaming services pay creators the same or even similar rates. For creators, Spotify is by a considerable margin the most lucrative streaming service among those surveyed⁵⁵ in terms of quantifiable copyright income. YouTube appears to make payments to PRS for Music, albeit at a fraction of the rate paid by Spotify and other 'on-demand' music services. Their contribution in terms of mechanical rights and sound recording rights remains unclear. SoundCloud has made no payments to the creators featured in this study to date. In effect, the largest (YouTube) and the second largest (SoundCloud) streaming platforms appear to be unlicensed or at least only partially licensed

⁵⁴ For reference, in the context of newspaper, blog articles and academic studies (Barr 2010) evaluating a million streams, 'Poker Face' by Lady Gaga has been streamed in excess of 98m times on Spotify alone.

⁵⁵ In the interests of balance it should be noted that other dedicated on-demand streaming services pay rates that are comparable to Spotify.

operations. This poses obvious challenges for the music copyright industries at large, but particularly for ‘DIY’ creators that do not have the corporate muscle of a record company or music publisher.

This obfuscation is by far the most problematic and troubling aspect of the digital copyright story. Furthermore, it would appear that this opacity has become increasingly unfathomable as the digital market has grown. When conducting similar research in 2010 (Barr 2010) it was possible to identify clear observable trends in the digital income creators were receiving from digital sources.

Somewhat depressingly, the BASCA chairman Patrick Rackow best sums up the current situation, “It’s not an open system and if it’s not an open system there’s no way of saying whether or not it’s a fair system.” (Rackow 2010)

4.4: LIVE MUSIC & COPYRIGHT

Many of the challenges of licensing in the digital sphere appear to remain unresolved. By comparison to the digital realm the live picture is refreshingly straightforward, at least from the creators’ perspective; not least because live music involves only the performing right in the musical work rather than the full suite of copyright in the song and the recording of the song. It is also altogether more transparent.

The post-Napster revenues generated by PRS for Music have also followed an impressive upward trajectory from £360m in 1998 to £666m in 2013 (Samuel 2015: 36). At the same time, the live sector has been growing post-Napster, both in absolute terms and in terms of the overall share of the UK music market. As a share of PRS revenue the live sector has doubled from 2% in 2003 to 4% in 2013: this is notable growth by any measure. However, as a share of the overall revenue base it represents a surprisingly low percentage. It is certainly not entirely compatible with the idea that the live sector is the site of rampant growth. In truth, the largest growth areas for PRS have been in digital, non-live public performance and, most notably, overseas income.

As discussed in the literature review, the relationship between live music and copyright in the contemporary setting has received scant attention from academic scholars. This is particularly curious given the central role that a single live performance of Monsieur Bourget’s works in a Paris café had on the establishment

of the principle of collective licensing of music copyright (Albinsson 2014). Ultimately, the licensing of live music set the precedent for *all* collective management of music copyright.

The ‘U2 Case’ (Towse 1997, Kretschmer 2002) and the subsequent MMC Report into performing rights (MMC 1996) illustrates the potential value of performing rights income as well as the contested nature of how it is collected and distributed. But aside from the case of Bourget and an all-powerful Irish rock band, very little is known about the more prosaic nature of copyright as it applies to live music. Academic and songwriter Matt Brennan has written about his surprise at receiving his first performing right statement from playing a major UK festival (Brennan 2012). That Brennan describes this income as “hidden revenues” is telling and entirely consistent with the finding of this study. It seems that creators are, by and large, oblivious to this type of income until it appears on their collecting society statement.

THE ‘HIDDEN’ INCOME STREAM

For ticketed popular music events the rate of 3% of gross box office receipts is paid to PRS and subsequently divided up between the composers and their publishers. PRS for Music has conducted a number of consultations on revising this rate upwards, the most recent in 2015 (Barr 2015). PRS argues that sponsorship and secondary ticketing income is unfairly beyond the scope of the PRS tariff. Concert promoters and venue owners have unsurprisingly objected strongly to any suggestion of a tariff increase⁵⁶. While PRS are quick to point out that in other territories this is often significantly higher than 3%⁵⁷.

This 3% rate may not sound particularly lucrative for rights holders or punitive to rights users but it can, in the right circumstances, represent a valuable income stream for songwriters and publishers. As Brennan indicates, larger gigs and festivals generate considerable sums in PRS fees. Even new-entrant artists playing support slots or playing unsigned stages at major festivals can receive an unexpected windfall from their share in the performing right fee.

⁵⁶ Like many lobbying organisations the Concert Promoters Association was founded in response to a specific event. In this case it was a proposed increase in the PRS Live Tariff from 2% to 6% in 1986. Ultimately the rate was settled at 3% in 1988 by the Copyright Tribunal (Barr 2015).

⁵⁷ PRS 2010 reports that in Italy, Spain and Switzerland this rate is as high as 10%. In the Netherlands, for example, the collecting society BUMA/STEMRA collects 7% though they rather controversially (MMF 2015a) offer a rebate to promoters and venues that does not find its way to creators.

Conversely, 3% can represent a significant cost to promoters and performers. Indeed, the PRS is generally one of the first expenses factored in to the costings and settlement of a live event spread sheet. While budgets may be trimmed on various production expenses such as crew wages, support band fees, or even brown M&Ms, there's no way round the PRS fee. In an industry characterised by high production costs and high risk, 3% can be a significant fixed cost.

For example, if a concert promoter sells 1000 tickets at £10 each, £240 is paid to PRS and proportionately distributed among the writers and publishers of the songs performed minus an administration fee ($1000 \times £10 = £10000 - 20\% \text{ VAT} = £8000 @ 3\% = £240$). It follows that larger shows with higher ticket prices will generate a larger pot to be shared by rights holders. Large festivals such as Glastonbury or T in the Park will generate hundreds of thousands of pounds for PRS members.

COSTINGS AND SETTLEMENTS

To illustrate what this looks like in the context of club and ballroom level shows in the UK live circuit, Table 4-11 shows some figures taken from costings and settlements from a selection of UK headline and support shows.. The costings of a show are sent from agents to artists setting out the show costs and the potential gross and net takings of the event, usually calculated on the (optimistic) premise of the show selling out. The settlement is the promoter's account of the ticket sales and the actual show costs, including the PRS deduction after an event has taken place. From this the performer's fee can be established. The fee is usually the greater of the net profit of the show or a pre-agreed fee, the so-called 'guarantee'.

Table 4-11: PRS as Proportion of Gross Receipts

Show	Attendance	Ticket Price	Gross Receipts ⁵⁸	3% of Gross
1	300	£7	£1826	£54.78
2	250	£6.50	£118.70	£3.56
3	250	£7.50	£1630.43	£48.91
4	910	£7.50	£5934.78	£178.04
5	1900	£15	£24782.61	£743.48
6	350	£8	£2434.78	£73.04

The settlement figure is then paid by the promoter to the PRS (or at least it should be!) and they distribute the total among the writers of the songs performed at the gig. This is subject to a 20% administration rate, far higher than the admin rate for digital which presumably reflects the greater cost of tracking live performances.

Table 4-12⁵⁹ illustrates what these types of distributions look like once they are paid through to creators in PRS distributions. Again, these are paid according to the conventional ‘writer’s share/publisher’s share’ model meaning a music publisher may only receive a return on a maximum of 50% of the total income received.

⁵⁸ Gross receipts are taken to mean total ticket sales net of, “Value Added Tax or any other government tax or imposition of like nature for the time being in force.” VAT was set at 15% in the data examined.

⁵⁹ In the case of songs 6A-6C the writer has not provided the society with song lengths therefore a default time of 3.01 is used by PRS, hence the identical payments for each song at each show.

Table 4-12: PRS Per Song Income

Event	Attendance	Song	Distribution per song	Revenue Per Audience Member
Major UK Music Festival	C. 80,000	6A	£136.43	£0.0016
		6B	£136.43	£0.0016
		6C	£136.43	£0.0016
UK Ballroom Show	C. 1900	6A	£28.68	£0.014
		6B	£26.68	£0.014
		6C	£26.68	£0.014
UK Club Venue	C. 300	6A	£6.11	£0.02
		6B	£6.11	£0.02
		6C	£6.11	£0.02
UK Major Music Festival	C. 80,000	7A	£148.55	£0.0019
		7B	£173.80	£0.0022
		7C	£152.66	£0.0019
UK Boutique Music Festival	C. 18000	7A	£7.21	£0.0004
		7B	£8.43	£0.0005
		7C	£7.41	£0.0004
UK Ballroom Show	C. 1900	8A	£15.22	£0.008
		8B	£14.80	£0.007
		8C	£15.22	£0.008

These tables provide a useful illustrative sense of just how valuable copyright income from live performance can be even to grass roots creators. A 10-song set on this basis would generate £1360, a considerable sum for an unknown, unsigned creator. However, this type of earning opportunity is likely to be a rare occurrence for grass-roots creators. At the other end of the spectrum, for the most successful artists these sums will pale into insignificance compared to the astronomical appearance fees they command. It is perhaps the mid-level artist who can secure multiple bookings on the summer festival circuit that stands to gain most from this “hidden” (Brennan 2012) income.

The average 'revenue per audience member' figure suggests that smaller shows may be more lucrative on a per capita basis, but in absolute terms the larger the gross receipts for the show, the more the creator can expect to receive from PRS. In a live context it appears that distribution of wealth is democratic and meritocratic. There is a clear and logical proportionality to these figures: the bigger the show the bigger the distribution. In this context copyright is a 'bums on seats' enterprise!

4.5: CONCLUSION

'ADDING UP' THE NUMBERS

The first point to make is that accessing the financial data examined here was exceedingly challenging. These obstacles are a feature of many research projects and are doubtless a contributing factor to the observable lacuna in the empirically sourced literature in this area. In many respects, overcoming these challenges is the most rewarding part of doing academic research.

The study found there to be a considerable volume of itemised, granular data available to creators relating to their copyright income, particularly through PRS for Music and music aggregator royalty statements. However, a troubling aspect of this is that creators too are unable to satisfactorily unpack the underlying mechanisms that lie behind these useful but ultimately superficial data sources. In practice, even creators that have not entered into contracts with third party investors become alienated from their works, administratively and procedurally, as soon as they release them into the digital sphere. That is to say they are entirely dependent on collecting societies and aggregators to license and collect income on their copyright with no influence over the underlying agreements these agents negotiate with digital services. This is particularly true in the digital realm. By comparison, assessing the value of copyright in the performance of live music is both straightforward and transparent.

On a more positive note, conducting this type of research affords the researcher the benefit of a wider view of the panorama of copyright income, a view not available to creators. This is particularly true for those at the start of their careers when they have little or no information relating to copyright income until they receive distribution statements coming, as they do, often months or even years after the activity that generated the income. The income data presented in this

chapter suggests that in the ‘new’ music economy of music streaming even relatively niche creators may be able to derive far more significant sums from copyright than existing accounts suggest. Similarly, the “hidden” revenue available from live performance can make a potentially important contribution to a ‘portfolio’ of copyright income streams.

Armed with this overview of how these niche creators generate income from copyright, it is clear that copyright in its natural state is inert. Many of the PRS statements and royalty statements examined displayed very little activity. Unless there is some catalyst for generating interest in the works they will be economically dormant. However, if the creator releases a record or goes on tour there can be an observable spike in revenue generated across the full range of copyright sources. This is not limited to the sources examined here but feeds into public performance and broadcast income and the more mysterious ‘pro-rata’ PRS income sources such as ‘Karaoke’, ‘Aerobics and Keep Fit’ or ‘Mood Music’.

In short, the main findings of this chapter are twofold. While there is a significant amount of useful copyright data available to creators, the underlying mechanisms governing these payments remain concealed. The second main finding is that copyright can and does generate apparently significant income, even for grass-roots creators.

WHAT NEXT?

Building on these findings, a qualitative assessment of what copyright ‘means’ to individual creators is conducted in the interview-based chapters of the thesis. The next step in this study is to shift the focus from the collectively negotiated copyright transactions to individually negotiated copyright transactions between creators and investors.

CHAPTER 5: COPYRIGHT CONTRACTS

5.1 INTRODUCTION

The music business is a cruel and shallow money trench, a long plastic hallway where thieves and pimps run free, and good men die like dogs. There's also a negative side. (Hunter S. Thompson⁶⁰)

Hunter S. Thompson's account of the music business is characteristic of the many literary works of fiction and non-fiction penned about the darker recesses of the music industries⁶¹. Indeed, numerous songwriters have put to music accounts of the pernicious nature of a life in the 'business'⁶². Furthermore, many industries 'insiders' have depicted a rather unfavourable 'warts and all' picture of the business they work in (Albini 1993, Goldberg 2000). Unfair and downright immoral contracts often lie at the heart of these accounts. To anonymously quote an experienced artist manager; "a major record contract has a hundred pages. The first three tell you what you're going to get...the next ninety seven tell you why you're not going to get it."

In the sphere of academic scholarship, the music industries are, of course, approached far more dispassionately. Nevertheless, much of the scholarly literature is premised on gloomy narratives of the subjugation of art and artist by commerce and capital (Caves 2000, Hesmondhalgh 2007, Stahl 2012). These critiques of artist labour markets find that oversupply of creative labour combined with concentrated patterns of ownership result in a 'race to the bottom' for competing "symbol creators" (Hesmondhalgh 2007: 17). The inevitable outcome of this 'race', it is said, sees creators cheaply sign away the copyright that subsists in their works (Wallis 2004:103, Kretschmer 2005: 7). Invariably, at the heart of these narratives of oppression lies a contract, or a collection of contracts: the record 'deal' and the publishing 'deal'.

⁶⁰ This quote, and variations of it, are usually attributed to Gonzo journalist and author Hunter S. Thompson but its origins are obscure.

⁶¹ Examples of this include: Frederick Dannen: *Hit Men: Power Brokers and Fast Money Inside the Music Business*, Simon Napier-Bell: *Black Vinyl White Powder*, Andrew Loog Oldham: *Stone Free*.

⁶² AC/DC: *It's a Long Way to the Top if You Wanna Rock 'n' Roll*, Brook Benton: *Hit Record*, Melanie: *Record People*, Pink Floyd: *Welcome to the Machine*.

CONTRACTS AND CONFLICT

In spite of the central role the contract plays in broader critiques of the music copyright industries, very little is known about the content of these deals or the relationship between the contracting parties. Most of what is known about how these transactions play out is gleaned from transcripts of court proceedings. Typically, these cases find creators, in the main commercially successful stars, challenging the agreements they entered into *before* they became successful (Greenfield & Osborn 2007, Laing 2012, Stahl 2013). The depositions and disclosures of disgruntled stars and executives are undoubtedly rich sources of qualitative data about the otherwise clandestine commercial activities of popular music practitioners. It is, however, hardly surprising that the picture that emerges is one of conflict, grievance and discord, given the adversarial circumstances that lead to a court case.

Moreover, evidence from the field suggests that this discord is in fact far less keenly felt among practitioners than much of the literature would have it. That is not to say these forces do not cast long shadows but, in the main, creators and investors attempt to construct workable commercial relationships in pursuit of common goals. There are, of course, contested issues, differences of opinion and divergent views, but it is important to recognise that the vast majority of creator/investor transactions will not be contested in court and will quietly run their course⁶³. Yet little academic attention has been devoted to the ‘lived experience’ of these more prosaic, uneventful and altogether more commonplace transactions. There is much to be learned about the detail of *how* and *why* creators transact what is potentially their most valuable commercial asset: the copyright that subsists within their musical works and sound recordings of these works. To that end, this chapter seeks to set aside narratives of discord and dispute in favour of a far more dispassionate examination of the content and character of copyright contracts.

⁶³ For more on court cases concerning music industry disputes see: Yanover & Kotler (1989) on unfair contracts, Bright Tunes Music Corp. v Harrisongs Music, Ltd. (1976) on plagiarism, Free (2002) on authorship disputes.

COPYRIGHT AND THE CONTRACT SPACE

The previous chapter of this thesis argued and demonstrated that copyright as an exclusive assignable property right is potentially of significant economic value to its owner. A founding principle of copyright is that it should, notionally at least, provide incentives to creators to produce copyright works⁶⁴. However, in its natural state it is commercially inert until a catalyst is introduced. This could be the endeavour of the primary creator or the activities of a third party investor in exploiting the ‘bundle of rights’. In effect the contract is the means by which copyright’s exclusive rights are converted into financial incentives and rewards for creators and investors (Kretschmer et al 2010: 1). Contract is the mechanism by which control is transferred (by assignment or licence) and sets out the conditions of this transfer.

Copyright law determines what rights can and cannot be included in contracts. For example, a recording artist will routinely assign their performers’ property rights⁶⁵ to a record company. Conversely, performers’ non-property rights are not assignable⁶⁶. Just as copyright dictates which rights can and cannot be transferred it also limits the temporal dimensions of the contract to the maximum copyright term. For example, a creator can assign copyright to a publisher on a ‘life of copyright’⁶⁷ basis, but they cannot assign copyright ‘in perpetuity’ for the simple reason that the copyright will ultimately expire and with it the exclusive rights it affords. Therefore, the “contractible space” (Kretschmer *et al* 2010: 17) is not boundless; it is to a significant extent limited by copyright law. But the scope of a copyright contract does not necessarily extend to the outer boundaries of the ‘contract space’.

Rather, there is considerable variety across the spectrum of recording and music publishing contracts. At one end of the spectrum are agreements where copyright law only notionally defines the contract space such as those between niche

⁶⁴ This founding principle present in The Statute of Anne 1710 that copyright is for the “...encouragement of learned men to write useful books” endures in Gowers’ assertion that IP, including copyright, should offer, “...incentives to innovate” (2006: 12).

⁶⁵ Performers’ property rights: reproduction right, distribution rights, rental and lending right, and making available right

⁶⁶ Performers’ non-property rights: the right not to be recorded live (except for private use), not to be broadcast live, not to be recorded off a live broadcast (except for private use), the so-called “use it or lose it” right, the right to supplementary annual remuneration” (MU 2015).

⁶⁷ ‘Life of copyright’ is a contract pegged to the maximum term of copyright in the territory that the work is being exploited. In a UK context this is Life of the author + 70 for musical works and 70 years from publication for sound recordings. Many contracts include clauses such as, “... for the life of copyright (life as may be extended)” in order to ‘futureproof’ these deals against any subsequent copyright term extension.

creators and 'micro-labels' where deals are agreed on the basis of no more than a verbal agreement and a handshake. In such arrangements control of copyright is not formally transferred. A more formalised type of record 'deal' that is still commonly operated today emerged from the Post- Punk 'DIY ethic' record companies of the early 1980s such as Rough Trade (Hesmondhalgh 1998). In these agreements label and artist would share any profits on a 50/50 basis and crucially, the copyright in the sound recording would revert to the artists after an agreed period of time. These deals were seen as offering an alternative, and indeed a critique of, the altogether more expansive contract space of the major record labels with far lower royalty rates and much lengthier retention of copyright.

At the other end of the spectrum lies the so-called '360 Degree Deal' that has attracted the attention of a number of academics and commentators (Jones, M. 2012, Marshall 2012b). In these contracts, investors secure an interest in all aspects of an artist's career beyond copyright in sound recordings, including: publishing, live performance revenues, merchandise and endorsements. The extent to which this type of deal has moved, "from the exception to the rule" (Jones, M. 2012: 142) remains unproven and, mindful of Williamson and Cloonan's warning against putting, "square pegs in round holes" (2007: 319), somewhat unconvincing. However, as shall be demonstrated and discussed in due course, there remains considerable variety in the types of agreements throughout the recording and the music publishing industries.

5.2 COPYRIGHT AND CONTRACT

Ultimately, record contracts and the music publishing contracts are, usually⁶⁸, a written expression of the commitments and rewards on offer to each party and, notionally at least, the basis of the working agreement (Caves 2000: 125). The scope and shape of the contract space are likely to be dictated by a multitude of factors. Some of these are made explicit in the contract itself, for example a large advance may be reflected in a long retention period designed to allow the company to recoup a significant 'front-end' outlay. Others factors influencing the nature of a deal can reasonably be deduced by taking a holistic view of the

⁶⁸ It is an interesting anomaly between copyright law and 'real world' industry practice that the CDPA states any assignment or license of copyright must be written down in order to be binding (CDPA S.90 (3)) yet unwritten, 'handshake deals' or what Caves (2000: 14) describes as "implicit contracts" are commonplace, particularly at the margins of the recording industry.

contract, the status of the parties involved and the milieu in which they are operating. This approach can reveal much about the relative bargaining power of each party and the supply and oversupply of creative labour for example. It is reasonable to assume that a new entrant creator will be offered a different type of deal to a creator with an observable track record of success. That said, in some cases the forces governing a particular artist or label doing a particular deal can defy logical explanation.

The subtler aspects of *how* creators and investors approach copyright contracting and *why* they enter into such deals are a matter for the final part of the thesis. For now the focus is trained on *what* is contained within contracts.

MAKE OR BUY

In theory at least, the creator has a wide range of options when it comes to assigning, licensing or retaining the copyright that subsists in their works. This ranges across the spectrum described earlier from ‘Digital DIY’, where the creator retains control of all of their copyright and seeks to exploit it by their own endeavours, to the all-encompassing ‘360° Deal’ where the creator cedes control of every aspect of their career to a third party investor. In essence, much of the variance can be observed in the extent to which the creator cedes control of what Caves calls “decision-rights” (Caves 2000: 15) to investors and how much control they retain. However, if they self-release they retain full control over their works and the copyright therein.

In this sense the decision-making of the individual creator is analogous to a ‘make or buy’ decision⁶⁹. ‘Make or buy’ refers to the point at which it becomes economically preferable for an individual or an organisation to *make* a product or alternatively *buy* that product (Beskano *et al* 2010). In a domestic setting this could be the decision to *make* kindling for the fire or *buy* some at the petrol station. In a commercial setting the record company may make records at its own pressing plant or outsource production to an overseas pressing plant.

In a popular music context, the analogy can be stretched to that of the creator deciding to *make* and self-release their works. Alternatively, they could enter into a rights transaction with an investor that involves some assignment or licensing of

⁶⁹ The ‘make or buy’ analogy was helpfully suggested by Will Page: Director of Economics, Spotify, at a meeting of the MCDA Advisory Board, University of Glasgow, January 31st 2013.

rights in return for investment. In this sense they might be described as using their rights to *buy* their way into the marketplace. In most instances this decision will, of course, be purely hypothetical as the huge oversupply of creative labour suggests very few will ever actually be offered any kind of deal by a record company or publisher. Again, for the purposes of a comprehensive exploration of the potential ramifications of differing approach, for now at least, the assumption is that all options are on the table.

COSTS AND BENEFITS

A creator that has the benefit of ‘real world’ experience of multiple offers from record companies, David Byrne⁷⁰ (a creator and a commentator), characterises the ‘make or buy’ decision as a trade-off between “more control” and “less control” as illustrated in Figure 5-1 (Byrne 2012: 220).

Figure 5-1: David Byrne’s Model of Less/More Control



Byrne posits that the larger investment associated with larger music companies results in the creator having less control over their works and a more extensive assignment of rights. However, with this comes a better chance of commercial success. By the same token, where investment is lower, it is possible that the creator may enjoy more control over their work and may stand to gain more in the event that the project is a commercial success. The cost of such a decision is that smaller deals, albeit with better terms, may have less potential to reach wide audiences and the associated financial return.

Byrne’s ‘more/less’ control dichotomy is essentially a cost/benefit analysis of various routes to market and contracts that are on offer to musical creators. Using Byrne’s model as an exemplar for assessing copyright contracts, this approach

⁷⁰ David Byrne is a former singer with American Post-Punk band *Talking Heads* and has also been involved in various collaborations and solo projects. In Chapter 7 of his book *How Music Works*, he uses financial records from different projects he has been involved in to demonstrate the creative, economic and contractual ramifications of entering into various recording agreements.

has been expanded and developed in this study using the terms ‘commitment’ and ‘reward’ in place of ‘cost’ and ‘benefit’. Economic theory provides various rationales underpinning the incentives and rewards in contracts (Caves 2000, Kretschmer et al 2010). The contract must, to some extent, appeal to the motivations and ambitions of each of the contracting parties. It provides ‘front end’ incentives and inducements to enter into the contract in the first instance and ‘back end’ incentives to encourage each of the contracting parties to remain productive over the course of the contract. Similarly, the contract contains commitments made at the outset and residual obligations over the term of the agreement and any post-term conditions. These will be examined in due course, but before doing so it is important to clarify the key distinctions between the record deal and the publishing deal with regards to copyright.

AUTHORSHIP AND COPYRIGHT CONTRACTS

Although record contracts and publishing contracts share many of the same core elements and characteristics, they diverge significantly around the issue of authorship of the underlying copyright work.

The music publishing industry is a somewhat abstruse industry to many outsiders, including academics and creators, particularly when starting out in the business. The word ‘publishing’, something of a relic of an age when the main business of the music publisher was reproducing and publishing printed manuscripts, is no doubt a contributing factor. The sheer range of licensing activities that the industry now engages in makes the publishing industry, for many, a baffling enterprise. However, the issue of authorship in the contract between creator and publisher is relatively straightforward⁷¹. In the majority of cases the author is an identifiable primary creator or group of creators. As soon as fixation⁷² of the work occurs the author or authors of a song own the copyright in the song until seventy years after the death of the author or last surviving author. Within this lengthy window of

⁷¹ Straightforward in the context of the agreement between author and publisher. Of course, identification and attribution of authorship among creators is often far less straightforward as evidenced in cases such as *Bright Tunes Music Corp. v Harrisongs Music, Ltd.* (1976) *Beckingham v Hodgens*, *Fisher v Brooker* (2006).

⁷² For copyright to subsist in a musical work, ‘fixation’ must occur: “Copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise; and references in this Part to the time at which such a work is made are to the time at which it is so recorded.” (CDPA s3 (2)). In music recording on a mobile phone for example easily satisfies this baseline requirement.

opportunity the copyright in the work may be assigned or licensed to a publisher in a transaction between creative labour and capital (Jones 2012: 2012).

The issue of authorship of the sound recording is not as straightforward. Michael Jones states that the main purpose of the record contract is, “establishing what a recording is from the perspective of the recording company; when it should be delivered to them; how much it will be sold for; where; by whom and with what financial rewards for both parties” (2012: 131). In addition to this, attribution of authorship is a key function of the contract, and authorship of the sound recordings is a contested issue. As discussed in the previous chapter, the author of a copyright work is the first owner of any copyright in the work and holder of a ‘bundle’ of exclusive rights. The author of a musical work is, in most cases, easily recognised as a composer/songwriter.

The wording of the CDPA finds the author of a sound recording to be, “the person by whom the arrangements necessary for the creation of the work are undertaken” (CDPA 9(2a)). As with many aspects of copyright law an apparently straightforward clause contains sufficient breadth as to be open to interpretation. Copyright in a sound recording is divided into two parts: *producers’* rights and the weaker *performers’* rights (Arnold 1997). Control of performers’ property rights is routinely assigned to record companies by performers in the record contract. The recording industry’s attitude to authorship of sound recordings is simple: whoever *pays* for the recordings, *owns* the recordings. It follows that the author of the recording is not a primary creator, and may not even be a person, rather, the author is the *producer* of the recording: traditionally a record company⁷³. But this does not necessarily clarify the matter. Pointing to the vagueness of the Act, Richard Osborne (2014b) challenges the assumption that the record company can legitimately claim authorship (Osborne 2013).

Osborne’s argument is that if the record company is contractually permitted to recoup the recording costs from sales and other exploitation of the recordings then technically the artist is paying for the recording albeit on a deferred basis. On some levels this is a compelling argument that makes creators rather than record companies the author of a sound recording. The danger of Osborne’s logic, for

⁷³ The word *producer* is used here in the legal sense to denote the producer of a ‘good’ rather than in the more conventional music industries’ conception of ‘record producer’ e.g. George Martin, Phil Spector, Timbaland. For a fuller discussion of the evolution of the term Producer in copyright legislation see Osborne (2014b)

creators at least, is that record companies could employ precisely the same argument to retain copyright in recordings of any artist that does not recoup recording costs. Indeed, as shall be argued in this thesis, the issue of retention of copyright in sound recordings is potentially far more problematic than attribution of authorship.

Putting the issue of retention aside for now, the pragmatic solution employed in the industry to the contested issue of attribution of authorship of sound recordings is to attribute ownership in the text of the record contract. In this respect the contract 'double-locks' the working assumption that the record company is the author of the sound recording by securing a written agreement to that effect from the artist. It is, however, worth noting that in this age of Digital DIY and self-release, creators themselves can with increased ease and affordability become producers (in the legal sense), and therefore authors, of sound recordings.

ASSIGNMENT AND LICENCE

Before looking at the exemplar contracts it is important to clarify the distinction between an *assignment* and a *licence* of copyright to a third party investor. The assignability of copyright is enshrined in law (CDPA s. 90 (1)) and is key in turning an inert right into a potentially valuable commodity. The work of Andreas Rahmatian (2009/2011) is particularly instructive and comprehensive on the underlying philosophical distinctions between assignment and licence of copyright in a number of jurisdictions. An altogether more rudimentary understanding of the distinction is sufficient here.

The assignment of copyright is tantamount to a full transfer of ownership of copyright from the original author to a third party. The licence is a more limited grant of permission by the owner (i.e. the author) to a licensee to exploit the works. The author, however, retains ownership of the work in its entirety. An assignment of copyright, such as that in a publishing contract, has the effect of splitting authorship and ownership (Rahmatian 2009: 5) inasmuch as the author retains the inalienable right to be identified as the author as well as other moral rights, while the publisher is the new owner of the copyright in the work. It must be noted that the assignment of copyright does not necessarily mean the assignee will own the work outright for the duration of copyright. Rather, it is common, in publishing at

least, for rights to revert to the author long before copyright in the work expires (Thompson 118).

In practice, the creator who exclusively licenses their works is unlikely to notice any significant difference in how their copyright is exploited to one who fully assigns their copyright. The licence granted to the record company or publisher is likely to be so extensive as to, “exhaust all possible forms of exploitation and leave the ownership right empty in effect” (Rahmatian 2009: 12). Therefore, in the context of this study these subtle distinctions between an assignment and licence of copyright are primarily academic and therefore of limited relevance to creators’ lived experience of these transactions. Indeed, in a number of the interviews it is apparent that the term ‘licence’ is used to denote a short-term exclusive transfer of control of copyright rather than the type of ‘life of copyright’ assignment that is common in the recording industry. Whether or not this casual use of the word ‘licence’ technically amounts to an assignment or a licence is largely incidental.

What is of far more significance here, as Rahmatian explains, is that “with the first assignment the copyright in the work has a life of its own, independent and divorced from the creator of the work” (Rahmatian 2011: 203). In effect, the act of assigning copyright, and transfer by exclusive licence, opens up the potential for the creator to become alienated from their work. The significance of this alienation shall become fully apparent in the later sections of this thesis.

5.3: CONTRACTS: PRACTICE AND THEORY

The purpose of this section of the chapter is to introduce examples of contemporary recording and publishing contracts⁷⁴. The intention here is not to make definitive assertions about the content and character of music copyright contracts. The unavailability of relevant data precludes any claims of representativeness. Rather, the objective of examining this sample of contracts is to provide an illustrative account of significant elements of music copyright contracts. Building on the main elements that are common across this constellation of copyright contracts it is then possible to offer a model of the key

⁷⁴ As stated in the methodology, all of the contracts featured were still active at the time of the research. That is to say, even if the artist had been ‘dropped’ the investor was still contractually in control of the copyright by assignment or licence.

‘front-end’ and ‘back-end’ commitment and reward elements of music copyright contracts.

COPYRIGHT CONTRACT EXAMPLES

Tables 5-1 and Table 5-2 address the distinct aspects of record contracts and music publishing contracts respectively. The methodology chapter details the provenance of the anonymised contracts examined here. The contracts are presented in order of their scope, from most expansive to least expansive. For example, record Contract 1 (RC1) is a “life of copyright” assignment of copyright with multiple ‘options’. RC 5 is a loose verbal agreement with limited commitment on the part of the creator, and indeed the investor. Similarly Publishing Contract 1 (PC1) is a multi-option *exclusive writer* deal encompassing all works written by the writer during the contractual term. PC3, on the other hand, is limited to a pre-agreed selection of songs.

RECORD CONTRACT SAMPLE

Table 5-1: Record Contract Sample

Contract Type	Commitment	Reward
Record Contract 1 (Independent: Label Group)	Scope: 1 album with 2 further options Territory: "The Universe" Assignment of "all performers' property rights" and specific ref to "making available right" Term: 5 months after release Post-Term: 'life of copyright' assignment 5 year re-recording restriction years	Advance: £40k plus recording, legal fees and tour support Royalty: 15% headline royalty on physical/digital sales and streaming in UK. Reduced for other territories. Rate increases 0.5% per option 50/50 split licenses e.g. synchronisations or overseas digital income.
Record Contract 2 (Independent: Label Group)	Scope: 1 Album with 3 further options. Territory: "The World" Term: 12 months Post-term retention of license: 10 years after expiry or termination of term	Advance: Initial advance of £60k plus recording, legal fees, equipment and transport budget ⁷⁵ . Option advances escalate c. 30% on a per minima/maxima basis Royalty: 50/50 royalty split with label on all exploitation.
Record Contract 3 (Independent: Standalone)	Scope: 1 album with 2 options Territory: "The World" Term: Maximum of 3 years Post-term retention: 15 Years 5 year re-recording restriction years	Advance: A maximum of £10k increasing at £5k increments per option Royalty: 16% headline royalty 50/50 on licenses such as syncs
Record Contract 4 (Independent: Label Group)	Scope: 1 EP no further obligation Territory: "The World" Creator to deliver recordings and artwork at own expense Term: n/a Post-Term: 'life of copyright' 3 year re-recording restriction	Advance: No advance Company pays reproduction costs Royalty: Flat rate of 50% royalty on "net receipts" from exploitation of recordings
Record Contract 5 'Handshake Deal' (Independent: Micro-Label) ⁷⁶	Scope: 1 album Territory: The World Term: 1 year 'rolling' term renewable by mutual agreement No post-term retention Creator to deliver recordings and artwork at own expense	Advance: No advance Royalty: 50/50 split on any profits Company pays reproduction and marketing costs

The most obvious feature of the record contract sample is the diverse nature of the key elements of the contracts. There are numerous *types* of deal and within these

⁷⁵ Exact sums rounded down £5k in order to ensure anonymity of source.

⁷⁶ As described by record company owner and corroborated by an artist 'signed' to the label

types it seems there is significant latitude for negotiation (Hull 2004: 79). The commitment the creator makes in respect of the scope and term of the deal varies considerably. The rewards they can hope to receive in terms of advances and royalties are equally varied. The many profound and inconsequential nuances within these deals provides the first evidence that the suggestion that copyright contracts are negotiated on a 'take it or leave it' basis is unfounded, or at the very least, greatly overstated. Indeed, a number of the contracts examined had been 'redlined' and 'blacklined' by lawyers in order to make amendments to the terms initially offered by the record company and publishers⁷⁷.

It is also noteworthy that these contracts are limited exclusively to sound recording rights and make no encroachments into other aspects of the creator's commercial activities. In these contracts at least there is no evidence of a '360 Degree' approach being employed. Indeed, the examples from the literature suggesting the '360 deal' is now 'industry standard' (Jones 2012, Marshall 2012b) invariably cite the "penthouse suite deals" (Greenfield and Osborn 2007: 5) offered to megastars such as Madonna, U2 and Jay-Z. Given the economics of touring and merchandising at lower levels of the industry it is questionable if record companies are likely to have any real appetite for a contractually binding interest in a suite of subsistence or loss-making activities of creators on the ground floor or in the basement.

It is, however, interesting that in two of the contracts provision is made for 'tour support' where the record company subsidises the cost of loss-making tours in the hope that the tour serves as a marketing tool for the records⁷⁸. It should be noted that these tour support budgets are discretionary, subject to the label's approval rather than obligatory. Moreover, tour support along with advances, equipment budgets, recording budgets and a whole host of other expenses are fully recoupable.

As is the case with most expenses incurred by the label in support of an artist's career, the artist ultimately pays. The issue of debt and recoupment is often cited as an example of the onerous nature of music copyright contracts. Whether this

⁷⁷ In their submissions to the Monopolies and Mergers Commission Report the recording industry collectively refuted suggestions that record contracts are either "standard form" or "non-negotiable" (MMC 1994: 250).

⁷⁸ While the industry is keen to trumpet tour support as key way in which they support new artists, journalistic and anecdotal reports suggest tour support has diminished along with record sales.

can correctly be considered 'debt' in the conventional sense is challenged shortly. Far more onerous in the contracts featured here is the presence of one-sided 'option' deals and lengthy post term retention of copyright serving as a reminder that, in these cases at least, the record company held a vastly superior bargaining position to the creator. Yet there is evidence that some kind negotiation beyond 'take it or leave it' has occurred.

But rather than suggest that the majority of creators wield *significant* power in their negotiations with record companies, the argument being developed here is that there is latitude in the negotiation even on significant 'deal points'. It is also apparent that there is considerable variety in the attitudes and approaches of record companies. The empirical evidence here suggests the idea of an 'industry standard' contract, largely premised on the promulgations of journalistic and trade press accounts, found in Jones (2012) and Marshall (2012b) is questionable. Rather, Greenfield and Osborn's notion of "quasi-standard form with the same basic constituents, although the details may differ in each case" (Greenfield and Osborn 2002: 72) appears to be a more accurate appraisal. Indeed, in support of this there is observable and meaningful diversity in the small sample examined here. It is also apparent that seemingly subtle variations in "details" can have profound ramifications for creators' experience of copyright. This tentative finding is given more credence when the publishing contract sample is taken into account.

PUBLISHING CONTRACT SAMPLE

Table 5-2: Music Publishing Contract Sample

Contract Type	Commitment	Reward
Publishing Contract 1 (Major) <i>Exclusive Writer Agreement</i>	Scope: 4 x 1 year options, Territory: "the solar system" Term: 15 year post-term retention, exclusive writer deal	Advance c. £20k paid in instalments. Advance on subsequent options for incrementally increasing to £60k for final option. International collection at source Royalty: 70/30 royalty split in writers' favour.
Publishing Contract 2 (Independent) <i>Administration Agreement</i>	Scope: Exclusivity limited collective activities of a band Territory: the world Term: 3 years with mutually agreeable renewal 1-year option for a further 3-years. No post-term retention	Advance: No advance Freedom for individual writers to publish other works elsewhere Royalty: 80/20 royalty split in writer's favour
Publishing Contract 3 (Independent) <i>Multiple Song Agreement</i>	Scope: limited to 10 named songs with no obligation for further commitment Territory: The world Term: 2 year exploitation period + 1 year renewable option	Advance: Nominal \$1 Advance Writers can publish other works with other publishers Royalty: 50/50 split 'on receipts' between writer and publisher ⁷⁹
<i>Publishing Contract 4</i> (Publishing Trade Organisation) <i>'Single Song' Agreement</i>	Scope: 1 song Territory: Negotiable Term: may vary considerably but the publisher is likely to request a long assignment	Advance: likely to be nominal except where the writer/song has a track record. Royalty: Varying royalty rate dependent on status of the writer and song.

Again the most apparent feature of this sample is the high degree of variance among the contracts. Again, for the academic researcher, while there are standard form contracts (Tschmuck 2009: 259) such as the 'fill in the blanks' single song assignment, it is something of an inconvenient reality that there is no 'industry standard' music publishing contract. A number of authors, albeit from an industries rather than an academic standpoint, offer instructive overviews of the various types of agreements that are a feature of the music publishing industry (Gammons

⁷⁹ This type of 50/50 deal is believed to be uncommon among publishers currently operating in the UK, although typical of 'legacy' contracts predating *Schroeder v Macaulay* (1974). Collecting 'on receipts' rather than 'at source' means a sub-publisher will be involved in overseas territories. The sub-publisher will deducted a share in addition to the main publisher thus reducing the creator's potential income from any overseas use. In many senses this appears to be a 'bad deal' by today's standards and an impasse in negotiations between publisher and writer meant the contract was never signed.

2011: 85, Thompson 2012: 118). Ann Harrison identifies seven main types of music publishing contract.

Figure 5-2:

Types of Music Publishing Contract (Harrison 2008: 96)

- Exclusive writer contract
- Single song assignment
- Co-publishing agreement
- Administration agreement
- Sub-publishing contract
- Collection agreement
- Synchronisation agreement⁸⁰

In practice, these types are not direct equivalents or substitutes and Harrison's taxonomy inevitably conceals much of the complexity of music publishing business models. Some of these contracts are negotiated between creators and publishers, some are agreements between publishers and other publishers and some are business-to-business transactions between corporate rights holders and corporate users. Unpacking the intricacies of these relationships is beyond the scope of this thesis.

Of primary interest in this study are contracts that are negotiated between primary creators and music publishers: *exclusive writer contracts*, *administration contracts* and *single song agreements*.

The publishing contracts featured here contain many of the same or similar elements to the record contract in respect of options, advances, post-term retention and royalty splits but also contain some important differences. Firstly, when reduced to these key 'deal points' the publishing deal appears to be far more 'artist friendly' in terms of royalty rate and retention of copyright. It also appears that the scope of what the creator commits to the deal can vary quite significantly. This ranges from; all of the works written by a creator in a set time period in the

⁸⁰ The 'synchronisation deal' when recorded music is 'synchronised' with film, TV and other moving images in many ways resides in the same 'saviour of the music industries' category as live music and the '360° Deal'. Just as is the case with the others, there is scant evidence to support such claims. Indeed, the sale of sheet music, reduced in some accounts to an arcane historical footnote, far outperforms synchronisation rights as a share of the UK publishing industry's revenue sources (Towse 2015)

exclusive writer deal, or it could relate to a specific song in a *single song agreement*.

When reduced to these essential elements the publishing contract is a relatively straightforward transaction. The writer may negotiate deals on a song-by-song basis or enter into an exclusive writer agreement where, for a specified term, all of their output falls within the scope of the contract. Of course in the highly competitive music market the writer may be happy to have any offer at all. However, in the event that the writer is faced with a genuine choice, the course they choose has potentially wide-ranging and long-lasting ramifications in terms of incentive, reward and, ultimately, control of published works.

MODELLING COPYRIGHT CONTRACTS

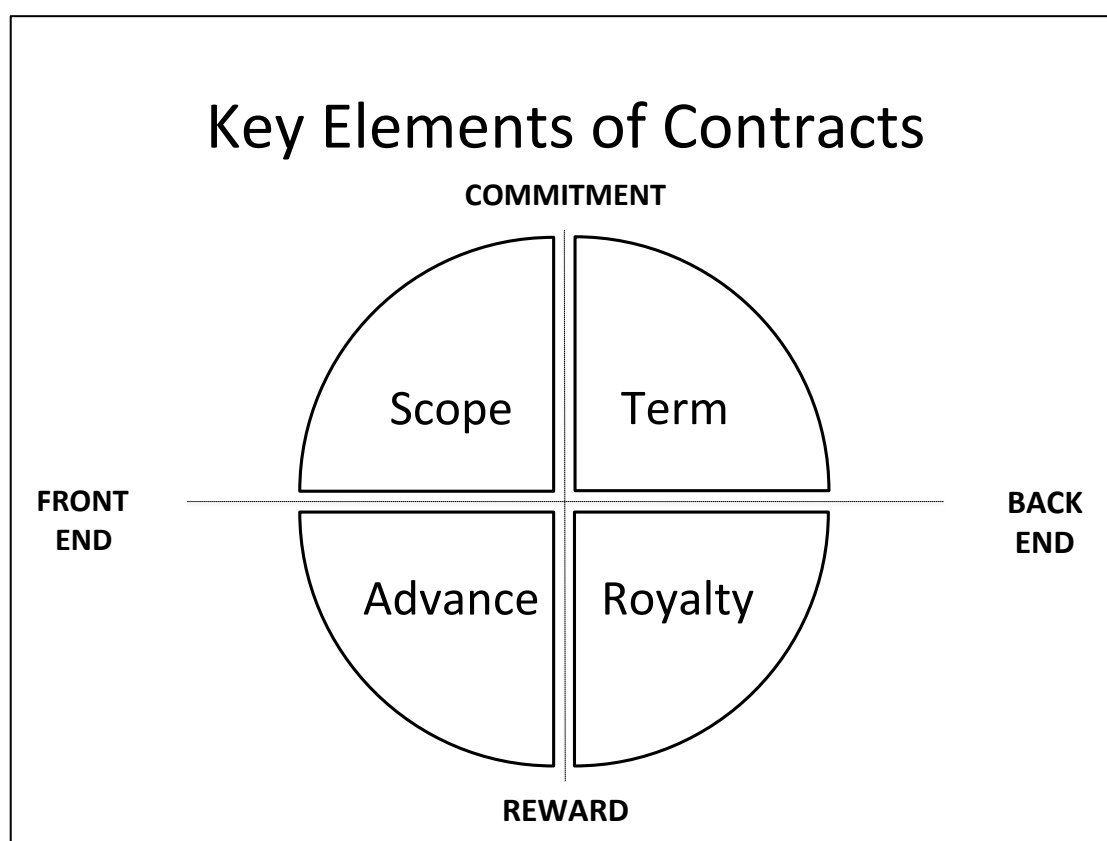
So far, the arguments made here run counter to a number of academic accounts of music copyright contracts. This opposition is largely on the grounds that these accounts construct overly convenient taxonomies of copyright contracts in the two core music copyright industries. Drawing on the contracts examined here it is possible to model copyright contracts according to their core *elements*: commitment and reward.

What emerges from the discussion so far is an impression of the creator faced with a dizzying number of factors when considering how best to exploit the copyright in their works. Whether to sign with a major or independent publisher: whether to assign the work or license the work. Is it better to accept a lower royalty with a publisher that collects 'at source' or a higher royalty from one that collects 'on receipts'? Should the writer seek a large advance payment against future royalties or eschew an advance in favour of an improved royalty rate? Of course there is no definitive answer to any of these questions.

The contract is to some degree a trade off between the commitment and obligation made by the contracting parties and the incentives and rewards on offer. As shall be discussed, the exclusivity of such contracts inevitably means that choosing one option effectively rules out others. However, the ramifications of such decisions can only ever be assessed retrospectively, and even then it is only possible to speculate as to the outcomes of alternative opportunities forgone. Copyright transactions, like life, must be experienced forwards but can only be understood backwards!

It is however possible to unpack some of the *potential* costs and benefits attached to different types of contracts. Operating from a creator's perspective Figure 5-3 provides a model of the key elements of the commitment and rewards contained in a contract at the outset (Front End) and those that are a feature of the contract over its duration (Back End). At the 'front end' of the deal the contract identifies and defines the scope of the agreement in respect of what works are to be assigned or licensed, what commercial activities and the territories the deal is to cover. The 'back end' commitment is reflected in the term of the agreement and any post-term retention of copyright after the contract ends. Variance in any or all dimensions will have implications for the revenues and earnings of creators.

Figure 5-3: Key Elements of Music Copyright Contracts



COMMITMENT: SCOPE AND TERM

The common element of all of the contracts here is that they are in some respect *exclusive*. This exclusivity invariably affords the investor the exclusive right to exploit the copyright in works covered by the deal. Therefore, at the outset of a contract the creator must make some kind of contractual commitment of copyright works to the deal. Beyond this fundamental tenet, the scope and term of this exclusivity displays considerable variability. The outer limit of the "contractible

space” (Kretschmer *et al* 2010: 17) is limited by the scope (the ‘bundle of rights’) and maximum term of copyright (70 years for recording contracts and life plus 70 years for publishing contracts) set out in law. Therefore, the scope and term of any contract must fall within these parameters. A creator cannot, for example, assign the inalienable element of their performers rights. Neither can they assign copyright in their songs for ‘life plus 100 years’ since exclusive rights in the work expire after ‘life + 70’.

SCOPE

The ‘scope’ of the deal represents what the creator puts into the deal in terms of works and, in spite of the limitations copyright places on the ‘contract space’, the scope of the copyright contract can be sprawling. The contracts featured here cover exploitation in *all* territories; terrestrial and extra-terrestrial! To quote PC1, “Territory shall mean the ‘Solar System’”. The enforceability of a copyright contract on Mars is doubtful, but the purpose of such expansive territorial scope is to allow the record company or publisher to exploit the works beyond the domestic market, or to license other operators to do so. Just as contracts include contingencies for interplanetary exploitation of copyright, they also contain clauses designed to ‘futureproof’ the deal, not only to incorporate any copyright term extension but also to include, “...all formats whether now known or hereinafter invented” (RC4). This is clearly designed to defend against creators arguing that new technologies are not covered by the terms of the original agreement⁸¹. These catchall clauses are present in all of the contracts examined here with the exception of RC5 the ‘handshake deal’ and PC4 the ‘fill in the blanks’ single song agreement. In these agreements the temporal, territorial and technological scope of the deal is uncertain and, presumably, negotiable.

Beyond these catchall clauses, the parameters of the ‘contract space’ vary considerably with some record contracts extending to the maximum temporal boundary (RC1 and RC4) and others stretching only as far as one album for one year (RC5). Contracts RC1, RC2 and PC1, are the most acquisitive in terms of the ‘front-end’ scope of the deal. In effect, the creator is exclusively assigning their entire creative output in that field to the company. “The Writer hereby agrees to

⁸¹ Indeed, in Sweden and Finland artists have been successful in arguing that the terms of their original contracts do not cover music streaming, thus requiring the company to ask permission to exploit the ‘making available’ right (Cooke 2015).

write and/or compose compositions exclusively for the Publisher during the term” (PC1). While many contract clauses are convoluted in their complexity, the language here is direct and the obligation of the writer is in no doubt: they will write songs *only* for the publisher during the term of the contract. The creators involved in all three of these deals were relatively new entrant creators with no track record of commercial success. In short there was little evidence of consumer demand for their works and as such the writers wielded little bargaining power in their dealings with a large music companies.

In PC2 the creator is required to commit far less in terms of copyright works. Only works created and performed by writers operating as a group or band are covered by the contract. Any works they write outside of the band are not subject to the contract. In this respect, the writer is obliged to commit less to the deal in terms of copyright works. Moreover, rather than a full assignment of copyright this contract is a licence of copyright from the writers to the publisher. The contract states, “writer to retain 100% ownership. *Anonymous Independent Publisher* to administer all rights relating to the musical compositions during the term.” In effect, the writer is relinquishing a significant degree of control to the publisher to administer the copyright, but this is not an assignment of copyright. In practice it is doubtful if this makes any noticeable difference to the creator since the licence for “the world” effectively extinguishes any potential the creator may have for the exploitation of copyright beyond the contract, in precisely the way Rahmatian describes (2009:12).

TERM OF THE AGREEMENT

The ‘term’ of the contract is the period during which works are committed to the contract. In other words, the term is the period during which the creator is ‘signed’. This is invariably linked to a minimum commitment set out in the contract and is a relatively straightforward matter in all of the deals cited. RC2 displays the maximum commitment in any of the record deals. In the event that all ‘options’ are exercised and delivered on time, the artist will be under contract for somewhere in the region of four years. Similarly, PC3 is the longest-term publishing deal at a maximum of six years if all options are exercised. The other contracts are all less expansive than these examples.

It therefore seems that the days of creators being tied to potentially perpetual contracts have been consigned to history, largely due to cases such as *Schroeder v Macaulay*, *ZTT v Johnson* and *Silvertone Record v Mountfield*⁸². In a UK context, such onerous contracts have been deemed an ‘unreasonable restraint of trade’ thus rendering the contract unenforceable. It has been argued convincingly that the fear of an unenforceable contract has hastened this evolution towards shorter, more equitable terms rather than any altruism on the part of record companies and publishers (Yanover and Kotler 1989, Evans 2003). As shall be discussed, the situation regarding the post-term retention of copyright is quite different and altogether more problematic.

OPTIONS

The main variable in dictating the contractual term is the presence of so-called ‘options’ in the contract. At the end of each term the label or publisher may unilaterally decide to ‘pick up’ the next option and in doing so activate an extension to the contract term, usually covering new copyright works. Alternatively they may decide, again unilaterally, to end the contract at that point. Crucially, the creator will in most instances have no right to trigger the option or terminate the deal. Thus, these contracts are clearly asymmetrically weighted in the investor’s favour (Greenfield and Osborn 2004: 96). It seems improbable that in a balanced negotiation a creator would submit to such a condition. Rather, they would far more likely request a mutually agreeable option or a contract that commits the investor to more than one option such as a “two album firm deal” (Thompson 2012: 50).

Even within the highly skewed option deals here there are some elements designed to protect and incentivise the creator. The option itself is a type of ‘use it or lose it’ element of the contract inasmuch as the investor must exercise the option within a specified timeframe or the creator can walk away from the deal with no further obligations to assign or license new works to the investor. In addition to

⁸² *ZTT v Johnson* case was triggered by Holly Johnson’s desire to leave Frankie Goes to Hollywood. This is the first case where the record deal rather than the publishing deal was considered to represent an unreasonable “restraint of trade” (Evans 2003). The *Silvertone Records v Mountfield* case found The Stone Roses joint record and publishing deal with Silvertone/Zomba to be unenforceable on the following grounds, “the term was calculated on the basis of an initial period of one year, to be followed by six possible option periods, to be exercised at the whim of the company. This could amount to a minimum seven year term. The judge on this basis considered the recording agreement unenforceable... The case took its toll and it was 3½ years before any new material was released by the group” (ibid.)

this, RC1, RC2 and PC1 indicate that in the event of the option being ‘picked up’ the investor must pay another advance and this advance shall increase with each option between pre-agreed minima and maxima parameters⁸³. Indeed, Caves argues that the, “compelling logic” (2000: 63) of option deals is to ensure the creator stays incentivised over a long period. Such incentives can be seen as partially offsetting the aforementioned one-sidedness of the option itself.

OBLIGATIONS

Another asymmetrical aspect of these contracts is found in the obligations of each party. The extensive obligations and commitments on the creator are made explicit throughout the contract in respect of what shall be delivered and when it shall be delivered. The obligations of the investor are far more vague and open to interpretation, particularly in reference to the ongoing efforts to exploit the works. PC1 and PC4 both state that, “The Publisher shall use its reasonable endeavours...” in relation to actively exploiting the rights covered by the deal. However, what is *reasonable* and what constitutes *endeavour* is not stated within the contract, so here the writer must operate on trust that the publisher will operate in good faith while conducting their business.

It does not necessarily follow that smaller deals with small independents are necessarily less skewed in the label’s favour. Nor does it necessarily follow that where the label invests little the terms will necessarily be more favourable to the creator. The following clause from RC4 was agreed between a self-produced electro solo artist and a small offshoot label of a larger label group. This ‘life of copyright’ deal did not include any advance and the creator paid for all of the production costs. The main obligation of the record company is the manufacture and marketing of the physical product.

The clause below is quoted verbatim and encapsulates both the ‘front end’ and ‘back end’ obligations of the creators (highlighted here in bold italics) with an impressive clarity and comprehensiveness. The “We” in this contract is the record company.

⁸³ Anecdotally it is clear that creators whose success exceeds that foreseen by the label may renegotiate far beyond these contractually agreed parameters, usually in return for additional options being added to the deal.

We are the author and first owner of the copyright in the Recordings and the artwork created in connection with the Recordings ***and accordingly are exclusive owners of the copyright in the Recordings*** and artwork ***and are exclusively entitled to exploit the Recordings and*** artwork including without limiting the exclusive right to ***reproduce, manufacture, rent, license, make available, adapt, transmit, distribute, sell, broadcast and communicate to the public the Recordings*** and artwork and records and videos derived from the Recordings and to publicly perform and otherwise use exploit and deal with the Recordings (and any part of the Recordings) and artwork ***in any way we shall think fit*** in ***all media and all formats whether now known or hereinafter invented*** throughout the Territory ***for the life of copyright (as may be extended)***.

The first highlighted section seeks to remove any of the doubts around authorship in the sound recording discussed earlier: the record company is the ‘author’. The following three highlighted sections, in turn, claim ownership of the copyright in the recordings, the exclusive right to exploit these rights before comprehensively explicating the ‘bundle of rights’ the company seeks to exploit. Then the clause issues the equivocating disclaimer, “in any way we shall think fit”. The final two passages of note ‘futureproof’ the contract against both the invention of new technologies and any extension of copyright term. The clause is a *tour de force* in encapsulating the core character and the asymmetry of music copyright contracts in one unpunctuated 132-word sentence. While all of these imbalances can be viewed as evidence of inequality or even iniquity in these contracts between creators and investors, it is the final highlighted section of the clause that is the most problematic feature of music copyright contracts for creators: the post-term retention of copyright.

THE POST-TERM PROBLEM

The ‘back end’ dimension of the commitment of the writer is reflected in the *term* of the agreement and the *post-term* retention of copyright, and there is an important distinction to be made between contract term and post-term retention. The term, as already discussed, is linked to delivery of albums and subject to maximum time periods, primarily to ensure the contract is enforceable. Crucially, however, the record company and publisher may retain the copyright in the works assigned or

licensed under the term of the contract for a specified *post-term* period even if the creator has been ‘dropped’ from the deal. Only once the post-term period has elapsed does the copyright revert to the writer. In RC5 the copyright in the recording reverts to the artist when the term ends. Similarly, in PC2 there is no post-term retention of copyright so in this instance, the copyright reverts to the author. However, in all of the contracts where an advance is paid, the investor retains copyright ‘post-term’, for a period varying from 10 years to ‘life of copyright’.

These often lengthy retention periods are largely costless once ‘front end’ expenses have been incurred and allow the record company or publisher to ‘warehouse’ works (Kretschmer 2012: 51) in the hope that a number of lucrative ‘hits’ will emerge from their expansive catalogues of largely unprofitable songs and recordings. In short, the longer the investor can retain the copyright in a work, the longer they have to secure a return on whatever investment they made at the outset. The post-term retention periods in RC1 and RC4 coupled with the findings of the interviews that feature later in this thesis suggest that ‘life of copyright’ assignments are a prominent feature of contemporary recording industry contracting. This does not appear to be the case in the publishing sector where retention periods are far shorter⁸⁴. Indeed this is one of the most obvious divergent features of record contracts and the publishing contracts. In this aspect the publishing contracts can be deemed more ‘artist friendly’ than the recording contracts, an impression that is supported when the discussion turns to royalty rates⁸⁵. However, in both record contracts and publishing contracts the investor may retain the copyright in the works long after the creator has been ‘dropped’.

The post-term retention period has the effect of dictating the investor’s ‘exploitation horizon’. Any exploitation of the copyright work must occur within that timeframe. This is problematic when the relatively short “investment horizon” (Kretschmer 2012: 46), the period in which the investor is *actively* engaged in exploiting the work, is taken into account. Kretschmer cites empirical evidence that suggests this period is likely to be less than 10 years for most cultural works (Breyer 1970/1)

⁸⁴ Life of Copyright in musical works is life of the author plus 70 years. For sound recordings life of copyright is 70 years from publication and therefore, in most cases, considerably shorter. The final works of David Bowie are an example of an exception to this. The musical works he released immediately prior to his death will become public domain works on the same day as the recordings of these works (notwithstanding any further changes to copyright term).

⁸⁵ It is important to note that ‘legacy’ publishing contracts agreed on a 50/50 ‘life of copyright’ are still regarded as binding. In effect music publishers will have catalogue works that are still exploited under terms that contemporary creators and their lawyers would balk at.

and there is evidence that very few sound recordings remain commercially viable beyond this relatively short period (Gowers 2006: 52). Indeed, industry ‘rule of thumb’ estimates of a 1:10 success rate (MMC 1994) suggest most works will fail commercially and be written off almost immediately. By triangulating these sources it can then equally be assumed that the company will have little incentive to invest further money, time or attention in works that have become economically dormant. And contractually, the record company and publisher are under no onerous obligation to do any of these things aside from perhaps ensuring the works remain ‘in print’. In the digital age, satisfying this requirement requires little effort or expense⁸⁶.

This confluence of forces potentially pushes the creator into an invidious situation. The scenario emerging from this misalignment of incentives sees the writer contractually alienated from works that an investor has no incentive or contractual obligation to exploit. This issue is likely to be less troublesome in contracts where the copyright reverts to the creator immediately or after a short retention period. These creators are able to self-release their works or license them to another record company or publisher. In cases where the period extends over many years and even decades there is significant potential for the type of principal-agent problems identified in the literature review to play out in practice. This issue is a central theme of the thesis and shall be revisited and interrogated in the final phase of the study.

REWARD: ADVANCES AND ROYALTIES

The discussion now moves from what the creator must *commit* to the deal to a discussion of the potential *rewards* the contract provides to the creator in the form of advances and royalties.

ADVANCES

As has been demonstrated, the contract is likely to contain ‘front-end’ and ‘back-end’ commitments and obligations for each contracting party, albeit that these are apportioned somewhat asymmetrically. On the other side of this the contract also provides incentives and rewards in some combination of ‘front-end’ advance

⁸⁶ Indeed, it is a feature of most contracts that the creator must inform the investor if they believe they are failing in this or other similar requirements set out in the contract. The investor then has time to remedy the situation.

payments and 'back-end' royalties. It is no coincidence that the section discussing the rewards on offer to creators in a contract is considerably shorter than the section in relation to their commitment and obligations!

The most directly quantifiable element of the rewards contained within a record or publishing contract is the advance payment made at the outset of the agreement. A number of the more modest contracts featured here contain no advance payments. In the case of publishing rights, it is often the case that the works have already been written and the job of the publisher is merely to exploit these and share the proceeds with the writer.

Where there is an advance, the payment serves a number of purposes. It is an inducement to the creator to enter into the agreement. It is also a type of reward for creating work that attracts the investor to sign the creator in the first place. Finally, a sizeable advance affords the writers the financial security to dedicate themselves to creative activity. It could be argued that upon receipt of a large advance the writer has no real continuing incentive to be productive, given that recoupment may take many years or, more probably, will not occur at all. For this reason, larger advances are paid in instalments: a provision that goes some way to protecting the investor from the uncertainty involved in contracting with creative artists (Caves 2000: 63), particularly when the work in question may not have been completed or even conceived when the agreement is struck.

The advance and any associated advance costs such as equipment and recording costs are payments set against royalties as yet unearned. Although routinely presented as a 'loan' or 'debt' by many authors and critics (Albini 1993, Toynbee 2004: 132, Wikström 2013: 144), an advance is a very particular type of debt: it is *recoupable* rather than *returnable*. This is a subtle but important distinction. PC1 states, 'All such advances shall be recoupable by the Publisher out of any and all fees and royalties...all advances paid to or on behalf of the Writer shall be non-returnable'. Any 'debt' is against future revenues rather than against the individual (Kretschmer et al 2000: 46) and the investor *cannot* pursue the creator to repay any advances. Viewed in this light, far from being a particularly burdensome aspect of music copyright contracts, the non-returnable advance may be a highly attractive proposition to creators. In effect the onus is shifted to the investor to recover the advance through sales and other exploitation of the material. What is clear from the contracts examined here is that where the investor pays an advance

the investor will insist on a lengthy post-term retention of copyright in order to recover these and ultimately derive a profit.

ROYALTIES

Given that “nobody knows” (Caves 2000: 3) the demand for musical works and recordings until they are released into the market, the investor is bearing significant risk by making advance payments against future royalties. Irrespective of how distant the ‘exploitation horizon’ is, in most instances the works will not recoup. The royalty system is central to investors’ strategy for ameliorating the risk of making advance payments in a market where failure is said to be endemic⁸⁷. In the publishing contracts cited in this study the royalties range from 50% to 80% in the creator’s favour and it is reported that 90/10 splits in the writer’s favour are achievable (Thompson 2012: 130). In some exceptional cases the writer will be able to secure an even higher share. Along with the shorter retention periods noted earlier, royalty rates are another key aspect of publishing contracts that can be said to be more ‘artist friendly’ than record contracts. The record contracts featured shows royalty rates ranging from 15% up to 50/50 splits. This reflects the relative risks inherent in both enterprises and again seems to validate the notion that quite simply; music publishers do less for their money (Negus 1992: 44).

In the publishing contracts sample the ‘front-end’ advance payment is likely to have a direct effect on the ‘back-end’ royalty rate the creator can expect, a suggestion that is borne out in a number of the music industries ‘manuals’ (Harrison 2008: 105). A large advance will most likely be offset by a lower royalty rate and the reverse is the case in respect of low or no advance payments where the royalty will be higher. In economic terms this can be characterised as an apportionment of risk. If the investor incurs higher risk by paying large advances they can expect to compensate by paying a lower royalty rate. If the creator decides to reject an advance in favour of an improved royalty they may be said to be bearing risk. Landes and Posner state, “If the author is risk averse, he will be worse off as a result” (1989: 327).

⁸⁷ As discussed in Chapter 4 the royalty split on public performances rights is to some extent predetermined and limited by collecting society conventions that effectively render 50% of the ‘writers share’ beyond the scope of the contract and, crucially, not recoupable against advances. A royalty is then paid to the writer from remaining ‘publishers share’ (MMF 2003: 203, Wikström 2013: 57). By the same token, performers’ rights licensed administered by PPL are not recoupable by record companies. Instead these are distributed on the principle of ‘equitable remuneration’.

It is less certain whether recording advances have such a direct impact on recording royalties. RC1 and RC 2 contain significant advances yet they offer considerably different royalty rates of 15% and 50/50 profit share. Given the differing accounting systems employed, the difference between a royalty rate of 15% and a 50/50 profit share deal, the disparity between these types of deal is not as significant as it may seem. In the event that the deal recoups the costs, the creators in RC2 will receive a far higher share of the profits than they would in a royalty deal but they are less likely to recoup these costs (Thompson 2012: 69).

Again, the issue of risk can be understood as a determining factor in the lower royalty rates seen in the recording contract sample. That record companies bear more costs than publishers is a reminder that, by comparison, the recording industry is a higher risk enterprise. In addition to a personal advance paid to creators in publishing deals, the recording deal may include a number of other advance payments and costs in the shape of equipment budgets, recording costs and tour support such as in RC1 and RC2. As shall be discussed, it seems that this risk differential only partially explains some of the key differences in the contracts in each industry. In the case of the creators featured in this study it is apparent that record contracts are far more highly coveted than publishing deals. In purely economic terms 'disparity of esteem' appears to be irrational given the more favourable nature of publishing contracts examined here. However, the symbolic value of the record deal to many creators is difficult to overstate.

CONCLUDING REMARKS

To conclude this discussion, the key dimensions of the incentives and rewards contained within copyright contracts are 'front-end' advances and 'back-end' royalties. These vary demonstrably between sectors and between contracts within sectors. In some instances an apparent cause and effect between low advances and high royalty rates can be tentatively proposed in RC4, RC5 and PC2. Similarly, it seems reasonable to suggest larger advances result in contracts that are more expansive in scope and post-term copyright retention. In other instances the relationship between 'front-end' incentives and 'back-end' rewards cannot be so clearly determined. This is the case in RC2 where, in spite of the considerable outlay, the creator receives an apparently generous 50/50 share of profits. Conversely, in PC3 the creator receives no advance yet only a 50% share of the publishing income. Perhaps these are simply examples of 'good deals' and 'bad

deals' that do not particularly conform to or contain any easily identifiable economic rationale. Indeed, it would require a survey of a far larger sample of contracts to make more robust claims of any such trends. However, this element of the research points to areas for further investigation. More pressingly, it also provides a valuable context for the remainder of the present study.

5.4 SUMMARY, CONCLUSIONS AND THREADS

FINDINGS

The purpose of this chapter was to collate and analyse a number of 'real world' contemporary music copyright contracts in the recording and publishing industries. The chapter first set out and defined the key relationship between copyright, contract and the "contractible space".

Using examples of contemporary recording and publishing contracts it was possible to construct a model that distilled these into four key elements: scope, term, advance and royalty. Drawing on this sample it was also possible to identify the commonalities and differences between recording contracts and music publishing contracts. What became apparent was the sense that the four elements of the contract do not operate discretely. Rather, they form an interconnected set where each can influence other dimensions of the deal.

Economic theory in particular offers some compelling explications as to why copyright contracts are set out in the way that they are and a number of these explanations are borne out in the examples consulted here. It is evident that contemporary music copyright contracts remain asymmetrically skewed in favour of the investing company rather than the primary creators. The most significant factor in these contracts was found to be the allocation and apportionment of risk between creator and investor.

Hitters and Wierda (2014) describe the evolution of such contracts as "opportunistic isomorphism". To put this in less technical terms, record companies and publishers do these one-sided deals *because they can*. Ultimately it seems probable that the one-sided agreements with creators are testament to the enduring role of record companies and music publishers as the music industries

gatekeepers. And this is an aspect of the industries where the gatekeeper analogy problematised in the literature review appears to remain relevant.

However certain aspects of these deals such as *recoupable* rather than *returnable* advances and the relatively short-term nature of all of the agreements examined suggest the creator is afforded some potentially favourable contractual redoubts.

Conversely, one aspect of a number of the contracts analysed that is potentially far more invidious for creators is the issue of 'post-term' retention of copyright. Given the capricious nature of the market it seems apparent that these long retention periods contain considerable potential for the creator to become alienated from works that the investor has no incentive to actively exploit.

WHAT NEXT?

The purpose of Chapters 4 and 5 of this thesis was to conduct an analysis of the documents relating to creators' copyright transactions in the music industries. From this it was possible to examine how creators are rewarded in both the digital realm and the live music context in transactions collectively negotiated by collecting societies and also those 'quasi-collective' transactions negotiated by digital music distributors. In Chapter 5 the focus turned to the key components of individually negotiated copyright contracts. The analysis here combined an empirical document review with the existing empirical and theoretical literature. As valuable as this documentary analysis has proved, it reveals little of the phenomenological dimension of the decisions creators make in respect of the copyright in their works.

Building on the findings of Chapters 4 and 5 the final phase of the thesis shifts the focus from the 'paper deal' to the 'real deal'. Stewart Macaulay notes that, "the written deal may be inconsistent with the actual expectations of the parties." (2003: 44) The final part of the thesis interrogates creators' expectations and experiences of the collectively and individually negotiated transactions into which they enter.

PART 3: THE ‘REAL’ DEAL

CHAPTER 6: LONG WAY TO THE TOP

6.1 INTRODUCTION

Part 3 of the thesis, incorporating Chapter 6 and Chapter 7, shifts the focus from the ‘paper’ deals and documents examined in the previous two chapters and onto the ‘real deal’. This part of the thesis draws primarily on data collected in semi-structured interviews with creators and investors. The overarching purpose of Chapter 6 is to add a phenomenological dimension to the earlier document analysis by examining aspects of creators experiences of the copyright transactions already discussed at length.

CHAPTER OVERVIEW

The first section of the chapter identifies what appear to be core fundamental motivations across the creator sample, namely: to reach a wider audience and to make a living from music. New-entrant creators regarded signing a record deal as a means of achieving such goals. However, a considerable ‘disparity of esteem’ was observed between the high symbolic and practical value ascribed to securing record contracts over the far less coveted music publishing contract. Copyright appeared to play little or no role in less experienced creators’ decisions to enter these contractual agreements. This provided an important insight into what were generally poor understandings of copyright’s role as a component of the contemporary music industries. By contrast, it was apparent that more experienced creators and investors were highly copyright-aware and copyright-orientated.

The second part of the chapter examines creators’ perceptions and experiences of ‘making a living’ from music and the role of copyright in that endeavour. The fact that for a number of creators it was an unexpected discovery that they earned ‘hidden’ income from performing rights earnings through live performance illustrates the ad-hoc way in which creators learn about copyright. While in some respects this type of experiential learning is a characteristic of the human condition,

in the context of potentially lengthy assignments of copyright it would seem that the price of this type of learning can be excessively high for creators.

The chapter concludes by looking specifically at music copyright in the 'new' music economy. In this digital realm, creators can, theoretically at least, access vast, disaggregated global audiences without entering into copyright transactions with record companies or publishers. The attitude of creators and investors to digital music platforms was ambiguous, particularly in the case of streaming platforms Spotify and SoundCloud. Nevertheless, what emerged from the interviews was that the democratising forces of digitisation may marginally ameliorate the creator's historically weak bargaining position. However, the prevailing sense remains that even in the 'new' music industries; it seems improbable that a creator can, in the words of one investor informant, "go all the way without a label".

6.2 CHASING THE DEAL

STARTING OUT

'Copyright is essential to the industry. If there was no copyright we wouldn't be putting out records and we wouldn't be publishing acts. So no copyright: no music industry.' (Olivia: London 2014)

This investor informant articulates an attitude to copyright that echoes the rhetoric espoused by music industries lobbyists: the recording industry is a copyright industry and without strong copyright music is under threat. While corporate investors may be highly incentivised by copyright as a central means of securing financial returns, it seems improbable that many, if any, creators start making music due to the existence of copyright.

The interviews found that creators' *and* investors' motivations for involvement in the production of music and immersion in a creative milieu corresponded closely to what Schlesinger and Waelde describe as, "...the personal commitment to an art form and a desire for self realisation" (2012: 25). Almost without exception the subjects pursued careers in music as a way of indulging a pre-existing interest in music as art: they were *all* music 'fans'. It is of no little significance that this was not restricted to the creator sample. A number of the investors had started out as music makers or had worked in various roles related to music such as; working in

record shops, university entertainment conveners, fanzine authors and club promoters.

Some of the sample stated that their musical and commercial activities overlapped into their social lives or that they were involved in music related hobbies. For creators *and* investors the motivations for pursuing a life with music at its core appeared to precede considerations of money, profit or indeed copyright. This is a very simple restatement of a point made by a number of scholars who have called into question the extent to which copyright serves as a primary incentive to create (Frey 1997, Towse 2001a, Schlesinger & Waelde 2012). More convincingly, these creators are doing it only, “partly for the money” (Towse 2001a: 473).

Drawing on interviews with “mid-level”, full-time music artists, Martin Kretschmer suggests that creators have four main interests in respect of the works they create:

- to see their work widely reproduced and distributed
- to earn a financial reward relative to the commercial value of the work
- to receive credit for it
- to be able to engage creatively with other works (in adaptation, comment, sampling etc (Kretschmer 2005: 13)

Propositions three and four, relating to credit and engagement with other works are matters that lie beyond the scope of this study. However, the first two propositions have considerable resonance with the findings of this study. Creators, and investors for that matter, have a primary interest in works being widely distributed and receiving a financial reward from these works. These twin objectives are often restated in the cliché that musical creators operate primarily in the pursuit of ‘fame and fortune’. A more nuanced rendering of these motivations suggests that creators harbour the altogether more humble ambition of reaching a *wider* audience and making a living from music. Although the goals may have been modest, during interactions with creators the strength of will to achieve these goals was in some cases palpable. And certainly for the less-experienced creators in this study it appears that the ‘record deal’ is perceived as the most effective means of realising these twin objectives.

THE RECORD DEAL ‘BADGE OF HONOUR’

As discussed in the literature review, the push/pull factors of a recording industry in apparent decline (push) and the ‘democratising’ force of digital technology (pull)

are real considerations for creators. Yet they do not appear to have weakened the immensely powerful allure that signing a record contract holds for creators. For new entrants in particular, the record contract is far more than the sum of the parts examined in the previous chapter. As a dispassionate academic researcher, it was possible to analyse and reduce these copyright transactions to their core elements. For the creator the symbolic meaning of the record deal makes such dispassionate consideration challenging. Indeed, it is questionable, even unlikely, that these new entrants view record contracts as copyright transactions at all.

Rather than being a set of commitments and rewards to be weighed up and considered, the record deal holds and confers a substantial element of “symbolic capital” (Bourdieu 1984: 242) on the creator among their peers. Greenfield and Osborn describe how the “badge of honour” (2007: 5) sets the ‘signed’ creator apart from their ‘unsigned’ peers while validating and elevating their creative endeavour. Unsigned creator Pete had not released any music but had recorded demos funded by his manager and they were actively seeking a record deal. Pete succinctly described ‘getting signed’ to be “the dream!” (Pete: Glasgow 2015). Harvey, a Glasgow-based singer-songwriter who had received overtures from a local ‘micro-label’ shortly before being interviewed, described his attitude to the approach:

Let’s not kid ourselves, it’s not Sony but someone out there has thought, you know what, I’ll take a punt on them, I want to distribute their music. Which on any level is a good feeling (Harvey: Glasgow 2014).

Another creator, this time with firsthand experience of getting signed and also getting ‘dropped’ paraphrased Greenfield and Osborn’s analogy with unerring (and presumably unwitting) accuracy as he reflected on the enduring validation that getting signed conferred upon him:

You become legitimised. Not just in the short term, but ever since then. I’ve always been in a band that signed a record deal. People treat me differently now than before that happened, which sounds crass, but it’s definitely the case. (Mario: Glasgow 2014)

In spite of having experienced the crushing ignominy of getting dropped, Mario believes the kudos the deal bestowed still sets him apart from his peers who had never been signed. By controlling access to an exclusive and privileged world

accessible only to the “chosen few” (Greenfield and Osborn 2007: 5) the record company serves as gatekeeper and tastemaker, sending a signal to the market that this creator has ‘arrived’. With the benefit of a wider overview the creator’s route into the industry would be perhaps better understood as the negotiation of a route through a complex “web of relationships” (Negus 1992: 46). However, the narrow focus of an uninitiated creator suggests the “gate” is, for the new entrant, a more appropriate analogy as they strive to find a route into the industry.

Therefore, signing the record deal signals a lifting of the barriers that admit the creator to ‘the business’ and to the contingent resources and opportunities which are not available to the ‘DIY’ creator. This corresponds strongly with Kretschmer’s proposition that a core interest of creators is to see their works widely “reproduced and distributed”. Jennifer, an unsigned creator who had self-released a number of singles expressed the view that the investment of a record company can enhance and elevate her works aesthetically:

I’d like to have a recording contract because I’d like to record the songs that I’ve written to the standard that I want them to be at. For me writing a song on a keyboard and then giving it to a band to learn is still not how it sounds in my head. In my head when I write a song it could sound like an orchestra and I can hear arrangements. (Jennifer: Edinburgh 2014)

Pete, focusing on more practical matters, perceived the record company as, “the machine that can bring my songs to the biggest number of people” (Pete: Glasgow 2014). These unsigned creators view the record deal as a means of elevating their practice and taking it to a larger audience.

And it seems record companies tap into this perception. Jack, a major record company executive outlined what he considered to be the fundamental role of the record company as an investor in unproven artists:

I feel record companies don’t get enough credit for that investment in the long shots, and there’s a lot of long shots out there that are getting invested in...it’s not a philanthropic thing, they think that they might be that one to rise to the top and become that great artist. (Jack: London 2014)

Olivia, the general manager of a UK independent label, suggested that, “you can’t go all the way without a label” (Olivia: London 2014). Of course, what ‘all the way’

means is hugely subjective. It could mean all the way to the top of the pop charts or it could mean simply making a living from music. What seems certain, however, particularly in light of the data relating to music streaming revenues, is that to derive a meaningful income from recorded music in today's market requires a mass audience. The record company is perceived by creators, and by its own operatives, as the principal route to this audience.

PUBLISHING AND 'DISPARITY OF ESTEEM'

The intense preoccupation with the record deal shown by new-entrant creators did not extend to the music-publishing contract. Instead, there was an observable 'disparity of esteem' in the perceived importance of each type of deal. In addition to indifference displayed by a number of interviewees, in a number of cases the publishing deal, and music publishing as an industry, was viewed with a degree of suspicion. Anton, a signed recording artist but an *unpublished* writer, expressed a curiously sceptical attitude to music publishing:

I've heard a lot of bad stuff about publishers. Getting signed and being given ten grand, twenty grand and then just never hearing from them for five years because they have too many people on their roster. (Anton: London 2014)

For more experienced creators the prospect of a five-figure publishing advance would surely be a highly attractive proposition particularly when the relatively 'artist friendly' nature of these deals discussed in Chapter 5 is taken into account. Although Anton was hypothesising rather than describing any concrete offers he had received, his attitude reinforces a sense of wariness towards publishing deals. Indeed, his response was indicative of the way in which creators' perceptions can be shaped by peers in a somewhat haphazard, not to say misinformed fashion:

Signing away your publishing too early seems to me to be a quite a common mistake...according to other people. (Anton: London 2015)

This illustrates something of the way in which creators learn about copyright, on an ad hoc basis from others' experiences of copyright transactions, in what Phillips and Street characterise as a melange of, "experiences, networks and identities" (2015: 355). Jennifer reinforced this idea in recounting advice she had received from a more experienced peer, "you want to be unpublished for as long as

possible...so at the moment as an unsigned artist it's better to own everything yourself..." (Jennifer: Edinburgh 2014). It was telling that neither Anton nor Jennifer proffered any underlying rationale for holding these opinions, even though Jennifer was able to draw on first hand experience of having been offered a single song publishing deal for a song 'covered' by another artist:

I probably don't know enough about what all the legal rights are, but I know that I'm in a better position for not having signed away my publishing to a small record label for four hundred Euros. (Jennifer: Edinburgh 2014)

This notion of 'giving away' or 'signing away' publishing rights is noteworthy as it implies a permanency to the assignment of copyright that this study has demonstrated is not likely to be a feature of a contemporary music-publishing contract⁸⁸. As has been shown, publishing contracts are likely to be far more favourable to creators than recording contracts in terms of royalty rates and copyright retention periods. It is therefore somewhat paradoxical that creators, so eager to secure a record contract, should be so reticent about the terms and conditions of a publishing contract.

Beyond simply observing this mistrust of music publishers it is difficult to draw any conclusions as to its origins. However, the suspicion echoes many academic accounts of exploitative, rapacious copyright companies 'ripping off' "desirous and inexperienced" (Jones 2012: 127) creators. More can be said about the relative lack of interest creators showed in their reflections on signing a publishing deal. This indifference brings the discussion back to an idea that re-emerged time and time again throughout the interviews; the notion that, perhaps above all, creators wish to see their works disseminated as widely as possible. While the record company is seen as an obvious potential launch pad for a career, the music publisher's potential to serve as a conduit to a mass audience is somewhat overlooked. But in truth, the publisher is far from impotent in providing a route to success. By placing a song with a high-profile artist or securing a high-profile synchronisation the activities of the publisher can catapult a creator out of obscurity and generate significant income into the bargain.

⁸⁸ In the contracts examined here, the longest retention of copyright was 15 years. Interviews with investors suggest that 20 years could be considered a long retention period. As shall be investigated, record contracts routinely run for 'life of copyright'.

Independent music publisher Jack suggests that this lack of understanding of publishing is more pronounced in writer/performers than in those creators that specifically write songs for others to perform:

We deal with a lot of people who are songwriters first and foremost.... So with them they're much more likely to be asking questions along the lines of "are you pushing my music? Is it going for that advert? Is it getting sent out to film production companies?" If it's an *artist* as opposed to a songwriter, then you might find they're a bit naive and say "we don't know anything about publishing. So if somebody can get all that sorted out for us and we don't have to worry then that's one less thing to worry about and we can concentrate on making records. (Jack: London 2014)

Jack's observation illustrates how copyright's division of creative labour (Toynbee 2004: 125) can shape a creator's attitude to commercial aspects of their career. A songwriter that doesn't perform only earns income from 'the publishing' and is therefore reliant primarily on the 'route to market' and revenue generated by their publisher. Drawing on practical experience, Jack's appraisal supports the idea that an "artist"⁸⁹ may display an observable 'disparity of esteem' in their ranking of record deals and publishing deals.

Again, it is not possible to identify definitively the source of what is, in some ways, a paradoxical perception held by these creators. However, to some extent it has its roots in a generally limited understanding of what music publishing is, what music publishers do and the terms of the contracts they are likely to offer creators.

While most creators, and indeed most of the public at large have at least a basic understanding of what record companies do, the same cannot be said of the relatively mysterious activity of music publishing. Ultimately, less than positive creators' attitudes to publishing betray a limited knowledge and understanding of basic aspects of music copyright and how it is transacted.

THE 'NUTS AND BOLTS': COPYRIGHT AND DECISION-MAKING

A characteristic of the interviews that formed a central aspect of this research was the lack of ease with which creators talked about copyright or even the commercial

⁸⁹ In the context of the interview it was clear that Jack was referring to recording artists that write their own material i.e. the type of creator that is the focus of this study.

aspects of their creative endeavour. Aside from issues of personal and commercial privacy, they were in some instances self-conscious about their own lack of understanding of copyright. A number of the interviewees readily conceded they knew little about copyright or indeed any of the commercial aspects of the music industries.

I don't understand the full implications of how the music industry works yet to know how I could fit into it as a part of a large business. (Jennifer: Edinburgh 2014)

Rather than expressing an unwillingness to learn, Jennifer suggests her inexperience was the main factor in not yet understanding the copyright elements of the industries. Esther, on the other hand, also unsigned but able to make a full time living as a classical pianist, saw it as a choice between spending time being creative and spending time learning aspects of the business she has no real interest in.

If I have a choice between going and researching something like this (copyright) and the chance to go and write something, I go and write something and I let the paperwork slide. (Esther: London 2014)

The picture that emerges is one of eager, ambitious creators seeking to enter music copyright industries armed with, at best, a rudimentary grasp of copyright and copyright contracts: at worst, no understanding whatsoever of the processes and implications of the industries' ways of working. It is for precisely this reason that record and publishing contracts will often stipulate that the creator receives legal advice from a specialist music lawyer in order to explain the, "meaning and effect" of the deal⁹⁰. Again, the spectre of unenforceability overrides any suggestion of altruism on the part of labels or publishers. In a number of high profile disputes, an absence of specialist legal advice at the point creators signed the contract has contributed to music contracts being deemed unenforceable (Greenfield and Osborn 2004: 100).

Whether creators intent on signing a deal are likely to reject it on the basis of the advice of a lawyer is doubtful. Mario devoted a considerable portion of the interview detailing aspects of his deal that he thought were undesirable, but

⁹⁰ The investor may meet these legal costs as part of the advance paid to the artist. This cost is, of course, recoupable.

conceded that even a number of years later, “If somebody put it in front of me today, I probably would sign it: this is the funny thing...everybody would!” From the other side of the transaction Bobby, an employee of an independent label group with considerable experience of artist management explains:

Some of them (creators) don’t even ask questions about the rights, they want to get *signed to a label* and get the record out. The actual reality is that a lot of people aren’t really interested in the nuts and bolts of things.
(Bobby: London 2014)

The eagerness of creators to submit to the conditions of a contract without necessarily understanding the ‘nuts and bolts’ of the deal forms one part of a confluence of circumstances that has led to suggestions that investors operate a ‘take it or leave it’ approach to negotiations with creators. This confluence finds “desirous and inexperienced” creators competing in a market where the supply of creative labour far outstrips the number of opportunities on offer (Hesmondhalgh 2007: 17). When the high-risk nature of investing in copyright works is added to this mix it would appear that the new-entrant creator has little latitude for negotiation.

However, the contracts examined here coupled with the interview findings indicates that the issue of ‘take it or leave it’ requires some qualification. In relation to music copyright contracts, use of the phrase appears to originate in *Schroeder v Macaulay* 1974, a case that continues to strongly influence copyright contracts today. In their analysis of the case Yanover and Kotler describe how, “Lord Diplock noted the publishing company’s adoption of the familiar “take it or leave it” attitude towards the artist and the artist’s responding willingness to enter into the contract” (Yanover and Kotler 1989: 219). The enthusiasm of creators to enter into contracts without necessarily understanding or even caring about the ramifications endures over forty years after *Schroeder v Macaulay*. However, the recording industry refutes claims that ‘take it or leave it’ negotiations are the default position. This has been stated collectively (MMC 1994) and in the interviews conducted for this research.

Olivia, general manager at a UK independent record label, explained that the terms of contracts varied within companies and between companies:

Yeah, they're all variable...I mean it depends on the record label as well. The company I used to work for had completely different system to the company I work for now. The company I work for now operates on a profit split, so it's a 50/50 profit split. The company I worked for before worked on a royalty system, so that was all about recoupment, min/max advances, based on a percentage split. (Olivia: London 2014)

While Olivia indicated that each company will have a *type* of contract it favours, the creator's status and also what the creator wants out of the deal can have a bearing on the terms agreed. This may have a direct influence on the copyright aspects of the deal.

Jack, head of business operations at a major record company with a background in music law, intimated that a full 'life of copyright' assignment was his company's 'default' starting position in contract negotiations, but not necessarily the only deal a creator might negotiate. Rather, a number of factors determine the scope of the deal:

Sometimes the less you're asking for, if you're saying "we don't need a recording advance, we don't need an advance because we've got our own money, we just want you to help us out with this" and it's a much lower risk deal, you can get a licence. It could be a short-term licence. Or if everybody in the world wants to sign you and you've got that leverage you can get a licence deal as well. So licence deals are common. (Jack: London 2014)

In the publishing realm there appears to be even more scope to tailor the terms of the deal. Billy, a music publisher who also runs his own micro-label⁹¹ explained:

At the lowest level, an administration deal where it'll be for a set term or minimum term of 3 years. As a writer you're not under any great obligation. You could have a deal with us, an administration deal, and you could write a song and think "hold on a minute this is 'a bit good' I reckon I can get this covered⁹². I (the writer) might actually shop this around rather than put it under my *Anonymous Music Publisher administration deal*". They're perfectly at liberty to go off and do that, but then if they do at some point

⁹¹ Indeed, Olivia and Jack also ran their own micro-labels as well as working day jobs at much larger operations.

⁹² As in the writer believes they can get another artist to record a 'cover version' of the track and potentially make it more lucrative.

say to us "I want to put it under our administration deal" then that's when it kind of changes. Once you've given us it, you can't then take it away because there's suddenly a hit record and somebody's saying we'd like to publish that on your behalf. We say "no we've got it now for the duration of that contract". That's the most basic deal. (Billy: London 2014)

Billy suggested that this type of administration deal is likely to be conducted on the basis of an 85/15 split in the writer's favour but is unlikely to include an advance payment of any kind. However, where an advance is paid the publisher will expect a greater share of the proceeds.

If we sign a writer and there's money involved, depending on the level of the money involved, then that would mean that 85/15 (in the admin deal) would shift to 80/20 or it could shift to 75/25 or whatever it might be. And also there'd be an extra term built in so it might be that the deal will run for so long but then we'll retain rights for 10 years once the deal is up. (*ibid*)

Here it is evident that the key elements of the deal: scope, term, advance and royalty *are* negotiable dependent on the expectations and objectives of each party. However, given their rudimentary understanding of copyright law and the "meaning and effect" of the contracts they covet, new entrant creators are entirely dependent on advisors such as managers and lawyers to secure the best terms on their behalf. While advice from such advisors given in good faith can be invaluable, the copyright contract is between the creator and the record company or publisher. It is therefore possible that the creator and/or their works will remain bound by the terms of the contract long after the services of advisors have been dispensed with. The point is that the long-term motivations, incentives and interests of the creator are not necessarily compatible with those of their advisors and the investors with whom they are negotiating. The consequences of this shall be revisited in the final chapter of the study.

6.3 MAKING A LIVING FROM COPYRIGHT

The discussion now turns to the other core motivation of creators observed in this study: receiving a reward from their creative endeavours.

“THE HARDEST WAY TO MAKE AN EASY LIVING”

As has been discussed, the record deal is a burnished ‘badge of honour’ loaded with immense symbolic and creative potential. It is unsurprising that the pursuit of this dream ends in disappointment for most. It is not possible to even estimate how many unsuccessfully pursue the dream of ‘getting signed’ but it can safely be assumed that it is the overwhelming majority of those who try. Of those that do ‘get through the gate’ and sign a deal, the reality is often somewhat different to the expectation. It is claimed by the recording industry that only 1 in 10 of its products recoup production and marketing costs⁹³. This endemic 90% failure rate coupled with one-sided option contracts suggests that for the tiny minority who succeed in getting a deal, life among the ‘signed’ ranks is likely to be fleeting. Only a select few will be able to build lengthy careers entirely within the professional music industries.

The careers of the creators featured in this study are not characterised by job security or dependable income. Rather there is considerable overlap and interplay between the *relatively* amateur and *relatively* professional (Finnegan 2007: 16). The royalty statements examined earlier demonstrated that making money from music, and copyright in particular, was likely to be a challenge for most. Copyright represents a portfolio of erratic undependable income streams from collectively and individually negotiated sources with no certainty of medium or long-term security. The contracts examined in Chapter 5 indicated that a one-year term or one-album deal might be the most a creator can expect in a recording or publishing contract, often with no guarantee of income during that period. Indeed, even being awarded the ‘badge of honour’ of a record contract does not guarantee full-time professional status for many artists (Lester 2015). To a significant extent the interviews support and reinforce what the documents examined earlier suggested.

Hesmondhalgh and Baker characterise creative work as, “the hardest way to make an easy living” (Hesmondhalgh & Baker 2011: 221) inasmuch as it is *rewarding* but generally poorly *rewarded* work. Across the sample there was a sense that

⁹³ The origins and veracity of this ‘rule of thumb’ are not entirely clear. Richard Osborne (2014c) traces references back as far as the mid-1950 music press and notes that it endures in scholarly texts to this day (Jones 2012, Marshall 2012a). It is apparent from submissions made to MMC (1994) that the recording industry uses the idea of endemically high failure rates strategically, an argument far more fully explored by Osborne in his excellent paper.

making a living solely from music would be a desirable outcome. For a number of creators, however, their experience of attempting to make a living and a career out of music is entirely consistent with the reality of creative industries work being uncertain and precarious: “portfolio work” (Schlesinger and Waelde 2012: 22). In spite of this precariousness, it is apparent that a career in music as a recording artist and songwriter is a highly desirable objective for a great many creators.

And being able to make a living *solely* from musical activity was considered by the majority of interviewees as representative of a type of success. Esther, a classically trained pianist felt fortunate to be able to make her living solely from music. She described how she had to strike a balance in deciding what time she devotes to different aspects of her musical endeavours.

I’m one of a few lucky people who make 99% of my money through music. It’s not great money, but it all comes through music. I don’t have a day job. I have quite a few different incomes from music. They could be better. If I wanted to I could play every day but I chose not to because I need to have writing time. (Esther: London 2014)

As an unsigned creator making a full time living from music made Esther something of an exceptional case. The majority of Esther’s income comes from live performance fees rather than copyright sources. Other creators were unable to generate enough to live on from music alone. Jennifer states that even a modest income from music would be preferable to a minimum wage job outside of music:

You know you want to make a living out of doing your art, not out of working in a shop. I’d be quite happy to make minimum wage (from music), I’m on minimum wage in my job at the moment. (Jennifer: Edinburgh 2014)

Holding down a job while devoting a considerable amount of time and energy to furthering her music career, was an existence Jennifer suggested was tantamount to, “having two full-time jobs”. Craig, a creator signed to a small independent label, said his day-job was something that stymied his musical activities:

Because we’re not full time musicians we all have day jobs. You can only write at certain times, you can only practice at certain times so it limits the possibilities. So it really depends on how much actual time you can

dedicate to it. I wonder if that wasn't the case how much (music) would we produce. (Craig: London 2014)

The sense that non-musical employment could 'crowd-out' more creative endeavour was present in a number of interviews. Tom had been making a living from music since the early 1970s and had accrued experience of the major label system as well as setting up his own label and publishing company. Drawing on considerably more experience than was available to Jennifer or Craig, Tom explained his attitude to making money from music today:

It's not looking to make a fortune or anything, if you're still carrying that dream then you're bound to be disappointed, but you have to put a lot of things as efficiently and effectively as possible in place for you to make a living for that. And making a living from it is *good* because that means you can keep on doing it. You don't have to chuck it and go off and do another two jobs so you're too exhausted to do it. (Tom: Glasgow 2014)

In the sample used in this research at least, the challenge for creators was to carve a career where as much of the portfolio was within the musical sphere: "good work" as opposed to "bad work" (Hesmondhalgh and Baker 2009: 39). Making a living from music was a goal of all of the creators featured. Some were achieving this and some were not. It appeared most were generating *some* money from music but not necessarily on a financially sustainable basis. However, it didn't seem particularly significant to creators if the money they made from music came from copyright channels or other sources. To return to the useful concept of 'portfolio work'. As demonstrated in Chapter 4, copyright's 'bundle of rights' is a portfolio of rights and, in turn, represents a portfolio of decisions for creators and a portfolio of potential income streams. Yet there was little sense that the less experienced creators featured here viewed copyright in such a way. On the other hand, the situation was quite different with those with more familiarity with the business.

COLLECTING SOCIETY INCOME

In many respects the most notable aspect of the interviews about copyright transactions was revealed in what creators *did not* talk about: namely copyright itself, music publishing agreements and collecting society membership. Indeed,

when the discussion turned to copyright and collecting societies a number of the interviewees displayed an appreciable diffidence about their level of understanding while expressing a desire to understand copyright better. Pete's response was quite typical in this regard:

I'm aware of them (collecting societies) but not the specifics of them and I'm aware that I should probably read up on them and learn more. (Pete: Glasgow 2014)

Collecting society income is the most accessible copyright income available to creators and all creators featured in the study were at least eligible to join PRS as writer members. However, the relative indifference they displayed towards collecting society income as a means of generating money from music again operated in stark contrast to the emphasis new entrant creators placed on securing a record deal.

As discussed, Esther makes a full-time living from music, but this is chiefly based on live performance fees rather than copyright sources. However, as a member of PRS her compositions and self-released recordings should be generating income. Esther admitted she had little idea of how much she earned from these sources, "for my first album I registered everything but I never checked what came out of it..." (Esther: London 2015). The PRS distribution statements examined in Chapter 4 demonstrate that this information is available to creators, indeed it is emailed to them on a quarterly basis in the form of itemised statements containing granular financial data detailing the sources of income and the territories where it was generated.

Again, it would appear that experience and connections to networks are central to creators learning about the mechanics of the copyright industries. As if to illustrate how experience of copyright income might change perceptions, Pete reflected on the attitude of one of his more experienced peers:

The guy that does our production, he's a bit older, he's 32, he's been a musician for a long time, he's obsessed with all that stuff and is constantly talking about PRS and percentages and it depresses me a bit. Because I would still do it (without making money), the joy I get out of it is from hearing the recorded song. (Pete: Glasgow 2015)

While Pete finds this fastidious interest in collecting society income disheartening, the more experienced interviewees saw it as a vital income stream even for new-entrant creators like Pete. An important insight was provided by Marc, a writer/performer with a track record of writing chart hits for various 'Boy Bands' and legacy acts. In his experience new entrants were put off by the abstract and abstruse nature of the income and the process for registration.

It's about generating as much PRS, MCPS and PPL (revenue) as you can. It's probably bottom of their (less experienced creators) agenda because they're not selling a lot of records and they're not getting a lot of exposure. So it seems like a hassle to them because of the dark arts of registering! (Marc: Glasgow 2015)

While Marc was overtly enthusiastic about collecting society income, if not the registration mechanisms, other interviewees' diffidence about the value of collectively negotiated copyright transactions in some instances concealed subtle but significant insights into the nature of such income streams. Craig said he put any PRS income back into recording with his band, "If we play somewhere big enough I do think "yeah that'll help": (Craig: London 2014). When asked if PRS income represented a meaningful income stream Jennifer responded immediately in the negative before qualifying her response, "No...well I don't make a living out of it. It's kind of set up in case I start to." When asked if she used PRS money to fund music making her response was hesitant but affirmative, "Ehhh....yes...at the moment..." It transpired that PRS income was being used to finance the recording of new works at a professional recording studio. Although not articulated or even perceived as such by the creator, this was a clear example of copyright derived income directly financing the production of more copyright works. While copyright cannot be said to be incentivising creativity here, it is indirectly driving cultural production.

COPYRIGHT INCOME FROM LIVE PERFORMANCES

The income Craig and Jennifer referred to here was performing rights income from playing live gigs, precisely the type of potentially lucrative "hidden revenues" (Brennan 2012) examined in Chapter 4. For more experienced creators such as Marc there is nothing 'hidden' about such income. Indeed, he actively sought out opportunities to generate such income indicating that six of his songs would be

performed on a UK 'Boy Band' upcoming reunion arena tour and would be particularly lucrative.

For less experienced creators this income stream can be their first experience of making money directly from copyright. Mario described his surprise when he received his first PRS distribution, which included a payment for a performance on a 'new bands' stage at a major UK music festival:

We weren't aware until we got the cheque through and then it was like "so that's why bands hang around the festival scene for so long!" I was absolutely shocked it was split between writers evenly.⁹⁴ (Mario: Glasgow 2014)

Again, this provided valuable insight into the ad-hoc way creators learn about copyright and echoed throughout the interviews. In many instances the learning is done 'after the fact' rather than in advance and it is not until money from copyright begins to materialise that creators begin to become increasingly 'copyright aware'.

In isolation Mario's surprise at receiving an unexpected windfall from PRS may seem like a rather incidental observation. When viewed in the context of the other interviews it allows a far more wide-ranging point to be made about how creators learn about copyright: they learn about copyright in an ad hoc way through experience. This corresponds with Street and Phillips' idea that musicians, "...acquired their knowledge in piecemeal fashion, as and when the occasion arose" (Street & Phillips 2014: 23).

THE PRICE OF AN EDUCATION

For more experienced creators, there was a self-awareness about how they had come to learn about copyright. In a number of cases they suggest they had learned, "the hard way" (Tom: Glasgow 2014). Chris described how he learned, largely from costly mistakes, about the subtleties of copyright licensing and how the collecting societies worked. He now considered himself to have a comprehensive knowledge of copyright that in many instances exceeded that of

⁹⁴ In the context of the interview it was clear that Mario meant the income was distributed proportionately to all of the writers whose works were performed at the festival irrespective of the status of the writers.

the investors he dealt with. But Chris remained aware that learning about copyright came at a considerable cost.

Yeah, that took a long time to work out. It's not obvious as a musician. It's not something that's shouted about. Hands on, absolutely! I've certainly been in situations where I'm glad I did the first year of the law degree I did.
(Chris: London 2014)

Marc, was more forthright in estimating the financial dimension of costly mistakes he had made as he developed his understanding of music copyright transactions, "I learned from losing hundreds of thousands of pounds" (Marc: Glasgow 2015).

For these creators learning about copyright and how copyright transactions work came at a high financial cost, albeit they now have a sound working knowledge and understanding of the potential and the pitfalls. It seems probable that the less experienced creators featured will in some cases learn by the same process. The potential implications of learning gained through long-term assignments of copyright shall be fully explored in the final chapter of the thesis. For now the focus shifts from the structures of the 'old' music industries to the 'new' music industries.

6.4 THE ROLE OF DIGITAL TECHNOLOGY

It seems somewhat anachronistic that in 2016, digital music is still treated as 'the new thing' at music industry conventions, in government policy documents, academic conferences and in the popular press. Digital music production has been around since the 1970s and commercially available to consumers since the early 1980s⁹⁵. As discussed previously the emergence of Napster in 1999 is widely considered 'year zero' for the full onslaught of digital production, dissemination and consumption of digitally recorded music and all that came with it (Witt 2015: 114). The post-Napster period now equals that of the 'golden age' of CD (1982-1999) and the unprecedented windfall it brought the recording industry (Laing 2004, Samuel 2015).

⁹⁵ The first digitally recorded and commercially released album in the Pop/Rock realm is often cited as Ry Cooder's 1979 release *Bop Till You Drop* (Fine 2008: 11). The launch of the digital format Compact Disc in 1982 has been characterised first as the saviour but ultimately the downfall of the recorded industry as it allowed the industry to digitise, repackage and resell their existing catalogue but it also provided the pristine digital music files required for file sharing, the *bête noir* of the contemporary industry (Witt 2015: 86).

The careers of most of the writer/performers featured here commenced in the Post-Napster era. For these creators the 'digital age' is all they know. But all of the creators interviewed, including those whose musical activities predate the 'digital revolution', were active users of digital production software to record their music, digital platforms to disseminate their music and social media networks to market their music. However, creators do not necessarily view all digital platforms equally.

Although the interview questions gave equal weight to streaming and download services without specifically naming any providers, SoundCloud and Spotify were the music services and platforms that most commonly emerged in searches of the transcripts of the interviews. iTunes and YouTube were mentioned far less frequently in spite of their position as market leaders in their respective business models of digital download and video streaming. Why this partiality towards the former occurred remains obscure, but attendance at industries events showed that between 2013 and 2015 Spotify and SoundCloud were 'buzz' topics. The growing academic interest in these services (Barr 2013, Allington *et al* 2014, Marshall 2015) suggests that these are, or at least they were, 'zeitgeist' issues in digital music discourses. For that reason, the main focus here is on these digital music streaming services.

THE 'NEW' MUSIC INDUSTRIES

Some of the more utopian predictions made about the digitalisation of music were that it would herald a more democratised, "disintermediated" music industries landscape where the barriers to entry would be lowered and anybody could participate. Proponents of this process point to the 'democratising' effects of digitisation on music production, dissemination and consumption (Alexander 1994, Jones, S. 2002, Bockstedt *et al* 2005). The extent to which "disintermediation" has meaningfully undermined the hegemony of established industries structures and power bases has been robustly challenged (Wallis 2006, Hesmondhalgh 2009). Indeed, the more idealistic predictions of more egalitarian music industries have to some extent given way to more pessimistic critiques charting the 'reintermediation' of the music industries. These accounts identify tech giants like Google, Amazon, Facebook and Apple, the, "GAFA digital city states" (Silver 2013: 21), as the new rulers of the music industries. Indeed, the dominance of the 'Big 3' major record companies and platforms like *iTunes* and *Spotify* suggests that intermediaries, both established and nascent, remain in control of the production and

dissemination of recorded music. The annual charts of commercially and critically successful music continue to almost exclusively comprise artists signed to record companies.

Whatever the future holds, it remains the case that an accessible and navigable technological infrastructure clearly exists to facilitate a direct creator/fan interaction with disaggregated global audiences. Engagements with contemporary creators support the notion that they have become adept at reaching these audiences on their own account. A variety of 'non-copyright' routes to market now exist for 'Digital DIY creators', and indeed established artists who wish to eschew the traditions of the recording contract, in the form of rights management companies and aggregators⁹⁶. Yet the creators featured in this research still appear to covet the support of investors and still view record companies in particular as valuable gatekeepers, facilitators and champions of their work.

'DIGITAL DIY'

A line of questioning put to all informants in the creator and investor samples was designed to query attitudes and perceptions of the "disintermediation" of the music industries. Across both groups doubt was expressed about the extent to which it was feasible to sustain a career without the assistance of an investor. It is unsurprising that investors rejected any suggestion that their services were no longer required; any suggestion to the contrary would be a tacit admission that their relevance in the contemporary music industries was on the wane. Bobby, head of marketing at an independent label group stated:

I suppose digitisation has made it easier to put something on *SoundCloud*. Anybody can put their own music up but how do people discover it? How do you market those tracks? How do you publicise and draw an audience to your *SoundCloud*? And that's what people need labels for. (Bobby: November 2014)

⁹⁶ *Soundcloud, Bandcamp, EmuBands, CD Baby, Kobalt Label Services, The Orchard, BMG Artist Services* are examples of routes to market for creators that do not involve assignment of copyright. Using a variety of business models these services allow creators to deliver their music to global audiences as well as access mainstream music platforms such as *iTunes* and *Spotify* but they do not seek to 'own' or license copyright in the way that a record company would. That said, neither do they offer the same type of investment that record companies.

While the role of the record company as tastemaker, “to kind of filter some of that ‘shit’ for want of a better word” (Olivia: London 2014) remains central to the industry’s sense of self, the extent to which ‘anybody can make a record’ was challenged by Jack, a major label executive,

If you want to record a band properly or record a pop artist you can’t do it on a laptop, you can’t do it. The new technological advances haven’t really made that much difference to that. You still need a studio, you still need a producer, you still need an engineer and mixer. So the costs of recording haven’t really come down so much. The costs of marketing and promoting somebody haven’t come down so much. (Jack: London 2014)

As a major record company, Jack’s company offers creators access to considerable resources that are not available to the DIY creator or even those on smaller labels. But this is couched not simply in terms of financial clout but in terms of aesthetics and access to audience. Of course, in return for access to all this, the creator will, in most instances be required to assign copyright for a considerable period.

Jack argues that an aspect of the ‘digital revolution’ that has been greatly overstated is the idea that music production costs have dwindled to the level that ‘anybody can make a record’. While creators such as Anton and Pete can make high quality recordings in ‘bedroom’ studios on relatively inexpensive hardware and ‘cracked’ software, other types of music remain prohibitively costly to produce. Jennifer is a creator working on compositions that feature string sections and multiple vocals and her reason for seeking a record deal was straightforward, “I just want to be able to realise the songs in the way that I envisage them to be and I can’t afford to do that myself” (Jennifer: Edinburgh 2014).

And rejections of the DIY approach were not limited to matters of money. Esther articulated her frustration and objection to the notion that creators in the digital age should assume functions traditionally borne by intermediaries:

I’m good at music; I’m not good at business. Yet suddenly I find out that to prove to people I’m good at music I am required to be good at business and I despise that, because I never studied business. (Esther: London 2015)

Where the interviews found creators to be enthusiastic about digital platforms as a means of reaching audiences, there was also a sense that a glass ceiling exists in terms of potential income in this 'DIY' digital music world and a ceiling that is not particularly high. Mario describes the crux of the problem:

OK, so you can make your music cheaper, you can get it to more people by yourself, but you still can't make the breakthrough to be able to make a living from it I don't think. Maybe you could sell your tracks at 79p to these audiences you're in touch with but I don't read about it much. It's not coming on my radar. None of my peers are doing it that way. (Mario: Glasgow 2014)

The doubt expressed as to the potential for DIY creators to 'monetise' digital music channels was a common thread of the interviews across the wider sample. While some of this scepticism appeared to have a basis in experience, there emerged a sense that in the case of music streaming creator attitudes reflected and were formed by popular discourses, particularly around Spotify.

ON DEMAND STREAMING: SPOTIFY

On the subject of income from digital music platforms, discussion of the interactive music streaming service Spotify provoked considerable opprobrium from creators. Indeed, the notion that Spotify was short-changing creators appeared to be an almost automatic response. Of all the creators, Esther most succinctly summed up this sentiment, "Nobody ever earned a penny from Spotify... well maybe they have earned *a penny* from Spotify!" This was a sentiment repeated throughout the interviews in various articulations, "streaming doesn't support an artist really, does it?" (Jennifer: Edinburgh 2014). Again this is illustrative of attitudes based on hearsay when the information on how much Spotify pays was readily available in each of these creator's quarterly PRS distribution statement.

By contrast, investors' attitudes to Spotify seemed somewhat more equivocal but contained a marked degree of scepticism. While supporting the underlying model of streaming Jack opined that, at the time of interview the platform wasn't delivering for any stakeholders:

It's not making sense at the moment. For anyone really, it's not making sense for the labels, it's not making sense for Spotify, it's not making sense

for the artists because Spotify is spending far more than they earn. (Jack: London 2014)

From a publisher's perspective Billy questions whether "long tail" (Anderson 2006) theorisations predicting consumer demand spread over a long tail of niche products would replace 'short tail' hit-based traditions of the music industries. While confirming that much of a publisher's commercial strategy is to acquire as wide a catalogue as possible, Billy explained how the administration costs of tracking attenuated 'long tail' income streams would remove any incentive for the publisher to pursue such income in the first place:

It's not really going to be a case of, if we get that extra ten thousand works and they all generate 50p each via Spotify then that's another five grand in our coffers. Because the fact is it won't be five grand in your coffers, it'll be five grand of which we're taking 10 or 15%. There is a point at which the amount of time and efforts, because you're having to pay a wage for and administration fees, far outweighs the income that's coming back. (Billy: London 2014)

For these investors, the business model and commercial value of Spotify remained unproved. To return to the findings of Chapter 4, it was found (on a 'per-stream' basis) that in order to generate sums that might assist creators in achieving their goal of making a living from copyright, streaming rates that would be unprecedented in the physical or even digital download realm would be required. However, it was also argued that even relatively niche creators are beginning to achieve the levels of traffic required to generate meaningful income, or at least a meaningful contribution to the creator's portfolio of copyright derived income streams. Crucially, however, all of the examples used in Table 4-10 were of creators signed to 'proper' record companies, again bringing into question the extent to which their importance to creators has necessarily diminished in the digital age.

SOCIAL SOUND: SOUNDCLOUD

The most surprising aspect of creator hostility towards Spotify was that other services that paid far less or even nothing were not viewed as unfavourably. This

disparity in pay rates was something Anton had discovered from some online research.

I've read up about them both. Spotify has got a lot of bad rap until recently it seems...until YouTube proposed a contract that was even worse and it suddenly made Spotify look quite good! (Anton: London 2015)

In Chapter 4, YouTube was found to pay creators considerably less than Spotify, it was also found that SoundCloud didn't appear to be paying grass- roots creators at all. In spite of this, the platform had largely evaded the type of vilification reserved for Spotify.

Patrik Wikström suggests that SoundCloud's main function is as a type of matching platform for artists and investors offering a convenient, "shortcut...for talent-spotting activities" (Wikström 2013: 169). In essence Wikström suggests the platform is a type of 'shop window' allowing creators to connect with industry A&R. But for creators the platform, the value of the platform lay in its facility to provide a direct route to a global audience. Indeed, SoundCloud appeared to be a platform that was held in particularly high regard.

...money from that is a kind of secondary thought. I don't think what I should be earning should be based on that. I'm just excited about the audience reach. (Jennifer: Edinburgh 2014)

Jennifer was not alone in expressing the attractiveness and the allure of the 'metrics' and feedback that these digital platforms offer in terms of play data and comments from fans. Esther echoes the sentiment that interactive digital platforms have a value that is not financial:

I guess it strokes our ego when we get a good comment and musicians live for that shit. Music is a labour of love. At the end of the day, even if you haven't made a penny, which is upsetting, what's more upsetting is if nobody is ever going to hear it. (Esther: London 2015)

Indeed, there appears to be an acceptance that the rewards will *not* be monetary. But the attraction of such services cannot simply be attributed to unsigned creators using them out of necessity. Anton, signed to a UK independent record label, described his activities prior to agreeing a contract with a label:

I've previously just released things in my own way and it's always been via stuff like Soundcloud or Mediafire and stuff like that, which was something I wanted to do because I knew that I'd built up a listener base pretty much on SoundCloud. (Anton: London 2014)

From creators a sense emerged that SoundCloud represented an environment for music that had little to do with financial reward. Rather it seems more akin to a type of 'gift economy' (Levi-Strauss 1969: 54) where the exchange is not quantifiable in monetary terms. Instead, it is a non-monetary exchange. The attractiveness of the SoundCloud platform once more suggests that for grass-roots creators at least, reaching a wider audience is their primary objective.

Of course, notions of 'gift economy' run completely at odds to the industrial strategies of commercially exploiting the copyright in musical works and sound recordings. In the context of the music industries as copyright industries these creator attitudes expose a noticeable and problematic subtext. The motivations of creator and investor are aligned inasmuch as they want to build a large audience in the digital sphere. However, the decision as to what services are used to reach an audience can become the source of conflict due to the complex relationship each service has with copyright. As Anton reveals, the means by which an audience is reached can bring the creator into direct conflict with the investor. At the heart of the dispute is the matter of copyright as an exploitable property right.

The label were suggesting that, instead of putting these tracks on Soundcloud as teasers, I should put them on YouTube and that would at least generate some revenue back. But the reason I didn't want to do that is because I have no presence on YouTube. I haven't made any music videos or anything like that so I don't think it would function as a network very well for me. Soundcloud does! (Anton: London 2014)

Ultimately what emerges repeatedly in interviews with creators, and indeed investors, is tension between the attractiveness of digital as a means of reaching global audiences and the difficulty in extracting income directly from these audiences.

In the 'old' music economy large audiences almost automatically generated lucrative returns for rights holders by way of the wide-ranging and exclusive 'bundle of rights'. Hit records generated sales, mechanical royalties, performing

rights and broadcast rights. In the realm of digital music services these orthodoxies do not necessarily apply. Relatively subtle differences in business models that are almost imperceptible to consumers and creators can have considerable ramifications in terms of monetising the copyright in music. In the light of recent deals with major record companies, publishers and collecting societies referred to in Chapter 4 it appears any 'spirit of gift' in the SoundCloud platform may soon be extinguished⁹⁷.

LEVELLING THE PLAYING FIELD

Rather predictably, the sense emerging here is that the core symbolic and practical roles of the larger labels and publishers remain fundamentally unchanged in the digital age. There is, however, evidence of at least some scope for creators to improve their bargaining position or indeed seek opportunities beyond the confines of a long-term copyright transaction. Writing at the end of the 20th Century Richard Caves suggested that creators could input only "time and talents" (Caves 2000) to an agreement between artist and investor. Some 16 years later, digitisation has perhaps added to creators' ability to 'add value' to their inputs. New entrant creator Pete feels that he can positively improve his bargaining position by his own actions:

Basically the idea is that once you've reached a sort of critical mass where you've got a bit of a fan base, you're good live and you've got some really good recordings behind you, at that point you're in the strongest position to encourage a label to make an investment. (Pete, June 2014)

Major label investor Jack agrees that bringing more than just "time and talent" to the negotiating table may result in a more favourable deal for the creator:

'I mean, I heard an artist sing in a flat the other day, she's sung into an iPhone and she's got a piano, we'd love to work with her and we hope to work with her but that artist is going to get a different deal to somebody who comes in and says, you know, "I've been touring for two years, I've got eighty five thousand Facebook fans, I've released 5 singles, two of which have been on Radio 1 at playlist level, we've sold X amount of *iTunes*,

⁹⁷ To recap, deals between SoundCloud and a number of rights holders and collecting societies have been announced in recent months and years, including deals with music publishers (Ingham 2015c) and PRS for Music (PRS for Music 2015c).

we've got X amount of streams on *Vevo* or *YouTube* or whatever." (Jack, London 2014)

It is important to recognise that the things Jack suggests an artist might do are traditionally functions of a record company: tour support, marketing, radio 'plugging' and video production. In effect, the creator is being asked to bear the financial and time costs the investor would otherwise have to bear. Under this model the creator is required to become entrepreneurial in order to possibly partially recalibrate the traditionally skewed balance of power and secure a more favourable copyright transaction. Again, this may be a viable and attractive proposition for some creators but not for others.

What is apparent is that, far from provoking a revolutionary recalibration of the balance of power in the music industries, the effect of digitisation on the relationship between creators and investors has been far subtler than many accounts would suggest. But that is not to say it has been insignificant.

6.5 CONCLUSION

SUMMARY OF FINDINGS

To return to the twin motivations of creators set out at the start of the chapter, namely, to reach a wider audience and to derive a reward from music, it is possible to tentatively suggest that as creators become more experienced the relative importance of these two incentives may shift from the former towards the latter. That is to say, in the early stages of a career reaching an audience is of primary importance but this is gradually eroded by the desire to receive a reward.

A more robust observation that can be made about creators and their copyright is the disparate nature of understandings and perceptions about copyright. New-entrant creators appear largely unconcerned with the copyright aspects of the contracts they seek. There emerges the distinct sense that creators learn about copyright from their peer networks and through experience of generating income from, for example, collectively negotiated sources.

The final section of the chapter looked at music copyright in the context of the 'new' music industries and found conflicting and paradoxical views among the sample. The Spotify service, a fully licensed music platform was viewed negatively, while

SoundCloud; a platform that does not pay creators, was viewed far more positively. Where creator and investor attitudes appeared to converge was on the notion that narratives of “disintermediation” had been somewhat overstated. Ultimately, to carve a career in the music industries was likely to involve entering into a formal relationship with a recording company and this in turn is likely to involve transfer of copyright from creators to investors.

WHAT NEXT?

The enduring symbolic and practical significance of the record company in particular has many important implications for creators. In view of the way in which creators appear to learn about copyright *ex post* rather than in advance of entering copyright contracts, the potential ramifications of the long-term copyright agreements they enter into will not be fully understood until many years in the future. In order to address these issues the remainder of this study problematises the continuing presence of ‘life of copyright’ contracts in the contemporary UK recording industry.

CHAPTER 7: 'LIFE OF COPYRIGHT'

7.1 INTRODUCTION

The final chapter of this thesis turns the focus to the issue of 'post-term' retention of copyright that can see the record company retain control of copyright potentially for the full 70-year term. The issue of copyright being retained by record companies long after the creator has been 'dropped' emerged in the analysis of contracts in Chapter 5 and reemerged in a number of the interviews conducted for the research. In many respects this is the most problematic aspect of the intricate interplay between copyright and contract observed and evaluated in this study. The chapter develops a critique of this aspect of creators' experience of music copyright by building on historical and contemporary calls for a statutory 10-year limit to any assignment of copyright between primary creators and third-party investors. The findings of this study support such an intervention.

CHAPTER OVERVIEW

Viewing 'life of copyright' assignments through the prism of 'principal-agent problem' (Towse 2001b, Kretschmer et al 2010, Negus 2014), the chapter builds on the empirical findings of the research so far and, using historical precedents, sets out a core problem that lies at the heart of these full copyright term contracts. The central propositions made in the discussion are as follows:

- 'Life of copyright' record contracts are reflective of the uneven bargaining position of creators and investors in copyright transactions.
- The economic and commercial rationale underpinning these long-term contracts is flawed for a number of reasons and the ramifications are potentially objectionable to creators.
- The 'democratising' effects of digitisation identified in Chapter 6 may marginally correct these imbalances but the enduring symbolic and practical importance of record companies suggests their bargaining power is largely undiminished.
- Historic and contemporary calls for statutory reversion mechanisms limiting the assignment of copyright by primary creators offer desirable alternatives

to the present situation but there is unlikely to be a meaningful appetite for such interventions among record companies or policymakers.

7.2 THE PRINCIPAL AND THE AGENT

THEORY AND PRACTICE

‘Principal-agent problem’ has its origins in the sphere of economics and institutional theory. It describes a situation that emerges where a person or organisation acts or makes decisions on behalf of another. The central issue is usually bundled with problems of information asymmetry and uncertainty (Caves 2000: 14). In short, principal-agent problem emerges when the principal has limited knowledge of, or control over, the actions of the agent. As such, it has been applied to various aspects of contracting in the creative industries (Kretschmer *et al* 2010: 15).

In most instances the ‘principal’ is taken to be the party that controls the economic capital in a relationship with an ‘agent’ who is subcontracted to conduct some kind of activity on behalf of the principal. In a music industries setting Keith Negus invokes principal-agent issues when describing the relationship between a music company and what he describes as, “...those subcontracted by music companies, operating outside the music company (with their own agendas/goals), recruited to act as go-between by linking musical artists to media, to consumer intelligence, to policy makers” (Negus 2014: 124). For instance, a record company might decide to employ the services of a radio plugger⁹⁸ to promote one of its products on regional radio rather than use its own staff. In this instance the music company (principal) may have limited influence over how the outsourced plugger (agent) operates.

In the context of the contracts discussed in this thesis, principal-agent problem might appropriately identify the record company as the *principal* and the contracted creator as the *agent*. Upon signing the contract the company is likely to have invested heavily in the creator but has little influence over how they subsequently behave or what they produce. To perpetuate some Rock tropes, the creator might develop a debilitating drug addiction and be unable to fulfil the obligations of a contract. Alternatively, writer’s block may lead to an outbreak of

⁹⁸ The job of the radio plugger is to get radio airplay and exposure for recording artists. Record labels and individual artists may outsource this function to specialist companies.

'second album syndrome' resulting in the delayed delivery of a recording or delivery of a product that is deemed by the label to be of a substandard quality⁹⁹. Ultimately, in a "tight control/loose control" (Hesmondhalgh 2007: 18) relationship (where the record company has tight control over distribution and marketing of the product but loose control over the creative activity of the creator) there is a great deal of the creator's activities over which the record company has little or no control.

However, the effectiveness of the concept of 'principal-agent problem' is that, in many cases, it can easily and appropriately be reversed with the result that the principal becomes the agent and vice versa. This is precisely the case in the relationship between record company and creator.

THE CREATOR 'PRINCIPAL'

In the context of earlier discussions of ownership of copyright works, this study takes the positions whereby the relationship is reversed and identifies the creators as the 'principal' in the relationship with the record company. There are two primary reasons why this is appropriate.

The first reason is adduced from the interviews with new-entrant creators actively seeking a record deal. Here the record company was viewed, to a significant extent as an external operator facilitating the ambitions of the creator. To paraphrase one of the interviews interview; the record company was viewed as, 'the machine that can take songs to a mass audience'. Thus, the creator is the *principal* driver of the initiative.

The second reason for identifying the creator as the principal rather than the agent has its roots in the ownership and authorship of copyright works. While the CDPA is far from conclusive on the authorship of sound recordings, as discussed in Chapter 5 (by industry convention and by contractual assignment) the record company will routinely be identified as the owner of the recordings. It is the main contention of this chapter that creators rather than investors should be identified as authors and therefore first owners of sound recordings. This would have the effect of allowing the creator to exert long-term control over these works, thus ameliorating their traditionally weak bargaining position and reducing the

⁹⁹ The contract will generally dictate that the record company rather than the creator will decide if a recording is of sufficient quality.

possibility of principal-agent problem emerging around life of copyright contracts. The remainder of this chapter advances precisely this argument.

THE INVESTOR 'AGENT'

In the alternative relationship as described above, the record company is identified as the agent. In effect, the record company is operating on behalf of the creator in order to assist them in the production and dissemination of recorded works. But, as demonstrated in the earlier analysis of contracts and as shall be further argued more fully in due course, the record company is under little obligation to carry out any activities beyond some basic procedural functions as set out in the contract. For example, they may be obliged to notify the creator of their intent to pick up the next option or alternative 'drop' the creator after a pre-agreed period. However, even apparently 'artist-friendly' clauses such as these allow record companies time to remedy any breaches of contract.

Such is the asymmetrical nature of most deals that the creator wields very little influence over the actions and decision-making of the record company to the extent that this kind of relationship can rightly be characterised as a 'real world' expression of principal-agent problem.

THE PROBLEM

As has been discussed at some length, the term of record contracts and indeed music publishing contracts is comparatively short in the contemporary industries. This period may be for a one album deal or a one-year to eighteen-month term with perhaps two or three 'options'. This means the creator is unlikely to be bound by the terms of the original contract for any longer than a maximum of five or six years.

The potential for principal-agent problem emerges when the potentially lengthy post-term retention of copyright is considered. Examination of contracts and subsequent interviews with creators show that in some instances the record company will retain copyright in the sound recording "for the life of copyright (as may be extended)". This means that the creator is potentially alienated from the copyright in the recordings for the full copyright term of seventy years. As the principal in this scenario, the creator wields little or no control over the record

company's decisions and activities in respect of these works. Therein lies the principal-agent problem.

7.3 LIFE OF COPYRIGHT AND THE 'CONTRACT SPACE'

A 'life of copyright' assignment represents the fullest temporal range of the "contract space" (Kretschmer *et al* 2010: 3). The contracts examined in Chapter 5 and the interviews with a number of creators and investors suggest such contracts are a feature of the contemporary recording industry.

Before proceeding to the issue of 'life of copyright' as a feature of recording contracts, it is important to issue the caveat that these are by no means the only type of contract in the music copyright industries. Again, as has been shown, it is important to reject outright any suggestion of the existence of 'industry standard' contracts.

In music publishing the contracts examined combined with secondary data and interviews indicate that in a UK music publishing setting at least, 'life of copyright' contracts are a legacy of a prior age¹⁰⁰. Nonetheless, this is a legacy that continues to contribute to the revenues of music publishers today. When asked about 'life of copyright' in publishing, with the benefit of many years experience of working for a large UK music publisher, Billy a music publisher explained:

Life of copyright? I think it would be very difficult to get that now. We've got a strong heritage catalogue. If I said Tin Pan Alley you'd know what I mean? Those deals will be, because of the era they were signed in, they *will* be life of copyright and probably split down the middle 50/50. (Billy: London 2014)

Billy made reference to Tin Pan Alley¹⁰¹ and then listed some well-known songs by well-known artists that he described as "evergreen copyrights". The point Billy was making was that, although his company would be unlikely to seek, 'life of copyright' assignments today, contracts that were negotiated on this basis remained binding and as such were lucrative income streams. Indeed, Billy was of the opinion that

¹⁰⁰ It should be noted that the discussion here is limited to exclusive writer, administration and single/multi song publishing contracts between creators and publishers operating in the popular music industries. In the world of 'production music' the situation with regards to royalties, buy-outs and retention of copyright is quite different and entirely beyond the scope of this thesis.

¹⁰¹ Tin Pan Alley here is reference to Denmark Street, London the home of British music publishing for much of the 20th Century.

these contracts alone would generate significant income to keep his company in business for many years without acquiring *any* new catalogue¹⁰².

While 'life of copyright' appears to be 'off the table' in the music publishing industry, it is very much a permissible dimension of the 'contract space' in the recording industry. However, it does not necessarily follow that all record deals are conducted on a 'life of copyright' basis. Rather, there was found to be considerable variety.

At one end of the spectrum are agreements offered by 'micro labels' where copyright law only notionally defines the contract space. Loose conceptions of short licences are agreed on a handshake and rights are seldom formally assigned. Irvine, the owner of a small UK independent label revealed that copyright played a minimal role in the 'handshake deals' he negotiated with creators. His company ethos and the short-term contracts the company offers creators are consciously based on that of an American Punk label, he explained, "We just do (one-year) rolling deals, that seems the fairest way of doing things" (Irvine: London 2014). Although his record label is run as a business and provides him with a full-time living, Irvine's approach to the industry had commonalities with the ideological dimension to the "micro-independents" featured in Robert Strachan's study as engaging in a "shared critique of power relationships of cultural production" (Strachan 2007: 261).

Billy, a publisher by day, explained the very different underlying ethos of his approach to the deals he does with creators on the micro-label he runs in his spare time:

I suppose if I'm investing that money in something then it wouldn't really be naughty of me to say "I'd like to actually acquire some rights in that" but essentially I don't. Technically I've got no rights to the actual recordings. I essentially write it off at the point at which I pay it. Twenty five years I've been working for *Anonymous Independent Publisher*, and various publishing companies et cetera...that's twenty five years of this industry giving me a living, paying for my flat so it is a little bit of an element of I'm

¹⁰² As noted in Chapter 5, the 50/50 royalty rate in the legacy contracts this publisher is describing is also now regarded as uncommon in the UK industry 50/50 splits are still a feature of publishing agreements in the US market as illustrated in Publishing Contract 3 featured in Chapter 5. This contract was offered by a US publisher to a UK writer and ultimately rejected on the basis of the 50/50 split and a number of other reasons.

more than happy to give something back to support artists that just probably wouldn't find that support elsewhere. (Billy: London 2014)

While Irvine's reasons for doing short-term 'handshake deals' are overtly ideological, Billy's particular reasons for doing the types of deals he does are more idiosyncratic. Indeed, to him it represented a type of homage to the industries rather than operating in opposition to them. Irrespective of their motivations, the types of deals these two labels offer creators are at the opposite end of the spectrum from 'life of copyright deals'.

Moving towards the centre of the spectrum of copyright assignment lie any number of variations on the 'licence'¹⁰³ deal, where the creators at some point in the future stand to gain control of the recordings. At this point they are at liberty to take control of the recordings and exploit them in any way they see fit. This could be to self-release or re-license to a record company. In the UK this type of shorter-term licence deal was a common feature of the type of record 'deal' that emerged from the Post-Punk 'DIY ethic' record companies of the early 1980s such as Rough Trade (Hesmondhalgh 1998). In these agreements label and artist would share any profits on a 50/50 basis and crucially, the copyright in the sound recording would revert to the artists after an agreed period of time: 10 years, for example¹⁰⁴.

From this shorter term assignment or licence of copyright the post-term retention of copyright can stretch for much longer periods lasting decades and even to the farthest expanse of seventy years. The remainder of the study focuses on these 'life of copyright' record contracts.

INVESTOR ATTITUDES TO LIFE OF COPYRIGHT

As discussed already, music industries' contracts frequently defer to the CDPA to define key terms, the clause "as defined in the Copyright Designs and Patents Act 1988" or variations thereof is commonplace. In specific reference to term, this is an area of copyright law that directly shapes the 'contract space'. In the document

¹⁰³ With reference to the discussion in Chapter 5 around assignment and licence, an assignment of copyright is tantamount to conferring ownership on the assignee whereas a licence means the creator retains ownership but cedes control. In practice, as a licence is often comprehensive in its scope, as Rahmatian (2009) suggests, there may be no discernible difference from the creator's point of view. Again, it appears creators and investors use the term 'licence' simply to mean a contract term that is shorter than 'life of copyright'.

¹⁰⁴ In Hesmondhalgh's (1998) account of the rise and fall of British independent label *Rough Trade* he suggests that a significant contributing factor in the downfall of 'Indies' such as *Rough Trade* and *Factory* was their failure to secure copyright assignment for lengthy periods.

analysis and interviews it was noticeable that 'acquisitive' copyright practices were not only associated with major music companies. That is to say, majors *and* independents may seek to retain the copyright in the sound recording for the full seventy-year copyright term. The presence of 'life of copyright' in a number of contracts examined in the study fed into questions around investors' contracting practices. Jack stated that he viewed 'life of copyright' as a common starting point for contract negotiations conducted by both the major record companies he had worked for:

That's (life of copyright) the sort of default position for any major record company and probably most Indies. You assign your rights in the recordings that you made during the term to us. (Jack: London 2014)

As Jack suggests, this type of deal is not limited to the major labels, but is also present in the terms offered by some independent labels. Olivia stated:

With recording rights, with master rights, I think it's fair enough that you ask for 'life of copyright'... I've never worked for the majors... I think the basis of an independent company is that you do want long copyright. (Olivia: London 2014).

In the UK at least it seems that for majors and many independents, 'life of copyright' deals are the default starting position for negotiations. The rationale, as some investors would have it, is that 'life of copyright' allows the company to develop talent over a longer period:

That's why 'catalogue' is important, that's why having a decent copyright term is important because you're looking at the long-term development of an artist. We have a very strong catalogue and we're very proud of it and we want to continue to sell that catalogue and we believe in artist development. So we want to get on to album number three or number five and be breaking bands long-term and allowing them to develop, so the band's first album is going to be really important when they're on their third or fourth album. (*Ibid*)

Taken at face value this appears to be an entirely creditable and logical position pointing towards a reciprocally beneficial long-term relationship characterised by

commitment, security and career development. However, in the context of the contracts examined earlier this rationale becomes questionable.

In practice recording contracts seldom reflect the type of security that guarantees three, four or five albums. While contracts from Olivia's label do not feature in the sample in Chapter 5, in the context of the evidence presented here it seems improbable that the contracts issued to artists by her company contain provision for a firm commitment to multiple albums. As discussed previously, option-based contracts allow the investor to decide when to exercise the option to continue with the agreement or decide to terminate the agreement at a predetermined point (Caves 2000, Greenfield & Osborn 2007, Jones 2012). It is of crucial significance that while the creator may be released from the contract when the option is not 'picked up'; the artist is 'dropped', but the record company retains the copyright. This allows the company to exploit the copyright as they see fit, or indeed passively "warehouse" (Kretschmer 2012: 51) these rights in the hope that they will at some indeterminate point in the future become economically active.

The rationale that underpins 'life of copyright' contracts as an expression of a commitment to long-term partnerships is further undermined when the endemic failure rate of recorded music products is taken into consideration. It has become an industries axiom that 80-90% of records will fail to recoup costs (Kretschmer et al 1999, Caves 2000, Osborne 2014c). *The Gowers Review of Intellectual Property* presents more robust evidence which suggests that the commercial life of recorded music is unlikely to exceed 10 years in all but a tiny minority of cases (Gowers 2006: 52). As record companies are primarily involved in the exploitation of copyright it seems improbable, indeed illogical, for them to expend resources on these 'failed' copyright works. Gowers suggests that where, "the costs of renewing copyright or reissuing copyrighted material are greater than the potential private return" (*Ibid*: 54), works of "enduring social and cultural value" (*Ibid*: 54) may be inaccessible to consumers and follow-on users. In the context of this chapter, it is important to recognise the inescapable conclusion that 'life of copyright' agreements will in fact put recordings beyond the reach of the creators that performed them. The result of this process is alienation (Rahmatian 2011: 215)¹⁰⁵ of the creator from their own works.

¹⁰⁵ For a comprehensive exploration of the term 'alienation' in relation to copyright see Rahmatian (2011) pp.201-244

CREATOR ATTITUDES TO LIFE OF COPYRIGHT

What ‘life of copyright’ means to creators was inconsistent across the sample of interviewees. For new-entrant creators the very idea of ‘copyright term’ appeared to be utterly abstract. However, questions around retention and reversion of rights did elicit *some* illuminating responses.

Chris reflected on how important it was to *own* his works in the sense that eventually he would regain control over, “Essential! I will only do it if it’s licensed. It’s always a finite thing” (Chris: London 2014). This was a sentiment shared by Tom, who with experience of life of copyright record and publishing deals dating back to the early 1970s, believed that copyright should, at some point, always revert back to the original creator. With the benefit of experience Tom suggested a reversion clause was something he would advise all creators should push to have written into a contract:

Think in terms of licensing stuff rather than selling stuff. So even if somebody winds up making money off your songs for the next 20 years...and maybe they make a bit more than they were entitled to...as long as at some point in time the ownership of that comes back to you and there’s some kind of reversion clause. (Tom: Glasgow 2014)

With specific reference to his contracts with record companies dating back to the early 1970s and by way of a convoluted process of takeovers and bankruptcy in the recording industry, his recordings from this period resided in the catalogues of two of the remaining ‘Big 3’ major music companies. He observed that one of these major labels was obliging when it came to affordably and expediently licensing recordings that he could subsequently release on his own ‘DIY’ label as a deluxe CD edition. Conversely, the other major label made this type of activity all but impossible, with the out-of-print recordings languishing in their vaults, inaccessible to Tom and any wider audience. In 2014 he was still experiencing the ramifications of copyright transactions conducted around 40 years previously. Reinforcing the finding of the previous chapter, Tom had, in his own words, “learned the hard way” (Tom: Glasgow 2014).

As discussed in the previous chapter the achievability of reversion clauses is likely to depend on a wide array of factors including the level of advance costs, the

status of the creator, the status of the label and many other variables. The argument that will be developed in due course is that bargaining skill and bargaining power should be removed from the post-term dimension of the negotiation. Instead, a post-term limit to assignment of copyright should be set by creators to investors. The effect of such an intervention would be to protect inexperienced creators at the start of their career with limited knowledge of copyright and few or no bargaining chips.

Anton, setting out in what he hoped would be a career in music, was a creator in exactly this position. His situation again reiterates the ad hoc means by which creators learned about copyright as they come up against the 'real world' scenarios. By coincidence, Anton's first record had been released the day prior to the interview. Although understandably excited about having his music released, he expressed concerns about the 'life of copyright' assignment that was included in the contract he was offered:

The life of copyright thing... yeah it does (bother me) in that...I don't know, it doesn't need to be that way basically. I should be able to own my own recordings...I guess you have to try to look at it objectively and think what has the label done for you and what do they deserve in return? (Anton: London 2014)

Anton had received a modicum of free legal advice from a friend's lawyer, "according to the lawyer there's no real legal basis for that because they haven't actually funded anything" (*Ibid*). He offered some insight into the negotiation, "They claim that it should be life copyright because it enables the artist to grow with the label" (*Ibid*). Here the record company is clearly employing the same rationale as Olivia with the suggestion of the creator growing with the investor is used as justification of 'life of copyright' assignment. It transpired that there was no commitment for another record in the contract.

When asked if he felt that under different circumstances this arrangement could be more palatable he responded as follows:

'If there's a situation where the label has really pushed to make something happen that you would otherwise not be able to achieve, so really you come to them with an idea and it's required effort and they helped that happen,

then I guess it would be a more reasonable kind of proposition but then again not necessarily.' (*Ibid*)

The creator here was attempting to weigh up the costs and benefits of what he has to 'give away' to the record company and what he might receive in return. Marc's attitude to dealing with record companies recognised the importance of incentives to the investor as well as the creator:

You *want* shorter-term deals, but again I look at both sides. It's only fair that if somebody is investing in something that they have a long enough time to make money out of it or at least get their money back. Sometimes you've got to give a little, to get a little! (Marc: Glasgow 2015)

Again from the more experienced creators and investors there's a sense of a sliding scale of post-term retention depending on what is on offer in other aspects of the contract. Bobby, Director of European Operations at an independent label described what he saw as the main considerations for an artist:

It's the artist's decision in the end whether they want to get that music out and if they're willing to give up their rights in perpetuity.... You have to weigh up the pros and cons of those. But it's a deal isn't it? If someone's going to give you a million pounds then probably you'd be quite happy to sign over the rights. If they're going to give you fifty thousand pounds, is it worth it? You have to make those decisions! (Bobby: London 2014)

Anton's deal didn't include any kind of advance; indeed he had paid for the recordings and designed the artwork. The record company's main role was to manufacture a limited run of vinyl records and market the product. His attempts to negotiate a shorter assignment or licence were unsuccessful, which again chimes with the idea of a skewed bargaining power of creator and investor. It also serves as a reminder that 'life of copyright' contracts are not simply a feature of major record company contracts.

SQUARING THE CIRCLE: RHETORIC AND RATIONALE

In essence what is being observed in Anton's case, is the seed from which the 'principal-agent problem' identified earlier is likely to emerge. The apparent divergence between creator and investor attitudes to 'life of copyright' will perhaps

not become apparent to creators until long after the contract has been signed. Indeed, it may not become apparent until long after the creator has been ‘dropped’ from the deal. The real problem emerges when the creator wishes to access or exploit the recordings in some way long after the record company has lost any interest or incentive in actively exploiting or marketing them.

As investor informants would have it, such deals are designed to ensure a long-term relationship can be fostered with creators. However, the analysis here suggested that although such a justification may be well-intentioned, examination of the nature of record contracts show this to be a deeply flawed rationale. Rather it seems reasonable to suggest ‘life of copyright’ terms, reflect the relative bargaining power of established investor and new-entrant creators. Moreover, such long-term asymmetrical deals serve to reinforce the unequal standing of labels and creators.

The extent to which affordable digital technologies of music production, dissemination and consumption of music might correct these imbalances was discussed in Chapter 6. The answer was by no means conclusive. While creators may subtly improve their bargaining position by taking on roles traditionally carried out by record companies, it appears that in order to penetrate the mainstream, creators still seek and require the support of record companies. In exchange for these services, creators will often have to enter into ‘life of copyright’ contracts.

In light of this somewhat gloomy conclusion, the final part of the chapter considers potential remedies to this undesirable situation, particularly for uninitiated new-entrant creators.

7.4 “UPON MATURER JUDGEMENT AND REFLECTION”

Up to this point of the study, the majority of what has gone before has served as a critique of data collected in the document analysis and interviews with stakeholders. In the final section the focus turns outwards and considers possible resolutions to the clear potential for principal-agent problem that emerge in ‘life of copyright’ recording contracts. The central argument proposed in this chapter is that the likely and invidious outcome of ‘life of copyright’ agreements is that many, if not most, recorded works will become simultaneously economically unviable for investors, and yet inaccessible to creators and consumers. From this an

inescapable conclusion can be drawn: life of copyright retention terms are excessive.

This raises the concluding question for the study: does this area of divergence between creators and investors intersect with broader discussions around copyright policy? The answer to this question is an unequivocal yes. In the literature there are instructive historical *and* contemporary calls for an inalienable reversion right that limits the period for which creators may assign their rights. Drawing on these sources, the purpose of the remainder of the chapter is to identify and evaluate potential remedies for the significant issues of principal-agent problem identified earlier in this study.

BILL FOR THE BETTER ENCOURAGEMENT OF LEARNING 1737

In the context of what is ostensibly a study of copyright and the dynamic fluidities of the digital sphere, a sudden diversion to the distant realm of 18th Century British copyright discourse may seem somewhat incongruous. However, what this historical turn discloses is that the issue of excessive copyright retention periods in contemporary recording contracts is an underlying issue as old as copyright itself¹⁰⁶.

The *1737 Bill for the Better Encouragement of Learning* also known as ‘The Booksellers’ Bill’ was, as the title suggests, a piece of legislation primarily concerned with the reproduction of printed literature. In 1737 copyright was solely a matter of book publishing. In the UK copyright in music was not established until *Bach v Longman 1777* (Kretschmer & Kawohl 2004: 35) and copyright in sound recordings did not pass into law until the *Copyright Act 1911*. As such, much of the 1737 Bill is not directly relevant to the discussion here except for one highly significant aspect: the issue of retention of copyright by third party investors.

Copyright historian Ronan Deazley’s analysis of the original draft shows that the 1737 Bill contained the proposition that copyright should only be assignable by authors to book publishers for a maximum term of 10-years, as stated in the *Bill for the Better Encouragement of Learning 1737*. The draft Bill was worded as follows:

¹⁰⁶ As discussed in the literature review copyright in books originates in *Statute of Anne 1710*, the world’s first codified copyright regime. The *Bill for the Better Encouragement of Learning 1737* was intended to reform this earlier piece of legislation.

‘[N]o author shall have the power to sell, alienate, assign or transfer, except by his last will and testament, the right thereby vested in him to the original copy of any book...for any longer time than 10-years, to commence for any sale...for any longer time, or to commence from a future day, and all bargains and covenants for the renewal of the same...shall be utterly void and of none effect.’ (Clause 15, *Bill for the Better Encouragement of Learning*, cited in Deazley 2004: 106)

That the bill sought to limit the author’s power to, “sell, alienate, assign or transfer” seems as relevant in the context of this study as it clearly was in 1737. However, it is notable that the Bill called for a fixed-term assignment limit in the context of what was a relatively short copyright term by today’s standards¹⁰⁷. Quoting from the draft of the Bill, Deazley provides an explication of the likely consequences of this proposed statutory limitation to the assignability of copyright:

Not only did this ensure that a considerable element of financial control would remain with the author, but it also provided them with the opportunity, to alter or correct their compositions, “upon maturer judgement and reflection” (Deazley 2004: 107)

Deazley’s commentary suggests the concerns of 18th century literary authors who wished to be able to “alter” or “correct” their works are not entirely dissimilar to those of 21st Century creators featured in this research who may wish to access and reissue recordings with the benefit of a “maturer” understanding of copyright¹⁰⁸. Ultimately, the 1737 Bill failed but the notion of a statutory limitation of copyright assignment remains relevant in the context of contemporary copyright scholarship.

USE IT *THEN* LOSE IT

In 2013 copyright term for sound recordings in the European Union, including the UK, was extended from 50 years to 70 years (Directive 2011/77/EU). The decision to extend the term came after several years of lobbying by the recording industry

¹⁰⁷ The proposed an extension of copyright term from a maximum of 28-years to a ‘Life of the author plus 11-years’ (Deazley 2010).

¹⁰⁸ Although this is a study of commercial aspects of creators’ experience of copyright it is also possible that creators may wish to adapt or remix the recordings or allow others to do so. Unfortunately this aesthetic dimension is beyond the scope of this study.

and other trade organisations¹⁰⁹. Citing a considerable body of empirical evidence a number of UK academics opposed the extension¹¹⁰ (Kretschmer *et al* 2008) leading to what Paul Harkins describes as, “hostile and damaging divisions between academics and representatives of the music industries” (Harkins 2012: 629). The objections of academics were premised on evidence that suggests copyright term was already excessive and any extension would benefit only a few corporate rights holders. The document states:

The record industry was offered a generous commercial bargain when investing in recorded music under the current exclusive term of 50 years. This already far exceeds the protection available to other R&D intensive industries. It cannot be the job of the European Commission to protect the revenues of incumbent companies at the cost of consumers, creativity and innovation. (Kretschmer *et al* 2008: 12)

In spite of these objections and the attendant rancour, term extension was implemented in November 2013. This had the effect of, at a stroke, extending ‘life of copyright’ contracts by a further 20 years. In the context of this chapter, the EU term extension greatly magnified the potential for principal-agent problems to arise.

However, Martin Kretschmer argues that limiting the period that creators may assign rights to third parties is not only desirable but may be achievable within the boundaries of current EU law. Indeed, he argues, “it is one of the last openings for reforming copyright law from within” (Kretschmer 2012: 51). Echoing the 1737 *Booksellers’ Bill* and evidence presented in Gowers (2006) Kretschmer proposes that after 10 years copyright should revert to authors upon which date they would have three options: re-assign/re-license the work; or the work could be administered by a collective management scheme, or the author may abandon the work.

While conceding that there would be significant practical and political obstacles to securing such an intervention, Kretschmer argues that there may be, “...dynamic effects of subsequent innovation from un-locking underused back catalogues” (Kretschmer 2012: 49). This potential to unlock back-catalogues has grown

¹⁰⁹ Indeed the UK music trade organisation UK Music was founded with the specific lobbying objective of securing copyright term extension for sound recordings (Harkins 2012: 646).

¹¹⁰ The proposed extension was initially from 50-years to 95 years which would have ‘harmonised’ EU copyright term in sound recordings with that of the USA.

significantly in the digital age, as there are no prohibitive production costs for existing recordings and, as discussed, digital markets are accessible even to DIY creators. Thus, if copyright reverted to creators they could release, promote and exploit recorded works that are of no commercial interest to investors thereby opening up hitherto inaccessible material to new audiences. In the case of the relatively few recordings that do remain commercially viable, the onus would be on investors to re-license these from creators.

There is also evidence of an appetite for such a reversion right from within parts of the industries, suggesting that this type of intervention is not simply a fanciful academic conception. In their submissions to the MMC *Report into the Supply of Recorded Music* (MMC1994) the International Managers' Federation (IMF) called for the Commission to consider whether the outright assignment of copyright with no reasonable prospect for reversion to the creator should be made unlawful (MMC 1994: 213). Their rationale bears considerable commonalities with Kretschmer's. The report states;

The IMF considered that if record companies were precluded from holding copyrights for the full term of copyright and had to return them to artists at least, say, every ten years, a very lively market in the licensing of these copyrights would develop. In general, if the record companies were forced to take the shorter-term view, it was probable that their more excessive advances and marketing programmes would be curtailed. That would be to everyone's advantage. Above all it would be easier for new companies to grow and develop, as they would be able to compete on fairer terms for back catalogue. The majors would have to be more cautious about predatory marketing practices, since they would not be able to cross-subsidise their new product from their catalogue sales as they did now. (MMC 1994: 211)

The argument developed by the IMF supports the idea that shorter-term assignments could lead to more vibrant and more accessible markets. Of course, a limit to assignment operates in direct opposition to the record companies' rationale that lengthy retention periods allow them to secure a return on their investment over a long period.

While a limitation could have the effect of reducing ‘front-end’ investment, Kretschmer argues that mutual benefit for creator and investor in such an intervention would be to allow for contract negotiation predicated on an observable track record rather than speculative guesswork as to the value of an untested copyright (*Kretschmer 2012*: 49). Again, this is an argument consistent with the IMF proposal:

Perhaps the greatest benefit would be that with an open market in copyrights their value would be easier to establish. (MMC 1994: 211)

But as an organisation that represents artists’ managers it is unsurprising that the IMF focus is on the benefits for creators:

Above all, from the IMF’s point of view, as artists’ managers, the position of the weakest participants in the industry, the artists and their families, would have been strengthened, especially in their later years, when now many suffered so badly. (*ibid*: 211)

This final argument made by the IMF has considerable resonance with the type of rhetoric employed in support of copyright term extension in 2013. While the evidence suggests term extension will benefit only a tiny minority of creators (*Kretschmer et al 2008*), the ‘use it or lose it’ provision in the same legislation hints at both a political will and a practical mechanism by which rights in sound recordings might revert from investors to creators.

The ‘use it or lose it’ provision in the directive dictates that in the event that the record company fails to make the recordings available after 50-years the copyright in the sound recording would expire, However while the performers’ rights in the recording would endure for a further 20-year period, the copyright in the recording would expire. Creating a curious, and apparently unprecedented, position where performers have rights in an expired copyright work. Unfortunately, for performers at least, the obligations on the record company to satisfy the ‘use it’ element of the clause appear to be very low. Further, the onus is on the performer to notify the record company of their wish to claim 20 years of performers’ rights¹¹¹. What at

¹¹¹The Directive states that performers may activate the ‘use it or lose it’ mechanism if: “...the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means”. At present it remains unclear how this will work in practice or indeed how much performers will receive. The speculative attempts by

first may appear to be a common sense and straightforward solution to the problem of dormant ‘warehoused’ recordings, on closer inspection reveals a complex maze of practical and conceptual challenges that remain untested. However, the underlying principle of a statutory reversionary right is one that can be extended to the core copyright in the sound recording.

What the IMF and Kretschmer propose, and what is being advocated in this study is a use it *then* lose it system rather than a use it *or* lose it. That is to say, the record company should not have the facility to automatically retain control of the copyright beyond the designated period. In practice, implementing such a limitation would be relatively straightforward. A number of contracts examined in this study and reported in interviews as well as secondary sources, (Hesmondhalgh 1998, Byrne 2012) contain clauses that ensure the sound recording rights revert to the creator after a predetermined period. This suggests that a maximum time limit would be relative simple to insert into record contracts.

The far more problematic issue would be how to engender the industrial cooperation and political will required to implement such a mechanism. Given the music industries’ concerted and orchestrated efforts to extend copyright term for sound recordings (Harkins 2012: 645) largely at the behest of the recording industry, it is improbable that the industry lobby would countenance a perceived weakening of those rights. In this regard the attitudes of the music industries lobby may not have evolved particularly since the *1737 Booksellers’ Bill*. Deazley suggests a statutory reversion mechanism would have been, “nothing short of revolutionary” (Deazley 2004: 107) in the book publishing industry of 1737. In the recording industry of 2016 this would require a paradigm shift of colossal proportions. The historic predisposition of policymakers to acquiesce to the demands of industrial lobbying currently suggests no such reversion mechanism is an imminent likelihood.

Bob Dylan’s record company Sony provided a commercial interpretation of what “sufficient quantity” by releasing a limited edition of 100 copies of unreleased material from 1963 on CD-R format.

7.5 CONCLUSION

FINDINGS

This chapter has viewed ‘life of copyright’ recording contracts through the prism of principal-agent problem. Drawing on interviews the discussion set out and problematised the rationale underpinning investors’ justification of ‘life of copyright’ contracts. The focus then turned to creators’ experiences of such deals and found them to be broadly undesirable. This conclusion was made principally on the basis that these deals see creators potentially alienated from works that investors are under no obligation to exploit or to allow the creator to do so.

The chapter then drew upon and added to historical and contemporary calls for a maximum limit of 10 years to be applied to any assignment of copyright by creators to investors. Such an intervention would allow creators to take control of the copyright in their recordings and exploit them as they saw fit. It would have the dual benefit of allowing investors to re-license these recordings at a financial level commensurate with the previous commercial success of the works.

In view of the findings of this study it seems that a statutory limitation to copyright assignments would broadly be advantageous to creators, particularly those at the start of their career. It was also argued that such an intervention would be relatively easy to deliver in light of the fact that limited term contracts are already a feature of some record companies’ contracts. However, given the lack of political will to support such an intervention the outlook is somewhat gloomy. Without a statutory reversion right, inexperienced creators with little or no track record of commercial success are likely to continue to enter ‘life of copyright’ contracts and learn ‘the hard way’ about the vagaries of music copyright in the digital age.

CHAPTER 8: CONCLUSIONS

8.1: INTRODUCTION

The concluding chapter of this study brings together, summarises and reflects upon the main findings of the research. In doing so, this chapter identifies where the thesis makes an original contribution to knowledge in the study of music copyright. In addition to this, the conclusion provides reflections on the research process and the extent to which the aims of the study were achieved. To this end it considers what aspects of the study might have been conducted differently and reviews the practical applications of the findings for creators and investors. The chapter closes by proposing areas for future investigation, as well as proffering innovative approaches to research in this area.

8.2: CONTRIBUTIONS OF THE THESIS

As discussed in the introduction to the study, copyright discourse is a crowded battlefield of competing interests. Academics, policymakers, lobbyists, investors, creators, and any number of other stakeholders, activists and critics vie for a platform to make their contribution to the debate. The literature showed a vast canon of works devoted to the academic study of copyright from many disciplines, and employing a broad set of methodological approaches. This convergence on the issue of copyright potentially presents a challenge for a PhD researcher looking to make an original contribution to knowledge in a crowded arena.

However, this study does make an original contribution by consciously rejecting convenient but over simplistic binaries that see copyright as a polarising force pitting idealistic and naïve creators against wily and rapacious investors. Rather than ask what copyright does *to* creators, the study asked what copyright does *for* creators and what it *means* to them as sentient participants in a diverse set of industries rather than inanimate components of an industrial machine. In this regard the study offers original insights into the interplay and exchange between creators and investors and the role of copyright in that relationship. Out of this emerges a far more rounded and convincing evaluation of the creator's position within the industries framework than is generally available in the literature.

The research made a number of original contributions, both in terms of the approach taken to the subject and, more importantly, in its findings.

The study is methodologically innovative in its use of mixed data collection methods, combining semi-structured interviews with creators and investors *and* an analysis of key copyright documents. Furthermore, the use of contemporary copyright documents including contracts and royalty statements sets this study apart from existing studies. The inclusion of these sources here adds considerable new depth to the analysis available in the existing literature.

The research examined creators' income streams earned from a variety of digital and live music sources. From this it was possible to gain an overview of individual creators' income previously unseen in academic literature. By framing these sources in a wider theoretical and empirical context it was possible to gain new insights into creators' portfolios of copyright income streams in the digital age.

With regard to live music copyright, as far as can reasonably be established, there are no existing studies that empirically examine either the financial dimension of copyright income to contemporary creators or the equally important creator attitudes to it. This 'hidden' income can be potentially lucrative, even for niche creators, indeed, for a number of those interviewed it was their first experience of making money from music copyright. Therefore, the study can reasonably claim to have made an original contribution to understandings of the implications of copyright in live music.

The analysis of copyright contracts featured in the study found that lengthy 'post-term' retention of copyright by record companies remains a feature of the UK recording industry. It was successful in demonstrating this to be the case by way of document analysis and stakeholder interviews. Building on historical precedents and contemporary discourse, an empirically founded case was made for a statutory limitation of 10-years of assignment of copyright by primary creators to third party investors.

In short, the study's main contribution is to recognise, foreground and describe creators' complex and often inconsistent experiences of music copyright. In doing so the study adds to a small but growing body of literature that uses largely qualitative empirical methods to tackle the surprisingly under-researched aspect of copyright scholarship.

8.3: MAIN FINDINGS

The research was conducted with the intent of scrutinising creators' experiences of music copyright in the digital age. From the outset the focus was trained on nascent digital streaming services and live performance; two sectors showing considerable growth against a backdrop of a once dominant recording industry in decline.

The thesis posed one overarching research question and three related sub-questions:

- How does copyright shape the commercial decision-making of popular music creators in the UK?
 - What are the key commercial decisions creators have to make in respect of their music copyright?
 - What level of reward might creators derive from the various income streams generated by copyright?
 - How does the interplay between copyright and contract influence the conditions within which creators operate?

Of course, the answers to these questions were far from straightforward, hence the 'story' of the research was told over tens of thousands of words of discursive narrative. Rather than pithy concise answers, what emerged was a diffuse and complicated sketch of intertwined and diverging attitudes and experiences. These intricacies reflect the complex nature of copyright's 'bundle of rights'. They also represent the complexity of the music copyright industries as a nexus of transactions, revenue streams and routes to market.

The inclusion of interviews in the research led to many hours of recorded material and hundreds of thousands of words of transcripts. The responses were often circuitous and oblique. It is the responsibility of the researcher to understand and interpret the relevance and meanings in these responses rather than simply treat them as answers to questions. Moreover, by synthesising the document analyses and the interview material it was possible to distil the findings into core themes and elements that contribute to a fuller understanding in respect of the primary and subordinate research questions. The main findings are presented here under the four core themes of the research:

COPYRIGHT AND COMMERCIAL DECISION-MAKING

The study operated on the premise that copyright's exclusive 'bundle of rights' presents creators with a bundle of potential decisions as to how their works are used and commercially exploited.

- Copyright appeared to have very little influence over new entrant creators' commercial decision-making. More experienced creators displayed considerably more copyright awareness, suggesting strongly that creators learn about copyright primarily by experience.
- The interviews suggest creators are motivated by a desire to reach a wider audience and to derive a reward from their music. These goals have only indirect links to copyright.
- It was possible to tentatively conclude that in the early stages of a career, reaching an audience is of primary importance but this is gradually eroded by the desire to receive some kind of reward for making music.
- Uninitiated creators starting out in the business have a host of potentially crucial decisions to make in respect of their 'bundle of rights' at the point where they are least qualified to do so. The ramifications of such decisions may only be appreciated in the fullness of time.

COPYRIGHT AND REWARD

The study operated on the premise that copyright's 'bundle of rights' presents creators with a portfolio of income streams.

- In the digital age creators' portfolios of income streams have become increasingly fragmented as the 'micropayment' model replaces income from one-off sales of recorded music.
- Creators and investors displayed scepticism about the financial value of Spotify in particular, though this seemed to be based largely on hearsay as opposed to actually checking their own distribution statements.
- While 'per stream' rates paid by digital services may be infinitesimally small, even relatively niche creators may be able to derive far more substantial sums from copyright than existing reports suggest.
- In the digital age, collecting societies, digital distributors and some but not all record companies provide a significant volume of granular itemised data. However, the underpinning mechanisms that determine how their income is derived are obscure.
- In comparison with digital, live music copyright is both straightforward and transparent. Furthermore, live performances can make a potentially important contribution to a 'portfolio' of copyright income streams even for niche creators.

- With the benefit of panorama over the entire dataset it is apparent that copyright, in its natural state, is inert. To generate money from copyright from the sources examined here requires a considerable degree of activity in the form of sales, streams and live performances.

THE DEMOCRATISING FORCES OF DIGITISATION

The study considered the extent to which accessible digital technologies had presented creators with alternatives to entering traditional copyright contracts with third party investors

- The ‘democratising’ effects of digital technology mean creators can potentially reach disaggregated global audiences without the assistance of a record company or music publisher. Therefore, the creator is faced with a genuine decision regarding whether to self-release or to seek the investment of a record company or publisher.
- An obvious tension emerged between the attractiveness of digital platforms like SoundCloud as a means of reaching and building audiences, and the difficulty in extracting income directly from these audiences.
- In practice, signed and unsigned creators become alienated from their works as soon as they release them into the digital sphere, after which they are entirely dependent on third parties to negotiate and administer agreements with digital services.
- A number of investors suggested creators could improve their contractual bargaining position by building a digital profile. It was not possible to identify examples of this.
- The record deal is perceived as a pathway to a wider audience and retains a powerful symbolic allure for creators. As such the extent to which a meaningful democratisation of the music industries beyond grass roots level has occurred remains doubtful.

COPYRIGHT CONTRACTS AND CONTROL

The study considered the interplay between copyright and contract as it shaped the experience of creators

- Music copyright contracts can be distilled into four key elements: scope, term, advance and royalty. These four contractual elements do not operate discretely; rather they form an interconnected set of variables where each *may* influence other dimensions of the deal.
- While copyright contracts are heavily skewed in favour of investors, certain aspects of these deals such as recoupable rather than returnable advances, escalating option advances and their relatively short-terms suggest the creator is afforded some potentially favourable contractual redoubts.

- Economic theory suggests contracts are shaped by the allocation and apportionment of risk between creator and investor. In some instances however, key dimensions of the contract bear little relation to the potential rewards on offer or risk borne by the investor suggesting opportunistic contracting practices
- In the contemporary recording industry 'life of copyright' 'post-term' assignments remain commonplace with investors' rationale for seeking such agreements founded on fostering long-term relationships and recouping costs.
- As most recordings will not recoup and most creators will be 'dropped' by their label, lengthy retentions of copyright are likely to lead to principal-agent problems for creators that are contractually alienated from these works for the full term of copyright.

8.4 REFLECTIONS ON THE FINDINGS

To pull all of these threads together into one consistent linear argument is exceedingly challenging. Indeed, a main argument made throughout the study is that linearity and consistency are seldom a feature of creators' experiences of music copyright. However, with the benefit of a holistic understanding of the complete thesis, a number of aspects of the study emerge that allow some broader reflections.

That the music industries are populated largely by participants seeking reciprocally workable ways of creating and disseminating music came as no surprise. Neither was it unexpected that copyright serves as the conduit through which much of this activity is commercially exploited by way of a series of transactions. Of course, the motivations and incentives of creator and investor for entering into these transactions are not necessarily congruent. Creators seem likely to be motivated by the prospect of their music reaching a wider audience as well as securing the symbolic significance of 'signing a deal'. Experience, not unnaturally, appears to bring knowledge and understanding of copyright and, from the responses of creators, it would seem that as their interest in copyright develops it becomes increasingly aligned with that of investors.

To a large extent this type of 'learning by doing' is inevitable, a conclusion that seems to be common sense. However, the job of the academic researcher is to develop insights that common sense does not provide. To that end, this fairly self-evident conclusion only becomes a meaningful empirical observation when viewed

in the context of the findings of the study that are obscure to the casual observer. That a creator often becomes alienated from the copyright in their music early in their career is a common feature of copyright transactions and upon assigning or licensing copyright the creator wields little control of or influence over the works from that point on. That they make these decisions before the benefit of experience has empowered them to fully comprehend the ramifications of the decision is perhaps the most fundamental problem empirically revealed in this study.

The main implication of the findings of this study is; how might this situation be corrected or at least significantly reduced? Aside from a statutory intervention to restrict the maximum term of copyright assignment, it is unclear how this invidious situation might be alleviated.

8.5 REFLECTIONS ON THE STUDY

The opportunity to conduct funded research into the business of music was, of course, a great privilege. Throughout the study I was able to present various iterations of the research to academic and industries audiences at conferences and seminars. In doing so, I was able to engage with a significant number of academics working in similar areas, but often coming from very different perspectives and approaches. Indeed, it was possible to engage personally with many if not most of the scholars whose works are referenced in this study. The research also allowed me access to sectors of the industries I had no prior experience of. These included engagements with major record labels as well as niche micro-labels, some of which I had no previous knowledge. I also had opportunities to interview an array of creators and investors, from high-level corporate executives to new-entrant, fledgling creators. These numerous encounters and exchanges were personally and professionally very enriching.

In respect of the data collection itself, this proved to be a mix of highly rewarding and energising dialogues as well as more frustrating encounters. Gathering data and accessing subjects proved to be a challenge throughout the study and a lesson very much learned. From a personal perspective the process of conducting the study was highly educative. Just as the creators featured in this study learn from experience so too do early-career researchers. But research is often an inefficient process where seemingly promising lines of enquiry can prove to be

blind alleys and what look like unlikely leads can throw up valuable illuminations and insights. That is the value of the endeavour and the failures as well as the successes of the project will be of equal benefit when conceiving and designing future research projects.

It is probably the experience of most researchers to ask at some time: 'why did I do it this way?' There were numerous points when such thoughts tormented me. Of course, in retrospect there are things I would have done differently and these are discussed in the methodology chapter. But on balance, the broad aims were achieved and this is reflected in the findings of the study.

Aside from contributing to the field of study and honing my research skills, the findings of the study and the challenges in accessing data have been of considerable value to me as a music industries practitioner. Acquiring an intimate understanding of copyright's various revenue streams, of how the collecting societies operate and what the main elements of a copyright contract are, provide highly transferable assets valuable for 'real world' applications. Most valuable of all however, has been the benefit this study has afforded of a broad view of copyright as it shapes creators' experiences of the music industries.

Unfortunately, such a nuanced panoramic view is generally unavailable to the individual creators, particularly those at the start of their journey into the music copyright industries, at the time they perhaps most need it. It is however hoped that some of this research will be of interest and value to the primary creators and perhaps even investors. A number of the interviewees and contributors of documentary data have approached me asking about the research and its findings. Some were seeking advice in respect of the data shared or themes that emerged in the interviews. These follow-up interactions demonstrate that, if presented appropriately, there is an appetite among creators to learn about copyright.

Creating pathways by which the research findings can contribute to 'knowledge transfer' is an important line of development I am keen to pursue. To this end, a data exchange could be mutually beneficial to creators and researchers. Such an initiative would involve creators exchanging documentary data with researchers in return for information and advice relating to copyright. This could have obvious reciprocal benefits for data hungry researchers and knowledge hungry creators.

Drafting the finer details of such a programme is something I intend to set my mind to in the weeks and months after submitting this thesis!

8.6 AREAS FOR FUTURE RESEARCH

Throughout the study there were research threads that had to be put aside and also thoughts of research paths that might be conducted ‘after this is all over’. A natural progression from this study would be to ‘scale-up’ the numbers and sample sizes in order to increase the ‘robustness’ of emergent findings. As discussed in the methodology, the Future of Music Coalition (FMC 2013) mixed-method study of 5000 musicians in the USA is an example of what might be achieved in a UK setting. However, identifying, accessing and securing the participation of subjects would remain an obstacle. While it might be practical to research unionised orchestral musicians in such a way, popular musicians appear to be far less agreeable to the scrutiny of academics.

Another area for future study might look at the rates negotiated by UK collecting societies with digital services like Spotify. These remain the source of continuing contention and have been roundly attacked as ‘short changing’ creators, while major copyright companies are able to secure large advances and equity stakes in these new services. PRS for Music was one of the first major societies to license music streaming services. In other territories similar collecting societies have been less keen to license at such an early stage, the German collecting society GEMA is a prime example of a ‘holdout’ society. There is, therefore, scope for a comparative mixed method study to evaluate what differing licensing strategies mean for the revenues of collecting societies, music copyright companies and individual creators under different regimes. Again, data deficits are likely to present a significant but not insurmountable obstacle to conducting such a study.

As always, accessing good quality data remains the biggest obstacle to advancing the study of music copyright. But rather than simply bemoan such data deficits, there are aspects of music copyright scholarship where imaginative data collection methods can shift the focus to new areas of investigation not dependent on accessing the closely guarded troves of data held by the music industries. By employing methodologies that are experimental, both in the sense that they have not been widely deployed in the study of copyright and also in the literal sense that they are based on natural and field experiments, popular music researchers could

develop novel and illuminating perspectives on previously obscure subjects. Two examples of such experimental approaches have direct relevance to this study.

The first would be to conduct a natural experiment based on tracking and measuring publicly available data generated by streaming services. It would be possible to gauge the effect of various external factors such as TV exposure, award nominations, or being 'playlisted' on BBC Radio 1, for example and from this to quantify the effect these external 'levers' have on a creator's career. In turn the ramifications for copyright revenues could be estimated and evaluated.

A more qualitative 'experiment' relates directly to the issue of post-term retention of copyright. While 'life of copyright' contracts remain a feature of the contemporary recording industry, so too are far shorter assignments of 10 or 15 years. It would be valuable to identify and assist creators signed to such contracts in exercising their contractual reversion. In so doing it would be possible to observe the practical, financial and cultural dimensions of such a process. This type of highly participatory experimental research could add an extra empirical layer to the debate around 'post term' retention of copyright and the effects of a reversionary right.

APPENDICES

APPENDIX A: RECORD CONTRACT

From:

[REDACTED]

To:

[REDACTED]

Date:

[REDACTED]

Dear

[REDACTED]

In return for the mutual promises set out as follows (receipt and sufficiency of which you acknowledge) you and we agree to the following terms:

Territory: The World.

Delivery: You will deliver to us finished master copies of the Recordings and associated artwork.

Recordings:

[REDACTED]

Net Receipts: We shall

[REDACTED]

[REDACTED] pay you 50% of our Net Receipts from our exploitation of the Recordings after your share of Net Receipts exceeds £200 (accounting on a half yearly basis, 90 days after the end of each June and December). "Net Receipts" means all the income received by us from exploitation of the Recordings (but excluding our share of public performance and broadcast income) after deducting all third party costs in connection with the Recordings.

Overriding anything to the contrary in this agreement, your share of Net Receipts shall include any payments by us to anyone who performed on or contributed to the Recordings and all music publishing payments.

Rights: We are the author and first owner of the copyright in the Recordings and the artwork created in connection with the Recordings and accordingly are exclusive owners of the copyright in the Recordings and artwork and are exclusively entitled to exploit the Recordings and artwork including without limiting the exclusive right to reproduce, manufacture, rent, licence, make available, adapt, transmit, distribute, sell, broadcast and communicate to the public the Recordings and artwork and records and videos derived from the Recordings and to publicly perform and otherwise use exploit and deal with the Recordings (and any part of the Recordings) and artwork in

any way we shall think fit in all media and all formats whether now known or hereinafter invented throughout the Territory for the life of copyright (as may be extended). To the extent that we are held not to be the first owners of the copyright in the

Recordings and artwork you hereby assign to us with full title guarantee the copyright in the Recordings and artwork throughout the Territory for the life of copyright so that we shall have the exclusive rights referred to in the previous sentences of this section. You, on behalf of yourself and all performers who performed on the Recordings, consent to such exploitation.

Miscellaneous: You warrant, represent and undertake that the Recordings, the artwork, and any materials delivered by you do not infringe the rights of any person. You warrant that we are fully entitled to exploit the Recordings and artwork free of any claims or encumbrances and, overriding anything to the contrary in this agreement, that the payments payable to you shall be inclusive of all royalties and/or payments payable to third parties in respect of our exploitation of the Recordings including all music publishing payments. You agree to indemnify us against any loss suffered by us as a result of a breach of any of your warranties or obligations under this agreement provided that the amount thereby indemnified against shall be limited to claims which have been settled with your consent or which have been subject to a judgment. You agree that you shall not re-record the compositions embodied on the Recordings until 3 years after the date of our release of the Recordings in the UK. This agreement shall be exclusively governed by the laws of England and exclusively subject to the jurisdiction of the courts of England.

This document covers the entire agreement between us with respect to the....

Recordings and you and we agree that it is legally binding on both of us.

Yours sincerely
Accepted & agreed

[Redacted signature]

for and on behalf of

[Redacted signature]

APPENDIX B: ETHICAL CONSENT FORM

CONSENT TO THE USE OF DATA

University of Glasgow College of Arts Ethics Committee

I understand that Kenneth Barr is collecting data in the form of taped interviews for use in an academic research project at the University of Glasgow.

The Research Project

Music Copyright in the Digital Age

Following recent developments such as the Gowers Review of Intellectual Property (2006), the music industry's co-ordinated efforts to convince the European legislature to extend the copyright term for sound recordings, and the passing of the UK Digital Economy Act 2010, this is a particularly appropriate time to interrogate music copyright law and policy as it effects three key groups: musicians, record companies, and consumers. In particular, this project proposes to explore two emergent, but under-researched, responses to the 'digital crisis' facing recorded music: internet streaming and live performance. At the same time it will locate these phenomena within a broader historical analysis about the interplay between music, performance, technology, and law. In short, this ambitious project aims to make a significant contribution to shaping the contemporary debates and policy concerning music copyright in the digital age, as well as to bring together researchers in Music and Law.

The aims of this project will be achieved by surveying the existing legislative framework as it relates to music streaming and live music as well as empirical analysis of financial data. In addition to this desk based research, the aims will be achieved by carrying out case studies and in-depth interviews with key stakeholders: musicians, investors and consumers.

I give my consent to the use of data for this purpose on the understanding that:

- ♣ The material will be treated as confidential and kept in secure storage at all times.
- ♣ The material will be retained in secure storage for use in future academic research
- ♣ The material may be used in future publications, both print and online. Signed by the contributor: _____ date: OR Signed on behalf of the contributor (i.e. parent/guardian in case of a person under 18) _____ date:

Researcher's name and email contact: Kenny Barr k.barr.1@research.gla.ac.uk

**Supervisor's name and email contact: Professor Martin Cloonan
Martin.Cloonan@glasgow.ac.uk**

Department address:

Music School of Culture and Creative Arts University of Glasgow 14 University Gardens Glasgow G12 8QQ

APPENDIX C: INTERVIEW QUESTIONS

Investor Questions

The first questions ask you to describe your own position in the industry and the state of the industry...

- 1. Firstly... How did you get into the industry? What is your role? What do you do?*
- 2. With reference to your own sector, tell me about the distinct challenges and opportunities digitization has presented to your business?*

The next couple of questions concern commercial Decision-Making...

- 3. The music industry has been characterized as a “rights industry”, how does the existence of the so-called ‘basket of rights’ inform the decision-making in the work that you do?*
- 4. Ultimately creators are responsible for the decisions they make with respect to how their music is used, as someone whose activity feeds directly into this process, can you tell me what you perceive to be the most significant of these decisions?*

These questions are about relationship between the investor and creators...

- 5. How much involvement do creators tend to take in the negotiation of the agreements you offer them?*
- 6. Can you tell me about the sort of questions do creators ask you about the agreements they enter into with you?*
- 7. The infrastructure allowing creators to produce and disseminate music to an audience without the aid of a third party is now fully developed and widely available. To what extent has this changed the nature of your commercial relationship with creators?*

Transactions and Agreements...

- 8. What factors influence the level of financial investment that you offer creators?*
- 9. In terms of level of investment and extent of contractual commitment, how has the character and content of these agreements altered in the digital age?*

And finally...

- 10. That is the end of the structured section of the interview; do you have anything else you would like to add in respect of music copyright, creators and the music industries?*

Creator Questions

1. *Tell me about yourself as creator of music... What do you do? How long have you been making music? What are your objectives as a music maker?*
2. *Once you've created a piece of music, you attempt to reach an audience, how do you decide how to most effectively achieve this?*

Now I'm going to ask some more specific questions about how you think about your relationship to your music...

3. *To what extent do you view your creative activity as being part of a business or industry?*
4. *When you create a piece of music, how important is it that you 'own' the musical work you produce?*
5. *In legal terms as a creator of music, you have an exclusive set of legal rights relating to how that music is subsequently used, do you consider these rights to be valuable to you as a creator?*
6. *In what ways does digital technology affect the ways in which you can distribute and control your musical works?*

These questions are about the commercial aspects of your creativity...

7. *How would you describe your understanding of the various income streams you can derive from your musical creativity?*
8. *How accessible is financial information relating to your music related income?*
9. *How important is it to you to be a member of collecting societies?*
10. *How important to you is it to have a publishing deal?*
11. *How important is it to you to have a record deal?*
12. *You are involved in (insert types of appropriate copyright transactions), how did you decide to enter into these agreements.*
13. *How do you now feel about the decision you made to enter into this transaction?*
14. *Can you describe the relative commercial value of recorded music and live performance in your musical activity?*
15. *Online fans can now chose to buy your music via download or access it via a streaming service, how do you feel about downloading and streaming respectively?*

And finally...

16. *That is the end of the structured section of the interview; do you have anything else you would like to add in respect of what we have discussed today?*

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