

**'Revitalising the UK Music Industries in the Aftermath of Covid-19:
a Feminist Critique of Music Copyright'**

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1. Introduction: Covid-19 Accelerated the Pre-existing Inequalities in the UK Music Industries

It is well-accepted that the cancellations of all live-music events in 2020, which continued well into 2022, significantly reduced the artists' income from their music.¹ This put pressure on the income streams from the recorded music, streaming, or other revenue streams. The UK Government recognised several of these challenges in two Department for Digital, Culture, Media and Sport (DCMS) inquiries in 2021,² in which all Governmental interventions into rebuilding the creative sector were undersigned with the promise of *Building Back Better*.³ It has become apparent since,⁴ that without a specific correction of the music eco-system, the *Building Back Better* promise will not include a social justice correction of the pre-existing, and Covid-19 exacerbated inequalities.

The Covid-19 pandemic and Brexit continue to disrupt the live music industry, which previously supplemented income for many UK music creatives. This already bleak reality is further exacerbated for women⁵ across the music industries, where evidence shows discrimination at record labels, music publishers, radio stations, orchestras, festival line-ups and lack of representation in senior leadership roles. A gender audit of the UK record labels, also referred to as the "copyright industries,"⁶ revealed, that over 80% of signed artists are men; and with the UK music publishers, evidence shows that 86% of signed songwriters are men.⁷ The talent the recording industries, together with the publishers, represent, support, promote and invest in, is predominantly male. This male domination in the commercial music space inevitably resulted in the 2023 BRITS Awards,⁸ where only men were nominated in the "Best Artist of the Year" category, in what are now the *gender-neutral* award categories.⁹ Equally,

¹ See Section 2 for WIPO related studies and evidence to this point.

² (1) In the UK, the Digital, Culture, Media and Sports Committee to the Parliament, conducted an inquiry into the 'Economics of Music Streaming' (launched in October 2020, with the final report published on 15 July 2021). Materials are available: <https://committees.parliament.uk/work/646/economics-of-music-streaming/>. (2) DCMS also conducted an inquiry into 'The Future of UK music festivals' (launched in November 2020, with the final report published on 29 May 2021). Materials are available: <https://committees.parliament.uk/work/779/the-future-of-uk-music-festivals/>. All links in this chapter were accessed on 31 March 2023.

³ In the UK, this is the Government's Plan for Growth (published 3 March 2021): <https://www.gov.uk/government/publications/build-back-better-our-plan-for-growth>. According to the UK Government, "Build Back Better: our plan for growth' sets out the government's plans to support growth through significant investment in infrastructure, skills and innovation, and to pursue growth that levels up every part of the UK, enables the transition to net zero, and supports our vision for Global Britain."

⁴ Evidence given in the oral session of the Inquiry into the "Misogyny in Music" by the UK Women's and Equalities Committee, on 26 October 2022, revealed that women working in the live music sector, are constantly harassed, and made unsafe in their working environment. Oral evidence recordings and transcript available: <https://committees.parliament.uk/oralevidence/11430/pdf/>. The inquiry's general website available: <https://committees.parliament.uk/work/6736/misogyny-in-music/>.

⁵ In this chapter, the term "woman/women" includes both cis- and trans- women. In the reports, there is however still an under-representation of data on trans musicians, or in fact, on gender non-binary or gender-expansive and gender-diverse persons. Furthermore, the author includes a fluid understanding of gender in her feminist approach, as per Kathryn McNeilly, 'Sex/gender is fluid, what now for feminism and international human rights law? A call to queer the foundations' in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar, 2019).

⁶ Richard Osborne, *Owning the Masters: a history of sound recording copyright* (Bloomsbury Academic, 2022) 1.

⁷ Vick Bain, 'Counting the Music Industry: the Gender Gap' (2019). Available: <https://vbain.co.uk/research>.

⁸ The BRITS Awards: <https://www.brits.co.uk>.

⁹ Industry news reported the BRITS nominations, together with the oral evidence given by several women in music organisations on 8 February 2023, to the Women's and Equalities Committee, on 'Misogyny in Music' (n4). See, Kamila Rymajdo, 'British R&B Is

there is no improvement in the live music sector, with the 2023 largest UK festival, Glastonbury, featuring an all-male headliner line-up.¹⁰

The male domination carries over to the radio sphere. Despite the impression that the world has moved onto streaming, radio continues to be an important medium of music consumption in the UK, and as such an important revenue stream for the creatives, or the recognition in music charts.¹¹ In 2022, it has been reported that up to fifty million listeners tune into UK radio, for an average of twenty hours per week.¹² The report demonstrates the continued under-representation in radio plays (BBC1 only 15% women; BBC6 at best, with 50% women), and devastating statistics for artists of colour (BBC6 is best, with 20% airplay for artists of colour (apart from BBC Asian (which is 90%) or Capital Extra (at 80%)). While there are no stations in 2022, which played exclusively male artists, there are several that played exclusively white artists (100%).¹³ The under-representation in radio plays results in lower royalties paid, which are the required thresholds for musicians to stand for elections in collective management associations in the UK.¹⁴

Classical or live music is no exception and music played to large audiences continues to be mostly written by men. In the 2020-21 season, canvassing a hundred orchestras, from twenty-seven countries, showed that only 11,45% of the scheduled concerts world-wide included compositions by women. Counting the compositions

Thriving. Why Is It Being Ignored? (VICE, 9 February 2023). Available: <https://www.vice.com/en/article/n7zazw/british-r-and-b-being-ignored-artists-to-watch>. On gender inequality in music awards, see Bain (n7) 5.

¹⁰ An announcement which was not well received by several stakeholders, see for example, Kamila Rymajdo, 'Why Do All the Festival Lineups Look and Feel the Same?' (VICE, 8 March 2023). Available: <https://www.vice.com/en/article/88x4xz/festivals-recycling-legacy-acts-research>. Also, Mark Savage, 'Glastonbury Festival 2023: Arctic Monkeys and Guns N' Roses to headline' (BBC News, 3 March 2023) (reporting an all-male headliner line-up). Available: <https://www.bbc.co.uk/news/entertainment-arts-64827413>. And, Rhian Jones, 'Why are there so few women headlining music festivals?' (The Guardian, 6 March 2023) (noting the "pipeline problem"). Available: <https://www.theguardian.com/music/2023/mar/06/why-are-there-so-few-women-headlining-music-festivals>.

¹¹ Karla Hernandez, Stacy L Smith, and Katherine Pieper, 'Inclusion in the Recording Studio? Gender and Race/Ethnicity of Artists, Songwriters & Producers across 1,000 Popular Songs from 2012-2021' (March 2022) USC Annenberg Inclusion Initiative ("Annenberg Report 2022"). Available: <https://assets.uscannenberg.org/docs/aii-inclusion-recording-studio-20220331.pdf>.

¹² The Why Not Her Collective (Linda Coogan Bryne), 'Gender & Racial Disparity Data Report on UK Radio 2021-2022' (1 September 2022). Available: https://www.canva.com/design/DAFF8ZA-Gg/VmTmzHp9uEmYmBqCjGa9ag/view?utm_content=DAFF8ZA-Gg&utm_campaign=designshare&utm_medium=link&utm_source=publishpresent.

¹³ There was no improvement from 2021: Linda Coogan Byrne & Women in CTRL, 'Gender Disparity Data Report, An analysis of the Top 20 Most Played British Acts across British Radio Stations in the Period of June 2019-2020 and the Top 100 Radio Airplay chart in 2020' (2020) <https://www.canva.com/design/DAEE37rIDuc/-7R8D7IzU7EMdcnv9Snw3w/view#1>. For Ireland, see: The Why Not Her Collective (Linda Coogan Bryne), 'Irish Radio Update: 2022' (2022). Available: https://www.canva.com/design/DAE5J18BbBl/vUxxKPlivDfKtQxt1delg/view?utm_content=DAE5J18BbBl&utm_campaign=designshare&utm_medium=link&utm_source=sharebutton#1. For the US, see: Karla Hernandez, Stacy L Smith and Katherine Pieper, 'Inclusion in the Recording Studio? Gender and Race/Ethnicity of Artists, Songwriters & Producers across 1,000 Popular Songs from 2012-2021' (March 2022) USC Annenberg Inclusion Initiative. Available: <https://assets.uscannenberg.org/docs/aii-inclusion-recording-studio-20220331.pdf>. In dance music, see The Jaguar Foundation, 'Progressing Gender Representation In UK Dance Music' (2022). Available: <https://www.thejaguarfoundation.net>.

¹⁴ The UK CMO, PRS for Music (<https://www.prsformusic.com>), holds elections for the Council (25 Members. Of these, 10 Writer Council Members and 10 Publisher Council Members, are elected by Principal Voting and Voting Members. There are also 4 independent, non-executive Members, and 1 Executive Director (the CEO)). Principal Voting Members and Voting Members are rightsholders, registered with the PRS, and according to the Articles of Association, the category of a Member is determined by the length of membership, and royalty earnings (see Article 5(e)). In 2022, to qualify as a Voting Member, one must earn, in the last 1-3 financial years, at least £1,422 (royalties for writers) or £7,111 (royalties for publishers). To be promoted to a Principal Voting Member, one must earn, in the last three financial years, £9,956 (royalties for writers), or £49,780 (royalties for publishers or successors). Information is available: <https://www.prsformusic.com/about-us/governance/prs-membership-categories>.

played, only 5% (747) were composed by women. Out of the total, only 1,11% were composed by Black and Asian women.¹⁵ In the 2021-22 season, the reports are showing no significant improvement, with 87,7% compositions played written by white men.¹⁶ Live performances in other genres are no more gender balanced: in 2022, only 13% of festival headliners were women,¹⁷ with Glastonbury featuring all-male headliners in 2023.¹⁸

The decisions made in the UK music industries are mostly left to the men in charge. When canvassing the senior leadership roles in 2020 and comparing them with 2021,¹⁹ research shows that the number of Chief Executive Officers (CEOs) across 11 trade body boards remains at only 27% women. Out of these, there are no black women CEOs. There was an increase in gender representation in other roles: from 9% to 27% of Chairpersons across the 11 music trade body boards are women, and despite this increase, there are still no black women in the role of a Chairperson; and from 34% to 42% of board members across the 12 music trade body boards are women. The leadership of the Collective Management Organisations in the UK, is also in the hands of (mostly white) men.²⁰

In 2021, the UK Intellectual Property Office (IPO) released a report,²¹ detailing that on average, women reported making £7,000 less in a year than men making a living from music (reporting an average earning of £20,000 per year).²² The sample of responses was not diverse: only 28% of all respondents were women (without a separate category for trans-women), 1% were “non-binary” and as high as 70% were white British. When research investigates the lived experience of non-white creatives, an exponential picture of discrimination emerges. Black women earn less still: they earn 25% less on average than their white women colleagues, and 46% less than their male

¹⁵ Donne UK, ‘Diversity in Concert Halls: 100 Orchestras Worldwide’ (July 2021) 7. Available: https://donne-uk.org/wp-content/uploads/2021/03/Equality-Diversity-in-Concert-Halls_2020_2021.pdf.

¹⁶ Donne UK, ‘Equality and Diversity in Global Repertoire: Orchestras Season 2021-2022’ (September 2022). Available: <https://donne-uk.org/research-new/>.

¹⁷ For reports of under-representation of women on UK festival line-ups, already in 2017, musician Emma Lee Moss, and reported by the BBC (22 June 2017) <https://www.bbc.co.uk/news/uk-england-40273193>. And more recently, despite the active criticism of this practice, in 2021: Deborah Stinton, ‘Turn Up The Volume – Female Focus’ (March 2021). Available: <https://thef-listmusic.uk/turn-up-the-volume-female-focus/>. Reports in April 2021 confirm that the gender imbalance has not been corrected: Helen Packer, ‘The Festivals are back, but where are the women?’ (Internation, 20 April 2021). Available: <http://internation.majcityjournalism.uk/arts-culture/festivals-are-back-but-where-are-the-women/>. It was reported that “[a] study by Female:Pressure found that, between 2017-2019, only 20% of acts booked for the electronic music festivals it surveyed were female” which has not improved in 2021. See also references in (n10).

¹⁸ References in (n10).

¹⁹ Women in CTRL, ‘Seat at the Table’ (2020) and Women in CTRL, ‘Seat at the Table: 1 Year On’ (2021). Available: <https://womeninctrl.com/seatatthetable2021/>.

²⁰ Metka Potočnik, ‘Collectivity without Solidarity, Inclusion or Democracy: a Feminist Critique of Collective Rights Management of Copyright’ (28-29 October 2022) Eighth Annual IP Mosaic Conference: Access for All? The Role of IP in Equity, Power, and Democracy in Challenging Times, in organisation by the Institute of Intellectual Property and Social Justice and co-hosted by the US Marquette University Law School (online). For the PRS for Music Board, see: <https://www.prsformusic.com/about-us/governance/board>. For CISAC Board Members, see: <https://www.cisac.org/about/board-and-committees> (with 25% women board member, (4 in 5 are white)). The rules on who can stand in elections, and voting rights, are based on economic factors exclusively (royalties earned), see explanation in (n14).

²¹ Intellectual Property Office (IPO), ‘Music creators’ earnings in the digital era’ (23 September 2021). Available: <https://www.gov.uk/government/publications/music-creators-earnings-in-the-digital-era>.

²² IPO Report (n21) 18.

colleagues.²³ Although we have approximate gender parity in people studying music (although there are courses, such as composition and musical technologies, where under-representation of women is still prevalent),²⁴ the education sector is not without its challenges²⁵ and there is no equal representation in any of the sectors of the music ecosystem. Furthermore women who are participating in the system, are not doing as well as the men. In 2019-20 there were only 40 women professors in UK music Higher Education (19% of all professors), and 175 men (81% of all professors).²⁶

Reports and evidence on the distribution of the economic power and its governance are instructive for any intellectual property (IP) researcher or stakeholder. That is however not the totality of circumstances, or evidence available on the experience of women in the UK music industries. Evidence shows that working conditions have deteriorated significantly for women working in the music industries, between 2018²⁷ and 2022.²⁸ Research shows that 72% of incidents were committed by people with seniority or influence of their career; 80% out of the 650 persons surveyed, who identified both as female and having a disability, experienced discrimination; and 94% of Black, Black British, Caribbean, or African respondents experienced discrimination. In further comments, 58% directly reported details of sexual harassment,²⁹ 78% of women experienced the highest levels of discrimination,³⁰ with 75% of all surveyed expressing that there are no clear processes of reporting discrimination in this sector.³¹ The totality of evidence of discrimination has prompted the Women and Equalities Committee in 2022 to start a Parliamentary Inquiry into 'Misogyny in Music',³² exploring all facets of discrimination in the music industries.³³ At the time of the writing, the Committee's inquiry is ongoing.³⁴

This chapter builds its inquiry on the above presented research, which unequivocally shows that women and men do not have equally successful or sustainable careers in music and questions the role of copyright law in this unequal

²³ Black Lives in Music (BLIM UK), 'Being Black in the UK Music Industry: Music Creators Part I' (October 2021); and Black Lives in Music (BLIM UK), 'Being Black in the UK Music Industry: Music Industry Professionals Part I' (October 2021). All reports available: <https://blim.org.uk/report/>.

²⁴ Bain (n7) 15-21.

²⁵ Anna Bull *et al*, 'Slow Train Coming? Equality, Diversity and Inclusion in UK Higher Education' (Equality, Diversity, and Inclusion in UK Higher Education (EDIMS), 2022). Available: <https://edims.network/report/slowtraincoming/>.

²⁶ Bull *et al* (n25) 64.

²⁷ ISM, 'Dignity at work: a survey of discrimination in the music sector' (2018). Available: https://www.ism.org/images/images/ISM_Dignity-at-work-April-2018.pdf.

²⁸ ISM (authored by Kathryn Williams and Vick Bain), 'Dignity at work 2: Discrimination in the music sector' (2022) 4 (asking specifically, "has there been any cultural change in the music sector since 2018? The survey data suggests a change that is not positive: 66% of survey respondents reported that they have experienced discrimination at work, 70% of which occurred in the past five years. This is up from 47% of respondents who reported having experienced discrimination in our 2018 Dignity at work report. 78% of discrimination was committed against women and 16% against men.") Available: <https://www.ism.org/images/files/ISM-Dignity-2-report.pdf>. ISM has changed its legal name in 2022, from Incorporated, to now Independent Society of Musicians.

²⁹ ISM 2022 (n28) 11.

³⁰ ISM 2022 (n28) 12.

³¹ ISM 2022 (n28) 20.

³² Reference at (n4).

³³ See Section 4.

³⁴ Written submissions: <https://committees.parliament.uk/work/6736/misogyny-in-music/publications/written-evidence/> and oral evidence sessions: <https://committees.parliament.uk/work/6736/misogyny-in-music/events/all/>.

treatment of different gender, and other characteristics, artists. This disparity in treatment, has been exponentially worse for women, as indeed all carers, during the Covid-19 pandemic (Section 2). The difference in treatment calls for a feminist inquiry into oft-held assumption that copyright law is objective, or gender neutral. This chapter relies on a combination of feminist theories and methods to expose the role of UK copyright law, with its focus on the economics and commercial aspects of music making, in creating, *or at the very least maintaining* the intersectional gendered hardships lived by women and gender-diverse persons aiming to make a living from music in the UK music eco-system. (Section 3). In its conclusion, the author calls for two changes in IP policy: first, that there must be an intersectional collection of gender-based evidence to inform the future reform, or reconstruction of copyright law, aligned with social justice goals of diversity and inclusion for all music creatives; and second, that it is the government's responsibility to correct course, as the music industries have failed to self-correct (Section 4).

2. Covid-19 Effects on the UK Music Industries

International and UK specific reports evidence the detrimental effects that the Covid-19 pandemic had on parts of the music industries.³⁵ Across all music industries in the UK, the Covid-19 had monumental impact, erasing 69,000 jobs, or one in three of the total workforce.³⁶ Recovery of the sector will require "continued investment and effort, addressing COVID-19 and post-Brexit issues, both of which pose significant threats."³⁷ Evidence shows that the Covid-19 pandemic disrupted the live music industries significantly, whereas the effects on the recorded, *i.e.*, the copyright industries, was nuanced, potentially leading to record profits in some areas. Experts suggest that the effects are likely to be long-lasting:

"The Covid-19 pandemic is likely to have profound and lasting structural effects on how culture is produced and enjoyed as well as how education and research are undertaken."³⁸

In the UK evidence shows in 2020, the music industries contributed £3.1 billion to the UK economy, which is a 46% decrease from £5.8 billion in 2019.³⁹ Further evidence also shows that less established artists, or those without systemic support, suffered even greater losses, across all sectors. An industry report by UK Music admits that despite

³⁵ Marilena Vecco *et al*, 'The impact of the COVID-19 pandemic on creative industries, cultural institutions, education and research' (WIPO Study, 2022) (covering an international body of evidence, across different sectors, including the music industries). Available: https://www.wipo.int/edocs/mdocs/copyright/en/wipo_cr_covid_19_ge_22/wipo_cr_covid_19_ge_22_study.pdf. For the UK, see UK Music, 'This is Music 2021' (October 2021). Available: <https://www.ukmusic.org/wp-content/uploads/2021/10/This-is-Music-2021-v2.pdf>.

³⁶ UK Music 2021 (n35) 8.

³⁷ UK Music 2021 (n35) 9.

³⁸ WIPO Study 2022 (n35) 47.

³⁹ UK Music 2021 (n35) 9.

their focus on the macro picture, if one were to investigate the lived experience of artists in different situations, a different picture might emerge,

“This report focuses on the macro level picture, but digging a bit deeper, there are a range of back stories of vastly differing experiences and circumstances. For instance, a consistent pattern emerged **whereby those least advantaged financially felt the greatest decline in incomes**. This was true of creators, music managers and recording studios. **In each case, the lowest earners experienced the greatest percentage income decline**.

This was because some higher earning creators and their managers can look to royalty-based income to offset the decline in live income. **Emerging artists, niche artists and musicians are far more reliant on live performance**. In the case of recording studios, the bigger facilities were better able to adapt and accommodate social distancing, whereas smaller studios had less flexibility and some remained closed during 2020.”⁴⁰

2.1. Live Music: compound burdens of Covid-19 and Brexit

Evidence from several jurisdictions demonstrates that it was the live music industry which was most affected by the Covid-19 pandemic.⁴¹ According to the OECD, 50% of music industries’ revenue originates from live events (concerts, festivals, tours, or solo performances),⁴² and due to the social gathering limitations imposed by the Covid-19 pandemic, such events were either cancelled, or postponed, with the added complexity that due to the increase of cost of travelling and accommodation, the attendance further dropped.⁴³ These effects were felt globally, with evidence from South Africa showing that 90% of the live music industry lost income due to the pandemic, and 25% reporting that no parts of the business could continue under lockdown condition.⁴⁴ Evidence from Nashville (US) shows that several music venues lost 72% of their revenue, to the total industry cost of \$17 million in lost wages and resulting to a loss of \$24 million to Nashville’s GDP.⁴⁵

To meet the challenges of the new circumstances, many artists turned to the online and digital spaces, including the use of new technologies, to create an alternative to the previously live music industry. Although there was some success in jurisdictions like South Korea, comparative evidence shows that the income from live streaming and

⁴⁰ Emphasis added. UK Music 2021 (n35) 10.

⁴¹ WIPO Study 2022 (n35) 12.

⁴² WIPO Study 2022 (n35) 12.

⁴³ WIPO Study 2022 (n35) 13.

⁴⁴ WIPO Study 2022 (n35) 13 (referring to the evidence reported in South African Cultural Observatory ‘Impact Analysis Live Music and its Venues and the South African economy during COVID 19’, 2020, available: <https://www.southafricanculturalobservatory.org.za/download/comments/691/10a5ab2db37feedfdeaab192ead4ac0e/Impact+Analysis+-+Live+Music+and+its+Venues+and+the+South+African+economy+during+COVID-19>).

⁴⁵ WIPO Study 2022 (n35) 13 (referring to the evidence reported in McCall, J., et al., ‘Music Industry Report’ Nashville Area Chamber of Commerce, 2020, available: <https://www.nashvillechamber.com/research/music-industry-report>).

Video-On-Demand (VoD) did not reach the levels of live music events before the pandemic.⁴⁶

The re-opening of the live music industry has not been seamless, and several alarms have been sounded to demonstrate the need for the sector to change. Ticket prices for live music events have been spiralling, and experts have raised questions about the access to the music events, for all groups in the society.⁴⁷ Some experts nevertheless predict that the industry is most likely to return to the model before the pandemic:

“In the long term however, stakeholders note that it is unlikely that the core value chain of the music industry will change too dramatically. [] It is therefore expected that the previous operating model whereby artists and labels retain close links to streaming platforms, venue operators and event promoters to distribute music, will remain dominant following the pandemic.”⁴⁸

In the UK reports show that the live music industry reached high levels of performance in 2019, and the 2020 year was forecast to exceed the record earnings from 2019. The UK went into lockdown in March 2020, putting all live events to a complete stop. According to the industry, the “revenues effectively fell to zero overnight.”⁴⁹ Assessing the year 2020 in totality, the evidence shows that “the actual decline [in revenues] was [] at 90%.”⁵⁰ The live music sector is “an intricate ecosystem” and its devastation had far-reaching effects across all sectors,

“The devastation of live music had a knock-on impact on the live performance income paid to songwriters and music publishers, the sale of physical CDs, vinyl and merchandise such as t-shirts. This impacted not only on artists’ revenue around live performance, but also the CMO, music publishing, recording and music merchandise companies who work with artists and their management teams.”⁵¹

2.2. Recorded Music and Composition: a Complex Picture

The recording labels, or the recorded music sector experienced a combined effect of the Covid-19 pandemic. On the one hand, the physical sales, which represent overall 20% of recorded music revenues, saw a drop of approximately 33% in 2020, with numbers again on the rise in 2021.⁵² There were also negative effects on distribution, and several artists delayed music releases, despite the option to release music digitally.⁵³ On the other hand, the recorded music industry saw a variety of trends

⁴⁶ WIPO Study 2022 (n35) 13.

⁴⁷ WIPO Study 2022 (n35) 14.

⁴⁸ WIPO Study 2022 (n35) 14.

⁴⁹ UK Music 2021 (n35) 22.

⁵⁰ UK Music 2021 (n35) 23.

⁵¹ UK Music 2021 (n35) 23.

⁵² WIPO Study 2022 (n35) 14.

⁵³ WIPO Study 2022 (n35) 16.

regarding the music consumption via streaming. Streaming has dropped significantly in some countries, where this type of activity could be linked to other activities, such as commuting. Experts have also speculated that this drop could be attributed to the reduced disposable income for many peoples. In the WIPO sample, over two third of the countries reported a decrease of 12.5% in audio music consumption, after the World Health Organization declared the pandemic on 11 March 2020. As a result, Spotify reported losses in the amount of \$838 million of revenue, in the first three quarters of 2020, in the countries studied.⁵⁴

The digital divide also affected the artists, where the “great ‘digital divide’ between established musicians and new and emerging artists” was reported.⁵⁵ This was particularly clear on the evidence from the developing countries, where the Covid-19 pandemic waves, new strains and stalled or slow vaccine rollouts further exacerbated the impact on the already struggling creatives. The digital market was also difficult for consumers in countries, where access to the electricity or internet connectivity were an issue.⁵⁶ UNCTAD also reported that more than 55% of peoples in the least developed countries do not have access to adequate supplies of power, leading to reduced availability of unlimited streaming services.⁵⁷

Differently, in countries where electricity and connectivity were abundant, streaming was a suitable manner of consumption in Covid-19 times. In the UK reports show that the recorded music performed well during 2020,

“Streaming had the greatest positive impact on recorded music trade revenues, which BPI figures show grew to almost £737 million in 2020, a 15% increase from £638 million in 2019. Physical sales dropped slightly to £210 million in 2020, a 3% drop from £216 million in 2019.”⁵⁸

In the UK, revenues from the composition (original music) or music publishers also experienced losses due to the Covid-19 pandemic, although their overall trend is a modest upward one. The CMO collecting the royalties on behalf of the composers (writers and publishers) collected close to £700 million for distribution in 2020, with greater losses projected for 2021 reports.⁵⁹ The evidence equally shows that the Covid-19 did not stop the music creation process, and songwriters and composers in 2020

⁵⁴ WIPO Study 2022 (n35) 14 (referring to the evidence from a study on 60 countries, see Kizielewicz, C., ‘Music Streaming Consumption Fell During COVID-19 Lockdowns’ Carnegie Mellon University, 2021. Available: [https://www.cmu.edu/news/stories/archives/2021/july/music-streaming-down-during-pandemic.html#:~:text=In%20more%20than%20two%2Dthirds,declaration%20on%20March%2011%2C%202020\).](https://www.cmu.edu/news/stories/archives/2021/july/music-streaming-down-during-pandemic.html#:~:text=In%20more%20than%20two%2Dthirds,declaration%20on%20March%2011%2C%202020).)

⁵⁵ WIPO Study 2022 (n35) 15.

⁵⁶ WIPO Study 2022 (n35) 15.

⁵⁷ WIPO Study 2022 (n35) 15 (referring to the evidence in Henderson, M., ‘How COVID-19 exposed music industry fault lines and what can be done’ United Nations Conference on Trade and Development (UNCTAD), 2021. Available: <https://unctad.org/news/how-covid-19-exposed-music-industry-fault-lines-and-what-can-be-done>).

⁵⁸ UK Music 2021 (n35) 16.

⁵⁹ UK Music 2021 (n35) 13.

registered over 5 million songs with the PRS, which is nearly one third more than in 2019.⁶⁰

2.3. Exponential Intersectional Gender Hardships

Evidence already confirms that not all artists fared the same in the Covid-19 pandemic, where artists without support systems or previously existing catalogues, did not have the same access to the markets of digital music and streaming.⁶¹ This section argues two further points. Firstly, women were affected exponentially by the Covid-19 pandemic, due to their caring and other home responsibilities. And second, due to the limitations imposed by the recording industries on the creative artists, women often opt to release their music independently (DIY). There is evidence that shows that independent artists, experienced more hardships due to the Covid-19 pandemic.

To start with, the precarity of women in work was worse than that for men, due to their proportionally more onerous commitments at home (*i.e.*, home schooling), resulting in the Covid-19 pandemic disrupting women's careers much more significantly than those of men.⁶² The pandemic is recorded to have exacerbated the pre-existing hardships for trans people, and "created disproportionate hardships for people marginalized by race and class."⁶³ The disruption to women's careers in music due to pregnancy or child caring responsibilities was already well recorded, and although illegal, still a considerable reality for most women in music.⁶⁴ The progress in 2023 is still lacking.

There are further factors, specific to the music sector, which add to the exponential burdens experienced by women working in the sector. Evidence shows that even when the live music sector reopened, the gender discrimination against women festival headliners persists, with a major UK festival in 2023, featuring an all-male headliner line-up.⁶⁵ Even for the select few, who were chosen as festival headliners, the

⁶⁰ UK Music 2021 (n35) 13.

⁶¹ WIPO Study 2022 (n35) 15.

⁶² Although this falls outside the scope of this chapter, for more, see: Abi Adams-Prassl, *et al*, 'Inequality in the impact of the coronavirus shock: Evidence from real time surveys' (2020) 189 *Journal of Public Economics* 104245 (the study relied on evidence from UK, US and Germany, and found the impacts of the Covid-19 pandemic were highly unequal and exacerbated existing inequalities in the labour market, with women and less educated workers most affected by the crisis). For a broader body of research, and feminist tools of recovery, see Global Institute for Women's Leadership (King's College London), *Essays on Equality: Covid-19, the Road to a Gender Equal Recovery* (2021). Available: <https://www.kcl.ac.uk/giwl/research/essays-on-equality-covid-19-road-to-gender-equal-recovery-2021>.

⁶³ Dylan McCarthy Blackston, 'Introduction: Transgender Studies Remixed' in Susan Stryker and Dylan McCarthy Blackston (eds), *The Transgender Studies Reader Remix* (Routledge, 2022) 3.

⁶⁴ Direct discrimination because of pregnancy or maternity is illegal under the 2010 Equality Act. That notwithstanding, several reports have gathered the lived experience of women confirming the opposite, where the loss of professional opportunities has happened either directly, or in most cases, covertly (the opportunities just went away): see for example, (1) ISM 2018 (n27); or (2) UK Music, 'Diversity Report' (2022) ("It is still the case that more young women are accessing the industry at an early stage but start to leave the industry in their mid-forties. Women are well represented in the 35-44 age category (53.0%) but the 45-54 age bracket (44.3%) is the point at which female representation starts to drop, with the numbers reducing further for those aged 55-64 (33.3%.") Available: <https://www.ukmusic.org/equality-diversity/uk-music-diversity-report-2022/>; or (3) Almuth McDowall *et al*, 'Balancing Act: PIPA's Survey into the Impact of Caring Responsibilities on Career Progression in the Performing Arts (2019) (finding that 12% of their respondents, all parents in performing arts, left the sector, due to bullying and/or discrimination). Available: <https://pipacampaign.org/uploads/ckeditor/BA-Final.pdf>.

⁶⁵ Section 1.

cost of a live tour, might have been prohibitive, especially when not supported by the traditional record labels (or having private resources). As late as in 2022, the effects of Covid-19 and Brexit are still felt, and music tours, much awaited by the fans, cancelled. Artists, who are facing increasing touring costs, must cancel live music tours, despite being celebrated and recipients of prestigious sector awards.⁶⁶

The argument that women in music have been affected by the Covid-19 exponentially, can be supported further by linking two pieces of separate research. The introduction showed research, where record labels and music publishers in the UK, mostly sign and consequently support and promote, male talent.⁶⁷ This is now a well recorded characteristic of the UK commercial music sector, which existed before the Covid-19 pandemic. For women and gender-diverse musicians, who release music, that means that they mostly do so independently. Evidence also shows that women have often had to remain independent, to preserve their creative control and not be forced to the terms of the 'commercial sound' as dictated by the music industries (record labels).⁶⁸ At the same time, research shows that the Covid-19 pandemic had disproportionate burdens on independently releasing artists.⁶⁹ Whether by choice or omission, women as independently releasing artists, were more negatively affected by the Covid-19 pandemic.

Finally, globally, musical production and musical technologies sectors did better in the Covid-19 pandemic, compared to the other music industries.⁷⁰ Both of these sectors are male dominated, with gender imbalance much higher, than previously reported statistics.⁷¹ Whereas music study is mostly gender balanced, music technology courses are male dominated. For example, only 12.88% women study Music Technology,⁷² and this carries over to life after graduation. The absence is even more stark for women of colour, where some reports record only notional presence in roles of music production.⁷³

The *Building Back Better* strategy must consider that the residual harms caused to the music sector by the Covid-19 pandemic are persistent, and for women,

⁶⁶ (1) Will Richards, 'Chloe Moriondo cancels UK gigs due to "cost of touring"' (NME Music News, 10 December 2022). Available: <https://www.nme.com/news/music/chloe-moriondo-cancels-uk-gigs-due-to-cost-of-touring-3364487>. (2) Eilish Gilligan, 'Risks, rising costs and 'relentless demands': why so many musicians are cancelling their tours' (The Guardian, 17 October 2022). Available: <https://www.theguardian.com/music/2022/oct/18/risks-rising-costs-and-relentless-demands-why-so-many-musicians-are-cancelling-their-tours>. (3) Tess Reidy, 'Rocketing costs and drop in ticket sales force musicians to pull tour dates: Animal Collective, Bonobo and Mercury prize winner Little Simz among acts to cancel concerts' (The Guardian, 23 October 2022). Available: <https://www.theguardian.com/business/2022/oct/23/rocketing-costs-and-drop-in-ticket-sales-force-musicians-to-pull-tour-dates>.

⁶⁷ See Section 1 and its reliance on Bain (n7).

⁶⁸ Empirical studies conducted between 2019 – 2021: (1) Metka Potočnik, 'Breaking Monopolies: a Feminist Approach to Intellectual Property in the Creative Industries,' Early Researcher Award Scheme (ERAS), University of Wolverhampton (October 2019 – September 2020) (15 interviews, 8 with creatives from the music industries, marked "C"); and (2) Society of Legal Scholars (SLS) (UK funded project): "Hear Her Speak: a Feminist Approach to Intellectual Property Law" (2020-21) (26 interviews, 14 with creatives from the music industries, marked "H"). The reference here is to be drawn to the interview with C9.

⁶⁹ WIPO Study 2022 (n35) 15. Specifically for the UK, see UK Music 2021 (n35) 10.

⁷⁰ WIPO Study 2022 (n35) 12-16.

⁷¹ Section 1.

⁷² Bain (n7) 21.

⁷³ Annenberg Report 2022 (n11) 22-23.

exacerbated. While the previous sections⁷⁴ clearly demonstrated that the pandemic significantly disrupted the music sector, live more than the recorded, this section further emphasises the point that the situation was far worse still, for women and gender-diverse artists.⁷⁵

3. Feminist Critique of Music Copyright

3.1. Relational Legal Feminism: Exposing the Commercial Bias of Copyright Laws

Relational legal feminism, when applied to IP laws,⁷⁶ informs that there is a better way of regulating the creative process and the resulting works, where the priority and resultingly, the focus of the rules is not on the outputs, rather the human creators, and their relationships with the community around them. West offers a helpful start of this thinking in her reading of relational feminism as,

“There is much that is wrong, that is inhuman and cruel, about our idealized liberal vision of unencumbered souls marching through chosen lives of productivity and earned incomes unencumbered by human connection. Feminism can be and has been a way to highlight what is wrong with such a vision and to seek a more humane and inclusive ideal for communal life.”⁷⁷

The commercial focus of the UK copyright law can be seen in several rules, including the types of rights given, ownership, moral rights, or exploitation of rights (see Section 3.2.). It is also clear, that the record labels, or the recording industries, do not represent all creative talent equally (see Section 1 above). At the same time, it has been observed by several policy makers and scholars, that the record labels or the recording industries are “a rights industry,”⁷⁸ or “the core of copyright industries,”⁷⁹ or that copyright is “central to the operations of the record industry,”⁸⁰ where the main value of the recording industries is the intellectual property, arising out of the music made.⁸¹ There are three main categories of rights in this regard: (1) the copyright protection of musical and/or literary works in a song,⁸² (2) the copyright protection of a sound recording,⁸³ and (3) the performers’ rights.⁸⁴

⁷⁴ See Sections 2.1. and 2.2.

⁷⁵ Arguably, research on trans women in music, and in general, trans musicians, together with gender diverse creatives, is still lacking, and more research, including the empirical collection of the lived experience, still pending, but necessary.

⁷⁶ Metka Potočnik, ‘Exposing Gender Bias in Intellectual Property Law: The UK Music Industries’ in Steven D Jamar and Lateef Mtima (eds), *The Cambridge Handbook of Intellectual Property and Social Justice* (Cambridge University Press, 2023) 483-484, 489-495.

⁷⁷ Robin West, ‘Relational feminism and law’ in Robin West and Cynthia Grant Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019) 70.

⁷⁸ Osborne (n6) 1.

⁷⁹ Referring to the Congress of the United States: Osborne (n6) 1.

⁸⁰ Referring to the British Government and its position: Osborne (n6) 1.

⁸¹ Osborne (n6) 3-4.

⁸² Section 1(1)(a) CDPA.

⁸³ Section 1(1)(b) CDPA.

⁸⁴ Sections 180 CDPA onwards.

Relational feminism asks us to include the lived experience of women in the industries, into the copyrights systems, and the resulting rules. As West explains,

“[w]e should build a liberal legal order on a foundation that rightly values choice and individualism, but that also recognizes human connection ... If we centralized women’s experiences of both *the harms* and *the aspirations* that are rooted in some way in this fundamental fact of human connectivity to the understanding of humanity that undergirds our liberal legal orders, we might thereby construct a more humane as well as more inclusive liberal legal order.”⁸⁵

The issue of too narrow of a commercial focus of copyright law in the UK can be corrected by a relational legal feminism reorientation, which broadly coincides with the theory of Intellectual Property and Social Justice and its call to redraft IP laws to include not only economic, but also social utilities into the system.⁸⁶ As posited by Mtima,

“To achieve its social utility purpose of human nourishing and flourishing, the intellectual property law must therefore adhere to inherent precepts of socially-equitable access, inclusion, and empowerment.”⁸⁷

If we add a social utility to copyright laws in the UK, we aim to expand access, inclusion, and empowerment of all creatives in the music eco-system.⁸⁸

3.2. From Inquiry to Critique: from Commercial to Relational Realignment of Copyright Laws

The commercial focus of the UK copyright law can be seen in several rules, including the types of rights given, ownership, moral rights, or exploitation of rights. Starting with the rights granted, CDPA extends protection in Section 1(1)(a) to original musical, and literary works, which include musical compositions and lyrics of a song, where applicable. In addition to this, CDPA also grants protection in sound recordings of the original authorial works,⁸⁹ where “a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced,”⁹⁰ without a threshold of originality, or creativity. Unlike in the US, the UK designs its CDPA protection of sound recordings on the investment made in the recording, by its producer. The producer is not the creative talent in artistic terms, rather

⁸⁵ Emphasis added. West (n77) 71-72.

⁸⁶ For IP-SJ see for example, (1) Lateef Mtima, ‘IP Social Justice Theory: Access, Inclusion, and Empowerment’ (2019) 55 *Gonz L Rev* 401; (2) Lateef Mtima and Steven D Jamar, ‘Researching Social Justice Aspects of Intellectual Property’ in Irene Calboli and Maria Lillà Montagnani (eds), *Handbook of Intellectual Property Research: Lenses, Methods and Perspectives* (OUP, 2021); and for a range of contributions (3) Steven D Jamar and Lateef Mtima (eds), *The Cambridge Handbook of Intellectual Property and Social Justice* (Cambridge University Press, 2023); and for the most recent explanation of the IP-SJ theory, (4) Lateef Mtima, ‘Intellectual Property Social Justice: A Theoretical Rationale’ in Steven D Jamar and Lateef Mtima (eds), *The Cambridge Handbook of Intellectual Property and Social Justice* (Cambridge University Press, 2023).

⁸⁷ Mtima 2019 (n86) 419.

⁸⁸ Potočnik 2023 (n76) 495.

⁸⁹ Section 1(1)(b) CDPA.

⁹⁰ Section 5A(1)(b) CDPA.

“the person by whom the arrangements necessary for the making of the sound recording [] are undertaken.”⁹¹

The tension between the authors of their musical works, who may or may not be the owners of copyright in their original musical and/or literary works, and the producers, most commonly the record labels, who have made the necessary arrangements and investments into the recording of that same music, is well recorded. The consequences of the “corporate ownership of sound recording copyright” have shaped copyright more broadly, and has fed into the creation of performers rights,⁹² which are arguably treated less favourably than copyright.⁹³ The so-called master rights have been at the forefront of many disputes with the artists, who have achieved great success, since releasing their first music.⁹⁴ News reported several instances of these disputes, and Taylor Swift is one of the rare examples, where the artist, after a prolonged dispute, regained control, by re-recording all her back catalogue (at a great financial cost).⁹⁵

A further demonstration of the commercial orientation of UK copyright law, where investment is protected, over the creativity or individual interests of the authors, is the ‘employment exception rule’ as found in Section 11(2) of the CDPA. Ownership or copyright in original musical or literary works, which are created by employees, in the course of their employment, is presumed to be with their employers, absent any agreement to the contrary. A contract between the employer and employee is possible, but the actual resulting content, is subject to the individual negotiating powers in any given case. As argued elsewhere, the negotiating powers are squarely with the recording industries, and not with the individual artists.⁹⁶ Moreover, to preserve their creative control, women often turn away from the traditional record labels, pursuing careers in the DIY space of independent publishing.⁹⁷

The commercial focus of UK copyright is also demonstrated in the minimal content of the moral rights. It has been suggested that the level of moral rights protection in the UK is so minimal, that the compliance with international rules is at risk.⁹⁸ Authors have noted that this appears to be a feature of common law systems,

⁹¹ Section 178 CDPA.

⁹² Osborne (n6) 5.

⁹³ Osborne (n6) 7. Richard Arnold, *Performers’ Rights* (6th edn, Sweet & Maxwell, 2021) [1.18], [1.26]. This is emerging as a significant area in IP law, in need of further research, but falls outside the scope of the present chapter, but see Metka Potočnik, ‘Music Performers and Neighbouring Rights: an Intersectional Gender Audit’ in Kathy Bowrey and Jessica Lai (ed), *A Research Agenda for Intellectual Property and Gender* (Edward Elgar, forthcoming, 2024).

⁹⁴ Osborne (n6) 10 (quoting Prince, who stated “If you do not own your masters, the masters own you.”).

⁹⁵ Osborne (n6) 10 (discussing Swift’s call for justice in having her rights and the need to counter the male dominance in the industry). On the re-recording phenomena, a recent report in Brendan Morrow, ‘Why Taylor Swift keeps releasing all those re-recorded albums’ (The Week, 14 May 2022). Available: <https://theweek.com/briefing/1013413/why-taylor-swift-keeps-releasing-all-those-re-recorded-albums>. Swift did not own the master rights to her commercially successful catalogue of music. Her masters were owned by Scooter Braun, who Swift accused of “incessant, manipulative bullying.” More broadly, the record label controlled the live performances, and the inclusion of the songs in documentaries (so called syncing).

⁹⁶ Potočnik (n76) 494-495.

⁹⁷ Potočnik (n76) 494-495.

⁹⁸ For example, Jonas Brown-Pedersen, ‘The Inadequacy of UK Moral Rights Protection: A Comparative Study on Waivability of Rights and Recontextualisation of Works in Copyright and Droit d’Auteurs Systems’ (2018) 3 LSE LR 115 (discussing UK rules on waivability of moral rights, and the right of integrity, as per Section 80 CDPA). See also, Iona Harding and Emily Sweetland, ‘Moral

with civil law systems offering more protection to authors, via a system of more robust moral rights. In the UK, moral rights are limited to their use in objective context (authors' subjective objections to the treatment of their works is unlikely to meet the statutory threshold of infringement), and the paternity right (the name itself is problematic from a feminist standpoint), is only given, when authorship is asserted. Furthermore, moral rights can be waived or assigned.⁹⁹ The issues reported in practice, relevant to the matters discussed here, involved the record labels releasing music, where the authors no longer had copyright (via assignment), and the record labels had the master rights. There have been worrying cases reported, or record labels releasing music under the artists' deadname,¹⁰⁰ despite the composer having transitioned before the re-release of their music. The well-known composer Wendy Carlos (composer of the film music in *The Shining* or *A Clockwork Orange*) has since used her IP rights, to stay out of the public eye.¹⁰¹

Copyright rules also allow for a free, contractual disposition of copyright, under the principle of party autonomy.¹⁰² Copyright contracts are essential to the value and business models of the recording industries, as the asserted aim is to invest in copyright, whereby "investment is derived from [the recording industries'] contracts with the recording artists."¹⁰³ This statutory framework rests on a false premise of party equality and refuses to recognise the reality, that in most cases (artists such as Taylor Swift, Beyoncé or Lizzo are the exception) artists feel entirely powerless when negotiating a contract with their record label. Artists have reported that, especially at the start of their careers, the terms of the contract are unlikely to be favourable, or even more extremely, the artists report of having signed their "life away with [] early releases"¹⁰⁴ which has lasting effects on the sustainability of their careers, and results in the inability to build legacy from early stages of their career.

The role of copyright contractual controls has further negative effects on the artists, wishing to participate and create in the music eco-system. Artists, have reported of the recording labels and other industry gatekeepers, such as the radio, dictating the sound, which "will sell" and the resulting pigeon-holing of individual artists' sound to meet the standards of the marketable "commercial sound." To avoid the pigeon-holing and limitations of the commercial sound, and with the view of preserving their creative controls, artists have walked away from record deals, and turned to the independent

rights in the modern world: is it time for a change?' (2012) 7(8) *Journal of Intellectual Property Law & Practice* 565 (focusing on the implementation of the Berne Convention and Article 6bis).

⁹⁹ Section 87 CDPA.

¹⁰⁰ Sinéad Gleeson, 'Sonic Seasonings: The Genius of Wendy Carlos' in Sinéad Gleeson and Kim Gordon (eds), *This Woman's Work: Essays on Music* (White Rabbit, 2022) 168.

¹⁰¹ Gleeson (n100) 166.

¹⁰² Section 90 CDPA.

¹⁰³ Osborne (n6) 1 (referring to the statement of the International Federation of the Phonographic Industry (IFPI) and their stated aim).

¹⁰⁴ The author draws on 22 interviews conducted during two empirical, original studies, see (n68).

release options (DIY).¹⁰⁵ As argued elsewhere, this necessary act of creative self-preservation comes at a high cost of surrendering the much-needed investment, and other industry support.¹⁰⁶

Relational feminism suggests that when lived experience of women in the music industries is considered, a repositioning of the aims and values of copyright law must take place.¹⁰⁷ Whereas economic utilities of copyright rules remain important, other social utilities should be written into the rules as well. To demonstrate the first, remaining importance of the economic utility of copyright law, artists consistently report of the desire to have sustainable careers in music, which allow them to pay the bills, and “live off music.”¹⁰⁸ The use of relational feminism would therefore not lead to the conclusion that the earning potential of the exclusive rights in copyright protected music is not crucial. That notwithstanding, women consistently report of additional value in music creation, or as suggested by the empirical data, of other markers of success. It is argued at present that UK copyright laws do not pursue social utilities, or non-commercial goals.

Relational feminism reorientation of copyright laws would suggest that the lived experience of women in the music industries should be placed at the centre of copyright rules. Women creating music more often reported success with the careers in other ways (non-traditional, or non-commercial ways¹⁰⁹), such as: when they connected or reaching the audiences;¹¹⁰ or made an impact on their communities;¹¹¹ or when they performed the craft of song-writing to a certain degree of professionalism, whilst forming a human connection with their audiences;¹¹² or reaching their own artistic achievements, and connecting with other people, to empower them, where music is created for purposes of social justice;¹¹³ or success as the courage to speak one’s creative truth;¹¹⁴ or sharing music with people;¹¹⁵ and also success as cultural capital;¹¹⁶ or success as making the industries accessible to young musicians.¹¹⁷

¹⁰⁵ SLS (n68) interviews with H93 (independent release is the only way to secure creative control, but it is very difficult to make it as an independent artist (“it is exhausting to do it all on your own”), and H95 (it imperative to act as an independent artist, to keep creative control and IP, but it is very challenging to run it all on your own).

¹⁰⁶ Potočnik (n76) 494.

¹⁰⁷ In one of the interviews an artists reported that the current industries are “all about the money” but that is not the main aim for her: SLS (n68) interview with H101.

¹⁰⁸ SLS (n68) interviews with H95, H98, H99, H56.

¹⁰⁹ SLS (n68) interview with H96.

¹¹⁰ SLS (n68) interview with H54.

¹¹¹ SLS (n68) interview with H34.

¹¹² SLS (n68) interview with H94.

¹¹³ SLS (n68) interview with H57.

¹¹⁴ SLS (n68) interview with H93.

¹¹⁵ SLS (n68) interview with H98.

¹¹⁶ SLS (n68) interview with H90.

¹¹⁷ SLS (n68) interview with H51.

3.3. Starting the IP Law Reconstruction: the Call for Intersectional Collection of Gender Evidence

The public mandate in the UK for the Government to step in, is supported by the public, and industry reports. Evidence shows that,

“The majority of the public want Government to do more to support the music industry. 54% feel the Government should be doing more to ensure musicians can work abroad post-Brexit, and 43% think Government is not doing enough to help people become professional musicians. 52% of the public think the Government should do more to support industry as a whole.”¹¹⁸

Despite the prevalent evidence of gender discrimination in the UK music industries (Section 1), the IP policy and governmental inquiries into the sector,¹¹⁹ do not collect evidence on how the rules might affect different categories of the stakeholders in the IP system, considering their gender, and other characteristics (such as race, nationality, immigration status, class, age, disability, sexuality, ...). A feminist approach is always accompanied by the feminist methodologies of collecting evidence, placing the relevant issues into their practical context:

“Feminist legal theory is the study of philosophical foundations of law and justice; informed by women’s experiences, its goal is to transform the legal system and the understanding of it to improve the quality of jurisprudence and women’s lives.”¹²⁰

The feminist methods of consciousness raising;¹²¹ the lived experience of women;¹²² embedded in intersectionality¹²³ and practical, or contextual feminist reasoning¹²⁴ are the crucial companion of a select feminist theory, which might change, if, or when

¹¹⁸ UK Music 2021 (n35) 38.

¹¹⁹ See the two examples after the Covid-19 pandemic: the DCMS Inquiry on the Economics of Music Streaming and the DCMS Inquiry into the Future of Music Festivals, references at (n2).

¹²⁰ Cynthia Grant Bowman, ‘Social feminist legal theory: a plea’ in Robin West and Cynthia Grant Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019) 91.

¹²¹ Katharine T Bartlett, ‘Feminist Legal Methods’ (1990) 103 Harv L Rev 829, 831.

¹²² Julie A Nice, ‘The gendered jurisprudence of the Fourteenth Amendment’ in Robin West and Cynthia Grant Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019) 343.

¹²³ Not only as the theory, named by Kimberlé Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour’ (1991) 43 Stan L Rev 1241; but also as an over-arching, methodological approach, see Chao-ju Chen, ‘Catharine A. MacKinnon and equality theory’ in Robin West and Cynthia Grant Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019) 63 (describing the radical feminist MacKinnon and her reliance on intersectionality, as a method, in her later scholarship).

¹²⁴ Bartlett (n121) 851 (“Practical reasoning approaches problems not as dichotomized conflicts, but as dilemmas with multiple perspectives, contradictions, and inconsistencies. These dilemmas, ideally, do not call for the choice of one principle over another, but rather “imaginative integrations and reconciliations, [] which require attention to particular context. Practical reasoning sees particular details not as annoying inconsistencies or irrelevant nuisances which impede the smooth logical application of fixed rules. Nor does it see particular facts as the objects of legal analysis, the inert material to which to apply the living law. Instead, new facts present opportunities for improved understandings and “integrations.” Situations are unique, not anticipated in their detail, not generalizable in advance. Themselves generative, new situations give rise to “practical” perceptions and inform decisionmakers about the desired ends of law.”)

needed.¹²⁵ The author emphasises not only the need to collect empirical evidence from women, but also trans women, and gender-diverse musicians, with various characteristics (including race, age, class, immigration status, disability,...). Intersectionality “can illuminate the diverse ways in which relations of domination and subordination are produced.”¹²⁶

Often scholars will combine various feminist theories, to address the multiple, overlapping facets of a complex problem, such as the different aspects of the music industries. That notwithstanding, it is argued here, that for IP reform to be meaningful, from the perspective of IP-SJ principles of access, inclusion, and empowerment, it must be based on the lived experience of women, in the form of empirical data. It is argued here that the currently existing data gap must be filled, and the onus for this is on the UK Government, under its *Building Back Better* promise.

4. Building Back Better: from Private to Public Mandate and Accountability for Inclusion in the Music Industries

To revitalise the UK music industries, after the devastation of the Covid-19 pandemic, currently exacerbated by the Brexit barriers to the free movement of workers and services in EU markets, it is argued here that the *Building Back Better* promise must follow the principles of feminist policy, where the intersectional gender hardships of the creatives in the sector are not ignored. Lombardo and Meier explain that,

“In contrast to mainstream policy approaches, feminist policy scholars define the quality of policy in terms of three criteria: integrating gender and intersectionality analytics into policy assessment, empowerment of disadvantaged groups, and social transformation to foster gender+ equality.”¹²⁷

This chapter and its author are not (yet) in the position of offering a new set of copyright rules. The chapter therefore starts with a feminist inquiry, and follows with a feminist critique. Reconstruction of the new copyright laws, which are informed by feminist theory, build on intersectional collection of gender evidence, and supported by the stakeholders in the industries and the government, who have the power to make the necessary changes, is still forthcoming. Demands for a list of changes, or fixes are

¹²⁵ The author relies on the combination and describes them under the concept of a Feminist Toolbox. Moreover, it is already foreseen that the relational feminism will have to be combined with the theory of radical feminism, in face of the persistent patriarchy of institutions and misogyny in music: Potočnik (n76) 484. Another option is socialist feminism, as per Grant Bowman (n119) 91 (“Politically, socialist feminism has always entailed a commitment to radically transform capitalist patriarchal institutions, to create an economy that no longer runs for profit, that is democratically controlled, in which women’s work is equally valued and women do not suffer violence and sexual exploitation.”). In future research the author also foresees the need to challenge the “neutrality of institutions” premise from liberal feminism, see Celeste Montoya, ‘Institutions’ in Lisa Disch and Mary Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (Oxford University Press, 2016) 367.

¹²⁶ Brittney Cooper, ‘Intersectionality’ in Lisa Disch and Mary Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (Oxford University Press, 2016) 401.

¹²⁷ Emanuela Lombardo and Petra Meier, ‘Policy’ in Lisa Disch and Mary Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (Oxford University Press, 2016) 625.

notoriously fraught with difficulty and without unequivocal governmental support, are unlikely to move in the right direction. As Rosemary Hunter elucidates,

“One of the long-standing tensions within feminist legal scholarship is between feminist critiques and reconstructions of law. Although academic research and teaching readily lend themselves to critique, **reconstruction is harder to achieve**. Theoretically, there are debates as to whether law itself is impervious to feminist revision, and practically, attempts at reconstruction **require the cooperation of those who make and implement law**, who tend not to be feminists and may, *at best, be indifferent or, at worst, actively hostile to feminist goals.*”¹²⁸

Without a correction to the existing intersectional gender bias, the Government risks perpetuating the existing intersectional gender discrimination. Without further intersectional collection of gender-based evidence, there is a real risk of, at best ignoring the pre Covid-19 discrimination of women and gender-diverse musicians, and at worst, exacerbating the severity of their mistreatment by the music industries. The time has come for the Government to move beyond the mere economics of IP systems and form a strategy that will include social utilities in music copyright law.

A possible start to the future UK Government’s approach, is the work of the UK Select Committee: Women and Equalities Committee and its 2022/23 inquiry into Misogyny in Music. Although only a start, it is argued here, that this type of inquiry should be more prevalent in all governmental policy work, related to the governance of IP systems and the music industries. The ownership and accountability of the Women’s and Equalities Committee to collect the evidence of the lived experience of women in the music sector, should serve as an example to follow more broadly. The inquiry is currently ongoing, and it is based on a recognition that women are not doing as well as men in the music eco-system. The Committee’s inquiry focused on the collection of evidence surrounding the following questions:

1. “What correlation exists, if any, between misogynistic lyrics and violence against women and girls?”
2. What types of support exists for women experiencing sexism or misogyny in the music industry? How can they report problems or abuse?
3. How safe do women and girls feel at live music concerts and festivals?
4. *What expectations are there on women working in the music industry compared to men?*
5. What steps should the Government and other industry bodies take to tackle misogynistic and sexist attitudes towards women in music?”¹²⁹

¹²⁸ Emphasis added. See, Rosemary Hunter, ‘Feminist Approaches to Socio-Legal Studies’ in Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2020) 261.

¹²⁹ References at (n4).

Whereas all evidence will be informative for all future working in the music eco-system, contributions on question 4, will be of note to IP scholars. For interested readers, and before the submission of the Committee's report, the submission of the F-List for Music brings light to several issues discussed in this chapter.¹³⁰

5. Conclusion

A question is often asked at the end of a feminist critique piece: what can be done about it? What are the specific recommendations a scholar is making, for a *feminist reconstruction of copyright laws*? And this is an inherently unfair question, before there is significant buy-in by the copyright policy maker into the collection of intersectional gender empirical evidence, which will inform any future reforms. The role of copyright law in at least maintaining the current power imbalances in the UK music industries, should not be discounted. Copyright law is the place to start the social justice corrective of a creative industry, which is inherently unjust towards half of its creators: women and gender-diverse creatives in the music eco-system. Without a corrective, we risk the future of music to stagnate and be reduced to the tailored tastemakers of commercial sound, without the excitement and imagination of a significant portion of the creators out there. There can be no Building back *Better*, if half of the creative talent, continues to be ignored, in the evidence collection, forming the start of all policy interventions.

¹³⁰ The F-List for Music Submission to the Inquiry (MiM0034) (co-authored by Vick Bain and Dr Metka Potočnik, submitted 17 July 2022). Available: <https://committees.parliament.uk/work/6736/misogyny-in-music/publications/written-evidence/>.