

**Submission of Nigel Parker
and on behalf of
Association of United Recording Artists (AURA)**

1. Aura was founded in 1993 as a non-profitmaking professional association and collecting society to represent exclusively the interests of featured performers, principally in connection with the implementation in the UK of the EU Directive on Rental and Lending Rights and on Piracy (EC 92/100) ("the Rental Directive"). Aura currently has about 500 members including some of the most successful performers in the UK, and on their behalf administers some £2-3 million annually of public performance income arising in the UK and overseas. Since its foundation, Aura has always believed that the extension of the term of copyright in sound recordings is a key issue in recognising the contribution of performers, and the time for implementing such an extension is now overdue.
2. Aura's principal activity in recent years has been the negotiation with PPL and other organisations representing performers (Equity, Music Producers' Guild, Musicians' Union and Pamra) of the PPL Distribution Policy affecting performers, and a range of initiatives designed to increase the earnings of UK performers including the tracing of unregistered performers, and the pursuit of overseas public performance income due to UK performers. Recently this co-operation has culminated in the proposed merger of PPL with Aura and Pamra, and the establishment of a Performers' Board within PPL, which is currently under consideration by the Office of Fair Trading. Since Aura may shortly cease to exist as a separate entity following its intended merger with PPL, this submission is made by Nigel Parker both in his personal capacity and on behalf of Aura.
3. Nigel Parker has qualified as a barrister, solicitor, trade mark attorney and is an accredited mediator, with particular experience of both contentious and non-contentious copyright and trade mark issues within the music business. He currently practises as an adviser on legal, business and public affairs concerning the music business. He is the author of *Music Business – Infrastructure Practice and Law* (Sweet and Maxwell, 2004) and has written articles on the music business for the national and specialist press. He is a Performer Director of PPL. In addition to co-founding Aura and acting as its legal counsel, he was the long-term legal adviser to the Music Managers' Forum from before incorporation until 2004.
4. Since leaving full-time practice as a solicitor in 1998, his other clients have included the BBC, the British Phonographic Industry (BPI), the British Academy of Composers and Songwriters (BACS), British Music

Rights (BMR), and Mick Hucknall/Simply Red. From 1993-8 he was partner and head of litigation and IP at a leading firm of solicitors specialising in media and entertainment law, where he advised many of the most successful performers and songwriters in the UK music business. Before that his career included 7 years at a major City of London law firm where his clients in the IP litigation department and the trade mark department, which he established, included owners of many major global brands. A regular semi-professional gigging musician for much of his adult life, in the late 70's his band released two singles on its own self-financed record label.

5. We have seen in draft the proposed submission of PPL, which we wholeheartedly endorse and support. This submission, whilst entirely independent from PPL, does not repeat matters raised in PPL's submission. It also does not attempt to outline the general structure and functioning of the music business. For that, we refer to Nigel Parker's book *Music Business*, in particular, the Introduction and Executive Summaries (Chapters 1-6, especially Chapter 5 – Music Business Executive Summary), Chapter 9 The Creative Business, Chapter 24 Group Agreements, Chapter 25 Recording and Publishing Agreements, and Chapter 28 Copyright, especially the introduction.

The Performers' Role

6. All music exploited by the modern music business is the outcome of one or more performances of music. The vast bulk of income earned by both songwriters and performers (and the companies which exploit their works) arises from the exploitation of recordings of performances of musical compositions. Without a technically, artistically and commercially successful recording of his work, a songwriter has no realistic prospect of earning a living. And in order to create such a recording, it is self-evident that highly-skilled and talented performers are required to perform the music.
7. Yet despite their crucial – indeed indispensable – role, performers are arbitrarily discriminated against by copyright law, and the infrastructure and practices of the music business which derive from it. Such discrimination is wholly unjustifiable in principle and, as is increasingly being recognised across the world, it has no place in a modern system of copyright law.

History of Sound Recording Copyright

8. The current copyright system, especially as it affects sound recordings, has its roots in the 19th century conception of music as essentially the performance of a score written in conventional western musical

notation. In this tradition, the composer is paramount; performers, however talented and highly trained they may be, are merely the unthinking medium through which the composer's musical imagination is expressed. In this context, the orchestra or band is simply a sophisticated organic sound reproduction device controlled by the composer through the written score, as interpreted by the conductor.

9. Copyright in sound recordings was first recognised in UK law by the Copyright Act 1911, which fixed the term of protection at 50 years from public release. By contrast, literary and musical works had been protected for the author's life plus 7 years since 1842. Since 1911, copyright protection for literary and musical works has been extended, initially to life plus 50 years, and most recently, in 1995, to life plus 70 years. Copyright in films was first introduced into UK law only in the 1956 Copyright Act, and its duration fixed at 50 years from release. However, in 1995 copyright in films was extended to 70 years following the death of the last to die of the director, screenplay author, dialogue author or soundtrack composer. Throughout all these modernisations of copyright law, protection of sound recordings has remained fixed at the level determined almost a century ago.

Early History of Sound Recording

10. Though Edison invented the first mechanical sound reproduction device, the "Phonograph", in 1877, it was commercially useless, especially as a means of recording music, owing to the inherent instability of the recording medium – wax and paper cylinders. In 1886, when the foundations of the modern international law of copyright were laid down in the Berne Convention, with the exceptions of barrel organs and musical boxes, no commercially applicable medium for the reproduction of music existed other than live performance; whether an orchestra following a written score, or folk musicians performing from memory.
11. Ironically, it was in the *following year*, 1887, that Emile Berliner patented the "Gramophone". This device reproduced sound by means of durable discs which, unlike the Phonograph, could be manufactured and duplicated in industrial quantities. However, it took nearly a decade to refine the technology to the point where it could be applied commercially.
12. Initially, mechanical sound reproduction was seen simply as a means of recording one example of a performance which might in any event be repeated substantially identically any number of times by the performers whose performance was recorded. The legislators who framed copyright law had, perhaps understandably, no appreciation of the uniqueness, and hence the potential value, of a sound recording of

a particular individual performance. In any case, the quality and duration of these initial recordings (a single side of a record could contain only a few minutes of music) was inadequate to record the nuances of a virtuoso performance or to act as a substitute for live performance. Serious musicians regarded them as essentially an amusing novelty.

13. However, there can be little doubt that, had the Berne Convention been concluded in, say, 1897, the year in which the Gramophone Company established its London office (later to become EMI), following the commercial launch of the Gramophone, and the competing "improved Phonograph", the treatment of sound recording copyright and performers would have been far more equitable than it was. Instead, UK performers and sound recording rightsholders have been struggling, so far in vain, for 120 years to obtain equal status with all other copyright creators and exploiters – and more recently with their counterparts elsewhere in the world.
14. As recording technology and techniques improved, it became possible for the first time to compare the details of musical performances side by side across time and place. By the 1920's recording technology had advanced considerably with the introduction of electrical technology to replace the original purely mechanical devices. Definitive recordings of classical and jazz performances, many of which are still listened to today were recorded during the 1920's and the following decades. The technical quality of these recordings captured artistic subtleties which could not be recorded or reproduced simply by the playing of a written score – or possibly even detected by the listener in a concert performance.
15. Jazz recordings of this period preserve spontaneous improvisational performances which were never, and could never be, written in conventional notation and which, but for sound recording technology, would have been heard by only a few hundred people at most. During this period, record collectors began building record libraries as appreciation grew of sound recordings as important artistic and historical documents. At this stage, though recording techniques had developed significantly, sound recordings remained essentially passive, at least in creative terms, seeking merely to record a live performance as faithfully as possible.

The Multi-track Revolution

16. The absolutely crucial, and truly revolutionary, development in sound recording technology was the invention in 1954 of multi-track recording by US guitarist Les Paul. From this time, recording ceased to be a passive record of a live performance, and became an active

creative process in itself. It is no exaggeration to say that it transformed sound recording from a technical process into an art form.

17. Les Paul realized that the relatively new recording medium of magnetic tape could be split into separately recordable tracks, simply by making the tape wider and constructing a tape recorder with a number of recording heads one on top of another. This allowed each instrument to be recorded separately on its own dedicated track. For Les Paul, the attraction of his invention was that it allowed him to play several instruments on the same recording, which was clearly physically impossible in live performance.
18. Initially, the multi-track innovation was, as so often, dismissed as a novelty with no serious artistic application. Modern musicians such as Prince and George Michael routinely play some or all of the instruments on their recordings. They literally could not compose, let alone record, their music without multi-track recording.
19. The invention of multi-track recording can be compared to the invention of oil painting, because of the level of control it offered over the finished work of art. Every detail of a recording, down to a single note, could be individually manipulated, worked and re-worked, to produce a perfect artistic result. Previously, record producers had to record all the instruments in the group at the same time, in a single "take", which meant that if any performer made a mistake the take had to be scrapped.
20. Perfectionist performers would record a song tens, even hundreds, of times, in search of the one take with the extra magic that might make a hit. Most of the takes might be equally accurate from a technical point of view, and indistinguishable to the average listener, but performers and their producers agonized over which was the most artistically successful. Multi-track recording meant that it was no longer necessary to choose between an inspired but flawed take and one which though more technically accurate was less musically interesting – it was possible to combine the best elements of both.
21. Purists, especially among classical musicians, argued that multi-track recording was "cheating" and that manipulation of the recording destroyed the artistic integrity of a performance. Others, such as pianist Glenn Gould, welcomed the artistic freedom of the new medium and constructed recordings which combined the best features of many individual takes to create a "virtual performance".
22. It soon became clear that the ability to record a number of tracks independently allowed skilful record producers to use the recording studio as a musical instrument in its own right, to create sounds, effects and arrangements which could not be composed or

created in any other way. During the sixties and seventies, pioneers such as Phil Spector, Brian Wilson, George Martin and Lee "Scratch" Perry explored the artistic limits of the multi-track recording studio.

23. Multi-track recording allowed the abandonment of the musical score as the origin of musical composition, as performers began to compose their own music and produce their own records. The hitherto absolute demarcation between composition, performance and recording became blurred. Music was composed and created in the studio because the studio set fewer limits on the musical imagination, and ideas could be tried out instantly. The sound recording increasingly came to replace the written musical score as the means by which **musical compositions** (as well as performances) were defined and recorded for posterity.
24. The Beach Boys' 1966 single *Good Vibrations*, widely regarded as the greatest single ever recorded, was composed, produced and created by Brian Wilson despite being unable to read or write a musical score. The finished five-minute recording was assembled from more than 70 hours of recordings, layered over each other to create music of astonishing complexity which could not possibly have been composed or created in any other way.
25. Modern music, especially popular music with its roots in the oral traditions of the blues (and before that, African tribal music), jazz, country and folk music, lays far greater emphasis on the characteristics of performers and performances, than on the nuances of composition or musical structure. For many years, groups have composed collaboratively, frequently in the recording or rehearsal studio, beginning with an outline of a song originated by one or two members of the group, and, in conjunction with the record producer, developing a distinctive group "sound". All of this further blurs the qualitative prejudice which underlies the differential treatment of sound recordings and other copyright works, notably musical and literary works.
26. Nowadays a recording studio may take the form of a laptop computer in the musician's own home. The music created is never performed in the conventional sense, but programmed directly into the computer. The recording is now the music. It is hardly surprising that the legislators who framed the Berne Convention failed to anticipate all these developments in recording technology and their artistic implications, but it is inexcusable for modern legislators to willfully ignore the developments of the last half-century in perpetuating the injustice inherent in the treatment of sound recording copyright.
27. Given the huge increase in the artistic and commercial importance of sound recordings to consumers over the past 50 years

or so, the law should strive to catch up and grant performers equivalent protection to composers and other creators of copyright works such as film directors, painters, sculptors and authors. It is all the more urgent to modernize the law now that 50 years has elapsed since the invention of multi-track recording as the first of these truly "artistic" recordings are beginning to slip into the public domain.

The Featured Performer's Contractual Position

- 28.** Inevitably, the multi-track revolution greatly increased the complexity, and therefore the cost, of producing recordings. In response to this, record companies in the US and UK began to recoup the entire cost of making recordings, which had previously been exclusively a record company expense, from royalties payable to contracted featured performers. The effect of this is that the performer receives no further income from the record company until the royalties payable exceed the total of the advances, recording costs and other recoupable costs incurred. Over time, the advances paid to performers by record companies became inclusive of recording costs.
- 29.** Since the performers' share of income from their recordings is much lower than the record companies' share, it is not unusual for decades to elapse before a performer recoups recording and other costs and becomes entitled to receive royalties. This applies even to highly successful performers. The situation was exacerbated in the 1980's when the use of videos as promotional devices became de rigueur. Without a video, a record would not receive TV airplay. The costs of video production, which might exceed by a considerable margin the costs of making the original sound recording, were added to the expenses recoupable from contracted featured performers, as were the costs of subsidizing loss-making promotional tours, known as tour support.
- 30.** The short life of sound recording copyright means that it is becoming increasingly common for recordings to fall into the public domain during a performer's lifetime. Typically this will happen at a time when the performer is at his most vulnerable, and no longer able to earn a living from performance. Given the effect of recoupment, it is quite possible that a contracted featured performer will never receive royalties from his recordings, or that they will become payable only for a decade or two before copyright expires.
- 31.** Contracted featured performers are uniquely disadvantaged. They undertake often gruelling commitments in order to promote their recordings by appearances in public, TV, radio, in their own promotional videos and in interviews for magazines and newspapers for which they receive no additional payment. Promotional concert

tours are frequently loss-making, especially in the early stages of a performer's career, and those costs are also borne ultimately by the contracted featured performer. The contracted featured performer undertakes thousands of hours of unpaid work in order to promote their recordings, which have in themselves taken hundreds of hours to produce.

32. The songwriter, publisher, record producer, and session musician all benefit from all the promotional activity undertaken by the contracted performer, but share none of the costs. Without the contracted performer's effort, the songwriter and his publisher have no outlet for their work. The contribution of the modern contracted featured performer should be recognised by the modernisation of the law which grants him rights.

The Session Player's Position

33. Though session players are not generally entitled to earn royalties from the sale of records, they continue to earn from the exploitation of recordings on which they have played. Non-featured performers are entitled to a share of income payable by users in respect of the public performance and broadcast of sound recordings, collected and distributed for the UK by PPL. This income is especially valuable to both featured and non-featured performers because it does not pass through the hands of the record company, and so is not used to recoup recording and other costs. Whilst session players' share of income from each individual track is lower than the featured performers' share, leading session players typically play on many more tracks than any featured performer, so their overall earnings can be comparable.

The Economic Effect of Extension of Copyright

34. The principal discernible effect of extension of sound recording copyright will be to compel record companies to pay a proportion of their profits from the sale of older recordings to contracted featured performers. In addition, a proportion of the income collected by PPL and equivalent societies will be distributed to both featured and non-featured performers on older recordings. It should be noted that recordings from 50 years ago make up a very low percentage of all records sold or performed in public. Though that proportion may be expected to increase somewhat over the coming years as the "artistic" recordings of the sixties and seventies come into consideration, it will always be dwarfed by the sales and public performance of current recordings.

- 35.** Though the payments made to the majority of performers might be relatively modest, it is precisely those performers who most need an additional few hundred or few thousand pounds to allow them and their dependants to live a dignified and comfortable retirement, free from the need to claim state benefits.
- 36.** The retail price of sound recordings to the consumer will not be increased noticeably by the modest copyright royalties payable to performers. A far greater proportion of the retail price of a recording goes to the taxman, the retailer and the record company, all of whom earn at least as much from the sale of a copyright-expired recording as from a copyright recording. Only performers lose out completely.
- 37.** Copyright-expired recordings and books are not markedly cheaper than current copyright editions. This is at least partly due to the economies of scale in producing, promoting and distributing the larger volumes typical of current works. In any case, within a very short space of time, on-line distribution of music is likely to become the norm, greatly reducing the costs of marketing and distribution, with the effect that recordings which it is currently uneconomic to make available will become commercially viable. The range of music available to the consumer will greatly increase, and the cost will fall.
- 38.** Payments by users of copyright works under blanket licences (which includes the vast majority) will not increase if copyright is extended. The fees they pay will simply be distributed in a different way, to include those performers and record companies responsible for older recordings.
- 39.** The only detrimental effect is likely to be felt by those few record companies which specialise in the release of out of copyright recordings. Whilst those companies offer a service to consumers, there is no reason to doubt that copyright owners will be equally able and willing to fulfil that need were sound recording copyright to be extended. Any perceived detriment to such companies is greatly outweighed by the gross injustice of permitting such companies to exploit and profit from recordings which they had no hand in making, without compensating the performers whose work and talent created them.
- 40.** The release of public domain recordings without payment of performer or other royalties is the inevitable consequence of expiry of the copyright term. Many performers live out their old age in penury, while companies cash in on music to which they made no contribution. The only viable solution to this problem is to extend the term of copyright protection, rather than to seek some alternative "moral" basis for the payment of performer royalties after the term has expired.

41. It has been argued that the bulk of any income from an extension of copyright would be taken by major performers who are already rich. There is some truth, but no force, in that argument. It is no answer to the plight of the impoverished musician to say that he deserves to live on state benefit and die in poverty, simply because a few highly successful performers are already rich enough. That adds insult to injustice. The typical retired musician, whether featured or non-featured, has more in common with a retired factory or call-centre worker than he does with the tiny minority of super-rich performers.
42. Major earners (including record companies) will be taxed on their income - and the taxation system, not the granting or withholding of copyright, is the appropriate means to deal with any perceived inequities in earnings. Moreover, the music which sells fifty and more years after its release may not be the music that was most popular when it was released - and in any event it sells in **much** smaller volumes. So the beneficiaries of extended copyright are not necessarily those who earned most during the first 50 years of its life.
43. The extension of sound recording copyright will take thousands of musicians off means-tested benefits - and **greatly** lessen the burden on the state. Moreover, the cost of doing so will be equitably, and invisibly, met by record companies and consumers who value their recordings, so reducing the need for taxation. The state will benefit both from a reduction in benefits paid to poor musicians, and from increased taxation of the earnings of wealthy musicians and record companies.
44. In summary, the effect of extending sound recording copyright will be almost imperceptible to the consumer or user of copyright works. Its principal effect will be to redirect a proportion of existing income flows within the record business away from record companies and towards performers.
45. The UK Government has frequently stated its ambition to make the UK the leading commercial environment in the world for creative enterprise. This cannot possibly be achieved by imposing on such a significant sector of the UK economy as the record business a copyright law which is rooted in the artistic and commercial environment, not of the last century, but of the one before that. The UK must not be allowed to lag further behind its global competitors both in the established economies of North America and Japan and the emerging economies of Asia, South America and Africa. It is central to the Government's policy towards the creative industries that sound recording copyright be extended.

The Legal Form of Copyright Extension

- 46.** There are two options available: either, follow the example of the US and fix a term of 95 years from the end of the year of first release; or adopt a life plus 70 years formula which might, as with films, be based on multiple lives. In principle we would prefer the latter, as it gives true equality with other copyright works, notably film. The lives chosen might include the record producer and all known featured (or contracted featured) performers. Since UK record companies now routinely register with PPL the contributions of all performers on released recordings, determining the expiry of copyright should be quite straightforward. However we recognise that this adds a further level of complexity, and would be happy with a fixed 95 year term.
- 47.** Whichever option is chosen, it should apply to all sound recordings, not merely those released after enactment of the extension works. That is the approach which has always been taken in the past when copyright in other works has been granted or extended. There is no reason why sound recordings should be treated any differently from film or any other copyright work. Were copyright introduced today, there could be no justification for discriminatory treatment. It is clear that the level of skill and labour, to say nothing of the financial investment, needed to create a sound recording amply justifies equal treatment with literary, musical and artistic works.

UK Copyright Office

- 48.** There can be no doubt that copyright industries suffer from the second-class treatment of copyright by the UK Patent Office. Since the Patent Office is expected to finance itself from the fees it collects, and since no fees are payable in respect of copyright, it is hardly surprising that copyright is neglected or ignored altogether by the Patent Office. Senior Patent Office staff have no, or wholly inadequate, experience or understanding of copyright, and the businesses which rely on it.
- 49.** The contrast with the US Copyright Office is telling. On its home page, the US Copyright Office gives a clear message: "We in the Copyright Office are proud to be part of a long tradition of promoting progress of the arts and protection for the works of authors." Whilst it is possible to find information on copyright through the Patent Office website, the UK Patent Office has no equivalent remit to champion the cause of copyright. Instead of taking pride in and supporting the achievements of copyright industries, the Patent Office seems to see its role as being to regulate and interfere in the business of copyright industries. It frequently champions the cause of those users and

consumers whose interests it (often wrongly) deems to conflict with those of copyright owners.

- 50.** The UK desperately needs a wholly independent, properly funded Copyright Office on the US model with an unequivocal mission to promote copyright and its social value, staffed by well-trained, motivated people with first-hand practical experience in the copyright industries. Government policy between the various departments which have some influence on copyright industries must be properly co-ordinated by unification in a single body.

The Social Impact of Copyright

- 51.** The social benefits of copyright are truly extraordinary, but widely misunderstood, ignored or taken for granted. Copyright is a form of property which anyone can create out of nothing. It requires no special skills or formal educational qualifications, no significant investment, and no bureaucratic formalities. Copyright protection is automatic and is recognised and respected all over the world, by virtue only of the act of creation itself – even if the creator is wholly ignorant of copyright, and does nothing to exploit it.
- 52.** Copyright, especially musical and sound recording copyright, offers an unrivalled opportunity for social advancement, especially among the most deprived sectors of the community. Through an understanding of copyright and the business opportunities which it affords, disadvantaged young people can readily be motivated to acquire transferable business skills including accounting, marketing, negotiation, legal, and organizational skills.
- 53.** Copyright is a dynamic engine of social inclusion which requires no intervention from the state save the creation of a stable and nurturing legal environment. Ownership of copyright offers the prospect of a stake in society and a stake in their own future to those who might otherwise own nothing of value at all. It offers young people nothing less than ownership of the means of production. The UK government should be proud of the UK's pre-eminence in the creative industries, especially in the field of music and sound recording, and it should do everything within its power to foster and liberate the tremendous creative potential of the UK population.