

Misogyny in music: a feminist reading of performers' rights

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'Misogyny in Music: a Feminist Reading of Performers' Rights'

Metka Potočnik

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1. Setting the Scene: Misogyny in Music.

*"Girls don't always sing about boys.
What if I wanna talk about suffering?
In the earth.
The ocean plastic happenings.
Would anybody listen at all.
If I don't parade in a bra, only to get my point across.
I don't always think about boys.
But I hear love is the only thing worth fighting for.
As well as loving the same sex.
Sanitary kits for homelessness.*

*Grenfell, mental health for all.
(Mental health for all).
[...]
'Cos I've been reading about:
Air pollution, sustainable fashion,
Learnt behaviours, why it all happens.
So I guess, I'll raise the issues,
With a nice beat behind me.
Singing it sweet, so you'll still buy me.
As I rethink the norm like."*

Ego Ella May, Girls Don't Always Sing About Boys (2019)

This chapter aims to rely on the existing scholarly criticism of performers' rights in intellectual property law,¹ and expand it, using a combination of feminist theories in law and music,² to critique the current legislative approach to protecting women and gender-diverse music creatives. Women and gender-diverse artists experience hardships and barriers, which prevent them from making music, that would reach broad audiences. Further still, when they do enter the music industries, they are censored and controlled in the music they make, or how they present themselves to the public. Their music, sound, and image are constantly policed, through the male gaze of the gatekeepers in the music industries.

This chapter focuses its inquiry on the United Kingdom (UK) and specifically its rules on performers' rights within the music industries.³ The chapter explores two main groups of hardships or barriers that women and gender-diverse creatives endure: firstly, there is reduced access to opportunities to make music in the UK, because women and gender-diverse artists are not supported financially and professionally by the sector; and secondly, when women and gender-diverse artists do enter the space of commercial or orthodox industries, their professional lives are plagued by unsafe working conditions, creative censorship and gender-based economic discrimination, including lower earnings and the gender pay gap. Consequently, women and gender-diverse artists lack the freedom and support to make or perform music in the ways they like. The music available to the public is therefore more homogenous, and falls more squarely in a set of genres, determined, and policed by the industry gatekeepers.

¹ See Section 2.2.

² See Section 3.1.

³ For feminist critique in UK copyright law, see Metka Potočnik, 'Exposing Gender Bias in Intellectual Property Law: The Music Industries' in Steven D Jamar and Lateef Mtima (eds), *The Cambridge Handbook of Intellectual Property and Social Justice* (Cambridge University Press, 2023); and Metka Potočnik, 'Revitalising the UK Music Industries in the Aftermath of Covid-19: a Feminist Critique of Music Copyright' in Jens Schovsbo (ed), *Intellectual Property Rights in Times of Crisis: Lessons Learned from the Covid-19 Pandemic* (Edward Elgar Publishing, forthcoming 2024).

Research shows that women and gender-diverse artists endure intersectional gender hardships⁴ that hinder their participation in the music industries. When asked, they explain that barriers exist because of who they are and the music they want to make.⁵ The lived experience must be considered from multiple categories of women, considering their race, age, disability, or class, among several others. The legal feminist theory of intersectionality offers a start, when it explains that women experience multiple interlocking systems of oppression. Nevertheless, the concept of intersectionality, and its traffic analogy⁶ could lead readers to assume, that there are instances, where multiple personal characteristics can be considered individually. In music, and in particular when attempting a feminist reading of performers' rights, the theory of intersectionality must be combined with the theory of conjectural bodies, developed by Robin James.⁷ James critiques the traffic analogy for its seeming separation of categories such as gender or race,⁸ and offers a more transformative analogy of cooking: all personal characteristics are transformed when they interact, and once combined, can never revert to individual characteristics.⁹ A Black woman is never just a woman, or just Black. She is always both. Furthermore, James also explains, that music is never a mere "representation" of individual characteristics of their creators or performers. Music is co-dependent of these characteristics and gender and race are constitutive of the music made.¹⁰ A feminist reading of performers' rights must therefore always consider, performers' personal characteristics, and their multiplicity, as they relate to the music, and its performance.

Hardships for women persist even for those that do *make it*. This term is often used by the public who see a woman as success, by measuring her awards, commercial profits, or fame.¹¹ Women face significant barriers at the start of their careers, and for most women, these persist throughout all stages of their careers (either via the motherhood penalty or age). There is increased scrutiny over their image, their bodies, and their voices due to the male gaze. The power houses we do see on the global stage, such as Beyoncé, Taylor Swift, Lizzo or Rihanna are the exception, not the rule. In

⁴ Although intersectionality as developed by Kimberlé Crenshaw is a term that focuses on gender discrimination and explores multiple, interlocking systems of oppression experienced by Black women, the term has been used so often in the UK, including in the Higher Education system, that it has come to stand as a synonym for equality, diversity, and inclusion of multiple under-represented groups. To avoid such reading, this chapter uses the terms intersectional gender hardships for emphasis on gender discrimination, as it interlocks with other characteristics.

⁵ Written and oral evidence available in the Women and Equalities Committee inquiry on 'Misogyny in Music' (started in 2022, still ongoing). Available: <https://committees.parliament.uk/work/6736/misogyny-in-music/>. All links in this chapter were accessed on 31 October 2023.

⁶ Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour' (1991) 43 Stan L Rev 1241.

⁷ Robin James, *The Conjectural Body: Gender, Race, and the Philosophy of Music* (Lexington Books, 2010). See Section 3.

⁸ James (n7) 4.

⁹ One cannot "un-bake a cookie," see James (n7) 21.

¹⁰ James (n7) xix, 3-4, 25-26, 38-39 (referring to the social practices of music making). See Section 3.

¹¹ Research however shows that women musicians will view success differently to the public: for more, see Potočník 2023 (n3).

practice, this is often referred to as the “what about Adele” question, and is used as a mechanism to distract from the evidence recording the situation for most women and gender-diverse artists in the sector.¹² The exceptional women artists, just like Adele, who have built their careers towards unparalleled echelons of traditional, or commercial success, will have different creative autonomy, negotiating power,¹³ and control over their image,¹⁴ which is not true for the rest of the artists relevant to the discussion here.

As Ego Ella May states in her 2019 *Girls Don't Always Sing About Boys* song, writing about issues that she finds important is still perceived as out of norm, by the industry gatekeepers or the public. She is seen by the orthodox music organisations, as stepping out of line. There are silent understandings or unwritten rules about what is acceptable for women to write about. May uses her lyrics to shine a light on the fact that there are rules about how women should appear on stage, when she writes that women are only noticed when they “parade in a bra.” May also explains that there are expectations about the sound women play, when she writes that her lyrics must be accompanied “with a nice beat behind” her, “singing it sweet, so you’ll still buy” her music. The music produced, her voice singing it are all the result of these expectations of the sector. The intersectional gender discrimination in music therefore not only limits the individual artist and their performances, but also affects the music we all get to hear, when it keeps some music, which is seen as out of norm, away from public distribution.

Artists in music can embody several roles, including that of composers, producers, musicians,¹⁵ singers, or performers. While it is not uncommon for individuals to embody several roles at once, evidence shows that institutional and systemic support exists for a certain type of artist in all roles: a white man. Specifically, reports have shown that UK record labels sign mostly male artists to their rosters;¹⁶ that UK music publishers in majority sign male authors;¹⁷ that radio stations play predominantly music written and performed by men;¹⁸ that orchestras play music authored (almost

¹² See evidence referenced in (n5).

¹³ Contracts and the negotiating power are not expressly considered in this chapter but see Potočnik 2023 (n3); for more detail also Kathy Bowrey, *Copyright, Creativity, Big Media and Cultural Value: Incorporating the Author* (Routledge, 2021) (Bowrey considers the power amassed by music divas such as Taylor Swift or Beyoncé, and their use of contracts to secure their position). The power of divas also considered in Mary Gani, ‘Negotiating Like A Diva: Preserving Creative Autonomy in the Music Industry’ (2019) 3 WLJ 37.

¹⁴ Lester finds IP law is not gender-neutral, but that with unparallel commercial success, women artists (music, TV and authors) have gained access to the correct legal and business advice, where their position is protected, and the gender-bias no longer harms them, see Toni Lester, ‘Oprah, Beyoncé, and the Girls Who Run the World - Are Black Female Cultural Producers Gaining Ground in Intellectual Property Law’ (2015) 15 Wake Forest J Bus & Intell Prop L 537, 543. Also, Gani (n13).

¹⁵ Also referred to as a session musician.

¹⁶ Vick Bain, ‘Counting the Music Industry: the Gender Gap; A study of gender inequality in the UK Music Industry’ (October 2019) 3 (Bain reviewed the rosters of artists signed to 219 UK record labels: out of these only 19.69% of artists signed were women). Available: <https://vbain.co.uk/research/>.

¹⁷ Bain (n16) 3. Bain reviewed the rosters of writers signed to 106 UK music publishers: out of these only 14.18% were women.

¹⁸ There have been several reports on this issue, with very little progress made in Ireland, but some progress reported in the UK (as of 2023): (1) The Why Not Her? Collective, ‘Gender & Racial Disparity Data Report on UK Radio 2021-2022’ (1 September 2022). Available: <https://www.canva.com/design/DAFF8ZA->

exclusively) by male composers.¹⁹ On average, men make more money from music than women or gender-diverse artists²⁰ and earnings from music are starkly lower for Black and other global majority women.²¹ If copyright and performers' rights systems are based on gender-neutral concepts of authors, or performers, they are divorced from reality. The myth of *talented performer* or *the artist*,²² who is gender-less, age-less, disability-less, colour-less, and who is protected by the existing performers' rights regime, must be reconsidered.

Women are controlled in the music they make (their sound and voice) and in their appearance when performing music (their image). The evidence seems to confirm the old saying, all too familiar to women and girls that they *should be seen and not heard*. These societal norms are even starker for performers from global majority groups. On the first point, the control over sound, research shows that women are policed regarding the music they are allowed to make.²³ Music that will be published is categorised as commercially attractive, or music that is fit for the radio, or music that will sell tickets to music shows. When women do not fit the industry's idea of what they should sound like,

[_Gg/VmTmzHp9uEmYmBqCjGa9ag/view?utm_content=DAFF8ZA-Gg&utm_campaign=designshare&utm_medium=link&utm_source=publishpresent](https://www.canva.com/design/DAFk3jU1zI8/IVvGJIKgo7SFpRnEGMKrsA/view?utm_content=DAFF8ZA-Gg/VmTmzHp9uEmYmBqCjGa9ag/view?utm_content=DAFF8ZA-Gg&utm_campaign=designshare&utm_medium=link&utm_source=publishpresent). In 2023, the authors of the reports even note that we can see a reversal to some of the old numbers in 2023 in Ireland: (2) The Why Not Her? Collective, 'Gender Disparity Data Report: Annual Radio Data Report on Irish Radio 2022/2023' (June 2023). Available: https://www.canva.com/design/DAFk3jU1zI8/IVvGJIKgo7SFpRnEGMKrsA/view?utm_content=DAFk3jU1zI8&utm_campaign=designshare&utm_medium=link&utm_source=publishsharelink. There has been some progress made in the UK: (3) The Why Not Her? Collective, 'Gender & Racial Disparity Data Report on UK Radio 2022-2023' (June 2023). Available: https://www.canva.com/design/DAFtZl9-HI/ymwZ2rr0910JYeCzyNOrUA/view?utm_content=DAFtZl9-HI&utm_campaign=designshare&utm_medium=link&utm_source=publishsharelink.

¹⁹ 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. The report reviewed 100 orchestras from 27 countries, in their 2020-21 season and found that only 747 out of the 14,747 compositions scheduled by the 100 orchestras during the entire 2020-21 season were composed by women: which is a total of only 5%. More alarmingly still, only 1.11% were composed by Black and Asian women and only 2.43% by Black and Asian men.

²⁰ 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>. Exploring earnings from music, the IPO found that in 2019, more than a third of musicians (37%) self-reported earnings of up to £5,000; nearly half (47%) reported less than £10,000, which is at the very bottom of the scale for annual pay in the UK, in 2019, according to the National Office for Statistics. Available: <https://www.ons.gov.uk/>. For musicians who relied entirely on music for their income, 43% reported earnings of up to £20,000, and 64% reported income of up to £30,000. IPO report found that women made significantly less in the group: median reported income for women was £13,057 and for men it was £20,160. In conjunction with the Bain Report (n16) it is also important to note that artists signed to major record companies earn considerably more than all other groups of artists. BLIM Report (n21) further shows that Black women earn a quarter less than white women.

²¹ Black Lives in Music (BLIM UK), 'Being Black in the UK Music Industry: Music Creators Part I' (October 2021). Available: <https://blim.org.uk/report/>. The report shows that Black women are the most disadvantaged in the industries, earning 25% less than white women, and 46% less than the men in the industries.

²² Craig finds that author-figure of copyright is not gender-neutral, see Carys Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar, 2011) 3 (Craig uses relational model to reimagine the concept of the author, with the better "vision of relational author as a participant in a process of cultural dialogue and exchange"), 13 (Craig finds that historically, the copyright system is built around the concept of romantic author), 32 (Craig reimagines "authorship as communicative and adaptive activity" which then replaces the notion of the author as "isolated and originating" for property rights over objects), 36.

²³ See Potočnik 2024 (n3) and Potočnik 2023 (n3).

they are not given access to the financial or business support, resulting in the reduction of their professional opportunities. The recording industries see themselves as taste-makers and through the notions of “commercial sound”²⁴ and “creative doctrines of songwriting”²⁵ the creativity of women and gender-diverse artists is limited, controlled, or curated. In addition, research into songs played on UK and Irish radio shows that women and gender-diverse artists do not get the same airtime as men.²⁶

When women step outside socially acceptable roles,²⁷ the consequences are swift, and severe. Manne explains it broadly, that women who step out of line are sanctioned by misogyny, which is the “‘law enforcement’ branch of patriarchal order.”²⁸ Women are not seen as experts, which also includes the creative industries, such as the arts, also known as the “Authority Gap”).²⁹ When women do assume roles, which are traditionally reserved for men, such as the creator, genius or virtuoso, women are sanctioned for stepping out of line. For women working in the music industries, conditions are not safe. Reports show that there are more women now working in the industries, but that has not improved the overall quality at work.³⁰ The UK Independent Society for Musicians found that between 2018-2022, the incidents of harassment, bullying and gender discrimination have gotten worse still.³¹ The state is so alarming that the Parliamentary Women’s and Equalities Committee (WEC) started an official inquiry into ‘Misogyny in Music’³² with the aim to design solutions to fix this industry problem. Overall, the hope is for a positive spill-over effect in addressing misogyny in the society more generally.

²⁴ Potočnik 2024 (n3).

²⁵ Sophie Daniels, ‘Keynote at the 2nd Annual F-List Research Conference’ (24 May 2023, ICMP, London).

²⁶ See *The Why Not Her? Reports* (n18). The research lead, Linda Coogan Byrne notes that the current research is not yet complete, as the radio statistics are measured through the gender of performers (who in some case might also be the songwriters or composers), and the collection of the statistics for the non-performing musicians (composers, or songwriters) is not available within this data.

²⁷ For an overview of scholarship on “traditional gender roles” see Lois Tyson, *Critical Theory Today; A User-friendly Guide* (4th edn, Routledge, 2023) 73-78 (chapter 4 – feminist criticism in literature and cultural production).

²⁸ Kate Manne, *Down Girl; The Logic of Misogyny* (Penguin, 2018) 63.

²⁹ Term by Mary Ann Sieghart, *The Authority Gap: Why Women are Still Taken Less Seriously than Men, and What we can Do about It* (Doubleday, 2021) 155 (exploring the male bias in publishing industry, where books written by women earn less), 158 (showing research that women’s art is valued less than art made by men).

³⁰ UK Music, *Diversity Report 2022* (2023). Available: <https://www.ukmusic.org/wp-content/uploads/2022/11/Diversity-2022-Spreads.pdf>.

³¹ Deborah Annetts, Chief Executive at Independent Society of Musicians, in Formal Oral Evidence Hearing, ‘Misogyny in Music; Transcript (19 April 2023) at Q115 (“women told us—and there were 660 respondents in total—that they felt that discrimination was endemic in the music sector. It was a truly horrifying experience going through all those various responses.”). Evidence at (n5).

³² Inquiry (n5) is ongoing at the time of submission of this chapter.

Performers' rights are not always included in accessible lay person explanations of music copyright,³³ nor are they a common feature of intellectual property (IP) study.³⁴ Select scholars already observed the noted differences between authors and performers, where until very recently authors were seen in a more favourable light, for their creative input, leading to more rights given to them.³⁵ Some have observed that performers have been "poorly served by intellectual property law."³⁶ Relying on the bundle of feminist theories (see Section 3), this chapter calls for a new vision of performers' rights, which abolishes the distinction in law between performers, as the sources of creativity and their performances. The legislative focus on the protection of performers should rest with the creatives themselves, acknowledging the inherent connection and mutual co-dependence between the person of the performer, and the musical performance they embody, perform and share. In the new system, performances are no longer seen as objects of individual transactions.³⁷ A better view of performances is one of creative processes, embodied and inherently connected with the performer. A law which centres the performer at its core, must consist of inalienable rights, with the potential of safeguarding the performers creative control and autonomy, whilst ensuring their safety, well-being and ultimately, empowerment. As the UK Government considers all evidence for the appropriate implementation of the Beijing Treaty,³⁸ this chapters argues for a paradigm shift, and a revision of the current system of performers' rights.

2. Legislative Bias: Authors' Rights over Performers' Rights.

2.1. Moral v Economic Rights: Inability to build a Legacy.

Performers' rights, as authors' copyright are built on international rules, that set minimum standards frameworks for countries to implement, and possibly upgrade in their domestic systems.³⁹ Scholars agree that performers (singers or session musicians) have not been served well by IP law.⁴⁰ Legislators saw it fit to intervene only

³³ Hayleigh Boshier, *Copyright in the Music Industry; A Practical Guide to Exploiting and Enforcing Rights* (Edward Elgar Publishing, 2021).

³⁴ L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (6th edn, Oxford University Press, 2022) Chapter 13, Section 2.

³⁵ See Section 2.

³⁶ Bently&Sherman (n34) 371.

³⁷ Craig (n22) 57 ("works are not objects of property, but moments of speech").

³⁸ See (n65).

³⁹ Richard Arnold, *Performers' Rights* (6th edn, Sweet & Maxwell, 2021) [1-01].

⁴⁰ Bently&Sherman (n34) 371. For a literature review and scholarship in the UK, see Section 2.2. For criticism of the framework and its implementation in Australia, see Kimberlee Weatherall, 'Pretend-y Rights: On the Insanely Complicated New Regime for Performers' Rights in Australia, and How Australian Performers Lost Out' in Fiona Macmillan and Kathy Bowrey (eds), *New Directions in Copyright Law: Volume 3* (Edward Elgar, 2006) 171, 172. On New Zealand, see Jessica C Lai, 'The Development of Performers' Rights in New Zealand: Lessons for the Asian Pacific Region?' in *Making Copyright Work for the Asian Pacific Region* (2018). See also references at (n48).

at the point in history, when due to the technological advances in sound recording technologies and radio broadcasting, the very livelihood of performers was put at risk.⁴¹ Performers were creatively not as valued as authors, which is demonstrated by the fact that they were not included in the 1886 Berne Convention.⁴² Authors were seen as the only true creatives, making original works, and the performers were seen as (mere) interpreters of these original works.⁴³ International protection for performers was codified only in the 20th century, with the adoption of the Rome Convention in 1961.⁴⁴ Since then, the international framework expanded (see the TRIPS Agreement,⁴⁵ the WPPT Treaty,⁴⁶ and the Beijing Treaty⁴⁷), with some additional protection for performers' rights.

That progress notwithstanding, scholars continue to agree that these rights do not rise to the quality of protection under copyright law: now given to authors and producers of sound recordings.⁴⁸ The Rome Convention was the first to define performers in its Article 3(a): ""performers" means actors, **singers, musicians**, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works []".⁴⁹

⁴¹ Bently&Sherman (n34) 371.

⁴² Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967 (with Protocol regarding developing countries) 828 UNTS 221 (Berne Convention).

⁴³ Bently&Sherman (n34) 371.

⁴⁴ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961) (Rome Convention).

⁴⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C of the Marrakesh Agreement establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994) 1869 UNTS 299 (TRIPS).

⁴⁶ WIPO Performances and Phonograms Treaty (1996) (WPPT).

⁴⁷ WIPO Beijing Treaty on Audiovisual Performances (2012) (Beijing Treaty).

⁴⁸ In the UK for example, (1) Lionel Bently, 'Authorship of Popular Music in UK Copyright Law' (2009) 12(2) *Information, Communication & Society* 179 (arguing for the establishment of new copyright to secure better protection in music, for all creatives); (2) Richard Osborne, 'Is Equitable Remuneration Equitable? Performers' Rights in the UK' (2017) 40(5) *Popular Music and Society* 573 (Osborne argues that performers should be given copyright in sound recordings, because of their creativity; the copyright should not be given to the record companies that have invested financial and administrative resources). And generally, for the UK, see also (3) Arnold (n39). For the US, Chisolm critiques both the moral and economic rights for performers: (4) Tuneen E Chisolm, 'In Lieu of Moral Rights for IP-Wronged Music Vocalists: Personhood Theory, Moral Rights, and the WPPT Revisited' (2018) 92 *St John's L Rev* 453; (5) Tuneen E Chisolm, 'Whose Song Is That: Searching for Equity and Inspiration for Music Vocalists under the Copyright Act' (2017) 19 *Yale JL & Tech* 274. For Australia and New Zealand, with comparisons to the UK, see (6) Kanchana Kariyawasama and Rangika Palliyaarachchib, 'The song would be nothing without someone to sing it: copyright and performers' rights in music' (2021) 35(3) *International Review of Law, Computers & Technology* 222 (the authors do not find the current system of protection to be effective); (7) Lai (n40) and (8) Weatherall (n40). On the EU and the digital space, see: (9) Ananay Aguilar, 'We Want Artists to Be Fully and Fairly Paid for Their Work: Discourses on Fairness in the Neoliberal European Copyright Reform' (2018) 9 *J Intell Prop Info Tech & Elec Com L* 160 (also critical of the system of rewards in the music streaming space).

⁴⁹ Emphasis added. WIPO, *Guide to the Rome Convention and to the Phonograms Convention* (WIPO Publications 1981).

Internationally, performers are separated from their performances, which are the objects of protection and exploitation. As will be argued below, the international framework ignores intrinsic links and the mutually co-dependent relationship between music performers and their performances.⁵⁰ There are two sets of rights: moral rights and economic rights. Moral rights include the right to claim performer-ship⁵¹ and the right of integrity.⁵² These moral rights are given to performers, in their performances,⁵³ and Member States decide, whether these rights are inalienable and the extent to which they last. Their existence confirms the intent at least, that performers' (natural persons) artistic achievement is recognised and valued in international law.⁵⁴ Whereas the importance of moral rights is not embraced in all countries, some commentators note their growing importance, particularly in the digital age.⁵⁵

Moral rights are independent⁵⁶ of economic rights and that makes their potential even more important to the natural persons, the performers, in situations when they are employed by the music industries, or when they have transferred their economic rights via a contract. Performers are given the exclusive right of authorising the broadcasting and communication to the public of their unfixed performances, except where the performance is already a broadcast performance, and the exclusive right to authorise the fixation of their unfixed performances.⁵⁷ The qualifying performance does not need to be live, and is defined as an aural performance, which "may be perceived by the human ear."⁵⁸

In addition, performers are given the right of reproduction, which gives them the exclusive right to authorise the direct or indirect reproduction of their performances fixed in phonograms, regardless of their manner or form.⁵⁹ Furthermore, performers have the right of distribution, that gives them exclusive control over the making available to the public of the original or the copies of their performances fixed in phonograms through sale or other transfer of ownership.⁶⁰ Performers also have the right of rental in commercial settings,⁶¹ and the right of making available to the public of their performances fixed in phonograms, in a way where the public can access them from a place and at the time of their own choosing.⁶² Importantly, performers have the right of

⁵⁰ See James (n7) and Section 3.

⁵¹ This is also the preferred term to 'paternity right' which is still used in some circles as the other name for the right of attribution.

⁵² WPPT, Art.5. For commentary, see Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties on Copyright: a Commentary on the WCT, the WPPT, and the BTAP* (2nd edn, OUP, 2015) 302-314.

⁵³ WPPT, Art.6.

⁵⁴ Reinbothe&von Lewinski (n52) 306.

⁵⁵ Reinbothe&von Lewinski (n52) 305.

⁵⁶ WPPT, Art.5(1). Also, Reinbothe&von Lewinski (n52) 306.

⁵⁷ WPPT, Art.6.

⁵⁸ Reinbothe&von Lewinski (n52) 307.

⁵⁹ WPPT, Art.7.

⁶⁰ WPPT, Art.8(1). Exhaustion is not regulated internationally, see WPPT, Art.8(2).

⁶¹ WPPT, Art.9.

⁶² WPPT, Art.10.

equitable remuneration for broadcasting of their performances fixed in sound recordings (*i.e.*, radio) and the right of remuneration for performances fixed in sound recordings, when made available (*i.e.*, streaming). Note that the latter, is not a right to equitable remuneration: remuneration must be negotiated.⁶³

2.2. Regional and Domestic Regulations: Continuance of Bias against Performers' Rights.

Scholars agree that the rewards or protection of natural persons for their creative outputs varies, depending on their outputs: authors in music are rewarded more than performers.⁶⁴ Although there are different levels of protection across different jurisdictions, majority agrees that more could be done to adequately reward the performing musicians and singers in the music industries.

In the UK, performers' rights are governed by the Copyright, Designs and Patents Act (1988, as amended), and the influences of the European Union law have not yet been erased.⁶⁵ The UK Intellectual Property Office has launched consultations on the implementation of the Beijing Treaty, citing the UK's freedom to do so independently, after having left the EU.⁶⁶ The IPO is exploring multiple issues, including the meaningful protection for performers in the form of moral rights, and the rules around the transferability of rights, albeit focusing narrowly on the performers' rights to secure equitable remuneration in AV performances.⁶⁷

The existing scope of UK protection includes moral and economic rights. Scholars hold that in all aspects but two: (a) duration and (b) the scope of protection; the rights of performers are at the level equivalent to that of the authors.⁶⁸ As it turns out however, these two aspects are significant and lead other scholars to recommend changes to the existing framework. Bently argues that music creators should get a new copyright in "original works of sound,"⁶⁹ which should reward creators, who are not protected adequately under the traditional categories of music, or literary works.⁷⁰ Osborne highlights the difference between different music creators, where performers'

⁶³ The lack of negotiation power for women and gender-diverse artists is a priority in feminist reconstruction of copyright law, see Potočnik (n3) 494-495 (on "Negotiation Black Holes").

⁶⁴ See (n40).

⁶⁵ The main instruments from the EU are: (1) Parliament and Council Directive 2006/115/EC of 12 December 2006 on Rental Right and Lending Right and Rights Related to Copyright (codified version); and (2) Parliament and Council Directive 2001/29/EC of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.

⁶⁶ UK Intellectual Property Office, 'Open Consultation on Beijing Treaty on Audiovisual Performances' (Published 14 September 2023, Closes 9 November 2023). Available: <https://www.gov.uk/government/consultations/beijing-treaty-on-audiovisual-performances>.

⁶⁷ See (n66). Detailed in the Call for Views: <https://www.gov.uk/government/consultations/beijing-treaty-on-audiovisual-performances-call-for-views/beijing-treaty-on-audiovisual-performances-call-for-views>.

⁶⁸ Bently&Sherman (n34) 371.

⁶⁹ Bently (n48) 196.

⁷⁰ Bently (n48) 196.

rights are weaker than those of songwriters or record companies in the UK.⁷¹ Aguilar explores the inadequate protection of performers' payment for music performances on the streaming platforms, where unlike in radio or broadcasting, there is no right of equitable remuneration.⁷² Arnold has argued for decades that performers should have the exclusive right to object to imitation of their performances⁷³ and that performers' rights, in so far that they protect the feelings of human performers, are integral in the regulation of the use of avatars or other likenesses in the digital spaces.⁷⁴ When facing new challenges, Arnold reminds that the justification of these rights is,

"The point of performers' rights is to incentivise and reward *performance*, in particular by performers **who do not own any copyright in the material being performed** (although performers who do have copyright are not excluded from protection)."⁷⁵

Scholarly criticism of the existing framework on performers' rights reaches beyond the UK, but none call for a paradigm shift, moving away from the notion of performance.⁷⁶ Scholars across multiple jurisdictions argue that the level of protection, is rarely sufficient, and needs expanding in all cases.⁷⁷ In essence music performers are not given equivalent rights to those of music composers or producers.⁷⁸ This inevitably leads to the difficulty to build sustainable careers or more broadly, a legacy.

In the US, Chisolm argues for the expansion of performers' rights, especially for music vocalists.⁷⁹ Chisolm finds that the current US copyright system, which does not accord any rights to vocalists in a song, when they are not written by the vocalist, should be changed and the vocalists given authorship rights in their performance as applied composition, which is to be separate to sound recording copyright, once fixed.⁸⁰ This copyright should be inalienable to avoid the current power imbalance in the recording industries.⁸¹ For vocalists, it is their voice that forms their instrument: "The vocalists' voice is their instrument and their performance is their creative contribution to a musical work."⁸²

⁷¹ Osborne (n48) 585.

⁷² Aguilar (n48). More broadly on streaming, see the inquiry by the Digital, Culture, Sports and Media Department (DCMS), on the Economics of Music Streaming (2020-2021). Available: <https://committees.parliament.uk/work/646/economics-of-music-streaming/>.

⁷³ Arnold (n39) and Richard Arnold, 'Performers' rights and artificial intelligence' in Ryan Abbott (ed), *Research Handbook on Intellectual Property and Artificial Intelligence* (Edward Elgar, 2022) 222.

⁷⁴ Arnold 2022 (n73) 224.

⁷⁵ Emphasis added. Arnold 2022 (n73) 223.

⁷⁶ See Section 3.

⁷⁷ For New Zealand, see Kariyawasama&Palliyarachchib (n48) and references in (n40). For Australia, see Weatherall (n40).

⁷⁸ Kariyawasama&Palliyarachchib (n48) 239.

⁷⁹ Chisolm 2018 (n48); and Chisolm 2017 (n48).

⁸⁰ Chisolm 2017 (n48) 281-282.

⁸¹ Chisolm 2017 (n48) 322, 330.

⁸² Chisolm 2017 (n48) 296.

Chisolm already alludes to the fact that a pure economic view of performers' rights will not be appropriate in the case of music performers, especially vocalists, highlighting a particular link between the performance and the singer themselves, because "a voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested."⁸³

3. Building Back Better: De-policing the Music Performers' Creativity.

3.1. Feminist critique of intellectual property laws: the Framework.

This chapter relies on a combination of feminist legal theories, and feminist philosophy on music, to ultimately argue for a paradigm shift in performers' rights regulation. Utilitarian view of performers' rights does not centre its aims or objectives on the performers and is consequently inadequate in the pursuit of a more equitable system for currently under-represented or excluded music creatives. This chapter argues that a combination of feminist theories, is needed to address the multiple systems of oppression in copyright and related rights, governing the music industries. Such analysis can contribute meaningfully to the broader umbrella framework of intellectual property and social justice theory.⁸⁴ This combination will lead to synergies and ultimately the power of the performers' rights to transform from their currently subordinate role to authors' right to a bundle of exclusive rights, with the power to introduce some much-needed social justice correctives for the under-represented musicians in the system.

The starting direction is the theory of West' relational feminism in law, which centres the human being at the core of all policy-thinking, which appears suitable for all IP laws regulating music, including performers' rights. It is argued that following West, a move away from capitalist, market-driven focus is possible,⁸⁵ in order to give access to, include and empower performers, who are currently largely subordinate in the system of music creation. Lives of productivity, or in IP law, outputs, are the burden we currently carry,

"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

⁸³ Chisolm 2017 (n48) 454 (referring to *Midler v Ford Motor Co*, 849 F.2d 460, 463 (9th Cir 1988)).

⁸⁴ For recent reflections on the theory, after several decades in use, see 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).

⁸⁵ Finding that the theoretical framework of copyright is unmistakably "premised upon liberal and neo-liberal assumptions," see Craig (n22) 11.

what is wrong with such a vision and to seek a more humane and inclusive ideal for communal life.”⁸⁶

Relational feminism as explained by West is helpful for its shift from objects to subjects, that is the human beings, together with their emotions and lived experience. West explores the notion of a human being, and their value, and with it, offers the much-needed paradigm shift,

“At the heart of the movement sometimes called relational feminism is the claim that we might best address all the problems, or limits, within liberal feminism [] by reconceptualizing the human being and doing so **in a way that centralizes precisely the experiences, emotions, ambitions, fears and dreams shared by many women that are marginalized by liberal conceptions of the human.** [] If we centralize women’s experiences to the definitional and tentative accounts we give of humanity, a different and truer picture might emerge.”⁸⁷

Section 3.2. aims to build on this feminist reading and focus the law’s perspective on the human beings involved in the creative process, rather than their outputs. Such feminist approach suggests at least two more directional points: first, the systems themselves must be re-designed, as evidence suggests they are discriminatory and second, individuals should not be reduced to typical categories or put in boxes; there is value in learning from everyone’s lived experiences.⁸⁸ Such approach is also aligned with the feminist theory of positionality, according to which “experience [is] foundation for knowledge.”⁸⁹ It is argued here that we can all learn to recognise the multiple systems of oppression, by continuously collecting, and recording lived experience of women and gender-diverse artists in music.

On feminist readings of systemic oppressions, radical feminism is instructive. Relying on Linda Nochlin’s notion that art making is a social activity,⁹⁰ it is argued here, that the same is true in music: music making is a social activity and not everyone gets to make music, at least not in a way that will allow them to connect with their audiences. Olufemi argues that “question of who gets to make art is inseparable from questions of liberation and freedom.”⁹¹ Evidence shows that embodying more than one marginalised characteristic leads to further barriers to success.⁹² It is therefore argued here that a position of music performers in the UK can never be fully understood, unless an

⁸⁶ Robin West, ‘Relational feminism and law’ in Robin West and Cynthia Grant Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019) 70.

⁸⁷ West (n86) 71.

⁸⁸ Katharine T Bartlett, ‘Feminist Legal Methods’ (1990) 103 Harv L Rev 829, 832 (on positionality and the value of lived experience).

⁸⁹ Bartlett (n88) 832.

⁹⁰ Linda Nochlin, *Why Have There Been No Great Women Artists?* (50th Anniversary Edition, Thames & Hudson, 2021) 41.

⁹¹ Emphasis added. Lola Olufemi, *Feminism, Interrupted; Disrupting Power* (Pluto Press, 2020) 88.

⁹² See the BLIM Report (n21).

intersectional approach is adopted, which instructs the researcher to collect relevant lived experiences not only in binary (male-female), but explores different genders (non-binary, or trans), with varieties of other personal characteristics (age, (dis)ability, race, immigration status, class,...). Such research directive is supported by scholars, such as Espineira and Bourcier, who agree with Rogue in that,

“one cannot address the position of women without also addressing their class, race, sexuality, ability, and all other aspects of their identity and experiences,” including transgender status. All forms of oppression and exploitation are “intimately related and reinforce each other” and attempting “to address them singly (i.e., ‘sexism’ divorced from racism, capitalism, etc.) **does not lead to a clear understanding of the patriarchal system.**”⁹³

Intersectionality is however just the start. Gaunt for example argues that the connection between music and the bodies that make it, has been systematically ignored, and feminist scholars must do more work in this space.⁹⁴ James’ feminist philosophy on music and her theory of conjectural bodies bridges the gap between the performers and their performances.⁹⁵ As with art, music is a social activity, not an objective state of the world, and music and their makers are mutually co-dependent. The questions of gender and race are not independent of the art-form itself, they are embedded in the definition of music, from the start,

“What counts as “music” is determined by various systems of racial privilege, and racial privilege is reinforced through discourses of musical value. **Discourses of music, race, and gender emerge and evolve together as varying models of articulating the relation between the material and the social.** In other words, music, race, and gender are interlocking and interdependent manifestations of the nature/culture problem.”⁹⁶

⁹³ Emphasis added. Karine Espineira and Sam Bourcier, ‘Transfeminism: Something Else, Somewhere Else’ in Susan Stryker and Dylan McCarthy Blackston (eds), *The Transgender Studies Reader Remix* (Routledge, 2022) 51-52 (quoting from J Rogue, ‘De-essentializing Anarchist Feminism: Lessons from the Transfeminist Movement’ in CB Daring *et al*, *Queering Anarchism: Addressing and Undressing Power and Desire* (AK Press, 2012) 28).

⁹⁴ Gaunt explores the concepts of musical identity and “musical Blackness” whilst denouncing any connection or support for essentialism. Gaunt refers to music as a social activity and musicality as culturally developed, see Kyra D Gaunt, *The Games Black Girls Play: Learning the Ropes from Double-Dutch to Hip-Hop* (New York University Press, 2006) 9 (“The musical and social history of the ring shout, spirituals, the blues, soul, funk and hip-hop, for instance, are too often read or interpreted as if men, women and children are a unified group. This erasing of sexual difference, differences in power and privilege in dancing, singing, and performing, leaves us with a sanitized interpretation of the black musical past and present, of traditions and innovations shared by both sexes, of improvisation and composition inspired by influential women and groups of children, by individual artists, yes, but more often than not by social practices and conventions shared in communal practice.”), 38 (“My stance is that musical blackness is a culturally transmitted set of practices, communications, and traditions, where embodied language and orality (kinetic orality) play a significant role in the social construction and knowledge of being African American in a sphere of culture and identifications that is dominated by music.”).

⁹⁵ James (n7) xv.

⁹⁶ Emphasis added. James (n7) xix.

Music is therefore not separate to their creator, or their performer, and the categories of gender or race are also co-dependent, not separate. The notions of music, race and gender are,

“Because the discourses of music, race, and gender **mutually constitute one another**, any claim about what, in music, is “real” and what is “fake” or superficial is always also a claim about what kinds of people are given the most epistemic credibility and social privilege. [] **Race, ethnicity, and nationality, in their coincidence with gender, sexuality, and class, are not external factors that can be expressed by or represented in music**; rather, via the contested relationship between what have been variously called essentialism and pluralism, expression and convention, the material and the social, these discourses coincide with those surrounding the study and practice of music such that, in their coincidence, the concepts and experiences of “race” and “music” crystallize into the configurations in which we find them today.”⁹⁷

Comments on the creativity and performance of music, which rise to the level required for copyright protection or qualifying performance are therefore comments on the authors and performers themselves. The combination of feminist theories and philosophy in music lays the groundwork to put forward a different reading of performers’ rights, according to which performers and their performances are integrally connected, and never separate.

3.2. Feminist Reading of Performers’ Rights: a System Reboot.

3.2.1. *Performers v Performance: a New Vision.*

WPPT gives performers exclusive rights regarding an aural performance. The CDPA includes musical performance in its scope and that includes singers, and possibly DJs who perform a recording of musical works.⁹⁸ Furthermore, the UK does not limit its scope of protection to live performances only, and includes ancillary performers, such as session musicians.⁹⁹ The broad interpretation of music performances notwithstanding, a feminist reading¹⁰⁰ demands a social justice corrective by refocusing legislative protection on the performer, moving away from the notion of commercialisation of the qualifying performances, i.e. the objects.

It has been suggested that a legislative focus on performances is the practical, and more realistic approach.¹⁰¹ As argued elsewhere however, this object-focused

⁹⁷ Emphasis added. James (n7) 25-26.

⁹⁸ Bently&Sherman (n34) 372.

⁹⁹ Bently&Sherman (n34) 373.

¹⁰⁰ See Section 3.1.

¹⁰¹ Arnold (n39) [1-02].

approach is gender-biased, especially via an intersectional reading.¹⁰² The law's narrow focus on the commercial exploitation of works is not aligned with women's motives in making and performing music. More women create music as amateurs, seeking human connection and non-commercial rewards.¹⁰³ Performers' rights must be available to all music creatives, whether creating and performing music professionally, or as amateurs.¹⁰⁴

If revised to centre around individual performers, giving them the power to not only commercially exploit their performances and related recordings, but also control the use of their names, sound and image, performers' rights could carry the necessary social justice corrective to copyright systems currently regulating the music industries, resulting in a change to the power imbalance between the large companies and the individual creators.¹⁰⁵ Moreover, if linked to the person of the performer, such rights would have to be inalienable, reducing the possibility of performers' exploitation via contracts, significantly.

3.2.2. *Male gaze and performers' image.*

Witnesses in the UK WEC inquiry on Misogyny in Music confirmed the reality for women and gender-diverse artists in the music industries today. Women are still judged for their appearances. When they do not fit the prescribed look, women will see their professional opportunities curtailed,

"We are still seeing situations in which women are sacked because they are pregnant if they are freelance. That is a reality. **If they do not look right**—if they have a bump that is showing—and they are in some kind of musical, they will lose that job, let alone thinking about menopause policies. [] **There is something about the image that women are asked to aspire to in music.** You have to look right. If you look a bit older, you might not look quite right. There is a lot of stereotyping that goes on in the music sector."¹⁰⁶

If they do not look right is judged through "the male gaze," a feminist theory in film, developed by Laura Mulvey,¹⁰⁷ which has not seen much application in music scholarship, but is often used by activist and women working in the industry,¹⁰⁸ to explain why women appear in either an overly sexualised form, or in forms of a mother,

¹⁰² Potočnik 2024 (n3) and Potočnik 2023 (n3).

¹⁰³ Potočnik 2024 (n3) and Potočnik 2023 (n3).

¹⁰⁴ Potočnik 2024 (n3) and Potočnik 2023 (n3).

¹⁰⁵ Contracts would not have the same result, given the immense power imbalance between the industry gatekeepers and most individual performers.

¹⁰⁶ Emphasis added. Annetts (n31) at Q134.

¹⁰⁷ Laura Mulvey, *Visual and Other Pleasures* (2nd edn, Palgrave MacMillan, 2009). This is now a revised edition, with reflections from the other, of the original essay published in 1989.

¹⁰⁸ For example, Linda Coogan Byrne referred to the male gaze in her discussion of the recent radio reports (n18), in the Women in Music Leaders Online Network (WMLON) workshop on 16 June 2023.

or almost a saint. Performers are particularly exposed to the male gaze scrutiny and judgement, where difficulty of getting it quite right is very difficult to navigate for women, regardless of their success. Billie Eilish has been vilified in the media, first for not wearing gender-conforming clothing,¹⁰⁹ and more recently (2022-23) scrutinised for now more “feminine” choice of wardrobe.¹¹⁰

Scrutiny is exponentially worse for women of colour,¹¹¹ and trans women. Wendy Carlos openly addressed the media and industry’s obsession with her ‘transness’ which has resultingly led to her seclusion from the public eye. Carlos uses copyright, not performers’ rights, to stay out of the public view, but that comes at potentially a high cost to the public, as there is a risk that Carlos will “simply disappear[r] from the culture, particularly to a new generation whose main access to music is streaming.”¹¹² Carlos’ contributions, as they co-incide with her identity, are not respected,

“Carlos talks of her fear – of the moralists who will judge her, of an industry that might no longer take her seriously, [] [s]he is wary of the press, who have been disrespectful, focused on her gender – or, I suspect a worse crime in Carlos’s eyes – her transness. [] **The record company continued to release albums under her deadname, even on reissues of earlier work, despite her transition.**”¹¹³

Transmisogyny against women in music in the UK is under-researched, and yet, well-recorded by the community. In their submission to the Misogyny in Music inquiry, The F-List for Music, relying on the expert evidence by Saskhia Menendez, reported that transmisogyny is misogyny, which can, “[B]e directed at trans women because of their identity, this is referred to as transmisogyny and comes in various forms including: [1] [d]iscrimination and violence (discrimination purely for one’s gender identity); [2] [o]bjectification (often objectified and sexualised); [3] [e]xclusion (from women only spaces to reinforce that transwomen are not women); [and] [4] [m]isgendering (using incorrect gender, name, pronouns can be invalidating and very hurtful).”¹¹⁴

Transmisogyny is reported in the UK music industries, and the media, where trans women are “also often misrepresented in mainstream media, and there are lots of

¹⁰⁹ BBC News, ‘Billie Eilish: My baggy clothes shouldn’t slut-shame others’ (20 August 2019). Available: <https://www.bbc.co.uk/news/newsbeat-49404609>. Also, BBC News, ‘Billie Eilish tackles body shaming as her world tour kicks off in Miami’ (10 March 2020). Available: <https://www.bbc.co.uk/news/entertainment-arts-51768033>.

¹¹⁰ Lisa McLoughlin, ‘Billie Eilish fires back at trolls who branded her a ‘sellout’ for wearing ‘feminine’ clothing’ (Evening Standard, 30 May 2023). Available: https://uk.finance.yahoo.com/news/billie-eilish-fires-back-trolls-161819753.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xILmNvbS8&guce_referrer_sig=AQAAAM3YHLBSytB5xjetlr0CSXoNUhoOsO8nvNvg8wVKBYaEZr6XKLrOUwH9oVdQTmoCqkmQMHI29nvcaHD2hBfyfopkQCd6rxgiFCBakXAVXAqmykivJW3C3eBghxHOaM9xtxfwRCfll80-_7vyyaU2AaoGxXUOTqMcJ3xtlwOgVc.

¹¹¹ BLIM Report (n21).

¹¹² 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) 166.

¹¹³ Gleeson (n112) 167-168.

¹¹⁴ The F-List for Music Submission to the Women’s and Equalities Committee Inquiry on ‘Misogyny in Music’ (co-authored by Vick Bain and Dr Metka Potočnik): MiM0045 (published: 17 May 2023) [2.3]. Available: <https://committees.parliament.uk/work/6736/misogyny-in-music/publications/written-evidence/>.

misconceptions of what it means to be a transwoman in today's society."¹¹⁵ Performers rights do little to protect performers, who face controlling interventions from the recording industries, policing their image. As seen with Carlos, even their names are disregarded, and their works released under their deadnames.¹¹⁶

3.2.3. *Women's derived creativity: author/performer dichotomy.*

Women who interpret music, their vocality, are not seen as creative under IP rules, where composers are the original creators, and performers, only the interpreters. In the UK, only 14% of authors, signed by the music publishers are women, which makes this a predominantly male space.¹¹⁷ When we do have (slightly) more women in music, it is more likely to be on the performing side, with women amounting to 20% of the recording artists signed by the UK record labels.¹¹⁸ The origins of the author/performer relationship are found in musicology and the focus on the individual, creator, composer, or genius,

"[t]he voice, and the role it played in the historicity of music, owed its conditions of the virtuoso player, the mastermind producer. That the condition was the composition, the voice the mere articulation of a budding beauty yet to be fully delivered."¹¹⁹

Voices of the performers were never considered as signatures, to be protected on their own, instead they have a rather functional view, which is subordinate to the composer's creative vision and often leads to the lack of credit given to these performers, vocalists, and artists,

"Serial and never fully unique in nature, I was told the voice(s) was (were) interchangeable. As if her voice's addition to the composition was merely textural; lacking the threshold degree of instrumentality or musicality. I believed I had forgotten, but was never given the opportunity to know the names of the sirens who 'went uncredited for their contributions to tracks that turned into number one gold for their producers' []; their affective powers were sacrifices for profit and later exegesis."¹²⁰

And overall, feminist musicologists observe that women's voices and their interpretative creativity is not of *the right type*, to be awarded protection, or recognition,

¹¹⁵ The F-List Submission (n114) [2.4].

¹¹⁶ Gleeson (n112) 168.

¹¹⁷ Bain (n16) 3.

¹¹⁸ Bain (n16) 3.

¹¹⁹ Discussing the works of Linda Sharrock. Juliana Huxtable, 'Praise Poem for Linda' in Sinéad Gleeson and Kim Gordon (eds), *This Woman's Work: Essays on Music* (White Rabbit, 2022) 47.

¹²⁰ Huxtable (n119) 47.

“What is often understood, even in the realm of ‘noise music,’ is that ‘noise’ largely denotes sound that is recognisable as neither vocal nor musical in the traditional sense. There is a droll cruelty in the analysis of voice in relation to experimental sound and music. In the canonisation of jazz, particularly what is understood as free jazz, the **sonic innovation of vocalists, especially women, is always a secondary consideration to the appraisal of musicality.** Claims that Linda’s voice undermines the very listenability of the album, that she is simply a different version of Yoko Ono or Patty Waters, or that her contribution to the record is simply as part of the group, listing her with the pianist and drummer, abound. Much of the praise the album received yields little mention of Linda.”¹²¹

The subordination of the vocalist, the performer is not gender-neutral: women often report of the difficulty of getting credit or recognition for their musical work (also referred to as the girlfriend problem). It is well-known (among women) that men “only need to walk into the room to be given credit on a song.”¹²² The authorial credit for the music made mostly goes to the man in the room,

“Her legacy seems to have been lost in the encoding, the reification of the vocal/instrumental or vocalist/instrumentalist dichotomy in which what she offers the musical composition is a technical potentiality **waiting to be activated by the virtuosic genius of the instrumentalist, who in this case, was also her husband.**”¹²³

3.3. Perpetuating the power imbalance: performers v phonogram producers’ rights.

Copyright law and related rights do not prioritise the protection of individual’s interests, instead they prioritise the investment and commercial interests in music making. Scholars agree that copyright does little to protect the performers in relation to the music they are performing.¹²⁴ At the same time however, the recording industries, that are controlled by mostly (white) men have a separate copyright in sound recording, which rewards their investment, not originality or creativity in music making. The scholarly criticism of copyright and related rights in music can be expanded and a feminist reading will assist.¹²⁵ As Bartow illuminates,¹²⁶ a feminist inquiry and critique of copyright law not only instructs us to find the origins of the different treatment of

¹²¹ Emphasis added. Huxtable (n119) 53.

¹²² BBC Women’s Hour (23 June 2023) (Anita Rani (presenter), co-hosting with BBC 6 Music’s Jamz Supernova, in conversation with Vick Vain, Catherine Anne Davies (the anchoress)). Available on BBC Sounds.

¹²³ Emphasis added. Huxtable (n119) 53.

¹²⁴ See Section 2.2.

¹²⁵ See Sections 3.1 and 3.2.

¹²⁶ Ann Bartow, ‘Feminist Methodologies and Intellectual Property’ in Irene Calboli and Maria Lillà Montagnani (eds), *Handbook of Intellectual Property Research: Lenses, Methods and Perspectives* (OUP, 2021) 764.

genders in a particular space, but also what role copyright or related laws have in “maintaining or minimizing the observed gendered hardships.”¹²⁷

It is argued here that the recording industries are well-aware of the immense power and control given to them by sound recording copyright, over the artists, and the sector. There are several music practices that are either allowed, or prohibited, depending on the originator of the creativity: under copyright law, anyone can do a cover of any song (perform it),¹²⁸ and there is no protection against imitation of performers.¹²⁹ In contrast, copyright does not allow the use of sound recordings, even in small quantities, without the owner’s permission (*i.e.*, sampling).¹³⁰ Creativity originating from global majority artists, women, or gender-diverse creatives is not protected on the same footing as the outputs (*i.e.* the investments), owned by the recording companies. Furthermore, the recording industries have used the power of copyright, with its bundle of exclusive rights, to control and police the image of global majority, and gender-diverse (including women) artists, through the power of master recordings and the contractual controls over the music made by such artists.¹³¹ Until there is a systemic shift of power in the music eco-system, there is unlikely to be a meaningful change to give access, include and ultimately empower women and gender-diverse artists (including performers). This chapter argues that the systemic shift could occur with firstly, all IP laws re-direction from outputs to people (authors and performers), and secondly, that the sound recording copyright should be significantly reduced, or abolished.

4. Conclusion: the Untapped Social Justice Corrective of Performers’ Rights.

A feminist reading of performers’ rights, as developed in this chapter, leads the writer to agree with scholars who critique performers’ rights, in particular their failure to protect the rights of music performers. It builds on that scholarly critique by relying on the feminist critique of copyright law in music more generally, and its focus on the commercialisation of music copyright law, which in practice leads to gender-biased positions of copyright law and policy. Specifically, feminist reading of performers’ rights

¹²⁷ Bartow (n126) 764.

¹²⁸ A compulsory licence will be paid for all covers: for live performances, the mechanical licence is to be paid by the venue, so there is no charge to the performer, playing the cover live. If the performer is aiming to record their performance of the cover, then the obligation to get the licence is on the performer, and the process more complicated. General rules are explained to the public, and the artists, by the UK CMOs, such as the PRS for Music: <https://www.prsformusic.com/what-we-do/licensing-music/do-i-need-a-licence>.

¹²⁹ A view which has been consistently critiqued by experts in the field, see Arnold (n38) [1-115]-[1-127] and Arnold 2022 (n73) 222.

¹³⁰ See for example, (1) Carlos Ruiz de la Torre, 'Digital Music Sampling and Copyright Law: Can the Interests of Copyright Owners and Sampling Artists be Reconciled' (2005) 7 Vand J Ent L & Prac 401; or (2) John S Pelletier, 'Sampling the Circuits: The Case for a New Comprehensive Scheme for Determining Copyright Infringement as a Result of Music Sampling' (2012) 89 Wash U L Rev 1161; or (3) Schuster et al, 'Sampling Increases Music Sales: An Empirical Copyright Study' (2019) 56(1) American Business Law Journal 177.

¹³¹ Osborne (n48).

considers concepts from other disciplines, such as James' theory on the conjectural body, or Mulvey's theory of the male gaze and its application to the music setting and music performers. Crucially, a feminist reading of performers' rights in music relies on the lived experience of women and gender-diverse creatives in music. Empirical evidence shows that women and gender-diverse artists are not doing as well in music as men.¹³² Relevant legislators or policy makers do nothing to collect the empirical evidence of the musicians in the sector, especially not when faced with a new challenge, such as equitable remuneration of music creators and performers for music streaming,¹³³ or the impact of Artificial Intelligence on music.

Scholars have been making a case for the strengthening of performers' rights in the past. The feminist reading proposed in this chapter calls for a reconstruction, rather than a reimagination:¹³⁴ a systemic shift of protection from outputs (*i.e.*, performances) to that of creatives (*i.e.*, performers). In addition, the system of copyright protection should be used as a lever of power, with the potential of resetting the power-imbalance between the record labels (*i.e.*, the recording industries) and the individual music creatives (*i.e.*, performers). Copyright in sound recordings should be revised and its term of protection or ownership, rethought, or abolished. Together, these two policy actions could serve as a social justice corrective of a system, which at best maintains the intersectional gender bias against women and gender-diverse music creatives in UK music industries, or at worst, is the origin of the power imbalance.

This is no longer a future project. The alarming state of things is confirmed by the UK WEC inquiry into Misogyny in Music, which recognises the complexity of the problem, that can no longer be left to self-regulation and instead demands an immediate and systemic government intervention.

¹³² Evidence recorded and discussion more fully developed in relation to copyright law: Potočnik 2024 (n3) and Potočnik 2023 (n3).

¹³³ That remains true, even when an opposite approach is urged, see Metka Potočnik, 'Neutral is the New Blind: Calling for Gender Segregated Evidence in UK Legislative Inquiries regarding the Music Industries' (2021) 6 WLJ 69 (explaining the submission made by the F-List). WIPO is changing its approach, urging all WIPO Member States to introduce gender-based evidence in their IP policy processes, see WIPO IP and Gender Action Plan (IP GAP) (2023). Available: https://www.wipo.int/export/sites/www/women-and-ip/en/docs/rn2023-1_ipgap.pdf.

¹³⁴ Craig (n22) (hers is a project of reimagination).