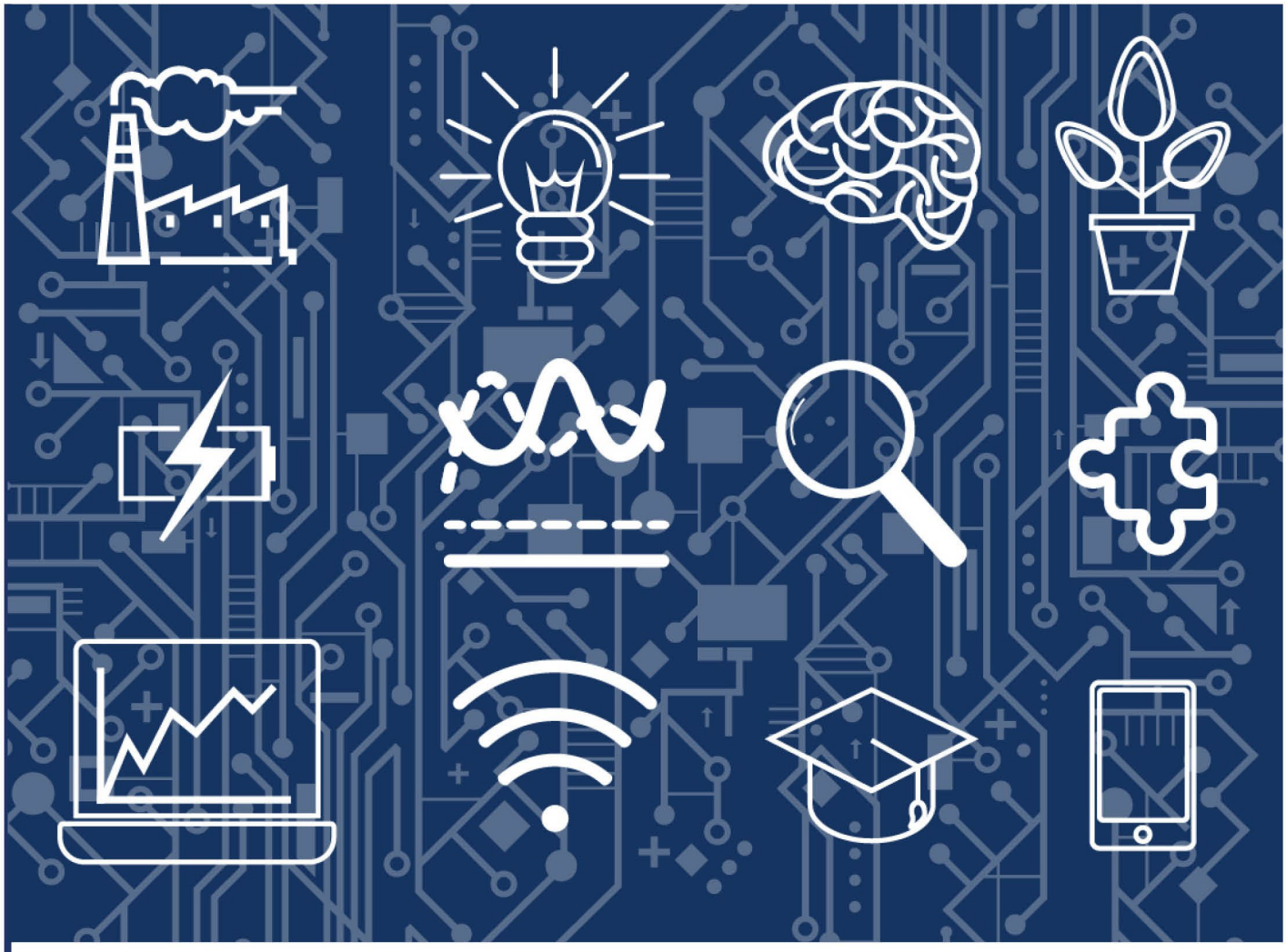
Intellectual Property Office

Rights Reversion and Contract Adjustment



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Rights Reversion and Contract Adjustment

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List of Acronyms

A&R	Artists and Repertoire
AIM	Association of Independent Music
BPI	British Phonographic Industry
CDPA	Copyright, Designs and Patents Act 1988
CMA	Competition and Markets Authority
CREATe	UK Copyright and Creative Economy Centre
DCMS	Department for Digital, Culture, Media and Sport
DSM	Digital Single Market
ECS	European Copyright Society
ER	equitable remuneration
EU	European Union
FAC	Featured Artists Coalition
FIFP	Fair Internet for Performers
IMF	International Managers Forum
IPO	Intellectual Property Office
MMF	Music Managers Form
MPA	Music Publishers Association
MPG	Music Producers Guild
MU	Musicians' Union
NDA	non-disclosure agreement
PPL	Phonographic Performance Ltd
PRS	Performing Right Society
R&D	research and development
SCRIPT	Scottish Research Centre for IP and Technology Law
SME	Small and Medium-sized Enterprise
WIPO	World Intellectual Property Organization

Introduction

0.1 Context and Research Questions

This report investigates two proposals that have been made to protect the contractual interests of UK music creators by making changes to domestic copyright law. One of the proposals is to introduce a reversion right, which would provide a means by which the transfer of copyright returns to the music creator at an agreed time-period after the contract with a rights holder has been signed. The other is to introduce a contract adjustment right, which would enable music creators to address disproportionate revenues resulting from contractual terms.

The report has its genesis in the inquiry into the Economics of Music Streaming that was launched by the Digital, Culture, Media and Sport (DCMS) Select Committee of the House of Commons in October 2020. The Inquiry had aims of studying 'the impact of music streaming on the creators and companies that comprise the music industry' and examining 'the long-term sustainability of the music industry itself' (DCMSSC 2021a: 5). Although it was set against the background of the Covid-19 pandemic, which deprived music creators of live music revenues and as a result placed a focus on their recorded music income, the DCMS Select Committee noted that 'dissatisfaction with music streaming within the music industry predated the Covid-19 pandemic' (2021a: 5). There had been several concerns, including the pricing of streaming services, the 'value gap' caused by safe harbour provision, the split of revenues between streaming platforms and rights holders, and the lack of transparency in agreements between these two parties. Most pertinent to this research project was the assertion that, 'whilst streaming has returned the recorded music industry to profit, music creators […] have not proportionately shared this benefit' (DCMSSC 2021a: 26).

The DCMS Select Committee gathered nearly 300 pieces of written evidence and held seven oral evidence sessions, receiving testimony from creators, trade bodies, music companies, collecting societies, governmental officials and streaming services. In July 2021, the Select Committee published its report relating to the Inquiry, which includes its recommendations for legislative reform and regulatory intervention.

In relation to the division of revenues between the recorded music industry and music creators, the Select Committee heard evidence that the turn to streaming had led to 'historic levels of profitability for the major labels whilst performers' incomes are less than the median wage' (2021a: 63). This alleged disproportionality was associated with recording contracts, which were viewed by some as offering terms 'under which the major music groups in particular acquire the rights to music […] at the expense of the creators' (2021a: 63). Although the Select Committee acknowledged that the digital environment had led to a greater diversity in contracting practices (2021a: 63), it noted an imbalance in bargaining power (2021a: 6304). As a result, it recommended that the Government expand creator rights by introducing a right to recapture works and a right to contract adjustment where an artist's royalties are disproportionately low compared to the success of their music (2021a: 67).

The right to recapture works (also known as a 'reversion right', 'revocation right' or a 'termination right') had been advocated by several participants in the Inquiry, including the Music Managers Form (MMF), the Featured Artists Coalition (FAC), the UK Copyright and Creative Economy Centre (CREATe), the Scottish Research Centre for IP and Technology Law (SCRIPT), Dr Hayleigh Bosher, and the Musicians' Union (MU). Measures that exist in

United States legislation were offered as an example for how this type of right could be incorporated into UK law. Under the 1976 US Copyright Act, authors are entitled to 'terminate' the transfer of the copyright in their works to a contracting party 'thirty-five years from the date of publication' (17 U.S.C. 1976: § 203). The DCMS Select Committee's recommendation states that the introduction of a similar right in the UK 'would create a more dynamic market for rights and allow successful artists to go to the market to negotiate better terms' (2021a: 67).

The right to contract adjustment was proposed by SCRIPT, the Ivors Academy, MMF, FAC, and the MU. The model in this instance was the adjustment measures that exist in German legislation, Dutch legislation and the European Union's Digital Single Market (DSM) Directive of 2019, to which the UK would have been a party if remaining with the Union. The DSM Directive stipulates that authors and performers 'are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights […] when the remuneration originally agreed turns out to be disproportionately low' (EU 2029: art. 20). The DCMS Select Committee report suggests that a contract adjustment right 'would particularly benefit performers on outdated legacy contracts' (2021a: 66) and that it should be 'implemented as soon as practically possible to ensure that rights for UK creators do not fall behind rights for European creators' (2021a: 67).

It is these recommendations for a right to recapture works and a right to contract adjustment that are explored in this research project. The UK government responded to the DCMS Select Committee's policy proposals in September 2021, stating that 'the impacts of these proposed new rights are uncertain and warrant further analysis' (DCMSSC 2021b: 4). Consequently, it instructed the UK Intellectual Property Office (IPO) to commission this research, expressing a need to focus on 'countries that have implemented similar measures' (DCMSSC 2021: 4). The IPO outlined three initial research questions:

- What similar measures exist in other countries and what has been their impact?
- Based on the available evidence, what are the likely benefits and costs to music creators and performers of implementing a reversion and a right to contract adjustment in the UK?
- Based on the available evidence, what are the likely benefits and costs to the wider music industry of introducing such rights in the UK?

Meanwhile, there have been developments in this area. In November 2021, the MP Kevin Brennan published details of his Copyright (Rights Remuneration of Musicians, Etc.) Bill, which intended 'to give effect to certain recommendations made by the House of Commons Digital, Culture, Media and Sport Committee in their July 2021 report on the Economics of Music Streaming' (CRRMB 2021b: 3). The Bill included proposals for contract adjustment and a right of revocation.

Brennan's Bill was debated in parliament in December 2021, but did not proceed beyond this second reading. In making the official response to the proposed legislation, George Freeman (Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy) stated, 'We accept that there is a problem and we accept the fundamental case made by the [DCMS] Select Committee' (Freeman 2021: 1221). Nevertheless, as with the DCMS Select Committee's own recommendations, it was noted that further research was required before taking action. This would include an investigation by the Competition and Markets Authority (CMA), as well as the IPO research projects (Freeman 2021: 1224). Freeman also stated that, while he wished to make it 'clear' that the Government had not ruled out legislation, its 'instinct' was 'to try to solve the problem through an industry-led package of measures that artists and musicians support' (Freeman 2021: 1225, 1230).

Therefore, in addition to addressing reversion rights and contract adjustment, this report will look at industry-led initiatives to address issues relating to the remuneration of performers and songwriters.[1]

In July 2022, the CMA published an update paper that outlined some of its initial findings in relation to its investigation and provided its reasoning for proposing not to make a market investigation reference. The CMA found that:

> One of the issues faced by artists is that due to the weak bargaining position that many face early in their careers, they may need to agree to long-term contractual commitments (eg to produce multiple albums) and assign the copyright to their work for a long period of time if they wish to secure a traditional record deal. Once they have achieved some initial success, their bargaining position may not necessarily improve due to these long-term contractual commitments. It can take many years for such artists to fulfil their initial contractual obligations and be able to negotiate improved terms. (2022a: §5.100)

However, while these issues coincided with the DCMS Select Committee's own analysis and its proposals for rights reversion and contract adjustment, the CMA raised questions about how such initiatives might be funded. As part of its research, it conducted a profitably analysis of recording companies, which had 'limitations', but suggested that 'in addition to what has already been paid out to artists, there are no substantial music streaming revenues left to pay artists substantially more, as a group, once record companies' costs have been accounted for, including the cost of raising funds to invest in artists' (CMA 2022a: §5.107). Consequently, the CMA noted that:

> Some interventions may help some types of artists, but in doing so, may risk the unintended consequence of redistributing revenues from one group of artists to another. The risk of this is higher when there are no substantial and sustained excess profits to transfer to artists overall. For example, measures to help established artists renegotiate improved terms once they achieve success […] could result in lower advances for new artists. (CMA 2022a: §5.108).

The CMA issued its final report on Music and Streaming in November 2022. While noting that 'the majors are earning a healthy level of profit', the organisation repeated that it had 'not found evidence of substantial and sustained excess profits by the majors' (2022b: §§2.40, 5.81). The CMA also confirmed its decision not to make a market intervention, instead noting that the proposals for rights reversion, contract adjustment and equitable remuneration could 'have more potential to improve outcomes for artists compared to measures to increase competition, but would need to be carefully thought through to avoid possible unintended consequences' (2022b: §5.82).

0.2 Methodology and Structure of the Report

Rather than making policy recommendations, the purpose of this report is to support decision-making by Government. To undertake this task, it is structured as follows:

[1] Correspondingly, the IPO supplemented its initial outline for this project with a further research question: 'Should change take place at a legislative level or is it possible for the recording industry to implement a voluntary code of practice?'

- Chapter one provides background information relating to the proposals for rights reversion and contract adjustment. In doing so, it addresses copyright contracts, first outlining issues that affect the creative industries broadly before looking at some contractual concerns relating to the music industries. After outlining remedies that have been proposed to address these concerns, the chapter then looks at views on contracting practices that we have gathered from interviews with stakeholders.

- The report then devotes individual chapters to rights reversion, contract adjustment and industry-led initiatives. Each of these chapters is broken down into the following sections:

    - An introduction, providing context for these means of addressing potential contractual asymmetry
    - A section on implementation, detailing various options for executing these measures and initiatives
    - A section outlining information that is available in respect of the impact of these measures and initiatives
    - A section on stakeholders' views, outlining opinions that have been gathered from those most affected by these proposals and initiatives

This research analysis has been undertaken using the following methodology:

- Interviews with rights holders, including the three major music companies, independent record labels and services companies

- A focus group discussion with publishers, organised by the Music Publishers Association (MPA)

- Two focus group discussions with music creators: one with songwriters organised by Ivors Academy; the other with featured artists and non-featured performers organised by FAC and MU

- Interviews with representatives of the following UK trade bodies and collecting societies Interviews with music managers, accountants, lawyers and music industry analysts

- Interviews with academics working in the areas of copyright law, economics and music industry studies

- Interviews and correspondence with legal experts on termination rights

- Interviews and correspondence with academics working on contract adjustment in Germany

- Desktop research, including an investigation of previous reports on contract adjustment and reversion/termination rights

- Data from UK recording contracts and music publishing contrasts

- Economic data from the music industries

Before proceeding, a note of caution should be made about the IPO's request for 'available evidence' and how it can be utilised to gauge the impact of these legislative recommendations. This report details the potential of these measures to address the

contractual concerns of music creators. It also outlines the potential impact upon the wider music industries, views on which can vary widely. What it has not been able to do, however, is provide detailed financial modelling in respect of gains and costs. There are number of reasons for this' should be 'There are a number of reasons for this:

- First, there is little 'available evidence' from countries that have introduced these measures. This is true of both reversion rights and contract adjustment, but not always on the same grounds. It is the United States that has the most impactful legislation for rights reversion. However, in this country there has been a continuous policy of either renewal rights or reversion rights from the introduction of its first copyright legislation until the present day. Therefore, it is not possible to measure impact in relation to the introduction of these rights: there is no before and after. Contract adjustment legislation, in contrast, is more common in continental Europe, where its introduction is of more recent vintage. Nevertheless, there is no apparent research in these countries detailing its financial impact.

- Second, if surveys were to be undertaken to assess the financial consequences of these measures, researchers would face difficulties in accessing some of the requisite data. It could be relatively straightforward to trace the number of applications that creators have made in respect of this legislation (a project to do so has been undertaken in the US in respect of reversion right claims; there have, however, been no similar projects in respect of claims for contract adjustment). It could also be possible to address sales and usage activity relating to works that have gone through a claims process, assessing their progress before and after rights have reverted or contracts have been adjusted. What would remain difficult, nevertheless, is how to enumerate this activity in relation to financial gains for the creators raising claims and the concomitant reduction in revenues for rights holders and other creators. This is because the financial terms of music industry contracts – both before and after the utilisation of the legislation – are private. As such, unless researchers can gain access to this financial information, their projections will largely be reliant on assumptions about royalty rates and lump sum payments.[2]

[2] As noted above, we have been able to access some music industry contracts as part of the research for this project. This constitutes a small sample of contracts from the 1960s through to the present day. However, while these contracts have provided us with an indication of general changes to contractual terms over this time, none of these contracts relate to creators who have acted upon rights reversion or contract adjustment legislation and thus they do not provide data on the gains that can be achieved.

- Third, and perhaps most importantly, there are various options in respect of how these measures can be implemented, as detailed in sections 2.2 and 3.2 of this report. These alternatives can make the financial impact of the measures vary widely. For example, some of the more extreme reactions from stakeholders – in relation to both gains and costs – have been made in respect of the consequences of legislating for a reversion right. However, most of this commentary has worked on the assumption that a UK reversion right would embrace contracts created before the legislation was enacted as well as those created afterwards. In addition, the stakeholders have assumed a straightforward or automatic procedure for gaining the reversion of rights. The effects of a reversion right would, however, diminish considerably if the legislation was not retroactive. Also, evidence from the US suggests that if formalities are imposed on the reversion procedure only a minority of works will be subject to reversion.

- Fourth, we have heard from US authorities on reversion rights and European authorities on contract adjustment that much of the effect of these measures lies in their 'soft power'. In both instances, there is a tendency for creators to use this legislation as a prompt for the renegotiation of contracts, rather than undergo the expense and/or difficulties of raising claims. In addition, there have been suggestions that the presence of these measures can lead to a general improvement in contractual terms, as rights holders would rather foster harmonious partnerships with creators than face the prospect of creators using this legislation to mount challenges to their agreements. It might be possible to make some assessments in relation to this latter point, if given access to contractual information. To do so would require a comparison of contractual terms in countries that have implemented these measures with those in countries that do not have them. Alternatively, it might be possible to examine the terms of contracts in relevant countries before and after this legislation has been implemented. Doing so would not be straightforward, however, as there are various factors that can cause contractual terms to change, out of which this legislation might not be the most important factor. Gathering information in relation to the renegotiation of contracts presents an even greater challenge, as the initiation and outcomes of these deals are generally private matters.

- Fifth, there are difficulties in gauging knock-on effects. The CMA investigation has indicated that, while these measures might result in benefits for some creators, the costs of these rewards will need to be paid for elsewhere. The most common argument from rights holders is that the implementation of these measures would result in a reduction in the levels of advance payments that can be paid to new artists and songwriters, as well as to fewer artists and songwriters being signed. These arguments should not be gainsaid, not least because the effects could be felt most keenly by smaller companies and creators from poorer backgrounds. Nevertheless, it is the case that the practices of rights holders in relation to advances and signing policies have many prompts, out of which rights reversion or contract adjustment might only have a small impact, depending on how they are implemented. Thus, any assessment of changes to the financial practices of rights holders would need to disentangle these multiple influences.

0.3 Executive Summary of Main Findings

Sections where evidence is provided to support the following findings are indicated in parenthesis. We ask that the findings in this Executive Summary are considered in relation to the evidence and caveats provided in the Report as a whole.

Background

Copyright Contracts

- There is a considerable literature on contractual asymmetry, which argues that creators are in an inferior bargaining position to the rights holders with whom they contract. These arguments have been raised by independent academics, researchers conducting surveys for governmental bodies and by legislators, including those working in the European Union, the US Government and the UK Parliament (section 1.1)

- The literature about contractual asymmetry tends to relate to the creative industries as a whole, rather than focusing on the music industries in particular. Among its findings, it suggests that, as a result of this asymmetry, some creators might be remunerated with 'disproportionately' low payments (whether by lump sums or through royalties), that the duration of contracts might be excessive, that the period of the transfer of rights might be excessive, and that the creator might have limited opportunities to renegotiate their contractual terms (section 1.1)

- To address issues relating to contractual asymmetry, many territories have introduced protective measures into their copyright legislation. In countries whose legislation is based on common law, the use of time-based reversion rights or renewal rights has been most prevalent. These measures have been introduced in the US and Canada, and, at certain times in its legislative history, have been present in the UK. In countries where legislation is based on civil law, measures relating to contract adjustment and fair remuneration are more common. Germany and the Netherlands have been pioneers in introducing this legislation. The protective measures introduced in these countries have influenced the 2019 DSM Directive that is currently being implemented throughout the EU (section 1.3)

Copyright Contracts in the Music Industries

- Among music industry rights holders, the most difficult aspect of contracting practice is that 'nobody knows' in advance which recordings or works will be a success. It is this risk investment – along with the need to make a profit – that underpins the contractual terms that are offered to music creators (section 1.2.4)

- The contractual terms offered to nascent creators tend to be inferior to those offered to experienced creators who are renegotiating their terms or are entering into new deals. This is because there is usually greater uncertainty about the new artists' chances of success, as well as greater need for financial input from rights holders at this stage of their careers (section 1.2.4)

- Within the music industries, there is evidence that contractual terms have improved over the course of the past fifty years. This is due to landmark legal cases, increased competition amongst rights holders, and the increased bargaining power of some creators. The digital environment has also led to music creators having a greater variety of contractual options from which to choose. Generally, this has prompted an increase in royalty rates and decreases in the duration of contracts and the periods for which copyright will be transferred (section 1.2.4)

Royalty contracts

- Despite improvements in contracting practice, there are situations in which music creators feel aggrieved in relation to royalty contracts. The following issues can arise: the royalty revenue can come to feel disproportionate if the recording or composition is a success; the duration of the transfer of copyright can come to feel excessive if it means that a 'disproportionate' royalty rate is applied to a recording or composition for a considerable period of time; the duration of the contract can come to feel excessive if it means that 'disproportionate' royalty rates are applied to all of the record releases or compositions that are covered by the deal (section 1.2.4)

- In the digital era, some music creators with older 'legacy' contracts have suggested that their royalty rates are becoming increasingly disproportionate. This is on the grounds that: a) sales of back catalogue have increased (section 1.2.3); b) the revenues from back catalogue are not being shared fairly because some of the costs encountered by rights holders costs have been reduced, yet older royalty rates have remained in place; c) contractual terms have improved; therefore there is an increasing gulf between what can be gained in a newly-negotiated contract and the royalty rates that are being encountered in long-standing deals (section 1.2.4)

- Rights holders have responded to these arguments with the following points: a) although some of their costs have decreased, they are encountering new costs in the digital environment; b) they have introduced voluntary measures to compensate music creators who have out-dated legacy deals; c) contracts often include incremental royalty rate increases in respect of the later recordings or compositions covered by the deals and in respect of sales targets being reached; d) contractual terms can be renegotiated (section 1.2.4)

Lump sum payments

- There are situations in which music creators can feel aggrieved in relation to lump sum payments:

    - Some non-featured performers argue that, rather than being encompassed solely by their lump sum payments for session work, their revenues for on-demand streaming should receive an additional equitable remuneration (this issue is the subject of a separate IPO report)
    - Some non-featured performers work outside of the agreement drawn up by the MU/BPI in respect of session rates. If they sell their input for low rates and the work goes on to be a success, the payment might appear to be 'disproportionate'
    - Some composers and lyricists argue that audio-visual commissioners are imposing contracts on them which insist on a full 'buy out' of their rights rather than paying them any royalties (section 1.2.4)

Stakeholders' Views on Copyright Contracts

- Views of Record Companies and Music Publishers

    - Record labels and music publishers emphasised their role as investors and disagreed with the view that contractual negotiation is asymmetrical
    - They highlighted the choices and the legal representation music creators have in signing contracts which they sign voluntarily based on well-informed decisions (section 1.4.1)

- Views of Music Creators

- The music creators' community argued that there is asymmetry in bargaining power, skewed toward labels and publishers
- Whilst acknowledging the importance of the majors' role in achieving commercial success, they argued that asymmetry is more pronounced in contracts with major companies as they have more leverage than independent companies
- The power imbalance is also argued to be systemic in that the majors' power stemming from the bulk of rights plays a crucial role in musicians' commercial success
- Power imbalance is deemed to be more pronounced in contracts with new artists, who have relatively little commercial leverage, knowledge, experience, or negotiation skills, but are often in need of financial support
- Despite diversified contractual choices in the market, the challenge of rising above the noise results in more limited choices for those who aspire to achieve commercial success (section 1.4.1)

- Recent Contractual Developments
  - There was general consensus that contractual terms have improved and choices have become diversified
  - It was debated whether the extent to which terms have improved is sufficient (section 1.4.2)
- Legacy Contracts and Renegotiation
  - All stakeholders agreed about the increased importance and contribution that back catalogue makes in the streaming economy
  - Label stakeholders emphasised the increased infrastructure they have put in place and attention that they pay to legacy contracts
  - All stakeholders agreed that renegotiation of contracts can be necessary but had contrasting views as to whether it takes place frequently enough
  - Labels and publishers were of one voice that they frequently re-negotiate old contracts and communicate with their creators
  - The music creators' community asserted that despite the increased importance of back catalogue, contractual terms for some legacy contracts, which tend to be for long duration (often for the full copyright term) and with comparatively low royalty rates, have not been updated to take account of streaming
  - The music creators' community stated that there is a lack of communication from some labels and publishers, notably when new technologies are introduced, which they argued, creates lack of trust
  - Music creators argued that auditing can be beyond their reach due to its cost and that non-disclosure agreement (NDA) practice creates lack of transparency (section 1.4.3)

Rights Reversion

- A reversion right could enable creators to terminate the transfer of their rights after a specified period or alternatively on recoupment of the advances paid to them by rights holders. After the rights have reverted, the creator could be able to negotiate a new deal and could possibly improve their terms. Consequently, reversion rights may help to address the concerns of creators who feel that their royalty rates are disproportionately low. However, it would only be possible to address the concerns of UK creators with legacy contracts if the legislation were introduced in a retroactive manner and thus applicable to contacts that were signed before it was enacted (section 1.3)

Prevalence

- Reversion rights are present in the legislation of 55% of the member states of the United Nations, most commonly as 'use it or lose it' clauses, enabling creators to rescind the transfer of copyright if their work is not being issued or being made available to the public. Moreover, following the implementation of the DSM Directive, a use it or lose it measure will be present in the legislation of all member states of the EU (section 2.1)

- The strongest form of this legislation is as time-based reversion rights that apply to all copyright works, regardless of whether they are being 'used' by the rights holders. Such measures are most prevalent in common law countries, including the US, which has 'termination' right enabling creators to rescind the transfer of copyright after a period of 35 years (section 2.1)

- The UK previously had time-based rights in the form of a renewal right, which was in existence between 1710 and 1814, and a termination right, which was in existence between 1911 and 1954 (section 2.1)

- It is a time-based reversion right, based on the model of the US termination right, that has been proposed for the UK by the DCMS Select Committee

Implementation of Reversion Rights

- The impact of time-based reversion rights is dependent on how they are implemented. Variables include

    - The trigger point: time-based reversion rights tend to come into force a set number of years after the copyright has been transferred to a rights holder. The shorter the time-period, the more financial impact they can have. This is because, on the one hand, a rights holder will have a reduced period in which to gain revenues from their control of copyright, and on the other hand, the creator will more quickly reach the point at which they can assume ownership of the rights. If they have been successful, they may then be able to negotiate for superior contractual terms
    - Formalities: the termination of rights can be automatic or there can be an application procedure. If the procedure is complicated, it can result in fewer rights being terminated
    - Ownership: it could be relatively straightforward for composers and lyricists to terminate their rights as they are recognised as the first owners of copyright. The situation is more complicated in respect of sound recording copyright, as the 'producer' (often interpreted as meaning the record company) is regarded as being the first owner. This issue would have to be worked through if the desire is for sound recording copyright to 'revert' to featured artists

- Co-creator agreements: music-making is usually collaborative; take-up of reversion rights will vary according to whether the termination process is open to each contributor to a recording or composition; if it requires a majority of the contributors to be in agreement; or if it requires all of the contributors to be in agreement
- Sub-licensing: it is the practice of most rights holders to sub-license their rights to various users of the works. If a reversion right is applied to these sub-licenses as well as to the original transfer of copyright, its impact will be increased
- Territory: the impact of a reversion right will vary depending on whether it applies only to contracts that have been signed in the country enacting the legislation, and if only applies to revenues accruing in the territory in which the legislation has been enacted
- Inalienability: the impact of a reversion right will be lessened if it is possible to waive or assign the right
- Retroactivity: if a reversion right is introduced to legislation, its impact will be magnified if it applies to contracts negotiated prior to the legislation being enacted. This is not only because a larger number of works would be in its orbit, but also because it is older works that are most likely to have been assigned for the life of copyright (section 2.2)

Information on the Impact of Reversion Rights

1. Take-up

- A study published in 2022, addressing the take-up of the US termination right since its introduction in 1978, found that:
    - Only 1.6% of registered works had been subject to termination claims. The low figure was in part due to the complicated formalities of requesting termination
    - Out of all types of creative work, termination notices were most common for music compositions and sound recording copyright. This reflects the popularity of back catalogue in the music industries
    - In respect of termination claims that were contested, 89.3% concerned sound recordings. This was in part due to complications relating to the ownership of sound recording copyright (section 2.3.1)

2. Financial gains and costs

- There are no surveys of the US termination right in respect of increases in royalty rates that creators might have gained, or in relation to increases (or decreases) to their revenues post-termination. Similarly, there is no information relating to the projected losses suffered by rights holders in respect of rights that have been terminated (section 2.3.2)

- It is nevertheless possible to outline average royalty rates for featured artists in different decades and posit that, if a retroactive reversion right were introduced in the UK and implemented retroactively, a featured artist who contracted for a single-digit royalty rate in the 1960s or 1970s could negotiate for a rate at least double that post-termination. Similarly, a composer or lyricist who was contracted for a 50% royalty rate in the 1960s or 1970s could gain a rate of 75% or higher post-termination (section 2.3.2)

- Various factors would need to be borne in mind before assessing the gains of costs of introducing a British reversion right:

    - First, the trigger point would need to be determined: if the reversion right were to be triggered after 35-years, as is the case in the US, around 11% of on-demand streaming activity would potentially be affected; if it was after 25-years, this would rise to around 15%
    - Second, it would need to be determined whether reversion was automatic or if formalities would be put in place. If the formalities were to be as strict as those in the US, this would suggest that only a small proportion of works would revert
    - Third, although points one and two might imply that reversion would only affect a minority share of repertoire that is generating revenue and only a minority of creators would raise claims, those who do raise claims would most likely be the featured artists and composers who have been most successful when it comes to generating revenues. Thus, the termination of a small catalogue of works could have a significant impact for a music company, particularly if it is the rights holder in respect of only a limited number of recordings or works
    - Fourth, the potential cost in respect of unrecouped balances would need to be delineated. Although the value of unrecouped balances forms part of the valuation of rights holdings if a music company is put on sale, the day-to-day operation of these companies is undertaken in expectation that a large proportion of these balances will not recoup. Thus, in terms of the impact of a reversion right, there should be a calculation of the unrecouped balances the music companies would have expected to recoup if they had retained control of the rights for the period that was originally negotiated
    - Fifth, a recording artist or composer might not sever ties with their former recording company or music publisher post-reversion. If the relationship has been harmonious, they might negotiate new terms instead
    - Sixth, it would need to be determined whether the reversion right would be implemented retroactively. If this were not the case, points one to five would be moot, as the reversion right would only apply to contracts negotiated after the legislation came into force. Moreover, given the fact that UK publishing contracts have already tended to move away from lifetime assignment of rights, and UK recording contracts are moving in a similar direction, the impact of a non-retroactive reversion right could be limited to a small number of cases in which a longer transfer of rights has been applied (section 2.3.2)

3. Knock-on effects

- Some rights holders and economists have argued that the costs of a reversion right would need to be paid for further down the line. This would either be through rights holders increasing the cost of their products or by them paying lower advances to music creators and/or reducing the number of creators being signed (section 2.3.3)

- Other experts and interested parties have argued that the presence of these rights could have a positive effect on contractual terms, as it would result in a climate in which the limited transfer of rights is the norm, and because rights holders would treat creators favourably in the hope that they would not terminate their contacts or would alternatively want to continue in partnership with them post-termination (section 2.3.3)

- There is a paucity of data in relation to any of these arguments. In addition, gaining data in respect of these knock-on effects is complicated due the fact that changes in the costs of goods and contractual terms can have various prompts, out of which

the significance of a reversion right would be dependent on the methods of its implementation (section 2.3.3)

Stakeholders' Views on Reversion Rights

- Record companies' views
    - Record companies expressed concerns about the potentially damaging impact of rights reversion, particularly in relation to the destabilising effect this would bring to their economic modelling which has been based on lifetime of copyright contractual terms
    - They argued that most artists do not recoup their advances and that income from back catalogue is used to invest in new talent; therefore rights reversion could result in less investment in new artists
    - Independent labels stated that the impact of the rights reversion could be particularly acute for them because they do not normally have the same level of commercially successful artists as major labels and therefore fewer resources to fall back on
    - Record companies argued that rights reversion would have a far-reaching negative impact on the UK music market as it would disrupt the ongoing cycle of the music ecosystem
    - Further, it was argued that this could make the UK music market unattractive to investors, potentially disincentivising investment by global companies in the UK (section 2.4.1)
- Music Publishers' views
    - Publishers shared similar views to record labels in opposing the introduction of rights reversion
    - Highlighting the songwriter-friendly business model, based on good-faith, publishers emphasised that rights reversion, based on the assumption of unfairness, does not suit their business model
    - They also emphasised that rights reversion would disrupt the mechanism in which the value of song is determined based on "willing buyer, willing seller" basis
    - With the recently increasing acquisition of publishing rights, they said, rights reversion poses a particular concern for publishers as this will uproot the financial investments for rights whose valuation was based on the duration of the acquisition terms
    - Concerns were raised about retroactive implementation as it was argued that rights reversion would not sufficiently take into account the publishers' risk investment and would create uncertainty in the rights acquisition market
    - The international legal implications of rights reversion were raised as an issue because it would not be clear how implementation in the UK would impact on contracts that apply globally, and would therefore cause issues with global licensing (section 2.4.2)

- Music Creators' views
    - The music creators' community argued that rights reversion could empower them
    - Music creators stated that fundamental problems exist in the way contracts work, as creators do not own their work even after advances have been recouped
    - They also argued that the advances that record companies provide do not justify the prolonged duration of copyright transfer, especially when new technologies give new life to old catalogue, yet musicians may not benefit from this exploitation
    - One of the biggest benefits of rights reversion, from the music creators' perspective, would be the opportunity to review their contracts and make more informed decisions about what the most appropriate deals are for them
    - Music creators argued that rights reversion would not necessarily disrupt the business models of labels or publishers, as most creators would still need to partner with rights holders and some of them might maintain their partnerships with their existing rights holders
- Practicalities of Implementation
    - Rights holders raised concerns that rights reversion could lead to 'a forest of litigation', as well as having a chilling impact by encouraging other countries to follow suit
    - The music creators' community argued that some of these concerns are exaggerated as the biggest impact of rights reversion would be re-negotiation, and not litigation (section 2.4.5)
- Mechanisms to Revisit
    - All stakeholders agreed about the need to re-negotiate contractual terms, particularly given the fast pace of technological change, and mechanisms to revisit were suggested by the music creators' community as a way to ensure contractual terms are kept up to date
    - Many music creators expressed the need to have a mandatory mechanism to revisit contractual terms after a short period of time, and five or ten years was suggested as an example (section 2.4.6)
- Use it or Lose it Measure
    - Most stakeholders agreed that whilst a use it or lose it measures exists in the UK, it is neither widely used nor useful because in the digital age, making the content available is easy and use it or lose it rarely happens (section 2.4.7)

Contract Adjustment

- A contract adjustment right could enable creators to contest royalty rates or lump sum payments that they view as being disproportionate in relation to the revenues generated by the recording or work. If their cases were upheld, they could secure financial compensation and/or increases to their royalty rates. However, in a similar manner to rights reversion, it would only be possible to address the concerns of UK creators with legacy contracts if this legislation was enacted with some affordance for retroactivity (section 1.3)

Prevalence

- Contract adjustment measures have had a long presence in some European countries. These measures have some commonality in that they allow for changes to contractual arrangements when the rewards to creators are seen to be disproportionately low in comparison to the overall revenues generated by their work

- Following the implementation of the DSM Directive, contract adjustment measures will be present in the legislation of all member states of the EU

- In contrast to mainland Europe, the UK has provided minimal protection for contracts within its copyright law (section 3.1)

Implementation of Contract Adjustment

1. Scope

- The impact of contract adjustment measures is dependent on how they are implemented. Variables include:

    - Disproportionality: in instances where contract adjustment has been enacted as 'best-seller' clauses, it has had several limitations. First, it has been restricted to instances in which there are large revenues and major differences between the earnings of the creator and the earnings of the rights holder. Second, it has been limited to cases in which the disproportionality between the revenues of the creator and the revenues of the rights holder could not have been foreseen. Third, it has in some instances been reserved for lump payments and has not been applicable to royalty contracts. The impact of a contract adjustment right will be expanded if disproportionality is viewed more broadly, if it can apply to contracts that were viewed as being unfair from the outset, and if it can encompass royalty payments
    - Inalienability: the impact of a contract adjustment right will be lessened if it is possible waive or assign it
    - Retroactivity: contract adjustment legislation could be implemented in a retroactive fashion. Alternatively, it could be implemented so that it applies only to contracts that have been negotiated after the legislation is enacted. A further option is that it can be applied to older contracts, but only respect of revenues generated after the legislation is enacted. Its impact will vary accordingly

2. Accompanying Legislation

- Countries that have contract adjustment legislation tend to accompany it with further measures that aim to protect the contracting practices of creators. These provisions include copyright legislation relating to:

- Transparency: as a means of helping creators to substantiate contract adjustment claims, as well as make other claims in respect of remuneration, some countries include measures that insist that rights holders provide access to their accounting information
- Fair Remuneration: some countries accompany their ex post legislation for contract adjustment with ex ante measures that seek to ensure 'fair' contractual terms at the point of negotiation
- Dispute Resolution: take-up of contract adjustment and fair remuneration measures can be low due to the expense of raising claims. Consequently, some countries have dispute resolution procedures that aim to make the process more affordable and efficient
- Collective Action: take-up of contrast adjustment measures can be low because creators fear they will be blacklisted by rights holders. Consequently, some countries have measures that enable creators to make anonymous and/or collective claims. In addition, some countries have measures for 'joint remuneration agreements', which encourage the trade bodies of rights holders to work with creators' associations to establish fair rates of pay
- New uses: some contracts encompass technological means of distribution that are yet to be developed and apply previously negotiated royalty rates to these new technologies. These royalty rates can be viewed as being disproportionate if the rights holders' costs for the new technologies turn out to be lower than their costs for the technologies to which the royalty rate was originally applied. To mitigate against this, some countries include legislative measures in respect of new uses. In some instances, these prohibit future uses from contractual control; in others, the rights holder must give the creator the option whether to agree to the terms for the new use; in others it is stipulated that the remuneration for the new use must be fair
- Lump Sum Payments: some territories hold the view that lump sum contracts for creative work are inherently disproportionate and therefore unfair. Consequently, they set parameters around such contracts, either limiting their use, stipulating minimum payments, or restricting the duration for which they can be applied (section 3.2.2)

Information on the Impact of Contract Adjustment

1. Take-up

- In countries that have contract adjustment measures there is little data relating to take-up. However, it is generally suggested that they have had limited effect

- The low take-up of these measures can, in part, be attributed to the way they have been enacted. Until recently, most contract adjustment legislation has been restricted to cases where gross disproportionality can be evidenced and there have been further limitations due to the expense of raising claims and fear of blacklisting

- In Germany and the Netherlands, contract legislation has been developed to address these limitations and consequently is having greater effect, albeit that this appears to be as much in its use to encourage renegotiation as through adjustment claims that are actively pursued

- French contract legislation has resulted in a minimum remuneration guarantee for streaming revenues

- Belgium has chosen to implement the DSM Directive's fair remuneration measure so that it provides a residual equitable remuneration for streaming revenues (section 3.3.1)

2. Financial Gains and Costs

- There is a paucity of data in relation to the financial gains and costs of contractual measures extant within copyright laws. This is the case with:
    - 'Best-seller' cases pursued by individuals through courts or dispute resolution mechanisms: there are no surveys of the outcomes of these claims and no detail of cases relating to the music industries
    - Informal settlements: there are no surveys of contract adjustment claims that have not reached the courts and have instead resulted in contractual renegotiation
    - Collective agreements: the minimum remuneration guarantee that has recently been implemented in France has not been accompanied by financial forecasts in respect of its potential impact (section 3.3.2)
- Various factors would need to be borne in mind before assessing the gains and costs of introducing a British contract adjustment right:
    - The ability to address different forms of contractual agreement: the effects of the legislation could be expanded if, through its interpretation of disproportionality, it addresses royalty contracts in addition to lump sum payments
    - The ability to address new uses of works: the effects of the legislation could be expanded if it were enacted so it encompasses technological developments such as streaming (either through a contract adjustment measure and/or a new use measure)
    - The ability to raise claims: the effects of contract adjustment legislation could be expanded if it were accompanied by a mechanism for resolving disputes
    - The ability to address collective needs: the effects of contract adjustment legislation could be expanded if it were accompanied by legislation that establishes fair rates of pay through joint remuneration agreements
    - The ability to address contracts entered into prior to the legislation being enacted: the effects would be expanded if it were applicable to older contracts (section 3.3.2)

3. Knock-on Effects

- If contract adjustment legislation was introduced in a manner that could have significant impact, it has been suggested by trade bodies for music creators that this could encourage rights holders to make general improvements to their contractual terms (section 3.3.3)
- Conversely, it has been argued by some legislative experts and rights holders that contract adjustment legislation could have negative effects for some music creators:
    - First, if the legislation were to result in increased costs for rights holders, they might counter this by reforming their contractual practices, including paying lower advances, offering royalty payments instead of lump sum payments (if this results in lower costs), and reducing the number of creators that they contract or hire
    - Second, if contract legislation leads to a general increase in payment rates within a country, some rights holders might choose to contract with creators who reside or are working in countries that do not have contract legislation and are therefore cheaper to employ

- Third, in relation to the lump sum contracts of non-featured performers, if a contract adjustment case is upheld, the costs might be borne by the featured artists with whom they have worked rather than by the rights holders (section 3.3.3)
- As is the case in respect of financial gains and costs, there is no financial data available in relation to these possible knock-on effects of introducing contract legislation (section 3.3.3)

Stakeholders' Views on Contract Adjustment

- Stakeholders expressed contrasting views about the need for legislative reform.
  - The music creators' community expressed the need for strong measures to enforce contract adjustment
  - They maintained that a contract adjustment clause would be useful because disproportionately low income is felt by many music creators under legacy contracts whose music has gained new avenues for consumption on streaming platforms
  - They emphasised that contract adjustment may benefit them by prompting re-negotiation
  - Rights holder stakeholders maintained that a contract adjustment measure is unnecessary. This is because royalties are escalated in proportion to how popular a song or recording is, and because successful artists and songwriters tend to have strong negotiating power and can seek renegotiation as their music achieves commercial success (section 3.4.1)
- New Use Measures
  - The music creators' community welcomed the potential introduction of a new use clause, arguing that streaming will not be the last new technology that the music industries will encounter and have to deal with
  - Labels and publishers believe that new technology measures are unnecessary because their contracts are generally future-proof (section 3.4.2)
- Lump Sum Measures
  - There were no suggestions from stakeholders that lump sum payments should be prohibited
  - There was, however, a desire from composers to provide some form of protection against buy out contracts in the audio-visual sector, whether through general contract adjustment measures or a restriction on the duration of transfer (section 3.4.3)

Industry-led Initiatives

- Rights reversion, contract adjustment and the additional contract legislation have their critics, both in terms of their efficiency and in respect of financial knock-on effects. It is, in part, due to these drawbacks, that music companies have expressed a preference for industry-led initiatives for contractual reform

Prevalence

- To address concerns that the royalty rates in legacy contracts are unfair, there have been calls from some music creator stakeholders for an industry-wide code of conduct that would stipulate minimum royalty rates for on-demand streaming and waive long-standing unrecouped balances. Thus far, there are no industry-wide agreements, but some music industry rights holders have acted on their own initiative, including the Beggars Group, Defected Records, BMG, and each of the major companies (section 4.1)

Implementation of Industry-led Initiatives

- Voluntary initiatives have been implemented in different manners:
    - The Beggars Group has a 'base streaming rate' of 25% and wipes out the unrecouped debts on advances 15 years after their 'active relationship' with an artist has come to an end
    - Defected Records has a minimum 30% royalty rate and a policy of writing off unrecouped debts on royalty accounts established prior to 2012
    - BMG is adjusting the legacy contracts of ethnic minority artists to ensure they are equivalent to those of white artists
    - Sony Music is 'not applying' unrecouped balances for featured artists and composers signed more than twenty years ago and who have not received an advance in the past twenty years
    - The Warner Music Group is 'not applying' unrecouped balances for featured artists and composers signed prior to 2000 and who have not received an advance since that date
    - The Universal Music Group is 'not applying' unrecouped balances for featured artists and composers signed prior to 2000 and who have not received an advance since that date (section 4.2)

Information on the Impact of Industry-led Initiatives

1. Take-up

- The Beggars Group has reported that around 24 artists enter its programme every year; Sony Music has indicated that 'thousands of artists and songwriters' benefited from its programme during the first year of its operation; one of the majors has stated that several thousand UK recording artists and several hundred UK songwriters will benefit from its programme of not applying unrecouped balances (section 4.3.1)

2. Financial Gains and Costs

a). Initiatives that impose minimum royalties and waive of recoupment:

- The Beggars Group has calculated that its initiative results in the company wiping out, on average, nearly £1m in unrecouped royalties every year, and that the total royalties paid through to its artists as a result of wiping out recoupment and

applying a minimum royalty rate amounts to, on average, over £75,000 each year (project interview) (section 4.3.2)

b). Initiatives whereby recoupment is not being applied:

- Sony Music has indicated that the first year of its programme of not applying recoupment resulted in featured artists and songwriters receiving 'millions of dollars in new royalties'; one of the major companies informed us that the present value of the additional royalties that will be paid under its worldwide legacy unrecouped balances program is in the mid eight figures in US dollars (section 4.3.2)

3. Knock-on Effects

- In contrast to claims that have been made about the financial impact of reversion rights or contract adjustment, there have been no suggestions that industry-led initiatives will have a knock-on effect on rights holder contracting practices (section 4.3.3)

- The Beggars Group has indicated benefits that these initiatives can bring to music companies, including encouraging legacy artists to work alongside them in respect of catalogue re-issues and encouraging new artists to sign with them (section 4.3.3)

Stakeholders' Views on Industry-led Initiatives

- Recoupment initiatives
    - The Beggars Group stated that its policy of wiping out unrecouped advances was largely an economic decision to reward legacy artists better by adjusting the margin from the old catalogues which account for increased revenue but require significantly reduced marketing costs
    - Major label stakeholders stated that their decision to not apply unrecouped advances reflects their efforts to be artist friendly
    - Major labels expressed concerns that uniform measures do not suit the competitive nature of the business, and emphasised the need to understand the different business model that majors have to independent companies like Beggars.
    - The music creators' community welcomed the initiatives, but also raised concerns as to their limitations
- Minimum royalty rates
    - The introduction of standardised minimum royalty rates was supported by many stakeholders from the music creators' community, who felt this would help to ensure minimum standards
    - Rights holders claimed that minimum royalty rates could set a low bar that might result in some artists gaining lower royalty rates than they would have been able to negotiate
    - Trade bodies for rights holders argued that a uniform minimum royalty rate would not be permissible 'because of competition law'

Chapter 1: Background

1.1 Copyright Contracts

As a means of providing background information for the legislative proposals addressed in this report, this chapter will first outline why some territories have thought it appropriate to incorporate rights reversion or contract adjustment measures within their copyright laws. These measures will be considered in relation to the creative industries broadly, before turning to how they might be considered appropriate for the music industries.

In the creative industries there are number of practices whose main economic rewards are derived from the creation of copyright works. These include the authorship of books and other forms of literature, the creation of reproducible works of fine art, the authorship of musical compositions, and the creation of sound recordings. The creators of these works commonly negotiate with companies in order to gain wider distribution of and greater remuneration for their works. From the companies' point of view, the main object of these negotiations is the assignment or license of copyright into their hands so that they can effectively exploit the works (hence, these companies are referred to in this report as 'rights holders'). These companies include the literary publishers who contract with authors, the makers of reproductions who contract with artists, the music publishers who contract with composers and lyricists, and the recording companies who contract with musicians.

The creators of copyright works are protected in their negotiations by the general tenets of contract law. Some territories have nevertheless expanded beyond contract law to include measures in their copyright legislation that provide contractual protection for creators. The main reason for this extra protection is that the contracting relationship between creators and rights holders has been viewed as being 'asymmetrical'. There is a considerable literature on this subject. In addition to the independent work of academics (Greenfield and Osborn 1998, 2007; Dusollier 2018: 447; Guibault and Hugenholtz 2002: 5; Stahl 2013: 2, 166-8; Towse 2001: 161; Towse 2018: 486-7; Wandtke and Holzapfel 2004: 287), this imbalance has been noted in surveys conducted for governmental bodies (Dusollier et al. 2014: 16; Guibault, Salamanca and van Gompel 2015: 4), and has been documented by legislators, including those working in the European Union (EU 2019: recital 72), the US Government (Ringer 1960: 125), and the UK Parliament (CRRMB 2021b: 3).

Various critical points have been raised in explanation of contractual asymmetry, the most regularly cited of which are detailed below. It should be stressed that this literature addresses the creative industries broadly, rather than the music industries specifically. Consequently, some of the nuances of how these critical points apply to the music industries are detailed in the footnotes:

- **Need:** It is often the case that a creator has a greater need to contact with the rights holder (because they have a limited number of contracting opportunities) than the rights holder has to contract with the creator (as they have the opportunity to contract with a large number of different creators) (CRRMB 2021b: 5; Stahl 2013: 166-7; Greenfield and Osborn 2007: 189-90). In addition, the demand among creators for contracts usually exceeds the supply of contracts available (Greenfield and Osborn 2007: 5; Towse 2018: 476). As a result, the rights holder could offer

'take it or leave it' contracting terms (Greenfield and Osborn 2004: 99, 181-2; Towse 2018: 477)[3]

- **Negotiating ability**: many creators have a lack of expertise in contracting and are unfamiliar with legalese;[4] in contrast, the rights holders with whom they contract may have considerable experience and be staffed with legal experts.[5] Thus they can have the upper hand when it comes to making demands (Guibault, Salamanca and van Gompel 2015: 111; Towse 2018: 488)

- **Finances**: rights holders can be well resourced in terms of legal advice; creators, in contrast, may not have sufficient funds to challenge poor contractual terms (Dusollier 2018: 447)

- **Market information**: within the creative industries there is uncertainty about which products will be successful. Rights holders nevertheless tend to have greater access to market information than most creators do, and they can utilise this to their contractual and commercial advantage (Guibault, Salamanca and van Gompel 2015: 108)

This asymmetry can manifest itself in several contractual practices, including:

1. In instances where the creator is being remunerated via a lump-sum payment, this payment might be disproportionate to the revenues derived from their work (Dusollier et al. 2014; 84-6; Guibault, Salamanca and van Gompel 2015: 108; EC 2014: 79)
2. In instances where the creator is being remunerated via a royalty agreement, this rate might be disproportionate to the revenues derived from their work (Aguilar 2019a; Bently et al. 2017: 43; Guibault, Salamanca and van Gompel. 2015: 33, 108; Towse 2018: 486-7)
3. The duration of the royalty agreement might be for a considerable period of time, and determined by options to extend its term (that the rights holder, not the creator, has the choice to exercise) and the delivery of a quantity of work (which the rights holder will have the authority to decide whether it has achieved acceptable standards and can therefore be counted towards the tally) (Harrison 2021: 87; Stahl 2013: 175)
4. The creator might be obliged to have the same royalty rate throughout the duration of the agreement, with the result that rates agreed for works created when they were unknown remain in place for the works created when they are established and have greater chances of success (CMA 2022a: §5.100; Guibault, Salamanca and van Gompel 2015: 139)
5. The creator might be contracted to transfer the rights in their works for long periods (in some cases, for the life of copyright), with the likelihood that royalty rates agreed

3 See Barr (2016: 135-6, 137, 163) for a refutation of the idea that record contracts are offered on a take it or leave it basis. He suggests, instead, that they are heavily negotiated. Barr concludes that the main area where there is unfairness, is not in the duration of contracts, but instead in the duration of the transfer of copyright. A similar argument can be raised in relation to music publishing contracts, with the caveat that the duration of the transfer of copyright in publishing contracts is often shorter than in recording contracts. However, recording contracts are also now less likely to feature life of copyright assignment.

4 It has, however, long been common practice in the UK music industries that creators must have independent legal advice (paid for by the prospective rights holder, if necessary) before signing recording, publishing or management contracts. They also have the advice of managers.

5 In the music industries, this legal expertise is less pervasive in the independent sector than it is amongst major companies.

for those works will remain in place throughout the duration of the transfer of those rights (EC 2014: 79; Guibault and Hugenholtz 2002: 5; Towse 2018: 488)[6]

6. The creator might be contracted to agree to royalty rates that are applied to future uses of their work, regardless of whether these uses result in diminished costs for the rights holder (Guibault, Salamanca and van Gompel 2015: 117-18; EC 2014: 79)
7. The creator might be required to recoup various expenses that have been made in the generation of the work before they can receive royalties (Jones 2012: 145-6; Krueger 2020: 163-4)
8. The company might have few obligations to promote the work (Harrison 2021: 144-5, 157-8; Jones 2012: 133; Stahl 2013: 131-2)
9. The creator might have limited opportunities to renegotiate their contractual terms (Guibault, Salamanca and van Gompel 2015: 139; Sexton 2017: 12)
10. The creator might have limited opportunities to audit their contracting company or have oversight of agreements that the company makes when exploiting their work (Cooke 2015; 23; EC 2016: 3, 20)

1.2 Copyright, Catalogue and Contracts in the Music Industries

As noted in the section above, the literature on the asymmetry of copyright contracts tends to address the creative industries broadly. It is nevertheless important to look at the nuances of different sectors and at the different types of creators who work within them. The following sub-sections focus on some of the distinctive features of the music industries, first looking at the particularities of rights ownership and payment methods, before addressing the music industries' orientation in respect of back catalogue. This material concludes by looking at how characteristics relating to copyright, payment terms and back catalogue have combined to create some of the contractual concerns raised by music creators and their representatives in the DCMS Select Committee inquiry.

1.2.1 Rights ownership

There are three main sectors of the music industries: the recording industry, live music and music publishing (Williamson and Cloonan 2007). Only two of these - the recording industry and music publishing - are centred on copyright contracts.

1. Within the recording and music publishing industries there are several different developers of copyright works:

a). Recording industry creators include:

6 The European Union has positioned the DSM Directive's contract adjustment measures as a means of dealing with the durational aspects of contracts:

Certain contracts for the exploitation of rights harmonised at Union level are of long duration, offering few opportunities for authors and performers to renegotiate them with their contractual counterparts or their successors in title in the event that the economic value of the rights turns out to be significantly higher than initially estimated. Accordingly, without prejudice to the law applicable to contracts in Member States, a remuneration adjustment mechanism should be provided for as regards cases where the remuneration originally agreed under a licence or a transfer of rights clearly becomes disproportionately low compared to the relevant revenues derived from the subsequent exploitation of the work or fixation of the performance by the contractual counterpart of the author or performer. (EU 2019: Recital 78)

- Featured artists: the musicians and singers under whose names sound recordings are released. These artists are contracted exclusively to record companies, production companies or services companies

- Non-featured performers: these performers include session musicians, orchestral musicians and backing singers. They are not contracted exclusively and can instead provide their services for the projects of different featured artists

- Studio personnel: the foremost creators among studio personnel are studio producers and engineers, most of whom work on a freelance basis and can therefore contribute to the projects of different featured artists

b). Music publishing industry creators can be contracted on an exclusive or freelance basis. They include:

- Composers: the authors of the melodic, harmonic, rhythmic and timbral aspects of songs and compositions

- Lyricists: the authors of the words for songs and compositions.

2. The input of these creators results in different types of intellectual property that have differing ownership criteria:

a). The recording process generates:

i) Sound recording copyright: although this copyright is derived from the recording activity of featured artists, non-featured artists and studio personnel, it is not awarded to the creators of the work. In the UK, the author, and hence first owner, is the 'producer' of the recording (CDPA 1988: §9(2)(aa)). Here, the term 'producer' does not refer to the studio producer; it is instead defined as 'the person by whom the arrangements necessary for the making of the sound recording […] are undertaken' (CDPA 1988: §178). Traditionally, this 'person' has been regarded as being the recording company that organises and pays for the recording sessions (Osborne 2023). It has nevertheless become increasingly common for featured artists to gain ownership of sound recording copyright. Moreover, despite this ownership criteria, nearly all recording contracts of featured artists request control of this copyright (by outright assignment or exclusive license) to the recording company with whom they are partnering

ii) Performers' rights: there are further rights in sound recordings that exist separately to sound recording copyright. These are the performers' rights, which belong in the first instance to the featured artists and non-featured performers who have made the recordings. Under UK law, the producer owners of sound recording copyright need to gain 'consent' from these artists and performers before they can utilise their recordings (CDPA 1988: §§182A-192CA). The producers do not have to secure any such consents from studio personnel, unless these personnel have contributed to the recordings as performers

b). The compositional process generates:

i) Copyright in musical works: the creativity of composers is recognised in copyright law; they are granted first ownership of the copyright in their works (CDPA 1988: §9(1))

ii) Copyright in literary works: the creativity of lyricists is also recognised in copyright law; they too are granted first ownership of the copyright in their works

(CDPA 1988: §§9(1), 11)

3. The owners of the recording rights and publishing rights are granted several controls over their work:

- The right to copy the work: also known as the reproduction right, this right addresses the reproduction of the copyright work 'in any material form', including 'storing the work in any medium by electronic means' and 'the making of copies which are transient or are incidental to some other use of the work' (CDPA 1988: §17). Physical sales and synchronisation licensing are encompassed by this right, as are some aspects of downloading and on-demand streaming

- The right to issue copies of the work to the public: also known as the distribution right, this right partners the reproduction right and in UK law is most commonly utilised in respect of physical products. It is required in instances where the distributor of the product is separate to the reproducer of the product

- The right to rent or lend the work to the public: this rental right addresses instances where a copyright work is accessed 'on terms that it will or may be returned' (CDPA 1988: 18A). It has rarely been utilised by the music industries other than to prevent a rental trade in physical products[7]

- The right to perform, show or play the work in public: also known as the public performance right, this right addresses the use of copyright works in venues, cinemas, shops, restaurants, workplaces, gyms, etc. It includes the use of sound recordings, films and broadcasts in these places

- The right to communicate the work to the public: this right can be broken down into two elements: the broadcast right, which addresses various forms of transmission, including radio and television broadcasts; and the making available right, which addresses 'the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them' (CDPA 1988: §20(2)(b)). The making available right was developed to address the transmission of interactive content online, and hence accompanies the reproduction right in addressing downloading and on-demand streaming. Collectively with the public performance right, these rights are known as the 'performing rights'

The owners of the publishing rights are additionally granted:

- The right to make an adaptation of the work: this adaptation right addresses various means of adapting, arranging and translating copyright works.

4. In respect of these controls, the owners of sound recording copyright and the publishing rights are each granted exclusive rights. As a result, they have options regarding how they exercise these rights:

- They can control the rights themselves

[7] Nicholas Garnett, the then chief executive of the IFPI, stated in 1993 that the 'Rental of phonograms first surfaced as a commercial threat in Japan in 1980. It spread rapidly as an enterprise and in the space of a few years severely prejudiced the normal exploitation of phonograms through retail outlets. Recognising this unfortunate development as counterproductive to the future of the phonograph industry a number of countries, i.e. USA, France, UK, hurriedly introduced the necessary legislation enabling producers to control the commercial uses to which copies of their phonograms were put' (House Committee on the Judiciary 1994: 36).

- They can assign control of the rights to another party via contract (meaning that ownership is transferred outright)

- They can license control of the rights to another party via contract (meaning that the author retains ownership of the rights but the licensee is allowed to make use of the rights within the terms of their licence)

- They can waive the rights, allowing others to have free use

These options can be exercised in the same manner for each of the exclusive rights or in different ways for each of the rights. They can also be exercised differently for particular activities that come under the individual rights

5. The owners of performers' rights are granted several economic rights. The producer owners of sound recording copyright need to gain the performers' consent by contract in order to reproduce, distribute, rent or make available their recordings (CDPA 1988: §§182A-182CA). In respect of the broadcast and public performance of their recordings, the owners of sound recording copyright must pay the performers an 'equitable remuneration' (CDPA 1988: §182D).

1.2.2. Payment Methods

Music creators have a variety of payment agreements:

Featured Artists

In respect of the reproduction, distribution and making available of recordings made by featured artists, their recording companies will contract for the assignment or licence of the sound recording copyright (even though the companies will commonly regard themselves as being the producers and first owners) and for the consents to utilise the performers' rights. In return, the companies will commonly pay the featured artists a combination of advances and royalties, although the artists can be contracted to receive lump sum payments instead. Royalties relating to these rights will not be paid to the featured artists until various costs have been recouped. Under an exclusive contract, costs that are recouped solely from the artist's royalty share commonly include the artist's personal advances (covering their living costs), recording advances (to pay for the studio work), tour support (advanced by the recording company to help fund live performance) and half the costs of video production. Under profit-share deals, all costs of production (bar, usually, recording company overheads) are recouped jointly from the artist's and recording company's shares of revenue before royalties are paid. Historically, the royalty rates for featured artists have been subject to several deductions, such as being paid lower rates to account for 'breakage' of physical formats during transit or for the costs of making sleeves. These deductions could result in royalty rates being lowered by 15% or more but they are absent in respect of on-demand streaming revenues. Royalty rates have also been subject to reductions, which can occur when recordings are sold at budget prices, advertised on television, distributed by mail order, featured on compilation albums or distributed in new formats. For sales activity in these instances, royalty rates can be reduced by a quarter, a third or a half. These reductions are less common in respect of on-demand streaming but might still be applied in relation to compilation albums and in respect of recordings that are

advertised on television.[8] Featured artists are paid in a different manner when it comes to the public performance and broadcast of recordings. For these uses they are paid equitable remuneration by the owners of sound recording copyright.[9] This remuneration cannot be used for recoupment purposes.

Non-featured performers

Rather than receiving advances or royalties for the reproduction, distribution and making available of recordings that they have contributed to, non-featured performers are instead remunerated through lump sum payments, with minimum UK rates determined by agreements drawn up between the MU and the British Phonographic Industry (BPI).[10] Although non-featured performers are usually hired by recording companies and it is these companies that will issue their payments, this expense forms part of the recording costs of featured artists and is thus recoupable against their royalties. Non-featured performers receive equitable remuneration for the public performance and broadcast of their recordings. In addition, the MU collects licensing fees for British non-featured performers in respect of the synchronisation use of their recordings, but only if those recordings have been made in the UK.

Studio personnel

Studio producers are commonly paid a mixture of fees (which are recoupable from the recording costs of featured artists) and royalties (which are deducted from the royalties of featured artists); studio engineers are commonly paid by fees (which are recoupable from the recording costs of featured artists).

Composers and lyricists

In exchange for the licence or assignment of their reproduction, distribution, rental and adaptation rights, music publishers and commissioners will pay composers and lyricists advances and royalties or lump sum payments. The method of payment is dependent on the company with whom the writer is partnering, the type of activity that is generating the revenue, and the exclusive rights that this activity is triggering. Music publishers will not pay composers and lyricists royalties relating to these rights until their advances have been recouped. These advance payments primarily relate to the writers' personal advances for their living expenses but can also include other funds that they require to finance their activities. Composers and lyricists commonly assign their broadcast, public performance and making available rights to collecting societies, which in return pay them a share of the licensing revenues. These revenues cannot be used for recoupment purposes. If a writer has a music publishing contract, the publisher will also be paid a share of performing rights revenues from the collecting society. In many instances, the publisher will distribute some of this share to the writer, but not until it has been recouped from advances.

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8 Ann Harrison notes that 'There is however a trend towards adding some or all of the cost of making the TV advert to the unrecouped balance and just recouping that from royalties in the usual way as opposed to applying a royalty reduction on just the records sold in the country the advert was showing in' (2021: 105-6)

9 Although UK copyright law states that it is the owner of sound recording copyright that pays the equitable remuneration to performers (CDPA 1988: §182D), in practice these payments are made from venues and broadcasters to the collecting society PPL, which is owned by British record companies. PPL then distributes a share of these licensing payments to featured artists and non-featured performers.

10 Non-featured performers can negotiate session fees in excess of the basic rates outlined in these agreements. Conversely, lack of adherence to these agreements can result in them being paid less than the basic rates.

1.2.3 Back Catalogue

One distinguishing feature of the music industries is the long life of its repertoire. In contrast to some other creative sectors, where income is derived primarily from the initial sales of goods, the music industries generate considerable revenues from back catalogue. Moreover, the money-making aspects of this catalogue have increased over time. There was a spike in revenues when the market transitioned from vinyl records to compact discs, as this change in formats led some consumers to repurchase music they already owned. The turn to on-demand streaming has provided for a still greater orientation towards back catalogue. This is, in part, because a greater amount of older music has been made available.[11] It is also due to the way in which streaming generates revenue. Rather than deriving income from individual sales, back catalogue provides revenue each time a recording is played.

According to data from the BPI, 72% of all streaming activity in the year 2021 related to 'catalogue' tracks (Crutchley 2022: 34-5). It should be noted that catalogue is defined in relation to recordings that are more than two years old. This broad categorisation means it can encompass recordings of recent vintage. The following table provides further detail in relation to on-demand streaming in the UK. It takes activity relating to the year 2021, and shows how streaming usage was apportioned in respect of recordings from different decades and years:

Table 1.1: Catalogue Share of Audio Track Streams

Date	% of Catalogue Streams	% of Total Streams
1940s	0.1	0.07
1950s	0.6	0.43
1960s	3.7	2.66
1970s	7	5.04
1980s	8.8	6.34
1990s	9	6.48

11 It has been suggested that reversion/termination rights can serve a public interest function. This is because they can lead to more works being made available to the public. For example, P. J. Heald has provided evidence that the US termination right has led to more books being in print (2020: 81). This is because, after having undertaken the termination procedure, authors have re-published their out-of-print works. The situation might once have been similar for music because physical products were in many instances deleted. However, in the streaming era this public interest function is somewhat negated. This is because the vast majority of recorded repertoire is now permanently available. According to Spotify literature from November 2022, it has over 80 million tracks on its platform (Spotify 2022). YouTube goes beyond this in serving a public interest function: the recordings uploaded by rights holders are accompanied by user-uploaded recordings, making vast amounts of repertoire available online.

2000s	17.1	12.31
2010s	53.7	38.66
2020	NA	13.4
2021	NA	14.6
Total	100	100
Source: Crutchley 2022: 34-5		

1.2.4 Contractual Concerns

Bearing in mind the digital environment, the negotiation of copyright contracts, and the legislative and financial positioning of featured artists, non-featured performers, composers and lyricists, it is possible to outline some contractual concerns relating to music creators in the UK:

Featured Artists

- From a recording company perspective, the most problematic aspect of contracting featured artists is that 'nobody knows' with certainty which of their products will be a success (Caves 2000: 58; Jones 2012: 29). A long-held, but seldom tested statistic is that only one in ten will be financially viable (Osborne 2021). The risk of contracting artists is compounded by the large investments that are required. According to statistics from the International Federation of the Phonographic Industry (IFPI), it takes 'between US$0.5 million and US$2 million to break in a major market such as the US or UK' (IFPI 2016: 6). Although some of this investment is recoupable from the royalties of featured artists, there are significant payments (including, in many instances, the costs of marketing) that are not recoupable

- The costs of risk investment are factored into the contractual terms that are offered by recording companies. Among the most important aspects to be affected are:

    - advance payments
    - royalty rates
    - the duration of the contract[12]
    - the duration of the control of the recording rights
    - the scope of the contract in respect of the territories that it covers
    - the uses of recordings that the contract embraces

[12] The duration is determined by optional periods, which the record company, rather than the featured artist, has the right to exercise. Prior to the 1980s, it was common for optional periods to last for a set length of time (Hill 1978: 36; Stahl 2013: 125). After this point, they became tied to the recording and release of album projects. The album commitment has remained common, despite the turn towards singles and EPs in the digital environment.

- If a recording project is not a success and the artist is dropped by the record company, the artist is unlikely to gain any changes to the contractually agreed transfer of copyright in their recordings. The assignment or licensing of the rights and the associated royalty rate will instead persist in accordance with the terms of the deal. The featured artist will not, however, be contractually obliged to pay back any outstanding balance in respect of unrecouped advances aside from the recoupment through royalties

- It is in situations where the recording project is a success that the featured artist is most likely to question the terms of their deal (CMA 2022a: §5.100; Towse 2001: 118). If the recording was contracted for when the featured artist was an unknown, their royalty rate will in many instances be lower than that of a successful artist who is negotiating a new record deal, as it will have been calibrated in relation to the ratio of hits to misses across the label's portfolio of releases. This royalty rate may be applied throughout the period that the company controls the recording rights, which in many instances is for the seventy-year duration of sound recording copyright (CDPA 1988: §13A). A second issue relates to the fact that, having had a success with one recording, the featured artist is more likely to have success with subsequent recordings. Yet, due to the long duration of contracts, these later recordings will often come under the terms of the original recording deal and the royalty rates will have been negotiated when the chances of success were poor. A third related issue is that, because the royalty rates might be low, the featured artist will have a reduced chance of recouping their advances

- There are two caveats to note. First, it is possible to negotiate a recording contract so it accounts for success. Record companies will allow for increases to advances and royalty rates when specific sales targets are reached and/or new optional periods are exercised. Common examples include a rise of 0.5 of a percentage point if the recording attains gold disc status, and of 1 percentage point for each optional period. The second caveat is that it is possible for successful artists to renegotiate their contracts. In doing so, they may achieve increases to their royalty rates and advances, but it is less likely that they will secure shorter transfer of copyright.[13] Any changes to royalties, advances and copyright transfer tend to be gained on a quid pro quo basis. For example, recording companies will commonly request an extension to the duration of the contract. As noted in section 1.4.3 there is disagreement about the willingness of record companies to revisit their contracts. The companies state that renegotiation is common, but other stakeholders believe it is most readily available to the top echelon of artists. The CMA has provided some evidence on this topic in its final *Music and Streaming* report. The organisation analysed data from the major companies for the period from 2017 and 2021, and found that 'a proportion of their artists have been able to successfully renegotiate their contracts but this varies significantly year-on-year and between majors (between 5% and 25% of contracts)' (2022b: 5.48).

- Further difficulties can arise in respect of changes over time. In general, contractual terms have improved over the course of the last 50 years. This is in part due to landmark legal cases, which have held that some of the most onerous terms in music contracts represent a restraint of trade.[14] Other improvements are due to the

13 In the interviews for this project, we heard from artist representatives and lawyers that it is possible to gain shorter periods of copyright transfer, but this is commonly restricted to the most successful artists and is less common that amendments to royalty rates and advances. We were also informed by a representative of a label that changes to the duration of the copyright transfer would be rare. However, if renegotiation involves the artist extending their contract by one or more optional periods, it is possible to gain shorter periods of copyright transfer for the new releases covered by the deal.

14 Music industry lawyer Ann Harrison notes that 'If the contract is so unfair that it's an unreasonable restraint of trade, it will be unenforceable', and adds 'Most major record companies have now moderated their contracts to deal with this issue' (Harrison 2021: 85-6). Kenneth Barr has noted that 'potentially perpetual contracts have been consigned to history, largely

digital environment, which has provided significant changes to the artist-company relationship. In the physical era, if a featured artist wanted to make recordings and have them made available to the public, they would have few options other than to contract with a record company.[15] This is because the record companies had general control of the manufacturing and distribution processes. The costs of these processes also affected the royalties that were paid. In the digital market, it is possible for artists to communicate directly with audiences and to distribute their recordings online without the aid of a record company partner.[16] The costs of manufacture have disappeared, and the costs of distribution have been reduced.[17] As a result, several alternatives to the traditional record company model have appeared. Featured artists will gain higher royalty rates if partnering with services providers or distributors. They will also retain ownership of sound recording copyright when contracting with these partners, which rather than being assigned outright will be licensed for a limited period. In turn, this environment and the economics of streaming have prompted traditional record companies to raise their royalty rates and be more competitive in respect of some of their other terms. For example, it was previously common for major labels to contract artists for five or more optional periods, but it is now more likely that an artist will be contracted for three optional periods. In addition, there is now greater possibility among both major and independent labels that copyright will be transferred for a period shorter than its full term, and for it to be licensed rather than assigned.[18] Each of the majors also offers its own label services and distribution deals. Some features of the market remain familiar, however. Failure is still predominant (Hesmondhalgh et al. 2021: 201). The vast increase in the number of featured artists releasing music means that, more than ever, it is those who gain the greatest marketing expenditure who are most likely to have hits. It is the major record companies who are best resourced to provide these marketing budgets, but in exchange for this risk-taking investment they might provide lower royalty rates than some other companies are offering and request greater control of copyright (albeit that their label services and distribution deals provide contractual alternatives). Consequently, artists face different contractual scenarios, depending on their cachet and needs:

- A new artist can work independently of a record company and contract with a distribution company to supply their recordings to music streaming services. In doing so, they can receive 100% of the revenue allocated to the use of the sound recording and retain ownership of the copyright, but they may be unlikely to gain much exposure. If they sign with a services company they could gain some advance funds and marketing support, but in return for a royalty rate that is comparatively high to that of a traditional exclusive recording contract

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due to cases such as Schroeder v Macaulay, ZTT v Johnson and Silvertone Record v Mountfield. In a UK context, such onerous contracts have been deemed an "unreasonable restraint of trade" thus rendering the contract unenforceable. It has been argued convincingly that the fear of an unenforceable contract has hastened this evolution towards shorter, more equitable terms rather than any altruism on the part of record companies and publishers' (2016: 144). See also Greenfield and Osborn (1998).

15 This was the case until the turn of the century, after which a hybrid model of physical manufacture and digital distribution emerged.

16 For streaming services, other than those where it is possible for users to upload content, a distributor is still required. Moreover, while many of these distributors work independently from the traditional recording industry, there are independent artists who work with the major companies and other music groups in respect of digital distribution.

17 There are, however, new digital costs, including the processing of digital transactions, data analytics, costs of licensing and accounting, and social media marketing.

18 The CMA has reported that in 2021 the major labels secured lifetime assignment of copyright in 26.4% of new artist contracts; this can be compared with 2012, when they were securing lifetime assignment in 66% of new contracts (CMA 2022b: Table 2.8). Moreover, the decrease in the period of assignment has been accompanied by higher average royalty rates and shorter contract terms, yet has not resulted in a reduction in the advance payments paid to new artists (CMS 2022b: §§550-551).

(approximately 70%) and the short-term licence of their sound recording rights,[19] they will be expected to do most of the 'heavy lifting' themselves (Ingham 2015). If the artist signs a 'traditional' deal with a major label, the current average royalty rate is around 26% (CMA 2022b: §5.52) and the company's opening point of negotiation might still be to request lifetime assignment of rights (DCMSSC 2021: §44, §115). The artist is likely to gain higher advance payments than offered through services deals, however, and a great deal more marketing support. If this support results in greater sales or increased streaming activity, the artist could gain higher revenues through having a 26% royalty than from having a higher royalty rate but little active use or sales of their work.

- A 'legacy' artist who was first signed in the pre-digital era can face extremes. If they are out of contract, they are well placed to take advantage of the terms offered by distributors and services companies. If they have retained a loyal fan-base, they will have reduced need of marketing expenditure; if they have sufficient finances, they may not prioritise advances. Consequently, they can forgo these forms of support and in return gain high royalty rates while also retaining ownership of copyright. The new agreement will, however, usually only apply to future releases. In contrast, their older, hit recordings are likely to be bound by the terms of their original deals. This is because of long-lasting contractual arrangements relating to sound recording copyright and because their earlier contracts will include clauses that embrace new technologies, which will often be remunerated in accordance with physical royalty rates. Therefore, unless renegotiated, these older recordings will receive lower payments than are now typical for on-demand streaming and downloading. In the 1960s and 1970s, it was common to contract for single-digit royalty payments. In the 1980s, the average UK featured artist royalty had risen to around 14% (Garfield 1986: 19). By the end of the 1990s, the average had become closer to 18% (Harrison 2000: 66), although by this period royalties were being calculated on a dealer price basis rather than a retail price basis and as a result this royalty increase is not as great as first appears.[20] The royalty rate from the 1990s is nevertheless considerably lower than today's average of around 26% (CMA 2022b: §5.52).[21] Moreover, the lower royalty rates from earlier periods can be a factor when it comes to the ability of featured artists to recoup their advances, as a result of which they might not be in receipt of royalty payments. As noted in section 4.2, however, there are initiatives by both major and independent companies to waive or not apply unrecouped balances in respect of some older contracts.

19 The length of the licence period will vary in accordance with advance payments and royalty rates.

20 Dealer prices, in most instances, would be around 30% lower than retail prices. Thus, any increase in royalties from the 1990s onwards should consider the fact that the percentage rate relates to a lower source of revenue.

21 It should be noted that, whereas featured artists' royalty rates for physical products are calculated on the entire rights holder revenues (this incorporating the money that is paid out to the compositional rights as well as the money for sound recording rights), their royalty rates for on-demand streaming are set against the sound recording rights revenue only. On the one hand, this means that the rise in average royalty rates in the streaming era is being calculated on a different basis to that of physical products and represents less of an increase in real terms. On the other hand, it means that if legacy artists are given the same royalty rate for on-demand streaming as for physical products, it is in effect reduced in real terms as it is being calculated in relation to a lower revenue source (Hesmondhalgh et al. 2021: 133).

Non-featured performers

- Although there is a belief in some countries that lump sum payments reflect an inferior form of payment to royalties, in the case of non-featured performers they can be justified in respect of the contributions that they make to recordings: they are commonly working under direction and are not initiating the creation of the recording.[22] In the UK, these lump sum payments are commonly made in accordance with the agreement established by the MU and the BPI. In general, this agreement is endorsed: as well as being drawn up between trade organisations for performers and recording companies, it is subject to regular renewal to reflect inflation and changes in working practice. There are, however, some lump sum payments for non-featured performers that occur outside of this agreement. In these situations, it is most common that non-featured performers will negotiate for a rate that is above the MU/BPI minimum, but there are occasions where they bargain for payments that are lower. In the latter cases, the payments might come to feel disproportionate in the event the recording is a success.

- In respect of income from recorded music, an issue raised by non-featured performers (and by some featured artists) concerns the categorisation of on-demand streaming within copyright law. In the UK, there are three performing rights: the public performance right and the two sub-sets of the communication to the public right (the broadcast right and the making available right). For the revenues generated by two of these rights, performers are legislatively granted a share of equitable remuneration (CDPA 1988: §182D(1)). It is British practice to divide the revenues for public performance and broadcast rights so that 50% goes to the holders of the sound recording copyright and 50% to the performers. The performers' share is then divided so that two-thirds goes to the featured artists and one-third to the non-featured performers (PPL n.d.). For non-featured performers this represents a welcome source of revenue on top of the lump sum payments they receive for their session work. On-demand streaming is regarded as falling under the making available right, which is the only performing right in UK law for which performers are not granted an equitable remuneration (CDPA 1988: §182D(1)), reflecting the broader classification of this right in the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty (WPPT 1996: art. 10). However, some non-featured performers object to this classification on the grounds that: a) on-demand streaming is replacing radio broadcasting as a source of music consumption;[23] b) the consumer experience of on-demand streaming is akin to broadcasting in respect of playlist and algorithmic listening. This aspect of music creators' earnings is investigated in a separate IPO research project.

22 In instances where they do compose original parts, non-featured performers are entitled to a share of the compositional royalties. They will not be entitled to royalties in respect of the sound recording aside from equitable remuneration, however.

23 Although there is evidence of a decline in radio listening amongst younger audiences (Linfoot 2018), there is less evidence of UK radio listenership declining as a whole or of revenues witnessing a substantial decrease (Hesmondhalgh et al. 2021: 121-2)

Composers and Lyricists

- The digital environment has not had the same impact on contracts between music publishers and composers as it has on contracts between record companies and featured artists. There are two main reasons for this. First, digital revenues make up a smaller proportion of publishing revenues than they do of recording revenues (Hesmondhalgh et al. 2021: 120). Second, the turn to digital represents less of a transformation for this sector. Recording companies were formerly focused on the manufacture of goods for sale; they are now primarily the licensors of sound recordings. This is a recent change. In contrast, the manufacturing era for publishers came to an end a century ago when sales of sheet music went into decline. Since this period, they have focused on the licensing of music, whether for use in public performance, sound recordings, broadcasts or audio-visual productions. The licensing of downloading and streaming therefore forms part of a longer history in which royalties are determined on a revenue-share basis. In most instances, publishing contracts are technologically neutral and do not have to factor in any significant production or marketing costs (Hesmondhalgh et al. 2021: 129). Consequently, while there have been some contemporary changes in contracting practices, including in some instances an increased commitment to marketing spend (Forde 2021), the major transformations to UK exclusive publishing agreements took place some time ago. In the 1960s and 1970s, it was common for writers to assign the copyright for its full term and to have a 50:50 split of revenues with their publisher (Peacock and Weir 1975: 152, 174).[24] The 1974 case of A. Schroeder Music Publishing Co. Limited. v Macaulay criticised some of the more onerous aspects of publishing agreements. Consequently, publishers attempted to make their contracts 'judge proof' by limiting their duration and accepting clauses that obliged them to actively promote the works they controlled or otherwise lose control of the copyright (Greenfield and Osborn 2007: 15).[25] The Macaulay case also led to agreements in which the royalty rate would rise in relation to the successes of the works and/or the exercising of renewal options (industry expert, project interview). It additionally made it 'unusual to see a transfer of copyright for the full term' (Greenfield and Osborn 2007: 15). Further developments were occasioned by competition in the sector and by decisions in the cases of Zang TumbTuum Records Limited and Perfect Songs Limited v. Holly Johnson (1993) and Zomba v. Mountfield and others (1993). As a result, the writers' average share of royalties had increased to approximately 75% by the 1990s (MMC 1996: §3.4; Harrison 2000: 87) and to 84% by 2021 (CMA 2022b: §5.98). In addition, there are occasions when writers might be willing to negotiate for lower shares (including complete buy out of royalties) dependent on the other terms being offered. The duration of contracts is similarly varied, but by the 2000s a 'typical' exclusive contract would last for an initial period of one year, plus two or three further optional periods (Harrison 2000: 91; Harrison 2021 148).[26] Meanwhile, it had become customary that the transfer of copyright would last for the period the writer was under contract plus a post-contract 'retention period' of a limited number of years. Writing in 2008, the publisher Simon Platz stated that 'life of copyright deals have given way to 30 years, 25 years and even shorter periods, after which rights revert back to the writer' (2008: 2). By the early 2000s, a retention period of 'twelve to fifteen years' had become

24 Andrew Loog Oldham adds that 'In the old world a pound would come in, the publisher would take 10 or 15 per cent off the top for collecting the money, an 'administrative charge'. The remaining 90 per cent or so would be divided up 50/50 between the writers and publisher. So the publisher's total would come to 60-65 per cent of the income' (Oldham 2000: 259).

25 In addition, the 1982 case of Elton John v Dick James highlighted the practice whereby publishers took excessive 'at source' deductions for administering overseas royalties.

26 The length of each option period will usually be determined by a 'minimum commitment' on behalf of the writer to deliver a required number of compositions. It is common that the optional period will last for a minimum of six months and will have a 'backstop' preventing it from lasting more than three years.

common (Harrison 2000: 90; Harrison 2021: 147. See also CMA 2022b: §5.131). Given these developments, there is a sense that publishing deals are generally 'favourable' to songwriters (Cooke 2015: 22). However, there is a divide between contemporary writers, who have the benefits of these fairer deals, and 'legacy' writers, whose contracts were forged in an earlier era and whose lifetime assignment of copyright ties them to royalty rates that are less than two-thirds of the average rate being negotiated today. In the meantime, the general tendency has been for music publisher advances to increase (Platz 2008: 2)

- Where the digital environment appears to have had most impact on composers and lyricists is in relation to lump sum contracts with audio-visual commissioners. The opportunity to secure audio-visual commissions has increased in the streaming age, but there is also 'general consensus' from composers and lyricists that commission fees have declined (Barr et al. 2021: 28). In addition, there is an increased tendency for commissioners to request a complete buy out of rights on 'take it or leave it' terms (Barr et al. 2021: 28). There is a geographical aspect to these contracting practices. In the US, there is evidence of audio-visual commissioners gaining buy out of all rights in exchange for lump sum payments (Barr et al. 2021: 28). In the UK, this appears to be less common. Although commissioners are requesting and commonly gaining buy out of the reproduction right element of audio-visual productions, the performing rights element is protected by the agreements that composers and lyricists have with collecting societies. As such, authors are continuing to receive royalties relating to these rights in most instances (Barr et al. 2021: 28). However, here too some commissioners are applying pressure to gain buy-out of all rights (Ivors Academy 2022).

1.3 Proposed Remedies

The following two chapters provide detail about two of the legislative measures that the DCMS Select Committee has proposed to address the contractual concerns of some music makers, first looking at rights reversion and then at contract adjustment. The final chapter turns to voluntary initiatives that music companies have suggested and put in place to alleviate some of these concerns.

Although the DCMS Select Committee has primarily focused on recording contracts, it is possible for the proposed legislative measures to encompass the concerns of composers and lyricists as well. They can also address contracts of the past in addition to those that are negotiated after the legislation is enacted. However, in the case of rights reversion in particular, this would only be possible if the legislation was implemented in a retroactive manner.

Rights reversion has been of greatest contractual impact in the US, where it has taken the form of a termination right (see section 2.3.1). If a similar right were to be enacted in the UK, it could have the potential to alleviate concerns of some legacy featured artists, depending on how it is implemented. It could also provide a means for legacy composers and lyricists to bring the deals for their older repertoire into greater alignment with royalty agreements that are being secured for contemporary work. In both instances, this is because the reversion/termination right could enable the creators to bring their original deals to an end; then, if their repertoire was still in demand, they might be able to negotiate improved terms. A reversion/termination right could also have an impact on creators who are contracting with music companies for the first time, as it would provide an opportunity to rescind the transfer of copyright in instances where long-term or lifetime assignment of rights is being requested.

Contract adjustment legislation has been more prevalent in continental Europe, where there has been a focus on addressing the inequities of lump sum contracts. Thus, the legislation could be utilised by audio-visual composers in situations where buy out contracts are deemed to be unfair. However,

these measures can also embrace royalty contracts and can cover a wide variety of instances in which rewards from copyright are disproportionately distributed between creators and rights holders (see section 3.2.1). As a result, they could be utilised to rebalance the royalty rates of legacy artists. Contract adjustment legislation has also, in some instances, been accompanied by further measures that seek greater contractual symmetry at the point of negotiation. Nevertheless, as with a reversion/termination right, the impact of this legislation is dependent on how it is implemented.

These legislative measures have their critics, both in relation to their efficiency and in respect of their knock-on effects. Consequently, the following chapters explore the potential opportunities and risks of implementation in addition to the potential rewards. It is, in part, due to these drawbacks, that music companies have expressed and displayed a preference for pursuing their own initiatives for contractual reform. These voluntary measures focus on legacy creators, looking at means by which their concerns over recoupment and royalty rates can be addressed. Here, an initial orientation towards the recording contracts of featured artists has been expanded so that in some instances the initiatives encompass the contracts of composers and lyricists as well. These initiatives, in turn, have limitations as well as benefits. Their impact will be addressed in the final chapter. However, before turning to these subjects, this chapter will conclude by looking at viewpoints we have gathered from stakeholders in relation to contractual practices in the UK music industries.

1.4 Stakeholders' Views

1.4.1 Power Relations

Power dynamics are key to understanding the impact of introducing rights reversion or contract adjustment, as this legislation is designed to rebalance asymmetry that might exist in copyright contracts. In this section we provide a summary of views that stakeholders have put forward in relation to power dynamics between music creators and rights holders.

Views of Record Companies and Music Publishers

In our interviews, record labels and music publishers emphasised their role as investors and disagreed with the view that contractual negotiation is asymmetrical. Apart from exceptional cases, sound recordings and musical works require a lot of investment and a strong support team to be successful, and it is labels and music publishers who have the expertise and financial input for this to happen. For major labels, they pay out a hefty sum of advances without knowing whether the recording will be commercially successful. They emphasised that an advance is given on a "nobody knows" principle and it should not be considered as a debt because artists do not have to pay it back even if they do not become successful.

Record companies and music publishers also emphasised the choices that artists and songwriters have when signing deals and that they are not forced into signing any specific contracts. The labels argued that artists are well informed of the deals on offer and can make bespoke changes to them. A publishing company executive stated, "I think it's just wrong to assume that songwriters are not grown-ups who are not able to make decisions. They should be free to make the decisions that they want to make and there are various protections in law for circumstances where there's undue influence and people have been misled, or fraud."

Labels and publishers also noted the legal representation that music creators have in signing deals. A major label executive stressed the competitive nature of contracts where specialist lawyers representing artists can deliver good terms, particularly for those artists who are sought after in the market. S/he commented, "I want to be very, very clear that we

don't sign contracts with artists who don't have professional representation, full stop […]. All of our artists have legal counsel who understand these terms and are advising them and making sure that they understand what they're signing up to voluntarily. Again they don't have to sign a contract at all with us."

A manifestation of this equal power, a publisher stated, is the bespoke and wide variety of contracts suited to individual songwriters and composers. S/he noted "Contracts have a wide variety of arrangements in them, including very modern contracts. So there are agreements that songwriters are voluntarily, willingly and happily enter[ing] into today that involve there being zero royalty payable, and those are contracts where people are paying significant amounts of money to acquire rights." In fact, it is a legal requirement that a songwriter [or recording artist] has legal representation when signing a contract. A publisher stated, "There is a clause where the composer or the songwriter acknowledges that he's sought specialist independent legal advice on the contract before he signs it, it's to protect both really but it fundamentally protects the parties from saying the contract wasn't understood or they didn't appreciate what they were signing up to."

Views of Music Creators

In contrast, the music creators' community argued that there is fundamental asymmetry in bargaining power. Despite the unprecedented opportunities and tools that digital technology has presented for music creators in pursuing professional music careers, the wherewithal that labels and publishers provide remains significant, particularly when it comes to achieving commercial success. In this regard, power imbalance is argued to be more pronounced in contracts with the major companies, as they have more leverage than independent companies. A songwriter explained how signing a major contract can be a big deal for music creators who want stardom, probably a once in a lifetime opportunity, "You want to be in this glamorous world and so you accept everything they say. I had no idea I'd signed such a bad publishing deal."

Some music creators viewed this power imbalance as being systemic, in that it arises from a market structure where the major music companies take up more than 70 percent of the global market (Music & Copyright 2022). In other words, the concentrated power stemming from the bulk of rights the major music groups own has brought about structural asymmetry. A manager described this as a vicious cycle where the "powerful get more money and they become more powerful." From the perspective of musicians, this means that signing a major deal can play a crucial role if the artist wants a certain level of stardom but it comes at a price. A music lawyer explained, "You need the financial and marketing behemoth to get you on the ladder of 'commercial success' but big rights holders are going to want to take a piece of you, or your art, on the way."

Power imbalance was regarded as being especially pronounced for new artists, who have little commercial leverage, knowledge or experience, are often in need of cash, and do not have the best negotiating skills. A former manager stated, "That's the reality of artists who've worked or struggled along to try to get to this goal of getting to be a professional musician, get to the next stage and suddenly being offered something, there is so much pressure on them to sign it, that they tend to sign it." Although advance payments serve an important source of income for the majority of artists, it was argued that they are most vital to those from less affluent socioeconomic backgrounds. An independent label executive commented, "If you're not coming from a middle- or upper-class family, advances are extremely important for you to be able to become a professional in this business, to do it full time, to engage in the profession. And should you then remove that or make those smaller, it then makes those from a bad socioeconomic background harder to get in the business, to stay in the business."

Whilst contractual choices have become increasingly diversified, there is now a greater challenge to emerge from the long tail of music creators. If a creator wants to achieve commercial success, it was suggested that the choices become narrower. A songwriter stated, "If you don't sign that deal and then the chance will never come again. You sign, and then you think that somehow it will work out. And I've heard lawyers say that 'don't worry, you can always renegotiate.' Well, they'll change things, the window dressing will change, but the fundamentals, once you're committed, you're committed."

Music creators claimed that contractual terms are usually standardised and there is little room for negotiation. A songwriter shared the experience of signing a contract with a major publisher when s/he could hardly make any changes, "When you came to negotiate the deal, you don't negotiate anything fundamental at all; they're called standard contracts for a reason […]. There are areas of the contract they will concede and then they'll say, you've really been so tough, and you really stood up for yourself. It's [expletive], you lose your copyright, you get [your percentage] and that's it." A manager explained that power asymmetry arises from the nature of the contracting parties, "It's still, in most cases, a power dynamic biased in favour of the corporation, not least of which because they have unlimited funds to spend on lawyers if that's what they choose to do […]. The artist has only one career, the label has thousands of careers which it's involved with. So to keep an artist in limbo, which they can easily do, is no problem for them. They do use that as a tactic absolutely for sure."

1.4.2 Recent Contractual Developments

There was consensus among stakeholders that contractual terms have improved and choices have become diversified. Record labels emphasised the wide range of deals that are on offer, including licensing deals, distribution deals and services deals, as well as increases in royalty rates and the shortened duration of contracts. Views on what is an appropriate royalty rate for streaming varied, but labels unanimously agreed that royalty rates have increased. A label trade body representative stated, "I think it's correct to say […] that royalty rates had moved on even during the CD era in favour of artists, but that process has accelerated since streaming came along, and we've seen substantial increases in only seven or eight years of the streaming economy. We've seen rates typically go from high teens or 20% to, more like 25% or more." However, there were differing views about the extent to which terms have improved. A manager commented, "Royalty rates have crept up but still if you're getting 25% as an artist, you're still doing well, which bearing in mind 75% is then remaining with the label, and their costs have decreased exponentially, they don't have warehousing costs, they don't have distribution costs as much." A former manager also asserted that it is important to understand the full content of a contract which usually has more terms relating to deductions than terms on what will be given to the artists, "The increase in royalty rates is very much smoke and mirrors because there are some increases in royalty rates but all of a sudden, you also see things like half rate royalties for anything which is TV advertised and deductions for marketing costs, which they never used to be deductible at all, and this kind of thing. Yes, there have been some headline grabbing increases in royalty rates but actually there have been some other terms that have changed behind the scenes."[27]

In addition, the music creators' community highlighted that diversified choices do not necessarily equate to increased bargaining power. The increased amount of music that has

[27] Labels indicate that gross royalty rates have increased, and many contractual deductions have been eliminated since the advent of streaming (see section 1.2.2).

become available on music streaming platforms has meant it is difficult to get noticed in a crowded field. Despite the diverse routes of pursuing musical careers, the chances of becoming highly popular via a DIY route are limited, leading to the continuing importance of intermediaries. A former manager said, “The record companies do realise that they still hold the whip hand in terms of successful careers for artists. There’s a lot of talk about people who’ve self-released, who’ve been really successful, but actually the numbers who’ve successfully self-released are absolutely tiny compared to the number of releases.”

1.4.3 Legacy Contracts and Renegotiation

All stakeholders agreed about the increased importance and contribution that back catalogues make to the streaming economy. However, we observed contrasting views on how back catalogues are being treated by music companies. Labels and publishers emphasised their close attention to these catalogues. A major label executive informed us that creators benefit from the increase in catalogue importance/revenues and labels work with and support artists at all stages of their careers, and not only in the early stages. In addition, s/he emphasised that a lot of work goes into presenting back catalogues, ”Catalogue is more important in the streaming world than ever before […] Labels will always need to, crudely, work those catalogues, to present them in new ways and it might be to present new versions of them, there might be box sets, deluxe versions, previously unreleased recordings, to really maximise the commercial potential of those catalogues for creators and labels alike.” All major labels indicated their enhanced investment in back catalogue, including increasing the number of staff who work in this area, employing more sophisticated teams, and having advanced infrastructure. A major executive said, “The catalogue divisions have got bigger and more sophisticated, because a greater share of the revenue being earned is through those catalogue recordings.” However, given that marketing space is limited on streaming music platforms, the record label sector acknowledged that not all back catalogues can get the same attention at the same time. A label stakeholder said, “I think catalogue is getting loads of attention, more than it ever has, but the fact there’s so much catalogue means it can’t always be all in the spotlight. But labels are putting more effort into marketing catalogue than they ever have.”

Some stakeholders refuted the argument that investment in back catalogues has increased. A lawyer stated, “I spent ten years as a senior A&R in [a major] company […] my experience is that record companies are resourced very similarly to how always were. So it’s disingenuous for them to suggest that they’ve got less warehousing and distribution and traditional costs but have reinvested those costs in a huge amount of extra staff and resources.” A manager also stated that the current music business practice would not be acceptable in other industries, “What would be the fair way for any company that grows exponentially in that size? If you were the energy industry or the financial industry, would you have been able as Lloyds Bank to take on 30 million new current account holders whilst not having a help line in the UK and everyone was querying their statements and couldn’t get through? I have a feeling the UK Government would be slamming Lloyds Bank to the floor when reporting record profits that customers were not being able to get any transparency of their information.”

The music creators’ community asserted that, despite the increased importance of back catalogue, contractual terms for some legacy contracts have not been updated to take account of streaming. One of the biggest concerns related to royalty rates, as rates for streaming have been carried over from physical formats for which the labels were bearing greater costs and risk. These have reduced in the streaming age. A lawyer said, “There is significantly less infrastructure and investment required than there was during the physical distribution era, yet the deals [for legacy artists] are still the same.” A manager concurred, “With streaming, we’re all still getting, up until recently, the same amount as though it was a

physical record, even though obviously part of the justification for the physical rate was always that the costs from the labels' perspective of distribution, manufacturing, marketing, which was hugely risky. […] If all you're doing is digitising your copyright you already have and then uploading them onto a service and then only paying the artists or the writer a small portion of that, that's unfair." Labels, however, argued that this represents a misunderstanding. Their view is that artists benefit from any cost saving in the digital economy (e.g. through a share of breakage/unrecouped minimum guarantees) and the ability to reach global audiences for all their recordings. A major label executive commented, "We don't exist in a purely digital world […]. Marketing costs have always been the most significant cost – and advances and recording costs. In the scheme of the broader economics, manufacturing and distribution were never the bigger costs. Digital distribution is not free, it needs to be managed. Most of the record companies will have digital deals with hundreds of different services and try and licence as many as they possibly can, provided they're reputable, they have the right functionality and that they can account correctly, and that comes at a cost, it's not free to manage."

Renegotiation

Labels and publishers stated that re-negotiation takes place frequently, especially given the increased importance of back catalogue in the streaming age. For example, a representative of a major label said, "I think it's not correct to look at old contracts as lifeless, static contracts that never change. Throughout the relationship between a label and an artist, things are required on either side and catalogue [is] more important in the streaming world than ever before." S/he continued to underscore the need to constantly communicate with artists for the continued use of back catalogue, which may result in improved rates, "Lots of those initiatives require the artist's involvement / cooperation, and sometimes approval. So what tends to happen is even contracts that were signed many years ago have been renegotiated over the years and the rates have changed. Whilst an artist is in the term of their recording agreement, usually when there's any success at all, there is some kind of renegotiation/ revisiting of the term."

Record companies also highlighted their interaction with their artists, including voluntary measures of removing packaging deductions on digital royalties, the repromotion of a back catalogue and reconfiguring royalty rates for legacy contracts. One label, for instance, took the decision to remove the packaging deduction on digital royalties to bring those legacy contracts in line with more modern contracts, as a voluntary measure. Even though the term of the record deal is over labels reported that there is still interaction between the artist and the record label. For example, there might be a re-promotion of a certain record from a legacy artist which will lead to a discussion then which will often result in a reconfiguring of the royalty provisions in legacy contracts.

Music creators suggested that the reality is far from what the music companies describe. Many argued that the terms for most legacy contracts leave much room for improvement. We were informed by an artist who signed a recording contract in the 1990s that "Effectively, there only seemed to be one type of deal we were being offered which was a life of copyright deal with a lot of money attached to it […]. I am firmly in support of the label model. We need the label model. Labels are brilliant. They're doing incredible things for music most of the time. [But] they're incentivised to get the rights for as long as possible as cheaply as possible. That's what they're incentivised to do and there's nothing to prevent them from doing it and they have all the power."

The music creators' community also expressed a need for more communication from rights holders, particularly when new technologies are introduced. They argued that a lack of communication is not only frustrating but creates a lack of trust. For example, when Spotify

came to prominence, music creators were not consulted or informed about some of the major decisions that were made about how this new form of music consumption might impact upon their existing contracts. The situation was regarded as being similar in respect of new forms of music consumption, such as TikTok or Twitch. An industry analyst expressed concerns in this regard, “But when Roblox comes along and they all start doing deals with Roblox, who is deciding how to interpret a record deal that talks about streaming to mean Spotify in the context of the metaverse? And that’s where I think the issues come up because the labels traditionally don’t consult artists or managers about those decisions. They don’t even communicate the decisions they’ve made.”

Another challenge with legacy contracts is that, whilst the transfer of copyright can be of long duration, the constant merger and acquisition in the industry can mean that its ownership will change. This can mean that only those who have a certain level of commercial success maintain their relationship with the labels. Without a significant level of commercial success, most music creators feel that they are not only inadequate at renegotiating but also do not know who they should be renegotiating with. An independent label executive stated that there is a culture in the industry that music creators who have not achieved a great commercial success do not feel they can approach the label to request a review. A manager said that this has led to a situation where music creators can feel they are trapped. S/he said, “They can’t leave, that’s the problem. They’re splintered amongst millions and millions of different managers. No one’s ringing me back, who’s going to hear you? No one’s going to hear you. So you’re trapped there.”

Moreover, even when they try to reach out to a label or a publisher to find out more about their accounts, there can be barriers in the way. First, auditing an account is out of reach for many music creators. Although the right to audit is usually in the contract, it was suggested that it is not widely exercised. Auditing costs often mean that it is available only to those who can afford it. This excludes most music creators. A singer-songwriter commented, “I spoke to my accountant, and it was very much like, an audit costs £15,000, we can absolutely do it, but there are a lot of artists in your position and it’s always a risk. I’ve spoken to a couple of other artists who are in the same position, where we don’t know whether there are a lot of royalties that are waiting for us, or been taken, but just basically weren’t really accounted for properly.”

Even when creators decide to audit, not only does this take a long time, but the answer usually is not very clear. A manager said s/he requested an audit for a successful artist, but it took a long time to receive a response and there was no clarity in the answer: “I received an email yesterday from a major label with a billion-streaming artist, four billion streamed singles, who have had a list of queries on an audit that started three years ago for 19 months, and we received an email yesterday saying they haven’t got round to it. It’s a billion streamer that’s still putting out billion stream records right now this second. So, where’s the service that comes with the revenue?”

In addition, the information might not be complete due to NDAs with streaming platforms. An accountant told us: “When I do an audit, the underlying source documents are not provided to me, they’re precluded.” A manager also agreed that NDAs pose a great challenge in having a clear and transparent understanding about accounts, “I think that the problem we have with NDAs in the industry is enormous. The lack of transparency, that’s a big issue for artists. How on earth can you make a qualitative judgement unless you can see who’s paying you what, or who’s paying them what? I’ve yet to find anybody who’s audited a record label and not found that the record label owed them money, not one.”

An industry veteran shared the view that the right to audit is not well practiced, and that artists should have full access to their royalty accounts with third parties, “There are

certainly clauses that remain in contracts which I think are unfair. The right to audit, for example, is always there but it's usually narrow […]. So there should be a basic business right that says if you're being paid based on a contract like this, you should have the right to know what third party deals the record company has done, so that you can check that and understand how and on what basis you're being paid." A recording artist argued that this practice keeps power in the hands of labels: "The truth is, even if it's in your contract, is it negotiable? This is the problem. You're never not in the same power dynamic, even with what's in the terms of the contract. It's the same thing with auditing rights."

Some members of the music creators' community argued that record labels have not shown enough willingness to compromise in the newly resuscitated music economy. It was suggested that during the downturn in recorded music revenues in the early 21st century, music creators made their own compromises by agreeing to accept 360 deals as a way to help the dwindling record business. Whilst the record sector is recovering to former prosperity in the streaming age, it was claimed that record labels have not returned this favour to the artists. A manager said, "One of the things that's come into contracts was whole 360 degree, on the basis when the market collapsed post the financial crash and CDs were dropping off and streaming was not replacing the lost CDs, and then at that point, the labels are like 'we need now a share of your live or we need a share of your publishing or we need a share of whatever it is because we're not making as much money over here.' But now they're making a lot of money again, they've not gone, 'by the way, we don't need this share of your live anymore or we don't need this share of your merchandise,' and that is always how it works with labels. There's never a rolling back of those things unless you are fighting it and you've got a huge commercial justification for it."

Relationships Between Rights holders and Creators

There was little disagreement about the importance of the partnership between rights holders and creators. Many stakeholders across the industry underscored the significance of the sense of partnership in contractual relations. A manager stated, "I think the word partnership is what you're after. There's no point in just being indentured." Similarly, a lawyer described the relationship as being like a marriage, through which a child is the link to both parties in a relationship even after a divorce, "An artist needs to be fully understanding of the decision to enter into, and perhaps later to get out of, those kinds of deals. It is like getting 'married' and, when the deal comes to an end, agreeing you'll get divorced, but you have a 'child' together (depending on the rights that have been granted under the deal), which is the art, the music. As an artist, you need to make sure you're having a 'child' (of music) with the right partner because over the course of the contract and sometimes even beyond, you're always going to have to deal with them." An industry analyst stated that labels are very good at certain aspects of their work, such as consumer marketing, but are not so good in their communication with artists, and that there should be a dedicated budget to address this, "Part of your responsibility to your artist is every time you do a deal, you've got to stick £10,000 in the budget to consult and communicate with your artists."

Chapter 2: Rights Reversion

2.1 Introduction

Reversion rights have been widely adopted. In a study conducted in 2019, Joshua Yuvaraj documented their presence in the legislation of 55% of the member states of the United Nations (2019). In a separate study of reversion rights measures conducted in 2020, Ula Furgal noted 150 separate reversion rights provisions amongst member states of the European Union (2020: 1).

The most common manifestation of these rights has been as 'use it or lose it' clauses, enabling creators to rescind the transfer of copyright if their work is not being issued or made available to the public.[28] As a result of its former membership of the European Union (EU), the UK includes a limited version of a use it or lose it right in its legislation. When the term of sound recording copyright was extended from fifty years to seventy years in 2013 as a result of EU Directive 2011/77 EU, a new clause was introduced to the Copyright, Designs and Patents Act 1988 (CDPA) by which performers are entitled to terminate the assignment of rights in the event their recording company is not issuing 'sufficient' copies or making it available to the public, and therefore cause the copyright in the sound recording to expire (the performers' rights continue to exist for the full duration of the copyright term, nonetheless) (CDPA 1988: §191HA). The use it or lose it provisions in many other European countries go further, permitting creators to terminate the transfer of unused works at other points in time.[29] Subject to various qualifications and options, the DSM Directive has made this type of use it or lose it right mandatory in all EU member states. Article 22 stipulates that 'the author or performer may revoke in whole or in part the licence or the transfer of rights where there is a lack of exploitation of that work or other protected subject matter' (EU 2019: art. 22(1)). Authors and performers also have the option to 'terminate the exclusivity of the contract instead of revoking the licence or the transfer of the rights' (EU 2019: art. 22(3)).

In addition, there is a separate and more comprehensive type of reversion right. Rather than being occasioned by a lack of activity relating to copyright works, it is available to all creators and is triggered after a set period. These time-based provisions 'are rare, if not non-existent' in the civil law countries of Europe and have instead been more prevalent in common law countries (Furgal 2020: 10). The practice can be traced back to the world's first copyright legislation, Britain's Statute of Anne, which came into force in 1710. This Statute set an original copyright term of fourteen years from first publication, during which

28 In addition to use it or lose it measures and time-based reversion rights, Furgal has identified two further legislative practices by which rights can revert to their original owners: 'provisions triggered by moral rights and convictions of the author or performer' and provisions 'triggered by circumstances linked to a person of a licensee or a rights-holder, usually concerning her economic condition. Relevant triggers include, among others, bankruptcy, insolvency, liquidation, transfer of an entity to a third party, as well as the lack of a legal successor' (2020: 4).

29 British publishers and record companies have noted that, rather than being present in copyright law, it is local practice to account for this eventuality via contract. Music publishing and publishing agreements include clauses that enable creators to reclaim works that have not been made available.

the author or their 'Assignee, or Assigns' would 'have the sole Liberty of Printing and Reprinting'. On expiry of the copyright term, 'the sole Right of Printing' returned to the author for another 'Term of Fourteen Years'. This system of copyright renewal was created to 'assist authors'; it was felt that the chance to re-instigate copyright and assign their rights anew could help them address the 'asymmetries and differences in bargaining power that informed author-publisher relations' (Bently and Ginsburg 2010: 1485, 1489-90).[30] Copyright renewal remained a feature of British law until 1814, at which point the term of copyright was set at whichever was the longer of a unified 28-year period or the duration of the author's life. This change to copyright law was granted on a quid pro quo basis to book publishers (Deazley 2008). Parliament was insisting they should distribute more free copies of their books to deposit libraries; in return the publishers demanded a unified period of copyright, believing it would provide them with 'a suitable period in which to recoup their investments' (Bently and Ginsburg 2010: 1547).[31]

In the meantime, the Statute of Anne had inspired American legislators to introduce a copyright renewal policy of their own. As with British legislation, the term of copyright was originally set at fourteen years, with the possibility for renewal for a further fourteen years. This policy was introduced in the first federal US copyright law of 1790, and remained a feature of US law until 1976, by which point the term of copyright lasted for an initial period of 28 years and a renewal period of 41 years. Copyright renewal was viewed as being of benefit to creators, as it enabled them to 'renegotiate disadvantageous bargains' (Ringer 1960: 125).

As an indication of the continuing popularity of songs and compositions, music provided 'by far the most important' category of copyright works in respect of renewal (Ringer 1960: 220). In a survey conducted in 1931/32, it was found that nearly half of all renewal registrations in the US were for musical compositions and that more than a third of musical compositions registered in this period were being renewed. In contrast, the copyright in only 7% of books and only 11% of periodicals was renewed (Ringer 1960: 220). There were no sound recordings among the works being renewed as they were not protected by US copyright law until 1972.

There were complaints in the US that the renewal system was paternalistic and interfered with the freedom to contract. The US Copyright Office nevertheless defended its purpose on the grounds that:

> an analysis of the copyright laws of the world reveals a tendency to treat copyright as something different from ordinary goods and chattels, and to establish restrictions on alienability and control over contract relations for the benefit of the author and his family. There is an apparent conviction that copyright involves an element of personal creativity entitling an author to special consideration in his contractual dealings, together with a recognition that when most copyright bargains are made there is no way to judge the ultimate value or life of the work. (Ringer 1960: 187)

30 During this period, British legislators were also contemplating whether to address this issue by shortening the permissible period of copyright transfer. In 1737, the Bill for the Better Encouragement of Learning proposed a 10-year limitation on the transfer of rights (Deazley 2004, cited in Barr 2016: 196-7).

31 Bently and Ginsburg comment on the irony that the introduction of the life-of-author copyright term coincided with the removal of copyright renewal, thus 'the ideology of authorship' arrived 'at the same moment that the law abandoned its attempt to intervene in the functioning of the book market to protect the interests of real, flesh-and-blood, writers' (2010: 1548).

The Copyright Office admitted that the renewal procedure was an 'inefficient and burdensome method of accomplishing this result', yet it was also the only means that US law had to 'preserve and maintain the author's personal and economic rights as against rights-holders and users' (Ringer 1960: 189, 205).

Given the prevalence of author-protective measures in other countries, the US Copyright Office saw fit to revise its policy of contractual protection rather than abandon it (Ringer 1960: 205). The 1976 US Copyright Act, which remains in force, replaced the system of copyright renewal with a 'termination' right (§§ 203, 304). Instead of having two separate periods of copyright, the US term is now continuous. However, on 'serving advance notice in writing', the author can rescind the transfer of copyright (17 U.S.C. 1976: § 203(3)). This is usually after a period of 35 years, but the legislation includes variants on this period.

The UK had introduced a similar limitation on the contractual transfer of rights in its 1911 Copyright Act, albeit that its termination measure was automatic rather than dependent on serving notice. This Act set the copyright term for literary, musical and dramatic works at life of author plus fifty years (Copyright Act 1911: §3). The maximum term of any transfer of rights was limited to 25 years after the author's death, at which point the rights reverted to the author's 'legal personal representatives as part of his estate' (Copyright Act 1911: §5(2)). During the final 25 years of the copyright term, the works could be published via a compulsory licence upon payment of a 10% royalty (Copyright Act 1911: §3). These measures were abrogated when the subsequent 1956 Copyright Act came into force.[32] As with the earlier abandonment of the UK's policy of copyright renewal, this repeal was occasioned by tangential matters rather than inherent problems with the reversion right.[33] The problem rested with the compulsory licensing measure, which was viewed as not being compliant with the UK's membership of the Berne Convention (Ringer 1960: 217).

As was common practice with British legislation of this period, the UK's 1911 Copyright Act was used as a model in many of its colonies and Dominions. In 1960, its presence was noted in the copyright laws of 'Australia, Canada, Ceylon [now Sri Lanka], the Federation of Rhodesia and Nyasaland [now Zimbabwe], Ireland, Israel, New Zealand, Pakistan, Union of Burma [now Myanmar] and Union of South Africa' (Ringer 1960: 208). Moreover, while this legislation has been overhauled in Australia and New Zealand, the 25-year curtailment of copyright transfer remains in force in Canada (R.S.C. 1985: §14(1)).[34] It has also retained a presence in the laws of Ireland, Malta and Cyprus, and has been a feature of Spanish Law (Furgal n.d.). Canada has, however, considered replacing its current measure with a termination right, modelled after US law (Yuvaraj et al. 2022: 255).

The US termination right has also served as the model for the DCMS Select Committee's proposal for a 'right to recapture works'. The Economics of Music Streaming report notes that

> This right already exists in the United States, whereby creators have the right to recapture after 35 years, giving them increased leverage to renegotiate royalty rates

32 When the Act came into force in 1958, it meant that all works published after that date had no reversion right. The right has, however, continued to apply in respect of works published before this date (Heald 2020: 81). This has no relevance in respect of sound recording copyright and performers' rights as their ownership criteria and copyright terms preclude them from eligibility. In contrast, there are musical works that were published before 1958, and which are still in copyright. As such, they could be subject to this reversion right.

33 Despite the abrogation of the reversion right, British authors can terminate copyright transfer by other means, including 'the bankruptcy of one party, restraint of trade, undue influence and breach of licence terms' (Dusollier et al. 2014: 78). They can also negotiate for a period of transfer that is shorter than the life of copyright.

34 Prior to the adoption of this provision in 1921, Canada had a policy of copyright renewal that was modelled after US legislation (Ringer 1960: 112).

> or take their rights to other companies if the terms of their record deals are unfavourable. This would prevent the most valuable rights from accreting at labels with the most capital and create a market for recaptured rights, whereby companies would compete upwards on royalty rates and terms of recoupment. (DCMSSC 2021a: §121)

A 'right of revocation' was an aspect of Kevin Brennan's Copyright (Rights and Remuneration of Musicians, etc.) Bill, which proposed that where an author or performer 'has transferred or exclusively licensed rights' they may 'after a period of 20 years has elapsed following that transfer or licence, revoke in whole or in part the transfer or licence of rights' (2021a: §§93F(1), 191P(1)). The explanatory notes for this Bill stated that this measure would ensure that performers and composers could 'benefit from (a) the levelling of bargaining power which may come from success, and (b) an ability to arrange other exploitation of their works where their initial arrangements may not be generating exploitation, thus ensuring wider availability of works to the public' (2021b: 3). Responding to the Bill in parliament, George Freeman said that, while government had 'not ruled out legislation to introduce any measures of the Bill', the 'first step' was 'to gather proper evidence' (Freeman 2021: 1224).

2.2 The Implementation of Reversion Rights

To examine the potential impact of a reversion/termination right, several implementation factors need to be considered. The US termination right legislation has been enacted in a distinct manner. This is, in part, as a means of balancing the differing interests of creators, rights holders and consumers. It is also because of the particularities of US law. The following sections set the US methodology alongside alternative proposals, including ones that have been put forward in respect of a reversion right within UK legislation.

Trigger Point

In creating the termination right, the US government suggested in 1961 that a period of 20 years 'would be ample' to enable' a rights holder 'to complete his exploitation of the work and to realize a fair return on his investment', albeit that at this time the termination right was being proposed for lump sum payments only (US Copyright Office 1961: 93). Both aspects of the proposal brought forth complaints. Authors' organisations objected to the exclusion of royalty contracts; rights holders insisted that 'the proposed 20-year limitation would often be much too short for the adequate exploitation of a work' (House Committee on the Judiciary 1965: 72). These arguments resulted in a compromise solution: the trigger point was extended to 35 years after the transfer of the rights, and the legislation was expanded to include royalty contracts alongside lump sum payments. In response, rights holders commented that the 35-year term provided the 'minimal basis' on which they could 'learn to live with such a provision' (Bently and Ginsburg 2010: 1567-8).

There are, in fact, different points of activation for the termination right. The US Copyright Act was implemented in 1978. For works created since this date, creators can activate the termination right 'at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier' (17 U.S.C. 1976: §203). Creators of pre-1978 copyright works can activate the right 'at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later' (17 U.S.C. 1976: §304).

There have been proposals for the activation point to be brought forwards. Noting the low take up of the US termination right by literary authors, Yuvaraj et al. have argued that 'this suggests most books have little value to authors and estates 35 years after the rights are

granted' and this might 'suggest that a reversionary period of 35 years is too long' (2022: 279). Shorter periods are in existence in other countries. Indonesia has a 25-year termination right. A similar 25-year reversionary right has been proposed in Canada (House of Commons, Parliament of Canada 2019, referenced in Yuvaraj et al 2022: 252).

British campaigns have also focused on a shorter period of transfer. During the debates about sound recording copyright term extension that occurred in the early 2000s, the MMF proposed a transferal limitation of 25 years, stating that this would 'give the industry a much-needed boost […] as rights are put out to tender' (Webster 2008: 4). By the time of the DCMS Select Committee inquiry into the economics of music streaming, the MMF and FAC were proposing a period of 20 years. They argued that this time period would 'allow artists to negotiate new deals in the future – possibly with new business partners – that acknowledge current market trends and modern industry practices' (FAC and MMC 2021: 11). Anabella Coldrick, chief executive of the MMF, has stated that in addition it would 'inject greater fairness into the market; boosting competition for copyrights' (Coldrick 2021). Moreover, as well as being of benefit to creators, it 'arguably would benefit record labels and music publishers who could then potentially bid for seasoned evergreen repertoire of proven value' (Coldrick 2021).

The DCMS Select Committee's own belief is that a 20-year limitation is the correct trigger point, as this 'is longer than the periods where many labels write off bad debt but short enough to occur within an artist's career' (2021a: 67). The Select Committee maintains that the reversion right 'would create a more dynamic market for rights and allow successful artists to go to the market to negotiate better terms for their rights' (2021a: 67). Kevin Brennan's Copyright (Rights and Remuneration of Musicians, Etc.) Bill duly included the stipulation that, where an author or performer has transferred their rights, they may 'after a period of 20 years has elapsed following that transfer or licence, revoke in whole or in part the transfer or licence of rights' (2021a: §§93F, 191P).

The predecessor to the MMF, the International Managers Forum (IMF), had previously suggested a shorter period, restricting the transfer to ten years (MMC 1994: §10.49). In its submission to the Monopoly and Mergers Commission's 1994 inquiry *The Supply of Recorded Music*, the IMF argued this 'would permit artists greater freedom of movement between record companies and more equitable rewards for their creative endeavours' and create an 'open market in copyrights' (MMC 1994: §§10.50, 10.53).

The IMF suggested that in addition there could be an alternative trigger point: copyright could revert to recording artists on 'recoupment of recording costs' (MMC 1994: §10.54). They regarded this as being in accordance with British law, which grants ownership of sound recording copyright to the party that has made the financial and organisational 'arrangements' for the recording to take place. Current managers' representatives regard this idea as 'interesting', but also believe it would not be fair on artists who are given a series of advances and therefore never recoup (managers' representative, project interview). Representatives of performer interests also find the idea problematic, as breakeven points can be difficult to determine (performers representative, project interview). This is also the view of another artist manager, who notes that 'you're leaving it in the hands of the framing of the contract agreements and the opaque accounting methods, to figure out whether the recoupment has taken place', and that the idea of basing it on recoupment 'is fine', but how do you stop record companies from doing that [issuing another advance], to make sure that you are unrecouped and you're still basically dealing under the old terms of your agreement?' (artist manager, project interview).

Formalities

In its 1961 report on the revision of copyright law, the US Copyright Office suggested a system whereby the transfer of rights would automatically revert to the original owner after a set period of years (Bently and Ginsburg 2010: 1564-5). The Music Publishers' Protective Association decried this idea as being 'another example of slapping the publishers down, but in this instance the slap would be so violent as to drain the very lifeblood of the industry' (Bently and Ginsburg 2010: 1566). Facing complaints such as this, the US government abandoned the idea of automatic reversion and instead created a complex system by which creators must terminate the transfer of rights 'within specified time limits and under conditions set out in Copyright Office regulations' (House Committee on the Judiciary 1965: 72-3). These time limits include a window of opportunity for serving notice that lasts for five years after the initial termination point (17 U.S.C. 1976: §203). In addition, authors and performers must serve notice 'not less than two or more than ten years' before the date of termination (17 U.S.C. 1976: §203). The rationale for including these limits has been to avoid 'indiscriminate terminations, and to provide a fair period of advance notice to the grantee that his rights are to be terminated' (House Committee on the Judiciary 1965: 75).

In respect of the conditions imposed by the Copyright Office, R. Antony Reese has outlined the 'daunting challenge' that creators face. They need to:

- identify who holds the right to terminate, and, if the right is held by multiple parties, identify and correctly compute their proportionate shares, and get the holders of more than one-half of the shares to agree to terminate;
- calculate the time period during which termination can occur and choose an effective termination date in that period;
- calculate the time period during which advance notice must be served on the party whose rights are being terminated;
- identify and locate the party on whom the advance notice must be served; and
- draft a proper termination notice, serve it properly, and record a copy of it in the U.S. Copyright Office before the effective date. (2016: 898)

The complexity of these formalities has been criticised by creators' representatives, legal scholars and the US register of copyrights (Reese 2016: 898). It has led to the termination process being handled mostly by attorneys, often those who are specialists in these rights (legal expert on termination rights, project interview). It also 'stymies' attempts to exercise the termination right and can lead to the invalidation of claims that are pursued (Reese 2016: 898). Suggestions have been made that music companies have taken advantage of the ease with which termination cases can be voided. It has been argued that the first response of record companies is to see if a termination notice is 'defective in any way' (artists' representative, project interview). Alternatively, it has been claimed that rights holders deliberately ignore termination notices in the hope that the window for acting on them will close (Jacobson 2019).

In order to gain proper 'traction' for the termination right, there are calls for a simplified process (artists' representative, project interview). Reflecting on the current difficulties with the US system, Yuvaraj et al. have suggested the 'radical possibility' of improving it by mandating for automatic reversion rights (2022: 286). It has nevertheless been suggested that, while an automatic process would provide a more straightforward means by which creators could regain their rights, it could lead to complications elsewhere. On the one hand, there could be administrative complexity because a limited number of corporate rights holders would be replaced by a large number of creator rights holders. One

consequence could be an increase in licensing costs and corresponding decrease in rights holder revenues (senior staff member of a collecting society, project interview). On the other hand, if rights automatically revert, but the original owner cannot be traced, it could lead to many 'orphaned' works that are difficult to license and therefore less likely to be made available to the public (Heald 2020: 87-8).

The 2021 Copyright (Rights and Remuneration of Musicians, Etc.) Bill attempted to address some of these concerns. Its process of rights reversion was not automatic but was less onerous than American methodology. Creators would serve notice on the holders of their transferred rights; there would then be a minimum two-year period between the serving of notification and the 'effective date of the revocation' (2021a: §§93F(4), 191P(4)). This was felt sufficient to provide 'those persons against whom the right of revocation is exercised time to make appropriate arrangements prior to the revocation becoming effective' (CRRMB 2021b: 7). There were also few time limits on when creators could make their claims. They could be raised at any point after the 20 years of transfer had elapsed. Also, if the rights reverted to an author or performer and they transferred their rights again, the 20-year limit on the period of transfer could be reactivated.[35]

Similarly, the formalities for the right of revocation in the DSM Directive are simpler than American methodology: 'where there is a lack of exploitation of that work or other protected subject matter', the author or performer is entitled to 'notify the person to whom the rights have been licensed or transferred and set an appropriate deadline by which the exploitation of the licensed or transferred rights is to take place' (EU 2019: art. 22(1)(3)).

There is one final issue with any reversion/termination right that requires formalities for it to be activated: creators might not be aware of its availability. Yuvaraj et al. have noted that in some countries that have these rights 'there is virtually no awareness they even exist' (2022: 251). This includes the US, where we were informed by legal experts that, aside from the highest earners, many creators are unaware that they have this right (legal expert on termination rights, project interview).

Ownership

In respect of the copyright granted to composers and lyricists for their musical works there are few ownership issues when it comes to reversion/termination rights. As the authors of these works, they are the rightful party to activate the right and to secure the return of copyright ownership.

Sound recording copyright is more complicated. American record companies have argued that sound recordings are exempt from the termination right due to the 'work made for hire' rules in US copyright law. Work made for hire criteria apply to any copyright work made 'by an employee within the scope of his or her employment' and to nine specified categories of commissioned works: a contribution to a collective work; part of a motion picture or other audiovisual work; a translation; a supplementary work; a compilation; an instructional text; a test; answer material for a test; and an atlas (17 U.S.C. 1976: §101). Rather than being owned by the creative author, as is the case with most other copyright works, it is 'the employer or other person for whom the work was prepared' who is the first owner in the case of work made for hire (17 U.S.C. 1976: §201). US copyright law states that the termination of copyright applies 'In the case of any work *other* than a work made for hire' (17 U.S.C. 1976: §203. Emphasis added).

35 This was not spelt out in the Bill itself, but its wording allowed for this possibility.

As a means of confirming their viewpoint on this subject, American record companies have routinely registered their sound recordings as works made for hire. There is nevertheless uncertainty about the legislative status of sound recordings. This has led the companies to formulate contracts with featured artists which state that, should it be held that the recordings are not work made for hire, they will be regarded as being assigned to the record company for the full copyright term (Stahl 2013: 224).

The practice of registering recordings as work made for hire has led to several legal challenges from featured artists. They have sought to test whether these claims are false and their termination rights can therefore be activated (Cooke 2019a; Cooke 2019b; Cooke 2020; Cooke 2021a; Cooke 2021b; Cooke 2022a). There has been no definite ruling on this issue, however. Some of these cases are ongoing, while others have been dropped with the participants coming to informal agreements instead (Cooke 2022b). It is also common that serving termination claims against recording companies results in the renegotiation of contractual terms rather than the rescinding of rights (Collins 2014).

These American debates do not have a direct bearing on UK law, as there are different criteria for the ownership of sound recording copyright. British legislation nevertheless provides issues of its own. As noted in section 1.2.1, UK law grants ownership of sound recording copyright to the 'producer', defined as 'the person by whom the arrangements necessary for the making of the sound recording […] are undertaken' (CDPA 1988: §§9(2)(aa), 178). Recording companies have claimed ownership of this copyright on the grounds that:

> The courts had held that the word 'undertake' meant 'be responsible for', especially in the financial sense but also generally. It could therefore be assumed that […] Parliament had intended that copyright should vest in the person who had undertaken the financial responsibility for making the recording. The ownership of that copyright was the reward for the risk they had undertaken. (MMC 1994: §108)

This argument does, however, also support the claims of some featured artists that they can instead be the first owners of sound recording copyright. This is because there are instances in which artists have funded their own recordings and made the arrangements for them to take place. In these cases, the artists would be the original owners as 'producers' and would thus be the potential beneficiaries of reversion rights. As an adjunct to this position, it has been suggested that any featured artist who has recouped their recording advances has effectively been 'responsible for' the funding of their recording. This has fed into the proposals outlined in 'trigger point' above, that it is on recoupment of recording advances that the ownership of sound recording copyright should 'revert' to recording artists.

More generally, the issue of ownership remains unclear. Consequently, in a similar manner to US labels, British recording companies have backed up their claims to be the original owners of sound recording copyright by requesting contractual assignment of this copyright from their recording artists. This assignment contains within it the suggestion that featured artists could be the first owners of this copyright, but this point not been legislatively determined. Therefore, the implementation of a reversion/termination right could result in outcomes similar to the US: a contestation of artists' claims by recording companies; a corresponding threat of test cases by recording artists as they aim to settle the ownership criteria; and the majority of reversion claims being settled through renegotiation.

As a means of avoiding this uncertain situation, two alternative implementation proposals have been suggested:

First, a reversion right could be written into UK law so that it sidesteps the issue of first ownership of the sound recording copyright and instead states that the enforcement of the

right results in ownership passing to the featured artists who made the recordings (music industry expert, project interview). In this respect, John Smith, the former general secretary of the MU, has noted, 'reversion is a misnomer – the copyright has always belonged to the record company. A statutory transfer of rights would be more correct' (2006: 8). Alternatively, the use of the term 'termination' rather than 'reversion' would make a clearer statement that the previous ownership of copyright has come to an end (music industry expert, project interview). Another alternative, as utilised in the DCMS Select Committee's own recommendation, is a right to 'recapture' transferred works. However, this term has a similar connotation to 'reversion' in respect of something returning to the person who formerly held it.

Second, the reversion could relate to performers' rights rather than sound recording copyright. This methodology was utilised in the Copyright (Rights and Remuneration of Musicians, Etc.) Bill, which stated, 'Where a performer […] has transferred or exclusively licensed rights concerning a sound recording of the whole or any substantial part of a *qualifying performance* to any person, that performer may, after a period of 20 years has elapsed following said transfer or license, revoke in whole or in part the transfer or licence of rights' (2021a: §191P, emphasis added). However, while performers are unambiguously the first owners of performers' rights, this methodology would raise further issues in respect of reversion. The performers would not be rescinding the ownership of the sound recording copyright, which would continue to reside with the contracting recording company, whether through the ownership criteria of UK law and/or through the transfer of this copyright from the performer. The performers would instead be terminating their 'consent' for these recordings to be reproduced, distributed, rented and made available to the public (CDPA 1988: §§182A-182CA). In that way, the reversion right would basically operate as a contract adjustment mechanism, whereby the record company and performers would be required to renegotiate their contractual terms (music industry expert, project interview). A second issue is that UK law has not tended to distinguish between the performers' rights of featured artists and those of non-featured performers.[36] Consequently, unless specified otherwise in the drafting of the legislation, the termination of the performers' rights would mean that the consents of all performer contributors to a sound recording would need to be renegotiated (for possible complications relating to this see 'co-creator agreements' below).

Co-creator Agreements

Music making is collaborative. This is commonly the case in respect of musical compositions, which tend to be created by two or more writers (Hesmondhalgh et al. 2021: 153-4). Sound recordings are rarely individually created and instead result from the input of many collaborators.

Collaborative works pose several issues in respect of reversion rights. First, if reversion is not automatic and is instead subject to formal requests, there are questions whether this process should be open to individual creators, should require a majority of the contributors to be in agreement, or should require all of the contributors to be in agreement. Second, there are concerns whether the decision to rescind should be restricted to particular types of contributor. This point is most pertinent in respect of sound recordings, as they commonly combine the creative work of various interested parties, including featured artists, non-featured performers and studio personnel. These issues are of consequence as

36 One exception to this is in respect of the term extension rules for sound recording copyright, whereby different criteria apply to performers who receive 'recurring payments' (i.e., royalties) and those who are 'entitled to a non-recurring payment' (i.e., a lump sum) (CDPA 1988: §191HB).

there is the possibility that licensing of works and revenue payments will get held up if there are disputes about rights.

When the US termination right was being developed, it was the argument of rights holders that an unanimity of creative collaborators should be required for it to be activated. Creator representatives argued in response that 'such a requirement would likely render the exercise of the right in co-authored works unworkable' (Bently and Ginsburg 2010: 1568). The US government resolved this issue by legislating for a termination right that can be 'effected by a majority of the authors' (17 U.S.C. 1976: §203). A similar rule applies in the case of single-authored works that, on the decease of the author, pass to multiple heirs: the termination right can be exercised by 'more than one-half of that author's termination interest' (17 U.S.C. 1976: §203). These rules only apply to post-1978 works. In respect of pre-1978 works, the termination right in collaborative works can be exercised individually, but only 'to the extent of a particular author's share in the ownership' (17 U.S.C. 1976: §304).

The US Copyright office has also expressed its opinion on the collaborative nature of making sound recordings. It has suggested that, if recordings are not classified as work made for hire and ownership is instead granted to the various creative authors of recordings, a distinction should be drawn between featured artists (a majority of whom would have the right to terminate) and non-featured performers (who would not be able to terminate) (House Committee on the Judiciary 2000: 93). The Copyright Office has been less clear whether studio producers should be classified alongside the featured artists as 'key contributors' (House Committee on the Judiciary 2000: 94).

In respect of European law, the DSM Directive has indicated 'specific provisions' for the implementation of its 'use it or lose it' reversion right, bearing in mind 'the specificities of the different sectors and different types of works' as well as 'the relative importance of the individual contributions, and the legitimate interests of all authors and performers affected by the application of the revocation mechanism by an individual author or performer' (EU 2019: art. 22(2)). At one level, this can be taken as enabling consideration of how different sectors and different types of collaborative work operate. At another, it can be taken as providing the possibility to exempt collaborative works from this measure (Aguilar 2019a).

As indicated in the sub-section above, one of the key issues in respect of any British reversion right would be whether musicians gain reversion of the sound recording copyright or if they gain reversion of the performers' consents instead. If the former were decided upon, the rights would most likely revert to featured artists only, as they alone transfer their interests in sound recording copyright to recording companies. Even here, however, there would need to be decisions about what proportion of contributors would be required to activate the right. If performers' rights were to offer the route towards reversion, this would further complicate issues around the activation of the right, as it would raise questions whether non-featured performers should have the same say as featured artists in applying for reversion.

Sub-licensing

Reversion/termination applies in relation to the original transfer of rights; it enables the creator to rescind the assignment or licence of copyright. One of the most 'bedeviling problems' in relation to these rights, however, is whether they should also apply to sub-licensing agreements that allow the original work to be incorporated within, or adapted to make, a separate copyright work (Heald 2020: 88). If they were to apply to sub-licenses, it would enable creators to rescind these agreements. Thus, for example, they could end any synchronisation licenses that have been granted for the use of a work or recording in a film, or any digital sampling licenses that have been gained for the use of a work or recording in another recording. It has been suggested that the rescinding of sub-licensing could

produce an 'inefficiency' problem, as it would enable musicians and composers to 'hold up' the circulation of works and 'leverage a disproportionate royalty' (Heald 2020: 88). A further consequence of providing creators with the ability to terminate a sub-license is that it might dissuade the sub-licensors from using their work in the first place.

US law has responded to this situation by excluding 'derivative works' from its termination right provisions.[37] The 1976 Copyright Act states that 'A derivative work prepared under authority of the grant before its termination may continue to be utilised under the terms of the grant after its termination' (17 U.S.C. 1976: §203). This is not the only means of dealing with this issue, however. In Canada, it has been suggested that the continuing use of a terminated work in a derivative work could be made subject to compulsory licensing provisions, whereby an affordable royalty rate is applied (Heald 2020: 89).

Territory

It is commonly held that the US termination right applies only to contracts that have been signed in the United States. This has been contested in court by some UK music creators, but rulings have thus far specified that, unless a British contract makes specific provision for the activation of the termination right in America, it is not possible for the authors or performers to utilise it (Cooke 2016). Consequently, major labels operating in Britain have reported that none of their UK-signed artists has exercised termination rights (Sony Music 2021: 3-4; Warner Music UK 2021: 6). It is likely that any British reversion right would mirror this practice. Hence, it would apply only to contracts negotiated in the UK unless the contract specifies otherwise. Nevertheless, it is notable that in respect of the DSM Directive, some EU countries have implemented its right of revocation so that, as well as applying to contracts governed by their domestic laws, it applies to foreign works exploited in their jurisdictions.

A further territorial aspect of the US termination right is that it has been viewed as applying only to revenues generated in the US market. Consequently, following a termination, the rights holder will retain the rights for other territories covered by their contract. This is not specified in the legislation and is viewed by some as being dubious legally (music industry expert, project interview). Here, it is perhaps less likely that the UK would follow American practice.

Inalienability

When Britain had a policy of copyright renewal, one of its weaknesses from a creator point of view was that the rights could be assigned throughout both the initial term of copyright and the copyright renewal term. As a result, the asymmetrical bargaining power in the creative industries resulted in rights holders claiming control of the rights throughout both terms (Bently and Ginsburg 2010: 1544; Ringer 1961: 160). The situation was similar in the US in respect of its copyright renewal legislation. It was possible to assign rights for the full duration of both copyright terms and thus rights holders sought ownership throughout (Ringer 1960: 162-3). Seeking to protect authors from the prolonged assignment of their work, the drafters of the 1976 Copyright Act made the termination right inalienable. It can neither be assigned nor waived, as indicated by the instruction that termination can be 'effected *notwithstanding* any agreement to the contrary' (17 U.S.C. 1976: §203. Emphasis added).

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37 US law defines 'derivative work' as 'a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work"' (17 U.S.C. 1976: §101). Rather than having a derivative right, the UK has an adaptation right. It is narrower than the US right, however. In respect of musical works, it only addresses their 'arrangement or transcription' (CDPA 1988: §21(3)(b). There is no adaptation right in respect of sound recording copyright or performers' rights.

Retroactivity

When the US termination right was introduced in the 1976 Copyright Act, it represented a continuation of the previous tradition of copyright renewal rather than a fundamental break with the past. There are nevertheless differences in the way that the US Copyright Act treats works created before the legislation came into force and those created after it. The termination trigger point for pre-1978 works is set at 56 years, mirroring the maximum combined term of copyright in the preceding 1909 Act.[38]

If a reversion right were to be introduced in the UK, it would represent a more radical break with the past as there has been no reversion right since 1956. This would raise questions about retroactivity. Should the reversion right apply to contracts that were agreed prior to the legislation coming into force?

Implementation has varied in respect of the right of revocation in the DSM Directive, with some countries applying it retroactively so that it addresses older contracts and other countries applying it only to contracts entered into after the enactment of the legislation.

Sectorial Considerations

In the United States, the termination right applies for all types of copyright work (except work made for hire) and across all creative sectors. Similarly, the right of revocation in the DSM Directive applies to all types of work except for computer programmes (EU 2019: art. 23(2)). In the UK, in contrast, the legislative recommendations from the DCMS Select Committee inquiry into the economics of music streaming and the measures in Kevin Brennan's Copyright (Rights and Remuneration of Musicians, etc.) Bill have been targeted at the music industries only. A sector-specific reversion right is presumably permissible within UK copyright law, but it would be expected that creators and rights holders working in other creative sectors would take an interest in the broader application of such a right.

2.3 Information on the Impact of Reversion Rights

To assess the impact of rights reversion legislation, this section looks at information that is available in relation to three topics:

- Take-up
- Financial gains and costs
- Knock-on effects

While there is a good deal of speculation about the impact of legislation, there is a lack of empirical studies, particularly in relation to financial gains/costs and knock-on effects. It has therefore been noted that, in formulating reversion rights legislation, 'stakeholders and policymakers are largely flying blind' (Yuvaraj et al. 2022: 252).

38 It should be noted that ahead of the 1976 Act coming into force, a series of public laws had extended the term of copyright from the 56-year period of the 1909 Act to an initial term of 28 years and a renewal term of 47 years, thus making an overall 75-year term (US Copyright Office n.d.).

2.3.1 Take-up

When considering this type of right, the focus is on the impact of the termination right in the US. Until recently, however, there have been few surveys relating to the take-up of this legislation. Moreover, the surveys that do exist have been limited in nature. In 2016, David Given published research relating to termination notices, but his work was restricted to pre-1978 applications only (Given 2016). In the same year, Joe Bogdan analysed post-1978 termination notices, but only in respect of the number of authors who had filed notices and therefore not documenting the number of titles subject to claims (Bogdan 2016). In 2021, Paul Heald published a useful study relating to the potential impact of introducing a 25-year reversion right in Canada (Heald 2021). It includes an investigation into the impact of reversion/termination rights on the availability of works, but this aspect of his research is focused on the book trade only.

A fuller investigation of US termination claims has now been made available. In 2022, Yuvaraj et al. published 'the first large-scale study of copyright termination notice records from the U.S. Copyright Office' (2022: 250). This study provides data in relation to the volume of claims being raised and rejected. It also delineates its findings in respect of different creative sectors.

Between 1978, when the US termination right came into force, and June 2020, when the survey was undertaken, there were 13,114 claims for termination, addressing 109,899 separate copyright works (Yuvaraj et al. 2022: 261). 65,523 of these claims related to works created prior to 1978; 44,376 were for post-1978 works (Yuvaraj et al. 2022: 261).[39]

Importantly, the researchers were able to compare the number of post-1978 termination claims raised against the total number of works registered in the same period that would have been eligible for termination. This has demonstrated the impact of having a procedure that relies on formalities. If the US had implemented an automatic termination right, 100% of the registered works would have been terminated. The US's system of applying for termination has instead resulted in 1.6% of registered works being subject to claims (Yuvaraj et al. 2022: 269).

As with the earlier survey of copyright renewal, the researchers found that termination notices were skewed towards music. This is in evidence in respect of the types of creator raising claims: all but one of the top ten claimants for post-1978 works was either a musician and/or a songwriter (Yuvaraj et al. 2022: 277). It is also evident in relation to the proportion of claims being raised: 66% of the claims were for 'works of the performing arts', of which the majority were musical works; 31.3% were for sound recordings; the remaining 2.7% were split between nondramatic literary works and works of visual art (Yuvaraj et al. 2022: 270). Moreover, this skew was not because composers and musicians commonly generate a greater number of works than literary authors and visual artists, as it became even more pronounced when titles subject to termination notices were compared with the total number of registrations in each category:

39 The difference in numbers is because of the 35-year period for the transfer of rights, which has meant that it is only since 2013 that it has been possible to terminate the copyright in any post-1978 works. Yuvaraj et al. noted a spike in termination notices at this point and that there has been a 'substantial drop-off' in notices more recently (2022: 267).

Table 2.1: Comparison of 1978-1987 Registrations with Works Subject to §203 Termination Notices

Category	Registrations 1978-1987	Percentage of total registrations	Titles subject to § 203 termination notices	Percentage of titles subject to § 203 termination notices
Performing arts	1,418,893	42.14%	20,745	66.00%
Sound recordings	153,486	4.56%	9832	31.28%
Nondramatic literary works	1,323,608	39.31%	840	2.67%
Visual arts	452,734	13.44%	13	0.04%
Multimedia	18,640	0.55%	0	0.00%
Total	3,367,361	100%	31,430	100%

Source: Yuvaraj et al. 2022: 272

It should be noted that, while the skew towards sound recordings was particularly pronounced – they constituted less than 5% of registered works yet accounted for more than 30% of termination notices – this skew could have been higher still if there were clarity whether sound recordings are applicable for termination notices (see 'ownership' in section 2.2 above). The argument that sound recordings should be debarred from termination due to them being works made for hire is reflected in them dominating when it came to contested claims. The researchers documented the number of works subject to counter-notices and therefore disbarred from termination: 89.3% were for sound recordings; 10.6% for the performing arts; the remaining 0.1% were for literary works (Yuvaraj et al. 2022: 277).[40]

Finally, one weakness of the work of Yuvaraj et al. is that it rests on the assumption that works are assigned for the life of copyright. This would have been the case with most sound recordings created in the 1978-1987 period under question (if only as a back-up to work made for hire claims), but even here the lifetime control of rights by recording companies would not have been uniform. Within music publishing it would also have been

40 Yuvaraj et al. provide a caveat relating to these numbers: it is not mandatory for counter-notices to be filed with the US Copyright Office; therefore it cannot be assumed that 'just because a termination notice has been issued that termination has actually occurred' (2022: 366)

common in this period for composers to have assigned their works for the life of copyright, but a considerable minority would have secured a shorter transfer than that. In general, there is little documentation of the contractual agreements for literary works and visual works, thus it is difficult to gauge how many would have been subject to a shorter transfer of copyright. The importance of this oversight is that there may be a significant number of works that were not terminated due to the fact the creators had already regained ownership of the rights.

2.3.2 Financial Gains and Costs

Ideally, there would be information on the financial gains creators have made from enforcing termination. As well as detailing increases in royalty rates and the value of unrecouped balances that have been wiped out, this would document the increased activity relating to their terminated works. The combination of all three could be significant, as it has been suggested that increases in payment rates and the exoneration of unrecouped advances can act as a spur to creators when it comes to promoting their material.[41] However, while it might be possible to document increases in sales and usage activity in relation to copyright works that have been terminated in the US, no such survey has been undertaken in respect of musical works or sound recordings. Moreover, even if this data were available, it would not be possible to measure it against changes in royalty payments. This is because the contractual terms and revenues of creators are a private matter. There are also no instances in which creators who have activated their termination rights have volunteered this information for the purposes of research.

Some estimations can nevertheless be made in respect of royalty payments. If the recording industry's ratios of success are accurate, only one in ten recordings will have managed to recoup the advances of the featured artists who made them. Therefore, the post-termination negation of recoupment could mean that up to 90% of recordings would be generating royalty payments that would be paid through to featured artists for the first time (voluntary policies of disregarding recoupment, as detailed in chapter 4, should also be borne in mind here). In addition, it is possible to suggest potential increases in royalty rates. Average royalty rates from the 1960s to 1990s look like this:

Table 2.2: Average Royalty Rates for Featured Artists

1960s	1970s	1980s	1990s
5% of retail price	9% of retail price	14% of dealer price	18% of dealer price

The average streaming royalty rate for a contemporary exclusive recording contract is approximately 26% (CMA 2022b: §5.52). If a featured artist were to enter into a services agreement post-termination, they could expect a 70% royalty rate (Hesmondhalgh et al. 2021: 141). If they were to self-distribute, they could, having paid the costs of distribution, gain 100% of the royalties. As should be clear, these are considerable increases. It would also be possible for featured artists to sell their rights, forgoing royalties and instead gaining

41 This point was made to us by the head of an independent record company and by an artist manager during the project interviews. See also Jones (2017: 408) for the increased promotional activity that David Bowie undertook having secured ownership of his sound recording rights.

considerable lump sum payments, as has been the case with the sale of recording rights by artists such as David Guetta, Mötley Crüe and Bruce Springsteen.

Three caveats should be noted. First, in the UK the termination of older contracts would only be possible if a reversion right was implemented in a retroactive manner. Second, evidence from the US suggests that the majority of termination claims are made by the most successful artists. These artists are the most likely to have recouped their balances and, even prior to termination, they will have been likely to have been on better than average royalty rates (either through their original contractual terms or through renegotiation). Third, if less successful artists were to terminate and gain these considerable increases to their royalty rates, this would need to be measured against the relative lack of activity relating to their repertoire.

In relation to composers who would be able to terminate under a retroactive right, it is likely that a higher proportion of them will have recouped their advances. This is because they generally would have been paid higher royalty rates and would have had fewer recoupment obligations than featured artists, thus providing them with means to pay them off. A terminating composer could nevertheless witness considerable improvements to their royalty payments. Throughout the latter half of the twentieth century, it was common for composers to be on a 50% rate (Passman 2009: 262). They now have greater ability to gain rates of 75% or more, and could claim 100% of the royalties if they elect to self-publish, albeit that in doing so they would have to pay the costs of distribution. Moreover, in the same manner as featured artists, they have the option to sell their rights in exchange for lump sum payments. It should nevertheless be noted again that it has been the most successful creators who have terminated. Correspondingly, many terminating composers may already have been in receipt of above average royalty rates.

When it comes to addressing the costs that the US termination right has imposed on recording companies and music publishers, there is also a lack of empirical data. Financial information is not publicly available and nor is it volunteered for research. The value of unrecouped balances is particularly hard to discern, although it could be expected that in the case of the major companies this would amount to many millions of dollars. The decrease to the music companies' revenues from terminated recordings and compositions should be easier to posit, as in many instances they would go from taking the majority share of recording revenues and up to fifty per cent of music publishing revenues to instead receiving none of the revenue for post-terminated works. Moreover, it would theoretically be possible to document the number of terminated recordings and compositions that have passed from the original recording companies and music publishers into other hands and to measure this against the subsequent post-termination successes of these works. No such survey has been undertaken in respect of recordings or compositions, however.

Given the above, various factors would need to be borne in mind before assessing the financial rewards and costs that would come with the introduction a British reversion right:

- First, the trigger point would need to be determined. Using the British 'Catalogue Share of Audio Track Streams' figures cited in section 1.2.3, it is possible to estimate the proportion of the recording rights revenues from streaming that could be affected if a reversion right were introduced: if the reversion right were to be triggered after 35-years, as is the case in the US, around 14% of streaming activity would potentially be affected; if was after 25-years, this would rise to around 20%.[42]

42 The music publishing sector does not provide similar data in relation to how its catalogue share of streaming revenue is distributed between different decades. However, while it would provide for some difference to the recording sector in respect

- Second, it would need to be determined whether reversion was automatic or if formalities would be put in place. If the formalities were to be as stringent as those in the US, this would suggest that only a small proportion of works would revert. The figures provided by Yuvaraj et al. indicate that, in respect of the total number of works eligible for termination in the US, 6.4% of sound recordings and 1.5% of musical compositions have been terminated (2022: 272)

- Third, although points one and two might imply that reversion would only affect a minority share of the repertoire that is generating revenue and only a minority of creators would raise claims, those who do raise claims would most likely be the featured artists and composers who have been disproportionately successful when it comes to generating revenues. Thus, the termination of a small catalogue of works could have a significant impact for a music company, particularly if the company is a rights holder in respect of only a limited number of recordings or musical works. These financial implications would need to be outlined in any assessment

- Fourth, the potential cost in respect of unrecouped balances would need to be clearly delineated. Although the value of unrecouped balances forms part of the valuation of rights holdings if a music company is put on sale, the day-to-day operation of these companies is undertaken in expectation that a large proportion of these balances will never recoup.[43] Thus, in terms of the impact of a reversion right, there should be a calculation of the unrecouped balances the music companies would have expected to recoup if they had control of the rights for the full period that was originally negotiated.

- Fifth, it should not be assumed that a recording artist or composer will sever ties with their former recording company or music publisher post-reversion. If the relationship has been harmonious, they might choose to negotiate new terms instead. Thus, from a music company perspective, the effect of activating the right might result in a change to their share of the proceeds, rather than a complete loss of revenue from the work.

- Sixth, and most importantly, it would need to be determined whether a reversion right would be implemented retroactively. If this were not the case, points one to five would be moot, as the reversion right would only apply to contracts negotiated after the legislation came into force. Thus, if the legislation were enacted in 2023, it would be 2048 before a 25-year reversion right could have any effect, and 2058 before a 35-year reversion right could have effect. Moreover, given the fact that UK publishing contracts have already tended to move away from lifetime assignment of rights, and UK recording contracts are moving in a similar direction, the impact of a non-retroactive reversion right could be limited to a small, but perhaps important number of cases in which a longer transfer of rights has been applied.

2.3.3 Knock-on effects

There are differing opinions regarding the knock-on effects that reversion/termination rights can have on contracting practices.

On the one hand, economists have argued that any increase in remuneration to creators from termination/reversion claims would need 'to be paid for somewhere down the chain of

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of the fact that older compositions can be activated on new recordings and can be covered numerous times, the predominance of original compositions on hit recordings would suggest some similarity.

43 In a survey of recording company accounting, the UK's Monopolies and Mergers Commission reported in 1994 that advances comprised 'between 54 and 60 per cent' of A&R costs in the period 1989 to 1993, and that during this time 'Between 50 and 66 per cent of gross A&R expenditure was written off annually' (1994: §8.30).

production or consumption' (Towse 2018: 483. See also Gilbert 2016). That is, if it does not result in increases in the prices of goods, it will instead result in weaker terms for creators when they contract and/or in fewer creators being signed. Michael Karas and Roland Kirstein (2018) have provided formulae outlining how contractual terms will be made to compensate for the expense of the US termination right.

Conversely, there are those who suggest that the presence of reversion/termination rights can have a positive effect on creators in respect of their contractual terms (Ringer 1960: 188). This is, in part, because they set a climate in which the limited transfer of rights becomes the norm (House Committee on the Judiciary 2000: 271). It is also because they set a climate in which rights holders treat creators favourably so they are either disinclined to terminate their contractual agreements or will otherwise be encouraged to resume a contractual partnership with the original contracting party post-termination (see section 2.4.4 below).

What is missing in either case, however, is any empirical evidence in respect of the differences that a termination/reversion right has made to contractual terms. Moreover, even if American contracting information were available, it would not be useful for gauging the impact that the implementation of a termination/reversion right has had within a country. This is because, rather than representing a break with the past, the termination right has provided a continuation of the copyright renewal procedure the country had in place between 1790 and 1978.

There should be greater potential for comparing American practice to that of other countries, as the contractual information could be assessed for any differences in terms.[44] Caveats would need to be considered before doing so, however. Significantly, it should be noted that any variations between territories would have various prompts, out of which the termination right might only have minor influence. This would not be the case if termination were automatic, but the formalities of the US system have led to it being activated for only a small number of works. Allied to this is the fact it has become increasingly common for featured artists and composers to negotiate contracts where the transfer of rights lasts for less than 35 years. This would warrant a different type of an analysis, investigating whether the presence of a termination right has either encouraged or impeded the shorter transfer of copyright. Nevertheless, here too any differences in contractual terms would be reliant on multiple factors, including changes in the means of distribution and increased competition amongst rights holders.[45] The analysis would be further complicated because the impact of the US termination right is not confined to American borders, even though it is regarded as applying only to US contracts and to domestic revenues. This is because the market for music is international; therefore, contractual developments in the dominant American market have sometimes been mirrored abroad (Castle 2022).

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44 Yuvaraj et al. nevertheless point out that, while it is possible to analyse the statutory reversion right in the US because of its registration process, similar information is not available in other countries (2022: 252).

45 It was the opinion of Ann E. Chaitovitz in the 2000 work made for hire hearings in the US that the contractual negotiation of the reversion of rights had been aided by 'the legal premise that the artist would regain ownership of the sound recordings after 35 years under the termination rights provision of the Copyright Act' (House Committee on the Judiciary 2000: 271). However, another factor that influences the shorter transfer of rights is the competition that is provided through alternative contracting practices, notably service agreements in which the creator does not forgo ownership of copyright. In addition, the recording industry is becoming similar to the publishing industry, in that the rights holders act as licensors and administrators that provide services to creators, rather than as manufacturers of products that service consumers. One consequence of this is that recording contracts are starting to mirror publishing contracts in respect of the shorter transfer of copyright. Feargal Sharkey noted in 2004 that it would 'only be a matter of time' before record companies had to follow the same path' ('Campaign Stirs' 2004: 7).

There is also a lack of empirical data relating to the effect that the US termination right has had on the renegotiation of contracts. It has been noted, nevertheless, that the threat of raising notices has led to many claims being settled informally.[46] Renegotiation has been reported in relation to some high-profile cases, including Paul McCartney's action to rescind the transfer of the American rights for his Beatles' songs, Prince's long-term campaign to own his masters, and Dwight Yoakam's work made for hire lawsuit (Cooke 2017; Collins 2014; Cooke 2017; Cooke 2022b). It appears to be particularly common in relation to sound recording copyright claims, not least because of the uncertainty about work made for hire criteria. The re-working of contracts has also been reported in relation to cases in which British artists have attempted to terminate their rights in relation to the American market (Cooke 2016). These claims might not be legally permissible in respect of worldwide agreements signed outside the US (Press Association 2016),[47] yet there are occasions when rights holders have responded on a voluntary basis, either by renegotiating terms with the creators who have raised them or through general practice whereby they revisit contractual terms after a period of 35 years, looking anew at the arrangements for American revenues.

These renegotiating practices provide little help when attempting to gauge the overall impact that reversion/termination rights have had on contracting practices. Although they could be taken as evidence that these rights have led to improvements in contractual terms, it could also be argued that they have acted to the detriment of new artists. This is because the expense of renegotiation could be allied to the expense of enforced termination rights and paid for via inferior terms in new contracts as well as resulting in fewer creators being signed. Unfortunately, there is even less information available about renegotiation than there is about termination claims. Only a minority of the cases are reported.[48] Moreover, even if a renegotiation is made public, its outcome will commonly be subject to a non-disclosure agreement.

A further situation in which these rights could have considerable knock-on effects relates to situations in which creators sell their rights in their catalogues, gaining lump sum payments and foregoing royalties. This is becoming increasingly common in relation to both publishing rights and recording rights, and the sums that are being negotiated can be considerable. Moreover, these catalogue agreements are being negotiated with investment companies, as well with traditional music industry rights holders. If a reversion right was introduced, it could reduce the worth of those agreements, both in respect of deals already negotiated (if a reversion was introduced retroactively) and in respect of future deals (as the rights holders and investment companies might expect a shorter period of ownership).

Despite the difficulties in gaining information in relation to each of these issues, it would be desirable that, in the event a British reversion right were introduced, there would be investigation of these knock-on effects.

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46 Legal experts informed us they had heard 'anecdotally' that the termination right is used by creators to gain improved terms with their existing contractual partners. They also noted that, when this factor is allied to the complexity of the US process and the lack of statistics available, it is difficult to use the US experience to gauge the impact that a reversion right would have in the UK (legal experts on termination rights, project interview).

47 It might be possible to do so, however, if a foreign contract explicitly states that rights arrangements for America are subject to termination right claims (Cooke 2016).

48 Yuvaraj et al. note, however, that 'As documented by the Authors' Alliance (n.d.), such negotiations are certainly taking place' (2022: 266).

2.4 Stakeholders' Views on Reversion Rights

2.4.1 Record Companies' Views on the Impact of Rights Reversion

All record label stakeholders expressed concerns about the potentially damaging impact that rights reversion could have, emphasising the destabilising effect that it may have upon investment in new artists. A major label executive said that their economic modelling is based on long periods of copyright transfer and that curtailing the duration would have an effect on their business. S/he said, "The problem is when we're modelling deals, we're modelling them out over the lifetime of our rights and factoring that in in how much we can pay for things. So to truncate that after that analysis and fair negotiation has been done is destabilising." Likewise, a major label executive emphasised that record labels take much risk in talent development and that rights reversion would cause a great uncertainty in their risk assessment, "Record labels, large and small, sink vast amounts of money into artists, and they do so based on an assessment of risk, investing for the future, but in all of those investments, certainty, reasonable certainty, as to what's going to happen with that contract, is very important. I think any business that is investing in any endeavour, creative or otherwise, has a need for some kind of clarity as to what they're putting that investment into and how long it's going to last for."

In this respect, labels argued that the potential impact of reduced income from back catalogue would be of concern. They emphasised that the music business involves high-risk and the revenue from legacy contracts is important for continued growth and investment in new artists by guaranteeing some level of certainty on returns. A major label executive stated, "If you look at the picture as a whole, revenues from catalogues, in large part, generate the available R&D money that gets invested in the new music scene, so the two are connected." Similarly, another major label executive remarked that rights reversion could impact upon the contractual terms for artists, "It would certainly result in worse terms for artists because at the end of the day, this is a business […]. If all of a sudden the length of time in which I can generate revenue from a work is cut in half, then that's going to have an impact on what I'm prepared to negotiate in exchange for that. So if that becomes a variable, it will have an impact in the contract of what we're prepared to do." S/he continued, "The majority [of artists] don't recoup. So if that becomes more risky, we're going to invest less in artists."

An industry analyst expressed concerns about the impact that this could have on independent record companies. The investment they make in artists can be proportionally riskier to them, as their artists can be less commercially successful than those of the majors: "If I'm a small independent business, and I've just spent £100,000 on an artist which to me is an awful lot of money and I did so on the understanding that this is how it's going to work, and then the law changes and it retrospectively changes my deal, that's not fair."

Record Companies' Views on a Negative Impact on the UK Music Market

Labels argued that rights reversion could make the UK music market less attractive. They stressed the labels' role in investing in new artists and creating hits, and that rights reversion would be likely to disrupt the music ecosystem in a negative way. A major label executive said, "That's part of that ongoing cycle of the ecosystem. We are the primary investors in artists. So if we're unable to do that, then you're not going to have as many hits, you're not going to have the other roles that are associated with the session musicians, the managers, the lighting technicians, the sound people – all of those will be affected."

Record companies expressed concerns that these measures could affect the prominent position the UK has as a global music market leader. A major label executive stated, “If you look at the UK music scene and its place on the world stage, we’ve always punched way above our weight in population terms. One in eight albums globally is by a UK artist, so the UK has always been a leading player in world music. And that’s become more and more challenging in a truly global A&R market, and I’d genuinely be concerned, if the wrong levers are pulled, that the chances of the UK continuing to be a leading player in the world market are diminished.”

Rights reversion in this sense, they argued, would make the UK market unattractive, potentially disincentivising investment by global companies in the UK. A major label stakeholder commented, “It would make the UK the least attractive place to invest in the whole world.”

2.4.2 Music Publishers’ Views on the Impact of Rights Reversion

Music publishers shared similar views to the labels in opposing the introduction of rights reversion. Publishers stated that their deals are songwriter-friendly, and they emphasised that the success of the publisher depends on the success of the songwriter because the contract is based on a revenue split. In this respect, a publisher commented that the introduction of rights reversion does not suit the publishers’ business model, which is songwriter-friendly and based on good faith, “Publishers have a model which is entirely aligned with the interests of songwriters. It’s a revenue split, so we need them to succeed so that we can succeed. If they don’t succeed, we don’t succeed. So, it’s an industry based on good faith conduct and relationships and to start interfering in ways which can’t be anticipated is probably not taking account of that. It makes an assumption around unfairness which we view as unfair.” A publisher also emphasised that the value of a song is determined by authorisation and negotiation through a mechanism of a “willing buyer, willing seller”, and that rights reversion would cause great uncertainty. S/he stated, ‘“I think it’s quite unreasonable when you have a willing buyer and a willing seller to then subsequently several years after the fact introduce a change which says I know you signed this contract willingly, but now it no longer says what you say it says. I think that introduces a huge amount of uncertainty into the market.”

With the increasing acquisition of publishing rights, there has been increasing capital poured into purchasing song rights. Publishers were therefore concerned that the change brought by rights reversion would have a negative impact on this market. A publisher said, “It’s not attractive in terms of getting investment. There is a lot of investment in the publishing market that is driving value for writers to be able to do these deals, and that’s not just within the publishing community, there are a whole load of investment funds sitting behind this and they look at things pretty rationally. If they start seeing they’re not going to get what they’re paying for, that market will slip away.”

In addition, mergers and acquisitions are common in the music business and in these circumstances the value of the acquiring rights is always taken into account in the valuation. By uprooting the financial investments, a major publisher argued, rights reversion would “unjustly take rights that [publishers] have paid fair value for […] on the assumption that they would continue to be entitled to them for the duration of the acquisition terms.”

Particular concerns were raised over the financial risk that retroactive implementation could bring to the market. A publisher commented that retroactive implementation would be unfair because it would not sufficiently take into account the publishers’ risky position and would create uncertainty in the rights acquisition market. S/he said, “So if you’re going to do anything like that retrospectively, it’s incredibly random and incredibly unfair to everyone

involved […]. The buyer has overpaid for something and they only discover that with the benefit of hindsight. I just think it creates chaos at every level of the publishing sector, whether it's independents, major companies or even some of the new entrants who are more financial asset acquisition driven." In this respect, a major publishing stakeholder described rights reversions as "stealing." S/he said, "Other jurisdictions have never implemented a right of reversion that looks back, because ultimately, as they recognise, that would be actually just stealing rights away from someone for no reason whatsoever, especially when in certain circumstances, very significant amounts of money had been invested in those rights."

Some other publishers raised concerns over the international legal implications of a retroactive right. Contracts apply globally but the introduction of rights reversion in the UK may create unintended consequences. A publisher commented, "It purely operates on a single jurisdiction basis. There's no extra territorial effect. So what you would be talking about is not the rescission of a worldwide grant, you'd be talking about the rescission of a grant purely in the UK. Now that actually creates a lot of problems because just terminating the UK, all you would do would create a fractured rights picture that becomes that much harder. If we're talking about ease of use of licensing and so on, you suddenly have a situation where you could create a position where you've got someone who owns the UK copyright and then a second party controls for the world. The UK copyright is also not of substantial value on a global basis. Generally, the industry would look at that as 5-10% of the worldwide copyright. So, you're actually creating a situation where you might make licensing significantly harder to achieve, whereas the right being returned to the writer is extremely small compared to the overall value of the copyright."

2.4.3 Music Creators' Views on the Impact of Rights Reversion

The music creators' community asserted that rights reversion could empower them, giving them choice in deciding what is best for their own creative work. For example, a stakeholder representing musicians argued that the current business model is skewed towards labels who benefit disproportionately higher than music creators. Rights reversion, they claimed, would bring the balance back by giving more power to those who created the music in the first place. An executive from a music creators' trade body said, "We think that far too much of the revenue ends up with the record labels. So, we feel like rights reversion would be a good rebalancing; it would potentially put a bit of power and choice back in the hands of the artist. It could also mean more revenue going direct to artists which would be better. It would give them more control over the use of their music if they were able to get their rights back, especially for those artists who don't have much bargaining power at the moment and therefore aren't in a position to negotiate."

This view suggests that fundamental problems exist in the way contracts work, particularly in situations where the creator has recouped their advances but still does not own the copyright in the work. A manager provided the analogy that, "The current record company contract is a bit like having a mortgage on a house and then when you pay off your mortgage, you still don't own your house."[49] S/he continued, "I look after [an artist who] has sold 250 million albums. He has earned [a major label] probably in excess of a billion dollars of profit – not net but profit. He still doesn't own the rights to those records. That cannot be reasonable. Leave aside the disproportionate recoupment against a smaller percentage versus the label." Agreeing with this, a lawyer questioned contractual dynamics that enable

49 A stakeholder from the record labels' sector said, "The mortgage analogy is flawed and that should be recognised. You have to pay back your mortgage, you do not have to pay back an advance."

labels to generate revenue for the life of copyright, “Is it equitable to hold onto the creation once you’ve recouped your investment and made a profit? Should it be possible to make a profit for the life of copyright once the original investment is recouped and de-risked and for the creator not to share in the success of that creation, or even regain those copyrights?” An industry veteran concurred, stating that the advances that record companies provide do not justify their prolonged ownership of copyright. S/he stated, “A record company shouldn’t be able to sign someone for say £15,000 or something and then own copyright for life of copyright which means exploitation for the next 70 years. Even if artists/bands are not popular 50 years after a contract is signed, a sync may turn up and it could be worth a lot of money. If the record companies had a maximum of 25 years of exploitation, that’s quite enough. I just think there have to be controls.”

Music creator stakeholders rejected the argument that rights reversion will jeopardise the UK music economy. It was argued that many successful music markets in the world have rights reversion. A songwriter noted, “The most successful music industry in the world has rights reversion […]. I think that if rights reversion were introduced, it would create the long term opportunity to correct the imbalance between the creator and the exploiter […] this is a way that Britain will put itself on a level playing field with the creators of, and with the SMEs of, the rest of the world and if we don’t do it, it’ll be hugely to the detriment of British business.” A former manager also commented, “The UK really should be competing on what it competes on best, which is creativity. The idea that somehow the British record companies are competing because they’re so much more efficient is nonsense. The thing that the UK is best at is finding creative artists and developing them and nurturing them and I don’t think that there’s any evidence that the UK record companies have been a lot more efficient.” A songwriter also said that rights holders should “just work harder, work different, be creative, and be transparent.”

These stakeholders claimed that the argument that rights reversion will create uncertainty in the market is not well grounded, as many artists will still need to find a home for their music, and most will choose to work with one of the existing companies if the relationships have been as good as the labels and publishers argue. A manager said, “Certainly if the companies have been doing their jobs properly and if they’ve been looking after the artists properly, why would the artists then take their rights and try and administer it themselves with the complexity that it involves, rather than actually make a deal with one of the existing companies to look after the rights for a while.”

Above all, the music creators’ community argued that rights reversion could contribute to making the music market a fairer place, by giving more power back to creators. An artist said, “This is the key thing that will create a market, create choices, bring fairness back into the system. This is the thing that allows artists to ensure that the record companies play fairly. All the other ones [suggested measures] belong to the other party, whereas reversion of rights belongs eventually to the artist.”

Likewise, it was argued that rights reversion could give artists opportunities to review their contracts and make more informed decisions about what the most appropriate deals are for them. A former manager asserted that rights reversion would lead to a fairer system where the record companies would have to work harder to attract artists and treat them more fairly. S/he said, “All it requires for the record companies to be a bit nimble in the way they deal with the artists […]. What happens […] the artists get the chance to shop around and look at the current deals that are available, look at the way the companies behave and look after the artists, and that then becomes a factor in how they do their licencing deals, which again feels much fairer and is one of the few things that would actually put a little bit of pressure on record companies to stop inching forward and taking more and more and more rights, and actually start to treat the artists fairly.”

The musicians' community also refuted the argument that the prolonged exploitation of copyright is essential to the record labels' business. Rather, they argued that most recordings recoup revenue in the short term. A manager said, "There is no A&R on earth that is signing an artist on the basis that they will recoup after 20 or 35 years. They're signing because they expect that artist to make money in the next 5 years, or 5 to 10 years. That argument from the labels really doesn't hold water." In addition, they questioned the labels' argument that rights reversion would have a negative effect on new artists. A musician claimed, "They don't invest in new artists, that's all gone. They wait for the artist to invest in themselves, build themselves up to a point where they're commercially viable and then they sign them. They've been using that hoary old argument for a generation and there's absolutely no justification for it now." A lawyer described this as being "the opposite of the pension system," in that "the norm is that young workers paying for the pensions of people who are now no longer working. In music, that position is in reverse."

2.4.5 Views on the Practicalities of a Reversion Right

A music publisher expressed concerns that a reversion right, if introduced in the UK, might be applied automatically rather than requiring a formal application process as is the case in the US. S/he said "So telling everybody your rights just disappear, that really does take away the control of the writer to determine what they want to happen." Right-holders also called attention to the fact that "works made for hire" are excluded from the US termination right. A publisher commented that it may require a significant change in the UK legal system to introduce a similar exception in the UK. S/he said "The work for hire concept in America goes way beyond what we have in the UK with [works created in the course of] employment. So that reaches across many types of commissioned work and those works for hire are completely carved out of the US termination system. So it has those in-built checks but we don't have that system of work for hire, so we'd have to either create it or create new exceptions. It would require a lot of change to bring that about. When we had reversionary rights, there were provisions about collective works, to try and preserve the value of works that had been granted for use in combination with other works. You'd have to do a massive overhaul of our legal system to do this."

Other concerns included the practicalities of introducing a reversion right that might apply only in the UK when contracts can be applicable worldwide. A publisher commented, "Some of these contracts are subject to foreign laws, and how can you introduce a mechanism under the laws of one nation which applies to a contract which typically is worldwide?" A music publisher also raised concerns that the implementation of rights reversion could lead to "a forest of litigation, wherein as soon as you start adjusting for those rights, you've really got lots of people with lots of indemnities down the licensing chain relied on the uses of the song that are instantly looking back up the chain." A publisher also raised the concern that the introduction of a reversion right could have a chilling impact by encouraging other countries to follow suit.

Stakeholders from the music creators' community emphasised that termination rights have been widely used as a tool for renegotiation in the US. A manager noted that litigation often costs a lot of money and requires prolonged legal battles, therefore labels will do their best to avoid this situation by renegotiating royalty rates, "What they [labels in the US] tend to do is say 'maybe you're right, maybe you're wrong, do you really want to go to court? It's going to take ages, it's going to cost you potentially hundreds of thousands of dollars, so here's some money and we'll just carry on as we are but we'll renegotiate the rights period maybe a bit or the royalty rates maybe a bit,' and that is a common corporate tactic in the music business."

2.4.6 Views on a Mechanism to Revisit

Some music creators argued that in addition to considering the introduction of a reversion right, alternative mechanisms to revisit contractual terms could be necessary. It was suggested that much of the unfairness stems from legacy contracts that have been signed when lower royalty rates were the norm in the industry and have bound music creators for a long periods of contractual terms. These contracts, it was argued, do not have specific terms for streaming, leaving many music creators unable to receive sufficient royalties from this source or no royalties if they have not recouped their advances. The music creators' community also emphasised that streaming economics are different from pre-streaming economics and that the increasing revenue generated means that contracts should reflect these changes, especially when legacy contracts do not have specific provisions on how they can be remunerated from streaming. For example, a manager said that "When the business changed to 95% coming from one source, it needs to have a chapter dropped in about streaming which covers how they will handle letting you in on the rates, both on your portal and on your statements that you receive through the mail."

Some music creators stated that these necessary changes would not happen unless contracting parties were coerced into it. As a way to resolve this, it was suggested there should be a way to make it mandatory to review contracts regularly, for example, every five or ten years. A lawyer who has worked for many different music creators said, "It seems to me there should be a time obligation every five years or ten years for contracts to be revisited and maybe improved on the basis of the current economic climate or the current best business practice. That's the problem, that those things currently never happen unless I take up the cudgels on behalf of an artist. The label never comes and says, streaming's gone off the roof, you're earning a billion pounds an hour, and we're going to improve the rate because the cake has got much bigger. The cake gets bigger but the slice for the artist still remains the same."

At the same time, others suggested that simplified contracts would help to resolve some issues. A singer-songwriter said, "We need, basically, to simplify hugely and have things visualised and clear, individually, so that we can have kind of a dashboard of everything that's going on and be clear about it. We could then see things or there could be a new job role of somebody who's basically a data sorter outer, who just comes in and goes, click, click, this information, then it will all work great." Agreeing that simplified contracts would be beneficial, a manager commented, "I think the simplification of the contracts would be an absolute bonus because the need for expert assistance and advice you have all the time when you're looking at these things makes the power dynamic pretty poor, and a lot of the standard boilerplate in label contracts is a waste of time."

Some stakeholders also expressed a desire for a mechanism to revisit contracts when advances are recouped. A manager commented, "I think at least again to put in there something that says when you're recouped, there has to be some sort of revisit or trigger. It doesn't necessarily mean that the contract terminates. I think there's a fear from labels that copyright reversion means instant termination of contract. We've already seen labels recognise that what you sign a deal for in the sixties or the fifties is not reasonable when you're still exploiting those catalogues now. So I agree that at some point you have like a ground zero sometimes." A lawyer concurred, "If they're not recouped, then I think there's a better moral case with the rights period being slightly longer. Whereas if they're recouped, I think there should be an automatic reversion of rights after a shorter period and that is the big point that I would push for."

2.4.7 Views on ‘Use it or Lose it’ Measures

Generally, stakeholders were aware that a use it or lose it measure already exists in the UK, but there was a belief that this has not necessarily been a useful provision, especially in the streaming era where to “use it” requires a simple upload of content. A label stakeholder commented, “The first thing to say is that there’s already, effectively, use it or lose it provisions in contracts because labels have release commitments. So we don’t really see the need for these provisions. But if they do exist, they should only ever apply where there’s a complete failure to exploit in any form, because there may be valid reasons why you’re focusing on one particular channel for a period of time.” A major label executive agreed that it is straightforward to make recordings available digitally and it is understandable for an artist to want the right back if this bare minimum is not exercised. S/he said, “Obviously it is easier to make recordings available digitally, and I get communication from managers, catalogue managers, catalogue artist managers, saying I’ve noticed this recording isn’t available on streaming services, whatever it might be, and in all those cases we usually simply accommodate them. It’s relatively straightforward to do so.” Another stakeholder agreed that a use it or lose it measure has not helped music creators much because making music available does not take much effort. An experienced music industry professional said, “Because in the digital era, it’s so easy to put a piece of music up on Spotify. There’s no effort or expense involved so there’s no reason why a record company wouldn’t put it up there. There was a lot of fuss made about use it or lose it and it was just a waste of time.”

Chapter 3: Contract Adjustment

3.1 Introduction

The DCMS Select Committee's proposal for a right to contract adjustment is inspired by legislation that exists in several European countries. These adjustment measures have commonality in that they allow for changes to contractual arrangements when the rewards to creators are seen to be disproportionately low in comparison to the overall revenues generated by their work. Their purpose is to provide a means of redress in situations where the terms of a contract have resulted in inequity.

Contract adjustment measures have a considerable history. In Germany, for example, they have been a feature of copyright law since 1965 (Guibault and Hugenholtz 2002: 33). There has also been a steady increase in the number of countries adopting this legislation. In addition, there have been repeated calls for it to be implemented in all countries of the EU, which will now be realised following the implementation of the 2019 DSM Directive.

In their 2002 'Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union', Lucie Guibault and P. Bernt Hugenholtz noted the presence of contract adjustment measures in five EU countries: Belgium, France, Germany, Spain and Portugal (2002: 34-5). Contemplating whether these measures should be expanded further and introduced in a common fashion throughout the Union, the authors stated that 'the demand expressed within some Member States for a more adequate protection for creators against abusive contractual practices may indeed be quite justified' but nevertheless decided that harmonising European law in this respect would be 'premature' (2002: 154). This was because the different approaches to contractual protection in EU territories had, as yet, had 'limited' impact, and also because the authors believed issues of copyright contract law were 'best addressed at the national level' (2002: 151, 154).

In a later report, published in 2015, Guibault, Olivia Salamanca and Stef van Gompel recorded the presence of contract adjustment legislation in some new EU member states, including Poland and Hungary (2015: 41-2). The authors stated that an EU-wide mandate for contract adjustment was now desirable, as differences between national laws in respect of copyright contract legislation were creating 'barriers to the functioning of the Internal Market' (2015: 114).

The report by Guibault, Salamanca and van Gompel influenced the European Commission's 2016 'Proposal for a Directive on Copyright in the Digital Single Market', which includes an instruction to implement contract adjustment legislation throughout the Union (EC 2016a). This proposal was accompanied by an impact assessment, which justified the introduction of contract adjustment legislation on the grounds that 'there is a natural imbalance in bargaining power in the contractual relationships' (EC 2016b: 175).

Bently et al. provided a further overview of European contract adjustment legislation in 2017, prompted by the proposals for this Directive. In doing so, they noted the new contract adjustment law that had been enacted in the Netherlands and summarised that the Directive was to be 'welcomed', as it would 'add some value in most of the Member states' (2017: 66-7, 83).

The European Commission's proposal formed the basis of the 2019 *Copyright Directive on Copyright and Related Rights in the Digital Single Market*, which includes a contract adjustment mechanism among the articles that address 'fair remuneration in exploitation contracts of authors and performers' (EU 2019: arts. 18-23). Recital 72 of the Directive provides a rationale for the introduction of this right:

> Authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration, and those natural persons need the protection provided for by this Directive to be able to fully benefit from the rights harmonised under Union law. (EU 2019: recital 72)

As a result of the DSM Directive, all EU countries will have to implement these contractual measures. This implementation procedure has been analysed in a review undertaken by the European Copyright Society (ECS) (Dusollier et al. 2020).

In contrast to mainland Europe, the UK has provided minimal protection for contracts within its copyright laws. However, following its Inquiry into the economics of streaming, the DCMS Select Committee recommended that the Government expand creator rights by introducing a right to contract adjustment into the CDPA (DCMSSC 2021a: 67). It stated that this right 'would particularly benefit performers on outdated legacy contracts' (DCMSSC 2021a: 66). In laying out its recommendation, the Select Committee pointed to the contract adjustment provision in the DSM Directive and to rights 'already established in Germany and the Netherlands' (DCMSSC 2021a: 66). It stressed that the right to contract adjustment should 'be implemented as soon as practically possible to ensure that rights for UK creators do not fall behind rights for European creators' (DCMSSC 2021a: 67).

The MP Kevin Brennan acted upon this proposal. His private members Bill addressing Copyright (Rights and Remuneration of Musicians, Etc) included a contract adjustment measure that would have enabled composers and authors to claim 'additional, fair and reasonable remuneration […] in the event that the remuneration originally agreed is disproportionately low compared to all subsequent revenues derived from the exploitation of the rights' (2021a: §93E). The Bill's explanatory notes stated that this would 'ensure performers and composers do not suffer from negative consequences arising from unequal bargaining power when entering into business relationships for the exploitation of their works' (CRRMB 2021b: 3).

Responding to the DCMS Select Committee's recommendation, the government noted that 'the impacts of these proposed new rights are uncertain and warrant further analysis', adding that 'Evidence from the Netherlands on the contract adjustment mechanism suggests that it may have little impact in practice' (DCMSSC 2021b: 4).[50] Responding to the

50 The Dutch contract adjustment legislation was nevertheless created prior to the DSM Directive and might need to be revised to accord with the EU's more comprehensive measures. As an example of this wider remit, the French supreme court, the Conseil

Brennan Bill, the MP George Freeman stated similarly that investigative studies were required before considering legislation (Freeman 2021: 1224). The following sections of this report aim to provide some detail.

3.2 The implementation of Contract Adjustment Measures

To assess the potential impact of contract adjustment legislation, various implementation factors need to be considered. First, there are factors relating to the scope of the legislation: does it address different forms of disproportionality; is it inalienable; will it be implemented retroactively? Second, there are factors relating to accompanying legislation: should the contract adjustment measures be backed by further measures that help creators to make effective claims?

3.2.1 Scope

Disproportionality

One of the common names given to contract adjustment measures is that they are 'best-seller clauses'. This term is indicative of the historical orientation of the legislation and of its limitations. Best-seller clauses have had some distinct features. They have been restricted to cases in which the disproportionality between the revenues of the creator and the revenues of the rights holder could not have been foreseen. A further limiting feature is that they have only applied in instances where there are large revenues and major differences between the earnings of the creator and the earnings of the rights holder (Guibault and Hugenholtz 2002: 93).[51] In addition, they have tended to be limited to lump sum payments and thus have been inapplicable to royalty contracts (Guibault, Salamanca and van Gompel 2015: 41-2). In some countries, including France and Spain, the restriction to lump sum payments has been mandated in legislation (van Gompel et al 2020: 72, 114). The orientation towards lump sum payments is also inherent in the stipulation that disproportion cannot be foreseen. This is because disproportionality in royalty arrangements is commonly apparent from the outset.

It is because of these various constraints that best-seller clauses have been regarded as being of 'limited effect' (Bently et al. 2017: 84). However, the DCMS Select Committee's proposal for 'a right to contract adjustment where an artist's royalties are disproportionately low compared to the success of their music' takes its cue from legislation in Germany and

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d'Etat, annulled the French government's original attempt to implement articles 2(6) and 17 to 23 of the DSM Directive as the legislation did not stipulate that authors and performers would be entitled to receive 'appropriate' remuneration (Spitz 2022).

51 French legislation has provided a mathematical formula for this, stipulating that 'the author may demand the review of the contract if he suffered a loss of more than seven-twelfths of the compensation to which he is entitled and if this loss is the result of either a burdensome contract or an insufficient advance estimate of the proceeds from the work' (Guibault and Hugenholtz 2002: 72). The French law has provided further restrictions in that it has excluded performers. It is notable too that it was originally proposed that the US termination right should be restricted to 'strikingly disproportionate' profits in respect of lump sum payments. Bently and Ginsberg note that while this theory 'captured the raison d'être for the termination right—to redress the imbalance when the author has sold her copyright for a pittance and the publisher reaps all the reward if the work proves successful—the "strikingly disproportionate" standard would have invited expensive and inconclusive litigation' (2010: 1566).

the Netherlands, which has been regarded as providing a broader framework. The German and Dutch legislation has also provided the inspiration for the contract adjustment measure in the DSM Directive, which in some respects can been viewed as providing an even wider remit. It is therefore worth looking at these approaches in some detail.

a) Germany

The original German contract adjustment measure in the 1965 Act on Copyright and Related Rights was a best-seller clause. It concerned 'grossly disproportionate' payments and the German Federal Supreme Court interpreted it as only applying in the case of unforeseen revenues (ACRR 1965 §36(2)). This measure was revised in 2002, at which point the former §36 was codified into the new §32a(1):

> Where the author has granted a right of use to another party on conditions which, taking into account the author's entire relationship with the other party, result in the agreed remuneration being conspicuously disproportionate to the proceeds and benefits derived from the use of the work, the other party shall be obliged, at the author's request, to consent to a modification of the agreement which grants the author further equitable participation appropriate to the circumstances. It shall be irrelevant whether the parties to the agreement had foreseen or could have foreseen the amount of the proceeds or benefits obtained. (ACRR 1965: §32a(1))

Haimo Schack has noted that this measure eliminates one of the 'serious deficiencies' of the old law, as 'Instead of a gross one, a conspicuous disproportion is now sufficient' (2002: 856). In addition, this measure has provided flexibility about the conditions that persist when the contract was agreed:[52] creators are entitled to contract adjustment in the event the contract was 'unfair at the outset' (Aguilar 2019a). It has also been suggested that 'entitlement to further remuneration applies even if the contractually agreed remuneration was equitable at the time when the rights were granted' (Bently et al. 2017: 62-3).

The German contract adjustment legislation has a further element, dealing with situations in which it is a third party, rather than the original contractor, that has benefitted most from the revenues. The legislation states that 'if the author's disproportionately low remuneration results from proceeds or benefits enjoyed by a third party, the latter is directly liable to the author' (ACRR 1965: §32a(2)). In addition, German case law has established that, rather than limiting adjustments to the modification of contacts, creators can make direct claims for recompense.

52 Polish law is similar in this respect (Dusollier et al. 2014: 40).

b) The Netherlands

Dutch copyright law traditionally had few measures concerning contracts (Hugenholtz 2016: 397). However, following the incorporation of the Copyright Contract Act in 2015, it now has some of the most comprehensive contract legislation in the EU, including the following clause:

> The maker may claim additional fair compensation in court from the other party to the contract if, having regard to the performances delivered by both parties, the agreed compensation is seriously disproportionate to the proceeds from the exploitation of the work. (CCR 2015: art. 25d(1))[53]

As with most of the Articles in the Dutch Copyright Contract Act, the contract adjustment measure is modelled on German legislation. Consequently, it includes a similar provision relating to the liability of third parties (art. 25d(2)). In addition, the success of the work 'need not be unforeseen' (Hugenholtz 2016.: 404). There are some differences, however. Rather than resulting in a 'modification of the agreement', the Dutch legislation points towards a claim for 'additional fair compensation'. In addition, the measure of disproportionality is stricter in the Netherlands. There needs to be a 'serious' discrepancy for the maker to be able to raise a claim. Indeed, the Dutch measure is titled 'bestseller clause'.

c) European Union

The 'fair remuneration' measures outlined in chapter three of the DSM Directive are influenced by German and Dutch legislation. Its 'contract adjustment mechanism' states that

> authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances. (EU 2019: art. 20(1))

Although the wording of the Directive is somewhat unclear, this mechanism has a wider remit than a best-seller clause. The work or performance does not have to have gained extraordinary success for the measure to apply. In addition, the measure allows for the correction of contracts that were 'unfair' from the outset (Bently et al. 2017: 84). This has encouraged Bently et al. to state that there is 'considerable value in what is being proposed' (2017: 8).

However, while the mechanism is derived from the laws of Germany and the Netherlands, it has a different orientation. The German and (particularly) the Dutch legislation have retained a best-seller focus. In contrast, the DSM Directive applies to all cases 'where the remuneration originally agreed under a licence or a transfer of rights clearly becomes disproportionately low compared to the relevant revenues derived from the subsequent exploitation of the work or fixation of the performance by the contractual counterpart of the author or performer' (EU 2019: recital 78). It thus 'covers any situation in which the agreed remuneration ends up being inadequate', and 'would apply in a situation where a creator

53 Translation Visser Schaap & Kreijger.

underestimated the economic importance of a particular mode of exploitation' (Dusollier et al. 2020: 19). This difference has meant that, in turn, the DSM Directive has influenced the existing laws of European countries. For example, the German contract adjustment clause was revised in 2021, so that, rather than being restricted to instances in which remuneration has been 'conspicuously disproportionate', the qualifying criteria now is that the creator's revenue is 'disproportionately low' (ACRR 1965: §32a(1)).

Inalienability

In order to make contract adjustment measures effective for creators, most territories have seen fit to make them mandatory and unwaivable. This is the case with German law (ACRR 1965: §§ 32a(3), 32b), Dutch law (CCR 2015: art. 25h), and the DSM Directive (EU 2019: art. 23(1)).

Retroactivity

It is the intention of the DCMS Select Committee that a contract adjustment right should 'benefit performers on outdated legacy contracts' (2021a: 66). Its ability to do so might be restricted, however. In some instances, it has been policy that such measures are not introduced retroactively and therefore do not apply to contracts that were entered into prior to the enactment of the legislation. For example, when the Dutch legislation came into force in 2015, it was stipulated that 'The law that applied before the date of entry into force of this Act will remain in force for agreements concluded before that date' (CCR 2015: art. III(1)).[54] There have been some nuances, nonetheless. In Germany, the contract adjustment measure does apply to contracts that were agreed before the legislation came into force, but only in respect of disproportionate payments that occurred after its enactment (ACRR 1965: §132(3)). The DSM Directive is not clear on the point of retroactivity: art. 26(1) states that 'This Directive shall apply in respect of all works and other subject matter that are protected by national law in the field of copyright on or after 7 June 2021'; art. 26(2) states that 'This Directive shall apply without prejudice to any acts concluded and rights acquired before 7 June 2021' (EU 2019).

One further point to consider in relation to retroactivity is that its impact could be different in respect of lump sum contracts and royalty contracts. If a creator has been paid a lump sum, there is greater likelihood that their contract adjustment claim would be for a further, compensatory lump sum payment.[55] Under the German model, any calculations for recompense would need to be made in respect of the extent to which the creator suffered from disproportionate revenues after the point that the legislation was enacted. In contrast, an artist on a royalty contract is more likely to gain changes to their contractual terms, rather than a compensatory payment. Commonly this would result in an increase to their royalty rate. This change would apply going forwards. Thus, there would be less need to make calculations in respect of the disproportionate revenues that occurred between the enactment of legislation and the raising of the claim. It is nevertheless possible that the royalty increase would be calculated in relation to the disproportionate revenues that

54 The measures in the Dutch Copyright Contract Act include a few exceptions to this instruction, but this does not include the contract adjustment measure.

55 There is an alternative method by which a lump sum agreement could be adjusted so it has a royalty payment going forwards.

occurred over the period from the enactment of the legislation to the making of the claim, rather than in relation to the overall losses suffered since the contract was agreed.

Sectorial Considerations

Some countries, including Italy, France, Belgium and Spain, have introduced contractual measures into their copyright laws that address specific creative sectors. In other territories, the measures have applied to authors' rights but have not applied to performances. The German and Dutch laws, in contrast, apply to all types of creative work, including performances. This is also the case with the DSM Directive, albeit that its transparency obligation and right of revocation can be applied taking into account 'the specificities' of each sector (EU 2019: arts. 19(1), 22(2)(a)).

In the UK, the DCMS Select Committee's contract adjustment recommendation is targeted at the music industries only, as was the contract adjustment measure in Kevin Brennan's Copyright (Rights and Remuneration of Musicians, etc.) Bill. Sectorial-specific contract legislation is presumably permissible within UK copyright law, but it would be expected that creators and rights holders working in other creative sectors would take an interest in the broader application such rights.

3.2.2 Accompanying Legislation

Although the DCMS Select Committee has proposed a single contract adjustment measure, legislation in this area is rarely left to stand on its own. To facilitate the claims of creators, most countries have introduced further copyright measures relating to contracts, including clauses addressing transparency, fair remuneration, dispute resolution, collective action, new uses and lump sum payments. Each of these is worth detailing, not only because they have the potential to make contract adjustment legislation more effective for claimants, but also because the UK government has considered incorporating further measures should its investigative work 'suggest them' (Freeman 2021: 1224). Moreover, most of the written evidence that the DCMS Select Committee drew upon in making its recommendation for contract adjustment was of the opinion that this measure should be bolstered by accompanying legislation.[56]

56 The SCRIPT written submission recommends that government 'consider the advantages of provisions equivalent to the Copyright Directive', which would mean that, in addition to the contract adjustment measure, it would incorporate its clauses relating to 'appropriate and proportionate remuneration' (art. 18), 'transparency obligation (art. 19), 'alternative dispute resolution procedure' (art. 21) and a 'right of revocation' (art. 22) (2020: 9). The MU submission recommends that the government 'Enshrine the broad principles of the EU Copyright Directive in UK law, particularly Chapter 3 covering transparency, fair remuneration and contract adjustment' (2021: 1). The UK Council of Music Makers (comprising FAC, The Ivors Academy, MMF, the Music Producers Guild (MPG) and the MU), recommends that 'The broad principles of the Copyright Directive should be adopted to enshrine the liability of online platforms in UK law and include provisions around greater transparency, improved contract terms and fairer pay for creators and performers' (2021: 1). In separate documentation, the wider UK music industry has expressed desire that the DSM Directive be adopted in its entirety. UK Music, the collective organisation bringing together AIM, BPI, FAC, Ivors Academy, MMF, MPA, the MPG, the MU, PPL and PRS for Music, campaigned that the Directive 'must be properly transposed into UK legislation' and that without it 'creators will continue to get a raw deal' (2019: 28). Nevertheless, while this transposition would include the Directive's measures for contract adjustment, it was in respect of its safe harbour provisions (EU 2019: art. 17) that UK Music's members had most common ground.

Transparency

In 2014, the European Commission reported on a public consultation it had undertaken to review EU copyright rules, including the finding that authors and performers felt 'the need for imposing transparency with regards to accounts and regular reporting by the publisher or producer to the author or performer' (2014: 79). Its subsequent Proposal for the DSM Directive included a transparency obligation, which among other purposes would provide authors and performers with the information needed so they could 'assess the continued economic value of their rights' (2016a: 20). This has been realised in article 19 of the DSM Directive:

> Member States shall ensure that authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due. (EU 2019: art. 19)

To a certain extent, this article is similar to the transparency measure in German legislation, whereby rights holders provide creators with 'information about the extent of the use of the work and the proceeds and benefits derived therefrom' (ACRR 1965: §32d(1)). There are some differences, however. One respect in which the German measure is stronger is that it extends transparency obligations 'further down the chain' (Bently et al. 2017: 62). Third party beneficiaries are obliged to provide 'information and accountability' about the proceeds and benefits they have gained from exploiting creators' works (ACRR 1965: §32e(1)). Conversely, there are ways in which the DSM Directive goes further than German law: the German transparency measure only applies where 'a right of use has been granted or transferred in return for payment', whereas the one in the DSM Directive 'applies in all cases'; the German law 'envisages a "request"', whereas the DSM Directive outlines an 'obligation'; the German law requires information 'once a year', the DSM Directive demands it 'on a regular basis'; and the German law excludes the 'transparency duty' in instances where 'the author has made only a secondary contribution to a work, product or service' or 'if the effort involved in providing the information would be disproportionate to the income generated from the use of the work' (Bently et al. 2017: 61).

Dutch law does not yet have a transparency obligation. Consequently, it has been difficult for authors and performers to 'substantiate a bestseller claim' (van Gompel et al. 2002: 4). Legal scholars in the Netherlands hope that the implementation of the DSM Directive will 'mitigate this problem' (2020: 4).

Kevin Brennan's Copyright (Rights and Remuneration of Musicians, Etc.) Bill backed its contract adjustment and right of revocation measures with a 'transparency obligation' that would help creators to gain 'up to date, comprehensible, relevant and complete information' (CRRMB 2021a: §§93D, 191N).

Fair Remuneration

Legislators and academics have argued for a holistic approach to contract legislation in copyright laws, whereby ex post methods that enable disproportionate contracts to be adjusted are accompanied by ex ante measures that support creators at the point of contractual negotiation. The aim is to create contractual terms that are fair from the outset and ultimately to mitigate the need for contract adjustment. It is the belief of Guibault, Salamanca and van Gompel that ex ante measures have the most 'impact on remuneration' (2015: 59); Bently and Ginsburg believe they 'may indeed offer the preferable path' (2010: 1586).

Ex ante measures can take various forms, including restrictions on the transfer of rights, limitations on buy-out agreements (see below), and measures that address the dissemination of works by new technologies (see below). Germany has been a pioneer in introducing a broader concept of 'fair remuneration' to copyright contracts, whereby the freedom to contract is tempered by measures that seek to ensure the equitability of the contract and avoid 'take it or leave it' contractual situations (legal expert, project interview). The ideal is that creators will not only be protected in respect of 'blatant abuse of negotiating power' but there will also be 'a general and comprehensive balancing of interests between authors and exploiters with regard to remuneration' (German Constitutional Court, quoted in Bently et al. 2017: 64).

In 2002, as part of its broader contractual reforms, a new section was introduced to German legislation, which states that 'If the agreed remuneration is not equitable, the author may require the other party to consent to a modification of the agreement so that the author is granted equitable remuneration' (ACRR 1965: §32(1)). Although this legislation does not outline specific payment rates, it states that the remuneration will be considered fair if 'at the time the agreement is concluded it corresponds to what is customary and fair in business relations' (ACRR 1965: §32(2)).

Dutch legislation has again been influenced by German practice. A 'fair compensation' clause was introduced in its copyright law as part of the 2015 Copyright Contracts Act (Hugenholtz 2016: 402).

A similar provision was recommended in the development of the DSM Directive but was not included in its first draft (Dusollier et al. 2014: 13-15). After lobbying from creator representatives, some of whom sought an unwaivable right to equitable remuneration (Aguilar 2019a; Bently et al. 2017: 77), the DSM Directive was re-drafted to include an article specifying that 'where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration' (EU 2019: art. 18(1)).

The fair remuneration measure in the DSM Directive allows for considerable flexibility in its implementation. The Directive states that 'Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests' (EU 2019: art. 18(1)).

Fair remuneration measures can have diverse effects. On the one hand, their imprecision can render them ineffective. The response to this in Germany has been to enhance the legislation with further measures, most notably in respect of joint remuneration agreements (see 'collective action' below). On the other hand, the vague terms of fair remuneration measures can witness them being applied broadly and thus encompassing both new

contracts and acting as a means of contract adjustment for older contracts. In Belgium, for example, the DSM Directive's fair remuneration measure has been utilised to create equitable remuneration for the streaming revenues of recording artists.[57] As with the residual equitable remuneration measure that currently exists in Spain, this payment will not replace the current recording rights distribution for on-demand streaming and will instead exist alongside it. The equitable remuneration will be non-recoupable from recording company advances. It is expected that it will account for only a small proportion of the overall streaming revenues, but it is possible that it could diminish the extant revenue shares for recording rights holders and as such the recording industry has opposed it, suggesting that it could result in a reduction in the amount of money that record companies have available to invest in new music (Cooke 2022c). Conversely, those who are in favour of applying equitable remuneration to streaming services are hoping that other EU countries will follow Belgium's lead (Cooke 2022c).[58]

Dispute Resolution Mechanisms

One criticism levelled at contract adjustment and fair remuneration legislation is that take-up by creators is low. This is, in part, due to the expense of raising complaints. The Fair Internet for Performers (FIFP) organisation has noted that creators have to go through 'long, costly and uncertain procedures in order to try and redress an imbalanced situation' (FIFP 2016). Guibault, Salamanca and van Gompel have complained that 'Having authors and performers challenge the contract can prove complex, expensive and time-consuming and thus impair the original purpose of the clause' (2015: 60).

To reduce the cost of bringing claims, the Dutch Act has facilitated a 'dispute resolution committee' (CCR 2015: art. 25g).[59] This idea has been taken up by the EU for its own 'alternative dispute resolution procedure', which aims to help 'authors and performers to enforce their rights without being subjected to the high cost and burden of judicial proceedings' (Dusollier et al. 2020: 20). The DSM Directive states that

> Member States shall provide that disputes concerning the transparency obligation under Article 19 and the contract adjustment mechanism under Article 20 may be submitted to a voluntary, alternative dispute resolution procedure. Member States shall ensure that representative organisations of authors and performers may initiate such procedures at the specific request of one or more authors or performers. (EU 2019: art. 21).

57 There has been some debate whether such a right is permissible within the remit of the DSM Directive. However, in July 2022, the EU Commissioner determined that the implementation of article 18 can encompass an equitable remuneration for performers (Cooke 2022d).

58 Chris Cooke notes that, because of the 'fair remuneration' measure in the DSM Directive, 'Germany added a new ER right for performers specifically linked to user-upload platforms, Belgium was set to do the same, but then extended the new ER right to cover all streaming services' (2022d). For the German legislation see the Act on the Copyright Liability of Content Sharing Service Providers (2021: §12).

59 Ahead of the implementation of the DSM Directive, Germany has not had a dispute resolution mechanism (Bently et al. 2017: 64). It has, however, had an arbitration board to help establish joint remuneration agreements (ACRR 1965: §36a).

Protocol 79 outlines the purpose of this measure:

> Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims by authors and performers, or by their representatives on their behalf. (EU 2019: protocol 79)

These supplements to contract adjustment legislation nevertheless have limitations of their own. According to Dutch scholars, the dispute resolution committee 'has by no means fulfilled its expectations' (van Gompel et al. 2020: 5). Participation in the committee is not compulsory and as a result has rarely been adhered to (van Gompel et al. 2020: 5). The EU's own alternative dispute resolution is also voluntary and as a result has been regarded as 'far too weak' (FIFP 2017).

Collective Action

The limited take-up of contract adjustment and fair remuneration measures is also due to fear of blacklisting. Dusollier et al. have stated that creators 'are hesitant to start legal proceedings before the courts, as they are afraid of damaging their relations with the rights holder' (2014: 40. See also Furgal 2020: 1).

This issue has been regarded as the main reason for the limited effect of the Dutch legislation (van Gompel et al. 2020: 4; DCMSSC 2021b: 4). Hugenholtz has stated that creators 'generally prefer to keep their peace' with their contractual counterparts 'for fear of losing future commissions or even of being "blacklisted"' (2021). As a means of resolving this difficulty, he has suggested that any dispute resolution mechanisms established because of the DSM Directive should 'allow anonymous and/or collective complaints on behalf of authors and performers' (2021). Dusollier et al. have stated similarly that 'Collective mechanisms of alternative dispute resolution and mediation procedures should be organised' (2014: 14). Van Gompel et al. agree that it should be made possible for creators to collectively 'and thus anonymously' raise complaints (2020: 5).

Blacklisting has also been encountered in Germany. When combined with the expense of raising claims, it has meant that contract adjustment actions have traditionally only been taken up by wealthy creators who have little to lose in taking rights holders to court (Peifer 2021: 818). German legislators have attempted to tackle this issue by accompanying their country's contract adjustment and fair remuneration provisions with measures that allow for 'joint remuneration agreements' in respect of copyright contracts (ACRR 1965: §36). These measures encourage the trade bodies of rights holders to work with creators' associations to establish 'equitable remuneration' rates for the exploitation of the creators' work (ACRR 1965: §§32, 36(1)). In this case, rather than supporting contract adjustment claims, the aim is to provide an alternative to them. If an agreement is in place, the contracting party is obliged to honour it in terms of at least a minimum rate of pay. In addition, if a creator's pay has been determined by a joint remuneration agreement, it cannot be deemed to be disproportionate and therefore they have no right to apply for further contractual adjustment (ACRR 1965: §36(4)). The situation is similar for newly negotiated contracts: if they have been determined by a joint remuneration agreement, they are regarded as being fair (ACRR 1965: §32(2)).

Other European countries have introduced similar legislation and practices. The Dutch Copyright Act includes a measure for 'fair compensation', but it applies only to the negotiation of new contracts (CCR 2015: art. 25c(2)).[60] In France, there is a strong tradition of collective bargaining to establish creators' rates of pay. In the UK, the MU/BPI agreement for non-featured performers' session rates provides a further example of a collective agreement.

Joint remuneration agreements will not be introduced throughout the EU, as the DSM Directive does not include a measure in this respect. The Directive nevertheless endorses collective bargaining (EU 2019: recitals 73, 78, 79). Moreover, its own contract adjustment measure is over-ridden if a collective bargaining agreement is in place (EU 2019: art. 20(1)).

Some legal experts believe that joint remuneration agreements provide the way forward in effectively facilitating contract adjustment and fair remuneration (Dusollier et al. 2014: 15; Guibault, Salamanca and van Gompel 2015: 114-15; Hugenholtz 2021; Dusollier et al. 2020: 2; van Gompel et al. 2020: 155). Difficulties can be encountered when establishing the necessary legislation, however:

- collectively negotiated remuneration rates can be viewed as infringing competition laws (Dussollier et al. 2014: 65; Dusollier et al. 2020: 10; Hugenholtz 2016: 402; Schack 2002: 857)

- there can be issues relating to the way that the payments of creators are delineated. Remuneration agreements are meant to apply only to the value of the transfer of the rights (ACRR 1965: §§32(1), 32a(1)). A creator's pay can nevertheless be made up various components, including the costs for their time and equipment. The value of each is rarely outlined separately in their contracts (van Gompel et al. 2020: 4)

- there can be a lack of will among rights holders to establish the remuneration rates. Germany has facilitated joint remuneration agreements since 2002, but there have been few collective accords outside of the literary fiction and film sectors (Bently et al. 2017: 65; Dusollier et al. 2014: 63). One reason for the lack of take up is that all parties must agree to the terms of the remuneration agreement; therefore, if one party stops bargaining, the negotiation 'is dead' (legal expert, project interview). To remedy this impasse, it has been suggested that there needs to be a more 'coercive mechanism' to make the legislation work (legal expert, project interview). In Holland, it is also the case that collective bargaining of remuneration has been 'slow to get off the ground' (van Gompel et al. 2020: 6). These agreements are 'hardly used' because, as in Germany, there is a lack of 'incentive' for rights holders to comply with them (van Gompel et al. 2020: 4). Consequently, there have been suggestions that the Dutch Copyright Act should 'include the possibility of a unilateral request if a bona fide attempt to reach a bilateral agreement has failed' (van Gompel et al. 2020: 4)

60 Article 25c(2) states: 'Our Minister of Education, Culture and Science may, having consulted an advisory body appointed by Order in Council and after consulting with Our Minister of Security and Justice, determine the amount of fair compensation for a specific sector and for a certain period of time' (CCR 2015); Article 25c(3) states: 'Our Minister of Education, Culture and Science shall only determine the fair compensation, as meant in the second paragraph, at the joint request of an association of makers existing in the relevant sector and a commercial user or an association of commercial users. This request shall contain jointly agreed advice regarding fair compensation and a clear definition of the sector to which the request relates (CCR 2015).

- stakeholders can place too much faith in collective solutions. Some commentators believe that joint remuneration agreements can only be effective if negotiated by truly 'representative' bodies of experts (Dusollier et al. 2020: 10; Schack 200: 856).

New Uses

In some creative sectors, it is the practice of rights holders to protect their interests in respect of new uses of works. They will include clauses in their contracts stating that their terms apply to technological means of distribution yet to be developed. It is on these grounds, for example, that recording contracts negotiated in the pre-digital era have been able to encompass on-demand streaming. This practice can work in the interests of creators, as it helps to facilitate the continuing availability of their works (Guibault, Salamanca and van Gompel 2015: 117-18). It can nevertheless pose problems in respect of fair payments. Royalty rates are regularly defaulted from the old use of the material to the new use,[61] but there are situations in which the rights holders' costs are reduced significantly, resulting in increased profits for them but no equivalent benefit for the creators. In such instances, it has not always been practicable to use contract adjustment measures to address the equitability of the division of payments. This is due to difficulties in classifying a rate that was previously regarded as fair as now being disproportionate.

To address this situation, some countries include measures in their copyright laws that specifically address new uses of works.[62] This legislation tends to apply to royalty contracts only, as lump sum payments by their nature usually embrace future uses of the creators' work (Schack 2002: 854; Guibault, Salamanca and van Gompel 2015: 147). In other respects, these measures have differed.

In some territories, it has been policy to prohibit the contractual transfer of rights in respect of technologies that are yet to emerge. Until 2008, this included Germany. The 1965 Act on Copyright and Related Rights stated that 'a licence purporting to grant rights with respect to unknown means of utilisation, and any obligation thereto shall have no effect' (ACRR 1965: §31(4)). When a new type of use was developed, the author would have the option whether to partner with their existing rights holder in respect of its exploitation. If they did choose to permit the use, the payment rate would have to be negotiated (Wandtke and Holzapfel 2004: 287). This measure was rescinded for two reasons. First, it stood in the way of the licensing of new services in the rapidly expanding digital environment (Wandtke and Holzapfel 2004: 289-90). Second, rights holders argued that, with the introduction into copyright law of a wider array of contract measures, the retention of the technology rule was excessive (legal expert, project interview). In 2008, it was replaced with a measure addressing 'contracts concerning unknown types of use' (ACRR 1965: §31a). Henceforth, rights holders have been permitted to acquire rights for unknown types of use, but this has to be agreed with the creator in writing (ACRR 1965: §31a(1)). In addition, at the point they

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[61] There are also instances in which creators are obliged to have a reduced royalty in respect of new technologies. For example, *Billboard* reported in 1992 that featured artists were receiving between thirty-five per cent to eight-five per cent of their contracted royalties in respect of compact discs, as they were still being expected to account for the 'manufacturing costs incurred' when this format was introduced (House Committee on the Judiciary 1994: 76).

[62] As well as being present in German, Dutch and French law, 'new use' measures are in the Belgian, Greek, Italian, Spanish, Hungarian, Polish and Lithuanian copyright laws (Dusollier et al. 2014: 135, 142; Guibault and Hugenholtz 2002: 149; Guibault, Salamanca and van Gompel 2015: 37). This is not the case in the UK, where creators are regularly asked to transfer 'the whole of the property, copyright and interest, present or future, vested or contingent' (Guibault and Hugenholtz 2002: 130).

intend to exploit a new type of use, they need to notify the creator of their intention to do so. The creator then has three months in which they can revoke the grant of rights; if they fail to do this, the rights holder can proceed with the exploitation of the new use (ACRR 1965: §31a(1)). Moreover, the creator cannot revoke the right if a joint remuneration agreement for the new use of the work is in place (ACRR 1965: §32(2)). Although these measures have been regarded by some as being weaker than the earlier 'new use' clause (Dusollier et al. 2014: 83), it has been suggested they could 'address the issue of a contractual remuneration that would be inconsistent with the effective digital exploitation of the work' (Dusollier et al. 2014: 71).

Dutch law has again been influenced by German practice. A 'new use' clause' was introduced in 2015 (Hugenholtz 2016: 402). However, it can be regarded as offering stronger protection to creators than the current German legislation, as it instructs that 'If the maker has granted exploitation rights for exploitation in a manner that is not yet known on conclusion of the contract and the other party commences exploitation, the latter will owe the maker additional fair compensation for this' (CCR 1965: art. 25c(6)).

In both the Netherlands and Germany the 'new use' measures are regarded as applying only to innovations that are transformative from the point of view of consumers and which have the capability to open up new markets (Wandtke and Holzapfel 2004: 290; Guibault and Hugenholtz 2002: 79). In German case law, for example, this precluded the compact disc from being defined as a new use, as this format was viewed as a being a variant on the vinyl record (Wandtke and Holzapfel 2004: 290). In the Netherlands it has been noted that 'digital broadcasting probably does not qualify as a new use, as compared to traditional broadcasting, whereas Internet streaming most likely will' (Hugenholtz 2016: 402).

French legislation has provided an alternative methodology. Here, the law permits 'the right to exploit a work in a form that is unforeseeable and not foreseen on the date of the contract' (CPI 1992: L. 131-6). There are nevertheless safeguards in respect of remuneration agreements, which in some instances allow creators to review contracts in respect of new uses. This includes Article L. 132-17-7, which has enabled literary authors to review financial terms in relation to digital publishing (Bently et al. 2017: 58). In addition, Article L. 212-14, which came into force in July 2016, has stipulated that performers whose works are fixed in phonograms are entitled to minimum remuneration for each mode of exploitation (Bently et al. 2017: 59). This measure has resulted in a payment agreement for on-demand streaming, agreed voluntarily in May 2022 'by all the unions and organisations representing music performers and producers' (Médiateur de la Musique 2022). The agreement stipulates for 'royalty rates higher than a minimum set between 10% and 13% depending on whether or not the producer handles its own distribution (reaching 28% for exclusive licensing deals) and establishes the principle of a rate enhancement in case of significant success' (Médiateur de la Musique 2022). The agreement also outlines minimum advance fees: '1000 euros (gross) per new album' and '500 euros for very small companies with a solidarity mechanism within the industry' (Médiateur de la Musique 2022).

A new use clause was recommended in reports that fed into the DSM Directive (EC 2014: 79; Dusollier et al. 2014: 104; Guibault, Salamanca and van Gompel 2015: 117-18). However, the published Directive does not include any such measure. This has been considered odd given that it is supposed to regulate issues relating to the digital market: the ECS felt that 'consideration could have been given to the particular economic context of digital modes of exploitations and their impact on a fair distribution of revenues between all actors involved' (Dusollier et al. 2020: 9).

Lump Sum Payments

Some European countries include measures in their copyright laws that address the transfer of rights for lump sum payments. At an extreme, they have prohibited this type of agreement, as lump sums have been viewed as being inherently disproportionate and therefore unfair (EC 2014: 79). There have commonly been exceptions to such provisions, however, and it is to protect against unfairness in these situations that contract adjustment legislation has been brought into play (Guibault and Hugenholtz 2002: 149-50).

Lump sum payments are restricted in France, Belgium, Greece, Italy, Spain and Portugal. There were also recommendations that the DSM Directive should include a prohibition on 'buyout' contracts (EC 2014: 82). These proposals are hinted at in the Directive's fair remuneration measure, which insists that payments must be 'proportionate' (EU 2019: art. 18). It is however moderated by recital 73, which maintains that a lump sum payment can 'constitute proportionate remuneration but it should not be the rule' (EU 2019: recital 73). The ECS has noted that 'Such derogations should be applied with caution […] to prevent the principle of a proportional remuneration becoming empty of any substance', and it has warned that they should not be used to 'justify "buy-out contracts", where all rights of an author or performer are acquired for any possible use against a one-off payment', as this would not represent an 'appropriate' remuneration (Dusollier et al. 2020: 15). Moreover, as Ananay Aguilar has indicated, the idea of a proportionate lump sum is difficult conceptually, given that such payments 'can only be proportionate in relation to a given value if this value is known or agreed in advance of exploitation, which history has shown is unlikely' (2019a).

Although Germany does not prohibit lump sums, it protects creators receiving this type of payment through the grant of a reversion right.[63] A new clause was introduced into the Copyright Act in 2016, which restricts the exclusive transfer of copyright for a lump sum payment to a period of ten years. At this point, the creator is 'entitled to exploit the work in another manner' if they wish (ACRR 1965: §40a(1)). The original rights holder is nevertheless entitled to continue with their own contracted use of the work (ACRR 1965: §40a(1)). In addition to applying to the authors of works, this measure applies to non-featured performers, even though the transfer of rights might make up only a small and undefined component of their pay (ACRR 1965: §79(2a)). However, as the rescinding of exclusivity does not apply if the creator is viewed as making 'only a secondary contribution', this might rule out the input of many session musicians (ACRR 1965: §40a(1)).

63 In addition, the German law stipulates that lump sum payments are subject to fair remuneration and need to 'be justified in the light of sector-related specificities' (ACRR 1965: §32(2)).

The recently agreed streaming royalty in France provides a different means to protect against disproportionality. As well as outlining a minimum lump sum payment for session musicians ('100 euros for a 40-minute album'), it includes progressive bonuses for them when streaming targets are reached ('about' 34 euros for 7.5 million streams and an 'additional' 42 euros for 15 million streams, etc.') (Médiateur de la Musique 2022). The head of one of the UK music industry trade bodies has posited that a similar scheme could be introduced in Britain (project interview).

3.3 Information on the Impact of Contract Adjustment

To assess the impact of contract adjustment legislation, this section looks at information that is available in relation to three topics:

- Take-up
- Financial gains and costs
- Knock-on effects

As with reversion rights, there is a good deal of speculation about the impact of these measures, but a lack of empirical studies. Here though, this paucity relates to each of these areas: there is a lack of information on take-up, as well as in relation to financial gains/costs and knock-on-effects.

3.3.1 Take-up

Contract adjustment measures have not always had a good press. In separate reviews of European legislation, they have been described by Bently et al. as being of 'limited effect' (2017: 84), by Dusollier et al. as 'inapt at solving the more general issue of uneven bargaining power' (2014: 71), and by Guibault, Salamanca and van Gompel as being 'complex, expensive and time-consuming' (2015: 60). Dutch legal scholars have stated that the contract adjustment measure in their country's legislation is 'rarely being invoked in practice' (van Gompel et al. 2020: 4). We have also heard from German scholars that, while they believe contract adjustment is 'the right idea', it needs to be developed 'until it works' (project interview).

These views need to put into context. First, they have been made in relation to particular aspects of the legislation, including its orientation to gross disproportionality and its limitations due to the expense of raising claims and the fear of blacklisting. The German Copyright Act, the Dutch Copyright Act and the DSM Directive have each attempted to tackle some of these issues. Second, there is a lack of data to back these arguments. There are no extant surveys relating to the number of contract adjustment claims that have been raised in Germany and the Netherlands, nor are there any figures outlining the rewards that have been gained. The implementation of the DSM Directive is meanwhile too recent to gauge its effects.

Given this lack of data, opinions on the take-up of contract adjustment legislation should be approached with caution. They do, however, point towards some similar results. In Germany, where contract adjustment has been in existence for a considerable time and has been bolstered by amendments to the law, we have heard that what began as a measure to address particular contractual circumstances has spread like a 'virus' throughout the creative industries (legal expert, project interview). However, rather than having an effect in terms of claims pursued through the courts, which remain limited, its main impact has been in relation to contractual claims that have been settled informally, including the renegotiation of music contracts (legal expert, project interview. See also EC 2016b: 187). The Netherlands introduced its contract adjustment legislation in 2015. Despite what is believed to be a limited uptake, it has been regarded as having 'a positive effect in the music sector'; this is because existing contracts 'are being renegotiated more frequently' (van Gompel et al. 2020: 4).

Other contract measures within copyright laws will, by their nature, have wider uptake. This includes the French minimum remuneration guarantee for streaming, which could result in contractual amendments for all recording artists who are currently receiving below the stipulated royalty rates for streaming. The Belgian fair remuneration measure will also have wide influence, although it will not result in direct changes to recording contracts and will instead provide a residual equitable remuneration for streaming that will exist separately to the royalties paid by recording companies.

3.3.2 Financial Gains and Costs

To assess the financial gains that creators have made through contract adjustment and the concomitant costs for rights holders, the following analysis is broken down into different means of implementing and activating these rights:

- First, in respect of contract adjustment cases pursued by individuals through courts or through dispute resolution mechanisms, there are to the best of our knowledge no surveys of the outcomes of these claims. In the 2016 impact assessment for the DSM Directive, the European Commission noted that financial information about contract adjustment is 'extremely limited' (EC 2016: 187). It added that 'Costs associated to the renegotiation of contracts are very difficult to estimate as they would depend on various factors as the number of relevant works, the scope of the assigned rights, the extent of changes that parties want to introduce and the current practices of remuneration negotiation' (EC 2016: 187). However, while there are few details of cases relating to the music industries, we have heard anecdotally that such cases are being raised. In addition, there are a few details relating to cases that have occurred within other creative sectors. In Germany, for example, the high-profile and long-lasting Das Boot case, brought by the film's cinematographer Jost Vacano, resulted in him receiving a payment of €462,000 on top of the €104,303 lump sum he was originally paid for his work (Peifer 2021: 814).

- Second, in respect of contract adjustment claims that have not reached the courts and have instead been settled informally, there are no details of the outcomes of these contractual renegotiations.

- Third, in respect of collective agreements, there is a mixture of lack of take-up, on the one hand, and lack of data, on the other. In Germany, it has been reported that joint remuneration agreement legislation has thus far failed to result in any collective agreements for the music industries. In the Netherlands, the Copyright Contract Act

has resulted in some 'progress' in terms of establishing collective agreements in the music sector (van Gompel et al. 2020: 6). However, the only music-related request that has been put forward to the Minister of Education, Culture and Science, which concerned a minimum remuneration rate for composers and lyricists, was ultimately rejected. Meanwhile, while the French minimum remuneration agreement for on-demand streaming provides detail in respect of royalty rates, lump sum payments and advances, it has not been accompanied by financial forecasts regarding its potential impact. Moreover, its implementation is too recent for there to be any data on its rewards and costs.

As can be discerned from the above, there is a paucity of data on the extent to which legislation has resulted in financial gains for creators and expenses for rights holders. Conducting research to fill this gap has been beyond the remit of this project but could be considered necessary should Britain choose to implement a right to contract adjustment. In addition, the concerns outlined in the section on implementation could be borne in mind before assessing the potential impact of the legislation. The points summarised below are of particular importance, as the financial implications (for both creators and rights holders) would differ considerably depending on how they are addressed:

- **The ability to address different forms of contractual agreement**. The effects of the legislation could be expanded if, through its interpretation of disproportionality, it addresses royalty contracts in addition to lump sum payments

- **The ability to address new uses of works**. The effects of the legislation could be expanded if it were enacted so it encompasses technological developments such as streaming. This could be accomplished through a contract adjustment measure or by a measure that specifically targets new means of distributing works

- **The ability to raise claims**. The effects of contract adjustment legislation could be expanded if it were accompanied by a mechanism for resolving disputes

- **The ability to address collective needs**. The effects of contract adjustment legislation could be expanded if it were accompanied by legislation that establishes fair rates of pay through joint remuneration agreements, particularly if these were made obligatory rather than voluntary

- **The ability to address contracts entered into prior to the legislation being enacted**. The effects of contract adjustment legislation would be expanded if it were made retroactive

3.3.3 Knock-on effects

Despite the lack of data, it can be suggested that best seller-type clauses are currently having limited effect in the music industries. The DSM Directive has nevertheless provided EU countries with the possibility of implementing contract adjustment rights that have the potential for greater impact. The DCMS Select Committee would also appear to want a contract adjustment right with a wide remit, as it has made it clear it should address royalty agreements.

If contract legislation were to have significant impact, it has been suggested that this could produce several knock-on effects. On the one hand, it has been claimed by trade bodies for music creators that the presence of impactful contract adjustment legislation would encourage rights holders to make general improvements to their contractual terms (project

interviews): there would be a need to do so to make them 'judge proof' (Greenfield and Osborn 2007: 15). On the other hand, there have been several suggestions regarding ways in which the legislation could have deleterious effects for some creators:

- First, if contract legislation were to result in significantly increased costs for the creative industries (both in relation to settling the disputes of creators and to costs of administration), these industries would counter this by realigning their contractual practices (Towse 2018: 483). There are various ways they could do so while still providing contracts that are viewed as being proportionate and/or fair:

    a) In respect of royalty contracts, they could reduce the scale of their advance payments.
    b) In respect of lump sum contracts, they could elect to instead pay the creators via royalty agreements. This idea would appear to run counter to some legislative thinking, which posits royalty agreements as being fairer than lump sum payments. However, Guibault, Salamanca and van Gompel have argued that 'In cases where works are particularly successful, the creator may indeed earn higher remuneration under proportional arrangements than under a lump-sum contract but the reverse may be true in the case of unsuccessful works' (2015: 111). The ECS has noted that, given the low success rates within the recording industry, this point is particularly pertinent in the case of non-featured performers (Dusollier et al. 2020: 5).
    c) They could cut their costs by reducing the number of creators they contract or hire.

    These arguments about knock-on effects are to a certain extent less salient in respect of contract adjustment than they are when it comes to rights reversion. This is because the purpose of contract adjustment is to address market distortion: it aims to rebalance the disproportionate distribution of revenues. In its impact assessment for the DSM Directive, the European Commission noted that 'Even though such measures would be very important for the affected individual creator, the direct impact on contractual counterparties would be limited since it would affect a limited number of contracts' (EC 2016: 188). One aspect of this legislation that could be of greater consequence, however, is if contract adjustment measures were to be backed by joint remuneration agreements, as these collective accords would recalibrate payments generally, rather than addressing specific instances of disproportionate returns. Contemplating the effects of such measures, Guibault, Salamanca and van Gompel have posited that 'the establishment of minimum remuneration terms may lead to a reduction in demand for authors and performers by exploiters, specifically those authors and performers whom the exploiters do not value sufficiently to be willing to offer a contract under the collective agreement' (2015: 115).

- Second, if contract legislation leads to a general increase in payment rates within a country, some rights holders might choose to contract with creators who reside or are working in countries that do not have contract adjustment legislation and thus are cheaper to employ. There is some evidence of this happening in practice. In relation to the book trade in Germany, where a joint remuneration agreement has been introduced, it has been reported that this has 'resulted in a drop in the translation market' (EC 2014: 80).

- Third, in relation to lump sum contracts in the recording industry, there is the question of who is ultimately responsible for any increases in payments that non-featured performers might gain from contract adjustment legislation. Although non-featured performers commonly contract with record companies and receive their payments from them, these costs are ultimately borne by featured artists, as they are recouped from their recording advances. Thus, benefits to one type of creator might result in costs to a different type of creator

Unfortunately, as is the case in respect of financial gains and costs, there is no financial data available on the knock-on effects of introducing contract legislation. This information would be desirable if the UK were to choose to implement these measures.

3.4 Stakeholders' Views on Contract Adjustment

In our interviews, as well as asking stakeholders about contract adjustment measures, we also asked them about provisions for new uses and for lump sum agreements. Stakeholders expressed contrasting views about the need for legislative reform. In general, the music creators' community expressed the need for strong measures to protect them in respect of copyright contracts, whilst the recording and publishing sectors maintained that existing provisions and industry practices are sufficient.

3.4.1 Stakeholder Views on Contract Adjustment Measures

Labels and publishers argued there is no need to introduce a contract adjustment clause. Whilst such measures have been founded on the basis that copyright contracts do not include appropriate measures to account for disproportionate success, labels and publishers pointed out that royalty payments escalate in proportion to how popular a song or recording is. They maintained that successful artists and songwriters tend to have strong negotiating power and ask for renegotiation as their music achieves commercial success. In this regard, the contract adjustment measure, in their view, would be unnecessary. A major label executive explained, "Record contracts have a royalty rate in them, the higher the sales the more royalties are concerned. There are usually escalations on those royalty rates in of themselves and then, in addition to that, any successful artist […] will renegotiate after one or two records anyway. So if an artist has success and you've only got two options, they quite understandably knock on the door after album one and say, if you want to carry on working with us on future albums, we think we need to revisit what the deal says."

Music publishers argued that there is no need for a contract adjustment clause in respect of their contracts. A publisher executive said, "There's an agreement which includes a revenue share in favour of the writer and that's by far and away the most common standard structure for a commercial music writer. And when you have a revenue share, there's a linear participation for the songwriter in any success. If something is more successful, they get more money. If something is less successful, they get less money. So there's no need for a bestseller clause in that kind of scenario."

A label executive emphasised that contract adjustment is rarely utilised in regions that have this legislation and that it is exercised only by those who are extremely successful. S/he said, "There are a number of European countries which have bestseller clauses, and I can

honestly say they are extremely rarely used in practice, and when they are, the only notable case I could come up with was the Elvis estate, one of the wealthiest artist's estates in the world. But I don't think bestseller clauses are meant for multi-million corporations to have a second bite of the cherry but that's the only people who really use them."

In contrast, members of the music creators' community argued that a contract adjustment clause would be useful, especially given that many legacy contracts tend to have low royalty rates and long duration of terms. It was also argued that today's artists can be in receipt of disproportionate deals. A manager explained, "You're a young kid, you make hot beats, you're in the studio with [a big name]. You sell him the beat for €500 or you sell him the beat for a 1% share of publishing. You then go back when that song is a number one record and ten years later you've grown up, you've realised you've got ripped off at the beginning. It's fair to go back and say, excuse me, that's my beat, you knew it that was worth way more than £500."

3.4.2 Stakeholder Views on New Use Measures

In general, labels and publishers argued that a new use measure would be unnecessary because their contracts are generally future proof. A label executive explained, "Most contracts are relatively future proof in terms of remunerating the artist; in so long as they're applying a royalty rate to the receipt of the company in the country of sale, whether that is a Spotify model or whether it's some of the new, emerging models, say Facebook, TikTok." When it comes to older contracts, s/he continued, although the new formats were not envisaged, the contracts are future-proof, in that they stipulate that "the record company would be selling their recordings on the format of the day […]. So what we're doing now, I suppose, is a logical extension of dealing with the world as we face it."

A label stakeholder argued that it is a misunderstanding that royalties are calculated in a way that is format specific. Instead, s/he argued, "artists are paid on a receipts model, so they get a percentage of the labels' receipts. So, in a sense, it's already future proofed […] even if the technology changed, and let's say it's some super TikTok, or Metaverse, form of exploitation of music, it will be a percentage of label receipts that goes to the artist and that should apply wherever." This view was echoed by a major record executive who confirmed that royalties for streaming are a clean percentage of the revenues at source, so if the royalty is, by way of example, 25% then the artist receives 25% of what the label actually receives as gross revenues." Likewise, publishers also emphasised their nimble approach in "adjusting to technology changes and the globalisation of rights." A publisher executive said, "The market is very nimble in reacting to technological changes and the globalisation of rights. It's nimble because it's competitive and it comes up with commercial solutions quicker than legislators and probably with less risk of unintended consequences partly because they understand the market and partly because where there are any unintended consequences, they also get corrected more quickly."

On the other hand, the music creators' community welcomed the potential introduction of such a clause, arguing that streaming will not be the last new technology that the music industries will encounter and have to deal with. It was noted too that there can be categorical difficulties with new uses, such as whether streaming should be understood in contractual terms as a licence or a sale. A new use clause, a former manager commented, would provide an opportunity to revisit terms in the future. S/he said, "The internet and digital delivery is a very good example of why that should exist because nobody can

foresee exactly what the delivery mechanisms are going to be for the future. So, the bulk of the catalogue, everything for the last 60/70 years will be there on a physical format, waiting to be unlocked. That will then require a different look at how people are compensated. Are you compensated for the mechanicals fixation or are you compensated for the usage? And is that usage equivalent of a sale or is it the equivalent of a broadcast? So all of this stuff is going to have to be revisited at some point and I think that a fundamental shift like that would require revisiting, and there would need to be some mechanism in contract law to make sure that it is revisited, to make sure that the treatment of both sides is still fair."

3.4.3 Stakeholder Views on Lump Sum Measures

We received differing views from stakeholders about measures for lump sum payments. The main desire for protection was raised by composers, among whom there was objection to the increasing prevalence of "buy out" contracts in the audio-visual sector. One writer stated that "commissioned music is an absolute car crash in terms of buyouts or life of copyright deals." Another media composer spoke of a trend for production companies "wanting to buy out a lot of rights that are traditionally the preserve of the writer in the first place." S/he noted that "The production companies think that they need to have all rights in this music, to be able to upsell their product in a contract to the digital platform, which is not necessarily the case but it's become a kind of perceived wisdom or a perception that these rights all need to be handed over if you want to have a chance to participate in digital streaming." Moreover, s/he stated that composers have been coerced into this transfer of rights on "take it or leave it" contracting terms.

There was, however, no expressed desire among composers to legislate for a general prohibition on lump sum payments. Instead, there was hope that this practice could be addressed through contract adjustment legislation or through a measure like the one enacted in Germany, whereby the exclusive transfer of copyright for a lump payment is restricted to a set number of years. Alternatively, one composer commented that "there need to be provisions" to prevent the transfer of rights.

Music publishers expressed a range of views on buy out contracts. One publisher stated that music publishers are "dead against" the lifetime transfer of mechanical and performing rights to production companies, but another expressed sympathy that these companies "need to know that they have the rights […] for the life of copyright, so that there's no interference with their ability to exploit the film, the TV programme, that that doesn't fragment." It was also argued that "a restriction or a prohibition on these downstream revenues being acquired by film and TV production companies will just push business away from UK songwriters". This is because there would be other jurisdictions where "local songwriters are willing to enter into these agreements and to agree to full buyouts of downstream rights."

Publishers noted that a general prohibition of lump sum contracts would prevent songwriters and composers from selling their catalogues to investment companies or music publishers. They therefore would not be able to "liquidate [their] post-mortem rights." In this context, one publisher suggested that, if legislation placed limits around lump sum contracts, it would be "taking options off the table for songwriters, because the entities (and often their bankers) that are willing to take the commercial risk of making investments in acquiring rights outright, often at very significant multiples and very high valuations, are

not going to be willing to do it if there's a possibility that their rights may be taken away from them at a later date."

Chapter 4: Industry-led Initiatives

4.1 Introduction

The British government has expressed its desire to solve problems of remuneration 'through an industry-led package of measures that artists and musicians support' (Freeman 2021: 1230). In doing so, it has echoed calls for voluntary measures and codes of conduct that have been made by creator representatives, as well as by some rights holders and their trade bodies. In respect of digital revenues, these demands have focused on two main areas: the implementation of minimum royalty rates and the waiving of unrecouped balances in respect of legacy contracts.

Trade bodies for songwriters and musicians would like these industry-led measures to be implemented in addition to legislation for rights reversion and contract adjustment. The FAC and MMF have campaigned about them for some time, insisting that 'legacy artists are paid the same royalty rate on old recordings as most new artists are on newer recordings', and that unrecouped balances are written off after a period of 15 years (2021: 6). Similar demands have been made by the MU, which has suggested a 15-year period for wiping out unrecouped balances (2021: 5). Tom Gray of the Broken Record campaign has argued that music companies should 'Cancel the unrecouped debts' (Dredge 2018).

Organisations for rights holders have different points of view. The BPI would prefer there to be no governmental intervention but has welcomed an 'individual' approach to waiving unrecouped balances (Dredge 2021). Impala, the trade body that represents music companies in Europe, has produced a '10-point action' plan, which includes commitments from record labels to 'pay artists a fair contemporary digital royalty rate' (2021).

4.2 The Implementation of Industry-led Initiatives

Some record companies have made voluntary moves in respect of these initiatives. In 2015, Britain's largest independent record company, the Beggars Group, implemented a 'base streaming rate' for all of its artists of 25% (Ingham 2019). It also introduced a policy of wiping out unrecouped advances 15 years after their 'active relationship' with artists has come to an end, which they have clarified as meaning fifteen years 'after the last record of an agreed contract is released' (Ingham 2019). This time period was chosen as it instigated a millennial start point for cancelling recoupment (project interview). Beggars' recoupment policy nevertheless operates on a rolling basis, meaning that as time goes on more artists become applicable for the clearing of their balances and the trigger point for cancelling recoupment moves forwards.

The Beggars Group has, in addition, argued that other labels should voluntarily make similar adjustments. In 2016, the company founder and chairman Martin Mills proposed that:

1. To win the support of performers, all labels — majors and indies — should commit to a 15% minimum royalty for digital exploitation for all existing contracts. Not as much as current norms, but way more than many heritage artists are paid.
2. They should also commit to the writing off of all artist balances after 20 years, so that after that point any earnings flow through (Ingham 2016)

An industry-wide policy has not been adopted, but some labels are undertaking their own initiatives. In a survey conducted by AIM in 2021, the organisation found that 19% of its members had policies of writing off unrecouped balances, with the average time for doing so being a period of ten years (2021: 15). In 2022, Defected Records introduced a minimum 30% royalty rate and a policy of writing off unrecouped debts for royalty accounts established prior to 2012 (Homewood 2022). BMG has a levelling-up initiative, whereby it is adjusting the legacy contracts of ethnic minority artists to ensure they are equivalent to those of white artists (Ingham 2020).

The three major music companies have also implemented policies:

- In June 2021, the Sony Music Group launched its ‘legacy unrecouped balance programme’. For recording artists signed to the company prior to the year 2000 and who have not received an advance since that date, it pledged to ‘pay through on existing unrecouped balances’ (Paine 2021). In doing so, Sony stressed that it was ‘not modifying existing contracts’: its policy was to ‘not apply’ unrecouped balances rather than wipe them out (Paine 2021).

- In July 2021, Sony Music expanded its legacy unrecouped balance programme to incorporate composers and lyricists

- In February 2022, the Warner Music Group introduced its own ‘legacy unrecouped advances program’, which follows Sony’s policy in ‘not applying’ unrecouped balances to recording artists and composers who signed with the company before the year 2000 and have not received an advance from them since then (Ingham 2022).

- In March 2022, the Universal Music Group launched its ‘worldwide goodwill program for certain legacy featured recording artists and songwriters’. As with Sony and Warner, the company will ‘not apply’ unrecouped balances to the royalty statements of contracted artists and songwriters who have not received advance payments since the year 2000 (Stassen 2022)

- In May 2022, Sony Music expanded its programme so eligibility is ‘on a rolling basis’, measured with each passing year in relation to twenty years since signing with the company and twenty years since receiving an advance (Malt 2022)

4.3 Information on the Impact of Industry-led Initiatives

To assess the impact of industry-led initiatives, this section looks at information that is available in relation to three topics:

- Take-up
- Financial gains and costs
- Knock-on effects

4.3.1 Take-up

As most of the industry-led initiatives are new, there is limited information on their take-up. The Beggars Group has reported, however, that around 24 new artists enter its programme every year and that, as of December 2022, 61 artists have benefitted in total (project interview). In addition, Sony Music has indicated that 'thousands of artists and songwriters' benefited from its programme during the first year of its operation (Malt 2022). We also heard from one of the other major companies that several thousand UK recording artists and several hundred UK songwriters will benefit from its programme of not applying unrecouped balances.

4.3.2 Financial Gains and Costs

In relation to financial gains and costs, the analysis needs to be broken down into initiatives that implement both minimum royalty rates and recoupment policies, and those that address recoupment only:

a) Minimum royalties and waiving of recoupment

The Beggars Group has reported that it is wiping out, on average, nearly £1m in unrecouped royalties every year (project interview). In addition, the total average annual royalties paid through to its artists as a result of wiping out recoupment and applying a minimum royalty rate amounts to over £75,000 (project interview). This average is increasing with each passing year, as more artists enter its programme. The company also noted that individual payments to artists can be significant, particularly if synchronisation licences are secured (project interview). It has also noted that the expense of wiping out recoupment would be greater for the major companies as they have a larger number of unrecouped artists (project interview).

b) Recoupment not being applied

Sony Music has indicated that the first year of its programme of not applying recoupment resulted in featured artists and songwriters receiving 'millions of dollars in new royalties' (Malt 2022). In our project interviews, we were informed by one of the majors that the present value of the additional royalties that will be paid under its worldwide legacy unrecouped balances program is in the mid eight figures in US dollars. Accordingly, the overall value of the program across all three majors would be significantly greater (project interview).

4.3.3 Knock-on Effects

In contrast to some of the claims that have been made about the financial impact of reversion rights or contract adjustment, there have been no suggestions from rights holders that their initiatives will have a knock-on effect on their contracting practices. It will nevertheless be worth monitoring whether the expense of these initiatives results in any reduction to advances, royalty rates or the number of creators being signed.

The Beggars Group has indicated that these initiatives can bring benefits to music companies. The increase in royalty payments encourages artists to work alongside labels 'in terms of exploiting their catalogue and working with them on rereleases and repackaging' (project interview). In addition, these artist-friendly policies can encourage new artists to sign with companies that have them in place (project interview).

4.4 Stakeholders' Views on Industry-led Initiatives

We gathered views from stakeholders regarding initiatives that have been implemented by individual companies in respect of waiving or not applying the recoupment of advances. In addition, we gathered views on minimum royalty rates and whether an industry-wide minimum would be desirable or practicable.

4.4.1 Stakeholder Views on Unrecouped Balances

As detailed above, several record companies have either wiped or not applied the unrecouped balances of music creators. The Beggars Group informed us that the main reason why they introduced their initiative was because, after economic consideration, they thought the cost was reasonable. An executive at Beggars explained, "An artist is maybe 50 years old and the costs of selling their music are considerably reduced because there's very few ongoing marketing costs and I just thought that would be a nice gift to the artist, to actually free them from the burden of that old balance at a time in their life when it could be of value. I got our finance people to run the numbers […] and I thought that sounds okay. Interestingly, the day that we decided to do it, we got an approach for a big sync on the first band we'd ever signed. That just felt like validation of doing that."

Label stakeholders stated that the decision to not apply unrecouped advances was reflective of their artist-friendly policies. A label executive confirmed that competitive forces have worked in the artists' favour, certainly in the streaming era and from 2000 onwards. Whether it was policy on breakages, on sharing equity and foregoing unrecouped balances.

Music creator stakeholders gave these initiatives a qualified welcome. We heard from creators who had received royalties for the first time as a result of these initiatives and were pleased about this change. An artist songwriter said, "I made money on that, because we had an enormous debt to [a major label]. […] I actually got royalties from them, I got about £1,500 / £2,000 or something. I was amazed." A former manager argued that these policies are "a clear admission of the fact that their [the labels'] position has been untenable." S/he commented, "Legacy contracts haven't actually been updated in any way. So they're still referring to all the same things, the packaging deductions, and I think it's quite telling that in

the last three months, all the major labels have now agreed to treat legacy artists differently. They are realising they're going to have to try and look a little better than they look so far."

Some criticisms were raised regarding the way the major companies are not wiping out recoupment and are instead "not applying" unrecouped advances, creating uncertainty whether the recoupment will be reinstated in the future. A musician said, "They're not actually forgiving the debt. What they're saying is we're just going to start paying royalties. The debt is not going anywhere. The debt will carry on sitting there in their books. They're not writing it off. What they're doing is they're saying we're going to pay you your royalty from now on if these things apply. So it doesn't mean they can't go back on it at a point in time when the political pressure has disappeared and the royalty rate they are paying will tend to be a historic one which is inappropriately low for the modern era. Is paying 5-10% in the streaming era appropriate? Certainly not when we see 25-30% rates as standard."

In respect of these criticisms, representatives of the major labels argued that a uniform measure would not suit the competitive nature of the business and emphasised that majors and independent labels have different business profiles and cannot therefore be compared. For example, it was argued that Beggars tend to pay lower advances than the majors, which would make it easier for them to wipe them out. A major label executive said, "It's horses for courses. I think you'd have to understand the nature of Beggars' business profile, the artists they're dealing with and the levels of advances they're paying […]. I think that companies often come up with programmes that are engineered around their own particular businesses and, therefore, they're not necessarily the right programme for the whole industry."

4.4.2 Stakeholder Views on Minimum Royalty Rates

Setting minimum royalty rates was supported by many stakeholders from the music creators' community, who felt they are necessary to ensure minimum standards. Several music creator stakeholders also expressed a desire for industry-wide minimums for royalty rates, outlined in codes of conduct. One music manager provided a comparison with minimum wage rates that have been introduced to protect workers in other sectors and argued that a minimum royalty would do the same for music creators. S/he stated, "There are plenty of other safeguards in other industries and for other forms of contracts […]. There are protections for the vulnerable employee. If you sign a contract and say you'll work for £6 an hour and actually the minimum wage of £10.35, even if you've signed a contract for £6, your employer is breaking the law." Another stakeholder representing music creators argued that a standardised minimum royalty rate would be particularly beneficial for legacy artists. S/he commented, "We have looked at whether labels could apply a minimum 10% royalty from the first stream, regardless of whether the artist is recouped or unrecouped, and regardless of the royalty rate in an existing contract. Alternatively, some labels offer a minimum digital royalty of 25% post-recoupment and it would be great to see this across the board (again, including on existing contracts). Some artists are on much lower rates and it's not acceptable given the success of streaming and the fact that many artists signed before it took off in any meaningful way." An artist manager added, "I'd personally like to see a minimum digital royalty rate across the industry of 25% as is currently being practised by the Beggars Group of record companies. Now I know that's not the easiest thing to do, certainly not in law but it should be an industry standard agreement and should apply to all recordings including catalogue recordings. You don't have to take it to Government and you don't need to change laws, nothing. Just say we

recommend that the minimum digital royalty rate should be 25%." Some music creator stakeholders were nevertheless sceptical whether a voluntary code of conduct would work. A manager stated, "codes of practice, unless they're backed up by law, they're just codes of practice. That's a box ticking exercise [...]. I don't think it really has any meaningful effect on the marketplace or the imbalance."

Although the Beggars Group has called for an industry-wide policy in respect of minimum royalty rates, some other rights holders we spoke to did not feel this was necessary or appropriate, taking into account the increase in royalty rates in the streaming era, and the full range of support provided by labels beyond the headline royalty rate (such as level of advances, marketing support etc). One label stakeholder argued that popularity needs to be seen as a key factor in how commercially successful an artist is. S/he stated that "Ultimately, we are in a popularity business, there's no escaping that. Sometimes we feel like what we're being asked to do is to pay a minimum amount of money to artists, even though they may not be popular enough with fans to succeed commercially from streaming."

In addition, rights holders suggested that a standardised minimum rate could disadvantage some artists, because it might result in lower royalty rates than they would have negotiated for. A label executive commented, "The problem with that is when artists come to us individually to renegotiate streaming rates, they end up in a better position than that." Another major label stakeholder stated that a minimum rate could go against artists who want higher advances rather than improved royalty rates.

Moreover, a representative of one of the trade bodies for rights holders argued that, regardless of the desirability of a minimum royalty, an industry-wide code of conduct would not be permissible 'because of competition law'. Another representative from a trade body stated that 'competition lawyers have been very clear with us that we cannot propose, or recommend, or encourage [out members] to agree on contractual terms, even one aspect of contractual terms like this'.

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