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Rearranging the Roles of the Performer and the Composer in the Music Industry – the Potential Significance of Fisher v Brooker

Introduction

The composer has historically been at the top of the tree in the music industry; most royalties due to artists flow back to composers/songwriters rather than performers. Over the last few decades, the enactment of stronger performers' rights has sought to redress this historical imbalance by providing performers with, amongst a number of economic and moral rights, the right to receive equitable remuneration for the exploitation and use of their performances. However, this article explores the fact that there may be cases where performers may be 'authors' for the purpose of copyright, as opposed to performers' rights. Some original works of joint authorship – musical arrangements – may not have been traditionally recognised as such within the music industry. For instance, with regard to the making of arrangements by a group of musicians, it appears from recent UK case law that as long as a performing musician makes an original contribution to the creation of an arrangement, he or she will be a joint author of the resulting work. As a result of this, the performing musician is deserving of a share of copyright in that arrangement, and by analogy, a share of licensing revenue from the exploitation of the arrangement. However, this conclusion appears to be slightly at odds with historical practices within the music industry. Furthermore, this raises further a question concerning whether it ought to be the case that performers are potentially seen as joint authors in return for their creative contributions.

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In order to assess these issues in detail, this article first outlines the concept of the musical work under the CDPA, including analysis of the distinction between the composition and the arrangement. The article also discusses the historical hierarchy of musicians in the music industry, exploring the reasons why the composer of the work has traditional received more royalties than the performer of the work. An assessment of the originality of compositions and arrangements is also detailed over the course of this article. Furthermore, in order to properly assess the issues, the important UK cases in this area are examined, with a particular focus on the case of *Fisher v Brooker,* a case which clarifies to some degree the law on the making of musical arrangements, and which also deals with the complex licensing issues that can arise from finding that a band member is in fact a joint author of a recorded arrangement.

Ultimately, this article argues that the law on authorship and joint authorship in this area is clear - any musician who adds sufficient creative originality to a musical work during the performance and recording process is a joint author of the resulting arrangement. However, although the law is clear, the traditional practices of the music industry may not take account of this. For this reason, it is important that musicians in groups place their legal relationship to each other, and the works they create, in writing before they begin the artistic process.

Assessing the Nature of the Musical Work under the CDPA – Compositions and Arrangements

This article primarily focuses on copyright law issues in relation to musical works and the authorship and ownership of these works. Within the music industry, the copyright in the original musical work, which is sometimes referred to as copyright in the musical

'composition', is often a highly valuable copyright.[2] However, with respect to musical works, the copyright in the composition is not the only potentially significant copyright; in addition to the copyright in the original musical composition there may also be copyright in a subsequent original 'arrangement' of that composition. Before the issues of authorship, ownership and licensing can be examined in this article, it is first necessary to undertake an analysis of the distinction between these two different types of musical work. Moreover, before the distinction between these two distinct musical works can be properly assessed, it is necessary to discuss the definition of 'musical work' under UK law.

It is generally acknowledged that what amounts to a piece of 'music' is undoubtedly difficult, and perhaps impossible, to define.[3] Regarding the definition of 'music' for the purposes of copyright law, it has been stated that a 'reasonably liberal interpretation is called for'.[4] In line with this, Rahmatian has remarked that it is 'wise' that the legislature did not attempt to define 'music' when enacting the CDPA.[5] As detailed below, it is clear that the UK courts take a broad interpretation of what amounts to 'music' and what is encompassed by the 'musical work'.

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[2] See discussion of this copyright at 'PRS for Music', one of the major copyright collecting societies; accessible at http://www.prsformusic.com/aboutus/pages/default.aspx

[3] C. L. Saw, 'Protecting the sound of silence in 4`33`` - a timely revisit of basic principles in copyright law,' *European Intellectual Property Review* 27(12) (2005), 467, 469.

[4] Laddie also remarked that an original musical work is usually 'a combination of sounds appreciated by the ear for reasons other than linguistic content'. H. Laddie, P. Prescott and M. Vitoria, *The Modern Law of Copyright and Designs* (3rd ed.), (London: Butterworths, 2000), 79.

[5] A. Rahmatian, 'Music and Creativity as Perceived by Copyright Law,' *Intellectual Property Quarterly* 3 (2005), 267, 268.

The Court of Appeal decision in *Sawkins v Hyperion*[6] is the most recent, authoritative decision on the nature of the musical work under the CDPA. In *Sawkins*, the claimant successfully argued that he owned the copyright in performing editions that he had prepared of public domain works originally composed by Michel-Richard Lalande. In this case, Mummery L.J. stated that 'the essence of music is combining sounds for listening to'.[7] Mummery L.J. also remarked:

"Music is not the same as mere noise. The sound of music is intended to produce effects of some kind on the listener's emotions and intellect. The sounds may be produced by an organised performance on instruments played from a musical score, though that is not essential for the existence of the music or of copyright in it... There is no reason why, for example, a recording of a person's spontaneous singing, whistling or humming or improvisations of sounds by a group of people with or without musical instruments should not be regarded as 'music' for copyright purposes."[8]

It is clear that this notion of music is broad[9]; it is not limited to harmony or melody. Mummery L.J. further stated that it would be incorrect to 'single out the notes as uniquely

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[6] *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565; [2005] 1 W.L.R. 3281.

[7] *Sawkins v Hyperion Records Ltd* [2005] 1 W.L.R. 3281, para. 53.

[8] *Sawkins v Hyperion Records Ltd* [2005] 1 W.L.R. 3281, para. 53.

[9] L. Bently, 'Authorship of Popular Music under Copyright Law' *Information, Communication and Society* 12(2) (2009), 179, 184. S. Ricketson and J. Ginsburg, *International Copyright and Neighbouring Rights- The Berne Convention and Beyond* (2nd ed.), (Oxford, Oxford University Press, 2006), 426 and J. Pila, 'Copyright and its Categories of Original Works,' *Oxford Journal of Legal Studies* 30(2) (2010), 229, 236-242. For further discussion of this point see A. Barron, 'Copyright Law's Musical Work,' *Social and Legal Studies* 15(1) (2006), 101, 105-106 and 123-4.

significant for copyright purposes and to proceed to deny copyright to the other elements that make some contribution to the sound of the music when performed, such as performing indications, tempo and performance practice indicators'.[10] Therefore, it is clear that the 'musical work' under the CDPA can encompass not only notes of music, but also other elements of musical practice and performance. Nonetheless, in *Coffey v Warner*[11], it was held that a musical work cannot exist where it consists of mere 'extractions' from another work. Thus, to exist as a musical work in itself[12], a smaller work must be separable from a larger work.

Originality of Musical Works - Compositions

Under the CDPA, in addition to the requirement of fixation[13], the requirement of originality is must be satisfied before a musical work is protected under copyright law.[14] A composition

[10] *Sawkins v Hyperion Records Ltd* [2005] 1 W.L.R. 3281, para. 56.

[11] *Coffey v Warner/Chappell Music* [2005] FSR (34) 747.

[12] A song lyric is protected separately from an accompanying musical work. CDPA s 3(1) states that a literary work 'means any work, other than a dramatic or musical work, which is written, spoken or sung'. In addition, it has been noted that even though the human voice is an instrument, sung lyrics are not part of the musical work. *Peter Hayes v Phonogram Ltd* [2003] ECDR 110, see views of Blackburne J.

[13] CDPA s 3(2). Fixation is a basic requirement for copyright protection in the UK. See *Merchandising Corporation of America Inc v Harpbond Inc* [1983] FSR 32. The musical work must be fixed in a tangible form for copyright to subsist; until a melody is recorded or written down, it will not have copyright protection . Nonetheless, it has been held that a 'musical work' can exist before it is 'fixed' , as noted by Park J. in *Hadley v Kemp* [1999] E.M.L.R. 589. As Mummery L.J.. stated in in *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565, at para. 53, it is necessary that music be 'distinguished from the fact and the form of its fixation as a record of a musical composition... fixation in the written score or on a record is not itself the music in which copyright subsists'.

will only be protected as a musical work to the extent that it is sufficiently original. As discussed below, following the *Infopaq*[15] judgment of the European Court of Justice, it has been argued that the originality standard has now been effectively harmonised in the EU, which has potential significance for copyright in the UK.[16] On the other hand, even if this is the case, the traditional UK view of originality, as based upon 'origination' and 'skill, judgment and labour' may still be of relevance. With respect to the traditional view, Peterson J. stated in *University of London Press v University Tutorial Press*[17]:

"The originality which is required relates to the expression of thought. But the Act does not require that the expression be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author".[18]

It appears from Peterson J.'s remarks that the traditional view of 'originality' in UK copyright law is broadly defined.[19] In line with this, it has been noted that it is not necessary

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[14] CDPA s 1(1)(a).

[15] *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECDR 16.

[16] E. Declaye, 'Wonderful or Worrisome? The Impact of the ECJ Ruling in Infopaq on UK Copyright Law,' *European Intellectual Property Review* 5 (2010), 247. C. Handig, 'Infopaq International A/S v Danske Dagblades Forening (C-5/08): is the term "work" of the CDPA 1988 in line with the European Directives?' *European Intellectual Property Review* 32(2) (2010), 53.

[17] *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.

[18] *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, at 608-609. This case was cited in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 by Reid J. at 277.

[19] With respect to Peterson J.'s remark on the notion of 'expression of thought', the idea/expression dichotomy was discussed in the case of *LB (Plastics Ltd v Swish Products Ltd* [1979] RPC 551 at 619, 633, where it was noted that it is original skill in expression, rather than thought, that is protected by copyright. However, there is no mention of 'idea/expression' dichotomy in the CDPA. For further discussion see H. Laddie, P. Prescott and

that work be 'unprecedented'.[20] Indeed, the threshold for originality has traditionally not been high.[21] In *Ladbroke v William Hill*[22], Lord Reid noted that 'skill, judgment and labour' on the part of the author are the necessary requirements for establishing originality.[23]

At this point, it must be stated that the ECJ judgment in *Infopaq*[24] appears to point towards using the notion of 'intellectual creation' as a standard of originality for all copyright works within the EU. Previous to this case, this standard was mainly of significance in the UK as the standard for computer programs/databases following the coming into effect of the EU Information Society Directive.[25] However, this standard of 'intellectual creation' is now potentially of great importance in relation to originality of musical works under copyright in

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M. Vitoria, *The Modern Law of Copyright and Designs* (3rd ed.), (London: Butterworths, 2000), 98 and W. Cornish, D. Llewelyn and T. Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (7th ed.), (London, Sweet and Maxwell, 2010), 448.

[20] H. Laddie, P. Prescott and M. Vitoria, *The Modern Law of Copyright and Designs* (3rd ed.), (London: Butterworths, 2000), 84.

[21] *Redwood Music Ltd v Chappell & Co Ltd* [1982] RPC 109 (QBD). See also *Sawkins v Hyperion Records Ltd* [2005] 1 W.L.R. 3281.

[22] *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273.

[23] *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, 278. This principle of copyright protection, as founded upon the skill and labour of the author in creating the work, was further reflected in the court's decision in *Designers Guild Limited v Russell Williams (Textiles) Limited* [2001] FSR 113. However, not every case that features 'skill and labour' has resulted in a copyright work. See also *Exxon Corporation v Exxon Insurance Consultants* [1982] RPC 69, where it was held that despite skill and labour expounded, one word could not amount to a literary work.

[24] *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECDR 16.

[25] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22/06/2001; accessible at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML

the UK. To some commentators this presents a challenge to the standard of originality as it is applied in the national courts of the EU, including the courts of the UK.[26] In this view, the traditional *Ladbroke* requirements of 'skill, judgment and labour' have seemingly been replaced with a requirement based on the notion of 'intellectual creation'. Indeed, Handig has argued that the harmonised *Infopaq* standard is probably higher than the previous UK standard under the CDPA.[27]

Furthermore, in the recent case of *Newspaper Licensing Agency v Meltwater*[28] the Court of Appeal upheld the ruling of Proudman J. in the High Court that the *Infopaq* test of intellectual creation was the test for originality in the UK. However, the Court of Appeal argued that this was not a change to the classic idea of originality under UK law, as expressed in the case of *University of London Press v University Tutorial Press*[29], as being based on the idea of the work 'originating' with the author. In other words, the Court of Appeal was of the opinion that *Infopaq* did not change the standard of originality under UK copyright with regard to issues of requisite merit or novelty.[30]

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[26] E. Declaye, 'Wonderful or Worrisome? The Impact of the ECJ Ruling in Infopaq on UK Copyright Law,' *European Intellectual Property Review* 5 (2010), 247, 248. C. Handig, 'Infopaq International A/S v Danske Dagblades Forening (C-5/08): is the term "work" of the CDPA 1988 in line with the European Directives?' *European Intellectual Property Review* 32(2) (2010), 53, 56.

[27] C. Handig, 'Infopaq International A/S v Danske Dagblades Forening (C-5/08): is the term "work" of the CDPA 1988 in line with the European Directives?' *European Intellectual Property Review* 32(2) (2010), 53, 56.

[28] *Newspaper Licensing Agency v Meltwater* [2011] EWCA Civ 890; see also High Court of *Newspaper Licensing Agency v Meltwater* [2010] EWHC 3099 (Ch).

[29] *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.

[30] It is interesting to note, however, made no reference to 'skill, judgment and labour', despite the fact that *Ladbroke* was cited in the judgment. *Newspaper Licensing Agency v Meltwater* [2011] EWCA Civ 890 para. 19.

Nonetheless, even if the standard of originality had been changed by *Infopaq*, this may have had little relevance to the originality standard with respect to musical works. On this point Derclaye has remarked that the standard of intellectual creation merely illustrates that 'creativity is the criterion of originality'.[31] Therefore, with respect to the originality of musical works even if the originality standard had been altered by *Infopaq*, the classic understanding of originality, as discussed in *Sawkins*[32], would arguably still be highly relevant since, as Declaye has stated, it is arguable that most, if not all, 'musical works' can be described as 'creative' to some extent.[33]

Originality of Musical Works - Arrangements

As noted above, analysis of the distinction between the 'composition' and the 'arrangement' is of vital importance to this article. In line with this, it is clear that under the CDPA a separate copyright can exist in an 'arrangement' of a composition as long as the arrangement

[31] E. Declaye, 'Wonderful or Worrisome? The Impact of the ECJ Ruling in Infopaq on UK Copyright Law,' *European Intellectual Property Review* 5 (2010), 247, 248.

[32] *Sawkins v Hyperion Records Ltd* [2005] 1 W.L.R. 328 at para. 28-36. For an assessment of this aspect of the case see A. Rahmatian, 'The Concepts of 'Musical Work' and 'Originality' in UK Copyright Law - Sawkins v. Hyperion as a Test Case,' *International Review of Intellectual Property and Competition Law* 40 (5), 560.

[33] E. Declaye, 'Wonderful or Worrisome? The Impact of the ECJ Ruling in Infopaq on UK Copyright Law,' *European Intellectual Property Review* 5 (2010), 247, 249. Furthermore, if one takes the 'intentional view' advocated by J. Pila, 'An Intentional View of the Copyright Work,' *Modern Law Review* 71 (2008), 535, then if one intends to create a musical work and it accords with the broad Sawkins definition, then this arguably shows sufficient intellectual creativity to satisfy the Infopaq standard with respect to musical works. It is arguable that Dr. Sawkins did intend to create a musical work in the form of a performing edition that could be played by modern performers. In addition, the process of editing and filling in the gaps in the musical score was arguably an example of 'intellectual creativity'.

is sufficiently original[34] and the requisite originality comes from the arranger.[35] The owner of the original copyright in the composition is not the owner of the new arrangement copyright, which vests in the arranger.[36] The arranger has the same ownership rights under copyright over his or her arrangement as the composer has in relation to his or her composition, with the caveat that the arrangement would require a license for the use of the underlying composition. It is clear, therefore, that potentially copyright can recognise rights in multiple arrangements of the same composition.[37]

With respect to originality, it can be said that the same low threshold of 'originality' is sufficient in relation to answering the question of whether an adaptation of a work results in a

[34] *Austin v Columbia* [1917-1923] Mac. CC 398. See also *Robertson v Lewis* [1976] RPC 169. Further see *Lover v Davidson* (1856) 1 CBNS 182 (involving musical accompaniment to an old air) and *Wood v Boosey* (1868) LR 3 QB 223 (involving an operatic pianoforte score). In line with this, Arnold has remarked that it is clear that very little is actually required on the part of the arranger 'by way of changes to an antecedent musical work' for the arrangement to be sufficiently 'original, and thus capable of attracting a fresh copyright'. R. Arnold, 'Reflections on "The Triumph of Music": Copyrights and Performers' Rights in Music,' *Intellectual Property Quarterly* 2 (2010), 153, 158. See also L. Abramson and T. Bamford of Harbottle & Lewis in the June 2008 edition of *The In-House Lawyer*, 42; accessible at http://www.harbottle.com/hnl/upload/documents/Music%20Copyright.pdf.

[35] *Redwood Music Ltd v Chappell & Co Ltd* [1982] RPC 109 (QBD). However a straightforward 'cover' of a work may lack sufficient originality. On this point see also comments of Lewison J. in section 6 of 'Copyright Claims' in *Aston Barrett v. Universal Island Rec. Ltd* [2006] EWHC 1009 (Ch).

[36] This would usually be the case unless an alternative has been agreed between the two parties.

[37] It must be noted that the effective use of this copyright is subject to licensing requirements and the copyright in the new arrangement does not replace or nullify the copyright in the underlying work. An arranger of a copyright work must have obtained a licence from the owner of the underlying copyright work in order to release and publish the new arrangement because the right to make 'adaptations' is one of the rights of the copyright owner, as is clear from CDPA s 21.

new copyright work i.e. a new, original 'arrangement' of the antecedent compositional work.[38] Nevertheless, where the distinction between two different musical works i.e. the 'composition' and the 'arrangement' has not been clearly maintained, potential difficulties may arise, particularly in relation to cases involving joint authorship of musical arrangements and any related subsequent licensing disputes. In order to assess the significance of licensing in this context, it is necessary to discuss the various rights that apply to 'composers' and 'performers' in the context of the music industry, as well as to briefly outline the way composers and performers earn royalties from the exploitation of these rights.

Comparing the Positions of the Composer and the Performer in the Music Industry

During the 20th century, the music industry expanded rapidly. Indeed, by the end of the 1990s, the global music industry was a huge part of the world economy.[39] There is little doubt that the commercialisation of music, and the consequent expansion of the music industry over the course of the 20th century, could not have occurred without the enactment and enforcement of copyright law.[40] The music industry still largely operates on the basis that the

[38] *Redwood Music Ltd v Chappell & Co Ltd* [1982] RPC 109 (QBD). See also *Aston Barrett v. Universal Island Rec. Ltd* [2006] EWHC 1009 (Ch), comments of Lewison J. at para. 10 of the 'Copyright Claims' section. This standard would arguably satisfy the *Infopaq* 'intellectual creation' standard since the making of musical arrangements requires some degree of creativity.

[39] The peak year of global recorded music sales was 1996, with a figure of approximately US $39 billion in sales; accessible at http://news.bbc.co.uk/1/hi/business/3622285.stm - See further G. Lopes and K. Jopling (eds.), *The Recording Industry in Numbers* (London: IFPI, 2003).

[40] For instance, the Monopolies and Mergers Commission noted in 1994 that copyright is vital for the music industry; see generally Monopolies and Mergers Commission, *The Supply of Recorded Music: A Report by the Monopolies and Mergers Commission on the Supply in the UK of Pre-recorded Compact Discs, Vinyl Discs and Tapes Containing Music* Cm 2599 (London: HMSO, 1994); accessible at http://www.competition-

first owner of copyright in the musical work and/or the sound recording will assign, or license, the relevant economic rights to a publisher, record company, and/or collecting society for the purpose of exploitation. In particular, the role of the 'collecting societies' is crucial to music licensing. There are a number of music collecting societies operating within the UK and Ireland. These organisations collect and distribute copyright royalties on behalf of composers, performers and record companies.[41] For present purposes the important composers' collecting societies in the UK are the Mechanical Copyright Protection Society (MCPS) and the Performing Rights Society (PRS). 'PRS for Music' is the umbrella organisation that represents the interests of both PRS and MCPS.[42] These organisations operate in the UK, but generally these organisations maintain reciprocal agreements with equivalent organisations in other states.[43]

The composer, or in a pop band context, the 'songwriter', is typically the author of the original musical work.[44] By way of assignment or licence, a composer can either register a

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commission.org.uk/rep_pub/reports/1994/356recordedmusic.htm#full

[41] It is generally acknowledged that SACEM in France in 1851 was the first composers' collecting agency. R. Wallis, 'Copyright and Composers' in S. Frith and L. Marshall (eds.), *Music and Copyright* (Edinburgh: Edinburgh University Press, 2005, 2nd ed.), 103, 103.

[42] http://www.prsformusic.com/Pages/default.aspx

[43] K. Garnett, G. Davies and G. Harbottle, *Copinger and Skone James on the Law of Copyright* (London: Sweet & Maxwell Ltd, 2010, 16th ed.), 1656. It is noted that while 'public performance and national broadcast rights' would normally be licensed 'from the society in which the public performance or broadcast takes place, collecting societies (particularly within the EU) compete with each other to offer favourable terms to the major international record companies for reproduction rights' therefore a record company can choose to deal with only one EU society for all of its EU 'manufacturing licences'.

[44] Nevertheless, it has been said that the composer has traditionally been in a 'vulnerable' position within the music industry. R. Wallis, 'Copyright and the Composer,' in S. Frith and L. Marshall (eds.), *Music and*

composition with a collecting society or sign with a publisher 'who then retains a share of the revenues in return for assistance in promoting the work'.[45] Licensing is one of the primary ways that composers can earn money in the music industry. For example, although a large amount of music industry income is generated from the 'exploitation of recordings of performances of musical compositions', composers often earn more than performers.[46] In addition, a composer will receive two possible streams of royalty income; one based on mechanical royalties, via MCPS, and one based on performance royalties, via PRS. It may be the case that a performer will only receive one stream, as discussed below.[47]

Indeed, it is partially due to the rationale that copyright should reward authors, i.e. composers, that performers were traditionally given very few rights under copyright. This is no longer the case. During the last two decades performers' rights have been gradually expanded.[48] Of particular importance is the fact that performers are entitled to 'equitable

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Copyright (Edinburgh, Edinburgh University Press, 2004), 103.

[45] R. Wallis, 'Copyright and the Composer,' in S. Frith and L. Marshall (eds.), *Music and Copyright* (Edinburgh, Edinburgh University Press, 2004), 104.

[46] N. Parker, 'A Raw Deal for Performers: Part 1 – Term of Copyright,' *Entertainment Law Review* 17(6) (2006), 161, 161.

[47] The exact terms of the performer's contract will depend on the circumstances. J. Barnard, 'Performers Rights' (October 2005); article accessible at http://www.musiclawupdates.com/wp-content/uploads/pdf-articles/Article-Performers_Rights.pdf.

[48] *Rome Copyright Convention* (1928); Accessible at http://www.efc.ca/pages/law/canada/rome.copyright.1928.html

Dramatic and Musical Performers' Protection Act, 1958; accessible at http://www.opsi.gov.uk/acts/acts1958/pdf/ukpga_19580044_en.pdf

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961(hereafter known as the 'Rome Convention'); accessible at

remuneration' when their performances are broadcast or played on radio. The collecting society that distributes the 'equitable remuneration' to performers is Phonographic Performance Limited (PPL).[49]

Nonetheless, it has been noted that while the strength of performers' rights has increased over the last few decades, performers do not have equivalent rights to composers.[50] Furthermore, session musicians are commonly asked to sign a consent form detailing the limits of their rights over the works on which they perform, which is usually authorised by the Musician's Union or an equivalent union.[51] For this reason, a session musician will generally only be given a one off performance fee rather than a royalty over the recording.[52] Nonetheless, the CDPA[53] provides performers with the right to 'equitable remuneration' when sound recordings of their performances are broadcast e.g. on radio.[54] Depending on their record contracts, high profile performers may receive other income streams as well. Furthermore, performers, even if they are not composers, can still potentially earn large sums of money

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http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html

Performances (Moral Rights) Regulations, 2006; accessible at http://www.opsi.gov.uk/si/si2006/20060018.htm

[49] http://www.ppluk.com/

[50] R. Arnold, 'Are Performers Authors? Hadley v Kemp,' *European Intellectual Property Review* 21(9)(1999), 464, 464-465.

[51] N. Parker, 'A Raw Deal for Performers: Part 1 – Term of Copyright,' *Entertainment Law Review* 17(6) (2006), 161, 163.

[52]N. Parker, 'A Raw Deal for Performers: Part 1 – Term of Copyright,' *Entertainment Law Review* 17(6) (2006), 161, 163.

[53] This is the case following the 1996 and 2003 Regulations which amended the CDPA; accessible at http://www.legislation.gov.uk/uksi/1996/2967/contents/made; http://www.legislation.gov.uk/uksi/2003/2498/contents/made

[54] CDPA s 182CA . A performer also holds an 'equitable remuneration' right for 'rental'. CDPA s 191G.

within the music industry, though a substantial portion of this income often comes from earnings arising from live gigs. Nevertheless, it must be noted that even in the case of a performer who produces a unique and transcendent performance of a composition, the performer will still be required to pay a licensing fee to the composer of the work.

For the purposes of this article, it is also necessary to consider the position of a musical 'arranger' under copyright.[55] As noted above, copyright in an 'arrangement' can exist separately to the copyright in the underlying musical composition. In many types of music, 'arrangers' are often simultaneously the composers and/or performers of works, and thus, they sometimes do not claim a separate 'arrangement' copyright for their own released version of the composition, as this is arguably unnecessary. Nonetheless, in the case of joint authorship, maintaining a clearer demarcation between composition and 'arrangement' copyright could actually help to resolve some disputes. In addition, in certain forms of music such as blues, jazz and other forms of traditional music, it is quite common to claim copyright in the arrangement of a public domain work or a copyright work.[56] Further to this, in the pop music world there are some well known arrangers, such as Nelson Riddle, who are not major songwriters or performers, but are skilled arrangers.[57]

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[55] See - http://www.prsformusic.com/creators/memberresources/how_it_works/arrangements/pages/arrangements.aspx

[56] As noted above, where copyright is claimed over an arrangement of a copyright work, a licence will have to be paid to the owner of the copyright in the underlying work, and respect to moral rights should normally be made.

[57] http://www.nelsonriddlemusic.com/nr_bio.htm ; http://www.amazon.com/September-Rain-Life-Nelson-Riddle/dp/0823076725

For the purposes of this article, it is notable that 'performers' can sometimes also be 'arrangers'. However, if a performer is credited as the author of a particular arrangement, and this arrangement is then covered by another artist, the performer would rely on the rules of authorship under copyright, rather than performers' rights, in order to secure a licence for use of the arrangement. Crucially, due to the fact that a composition is often created by one songwriter, but the final released version is performed by a full band in the studio, it is possible that a legal dispute can arise, subsequent to the creation of a musical arrangement, about the authorship and ownership of that arrangement. If the arrangement is highly valuable, in terms of the potential for generating licensing revenue, this might provide an incentive to bring a case before the courts. In fact, as discussed below, a number of cases in this area have occurred along these lines in the UK.

Exploring the Distinction between the Composition and the Arrangement in UK Case Law

There have been a number of UK cases where a particular copyright arrangement has been the subject of a legal dispute. For instance, as outlined below, in both *Godfrey v Lees*[58] and *Beckingham v Hodgens*[59] the disputes centred on the joint authorship of the particular copyright arrangements in question. One reason that these kinds of disputes can occur many years subsequent to the recording and release of the musical work is that it is sometimes the case that the band members or musicians involved in the creation of the work did not discuss or come to an agreement regarding the distribution of rights in the work before they entered the recording studio. Furthermore, once a distinction is made by courts between an

[58] *Godfrey v Lees* [1995] E.M.L.R. 307 (Ch D).

[59] *Beckingham v Hodgens* [2002] EWHC 2143 (Ch); [2002] E.M.L.R. 45.

arrangement and an underlying work, previously unforeseen licensing complications may arise. As previously stated, the relevant issues of joint authorship are not considered in detail in this article. However, for the purposes of this article is necessary to note a number of issues concerning the cases and the particular arrangements in question.

In *Godfrey v Lees*, the dispute concerned the copyright in recorded 'arrangements' of a number of songs by the band Barclay James Harvest. The producer of the band had contributed string arrangements and other musical elements to the eventual released versions of the songs i.e. the musical works in question. The copyrights in the arrangements were correctly identified as being distinct from the copyright in the underlying works and the producer was awarded a share of joint authorship in the arrangements. However, the producer was estopped from claiming royalties as the court held that he had impliedly given a gratuitous licence to the defendants regarding the works in question**.**

In *Beckingham v Hodgens*, the dispute concerned the well known version of the song 'Young At Heart' released by the band 'The Bluebells'. The work in question was again recognised as an arrangement of the underlying work. It was found that the session musician, a violinist known as 'Bobby Valentino', had contributed the famous violin 'hook' to the arrangement. The court stated that he was entitled to be rewarded with a share in the joint authorship of the arrangement. Furthermore, unlike in *Godfrey*, the joint author in *Beckingham* was not prevented by the court from claiming royalties.

Despite the clarity found on these issues in the above judgments, it appears that when musical works are first composed and recorded, the distinction between the underlying work and the recorded arrangement of that work can often blur. It is further arguable that courts have

sometimes found it difficult to clarify the distinction. For instance, in *Hadley v Kemp*[60], a number of the band members of 'Spandau Ballet' took a case against a fellow band member Gary Kemp, arguing for a share in the copyright of a number of Spandau Ballet songs. Gary Kemp was the principal songwriter of the group. He wrote the lyrics, chords and basic melody to the song 'True', which was one of the group's biggest hits, and one of the works under dispute. One of the disputes over the song concerned its famous saxophone solo, which was played by Steve Norman, a band member. The solo lasted for 16 bars, approximately 9% of the song. Norman devised this solo around the chords that Kemp presented to him. The court ultimately held that the creation of the solo was not a 'significant and original contribution' to the work. Analysis of this notion of 'significant and original' with regard to joint authorship is not the subject of this article. For the purposes of this article it is interesting to note that with regard to the actual 'musical work' at issue in *Hadley* it is unclear as to whether the musical work, as composed and recorded in 'demo' form by Gary Kemp, was the same 'work' as the eventual version of 'True', as recorded by the entire band, or whether the eventual band recording was an original 'arrangement' of Kemp's composition.[61] Furthermore, Park J. did not make such a distinction in his judgment, which may indicate that the other band members were 'claiming co-authorship of the works themselves'.[62] Arnold has argued that either outcome could have been possible, had it been fully considered by the court.[63] It has further been noted that 'in assessing claims to co-authorship of musical works,

[60] *Hadley v Kemp* [1999] E.M.L.R. 589 (Ch D).

[61] R. Arnold, 'Reflections on "The Triumph of Music": Copyrights and Performers' Rights in Music,' *Intellectual Property Quarterly* 2 (2010), 153, 159.

[62] L. Bently, 'Authorship of Popular Music in UK Copyright Law,' *Information, Communication and Society* 12(2) (2009), 179, 191.

[63] R. Arnold, 'Are Performers Authors? Hadley v Kemp' *European Intellectual Property Review* 21(9) (1999), 464, 467-468.

the vital first step is for the court correctly to identify the work the subject of the claim to copyright and to distinguish it from any antecedent work'.[64] The fact that the court failed to do so arguably makes the judgement problematic[65]. Nevertheless, it has been stated that the judgment of the High Court in *Fisher v Brooker*,[66] the facts of which are broadly comparable with *Hadley*, did resolve some of these difficulties, particularly with regard to recognising joint authorship of arrangements among bandmembers.[67] This important case is discussed in detail below.

Fisher v Brooker in the High Court – Recognition of a Work but not an Arrangement?

In *Fisher*, the facts were similar in some respects to the *Hadley* case. In this case the circumstances surrounding the authorship of the famous song 'A Whiter Shade of Pale' were in dispute. This song became a huge hit in the 1960s, and it remains commercially valuable today, due in no small part to its popularity in the market for 'ringtones'. Gary Brooker had always been credited with the copyright in the musical work because he wrote the chords and melody of the song. The song lyric, protected under the CDPA as a literary work, was authored by Keith Reid. According to Gary Brooker, this basic version was originally

[64] R. Arnold, 'Reflections on "The Triumph of Music": Copyrights and Performers' Rights in Music,' *Intellectual Property Quarterly* 2 (2010), 153, 159.

[65] R. Arnold, 'Reflections on "The Triumph of Music": Copyrights and Performers' Rights in Music,' *Intellectual Property Quarterly* 2 (2010), 153, 159.

[66] *Fisher v Brooker* [2006] EWHC 3239 (Ch); [2007] E.M.L.R. 9, on appeal to the Court of Appeal in *Fisher v Brooker* [2008] EWCA Civ 287 and on appeal to House of Lords in *Fisher v Brooker* [2009] UKHL 41; [2009] 1 W.L.R. 1764.

[67] This point is made by L. Abramson and T. Bamford of Harbottle & Lewis in the June 2008 edition of *The In-House Lawyer*, 42-43; accessible at http://www.harbottle.com/hnl/upload/documents/Music%20Copyright.pdf

recorded as a bare 'demo'. This 'demo' version, referred to by Blackburne J. as 'the Song', was presented to the other band members, who then performed on the final recorded and released track 'A Whiter Shade of Pale', referred to by Blackburne J. as 'the Work'.

'A Whiter Shade of Pale' is perhaps most famous for its organ instrumental sections, which were created by band member Matthew Fisher during the performance and recording process. In this case, as with *Hadley*, the instrumental sections in question were created by a band member in response and counterpoint to a chord structure devised by the main songwriter of the group.[68]

Abramson and Bamford have asserted that since copyright in a song exists from the time it is reproduced in a material form, the original demo version created by Brooker and Reid i.e. 'the Song', was in fact the 'original work' in the case. The released version of the song i.e. 'the Work', which featured Fisher's organ solo, should therefore be regarded as an 'arrangement' of the original 'work'. The commentators noted that the High Court judgment in *Fisher* did not appear to agree that the demo 'version' of 'A White Shade of Pale' was a 'work' for the purpose of copyright. In fact the court appeared to consider the earlier version as a draft or something akin to that.[69] This has been described as a 'wrong' interpretation of the law by Abramson and Bamford.[70]

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[68] Interestingly, both 'the Song', as apparently initially presented to the band members in demo form by Gary Brooker, and the organ solo featured in 'the Work', which was devised by Matthew Fisher, were inspired and adapted to some extent from separate musical pieces originally composed by Bach i.e. musical works which reside in the public domain. *Fisher v Brooker* [2007] E.M.L.R. 9 at para. 36

[69] L. Abramson and T. Bamford of Harbottle & Lewis in the June 2008 edition of *The In-House Lawyer,* 42-43; accessible at http://www.harbottle.com/hnl/upload/documents/Music%20Copyright.pdf. See also comments of Blackburne J. in *Fisher v Brooker* [2007] E.M.L.R. 9 at para. 52-55.

In fact, as detailed further below, a number of licensing complexities could have arisen had Blackburne J. held that the work in question was the 'arrangement' of Brooker's antecedent composition. It is possible that these licensing concerns may have influenced the decision of the court in finding that there was no antecedent 'work'.[71] The arguments of Mr. Fisher's counsel, Mr Sutcliffe, were summarised by Blackburne J. in his judgment on this point:

"He submitted that an approach whereby each musician contributing to the arrangement, provided his contribution is significant (i.e. non-trivial) and original, can share in the copyright of the arrangement gives rise to practical problems. Thus, if a work exists in multiple versions, each entitling its authors to share in the publishing royalties arising from the exploitation of that version, the work will require multiple registrations with the collecting societies and sophisticated monitoring to ensure that royalties are paid to the correct parties. Second, he said, if the author of the original work is not one of the arrangers, steps will have to be taken to ensure that a share of the arranger's copyright is paid to the owner of that original work. Third, he said, if all the band members are in principle entitled to a publishing royalty, the result will inevitably be a drastic paring down of the share of royalties payable to the writer and publisher of the original work, especially if there is a

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[70] L. Abramson and T. Bamford of Harbottle & Lewis in the June 2008 edition of *The In-House Lawyer,* 42-43; accessible at http://www.harbottle.com/hnl/upload/documents/Music%20Copyright.pdf.

[71] *Fisher v Brooker* [2007] E.M.L.R. 9 at para. 52-58. See also A. Barron, 'Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice,' *Social and Legal Studies* 15(1) (2006), 25, 47. Barron noted that the fact that joint authors are generally held to be tenants-in-common i.e. holding equal shares, means that courts may be wary of multiplying the number of potential owners from whom licence must be obtained for various transactions.

multiplicity of versions. In those circumstances, he said, it was hardly surprising that this is not something to which writers and publishers have generally agreed."[72]

It is clear from the above argument that Mr. Sutcliffe considered that a finding that Matthew Fisher was actually a joint author of an 'arrangement' would lead to huge difficulties in practice, in particular regarding the distribution of licensing royalties. Nonetheless, his statement arguably reflects the legal reality – 'each musician contributing to the arrangement, provided his contribution is significant (i.e. non-trivial) and original, can share in the copyright of the arrangement'.[73]

Ultimately, in Blackburne J.'s opinion Fisher was a joint author of 'the Work'.[74] However in light of the above statement it is arguable that Blackburne J. sought to avoid dealing with the licensing complexities that would have arisen had he found that 'the Work' was an arrangement of 'the Song'. As discussed below the Court of Appeal explicitly clarified this point, albeit without stating that Blackburne J. had erred in his finding.

[72] *Fisher v Brooker* [2007] E.M.L.R. 9 at para. 50.

[73] *Fisher v Brooker* [2007] E.M.L.R. 9 at para. 50.

[74] This article does not deal with the issue of 'joint authorship' in relation to the Fisher case, a subject that has been dealt with comprehensively by other commentators. R. Arnold, 'Reflections on "The Triumph of Music": copyrights and performers' rights in Music,' *Intellectual Property Quarterly* 2 (2010), 153, 161-164. See also L. Bently, 'Authorship of Popular Music in UK Copyright Law,' *Information, Communication and Society* 12(2) (2009), 179, 191.

Fisher v Brooker in the Court of Appeal – the Arrangement Clarification

When judgment was handed down in the Court of Appeal, the court took the view that 'the Work' was, definitively, an original copyright arrangement of the original copyright work referred to in the High Court judgment as 'the Song'.[75] However Mummery L.J., giving the majority view, took this view without reference to the fact that the original trial judge, Blackburne J. did not correctly maintain the above distinction between 'the Song' and 'the Work' i.e. the underlying compositional work and the arrangement of that work. Mummery L.J. merely began his judgment with the presumption that 'the Work' was an arrangement of 'the Song' (which was also recognised as a 'work' in itself).[76]

Mummery L.J. also clarified the exact rights in question in the case. He made a clear distinction between the rights in 'the Song' i.e. the underlying musical work, the rights in the 'the Work' i.e. the arrangement' of that work, the rights in the eventual sound recording of the arrangement that was produced by the band, and the rights of the performers in relation to their performances on the recorded and released 'A Whiter Shade of Pale'. Mummery L.J. categorically stated that the case concerned the rights over 'the Work'[77] i.e. the arrangement. It is clear that Mummery L.J. realised the full legal ramifications of recognising that 'the Work' was an arrangement of 'the Song'.[78]

[75] *Fisher v Brooker* [2008] Bus. L.R. 1123 at para. 34, comments of Mummery L.J.

[76] *Fisher v Brooker* [2008] Bus. L.R. 1123 at para. 16, comments of Mummery L.J.

[77] *Fisher v Brooker* [2008] Bus. L.R. 1123 at para. 34, comments of Mummery L.J.

[78] *Fisher v Brooker* [2008] Bus. L.R. 1123 at para. 34, comments of Mummery L.J.

Crucially, in order for the arrangement to not amount to an infringement of the copyright in 'the Song', 'the Work' would need to have been correctly licensed by the copyright holders. In other words, once the Court of Appeal had correctly recognised that 'the Work' was an arrangement, it became necessary and unavoidable for the court to deal adequately with the crucial licensing issues that sprung from this recognition. Interestingly, Mummery L.J. dealt with the complicated licensing difficulties that arose from the finding that 'the work' was an arrangement by conveniently finding numerous implied licences which at various times involved the implied consent of Brooker, Fisher and Essex Music, and which covered the making of the arrangement and its subsequent exploitation. While the finding of these implied licences is arguably not a fait accompli, it is nonetheless arguable that the approach of Mummery L.J. is preferable to that of Blackburne J. on this issue, since Blackburne J. largely avoided the importance of the issue of licensing of arrangements.[79]

It is hard not to conclude that there was a teleogical element to Mummery L.J.'s reasoning in finding the implied licences. For example, Mummery L.J. was clear that in his opinion a finding which resulted in 'split' licensing rights was not in the interests of any of the parties involved, and he went on to emphasise that in finding that the implied licences existed, he was doing what was logical and necessary in light of the facts.[80] For instance, a fundamental question in the case concerned whether there existed an implied licence between the owners of copyright in 'the Song' and the makers of the arrangement known as 'the Work' which allowed for the making of and exploitation of the arrangement. In light of the facts of the case, the court accepted that there was an implied licence from Essex Music that authorised

[79] *Fisher v Brooker* [2008] Bus. L.R. 1123 at para. 101, comments of Mummery L.J.

[80] *Fisher v Brooker* [2008] Bus. L.R. 1123 at para. 102, comments of Mummery L.J.

the creation of 'the Work'.[81] It appears that Mummery L.J. relied on the 'necessity' of the existence of the implied licence in order to find that the licence did in fact exist.[82] However, it was also of crucial importance to the case to establish what exactly the effective terms of the licence were. On this point, the court found that in impliedly granting licence to make the arrangement, Essex Music were not attaching a condition that prevented Matthew Fisher from obtaining an interest in the jointly authored arrangement.[83] However, Mummery L.J. also held that although Fisher was entitled to be recognised as author of the arrangement i.e. 'the Work', he was not entitled to claim royalties as it was found that he had given an implied irrevocable licence to the defendants to exploit 'the Work'. This issue was appealed to the House of Lords, which ruled on point in 2009, as outlined below.

The House of Lords – The Final Word on the Royalty Question

The House of Lords in 2009[84] reversed the decision of the Court of Appeal in relation to the royalty question, concluding that Matthew Fisher was entitled to royalties. However, on this point it has been noted that the House of Lords decision may have an effect on the type of royalties that Matthew Fisher can claim:

"While judgment was given in favour of Fisher, the Law Lords' suggestion that the recording contract granted a royalty-free licence to Essex to exploit the song in the medium of the original recording takes some of the sheen off Fisher's victory. He will still be entitled to

[81] *Fisher v Brooker* [2008] Bus. L.R. 1123 at para. 94-97.

[82] *Fisher v Brooker* [2008] Bus. L.R. 1123 at para. 103, comments of Mummery L.J.

[83] *Fisher v Brooker* [2008] Bus. L.R. 1123 at para. 100, comments of Mummery L.J.

[84] *Fisher v Brooker* [2009] UKHL 41; [2009] 1 W.L.R. 1764.

royalty income from cover recordings and live performances, but, if the court is right, royalties from the song as it appears on the iconic first recording will be beyond his reach."[85]

Nonetheless, Baker and Lawson concluded that the case may have the effect of encouraging 'a stream of vexatious lawsuits' taken by former pop band members and session musicians in the near future.[86] With respect to the licensing of music within the industry, the *Fisher* saga is revealing in that with every judgment, from the High Cout to the House of Lords, a slightly different licensing arrangement was considered. From the High Court case it appeared that the court only recognised one copyright, 'the Work', of which Matthew Fisher was a joint author. The High Court also acknowledged that he was potentially entitled to licensing royalties governing the work. The Court of Appeal however stated that Matthew Fisher was a joint author of the 'arrangement', not the underlying composition, and furthermore the court held that he was not entitled to royalties for use of the arrangement because he had impliedly given a licence in this regard to the other relevant parties, Gary Brooker and Essex Music. Moreover, in the House of Lords, the court decided that Matthew Fisher was entitled to receive royalties for some of the rights concerning the 'arrangement', but that he had granted a royalty-free licence to the other parties governing the rights to the arrangment on the original released sound recording. The fact that three varying interpretations were given to the licensing arrangements in the above judgments illustrates the complexity of the issue of licensing in this context.

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[85] J. Baker and E. Lawson, 'Case Comment - Fisher v Brooker: "Whiter Shade of Pale" organist Matthew Fisher wins case in the House of Lords – but with a sting in the tail,' *Entertainment Law Review* 20(8) (2009), 296, 297-298.

[86] J. Baker and E. Lawson, 'Case Comment - Fisher v Brooker: "Whiter Shade of Pale" organist Matthew Fisher wins case in the House of Lords – but with a sting in the tail,' *Entertainment Law Review* 20(8) (2009), 296, 297-298.

Reconsidering the Role of Performers in the Music Industry – Should they be seen as 'Authors' of Arrangements?

It is quite possible that in the near future other 'unsung' performers, session musicians and other musical contributors will make copyright claims regarding other famous hit songs of the past – songs that from a copyright perspective may actually be most accurately described as jointly authored 'arrangements' distinct from the underlying musical works. Nonetheless, considering the fact that 'performers' rights' has largely developed to compensate performers for the fact that they generally do not benefit from 'authors' rights', is it now possible that some performers could end up with more rights than some composers? If this is the case, then the traditional music industry model has been slightly turned on its head. In fact, some performers i.e. those who can claim joint authorship of arrangements, could potentially begin to move towards the top of the revenue tree, with multiple streams of revenue coming from both performers' rights and copyright. A musician who is concurrently an arranger and performer would potentially be in a stronger position than a mere 'performer'.

In light of this, the question arises as to whether it ought to be the case that performers are potentially seen as joint authors in return for their creative contributions. In other words, given the increasing scope and value of performers' rights in recent decades, should performers be able to claim a right over jointly authored arrangements as well?

If copyright is envisaged as a way of encouraging and rewarding creativity in the musical context, copyright should surely encourage and reward the creative contributions of musicians in this way. Furthermore, it is these final arrangements that are released to the public, embodied in the original sound recordings, which are often the best and most valuable

versions of the ‘songs’. In fact, a particular musician’s creative contribution may be the most recognisable part of a song, as was arguably the case with respect to the organ part in ‘A Whiter Shade of Pale’, as described in *Fisher*. With this in mind, it seems fair that performers are entitled to be joint authors of the arrangements to which they add sufficient originality.

Nonetheless, even if such a position is legally and morally justifiable, if it is the case that performers are often joint authors of arrangements, this clearly has significant potential consequences for licensing within the music industry. For example, a musician who is a joint author of an arrangement is entitled, as a joint author of the work, to a royalty both in relation to subsequent recorded cover versions of that particular arrangement, via mechanical rights, and with regard to subsequent performances of that particular arrangement, via performing rights. As previously stated, and acknowledged by the courts, this would appear to add several layers of complexity to the licensing system. Due to the fact that the subsequent cover version of the arrangement would be derivative of both the original composition and the particular arrangement, a licence would be required from both the composer of the original work, and the arranger of the arrangement of that work. If there are multiple joint authors of the arrangement, because a number of group members have added creative contributions, all the joint authors would need to license the work. For the licensee this would not necessarily result in a more complex procedure, since a blanket licence fee is typically available for both mechanical rights and performing rights. However, the complexities would become apparent when the rights are distributed by the collecting societies among both the copyright owner of the original composition, and the original arrangement. It has traditionally been the case that the composer has received the lion’s share of this royalty revenue. However, if there are additional rights licensed over an original arrangement, the copyright owner of the arrangement copyright would also be due a royalty.

Some of these considerations are acknowledged in music industry practices. As previously noted, it is often the case that session musicians sign a musician's union contract stating that they are to receive a one-off fee rather than a royalty right resulting from their performances and contributions.[87] Band members may also sign an agreement with the principal songwriters in the band covering such issues.[88] However, in a case where there is no agreement otherwise between the members of a group, it would appear following the *Fisher* case that the de facto position is that a musician who adds sufficient originality to an existing composition during the performance and recording process will be a joint author of the resulting arrangement. Given the low threshold for originality, this is probably a more common occurrence than has traditionally been recognised in the music industry. It is no wonder that in the judgment of the Court of Appeal in *Fisher* Mummery L.J. warned musicians to put their relationship to each other in writing before commencing recording.[89]

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[87] Performances (Moral Rights) Regulations, 2006; accessible at http://www.opsi.gov.uk/si/si2006/20060018.htm. A number of sample draft contracts are accessible via the internet; http://theoryofmusic.wordpress.com/2009/02/24/draft-of-a-session-musicians-contract/; http://www.docstoc.com/docs/14855654/Musician-Work-for-Hire-Agreement; http://basschat.co.uk/index.php?s=e99eb19ff0ae8b4ea2c5f44f98e34b02&showtopic=2508&st=20&start=20; http://www.musiccontracts101.com/docs/sample/

[88] See discussion of music industry practices and the kinds of agreements that typically relate to these kinds of circumstances in *Fisher v Brooker* [2007] E.M.L.R. 9 at para. 61-62. Such an agreement was lacking in the case of *Joyce v Morrisey & Ors* [1998] EWCA Civ 1711; [1999] EMLR 233, which involved the defunct band 'The Smiths'. The principal songwriters, Johnny Marr and Stephen Morrissey were successfully sued by their fellow former band member, Michael Joyce, for a share in the songwriting royalties of the group.

[89] *Fisher v Brooker* [2008] Bus. L.R. 1123 at para. 105, comments of Mummery L.J.

Conclusion

Cases involving jointly authored arrangements potentially require courts to make difficult choices regarding how licensing revenue should be split in a case where a composition has been authored by one songwriter, but other members of a group have added creativity to the final recorded arrangement of the song. As discussed over the course of this article, the courts have not always decided these issues in a uniform way. However, despite the complexity that may arise, this article argues that the courts ought to be primarily guided by the tenets of copyright law, not by the traditional licensing practices of the music industry. These findings may in some cases lead to licensing considerations, and courts may have to stretch to find implied licences in order to take account of these considerations. Nonetheless, the way that licensing revenues are distributed is something for the music industry itself to deal with, not the courts. Furthermore, there has been much recent criticism of the collective licensing system[90], and particularly the inability of the music collecting societies to adapt sufficiently to the digital age, if an overhaul of the collecting societies does take place in the near future, it might be useful for the societies to consider whether the system can be tweaked to make it more flexible and accessible to musicians and users, with the licensing of both compositions and arrangements in mind.

[90] See generally W. J. Cardi, 'Uber-Middleman: Reshaping the Broken Landscape of Music Copyright,' *Iowa Law Review* 92 (2007), 835, S. Liebowitz and R. Watt, 'How to Best Ensure Remuneration for Creators in the Market for Music? Copyright and its Alternatives,' *Journal of Economic Surveys* 20(4) (2006), 513, P. Gyertyanfy, 'Collective Management of Music Rights in Europe after the CIASC decision,' *International Review of Intellectual Property and Competition Law* 41(1) (2010), 59.