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Genealogies of copyright tariffs

Jose Bellido and Fiona Macmillan

One of the major achievements of copyright collecting societies throughout the twentieth century was the creation of an alphabetised list of music tariffs. This simple sorting mechanism still functions as the basic tool that enables music users to legally play music. To an extent, the making of the list can also be seen as a bureaucratic memoir written after decades of legal struggles defined by negotiation or litigation. This A-to-Z guide capitalised on the possibilities of experiencing music in the contemporary world and is reflected in our legally defined culture. Theatres, cafés, clubs, cinemas and even gyms are still governed by that legal alphabet. For example, if you run a cinema, you are expected to apply for a music licence under tariff ‘C’; if you own a nursery where music is played, you require a licence under tariff ‘N’; and so on. Despite the centrality of tariffs in everyday practice, they have not been part of the thematic preoccupations of copyright scholarship. Perhaps the reason for this lack of interest is the sense that their technical and mundane character makes them somehow impenetrable or unattractive. Furthermore, the range of tariffs has often been subjected to feedback variations and processes of renegotiation, adjustment, amendment and referral, so tracking their changes or determining their stability has seemed a tedious exercise. Against that gloomy or dispiriting view of tariffs, our chapter is an attempt to trace their coming into being by positioning them as the central focus of our inquiry. Although we are more interested in their effects, an understanding of how they became inscribed in law is pertinent because it shows their historical significance in determining the scope of copyright. The suggestion here is that a focus on tariffs and their variations elicits a different type of observation of copyright, one that is characterised by a closer attention to practices and procedures operating at not only a local but also an international level.

Tariffs explain how copyright fees are applied. They can be reduced or adjusted, disputed or accepted; but thanks to their distinct formulas, rights are turned into money. While tariffs could operate on a different basis, their main objective is to determine how much should be paid for the use of

music repertoires. This mode of assetisation is connected to the ways in which copyright collectivisation evolved.¹ Law and economics scholarship suggests that tariffs are necessary and desirable, as they reduce transaction costs, and for that reason they deserve scrutiny.² Such a view is understandable and should be taken seriously, but several questions remain: do tariffs have a legal history? When did they come into force? How can we conceive their peculiarities beyond the question of efficiency or reasonableness? Almost a decade ago, we wrote about the ways in which the Performing Right Society (PRS) collected copyright fees, and their disputes with other authors' societies and associations about those methods.³ Although there is much more to be said about that, our intention now is to zoom in on these histories to see how the inventory of tariffs arose. Our starting point is World War II and its aftermath, as this was a critical history-forming moment for copyright practice. The advent of World War II disrupted communications and fractured international relations, so it is no surprise that it also affected copyright in many ways. It is not only that legislation was passed in different countries to assume control of enemy property – international collaborations and projects constructed around copyright started to fall apart. One of the ventures affected by the war was *World Copyright Law*, an encyclopaedia whose editor, Paul Dienstag, could not see finished as he was killed in Bergen-Belsen concentration camp.⁴ That multivolume project was completed after the war, as it happens, with the collaboration of many Jewish émigrés.⁵

The highly contingent and uncertain nature of war also put the impartiality of international copyright associations through the severest test, and some affiliations were practically inoperative during the war period. At the national level, the PRS also struggled and was forced to develop a number of strategies to continue its services. The closure of theatres and music halls at the outbreak of war made collection of copyright fees difficult or impossible.⁶ And, although these venues were allowed to reopen, some never did. This reduction in business had an immediate impact on an agency that was built to collect fees from venues in which music was performed. As if this was not enough, even ordinary routines and paperwork, the main channels connecting rights and money, were disrupted. The offices of the society's solicitors, Syrett & Sons, were bombed in the Blitz, in January 1941, and while they continued to assist the society and its operations, they had to do so in straitened circumstances.⁷ These experiences are often recalled with a sense of heroism in official histories. However, although resilience was an attribute that contributed to their survival, it seems to us that the key to their continued operation during the war was the way collecting societies reorganised their alphabetised tariff as a response to conditions caused by the international crisis.

Tonic properties

On 23 June 1940, the radio programme 'Music While You Work', soon to become a regular feature of the British Broadcasting Corporation (BBC), first aired.⁸ Its premise was that music was a tonic for factory workers, as it relieved the tedium that was deemed to be an inevitable part of their routine.⁹ It made a monotonous job lighter, and workers happier, or at least created a spirit of cheerfulness and gaiety. Perhaps the most well-known illustration of this effect was in *Snow White and the Seven Dwarfs*, Walt Disney Productions' animated film from a few years earlier.¹⁰ While showing regard for the welfare of the workers, the ultimate objective of 'Music While You Work' was increased output.¹¹ Music in factories enhanced productivity and sped up munitions output. In the context of war, it all made sense.¹² It improved morale, facilitated demand for joining the forces and gave a name to the enemy. For the enemy was not just 'the Nazis' but something more tangible and immediate: boredom and its kindred ally, fatigue.¹³ The stimulating effects of music were, therefore, rationed in daily 'doses' – or, to put it another way, programmed. This was the result of psychological experiments in which music and industrialisation intersected. Wynford Reynolds, the Welsh musician in charge of the BBC programme, summarised this momentum as follows:

There is abundant evidence that music in industry has come to stay. Already some thousands of factories are using programmes of music during working hours, but it is safe to say that the movement is in its infancy – the movement is spreading rapidly, and it is possible to foresee the day when no up-to-date factory will be without 'Music While You Work'.¹⁴

Having been founded in 1914, at the outbreak of World War I, the PRS had already lived through 'troubled and abnormal times' and was aware of the intimate connection between war and music.¹⁵ Although it had drawn up licences and tariffs of fees for various types of entertainment, it quickly realised the need to extend its reach beyond theatres, clubs and hotels to cover regimental depots, military barracks and canteens, where music was also performed. Compared to commercial facilities, these military premises presented several licensing obstacles that the society tried to overcome during the war and in its aftermath. First, it was not clear whether the Crown was bound by the 1911 Copyright Act, particularly when a band was playing in performance of its military duties.¹⁶ Second, it was often suggested that the servicemen and women's dwelling place, be it ship, barracks or camp, could be considered to be their home.¹⁷ If this was accepted, most performances taking place in military premises were of a domestic nature.¹⁸



Figure 4.1a and b Wynford Reynolds visiting a factory to obtain opinions on the BBC programme ‘Music While You Work’. 1 June 1942. Courtesy of the BBC Archives

Third, it was argued that the need to pay a music licence would penalise servicemen and women for performing a public and patriotic duty.¹⁹ Despite all these difficulties and logistical challenges, the society continued to remind military units that copyright infringements were taking place on their premises.²⁰ This persistence yielded results: some *ad hoc* permits and licences were issued and the ‘B’ entry in the tariff list was slowly crafted.²¹ After considerable back and forth discussion, regular and territorial army bands and brass bands were invited to apply for music licences under the new tariff.²² The gradual carving out of this tariff suggests that the system of copyright administration worked by stripping away context and chronology. Indeed, each of the letters had its own history and serendipities, and an alphabetised tariff list – a sort of index – evolved over time. But the most interesting part of this development is that each letter of the tariff list was issued as if no conflict had ever existed. In other words, the list appeared shorn of any narrative experience to produce a normative order that would facilitate copyright compliance and efficiency.

What made the BBC’s ‘Music While You Work’ remarkable was that it connected music and war but in an industrial context. Moreover, the programme facilitated the emergence of another entry (tariff ‘I’), one of the most important letters in the PRS’s alphabetised system of tariffs. And ‘Music While You Work’ helped to coordinate efforts between public and private sectors, a convergence that characterised the mobilisation of labour for war production.²³ Private factories were engaged in national duties

because of the state of emergency, and this unexpectedly solved one of the riddles about licensing mentioned above. When radio broadcasts were relayed to factories, the patriotic duties performed there did not just concern military officials but extended to ordinary citizens and entrepreneurs drafted into industry. Although the contentious issue of performing one's patriotic duty was overcome, the main problem that haunted the interpretation of the scope of the right – the question of whether factory radio constituted a performance 'in public' – remained. That the expression 'in public' had already been subjected to litigation on many occasions, becoming a magnetic topic for lawyers, is no surprise.²⁴ Strictly speaking, liability for infringement of copyright by performing a piece of music depended on whether the performance was given in public or in private.²⁵ This distinction hinged upon heterogeneous contingent and deictic factors, so the question of whether a venue constituted a domicile, a quasi-domestic setting or a commercial institution was often portrayed as a matter of fact. Interestingly, the expression 'in public' caused ongoing concern around the scope of copyright not just because it was factually loaded but because of the difficulty of operationalising and applying it to different environments.²⁶ The more the law tried to disassociate it from facts on the ground, the more it seemed to unearth an epistemological anxiety about the expression. It did not help that the succession of cases trying to define it elicited different legal 'tests', which have become textbook examples of the uncertainty of the law.²⁷

Perhaps the best way to navigate this legal minefield is by finding a narrative anchor that allows us to follow how the alphabetised tariff list emerged as an attempt to absorb this uncertainty. One way of doing so is to read the cases in sequence, as they were observed by copyright collecting societies, in order to trace how they influenced the development of new tariffs, shifting the emphasis from premises to entertainment promoters.²⁸ When copyright liability was made dependent on those who organised performances 'in public', it was possible to move the question to a meta-level. Instead of looking directly at the nature of premises as domestic or non-domestic, the focus turned to those who controlled buildings and organised the entertainment. More interestingly, the inner workings of collecting societies also changed, revealing that their system of tariffs was not inert or static but seized upon possibilities and loopholes left by legal decisions. By structuring new tariffs and their corresponding application around management, music promoters who wished to avail themselves of the society's repertoire were given the opportunity to manage the risk without legal threat.²⁹ Thus, the basis of the system's appeal was to find some certainty in otherwise uncertain territory.³⁰ Another productive way to understand these copyright disputes is to consider the impact of analogical reasoning in rationalising the unwieldy

nature of facts relevant to understanding the term ‘in public’.³¹ Even today, this way of approaching the issue is rather interesting and can be seen, for example, when an aeroplane providing in-flight music is described as a ‘flying cinema’.³² In a similar vein, commercial television was depicted as a ‘nationwide theatre; a theatre to which the audience were admitted without direct payment’.³³ What these analogies reveal is that no matter how much we try to rationalise facts, different notions of ‘the public’ are embedded in the imagination of the legal system, and those fictions can be extended or restricted to favour different arguments in court.

Returning to the factory situation in the 1940s, a curious aspect that characterised those performances is that they took place by mechanical means. In other words, radio broadcasts of the programme ‘Music While You Work’ were relayed through loudspeakers installed in war factories.³⁴ Precisely because radio waves detached performances from venues, they provided the opportunity to bring them under those tariffs that hinged upon management. In other words, those who installed radio apparatuses could be held liable for copyright. This point was debated extensively because it raised questions such as the ones later elicited by jukeboxes: namely, whether the installation or the switching on of the machine was the trigger for what constituted a performance.³⁵ Given this, there was a need to rationalise the situation in order to be able to argue that factory performances happened ‘in public’. The ambivalent nature of the term is seen in opposing opinions given by leading counsel who were copyright experts of the time. The Industrial Welfare Society asked barrister Hugh Fletcher Moulton to consider whether employers were liable to pay copyright fees to the PRS when music was relayed in factories for the purpose of relieving fatigue and boredom and, thereby, increasing munitions production. His answer was quite convincing: they were not ‘public’ performances because workers were all living, or at least working, under one roof.³⁶ The same view, namely that factory broadcasts were not performances ‘in public’, was shared by Harry Samuels, a barrister specialising in industrial law.³⁷ However, the PRS saw things differently, considering factory broadcasts to be ‘in public’. It had invoked its procedural device to rationalise these broadcasts, issuing licences to companies to cover performances under a new heading – tariff ‘I: industrial premises’.³⁸ Although the procedure had commenced in the summer of 1940, just after the first ‘Music While You Work’ was aired, the society was, nevertheless, aware that, in the absence of any consensus around liability, factory broadcasts constituted an entry that needed to be managed carefully. This can be seen in the way payments were initially set at a nominal fee of one guinea ‘for the sake of equity’,³⁹ leaving the question of legal liability unresolved.⁴⁰

Friendly actions

One of the recurring problems faced by the PRS when dealing with broadcast performances was that their requests were often perceived as a double imposition, as managers or proprietors of premises were already paying a wireless licence.⁴¹ Although licences for radio sets were issued by the Postmaster General and derived from different legislation, this understandably contributed to the perception that the demands of the society were unreasonable. In 1942, the society launched a friendly action against a company using broadcast music for the entertainment of workers in its factory. The company was Gillette Industries Ltd, which from the very beginning of the 'Music While You Work' experiment, had been attracted by its promise of improved morale and productivity. Curiously, this experiment, rather than being local or even national, resembled the services offered by Muzak, an American company claiming that their music 'improved morale, alleviated monotony, reduced fatigue, made time pass quickly, cemented relations, relieved boredom, lessened rejects and sped production'.⁴² One Gillette manager was so enthusiastic that he wrote to Wynford Reynolds, the musician in charge of the BBC programme, to say he could not believe that 'heaven itself could offer more!'⁴³ In that sense, Gillette, one of the keenest supporters of the programme, was a suitable candidate to test whether factory performances were performances 'in public', and, hence, whether copyright fees were payable.

Actions brought as test cases, conducted in a friendly spirit, were one of the ways in which collecting societies assessed whether their tariffs were properly set up and whether licences under them could be further insisted upon. It followed that test cases often came after a new opportunity to collect fees had arisen. These actions are interesting because they illustrate the strategic nature of litigation, not just as adversarial dispute but as a way to normalise the legality of a practice in order to move forward. The underpinning rationale of these actions was that it would be in the best interests of all concerned to find some clarification and settle legal questions for good. Although this often looks like wishful – even oxymoronic – thinking, it was the way in which the PRS had proceeded a decade earlier, when it had launched a friendly action against Hammond's Bradford Brewery Company Ltd.⁴⁴ This precedent had settled the question of whether copyright licences in favour of the society were necessary for wireless music, in addition to the BBC licence.⁴⁵ As with that earlier case, it was preferable to face a friendly defendant who would be open and honest throughout the litigation and not employ the usual lawyerly stratagems. In any case, these friendly actions provided the opportunity to establish some certainty about the implementation of tariffs in a chaotic environment. Gillette was

selected because it would allow information to be shared without requests for disclosure and other legal mechanisms that would inevitably delay and convolute the action. Having access to information about the numbers of employees and the relevant practice of factories – how many loudspeakers, how they relayed music and what feedback was available from employees – was necessary to justify the view that a tariff might apply, that a fee was possible and that a legal precedent could be achieved. More to the point, Gillette was chosen because it was a privately owned factory. While the situation had been settled in relation to government-owned factories (and their canteens and hostels), it was still controversial whether public performances could take place in private factories. Just how contentious this issue was was made clear by another action listed in the courts immediately after the action against Gillette. The PRS had asked Ernest Turner Electrical Instruments Ltd in High Wycombe to take out a licence, a request that they refused.⁴⁶ The company went on the attack, taking the very same issue to court but seeking the opposite result: a declaration that music broadcast to employees did not constitute a copyright infringement. At first glance, the only difference between the two actions is that the PRS were the plaintiff in the first and the defendant in the second.⁴⁷ Yet, at the same time, it is important to keep in mind that the case against Gillette was a friendly action, an attempt to signal and find legitimacy for another entry in the society's system of tariffs. For that reason, the society did not ask for an injunction but were content to have their rights declared.

The two cases were heard in January 1943 by Mr Justice Bennett. One of the witnesses called was Wynford Reynolds, the organiser of 'Music While You Work'. The solicitors for the society had asked him to prepare a memorandum containing evidence of listeners' reports, summaries of his factory field notes and a report of research on music in industry.⁴⁸ When Reynolds was asked to give evidence on the stand, he said that the effect of the music on factory workers was 'tonicking'.⁴⁹ Although these issues might appear irrelevant to determining whether a performance took place 'in public', they were still pertinent in highlighting the value of music for employers.⁵⁰ Music was not just entertainment – it could be seen to enhance productivity. The judge found for the society in both cases and declared the relevant broadcast relays to be performances in public.⁵¹ Interestingly, the precedent Bennett used to guide his decision was the case relied upon by the society, the Court of Appeal decision in *Jennings v Stephens* (1936).⁵² Bennett could find no relevant distinction between the facts of *Jennings v Stephens* and those of the case before him. This conclusion is intriguing, bearing in mind that the precedent concerned a play (and not radio broadcasts) performed at a meeting of a women's rural institute at which no guests were present and no charge was made for admission.⁵³ Although there is much to be said about

the similarities and differences between the two cases, it is sufficient to note here that the previous dispute was also problematic for several reasons.⁵⁴ Most of them can be appreciated in the controversial and elusive way in which the Court of Appeal in *Jennings v Stephens* reversed the first instance judgement, disregarding a number of factors such as the deprived area in which the performance took place, the gender dimension within the criteria for admission to the village association and the covert attempt by professionals to challenge amateur performances.⁵⁵ In conventional accounts of copyright, these cultural and social features have been simplified or ignored. The decision in *Jennings v Stephens* has, instead, become important as establishing the rather uncertain test for determining what was a performance in public, which was that ‘the true criterion seems to be the character of the audience’.⁵⁶

The two decisions by Bennett in the ‘Music While You Work’ cases were appealed, and the Court of Appeal upheld them, dismissing the appeals and reaffirming that the factory broadcasts were performances in public.⁵⁷ Again, the judges emphasised the significance of *Jennings v Stephens* in reaching their decision and went even further, highlighting on several occasions that the point was not to whittle down the value of the statutory monopoly conceded by the Copyright Act.⁵⁸ This emphasis on defining copyright as a monopoly was particularly evident in the approach of Lord Greene, Master of the Rolls. Although Lord Justices Luxmoore and Goddard agreed, their judgements were more measured. What united them, however, was the resort to a general defence of copyright to justify the conclusion they reached. The PRS praised the decision and described it as ‘the most valuable pronouncement on the subject which has yet been made’.⁵⁹ In fact, the unanimity of judicial opinion was seen as an achievement not only because it signalled the sanctity of copyright as property but also because it confirmed the legality of the tariff introduced by the society. This point was later reinforced when leave to appeal to the House of Lords was refused.⁶⁰

From premises to use

At the heart of the judgements in the ‘Music While You Work’ cases lay the argument that the nature of the place where the performance was given was immaterial when deciding whether it was public. This is consistent with a line of reasoning according to which private entertainment might be given in a public room and public entertainment might be given in a private house. Similarly, it did not seem to matter whether workpeople listened to music while they were at their benches engaged in their duties, having a meal, standing or sitting, having a rest or working elsewhere in the factory. By

focusing exclusively on the nature of the audience having the benefit of the music, the law seemed to shift the emphasis of licensing from the premises in which a performance took place toward the value of music as such. As previously mentioned, the tonic property of music was the reason it had been introduced in factories. Although this feature was disregarded in the legal decision as irrelevant,⁶¹ the peculiarity is that it was still central to the wartime situation.⁶² This can be seen in the aftermath of the litigation. One of the concerns after the judgement was that copyright fees could inhibit factories from using music.⁶³ Another difficulty was that the PRS required information to make tariff 'I', the tariff for industrial premises, operational. The information necessary to issue licences under that tariff concerned the number and location of war factories, the duration of the use of music and the number of employees. However, this information was difficult to obtain as the census of factories engaged in munitions work was confidential.

In April 1943, just a month after the decision from the Court of Appeal, the government entered negotiations with the society to reach a comprehensive arrangement to avoid the disclosure of such information and to relieve factory owners of the necessity of taking out individual licences.⁶⁴ Two months later, an agreement was made between the government and the society by which copyright fees for the relaying of music in factories (and in canteens and hostels established in connection with them) were to be covered by a payment from the government for the period of the war.⁶⁵ Presumably, the idea that music was an aid to wartime production forced the government to take that initiative, especially after parliamentary questions were raised.⁶⁶ Curiously, for security reasons, the lump sum paid was an arbitrary one, bearing no relation to the extent of use or the audience. Although the agreement did not specify the number of factory premises, employees or hours of music, it tried to be as comprehensive as possible. Ultimately, it included any music relayed to quarries, mines, shipyard premises, printing works, laundries and so on.⁶⁷ What we can see here is that somehow 'public' places ended up being equated to ordinary places of entertainment when they were connected to war work. In other words, the distinction between public and private realms was blurred in relation to a variety of sites that were all subsumed under the copyright agreement. In the absence of explicit distinctions between private and public, or lacking subtle divisions (quasi-domestic, semi-public), the arrangement enabled borderline cases – premises that were not typical places of entertainment – to be covered by copyright. While this blurring was criticised by some commentators as conflating two supposedly distinct expressions ('performance in public' and 'public performance'), the truth is that it facilitated, or at least helped to normalise, the view that a performance in public could take place almost anywhere. Such a functional perspective was embraced in the alphabetised system of tariffs

crafted by the society that began to include unusual site-specific venues in which radio apparatuses had been installed.⁶⁸

On 24 February 1946, just after the cessation of hostilities, the agreement between the government and the PRS came to an end. Although the question of whether a factory was a public place was raised again incidentally, with this matter having already been decided in courts, the main issue now was how much to charge.⁶⁹ After music had become a permanent feature of industrial life, thousands of factories found themselves in the same predicament. If they wished to continue relaying broadcasts in workplaces, how could they balance their books and pay a licence? As a way to facilitate compliance, the PRS printed tariff 'I' and circulated it to them almost immediately. The pamphlet read like a menu, listing rates to determine suitable licences for industrial establishments. And many companies, such as Clarke Cluley & Co. Ltd and Austin Motor Co. Ltd, complied, signing a licence to perform music by means of wireless loudspeakers during normal working hours.⁷⁰ Yet, the subtle impact of this new tariff can be seen in the manner in which it was made applicable to establishments that were not factories, such as tattoo and ice cream parlours, hairdressing establishments, zoological gardens or temporary events such as flower or Christmas shows.⁷¹ Early in the history of copyright collecting societies, it had become clear that mobile and ephemeral performances were difficult to include in an alphabetised fiat of tariffs dominated by a form of licensing based on premises.⁷² Eventually, partial solutions were devised in the attempt to fix rates for performances 'on the road'. For example, a special sundry tariff for itinerant showmen and small touring circuses (tariff 'S') was introduced in the mid-1920s, with charges that varied according to the means of performance, whether organ, barrel organ or radio gramophone.⁷³ Although the application of the tariff posed some practical problems regarding supervising routes and itineraries, it remained unchanged for many decades. Moreover, the society had also been concerned with music performances on ships almost since its foundation and had the intention of testing this point in court. In 1925, a case had been prepared against the Union Castle Steamship Co. Ltd, but the action was settled out of court without any admission by the ship owners or the Chamber of Shipping that they were under any legal liability to pay copyright fees.⁷⁴ After that, negotiations to revise the tariff always began with the same caveat regarding the question of liability, which, in turn, made licensing commercial shipowners a protracted affair, and one that the society was also reluctant to address. In fact, licensing without an explicit acknowledgement of liability was a risky move that could rebound on the society if the issue ever reached the courts. However, after the success of tariffing industrial establishments, the society amended its forms for premises, redesigning the scheme to cover vessels. In the society's view, broadcasts on ships

resembled broadcast relays in factories. Although objections were raised over the accuracy of that correspondence – because a ship could arguably be seen as the home of the seaman – the society’s solicitors were convinced that the analogy between factories and ships worked, placing ships beyond the realms of domesticity. As such, the practice went ahead. The success of this move was evidenced by the considerable increase in the music licences issued to cover music on ships after February 1946.⁷⁵

Significantly, decisions around factory music made throughout the war and its aftermath led to a flexible method of licensing because they enabled analogies to gain traction, as seen with the licensing of ships. This shift in perspective and emphasis meant that, from that point on, installation of radio equipment in similar transitional spaces, such as trains, buses and taxis, increasingly attracted the attention of the society.⁷⁶

Interestingly, these spaces recall what Marc Augé called ‘*non-lieux*’: in-between spaces that have become ubiquitous in modern life.⁷⁷ What united them is that they were places of consumption, places where music could be heard *while* the consumer was shopping, travelling or eating.⁷⁸ The parallel between these spaces and the ‘Music While You Work’ cases is evident. After those cases, the alphabetised system of tariffs could be based on the *use* of music – a use that could take place, as we have seen, almost anywhere. This troubled some. For example, the Registrar of Goldsmiths College, part of the University of London, tried to make the society aware of a distinction between musical performances for educational purposes and concerts given for the public pleasure.⁷⁹ However, the society replied by reference to the jurisprudence mentioned above, suggesting that every entertainment in the college should be regarded as public and that the only relevant factor was the character of the audience in relation to the copyright owner.⁸⁰ Although some settings, such as hotel bedrooms, remained highly contested, the general effect was to reconfigure the distinction between private and public. Anxiety about how these changes were affecting the logic of copyright can be observed in several perceptive essays written in the same period. For instance, François Hepp evocatively coined the notion of ‘Le public inconnu’ (*The unknown public*) as the feature shaping the reality governing the collective management of copyright.⁸¹ This elusive public recalls Auden’s ‘unknown citizen’. But it was sought, calculated and rendered visible by reference to several matrices such as the wireless sets and loudspeakers being used and to whom they could be audible. Its legibility was connected to the way tariffs increasingly turned their attention to average use estimation based on Gallup projections and similar statistical technologies.⁸² Rather than defining the public in relation to a locality, these social technologies remade public performances by reference to music usage. Similarly, Marcel Saporta considered that great temptation in copyright practice involved



Figure 4.2 Loudspeaker on the London Underground, 1941.
Courtesy of the Imperial War Museum

replacing the notion of reproduction with that of ‘use’.⁸³ And that was very much the gist of the transformation in the alphabetised system of tariffs.⁸⁴

Involuntary listening

Mechanical performances in factories and other workplaces helped to redesign copyright licences and the system of tariffs in different ways. The reference to ‘places of entertainment’ could be deleted in the corresponding paperwork in order to license other spaces and journeys where music was relayed.⁸⁵ The charging of fees, previously based on box office receipts from admission to entertainments, could also be modified, giving way to fees calculated on the use of music and its duration, adjusted to the number of employees, passengers, consumers and the floor or shop space.⁸⁶ Another subtle change facilitated by these music relays was to the mode of listening,

which, in turn, led to constructing a different type of music listener. While traditional leisure gatherings such as theatres, cinemas or music halls encouraged a purposive approach to defining an audience, the significance of the use (and licensing) of industrial and background music was that the public could be constituted even against the will of its constituents. According to some commentators, the amenity value of music led to a conceptual eroding of the traditional notion of public and audience,⁸⁷ arguably involving a distorted idea of music, which, by definition, did not have a 'use'.⁸⁸ Audiences could be captive, listening being forced upon workers, prisoners, passengers and consumers regardless of whether they wanted to listen or not.⁸⁹ This recalls the wartime factory experiments carried out by Wynford Reynolds and his evidence in court as to whether workers were beguiled (or not) by the music relayed.⁹⁰ And it is possible to ask the same questions of other commercial environments where music began to be relayed. Were consumers attracted by music in shops, trains or ships? Did they need to be? Presumably, these issues did not really matter, as the appeal judges in the factory music case had emphasised. But the ways in which the legal definition of a performance in public no longer depended on admission tickets, membership, profit or any other factor raised the question of whether the law was facilitating the emergence of a different type of listener – one who was involuntary. When performances in public were defined by reference to the character of the audience and its relationship to the copyright owner, the only yardstick left to define a performance in public was the system of tariffs developed by collecting societies. As suggested by a leading copyright commentator, it could be contended that 'any group of persons who might be contemplated by the owner of the copyright as a possible source of revenue from public performances constituted the public for the purposes of determining what amounts to an infringement'.⁹¹ And if tariffs were modulated or adjusted to cover places in whose interiors a radio broadcast system had been installed, this legal question seemed to have been displaced.⁹² It was no longer the legitimacy of tariffs but their reasonableness that ended up being contested in courts.⁹³

It can be assumed that the PRS extended its geographical reach to seize upon the opportunities around music usage that emerged after World War II. The ubiquity of music became such that one unenthusiastic involuntary listener, Keith Waterhouse, advocated decades later for the constitution of a Non-Performing Rights Society that would 'send inspectors equipped simply with the physical means of enforcing the non-performance of all public din'.⁹⁴ The truth is, however, that the society did not always immediately enlarge the system of tariffs by tackling all public places. This can be seen by studying the frequency of lawsuits historically. Looking at a graph depicting lawsuits initiated by the society, it is easy to see that the late 1940s and early

1950s were years in which it took a cautious approach regarding litigation.⁹⁵ Its reluctance to press some cases in court and its hesitation about extending tariffs were often influenced by copyright legislation still being at the drafting stage or by international copyright negotiations still in train. Indeed, the 1940s and 1950s were punctuated by several key legislative milestones in the development of copyright: the Brussels Revision Conference of the Berne Convention (1948), the Gregory Committee (1952) and the passage of a copyright bill through parliament that culminated in the Copyright Act of 1956. The need to differentiate political and legal times before and after the war also triggered the constitution of the British Joint Copyright Council in 1953.⁹⁶ This association was set up on the initiative of the PRS specifically to establish an authoritative medium for negotiation with governments and other authorities on behalf of copyright owners.⁹⁷ This was achieved in India, Australia, the United Kingdom and the United States when laws were revised, or their replacement with a new statute was considered, and also in the Stockholm Revision of Berne in 1967.⁹⁸ Arguably, the society augmented its political capacity, acting directly on its own account and also indirectly through the British Joint Copyright Council. But the most notable aspect of the latter institution was that it showed how national experience could increasingly influence the development of international copyright and vice versa.

New publics

The significance of factory music in relation to the system of copyright tariffs can be observed in the way it spread around the world. For instance, the Canadian Performing Right Society Limited followed the English precedent to set up a tariff for the use of music in factories.⁹⁹ And, almost a decade after the Gillette litigation, similar lawsuits were brought in Norway and Denmark by their corresponding national collecting societies.¹⁰⁰ This proliferation shows a legal circulation of tariffing methods and demonstrates that the internationalisation of copyright also took place from below. Furthermore, this approach extended the scope of tariff systems beyond places of entertainment to other premises in which entertainment had not initially been foreseen. Newly conceived contexts deemed suitable for a tariff paved the way for the development of scales of percentages, which took into account more than seating capacity or admission receipts, thus modifying the tariff system traditionally followed by collecting societies, foreshadowing the networked society we now live in and directly anticipating the digital realities in which copyright would operate decades later.

This international effect was doubtless facilitated by the exchange of information at the International Confederation of Societies of Authors and Composers (CISAC).¹⁰¹ After the war, the confederation became even more active, establishing a forum for collecting societies to share and standardise practices.¹⁰² As national societies were interested in the methods through which others established their tariffs,¹⁰³ CISAC ended up occupying a pivotal place, setting up *enquêtes* (surveys) that charted positions, challenges and opportunities related to tariffs.¹⁰⁴ These practices made visible difficult jurisdictional cases, such as payment for public performances in Europe by US forces,¹⁰⁵ constituting an iterative process that constantly reviewed tariffs and their application¹⁰⁶ and facilitating the development of new categories for national tariffs, such as the one that began to be applied to the aviation industry in Britain (tariff ‘AC’).¹⁰⁷ Although questions of jurisdiction continued to be litigated, it is interesting that tariffing in-flight music, a practice now taken for granted, can be traced back to discussions that took place in the 1960s under CISAC’s aegis.¹⁰⁸

By shifting the focus from places of performance to music usage, the tariff system was tied to changes in the materialities of communication even before statutory reforms. More concretely, it was able to grasp the emergence of a sort of ‘communication’ right to such an extent that, as some commentators have noted, legal controversies once litigated as public performances would now, instead, be argued under the right of ‘communication to the public’.¹⁰⁹ Although the scope of these two rights has received much attention in legal doctrine,¹¹⁰ we would like to highlight an obvious spatial distinction already imagined in the iterative process through which tariffs were constantly reconfigured. While performing in public took place ‘in’ certain premises or ‘in’ a precise location, the new right was given with respect to communications ‘to’ the public. This change in the relevant preposition further detached the right from any fixed location, thus admitting new forms of transmitting and receiving music such as streaming. Therefore, if the main characteristic that differentiates performance in public from communication to the public is demonstrated by the lexical distinction between the two, this different media ecology had already been absorbed by the tariffs. Arguably, such a recursive feature had been prompted not only by new forms of communication but also by new ways of listening.¹¹¹ One of the interesting issues at stake here was that the new right continued to embrace the idea that music was being used, an assumption already established, as we have seen, as the main vector of the system of tariffs. While the new right appeared inevitably trapped by similar attempts to define ‘the public’, it came from the perspective of communication instead of the other traditional features, such as location and audience, that made a performance public.¹¹² So there is more to the communication right than just its scope. It involves

a different way of looking at copyright; one that makes the entanglement of users and technologies even more explicit. There is no better place to see this than in legal controversies that collecting societies litigated.¹¹³ Because tariffs based on a percentage of admission receipts did not fit well with the development of background music, new sets of tariffs continued to emerge in which charges were based on music usage. Ultimately, this was one of the features that the reworkings, litigations, negotiations and consultations of the alphabetised system of tariffs achieved. Furthermore, by blurring the line between leisure and work and, in turn, reconfiguring the distinction between public and private spaces, it also helped to define a different type of social relationship with music.

Conclusion

Almost a decade ago, the PRS commissioned a report to investigate the effects of music on our society. The result was *The Power of Music*, a seventy-page document written by Professor Susan Hallam.¹¹⁴ It showed how music could be used to encourage different types of behaviour and discussed music's beneficial effects on physical health and well-being. It is possible to find parallels between this report and the assumptions underpinning factory music during World War II. While the intersection between applied psychology and copyright law is often neglected in doctrine, the exploitation of copyright fully embraced this connection. This can be seen in the number of similar reports commissioned by other collecting societies and copyright organisations.¹¹⁵ Ironically, the push to highlight the tonic or therapeutic properties of music seems, at least for the copyright collecting societies, focused on finding a 'new' public – that elusive concept that has so puzzled the law.¹¹⁶ It is interesting to observe how the law gradually redefined the term 'public', moving away from a focus on location toward definitions predicated on use. After all, what is a new public if not a new opportunity to license new forms of usage? Legal tests developed in the aftermath of the right to communicate the work to the public sporadically referred to the notion of 'profit' as a relevant (but not essential) factor to be taken into consideration when determining the scope of the right.¹¹⁷ Although most criticisms of this development came from law and economics scholarship, we still want to note the circularity that it often entails. These discussions echo the arguments once raised regarding factory music, that a new 'public' tends to be elucidated or assumed when the merchandising value of music is evidenced.¹¹⁸

To return to where we started – the tariff alphabet: why did almost all copyright collecting societies structure their tariffs following an alphabetic

regime? One answer can be found in the way economists have described collecting societies, linking the public interest to an efficient system that classifies customers.¹¹⁹ As a system of classification, the alphabet enabled singular, disembodied, authoritative forms of tariffs to come into being. Part of the effect of an indexical system comes from its regimental capacity to convey clarity and order and, therefore, trigger compliance. This worked by stripping away context and chronology. The alphabet was a medium allowing media environments and music users to mutually constitute each other, providing certainty (and, according to some, fairness) in the application of copyright fees. Certainly, the alphabet provided a way to define and control different types of exploitation of music by organising, imagining and cataloguing diverse ways of performing or communicating to the public and, in turn, constructing different music ‘users’. By moving away from a one-size-fits-all approach, it became a management tool that incidentally served to avoid the monopolistic arguments often levelled against collecting societies. Its form has been subject to negotiation and consultation and its entries, occasionally after litigation, have been stabilised. Our chapter has not tried to cover all the implications of the rise of alphabetic codification in copyright collecting societies but, rather, has had a more modest ambition. It has tried to historicise the features and possibilities opened up by the establishment of a single alphabetic entry (‘I: Industrial Premises’) that, we argue, bore a pivotal significance in shaping the way we understand copyright today and that emerged in a controversial and protracted manner.

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Notes

- 1 On assetisation in general, see Kean Birch and Fabian Muniesa, eds, *Assetization: Turning Things into Assets in Technoscientific Capitalism* (Cambridge, MA: MIT Press, 2020).
- 2 See, for instance, Christian Handke and Ruth Towse, ‘Economics of Copyright Collecting Societies’, *International Review of Intellectual Property and Competition Law* 38, no. 8 (2007): 937–57.

- 3 Jose Bellido and Fiona Macmillan, 'Music Copyright after Collectivisation', *Intellectual Property Quarterly* 3 (2016): 231–46.
- 4 Leiden University Libraries, Archive of Sijthoff's Uitgeversmaatschappij N.V., Syt D 61, S. G. Van Looy, A. W. Sijthoff's Uitgeversmij, to Harold L. Pinner, 6 July 1945.
- 5 Among them were Ernest E. Hirsch (Turkey); Harold L. Pinner (UK); Wenzel Goldbaum (Peru); see Harold L. Pinner, ed., *World Copyright: An Encyclopedia* (Leyden: A. W. Sijthoff's, 1953), xiv.
- 6 'British Music Royalties Drop Below \$3,000,000 Due to War', *Billboard*, 20 July 1940, 11.
- 7 PRS Archives, Solicitors' files, General Manager, PRS, to CG Syrett, Syrett & Sons, 6 January 1941.
- 8 Brian Reynolds, *Music While You Work: An Era in Broadcasting* (Lewes: The Book Guild Ltd, 2006), 2.
- 9 Transport for London Archives (hereinafter TfL Archives), LT000234/142, Memorandum to VAM Robertson, 12 July 1940 ('Music While You Work' at Acton Works).
- 10 Jake Burdick, 'Practical Pigs and Other Instrumental Animals: Public Pedagogies of Laborious Pleasure in Disney Productions', in *Disney, Culture, and Curriculum*, eds Jennifer A. Sandlin and Julie C. Garlen (New York: Routledge, 2016), 47–58 at 50; see also Marek Korczynski, *Songs of the Factory: Pop Music, Culture, and Resistance* (Oxford: Oxford University Press, 2014).
- 11 University of Liverpool, Special Collections & Archives, D431/6/5, 'Music While You Work: A Survey of the Application of Music to Industry' (undated), 5; see also 'Music Can Increase Production', *The Factory Manager* XI, no. 99 (July 1942): 43–45.
- 12 It was argued that the programme related 'the industrial war worker fully to the total effort' and 'bridge[d] the gulf between the factory (production) and fighting (destruction)'; see University of Sussex Special Collections, Mass-Observation Archive, FR 1249, 'Music While You Work', 21 May 1942.
- 13 'Music Oils Wheels of Industry', *Manchester Evening News*, 7 July 1941; BBC WAC 57/1, Press Cuttings; 'Readers' Forum: Music While You Work', *The Factory Manager* XI, no. 103 (November 1942): 38–42, and TfL Archives LT000234/142, 'Music and Entertainment for Staff Employed in Board's Works', 7 November 1940 ('Your hands are helping to win the war', 'Every workshop is a war shop today', 'A step-up in production is a step nearer victory').
- 14 BBC WAC R22/207/1, Wynford Reynolds, General Directive issued by BBC Management research group No. 1, 10 July 1942.
- 15 Charles F. James, *The Story of the Performing Right Society: An Association of Composers, Authors, and Publishers of Music* (London: The Performing Right Society, 1951), 22; Monika Dommann, *Authors and Apparatus: A Media History of Copyright* (Ithaca, NY: Cornell University Press, 2019), 75–76.
- 16 TNA, TS 32/626, B.B. Cubitt, General Officer Commanding-in-Chief, Yorkshire, to All Commands and Districts at Home, 18 June 1921.

- 17 TNA, WO 32/3904, NJO Carbutt, Adjutant 18th Field Brigade to the Secretary, PRS, 29 December 1932.
- 18 TNA, ADM 1/8609/136, Brigade Major, R.M. Artillery, to the Superintendent, R.N. School of Music (minute) 24 June 1921.
- 19 TNA, TS 32/626, Treasury solicitor, 'Case to Counsel to advise on the interpretation of section 1 (2) of the Copyright Act, 1911', 8 May 1950.
- 20 TNA, WO 32/3904, C. F. James, General Manager, PRS, to Officer Commanding, Preston Barracks, Brighton, 24 October 1932.
- 21 TNA, BT 209/652, Copyright Committee, 22 May 1951; Notes on Meetings with interested parties.
- 22 TNA, AIR 2/294, John Woodhouse, PRS, to F.H. McNamara, Squadron Leader, RAF, 28 May 1926.
- 23 BBC WAC 57/1, Press Cuttings, 'Music that Steps up Output', *Radio Times*, 10 July 1942.
- 24 See, for example, *PRS v Bradford Corporation*, Mac.C.C. (1917–23) 309; *PRS v Cyril Theatrical Syndicate Ltd* [1924] 1 KB 1; *PRS v Mitchell & Booker (Palais de Danse) Ltd* [1924] 1 KB; 762; *PRS v Bray Urban District Council* [1930] A.C. 377; *PRS v Hawthorns Hotel (Bournemouth)* [1933] Ch 855; *PRS v Hammond's Bradford Brewery Co.* [1934] 1 Ch 121; *PRS v Camelo* [1936] 3 All ER 557.
- 25 The Gregory Committee (1952) already highlighted that the distinction was not stable since 'performances taking place on what many persons might regard as a private occasion [...] are, in the interpretation of a Copyright Act, regarded place as taking place in public'; see Report of the Copyright Committee (Cmd. 8662) (1952), paragraph 125.
- 26 'Public Performance', *The Author, Playwright and Composer* XLIV.1 (Autumn 1933), 2–3; see also Winifride B. McConnell, 'Legal Cases', *The Author, Playwright and Composer* XLIV.2 (New Year 1934), 58–60; Evan James MacGillivray, 'Legal Cases', *The Author, Playwright and Composer* XLVII, no. 3 (New Year 1934): 122–3.
- 27 Lionel Bently, Brad Sherman, Dev Gangjee and Philip Johnson, *Intellectual Property Law* (Oxford: Oxford University Press 2022), 171.
- 28 London Metropolitan Archive, P85/ANS/059, The Performing Right Society (Limited): Its Origin, Objects, and Methods (Pamphlet H); see also Western Cape Archives and Records Service (hereafter WCARS), ZA KAB 3/CT_4/1/4/362_G398/4_1, Town Clerk, Johannesburg, 'Note about the Performing Right Society', 1 September 1926.
- 29 'Performing Rights and Boarding House Gramophones', *The Pianomaker* (September 1928): 475; see also, for instance, Gwynedd Archives Service, XDSS/D40, Licensing Department, PRS, to Promenade Pavilion, Penmaenmawr, 22 August 1923. It is no coincidence that other collecting societies, such as SACEM, also shifted their focus to managers to develop their system of tariffs; see Anna Marie Skråmestø Nesheim, 'Performing Rights: Authors, Performers, Managers, and Machines in the Age of Technological Innovation, 1890s–1950s' (PhD, University of Oslo, 2023), 44.

- 30 The society described this situation as ‘the danger’ or ‘the risk’ of being unlicensed; see WCARS, ZA KAB 3/PLS_2/1/41_P1/1_1, ‘The Performing Right Society: Its Origin, Objects, Methods’ (Pamphlet H: South Africa). 4.
- 31 See, for instance, R. Southern, ‘Public Performance of Music’, *Co-operative Review* 17 (March 1943): 35.
- 32 *British Airways Plc. v. The Performing Right Society Limited* [1998] R.P.C. 581; 600.
- 33 PRS archives, ‘Meeting of the Sub-Committee appointed by the General Council to consider the question of contracts for Commercial Television with the four programme contractors’, 16 May 1955, 529–32.
- 34 TfL Archives, LT000844/118, Memorandum to LC Hawkins, 29 July 1941 (‘Music While You Work’ at Chiswick, Acton and Charlton).
- 35 See, for instance, ‘Barrington Electronics Ltd. & The Phonograph Operators Association v PRS’, *Inter-Auteurs* 144 (1961): 238.
- 36 TNA, TS 27/528, Extract from the *Bulletin of Industrial Welfare Society*, November 1940.
- 37 Harry Samuels, *Industrial Law* (London: Isaac Pitman & Sons Ltd., 1939), 201–3.
- 38 Unilever Archives, GB1752.UNI/GF/LG/1/2/502, Van den Berghs & Jurgens, Ltd., Cheshire to Ernest Charles Ford, Licensing Department, PRS, 24 February 1942.
- 39 PRS Archives, Tariffs Committee Meeting, 19 December 1957, 102.
- 40 Cristina L. Baade, ‘Victory through Harmony: The BBC and Popular Music in World War II’ (PhD, University of Wisconsin-Madison, 2002), 316–17. This lack of consensus can be appreciated in the pages of the journal *The Factory Manager*, in which a reader complained that ‘the suggestion that the performance of gramophone records or radio programmes within the precincts of a factory should be considered as a public performance, appears to require some stretch of the imagination when one observes the numbers of Home Guards, sentries, Police, and other people posted round most of the factories where music is played today; these are anything but public places; in my opinion such performances are private in nature and are for the private entertainment of those who congregate each day in pursuance of their daily living, just in the same way as their radio at home relieves the tedium or monotony of the leisure hours’; see ‘Factory Music and Copyright Law’, *The Factory Manager* XI, no. 101 (September 1942): 30, 45; ‘Factory Music and Copyright Law’, *The Factory Manager* XI, no. 102 (October 1942): 43–45.
- 41 BBC WAC 57/1, Press Cuttings, ‘Music While You Work’, *The Music Teacher & Piano Student* 21 (July 1942): 142; see also ‘1d-a-head Demanded for Works Music’, *Daily Mail*, 22 May 1942, 3; ‘Factory Music and Copyright Law’, *The Factory Manager* XI, no. 99 (July 1942): 46–47, at 46; C. F. James, ‘Music in Factories’, *The Times*, 12 June 1942, 5; C. F. James, ‘Music in Factories’, *The Times*, 23 May 1942, 5.
- 42 BBC WAC 57/1, Press Cuttings, ‘Cues Music Piped into War Plants’, *Variety*, 18 November 1942. This resemblance is also made explicit in Alexandra

- Hui's essay 'Muzak-While-You-Work', *Historische Anthropologie* 22, no. 3 (December 2014): 364–83; and David Hendy's book *Noise: A Human History of Sound and Listening* (London: Profile Books Ltd, 2013), 298–393.
- 43 BBC WAC, File 1 R27/262/1, L.H. Young, Gillette Safety Razor Company to Wynford Reynolds, 17 February 1942.
- 44 *PRS v Hammond's Bradford Brewery Co Ltd* [1934] Ch. 121.
- 45 London Metropolitan Archive, P85/ANS/059, 'Use of Loudspeakers in Public Places: Copyright Test Action: *PRS v Hammond's Bradford Brewery Company, Ltd.*', *The Times*, 5 April 1933 (newspaper clipping).
- 46 Paul Abel, 'Lettre de Grande-Bretagne', *Le Droit d'Auteur* (June 1943): 64–70, at 65; 'Music in Factories: Preliminary Procedure in Copyright Action', *The Times*, 14 October 1942, 2.
- 47 'Music While You Work', *Electrical Review*, 5 February 1943, 191.
- 48 BBC WAC, R22/207/1, CDG Perkins, Director of Legal Dept. BBC to Syrett & Sons, 2 January 1943.
- 49 BBC WAC 57/1, Press Cuttings, "'Music While You Work" Test Case', *News and Times*, 4 January 1943.
- 50 Wynford Reynolds, 'A Summary of Research on Music in Industry', *The Factory Manager* XII, no. 107 (March 1943): 38–42, at 38.
- 51 'The Price of Jazz', *Manchester Guardian*, 27 January 1943, 4; 'Music While You Work: Judgment Against Firm', *Manchester Guardian*, 27 January 1943, 7; 'Music in Factories: Performances in Public', *The Times*, 30 January 1943, 2.
- 52 *Jennings v Stephens* [1936] 1 All ER 409; see also 'Music in Factories: Performing Rights Infringed', *The Times*, 27 January 1943, 2.
- 53 Evan James MacGillivray, 'Legal Cases', *The Author, Playwright and Composer* XLVI, no. 1 (Autumn 1935): 21–23 and 'Legal Cases', *The Author, Playwright and Composer* XLVI, no. 3 (summer 1936): 140–42.
- 54 One notable aspect shared in both legal cases is that they seem to have emerged as a way to normalise the legality of practices in order to extend the reach of the tariff system. In January 1933, the PRS had furnished a tariff for clubs ('C') and started licensing clubs affiliated to associations; see 'Copyright Music in Clubs', *Conservative Clubs Gazette* 37, no. 454 (January 1933): 4.
- 55 Bonnie White, *Women's Amateur Theatre in Rural Britain, 1919–1945* (London: Routledge 2024), 159–61.
- 56 *Ernest Turner Electrical Instruments Ltd. v PRS* and *PRS v Gillette Industries Ltd.* [1943] Ch. 167; 171; see also Robert Jardine Brown, 'The Constitutional History of Broadcasting in Great Britain, 1922–1946' (DLitt dissertation, University of Edinburgh, 1946), 224.
- 57 'Music While You Work', *Nottingham Evening Post*, 17 March 1943, 1; 'Performing Right Society Ltd. v Gillette Industries Ltd', *The Times*, 17 March 1943, 2; 'Factory Broadcasts', *Manchester Guardian*, 18 March 1943, 6; 'Music While You Work as Public Performance', *The Solicitor* (August 1943): 121.

- 58 'Music While You Work', *Electrical Review*, 26 March 1943, 428; see also Gavin McFarlane, *Copyright: The Development and Exercise of the Performing Right* (Hailsham: John Offord [Publications] Ltd, 1980), 123.
- 59 'Music in Factories', *The PRS Emergency Bulletin* 10 (April 1943): 61–62.
- 60 BBC WAC 57/1, Press Cuttings, 'Notes and News: Music While You Work', *The Musical Times*, April 1943; see also 'Music in Factories', *Foundry Trade Journal*, 25 March 1943, 251.
- 61 Evan James MacGillivray, 'Ernest Turner Electrical Instruments Ltd. v Performing Right Society Ltd; Performing Right Society Ltd. v Gillette Industries Ltd', *Copyright Cases 1936–45* (London: Wildy & Sons, 1949), 411.
- 62 'Music with a Purpose', *The Factory Manager* XI, no. 98 (June 1942): 24–25.
- 63 This point had already been raised when the society began asking factory owners to take out a licence; see D.A. Jones, 'Music in Factories', *The Times*, 21 May 1942, 5.
- 64 'Air Music for Factories in Eng. Ruled Subject to Fee', *Variety*, 26 May 1943, 17.
- 65 'Music for War Factories', *Derby Daily Telegraph*, 26 May 1943, 8; 'Music While You Work: The Performance of Music in Factories', *Production and Engineering Bulletin* 2, no. 8 (June–July 1943): 370–71; see also 'Music While You Work', *The Board of Trade Journal*, 26 June 1943, 343; 'Britain Pays 150G for War Workers' Music', *Variety*, 2 June 1943, 42.
- 66 BBC WAC, R22/207/1 Radio Music While You Work, 1942–1943 File 1A; Extracts from Parliamentary Debates, 10 February 1943; see also 'Music While You Work: Questions', *Derby Daily Telegraph*, 10 February 1943, 8.
- 67 TNA, AVIA 22/668, C.F. James, PRS to R. Jardine Brown, 28 April 1943; Provision of music in factories.
- 68 TNA, LAB 18/46, C.D. Plant, Ministry of Labour and National Service to E.C. Ford, Licensing Manager, PRS, 11 March 1958 (regarding the therapeutic properties of music for music rehabilitees in gyms).
- 69 See, for instance, TNA, LAB 18/46, S. S. Innes, Treasury Chambers, to W.G. Fuller, Ministry of Labour and National Service, 9 August 1946 (regarding training centre canteens administered by the Ministry of Labour).
- 70 British Motor Industry Heritage Trust, Archive Department, 80/84/15/76-AUS-16, JF Bramley, Safety & Welfare Department, Austin Motor Company Limited, to the Licensing Department, PRS, 6 November 1943; see also Coventry Archives, PA1233/120/1–2, 'Performing Right Society Licences for Radio in Canteen', 7 March 1947.
- 71 Zoological Society of London Archives, SUP/5/1/3/30, E.C. Ford, Licensing Department, PRS to the Secretary of the Zoological Society, London, 21 January 1947.
- 72 See, for instance, WACRS, PRS and Bournemouth Corporation (licence covering halls, piers and bandstands), 19 March 1924; Borthwick Institute, University of York, PR/Y/MB/145, John Woodhouse, PRS to J. Atkins, New Earswick, 8 September 1926 (Village Hall); see also Dudley Archives & Local

- History Centre, PR3/5/3/1, C.F. James, General Manager, PRS, to St. Johns Hall, Brockmoor, 24 October 1932.
- 73 WCARS, ZA KAB 3/SSE_4/1/109_1/2/48_1, 'Return of Concerts and Dances held in Town Hall, Municipality of Somerset East Travelling Companies (1927)'.
- 74 National Maritime Museum, Greenwich, RMS/90/6, Performing Right Society Ltd agreement with Royal Mail Steam Packet Company 1926 and transferred to Royal Mail Lines Ltd 1932.
- 75 Wirral Archives and Records Management, W/160/137/9, Emrys Evans, Town Clerk, County Borough of Wallasey, to Licence Accounts Department, PRS, 4 May 1950.
- 76 Although wireless music in trains was first experimented with in 1933, the service was discontinued because of the copyright fees charged by the PRS. By the 1950s, the society already established a tariff for this service that was accepted by several railway companies and considered the possibility of licensing taxis that had installed radios; see BBC WAC, R60/39/1, 'Wireless on Trains. L.N.E.R. experiment to cease. Performing Rights Difficulty', *The Times*, 2 November 1933; 'Letter to the Editor: Wireless in Trains', *The Times*, 3 November 1933; 'Letter to the Editor: Wireless in Trains', *The Times*, 4 November 1933.
- 77 Marc Augé, *Non-Places: Introduction to an Anthropology of Supermodernity* (London: Verso, 1995), 96.
- 78 'Music While You Eat', *Nottingham Evening Post*, 7 July 1942, 1. Music in these places was considered to constitute a modern form of 'motivation'; see Hagley Museum and Library, accession 2407, Ernest Dichter Papers, Box 92 File 2092A, Ernest Dichter, 'The Modern Retailing Environment and Shopping Motivations: A Research Proposal', August 1967. Interestingly, the use of music while shopping facilitated another case brought by the society three decades later: *Performing Right Society Ltd v Harlequin Record Shops Ltd* [1979] FSR 233.
- 79 Goldsmiths College Special Collection & Archives (hereafter GCSCA), GOLD/1/6/1/2/18, Registrar, Goldsmiths College, to General Manager, PRS, 22 April 1959.
- 80 GGSCA, GOLD/1/6/1/2/18, E.C. Ford, Licensing Manager, PRS to Registrar, Goldsmiths College, University of London, July 14 1959.
- 81 François Hepp, 'Le public inconnu', *Revue Internationale du Droit d'Auteur* XI, no. 4 (April 1956): 34–59.
- 82 See also François Hepp, *Radiodiffusion, télévision et droit d'auteur* (Paris: Éditions inter-nationales, 1958), 81–94.
- 83 Marcel Saporta, 'Les reproductions mécaniques et leur usage privé', *Revue Internationale du Droit d'Auteur* I, no. 4 (October 1953): 64–89, at 75. On this point, see Nesheim, 'Performing Rights', 245.
- 84 We are aware that this is only one of the different genealogies that can be produced about the history of tariffs. Indeed, 'user' associations of music had emerged in the 1920s to oppose or negotiate tariffs with copyright collecting

- societies. But, remarkably, the driving force of those associations was the hotel and catering industry; see, for instance, ‘Hotels and Restaurants Associations and the PRS’, *The Theatrical Managers’ Journal* (August 1927): 133; ‘Music and Copyright’, *Daily Mail*, 7 December 1929, 10.
- 85 Wirral Archives and Records Management, W/160/137/9, Copyright Music Licence (PRS) to the County Borough of Wallasey, 6 September 1946.
- 86 London Metropolitan Archives, CLC/B/016/MS17441, *Music and the People: The Composer, the Music-User and the Performing Right Society* (Luton: White Crescent Press Ltd, 1959), 6; see also TfL Archives, LT000130/137, H. Strangeways, Licensing Manager PRS to the Secretary, London Transport, February 26 1964.
- 87 In fact, one commentator suggested that ‘To apply the word “public” to factories, especially in wartime when many of them are controlled places and come within the operation of the Essential Work Order, is to limit its popular meaning’; see BBC WAC 57/1, Press Cuttings, ‘Music in Factories: Performances in Public’, *The Times*, April 1943.
- 88 Jacques Attali notes that the French collecting copyright society, SACEM, gave a *value*, in the bourgeois sense of the term, to the music of the people; see Jacques Attali, *Noise: The Political Economy of Music* (Minneapolis, MN: University of Minnesota Press, 2009), 78. In a similar vein, we are suggesting that the practices of the PRS also worked on the assumption that music was given a different *value* in the context of war. As suggested by one commentator, this functional value of music to boost morale, decrease fatigue and increase productivity was different from the long gone *l’art pour l’art* attitude; see Richard Freymann, ‘Music While You Work’, *Musical Times* (November 1941): 397–98 at 398.
- 89 BBC WAC 57/1, Press Cuttings, ‘Music While You Work’, *Musical Times* (February 1942).
- 90 BBC WAC 57/1, Press Cuttings, ‘“Music While You Work” Test Case’, *News and Times*, 4 January 1943.
- 91 F. E. Skone James and E. P. Skone James, *Copinger and Skone James on the Law of Copyright* (London: Sweet & Maxwell, 1958), 187.
- 92 TNA, LAB 18/46, F. Williams, to the Regional Controller, Ministry of Labour & National Services, 19 April 1947 (regarding the wireless installations and programmes radiated at St. Loyes College).
- 93 After the Copyright Act (1956), the Performing Right Tribunal (later named as the Copyright Tribunal) had this aim of assessing the reasonableness of tariffs; see Michael Freegard and Jack Black, *Decisions of the UK Performing Rights Tribunal and Copyright Tribunal 1957–1996* (London: Bloomsbury, 1997).
- 94 Keith Waterhouse, ‘When Noise Annoys’, *Daily Mail*, 14 July 1986, 8. Similar criticisms can be read in ‘Music While You Work’, *The Musical Times* 83, no. 1188 (February 1942): 58–59.
- 95 This is remarkable because the society often considered that ‘litigation is always with us’ (*The Performing Right Gazette* (July 1928), 329). In fact, it was frequently assumed by some commentators that the society established its rights ‘by litigation’; see WCARS, ZA KAB 3/CT_4/1/5/695_G17/5_1, ‘Performing

- Rights: Society's Activities Described', *Cape Times*, 17 May 1926 (newspaper clipping).
- 96 'The British Joint Copyright Council', *Inter-Auteurs* 122 (1956): 58. The name was changed to British Copyright Council when it was reconstituted in 1965; see, for instance, British Copyright Council Archives, Denis de Freitas, Chairman, British Copyright Council, to Indira Gandhi, Prime Minister, India, 11 March 1982.
- 97 'Copyright Law Revision', *Performing Right* 27 (September 1956): 17; Royce F. Whale, 'The Battle', *Performing Right* 28 (March 1957): 68–71.
- 98 Victor Bonham-Carter, *Authors by Profession: vol. 2 1911–81* (London: The Bodley Head, 1984), 128. Some references to the British Joint Copyright Council and the Stockholm Revision are found in Lionel Bently and Tanya Aplin, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge: Cambridge University Press, 2020), 45–46.
- 99 Libraries & Archives Canada, File: 2-C-59, RG28-A, Vol. 103, Rogers & Rowlands, solicitors, to J.C. Macfarlane, 3 November 1943.
- 100 H. D. 10 January 1952 i sag 243/1950 (UfR -Ugeskrift for Retsvæsen-, 1952, 269) [Denmark]; NRt – Norwegian Court Reports –, 1953, 633 [Norway]; see also Seve Ljungman, 'News from Sweden', *Revue Internationale du Droit d'Auteur* 95 (1978): 95–125 at 101.
- 101 See the chapter in this volume by Johan Larson Lindal. Among the standardising routines taking place at CISAC was the establishment of a 'fiche internationale', a card that regulated the way societies gathered information and constituted their repertoires; see CISAC Archives, DOC51–0002, Circulaires 1951–1958, 'Reorganisation of the Fiche Internationale', Paris, 22–25 June 1956.
- 102 CISAC Archives, DOC59–0001, Circulaires 1959–1961, Mario Pecori, 'Action des sociétés en matière de tarifs', Paris, 17–18 April 1959.
- 103 This can be seen, for example, in the way the Spanish collecting society (SGAE) frequently requested information from its French and British counterparts (SACEM and PRS) about their system of tariffs in order to set up its own tariff practices; see SGAE Archives, SGAE Committee Meeting, 26 June 1964, 20; SGAE Committee Meeting, 11 December 1964, 67.
- 104 CISAC Archives, DOC046–0001, Circulaires 1946–1950, 'Enquête sur les Tarifs (circulaire n. 4)', January 1950; DOC51–001, Circulaires 1955–1956, 'Enquête sur les Tarifs', 10 August 1955; DOC60–001, Circulaires 1960–1961, 'Tarifs radiodiffusion- télévision (Enquête portant sur l'année 1960)'.
- 105 CISAC Archives, DOC059–0001, Circulaires 1959–1961, Jon Leifs, 'Infractions au droit d'auteur commises par les Forces Américaines', 12–15 September 1960.
- 106 CISAC Archives, DOC51–0002, Circulaires 1951–1958, 'Action des sociétés en matière des tarifs', 19 January 1955; DOC67–002, Circulaires 1967–1969, 'Tariffs principles envisaged', 27 March 1969.

- 107 CISAC Archives, DOC059–0001, Circulaires 1959–1961, M. J. Van Nus, ‘Musique en avion pendant les heures de vol’, 27 June 1960; DOC60–001, Circulaires 1960–1961, ‘Résultats de l’Enquête 5: Musique en avion pendant les heures de vol: Contrats déjà intervenus’.
- 108 As Mr Justice Birrs has recently observed, ‘it is common ground that airlines are generally granted licences by copyright collecting societies domiciled in the same country as the airline’; *Performing Right Society Ltd v Qatar Airways Group QCSC* [2020] EWHC 1872.
- 109 Lionel Bently, Brad Sherman, Dev Gangjee and Philip Johnson, *Intellectual Property Law* (Oxford: Oxford University Press, 2022), 171.
- 110 See, for instance, Lucie Guibault and João Pedro Quintais, ‘Copyright, technology and the exploitation of audiovisual works in the EU’, *Iris Plus* 4 (2014): 9–24; P. B. Hugenholtz and S. C. van Velze, ‘Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a “New Public”’, *IIC – International Review of Intellectual Property and Competition Law* 47 (2016): 797.
- 111 *British Airways Plc. v. The Performing Right Society Limited* [1998] R.P.C. 581, 601; see also CISAC Archives, DOC60–001, Circulaires 1960–1961, ‘Enquête 5: Musique en avion pendant les heures de vol’, surveying the mode of reception of music whether loudspeakers or individual headphones.
- 112 Almost two decades ago, Tanya Aplin already indicated that ‘if any meaningful distinction between acts done “in public”, as distinct from “to the public”, is to exist, the former would have to connote reception of the performance *in the same geographical location*’; see Tanya Aplin, *Copyright Law in the Digital Society: The Challenges of Multimedia* (Oxford: Hart Publishing, 2005), 126 [our emphasis].
- 113 See, for instance, *Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v. Hostelería Asturiana SA (Hoasa)*, C-293/98; [2000] ECR I-00629; *SGAE v. Rafael Hoteles SA* [2006] ECR I-11519 (ECJ); *Phonographic Performance (Ireland) Ltd v. Ireland*, Case C-162/10 [2012] 162.
- 114 GGSCA, NNAH/AD/24/3/8, Susan Hallam, ‘The Power of Music’ (Transcript of a presentation that relates to a publication from The Performing Right Society Foundation).
- 115 IFPI, *Engaging with Music* (2022), 10, where it can be read that ‘[a]round the world, music continues to play an increasingly important role in in people’s well-being- both in terms of supporting our mental health and also soundtracking and motivating our physical activity’.
- 116 The quest for interpretation seems like an ‘ongoing copyright obsession’; see Justin Koo, *The Right of Communication to the Public in EU Copyright Law* (Oxford: Hart, 2019), v. In that sense, the European Copyright Society had also highlighted that one of the ‘steps to optimize the current harmonization status’ of EU copyright law would be the clarification of ‘important notions to terminate endless debate’ (e.g., the right of communication and making available to the public); see letter from the ECS to Thierry Breton, Commissioner for Internal Market, European Commission, 24 April 2023, available at <https://>

- europeancopyrightsociety.org/wp-content/uploads/2023/04/ecs-letter-to-commissioner-breton-april-2023.pdf (accessed 12 June 2023).
 117 *ITV Broadcasting v TV CatchUp*, Case-607/11 [2013] 3 CMLR (1), 1 [42].
 118 *Phonographic Performance (Ireland) Ltd v. Ireland*, Case C-162/10 [2012] 162 (‘it must be held that the guests of a hotel may be described as “targeted” and “receptive” ... Indeed, the action of the hotel by which it gives access to the broadcast work to its customers constitutes an additional service which has an influence on the hotel’s standing and, therefore, on the price of rooms. Moreover, it is likely to attract additional guests who are interested in that additional service’).
 119 Arnold Plant, *The New Commerce in Ideas and Intellectual Property* (London: The Athlone Press, 1953), 25.

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