

Copyright in music

1. This note has been prepared for the purposes of this inquiry, ie it concentrates, in very general terms, only on those aspects of copyright relevant to our investigation. Except where specific mention is made, it takes no account of prospective legislation in the shape of the Copyright, Designs and Patents Bill now before Parliament.

Historical

2. Copyright originated in the 15th century in the licensing of printers and books and the proscription of their counterfeiting. The first Copyright Act, passed in 1709, gave authors of books the sole right of printing them for a prescribed term, the titles of the books being registered with the Stationers' Company. Subsequently the House of Lords decided in 1774 (*Donaldson v Beckett*) that the Act had extinguished the common law copyright in published works, while leaving unaffected the common law copyright in unpublished works.

3. There were a number of copyright statutes passed in the 19th century. The Copyright Act 1842 first dealt with performing rights in musical (and dramatic) works, with protection equivalent to that for literary works. Hitherto musical and dramatic works had been deemed to be books, and covered by literary copyright. However, the Act provided inadequate protection for performing rights in musical works and the Copyright (Musical Compositions) Acts of 1882 and 1888 (by which reservation of the right of public performance of any musical work had to be printed on any published copy of the work, with payment of costs and penalties left to the discretion of the court) provided added protection. But sale in the streets of pirated copies of songs and music and difficulties in bringing prosecutions led to the passing of the Musical (Summary Proceedings) Act 1902 and the Musical Copyright Act 1906; they prescribed procedures against infringers of musical copyright (both Acts were subsequently repealed by the Copyright Act 1956).

4. Criticism of the various copyright Acts passed between 1735 and 1875 was made in a Royal Commission report published in 1878. The Acts were badly expressed, even unintelligible, the report said, but action to amend and consolidate the various Acts was not taken until after the stimulus of, successively, the Berne Convention of 1885 (to which Great Britain adhered in 1887) and the Berlin revision of 1908. It was necessary for our laws to be amended to conform to the Conventions and to provide foreigners with adequate protection.¹ The Copyright Act 1911 was accordingly passed.

General provisions of 1911 and 1956 Acts

5. The 1911 Act clarified existing confusion about copyright by defining it as the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, . . . and shall include the sole right . . .

(d) in the case of literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film,² or other contrivance by means of which the work may be mechanically performed or delivered, and to authorise any acts as aforesaid.

(Section 1(2), Copyright Act 1911.)

¹ A series of bilateral treaties had earlier reciprocally protected foreigners' works and the International Copyright Act 1844 (as subsequently amended) enabled Orders in Council to be made to confer copyright in the United Kingdom on those works. After the Berne Convention, the International Copyright Act 1886 was passed for a similar purpose. The Acts of 1844 and 1886 were repealed by the 1911 Act, but the administrative structure of Orders in Council was retained so that, among other things, United Kingdom copyright law could continue to be extended to the dominions, colonies and foreign countries. The Copyright Act 1956 maintained that principle.

² At that time silent, of course.

6. The 1911 Act conferred these rights on authors, composers and artists for their literary, dramatic, musical and artistic works; 'author' was not defined in the Act but covered all categories of creators of work in which copyright subsisted. Apart from copyright being an exclusive right to do something (see the preceding paragraph), it is also an exclusive right to prevent others from infringing copyright (subject to certain statutory exemptions). It is generally for the owner of the copyright to bring any action against an infringer, although in certain circumstances criminal sanctions may apply.

7. An interesting feature of the 1911 Act was that it set out to encourage the infant record industry¹ at a time when it was threatened by the powerful music publishing industry, whose sheet music sales provided almost the only opportunity of hearing music outside the concert hall, theatre or music hall. A statutory exemption from infringement of copyright was given to anyone who produced 'records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced' provided prescribed prior notice was given to the owner of the copyright and a royalty was paid to him. The prescribed rate of this 'mechanical' royalty was 2.5 per cent of the ordinary retail selling price of the 'contrivance' in the case of contrivances sold between 1 July 1912 (the commencement of the Act) and 30 June 1914, and 5 per cent thereafter. (These rates were varied in respect of records made of musical works published before the commencement of the Act, and a minimum royalty was introduced of not less than a halfpenny for each separate musical work in which copyright subsisted.)

8. Further revisions of the Berne Convention took place at Rome (1928) and Brussels (1948). The Copyright Act 1956 enabled the United Kingdom to ratify the 1948 revised Convention and give effect to its provisions. The 1956 Act also took note of the provisions of the 1952 Universal Copyright Convention which, unlike the 1948 revision of the Berne Convention, extended protection to works of non-Convention nationals first published in a Convention country and works of Convention nationals first published in a non-Convention country. The 1956 Act also took account of improved technology, so that 'record', for example, is defined as:

... any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable (with or without the aid of some other instrument) of being automatically reproduced therefrom ...

The definition of 'reproduction' in the 1956 Act (it did not appear in the 1911 Act) is:

... in the case of a ... musical work, includes a reproduction in the form of a record or of a cinematograph film ...

and 'performance' is suitably updated as:

... includes any mode of visual or acoustic presentation, including any such presentation by the operation of wireless telegraphy apparatus [eg receipt of broadcasts] ...

9. The 1956 Act reinforced the concept that copyright in a work meant the exclusive right to do or authorise any other person to do, 'certain acts'² in relation to that work in the United Kingdom or in any other country to which ... [the] Act extends'. The Act also states that copyright is infringed by anyone, other than the owner of the copyright, who does, or authorises anyone else to do, any of those 'acts' without the licence of the owner.

10. The 1956 Act repealed all but three sections of the 1911 Act and is, at the time of this report, the main extant statute on copyright. It has been amended a number of times, most significantly by the Cable and Broadcasting Act 1984.

¹ There were only three record producers at the time.

² See paragraph 11 below.

What follows is therefore a note of the provisions of the 1956 Act so far as they relate to music. (Some of these provisions were similarly to be found in the 1911 Act.) Copyright subsists in every original musical work which is unpublished provided the author was a 'qualified person'¹ at the time the work was made. Where an original musical work has been published, copyright subsists if, but only if, first publication took place in the United Kingdom (or another country to which the provisions of the Act extend) or the author was a qualified person at the time of first publication or was a qualified person immediately before his death if he died before first publication. Orders in Council have been made applying the provisions of the Act to works by nationals or residents of, and works first published in, approximately 100 countries party to the Berne and Universal Copyright Conventions.

11. Copyright in a musical work published during his lifetime subsists for 50 years from the end of the year in which the composer dies if it is first published, or first performed in public, or first offered for public sale as a record, or first broadcast or first included in a cable programme before the composer's death. If none of those things happens until after his death, copyright subsists for 50 years from the end of the year in which first publication or first performance or first offer for sale or first broadcast was made or the first inclusion in a cable programme took place. Thus, if none of those things happens, copyright continues indefinitely. Acts restricted (save for certain statutory exemptions) by the copyright in a musical work are:

- (a) reproducing the work in any material form;
- (b) publishing the work;
- (c) performing the work in public;
- (d) broadcasting the work;
- (e) including the work in a cable programme;
- (f) making any adaptation of the work (which means an arrangement or transcription); and
- (g) doing, in relation to an adaptation of the work, any of the 'acts' specified in (a) to (e).

12. Performance of a musical work, or the issue of records, does not constitute publication of the work. Publication is achieved only when reproductions of the musical work are first issued to the public, that is to say, a score is printed and published, and can happen only once in respect of any particular work.

13. The 1956 Act updated the 1911 Act in respect of the making of a record of a musical work and its associated royalty. It states that provided a first recording has been made for the purposes of retail sale with the licence of the copyright owner, it is then open to anyone to make his own recording (ie his own version) without infringing copyright so long as:

- (a) prior notice is given to the owner of the copyright in the prescribed² manner;
- (b) the record is to be sold by retail, or to be used for making other records to be sold by retail; and
- (c) in the case of a record sold by retail, the manufacturer pays to the owner of the copyright in the prescribed² manner and at the prescribed² time, a royalty equal to 6.25 per cent of the ordinary retail selling price calculated

¹ 'Qualified person' means an individual who is a British subject (ie Commonwealth citizen) or British protected person or a citizen of the Irish Republic or is domiciled or resident in the United Kingdom (or in another country to which the provisions of the Act extend); or a body incorporated by law in the United Kingdom (or another country to which those provisions extend).

² By the Copyright Royalty System (Records) Regulations 1957 (SI 1957/866) as amended by the Copyright Royalty System (Records) (Amendment) Regulations 1973 (SI 1973/409).

in the prescribed¹ manner, subject to a minimum royalty of three farthings [now 0.313p] in respect of any one musical work (if the record comprises two or more copyright works, the royalty is apportioned among the owners of the copyright in the works as may be agreed, or determined by arbitration).

14. It should be noted that the minimum statutory mechanical royalty of 0.313p for any one musical work applies only to a work (or an adaptation of it) of which a record is to be made under the provisions of section 8 of the Act, ie under the statutory licence² without infringing copyright. Section 8 does not deal with circumstances in which the user is expressly licensed by the copyright owner, nor are there provisions of the Act which lay down a minimum royalty to be applied in such circumstances.

15. If it appears to them that the ordinary rate of the statutory mechanical royalty (or the minimum amount payable) has ceased to be equitable the Department of Trade and Industry may appoint a public inquiry³ to investigate the matter and if, as a result of the inquiry, the Department are satisfied that a different rate or amount is justified, they may make an order prescribing the new rate or amount; the draft order must be approved by both Houses of Parliament. The last inquiry was held in 1977 and recommended no change.

16. Literary copyright may also subsist in lyrics. In respect of a sound recording, provided any associated lyrics have been previously recorded, the exemption (in respect of making a sound recording) also covers the lyrics of a song, subject to giving the prescribed notice and paying the prescribed royalty (though only one royalty is payable for a record, so that if the copyright owners of music and lyrics are different persons the resulting royalty is apportioned between them, as might be agreed, or determined by arbitration).

17. It should also be noted that, subject to what is said below about commissions, the maker of a sound recording⁴ or his assignee owns the copyright in the sound recording (but not in the musical work recorded) until 50 years after the end of the year in which it was first published.⁵ The 'maker' of a sound recording is the person who owns the record when it is made. If the making of the record is commissioned for money or money's worth, the commissioner is, in the absence of contrary agreement, the first owner of copyright. Copyright restricts the making of a record embodying the recording; public performance of the recording; broadcasting the recording, or including it in a cable programme. The sound-track of a film is, however, not a sound recording, but part of a film. Its copyright first rests in the producer and lasts for 50 years from first publication (or from registration, in the case of films formerly registered under the Films Acts); but the definition of 'publication' is such that it is possible for a film shown at cinemas or on television, but not sold or hired to the public, never to be published and thus enjoy unlimited copyright. The restricted acts are the same as for a sound recording. (Similar rights exist in respect of the copyright owned by a record company in a music video it commissioned in order to promote, generally, a pop song.)

¹ The regulations (as footnote (2) on the previous page) prescribed that

the ordinary retail selling price of any record shall be calculated at the marked or catalogued selling price of single records to the public, or if there is no such market or catalogued selling price, at the highest price at which single records are ordinarily to be sold to the public, exclusive of value added tax in either case.

² Strictly, section 8 of the Copyright Act 1956 (like the 1911 Act) does not grant a licence as such, but offers a defence to an action for infringement of copyright if it can be demonstrated that the record producer has complied with the statutory procedures; see also paragraph 7.

³ The Secretary of State appoints the person to hold the inquiry, and two others to assist that person. Other procedure governing the inquiry is set out in the Copyright Royalty (Records of Musical Works) (Inquiries Procedures) Regulations 1974 (SI 1974/2190).

⁴ Defined in the 1956 Act as

the aggregate of the sounds embodied in, and capable of being reproduced by means of, a record of any description, other than a sound-track associated with a cinematograph film.

A sound recording is regarded as having been made when the first record embodying the recording is produced.

⁵ 'Publication', in relation to a sound recording, means the issue to the public of records embodying the recording or any part thereof (1956 Act).

18. Television and sound broadcasts also attract copyright, of a duration the same as for a sound recording or film. The BBC and the Independent Broadcasting Authority (IBA) own the copyright in their broadcasts. Performers have no statutory civil rights in their performance, but there are criminal penalties against certain unauthorised uses of their recorded performances under the provisions of the Dramatic and Musical Performers' Protection Act 1958 and the Performers' Protection Acts 1958 to 1972.

19. The inquiry described in paragraph 15 is not to be confused with references to the Performing Right Tribunal (PRT) established by the 1956 Act to determine disputes between licensing bodies and persons requiring certain kinds of licences, or organisations representing such persons. The Tribunal's procedures are governed by the Performing Right Tribunal Rules 1965.¹ The 'licensing bodies' are:

- (a) in the case of a literary, dramatic or musical work, for licences for a public performance, or a broadcast, or inclusion in a cable programme, of the work (or an adaptation of it), a society or other organisation whose main object is to negotiate or grant, either as owners or as agents for the owners of copyright, such licences;²
- (b) as regards licences for the same rights in relation to a sound recording, any owner or prospective owner of the copyrights in the recording, or any person or body acting as agent for such owners;³
- (c) as regards licences for television broadcasts to be seen or heard in public by a paying audience, the BBC or the IBA; and
- (d) as regards licences for music videos for public performance and television broadcast, or inclusion in a cable programme, by the owner of the copyright, or any person acting as agent for the owner.⁴

Assignment of copyrights

20. Since 1911, the owner of a copyright has been able to assign his copyright, as personal property, to someone else (ie it can be sold, leased, given away, or bequeathed). An assignment may be total or partial,⁵ and must be in writing. Although it is open to any composer to publish his own work (and many do) many composers choose to assign (or license) their copyright to music publishers for, principally, promotion, protection and exploitation of the work, with the publisher providing the capital and often paying advances. Most publishers belong to the Music Publishers' Association (MPA), a trade association (and a non-profit-making company limited by guarantee) whose Council comprises eight standard publishers⁶ and sixteen popular publishers.⁶ By convention, if the president is a standard publisher, the vice-president is a popular publisher, and vice versa.

21. The former customary practice of assignment for the life of the copyright began to change in the mid-1960s with the advent of the performer/songwriter and became less and less frequent over the following decade. By the mid-1970s it had become the exception rather than the rule. It is also open to a composer to 'co-publish' with a publisher, so that the publisher's copyright earnings and expenses are shared between composer and publisher; this is a practice originating in the United States, but rare in the United Kingdom. It is also to be noted that some contracts with publishers grant only a right to administer the work or catalogue without any rights of copyright being assigned. Today, songwriters, whether or

¹ SI 1965/1506.

² In practice, the Performing Right Society Ltd (PRS).

³ In practice, Phonographic Performance Ltd (PPL).

⁴ In practice, Video Performance Ltd.

⁵ That is, restricted to one or more of those countries in which the owner has an exclusive right, or restricted to part of the duration of the copyright, or restricted to only certain of the classes of act covered by the copyright.

⁶ See the glossary for a description of this term.

not performer/songwriters, tend to opt for short term contracts, the duration varying from one year upwards, with options for renewal, followed immediately by a retention period in respect of copyrights created during the initial contract term.¹

22. There are many other factors worthy of note: first, many agreements with songwriters provide that the period of the publisher's rights will be prolonged if he obtains a cover recording of the song (ie a recording of the song by a performer other than the songwriter). Secondly, under many agreements today the songwriter can terminate the publisher's rights in relation to individual titles if the publisher has failed to exploit them during a specified period. In general, the modern songwriter's copyrights are not signed away to nearly the same extent as was common, say, 25 years ago.

Exploitation of rights

23. There are four principal means of exploitation, each of which requires the consent of the copyright owner and which therefore enables a royalty to be set as a condition of licensed consent. These are:

- (a) When the work is performed in public, broadcast or included in a cable programme ('**performing rights**'). Principal users of performing rights are therefore television and radio stations, discotheques, clubs, concert halls and other places where music is performed in public.
- (b) When a musical work is recorded ('**mechanical rights**'). Principal users of mechanical rights are record companies.
- (c) When the work is recorded on a sound-track for a television programme, a film, an advertisement or similar audio-visual work ('**synchronisation rights**'). Principal users of synchronisation rights are therefore film and television production companies.
- (d) When printed versions of the work are sold ('**print rights**'). Principal users of print rights are therefore companies involved in the business of selling sheet music and other printed versions of the musical work.

Publishers and composers obtain most of their copyright income from licences of performing and mechanical rights, with synchronisation and print rights nowadays representing a minor share.

24. Since large sums of money can be generated by the use of successful musical works, it is important that where rights to a licence are not governed by statute, they are clearly defined in advance, and royalty and payment terms clearly set out in writing in order to avoid legal disputes. There is thus a network of legal contracts regulating commercial use and distribution of musical works, and these agreements operate both on an industry-wide level (collective or 'blanket' agreements) and between individual copyright owners and users of their works.

25. Earnings of composers and lyricists are made up of copyright royalties from a variety of sources and for a variety of uses. (In addition, performing songwriters can earn substantial fees for their services as performers and recording artists.) Music publishers share in the earnings of composers whose works they publish on the basis specified in contracts between them.

26. The true significance of copyright to its owner lies in its positive economic exploitation, rather than the power to prevent potential users from dealing with the protected work. In general, it is clearly impracticable for the composer to discover whether any unauthorised use is being made of his work and it is similarly impracticable for each user to have to trace the composer or his publisher on each occasion on which a protected work is to be used.

¹ The term of the publishing contract determines the period during which music written by the composer becomes the property of the publisher. The retention period is the period during which the copyright would remain with the publisher after the initial songwriting contract has expired. The length of the overall term is usually, in practice, inversely related to the commercial success of the composer, so that the composer/performer of successful pop songs is much less likely to have a long contract/retention period than the composer of serious music, particularly one who is not a performer in public.

Collecting societies

27. In most countries throughout the world this problem has been resolved by the formation of copyright licensing/collecting societies empowered to grant licences and collect royalties on behalf of copyright owners. These societies constitute separate bodies which the potential user can approach to obtain a licence. They represent an efficient means of granting the licence required by users of the copyright work and securing payment for the copyright owner. In the United Kingdom, the society responsible for licensing and administration of performing rights is the **Performing Right Society** and the society responsible for licensing and administration of mechanical rights is the **Mechanical-Copyright Protection Society**. A blanket licence granted by a collecting society gives the licensee access to a whole repertoire of protected works. In return for a single annual royalty payment (usually payable by instalments) and the supply of information as to usage, the user can make use of the entire stock of protected works as often as he wishes during the currency of the licence. He thereby avoids the cost and effort of seeking out individual copyright owners in the United Kingdom and abroad.

28. These national collecting societies are linked together by international contracts of affiliation. In this way, each society collects in its own territory in respect of the works of its own members, and also in respect of the members of each other national society abroad with which it is affiliated. By the same contract of affiliation, each national collecting society is empowered to grant to users licences in respect of its own territory for the repertoires of each society with which it is affiliated. By this system, each society is able to offer its licensees access to what is, in effect, a worldwide range of copyright music.

29. The affiliated societies co-operate in various fields of activity, such as development of technical methods of documentation and distribution, through the medium of their international organisations: the *Confédération Internationale des Sociétés d'Auteurs et Compositeurs* (CISAC);¹ and, in the case of mechanical right organisations, the *Bureau International des Sociétés gerant les Droits d'Enregistrement et de Réproduction Mécanique* (BIEM).¹

30. Most authors and composers elect to belong to their own national collecting society but some find it an advantage to belong also to a foreign society, such as one of those in the United States. This might be the case, for example, where the works of a British composer are also substantially performed in a single foreign country.

The Performing Right Society Ltd (PRS) and performing rights

31. The PRS was formed in 1914 and administers performing rights in musical compositions on behalf of composers and publishers, who assign their performing rights to the society exclusively. There are two categories of performing rights: 'grand rights'² and 'small rights'.³ Grand rights are public performance rights in dramatico-musical works such as operas, operettas, revues, ballets and musical plays. Grand rights are normally licensed by the individual copyright owner (usually the publisher), not the PRS. Small rights, which are administered by the PRS, are in respect of non-dramatic performances of music (although performance of limited excerpts from dramatico-musical works falls within the small rights licensing). Such use of small rights varies enormously, from major live pop concerts to broadcasting to background music (see paragraph 3.11).

¹ CISAC is concerned with all types of rights, not simply performing rights in music; there is therefore an overlap with BIEM in respect of mechanical rights.

² Industry usage originating from a mistranslation of 'grands droits'.

³ A translation of 'petits droits'.

32. The PRS is a non-profit-making company limited by guarantee whose General Council consists of not more than 24 directors, of whom not more than 12 may be publishers and not more than 12 may be writers.¹ In addition, the PRS's articles of association limit to four the number of directors nominated by 'user-owned' publishers and to six the number of directors who may be nominated by 'foreign-owned' publishers. 'User-owned publisher' is defined as:

- (a) any company in which more than 50 per cent of the shareholding is owned or controlled by persons whose main business or a substantial part thereof consists in any activity requiring a licence from the Society or from any of its affiliated societies; or
- (b) any firm in which more than 50 per cent of the assets are owned or controlled by persons whose main business or a substantial part thereof consists in any activity requiring a licence from the Society or from any of its affiliated societies.

The term 'foreign-owned publisher' is defined as:

any company in which more than 50 per cent of the shareholding is owned or controlled by persons who are not nationals of any of the countries which are for the time being Member States of the European Economic Community, or any firm in which persons who are not nationals of any of the countries for the time being Member States of the European Economic Community own or control more than 50 per cent of the firm's assets.

33. Virtually all licences of non-dramatic performing rights in the United Kingdom are issued by the PRS, which administers performing rights in musical compositions on behalf of member-writers and member-publishers (performing rights in all copyrights owned are required to be assigned to the PRS) and its foreign affiliates. Instead of those wishing to perform music in public attempting to locate the copyright owner each time they wish to play a particular work, the PRS undertakes this function by centralising licensing and collection of royalties through its issue of an annual blanket licence to users such as proprietors of premises where music is performed, the promoters of musical events, television and radio stations etc. The blanket licence provides the user with a licence to use any or all of the works in the PRS repertoire, as little or as often as the user desires, for a fixed fee that is usually not directly related to the amount of music used. It is therefore the PRS, and not individual music publishers or composers, which negotiates the blanket licence royalty rate with users for the licensing of rights it administers. The society's powers of negotiation are subject to the approval of its General Council and the jurisdiction of the PRT (see paragraph 19). There are published tariffs for certain types of established use, with other types of use being negotiated by the PRS and the user. If a user feels that the PRS is seeking an unreasonably high royalty rate he may refer the dispute to the PRT, which is empowered to hear and resolve disputes between the PRS and licensees of performing rights.

34. Royalties collected by the PRS are based on detailed returns by broadcasters and other blanket licensees. Performances are also monitored by various means, including visits by a large number of inspectors. Royalties collected by the PRS are distributed in accordance with complex criteria dependent on the nature of the music used,² the nature of the use made of it, and the writer's agreement with his publisher. These criteria (which are set out in the 1987-88 Performing Right Yearbook) are subject to an over-riding principle that in no case may the share of the publisher of a particular work exceed one-half of the total distributable fees in relation to that work. In the case of a published song, the basic division is one-third of the distributable fees to each of the composer, lyricist and publisher. The PRS's rules of distribution mean that writers (if they are PRS members) of musical works always receive their share directly from the society and not via the publisher.

¹ The great majority of the 'writer' membership of the PRS consists of composers, but there are some lyricists.

² The PRS, in common with its foreign affiliates, gives preferential treatment to use of serious music; see paragraph 3.12.

The Mechanical-Copyright Protection Society (MCPS), and the Mechanical Rights Society Ltd (MRS) and mechanical rights

35. The MCPS deals with the licensing and administration of mechanical rights in musical works. The Mechanical Copyright Licences Company Ltd was established in 1910 in anticipation of the Copyright Act 1911. Its purpose was to collect and distribute mechanical royalties generated by the new gramophone record companies. Shortly after, The Copyright Protection Society was founded and, in 1924, a merger of the two bodies resulted in the formation of the MCPS. MCPS acquired the interests of Associated Copyrights Limited in 1937 and later assimilated The Sound Film Music Bureau. In the early 1980s it absorbed BRITICO (a small society administering mechanical rights, mostly in foreign works). The MCPS has been wholly owned by the MPA since 1976.

36. The MCPS's articles of association provide that the number of directors shall not be less than seven nor more than 12, of whom three must be full writer-members of the PRS¹. Apart from the managing director, who is a full-time executive, all MCPS directors are non-executive. The Board is appointed by the MPA and non-executive members retire by rotation after three years' service. The function of the Board is to determine policy and monitor progress in its implementation. The MPA Council monitors progress of the MCPS through a Liaison Committee comprising three MPA Council members who are not on the Board of MCPS.

37. Since 1952 matters of general copyright policy and negotiation of industry licensing agreements for mechanical rights have been the responsibility of the MRS, a company limited by guarantee and served by an elected council of composers and music publishers. Policy and licensing agreements having been formulated by the MRS, administration is then delegated to the MCPS. The MRS is controlled by an elected Council of 18 members, of whom four are composer representatives and 14 are publisher representatives. Most United Kingdom music publishers are members of the MRS, whose prime purpose is to negotiate rates and agreements with copyright-user-representative bodies, although this function is in practice carried out mainly by the MCPS Executive, who then seek ratification by the MRS Council. Publisher-members of the Council need not be members of the MPA. The combination of the activities of the MCPS and the MRS into one body has been under consideration for some time.

38. Each member of the MCPS enters into an agency contract with the society, giving it the right to administer the member's mechanical copyrights for a minimum period of one year. This agency contract is automatically renewed from year to year until either party gives the other six months' notice of termination. Conditions of contract differ slightly between composer and publisher members. Publishers may, if they wish, contract to collect certain mechanical royalties (eg film synchronisation and record manufacturing royalties from the major record producers) directly and, in practice, many publishers do not appoint MCPS as their agent in respect of such rights but deal with record and film production companies directly. (Such direct dealings with record companies will still, however, be on the basis of the statutory rate of 6.25 per cent.) Individual composer members, however, must allow the society to handle all mechanical royalties. Like the PRS, the MCPS administers an annual blanket licence for broadcasters, who provide detailed returns of recordings used (see paragraphs 33 and 34). As with the PRS, the MCPS's operations are funded by commission taken on royalties distributed, with the intention of covering its administrative costs.

39. In practice, royalties for mechanical licences for records and tapes are currently set by statute (see particularly paragraphs 13 and 14). The Copyright Act 1956 provides for a statutory recording licence (SRL) so that recordings of a musical composition can be made without the authority of the musical copyright owner provided the statutory royalty rate is paid and other statutory conditions are complied with. (The statutory licence does not cover the first recording of a work but, in practice, the first recording is inevitably licensed at the statutory

¹ The PRS has three categories of membership: full, associate, and provisional, governed by varying admission criteria and conferring different membership rights.

royalty rate.) This statutory royalty is divided between the owners of all the copyright works on a record or tape. A minimum statutory royalty per copyright work of 0.313p (being the decimal equivalent of three farthings) is also stipulated (but see paragraph 14).

40. When the Mechanical Copyright Licences Company was started, it adopted the method of collection laid down in the Copyright Act 1911; this method was to issue MECOLICO adhesive stamps against payment of appropriate royalty fees by record companies, a stamp being affixed to every record sold. The procedure remains theoretically operative to this day, but is in most cases not employed, since 'royalties may be paid in such manner and at such times as are specified in any agreement which may be made between the manufacturer and the owner of the copyright'.¹

41. As agents for copyright owners, the MRS and the MCPS enter into a variety of agreements with record producers, obviating the necessity to affix stamps. All these agreements require both the name of the copyright holder and the letters MCPS to appear on the label affixed to the record, and also the submission of a statutory notice at least 15 days before its release. On the basis of information supplied in such a statutory notice, a claim will be sent in respect of copyright musical works administered by the MCPS. The royalty is paid by larger record companies on record sales during each quarter and by smaller record companies on records pressed.

42. In the United Kingdom, over 95 per cent of mechanical royalties from commercial records available for retail sale are generated under the industry agreement negotiated between the MRS and the British Phonographic Industry Ltd (BPI), the trade association for the record industry. This agreement provides the framework for administration of the statutory licensing system provided by the Copyright Act. For example, since the abolition of resale price maintenance, it has been impracticable to establish the 'ordinary retail selling price' of every record sold and the BPI/MRS agreement therefore determines a base price to which the 6.25 per cent royalty is to be applied; the base price provided by the agreement is the recommended retail price or, where no such price is recommended, the price at which records are sold to independent dealers plus a mark-up depending on the type of record.² Given the general abandonment by the record industry of recommended retail prices, the amount of this mark-up was renegotiated in 1981-82 on the basis of surveys, jointly commissioned by the BPI and the MRS, to arrive at levels intended to approximate to actual retail selling prices. Even where publishers deal directly with record companies, the terms of the BPI/MRS agreement govern those relationships.

Differences between the PRS and the MCPS

43. Apart from the rights administered, the PRS and the MCPS differ in two major respects:

- (a) Whereas the PRS, by taking an assignment of the performing right from its members, is the owner of this right on behalf of the members, the MCPS acts only as an agent and ownership of the mechanical right remains with the writer or (in cases where it has been assigned by the writer) his publisher.
- (b) The PRS's rules of distribution of royalties have the effect that writers (being PRS members) of musical works almost always receive their share directly from the society and not via the publisher. The MCPS has no such rules and will distribute royalties in whatever agreed proportions may apply. In the case of works not assigned to a publisher, this will be 100 per cent to the writer. In the case of works owned or administered by a publisher, this will generally be 100 per cent to the publisher, leaving it to him to make a further distribution to the writer on whatever basis has been agreed³.

There are also differences in the representation of composers on the governing bodies (see paragraphs 32 and 36).

¹ The Copyright Royalty System (Record) Regulations 1957 (SI 1957/866).

² There is no mark-up in respect of compact discs.

³ It is understood that the MCPS will pay his share directly to the composer provided the publisher agrees; this seldom happens.

Synchronisation rights

44. The MCPS is given power by some of its members to grant synchronisation licences. To certain users, particularly broadcasters, synchronisation licences are issued by the MCPS, with the MRS, on a blanket basis. Where synchronisation rights are not vested in the MCPS, the fee for licences other than blanket licences is a matter for negotiation between user and composer, or his publisher.

Print rights

45. The royalty paid by users of print rights is a matter for negotiation between user and composer or his publisher, but it is normally from 10 to 15 per cent of the retail selling price.

Rates of royalty

46. Royalty rates for each variety of copyright use of music may be subject to individual negotiation, statutory provision, collective industry agreement or industry convention. The following table sets out the usual royalty rates and the source of those rates for each of the major varieties of copyright use of musical works (it does not cover the use of secondary rights ie sound recordings, films etc).

<i>Copyright use</i>	<i>Usual royalty rate</i>	<i>Source of rate</i>
Manufacture and sale of records (excluding compact discs)	6.25 per cent of published dealer price plus fixed mark-up	Departure from statutory rate agreed between MRS and BPI
Manufacture and sale of compact discs	6.25 per cent of published dealer price (with no mark-up)	Departure from statutory rate agreed between MRS and BPI
Manufacture and sale of videograms	7 per cent of published dealer price plus £1 per minute synchronisation fee	MRS recommendation (not always followed) following negotiations with video industry
Video discs and compact disc video	No agreed or usual rate	Industry negotiations continuing
Film synchronisation	Variable fee	Individually negotiated in each case
TV synchronisation	BBC and ITVA*: annual fee Others: no set fee	MRS/MCPS blanket licence agreement Individually negotiated
Film performance	Fee based on percentage of gross receipts	PRS blanket licence†
Radio/TV broadcasts	BBC: fee based on percentage of licence revenue ITVA: annual royalty with quarterly cost of living adjustments AIRC‡: royalty based on percentage of advertising revenue	PRS blanket licence† PRS blanket licence† PRS blanket licence†
Other public performances§	Tariff on fees depending on category of place of public performance	PRS blanket licence†
Sheet music	10-15 per cent of retail price	Industry convention

*Independent Television Association Ltd.

†Subject to supervision of the PRT.

‡Association of Independent Radio Contractors.

§Works involving grand rights are licensed by copyright owners direct (see paragraph 31).

The Copyright, Designs and Patents Bill

47. Although the 1956 Act consolidated copyright legislation, it remained a complex subject and the Act has been criticised on several grounds (eg as being obscure). Over the last ten years several reports have been published as White Papers and Green Papers advocating various changes in the law. Composers, music publishers and the record industry all contributed advice, and the Government's intentions regarding changes in the law affecting intellectual property rights were published as a White Paper in 1986.¹

¹ Intellectual Property and Innovation (Cmnd 9712), April 1986.

48. The Government's proposals for the reform of the law of copyright and other intellectual property rights stemmed from increasing use of high technology equipment: computers, tape recorders, videos, direct broadcasting by satellite, and so on. The White Paper noted¹ that composers and music publishers believed that the SRL had 'outlived its usefulness and should end', a belief the Government shared. The record industry, however, was content to retain the SRL.

49. The Copyright, Designs and Patents Bill was introduced in the House of Lords at the end of October 1987. It provides (in Schedule 7) for the repeal of the whole of the Copyright Act 1956 (so that the SRL would fall with the repeal of the Act) and, at paragraph 19, Schedule 1² to the Bill, says:

Abolition of statutory recording licence

19. Section 8 of the 1956 Act (statutory licence to copy records sold by retail) continues to apply where notice under subsection (1)(b) of that section was given before the repeal of that section by this Act, but only in respect of the making of records—

- (a) within one year of the repeal coming into force; and
- (b) up to the number stated in the notice as intended to be sold.

50. Despite their earlier advocacy that the SRL should be repealed, some composers now have certain reservations (see paragraph 4.43). If the SRL did not exist, copyright owners (ie in many cases, publishers) would have the power to dictate which record companies could record particular works, subject to the powers of the Copyright Tribunal (see paragraph 51) in relation to copyright within licensing schemes. However, the limitations of the SRL are not always recognised. Although conferring a statutory licence, the mechanical royalty system is permissive; licensors and licensees are already free to agree terms below the statutory rate if they wish (see paragraph 14). If the SRL is abolished, it would be for copyright owners, individually or collectively, to negotiate a new mechanical royalty rate.

51. Other provisions of the Bill³ rename the Performing Right Tribunal as the Copyright Tribunal and extend its jurisdiction to deal with disputes over collective licensing arrangements in all areas of copyright, as the 1986 White Paper had envisaged.

52. It is understood that the Bill is expected to receive its third reading in the Lords in February 1988,⁴ before moving to the Commons. On completion of its stages there, it would return to the Lords later in the year for consideration of the Commons' amendments.

¹ See Chapter 11 of the White Paper; this is reproduced as an annex to this appendix.

² Schedule 1 to the Bill was replaced on 14 December 1987 by a new schedule during the Lords Committee stage, but paragraph 19 was unchanged.

³ Clauses 132 to 141 of the 28 October 1987 print of the Bill.

⁴ At the time of our report, the Bill had still to complete its Committee stage in the Lords.

Chapter 11 of the 1986 White Paper

CHAPTER 11

Statutory recording licence

11.1 'Statutory recording licence' (SRL) is the system in section 8 of the 1956 Copyright Act¹⁸ under which the owner of copyright in a musical work, once he has authorised somebody to make recordings of it for retail sale, loses the right to stop any other record maker recording it. Instead a statutory royalty (currently 6½ per cent of the retail price) is payable.

11.2 SRL was introduced in the Copyright Act 1911²⁷ to encourage the growth of the then infant recording industry. Until recently it seems to have operated to general satisfaction, and Whitford² recommended its retention. The 1981 Green Paper³, however, while acknowledging the widespread support for SRL, questioned whether in this single area of copyright it was now really necessary to provide a derogation from the exclusive right of composers and music publishers. The Government accordingly sought comment on its view that the recording of music would be better left to the operation of the competitive forces in the market.

11.3 The responses to the 1981 Green Paper have revealed that although the record industry continues to support SRL, composers and music publishers now believe it has outlived its usefulness and should end. It is argued that:

- (a) with the recent abandonment of recommended retail prices by much of the record industry it has become difficult to find a mutually acceptable reference price from which to calculate the statutory royalty; and
- (b) SRL obliges rights owners to permit the making of recordings by an increasing number of unsound companies who fail to pay.

11.4 Statutory licensing systems conflict with the normal copyright principle that a copyright owner should be able to control the use made of his material, and can only be justified where there are special circumstances. The conditions which SRL was designed to meet have long since changed and the breakdown of the consensus in its favour strongly reinforces doubts expressed in the 1981 Green Paper. The principal danger cited by supporters of SRL—that without it large music publishing groups might restrict recording of their repertoire to in-house labels, thus depriving the public of the variety of versions it has come to expect—seems unlikely to occur on a significant scale. There is now a very large number of recording companies. Diversity is an established feature of the market and the success of a particular recording is not necessarily predictable. Publishing groups are thus unlikely to put their own commercial interests at risk by restricting exposure in this way. Nor does it seem reasonable to suppose, as has been suggested, that royalty rates would be raised to the point of creating widespread loss of sales and unemployment. The rights owners would damage their own interests by such action as much as those of the record companies.

11.5 **The Government therefore intends to abolish the SRL system.** Two subsidiary requirements flow from this conclusion:

- (a) **transitional arrangements will be necessary in relation to future sales of recordings already notified under the SRL system;**
- (b) **the jurisdiction of the Copyright Tribunal established to settle disputes in all areas of copyright where the rights are collectively administered by collecting societies representing groups of copyright owners (see Chapter 18), will cover licensing schemes operated by collecting societies in respect of recording rights.**

(Intellectual Property and Innovation (Cmnd 9712), April 1986.)

Note: Footnote numbers as given above.

¹⁸ Copyright Act 1956 (4 and 5 Eliz 2 c.74), 5 November 1956.

²⁷ Copyright Act 1911 (1 and 2 Geo 5 c.46), 16 December 1911.

³ Copyright and Design Laws (Cmnd 6732), March 1977.

³ Reform of the Law relating to Copyright, Designs and Performers' Protection (Cmnd 8302), July 1981.

APPENDIX 2.1
(referred to in paragraph 2.2)

Warner: consolidated statement of operations, 1982 to 1986

	1982	1983	1984	1985	<i>\$ million</i> 1986
Operating revenues	1,509	1,723	2,024	2,235	2,848
Operating costs and expenses	1,335	1,539	(1,839)	(1,957)	(2,498)
Operating income	<u>174</u>	<u>184</u>	<u>185</u>	<u>278</u>	<u>350</u>
Unallocated income/(expenses)	<u>(161)</u>	<u>(218)</u>	<u>(115)</u>	<u>124</u>	<u>(53)</u>
Income from continuing operations before taxes	13	(34)	70	402	297
Provision for income taxes	<u>(29)</u>	<u>23</u>	<u>(57)</u>	<u>(207)</u>	<u>(133)</u>
Income from continuing operations	<u>(16)</u>	<u>(11)</u>	<u>13</u>	<u>195</u>	<u>164</u>
Income/(loss) from discontinued operations	<u>274</u>	<u>(406)</u>	<u>(612)</u>	<u>-</u>	<u>22</u>
Income/(loss) before extraordinary items	258	(417)	(599)	195	186
Extraordinary items	<u>-</u>	<u>-</u>	<u>13</u>	<u>-</u>	<u>-</u>
Net income/(loss)	<u>258</u>	<u>(417)</u>	<u>(586)</u>	<u>195</u>	<u>186</u>

Source: Warner.

APPENDIX 2.2
(referred to in paragraph 2.16)

Chappell: consolidated financial results, 1982 to 1986

	1982*	1983*	1984*	1985	1986
Turnover	64.6	64.2	67.5	73.2	90.4
Royalty expense	33.3	33.1	35.7	39.5	49.6
Net publisher's share	31.3	31.1	31.8	33.7	40.8
General and administrative expenses	(16.7)	(16.3)	(17.1)	(21.0)	(27.7)
Depreciation and amortisation	(2.4)	(2.1)	(2.9)	(7.3)	(8.7)
Operating expenses	(19.1)	(18.4)	(20.0)	(28.3)	(36.4)
Income from operations	12.2	12.7	11.8	5.4	4.4
Interest income/(expense), net	1.7	1.5	1.9	(9.5)	(10.3)
Loss on foreign exchange, net	(0.9)	(0.3)	-	(3.7)	(1.0)
Other income/(expense), net	(2.4)	(30.1)	(5.1)	(0.2)	0.6
Profit/(loss) before income taxes	10.6	(16.2)	8.6	(8.0)	(6.3)
Provision for income taxes	(5.3)	(3.1)	(2.1)	(1.6)	(1.4)
Net profit/(loss)	5.3	(19.3)	6.5	(9.6)	(7.7)

Source: Chappell.

*The figures for these years have been converted from deutschmarks at a rate of 2.91 deutschmarks to the US dollar.

APPENDIX 2.3
(referred to in paragraph 2.16)

Chappell: summarised consolidated balance sheet at 31 December 1986

		<i>\$ million</i>
Music publishing rights		123.3
Property, plant and equipment		2.1
Notes receivable, long term portion of advances and other assets		10.4
		<u>135.8</u>
Current assets	70.4	
Current liabilities	<u>(85.4)</u>	<u>(15.0)</u>
		<u>120.8</u>
Long term debt		108.7
Deferred income taxes		7.6
Other liabilities		3.0
		<u>119.3</u>
Minority interest	0.4	
Shareholders' equity	<u>1.1</u>	<u>1.5</u>
		<u>120.8</u>

Source: Chappell.

APPENDIX 2.4
(referred to in paragraph 2.21)

Chappell's companies in the United Kingdom

Chappell Darien Inc
Chappell and Intersong Music Group (UK) Ltd
Chappell International Music Publishers Ltd
Throat Music Ltd
Intersong Music Ltd
Chappell Plays Ltd
Chappell Music Centres Ltd
Chappell & Co Overseas Holdings Ltd
Burlington Music Company Ltd
Ascherberg, Hopwood & Crew Ltd
Bubbles Music Ltd
Palace Music Company Ltd
Chappell Morris Ltd
Chappell Music Ltd
Abigail Music (London) Ltd
Stratford Music Ltd

Source: Chappell.

(referred to in the footnote to paragraph 4.2)

IMPACT's fact sheet

IMPACT published its fact sheet some weeks before the reference to the Commission was made. The fact sheet is reproduced below.

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**THE
INDEPENDENCE FOR
MUSIC
PUBLISHING
ACTION GROUP**

FACT SHEET

1 INTRODUCTION

□ IMPACT was formed, initially motivated by SBK Songs, to represent the interests of the Independent Music Publishing Industry, at a time when it faces a crisis, precipitated by two events:

1. The impending Warner Communications takeover of Chappell & Co.,
2. The likely abolition of the statutory royalty rate in the forthcoming Copyright Bill.

□ In spite of their improving profitability over recent years, record companies have been attempting to pare down the cost of fee and royalty payments. This has been very much at the expense of the music publishers, who have seen a steady erosion of their rates and their role within the industry.

□ There are only two major non-record company owned publishing companies remaining in the UK – Chappell & Co and SBK Songs. But there are a great many more minor independent companies who together, make a substantial contribution to the business.

The 'independents' would see themselves as playing a critical role in the discovery, funding and development of the 'raw' talent, which will be the next generation of stars and writers for stars.

□ The potential Warner/Chappell merger, coming at this particular time, highlights the drastic problems within the industry.

More than being "just another nail in the coffin", it could signal the industry's "final straw".

The problems and the consequences of the merger and the Copyright Bill are discussed below.

2 BACKGROUND

□ Warner Communications, amongst their many media and entertainment interests, have record companies eg WEA, Warner Bros and Atlantic, and a music publishing operation – Warner Bros Music.

Other interests include films, cable TV, publishing, and with their recent acquisition of

The Cannon Group, film distribution. Warner's turnover in 1986 was \$2.85 billion with net profits of \$186 million. [JORDANS/INFOCHECK].

□ Chappell & Co., founded in 1811, is one of the oldest, and the largest surviving music publisher in the world. Over the years it has handled the interests of [for example] George and Ira Gershwin, Cole Porter, Noel Coward, Irving Berlin, Rodgers and Hammerstein, Lerner and Loewe etc, and many first division contemporary acts. Chappell has always been independent, apart from a relatively short association with Polygram from 1968 to 1984.

Chappell & Co's 1986 turnover was \$96.6 million and showed a net loss of \$7.7 million. [JORDANS/INFOCHECK].

□ Independent research estimates that if the Warner/Chappell takeover were to go ahead, the combined company would have a UK market share of 30-35% [catalogue] and 25.5% [turnover]. This would be some 14.4% more than its nearest rival – EMI Music. [HENLEY CENTRE/JULY 87].

3 INDUSTRY FACTORS

□ The UK at present has a statutory rate for mechanical copyright royalties – the payment for use of songs in records, tapes etc. Until RRP was abolished in 1981 this was 6.25% of retail price. Since then it has been 6.25% of trade price + an agreed 'mark-up'. In real terms the rate has fallen to 5.5% of retail price.

□ The various music publishing industry negotiating committees [MRS, MPA, MCPS] are made up of a preponderance of employees of record company owned publishing companies. It is not unusual for council and committee members to be negotiating terms with employees of the parent record company. Inevitably conflicts of interest arise between the aims of the publishing operation and the profitability of the record company.

□ If the statutory rate is abolished, it is these negotiating committees who will fix terms with the record companies. There is a clear risk that the rate will be pushed down *dramatically*, as it has been in other EEC countries, where the average drop has been 6% since 1981. In the

Netherlands the rate has fallen by 9.24% in the same period.

□ The committees' lack of teeth is demonstrated by the recent negotiations on compact disc royalties, where the industry has been forced to accept 6.25% of trade price with no mark-up. This brings the rate down to 3.6% in real terms. Negotiations are currently underway regarding rates on other new technological developments such as DAT and Compact Disc Videos.

□ The publishers share of copyright royalties has fallen dramatically of recent years. Ten years ago the split between writer(s) and publisher was usually 50/50. These days it is likely to be 25/75 [in the writers' favour] and sometimes as low as 5/95.

□ In the UK, generally a writer assigns full copyright in his/her work to the publisher, who then assumes absolute responsibility for its protection, promotion, income collection and distribution. When the user [record/film/TV company] is also effectively the copyright owner, there is likely to be a conflict of interest between the publishers' ability to fulfill these undertakings and the interests of the group's profitability.

□ Warner Communications, as one of the world's largest entertainment conglomerates would benefit considerably from easy and cheap access to a vast 'blue chip' catalogue such as Chappell's, particularly when negotiating with itself for usage rates. Even though publishers are already paid very little for copyright useage in film and TV, this may be the prime objective for the Warner Communications acquisition, particularly in the light of Chappell's substantial trading losses over recent years.

□ It is one of a publisher's principal roles to acquire and provide material for the record company/performer [the 'consumer'] and to be paid usage fees for this service. These are then split with the writer/composer. When the 'provider' and 'consumer' are owned by the same company it might be considered inevitable that the 'provider' could be forced into more favourable terms than those he might otherwise have expected. When the music

publishing industry is heavily dominated by record company owned publishers, the overall industry terms may suffer in the same way. If Chappell loses its independence, 80% of the UK popular music publishing industry would be record company owned. (HENLEY CENTRE FOR FORECASTING/JULY 87).

□ It is a publisher's objective to obtain 'covers' for his copyrights. It is IMPACT's belief that for a body such as Warner Bros Music to own approximately one third of all UK copyrights, entirely negative competitive factors would be allowed to arise. Under common ownership, and under the proposed legislation, it would even be possible for such a body to pay no royalties or substantially reduced rates on Chappell copyrights. A monopolistic bargaining situation could arise where it would be open to Chappell/Warner to withhold copyright licences from other record companies. This is particularly relevant to the Chappell catalogue with its very high proportion of 'standards'.

□ In all of the above points, it will be the non-performing songwriter who will suffer most. They must depend wholly for their income from writing, and do not receive the compensatory advances and royalties that a recording writer would receive from a recording deal. For a writer/performer, the opportunity may also exist to negotiate a more favourable recording royalty rate to compensate for a diminished publishing income. The vast majority of copyrights which Chappell owns or administers are the work of non-performing writers.

4 RESTRICTIVE PRACTICES

□ It is our belief that uncompetitive incentives are being made to artists who are signed to a corporate record company, also to sign their publishing interests to the same company. This may take the form of only guaranteeing to pay full mechanical royalties if this is the case.

□ It has become standard practice for artist recording contracts to include 'controlled composition' clauses for sales of records in USA and Canada. Under these clauses the writer(s) and publisher must accept royalty rates of only

75% of the statutory rate, on only 85% of sales. This trend is already taking root in the UK, and it is our belief, that particularly under the proposed legislation, it will become even more commonplace.

□ In recent years, some major record companies have introduced 'central accounting'. This involves filtering all domestic and international royalties through the territory with the lowest rates or most favourable conditions (perhaps the Netherlands), and negotiating a 'volume discount' with the local collection agency. Although, principally through an SBK Songs initiative, this trend has been slowed down, it is still a serious threat to independent Music Publishers.

□ If an artist signs to the same company for records and publishing, the record company is able to cross-collateralise its advances with those of the publishing division – thus paying off recording advances out of publishing revenues.

5 SUMMARY

The above will graphically demonstrate the serious malaise which exists within the music publishing industry, and the anomalies which affect its ability to control its own destiny.

If Chappell & Co ceases to be autonomous, the industry imbalance will become even more critical, and hasten the day when music publishing may not even exist as a separate entity.

What would happen to Chappell staff and their location is another matter for conjecture.

For the future of music and the music industry itself, it is essential that publishing plays its traditional role of discovering, nurturing, and funding the development of the next generation of songwriters.

Although some record company owned publishers pursue these objectives with vigour, it is only with a strong independent, autonomous presence that they will be able to continue to do so.

For the sake of music ... "let's call the whole thing off."

Make a song and dance about it!

Write now to Sir Gordon Borrie at the Office of Fair Trading and Francis Maude MP at the Department of Trade and Industry, and insist that the Warner Communications/Chappell & Co Inc bid is referred to the Monopolies and Mergers Commission.

THE INDEPENDENCE FOR MUSIC PUBLISHING ACTION GROUP
ASHBROOK HOUSE, 3-5 RATHBONE PLACE, LONDON W1P 1DA. 01-637 0441

Additional evidence by third parties

1. The CJC explained that a composer assigning copyright lost control of it except in respect of the performing right, where every member of the PRS assigned the performing right in all extant and future work to the PRS, a company limited by guarantee, whose Board comprised 12 publishers and 12 writers. The membership enjoyed voting rights for the election of Directors and otherwise in accordance with the Society's Articles and Rules. Thus the established composer-member of that Society had a voice in the administration of the performing right.

2. With this one exception, the CJC said, it was customary for virtually all music publishers to demand assignment of the composer's copyright as a condition of publication or exploitation of music. Further, many larger publishers would now only do business with a composer subject to an exclusive agreement under which that creator would assign all future work to the publishing company for a specified period. Thus, as distinct from literary authors, who by long-established custom license the publication of their work, composers, as the price of publication, exploitation or even of obtaining a commission, had to give away copyright(s) in work(s), thereby handing control to the publisher. Thus composers had very little power against the owners of a music publishing catalogue should it fall into the wrong hands. In this instance the CJC was concerned that one of the largest independent copyright owners—Chappell—should be acquired by one of the largest multifarious copyright users—Warner—controlling recording, film-making and television interests, all of them large-scale users of copyright material.

3. The CJC understood that one consequence of the merger could be the introduction of controlled composition clauses, a practice currently prevalent in the USA but not in Britain. Such a clause might be combined with a further clause which would require a composer to assign all future music to Chappell, as a condition of including work in a Warner record album. The CJC acknowledged that the precise nature of such a clause would vary according to circumstances, but the power which a vertically integrated conglomerate undoubtedly possessed would enable such an organisation to enforce the signing of controlled composition clauses. Not only did this erode composers' rights as the CJC had known them, and not only did this undermine EC thinking, but the very size of the market share which would be controlled by Warner/Chappell would be a threat to the chances of the individual composer's (as also of the non-compliant composer's) work being heard.

4. The CJC hoped, assuming the Copyright, Designs and Patents Bill was enacted and the present statutory recording royalty disappeared, that royalty on sales (of records, tapes, compact discs) or recordings would rise comparatively with competitively established rates in many other countries: hitherto the United Kingdom and the Irish Republic had enjoyed the lowest such recording royalties in Western Europe, to the detriment of composers and their publishers. But should the proposed Warner/Chappell merger come to pass, what was there, the CJC asked, to require Warner record companies to pay recording royalties on copyrights controlled by Chappell, for both companies would have common ownership? Further, Warner/Chappell would be able to withhold any musical work within its control from any competing record company. The 'exclusive right' to record or not to record, to authorise or not to authorise elsewhere would be the legal prerogative of Warner/Chappell. This would be guaranteed, the CJC said, to the merged companies under proposed copyright legislation. Unless copyright owners and copyright users were divorced from common ownership, there could be no guarantee of free negotiation between musical exploiters on the one hand, and representatives of creators on the other. That a composer could suffer the loss of all royalties on the synchronisation of his music with a number of different films, where a publishing company was vertically owned by even a comparatively small film company, was something which had already happened.¹

¹ *MMC note:* We were given details of the alleged incident. We have not pursued the matter with the film company alleged to have been concerned, for it was not part of the Warner organisation.

5. The CJC further pointed out that composers of serious music already had great difficulty in getting their works recorded. If they succeeded, they were at least guaranteed a 6.25 per cent recording royalty under the present system. If matters were left to competitive market forces and only the most 'commercial' music was to succeed in attracting high royalty percentages, it went without saying that many composers of serious music would have to settle for rates which were lower than the current statutory royalty.

6. The CJC told us that the combined Warner/Chappell music publishing division plus any other integrated record/publishing company would be sufficient to form a new collection society, capable of administering performing and mechanical rights. This would be disastrous, not only for those composers whose works were assigned to companies controlling the new society, but also for those copyright owners whose works were not so assigned. The effects would be to weaken the PRS's and the MCPS's mandate in respect of blanket licensing. The new society would not be independent of those whom it was licensing and current or proposed legislation offered no protection (in contrast to what happened in certain other Western European countries). Such a society could set its own terms, and writers might be forced to assign rights to it as a condition of a record/publishing deal. Chaos would be caused in relation to licensing arrangements between the current United Kingdom collection societies and their overseas counterparts. The United States' experience had demonstrated that competing societies brought no benefits to consumers or copyright owners. In order to avoid accidental infringement of copyright, users of music found they had to be licensed by all societies, and might end up paying more.

7. The CJC told us that should the Warner/Chappell merger come about, it estimated the merged concern together with EMI Music would control over 50 per cent of music publishing in the United Kingdom. Bearing in mind that all other music publishers would be collectively competing for less than 50 per cent of the market, and that other mergers might squeeze that market even further, the Warner/Chappell merger could only be against the competitive interests of all those other publishing firms. Among anti-competitive disadvantages, the CJC said, independent publishing firms not owned by record companies would be obliged to pay royalties to composers in respect of recordings, whereas Warner/Chappell, as an integrated undertaking, would have the ability to adjust to a nil or low rate such royalties owed by the recording arm to the publishing arm. Equally, record and film company programme makers who were not integrated with music publishers would also be at a disadvantage in relation to integrated companies. This could lead to more firms becoming integrated, to even greater disadvantage to the composer. Independent publishers would therefore be at a competitive disadvantage. Realisation of the proposed merger would threaten, at the very least, and probably diminish earnings of composers and restrict or prevent free and unfettered promotion of their music. The CJC therefore urged that the proposed Warner/Chappell merger in the United Kingdom should be disallowed, being against the public interest.

8. The ACCS/MU told us the machinery by which returns were secured from exploitation was far from perfect. The PRS, although nominally a joint society of composers and publishers, displayed (not surprisingly, in view of their economic strength) a considerable degree of publisher influence. The PRS, unlike some of its continental equivalents, did not distribute royalties to arrangers of copyright works and distributed royalties on a predetermined scale to arrangers of non-copyright works. The treatment of film music, where the composer was able (and, in practice, required) to agree that music was 'deemed' to have been published (even if it had not) and thus lose 50 per cent performing right fees, illustrated the influence of publishers.

9. The ACCS/MU said the composer was worse treated over mechanical rights than with performing rights. The MCPS was publisher-owned and controlled. In many cases, publishers dealt directly with users and, again, the composer could

only rely on contractual rights. Furthermore, the expected end of the SRL would remove any guarantee of a minimum royalty rate. The publisher would not only have full control of the (assigned) right but would be able to negotiate the level of royalty, whether higher or lower.

10. The ACCS/MU acknowledged that the matters referred to in the two immediately preceding paragraphs were not the direct concern of the Commission in the present reference. It submitted, however, that these unsatisfactory aspects would be exacerbated by the proposed merger. Such protection for the composer as at present existed would be greatly weakened if the motivation of a major publisher to secure the most advantageous deal from a major user of music was reduced. Nor would that effect be confined to those whose rights were at present assigned to that publisher. Warner was a major organisation including record companies, cable and film interests. All those interests would be likely to attract composers towards Chappell for publication of their work.

11. The ACCS/MU said the Warner/Chappell organisation would control approximately one-third of the works and a quarter of the turnover in music publishing. The ACCS/MU therefore submitted that the merger:

- (a) would erode the protection of many of the actual and potential creators whose work was necessary to our society;
- (b) would effectively reduce the bargaining power and control over their works of a large number of British composers and arrangers;
- (c) would inequitably reduce composers' and arrangers' earnings;
- (d) would jeopardise exploitation (and therefore availability) of their work; and
- (e) would unfairly threaten the position of independent publishers.

These effects would be contrary to the public interest.

12. Minder Music Ltd told us that independent publishers negotiated with record companies and other users of music to safeguard the rights of composers. A conglomerate like Warner, on the other hand, could—as a record company and also a music publisher—be negotiating with itself. Such a situation could not be in the public interest. If lower copyright royalties became the practice due to multimedia companies negotiating with the publishing division the independent sector would suffer. The songwriter, Minder Music said, was the original source of the record industry. If there was no independent music publishing industry to safeguard songwriters' interests the industry and the public would suffer in the long term.

13. MCA Music Ltd strongly opposed the merger, for Warner and Chappell each owned and controlled extremely large catalogues of music compositions which, if joined, would result in one company having a substantial controlling interest in the music publishing business, inevitably undermining the ability of other music publishers to compete.

14. Stainer & Bell Ltd said its opposition to the merger was in general terms, for it did not, at present at any rate, publish very much material used in film and video. It believed the future role of small companies in negotiating intellectual property rights might eventually disappear if Warner used Chappell-controlled copyrights whenever possible. This could lead to certain writers feeling that, if they wanted their material to have a chance, they must be represented by a publisher with a film maker in the group. This would mean that the person negotiating rights on behalf of such composers was trying to serve two masters, with an inevitable conflict of interest.

15. Stainer & Bell also told us that with the various proposals on licensing in the Bill currently going through Parliament, it was important that terms under which licensing came to be agreed were not dominated by companies who (within the same group) were both potential grantors and grantees. This was already true to a greater extent than Stainer & Bell would wish but the scale of the proposed merger made the matter of wider significance still.

16. Faber Music Ltd explained that it had no reason to doubt Warner's honourable intentions but it had witnessed over recent years many examples in the United States of music publishing companies being absorbed within large and diverse corporations. In each case the consequences had been dire, especially for composers; they had found themselves without a publishing relationship or partnership in the sense which they had enjoyed in the past. Faber Music feared the merger would lead to much the same situation in the United Kingdom and must, and should be, a matter of genuine public concern.

17. Yet more importantly, Faber Music said, a disquieting trend in recent years had been the acquisition by record companies of significant—and sometimes controlling—interests in music publishing companies. The constitution of Warner Communications Inc undeniably highlighted this unwelcome trend, which must reduce effective competition and also greatly diminish the effective bargaining power of the composer, and especially those composers under contract to Chappell, who would surely find themselves in an intolerably weak position should their new proprietors prove to combine under one roof interests which were not identical and ought clearly to be separated. If the proposed merger went through, the combination represented a real threat to the composer's interest and to his right to negotiate freely, and not under undue pressure, with those who wanted to exploit the products of his creativity, whether a symphony or a pop song. Faber Music viewed the merger as entailing a grave deterioration in the competitive rights and interests of the composer.

18. The United Kingdom branch of the International Association of Music Libraries, Archives and Documentation Centres (IAML: UK) told us it saw two main objections to the merger. The first concerned the MPA, a body with whom IAML: UK had a great deal of contact. During the last few years it had tried to establish closer links by discussing problems of mutual concern (eg economics of publishing, availability of publications, standard numbering scheme for bibliographic purposes, copyright reform etc). Although there were times when views differed there was general acceptance that each organisation could be of assistance to the other. IAML: UK felt that the new, merged company would become the dominant force in the MPA, with the ever present threat of withdrawal if its views were not accepted by all, thus changing the way in which the MPA was run at present. Although, IAML: UK said, it would be wrong to try to anticipate decisions which might be taken, it feared that the interest of its own readers and of music users as a whole would not be well served by this change.

19. It also seemed strange, IAML: UK said, that a merger should be envisaged which linked owners and main users of the catalogue. The MPA was seen as a negotiating body with the film and recording industries. If the same company was involved on both sides, this would create a total monopoly and would certainly not be in the public interest. In addition, there would probably be adverse consequences for potential earnings of composers contracted to Chappell; they would be at the mercy of agreements made between Chappell/Warner's publishing and recording/film producing divisions.

20. IAML: UK told us its second major concern was that its knowledge of takeovers and mergers in the music publishing industry had been that the streamlining which occurred (as well as bad cases of asset stripping) had resulted in a large diminution of the number of publications of serious music available. For example, scores which sold slowly as sheet music took up a great deal of shelf space and rationalisation by the new proprietor of a publisher often meant that existing stocks were thrown away. This was contrary to the need of composers to have the widest circulation for their works and for music users to have full accessibility to them. In particular, for performing artists and performing organisations less accessibility to material would represent a considerable curtailment in the range of choice of music available for performance. This in turn would limit the experience of concert audiences and media listeners. IAML: UK therefore felt that the proposed merger would exacerbate already existing problems and could not possibly be in the public interest.

21. BASCA told us the modern independent publisher was rather like an agent for a composer, in that he promoted his writer within the industry, and encouraged users, such as record companies, to record and otherwise exploit the works. Because of the power which was thus enjoyed by record companies, and because the traditional 'printing' publisher had evolved into someone who merely represented writers (and owned or, at least, controlled by way of assignment, their copyrights), most user companies had decided they could easily 'acquire the publishing' for works which they had power to record and exploit, even though there might be little intention or need to publish in the traditional way, by printing. Having discovered that it could 'acquire the publishing' from composers who were glad enough just to see their works recorded, the record company (to use the record company example) merely had to sit back and wait a few years until it had acquired copyrights to a vast catalogue of works. In such cases, BASCA said, there was no independent publisher, representing the interests of the composer, in a world where he increasingly needed protection, and the role of agent to the writer was played by the very company which wished to acquire a licence for his songs. It was negotiating with itself. The only person who was not part of this incestuous negotiation was the creator of the work, who in signing over the copyright to his publisher had effectively lost control over it, and was at the mercy of the company.

22. BASCA explained that although picked up as incidental rights by (in this case) record companies, income derived from publishing rights was nevertheless very important to them. Invariably, an artiste who wrote songs would only be given a recording contract as an artiste if he assigned copyright in the songs to the publishing arm of the record company; and often, the separate recording and song writing deals were cross-collateralised by the record company, so that royalties from the songs were taken to pay for production costs of the record.

23. BASCA argued that there were thus two distinct types of publisher in modern popular music; those who were owned and controlled by record companies, and those who were not. Those who were not had a much greater incentive to look after their copyright income and to protect their writers' interests, because they were not merely using it to underwrite other activities: they needed it in order to survive. Unfortunately, these independent publishers were a dying breed.

24. BASCA told us Chappell was one of the most respected independent music publishing companies, controlling a vast back catalogue of standards (songs with a special value by virtue of their suitability to be recorded many times throughout the years, rather than having their earning power limited to the proceeds of the original recording). Chappell also had a properly managed contemporary department, and first class worldwide copyright and collection facilities. It was one of the last independent publishers which was large enough to have a strong voice within the industry, and the power to administer its copyrights efficiently without compromising itself commercially. It had acquired its catalogue of songs by virtue of its reputation as a music publisher in the true sense, rather than as an accumulator of incidental rights in the way a user-owned company would build up a catalogue.

25. BASCA explained that user-owned publishing companies were not new (however unhealthy). The characteristic which made the Chappell/Warner merger a particularly special case was its sheer size, giving one company a 30 to 35 per cent share of the available United Kingdom catalogue; it would also be administered by one of the world's biggest user-owned organisations. The merger would deprive the industry of one of the last independent publishing companies, and writers of one of the last companies with the ability and the need to protect the interests of the creator of the copyright. The vast Chappell catalogue would fall into the hands of a company which could then 'negotiate with itself' to the disadvantage of the writer.

26. BASCA told us it had been suggested by others that, since there were already many user-companies which had their own publishing companies, this merger was merely the continuation of an inexorable trend, and that the momentum for other such mergers was already too strong to be reversed. BASCA

submitted that the Warner/Chappell merger would not be part of an existing inexorable trend, being different, first because of the staggering size of the resulting conglomerate, and perhaps more importantly, because the vast new company would have been formed, not gradually and by natural trading over a period of years, but by the bulk purchase of one enormous company by another. Writers and composers whose copyrights were part of this sale had no choice in the matter, whereas in the natural build-up of a user-company, transactions were individual and made for commercial reasons with the consent of the composer, even if, in some cases, they were made under pressure from the user-company which could use its power in making individual deals.

27. BASCA maintained that there was an increasing tendency for companies to buy and sell music copyrights as assets, without regard for the creative aspect, and usually without consultation with the composer. BASCA knew of one particular example where a well known composer assigned the copyrights of his songs to a music publishing company on a 50/50 royalty split (which was an accepted arrangement where the publisher was genuinely going to exploit the works—as distinct from a pure collection/administration deal where the writer might retain 85 per cent of the royalties and the publisher undertook merely to collect royalties rather than to promote). The catalogue was then sold to a large American entertainment corporation, which later sold it to a company which was not in the music business and could not promote the copyrights as originally agreed. The composer could look to the original company and claim breach on the grounds that it had not ensured that the works were exploited, but meanwhile his copyrights were an asset in the hands of a company which was not even in the entertainment business. This was happening more and more and composers had no control once they had assigned the copyright, which was invariably required of them as standard industry practice before trading could commence. Even within the industry, the practice of buying and selling copyrights as pure commodities was increasingly widespread, and a composer would not know whether his copyrights would end up under the control of a responsible independent publisher or under that of a potentially unscrupulous user-company.

28. BASCA told us the compulsory mechanical licence would no longer exist with the passage of the new Copyright, Designs and Patents Bill, and any company wanting to record any song would have to apply to the publisher on each occasion. The abolition of the SRL might seem, at first sight, to strengthen the position of the publisher until it was realised that, with the Warner/Chappell merger, 80 per cent of the mechanical-licensable copyrights would be controlled by record companies. The record industry had successfully resisted an attempt by independent publishers some years ago, to persuade a public inquiry¹ to raise the statutory mechanical royalty rate to 8 per cent. In a new, free-bargaining climate, BASCA suggested that record companies could not be stopped from demanding collectively a lower rate. A newly merged Warner/Chappell giant would wield tremendous negotiating power. The role of a genuinely independent publisher would be to resist such a move, but the publishing division would have to obey its master, Warner Communications, and it was inconceivable that Warner would instruct its own publishing division to resist.

29. BASCA explained that it had even been suggested that record company-owned publishers, strengthened by the new merger, could start up their own collection societies in competition with the MCPS and the PRS. As their catalogues would account for over 80 per cent of the market, such a move would be possible. The effect would be to emasculate existing societies, and both writers and general public would lose the benefits of having properly independent societies to negotiate and collect royalties. It should be noted that the MCPS was owned by the MPA so that it was already in the hands of the publishers, who did not recognise that the voice of the writer should be heard equally with publishers, on its board. There were only three writer-director positions available, but at least six publisher-director positions. BASCA said the board of the PRS, on the other

¹ *MMC note:* The inquiry was held in accordance with the provisions of section 8(3), Copyright Act 1956 (see paragraph 15, Appendix 1.1).

hand, was finely balanced between publishers and writers, and even then, subdivided evenly between popular and serious music composers and publishers. The PRS made significant contributions to third parties involved in the creation and popularisation of music, and to needy and worthwhile causes, through its Donations Committee, its Members' Fund and in its general operation. The PRS supported the continuation of musical minority activities, such as serious, ethnic, jazz and brass band music, to far greater an extent than would happen if the PRS were to be replaced by a purely commercially-minded user-owned collection agency.

30. Further, BASCA told us, it would be quite wrong for a large user-controlled collection agency to exist, for the obvious reason that once again it would be negotiating with and collecting from itself, but on an even larger scale than could be achieved by individual corporations, however big.

31. BASCA suggested that almost all British record companies included 'controlled composition' clauses in their standard worldwide recording contracts. These related mainly at present to the sale of British-made records in the USA. They provided that an artiste who had written, or otherwise controlled copyright in songs which would be recorded under the contract must guarantee that his publisher would license copyrights to the record company at a rate less than the applicable statutory rate in the USA. This had nothing to do with copyright in his performance as an artiste, but had to do only with his influence over copyright in the songs. If an artiste wished to record with that record company, he had to accept a low rate of royalty as a writer, and had to impose that same low rate on other writers who had written songs which had been recorded by him under the contract. If he failed to persuade other writers (should there be any), and those writers had to receive a fairer rate, the record company was entitled to deduct from his artiste royalties or his own writing royalties, extra amounts paid out to other writers.

32. BASCA told us that if the proposed merger went through, and a new Copyright Act provided for the abolition of a statutory mechanical royalty, record companies would almost certainly introduce controlled composition clauses into contracts in the United Kingdom, so that artistes would have to accept low songwriting royalties if they wished to record their songs. If Chappell had remained independent, it would have opposed this. As part of Warner, it would be powerless or indeed unwilling to resist this development.

33. BASCA explained that grand rights were not controlled in their collective form by the PRS because of the tradition that publishers had been able to license such productions themselves by negotiating a percentage of the receipts. If Warner acquired Chappell (who controlled a massive catalogue of scores, including those by Gershwin, Cole Porter, Rodgers and Hammerstein), there would technically be nothing to stop Chappell from licensing Warner (ie itself) to make or allow others to make stage productions at a low or even non-existent rate of royalty. It might even be exempt from paying a writer's royalty, because many contracts obliged the publisher only to pay a percentage of monies 'received' by themselves rather than a percentage of a definable amount from a particular source.

34. In summary, BASCA told us, the merger would be harmful to competitors of the two companies and to composers and authors who had already entrusted or might in the future entrust copyrights of their works to either company. BASCA could see no identifiable benefits to the public interest likely to arise from the merger. The proposed merger could only erode the traditional role of the music publisher as an independent protector and developer of the talents and contributions of past and particularly of future generations of composers and songwriters. This erosion must be perceived as against the public interest.

35. BASCA told us it did not believe that any undertaking by the companies would be sufficient to protect the public interest (and that of other interested parties) from the effects described. BASCA said it would like to see legislation which, in the anticipated absence of provision for a statutory mechanical royalty

in the new copyright legislation, would afford to composers unhappy about licensing arrangements made on their behalf by their publishers or others, a right to refer such matters to the proposed Copyright Tribunal. BASCA did not, however, consider that even with such legislation, the proposed merger should be allowed to proceed.

36. Music Sales Ltd said that as a printed music publisher (the largest in Europe) it licensed rights from various United Kingdom and US publishers for use in the United Kingdom and other world markets. These rights were generally on a term basis and called for a royalty to be paid to the publisher of about 15 per cent of the retail selling price. Although they presently distributed their printed music jointly,¹ if Chappell and Warner were to merge they would create a company that would effectively control and own rights for the major portion of the printed music market. The popular music publishing end of the printed music business was already dominated by Chappell and Warner. Together they could create a block that would own the rights to print what Music Sales estimated to be one half of popular and standard music played today. Perhaps, more importantly, they would effectively control most new music being published.

37. Music Sales told us that the publishing or rights end of the business of most major publishers today were affiliated with a record company. New material by known writers, new bands or singers and performers was sought after by publishers and record companies. Advance payments against future income was the rule. These advance sums were often substantial. When a record company had a publishing arm it had the ability to persuade writers and bands to enter into both publishing and record contracts. The advance could often then be offset against earnings from either source. When printed music income was included there was yet another source to offset that advance. Having these alternative ways to offset income gave a fully integrated company like Warner/Chappell an advantage with which Music Sales could not compete. If Music Sales were interested in the printed music of a popular group Warner/Chappell could increase the advance for record sales. Such 'cross-collateralisation' had worked against Music Sales in past competition with Warner and now with the combined Warner/Chappell company, it stood less of a chance to compete.

38. Music Sales submitted that from a strictly publishing or rights point of view, the combined Warner/Chappell company could easily overcome competition for new material by offering extraordinary advances. In terms of market share, the popular music business was already dominated by very few firms. If income statistics from the PRS and elsewhere were examined and attention was focused on income received for the past three years (deducting catalogue or standard income), Music Sales believed it would be found that a handful of publishers divided current PRS income. Income from the combined Warner/Chappell company would amount to a substantial percentage of the whole; the proposed merger would consolidate its position.

39. Music Sales suggested that synchronisation rights, film and video rights, plus income from advertising agencies were of increasing importance to all music publishers. The merger created a company capable of making block deals with advertising agencies and film and video companies for usage at special rates. Access to the combined Warner/Chappell catalogue would be of particular importance to an advertising agency or film company.

40. Music Sales told us the music industry was a tiny industry compared to many. It had traditionally been an industry noted for very little start-up costs and overheads. This had changed in recent years, and very few new companies had entered the business; of those, few had survived. The music business was dealing with rights protected by law which gave those in control an advantage which other industries did not enjoy. When control of these rights fell into the hands of large

¹ MMC note: Through International Music Publications, a joint venture between Chappell and EMI Music.

international conglomerates with fully integrated companies, that advantage was multiplied. Normal rules of competition were not effective when it came to control of rights. In the case of the Warner/Chappell combination barriers became insurmountable.

41. The Association of Independent Radio Contractors Ltd (AIRC) told us the effect of the merger, if allowed to proceed, could lead to unhealthy concentration of power in record and music publishing. AIRC and other broadcasters were already faced with high costs and restricted usage of records for broadcasting. AIRC said it would not wish to see monopolistic excesses in respect of the licensing of *recordings for broadcasts*¹ affect the licensing of published musical *works* for broadcasts, and a link-up such as was proposed between a recording 'major' and a publishing 'major' might open the way to this. AIRC saw no identifiable benefits to the public interest likely to arise from the merger and believed it could operate against the interests of those businesses which had to deal with recording companies and publishers over rights.

42. The Music Industries Association (MIA) said it was generally felt that the operation of copyright law in conjunction with free market negotiations had worked reasonably well. Satisfactory operation of free market negotiations had been due to the clear distinction between copyright owners and user companies. Even where in the past music publishers and user companies had been members of the same group, they had continued to operate separately in the best interests of individual companies, regardless of group interests. It was perhaps remarkable, the MIA said, that there had, under these circumstances, been no interference in free negotiations; undoubtedly this had to do with the high business ethics of the groups involved but this situation could not be guaranteed in respect of any future larger conglomerates. There was a possible danger that there could be a conflict of interest between user and owner elements of any merged conglomerate which could well affect the negotiating power of copyright owners generally in dealing with copyright users. The MIA said it had no knowledge of the corporate management of Warner but simply pointed to the potential dangers of such a merger as that of Warner with Chappell.

43. The MIA told us that in trying to assess the public interest involved in the Warner/Chappell merger, it started from the proposition that the existence of copyright, and thus the fair remuneration of copyright owners, was in the public interest. The MIA had made the assumption on the basis that copyright law existed to protect the creative ability of composers and authors. No identifiable benefits to the public interest could be seen as likely to arise from the merger, which could clearly be detrimental to the public interest in two respects:

- (a) if copyright owners could be controlled and manipulated to the benefit of copyright users, this would interfere with the free interplay of market negotiations; and
- (b) any reduction in the number of major publishers would remove part of the competition by which publishers sought to offer their services to composers and lyricists.

¹ *MMC note:* Licensing of recordings for broadcasting, and the collection of resultant royalties, is for Phonographic Performance Ltd. That function is outside the scope of our investigation, for it involves copyrights in particular sound recordings (see paragraph 19 (b), Appendix 1.1) not the copyright in the music itself.