

12 Views of music publishers

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12.1. We received views from the trade association, the MPA, and from individual publishers, including several who are represented on the General Council of the PRS.

Music Publishers' Association

12.2. The MPA told us that it had about 175 members, excluding associated, affiliated and subsidiary companies. The members were of many different types and sizes, from the music publishing components of multinational groups to very small independent members. The MPA (like the PRS) is a company limited by guarantee. It was formed in 1881. Its affairs are managed by an elected Council comprising a President, Vice-President and 22 other members, of whom 7 are standard publishers and 15 popular publishers. These categories are defined in the Articles of Association as publishers whose catalogues contain a majority respectively of serious or of light or popular music.

12.3. Members of the MPA made a significant contribution to the economy. The recent report by British Invisibles (see Appendix 3.1), which the MPA had been responsible for initiating, showed that in 1993 around £110 million was received by music publishers direct from overseas sources in invisible earnings for the exploitation of copyright music originating from the UK. This excluded money paid through the PRS and the MCPS. A proportion of overseas income would be paid by the publisher to the writer: it was not possible to specify this proportion, which depended on each individual contract.

12.4. Contracts took many different forms, but generally provided that the copyright in the relevant musical work or works was assigned to or exclusively licensed to or administered by the publisher, subject to the rights assigned to the PRS. The contract would specify how royalties arising from the exercise of the performing right were to be divided between the creator and the publisher. The PRS would distribute royalties on this agreed basis, although it would never distribute less than 50 per cent to the creators.

12.5. Almost all MPA members were also members of the PRS; they accounted for about 90 per cent of the earnings of all publisher members of the PRS. The reason for the apparent discrepancy between the number of MPA members (175) and the number of publisher members of the PRS (2,400) was that the latter counted associated, affiliated and subsidiary companies separately. Eight members of the MPA Council were also members of the PRS General Council. Income from the PRS formed a substantial part of the total income of music publishers and they were heavily dependent on the PRS to ensure that the administration of the performing right was carried out properly and effectively. What they wanted were high-quality commercial

practices, efficiency, value for money, and a user-friendly service which licensed accurately and collected and paid speedily. These objectives were in the interests of all PRS members as well as licensees.

12.6. The MPA said that the views it expressed did not necessarily represent the views of each individual member, several of whom would be making their own submissions.

12.7. Collective licensing had been supported by, among others, the UK Government, the institutions of the EC, and the MMC. It was not an end in itself, nor was it necessary in all areas. But in many cases the burden of monitoring, licensing and collecting royalties for individual uses was either too great for individual rights owners to carry out, or should be more cost-effective if carried out collectively. With advances of technology giving rise to the possibility of instantaneous supply of music through superhighways, collective licensing was unlikely to decrease, provided it could be carried out effectively, efficiently, and in accordance with the needs and wishes of the Society's members. In areas where collective licensing was appropriate, the MPA supported the existence of strong performing and mechanical rights bodies focusing on their core functions.

12.8. The MPA generally supported the recommendations of the Clarke report but (writing in March 1995) regretted that they had still not been put into effect. Commenting on specific recommendations, the MPA said that while its Council was not unanimous on the point, a substantial proportion thought the report was correct in recommending that a maximum of 16 members of the General Council was appropriate for an operating company such as the PRS. On the question whether an electoral college system should be introduced, with publishers electing publishers and writers electing writers (not recommended by Clarke since it might encourage a factional approach), the MPA was again not unanimous; a strong section believed factionalism was as much of a problem even without an electoral college. This was because it left it open to writers to elect a music publisher who was considered by other music publishers not to be the right candidate. So long as there was separate writer/publisher representation on the Council, it was argued that the representatives should be chosen by their respective communities. Once elected, it was for each Council member, whether writer or publisher, to ensure that he or she represented the common interests of both.

12.9. The Clarke report had described the maintenance of good working relationships between writers and publishers, even though they frequently had divergent interests, as one of the finest achievements of the PRS. The MPA enjoyed extremely good working relationships with the writers' guilds. However, writer/publisher tensions appeared to be of more significance within at least part of the General Council. As the Clarke report had gone on to recognize, 'recently this vulnerable consensus had appeared more threatened'. There was a strong perception within the MPA that the breakdown of the negotiations between the PRS and the MCPS had been in part fuelled by, and had also maintained, those tensions.

12.10. The role of the Chairman of the PRS was crucial in maintaining harmony between the various interests. The roles of Chairman and Chief Executive should always be kept entirely distinct and it was vital for the future that the roles were properly defined and separated, so that the Chairman could concentrate on his or her non-partisan functions.

12.11. The MPA supported the recommendation that a structure of small Board committees be established to focus on different revenue streams and functional areas. The General Council's wish to keep control of the decision-making process had been understandable at the time of the PROMS problems, but there were concerns at the length of time it appeared to take, and the difficulties which appeared to be involved, in reaching decisions. An illustration was the Music Copyright Reform Group, much of whose work in the last two years had been frustrated by the PRS's failure to be able to agree on matters of policy as well as detail.

12.12. After describing the practice respectively of the PRS and the MCPS, the MPA said that whether exclusivity was vested in a collecting society by way of assignment or by way of appointment as exclusive agent might not be relevant in practical terms, although there were those who would say that ownership of the rights by the collecting society had the danger of encouraging a belief by the collecting society that it was more important than its members. Others would emphasize that any such dangers could be countered by a strong Board of Directors and that there were legal advantages to the collecting society in owning the rights. The question whether collecting societies needed to operate on the basis of exclusivity was contentious, particularly in the light of the current litigation between U2 and the PRS. Not all members of the MPA were agreed on the answer. The principal advantage of granting exclusivity to the licensing body was that it helped the music creator and publisher to resist user pressure to grant licences on unfair terms and conditions.

12.13. A good example of the pressure which could be put on creators and publishers where they were able to grant licences direct was the notorious 'controlled composition' clause which operated principally in North America and required the artist as songwriter to allow a record company to use his or her songs at rates lower than the normal statutory rate, often without any provision for increase in proportion to the price of the records.

12.14. In the MPA's view, exclusivity would by and large cease to be an issue for members of the PRS if the Society operated efficiently, collecting and distributing royalties quickly at the lowest possible commission. Members' confidence in allowing the Society to administer exclusive rights could also be encouraged by its acceptance of contractual obligations towards them.

12.15. Development of IT at the PRS had been essentially by computerizing discrete manual systems. The failure of PROMS had been a serious blow. Collaboration between the PRS and the MCPS was the most positive way forward for both societies, and the MPA deplored the fact that no agreement had been reached. Ultimately both societies served the same common interest of creators and publishers. The MPA continued to find it regrettable that the PRS should apparently take the view that developing existing systems in the context of a company jointly owned and controlled by the PRS and the MCPS involved more risk than using third party contractors to develop new systems. The MPA welcomed the continued co-operation in such areas as joint registration of works, and acknowledged that both societies had expressed the wish that it would be possible to revisit the subject of collaboration at a later stage. However, this was insufficient: the joint venture service company should be established without delay.

12.16. While PRS administration costs as a percentage of gross revenue had declined, in absolute terms they still showed a slight increase. Furthermore the PRS did not deduct administration costs from royalties received from affiliated societies in the USA or the EC, with the result that a higher percentage of costs was borne by UK domestic royalties. The Clarke report had referred to 'layers and layers of procedures and practices of breathtaking complexity'. While the MPA applauded the PRS's recognition that action needed to be taken, it believed the development of the joint service company with the MCPS was imperative. It would enable both societies to improve their efficiency and cost-effectiveness.

12.17. Allegations against the Society mentioned when the MMC inquiry was announced, of inadequate representation, unfavourable distribution policies and inadequate royalty payments for composers of less popular forms of music, were incorrect. Given the fact that the PRS was the only performing right society in the UK, the MPA accepted that some degree of subsidy was inevitable in certain cases, but it would be entirely unfair for those who experienced less use of their music to have a disproportionate share in revenues, or a disproportionate role in the Society's constitution. The LMDP, whose aims the MPA had supported, had its imperfections and had been modified. There was a case for saying that these modifications had gone too far in accommodating writers whose works did not enjoy the same degree of usage as others, but the MPA accepted that it was difficult to find a totally satisfactory, fair and cost-effective policy. While the MPA supported attempts to find methods of overcoming imperfections in the system, this must not override the need for efficiency and cost-effectiveness in the interests of all the members.

12.18. About 85 per cent of the publisher's share of overseas royalties was paid by the local society to the local sub-publisher, and not remitted back through the PRS. However, the reciprocal agreements between the PRS and the local societies still applied to those royalties, and it was the PRS's responsibility to ensure that the overseas collecting societies complied with their obligations. MPA members were extremely critical of the policies and practices of many overseas performing right societies, particularly those on the continent of Europe. Common complaints were the lack of data identifying works and uses of those works, delays in payment, and the fact that 'social and cultural' payments were deducted which by and large benefited only local writers and publishers. These deductions were substantial: examination of the 1993 accounts for France, Germany, the Netherlands and Sweden alone showed 'social and cultural' deductions of nearly £40 million. The MPA supported the PRS's stated objectives of achieving transparency and exchange of accurate data, an end to bias in favour of local repertoires, elimination of non-identification of works, faster payments, and lower deductions. This must be a high priority for the PRS in the immediate future.

12.19. The MPA was in favour of regular meetings between the PRS and representatives of major publishers and leading writers, and with their associations. Good communication between a collecting society and its members was essential. There was room for improvement in this area. In addition to the constitutional and other changes already envisaged, the PRS must consider what was required to ensure that it properly reflected economic strengths within the market while continuing to take account of the interests of other

sections of the writer and publisher communities. The PRS was a business serving the needs of its members, not a charity.

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12.20. This respondent was an important music publisher in the UK, and, through its affiliates, in all major territories. It was active in all areas and genres of music from classical to pop. It offered a wide range of services to writers, including artistic and financial support, direct fee collection from users and (via its international sub-publishing network) from overseas collecting societies, auditing users' and collecting societies' returns, and generally promoting the writer's career and his or her songs by encouraging maximum exploitation of musical works on recordings, in print and as soundtracks to film and television productions and advertisements. A significant percentage of all PRS domestic income was distributed to the company and to writers whose works it published.

12.21. The company supported the principle of collective licensing of performing rights which benefited both owners and users and was recognized in all major jurisdictions as efficient and beneficial. The factors which had led the MMC to endorse the principle of collective licensing in their report on PPL¹ were equally compelling in relation to performing rights. However, collective licensing was not in all instances the only practicable mechanism, as witness 'grand rights' and the operation of Article 7(f) in the PRS Articles of Association. The company believed that the categories of use where direct licensing was permitted could usefully be extended and that direct licensing could exist side by side with collective licensing. Some pop concerts might involve only a limited number of rights owners, in which case the negotiation of bilateral agreements might be feasible. Large users such as the BBC and other major radio and television broadcasters might be able to enter bilateral agreements with some major rights owners without much difficulty and without risk of broadcasters exerting excessive power over any rights owners. MCPS practice in regard to music videos, and international experience, appeared to demonstrate that an assignment or exclusive licence of all classes of a type of right was not a pre-requisite for the efficient operation of a collective licensing body. Overseas experience demonstrated that competing licensing bodies could satisfactorily co-exist.

12.22. The PRS had excessively complicated administrative arrangements and antiquated procedures and systems, whether for copyright notification or collection and distribution of revenues. This had led to excessive and increasing costs, primarily in staff, most of which were involved in the largely manual processes associated with these arrangements. There was clear scope for improvement in cost-effectiveness, cost allocation and transparency. Costs were too high both overall and in relation to individual income streams, accounting in 1993 for 30.62 per cent of all UK public performance income and 19.55 per cent of broadcasting revenue, the latter being extremely high in relation to costs of collection and distribution. By contrast the overall percentage commission charged by the MCPS in 1993 was only 7 per cent. The difference between the administration and licensing costs of the MCPS and the PRS seemed disproportionate to the differences in their work. The most important means of reducing costs would have been for the PRS and the MCPS to merge their overlapping administrative systems into a joint service company. It was a matter of regret that negotiations to this end had not succeeded. Co-operation with PPL in areas of overlap (eg licensing inspectors) could also produce significant savings. Valuable lessons could be learned from overseas societies, and in particular from those in territories where mechanical and performing rights were jointly administered.

12.23. The PRS should establish an accurate database of the works it administered, make faster payments of royalties, simplify its complex tariff structure and costly and inefficient systems of collection and distribution, introduce more transparent systems of management and operation, invest in effective new technology to replace its antiquated manual system, explore all avenues for simplification of enforcement procedure, and introduce a flat rate commission on revenue such as that in force at the MCPS. Broadcasters should be given incentives to provide machine-readable logs. Annual costs could be reduced by £10 to £15 million over a five-year period.

12.24. The PRS's distribution policies had historically rewarded less successful writers and those of less popular forms of music disproportionately to their contribution to the income of the Society. Allocation

*Details omitted. See note on page iv.

¹ *Collective licensing: a report on certain practices in the collective licensing of public performance and broadcasting rights in sound recordings*, HMSO, Cm 530, December 1988.

procedure had at times been haphazard and even quixotic (eg UPA). An annual membership subscription should be introduced and in order to discourage the registration of works with no earning potential, the administration of which imposed a cost burden on the PRS, a reasonable charge should be made for notification of new works. The PRS compared poorly with the MCPS in respect of the speed and regularity of distribution of income.

12.25. The company had no objection to fairly compensating writers and publishers of works whose performance had not been logged under existing sampling systems. However, the PRS's current scheme was irrational because it presumed that works had been performed without requiring any evidence as to UK exploitation during the relevant distribution period, whereas it was an accepted fact of the industry that the overwhelming majority of works were rarely, if ever, performed. A claims procedure would place the burden of proof on writers and publishers and would assist in achieving the goal of more equitable distributions.

12.26. Unlogged performances were only part of the cross-subsidization. Income in general was distributed in a way which discriminated against successful writers and music publishers and the inappropriate allocation of costs had a similar effect. A collecting society existed to license, collect, and distribute efficiently, not for wider social purposes. The PRS should be operated on a non-cross-subsidizing, non-redistributive, basis. The Society's failure to appreciate this appeared to be in part psychologically attributable to the fact that it *owned* the performing right. If it were quite clear that it was there simply as the representative of writers and publishers it might be less tempted to view itself as having an independent existence apart from its members. It was also relevant to recall that a small percentage of the membership generated most of the income.

12.27. It might be practicable for certain publishers to license direct major radio and television stations and live performances. An advantage of doing so would be that individual circumstances could be taken into account, for example by stipulating a higher royalty after initial production costs had been recovered, as was sometimes done for musical shows.

12.28. The company provided information on the relative costs of collecting societies in the UK and other countries. It concluded that these figures supported its contention that the PRS's costs were excessively high. The PRS was in a privileged position because it was the only vehicle for exploitation of the performance right. Hitherto this had shielded it from the pressures to improve efficiency to which non-monopolistic organizations were subject.

12.29. The effective commission on broadcasting revenue should be reduced from 20 to 10 per cent over a three-year period and on public performance revenue from 30 to 15 per cent over the same period. This would force the PRS to make changes to its cost base but would not in itself be sufficient. A period of grace of two to three years would allow the PRS to put its house in order. Competitive forces should then be allowed to act by enabling rights owners to withdraw their rights in all or in part from the PRS and make such other arrangements as they saw fit, including setting up another collecting society, licensing other societies to perform the tasks currently performed by the PRS, or licensing certain types of users direct, though it was unlikely that they would in fact do so if the PRS had used the period of grace effectively. In any event, exclusivity was not indispensable to enable the PRS to carry out its objectives, and should be abolished unless indispensability could be established as would be required by Article 85(3)(a) of the EEC Treaty.

12.30. The introduction of non-exclusivity would require a number of major changes to the way in which the PRS currently conducted its affairs, but would not appear to give rise to any insurmountable difficulties. It would enhance flexibility and choice for rights owners and users and would provide the incentive for the PRS to reform its methods of operation. Such a change would also make a positive contribution to the public interest, given that it would advance the objectives recognized by section 84(1) of the Fair Trading Act 1973.

12.31. Both independent consultants employed by the PRS and the MCPS had recommended the setting up of a joint service company and both had identified very substantial savings that would result. Changing business requirements, including the introduction of electronic data interchange, were new and important factors. The position adopted by the MCPS, that successful execution of the project required a wholehearted commitment from both sides, was reasonable. It was extremely regrettable that the PRS declined to accept the necessary commitment, particularly in view of the absence, then and now, of any other viable options.

12.32. Criticisms were made of what were seen as the PRS's generous conditions of employment, the number of support staff and accommodation costs.

12.33. Invited to comment on possible remedies the MMC had in mind to consider, the publisher described them as weak. It was difficult to see how they could be incorporated into orders and undertakings and even if they were all implemented their effect on the PRS's performance would be marginal. So long as exclusivity provisions having substantially the same ambit as those currently imposed by the PRS continued to operate, there would be no opportunity for market forces to do their work and therefore no real source of pressure for improvement. The publisher was also very concerned at the absence of any mention of ServiceCo (the proposed joint operation between the PRS and the MCPS). Like many other PRS members, it felt that the project held much potential to reduce costs and improve efficiency. At the very least, this very important matter should be properly explained to members and put to a vote.

12.34. It was the suggested recommendation on the assignment of rights which fell very seriously short of what was required. There was no reason why members who wished to deal direct with users should be prevented from doing so by restrictions imposed by the PRS. Directly competing licensing societies could satisfactorily co-exist, as US experience showed, and direct licensing could exist side by side with the collective licensing structure and would not destroy it. There were precedents in the UK (direct licensing of grand rights and video rights) and parallels elsewhere, including Benelux, Denmark, Ireland, Italy and Portugal. Broadcasters should be included: it would be easier to license them directly than to license live performances.

12.35. Experience in the USA also showed that any fears that members' collective bargaining power would be reduced were groundless. Nor should the PRS's administration costs increase, but if they did this would expose the PRS to pressure of an entirely normal kind. It had a great deal of room for manoeuvre in the area of costs. In short, the rules should be amended so as to enable members to license direct to users all classes of rights, as the members saw fit.

12.36. The concept of 'bundling' was familiar in competition law, and it was the bundle that was objectionable—a classic case of a monopolist refusing to allow its services to be used in part. With regard to the supposed impact on tariffs, it was a strange argument to put to the MMC that a monopoly should be preserved because it kept prices up. Restrictions of competition might sometimes be justified by market imperfections, but where was the imperfection in this case? No reason had been offered for supposing that allowing market forces to operate would lead to a worse result or to any adverse impact on the public interest. It was the *possibility* of competition that was crucially important: if the PRS knew that it could no longer 'bundle', it would have an incentive to get its house in order. Once it understood that it no longer had exclusive rights, and had to achieve a fixed commission rate, other matters, such as company organization, would fall into place. The thrust of the publisher's argument was to make changes that would improve the yield for *all* members.

12.37. The other possible remedies were supported, subject to some tightening up. If the MMC's eventual conclusion was that the status quo as regards exclusivity should be broadly maintained, it was all the more essential that target percentages be imposed (see paragraph 12.22). A fixed commission on revenues provided an indispensable discipline. A specific overall rate, or several fixed rates, should be recommended, to be implemented at the very least by the end of a two- to three-year period. Suggestions had already been made for changes that would improve the accuracy, transparency and speed of distribution of funds. It would be of little use to have a census without having a system in place to utilize the results, and without the means of keeping continuously abreast of a dynamic situation. With regard to IT, seven years after new computer systems were first mooted no significant changes had been made. ServiceCo carried with it great potential for improvement without the high degree of risk associated with third party 'outside' projects. The MMC should recommend that the PRS explore joint initiatives with the MCPS and PPL.

PolyGram and U2

12.38. Polygram International Music Publishing Ltd said that its music publishing business in the UK now comprised PolyGram Music Publishing Ltd, Dick James Music Ltd, and Island Music Ltd. Each of these companies, together with PolyGram International, was a member of the PRS. PolyGram supported the principle of collective licensing but believed the activities of the PRS had to be tested against those standards of equity and fairness which any collective licensing body must satisfy in order to comply with the established principles of competition law which had been accepted in the consistent practice and case law of the MMC,

the European Commission and the ECJ. The European Court had gone so far as to suggest in the SABAM case that any restriction imposed upon members of collecting societies must be 'indispensable'.

12.39. The PRS's failure to discharge these burdens did not arise from wilful misfeasance on the part of its management, but from its enjoyment of what Sir John Hicks had described as 'the greatest profit of monopoly, a quiet life', free from competitive pressures. Price competition had not operated effectively or at all because the PRS had not been constrained by competitive forces to reduce its costs to the lowest possible level. Many of the productive, allocative and administrative inefficiencies of the PRS's operations had been acknowledged in Professor Clarke's report on corporate governance. The failure of negotiations with the MCPS was extremely regrettable.

12.40. Members were required to assign all performing rights for all parts of the world, but had no influence over how their rights were exercised. There was no positive obligation in the membership contract for the PRS to take any action in respect of those rights. However, the PRS could not abdicate its responsibility to supervise and scrutinize the manner in which these rights were exercised, whether by itself on its own account in the UK or through sister societies outside the UK.

12.41. It was being argued in the U2 proceedings (with which PolyGram was associated as the sixth plaintiff) that the scope of the assignment of rights required of all members was disproportionate and inequitable (see paragraphs 12.46 to 12.53). Particularly in relation to live performance rights, there was no possible basis upon which such a tie, imposed irrespective of the ability or wish of individual members to administer works on their own account, could be categorized as 'absolutely necessary' (the words used in relevant judgments of the European Court), or as necessary at all. Other collecting societies, such as ASCAP and BMI in the USA, did not require absolute assignment of all rights in this manner.

12.42. International collection and distribution of revenues was characterized by a total lack of accountability, transparency and control. There was no way of knowing whether the assigned rights were being effectively exercised in terms of maximizing income for authors, composers and publishers, or of assessing whether, as a result of negligence or otherwise, PRS members were not receiving as much income as they should receive. The PRS did not give copyright details to sister societies of a sufficient quality so as to be capable of being used by them. No accounts were provided of what revenues were collected by the individual collecting societies, what deductions had been made, or what were the costs of administration. The fact that it might be difficult to ascertain this information or establish a system for doing so was not, in competition law terms, an excuse; a monopolist's abdication of such an obligation was abusive, unfair and inequitable and could not be justified.

12.43. Most performing right societies paid each other twice a year for each income type. There was no reason why the PRS could not account more quickly to its members (and why the sister societies could not account more quickly to the PRS) in accordance with normal commercial usage in similar transactions. It was in any event impossible for PRS members to ascertain whether the distributions, when made, represented semi-annual accounting (as opposed to some other period). Cumulative delays at each stage could add up to 18 months (for a UK performance) or nearly twice as long (for an overseas performance).

12.44. Costs of collection (though unauditably by the recipients) appeared to be unacceptably high. A simple comparison between societies of costs as a percentage of revenue was inadequate, because of the variation of mix of income, total turnover, repertoire represented, tariffs for users, size of membership and extent of rights represented. Since 1986 PRS costs had never been reduced in cash terms, although they might have fluctuated in percentage terms, and had increased by approximately 28 per cent more than the RPI. Despite frequent protestations by the PRS that it was reviewing its costs structure, results had yet to materialize. All EC societies other than the PRS utilized receipts from the copyrights of PRS members for national social and cultural activities which offered no benefit to PRS members. The PRS had failed to prevent such discounts being applied or to insist on reciprocity.

12.45. The structure and operation of the PRS were such that it had become impervious to change. The voting structure favoured the maintenance of the status quo and did not represent the commercial interest or commercial importance of individual members.

12.46. Invited to comment on possible remedies the MMC were minded to consider, PolyGram and U2 said in a joint response that the PRS's views on exclusivity seemed to be based on a fundamental misapprehension of the role of a collecting society. Members did not assign their rights in order to enable the PRS to

function independently of their interests, but rather to undertake in a commercially effective way those activities they wished it to undertake. The PRS's position was a veiled attempt to support the untenable proposition that the less successful should be subsidized by the more successful.

12.47. It was incorrect to claim that exclusive assignment was necessary because of the enforcement difficulties that would otherwise arise, as the experience of the MCPS showed. It did not take an exclusive assignment but acted as sole agent for its members. Clause 11 of the MCPS membership agreement set out procedures for enforcement and there was no reason why the PRS should not adopt the same approach. Under its contracts of reciprocal representation with foreign societies, the PRS already granted and received public performance rights on a non-exclusive basis.

12.48. The PRS's financial arguments were unconvincing. Exclusivity had not enabled it to operate efficiently and cost-effectively, as was illustrated by a table recently provided to members which set out expense recovery rates exceeding 30 per cent and in a number of cases exceeding 45 per cent. The table also showed that live and non-live performances were severable and were already subdivided by the PRS. There was every reason to believe that if the PRS were to allow members to exploit and administer certain rights themselves, this would result in a cost saving in respect of the monitoring, collection and administration of those rights.

12.49. The fundamental starting point for any system of collective licensing was that members should be able to decide if, and the manner in which, they wished to enforce their copyrights. As a matter of practicality, it might be easier for the PRS to enforce the relevant rights for certain members or in respect of certain venues. However, there was no objective or proportionate *necessity* for the PRS to preclude the copyright owner from having the choice to enforce his copyright in his own name.

12.50. Works performed, but not composed, by members of U2 would predominantly be part of the planned performance repertoire, of which they formed a very small part (invariably less than 10 per cent). Such works were performed spontaneously only on rare occasions. There would be no difficulty in ensuring proper remuneration for the composers. U2 would inform the PRS in advance or within a reasonable period (say 28 days) afterwards of the concert repertoire, and of any spontaneously performed work in the unlikely event of such an occurrence. Members exploiting their own live performance right would be liable to account to the PRS for a pro-rated fraction of their net receipts by way of remuneration of the non-performing composer: thus if 20 works were performed, of which one had been composed by another PRS member, the group would account to the PRS for $\frac{1}{20}$ of its net receipts. Any concerns on the part of the PRS relating to the amount to be received by other composers could be met by providing for a PRS tariff minimum payment in respect of each work performed.

12.51. On the assumption that composers of works performed by supporting acts had assigned their live performance rights to the PRS, then the PRS's standard tariff would continue to apply to promoters of concerts contracting for supporting act performances. To the extent that this tariff imposed financial constraints on promoters, the risk would fall predominantly on U2, since their remuneration as composers would be a matter for individual negotiation. Prior to any tour detailed negotiations took place on a wide variety of matters, including the allocation of income between the headline group and support acts. There was no reason why similar arrangements could not be made between the PRS and its members to determine those parts of the performance which were to be self-administered and those which were to continue to be administered by the PRS. If a support act performed works by other members, the same considerations (and, *mutatis mutandis*, the same solution) set out in the previous paragraph would apply.

12.52. A subdivision of live and non-live performances should be no more problematic than the large number of other situations where apportionments were made to take account of differences in copyright protection for different works performed by the same or different artists at the same event. The arrangements described above would be objective, transparent, and easily verifiable. The introduction of a competitive element in the administration of rights would drive the PRS to operate more efficiently and cost-effectively. With regard to the alleged impracticality of members administering live performances, with correspondingly high costs, if this was true (which was not accepted), self-administration should represent significant cost savings to the PRS. The views expressed by the PRS on this point appeared to be another example of 'benign paternalism', whereby the Society was trying to dictate to its members instead of acting in accordance with their needs and interests.

12.53. In the current litigation, PolyGram and U2 were seeking relief as a result of the refusal by the PRS to reassign to the plaintiffs the live performance right. However, in relation to the MMC inquiry they had a broader concern to ensure that PRS members had the option to determine the way in which their rights should be administered in any given circumstances. It was difficult to see how introducing an element of choice could be other than in the public interest. PolyGram and U2 accepted that this would require the PRS to reassess important aspects of its business, but thought this needed to be done anyway. The practical problems could all be dealt with contractually, as set out above: it would be just one more aspect of going on tour or managing a large concert.

12.54. Asked by the MMC to address certain other issues, PolyGram re-emphasized that in its view there was no objective or indispensable justification for the PRS to take *any* assignment of *any* rights from its members, who should be able to opt in or opt out as they saw fit. With regard to non-live performance and broadcasting rights, the publisher or writer would have the keenest self-interest in ensuring that they were administered as efficiently and effectively as possible. Monitoring the exploitation of non-live performance rights was notoriously difficult, as was apparent from the PRS's current efforts, and would not be affected detrimentally if members were given the right to self-administer. An important element of competition would be introduced if an alternative existing field-force-the MCPS or PPL-or a new market entrant were enabled to collect and distribute on behalf of such members.

12.55. In certain circumstances the PRS could monitor, collate and collect royalties more efficiently than a publisher or writer. But this was not always the case, even in relation to broadcasting. Radio and television programmes were often dedicated to one genre or one artist, and in these instances self-administration would prove more efficient and cost-effective. Similarly music used as soundtrack on films could be directly licensed to broadcasters. There was no justification or indispensable need for such opportunities to be foreclosed. Producers would be enabled to supply a total package, the PRS being notified of each transaction so that it could adjust on a pro rata basis the share of any blanket royalty payments due to the copyright owner.

12.56. With the advent of digital technology, monitoring of all broadcasts would be greatly simplified. Two companies were already offering multi-channel audio systems transmitting digital signals. Terrestrial digital broadcasting licences would be available in the UK from 1997. Interactive services would follow shortly. To exclude copyright owners from the right to license such broadcasts would be to deprive them of a new form of distribution offering a significant revenue stream.

12.57. There was no reason why the PRS could not operate on the same non-exclusive basis as ASCAP and BMI in the USA. The decision of the US Supreme Court in *BMI v CBS Inc* (441 US1 (1979)) forcefully supported many of the arguments in favour of non-exclusivity. The competitive structure in the USA led to greater efficiency, effective monitoring, and competitive negotiated rates.

12.58. Other remedies contemplated by the MMC were generally acceptable, except that relating to registration fees. Funding should be on the basis of a fixed annual subscription fee and commissions, as against deductions from gross revenues, for the administration of the relevant categories of rights. If the MMC were not intending to deal themselves with the various abuses by foreign societies which had been identified, they should make unequivocal recommendations to the Competition Directorate-General of the European Commission so that that Commission could adopt clear guidelines, perhaps by means of a block exemption pursuant to Article 85(3), regarding the application of EC competition rules to the constitution and operation of collecting societies. Parties invoking the proposed appeals procedure should lose their right to take proceedings before the courts in relation to the same subject matter; section 76 of the Friendly Societies Act 1974 would provide a model in this respect.

Boosey and Hawkes

12.59. Boosey and Hawkes said that it was one of the oldest and largest companies in the UK solely involved in the music business. Boosey & Co and Hawkes & Son were founded in 1816 and 1832 respectively and were amalgamated in 1930. Both companies had been active in musical instrument manufacture and music publishing and both operations had continued up to the present day. It had been the policy of the company and its predecessors to play a full part in the activities of the music publishing industry as a whole and the PRS in particular. Mr Leslie Boosey had for very many years been Chairman of the PRS. The company strongly supported the principle of collective licensing by one organization for public performing rights. It generally

supported the submission of the MPA (paragraphs 12.2 to 12.19), believing further that in addition to acting efficiently, accurately and cost-effectively a collecting society should be seen to act fairly in the interests, so far as possible, of all its members as a whole. A collecting society also had a duty publicly to support and enhance music copyright protection in all areas.

12.60. There was scope for further investigation of the sharing of common information and resources by the PRS and the MCPS. The company was in general agreement with Professor Clarke's recommendations and thought internal changes could be made to improve efficiency. The PRS was perceived as being an excessively bureaucratic organization, slow to adapt to necessary changes in the market-place. There was some reluctance to consider PRS activities in certain areas on an objective commercial basis. The fact that overheads were deducted off the top and not charged as a commission at published rates did not provide an obvious incentive for better control of costs.

12.61. It was inevitable that with as large a General Council as the PRS currently had, some Council members would be less committed to the PRS than others or might be tempted to pursue personal or sectional interests. The company supported Professor Clarke's view that permanent and/or ad hoc committees should be appointed from time to time to investigate specific problems in depth and report back. The opportunity should be taken to co-opt on to these committees other qualified experts, who need not be Council members (nor need the committees be automatically equally balanced between composers and publishers). Reducing the size of the Council would at present be divisive, and action on this recommendation might best be deferred. If it were reduced, adequate safeguards should be introduced to ensure representation of as many significant segments of the music publishing industry and different types of composers as possible.

12.62. The Chairman should be subject to retirement by rotation like other Council members. The fact that the Chairman was also filling the position of Chief Executive was undesirable, but in current circumstances probably inevitable.

12.63. The collapse of the PROMS project had left the PRS weak and vulnerable in the area of infrastructure technology. The experience led to a serious decline in morale and an understandable disinclination to take necessary but unpalatable decisions for fear of antagonizing any part of the membership.

12.64. The PRS was not a charitable organization and members whose works were performed infrequently or in venues which could be licensed only at minimal charges should not be led to believe they had an automatic entitlement to a regular payment. There was strong evidence that returns even from the so-called significant venues were not always accurately processed.

12.65. Nevertheless, Boosey and Hawkes believed no fundamental change was required. PRS management and the General Council were fully aware of the criticisms and were making serious attempts to come to terms with them. The process was perhaps taking rather longer than might, in an ideal world, be desirable.

BMG Music Publishing Ltd

12.66. BMG Music Publishing Ltd (BMG) said that it was a major UK music publisher, ultimately controlled by the Bertelsmann Group, one of the world's leading media and entertainment groups. It wholeheartedly endorsed the concept of collective licensing through the PRS, but had some concerns about its current operations. While each member was required to assign rights exclusively to the PRS, there was no reciprocal obligation: the PRS did not undertake even to use its best endeavours to administer the rights to the best advantage of the member.

12.67. For example, the PRS should take responsibility for registering the rights with equivalent societies in other territories, which was in practice invariably left to the overseas publisher. Circulation on microfiche was unsatisfactory: the first activity on a work might not be in the UK, overseas societies frequently ignored the microfiche, and the PRS seemed unable or unwilling to remedy the situation.

12.68. In the case of most publisher members of the PRS, overseas revenues were collected on their behalf by their affiliates or sub-publishers, not by the PRS. Writer members received both their UK and overseas income through the PRS, whose administration costs were borne by the membership as a whole. The

effect was that a publisher paid approximately 27 per cent of its PRS income in administration charges, whereas the average across the membership as a whole was only 17.8 per cent.

12.69. The failure of PROMS had highlighted deficiencies in administration and management and had a traumatic effect. Each work needed two registrations. First, it was added to the RWF. Subsequently, when performance or broadcast activity was picked up, it was registered on the AWF. The PRS was still working with a manual card-file system involving two separate types of registrations which could not interact. There was a separate agreements file linked to the AWF, but any change did not automatically update the active works attached to it. This gross inefficiency inevitably led to errors which in turn caused delay in registration and distribution of revenues. The registration and administration of television/film deals and of live performance fees was particularly erratic. It was essential that the PRS developed an IT policy that provided for its needs-and thus its members' needs-as efficiently as possible. It should explore ways to collaborate with the MCPS and PPL which shared similar information, functions and needs.

12.70. Whilst the costs of running the PRS organization were borne by a relatively small number of members, those members had no greater say in the running of its affairs than any others. This was inequitable. The PRS constitution should provide for different levels of membership depending on the different shares of revenue. It was somewhat ironic that the current inquiry was in part the result of complaints by composers of less popular forms of music that they were receiving inadequate royalty payments; arguably, it was the more successful composers whose payments were inadequate, as such a large amount was absorbed by administration costs.

12.71. It was a matter of great concern that the PRS had, at the time of the submission, been without a Chief Executive for 15 months. Professor Clarke's report remained unimplemented, six months after it was presented. The rigidity of the PRS rules could override the wishes of members. For example, a writer might wish the PRS to pay his or her writer royalties on some songs direct to a publisher. PRS rules did not allow for this. They should be made more flexible and responsive to commercial needs.

12.72. The practices of affiliated European societies were a constant source of frustration. The worst example was the arrangement under which up to 10 per cent of gross revenues generated by PRS members were deducted by the affiliated society and used for its own local social and cultural purposes. As the revenues generated by PRS repertoire in these territories were proportionately far greater than the revenues generated in the UK by the repertoire of other societies, there was clear discrimination against PRS members.

12.73. BMG believed that its criticisms of the way the PRS currently operated could quite easily be met, and that none of them were so fundamental as to call into question the basic concept of collective licensing.

Interspear Music

12.74. Interspear Music (Interspear), a small publishing company, represented the works of 20 PRS composers on a non-exclusive basis. The active catalogue contained about 1,000 titles, primarily production library music tracks for broadcast and advertising. In its view, the overall strategy of the PRS favoured the bigger players, and whilst it might claim to represent the entire membership it did not do so equitably or accountably. In 1992 Interspear's income decreased by 28 per cent although its active catalogue had increased by 13 per cent. This was because the Distribution Committee had decided to reallocate 50 per cent of Interspear's earnings from a section of the radio logs income to a different segment of the membership without any proper notification of the effects of such a decision. The PRS had said that 'the goalposts were moved, so some people who got used to scoring were now failing to do so'. It was impossible to think of another business where such a situation could occur. The nature of the company's work in production library music meant that there were no fronting artists to promote live performance, so it was totally reliant on broadcast and background music licences.

12.75. The policy of the PRS towards live performance further indicated the bias towards the upper echelons of the business by reducing the number of significant venues. The 'sampling' of radio plays was another inaccurate hit-or-miss strategy which added to the 'pot' to be decided politically by the Distribution Committee rather than remunerated to the true supplier of the work. Nothing had illustrated the inefficiency of the organization more than the PROMS débâcle, paid for by the members from the net distributable income.

12.76. Interspear later commented on the resolution put to the PRS AGM on 14 September 1995 to remove Mr Lyttleton from the General Council (see paragraph 13.26). In Interspear's view this action further reflected the desire of the Council to control its level of accountability. The response by the Council to Mr Lyttleton's message to PRS members was open to criticism at a dozen points. Unfortunately those who were dissatisfied could not take their business elsewhere.

Magnum Music Group

12.77. Magnum Music Group (Magnum) said that it was one of the larger independent record companies in the UK, with a product catalogue that was distributed throughout the world. It had recorded and distributed many artists and bands working the club and concert circuit in the UK and overseas, and owned four publishing companies. It had never received a payment of more than a few pounds from the PRS and had never been able to obtain an explanation. During one year it had submitted a performance list of acts regularly working in the UK, but without result. PRS policies had deliberately excluded it from its rightful amount of royalties. The view that the PRS was operating as a cartel of the major record corporations was one that would merit investigation.

12.78. Magnum said at a hearing that it operated a niche marketing policy with six or seven different labels. In 15 years it had never received a distribution greater than low three figures, despite the transmission of much information to the PRS, information which appeared to have been ignored. Evasive replies were received when PRS distribution policy was questioned. The company had between 500 and 1,000 copyrights, all of which were active. Revenue from PPL was also smaller than it should be, but the problems were nowhere near as great as with the PRS.

Savera Music Ltd

12.79. Savera Music Ltd estimated that there were some 10,000 Indian/Pakistani/Bangladeshi restaurants, bars, clubs and shops in the UK. The PRS had been collecting public performance licence revenue from such outlets, all of which played Asian music. The licences were issued by the PRS on the basis that the revenues collected would be distributed to the relevant composers, arrangers, lyricists and publishers. Yet Savera, one of the largest publishers of British Asian music, had not received any of the money collected on its behalf by the PRS. The sampling arrangements for public performances were such that monies owed to Savera were being distributed to others. The PRS also collected revenues from broadcasting usage. There were some 40 radio stations with regular 'Asian' programmes, some of which played such music 24 hours a day. However, Savera had been paid only negligible sums from this source and had not succeeded in getting the PRS to remedy the situation. The same was true of international revenue, although there was evidence that British Bhangra music, in which Savera specialized, was being played world-wide. The structure and rules of the PRS had greatly handicapped the full development of this new and vibrant part of the British music industry.

Westbury Music Ltd

12.80. Westbury Music Ltd said that it was almost exclusively a music publisher and a consultancy company. It looked after people who wrote music, who tended to be high on creativity and low on paperwork. About one-third of its income came from the PRS. Many people had reservations about the way the PRS processed money levied from clubs and discothèques. For some years club music had been predominantly 'underground': it was of a type which most people over 25 would not recognize, was not often played on the radio and rarely achieved chart positions. To pay club and discothèque money out on the basis of a mixed sample of the top 100, radio logs and album tracks, as the PRS currently did, was absurd. When an independent label put a track out it did not send it to radio stations but to club DJs. The PRS General Council and Distribution Committee were dominated by major publishers and writers of mainstream music, and were probably two or three years behind the current situation. The PRS had ignored Westbury's suggestion that specialist input was needed; its response to representations had been 'next to negligible'. Reaction sheets from individual clubs could help.

12.81. The MCPS was in Westbury's view a much more businesslike company than the PRS. The latter had been in the grip of administrative lawyerdom and was relatively slow-moving. There were good people at the PRS up to a certain level, but above that level it became a marshmallow, absorbing all the pressure but not

moving. The MCPS had specialist people who knew about underground, rap, or dance music: the PRS did not. While the PRS did a good job to a certain extent, it needed to be more efficient, more representative and more sensitive to emerging needs.

Oriel Library

12.82. Mr Theo Wyatt of the Oriel Library drew attention to the way in which the PRS discriminated against its smaller publisher members. He ran a small music printing and publishing business with a highly specialized output (music for recorder consort), and because of his intimate knowledge of the repertoire and economical production method had been very successful. The performing rights of his 80 titles, all still active, were vested in the PRS. The PRS normally terminated the membership of any publisher whose aggregate earnings over a three-year period were less than £250. In 1992 it decided that UPAs should be paid only to members with earnings of £50 a year, and reduced drastically the number of licensees required to submit details of music performed (the significant venues policy). Each of these measures served to reduce the share of the Society's income going to smaller specialized and educational publishers. Each had no other justification than the desire to make the administration of the Society easier and cheaper, which was not in itself ignoble but could not be justified when the result was to increase discrimination against a section of the membership already receiving a very meagre share of the Society's income.

12.83. Mr Wyatt subsequently commented on another aspect of the Society's practice which operated to the detriment of publishers whose catalogues consisted in part of instrumental arrangements of non-copyright works. The PRS had a sophisticated grading system of 14 categories for such works whereby the points earned for a performance were expressed as a fraction which decreased as the artistic contribution of the arranger was deemed to be less, down to $\frac{1}{20}$, divided equally between arranger and publisher who got $\frac{1}{40}$ each. It was easy to see the logic of this so far as it concerned the arranger. But the cost to the publisher of editing, setting, printing and distributing a work of a certain length was the same whether it was a simple transcription or wholly original.

Copyright Income Administration Ltd

12.84. Mr Harold Spencer, Chairman of Copyright Income Administration Ltd, a publisher member of the PRS, said that his company, whose catalogue was administered by Warner Chappell Music Ltd, had acquired full copyright ownership of the music content in the majority of Indian films, with title to collect performance royalties due anywhere in the world. Accounts published in PRS Yearbooks appeared to show certain sums which had either been sent to or received from India, but it was unclear where these sums arose, how they were calculated, or to which country's copyrights they referred. Were royalties exchanged with India or not? No PRS member had ever received a statement showing how much money their copyrights had earned in India.

12.85. The company had reason to believe that the PRS and the Indian Performing Right Society (IPRS) had agreed, for tax reasons, that each could keep the royalties the other earned in its territory. While this might once have been a tolerable arrangement, it was not so today. The amount of Western music played in public in India was insignificant compared with the amount of Indian music performed in the UK. Between 2 and 4 per cent of radio and television broadcast time in the UK was devoted to Asian programming.

12.86. Under Indian law, the copyright in music in a film belonged 100 per cent to the film producer. This had been upheld by the High Court in Delhi in 1977 and it applied to the music now owned by the company. However, the PRS had paid nearly £90,000 to the IPRS in October 1993-the first such payment ever made-as the 'writer's share' for works which did not in fact or in law comprise part of the IPRS's repertoire.

12.87. There was no other society to whom these copyrights could be licensed because of the exclusive deed of assignment. The PRS was restraining trade and causing actual financial losses through an abuse of monopoly power.

Bardic Edition

12.88. Mr Barry Ould of Bardic Edition said at a hearing that he was a small independent publisher who had been in business for some eight years. He was an associate member of the PRS. He said that everyone whose work was performed at venues not regarded by the PRS as significant was adversely affected by the current distribution policy. They received no royalties although the venue was paying the PRS for a licence.

12.89. Mr Ould subsequently provided documents relating to a concert of music by Lord Somers at the British Music Information Centre (a significant venue) in April 1994. Payment had been received for only one song, lasting five minutes, from a concert that lasted an hour and a half.

Jelly Street Music

12.90. Jelly Street Music, a new publisher member of the PRS whose repertoire included dance music, had found that unless works reached the upper echelons of the national charts or were featured on national radio and television channels, the likelihood of receiving adequate royalty payments was minimal, even though the works were commercially marketed and played on specialist radio shows and at nightclubs, discothèques and other venues throughout the UK. It seemed grossly unfair that such venues should pay a fee only to have it distributed in the main to suppliers of popular music. The company's most recent royalties from the PRS amounted to £110, compared with £3,500 received from PPL for the same period.