

Response Document

Call for evidence: Review of the UK Intellectual Property Enforcement Framework

The call for evidence will be open **until 2 November 2020**

Respond to the Call for Evidence by filling in the response template at the bottom of this page. Email the template to enforcement@ipo.gov.uk. The deadline for this has been extended from 2 November 2020 to 9 November 2020 to allow extra time for responses to be submitted.

When responding please state whether you are responding as an individual or representing the views of an organisation:

- I am responding as an individual
- I am responding on behalf of an organisation

What is the name of the organisation?

The F-List for Music CIC

The report is prepared by Vick Bain and Dr Metka Potočnik**, both Directors of **The F-List for Music CIC**.*

Please check the box that best describes you as a respondent:

About you:

Are you:

- An individual
- Micro business (10 employees or less)
- Small Medium Enterprise (up to 250 employees)
- Large business (over 250 employees)
- Legal profession e.g. attorney or solicitor, barrister, judge
- Representative group
- Other

(Please describe) **Community Interest Company, acting on behalf of all female musicians in the UK**

Please respond to the questions that are relevant to you.

When responding to the questions please specify which IP right(s) you are referring to.

Please return completed responses to enforcement@ipo.gov.uk.

* Vick Bain, former CEO of the British Academy of Songwriters, Composers & Authors, board director of the Incorporated Society of Musicians, trustee of charity Parents & Carers in Performing Arts, equality, diversity and inclusion consultant and researching for a PhD in women's careers in the music industry <https://vbain.co.uk> (all links in this report were accessed 8 November 2020).

** Dr Metka Potočnik is a Lecturer in Law (University of Wolverhampton), a qualified lawyer in Slovenia (since 2008), and a graduate of Queen Mary University London (PhD), King's College London (LLM) and University of Ljubljana (LLB). Recently her funded research focuses on the critical investigation of IP law through a feminist lens. Her focus is on the female creatives in the UK creative industries. More: <https://researchers.wlv.ac.uk/m.potocnik>.

1. The cost of legal challenges

1.1 Costs of taking action

1. What costs have you or your business incurred when protecting your IP right(s) from infringement? When you respond, please include the type of IP right(s) you were protecting. What was the outcome of the case?

As a preliminary point, **The F-List for Music CIC** expresses its regret in the lack of empirical data to support its submission here. The deadline of 2 November 2020 (extended in the same week to 9 November 2020) was unfortunately much too short to collect and present the evidence from the female and gender non-binary musicians on its roster. At present, there are over 4,500 artists on its registry (all UK based).¹ If given the chance, **The F-List** would like to have a further opportunity to share its' members lived experience with any committee looking at revisions of UK IP law (substantive and/or enforcement provisions). All but one of the UK music membership organisations have a majority of male members and therefore it is essential an analysis of the impact of the current Intellectual Property (IP) regime on female and other gender minority musicians are sought and taken into consideration. There is an assumption that IP is gender neutral, but this is not the case and often hides bias.

The UK Creative Industries are biased, and lack of representation has been confirmed by numerous reports. To illustrate, Bain found for the UK that “just over 14% of writers currently signed to publishers and just under 20% of acts signed to labels are female.”² In similar terms, Smith *et al* found that “women are missing from popular music.”³ Furthermore, Coogan Bryne finds underrepresentation of female musicians across British Radio Stations (2019-20).⁴ The boards of the UK music royalty collecting societies, PRS for Music and PPL remain resolutely male dominated, 88% and 94% respectively,⁵ because of the minimum earning requirements which act as a barrier for female musician representation. PRS for Music reports only 18.4% of its 145,000 strong membership are female.⁶ This means the gatekeepers in the music industry have been almost exclusively male for over a century and show little sign of progress. Given these practices across the UK music sector, research has started to investigate the role of IP law⁷ in perpetuating the lack of diversity in the UK music industry.

When Bain made the call in March 2020 on social media (Twitter) for all female musicians, wishing to get access to professional opportunities in the music sector, over 1000 individual artists signed up on the registry within weeks. The energy behind this initiative was inspired and the need to collect women's experience in the sector

¹ The register available: <https://thef-list.uk/about-us/about-the-f-list/> (free, open, and web-based resource).

² Vick Bain, 'Counting the Music Industry, the Gender Gap' (2019) <https://countingmusic.co.uk>.

³ Stacy L Smith *et al*, 'Inclusion in the Recording Studio? Gender and Race/Ethnicity of Artists, Songwriters & Producers across 800 Popular Songs from 2012-2019,' (2020) <http://assets.uscannenberg.org/docs/aii-inclusion-recording-studio-20200117.pdf>.

⁴ Linda Coogan Byrne and Women in CTRL, 'Gender Disparity Data Report. An analysis of the Top 20 Most Played British Acts across British Radio Stations in the Period of June 2019-2020 and the Top 100 Radio Airplay chart in 2020' (2020) <https://www.canva.com/design/DAEE37rIDuc/-7R8D7IzU7EMdcnv9Snw3w/view#1>.

⁵ Nadia Kahn 'A Seat At The Table' (2020) <https://womeninctrl.org/seatatthetable/>.

⁶ PRS for Music '100 Women Changing Music' (2020) <https://www.prsformusic.com/press/2020/100-women-changing-music>.

⁷ Metka Potočnik, 'Exposing Gender Bias in IP: The Music Industry' (October 2020, Sixth Annual IP Mosaic Conference: The Arc is Hot! Using IP to Further Social Justice, US), <https://iipsj.org/programs/ip-mosaic/>. Full paper available on request (email: m.potocnik@wlv.ac.uk). Also, Metka Potočnik, "Out with the Old: a Feminist Approach to Intellectual Property" (September 2020, Society of Legal Scholars Annual Conference, University of Exeter, Exeter, UK); and Metka Potočnik, 'Hear Her Out: a Feminist Approach to Intellectual Property' (June 2020, Annual Research Conference, University of Wolverhampton, Wolverhampton, UK).

can no longer be ignored. It is argued here that IP law plays an important role in the artist's success and their opportunity to 'make a living' of their music. With so many record labels, festivals and radio stations perpetuating practices, which exclude women musicians, the responsibility of getting to know the system, from the position of an outsider, rests on women artists as individuals, or perhaps, bound in membership organisations.

The F-List for Music CIC will aim to collect the lived experience of women and gender non-binary musicians, in order to submit empirical data to calls as this one, or any related call on IP law.

2. Have you avoided making a claim or pursuing a case when protecting your or your business' IP? If so, please explain your reasons. For example, was it because of the costs involved?

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3. Which costs did you consider when deciding what action to take to protect your IP? For example, the cost of the time spent dealing with the infringement or the possibility of paying an expert?

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4. Were you aware of or did you consider the use of protective measures such as IP insurance? For example, BTE (before the event), ATE (after the event), legal expenses insurance, or free legal advice through services like the Citizens Advice Bureau or IP pro bono?

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5. Is there a reason you did not use protective measures such as IP insurance?

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Costs from defending action

1. What costs have you or your business incurred when defending an accusation of alleged infringement? When you respond, please include the type of IP right(s) you were accused of infringing. What was the outcome of the case?

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2. Could you provide some information on how you funded the case? For example, debt, using free legal services or insurance.

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1.2 Pro bono publico

1. Have you considered or used IP pro bono or similar services to help with the costs of seeking legal advice? If so, please provide details of your case (this can be anonymised) and your overall experience.

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2. Did anything prevent you using these services? Please provide details.

These services are not well known to individual artists on **The F-List for Music CIC**. The above general statement notwithstanding, the accessibility of these services should be better signposted, and in particular effort should be placed in linking the public institutions (such as the Intellectual Property Office) or the legal representatives, with individual artists. This, it is suggested here, is best done through an establishment of a new consortium, which would serve as an umbrella for all organisations, freelancers or individual musicians. An example of such an action is the WIPO for Creators Consortium,⁸ which aims to “objective of the Consortium is to raise awareness and increase knowledge of creators’ intellectual property rights and related processes required for creators to be fairly acknowledged and compensated for their work, regardless of their geographical, cultural or economic conditions.”⁹

As with all of the sections above, initial evidence¹⁰ suggests that IP law is at present unknown, or when known, complex and resultingly inaccessible to female musicians. This further links to the inaccessibility of enforcement mechanisms and expert legal scholars for (at least two) reasons: inaccessibility of information and the cost attached with the action. Initial pilot studies confirm that IP law and its enforcement are seen as highly complex, and prohibitive for female and gender non-binary artists.¹¹ Moreover, the rules on commercial exploitation of copyright and moral rights are seen as inadequate in the pursuit of creative autonomy of artists. Further research is needed, in particular a critical investigation of IP law through a feminist lens, in order to evaluate the effects of IP law on women and gender non-binary artists.

It is sometimes suggested that there is already sufficient support available to those, who do not have the funds to instruct expert legal teams on complex IP matters. If there are free services available however, it is suggested here that musicians will only learn of them through ‘word of mouth’ or by awareness raising campaigns through organisations such as the Incorporated Society of Musicians (ISM)¹² or now, newly established **The F-List for Music CIC**.

⁸ Collaboration between WIPO and Music Rights Awareness Foundation (reported on 10 August 2020): https://www.wipo.int/pressroom/en/articles/2020/article_0016.html.

⁹ The Charter: https://www.wipo.int/export/sites/www/copyright/en/management/charter_of_wipo_for_creators.pdf (accessed 30 October 2020).

¹⁰ Metka Potočnik, “Breaking Monopolies: a Feminist Approach to Intellectual Property Law in the Creative Industries,” (September 2019 – August 2020), <https://researchers.wlv.ac.uk/m.potocnik>.

¹¹ Potočnik (n7).

¹² <https://www.ism.org>.

3. If you are aware of the service but have not used it please explain why not? For example, were you unable to get a referral to the IP Bar pro bono service?

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1. Accessibility and effectiveness of judicial processes

1.1 Experience of the judicial system

1. Do you have experience of the judicial process? If you do, please provide details of your specific IP case. Please include whether you found the system easy to understand and use.

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2. Were you aware of the different routes available to take to pursue the alleged infringement?

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3. When your product or creation was being infringed, did you feel there was easy access to the court system? Was there easy access to information on which route would be the most suitable? Please explain what happened in your case.

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1.2 Preliminary and out of court solutions available

1. Have you stopped infringement of your rights without taking the infringer to court?

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2. Did you use an alternative dispute resolution (such as mediation or arbitration)? If so, please provide details of which service you used, your experience and the outcome.

At present the ADR services are not well known across the music sector. Although the IPO has a mediation programme advertised online,¹³ its reach is limited. There are plans to promote mediation among all members of **The F-List for Music CIC** for numerous reasons.¹⁴ First, the process is less adversarial and formal than litigation or arbitration. Second, the costs attached to mediation proceedings are expected to be considerably lower than costs of (international) arbitration or litigation. And finally, it is also recommended that the mediation of such disputes occurs under the auspices of professional bodies in the UK music industry, which would further allow for a readily available list of suitable music experts (musicology and the music business) who could take on the role of a mediator.

¹³ <https://www.gov.uk/guidance/intellectual-property-mediation>.

¹⁴ This proposal is being discussed on the research into ADR in the music industry: Metka Potočnik, 'Mediation and Arbitration of Music Disputes: an Alternative Forum for Transnational Disputes' in Ann Harrison and Tony Rigg (eds), *The Present and Future of Music Law* (Bloomsbury, forthcoming 2020/2021).

3. How did you find out what route to take to enforcement?

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4. What was your experience of using the chosen method?

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2. Suggested remedies

2.1 Improvements to processes at Small Claims Track (SCT) at the Intellectual Property Enterprise Court (IPEC)

1. Have you used the small claims track? If you have, please describe what happened in your case? Did you find the available guidance easy to understand without the need to seek legal advice?

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2. Have you looked into using the small claims track and decided not to use it? If so please provide details of what happened and your reason for not using the service.

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3. Would providing examples of cases have helped when considering whether to use the small claims track and your understanding of the process?

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4. If you have used the small claims track would you use it again for a future infringement case? Please explain your reasons for your decision not/to use the small claims track again?

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5. Have you had experience of using the CE file application service to submit an IP claim? If so, please provide details of your experience, including whether it was submitted to one of the regional courts hearing SCT cases.

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2.2 Introduction of a statutory damages regime

1. Have you had a case that resulted in damages being awarded? If You have, please explain on what basis the damages were awarded?

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2. Do you think the introduction of a system such as statutory damages would help reduce barriers (if you believe there are any) for pursuing or defending legal action?

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3. Do you consider that this could have a negative impact on the system? For example, an increase in false claims?

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4. Do you think that there is a way that any negative impact of the implementation of statutory damages could be reduced? For example, the inclusion of a clause.

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Additional: Inclusion of registered designs within the scope of the small claims track (SCT) of the Intellectual Property Enterprise Court (IPEC).

1. Have you previously used the small claims track to enforce an unregistered design? If so, please provide details of your experience.

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2. Have you been involved in a dispute over a registered design that would have been suitable to be heard in the IPEC small claims track? If so, please provide details of your experience and the approximate damages sought.

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3. Have the costs associated with legal action in IPEC's multi-track prevented you from enforcing your registered designs? If so, please provide details and costs.

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4. If registered design cases could be heard in the small claims track, would you use this route to enforce your design? Why would you use/not use it?

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5. Do you have any concerns about including registered designs in the small claims track? If so, what are they?

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6. Do you think there would be any impact on the court system in the UK if registered design cases were heard in the IPEC small claims track? If so, what would that be?

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Please include any additional comments or examples, if you have them.

We have demonstrated in this document elsewhere, that the commercial music industry is not a welcoming place for many female musicians. Female musicians face many barriers men do not, not least in that they very often earn far less than their male counterparts¹⁵ and this can prematurely end their careers in music or means they must seek income elsewhere. All musicians have, over the past two decades in the age of digital music, struggled to enforce their IP rights especially on platforms which do not have good systems for independent musicians such as YouTube, but this impacts female musicians significantly more. Having an easily accessible and affordable IP infringement system that works for them, could form an essential part of their ability to continue to make a living from their music.

¹⁵ Bain (n2).

The F-List for Music CIC is of the opinion that collecting further empirical evidence from women and gender minority artists, inquiring as to their experience of the IP system and enforcement of IP rights, is instrumental to an IP system, which promotes and protects all groups of creatives, which are currently underrepresented. In order for such collection to be informative and instructive, it is suggested time and funding is needed to support systemic, and large-scale collection. **The F-List for Music CIC** is aiming to conduct such research in the coming months, with the support of the right strategic and research partners.

Please return completed responses to enforcement@ipo.gov.uk.