

## Written evidence submitted by Robin Firman

What follows are my personal views and not those of PPL where I serve as a Performer Director.

Currently, session musicians gain no remuneration from the UK record industry for the exploitation of their performances fixed on commercially available recordings which are licensed by record companies to the various streaming services. We are the “unsung heroes” of the recording industry.

The historical background to this state of affairs is somewhat controversial in that streaming is predicated on the “Making Available” right which was granted to performers (including session musicians) in 1996 by WIPO and adopted by the EU in 2002. Article 3 of Directive 2001/29/EC (“the Information Society Directive”) states:-

“Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

- (a) for performers, of fixations of their performances;
- (b) for phonogram producers, of their phonograms;”

This was intended to give effect to Article 8 of the WCT and Articles 10 and 14 of the WPPT.

WIPO - “performers should benefit from the exclusive Making Available Right”.

This is all well and good, but unfortunately since 1996 session musicians have been obliged to sign a “consent form” agreed between the MU (Musicians’ Union) and the BPI (British Phonographic Industry) which effectively assigns all future rights granted to musicians to the record companies, in return for being paid for any recording session undertaken. There was no prior consultation with MU members involved in studio work associated with this agreement, we were presented with a fait accompli. To illustrate the oppressive nature of this arrangement I quote a short extract from the first incarnation of the form, of which we did not retain our own copy, this is from an A4 size page of very small print (magnifying glass needed).

“The right to produce and/or commission and/or issue a recording and the right to exploit in perpetuity such Recording or part thereof (subject only to the limitations set out in in this Agreement) including (without prejudice to the generality of the foregoing) the right to:

- (a) exploit such Recording in all formats (**whether now known or hereafter created** and including without limitation vinyl disc cassette cartridge audio-only CD, CD-DA, CD plus, CD+G, DAT, laserdisc, videogram and film) **and media (whether now known or hereafter created including without limitation on line delivery)** ..... (my bold).

You will note that many of the mentioned formats are now history, but the above gives a flavour of the record companies’ determination to acquire rights to future unknown ways in which to exploit their product to the potential financial detriment of musicians.

You may ask what about the exploitation of recordings made before this “agreement” was made. The previous shorter “musicians consent form” is silent on future “hereafter created” formats. This was a communal form in use from c1983 – 1996, containing three short clauses:

- (1) Supply to the public

- (2) Public performance and broadcasting to such extent as is licensed by Phonographic Performance Limited.
- (3) Incorporation into any record, including the sound-track of a cinematograph film to be used solely for paid commercial advertisements of duration not exceeding 2 minutes advertising supply to the public under (1) above.

In the context of the time “supply to the public” could only be via physical records, CD’s and cassettes, we signed for the present not an unknown future. Could this wording have a future unknown meaning that a reasonable person would construe from them? Session musicians were not given a copy of this form, and before c1983 no such written consent was given by individual musicians.

I know of no other walk of life where one is obliged to give away (for no additional monetary consideration) future rights in order to receive payment for work done today. Furthermore, I am sceptical as to whether the record companies can own our making available right (which did not exist) prior to 1996 and continue to license recordings for streaming made before that date without any agreed remuneration for session musicians. Unfortunately, the notion that this right might be used retroactively has not been tested in UK law, performers are properly wary of the record labels’ deep pockets when it comes to litigation! Even today the impact of the loss of the making available right is not widely understood within the session fraternity. This oppressive “agreement” is firmly tilted in the employer’s favour and, in my opinion, would not pass a test of being fair and reasonable; it deprives session musicians of fair and legal remuneration for the exploitation of their performances via streaming by hijacking the making available right for that purpose.

There is one possible solution which has been formulated in Spain, the only country, to my knowledge, to enshrine in law payment to session musicians for streaming. In Spain there is legal presumption of transfer of the Making Available right to the producer of a sound recording; to compensate for this transfer there is an unwaivable right to remuneration for the making available of a sound recording, which is paid by the user of the sound recording to the Spanish royalty collecting organisation (AIE), which then distributes the proceeds to rights holders. I have received such payments via PPL, so I know it is possible for record labels to “do the right thing” by session musicians.

The streaming services and record labels continue make substantial profits, apparently 75% of UK industry revenue comes from streaming (£1+ billion + from 114 billion music streams) according to a quick “google” search, with an upward trajectory. I know the vast majority of popular recordings would not exist in their present form without the creative input, skill and expertise of session musicians in all genres over many years.

Finally, I would like to thank the DCMS select committee for taking the initiative in investigating what is, in my opinion, a flawed business model that does not properly remunerate the performer community on which it relies for its product /revenue.

Robin Firman

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