

RECAPTURING MASTER RECORDINGS

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Introduction

In the Parliamentary Inquiry into the Economics of Music Streaming Report (2021)¹ (“Parliamentary Report”) concerning the UK Music Industry and the lack of fairness and equitable remuneration perceived within the modern technologies associated with streaming music, it was recommended that Copyright law should be amended to provide authors, musicians, and other creatives with a “right to recapture” their copyrights². This recommendation, together with others concerning equitable remuneration in streaming and contract adjustment, was proposed to re-establish balance between creatives (composers and musicians) and those exploiting the works of the creatives (record companies and music publishers). The value of these rights can be seen by the recent spate of sales by heritage musicians of their catalogues of recordings and compositions including the sale by the Estate of David Bowie of the full publishing rights in his songs to Warner Chappell Music for reportedly in excess of \$250 Million³. The Government Response delayed a decision on the recommendation until after further research had been carried out, prompting a private members Bill⁴ (“the Bill”) sponsored by Kevin Brennan to be introduced into Parliament. This article considers some of the practical concerns of any such proposal for a right of recapture and considers some alternatives towards achieving the aim of balancing fairness.

Copyright

A master recording of a song will comprise multiple rights. The composition which is recorded will comprise both a musical copyright (in the music) and a literary copyright (in the lyrics), the initial ownership of which will be by the author or the composer. During the existence of the copyright (life of the author plus seventy years), the owner of copyright may assign and/or licence the whole or part of the copyright for the whole period of copyright or part thereof, as seen in the sale of the David Bowie publishing rights.⁵

The sound recording (or master recording as it is commonly referred to i.e., the recording of the performance of the composition) also has a copyright which subsists for a period now of 70 years from the date of recording or release. Although recordings are now seen as creative endeavours in themselves, the Copyright Designs and Patents Act 1988 (“CDPA”) provides that the “author” of the copyright, and thus initial owner, is the “producer” of the sound recording⁶. Section 178 defines that the “producer” means “in relation to a sound recording ..., the person by whom the arrangements

¹ For a summary of this, please see “The Economics of Music Streaming Inquiry” by Boshier (2022) Entertainment Law Review

² Digital, Culture, Media and Sport Committee, Economics of Music Streaming (House of Commons, 15 July 2021) HC 50, 123.

³ *Variety.com* (3rd January 2022) <https://variety.com/2022/music/news/david-bowie-publishing-catalog-acquired-warner-chappell-1235145941/>

⁴ Copyright (Rights and Remuneration of Musicians, Etc.) Bill

⁵ Copyright Designs and Patents Act 1988 ss 1, 3, 9, 11, 12, 90

⁶ Copyright Designs and Patents Act 1988 ss 1, 5A, 9, 11, 12

necessary for the making of the sound recording ... are undertaken”⁷. Somewhat counter-intuitively this is not the performers (the band or featured artist) nor indeed the record producer (responsible for the final sound of the master recording) but the persons arranging for the recording, most typically a Record Company, Production Company or even the Recording Studio, being the body that has financially made it possible for the recording to be made. The musicians who have performed on the recording have rights in the performances made by them⁸, which are generally of limited impact (the Performers Non-Property Rights⁹) or assigned to the Record Company that takes ownership of the sound recording copyright (the Performers Property Rights¹⁰) subject to provisions for equitable remuneration, the subject of discussion and recommendation in the Parliamentary Report¹¹.

Herein lies the problem with the proposed right of recapture. As the ownership of the master recordings copyright has never resided with the performers, any proposed right to reclaim copyright has no existing or past ownership to bite on. This is not the case for composers of the underlying song who as authors will have the initial ownership of copyright, and thus even if they have subsequently assigned copyright could have a right of copyright that could be recaptured. This article is focussing on the difficulties faced by artists recapturing the master recordings copyright.

The Right of Recapture of Master Recordings

The recommendation in the Parliamentary Report and taken up in the Bill was that composers and artists should have the right to revoke a contractual assignment of their rights after a period of twenty years and recapture their rights. Twenty years was said to be a period “longer than the periods where many labels write off bad debt but short enough to occur within an artist’s career”¹² and thus enable artists to be able to take control of their rights and exploit them either by re-licensing or by self-exploitation. The Bill proposed this by way of insertions into the CDPA of new sections 93F (for composers) and 191P (for performers).

The Position in the USA

The Parliamentary Report referred to the right to revoke and recapture as one used in the USA. Section 203 of the US Copyright Act 1976 provided that authors of copyright works could terminate any assignment or licence of copyright in that work made after 1st January 1978 by way of notice effective after 35 years from the date of the grant of the assignment or licence¹³. However, unlike UK Copyright law, section 201 provides that the first owner of copyrights in a sound recording are the author or authors of the sound recording, which is decided based on fact or agreement but is most normally the performers on the sound recording. Artists including Eagles, Bob Dylan and Tom Waits have successfully terminated assignments.

This right of termination is ineffective if the copyright is a “work-for-hire”, as in that case the first owner and author of the copyright would be the employer¹⁴ if the copyrighted work is made by an employee during employment, or a work commissioned and agreed within a contract that such work

⁷ Copyright Designs and Patents Act 1988 s 178

⁸ Copyright Designs and Patents Act 1988 ss 180 - 194

⁹ Copyright Designs and Patents Act 1988 s 192A

¹⁰ Copyright Designs and Patents Act 1988 s 191A

¹¹ See footnote 2

¹² See footnote 2

¹³ There is a five-year window for termination and recapture under the Copyright Act 1976

¹⁴ Copyright Act 1976 s 201

is designated as a work-for-hire. However, despite record company practice to designate all sound recordings as works-for-hire in contracts made with artists, under section 101¹⁵ sound recordings are not one of the categories of work which can be designated as a work-for-hire when commissioned. Attempts by record companies to argue that sound recordings fell into the definition of a work forming part of a “collective work” (typically defined as an encyclopaedia or anthology where different authors contribute to the overall work), arguing that an album of sound recordings was a collective work. It clearly does not fall into that definition, no matter what the contract signed between Record Company and artist stated. In almost all cases, artists are not employees of record companies, but contracts made between them are ones categorised as a joint venture, artists being independent contractors.

The experience in the USA has largely operated behind closed curtains with artists and companies entering into non-disclosure agreements following termination notices. Don Henley of the Eagles, a key proponent of using the termination provisions, had identified in an interview that in many cases artists who had served notice to terminate chose to use it as an opportunity to renegotiate their contracts for better royalty rates rather than take back control¹⁶. Given the window of between 35 and 40 years following release of the master recording as the period when recapture can happen, the average performer would be aged 60 to 80 or the provisions may be operated by their heirs, by which stage many artists would have lost that connection to the industry (although many such as the Rolling Stones continue touring well into their dotage) and it may well be the case that the heirs are not in a position to control the copyrights through lack of connection to the industry. Hence, the better the devil you know attitude. The right of termination may be illusory when the practicalities of dealing with the rights are beyond the artist. Not everyone has a catalogue of works as much in demand as David Bowie, Bruce Springsteen, or Bob Dylan¹⁷.

The case involving Duran Duran¹⁸ illustrates the difficulties associated with international acts within the music industry seeking to recapture rights. The case involved the members of Duran Duran terminating their publishing contract in respect of compositions, not master recordings, by service of notice under s203. The contract was stated to be worldwide, but subject to the law of England & Wales and the UK publisher obtained a declaration preventing them from breaching the contract as the notice would only have been effective in the USA. The norm has been that contracts signed by record companies and artists have been expressed to apply on a worldwide basis (or certainly a territory greater than the UK) and so any termination of contract and recapture of rights would only apply if the contract were to be subject to the laws of the jurisdiction giving the right to recapture.

Section 191HA of the CDPA

UK law already has a version of a right of recapture in the CDPA. Performers may recapture their performers rights¹⁹ in a sound recording assigned to the sound recording owner after 50 years (so that there are 20 years remaining of protection) provided that either a) there are not *sufficient quantities* of the sound recording issued to the public or b) that the sound recording has not been made available to the public by digital means. It is clear that the provision lacks real practical benefit with the period required to wait meaning it is almost impossible for an artist to have the continuing

¹⁵ Copyright Act 1976 s 101

¹⁶ *Rolling Stone.com* (2011) <https://www.rollingstone.com/music/music-news/don-henley-record-companies-not-going-to-roll-over-on-copyright-issue-237724/>

¹⁷ *Evening Standard* (5th January 2022) <https://www.standard.co.uk/business/music-royalties-hipgnosis-round-hill-music-bruce-springsteen-red-hot-chili-peppers-paul-simon-neil-young-b973536.html>

¹⁸ Gloucester Place Music Ltd v Simon Le Bon & Ors [2016] EWHC 3091 (Ch)

¹⁹ Copyright Designs and Patents Act s 191HA

business contacts to make use of the reacquired rights, nor the energy to try to navigate a changed music industry environment. It is also unlikely that their fanbase would still be of such a critical mass for them to buy sufficient copies of any release made by the artist. Further, the conditions required before rights may be reacquired are not ones that are easy to show. There is no definition as to what “sufficient quantities” of copies issued to the public might mean; and it would be unlikely that any performer would go to Court to seek a declaration about that. Especially as the second condition is that the sound recording needs to be made available for digital distribution – so that a member of the public may “access” the sound recording. This would imply that the sound recording could be available for purchase digitally, could be streamed via a service such as Spotify, or indeed even available on services such as Bandcamp. It is unlikely that any owner of a sound recording would be unable to fulfil the second condition easily, rendering this right virtually illusory.

Even if the performers rights were to be recaptured, this would not transfer to the artist the sound recording copyright in the recording, meaning that in order to exploit the recording embodying the artist’s performance, the artist would need to work with the owner of the sound recording, who, under the conditions in section 191HA CDPA, would appear to have an almost total disinterest in the recording. It is difficult to see how this may lead to a stream of income given an artist who made the recording at least 50 years previously, and unlikely to be available for a marketing push, allied to a record company more focused on newer artists and recordings. Yes, there may be specialist labels in certain genres looking to release archival recordings, but these tend hardly to be mass market exploitation.

The Copyright (Rights and Remuneration of Musicians, Etc.) Bill

In the Bill, the proposed s 191P would seem to duplicate the existing rights given to performers although there is no suggestion that s 191HA is to be repealed. S 191P proposes that performers who have transferred or exclusively licensed their rights in a sound recording, their performers’ property rights²⁰, for the whole of “any substantial part” of the performance, may after 20 years revoke the transfer or licence. This right is not possible to be waived or transferred but may be transmitted on death. Revocation is by giving of notice of not less than two years. The proposal has the merit of reducing the 50-year term in s 191HA down to 20 years which would mean that artists are more likely to be able to promote re-releases of their material. There seems to be no limited window for this right of revocation as applies in the USA, the time simply meaning that notice cannot take effect on any date until 20 years after the transfer or licence has taken place. It is also of interest that the proposal goes somewhat further than the call for the right of recapture made by Tom Gray of the #BrokenRecord campaign in his evidence submitted to the Inquiry leading to the Parliamentary Report²¹. In that he called for the right of recapture to apply only to recordings which had not been exploited by the companies which owned it.

However, the proposed section still has not overcome the difficulty that the revocation only applies to the performers’ property rights and does not give the featured artists the right to (re)claim the sound recording copyright without which the exercise of the performers’ property rights is limited, presumably limited to renegotiating with the record company which owns the sound recording rights. Of course, this issue does not apply to composers who utilising the mirror right under proposed s 93F would recapture their whole copyrights. Featured musicians who have entered into record contracts with record companies (and indeed often similar arrangements such as production agreements, but generally not pure distribution agreements where they would own the sound

²⁰ See footnote 10

²¹ <https://committees.parliament.uk/writtenevidence/10156/pdf/>

recording copyright prior to assignment), would not under the CDPA be treated as the author of the master recording and so not owner of the sound recording copyright.

There is a lack of clarity about the position of musicians who are not featured artists. If a master recording features musicians on the recording who are not featured artists but so-called session musicians, their performances are also qualifying performances and are generally subject to a buy-out assignment to the prospective copyright author/owner of the master recording. Such session musicians are entitled to equitable remuneration collected via the Phonographic Performance Limited for communications to the public (i.e., plays on radio) of that performance or plays in public²². This could lead to the anomalous situation where these buy-out contracts could be revoked either in isolation from other performances in the master recording or revoked at separate times, rendering the collective use of the individual performances in the master recording incoherent at best. This could very well mean that instead of greater exploitation (re-release) of the master recording (were that to be possible) the real result could be that the recording become unavailable and even less income is derived – the antithesis of the reasoning behind the proposed legislation.

The rationale for the 20-year period is that it balances the rights of the owners of the copyright in the master recordings to write off any debts and also is short enough for artists to still be involved sufficiently in the music industry to continue to exploit the performances. However, by calculating the period as from the date of the assignment / exclusive licence it does not mean that there is a single calculated period in the duration of the right, which at least s 191HA benefited from. If recordings are unreleased or unexploited, the 20-year window is a long period during which those recordings are not eligible to be earning income. At the time of writing of the article, there has been a new release of David Bowie's album *Toy: Toybox* which was recorded in 2000 but was languishing in the record company vaults until release as a complete album in 2021²³. Would a "use-it-or-lose-it" proposal be more effective from an artist's perspective? The process within the music industry is that renegotiation of contracts is common. Success and the exercise of option agreements extending the term of the arrangement can mean that the assignment or exclusive licensing can be repeated on several occasions. Could an artist terminate subsequent agreements by giving notice in respect of the initial licence? What would the position be where the first owner of the master recordings has sold those to other companies?

Will the period of 20 years apply retrospectively? At present the period of subsistence of the rights in performances and in sound recordings lasts for 70 years, covering now all recordings from the 1950s onwards. Retrospective application could mean recapture of performers rights on all recordings up until 2000. Prospective application would defer the first recaptures until 2042, assuming the legislation were to come into force this year. That is a long wait for current musicians who are the ones lobbying for the change in the law. What about the practicalities of the recapture once it has been successfully exercised? The owners of the sound recording copyright will normally hold the fully mixed master recordings and often the stems comprising the individually recorded performance elements which comprise the final master recording. Would those be returned to the performers? What would the position be if these recordings were no longer extant? For example, in

²² Copyright Designs and Patents Act 1988 s 181D

²³ Several tracks from the album were released as extra tracks on subsequent albums *Heathen* and *Reality* before the album formed part of the 2021 box set *Brilliant Adventure* and then seeing a release in 2022 as a stand-alone album

June 2008 a warehouse fire destroyed over 120,000 master recordings belonging to Universal Records²⁴.

The Bill, at the time of writing, has had its second reading in the House of Commons.

Recording Costs and Record Contracts

The narrative around the right of recapture is of course from the perspective of the artist (as is the narrative around the right to equitable remuneration from streaming). However, the position of the record company (shorthand here for owner of the copyright in the master recording) must also be considered. The rationale behind the record company owning the copyright in the sound recordings is that they have made the arrangements for the recordings to be made, essentially paid for the recordings to be made²⁵. However, the traditional method of this is that the record company would include the recording costs within the recoupable advance defined in the record contract. Recoupment would mean that the record company would be paid those recording costs back from the share of the sales royalties allocated to the artists. Until all these advances were fully recouped from sales generated by the master recordings, the artists would receive no further money by way of royalties. However, even if the advance were to have been fully recouped, meaning that the recording costs had now been paid by the artist, the rights would not be re-assigned or indeed assigned over to the artists by the record company. The record company therefore retained a valuable asset even once the term of the record contract had finished allowing them to further exploit that asset leaving the artist to negotiate with other record companies on the basis of future recordings and their past reputation, but crucially not their past recordings. Record companies would and have argued that the successful artists and their recordings are the return on their investments in both that artist and also in unsuccessful artists. In *Panayiotou*²⁶, it was argued by Sony that one successful artist was needed to return investment in 30 unsuccessful artists. There could be a practical risk that record companies would no longer invest in artists by paying recording costs. Whilst many artists are reducing recording costs by recording on home studio set ups, generally superior quality will be more costly and can deter young artists.

Problems and Proposals for Solutions

The rationale behind the proposal for a right of recapture is to enable musicians to enjoy greater rewards from their endeavours through re-promotion of old recordings, exploitation of those recordings by means of synchronisation licences and sample licences, a greater return from sales and streams, and where recordings are not available for public purchase (in its widest sense) to release these recordings and issue them to the public. To achieve these aims, musicians need to have control over not just their performers rights but crucially also the copyrights in the sound recordings. Without that duality (achieved in the USA), these aims cannot be met.

The solution would be to amend the CDPA to identify as the author and first owner of copyright the musician or musicians who are the featured artists on the recording. This would be to the detriment of session musicians whose contributions would have been bought out for a session fee and equitable remuneration. However, as authors and first owners, musicians would be on the same

²⁴ *New York Times* (11th June 2019) <https://www.nytimes.com/2019/06/11/magazine/universal-fire-master-recordings.html>

²⁵ See footnote 7

²⁶ *Panayiotou and others v. Sony Music Entertainment (UK) Ltd.* ([1994] ChD 142

footing vis a vis composers in actually having ownership of a right that can be recaptured following revocation of any agreement. Recovery of both performers' rights and copyright in the sound recording would give musicians full control over their master recordings and allow them to use those assets to negotiate further exploitation. In practical terms, aside from the right of recapture, it would be unlikely that there would be much effect from this change as existing contracts are normally drafted so as to assign all rights in the recordings without being specific as to the precise designation of those rights. It is unlikely that record companies would wish to disturb the joint venture nature of their relationships with featured musicians engaging them as employees so as to benefit from the provision whereby the employer becomes the first owner of copyright.

Such a provision would be relatively simple in the circumstance that the featured musician is a solo artist. It becomes somewhat more difficult in circumstances where there are a number of musicians. A band will generally over the years have fluctuating membership. Would the owners of copyright be the named members at the date of recording? Clearly that would be the case, but what would the position be should the individual members assign their share to the legal body representing the band? Would that be an assignment capable of biting on the right of recapture to the detriment of members of the band who joined after but may have contributed to the reputation and success of the band? And how would the authorship and ownership apply in recordings by orchestras?

A less clear reform would be to provide that the featured musicians are authors of the sound recording while the first owners would be jointly the featured musicians and the person responsible for arranging the sound recording, which would be analogous to the position that applies in respect of copyright for films under the CDPA. This could give greater control for musicians but would still require negotiated agreement with the company. Any right of recapture would most likely need for the record company to assign its share in the ownership of copyright to the musicians.

The Bill proposes a provision for contract adjustment²⁷. Maybe, with due deference to freedom of contract, the way forward is to give musicians greater protection when entering into contracts assigning or licensing rights related to sound recordings. Periods of exclusivity could be limited requiring any assignment to revert to a non-exclusive deal after a number of years. This could permit the musicians to enter into contracts with other record companies to release these recordings in competition to the original company. Repackaging of recordings in compilations can generate renewed interest in the musicians and this can be to the benefit of all parties. It is unlikely that record companies would invest so heavily in musicians if they knew they could only benefit from exclusivity of the rights for a short period, nor indeed pay royalties at a full rate possibly, but on the converse, it may ensure companies seek to maximise the returns available during the period of exclusivity.

The conditions attached to s 191HA CDPA provide that there must be a minimum availability of recordings available for purchase or available digitally. In terms of maintaining exclusivity of copyright, one not terribly attractive proposal would be to require minimum sales or return to the artist, failing which the copyright would be assigned back to the artist. In most record contracts the record company is under no obligation to release recordings within a set period or indeed at all. This leaves musicians potentially in a position where they have no potential for income at all aside from the residue of any advance paid on or prior to delivery of the master recordings. This was criticised by courts in cases where musicians applied to set aside contracts for restraint of trade²⁸. Potentially contracts should provide that record companies should release recordings within a short period of

²⁷ Copyright (Rights and Remuneration of Musicians, Etc.) Bill s 3(2) proposing s 191O

²⁸ ZTT -v- Johnson (1990) EIRP 175; Silvertone Records -v- Mountfield (1993) EMLR 152

time following delivery of the master recordings or assign the copyright to the musicians so they can seek to release them elsewhere. This would need an adjustment to the normal exclusivity provisions in contracts which would prevent musicians from recording for other record companies during the period of the contract. Also, such rights would cause issues around suspension provisions in the exclusive contract as rejection of the master recording would mean that the minimum recording commitment would not have been met during that period of the contract. Another contractual regulation could be to require the musician to receive a minimum annual payment in respect of rights in the sound recordings exclusively assigned to the record company. Given the reduction in income received by record companies from digital streaming services, such a proposal is very unlikely to be well received. It would almost certainly reduce the number of recordings released by record companies and reduce the number of artists they could take risks on. Independent record companies would be at significant risk of failing to generate such revenues in royalties for many releases by unknown artists. Failure to meet the minimum annual payment would be a trigger for assignment of copyright back to the musician or to trigger any exclusive assignment or licence to be non-exclusive.

Conclusion

The concerns raised by musicians about their income from streaming led to the Parliamentary Report, part of which was a recommendation about right of recapture of rights in sound recordings. The complexity of the rights involved had not been fully resolved in the Bill put forward by Kevin Brennan MP. As a Private Members Bill, it is unlikely to progress further onto the statute book, but it does not mean that the Government should not act proactively in seeking to balance the position of musicians and record companies. The US experience shows that a right to recapture rights can work. But for it to work in the UK, such recapture can only be effective if musicians are able to obtain both their performers rights and also the copyright in the sound recording.