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Success ratios, new music and sound recording copyright

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Abstract

This article addresses the uses that record companies have made of two rhetorical tropes. The first is that only one in ten artists succeed. The second is that they are investing in new music. These two notions have been combined to give the impression that record companies are risk taking both economically and aesthetically. They have been employed to justify the companies' ownership of sound recording copyright and their system of exclusive, long-term recording contracts. More recently, the rhetoric has been employed to combat piracy, extend the term of sound recording copyright and to account for the continuing usefulness of record companies. It is the argument of this article that investment in new music is not necessarily risk taking; rather, it is policies derived from risk taking that provide the financial security of record companies.

Introduction

PolyGram lawyer: Fiscally speaking, in 1972 American Century claimed six million dollars in profits yet 92% of the records you released were – speaking frankly - flops.

Richie Finestra, head of American Century Records: Technically, yes, but in reality they only look like flops.

Head of PolyGram: Please explain . . .

In Martin Scorsese's *Vinyl* (2016) the record industry bosses come clean. Risk taking is no risk at all. New artists - 'not your most sophisticated individuals' - are desperate to sign deals. They are given large advances but their contracts contain the magic word 'recoupable'. Finestra outlines the consequences:

No matter how many records they sell, the actual cost of producing that record always comes out of the artist's end. Physically manufacturing the record; touring costs; studio space; marketing; packaging; if a drummer drinks a Pepsi in the middle of recording that album, believe me he's paying for it at a 700% mark up. We really don't have any downside.

His head of promotions backs him up, 'we practically break even on all the flops. But the hits? That's where we cash in big'.

Vinyl is set in 1973, but its success ratio was in evidence 25 years earlier and is still being propounded today. For more than half a century, record companies have claimed that only one in ten of their artists will succeed. Michael Jones has argued that 'We do not have to ask why the music industry lives with such a high failure rate; the answer is, simply and quite brutally, because it can afford to' (1997, p. 28). It is nevertheless worth raising this question. Contrary to *Vinyl*, the industry has maintained that its flops *are* flops: they result in losses for the companies concerned. It is the other half of the equation that makes the failure rate affordable. The record business is centred on blockbuster hits: the gains of the successes outweigh the losses of the failures. This much has been acknowledged (Frank and Cook 2010, pp. 106-10). What has received less

attention is the strategy that underpins these economics. One reason why record companies can afford failure is because of failure itself.

It is a strategy that is underpinned by rhetoric. The companies have combined two particular tropes. The first is the success ratio itself. It has been consistently utilised but is hard to verify. The second is that record companies are risk-taking investors in new music. This trope casts the first in a benevolent light. Artists are not failing because record companies are bad at their jobs; they are failing because record companies dare to push boundaries. This rhetoric has had profound effects. It has been employed to justify stringent aspects of recording contracts and it underpins the record companies' ownership of sound recording copyright. Ultimately, it defends the economic base that the recording industry is built upon.

This article explores the evolution of this rhetoric. It concentrates most fully on the British market, beginning by outlining sound recording copyright ownership under UK law. It then turns to the one in ten statistic, tracing its usage within the record industry and its analyses within academia. The article next addresses the rhetoric of 'new' music, examining how risk taking has been used in defence of the record companies' ownership of sound recording copyright and then as a means to combat the piracy of this copyright and to extend its term. Although UK law relating to sound recording copyright has its own quirks and the use of industry rhetoric within the country has particular emphases, the ground covered here can be taken more broadly. Accordingly, the final section of this article looks at the promotional literature of the International Federation of the Phonographic Industry (IFPI). This organisation uses the rhetoric of success

ratios and new music to argue that there is still a need for record companies in the digital age.

Sound recording copyright in the UK

In the early 1990s, the British Monopolies and Mergers Commission (MMC) investigated the cost of compact discs in the UK, prompted by concerns that their high price was a result of monopoly situations within music businesses (MMC 1994, p. 3). The Commission's findings were summarised in *The Supply of Recorded Music*, which has been described by Martin Cloonan as 'the most detailed analysis yet undertaken by a government body on the ways in which parts of the music industries [...] work' (2007, p. 70). This report's main focus is on record companies. From the outset it underlines their financial core, stating that 'Copyright is central to the operations of the record industry' (MMC 1994, p. 3). It is sound recording copyright that is being referred to here: the ownership of the recording masters. This right gives the companies control of the recordings; payment will be due to them for any sale or usage throughout the duration of the copyright term. In addition, as the International Managers Forum (IMF) pointed out to the MMC, 'the copyright catalogues of the record companies are their most valuable asset' (ibid., p. 173).

The Supply of Recorded Music suggests that 'Under the 1988 Copyright Act the copyright would normally be owned by the record company' (ibid., p. 30). This is only partially correct. Although record companies do normally assume control of sound recording copyrights, ownership is not confirmed by the 1988 Act. The subject is dealt within in clause 9.2a, which also concerns film production. As first published, the clause stated that the 'author' of these art

forms is 'the person by whom the arrangements necessary for the making of the recording or film are undertaken' (CDPA 1988, p. 5).¹ 'Arrangements' is a loose word. It could indicate that the owner of sound recording copyright is the party that commissioned it. If so, the record companies possibly are the proper owners. There are many parties involved in arranging a recording project, but it is the signing policies and release schedules of record companies that determine the existence of most commercially released recordings.² This has not been the record companies' own interpretation of the term, however. They have emphasised instead that the 'arranger' is the party who has paid for the recording. Ironically, this interpretation problematizes their ownership claims.

The norm of record company ownership of sound recording copyright was established via earlier copyright legislation. In Britain, the subject was first covered in the Copyright Act of 1911. Clause 19.1 states that 'first owner' of sound recording copyright is 'the person who was the owner of such original plate at the time when such plate was made', adding that this 'person' can be a 'body corporate' (CA 1911, p. 12). In the early years of sound recording, the owner would therefore have been the record company. At the time of the 1911 Act, music was recorded directly to acetate discs. These 'plates' were commonly recorded in the record companies' own studios and were produced and engineered by salaried employees. Few artists had record contracts; they were instead paid session fees and perhaps an annual retainer (Martland 2013, pp. 187-191). They would have had no claim to ownership of the copyright.

This position was reinforced in the Copyright Act of 1956. Clause 12.4 states that 'the maker of a sound recording shall be entitled to any copyright subsisting in the recording' (CA 1956, pp. 19-20). The Act does add a provision,

however, stating that 'where a person commissions the making of a sound recording, and pays or agrees to pay for it in money or money's worth, and the recording is made in pursuance of that commission, that person, in the absence of any agreement to the contrary, shall be entitled to any copyright subsisting in the recording' (ibid., pp. 19-20). This addition is indicative of changes in the sound recording world: some sessions were now taking place away from record company premises. It also provided several hoops that record companies had to go through to justify their ownership of copyright. They had to have commissioned the works *and* paid for them *and* ensured that this ownership was not compromised in contractual agreements.

In contrast, the 1988 Copyright, Designs and Patents Act offers no qualification of the phrase 'the person by whom the arrangements necessary for making the recording are undertaken'. Its definition of ownership is more compact and it aims for greater flexibility. As well as covering both film and sound recording, it attempts to capture developments in each of these fields. Importantly, it legislates for a transformation in record industry practice. By the time of the 1988 Act the contemporary method of arranging recording sessions had been established. Most musicians are issued with recording budgets. These are usually spent on independent recording studios with independent staff.

In support of their decision that record companies should be regarded as the 'normal' owners of sound recording copyright, the MMC referred to a House of Lords debate about the drafting of the 1988 Act. Lord Williams of Elvel had felt that the wording of clause 9.2a was unclear and proposed instead that the copyright owner be defined as the person 'who commissions that recording and pays or agrees to pay for it in money or money's worth'; he also suggested that

film directors should share copyright ownership with film producers (HL Deb 30 November 1987). Lord Beaverbrook's response was quoted by the MMC:

The Bill deals with copyright in sound recordings in the same way that the present law [i.e. 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. (MMC 1994, p. 51)

The ellipsis in this passage belongs to *The Supply of Recorded Music* itself but Beaverbrook's excerpted argument is worth noting. He claimed that the initial wording of clause 9.2a 'largely sweeps up the question of commissions since record companies commissioning independent recording studios will be the body making the necessary arrangements, not the studios' (HL Deb 30 November 1987).

Lord Williams of Elvel withdrew his amendment. Consequently, clause 9.2a was published as drafted and contained no specific mention of payment for recordings. The major British record companies wished to bring attention to this aspect of arranging, nonetheless. In *The Supply of Recorded Music* they made the following joint statement:

It was clear that, in drafting the relevant provisions of the 1988 Copyright Act dealing with the grant of copyright in sound recordings, Parliament had intended that the record company should be the holder of that right, since it was the record company which generally made the necessary arrangements for the making of the recording, including the provision of

the necessary finance. There was authority as to the meaning of 'the person by whom the arrangements ... are undertaken' in relation to films. The courts had held that the word 'undertake' meant 'be responsible for', especially in the financial sense but also generally. It could therefore be assumed that in using the same formula for sound recordings as for films in the 1988 Copyright Act, Parliament had intended that copyright should vest in the person who had undertaken the financial responsibility for making the recording. The ownership of that copyright was the reward for the risk they had undertaken. (1994, pp. 252-3)

Although record companies have usually been rewarded with this copyright, there remains a lack of clarity around the word 'arrangements'. Moreover, the record companies' claims have been undermined by their own logic. It is now artists, rather than record companies, who take the financial responsibility for recordings; or at least they attempt to. Artists' recording budgets are commonly issued in the form of advances. The record companies claw these advances back from the artists' royalties: these funds are 'recoupable'. If the companies' own interpretation of the law is correct, then recouped artists could be regarded as the rightful owners of the copyright in their sound recordings. They have, after all, taken full financial responsibility for them.

The record companies' logic is also undermined by their contracts. In an attempt to shore up their ownership of sound recording copyrights, a standard exclusive recording contract will stipulate that the artist must 'assign' the copyright in their sound recordings to them, typically for the life of copyright. This harks back to the 1956 Act: the companies are establishing their claims to copyright by paying for sound recordings *and* making agreements. These claims

are contradictory, however. Why are record companies asking for the assignment of copyright if they believe the 1988 Act defines them as the 'arrangers', and therefore the first owners, of sound recordings?

This conundrum remains unanswered. The record companies do provide a rationale for their ownership of sound recording copyright, however. They argue that only one in ten of their artists will achieve profitability. In highlighting this imbalance, they suggest that, over all, it is record companies who shoulder the risk of financing sound recordings. As such, they deserve the copyrights of the few successes to compensate for the losses of the many failures. It is to this one in ten statistic and its rhetorical uses that we now must turn.

Success ratios

An early use of the one in ten statistic can be found in *Billboard*, 21 July 1958.

Bob Rolontz calculated that there were about 100 singles released in the American market each week, a figure he regarded as 'overproduction':

Since less than 10 per cent of all records released become hits, and the figure is closer to 5 per cent than 10 per cent, the majority of them hardly sell at all. Possibly 60 per cent of all released sell 2,000 to 3,000. Another 20 per cent sell up to 25,000. And another 10 per cent sell 50,000 or more. The hit 10 per cent sell the 100,000 to 1,000,000 records. In other words 80 per cent of all records released are a loss for all concerned

(Rolontz 1958A, p. 4)

From the outset we witness two characteristics of success ratios. First, they can be measured in different ways. Rolontz begins by examining the ratio of hits to

releases and then addresses the profitability of recordings. The second is that success rates can vary: the article alternates between 5%, 10% and 20%.

It is nevertheless the one in ten statistic that the record industry has most commonly used. Rolontz employed it in relation to albums in the following week's *Billboard*, arguing that 'true money making LP's are certainly no more than 10 per cent of all released' (1958B, p. 10). By the following decade the statistic was being used in Britain. In 1966, *Melody Maker* asked, 'If, as the record companies now admit, nine out of ten singles fail to make the Pop Fifty, what can the aspiring popper do to shorten the odds against his getting that elusive hit record?' (*Melody Maker* 1966, p. 8). The statistic remained in use thirty years later. *The Supply of Recorded Music* reported, 'The majors tell us that only one in ten of the pop artists with whom they sign contracts turns out to be successful' (MMC 1994, p. 24). A great deal rested upon this statement, but it remained unchallenged and unverified by the MMC. British politicians were similarly compliant. In 1997, Chris Smith, the Labour Party's Culture Secretary, echoed industry claims that 'On average, 80-90 per cent of artists signed to record companies will not succeed' (1997, p. 81). Meanwhile, the ratio maintained its presence in the US: in the early 1970s, it was argued that 'only 10 percent [of records] smelled "break even"' (Denisoff 1975, p. 5); in the mid-1990s, it was claimed that 'Nine out of ten acts signed to record contracts are losers' (Goodman 1997, p. 232). Writing in 2014, Simon Napier-Bell summed up the statistic's persistence:

the ratio of success is what it always was – for every ten artists signed, nine will get nowhere. A contract with a major record company was

always a 90 per cent guarantee of failure and it still is today. (2014, p. 285)

The endurance of the statistic is remarkable. It has survived despite significant changes in record industry practice. Three factors in particular should have affected its consistency. The first is that the industry has gone through peaks and troughs. The usual reaction of record companies during leaner times is to cut the size of their artist rosters and introduce more cautious signing policies. As a result there should be a higher ratio of hits to releases during hard times, at least if measured in relation to chart entries. The second is that major record companies have moved from an industry model whereby they manufactured records, to one where there is less physical manufacture, most of which is undertaken by outside companies. In the 1970s, the majors' manufacturing interests were viewed as a cause of overproduction, as these companies needed to generate sufficient product to keep their pressing plants busy (Denisoff 1975, pp. 97-8). Manufacture also provided a platform from which to experiment. The majors manufactured product for smaller companies, thus gaining a steady stream of income that safeguarded them against the 'adverse financial impact resulting from the considerable risk involved in speculative investment in new recording artists' (Hill 1978, p. 32). As such, some commentators believe they took greater artistic chances when they were in the manufacturing business (Harrison 2011, p. 171). The third factor is that record companies have become increasingly sophisticated when it comes to consumer data. From an industry which did little audience analysis, we now have one that conducts detailed market research, taking full advantage of the digitisation of consumer activity

(Frith 2001, p. 34). Despite this wealth of data, the one in ten success rate persists.

The ratio is slippery, however; it has been used to measure different things. As we have moved through this time period it has less regularly been employed in relation to the ratio of hits to releases, which is just about quantifiable, to instead addressing the proportion of records that are profitable. When it comes to profitability, we have to trust the record companies' own calculations. They do not publicise precise sales figures, nor do they detail breakeven points of releases, which can vary widely (Osborne 2014, pp. 164-6). There has also been variation regarding which breakeven point they use. Sometimes they employ the statistic in relation to the recoupment of an artist's personal, recording and video advances; at others it is applied to the overall expenditure on a release, adding in the costs of manufacture, distribution, marketing and promotion. What also gets obscured is the fact that artists and record companies have different breakeven points. A 'failed' record for an artist may be profitable for their record company. Interviewed in 1971, Warner executive Joe Smith admitted that his artists received a lower share of profits than his company did, therefore their debts took longer to pay off: 'they're recovering it at a lesser rate than we are' (Sanjek and Sanjek 1991, p. 212). He calculated that it would take sales of 100,000 albums for an artist to recoup 'their advance and recording costs, and from then on they're making money. But only 10 to 15 percent of the albums sell that well' (ibid.).

Some academics have questioned the veracity of success ratios. Writing in the 1990s, Keith Negus reported an industry belief that only one in eight artists recoup their advances. While arguing that this is 'an elusive figure, hard to verify

and as mythical as it is statistical', he noted that some genres have a higher hit rate than others (1999, pp. 47-50). In 2013, Lee Marshall listed a number of one in ten citations. He questioned their 'seeming truism' and suggested 'the failure rate may not be as high as conventionally perceived' (2013, pp. 583, 584). Other academics have tested the ratios out. In the early 1970s, Simon Frith quantified 'A Year of Singles in Britain', finding a success rate of 'about one in eleven' (1974, p. 40). In addition, he discovered that independent labels had a better profitability ratio than majors (*ibid.*, p. 39). Jones undertook a similar exercise in 1995, tracking a week's worth of single releases to monitor how many made the charts (1997, pp. 38-48). His main concern was nevertheless with the overall profitability of acts. Although he discovered that 'the scale of failure is still enormous', he conceded:

Without knowing the extent of the recording and the promotional budgets for a new act; or the extent of recoupable debt for an 'established' act, we cannot know the sales target figure for a release by that act. Without knowing the sales target figure, and with no access to actual numbers of records sold, we can't judge whether the act in question is regarded by their label as either succeeding or failing. (*ibid.*, p. 47)

While the statistic has remained much the same, the academic accounts of it have changed. In the 1970s and 1980s it was used as evidence of a 'mud against the wall' approach to releasing music (Chapple and Garofalo 1977, p. 14). Paul Hirsch documented a record company belief that 'There are no formulas for producing a hit record' (Hirsch 1971/2, p. 655). Labels would therefore issue an array of titles, hoping some would stick. Bernard Miège drew pessimistic conclusions from this scenario, arguing that it resulted in job insecurity and

impecuniosity for artists (1989, pp. 89-90). In contrast, Frith saw it as evidence of consumer sovereignty (1978, p. 97). For David Hesmondhalgh the signing policies of these decades resulted in 'a substantial degree of artistic innovation and experimentation' (2013, p. 249).

By the 1990s, the costs of recording, promoting and marketing records had increased considerably (Negus 1992, p. 40). This was also the era in which more sophisticated methods of audience and sales analysis took hold. Negus argued that this resulted in 'a straightforward reluctance to experiment, a reduction in risk-taking and a propensity towards a partial view of the world' (1999, p. 52). Jones suggested that record companies were no longer involved in 'overproduction'; they were instead 'over-signing' new acts (1997, p. 313). This policy was considered to be more cost-effective. Although record companies would 'initiate the commodification of a number of commodities', they would 'choose to concentrate marketing and promotional resources on only a proportion of these on the basis of "intelligence" garnered from the market place' (ibid., p. 149). The essential point of analysis was no longer what happened once a record was in the market, but the system of prioritisation that had taken place before it was released.

Building on these studies, some writers have suggested that record companies have a systematic approach to failure: it is the condition to which the industry constantly aspires. By 2001, Frith was viewing success ratios in a new light. He asked, 'What if a record's failure reflects not the irrational activities of musicians and consumers but the perfectly rational activities of record companies themselves?' (2001, p. 47). In contemplating why a record company would chose *not* to promote some of its artists, he outlined the following areas of

policy:

the development of the portfolio management structure; the carefully orchestrated programme of global release and promotion; the calculation of what budgets are available for what products when; a sense at any one moment of to which project it makes most sense to devote energy. (2001, p. 48)

More recently, Marshall has suggested that 'the high failure rate associated with the record labels can [...] have some beneficial aspects for labels', pointing out that it 'serves important rhetorical purposes in relation to governments, policy makers, and consumers, and [...] in contractual negotiations with its artists' (2013, p. 584).

Although profitability is difficult to verify, the statistic should not be dismissed out of hand. The majority of recording projects *do* fail to breakeven. More importantly, Marshall is right: the success ratio has been tactically employed. It has been used in defence of a contractual system that binds artists to record companies in exclusivity for long durations, with any options regarding duration being in the company's favour. It has also justified the companies' ownership of sound recording copyright. *The Supply of Recorded Music* is illustrative of industry thinking. The record companies argued that 'exclusivity and other provisions on copyright and length of contract are essential to enable the industry to function at all' (MMC 1994, p. 13). Having heard evidence from each of the major record companies, the MMC decided:

It was only by concluding contracts which embodied such terms as retention of copyright, exclusivity and a reasonable length of contract term that the companies could reap the necessary long-term benefits for

those few artists who succeeded and that the artists who succeeded could reap the long-term benefits in their development and career. (1994, p. 251).

But why have so few artists achieved profitability? One reason is because they are given high advances, which are therefore difficult to recoup. Giving evidence to the MMC, the record companies maintained that 'in general new artists currently preferred to secure larger advances and royalties rather than ownership of copyright' (ibid., p. 29). This statement warranted closer inspection. In this instance, the companies were suggesting that ownership of recording copyright rested on contractual negotiation rather than being determined by the 1988 Act. This allowed them to promote artist agency when it came to the setting of advance fees, although they had elsewhere admitted at least partial responsibility for their scope: one of the major labels argued that they were set 'between that level of advance necessary to persuade the artist to accept the offer in preference to a rival record company, and a prudent maximum, given the unpredictability of an artist's reception in the market' (ibid., p. 227). The record companies were also suggesting that, for artists, high advances and copyright ownership should be considered mutually exclusive, but this argument rested on the failure of most artists to recoup. We therefore need to ask whose interests have best been served by the system of high advances.

Another reason why so many records fail to achieve profitability is because of the high costs of marketing and promotion, but these costs are high because there are so many records. Broadcasters and journalists are faced with a plethora of releases. One way to filter them is to assess marketing expenditure. Marshall noted that 'failing to spend substantial amounts on independent

promoters makes it look like the label is not serious about a record, thus dooming it to failure' (Marshall 2013, p. 583). This expenditure has enabled major record companies to exercise their power. In America, for example, there have been times when promotion has become so expensive that only the largest labels can afford it, thus providing 'a means to keep small companies off the charts' (Dannen 2003, p. 264).

It is the major record companies, ultimately, who have set the bar for the success ratio high, and yet they have argued that they deserve compensation for its effects. In doing so, they have received ample rewards. Their contractual policies have received official approval and their ownership of copyright has been endorsed. To achieve this, however, they have had to cast their failure in a positive light. And this is where the rhetoric of new music comes in.

New music

The tactical employment of new music is a recent trend when compared with the rhetoric of success ratios. The two phenomena have nevertheless long been considered in tandem. They are, for example, brought together in the 21 July 1958 *Billboard* article cited above. Rolontz believed that overproduction had a negative effect on new acts, arguing that record companies provided them with little 'staying power' as they were constantly looking for acts that were newer still (1958A, p. 4).

The Supply of Recorded Music provides a more sanguine view of overproduction. Here the record companies portrayed their contracts and copyrights benevolently, arguing that they facilitated the sponsorship of new British performers. They maintained:

If material modifications were made to the key provisions in recording contracts, dealing in particular with the extent of copyright acquired by the record company, the length of the contract and the exclusivity provisions imposed on the artist, then the companies would be forced to take a much more short-term view of their relationship with artists, which would not only be detrimental to the longterm development of those artists, but which would inevitably mean that the companies would not be able to invest as widely in new UK artists as they did at present.

(MMC 1994, pp. 251-2)

In the 1990s, British record companies began to enter into closer dialogue with governments. Cloonan noted that 'key people in the popular music industries came to realize that politicians needed to be lobbied' (2007, p. 21). In part, this was because their industries were being scrutinised: *The Supply of Recorded Music* was one of a number of official investigations. It was also because governments were keen to open dialogue. This interest was reflective of an era in which the profits of heavy industry had declined while those of the cultural industries had grown (ibid., p. 39).

Cloonan argued that the record companies were in need of 'an image-building exercise'; adding, 'Clearly at a time when cultural policy was increasingly becoming part of economic policy and when the music industries seemingly felt some unease about stressing pop's cultural value, the pragmatic response was to make the economic case' (ibid., p. 75). The argument they made was nevertheless balanced between the two. While the record companies promoted their economic worth, they also sought protection. In doing so, their promotion of new music leant more towards its aesthetic and cultural qualities

than it did to financial policy. There was no mention of portfolio management or budget calculations; instead there was an emphasis on the risk-taking nature of supporting the new. There was less talk about the search for the next blockbuster acts than there was about supporting the marginal, the challenging and the forward-looking. The companies stressed they were signing 'creative' artists and issuing 'innovative music'; they were prepared to sponsor acts with 'minority appeal' (MMC 1994, pp. 230, 247, 252). They were also patriotic, providing investment for 'new UK artists' (ibid., p. 252).

In making their case to the MMC, the record companies drew upon an earlier instance of successful lobbying. In support of proposals for the EC Rental Directive, the European Commission claimed the 'large-scale investments' of record companies 'have to be protected', as this would enable the companies '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. (ibid., p. 209)

Cloonan depicted the manner in which the 'music industries' commonsense view of the world' began to permeate British governments (2007, p. 41). Although Negus's contemporary research had revealed a system of tight financial control and restricted musical innovation, the record companies stressed that they were risk taking. This tactic was employed in one of the first investigations into the

record business undertaken in this period, the National Heritage Committee's 1993 Inquiry into CD Prices. The major companies suggested they were involved in 'a high risk business'. The Committee only noted that they 'can be', however (ibid., p. 70).

The Supply of Recorded Music, published the following year, evidences a new level of accord with the record industry. There was now agreement that it was a 'high-risk business', driven by the search for new artists (1994, p. 4). The record companies had much to gain by highlighting their risk-taking deeds. They were used in defence of their ownership of sound recording copyright: the MMC conceded that 'since the record companies take the risk of investing in artists when they are unknown, they should not have the rewards taken away on those occasions when their investment turns out to be successful' (ibid., p. 30); they supported the system of exclusive, long-term contracts: the companies argued that these provided the platform from which 'to take the very significant risks in investing in new artists' (ibid., p. 251); and they justified the high price of CDs: the labels maintained that by controlling these costs they could 'generate sufficient funds to invest in [...] new music and artists' (ibid., p. 230).

Although the MMC endorsed each of the record companies' claims, their suggestions did not go uncontested. Giving evidence to the Commission, the IMF questioned the companies' quantification of success. They argued that the one in ten success ratio was based on a short-term analysis of an artist's profitability, pointing to the fact that record companies would retain copyright in the sound recordings for 50 years, regardless of whether an artist was signed to them. Consequently, it could accrue income long after an artist had been dropped on account of non-profitability. They noted that, whereas the losses from

'unsuccessful' artists would be detailed in company balance sheets, the value of their copyright catalogues would not appear there (ibid., p. 173). The IMF proposed instead a shorter term of sound recording copyright, suggesting a period of 10 years, after which the rights would 'revert' to the artist. This, they believed, would give artists greater bargaining power in their negotiations with the industry, as the value of these copyrights would reduce the need to 'obtain capital [...] on disadvantageous terms' (ibid., p. 211). The IMF maintained that the 'more genuinely competitive environment that would follow from these changes would [...] also lead to lower prices to the consumer, due to the greater efficiency that would ensue from this heightened level of competition (ibid.).

Others, too, have queried the record companies' benevolent self-portrayal. Miles Copeland, who has had a successful career as both a manager and as a head of record labels, stated that 'If you're trying to build a record company, and you're trying to build an asset, what you really try to do is you try to find a young artist that you can sign and develop' (Stahl 2013, p. 155). While he stressed these are 'the riskiest ones', he admitted they are 'where you're going to get the most return. When I go to the marketplace to try to borrow additional money, or get investment in my company, they're going to look at what are the potential returns of [my] company' (ibid.).

New artists offer good returns because they are contractually weak. In a competitive business, in which only a small proportion of artists are successful and an even smaller proportion is signed, a prospective artist has little bargaining power. Those who do manage to secure record company interest will generally be on lower royalty rates than established artists and their contracts will contain a greater number of restrictive clauses (Dannen, 2003, p. 79; Jones

2012, p. 52; Negus 1992, pp. 149-50). Anita Elberse has argued that 'Locking acts in when they do not yet have any bargaining power ensures that the labels can benefit longer from their investments in talent development' (2014, p. 199).

Leslie F. Hill, while a director at EMI, conceded that new artists have 'the greatest profit potential for the company' (1978, p. 35).

In their dialogue with governments, record companies have claimed their ownership of copyright and restrictive contractual system support the creation of new music. The reverse is also true: it is new music that supports the record companies' system of ownership and control. Given that the sponsorship of new artists makes record companies look good as well as helping to ensure their profitability, it is little wonder that has been emphasised in further industry campaigns.

New uses for new music

In the 21st century, the British record industry has sought governmental backing in two key areas: the need to combat the digital piracy of sound recording copyright, and their desire to increase the duration of its term. In both cases new music has been utilised.

Consumers Call the Tune, issued in 2000, was the first British governmental report to consider the effects of the 'on-line revolution' on the music industries (DCMS 2000, p. 3). It contains a call for ministers to take action against the digital theft of the record companies' copyrights; in his foreword to the document, Chris Smith noted this is 'a message we hear loud and clear' (DCMS 2000, p. 3). The record companies argued that failure to bolster intellectual property laws would reduce the supply of new music. Martin Mills,

head of Beggars Banquet, maintained, 'if today's music isn't paid for, tomorrow's music won't be made' (DCMS 2000 5). Geoff Taylor, Chief Executive of the British Phonograph Industry, evidenced similar logic in *Digital Music Nation 2010*, a campaigning report issued by his institution. He claimed that, via a more tightly policed internet,

not only do we give our music the chance to flourish, but we will spur on digital innovation and investment. If we falter and lack the courage to act, we risk creating a serious cultural deficit in the UK. The voices of a generation of new bands and artists simply won't get signed and won't be heard. (BPI 2010, p. 2).

The lobbying for an increased term of sound recording copyright began in 2002, when Phonographic Performance Ltd (PPL), the record company-owned collecting society that licences the use of recorded music in public, first raised the issue with the DCMS (*Music Week* 2011, p. 5). Further impetus came in 2004, when the trade journal *Music Week* launched a support campaign (*Music Week* 2004, pp. 6-7). By 2006, the record companies' case was being heard as part of the *Gowers Review of Intellectual Property*, commissioned by Gordon Brown when Chancellor of the Exchequer (Gowers, 2006, p. 48). Indeed, according to Nicholas Cook, the campaign was 'one of the specific reasons why the Gowers Review was set up' (2012, p. 608).

In making their case, the British record companies argued that 'extension of term would increase the incentives to invest in new music [...] as there would be longer to recoup any initial outlay (Gowers 2006, p. 49). *Music Week* maintained that if the 50-year term remained in place, record companies would take fewer risks: 'labels will invest in safer options, they will stop backing the

challenging artists for which the UK is renowned' (*Music Week* 2006, p. 9).

Making the case for extension was to prove harder than enlisting support for copyright infringement, however. In seeking evidence that a longer term 'would increase the incentives for record companies to invest in new acts', Andrew Gowers was informed by 17 economists, 'including five Nobel Prize winners', that any extra money generated would be 'negligible' (Gowers 2006, p. 52). The economists argued that 'most sound recordings sell in the ten years after release, and only a very small percentage continue to generate income, both from sales and royalty payments, for the entire duration of copyright' (ibid.). The *Gowers Report* pours scorn on the idea that a longer life of copyright will provide younger musicians with 'incentives to make music' (ibid.). Giving evidence, Dave Rowntree commented, 'I have never heard of a single one [band] deciding not to record a song because it will fall out of copyright in "only" fifty years. The idea is laughable' (ibid.). More generally, the report argues that extension will benefit established stars rather than nascent artists (ibid., p. 51).

It was suggested elsewhere that new artists might actually suffer a decline in public performance royalties. John Smith, general secretary of the Musicians' Union, pointed out that 'under blanket licence arrangements all an extension of term would do is dilute the existing pot by adding more repertoire' (Smith 2006, p. 8). Each performance would receive a smaller distribution royalty, as the total money generated by broadcasting and public premises licences would not be raised. Daniel Byrne believed that the remaining income would be skewed towards established artists, as an extension of copyright term would reward 'unproductive performers' while distributing less money to 'younger acts' (Stanley 2011). The balance could be skewed further still, as record companies

would consequently focus greater attention on these unproductive artists. According to Jason Toynbee a longer term would encourage the music industry 'to promote stars and "classic" songs and recordings', as they could 'create economic value from them with very little extra investment' (Toynbee 2004, p. 133).

There was a sense that the record companies had stretched themselves too far. Earlier claims that only one in ten artists succeed could not be squared with a belief that copyright extension would benefit new acts. The *Gowers Report* instead reminds us that:

Eighty per cent of albums never recoup costs and so no royalties are paid to the creator. [...] If the purpose of extension is to increase revenue to artists, given the low number of recordings still making money 50 years after release, it seems that a more sensible starting point would be to review the contractual arrangements for the percentages artists receive. (2006, p. 51)

Gowers rejected the record companies' logic, arguing that term extension 'would not increase the incentives to invest, would not increase the number of works created or made available, and would negatively impact upon consumers and industry' (ibid., p. 56).

In coming to his conclusions, he reached back to early debates about copyright. Britain's first copyright law, the 1710 Statute of Anne, makes its intentions clear in its title. It is 'An act for the encouragement of learning, by vesting the copies of printed books in the authors or publishers of such copies, during the times therein mentioned'. The Act strikes a balance: as an incentive to produce, there should be copyright in artistic works; to ensure these works enter the public domain, and can therefore best inspire future authors, the term of

copyright should be limited. Gowers alluded to this trade-off in his report, noting that a properly functioning copyright system is one where 'incentive to innovate is balanced against the ability of follow-on innovators to access knowledge' (ibid., p. 45). He also quoted Lord Macaulay, who argued in 1841 that 'it is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good' (ibid., p. 50). According to this belief, it is a limited duration of copyright that encourages new work.³

This was nevertheless not the end of the campaign for copyright extension and nor was it the end of record companies' enlistment of political support. The pro-extension campaigners turned their focus upon the European parliament. To this end, John Kennedy of IFPI and John Smith of the Musicians' Union met with Charlie McCreevy, European Commissioner for Internal Market and Services. In February 2008, McCreevy launched a proposal, seeking a sound recording copyright term for the EU of 95 years. After three more years of debating and redrafting, during which Britain's Labour government eventually came out in favour of term extension, the European Parliament agreed on a period of 70 years (Harkins 2012, p. 642).

In celebrating this outcome, Geoff Taylor could not resist mentioning new music: 'A longer copyright term is also good news for music fans, as it will ensure that UK record labels can continue to reinvest income from sales of early recordings in supporting new British talent. (Ashton 2011). Fran Nevrkla, chairman of PPL, stated similarly, 'The enhanced copyright framework will [...] enable the record companies, big and small, to continue investing in new

recordings and new talent' (ibid.).

The rhetoric of risk-taking investment has been employed to safeguard the record companies' ownership of sound recording copyright, to defend this copyright from piracy, and to extend its term. A measure of the companies' faith in this rhetoric is that it has been adopted by IFPI, their global trade body. Moreover, investment in new music is now being used for an all-encompassing cause: to explain the need for record companies.

Investing in music

The profitability of record companies has fallen. IFPI has charted a decline in global income from US\$ 27.3bn in 1999 to US\$ 14.9bn in 2014 (IFPI 2012B, p. 7; IFPI 2015, p. 6). Biennially since 2010, this organisation has issued *Investing in Music* reports, arguing that, despite this decline, record companies offer prospective artists their best chance of success. Ann Harrison believes the aim of the reports is to 'debunk suggestions that an artist can develop careers in the business without needing a label' (2011, p. 64). The reports suggest as much, maintaining 'There has been a mistaken belief among some that the role of labels would be diminished in the digital age' (IFPI 2014, p. 6).

In making their case, IFPI have stressed that new artists are at the heart of record companies' concerns: each report claims they are the 'lifeblood' of the industry (2010, p. 6-7; 2012A, pp. 7, 9; 2014, p. 6). The reports offer daunting figures regarding the amount of money it costs to break a new act. A spend of 'between US\$200,000 and US\$500,000' in 2012 had risen to 'US\$500,000-2,000,000' by 2014 (2012A, p. 11; 2014, p. 7). What they do not admit is that these costs are partly attributable to the companies' escalating promotional

wars, which are in turn derived from the fact that more artists are signed than will succeed.

There is one concession to previous practice, however. The one in ten ratio is revised. Left as it was, it could have been taken as evidence that record companies are not viable: why sign with them if there is only a slim chance you will succeed? Consequently, the 2012 report tells us 'the most common estimate cited by senior music company management is a success ratio of one in five. This is more than the commonly estimated one in ten ratio of a decade ago, reflecting a generally higher success rate than was previously the norm' (2012A, p. 11).⁴ However, just as record companies provided little evidence for their earlier statistic, this revision is offered without any proof.

The ratio is balanced with the idea that record labels support a 'wide community of artists, many of whom will not be commercially successful' (2010, p. 5). Failure is employed as a means of demonstrating altruistic ways. IFPI claim that, while 'Continually investing in new talent is a hugely risky business', it is record companies who 'shoulder the financial risk inherent in trying to break a new act' (2010, p. 6; 2014, p. 5). According to Nick Raphael, president of Capitol Records UK:

We put just as much effort and money, if not more so, into the acts that don't succeed as with those that do. There may be any number of reasons why they don't connect with the audience, but it is not for lack of effort and support from labels that want them to succeed. (2014, p. 9)

There is no mention of the strategic prioritisation of acts. The reports claim instead that 'longterm' contractual involvement is of benefit to artists. It allows them 'to develop their own brand identity and earn a living from different

sources' (2010, p. 7).

It is not just prospective artists who are expected to read these reports, but also policy makers within governments. To this end, IFPI claim that investment in new music benefits 'the economy as a whole' and that record companies have 'sustained their investment in artists despite the significant fall-off in overall sales revenue' (ibid., pp. 5, 7). The reports provide a reminder that 'A&R spending today [...] is under greater pressure than ever from the impact of illegal file-sharing and other forms of piracy' (ibid., p. 9) and they boast that record companies invest more money in 'research and development' than the pharmaceutical and biotechnology sector (2012A, p. 9; 2014, p. 9). In order to continue this practice, however, the record companies' ownership of copyright needs to be maintained:

It is copyright that makes investment in music possible. It is copyright that allows the industry that helps artists gain a return on its investment, and therefore plough back new funds and resources into the next generation of talent. And it is copyright which underlies the endeavours, the risks and the successes that fill the pages of this report. (ibid., p. 4)

The 2014 *Investing in Music* report come closes to declaring the record companies' self-interest. Placido Domingo, Chairman of IFPI, states that 'instead of calling this report *Investing in Music*, it could also be titled *Investing in Copyright*' (2014, p. 4). For the most part, however, this investment is not discussed as resulting in something that the record companies will profit from or own. The suggestion, instead, is that any income derived from this right will be ploughed back into the future: IFPI claim that the majority of record companies' copyright income is spent on new music, as labels 'reinvest the proceeds of

successful campaigns in the discovery and nurturing of the next generation of talent' (2012A, p. 7). In reaching this formulation, they provide a phrase that the record companies have been grasping for in each of their campaigns and reports: what they are peddling is a 'virtuous cycle of investment' (2010, p. 5). This honourable inflection has been implied whenever they have combined the rhetoric of their success rate with their rhetoric of newness.

Conclusion

The economic wellbeing of record companies has been underpinned by two rhetorical tropes. The first is that only one in ten artists succeeds; the second is that they are supporters of new music. Both tropes are problematic. The labels' success ratios require verification and their nurturing abilities can be questioned. Artists who are not prioritised for promotion would hardly recommend their companies' virtues. Moreover, record companies might be signing new artists, quantitatively, but this does not mean that their music is new, qualitatively. In the current century, for example, theories of 'retromania' have taken hold (Reynolds 2011).

This is not to say that either trope is baseless. The careers of most artists will end in failure and the record companies will right off these artists' losses. There is also an element of truth in the companies' risk-taking propaganda. Until recently it has been hard to test their claims because there have been few alternatives to their policies. This hegemony is finally being challenged. The new decade has witnessed the rise of service companies, such as Kobalt, who perform many of the functions of a traditional record company but do not own their artists' copyrights. How can they afford this? The charge levelled against them is

that they do not take risks; they can forgo copyrights because their deals are reserved for proven artists who are old (*Music Week* 2015, p. 9).

It would also be wrong to claim that the record companies thought out their rhetoric first and subsequently went in search of failure and novelty. The reverse is the case. To acknowledge this is not to deny their strategies, however. The important thing to monitor is how failure and novelty have been utilised to the record companies' advantage. There are many aspects of industry practice that require greater scrutiny, notably the exclusive, long-term nature of recording contracts and the record companies' ownership of sound recording copyrights. One reason why they have not received sufficient questioning is because of the high success rate of their rhetoric.

Notes

¹ Clause 9.2a was later updated. The Copyright and Related Rights Regulations of 1996 separated sound recording copyright and film into two new clauses (CRRR 1996). Clause 9.2aa of the Copyright, Designs and Patents Act states that 'in the case of a sound recording' the author is 'the producer', a term that is clarified using the old wording of the act: 'the person by whom the arrangements necessary for the making of the sound recording are undertaken'. Clause 9.2ab provides a more radical amendment. The authors of a film are now taken to be 'the producer and the principal director'. Where ownership was once taken to reside solely in the party that arranged the production, the Act now awards part-ownership to one of the artistic creators.

² The major exceptions are self-releases or licence deals. In licence deals artists, production companies and smaller record labels create and finance recordings, which they licence to a larger record company for release while retaining the underlying copyright ownership (Harrison 2011, pp. 78-9).

³ It could nevertheless be argued that, just as the decisions of artists are not affected by a longer term of copyright, their access to music would be little affected by a shorter term (Osborne 2015).

⁴ The 2010 report states that 'Estimates of the success ratio vary between one in five and one in ten (2010, p. 7). Curiously, the latest report has returned to this state of uncertainty, stating, 'There is no single authoritative figure for the proportion of record companies' signings that are commercially successful, but a common estimate is between one in five and one in ten' (2014, p. 8).

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