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A PALER SHADE OF LITIGATION: STILL MORE CONFUSION IN MUSICAL PROPERTY RIGHTS

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I. Abstract

This paper gives an economic analysis of the judicial decisions in the disputes over authorship of Procol Harum's 'A Whiter Shade of Pale'. The first legal contest took place in 2006, 39 years after the song was written and was found in favour of the plaintiff (Fisher), in the first case he has brought against Brooker-Reid, in terms of his right to authorship. He was deemed to merit 40% of the musical composition rights but only from the date of his application onwards. However the case went to appeal with the result that in April 2008, it was found that although Fisher was still entitled to the authorship status he had been granted that he was not now entitled to any share whatsoever of the composing royalties.

This case is partly unusual in that the judge, in the initial case, had formal musical training and saw fit to interpolate this human capital into the proceedings. The defendants made a number of remarks about the nature of the precedent set and its implications which can be usefully discussed in terms of economic models of production. In the appeal hearing one of the reasons given for the decision reached was the argument that the previous cases set an unfortunate precedent detrimental to composers of pop/rock music. The 'rock and pop' music production mode is discussed here with reference to this and other pertinent cases.

II. Introduction

The volume of song writing authorship disputes have grown in the music industry as the role of recorded music has increased. According to Keyes (2004) there were around twice as many such cases in the USA in the second half of the twentieth century (43) as there were in the first half of the century. The rise of vinyl, cassettes and cds greatly increase the scope for earnings beyond what could be obtained from sales of sheet music and performing rights income. This increases the prospective income stream for any claimant to a share of a previously copyrighted song and/or performance. The cases which come to court are only the tip of the iceberg as threats of action will lead to out of court settlements. The risk of claim threats also has implications for the efficiency of production in the industry as countervailing actions are to be expected by those at risk of claim.

The study of individual music industry cases is of wider relevance as the decisions made proceed on the basis of doctrines which are applied to creative authorship and intellectual property in general. Such intellectual property could be embodied in computer games, other software or scientific or industrial research patents. The key aspect of the case study in this paper relates to the role of lapses of time in pressing a claim to ownership rights (covered by the doctrine of *laches*).

The lapse of time in this case is over thirty years to the initial taking of a claim. Although this in itself is not held to be a barrier to a claim, it can be seen below that if appears to feature in the overthrow of the original judicial decision. There is a clear economic efficiency issue here for the holder of any form of intellectual property as they may invest over many decades in investment to maximize the potential of the asset only to discover

that this income is eroded by a belated claim which they may not have even been aware existed.

This paper surveys a specific authorship dispute in the music industry which has produced confusing and contradictory decisions for both the legal practitioner and economists. In this case, there is no dispute about the terms of contracts signed in the past. The essence of the matter is the assertion of a property right in a musical work and the attendant rights to income. In the present case, a dispute that had never previously been aired finally comes to court after nearly 40 years and authorship rights are granted to the plaintiff and limited royalty rights, then the course goes to appeal and the authorship is upheld but the royalty rights are removed. This case was in the U.K. but there have been similar cases in America in song-writing disputes brought after long delays where authorship was granted but no income [Tomlinson (2002)]. From an economic point of view, there are questions about whether it was efficient to award authorship rights in the first place and also whether it is efficient to award authorship rights with no royalty rights. In pursuing this one has to also question how the decisions came to be made.

Overall there seems to be a situation of contradiction. One can understand the decision to give no right of authorship and no rights to income or rights to authorship and the attendant income.

However, this situation produced a case of original award of rights but only limited income then rights and no income at all.

III. Background

Procol Harum were one of the groups to emerge from the UK in the 1960's blues boom. The disputed author in this lawsuit (Gary Brooker) was a member of the

Paramounts R ‘n’ B band. Along with B.J. Wilson (drummer) and Robin Trower (guitarist) who became members of Procol Harum for their first album although they did not play (notably or at all) on A Whiter Shade of Pale itself. When Matthew Fisher departed in 1969, his replacement was Chris Copping who had also been a member of the Paramounts. Hence in 1969-1971 Procol Harum had a line-up consisting solely of former Paramounts members.

After the Paramounts disbanded, Brooker was brought together with lyricist Keith Reid through the auspices of Svengali figure Guy Stevens. They planned to be songwriters for other people. According to Brooker, he went home with the lyrics to AWSOP (I will use this abbreviation for the song title from hereon) which was the original longer version with more verses, after his first meeting with Reid and soon after began to compose the musical accompaniment on the piano in his mother’s house. A publishing demo was eventually made which is said to be lost although Justice Blackburne made a very curious remark which seems to imply that he had heard it.

As the prospects for placing songs were, in 1966/7, far from good, Brooker and Reid formed a band initially through adverts in ‘Melody Maker’ magazine. Most of these musicians were deemed unsatisfactory leading to the eventual introduction of Wilson and Trower. However, Matthew Fisher, who replied to an advertisement, was retained. He had the additional attraction of owning a Hammond organ. Having dropped out of music college, he had a variety of experience having backed hit singer Billy Fury and more recently the (later to be Raving Monster Loony political candidate) Dave (self –styled ‘Screaming Lord’) Sutch. Fisher became a member of Procol Harum in 1967 and stayed until 1969 when he was, apparently sacked.

Fisher's departure in 1969 involved a settlement whereby he was absolved from any responsibility for the currently outstanding debts of the group in exchange for waiving his performance royalties. He did not rescind his compositional rights and, by his own admission, did NOT at this time make any claim for any kind of ownership or copyright in AWSOP. This fact seems to have been a factor in the decision in the appeal specifically with respect to the extreme delay in bringing his claim [see 2008 EWCA Clv 287]. During his time, in the band, he was granted composing credits on a number of pieces including an instrumental of his own. He also sang some songs on the second and third album although he never sang solo in live performance. After this he seems to have had a period of depression but returned very briefly to join Procol Harum (in 1971) for just a few weeks when he received a cheque for £500 which, somewhat confusingly seems to have been royalties for producing the 1969 album 'A Salty Dog'. He did not perform live or record any material in this sojourn and according to interviews in Johansen (2000) this experience made Brooker and Reid determined never to work with him again. In 1973, he began releasing solo records although he did not tour in support of them. His first solo record 'Journey's End' contains what appear to be attacks on Brooker and Reid for stealing composing royalties from him. They are of course not named but one might be inclined to guess that they are the subjects of 'Play Their Game' and more pointedly 'Going For A Song' is a direct reference to AWSOP- specifically not wanting to hear it ever again and being sick of it. Fisher later claimed that he was writing this song in the persona of Brooker who must be sick of hearing the song and being asked about it. By the 1980's Fisher had largely disappeared from music although somewhat surprisingly he appears as co-composer and player on Brooker's 1983 solo album 'Echoes in the Night' which thus seems to be veering towards a reunion of the 'classic' Procol Harum line-up as Wilson and

Reid were also involved. Despite this reconvening Fisher, later choose to leave music and pursue education eventually obtaining a computer degree at Cambridge University.

The Fisherless Procol Harum disbanded in 1977 but in 1991 a ‘classic’ reunion of Procol Harum took place with major record company backing resulting in an album ‘The Prodigal Stranger’. In 1989 and 1991, Fisher took legal advice about bringing his claim but did not bring this to the attention of any party involved in the copyright. Also around this time, Brooker and Reid finally regained control of the rights to AWSOP which has been subject to exploitation by unscrupulous managers in the past. Fisher, Trower, Brooker and Reid were on board but Wilson had just died. Trower quickly vanished failing to play live and although he appears on the album booklet and in promotional material he seems not to play much on the record. By 1992, record company support evaporated in the face of poor sales of the ‘Prodigal Stranger ‘. Brooker, Reid, Fisher and mates soldiered on. By the late 1990’s they were not recording and seldom performing bar sporadic special events. This state of affairs continued until the present century saw the release of a new cd, The Well’s On Fire following more regular performing which continued to be frequent after the cd came out. Fisher had an instrumental composition on this cd which he regularly played at concerts. Fisher had played sporadically with the band in its lax late 90’s phase but he entered into regular membership again in the busier 21st century until he abruptly quit soon after serving notice, in 2004, for his rights to a future share of AWSOP royalties. Sometime after this he launched his case which took some time in coming to court. The significant feature of the above potted history of the above is that he showed a profound tendency to come back and work with Brooker and Reid for long periods, and was granted composition credits on the two recordings which

came after the 1991 reunion of the band in addition to a number of composing credits which he had on the 1967-9 recordings.

We should of course point out that sales of recordings were so weak, by this time, that such credits would have brought him little money. He has also complained in various interviews that he was not party to information about the royalties even in the 'second coming' of Procol Harum since 1991. There are also suggestions that Brooker would occasionally hand him royalty cheques without documentation of what they related to. It may also be the case that as a performer he was 'effectively' 'on wages' for live work along with the new members hired since 1991 as the Procol Harum 'brand' is owned by Brooker and Reid. Nevertheless the fact remains that he clearly did enter into situations which one might have expected to precipitate his claim in 1969, 1989 and 1991 yet chose not to act.

The first legal contest took place in 2006, 39 years after the song was written and was found in favour of the plaintiff (Fisher), in the first case he has brought against Brooker-Reid, in terms of his rights in 'the work' rather than 'the song'. He was deemed to merit 40% of the musical composition rights from the point at which is claim was stated (Reid contributed the lyrics but no music and therefore received the other composing rights). Justice Blackburne arrived at this figure as somehow fair after considering 33% and the 50% asked for by the plaintiff. He rejected the claim for six years of retrospective royalties saying that there was no case for Fisher to receive any restitution payments going back beyond the time when he staked his claim.

He freely admitted that there was a subjective element in the figure arrived at but seemed adamant in his conclusion that Fisher merited co-compositional status. This is confused by the fact that in both the original case and the appeal, a distinction was

maintained between ‘The Song’ deemed to have been written by Brooker and Reid and copyrighted before Fisher had any involvement and ‘The Work’ which is the well known Procol Harum recording of the song. Fisher’s award was for ownership in the work not ownership in the song. The decision granted right to appeal on the grounds of important issues one of them being the possibility that this decision might set a dangerous precedent for the whole of the music industry. One may note [Wyman (1986) for example] that there is a very similar situation for some well-known Rolling Stones songs as at least one of the attributed owners of very successful compositions has openly admitted that Bill Wyman made some crucial contributions to originating the song (in fact this is a stronger case than Fisher’s if we maintain the song-work distinction).

The case went to appeal with the result that in April 2008, it was found (in a 2-1 split decision) that although Fisher was still entitled to the authorship status he had been granted that he was not now entitled to any share whatsoever of the composing royalties. Nothing else was changed. The decision is clearly explained [see 2008 EWCA CIv 287], but as Fisher himself said on his website, the conclusion seems to appear suddenly and is at odds with the discussion rather like a rabbit being drawn out of a hat. The reason for the decision would seem to be the delay issue (which we discuss further below) which is explored in detail although the ‘dangerous precedent’ is given as a reason also although it is hard to see in the account of the Appeal decision that any substantial proof is given on this point. This is dealt with further below in terms of the economics of transactions costs.

Fisher’s explanation for the delay in bringing his case was that he had immense difficulty in finding the right legal representatives who would be suitable for this case. A very likely trigger for his case is the recent award of substantial royalties to singer Clare Torry for her contribution of wordless vocals to one track on the ‘Dark Side of the Moon’

album by Pink Floyd. The most substantial legal precedent for the case is that of *Bobby Valentino vs. The Bluebells*. In the Bluebells case, revenues had accrued in more recent times due to the use of the song in television advertising. Valentino's claim was not based on having originally written the song but on the significance of his contribution in terms of the distinctive violin part. His victory forms a very direct precedent for Fisher's case.

Prior to this there were no notable cases of royalties being awarded for claims going back many decades in the U.K. although such awards had been made to songwriters as opposed to a session musician in the USA [Tomlinson (2002)]. The most notable case of a band member claiming composing royalties in the USA [the Chuck Berry case] failed totally. The issue of delay is a source of many-faceted confusion in the present case. It is important to note the following:

- Fisher did not claim for royalties going back to 1967 but only for six years of retrospective royalties
- Unlike Torry he was not a session musician hired on wages to perform a specified task on an isolated track. Rather he was a band member over a long period of time. The vast majority of his professional musical activity has been with Brooker and Reid other than on his own or with other musicians.

Evidence in the case did <u>not</u> largely revolve around factual evidence in the following aspects:

i. Both sides agreed on much of the historical narrative of how the song came to be written and arranged
ii. Relevant physical evidence had been lost/destroyed
iii. Relevant witnesses were, by and large, dead.

This case is unusual in that the judge, in the initial case, had formal musical training and saw fit to interpolate this human capital into the proceedings although it does not figure *explicitly* in the summary of his decision [Royal Courts of Justice (2006)]. The defendants made a number of remarks about the nature of the precedent set and its implications which can be usefully discussed in terms of economic models of production. In the appeal hearing, one of the reasons given for the decision reached was the argument that the original case set an unfortunate precedent detrimental to composers of pop/rock music. In effect this is an efficiency argument. As there was a paucity of evidence in the case and no disputes were aired about a significant role of contracts or promises the discussion is inevitably about rights and the impact of delay given the remarkably long time between the release of the record and the claim to authorship and income.

IV. Efficiency and copyright aspects of the issues involved

Leaving aside technicalities of when the work was copyrighted (i.e. was it when Brooker composed the song alone or in the recording studio with the others?) which are connected with the lack of tangible evidence, the most important feature of the case is the acceptance of the claim to authorship on the grounds that Fisher did make important original/creative or commercially important contributions to the musical material that Brooker had conceived.

The fact that it may be deemed original and is a distinctive part of the public recognition of the song was agreed by the musicologist called for the defence in the original case, Peter Oxendale, who said that Fisher's contribution was:

"distinctive and memorable and would, in my opinion, be identified by almost anyone familiar with the repertoire of contemporary popular music even after hearing just a few bars" (Royal Courts of Justice 2006, 10). He also describe it as significant and Judge Blackburne agreed (ibid.11)

Brooker agreed that Fisher contributed the distinctive organ elements that are popularly considered to be the 'unique selling point' of the recording. Fisher freely admits that his part was a synthesis of a number of different Bach pieces. This does not preclude it from being deemed original or commercially a unique contribution by Fisher.

The main defence from Brooker's side on the composition aspect was that his original composition 'suggested' quite clearly the route that Fisher took. We might go on then to argue that a randomly chosen competent session man might have played a similar part. In this context, we may also note that the drums on AWSOP were played by Bill Eyden, not a member of the band, because of difficulties of getting the drum part right, who could therefore have made a claim of the type initiated by Torry.

This suggestion argument could obviously be made in any case of this type. A decision on the suggestion argument would appear to require musicological expertise and thus we might suggest the original Fisher case featured the judge acting as the expert witness. Discussing an earlier case Coulthard (2000), notes that the saxophone solo on 'True' by Spandau Ballet was described, by the judge, as being 'improvised' whilst finding against the claimants. If it is thus to be described then it was not written by the song author (Gary Kemp) as he had not dictated which notes should be played prior to the performance. The Spandau Ballet case involved a 'non-musical' judge who decided to listen to all the recordings in private. He decided against the claimants despite his improvisation remark which seems to imply that he had reached a similar conclusion to

the ‘musical’ judge in the AWSOP case that the plaintiff had improvised and thus made an important contribution to the source material.

Judge Blackburne concluded that Mr Brooker:

“accepted that the organ solo was the result of a careful creative process on Mr Fisher’s part and that it was a melody in its own right which he, Mr Brooker, had not played before” [Royal Courts of Justice(2006,37). He then goes into Brooker’s cross-examination on this at length which might lead one to believe that the crucial part in his conclusion in favour of Fisher was based on the concession that he had created an *original melody* rather than a routine band member contribution. The defence musicologist (Oxendale) sought to make the counter argument-on the basis of convention in rock/pop music where there is informal trust and tacit assent to all ownership going to the originators of a song unless they claim otherwise.

Agreed and trusting informality can clearly raise output as resources are not used up in disputing and protecting claims to authorship rights. One may note also that someone without copyright attribution does stand to make economic returns from their contribution even if it is not formally attributed. This can come via recording and performing fees rising whilst one is in the ensemble and enhanced payments upon quitting due to a higher profile and reputation by association. In general, in popular music a musician has a higher market value if they have been associated with success even in cases where their contribution was genuinely insignificant.

In Matthew Fisher’s case this did generally not occur as he did not go on to carve out a successful musical career outside Procol Harum and thus could be said to fail to exploit the imputed rights which he did have from the contributions to AWSOP which might not have been judged to be authorial.

Noncontractual relations in all areas of business have attracted the interest of many social scientists especially since the work of Macaulay (1963) and in economics most notably from Williamson (see e.g. Williamson (1981). Noncontractual arrangements are, in effect, unwritten agreements. An individual is effectively delivering an expectation of specific performance contingent on other events. When trust breaks down then noncontracted labour may be withdrawn or worse still rent seeking and malfeasance [cp. the analysis of rules by Ehrlich and Posner (1974)] may be chosen as alternate resource uses. Unwritten agreements are intrinsic to the musical creation side of the music business due to transaction costs [cp. the analysis of rules by Ehrlich and Posner (1974)]. Essentially the market is incomplete as it is impossible to draw up appropriate enforceable contracts.

A situation of too much formality will occur [Holmstrom and Milgrom (1991)] if explicit connections between rewards and activities lead to excessive concentration on measurable aspects of the job at the expense of difficult-to-proxy inputs. An illustration of this would be where the leader made an early formal insistence that no monies would accrue other than through standard industry rates for each task. This gives those with a comparative advantage in playing, rather than composing, too much inducement to spend time in composing and even wasteful rent-seeking to attempt to get their compositions on the recorded outputs [cp. Cameron and Collins (1997)]. One may note that in the case of Procol Harum, that up to 1973 that there was a democratisation in that
Fisher, and later Trower, had a number of compositions on the recording and also sang despite having weaker more inaccurate voices than Brooker. This would not have provided significant revenues as this only covers shares of fairly low selling records. It

remains an overwhelming fact that the sales of AWSOP dwarf all other revenues from Procol Harum activity.

Despite this, the other Fisher compositions are germane to the present case as there are instances where Brooker shared compositions with others (including Fisher) which might, from what one knows, be said to have followed a similar process to that agreed upon as the genesis of AWSOP. Surprisingly the accounts of the legal cases do not indicate that this avenue was pursued despite the possibility that Fisher may have written the 'distinctive' organ parts on which the copyright issue turns *before* he heard Brooker's composition. In addition it is notable that Fisher did not attempt to claim any form of copyright in the name as a trademark despite the fact that many interviews with Brooker have featured claims that Fisher had a unique touch on organ that no one else could copy. This organ sound is what is most typically associated with the music of Procol Harum and thus may be said to be a key part of the trademark.

V. The Delay Issue

Inevitably the delay in bringing the case attracted a lot of attention in court and the media coverage. Delay by itself does not render a legal case invalid; there are obviously cases such as murders where new evidence comes to light. In this case, new evidence did not come to light rather Fisher made a claim against his fellow band members only after having worked with them in several different spells over a 38 year period. Far from there being new evidence there was an attrition of evidence.

The latter point seems to have caused some confusion. The defence case sought to emphasize the infeasibility of a fair trial given the non-existence of a publisher's demo of the song, the death of key participants and the difficulty of memory in the case of the

participants. Such is the confusion that Brooker, in post-appeal decision publicity seems to have been of the opinion that the evidence difficulties in delay were the reason for the decision when this is not the case.

However, this aspect of delay is totally irrelevant as there was general agreement amongst both sides. A genuine publisher's demo of the pre-Fisher song was not in effect needed as Brooker did not dispute the nature of Fisher's additions although he attributed them to group arrangement sessions rather than totally independent work.

Moving on the next aspect of delay one comes to the issue of the question: did Fisher really not stake any claims with the song's authors before bringing his case? The defence claim that this was their first knowledge of this and that they were shocked to be so accused (despite the thinly veiled attacks in Fisher's solo records). Fisher claims that these issues were raised and there are witnesses who would support this. Late in the original case it was submitted that Fisher had sought legal advice and had aired his claim in 1989. Judge Blackburne (Royal Courts of Justice (2006, 17) stated of Fisher that "his admitted failure between then *(1967)* and 2004 even so much as to hint to Mr Brooker that he should be acknowledged as a joint author of the Work is quite extraordinary. In itself, however, Mr Fisher's silence over so long a period is irrelevant to whether he can assert a share in the ownership of the musical copyright in the Work resulting from his contribution to its composition."

The delay issue about composing rights comes under the doctrine of *laches* which has been pertinent in a wide range of music industry cases including others about composition [Tomlinson (2002)] and the Meat Loaf case where Jim Steinman refused to let Meatloaf use the term 'Bat Out of Hell' in a record title on the grounds that he had effectively copyrighted this franchise whereupon Meat Loaf sought to claim that he had

contributed to the franchise many years earlier via various key ideas. The application of laches can lead to the case being dismissed because of unreasonable delay. This is not judged on the basis of the amount of time and the onus is on the defendant to prove that the delay was unreasonable and prejudicial to the defendant and would have been to their detriment. That is, the defendant may have taken actions which weaken their position such as spending the money that had accrued to them in the intervening period when the right had not been notified or they may have put more effort into promoting the disputed copyright than they would have done if they had known there was a dispute.

The laches argument was rejected in the Blackburne decision on AWSOP paving the way to give Fisher rights on the grounds of his significant and original contribution in the manner of the Bluebells case. The defence argument; that Fisher had silently assented to exploitation of the rights in the song, by not staking his claim, was rejected. The puzzling feature of the result of the appeal is that the laches argument appears to have been rejected again and can not therefore be the basis of the change in the result.

The treatment of delay in the appeal comes closer to the treatment of the role of the Meat Loaf 'Bat Out of Hell' 'trade mark' argument and the depiction of 'band name' capital as an asset in the earlier (American) case of the Byrds where the judge gave ownership of the name to the former drummer. The drummer, Michael Clarke was not a founder member of the partnership nor was he a significant composing member having only 1/3 of one song to his name on the five albums on which he appeared. The award was made to Clarke on the grounds that the commercial asset value of the name was not being exploited by the members who would be regarded as 'key' to the identity of the group. To give them the name which they would then desist from using would be encouraging a 'dog in the manger' strategy.

The summary of the Appeal decision in the AWSOP case argues that the value of the song was nurtured and upheld by Brooker and Procol Harum by promoting it. We have noted that Fisher was present during some of this promotion period (although not in 1969-1977 bar a few weeks in 1971) of the first career phase of the band. It is notable that very many of the precedents cited in the judgement are not music or entertainment industry cases but more regular commercial ones. We might then launch on a speculative analogy. The case is being treated rather like say the situation where Fisher had been a lab worker in the Brooker-Reid ice cream factory who had made a vital contribution to their new ice cream but had not laid any claim to the recipe or patent. Then many years go by and the owners have steadily been manufacturing the ice-cream and he suddenly stakes a claim to a share of the reputation capital revenue which they have built up.

It is probably worth pointing out that such an extreme delay as this would run the risk of running out of time anyway if *droit de suite* provisions were more restrictive from the author's stance as there would be no money to claim once the public domain line had been crossed. If we go back to the ice cream factory analogy then the Appeal decision is somewhat like a requirement that all future ice creams have 'designed by Matthew Fisher' somewhere on the wrapper but none of the money goes to him.

It seems difficult not to arrive at the decision that if the decision in this appeal had arisen before the Clare Torry case and was taken as a precedent then she could not have won any money as it is hard to see any substantial difference as all the legal authorities in the AWSOP case are pretty much in agreement Fisher has made a 'significant' contribution as did she. There is considerable sophistry of language in the appeal decision [see 2008 EWCA Clv 287]. It is repeatedly claimed that Fisher's waiting period was not a 'mere delay' but an 'extreme', 'inexcusable', 'unconscionable' delay in the sense that

although he did not implicitly assent to waiving his copyright by his inaction, he had mislead the owners of the song and work into believing that there was no dispute. If one wants to impute states of mind in support of this it will be noted from the above that he rejoined in 1971 and 1991 in both cases after points where he would have been expected to open the issue.

VI. Choosing an appropriate model of production for music industry cases

The model of production seems crucial for deciding on what are efficient contracts. The problem of the appropriate model of production was considered for the Spandau Ballet cases in a paper by a practising barrister, Alan Coulthard (2000). He puts forward a typology of three modes of musical production. The three scenarios of Coulthard are:

Jamming: where a process of collaboration by the members of the collective composes the songs.

Group arrangement: One or more group members conceive the song prior to arrangement and the rest of the members develop an arrangement in rehearsals. This is the model maintained by the defence in the AWSOP cases.

Cover versions: If the song has previously been recorded, then the new version may seek to add value via a different arrangement

For what it is worth, the career pattern of Procol Harum would seem to be one of Brooker privately developing a song which he would bring to the band. It thus falls under the group arrangement heading. There is little evidence of jammed compositions and few cover versions were attempted (only two on the official recordings). The distinction between the song and the work in the AWSOP case complicates the group arrangement case by distinguishing composition (of a song) from ownership of a 'work' which is made

from it. This brings the transactions cost problem that if rights were to be accurately assigned presumably someone needs to keep an accurate record during the production process of what contributions were made to the work which were not in the song.

As AWSOP has been covered over 700 times there are serious transaction costs problems in recovering any royalties awarded to Fisher as his award was *vested in the work and not in the song therefore it would need to be determined to what extent a cover used his contribution to the work*

For example, a country and western version played on banjo and mandolin where his 8 bar organ 'melody' was not reproduced in any shape or form would presumably lead to no royalties for him, the burden of determining this would fall on collecting societies and thus would require assessment of every single cover version. This is quite a problem but we must not forget that the judge was prepared to make a subjective arbitrary statement about the magnitude of Fisher's contribution despite the fact that there is no tangible objective record of how the song transmogrified into the work. By the same token, presumably someone could be appointed to make a block assessment of the typical amount of Fisher's component in cover versions.

In popular music, the model of production is full of unmeasurable elements. It is difficult to identify separable marginal products for the inputs even *ex post* to the production of a song/performance. It is quite hard to identify precisely why the few successful product lines have been so compared with the legion of failures. Long after a unit of production has failed to be artistically and/or commercially successful people still debate which ingredients were they key to the achievements in the successful period. At the point of creation, it must be even harder to separate the contribution of inputs to the extent that the process is more like one of research and development. There is also a

question as to whether revenues are actually accruing to the song *per se* but rather a style of performance (trademark) of which the song is an embodiment. The failure to achieve comparable sales with follow-up songs may represent diminishing returns in consumption of this style.

Styles will be subject to cycles of fashion. They may resurge at a later date or simply find a greater nostalgia market. Procol Harum originally stumbled into the briefly fashionable style of psychedelia due to the abstract nature of the words to AWSOP. They then tried to play down this commercial song success and portray themselves as serious 'prog rock' musicians. The latter being conspicuous when they joined their new record company Chrysalis in 1971. At this time, bands of technically superior performing musicians were appearing and it seems that, following unexpected success, with an orchestral recording in 1972, that Chrysalis were aiming for something of an Elton John market as they minimized the role of Reid the non-performing lyricist. It could reasonably be argued that the band did not successfully assimilate or propagate any new styles after Fisher left. Their orchestra rock style, the greatest commercial success after the AWSOP organ dominated style, was to a large degree founded on some of the contents of their third album ('A Salty Dog') of which he was producer and important accredited contributor.

Taking all of the above into account we might claim that there is support (even from the defendants in the original case) that Fisher made substantial contribution to the Procol Harum trademark or brand and received little reward from it. The appeal removed his royalty rights on the basis of a *different* model of production. That is, delay in staking his claim to ownership rights while others exploited the asset to which he is agreed to have contributed. In other words, he is being denied income because the income is deemed to have attributed to the collective asset style as enshrined in the 'work'

VII. Concluding Discussion

The net result is extremely peculiar from an economic point of view regardless of whether one thinks the original decision was right or wrong. That is, someone has been awarded a 40% share in a musical composition yet barred from claiming any income arising from the use of the composition. As mentioned earlier, this is not unprecedented in Anglo-American law which is not to say that it makes sense. Also, the long delay American cases seem to have had different key ingredients. Most important of all they pivoted totally on claims for shares based on contribution to a song rather than a work in the terms used here. The Chuck Berry case is a classic situation where the claimant asserted that he had actually written many of the songs or parts of them prior to any further arrangement or production. The delay was attributed to problems of alcoholism but to no avail as the case was lost essentially for lack of evidence. The AWSOP case has had serious evidence problems on account of delay. The key evidence which would seem to have judged the original decision would then seem to be based on two things which are dependent on the judge's *musical* (not judicial) opinions:

The music industry is naturally fated to throw up disputes as it involves what typically are business partnerships with small numbers of people in them in which some people from the group make huge incomes while other contributors make little or none. This can, of course, arise in a conventional firm but, given the structure of the law, no low level employee of a mega corporation stands any chance of suing for remuneration on a par with the CEO.

It may be difficult to stop the flow of disputes coming to court as embedded personal conflict, in such situations, often means that the parties are not likely to reach a

settlement before proceedings. The inconsistency of findings in proceedings could encourage an increase in the supply of hearings, depending on the degree of contingency in the fee structure for legal payments, if the plaintiffs have a sufficiently low degree of risk aversion. In such circumstances, bringing a case may seem a worthwhile speculative investment as the lack of settled decision-making in such cases promotes the idea that there is always a chance of winning on some principle. The finding in the original AWSOP case was consistent with the findings in the Bluebells case as it continued the idea that any unique or original contribution to a song could be identified as an act of authorship. The appeal decision does not overthrow this as it maintains Fisher's authorial rights.

This is a problem in itself as far as consistency goes. There still remain issues about the efficiency of the precedent set in the Bluebells case and maintained here. That is, the efficiency of allowing property rights to be decided on the basis of the originality/significance of a contribution to a recording as distinct from the song itself. This requires someone to do the near impossible –impute marginal productivity to a joint process. This could for example logically lead to record producers claiming to be joint authors if some particular sonic effect becomes the trademark aspect of a successful recording although there are market reasons for this being unlikely.[1] Then we come to the issue of who the 'someone' is who decides on important contribution. It seems that the contribution magnitude is being decided on a mixture of casual inferences about what makes a recording a success and judicial perceptions of the relative weight of different elements in the work.

The case discussed in this paper might be added to the litany of 'Bumblenomics' cases a term I have just invented based on Charles Dickens' Mr.Bumble's pronouncement that the 'law is an ass' or as economists' might have it, a deleterious rent-

seeking institution [see Cameron and Thorpe (2004). It would certainly seem from standard game theoretical/Pareto optimality notions that both sides in the Procol Harum case would surely have been better off if they could have reached a settlement without going to court. One must pause here to comment on Fisher's claim for royalties not going back to 1967 which distinguishes this from the Pink Floyd 'Dark Side of the Moon' case. Fisher claimed that he was not 'interested in the money' only in the recognition of the contribution he made and he continues to maintain this on his website. Nevertheless, one would be inclined to think the reason for the span of his claim is a strategic 'foot in the door' ploy by his legal team in that the right once established might be then the basis for a case of a bigger settlement on the grounds of authorship.

Improving the social efficiency of the legal handling of music cases would seem to require:

1) Codification of the models of the production process applied to composition and explicit statements as to how they are being used
2) Clarification as to whether judges should start performing 'expert witness' duties by default either by listening to the records (if they are not formally trained musically) or by studying the compositions if they are. Their doing so clearly has a number of problems in that it adds to the cost and also muddies the waters of the debate.
3) Summary initial hearings with explicit focus on reaching a settlement might be instituted for music industry cases.

NOTES:

At various points I refer to interviews with Fisher and Brooker and a variety of hearsay and rumour. This is distilled from a number of original sources at Beyond the Pale (website) and print material that is reproduced there. I also draw on the decisions in the two cases.

1. A comedic illustration of this is in the act of the character Brian Appleton a failed musician turned journalist turned academic (played by U.K. comedy actor/writer Graham Fellowes better known for his failed songwriter character John Shuttleworth) who claims to have been the unaccredited genius behind the silent/stop parts on the Cockney Rebel song 'Make Me Smile' and other well known recordings. The market factor attenuating opportunistic behaviour by producers is that they are more dependent than musicians on goodwill and reputation for future employment.

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