

10 Views of industry bodies

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Collective licensing bodies

Mechanical Copyright Protection Society Limited

10.1. The MCPS is a member of the BCC, and a society representing as agent those who own, control or administer the rights in the UK to copy or to reproduce those musical works and their associated lyrics which are in copyright. The MCPS submitted written evidence to the MMC and attended a joint hearing with its parent body the Music Publishers' Association Limited (MPA). The MCPS has been owned since 1976 by the MPA (for the MPA's views see paragraphs 10.89 to 10.105). The MCPS's role and activities are scribed in Chapter 4.

10.2. The MCPS said that copyright was in essence a territorial right. Apart from the International Conventions (Rome and Berne) and the Treaty of Rome, it was subject to the national laws of each country. The aim of both the International Conventions and of domestic copyright legislation was to protect the original creative works of the composer and author. Copyright safeguarded the need for a composer as the creator of an original musical work to receive a fair reward for its exploitation by those who used it for their own commercial gain. That reward could only be derived from the royalties payable by users. This right of a composer to receive equitable remuneration was recognized in the revision to the Berne Copyright Convention signed at Stockholm in 1967.

10.3. Copyright owners of musical works could not in practice license and administer the inclusion of those works in sound recordings on an individual basis. Collective licensing on standard terms, including the royalties payable, recognized this reality.

10.4. It was important to clarify the position regarding the importation of records into the UK from third countries outside the EC and in particular from the USA. CA had suggested that the same open-borders policy should apply to imports of pre-recorded music from the USA as applied within the EC. In view of the purported lower cost of pre-priced recorded music in the USA, it had been argued that these lower-priced goods would act as a stimulus to competition in the UK market, and result in lower prices for the consumer.

10.5. The MCPS drew attention to recent evidence given to the NHC by W H Smith, a major retailer with a high percentage of the UK retail market for recorded music. W H Smith had pointed to many practical difficulties in the way of importing US products, quite apart from issues of copyright law. It would be necessary to import in bulk in order to get discounts; moreover, the attendant costs of stockholding and distribution would considerably erode any price advantage which could be passed down to the consumer.

10.6. Copyright owners had to be sure that imports of pirate material produced without any copyright licence were banned from entry into the UK. The MCPS stressed the importance of current copyright protection, in particular the right of the copyright owner to control importation under section 27 of the 1988 Copyright Act, in helping to control piracy. Any erosion of this right would undermine the basic principles of copyright law and make the control of piracy more difficult.

10.7. The MCPS said that the scale of imports of pre-recorded product from outside the EC under the MCPS/BPI Import Scheme had over the years been cyclical, depending in part on exchange rates, particularly the exchange rate between the US dollar and pound sterling. For example, if the US dollar was too high, imports of records made in the USA declined because their price to the consumer was above that of locally-produced products. The reverse was also true.

10.8. The MCPS noted that the NHC had recognized in its report that section 602 of the US Copyright Act:

prevents the importation into the USA from the UK of any CDs, tapes or LPs containing copyright material owned, controlled or licensed to American producers or publishers and that as a result of this trade barrier the UK's share of the American market had diminished from 34 per cent in 1985 to 14 per cent currently.

This legislation was much stronger than the comparable UK provisions. In addition, most US licences were for distribution within the USA. Exports in breach of such licences could not be totally prevented.

10.9. The MCPS stressed the potentially adverse effect of any relaxation of the law relating to parallel imports from the USA, if this was not matched by a similar relaxation in US law. The MCPS considered that the concept of reducing copyright protection to the lowest common denominator would damage the UK's creative abilities and would reduce its foreign earnings.

10.10. Unlike the UK, which had abolished its compulsory licensing procedure, the USA still had a compulsory licence, and record companies were able to force the low statutory royalties payable in the USA even further down by the operation of controlled composition clauses. If parallel import provisions were removed in the UK, the effect of the US statutory provisions and the controlled composition clauses would spread to the UK. The MCPS submitted that this would be a breach of the Berne Convention which provided that compulsory licence provisions only applied in the country in which they were imposed.

10.11. Finally, the MCPS said that the MMC should not consider only the roles of retailers and record companies, balanced against the interests of consumers. Composers were also an intrinsic and essential part of the music industry. Decisions which were taken regarding the production and distribution end of the industry should be considered in the context of the effects they would have on the composers and on the music publishers who represented them. The MCPS said that no erosion of copyright law and protection must take place. If it were to do so, that could be to the detriment of the creative parties, and also, ultimately, to the consumer.

Phonographic Performance Limited

10.12. PPL submitted written evidence and attended a hearing. Since 1934, PPL has licensed the UK Performance Copyrights in records, namely the right for third parties to broadcast and play recordings in public, on behalf of record companies (see paragraphs 4.73 to 4.77).

10.13. Commenting on the recommendations made by the MMC in their 1988 report,¹ PPL said that only two had not yet been implemented. The first was that all performers should receive equitable remuneration paid directly by PPL. PPL's revenues were distributed as follows: 67.5 per cent to the record companies, 20 per cent to named performers and 12.5 per cent to the MU for its session musicians. PPL said that in respect of the payments to the MU, negotiations were at an advanced stage, and PPL hoped that the question as to how the 12.5 per cent would now be distributed to session artists would be resolved. The moneys were being held on account. PPL said that it expected a settlement soon.

10.14. The second recommendation which had not yet been carried out related to the distribution of payments to named performers. PPL explained how matters had moved on since the 1988 recommendations were made. It was presently considering a new method of distribution based on more comprehensive sampling of Independent Local Radio broadcasts. PPL said that distribution relating to public performance was the least satisfactory part of its operation. At the moment the vast bulk of the money which was distributed was on the basis of Radio 1 and 2 broadcasting returns. PPL was now considering basing its distribution of public performance revenue principally on usage returns from relevant licensees.

10.15. PPL confirmed that all member companies and artists, whether in specialized repertoire or popular, whether large or small, famous or unknown, would get the same rate of remuneration per second or per minute of playing time if their record was shown on a broadcasting usage return.

10.16. PPL told the MMC that it was currently considering proposals to change the 'Rules of Admissibility' to full membership of the organization. At present, of the 1,483 members, 21 were full members; the remainder had associate status. The intention was to increase the number of full members of the organization and substantially widen the 'franchise'.

10.17. No decision about changes to PPL's membership rules had been made by the time our inquiry was completed.

Performing Right Society Limited

10.18. The PRS has 2,453 publisher members and 24,602 composer members. It administers the performing rights of composers, authors and publishers (see paragraphs 4.78 to 4.80). The PRS said that it associated itself fully with the views expressed by the MCPS (see paragraphs 10.1 to 10.11). Any erosion in copyright protection would be harmful to its members. Moreover, since the copyright regime existed in order to provide economic incentives to creators, if those incentives were to be diminished, so too would be the output of those creators, and this would be to the detriment of society generally.

Video Performance Limited

10.19. VPL submitted written evidence and attended a hearing. VPL originated in 1984 as a collecting society to license the UK public performance and broadcasting rights in music videos owned or controlled by its members (see paragraphs 4.81 and 4.82).

10.20. Referring to the EC complaint and UK court case brought against it by MTVE (see paragraph 10.138), PPL said that it had made clear in its various submissions to the EC Commission that it had little doubt that MTVE's objective in seeking to negotiate rates individually with the record companies for use of

¹ *Collective Licensing: a report on certain practices in the Collective Licensing of Public Performance and Broadcasting Rights in Sound Recordings*, Cmnd 530, December 1988.

their music videos was to create for itself in Europe the same dominant position as its sister company, MTV, already enjoyed in the USA. If, as a result of pressure from MTVE through its various legal actions, collective licensing of music videos through VPL were no longer possible, it would be the smaller VPL members who would suffer even more than the majors. The majors enjoyed a sufficient degree of bargaining power to ensure that they would still receive payment for use of their videos. Smaller companies, on the other hand, would be likely to find that they received little or no payment. Once the principle of 'pay for play' was undermined in this way, the whole value of copyright in recorded music (including music videos) would also be undermined, with potentially very serious consequences for the whole music industry.

10.21. VPL explained that it received moneys from the broadcasters over the year and then distributed those moneys to its members, after deduction of expenses, on the basis of the actual usage made of each member's videos. Distributions were made annually with two payments on account during the year. VPL estimated that between 75 and 80 per cent of the titles it licensed were produced by the major record companies.

10.22. VPL said that any move away from a single negotiation by VPL on behalf of its members to a situation where each record company had to arrange fees itself with broadcasters would be a potentially very serious problem for independents.

Representative bodies in the industry

International Federation of the Phonographic Industry

10.23. The IFPI submitted written evidence and attended a hearing. It represents the world-wide recording industry with a membership of 1,055 members in 72 countries; in the UK its member companies are organized in the BPI (see paragraphs 4.85 and 4.86).

10.24. The IFPI said that there was a wide diversity of economic, commercial and legal infrastructures across the different countries having copyright laws. These shaped decisions about when and where, and on what terms, records were manufactured and distributed. International copyright and neighbouring rights protection of sound recordings varied so widely that new recordings were likely always to find themselves completely unprotected in several countries and subject to limited protection in many others. In so basic a matter as duration of copyright protection, for example, national laws were still far from uniform. To deprive authors, performers and producers of the ability to protect the rights they enjoyed in states with strong copyright laws from exports originating in states that failed to respect their interests would be generally harmful. But, of equal concern to the public interest, it allowed the indifference to authors, performers and producers reflected in one country's laws to thwart the cultural and economic policies of other countries that vigorously promoted creativity through generous copyright systems.

10.25. In a world characterized by sharply uneven levels of intellectual property protection accorded to record producers, the role of importation rights had become critical. The IFPI believed that the importance of importation rights was becoming more widely recognized in national laws, in the negotiation of new treaties and other international agreements and in the developing rules of the EC.

10.26. The IFPI said that there was an absolute need for a right to authorize or prohibit the importation of sound recordings and any reduction of the importation right now provided in the 1988 Copyright Act would be contrary to the international trend to recognize such a right in national legislations and would raise conflicts with obligations existing under EC law.

10.27. The right to authorize or prohibit importation served the public interest, because parallel imports tended to have an unfavourable effect on national art and culture. The consequences of parallel imports for national cultural heritage included a smaller range of recorded music available to the general public and a limitation on the funds for the promotion of national arts and artists. Depriving intellectual property owners of a specific importation right would mean acting against a prosperous national cultural heritage, and it would also have a negative influence on the fight against piracy, given the difficulties in distinguishing legitimate from illegal copies.

10.28. The IFPI concluded that this was why the majority of countries provided a right to authorize or prohibit the importation of copies of works. Some of these rights had been introduced fairly recently and it seemed that more countries were set to follow these examples. In the member states of the EC such a right was required under the terms of the EC Rental Directive, which had to be implemented by member states by 1 July 1994.

British Phonographic Industry Limited

10.29. The BPI held meetings with MMC staff, commented on draft MMC questionnaires and surveys, and submitted written evidence, including a submission representing the views of the BPI independent record company membership, and an economic study commissioned by the BPI and carried out by National Economic Research Associates (NERA), which addressed the question of how the independent sector could be affected by a significant reduction in the prices of CDs. The BPI also attended a hearing.

10.30. The BPI is a trade association which represents a variety of different manufacturers, producers and sellers of all forms of phonograms, including vinyl discs, CDs and audio cassettes (see paragraphs 4.83 and 4.84). The BPI explained that its membership was open, on an entirely transparent and non-discriminatory basis, to any UK company which was engaged in the production of records or audio-visual recordings, or which was engaged in the business of selling records under its own label or trade mark. The BPI emphasized the importance of the role played by the independent company representatives on BPI committees and the BPI Council. There was currently a majority of independent Council representatives.

10.31. The BPI said that the MCPS/BPI Joint Licensing Scheme (the Scheme) facilitated rather than frustrated the importation of sound recordings into the UK and was of positive assistance in the licensing of imported copyright works into the UK. It said that the Scheme enabled unnecessary anti-piracy actions to be avoided and it preserved the integrity of domestic copyright protection. We were told that, prior to the BPI's involvement in the Scheme, the MCPS was only able to license to importers the copyright in a musical work and therefore an importer had to approach each record company individually for a separate licence in respect of the sound recording. This had caused many problems for importers, who had often thought, incorrectly, that they were licensed both in respect of the musical work and the sound recording, whilst in fact they were only licensed for the copyright in the musical work.

10.32. The BPI explained that it received, for distribution to its members, half of the royalties received under the Scheme after deduction of the MCPS's commission. This payment was not intended to be compensatory, but was recognition of the fact that, in the absence of the UK copyright owner's consent, importation into the UK would be unlicensed and would represent a copyright infringement.

10.33. It would be wrong to assume that there was an essential contradiction between competition policy on the one hand and the protection offered by copyright legislation on the other hand. One of the primary objectives of competition policy was to promote short-run, allocative efficiencies with a view to driving prices towards marginal costs and thereby maximizing output. While the potentially exclusionary nature of copyright protection might appear to be in conflict with that principle, this was not necessarily the case. While the BPI accepted that copyright had a zero marginal cost of use and could be used by an infinite number of people simultaneously without exhausting the information, there were, in the BPI's view, compelling consumer welfare arguments to justify the current position.

10.34. The BPI believed that the distribution right inherent in UK copyright protection and now introduced across the EC by the Rental Directive was consistent with increased productive efficiency. Equally, parallel imports were inconsistent with such productive efficiency since they might reduce efficiency to the detriment of consumers by denying them qualities for which they were prepared to pay, such as, for example, consistently high standards in pre-sales and after-sales service and a reduction in the level of innovation. Such imports might also have the effect of raising the cost of supplying consumers as a result of disruption to record companies' investment planning and general distribution policies.

10.35. The reality of this situation had been recognized by the European Commission when, in 1991, it published its initial proposal for what later became the EC Rental Directive:

With regard to the economic rights, the above applies similarly to the organizational, technical and economic achievements of phonogram producers, film producers and broadcasting organizations. Their large-scale investments have to be protected, not least to enable them to contribute to the protection of authors and performing artists. Only if such investment is protected will producers *et al* be able to invest not only in productions which are oriented towards pure commercial success and which would therefore guarantee a certain income, but also in such productions which are novel, particularly demanding or unusual in any respect and therefore less likely to be financially rewarding, but which still represent a necessary contribution to the increasingly threatened diversity of culture. Finally, a sufficient protection is a pre-condition for a situation in which producers may risk investing in recordings with still unknown, young performing artists, or in works of unknown composers, or in compositions which are important from a cultural point of view, but which are not very popular.

10.36. The BPI noted that Norway had recently introduced into its legislation a prohibition of unlicensed parallel imports. The proposal for the introduction of this prohibition had emphasized the following:

- (a) the unfavourable impact of parallel imported products on national culture;
- (b) the loss of finance for popular products which required financing for their maintenance on the market;
- (c) the effect of parallel imports on the success of Norwegian recorded works abroad; and
- (d) the introduction of the EC Rental Directive into Norwegian legislation under the EEA Agreement.

10.37. Similar arguments applied in the UK:

- (a) the current import control provisions enabled UK artists to have a significant impact on the domestic market; currently they commanded about a 50 per cent share of this market;
- (b) the British record industry was a significant exporter, with invisible earnings running at about £500 million a year; this international success had led to other cultural and economic advantages for the British economy by encouraging a predisposition on the part of foreign consumers towards other British goods and services;
- (c) British music had a high level of penetration in overseas markets; this ranged from between 15 and 25 per cent over recent years and currently accounts for 18 per cent of the world market; and
- (d) the EC Rental Directive would become effective in the UK after 1 July 1994.

In short, therefore, not only was UK current legislation on parallel importation consistent with the existence of a distribution right as part of a coherent system of protection of copyright, but it was particularly striking that the economic and cultural rationale for the existence of such legal protection clearly existed in the UK market.

10.38. The BPI said that opponents of the parallel import restrictions had argued that the effect of those provisions had been higher prices for recorded music in the UK. The BPI believed it was not disputed that any industry dependent on R&D and innovation, and justifying intellectual property protection for this purpose, required adequate opportunity for profits in order that such investment could continue. The need to reward innovation implied that the innovator should be allowed to price that innovation higher than its marginal cost. However, apart from this fundamental principle, there was no evidence to suggest that the existence of parallel import restrictions was in any sense synonymous with higher prices: indeed, the contrary appeared to be the case.

10.39. The need for copyright legislation as a source of economic wealth and creativity and the dynamic productive efficiency which it created had been recognized in recent years by the UK Parliament, the European Commission, the OECD and by the legislatures of a rapidly increasing number of countries. The underlying trend in recent years had been increasingly for the rights of importation or first public distribution to become an integral part of national copyright protection. In most cases where copyright legislation had recently been introduced or amended (for example, in Eastern Europe, Greece, Norway and Taiwan) the importance of parallel import protection had necessitated the inclusion of specific importation rights.

10.40. The BPI said that it would be unlawful and a breach of Article 9 of the Rental Directive to remove the current importation rights in section 27 of the 1988 Copyright Act. It would also, the BPI maintained, fly in the face of all recent developments at both national and international level for the importation right to be removed. At a time when the movement in the EC and internationally was for greater convergence of national copyright laws, it would be very striking if the UK were to move in the opposite direction.

10.41. The UK independent music sector was vibrant, dynamic, diverse and a source of great strength to the UK record industry as a whole. The advancement and success of this sector of the industry was of great importance to the BPI and its members. The removal of the parallel import restrictions would result not only in a decline in UK prices, but also to these independents losing a significant proportion of their UK domestic record sales as a result of the UK market being flooded by parallel imports. Independents would then have the stark choice of either terminating their existing licensing arrangements for their repertoire in other countries, so as to prevent licensed works being available for importation into the UK, with the consequential loss of licensing income, or alternatively suffering the loss of what might be a significant proportion of their UK domestic sales to parallel imports. In some cases the impact of the removal of parallel import restrictions would be fatal.

10.42. The NERA study (see paragraph 10.29) also concluded that there was sufficient evidence to support a prediction that a reduction of £2 in the prices of CDs would threaten the financial viability of a large percentage of independent record companies.

10.43. Commenting on the BMRB Survey results (see Appendix 7.2), the BPI said that it was not surprised by BMRB's findings. The BPI would have expected retail prices to be lower in the USA than in the UK, but it would also have expected prices in the UK to be the lowest in the EC. However, the BPI considered that BMRB's survey was inadequate in a number of respects. In particular, because of the limited range of products included in the sample, the survey did not reveal the much wider range of pricing structures available in the UK and in particular the extensive mid- and budget-price ranges available. The BPI also considered that it was not possible to ascertain from the survey the greater range, and therefore wider consumer choice, available in the UK as compared with the USA. The BPI noted that, notwithstanding the relatively weak or non-existent controls on parallel imports in Denmark and France, the survey showed that retail prices in these countries were amongst the highest recorded in the survey.

10.44. Finally, commenting on the UK music charts, the BPI said that the official Chart had been effectively policed by Gallup and this would continue when it was controlled by Millward Brown. The BPI submitted to the MMC a memorandum describing how the Charts operated and were effectively policed, and provided details of the BPI's own Code of Conduct for the Charts, which specifically forbade any actions which were likely to distort chart positions.

International Managers' Forum

10.45. The IMF gave written evidence and attended a hearing. The IMF was founded in September 1992 as a forum for discussion and concerted action among managers of popular music artists and producers. It has over 650 members, including managers of some of the most successful artists and producers in popular music, and also managers of artists who do not currently have any recording agreement.

10.46. The IMF said that it welcomed the MMC inquiry, in particular because the MMC's terms of reference extended beyond a consideration of retail prices to encompass a consideration of all aspects of the supply of recorded music.

10.47. In the opinion of the IMF, it was in the acquisition and retention of the services of recording artists (and especially the treatment of copyright in the recordings which those artists produced) that the anti-competitive character of record companies (in particular the major record companies) could most clearly be seen. In the insistence on record company ownership of copyright, in the standardization of the principal terms of artists' contracts, and in their exclusivity, record companies had taken advantage of the relative bargaining weakness of individual artists. No matter how successful he might become, an individual artist could never hope to overturn many of the terms which record companies regarded as 'standard'. Though some artists might negotiate improvements in their terms, these new terms rarely, if ever, became incorporated as standard terms in other artists' agreements.

10.48. The IMF noted that there had been numerous court cases between artists and their record companies alleging undue influence, restraint of trade, and more recently (in the case brought by George Michael against his record company Sony) breach of Article 85 of the Treaty of Rome, on the ground that his recording agreement had as its object or effect the distortion of competition in the EC.

10.49. The IMF considered that if record companies were precluded from holding copyrights for the full term of copyright and had to return them to the artists at least, say, every ten years, a very lively market in the licensing of these copyrights would develop. In general, if the companies were forced to take a shorter-term view, it was probable that their more excessive advances and marketing programmes would be curtailed. This would be to everyone's advantage. Above all it would be easier for new companies to grow and develop, as they would be able to compete on fairer terms for back catalogue. The majors would have to be more cautious about predatory marketing practices, since they would not be able to cross-subsidize their new product from their catalogue sales, as they did now.

10.50. If restrictions on copyright ownership were introduced, the IMF said, it might be argued that the majors would have to reduce their investment in new artists. The IMF thought this concern was probably groundless; even if a reduction in such investment materialized, that would not necessarily be detrimental to the consumer, especially if it helped new companies to grow. Perhaps the greatest benefit would be that with an open market in copyrights their value would become easier to establish. In a short space of time copyrights would become useful securities or assets for all those small firms, individuals and artists who at the moment found it hard to obtain capital from anywhere other than the major record and publishing companies, and then only on very disadvantageous terms. This factor alone could be enormously beneficial both to the industry and the public in providing a better funded, more open and competitive industry.

10.51. The IMF was aware that such a course would take the UK record industry into uncharted waters, but it believed there was no evidence that the general improvement in copyright terms for writers had caused any long-term problems for music publishers. Nor was there any evidence that the more equitable terms given to writers by book publishers had led to the decline of book publishing. Whatever the risks from this course it would be a British or European problem to solve and the principle of intellectual property protection would have been upheld. Above all, from the IMF's point of view, as artists' managers, the position of the weakest participants in the industry—the artists and their families—would have been strengthened, especially in their later years, when many now suffered so badly.

10.52. The more genuinely competitive environment that would follow from these changes would, the IMF concluded, also lead to lower prices to the consumer, due to the greater efficiency that would ensue from this heightened level of competition.

10.53. The IMF advocated the adoption of industry-wide Minimum Terms Agreements (MTAs) which would permit artists greater freedom of movement between record companies and more equitable rewards for their creative endeavours. The IMF considered that whatever steps were taken to improve competition in the record industry, unless there was increased competition in the acquisition of artists' services and in particular in the way that artists' copyrights were dealt with, the major record companies would increase their control over the supply of recorded music in the UK and elsewhere, to the detriment of the consumer both in terms of choice and price.

10.54. Three core provisions of MTAs should be as follows:

- (a) Ownership of copyright should either remain with the artist (subject to a limited licence to the record company) or revert to the artist on the happening of one or more of the following events:

- (i) recoupment of recording costs; or
 - (ii) a given number of years after either release or recoupment; or
 - (iii) on the artist leaving the record label; or
 - (iv) on the record label becoming insolvent.
- (b) All artists' contracts should include a statement of Real Royalty Rate (RRR) in relation to each format, analogous to the APR which banks and other lenders had to declare. The RRR should have a statutory definition and should be the sum an artist would actually receive by way of royalties expressed as a percentage of a notional retail price (eg PPD less VAT (but no dealer discounts or other deductions) uplifted by 130 per cent). Contracts might still contain packaging deductions and provisions that royalties were payable on only 90 per cent of sales, for example, but artists and managers would have a clear method of comparing the terms offered by different companies. The RRR would be a significant disincentive to the use of artificial means of reducing effective royalty rates and would greatly simplify auditing and accounting calculations. The RRR should also be quoted to each and every artist to whom royalties were paid, irrespective of when his or her agreement with the record company was concluded, either on every royalty statement or in a separate document sent with each royalty statement.
- (c) Artists should be given greatly increased audit rights, including rights to audit records of the manufacture of sound carriers and the books of foreign licensees (especially where licensees were affiliated to the record or publishing company concerned). In particular, artists should be given collective audit rights so that the costs of audits could be shared among an unlimited number of artists. At present artists were prevented from employing an accountant to audit a record company's accounts if that accountant was (or, in some cases, had recently been) engaged in an audit of the company on behalf of another artist. There was no justification for such a term other than to inconvenience artists and their advisers, and discourage them from undertaking audits.

10.55. The IMF also suggested the following further terms for inclusion in an MTA:

- (a) Ownership of copyright in artwork, videos and other visual and audio-visual works should also vest in the recording artist rather than the record company, provided that an assignment from the designer, photographer or director could be obtained.
- (b) After an initial period of, say, three albums, options should operate by mutual agreement, ie a company should only be able to exercise its option with the artist's consent (this would not give the artist a right to require the company to release a further album if the company did not wish to exercise its options). Once an artist had fulfilled his minimum commitment and it had been released, and provided that he had recouped all outstanding advances, he should be free to leave the record company if he wished to do so, subject, perhaps, to granting his record company the right to retain his services if they chose, by matching the best offer he might receive from another company.
- (c) Record companies could absorb all recording costs themselves and pay the artist a lower royalty on all sales until recoupment. This would solve one of the major problems afflicting 'average' artists who at present received no income if they were unrecouped.
- (d) Recording and publishing agreements should be exclusive only for relatively short periods of time (possibly to be measured by reference to recoupment). In particular, artists should be given ownership of and freedom to release any recordings rejected by the record company currently entitled to their services, and record companies should themselves pay wholly or partly for the cost of making any rejected recordings.
- (e) Artists should be free to place their recordings with another company in any territory in which the work concerned had not been released within, say, three months of its initial release in the home territory or another major territory. Similarly an artist should be free to release his works through another company on any format (eg vinyl) on which his company refused to release his works.

10.56. The IMF also proposed that the MMC should give consideration to whether the following practices should be made unlawful or otherwise proscribed:

- (a) requiring of an outright assignment of copyright in sound recordings (with no realistic prospect of reversion to the artist) as a pre-condition of entering into a recording agreement;
- (b) requiring of an outright assignment of copyright in sound recordings as a pre-condition of entering into a publishing agreement;
- (c) requiring an artist to enter into a publishing agreement with an affiliated company, as a precondition of entering into a recording agreement, or vice versa;
- (d) distributing so-called 'promotional' records to dealers for the purposes of retail sale. There might, for example, be a limit on promotional distribution of 10 per cent of records manufactured. An artist should, in the IMF's view, receive full royalties on any records so distributed;
- (e) requiring the artist in certain circumstances to grant licences for the mechanical reproduction of his songs at below the statutory rate, by means of so-called 'controlled composition clauses'; and
- (f) giving so-called 'file discounts' whereby major retailers obtain goods from record companies at substantially cheaper rates than smaller independent retailers, simply as a result of their bulk purchasing power.

10.57. Turning to the question of the profitability of the record companies, the IMF told us that in its opinion the true profitability of those companies was understated in their published accounts because of the inappropriate methods used for accounting for copyrights. The IMF drew a distinction between record companies' income and expenditure on a current account basis, and their acquisitions and disposals on a capital account basis. Copyright catalogues were the record companies' most valuable asset. Accordingly, the acquisition and disposal of copyrights should be accounted for on a capital account basis. Record companies almost never made a capital payment to the artist in return for the company's acquisition of copyrights. As a result, neither the cost nor the value of those copyrights appeared in the companies' balance sheets. Current accounting rules and practices enabled record companies effectively to disguise the value of the rights they acquired from artists. And while the companies' level of profitability on turnover might appear to be moderate, their profit expressed as a proportion of capital employed was much higher.

10.58. The IMF also stressed the significance of the arrival of Direct Digital Broadcasting, which would allow whole albums to be broadcast in perfect digital sound quality without interruption directly into consumers' homes, whether by cable or satellite. It was widely thought that such broadcasting would eventually replace physical sound carriers as the means of delivery of sound recordings. The implications for the retail and distribution side of the industry were very significant, particularly for artists, in view of the fact that the record companies owned copyrights for the full length of the copyright term. The experience of the introduction of CDs had indicated that record companies might abuse the introduction of new technology as a means of reducing the share of income paid to artists. The record companies controlled PPL, and they could treat this new form of transmission as just another type of broadcast no different in principle from the present system. The recent introduction in an EC Directive of a right to an equitable remuneration for performers when their sound recordings were broadcast further highlighted the importance of this aspect of record companies' relationship with their artists.

10.59. Thus the question of who owned the copyright in the recording had, the IMF said, become an even more crucial question for the future. The constant development of new technology was always running ahead of contractual provisions and this, combined with the long life of pop music (far longer than anyone would have predicted 20 years ago), made ownership of copyright a vital issue for the future health and structure of the UK music business.

10.60. The IMF considered that the issue of 'promotional copies' was contentious. A distinction should be drawn between records distributed to disc jockeys, magazines and newspapers for the purposes of criticism and publicity, and copies given away to retailers as a form of disguised discount. There was usually no limit on the number of promotional records which could be given away, so a record company could deprive an artist of royalties on records given away 'free' to dealers, thereby effectively subsidizing a large proportion of the discount from the artists' pocket. Indeed this was an area which the IMF considered as being open to serious abuse.

10.61. Turning to the question of parallel imports, the IMF said it did not believe that the rather simplistic solution suggested by CA, and others, of abandoning parallel import controls would result in any benefit to consumers. It would, on the contrary, almost certainly lead to increased piracy, and ultimately to an overall increase in the cost of recorded music. In addition, it would cause damage to artists out of all proportion to any conceivable benefit which might accrue to consumers. It would deprive copyright owners of a fair reward for their innovation and creativity. In particular, new artists and smaller independent record labels who were unable to pursue importers of pirate material would find it especially difficult to become established. The IMF said that in particular:

- (a) Attacking copyright protection in this way risked undermining all forms of intellectual property, including patents, copyrights and trade marks. Abandoning parallel import controls might superficially appear to benefit some consumers in the short term, but the implications were enormous and the results were highly unpredictable.
- (b) The vast increase in imports of records that could occur would inevitably lead to an increase in the importation of pirate records, for the simple administrative reason that it would be impossible to ascertain in many cases which imports were legitimate and which were pirated. Customs and Excise was underfunded and undermanned and so could not take on the additional task of differentiating between pirate and genuine products on such a scale.
- (c) The majors would have an advantage over the independents by being able to source from the cheapest market in the world, namely the USA. A range of pressing costs was available to all, but through their subsidiaries the majors could source from countries which paid lower artist and mechanical royalties. In addition, by choosing to source product in countries with high rates of inflation, and where payment was slow, royalties to artists could be very severely reduced. As artists had neither the right nor the resources to conduct world-wide audits, this would raise huge problems for the artists.
- (d) The present relationship between artist and record company, and hence the whole UK music industry, relied, in effect, on investment in copyright. That was the key security for UK and overseas industries lending into the market. Without a clear knowledge that the benefit from investment would return to them, UK companies and UK divisions of the multinationals would find it hard to invest. It was hard to see how a successful industry could survive in this country if it were opened to imports from markets which had no effective system of copyright enforcement (however strict the laws against infringement might be). Imports from countries with similar levels of mechanical copyright payments presented a lesser problem, though the difficulties of conducting audits meant that artists would be significantly disadvantaged.

10.62. The IMF considered that the prices charged to the consumer in the UK (and Western Europe) for CDs were too high. CD prices had fallen markedly on average since the NHC hearings on CD pricing, though full-price CDs were still highly priced, particularly in comparison with videos. The IMF argued that its suggested restrictions on record companies owning artists' copyrights in perpetuity might help to achieve the same ends as parallel imports but in a far less dangerous and unpredictable manner.

10.63. The IMF also emphasized that as the retail trade had become more and more corporate, decisions about stocking records increasingly became decisions about sales per square foot and less and less about music.

10.64. Finally, the IMF noted that in a further attempt to maximize profits, some record companies had recently attempted to control or share in the merchandising income of their artists. Their justification for this had been that the artist owed his success to the record company's efforts and should share with them his income from the association of his name and image with sales of merchandise (other than records and videos). The IMF did not agree with this approach. The artist's name and image were plainly the artist's intellectual property, to be exploited for his benefit. The record company should be paying the artist for the use it made of this property, not the other way round.

10.65. To demand that the artist give up his merchandising income, as well as granting a royalty-free licence to use his name and image for the promotion of records, was a clear abuse of the record company's negotiating strength, and an attempt to control aspects of the artist's career which were not the legitimate concern of a record company. In its view, 'brand association' was a significant factor in the valuation of the copyright of all artists and one for which artists currently received no income or compensation whatsoever. The IMF suggested that artists should either receive a royalty from record companies for the use of their name and image, or that this 'brand association' factor should be incorporated into regular capital revaluations of the artists' copyrights, a proportion of which should be paid to the artist.

Association of Professional Recording Services Ltd

10.66. The Association of Professional Recording Services Ltd (APRS) made representations and attended a hearing. The APRS was founded in 1947. It is the trade association for the professional sound industry of the UK. Its members include recording studios, post-production facilities, manufacturers, suppliers of products and services, record producers, recording engineers, duplicating and pressing facilities, audio equipment hire firms, consultants and other businesses and individuals professionally involved in the sound recording industry.

10.67. The APRS said that the health of the recording industry which it represented was dependent on customers' continuing to buy recorded music. But those customers had freedom to choose. Recorded music was not an essential purchase. If it was too costly, few would buy it.

10.68. Over the last two decades, the studio industry had greatly enhanced the facilities and standards of excellence demanded by its clients by continuous reinvestment in equipment. Yet studio hire rates had not risen to recover the costs of technical improvements, let alone to match inflation. Indeed, as a result of improved efficiency and greater competitiveness, none of the prices charged by APRS members had been raised in real terms for at least the past two years, and some had even fallen.

10.69. The availability to the consumer of reasonably-priced, high-quality playing equipment in the last few years had made it necessary for all parties in the production of recorded music, from the studios and record producers to the post-production and duplicating facilities, to improve their quality standards, which involved even greater investment in time and care as well as equipment.

10.70. The APRS said that it was for other parties, particularly the record companies and the record retailers, to explain how they established and justified retail price levels. Theirs was the commercial judgment which determined the price at which each record must sell, to cover the costs of manufacture and overheads of promotion and distribution while leaving a surplus for necessary profit and for the speculative investment in new talent, which was undoubtedly a major expense.

10.71. From its understanding of record company operations the APRS believed the essential surplus of these companies was in fact under pressure. The days had gone when listening to records was a major leisure activity. An increasing array of alternatives, from computer games and videos to sport of every sort (much of it publicly subsidized), was now competing for the consumer's interest. In these circumstances the APRS considered that campaigns such as that to cap the price of CDs, or moves to legitimize parallel importing, and so unnecessarily limit the record companies' room to manoeuvre in their pricing strategy, were misguided and dangerous.

10.72. The danger was that any reduction in the current levels of profitability of the record companies would have grave implications for most APRS members; some had already been forced to shut down, and more would have to do so. The record companies were the principal users of studio time, they were the hirers of the record producer, and it was they who contracted with pressing and duplicating facilities for the manufacture of cassettes, vinyl and CDs.

10.73. The APRS observed that it was an unfortunate feature of the system that when record companies were obliged to cut costs, they traditionally did so-because the rates were negotiable-by reducing what they would pay the studio, the record producer or the duplicator.

10.74. The actual or prospective reduction in revenue from the record companies would produce many knock-on effects, both immediate and long-term. Among the most important of these would be a decline in the profitability of studios, leading to static or even declining staffing levels. The result of this would be that the pool of competent studio engineers-the talent which should sustain the future of UK recording studios-would become ever smaller. Low profitability of studios would also mean less investment in new equipment. Up to 80 per cent (in value) of the equipment in a typical UK commercial studio was made in this country.

10.75. The success of the UK in consistently maintaining its place among the international leaders in professional recording had underpinned the development by several British manufacturers of advanced mixing consoles highly tuned to the specific requirements of recording studios. This was one of the reasons why the UK had become the leading world supplier of such equipment. If UK studios lost their skilled staff and fell behind in their investment in new equipment, they would attract fewer and fewer recording projects from overseas. At the level of major recording artists, the business was entirely international. In the past, mostly foreign artists (particularly from the USA) readily came to record in this country because of their faith in the skills of our staff and the excellence of the equipment available. The UK was still regarded, with New York and Los Angeles, as among the greatest recording centres of the world. The UK should do everything to preserve this reputation.

10.76. Less speculative investment in new artists meant fewer projects on which record producers could be engaged. Because their skills could be applied in many countries, some of the more highly talented producers been forced to look for work elsewhere (mainly in the USA, and, to a lesser extent, in Europe). The overseas studios in which they then worked gained invaluable experience, while British studios stood empty. As record companies strove harder and harder for the lowest price in the manufacture of cassettes, CDs or vinyls, the pressers and duplicators faced diminished profitability, which again was leading to job losses and closures. The temptation for the record industry to shift its cassette and CD production to other - countries, where surplus capacity was ready and waiting, might become irresistible. Another cornerstone of the UK recording industry would have crumbled. Once a customer had decided to have his duplication carried out by an overseas supplier, the decision also to place the whole recording, mixing and post-production process in overseas recording facilities was likely to follow.

10.77. The *Commercial Recording Studio* (CRS) arm of the APRS said that the monopoly position of the MU was a matter of concern. Its complaints were that: session musicians had to be members of the MU; the Union had a list of approved studios which indirectly discriminated against other ones; the Union placed constraints on the use of music; and exclusive Union agreements existed with the BBC and effectively with the BPI, since the BBC only used BPI members.

10.78. The *Pressers and Duplicators Group* (PAD) of the APRS made the following points:

- (a) Some duplicator (cassette) companies were now moving towards the manufacture of both CDs and cassettes, in order to remain viable. This called for a very heavy investment, with consequent high financial risks, in view of the difficulty of winning new orders.
- (b) The manufacturing cost of all formats was very low compared with the retail price, and this in turn meant that the profit per unit to the manufacturer was also low.
- (c) In order to safeguard order books, levels of service and quality needed to be of the highest standard, which in turn meant a continual investment in applied technology.

- (d) PAD's concern was that if the record companies, wholesalers and retailers attempted to apply a significant price cut, they would be driven to source their manufacturing outside the UK (and even outside the EC), where although manufacturing equipment cost the same, wage rates and other overheads were considerably lower. Even so, this would be unlikely to reduce the unit cost by more than around 15p; yet the damage to the UK industry would be irreparable.
- (e) As to parallel importing, PAD said that it was self-evident that UK pressing and duplicating plants would suffer if there were a reduction in the demand for their products, directly proportionate to the volume of vinyl, cassette or CD recordings which entered the UK market from abroad; if those products were cheap because they were manufactured without regard to due copyright payments, that would amount to unfair competition and should not to be countenanced.

10.79. The *Suppliers Group (Manufacturers and Distributors) (SGMD) of the APRS* represents numerous equipment manufacturers, component suppliers, distributors, dealers and technical consultancy companies operating in disparate fields of the professional audio industry.

10.80. The SGMD said that the manufacturers' position was under severe threat from increasing competition from the Far East and other European countries, and from some revival in the USA. This had recently resulted in many acquisitions, mergers and take-overs. In all too many cases, the buyers had been foreign. The jobs might remain in the UK, but, ultimately, the profit would not.

10.81. There was no clear evidence to suggest that the consumer would significantly increase his purchase of CDs if they were reduced in price by a modest amount. However, there was certainly evidence to suggest that a reduction in profit would have a detrimental effect on jobs, exports, quality and consumer choice.

Re-Pro

10.82. Re-Pro, which is the working name of the Guild of Recording Producers, Directors and Engineers and a division of the APRS, also gave written evidence and attended a hearing. It has some 140 members who are actively involved in the audio recording industry-professional record producers, directors and sound engineers.

10.83. Commenting on CD pricing, Re-Pro said, first, that it was imperative to maintain the profitability of the industry not only for the good of those working within it, but also for the consumers of the product, namely the general public; secondly, the question of CD pricing was a commercial matter which should rest with the record companies; and thirdly, the proposal to lift import restrictions to allow products manufactured outside the EC to be imported into the UK should be resisted.

10.84. Referring to producers' performance income, Re-Pro said that the position enjoyed by the major record companies allowed them to adopt certain uncompetitive practices in their dealings with record producers, and these operated against the public interest. Re-Pro considered that PPL was dominated by the major record companies (thus, Polygram and EMI between them accounted for 9 out of 13 full members) which did not accept that section 9(2)(a) of the 1988 Copyright Act applied to producers. Re-Pro argued that this section of the 1988 Copyright Act should be considered to confer at least joint ownership of the copyright in the sound recording on the producers. Re-Pro submitted a copy of Counsel's opinion in support of this view. PPL had refused to discuss the matter with Re-Pro since 1989. Re-Pro therefore urged the MMC to seek undertakings from the principal record companies that they would modify producer contracts to ensure that record producers received an equitable share of performance income from PPL, and use their control of PPL to ensure comprehensive and accurate logging of sound recording usage so that performance income could be distributed correctly to each individual contributor.

10.85. Re-Pro said that the method of supplying recorded music to the consumer in the UK was likely to change radically in the future. It therefore asked the MMC to examine the question of how income derived from future methods of supply, such as digital diffusion, could be distributed equitably between the various contributors; and to seek undertakings from the major record companies that every digital transmission would be accurately logged and that the revenue derived was collected and distributed accurately and fairly.

Re-Pro said that the current methods of licensing, collecting and distributing performance and broadcast income undertaken by PPL were untenable.

10.86. Re-Pro contrasted the position of PPL with that of the PRS. Whereas PPL was owned and controlled by the majors and was only obliged to serve their interests, it was clear to Re-Pro that the PRS was an accountable and democratic organization which was organized to fulfil its aim of providing regular and accurate distributions to a vast number of writer and publisher members. But even the PRS needed to guard against corporate complacency.

10.87. Re-Pro hoped that its views might contribute to the development of an accurate, transparent and accountable system to handle the collection and distribution of performance revenues, so that all those, including creative record producers, who were entitled to a share in them received that share.

10.88. In particular, Re-Pro urged the MMC to recommend changes in UK legislation which would ensure that the role of the record producer would be deemed to fall within the definitions of either 'record producer' or 'performer' referred to in international conventions and EC Directives.

Music Publishers' Association Ltd

10.89. The MPA also made representations. It is a member of the BCC, and the trade organization which represents music publishers in the UK. One of its functions is to protect and enhance the law relating to the copyright in music. The MPA currently has 175 members plus their associate and subsidiary companies.

10.90. The MPA said that it was independent of record companies and of retailers. It did not deal directly with the licensing of mechanical rights, and was not the main negotiating body with the record industry. Both these roles were carried out by the MCPS. However, it did issue guidelines on the use of 'grand right' works, such as operas and stage productions, and negotiated fees with broadcasters.

10.91. The majority of composers delegated the promotion of their work to music publishers. The creative role of music publishers was to find and develop new composers and new works, as well as to promote their existing catalogue of musical works.

10.92. The MPA said that music publishers, particularly those who specialized in classical music and in the educational market, continued to publish printed music. However, leaving aside performing rights income, the great majority of their income was derived from royalties from records. Royalty income from this source formed the main income stream for both music publishers and composers.

10.93. Commenting on record prices, the MPA said that CDs had traditionally been more expensive than vinyl records or cassettes. This, in part at least, reflected the higher quality of the product. CDs had a better sound quality, were more durable, allowed for pre-programming of tracks, and had longer playing time.

10.94. Any decision which might be taken by the MMC over CD pricing had to take into account the music industry as a whole, including the royalty income of music publishers and the composers whom they represented. Undue pressure on prices would have the adverse effect of reducing royalties. An enforced reduction in the price of CDs in the UK would be detrimental to the interests of music publishers, composers, songwriters and lyricists for whom royalties from records were their mainstream income.

10.95. The prices of records were not dissimilar throughout the EC, but the royalty rate payable was lower in the UK than in continental Europe. In 1991 the Copyright Tribunal had set the royalty rate as a percentage of 'published price to dealer' (PPD) which meant that, if the PPD were to be reduced, then UK composers and their publishers would be further disadvantaged as compared with their continental colleagues.

10.96. The MPA noted that when in 1928 the price of the product had fallen, the statutory rate of royalty had been increased. It wished to avoid a further expensive and time-consuming review in order to readjust the appropriate royalty rate upwards.

10.97. If the price of CDs at the higher end of the spectrum for recorded music were reduced, there was a considerable danger that music publishers would suffer a disproportionate burden of the fall in price. The MPA did not accept the premise that any lowering of CD prices was bound to be financially beneficial to music publishers because they would receive royalties on increased sales. When record companies had varied their prices in the past there had not been any noticeable change in sales levels. In the classical field, for example, a new symphony, the Gorecki Symphony No 3, had recently by far and away outsold any other classical record. This was in a market in which one could buy at prices ranging from £2 to £15 and yet this biggest-selling record was at full price. This was the case despite the fact that two other, cheaper, versions of the symphony were on sale during the same period, and one of those (the Koch version) had been recommended by *Gramophone* as representing better value overall.

10.98. The MPA also considered that the price structure in the UK was important for the industry which had a great number and variety of independents; in a sense these independents operated under the umbrella of a relatively high full price, and therefore a drop of £2 on CD prices could drive many of them out of business since their profit margins were known not to be high. In this context, the MPA noted that the variety of product available to the UK consumer was probably wider than anywhere else and feared that a loss of choice would be the logical consequence of an imposed £2 price reduction.

10.99. The UK music market was amongst the most successful in the world. That had happened through investment by music publishers in composers on the basis of an expected level of return, and on the basis that British composers had been extremely successful in the past in being able to sell their music outside the UK. If the income of the UK music publishers were effectively to be lowered, this would affect the ability of the UK music publishers to invest in talent, and that in turn would have an effect on the industry's ability to export its product to the USA or elsewhere. Foreign earnings coming back into this country would fall.

10.100. Again, any lowering of the barriers to cheaper US imports would be extremely harmful to the interests of music publishers in the UK. Music publishers had no power to determine the wholesale price of records, but would suffer doubly from an erosion of royalty income from reduced prices, and from an erosion of copyright protection. Any relaxation of the UK law relating to importation would inevitably curtail the financial benefit music publishers in the UK gained from 'sub-publishing'. Music publishers and the composers whom they represented would lose this source of their income. The music publisher in the UK, acting as a sub-publisher (for example, for a copyright owner in the USA), would continue to be responsible for promoting the musical work in the UK, but might well not be paid a royalty on UK sales. The benefit might well accrue solely to the copyright owner in the USA.

10.101. The MPA said that there was a constant need for copyright owners of musical works to be diligent in order to prevent the importation of records, particularly CDs, made without licence in their country of origin, for example in Taiwan and Korea. The piracy problem was widespread.

10.102. In view of the considerable difficulties in detecting whether products were pirated, the MPA thought that the administrative burden would be greatly increased if an open-borders approach was taken for products from outside the EC. The provisions of the 1988 Copyright Act relating to importation of infringing copies of musical works (section 111(1), (2) and (4) and section 112) only related to printed goods, and therefore did not assist music copyright owners in controlling the input of unlicensed records.

10.103. The MPA also expressed concern that parallel imported records might not have borne royalties even in the country of origin, a matter that was difficult to establish. So far as the USA was concerned, it said that as the owner of rights within that territory, it had no evidence or knowledge in particular cases of whether royalties had been paid in the USA. The licence issued in the USA was for the sale of those records there and would not cover export. The MPA added that if imports were allowed from markets (such as South-East Asia) which were not properly organized, it was doubtful whether royalties would filter back to the UK.

10.104. The MPA submitted that there was a fundamental difference between the removal of parallel import provisions in the EC and removing them in total. The EC market had worked well for the UK industry. However, the USA had import barriers in position.

10.105. Finally, the MPA said that music publishers were in a high-risk industry which demanded considerable investment with uncertain returns. Market forces should be left to determine the price of records to the consumer. Any decision to the contrary had to take into account not only the interests of retailers, record companies and consumers, but also the needs of music publishers and the composers whom they represented.

Musicians' Union

10.106. The MU made representations and attended a hearing. It said that it was the representative organization for all musicians in the UK and had some 37,000 musicians in membership. It was the second largest musicians' organization in the world, second only to the American Federation of Musicians. The Union recruits and represents musicians across all areas of the music profession and maintains a collective agreement with the BPI in relation to popular music recordings and symphonic/chamber ensembles.

10.107. The MU considered that if the existing copyright law governing parallel imports was amended, it was by no means certain that CD prices in the UK would fall. Indeed, the price of original recordings in countries without such a restriction, such as the Irish Republic, Denmark, France and Japan, was without exception higher than in the UK. None of these countries had the same international reputation as the British recording industry, and none compared with the UK in terms of the diversity of its music product.

10.108. The abolition of the parallel imports rule would certainly have repercussions within the UK recording industry, and would allow the US record industry to provide cut-price products directly to the UK. It was significant that the USA currently operated parallel import controls.

10.109. Furthermore, the MU considered that if such imports were allowed, major retail record chains would buy in bulk but might not pass on such reduced prices to the consumer. Such cheaper product would result in the UK record companies having to reduce their prices and therefore their profit margins. The success of the British recording industry, second only to the USA, was based on the ability of companies to invest in failure; in other words, to record and sign up musical talent which might or might not be successful in either artistic or monetary terms. As a result of the general profitability of the British recording industry, such risks had been taken many times in the past and would, it was to be hoped, continue; such investment had the direct result of making the industry as diverse as it was.

10.110. The MU expressed particular concern about the future of classical music recordings which, as a result of the number of musicians involved and the need for high-class product, were more expensive to produce, and said that if profit margins were further squeezed then reissues of existing recordings or more recordings from eastern bloc countries would result, with a consequent loss of recording engagements that formed an important element of work for UK orchestras. The British record industry was a major invisible earner for the UK.

10.111. In the view of the MU there was no monopoly situation existing in this industry; the public interest was best served by maintaining the status quo.

10.112. The Union was concerned that in the investigation the MMC should be sensitive to the principles of intellectual property law, and in particular to the internationally recognized principle of licensing and distribution of copyright works. Performers had a fundamental interest in ensuring that their rights were protected and adequately remunerated, and to this end, as a result of the European Community Directive 92/100 (the Rental Right and Neighbouring Right Directive), they were involved in discussions with the record industry in an attempt to agree jointly recommendations to the Government as to how the new Directive should be implemented. Implementation of the measures recommended in the MMC report into PPL's licensing policies formed part of those discussions.

10.113. In that connection, PPL had withheld all payments of moneys owed to Union members since the allocation period ending on 31 May 1989. The moneys owed were significant, at the rate of 12.5 per cent per recording. Negotiations directly with PPL and indirectly through the BPI had failed, but the Union considered that the EC Rental Directive would solve the difficulties, since performers would have a statutory right to payment.

10.114. The MU also criticized the majors for paying low wages and arranging poor living conditions for foreign acts and orchestras, particularly those of eastern bloc origin.

Other bodies

BBC Audio International

10.115. BBC AI submitted written evidence and attended a hearing. BBC AI is a joint venture between BBC Enterprises (a wholly-owned subsidiary of the BBC) and Monty Lewis Associates Ltd. The objective of the company is to enable the BBC's archive of classical music recordings to be released commercially on record through the licensing of the BBC sound recordings to record companies for duplication, distribution and sale in the world market. However, BBC AI said that it had met with resistance from certain record companies, which had relied on the exclusivity provisions in their contracts (with the artists performing in the BBC recordings) to prevent BBC AI from concluding agreements with these artists.

10.116. BBC AI considered that the structure of the record industry had been firmly set by the majors through a dominance that they had established over decades by amassing a roster of artists protected by exclusive agreements; this industry practice of exclusivity was encountered by any company wishing to enter the market.

10.117. BBC AI was concerned about the part played by the BPI and took the view that in August 1991 the BPI was mobilized by the majors, in particular PolyGram, whose Chairman had just been appointed as Chairman of the BPI. BBC AI believed that, in turn, the BPI had mobilized its members to deter artists' agents from dealing with BBC AI, primarily by drawing their attention to the exclusivity provisions of their artists' contracts: this ensured that BBC AI was both denied a supply of product and frustrated in its attempt to enter the market.

10.118. BBC AI said that the efforts of the record industry had effectively delayed its entry into the market and might have caused BBC AI irreparable damage.

10.119. BBC AI still did not have product on the market; but in June 1993, after having initiated court proceedings, BBC AI considered it had reached agreement with EMI which removed the restraints previously imposed. It was now bringing proceedings against Decca Records of the PolyGram Group.

10.120. Since BBC AI's formation in 1991, both EMI and PolyGram had launched budget or mid-price labels which featured recordings by famous and well-established artists. BBC AI considered that a comparison between the artists offered by these labels and those from a typical independent demonstrated not only the importance to the majors of their exclusive agreements with artists, but also how those agreements reinforced their dominance.

10.121. BBC AI said that the majors saw it as a direct threat to them because it had a large back catalogue of prominent artists and performances; it had the financial backing of BBC Enterprises and the expertise of Monty Lewis (previously Chairman of Pickwick Records); and it had entered a sector of the market (mid-price/budget) which had been previously under-exploited by the majors and which was becoming rapidly more profitable.

10.122. BBC AI considered that the following matters were at issue:

- (a) the BBC Archive Recordings were historical documents belonging to the nation (many were unique first performances or performances of artists only recorded by the BBC) and the public should be able to buy them;
- (b) the entry of these recordings into the market-place would introduce an element of competition in an area controlled by two major companies;

- (c) the entry of the BBC into the market-place would generate an income from the BBC's Sound Archive assets in accordance with the Heritage Secretary's expectations; and
- (d) through BBC AI, those independent record companies that had been unable to enter the market-place because of the limited supplies of archival recordings would now have a source of product that was not controlled by the majors.

10.123. BBC AI recommended that, if the MMC were to make an adverse finding on this issue, the OFT should look into the behaviour of the record companies and the BPI under the provisions of the Competition Act or the Restrictive Trade Practices Act; and that an undertaking should be sought by the Secretary of State from the major record companies and in particular from the PolyGram Group that they would not seek to exercise the exclusivity provisions in their artists' contracts, in respect of BBC recordings, beyond a period of ten years from the date of any particular performance by an artist who was under contract at the time of performance.

Chart Information Network Company Limited

10.124. CIN wrote to the MMC explaining its role in the music industry. It said that it was the company which commissioned and was the copyright holder in the official UK Music and Video Charts. It did not have any direct involvement in the monitoring of retail record prices, although it tracked official dealer prices for the purposes of chart eligibility and carried out price band analyses.

10.125. The CIN Chart survey currently monitored the official dealer price for each title and format released, as registered by record companies with Gallup at the time when release information was first available. These prices were used to classify all product for the purposes of chart analysis (eg full, mid and budget category albums), and in the case of singles, to set a dealer price threshold for a single to be eligible for the Chart. Historically, the price threshold was introduced at a time when the integrity of the charts was being compromised by the release of extremely cheap singles; retailers were then selling large volumes of these singles at artificially low prices. The price thresholds for eligibility were in no way a requirement for record companies to set their prices at a particular level. It was perfectly acceptable for prices to be below this threshold; it was simply that the product would not then form part of The Chart. The dealer price threshold in no way precluded retailers from selling singles at lower prices.

10.126. CIN said it understood that it was not uncommon for special promotions to be made available to retailers when purchasing singles, although it had no reason to dispute the comments of EMI to the NHC that these promotions were available to all retailers. Gallup (and now Millward Brown) was required to devote adequate resources to ensuring that ineligible singles did not enter the charts, and CIN was satisfied that they had done this well, and in line with good market research practice. It was not feasible for Gallup to assess individual promotions across all chart and non-chart outlets to guarantee that a balance existed.

10.127. Commenting on the existence of retailers' own charts for both singles and, more often, albums, CIN said that they had effectively diluted the impact of the national CIN Chart in the eyes of consumers. It was confusing to hear 'number one' on BBC Radio 1 FM on Sunday only to find another title at 'number one' in the local record store. However, CIN said that its own Chart remained the industry's bench-mark, not only because it was the only accurate sales monitor of all UK record sales-a nationally representative poll-but also because its wide media exposure, especially on BBC, ensured its 'bench-mark' status. Its function was to 'photograph' the market each week, reflecting the 'average taste' across disparate styles of music. Although the top 40 Chart was no longer a homogeneous collection of 'pop songs', it still represented the 40 best-selling singles in order of popularity.

10.128. CIN observed that with the increasing segmentation of the music retail market, each chain considered that it had to appeal to its own customer profile by reflecting purchasing patterns and taste within its own stores. The retailer's objective in promoting its 'exclusive' own-brand charts was to draw a particular type of customer to the store and to encourage loyalty. Such charts allowed retail chains to differentiate themselves from others, and to establish an image associated with the range of music they promoted.

10.129. In CIN's opinion the effect of these charts on record companies could be both positive and negative. High chart placings for new releases offered them an opportunity for tailor-made in-store promotions (eg window displays and co-operative press advertising), while the dilution and confusion created among some chart-watchers could diminish the title's chances of a high placing in the Official CIN Chart, if consumers were not clear of its chart status.

Gallup Chart Services

10.130. Gallup Chart Services (Gallup) submitted information about how its charts were compiled, in particular summarizing the security measures which it employed to ensure the fairness and accuracy of its charts. Gallup also attended a hearing and gave a presentation at its premises to members of the Group and staff conducting the inquiry.

10.131. Gallup explained that all retailers who supplied information for use in its charts (the 'panel') were obliged to sign a Code of Conduct. Gallup would not consider using shops for chart compilation unless they signed the Code and abided by its terms. Where breaches had been discovered, shops had been removed from the panel. BPI members also signed a code which outlawed any activity which might distort the charts. That code was currently under review.

10.132. Gallup also drew attention to some press and trade articles which were commenting on the singles chart since Millward Brown had taken over the role of compiling the weekly pop charts at the beginning of 1994. The two major complaints in the articles concerned, first, the speed with which singles were now entering and leaving the chart, and secondly the ousting of independent music from the chart, because under the new arrangements with Millward Brown, a number of independent retailers had lost their chart return status.

MTV Europe

10.133. MTVE submitted written evidence and attended a hearing. MTVE had since 1987 operated a satellite-delivered television service which transmits programming across Europe 24 hours a day. MTVE's programming centres on music videos which are produced by record companies primarily for the purpose of promoting new releases and increasing the sales of CDs, records and tapes. More than 80 per cent of the music videos aired on MTVE are supplied by the five major record companies.

10.134. MTVE's views focused on what it regarded as the collusive and anti-competitive behaviour of record companies in relation to promotional music videos. The price demanded by record companies for licensing the dubbing, broadcasting and cable transmission of these videos was far higher in the UK and elsewhere in Europe than it was in the USA.

10.135. MTVE considered that it was the victim of collusive practices by the record companies in the UK, especially the five majors. It said that these collusive practices related to the licensing of broadcast and cable transmission of promotional music videos, products which fell outside the definition of 'reference products' but which nonetheless clearly fell within the remit of the MMC's terms of reference. MTVE said that the practices constituted steps being taken to exploit the joint monopolistic position of the record companies downstream but were intimately linked to the production of recordings in their various forms. Furthermore, the downstream behaviour of the record companies in relation to promotional music videos constituted important evidence of their upstream joint monopolistic position, and as such was of immediate relevance to the MMC's inquiry.

10.136. MTVE argued that it would not make sense economically or commercially to examine vinyls, CDs and cassettes without also examining videos, which were after all produced for the precise purpose of marketing audio products. Videos were clearly in a distinct category from the use of music as background to films and television programmes, and the motivation of record companies in producing and using them was driven by their commercial strategy in relation to the marketing of recordings.

10.137. MTVE said that the record companies were acting collusively through the collective licensing body VPL. MTVE had made a complaint to the European Commission on the anti-competitive activities of VPL and the record companies.

10.138. MTVE explained how its programming format had originated in the USA in the early 1980s. It had observed that two markedly different schemes had developed in the USA and Europe for licensing rights from the record companies to play promotional videos. In the USA each record company separately licensed its music videos directly to MTV for inclusion in the US service, and each had done so since the inception of the music video programming concept by MTV. The situation in the UK (and Europe generally) was quite different. Here, in MTVE's view, the record companies were determined not to repeat the practice of separate, open market negotiations of licence fees between each major and MTV (as in the USA), and had created a mechanism to exact higher licence fees from MTVE (and other users of music videos). Led by the five majors, the record companies had created VPL as the exclusive entity through which music video rights could be obtained by any potential user. Thus, MTVE (and other users of music videos) could not negotiate directly for UK rights with the same record companies with which they negotiated directly, and separately, for US rights.

10.139. As a result of this price collusion, users in Europe, including MTVE, were paying higher licence fees than in the USA, where in general such videos were provided free of charge in consideration of their promotional value. MTVE said that the record companies had used VPL as a veil for their collusive and anti-competitive refusal to negotiate, and the exploitation of their monopolistic position in relation to promotional music videos.

10.140. MTVE alleged that more than 80 per cent of the licensing by VPL was on behalf of the five majors; that the record companies had abused their dominant position by using VPL to apply excessive royalty rates which took a substantial proportion of 'pre-royalty profit'; and that neither independent record companies nor recording artists had any representation on VPL. MTVE said that the majors should be precluded from using VPL, and should be forced to negotiate with MTVE individually.

10.141. MTVE noted that since the MMC inquiry had been in progress, four of the major record companies had launched 'VIVA', a 24-hour music video cable channel in Germany. MTVE had no objection to competitors entering the market. It was concerned, however, that VIVA was a joint venture between four horizontal competitors who collectively accounted for 70 to 75 per cent of the supply of pop music videos and who also controlled VPL (and the IFPI in respect of the licensing of the rights in their products to MTVE) with which they now competed.

10.142. MTVE explained that it had filed a complaint with the European Commission in respect of VIVA on 25 November 1993. It observed that in late January 1994 all five major record companies had announced their intention to launch a 24-hour music television network world-wide and that this was a further exploitation of their oligopolistic position. It also threw doubt on their claim that the investigations by the MMC and the European Commission were being taken seriously by them.

Careful Arts

10.143. Careful Arts, a company which manages acts, particularly 'development' acts (the industry label for those which have yet to achieve any significant commercial success), made a submission.

10.144. It supported the position of the IMF, particularly about the ownership of copyright and parallel imports (see paragraphs 10.47 to 10.61), and criticized the length and restrictive nature of the majority of the agreements in the industry between record companies and artists. It noted that they included many examples of unfair royalty breaks and packaging deductions.

10.145. Careful Arts observed that many of the problems which affected development acts arose from the massively superior bargaining power of the record companies at the time of contract negotiations, and their resources for protecting and enforcing those contracts. Such acts represented more than 95 per cent of those seeking careers in the business.

10.146. Careful Arts proposed that a voluntary code of practice be introduced to cover contracts, and that an effective and binding independent arbitration service be available when the code of practice proved insufficient to facilitate agreement. These measures would greatly reduce the costs to acts who might not have the resources to go to law.