

13 Other views

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13.1. In this chapter we summarize the views put to us by other collecting societies; by Professor Clarke, author of the report on the corporate governance of the PRS reproduced in Appendix 7.2; by persons formerly associated with the PRS; and by the English and Scottish Arts Councils.

Mechanical Copyright Protection Society

13.2. The MCPS said that it was a company limited by shares and founded in 1924. Since 1976 it had been a wholly-owned subsidiary of the MPA. The Board of Directors comprised 16 members, of whom four must be full writer members of the PRS, the remaining 12 being representatives of music publishers. The directors were appointed by the MPA, subject in the case of the writer members to consultation with the guilds. Currently five members of the MCPS Board were also members of the General Council of the PRS. As at September 1995, the MCPS had 9,798 members, of whom 6,344 were writers and 3,454 publishers, the last figure including some affiliates within the same group.

13.3. Whereas the PRS divided royalties between writer and publisher, and had a rule prescribing a minimum share to be paid to the former, the MCPS (unless otherwise directed) paid all royalties to the publisher, who either remitted them to the writer less the amount the publisher was entitled to retain under contract, or (as was more common nowadays) used them to recoup the advances already paid to the writer. The MCPS acted as agent for writer members only in respect of works not subject to a publishing contract. The relationship between the MCPS and its members was, and always had been, that of agent and principal. The rights for which it acted as agent were those relating to the making of sound-bearing copies and the issue of such copies to the public. What this meant in practice was that it acted in respect of a wide variety of copies such as records, videos, microchips, films, television programmes and multimedia products. The principal exclusion from its mandate was sheet music.

13.4. The MCPS granted licences in three main ways: blanket licence agreements, permitting the use of any musical work for which the MCPS acted as agent; licensing schemes, governing the terms and conditions on which users might obtain licences; and individual licences. In the last two cases, members could if they wished opt to license direct (as they also commonly did for motion pictures and commercial advertisements). For phonograph records (CDs and cassettes) the MCPS always granted the licence. The MCPS provided a full description of its licensing and distribution procedures and also gave a demonstration at the MMC of the operation of its IS.

13.5. Costs were paid through the levying of commission on royalties. The rates varied from 4.75 to 12.5 per cent, the lowest rate applying to royalties paid by the major record companies which generated most income. The membership agreement contained reciprocal obligations on the part of the MCPS and its members, those undertaken by the MCPS being to use its best endeavours to protect its members' works from infringement, and to collect the royalties; to act in the best collective interest of all members; not to

discriminate; and not to collect royalties which the member was entitled to collect direct. Members were entitled to terminate their agreements on six months' notice.

13.6. Asked at a hearing about the practical differences between assignment of rights (as in the case of the PRS) and an agency relationship (as in the case of the MCPS), the MCPS said that they were mainly in the area of enforcement. Proceedings for infringement of copyright had to be taken in the name of the relevant copyright owner, whose permission was necessary. Ultimately there were not many complexities as a result. Any defendant in infringement proceedings had the right to challenge title, whether through the PRS or the individual copyright owner (see also in this connection paragraph 12.47).

13.7. The MCPS had changed from a vertically integrated organizational structure to a matrix structure in order to develop a single, fully flexible, set of systems which would serve all its functions of licensing, collection and distribution, both present and future. This model ('the common system') had been proposed and agreed as the foundation for the proposed collaboration between the MCPS and the PRS. After describing existing forms of co-operation between the two societies, the MCPS gave an account of the basis and outcome of the negotiations during 1994 (see Chapter 8). The MCPS had taken the view that the aim should be to identify what was in the best common interests of the members of the MCPS and the PRS, even if this might mean that terms which might be obtained in a normal arm's length negotiation (for example, payments for intangible assets) were not achieved. Any risk to the MCPS's efficiency and quality of service to its members must be avoided. The interest to the MCPS's members in a joint venture company was to minimize duplication of effort, to achieve cost savings, to develop the MCPS's systems in order to give improved service to its members through collaboration with the society closest to it, to plan for the long term by moving towards electronic data systems using common codes, formats and standards, and to create an entity which would be strategically placed within the market for the supply of information. Since most MCPS members were also PRS members, they would benefit in both capacities.

13.8. The fundamental difference had been whether all IS/IT functions should move to the joint venture company, or whether the PRS would retain a substantial stand-alone IS/IT function. The MCPS believed there were advantages in the first course, and, more importantly, dangers if it were not adopted. There was a great risk in either society developing systems independently from those within the joint service company. A step-by-step commitment to the ultimate goal was not compatible with the MCPS's integrated system development on which the service company system was to be based. The MCPS remained ready to reopen negotiations if the IS/IT issue could be resolved, but in the absence of agreement would have to consider strategic alliances with other rights organizations, although without the same degree of joint venture collaboration as with the PRS. The concept of a joint service company with the PRS, with both societies undertaking development jointly in the common interests of MCPS and PRS members, was undoubtedly the best way forward, and it was a matter of much regret to the MCPS that the negotiations had failed.

13.9. A comment made by the MCPS's consultant, which has a bearing on some other representations received, was that the current PRS licensing system was totally independent of their other IT systems. This prevented the PRS from linking specific licences (eg club premises with evenings of reggae or folk jazz) with closely-matched repertoire. With the MCPS integrated IT system this linking was easy to attain; it was a key factor in making possible fairer distributions.

Phonographic Performance Ltd

13.10. PPL provided particulars of its own activities (see paragraph 3.31) but did not express views on the matters referred to the MMC for investigation. It said that its effective running costs, after allowing for exceptional items, were about 12 per cent of gross revenue. Substantial changes had been made to the constitution, enabling all members to attend and vote at General Meetings, and to the distribution system, broadening the basis of samples on which commercial radio revenue was distributed and using a combination of radio returns and dance and club charts, plus actual returns from some users, to distribute public performance revenue more accurately. Accuracy and precision in collecting usage information were more important than ever now that digital technology was revolutionizing the extent and nature of record usage. It was essential, also, that maximum accuracy of distribution was achieved for minimum cost. Members realized that it was practically impossible to get returns from thousands of public performance users, but expected PPL to find the most accurate, intelligent and cost-effective method of distribution.

13.11. While the PRS and PPL had licensees in common, several factors had inhibited closer co-operation, among them the different interests represented, differences in licensing practice, and the view (to which the PRS had drawn attention) that users may be less willing to pay a larger sum to a single collection point than smaller sums to two different bodies each administering a different aspect of copyright.

13.12. In future, use of the ISRC would be essential to help build up a database which could recognize the individual tracks used by broadcasters and other record users. The National Discography was one of several options under consideration.

13.13. PPL emphasized the role collective licensing played in ensuring that copyright was adequately protected and remunerated, that money was collected and distributed in a cost-efficient manner, and that music users were offered a single point of contact.

Overseas societies

13.14. Mr John LoFrumento, Chief Operating Officer and Managing Director of ASCAP, and Mr Roger Greenaway, UK/European Director, attended a hearing. Mr Greenaway was Chairman of the PRS from 1983 to 1986 and subsequently a Deputy Chairman. They told us that if ASCAP made major changes in distribution policy it had to go before a court. Whatever was done in the boardroom became public knowledge. There was a Board of Review composed of members of ASCAP who were elected every two years; they were not members of the Board of Directors or of advisory committees. A further appeal could be made to the court against decisions of the Board of Review. The consent decree system provided protection but also imposed constraints, in particular by limiting ASCAP's competitive abilities. ASCAP's general counsel was entirely independent of the society's management. Mr LoFrumento agreed when it was put to him that it was important that the judge administering the consent decree built up over time experience of the working of the society and the industry, and that in a sense he played a role going beyond the traditional judicial role, trying to find common ground and the answer that seemed to be the most reasonable one in all the circumstances.

13.15. Several of the overseas societies made favourable comments on the PRS. ASCAP said that it had always experienced cordial relations with the PRS, which it considered a highly professional organization, to the substantial benefit of the members of both organizations. The South African Music Rights Organization hoped that if the MMC concluded that the PRS was a monopoly, it would also conclude that it was a benevolent monopoly which operated to the benefit of both the creators and the users of musical works. The Swedish society, STIM, said that the PRS had an excellent record in all respects. The problem was not the efficiency of its administration or the fairness of its distribution, but the low level, by European standards, of tariffs for copyright prevailing in the UK. British authors were better remunerated when their works were performed abroad than when they were performed at home. The Polish society, ZAIKS, considered the PRS highly efficient and said that it had always shown much professionalism.

13.16. By contrast IMRO, in a submission made late in the inquiry, drew the MMC's attention to certain features of the PRS's activities which it believed were unfair and represented an unreasonable exercise of monopoly power. The first such feature was the PRS's grading system for arrangements. A significant proportion of original arrangements in IMRO's repertoire was remunerated at only $\frac{2}{12}$ (16.66 per cent) of the royalty that would otherwise have been paid. This was unjustified to the extent that it purported to distinguish between two types of copyright work, both of which were treated equally in national law and under international convention. It was applied in an arbitrary and inconsistent way and particularly affected IMRO and its members, many of whom created works in the Irish traditional music idiom which were drawn from pre-existing non-copyright material. The Irish ethnic minority in the UK constituted a significant audience, and an important market, for such music.

13.17. The second feature of which complaint was made was the inadequate monitoring of music used by the PRS. In relation to the miscellaneous live category, the PRS's failure properly to monitor led it to use a wholly inappropriate and unfair basis of distribution (radio logs). It would be entirely feasible for the PRS to introduce a more equitable system based on sampling, as IMRO itself had done. The significant venues policy had not been implemented properly and did not adequately take account of the ethnic and cultural diversity of live music in the UK.

Professor T Clarke

13.18. Professor Clarke, whose 1994 report on corporate governance is referred to elsewhere and reproduced in Appendix 7.2, said that whatever problems he had identified in the current governance of the Society, and whatever proposals for change he had made in his report, he was convinced that:

- (a) the comprehensive basis of the exclusive assignment of rights to the PRS facilitated the efficient and equitable operation of musical copyright in the UK;
- (b) the PRS was an open society, striving to reduce costs and to be as cost-efficient in carrying out its complex work as any comparable society in the world;
- (c) the PRS had significantly improved income in recent years and made constant efforts to distribute this revenue in the most reasonable and equitable way possible; and
- (d) the PRS Council was representative in a balanced way of the different corporate interests in the industry, the different genres of music, and of writers and publishers.

13.19. In Professor Clarke's experience the Council consistently acted with considerable integrity and responsibility towards the interests of all of the membership of the PRS. It was open and self-critical in its exploration of how to raise performance. He believed the central thrust of his proposals was still valid: relations between the Council and executive management could be improved, with a greater measure of mutual understanding and trust; the Council could focus more on matters of strategic importance, delegating more detailed work to committees; there should be some representation external to the music industry; a process of director development would be helpful; and there were ways in which the wider PRS membership might be drawn more into policy-making. Other means than those he had recommended might achieve similar ends. It was the objective of achieving a more professional, focused and active mode of governance that was important, not the particular methods adopted.

13.20. During a hearing he attended, Professor Clarke again emphasized that there had been a willingness, a commitment, and an openness on the part of the PRS in looking at its procedures and trying to reform them. The PRS was several things at once: a large financial services business, but also a membership society. The music business was not an easy environment in which to survive. Matching the changing expectations of so many different interests was an extraordinarily difficult administrative task. Professor Clarke expressed the hope that any recommendations the MMC might make would help the PRS to improve its efforts but would not destabilize it. While the complexity of the demands on the PRS was undeniable, he thought there could be a drive for simplicity and transparency in the interests of efficiency and fairness. His conception of the PRS was a very positive one: it was performing an important cultural and commercial function with integrity.

Persons formerly associated with the PRS

13.21. We received evidence from three former members of the PRS staff, Mr Michael Freegard who was for many years the Chief Executive, Mr Robert Abrahams, who was Deputy Chief Executive, and Mr Brian Engel. We did not receive evidence from Mr Trevor Lyttleton while he was a member of the General Council, but noted the views he had expressed as reported in the *PRS News* and elsewhere.

13.22. Mr Freegard, who did not seek to submit evidence but attended a hearing at the request of the MMC, said that he had spent 28 years at the PRS, up to 1992. Among the points he made in reply to questions was that a balance between diverse interests had been struck over many years, and it was only in the last three or four years-when, in his view, the pop industry had become over-assertive of its interests-that things had gone wrong. It was totally impossible for the PRS, within any sort of reasonable cost ratio, to capture and log and account for all public performances. Therefore, some kind of allocation in recognition of the fact that many performances went unreported was essential. With regard to the need for exclusivity, it had been questioned only by professional managers of pop groups, some of whom might have a conflict of interest if they were also associated with the promotion of concerts. If exclusivity were abandoned, there would be severe difficulties of enforcement and many little-known writers who performed at these concerts, and whose bargaining power was low, would get nothing for their performing rights.

13.23. Mr Freegard said that he had been consulted by, and concurred in the submissions made by, Dr Mitchell on behalf of the Britten Estate (paragraphs 11.96 to 11.103). He supplied a copy of his article 'Quis Custodiet? the role of Copyright Tribunals', published in the *European Intellectual Property Review*, July 1994.

13.24. Mr Robert Abrahams, who joined the PRS in 1980 and was Deputy Chief Executive from April 1983 to October 1992, said that he was concerned lest imputations of managerial inefficiency might mistakenly attach to his name as one of the PRS top management team members who left the organization shortly before or after the disclosure of the PROMS fiasco, in which, in indicated, he had acted as a 'whistleblower' prior to what the PRS had since admitted in Industrial Tribunal proceedings had been his unfair dismissal. Since that time he had been involved in litigation in order to ensure that any such coupling of his name with managerial inefficiency or worse, particularly in the context of PROMS, was averted or rectified, and to obtain payment of monies due under the contract of employment operating at the time of his departure. Mr Abrahams had brought libel proceedings against the PRS in respect of aspects of its reporting to its members and others of the PROMS disaster which had resulted in a settlement after the case had been opened in Court, including the PRS's acceptance as part of an agreed statement read in open Court that he bore no responsibility for any of the failings of the PROMS project and that he never misled the General Council in any way. The employment litigation resulted in a decision in his favour on the legal issue in dispute in the Court of Appeal on 19 May 1995, after a PRS appeal against an earlier judgment, also in his favour; the employment litigation was continuing on issues of quantum in the absence of agreement between the parties as to the full extent of the sums payable by the PRS. Mr Abrahams referred to the increasing factionalization of the PRS Council which he ascribed mainly to the ambition of certain elements to have greater control of industry institutions. If there had been a mechanism in place for discussion of his own situation on a calm basis with the Council or a senior figure not immersed in the highly factionalized and politicized atmosphere prevalent, the matter could have been resolved without the immense cost and disruption inherent in the double dispute. He could not believe it was in the best interests of the PRS for matters to have reached the proportions they had done.

13.25. Mr Brian Engel, formerly a membership manager of the PRS, and a composer member for over 20 years, also submitted evidence. His views are summarized in paragraphs 11.85 and 11.86.

13.26. Mr Trevor Lyttleton was elected by postal ballot in 1993 as a publisher member of the General Council with 8,839 votes, the largest number ever cast for a candidate. At the AGM on 14 September 1995 a resolution that he be removed from office was passed by 5,536 votes to 3,270. The main reason for the resolution, moved by Mr P Waterman-himself a member of the General Council until his resignation immediately before the EGM in May 1995-was stated to be the number and nature of the questions raised by Mr Lyttleton-over 300, said by the PRS to cost some £100,000 to answer. Mr Lyttleton told us that he had subsequently obtained senior Counsel's opinion, a copy of which he provided, to the effect that the resolution purporting to remove him from office was invalid because it was put to a poll directly without first putting it to a show of hands.

13.27. We read Mr Lyttleton's views as published in *PRS News*, autumn 1994, in which he was reported as having said at the 1994 AGM that the situation he had discovered within the PRS had turned out to be even worse than he had feared. He was still finding it difficult to obtain information and had seen little really close monitoring of costs and expenditure. In the course of the inquiry we were shown by the PRS the text of a statement made by Mr Lyttleton to the General Council on 21 August 1995 in the course of which he claimed *inter alia* that PRS management had kept from the General Council MMC criticisms of policies placed before it for approval and had failed to report General Council deliberations to the MMC in a full, fair and unbiased manner. Mr Lyttleton also dissociated himself from the General Council's failure to insist upon being consulted on certain substantive issues. Mr Lyttleton's charges were rejected by the Chairman and management of the PRS and (in the case of those made at the 1994 AGM) in a response signed by 27 past and present members of the General Council.

13.28. In a written statement made in response to a request from the MMC after he had ceased to be a director, Mr Lyttleton said that for some 20 years he had worked assiduously, both off and on the General Council, to make the PRS more open and accountable and less wasteful and extravagant, a claim he backed up with documentary evidence. He had had difficulty in obtaining information, a current example being a failure to respond promptly or adequately when he enquired how much of the £2 million paid annually to members by way of adjustments to their distributions had gone to members of the General Council. In a speech to the

AGM Mr Lyttleton had said that he had asked pertinent, useful questions of the kind he had been given a mandate by members to ask. Why did the Council want to get rid of him in such a hurry before his term expired in 1996? PROMS would never have lost so much money if the right questions had been asked in time, nor would £550,000 have been spent as a result of litigation with Mr Abrahams. The General Council ignored, at their and the members' peril, the cost of not asking questions.

13.29. Several members of the PRS subsequently wrote to the MMC criticizing both the fact that Mr Lyttleton had been removed from office and the way in which this had been done.

Arts Councils

13.30. The Arts Council of England did not think it appropriate to give a formal view, since the administration of performing rights did not impact directly on its work, but made the comment that concern had been expressed that the PRS drew on too few venues and that the fixed percentage rule in force in some of them, meaning that the same proportion of box office takings was passed on to the PRS however much copyright music was included in a programme, arguably discouraged the performance of copyright work. The Scottish Arts Council said that it would not wish to see the undermining of the principle whereby the artist's performing rights were protected by law. There was, however, a wide consensus amongst Scottish and Gaelic traditional artists that PRS criteria discriminated against them in terms both of the weighting accorded to Scottish traditional music *vis-à-vis* other music forms and of the recognition of venues.