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## Music & Media

### So Near Yet So Far - Procul Harum Claim Upheld But Financial Element Denied

The song “A Whiter Shade Of Pale” by Procul Harum (“the Song”) probably needs no introduction to the vast majority if not all the readers of this article. When first released as a single on 12 May 1967, it reached number one in the UK singles chart where it remained for several weeks. It reached number five in the American charts, selling over a million copies. Worldwide, over six million copies were sold. On 26 March 1968, it was declared to be the International Song of the Year at the thirteenth Ivor Novello Awards. In 2004, Rolling Stone magazine placed it at number 57 in its “500 Greatest Songs Of All Time”. There are over 770 versions of the Song performed by other groups.

#### The facts

The case concerned the ownership of the musical copyright in the Song as recorded by Procul Harum for its first release in May 1967. The song had in fact already been written by the time the band came to record it. The lyrics had been written by Keith Reid (not a member of the band) with the music having been written by the First Defendant, Gary Brooker. At the time, the band had not even been formed. In 1966, Mr Reid had been introduced to Mr Brooker by a mutual friend. This has led to them working together, as a result of which, the Song was written. Mr Reid and Mr Brooker had then decided to try to form a band. They placed an advertisement in Melody Maker for the week ending Saturday 28 January 1967 seeking a lead guitar player, a bass guitar player and an organist. Mr Fisher then placed an advertisement in Melody Maker for the week ending Saturday 25 February 1967, advertising his services as an Hammond organist with a view to joining a professional group. Mr Reid answered Mr Fisher’s advertisement, which resulted in Mr Fisher joining the fledgling band.

The band immediately began to rehearse the material Mr Reid and Mr Brooker had written, including the Song. The evidence overall was that each band member was given a large amount of free rein to improvise their respective parts. Mr Brooker’s evidence was that the version of the Song as recorded was essentially the same as the version that he had originally written with Mr Reid. In contrast to that, Mr Fisher’s evidence was that he had spent some time at home before the recording session composing what he described as “a definitive solo”. Mr Reid and Mr Brooker were credited as the writers of the Song and accounted to on that basis by the various collection societies. That was how things were left for the best part of 40 years. Until, that is, 19 March 2004, when Mr Fisher’s (then) solicitors raised Mr Fisher’s claim to “a writer’s share”.

Mr Fisher’s silence over that period is all the more remarkable since:

- He remained a member of the band until August 1969.
- Thereafter and from time to time he took part with Mr Brooker (and with other current and ex-members of the band, which formally disbanded in 1977) in concert tours.
- The Song as recorded was one of the tracks on the 1997 re-release of the band’s first album (it had not been on the original album)
- Mr Fisher was frequently in dispute with Mr Brooker and from time to time was, with Mr Brooker, a Defendant to proceedings brought by others.
- It is clear from interviews given by Mr Fisher over the years that Mr Fisher regarded himself as the composer of the organ part and that the absence of any formal recognition of this was a continuing source of grievance.

## The Judge's decision

The first question that the Judge had to decide was whether, after such a long passage of time, it was possible to have a fair trial. There were certainly a number of things that appeared to make a fair trial impossible:

- The original demo recording made before Mr Fisher's involvement had been lost.
- Certain witnesses who should otherwise have been able to give evidence had died.

The Judge homed in on the fact that the key issue in the case affected by Mr Fisher's delay was who composed the distinctive eight bar melody of the organ solo. There were only two contenders – Mr Brooker and Mr Fisher. The Judge concluded that, with both witnesses in Court giving evidence, the passage of so many years had not rendered a fair trial impossible.

The Judge then found it to be “abundantly clear” to him that Mr Fisher's organ solo as heard in the first eight bars and as repeated is sufficiently different from what Mr Brooker had composed on the piano to qualify in law “by a wide margin” as an original contribution to the recorded version of the Song with the result that Mr Fisher qualified to be regarded as a joint author of the recorded version of the Song.

The Judge then had to consider whether various technical legal points (“estoppel”, “acquiescence” and “laches”) should prevent Mr Fisher's claim succeeding. The points argued in Mr Brooker's favour were that:

- Mr Fisher had failed to assert his claim before the recorded version of the Song was released on 12 May 1967.
- Mr Fisher must have decided in 1967 not to pursue his claim but to remain with and benefit from being a member of the band.
- The circumstances in which Mr Fisher left the band in 1969 (in particular, in return for giving up his entitlement to any future **recording** royalties, Mr Fisher was released from some two or three thousand US dollars (given the passage of time, the evidence on this point was inconclusive)).
- Mr Brooker's efforts in promoting the band's repertoire including the recorded version of the Song for 40 years or so.
- Mr Fisher's long delay in asserting his claims.

The Judge was heavily influenced by the fact that Mr Brooker would not suffer any detriment (other than a reduction in his income from the recorded version of the Song) if Mr Fisher's claim were allowed to succeed despite the very long passage of time. On the contrary, the Judge found that the above factors made little real difference – for example, Mr Brooker would have continued to promote the band's repertoire regardless. Indeed, rather than suffering any detriment, the Judge found that Mr Brooker had in fact received a “windfall” for 40 years or so in that Mr Brooker had been receiving a far greater income that would have been the case had Mr Fisher brought his claim at the outset. The Judge said:

“On the facts of this case, where it is difficult to discern any or any appreciable detriment, it would in my judgment be a wholly extravagant and unjust result to deprive Mr Fisher for the remainder of his life and 70 years thereafter of his interest in the Work's musical copyright on the basis of the estoppels that have been pleaded, the more so when for almost 40 years the Defendants have enjoyed the fruits of that copyright interest without the need to account for any part of them to Mr Fisher.”

The Judge therefore allowed Mr Fisher's claim and assessed the value of Mr Fisher's contribution to the music at a 40% share.

Mr Fisher had “only” claimed back payment for 6 years, in accordance with general legal principles which prevent Claimants claiming back beyond this period of time for policy reasons. The Judge stated that “Mr Fisher has sat back and permitted the two [collection] societies to account to the Defendants for royalties in respect of the musical copyright in the Work for nearly 40 years” and that, by doing so, Mr Fisher “must be taken to have gratuitously licensed the exploitation of his copyright”. The Judge therefore refused to allow Mr Fisher to claim back payment for 6 years but only until his present solicitors sent their letter before action in April 2005.

## The Appeal

The main judgment by the three Court of Appeal Judges was given by Lord Justice Mummery. He described the trial Judge as “musically literate” and the trial Judge's judgment as having been “excellent”. He also found that the trial Judge had demonstrated that it was indeed possible to have a fair trial by making clear findings of fact despite the passage of time. Despite that, however, Lord Justice Mummery then took it upon himself when writing his judgment (the point not having been argued) to find that, although Mr Fisher had indeed written 40% of the recorded version of the Song, it would be unconscionable to allow Mr Fisher the usual remedies associated with a co-owner of copyright (principally the right to an injunction)

because of Mr Fisher's "excessive and inexcusable delay in asserting his claim to title to a joint interest in the Work."

## Comment

The trial Judge gave two reasons for granting the Defendants permission to appeal to the Court of Appeal:

1. The unusual nature of the claim.
2. The insistence of the defeated Defendants that the decision would have a widespread and dire effect on the way that the music industry has operated in the past.

It is not known precisely what the Defendants meant by 2 but it has been suggested that if the trial Judge's decision had been allowed to stand then this would have opened the floodgates for every session musician or band member who has ever played on a record to bring a claim for ownership.

The fact that the Court of Appeal has allowed the Defendants' appeal goes quite some way to closing the floodgates just after they had been opened. The Defendants may not, however, be out of the woods just yet. It remains to be seen whether Mr Fisher will apply for permission to appeal to the highest Court in the land, the House of Lords and, if he does, whether the House of Lords will grant him permission to appeal. It is submitted that Mr Fisher should be granted permission to appeal and that Mr Fisher's appeal should be allowed. The reasons for this are set out in the judgment of the dissenting Court of Appeal judge, Mr Justice David Richards. He noted that Mr Fisher's legal team had made it clear to the trial Judge that Mr Fisher did not wish to stop the exploitation of the recorded version of the Song (indeed, Mr Fisher would have to have quite a vindictive streak to want to do so as this would effectively have amounted to him cutting off his nose to spite his face). Mr Justice David Richards stated that:

"Where the Defendant cannot show any detriment resulting from the delay, it is not on existing principles unconscionable for the Claimant to assert his right for the future. In my judgment this is justifiable: a property right should not in effect be extinguished without either consideration or detriment, although delay amounting to laches may properly be a bar to equitable remedies such as an injunction. Nor do I consider the result to be unjust. Where the Defendants retain all past earnings and have suffered no detriment from Mr Fisher's delay, there is in my view no injustice if his interest in the copyright is now established for the future."

If, as the Defendants suggest, allowing Mr Fisher's claim to succeed will have a dire result on the way the music has operated in the past, then that may be no bad thing. There must be many similar circumstances where for one reason or another writers have been (or rather, are being) deprived of the fruits of their labours. If this case gives other writers the courage to pursue such claims then that cannot be a bad thing. Equally, the case should serve us all as an example of the importance of executing binding legal documents regulating the various writers' shares of songs. The dire consequence would be if "try on" claims came crawling out of the woodwork. It would, however, be a brave Claimant who used Mr Fisher's case as a means to try to hold credited writers of songs (and their publishers) to ransom by bringing tenuous or even falsified claims. The Court has always had the means to weed out such claims so Mr Fisher's claim should not make any difference in that respect.

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