

4 The copyright system and its enforcement

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The copyright system

4.1. The copyright system has been part of British statute law since the early 1700s. It is currently embodied in the comprehensive Copyright, Designs and Patents Act 1988 (the 1988 Copyright Act).

Droit d'auteur and common law systems

4.2. Throughout the world, states have their own separate copyright regimes which prevail in their own territories. These regimes reflect two different traditions. The first is the *droit d'auteur* or civil law system which applies in non-English-speaking countries and therefore throughout most of Europe. In essence, this system developed from considerations of natural justice which view the work of an author as the expression of his personality, giving him fundamental human rights both to control economic exploitation of his work and protect its integrity. The second system is the common law system of the UK and other English-speaking countries. This

has as its basis the concept of safeguarding the skill, labour and investment of those responsible for the creation of works, in order to protect them from reproduction and other uses of the material which they have not authorized. Copyright under the common law system might therefore be characterized as a right to prevent people from dealing with others' intellectual property without rightful authority. However, despite these differences in philosophical approach between the civil and common law systems, the kinds of materials protected under both systems are essentially the same, as are the forms of exploitation of these materials which are protected.

4.3. Whatever the system in each jurisdiction, it is subject to the international obligations of the state concerned. Most countries belong to international conventions on copyright and so are under at least some international law obligations on copyright. In paragraphs 4.45 to 4.53 we discuss relevant aspects of the international conventions. First, however, we discuss the UK copyright system.

The UK statutory framework

4.4. In its original form under the Copyright Act 1709, copyright was a single right giving the author of a literary work the right to control the copying of that work. That of course reflected the fact that the only way in which an author's work could be widely distributed was in printed form. Throughout the last three centuries there has been a continuous process of evolution brought about through fresh legislation, leading to the 1988 Copyright Act. Parliament has amended copyright law in the UK on several occasions so that it was able to address the impact of new technologies. Copyright law has proved a flexible piece of legal machinery. Today the copyright system embraces a wide range of products involving human creativity, such as musical and artistic works, sound recordings (records, tapes, cassettes, CDs etc), films and broadcasts. It is still developing as new types of electronic and other data are developed. Accordingly, copyright is no longer a single right to authorize or prohibit copying, but comprises a bundle of individual rights giving the copyright owner the right to control the various ways in which his property can be exploited.

4.5. First, copyright is a property right. Section 1(1) of the 1988 Copyright Act so describes it. It can be dealt with in the same way as other forms of property. It can be sold, its use can be licensed, it can be given away or it can be bequeathed. The right, however, is intangible. It is not the same as the physical object, eg the book, the disc or the picture. The holder of the right may protect the right in various ways, and in the last resort through legal proceedings.

4.6. Secondly, copyright is not an indefinite right. The 1988 Copyright Act provides that copyright in a musical work expires at the end of 50 years from the end of the calendar year in which the author dies.¹ It further provides that copyright in a sound recording expires at the end of the period of 50 years from the end of the calendar year in which it is made, or if it is released before the end of that period, 50 years from the end of the calendar year in which it is released. Whilst these rights are of limited duration, we note that they are longer than the duration of certain other intellectual property rights. For example, the maximum term of a patent grant is 20 years from the filing date. However, it is the fundamental differences between different forms of intellectual property which have resulted in different terms of protection. For example, a patent gives exclusive rights exercisable against a person who subsequently makes the same invention, even independently, whereas copyright is only exercisable against a person who has demonstrably dealt with the original work and used it as his starting point. In addition copyright does not protect ideas, merely the way in which they are expressed. A patent by contrast can protect the basic concept underlying an invention, albeit only when that concept has been embodied in something which has industrial application.

4.7. Thirdly, rights under copyright are generally exclusive rights. For example, the copyright owner is the only person entitled to reproduce the work; third parties need the copyright owner's authority to do so.

4.8. Finally, a given product may embody several copyrights whose original owners are different. Thus, for example, on a record there exist rights in the sound recording, usually owned by the record company, as well as rights in the music and lyrics, owned by the composer or songwriter initially and usually assigned to his music publisher.

¹ See, however, paragraph 4.44 below.

The copyright system and sound recordings

4.9. The copyright system provides the legal and commercial basis for the recorded music industry. The complex web of business relationships in the industry depends on the system.

4.10. The rights incorporated or subsisting in a sound recording are generally of the following kind:

- (a) copyright in the musical, literary and/or dramatic work (for example, in the case of a song, in both the music and the words) (see paragraph 4.11);
- (b) copyright in the sound recording itself (see paragraphs 4.12 to 4.18);
- (c) rights of performers whose performances are embodied on the recording (see paragraphs 4.19 to 4.21); and
- (d) rights of persons having exclusive recording rights in the recording of artists' performances (see paragraphs 4.19 to 4.21).

We deal with each of these in turn below. In addition, the author of literary, dramatic and musical works is given 'moral rights' to be identified as the author of his work, and the right to object to derogatory treatment of it.

Copyright in the musical, literary or dramatic work

4.11. The copyright in a sound recording is separate from the composer's copyright in the musical work. Musical works may range, for example, from an opera to a simple song. Rights in such music which the composer (ie of the music and of the lyrics) desires to exploit on a commercial basis will generally be assigned or licensed to a music publisher.

Copyright in the sound recording

4.12. Under the 1988 Copyright Act a sound recording is one of the descriptions of work in which copyright subsists (section 1). The definition in section 5(1) of the 1988 Copyright Act covers any recording of a literary, dramatic or musical work or other sounds, regardless of medium.

4.13. Section 11(1) of the 1988 Copyright Act provides that the author of a work is the first owner of any copyright in it. The 1988 Copyright Act defines the 'author' of a sound recording as the person by whom the arrangements necessary to make the recording are undertaken (section 9(2)(a)).

4.14. Section 9(2)(a) has generally been interpreted in the industry as meaning that the 'person' referred to therein is the record company. In practice the record companies take steps to ensure either that they are the first owners of the copyright or that the first owner assigns the copyright to them, for the full period of copyright protection, along with the consent of the artists, and where necessary the producers, to exploit the sound recording. In return, royalties are paid. Licences are also taken from the owner of the literary and musical works, again subject to payment of royalties.

4.15. The House of Lords debated section 9 in 1987. Lord Beaverbrook, the Minister concerned, commented on the provision by reference to the then existing law covering the positions of film producers and directors:¹

... The Bill deals with copyright in sound recordings in the same way that the present law [ie the Copyright Act 1956] treats films; namely, that the first owner is the person who makes the necessary arrangements for the recording. This approach works satisfactorily for films and we believe will do so for sound recordings ... to give the director a copyright in the film would not be fair to the person who has made and paid for the arrangements for the film production. In making those arrangements he will of course have negotiated appropriate remuneration for the

¹Hansard H L, 30 November 1987, col 890.

director. It would be wrong for the director to be able to claim additional remuneration on the basis of his copyright

4.16. A different interpretation of section 9(2)(a) of the 1988 Copyright Act was offered to us by Re-Pro, a group of mainly self-employed recording producers, directors and engineers (see paragraph 10.84).

4.17. The rights which are comprised in the copyright in a sound recording are the exclusive rights to:

- (a) copy the recording (section 17) (this includes synchronization and dubbing rights);
- (b) issue copies of the recording to the public, including the rental of copies to the public (section 18);
- (c) play the recording in public (section 19); and
- (d) broadcast the recording (on radio or television) or include it in a cable programme service (section 20). (However, these particular rights are only exclusive rights to authorize or prohibit if they are exercised individually by a copyright owner. Section 175 of the Broadcasting Act 1990 amended the 1988 Copyright Act to the effect that where copyright owners act collectively to exercise their rights they cannot limit the broadcasting or cable transmission of sound recordings, ie they are entitled simply to receive equitable remuneration and to impose reasonable licensing terms and conditions.)

Each set of rights can be assigned separately.

4.18. A person infringes copyright if he does any of the acts mentioned in paragraph 4.17 without the authority of the copyright owner. In relation to copyright infringement, the copyright owner (or exclusive licensee of the right infringed) can claim for civil remedies. Additionally the 1988 Copyright Act provides for criminal sanctions against persons knowingly making or dealing with infringing articles. Thus, for example, the owner of material which has been 'bootlegged' (illegally recorded at a broadcast or concert) has recourse to civil remedies or to the criminal law.

Rights of performers and persons having recording rights in performances

4.19. The 1988 Copyright Act confers the following rights on a performer:

- (a) to prohibit the making or reproduction of a recording of his performance (sections 180(2) and 182(1)(a));
- (b) to prohibit the broadcasting, or inclusion in a cable programme service, of his live performance (or an illicit recording of his performance) (sections 182(1)(b) and 183(b));
- (c) to prohibit the showing or playing in public of an illicit recording of his performance (section 183(a)); and
- (d) to prohibit the distribution in or importation into the UK of an illicit recording of his performance (section 184(1)).

We discuss imports which infringe copyright further in paragraphs 4.22 to 4.30.

4.20. The performer generally gives consent to the exclusive making, performing, broadcast and distribution of the recording (in return for a share of the income from these forms of exploitation). However, by virtue of their contracts with a record company, performers generally confer exclusive recording rights on the record company, so that the record company is entitled, to the exclusion of all other persons, to make one or more recordings of the performer's performances with a view to their commercial exploitation. We refer to these exclusivity contracts in paragraph 5.131.

4.21. The 1988 Copyright Act confers similar rights to those listed in paragraph 4.19 on persons who have exclusive recording contracts with performers to prohibit:

- (a) the making or reproduction of a recording of the performance (section 186(1));

- (b) the broadcasting, or inclusion in a cable programme service, of an illicit recording of the performance (section 187(1)(b));
- (c) the showing or playing in public of an illicit recording of the performance (section 187(1)(a)); and
- (d) the distribution in or importation into the UK of an illicit recording of the performance (section 188(1)).

Imports which infringe copyright

4.22. We next discuss imports which infringe UK copyright. There are two categories. The first is where the copy has been made in another jurisdiction under a licence granted by the UK copyright owner but where the licence is limited to making in that territory alone (paragraphs 4.24 to 4.29). The second is where the copy is made entirely without the consent of the copyright owner (paragraph 4.30). In either case section 22 of the 1988 Copyright Act provides that the copyright in a work is infringed by a person who without the licence of the copyright owner imports into the UK, otherwise than for his private and domestic use, an article which is, and which he knows or has reason to believe is, an 'infringing copy'.

4.23. The owner of copyright in a sound recording may give notice to Customs and Excise that infringing copies of the work are expected to arrive in the UK at a specified time and place, and that he requests Customs and Excise to treat the copies as prohibited goods (section 111(3) of the 1988 Copyright Act). The effect of the notice is that the importation is prohibited, and that the goods are subject to forfeiture. Such a notice can be given in respect of any imports which are infringing copies of either of the two categories described above.

4.24. As regards the first category, an article is an infringing copy if it has been or is proposed to be imported into the UK, and its making in the UK would have constituted an infringement of the copyright in the work or a breach of an exclusive licence agreement relating to the work (section 27(3) of the 1988 Copyright Act). An exclusive licence means a licence from the copyright owner authorizing the licensee, to the exclusion of all other persons (including the person granting the licence), to exercise a right otherwise exercisable exclusively by the copyright owner (section 92(1) of the 1988 Copyright Act).

4.25. In most circumstances, section 27(3) gives the copyright owner, or the exclusive licensee, ability to control importation into the UK of copyright material which has been lawfully made abroad with his consent. For example, a UK copyright owner may grant licences for the making of the work abroad and not in the UK. Since articles made under such licences could not lawfully be manufactured in the UK, their importation renders them infringing copies. Thus the owner of the UK copyright or the exclusive licensee can object to their importation without his consent. As explained in paragraphs 4.35 to 4.37, the provision does not apply, however, to imports from member states of the EC (section 27(5)).

4.26. The copyright owner's power to prevent the importation of copyright articles was extended to cover breaches of exclusive licence agreements in the 1988 Copyright Act. The amendment to the law was made following the judgment in *CBS United Kingdom Ltd v Charmdale Record Distributors Ltd*¹ which held that the Copyright Act 1956 did not protect exclusive licensees from importations of copies made abroad by the owner of the UK copyright.

4.27. The effect of section 27(3) of the 1988 Copyright Act is to give the copyright owner, or the exclusive licensee, power to proceed against imports of recordings lawfully produced under licence in another country for sale in that country. Such imports are known colloquially as 'parallel imports'.

4.28. The power to control 'parallel imports' relates only to imports of copies of a particular work or product. If a UK record company makes a recording of a particular composition, the copyright in that recording will enable the record company to prevent copies of that recording made under licence abroad from being imported into the UK, save with its permission. It will not empower the owner of the copyright in the sound recording to prevent importation of copies of a different recording of the same composition made in, say, the USA.

¹[1981] 1 Ch 91.

4.29. Moreover, if a UK record company had no licence arrangement with others, and itself made and distributed copies abroad, it could not prevent subsequent importation of those copies. Such copies, not being infringing copies within the meaning of the 1988 Copyright Act, would lie outside section 27.

4.30. The second category of imports which infringe UK copyright relates to recordings which have been made illegally. These are infringing copies (section 27(2) of the 1988 Copyright Act). Section 22 of the 1988 Copyright Act (see paragraph 4.22) also applies to imports of such recordings. We now discuss illegal copying.

Illegal copying

4.31. Illegal copying falls broadly into two areas: first, piracy and secondly, home taping. 'Piracy' is a generic but imprecise term used to describe the commercial exploitation of a number of different kinds of unauthorized recordings, of which bootlegging and unauthorized reproductions of legitimate commercial recordings are the most common. A pirated recording may be a compilation of recordings that have never been released in the same combination on a legitimate album.

4.32. Bootlegging is the unauthorized recording of a performance broadcast on radio or television, or of a live concert. Many bootlegs are recorded at live concerts using a portable cassette recorder, or even taped directly from the console by tapping into the concert venue's sound system. Bootlegs do not usually include the name of the performer's legitimate recording company. The sound quality is usually inferior to that of a legitimate recording.

4.33. Unauthorized reproductions of legitimate recordings fall into two categories: those which simply reproduce the sound and those which copy the product as a whole, known as 'counterfeits'. Counterfeiting is the unauthorized duplication not only of the sound but also of the original artwork, label, trade mark and packaging of legitimate recordings. Counterfeits generally contain the same material as, and are designed to be indistinguishable from, a legitimate release.

4.34. Another area, which is more controversial, is that of the home taping of recordings, ie the taping by individuals on to blank audio tapes of recorded material contained on commercial recordings or of recorded material being played on the radio. There has been a long-running debate in this country as to whether home taping causes significant prejudice to copyright owners, albeit that it is illegal in most circumstances. Indeed, this is one reason why the UK Government has remained unconvinced that it should introduce a levy on blank tapes to compensate copyright owners for the effects of home taping and why the 1988 Copyright Act legalized the recording of broadcast works when this was done solely for the purpose of enabling them to be viewed or listened to at a more convenient time. Many countries have adopted such a levy.

The EC: doctrine of 'Community-wide exhaustion of rights'

4.35. Section 27(5) of the 1988 Copyright Act provides that section 27(3) (see paragraph 4.25) does not apply to an article which may lawfully be imported into the UK by virtue of any enforceable Community right. The effect of this provision is that the copyright owner of a sound recording cannot prevent importation of copies lawfully sold or distributed in other member states of the EC.

4.36. EC law has always recognized the validity of national rights of copyright and has not regarded them as inherently anti-competitive or restrictive of inter-state trade. Article 36 of the Treaty of Rome allows for exceptions to the principle of free movement of goods, where controls on imports and exports are justified on the ground of the protection of industrial and commercial property, provided that such measures do not constitute a means of arbitrary discrimination or a disguised restriction on trade between member states.

4.37. But a principle of 'exhaustion of rights' within the EC is applied so that the application of national property laws does not create a barrier to the free movement of goods within the single market of the EC. This principle operates by treating the EC as a single market for the purposes of distribution of copies of works, and therefore regards the copyright owner's right of distribution in all member states as having been exhausted by the first sale or distribution with his consent of those copies in any single member state. Accordingly the 1988 Copyright Act provides for the principle of exhaustion of rights in the EC in section 27(5).

4.38. However, the doctrine of exhaustion of rights has not been applied rigidly to negate valid national rights and in particular the copyright owner's right to consent to first distribution. In one case, for example, sound recordings (of Cliff Richard's songs) were no longer protected in Denmark but were still protected in Germany, as the latter state gave a longer period of protection to sound recordings. The European Court of Justice held that it was permissible to prohibit the import into and sale in Germany of copies of sound recordings made in Denmark, because the copyright owner had not consented to the manufacture or sale in Denmark of those particular copies of the sound recordings.¹

4.39. The European Commission has been working on a programme of harmonization in copyright law, not with a view to a complete harmonization of the substantive law, but concentrating on those areas where co-ordinating actions at EC level are considered necessary to prevent distortions to the internal market. Directives have been adopted on a variety of matters, including the Rental Directive and the Term of Protection Directive, which are of relevance to our inquiry.

Directive 92/100/EEC: 'the Rental Directive'

4.40. The Rental Directive is one of several Directives in the copyright field which have now been adopted by the Council of Ministers. It deals with the right to control the rental and lending of copyright works, and with the protection of performers, record producers and broadcasting organizations. In particular, Article 9 provides that member states shall make provision for record producers and performers to have the exclusive right to make recordings of their performances available to the public by sale or otherwise. Producers and performers only lose this right in respect of particular copies when those copies are first sold within the EC by the rightholder or with his consent. This 'distribution right' is not lost if the copies are issued outside the EC.

4.41. The deadline for implementation of the Directive by member states is 1 July 1994.

4.42. In an article by Jorg Reinbothe, the EC official responsible for drafting the Rental Directive, and Silke von Lewinski of the Max-Planck Institute of Munich, they comment as follows:

While Article 9(2) states the established rule of intra-Community exhaustion, it does not expressly address 'international exhaustion', in other words, the question of whether member states are allowed to provide for an exhaustion of the distribution right under Article 9, even if the consent to putting into circulation was given in a third country for distribution there. This question is by no means purely theoretical, as it deals in fact with the prohibition (or admission) of parallel imports into the Community.

In fact, Article 9(2) has to be interpreted in such a way that member states are prohibited from applying international exhaustion; this means that a member state may not provide that the first sale in any country outside the EC results in the exhaustion of the distribution right within its own territory, and consequently within the whole EC. The distribution right is only exhausted where an object has been first sold within the EC with the consent of the rightholder; exhaustion does not occur where an object is first sold outside the EC, be it with or without the consent of the rightholder.²

Although the views expressed by Reinbothe and von Lewinski are stated to be their personal opinions, the same interpretation of Article 9(2) has been given by Commission officials acting in their official capacity.

4.43. The MCPS, BPI and the International Federation of the Phonographic Industry (IFPI) have made submissions to us to the effect that for Article 9 to operate in accordance with its own terms, each member state will have to enact laws (if it has not done so already) enabling the rightsholders to prevent the importation from outside the EC of recordings in respect of which the exclusive right exists.

¹ *EMI Electrola GmbH v Firma Patricia Im- und Export* [1989] ECR 79.

² [1993] 6 *Entertainment Law Review* 169 at page 174 published by Sweet and Maxwell Limited.

Directive 93/98/EEC: 'the Term of Protection Directive'

4.44. The duration of copyright in the UK in literary, dramatic, musical and artistic works will increase to the life of the author and 70 years after death, as a result of the Term of Protection Directive. The Directive harmonizes the term of protection in the EC. Member states must implement the Directive by 1 July 1995. The Directive also requires that sound recordings are protected for 50 years (as is already the case in the UK).

The Berne Convention

4.45. The UK is a party to the latest act (Paris 1971) of the Berne Convention for the Protection of Literary and Artistic Works.¹ The Convention *inter alia* prescribes minimum rights in respect of literary and artistic works, which include musical and dramatic works. The rights cover most of the ways in which such works can be commercially exploited and are in general exclusive rights of authorization (although in relation to some of them there are exceptions).

4.46. The rights are in summary those of translation, reproduction, public performance, broadcasting and communication to the public by wire, public recitation and adaptation. While the Convention covers literary, musical and other works included on a recording, it gives no rights in the recording itself. Such rights are given by the Rome Convention (see paragraph 4.53).

4.47. The Berne Convention is administered by WIPO. WIPO has been considering the question whether there can be implied into the Convention rights on the part of the author or other owner of copyright to authorize first distribution, and also oppose importation of copies of a work.

4.48. The International Bureau of WIPO has taken the view that there is good reason to believe that in addition to a general right of first distribution, a right to oppose importation can be inferred from the present text of the Convention. In 1993 the Bureau proposed a protocol to the Berne Convention stating, *inter alia*, that under the present text of Berne, it is obligatory to protect the exclusive rights of the author or other owner of copyright to authorize the first distribution and the importation (for distribution) of copies of works, as these rights, although not mentioned in the Convention, are inseparable corollaries to the right of reproduction mentioned expressly in the Convention.²

4.49. A WIPO Committee of experts (formed of representatives of the governments of countries belonging to the international copyright agreements) last considered the proposed protocol at their Session in June 1993. The Chairman of the session summarized the discussion on a right of importation as follows:³

The proposed right of importation has limited but substantial support ... among governmental delegations, and most of the non-governmental organisations have argued in support of such a right. However, opinions are divided on this issue; many delegations reserved their position, and some delegations opposed the right of importation for various reasons. The International Bureau should study the importation right in relation to trade, competition, and consumers' rights issues, as well as the question of whether the right of importation could be ensured through an appropriate limitation on the application of the principle of exhaustion of the distribution right.

4.50. As we indicate above, the 1988 Copyright Act provides for a right to oppose importation, save in respect of imports from other member states of the EC or imports as described in paragraph 4.29. Many other countries also make such provision. We observe, however, that there are several countries which do not make provision for bans on parallel imports, for example Denmark and Sweden.

4.51. We have already mentioned the report of the Australian Prices Surveillance Authority on its inquiry into the prices of sound recordings (see paragraph 3.46). The Australian Government is still considering its position on this matter.

¹ Cm 1212. See Appendix 4.1.

² WIPO paper for the Committee of Experts on a Possible Protocol to the Berne Convention, BCP/CE/2-III.

³ Report adopted by the Committee BCP/CE/111/3 paragraph 91.

4.52. We are not aware of any other jurisdiction where the possibility of allowing parallel imports is being considered. If there is a trend, it is in the opposite direction. We have noted in particular that Norway has recently amended its domestic law to give the producer of a sound recording the right to prevent parallel imports of copies of his recordings into Norway.¹

The Rome Convention

4.53. The UK is also party to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961 (the Rome Convention).² The rights concerned are known as 'neighbouring rights', ie those that neighbour copyright in literary and artistic works. These neighbouring rights include rights in sound recordings. In the 1988 Copyright Act those rights are assimilated with copyright (see paragraph 4.12). The Convention prescribes minimum rights and limitations on those rights. These are less extensive than Berne but include *inter alia* exclusive reproduction rights.

The GATT agreement

4.54. The Agreement on Trade-Related Aspects of Intellectual Property Rights including Trade in Counterfeit Goods (TRIPS) does not change the international position on distribution and importation rights. Article 6 of TRIPS specifically indicates that the agreement does not address the issue of exhaustion of rights.

US federal law

4.55. The USA is a member of the Berne Convention but not of the Rome Convention. The relevant law is contained in the copyright law of the USA in Title 17 of the US Code, as amended. Section 602(a) provides that importation of sound recordings into the USA without the authorization of the copyright owner constitutes an infringement of the exclusive right of the copyright owner to distribute sound recordings. This applies equally to copies which were lawfully and unlawfully made. In the case of unlawfully made sound recordings, the US Customs Service has the power to prevent importation. With respect to copies lawfully made abroad, no such authority is granted under Title 17 and redress must be sought in the courts.

¹Norwegian Copyright Act of 12 May 1961 as amended up to 9 June 1993.

²Cmnd 2425. See Appendix 4.2.

The exploitation of rights in sound recordings

4.56. As already noted (paragraph 4.13), the record company will own the copyright in a sound recording by virtue of sections 9 and 11 of the 1988 Copyright Act if it has undertaken the arrangements necessary for the making of that recording; and this is usually the case. Sales of such recordings in the UK generate revenue for the record company. This revenue derives from sales of records to UK customers (eg wholesalers, rack jobbers, retailers and record clubs); licensing of the rights in sound recordings to other UK record companies (eg for use in compilation albums); and from income collected by PPL on the public performance of recordings (eg from television and radio broadcasters).

4.57. In addition to deriving revenue directly from UK customers and licensees, the record company will also obtain revenue from licensing the recording to other record companies for manufacture and sale overseas. The overseas company will receive the proceeds of sale and pay a royalty back to the licensor, ie the UK record company. Overseas sales are an important source of revenue for many UK record companies.

4.58. Where the overseas company is an associate of the UK record company, the terms of the licence and royalty agreement are usually brought together under a 'matrix agreement', which will govern all cross-licensing arrangements within the record company's group world-wide. In this situation, the UK record company will usually be responsible for paying royalties on those foreign sales to its recording artists in the UK (and possibly also to the producer and mixer). The UK composer, through the UK music publisher to which he or she is contracted, will also receive royalties on sales of the recording outside the UK; these royalties are usually paid by the record company in the country where the record is sold to a local collection society; they are then passed to the local music publisher (to whom the UK music publisher will have sub-licensed the copyright in the composition) and then by the local publisher to the UK publisher; the composer then receives his or her share of royalties from the music publisher in the manner agreed between them.

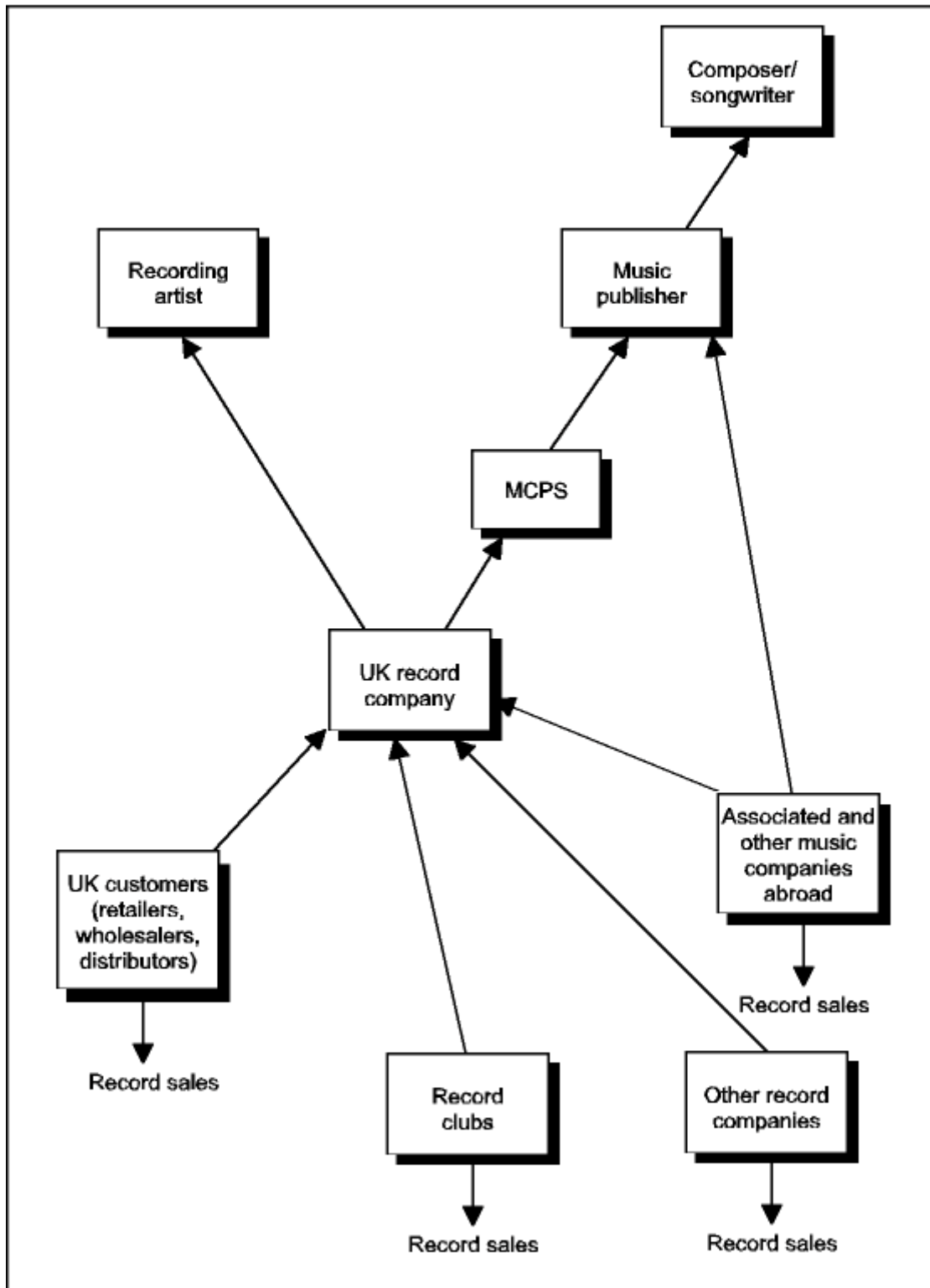
4.59. A schematic diagram showing the principal routes through which returns flow from record sales in the UK and abroad to the owners of property rights is given in Figure 4.1.

4.60. The record company for its part makes the following payments:

- (a) Advances (ie advance payment of royalties) and royalties (ie on sales) are paid to the recording artist in accordance with the terms of the recording contract. So far as advances are concerned, these are never repayable by the artist to the record company, even if the amounts are not recouped by the record company out of record sales. As for royalties based on record sales, the recording artist will usually receive such royalties from the record company if, and to the extent that, his or her entitlement to them exceeds the advances that have already been paid to him or her by the record company. In many cases, the record company fails to achieve sufficient sales to recoup the advances it has made. Advances of royalties and royalties may also be payable to the producer, depending on the terms of his or her contract.
- (b) Royalties of 8.5 per cent of the published dealer price of the recording to the MCPS which in turn passes this to the owner of the copyright in the musical work used in the recording. The right to reproduce the work on record is commonly known as the mechanical right, and this is one of the principal ways in which the copyright owner's exclusive right to reproduce his or her work in a material form is exercised. The MCPS is a copyright collection society which acts as agent for the party controlling the mechanical rights, whether this be music publisher or composer, in licensing record companies to manufacture records reproducing copyright musical works, and to distribute those records. The MCPS deducts commission from the royalties received, and then distributes the balance to its relevant member. Where the MCPS's member is the composer, this means that the composer gets his or her royalties direct. Where the MCPS's member is the music publisher, the composer receives his or her share of royalties from the music publisher in the manner agreed between them.

FIGURE 4.1

Income flows from record sales to property rights owners



Source: MMC, based on figure supplied by Sony.

Collective licensing bodies

4.61. As already noted, in addition to deriving revenue from the reproduction of music in the form of records, record companies and other rightsholders also receive income from the broadcasting, public performance, synchronization and dubbing of sound recordings. Various collective licensing bodies, acting on behalf of individual and corporate rightsholders, facilitate the licensing of rights and the collection of revenue in connection with these activities. A schematic diagram shows the revenue flows to and from the main collective licensing bodies in the UK music industry (Figure 4.2).

4.62. The principal functions of collective licensing bodies are licensing the use of copyright, determining the tariffs for that use, collecting royalties, distributing the revenue, monitoring the use of copyright material and enforcing copyright.

4.63. The role and practices of bodies in the UK concerned with the collective licensing of sound recordings for broadcasting and public performance was investigated and reported on by the MMC in 1988.¹ That report focused on the practices of PPL. The principal finding of the MMC was that collective licensing bodies were the best available mechanism for licensing sound recordings provided they could be restrained from using their monopoly unfairly.

4.64. We now consider briefly in turn each of the collecting societies which play a significant role in the recorded music industry.

Mechanical Copyright Protection Society

4.65. The MCPS, which is owned by the Music Publishers' Association, the trade association for the UK music publishing business, is a collective licensing body representing as agent those who own, control or administer the rights in the UK to copy or to reproduce musical works and their associated lyrics which are in copyright.

4.66. The MCPS acts as agent for UK composers, writers and music publishers in relation to the vast majority of musical works which are actively exploited in the UK. The MCPS represents 4,992 composers and 3,146 music publishers. It also acts as agent in relation to works of foreign composers, writers and music publishers, either through those of its members who have sub-publishing rights in the UK, or through contracts with other mechanical rights collecting societies throughout the world.

4.67. The relationship between the MCPS and its members is now governed by an agreement under which the MCPS is mandated by a composer and/or music publisher in return for a commission to exercise certain rights on behalf of the member. The MCPS may administer these rights by operating Licensing Schemes (see section 116 of the 1988 Copyright Act).

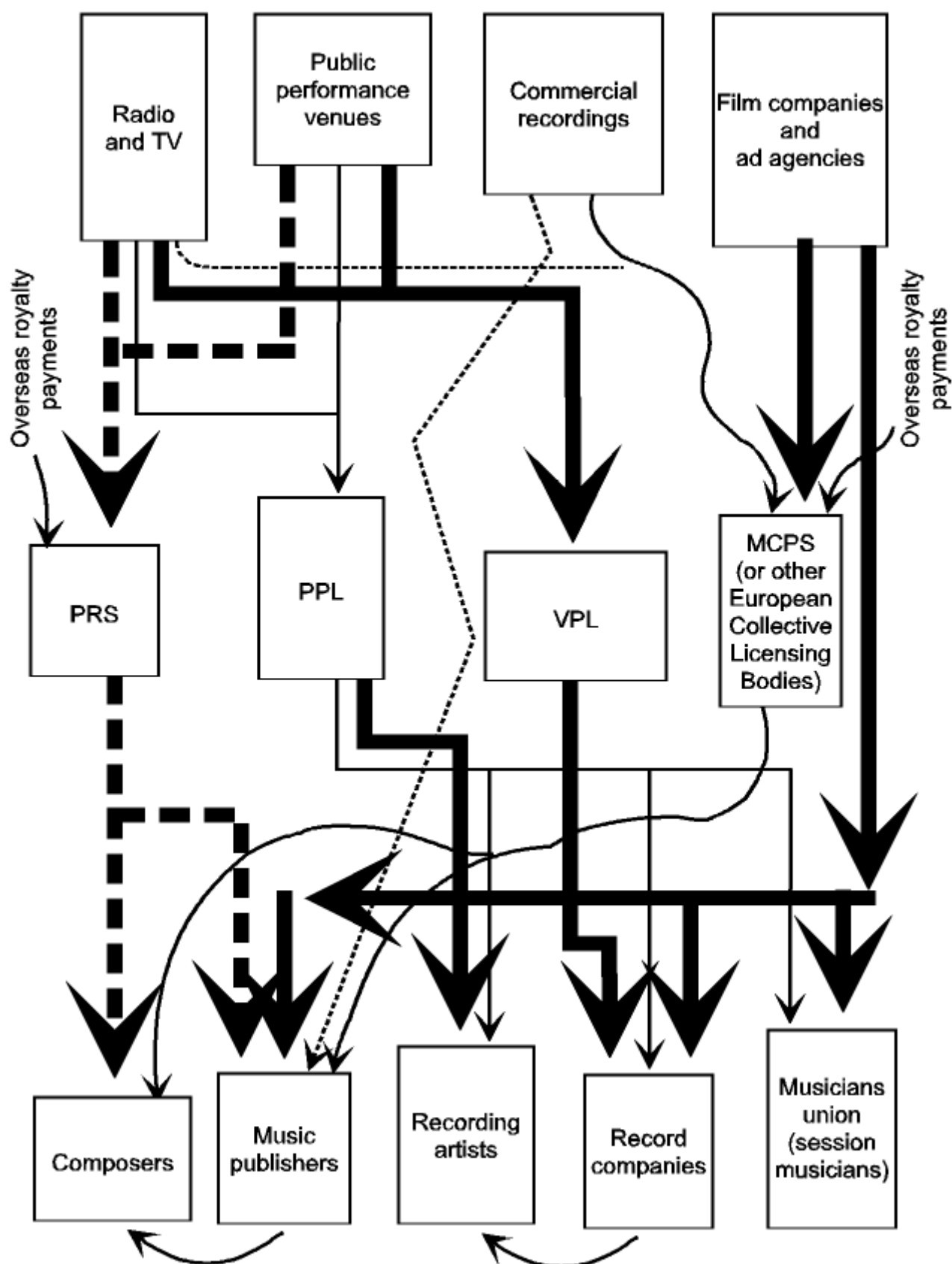
4.68. The current rate of royalty due to MCPS members for reproduction of their works in the form of records and distribution of those records was decided in 1991 by the Copyright Tribunal (a body set up under the 1988 Copyright Act to hear and determine proceedings in respect of licensing schemes and other related matters) in a reference between BPI (the applicant) and the MCPS for variation of three standard form contracts which constituted a proposed licensing scheme to be operated by the MCPS. The Tribunal's decision² was that the royalty rate should be 8.5 per cent of the published dealer price.

¹ See footnote to paragraph 2.171.

² Reference No CT 7/90.

FIGURE 4.2

Revenue flows to and from UK collective licensing bodies



Source: BPI.

The MCPS/BPI Joint Import Scheme

4.69. As already noted, under the 1988 Copyright Act the copyright owner, or the exclusive licensee, has the ability to control importation into the UK of copyright material which has been lawfully made abroad with his consent (see paragraphs 4.25 to 4.28 above). The BPI (see paragraph 4.83) and the MCPS have set up a system to license importers of recordings from outside the EC on behalf of both the record companies and the music copyright owners (music publishers, composers or foreign societies).

4.70. This scheme, known as the MCPS/BPI Joint Import Scheme (the Scheme), is used principally in relation to specialist niche market product where the demand for the recordings comes principally from independent retailers specializing in particular genres of music. The Scheme documentation provides for:

- (a) the licensing of any record lawfully manufactured outside the EC which is not, at the time of entry, in the catalogue of any BPI member company or intended for release by that company;
- (b) the licensing of any special format (including any recording where the contents are different from the UK version) of a record which is in the current catalogue of a BPI member company provided that the prior written permission of that company is obtained and the MCPS is notified before importation takes place;
- (c) the existence of the licence to be evidenced by the affixing of the correct denomination of stamp to the product; and
- (d) copyright owners to retain their legal right to place a restriction on the importation of specific records.

The MCPS has stated that in practice the conditions under (a) and (b) above are not applied, and importers are permitted to import both catalogue and non-catalogue product unless a specific notice has otherwise been given to them.

4.71. Under the Scheme, importers (and also retailers who choose to import directly) apply to the MCPS for a licence of either the copyright in the composition or the copyright in the recording, or, more usually, both. The Scheme allows the import and sale of records without infringement of either copyright, provided that the imported product bears the appropriate royalty stamps. The royalty stamps are obtained by the importer from the MCPS prior to importation and must be affixed to the records or their sleeves within 14 days of importation, or prior to sale, whichever is the earlier. The stamps are charged at a flat rate for each format. The current rates for stamps covering both copyrights (ie in the composition and the recording) are as follows:

- 7" vinyl single-15p (plus VAT);
- 12" vinyl single-45p (plus VAT);
- cassette and vinyl albums-75p (plus VAT); and
- CD-£1.25 (plus VAT).

4.72. The revenues from stamp sales are divided equally between the BPI and the MCPS after deduction of a 15 per cent commission. Thus, 42.5 per cent is paid to the BPI for onward transmission to its members and 42.5 per cent is retained by the MCPS and distributed to its members.

Phonographic Performance Limited

4.73. As noted above (paragraph 4.17), the 1988 Copyright Act provides a copyright in the public use of sound recordings. The practical effect of this is that the companies or organizations which make sound recordings have legal protection against unauthorized public performance or broadcasting of their sound recordings.

4.74. PPL is a non-profit-making company established in 1934 by the recording industry to administer public performance and broadcasting rights centrally. Its members, of whom there are currently 1,483, have assigned these rights to PPL so that on their behalf it licenses all UK public performance users and broadcasters. At present, 21 PPL members are full members; these include all the major record companies. The remaining members have associate status. Towards the end of our inquiry, PPL informed us that it was considering changes to its membership rules, with the aim of increasing the number of full members and substantially widening the 'franchise'. All of PPL's income from licence fees (less running costs) goes back to its members and to performers and artists.

4.75. The terrestrial and satellite broadcasters licensed by PPL are the BBC (both radio and television) and the various commercial radio and commercial television companies. PPL issues licences for tens of thousands of sites for public performance, including the following types of premises and users: discotheques, night clubs, public houses, hotels, restaurants, halls, dance teachers, sports clubs, shops, theatres, cinemas, leisure centres and local authority sites.

4.76. PPL's licence gives permission to use any or all of the recordings at any time included in the repertoires of its members for the purposes stipulated on the licence. PPL has many standard tariffs covering the various different kinds of public performance users. These are often negotiated with national representative organizations. The licence usually lasts for one year.

4.77. PPL's revenues are distributed in the following proportions: 67.5 per cent to the record companies; 20 per cent to named performers; and 12.5 per cent to the Musicians' Union.

Performing Right Society

4.78. The Performing Right Society (PRS) was founded in 1914 as a non-profit-making organization, and now has over 27,000 writers and publishers in its membership. Its principal function is to derive income from and control the public performance and broadcasting and cable diffusion rights in the copyright works of these writers and publishers. Through its relationship with performing rights bodies in other countries, the PRS now represents more than 700,000 copyright owners and its income in 1993 was over £155 million.

4.79. The broadcasting of repertoire represented by the PRS takes place within blanket licences agreed with such organizations as the BBC, the independent television companies, the Association of Independent Radio Contractors and various cable and satellite television operators. In addition, more than 200,000 public performance licences are currently in force, and some 20,000 new licences are issued each year. These permit the playing of music, live or recorded, in premises as varied as pubs, hotels, concert halls and discotheques. The society operates almost 50 different tariffs, most of which are agreed with a trade association or representative body of the music users concerned.

4.80. About a third of PRS income comes from overseas use of British and Irish works, with the rest paid by UK and Irish broadcasters and public performance venues. Distribution of income takes place in April, July, October and December, after deduction of administration costs which, overall, average 18 per cent.

Video Performance Limited

4.81. VPL was set up in 1984 as a collecting society to license the UK public performance and broadcasting rights in music videos owned or controlled by its members. The music videos in question are short clips (of about four minutes) made by the record companies originally as a promotional tool. As at July 1993, VPL had a repertoire of 20,312 music videos; at the same date, it had 275 public performance licences in force and 27 broadcasting or diffusion licences.

4.82. Membership of VPL is open to anyone who owns or controls UK performance and broadcasting rights in music videos; there are currently 390 members. Of those members, around 23 are controlled by one of the five major UK record companies. The remainder are small record companies, or sometimes individual performers, on whose behalf VPL acts to ensure that they receive fair remuneration for use of their music videos by broadcasters and others. UK terrestrial broadcasters pay on the basis of a promulgated tariff. Deals are negotiated individually for satellite broadcasting and cable diffusion: MTV Europe, for example, pays fees on a scale which starts at

7.5 per cent of its net music advertising revenue up to £10 million, rising to 20 per cent on revenue in excess of £35 million, but provided that the total percentage paid is not greater than 15 per cent.

Other relevant industry bodies

British Phonographic Industry Ltd

4.83. The BPI is a UK industry trade association which represents a variety of different manufacturers, producers and sellers of all forms of records ('phonograms') including vinyl records, CDs and cassettes. It has some 150 record company members from throughout the country, which together issue the vast majority (90 per cent) of commercial records in the UK; these include the five major record companies. In addition to those members which record and issue the better known popular and classical works, BPI membership encompasses a large number of more specialized 'niche' recording companies.

4.84. The BPI is regarded in the industry as having a key role in safeguarding the interests of the industry at large. For example, the BPI's Anti-Piracy Unit, which is entirely funded by the record companies, undertakes extensive work in conjunction with the police and trading standards officers in investigating and preventing sound recording infringement. In 1992 the Unit was involved in 700 piracy actions, twice as many as in the previous year. While a good proportion of these were civil actions taken by the BPI, many of them were criminal prosecutions instigated by the police and Trading Standards Officers, in which the BPI played a central role in co-ordinating evidence, or providing back-up information. In 1993 the number of actions involving the Unit rose to between 800 and 900. The BPI is also responsible for providing much information and data on the industry via its publications.

International Federation of the Phonographic Industry

4.85. The International Federation of the Phonographic Industry (IFPI) represents the world-wide recording industry; its membership comprises 1,055 members in 72 countries. In the UK, its member companies are organized in the BPI. The IFPI is officially recognized by the United Nations as an international non-governmental organization, and participates on behalf of the recording industry in all international meetings on intellectual property.

4.86. One of the IFPI's responsibilities is to promote an effective world-wide regime of copyright protection for the recording industry, especially, but never limited entirely to, protection for producers of sound recordings. To this end, the IFPI is active in making representations to national and regional governments and official bodies such as the EC Commission, and it participates in all international meetings organized by WIPO, UNESCO, the Council of Europe and the GATT Secretariat which are concerned with intellectual property protection at the international level.