

# 14 Views of the PRS

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14.1. The PRS said that its purpose was to provide for its members a service which they could not effectively carry out for themselves, namely the exercise of the performing right in musical works, which required the individual authorization of all music users in the UK and collection of royalties from them. In joining a membership society in order to receive this service, they were in a different position from customers of a service purchased in the market-place, such as banking or insurance. The fundamental difference was that the service provider, the PRS, was controlled by those to whom it provided the service and was answerable to them, rather than to a separate group of shareholders.

14.2. Many day-to-day operations were delegated to management, but control remained with the membership who could, in the last analysis, dismiss the management. If members did not like some aspect of PRS policy, they had the power to change it. That was not to say that each individual member could insist on the PRS's business being conducted in a particular way. The interests of one member, or group of members, sometimes differed from those of another, for example on distribution policy or expenditure on sampling. This was illustrated by the representations made by various members to the MMC, many of which contradicted each other. Such tensions were inevitable in a society with 28,000 members, ranging from little-known individual composers to large publishing corporations. An individual member might find it frustrating if he could not secure the change he wanted, but it was inevitable that this would sometimes happen in a democratically-run society.

14.3. A balance had to be struck between the varying interests of different members. This was achieved through the General Council which brought together a wide range of experience in the music industry. Generally it had been able to reach a sensible balance between conflicting interests on the major issues affecting the Society. It had now been agreed in principle, at the EGM of the Society on 18 May 1995, that the General Council should be strengthened by the addition of independent and executive directors. Members had a number of ways of making their views known to management who would pass them on to the General Council. The writers' guilds and the MPA were consulted on any significant policy change, the PRS held regular meetings with members, either of a general nature or for specific genres such as media and classical, various member liaison events had been set up in London and regionally and any member could raise an issue at the Open Forum of the AGM.

14.4. Once a policy had been adopted, it was in the interests of all members for it to be implemented efficiently. The PRS acknowledged that there had been some difficult episodes in the past—for example, the suspension of the PROMS project—but submitted that recently there had been major achievements. For example, over the past two years revenue from broadcasting had increased by 14.5 per cent, revenue from UK public performance by 15.1 per cent, and international revenue by 21.5 per cent; normal administration costs had fallen by 3.4 per cent; the average response time for members' queries had been reduced from 235 days to 24 days; and major IT projects had been completed on time and to budget. As in any business, there was scope for further improvement and management were constantly seeking ways of increasing efficiency.

14.5. It was out of a desire to improve efficiency further that the PRS had entered into negotiations with the MCPS, with a view to eliminating duplication in administration (which turned out to be less extensive than supposed). The PRS felt it contributed constructively to these negotiations and in fact bent over backwards to secure agreement. However, a scheme of that scale required the resolution of a number of key issues (see paragraphs 14.59 to 14.71, and Chapter 8), which had not been done after 17 months of negotiation, and to continue would have risked members' money. Despite this experience, the PRS remained eager to pursue co-operation with the MCPS, PPL, and, indeed, some of its major users. Collectively working towards interconnectivity of databases built to common international standards would bring greater benefit, particularly as music producers and users were part of this development. It was also essential that any co-operation respected the interests of the PRS's writer members, who were not effectively represented by any other collecting society in the UK.

14.6. The PRS recognized that it had a *de facto* monopoly, although there was nothing to stop a rival society from administering composers' or publishers' performing rights in the UK or overseas. Music users had a legitimate interest in being able to use music for public performances of various types without paying excessive charges. This interest had to be balanced against the interests of rights owners in securing fair remuneration for use of their work.

14.7. Many users did not see the issue as one of balance. Licensees wishing to use background music in shops, public houses and similar premises saw themselves as running businesses to which music was incidental, and did not always accept that they had an obligation to pay for it. If the objective was a fair balance, this was much more likely to be achieved by a collective society than by individual negotiation, provided there was recourse to an independent tribunal which could ensure that the collecting society did not abuse its position. Individual negotiation would be a nightmare for the sort of licensee described above, for whom the PRS provided a convenient and low-cost way of complying with copyright law. Even large music users would face a greatly increased administrative burden, as would rights owners. These costs would represent a 'deadweight' loss, leaving everyone worse off.

14.8. Similar arguments appeared to have weighed with the MMC in their 1988 report on collective licensing, where it was stated (paragraph 7.11) that:

If collective licensing were abolished, we do not doubt that the larger bodies concerned, such as the BBC and the major record companies, would manage bilateral negotiations without too much difficulty ... [but] many of the smaller record companies said that they would find it impossible. It was clear, too, that the individual copyright owners would have great difficulty in recovering royalties in the public performance market.

This conclusion applied with even more force to the performing right, where the number of rights owners (composers and publishers, as distinct from record companies) was much greater.

14.9. Any concerns on the part of users that the PRS might exploit its position should be allayed by the fact that the Copyright Tribunal not only existed as a last resort in the event of a breakdown of negotiations, but in practice had on several occasions made lower awards than the PRS was seeking. Although the PRS would like the Tribunal's remit to be limited to preventing abuse (see paragraphs 14.82 to 14.85), the PRS acknowledged its important role in ensuring that the interests of users were fully protected.

14.10. Members assigned their rights exclusively to the PRS, in common with the practice in almost all performing right societies in the world. The PRS firmly believed such exclusivity enabled it to exercise and enforce the rights assigned to it to the maximum benefit of both its members and users, while maintaining administrative efficiency.

14.11. Asked about the purpose of assignment of the film synchronisation right, the PRS said that this was a way of giving some recompense to the composer for the loss of royalties in the USA where licensing of performing rights in cinemas was prohibited by law. The strength of the film companies was such that some protection for the writers was needed.

## **Aims and objectives**

14.12. Against this background, the PRS addressed the issues provisionally identified by the MMC (see Appendix 2.1). The General Council, and the management, were clear about the PRS's aims, which were to do for its members what they could not effectively do for themselves. Periodically these aims were expanded and clarified, for example in the 'Towards 2000' study and in the PRS mission statement, both of which had been supplied to the MMC. The PRS's key objectives were also straightforward and understandable and were restated yearly in the operating plan.

14.13. In practical terms, the PRS's primary objectives must be to enhance revenue and to provide a service to its members. Subsidiary objectives were also required, for example to do these things efficiently or within reasonable cost parameters. Although the PRS controlled only a fairly narrow spectrum of copyright interests, it had no fewer than 28,000 members, handled a huge range of works and processed millions of performances a year. Setting priorities for the tasks necessary to achieve the objectives could be open to considerable variation and could not be achieved just by a restatement of aims and objectives. The issues were too complex to be encapsulated in a simple form of words.

14.14. On the revenue side, the General Council's Strategy Group had set a clear objective to increase income. The annual plan for 1995 showed how successful the PRS had been in achieving this over the last 15 years.

14.15. On the cost side, there was seldom uniformity of interest among the membership. A major interested party would be more interested in maximizing his or her income through the PRS by means of low administrative cost attained through a reduction in manpower, more recourse to sampling than census, dedication of few resources to members' queries, and insisting on no manual intervention and maximum use of systems. A far larger number of low-earning members might be more sympathetic to higher administration costs, if this would mean that their works would be detected and analysed, even where infrequently performed.

14.16. During the 1980s the PRS had put the bulk of its top management and all its licensing senior management effort into maximizing revenues with consequent substantial increases in most of the major public performance tariffs and royalties paid by broadcasters. At that time, measures to increase efficiency, and (to some extent) to contain costs, took second place to the revenue drive. However, in the early 1990s the General Council considered that administration costs were unacceptably high and the corporate focus changed so as to rank cost control and revenue growth equally. On the question of whether members were able to evaluate the Society's decisions, with members' diverse backgrounds, varying levels of interest in the PRS and possibly because many were creators and not business people, it was not always possible for them to evaluate objectively the PRS's strategic or tactical plans as a whole.

14.17. Thus the PRS was clear about its aims and objectives. Nor did it accept that there was a lack of specificity about their relative importance. Given the variety of pressures on the PRS at any one time, and the fact that there could be substantial changes in the interests represented on its Council, it was hardly surprising that, from time to time, actions might be criticized by one section of the membership as being too much in favour of another. The important point was that the membership ultimately had the power to regulate the governance of its Society, both through the voting entitlements of full and associate members and the re-election processes to the Council, ensuring that every director had to seek re-election every three years.

14.18. If a particular influence or genre of music was perceived by part of the membership to be receiving more than a reasonable share of the PRS's resources or income, then the membership probably had more opportunity for recourse to corrective action than was the case in many public companies. In addition, the PRS had strong links with the writers' guilds and the MPA, held members' surgeries, and kept in touch with the membership through the various meetings which were regularly held by the Membership Division. Changes to policies were normally subject to one or more progress reports from management to Council specifically so that the impact of the change could be assessed. Policies which were not working effectively, which were giving rise to noticeable complaints or which produced unforeseen effects would always be brought to the attention of the General Council or the appropriate committee. The PRS's strong service ethic provided additional protection.

### **Cross-subsidies and donations**

14.19. The money collected by the PRS belonged to it but was in effect held in trust for its members before being distributed to them in accordance with the distribution rules. It was up to the General Council to decide how the money should be distributed (see paragraphs 14.94 to 14.99). At present some of it funded the PCA (previously the UPA), the EES and the subsidy which approximately trebled the gross classical revenue pool. The PCA and UPA were not perceived as subsidies as they were intended to compensate for performances not picked up by the PRS as a result of sampling or incomplete performance information.

14.20. The arguments for the EES centred around the wish to mitigate to some degree the drop in earnings of long-established members whose works were no longer performed to the same extent. Such a scheme illustrated the differences which could be maintained between a membership society and a company owned by shareholders. There were cultural and benevolent arguments for supporting classical music which had wide, if unquantifiable, benefits to the public. These policies had no impact on users of musical works as they involved only internal allocation of revenue. They had been established by the elected representatives of the PRS, were maintained by an elected Council, and could be changed or even abolished if the membership so decided.

14.21. With regard to donations, the Council and members had always believed they had a responsibility to put something back into the industry. The current policy was to support some contemporary music performance, writers' guilds, music for education and theatre (the former including a Composers in Education scheme), choral groups specializing in contemporary works, and certain scholarships, sponsorships or awards. The PRS did not sponsor concerts as such, take commercial risk in promoting big events or pay individual artists. Promotions and donations were funded from non-licence revenue and amounted to less than one-quarter of 1 per cent of total revenue (£258,211 in 1994).

14.22. The general policy of the PRS was to treat all its members equally, classical music being the only genre given revenue support. Individual composers were not specifically targeted for financial support at the beginning of their careers (a question the MMC had raised), although new members generally were so targeted for attendance at exhibition days or members' surgeries, and were guaranteed a certain sum in their first year of membership under the PCA scheme (see paragraphs 6.118 to 6.120).

### **Aspects of corporate governance**

14.23. The Memorandum and Articles of Association were the result of many amendments made over the years since the PRS was incorporated in 1914. The language was, in places, archaic and could be

expressed in more modern terms, but the essence of the PRS's structure and the rights and obligations of members was clear. No distinction was made between categories of members or of works. The articles gave a framework within which the PRS could act in the best interests of all its members without discrimination. The General Council had wide discretionary powers, but this was desirable given the sheer size of the voting membership (nearly half were associate or full members and therefore had voting rights-see Chapter 7) and the fact that the Council consisted of the members' elected representatives. There was the continued possibility of changes in the General Council, whose members were elected for a three-year term, if the membership at large so wished. It was critical to recall that the PRS was a membership society and therefore subject to the wishes of its members. The General Council's decisions could be challenged, or even overturned, at a General Meeting.

14.24. The PRS's strategic planning process involved the balancing of plans and policies as well as the balancing of short-term and long-term effects and benefits. The process was not an annual one-off exercise but a constant review by the Council and its committees. Once a year, in the operating plan, the Society set out its priorities showing where the emphasis would be placed in the coming year. Although the last formal document planning for more than one year covered 1992 to 1994, the strategy followed had enabled the PRS to exceed the targets that document laid down; normal administration costs had been reduced to 23 per cent of domestic licence revenue (against a target of 24.6 per cent) and 15.2 per cent of total revenue (target 16.4 per cent). The PRS had therefore exceeded its stated targets and reduced the cost:revenue ratio to a level lower than that of comparable societies.

14.25. The recently concluded negotiations with China were an example of the type of dilemma which faced the PRS in balancing short-term and long-term interests. No royalties were expected from China for some time, but it would, by some predictions, be the largest music market in the world within 20 years. Even now, major satellite broadcasting channels in the Pacific Rim could be received in China. The object of negotiating a reciprocal agreement was to ensure that the PRS was represented from the beginning and could give the Chinese such help as they reasonably needed to ensure that the PRS's rights would be adequately protected. The long-term benefits could be considerable. Moreover every time another society signed the new PRS contract, it helped persuade other societies to do so and was thus a significant step in the PRS's attempts to modernize reciprocal representation relationships. Comparatively to other projects, few resources were involved in reaching agreement with the Chinese society.

14.26. The Strategy Working Group of the Executive Committee had been meeting since January 1995 to draw up a medium-term strategy for the PRS, including consideration of the structure of the Society. Although no final decision had been made, current thinking was that the PRS should be divided into three distinct businesses corresponding to its existing revenue streams of broadcasting, public performance, and international. This would help the PRS focus on the short-term and long-term objectives of each business area.

14.27. The PRS required a Chief Executive as well as a Chairman and had been actively searching for candidates for the Chief Executive position. As the General Council had expressly decided in December 1993, the roles of Chief Executive and Chairman should not be combined pending appointment of a Chief Executive and responsibilities were allocated to the Chairman and top management. The job required particular characteristics and the number of suitable applicants was not large. The Chief Executive when appointed would have his or her own ideas and would take part in developing and implementing a coherent strategy, but ultimately it was the decisions of the General Council which represented the membership which would determine that strategy. (The appointment of a Chief Executive with effect from 6 November 1995 was announced in the course of our inquiry.)

14.28. The 50:50 voting division as between writer and publisher directors was deemed necessary to protect the interests of the two main interest groups. There had not been any move to change this fundamental balance. When the issue was discussed, writers pointed to the MCPS which was publisher-owned (see paragraph 3.27) and publishers pointed to the European societies (including those which administered mechanical as well as performing rights) whose Boards tended to be controlled by a majority of writers. The present structure did not lead to inefficiencies or difficulties: rather to clear expression of all industry views, thereby allowing equitable policies to be developed. On sensitive factional issues it might sometimes be difficult to reach agreement, but it was hard to see how a different balance could facilitate decision-making while still protecting the legitimate interests of all members.

14.29. The EGM in May 1995 had agreed to reduce the permitted number of directors employed by user-owned publishers (for definition, see paragraph 3.19) from four to three. The reason was to prevent music users from having undue influence on the discussions of the Council, particularly in licensing and tariff matters. At the same time, it was agreed to remove the limitation on foreign-owned publishers, since this had never been an issue.

14.30. At the same meeting, Professor Clarke's recommendations as to the need for independent and executive directors had been accepted. His recommendation for a reduction in the size of the General Council was also accepted and the reduction in the number of writer and publisher directors to nine of each by the 1997 AGM was approved by the membership at the AGM on 14 September 1995. It was unclear whether the MMC's allusion in their list of issues (Appendix 2.1) to 'public interest' directors referred to the appointment of persons in addition to the proposed independent directors. The present directors would say that they were elected to represent the interests of the whole membership, and indeed there were many aspects of the music scene not directly represented. Concern had been expressed, however, that some directors might have difficulty in balancing interests when they were simultaneously directors of the PRS, the MCPS, and the MPA or one of the writers' guilds.

14.31. Making the PRS formally accountable to an external regulator was unlikely to assist either users or members. Members had daily access to staff and could raise questions or challenge decisions that affected them. If the treatment of one section of the membership was altered, this invariably had implications for other sections; unfairness, if it existed, could best be dealt with by the members themselves through their elected representatives. The degree of accountability was similarly a matter for the members, because they must determine whether the expenses put to each activity were acceptable. The PRS questioned whether a society run by and for its members could ever be considered non-accountable. The question of an appeal panel/review board with an independent Chairman was being considered by the Council.

14.32. So far as music users were concerned, perceived unfairness often took the form of a belief that tariff or licence rates were too high or that they were inappropriate for the particular type of music use concerned. Most users could take up problems through their trade associations and in the end, if there was a serious dispute, could have recourse to the Copyright Tribunal; to that extent, the PRS already had an external regulator.

14.33. Turning to the question posed by the MMC concerning the use of committees and groups, the PRS accepted that the voting members of its committees were exclusively General Council members, but said that people taking major decisions must be accountable to the membership. This would not be straightforward if many committee members were neither directors nor employed managers. Many external directors would begin to alter the nature and balance of the Council as a representative body of the membership at large. The membership, via their elected representatives, must be heavily involved in policy-making, management being charged with the day-to-day running of the company. Almost all organizations had committees or working groups of some kind, and the nature of the PRS's business required specialist committees on such subjects as music classification or the LMDP. The committee structure built up experience and expertise, harnessed the motivation and interest of Council members for particular topics, and enabled often complex detail to be grasped.

14.34. The Executive Committee, which had recently been given greater authority, with its Strategy Working Group, and the General Council, were responsible for the broad perspective and the co-ordination of committee work. Guild and MPA members regularly attended meetings as non-voting participants as did management, staff and outside advisers. Any Council member could attend any committee as an observer. Changes were nevertheless in progress, as already indicated.

## **Information systems and information technology**

14.35. The PRS had a track record stretching back to the 1960s to show that it had successfully applied IT to benefit its members. PROMS had been a set-back, but there was clear evidence that over the past two years the PRS had profitably and innovatively applied IT and had thereby achieved significant savings.

14.36. PROMS failed for a number of reasons and many valuable lessons were learned and acted on. Amongst the root causes were poor implementation and project management, lack of attention to data quality and the fact that the project attempted to automate inefficient processes. Such problems were common to other major failures of computer schemes in the same period (London Ambulance Service, Stock Exchange, etc). Given the size and complexity of the project, the PRS employed outside specialists to advise on each stage. One such specialist had been sued and had agreed to pay substantial compensation. PROMS in fact showed that the PRS was able correctly to identify how technology could be used to improve the business. The decision to develop an integrated computer system to handle most aspects of the PRS's business was, and remained, the correct strategy. The PRS had not, however, fallen into the trap of running down its existing systems and was therefore not forced to continue the project. And it did not throw good money after bad when the project was shown to be fatally flawed. The PRS's 'old' systems had absorbed rises in volumes and delivered every distribution to schedule, while supporting a steady growth in productivity. A serious hold-up in the application of IT occurred during the negotiations with the MCPS, since the PRS's investment in strategic development was suspended as the MCPS had asked that this be a pre-condition of negotiation. By the time the negotiations were called off, a number of key problems had been identified, none of which related to the application of IT. The breakdown in negotiations did not suggest deficiencies in IT. The PRS had set out for the MMC the many innovations it had introduced since PROMS.

14.37. The PRS recognized that IS were fundamental to its business success and had adopted a three-pronged approach. The first prong (the 'top-down' part) was designed to elicit the business plan and goals and then to deduce IS needs. Secondly, current systems were regularly evaluated; many applications which had provided competitive edge were evolutionary add-ons to existing systems. Finally, there was the search for opportunities for IS to create new strategic options. The General Council had laid down a policy that insisted on incremental development, carefully and properly planned and monitored, with clear progress reporting and no major 'leading edge' technology. Internal resources had been strengthened, and external quality assurance advice obtained. Procedures had been established to enable the Executive Committee to relate IT to current operational issues.

14.38. The new IS strategy was being developed as a 'total business system' looking at all the major workflows and their interrelationships. Underpinning it would be a dictionary defining all the data used within the systems. Application systems would be built around an integrated database facilitating control and quality assurance. An implementation plan was ready by the end of October 1995 and included a schedule which would substantially be completed by 2000. The whole plan was designed to support the business vision agreed with the Strategy Working Group. A number of important areas were being covered, including incremental development and change management.

14.39. With data quality having been one of the problems with PROMS, the PRS was now analysing data at a level of detail sufficient to provide complete solutions to existing problems. A comprehensive review of current data and future data requirements was being undertaken. A number of changes to current systems would be made to improve data handling, which would also help to improve data quality and working efficiency. A third line of attack addressed the actual clean-up of the data.

14.40. As the new strategy developed and moved into implementation, the proportion of IS investment spent on new development as opposed to 'refurbishment' would climb rapidly. The Council had made it clear that it was ready to invest as and when the case was made. It was accepted that more staff with different skills would be needed, but until the initial planning stage had been completed it was not known precisely what skills, or how many staff, would be needed. For example, it might be decided to subcontract most of the programming to software houses, with the PRS specifying, designing and testing.

14.41. The importance of unique numerical identification systems for authors, works and other data was fully recognized. The PRS was represented on the CISAC IS steering committee, the body charged with developing future standards for international application. Existing numbers, such as the CAE, were at the heart of current systems. Newer codes, for example the IFPI ISRC, and record numbers would be incorporated, though new systems would be needed to use the ISRC. The ISWC and the Agreement Number being introduced by CISAC would also be built into new systems. In autumn 1995 the PRS and the MCPS agreed that they would jointly administer the ISWC in the UK. It was likely that the ISWC would be placed in current systems to support a pilot project in early 1996. At the same time the PRS and

the MCPS would jointly introduce an electronic notification system for publishers. It was just as important to develop systems that utilized and linked the numbers; for instance, the ISRC and the ISWC must be linked to enable rights societies to operate effectively. Also, and arguably even more importantly, all participants in the industry must use the codes or they would be of limited value. At present use of the CAE was sporadic and some publishers used their own codes. The PRS was making strenuous efforts to improve this situation.

14.42. The General Council had recognized that it did not itself have extensive IT expertise and had already acted to address this (see paragraph 14.37). The first step was the appointment of a Chief Executive with extensive IT experience. The next step would be the appointment of an independent director with IT experience. PROMS had brought home the need for continual vigilance and for normal business practices to be applied to IT. The PRS had on its Council a number of people with business experience enabling them to evaluate proposals from a variety of experts. Senior management, and other PRS staff, had a stronger grounding in a number of aspects of IT development such as systems analysis, business case preparation and the working out of dependencies. These skills, resulting from extensive and successful training programmes during PROMS, BPR and TCI, were being added to, for example by KEY, a method of process and data modelling.

14.43. The PRS drew our attention to the fact that the MMC consultant's investigation finished in May 1995 but work on the PRS IS Strategy Plan continued until October. Therefore, the consultant's report did not reflect this later work. The final strategy document covered a number of points raised by French Thornton. For example, it gave the details of the IS strategy support for the business operational visions and detailed a change in management and audit structure. The strategy also incorporated standards produced by the CISAC Common Information System project. Major ideas from the existing list of potential areas for improvement (as reported on by French Thornton) were also covered, for example automating support for Licensing Inspectors.

### **Other aspects of efficiency**

14.44. There was clear evidence to show that under the current structure normal administrative charges were reducing steadily. This year such charges, as a percentage of total revenue, were forecast to be the lowest since 1978. This decrease must be seen in the light of business growth: between 1990 and 1994 total revenue in nominal terms had increased by 27 per cent and net distributable income by 30 per cent, while average manpower employed remained constant. In so far as international comparisons provided a reliable bench-mark, the PRS compared favourably with overseas societies engaged in similar activities (see Chapter 9).

14.45. The 'commission charges' idea proposed in the MMC's list of issues did not necessarily provide a better mechanism to reduce costs than the current arrangement. What would happen if a commission charge was exceeded? The outcome would be the same as if a current administrative target was exceeded, ie the distributable income would be reduced. In any event, the administration charge recovery rates on each distribution source of income were set by Council members at the Distribution Committee which observer members attended. Wider publication of these would be akin to publishing a commission rate.

14.46. Any comparison with other collecting societies must be made with extreme care. A mechanical rights society like the MCPS had a comparatively simpler task than the PRS, collecting revenue from a relatively limited number of separate users, in respect of fewer works, and distributing to a smaller number of members (mostly publishers). Moreover the nature of most licences granted by the MCPS did not require performance analysis, contrasting sharply with the PRS. The MCPS licence was normally granted for a given number of works to be put on a recording or soundtrack, quite unlike the PRS blanket licence.

14.47. What really mattered was the priority, attention and skill allocated to cost reduction and cost control. Lowering administrative costs was a key objective and more effective ways were being developed of identifying and achieving savings. In this connection, the PRS pointed to the results achieved by its BPR and TCI (see Chapter 7). The Strategy Group and management were looking at ways to improve focus on the revenue streams including a further allocation of indirect costs to distribution pools. In

addition, the Council, through the Staff Committee, had requested that management prepare ideas for a 'gain sharing' scheme linked to performance. At some point, however, the PRS (and the incentive scheme) would have to recognize that there was a limit below which it would not be realistic to reduce costs, although more emphasis would still be placed on quality, eliminating errors, and avoiding cost increases. This was because there was a critical difference between the PRS and companies in competitive markets. In other markets, there was scope to expand (at the expense of the competition, or by adding new customers or discontinuing popular but costly lines), to create new markets, or to raise prices in line with scarcity. The PRS, by and large, did not have these options, though economies of scale might be gained by working with, for example, PPL and broadcasters.

14.48. Contracting out or facilities management of certain business activities could result in benefits, particularly if the contract had built-in cost savings or other improvements. The PRS already had substantial experience, and success, with this approach in non-core activities (computer operations, PC maintenance, security, and catering). Licensing agents were employed in four areas. The case for outsourcing printing was under investigation. The PRS had over a number of years been evaluating companies offering broadcast identification services using 'digital fingerprints', though all systems had limitations for PRS purposes which had not yet been overcome. Future developments would be monitored carefully. This issue had now been taken up by the CISAC Steering Committee. The PRS regularly looked for further use of facilities management and was also examining ways of 'insourcing' by collating and analysing data for PPL and broadcasters.

14.49. The mere act of contracting out did not guarantee either savings or service improvements. There was still the difficult task of setting up the service level agreement, measuring performance and managing the service. This type of approach worked best with activities common to many businesses so that third parties built expertise and offered economies of scale. It was not appropriate to unique activities, such as the identification or 'discovery' of unknown musical works from a broadcast. For operations involving specialist skills not readily available in the outside market, the Society might find it better to hire its own staff, thereby assuming direct responsibility for training and quality control. Particular care and effort would be needed in contracting out sensitive areas such as licensee contact or membership activity.

14.50. Proper analysis of the task, and a full cost-benefit analysis, were prerequisites. The possible loss of strategic knowledge would be particularly important if core activities were involved, as also would be the possible loss of the service ethic prevalent among PRS staff. The PRS had a cautious 'performance-risk curve', particularly following PROMS. Its strategy was first to improve the foundations, which was expected to yield a considerable return at low risk. Only then could it embark on a second phase of higher risk: 're-engineering' changes, and an extension of outsourcing into core areas, should rightly be seen as at that end of the change scale.

14.51. At the MMC's request, the PRS had checked the amount of staff time spent on internal functions as opposed to external transactions. It found that in core departments the proportion varied from 2 to 10 per cent, with most in the range 4 to 6 per cent, and in support departments from 2 to 11 per cent. These figures compared favourably with those in a BBC Education/Industrial Society 'Working Time Survey' in 1993. Council and management attached great importance to performance indicators, which were a key part of the TCI initiative. Bench-marking was more difficult because the greater part of the PRS's activities were not readily comparable with those of other organizations, but it might be applicable in some service areas.

14.52. Acknowledging that much remained to be done in improving cost allocation so that cost-effectiveness could be more readily assessed, the PRS said that this was one of the main concerns of the Strategy Group. Many improvements had already been made, but reallocation of indirect costs was only part of the task. The PRS needed to complete the mapping of work processes to ensure that costs were correctly charged to activities and then to revenue streams and finally to members. Some activities-members' queries, finance, legal-were clearly shared. To enable members to make a balanced assessment of cost-effectiveness, service level agreements must be established where possible. An activity might be expensive but demanded by the membership as part of their definition of quality or service. This was certainly true, for example, of the 1992 LMDP on programmes from certain significant venues which were not classed as concert venues.

14.53. The PRS's public performance licensing covered some 258,000 premises on over 200,000 licences, of which some 30,000 were replaced every year. This required considerable effort not only from people in the field (local licensing inspectors) but also from substantial numbers of office staff. Delegating the work done by the latter to regional inspectors would be counterproductive leading, as it would be expected to do, to increased local cost and difficulties in measuring the standard of performance. But it remained the Society's policy, as it had been for the last ten years, to decentralize its public performance licensing operation to a number of compact regional centres where licensees could feel that the staff dealing with their case had at least some local affinity and where other benefits of regionalization (management of inspectors in the field, access to local media and to members) could be cultivated. Whenever the PRS had opened a regional licensing office, the increase in revenue had justified the investment within two years.

14.54. In the medium term, until new systems were in place, the PRS felt there was far more to be gained, and at less risk, from making the current centralized services more efficient than from large-scale regionalization or relocation, though nothing was excluded from consideration in the longer term. A detailed business case would be needed and it had to be borne in mind that most sources of data (and many major members) were in London. Intuitively, it seemed that many of the PRS's core processes lent themselves to being provided centrally.

14.55. The PRS gave examples of sources from which it had obtained outside specialist advice on aspects of its operations over many years, on a range of subjects including management structure, the feasibility of PROMS, records management, staff grading, performance indicators, and (currently) switchboard/voice communications, printing and stationery and bench-marking.

14.56. The Strategy Group was not in favour of an administrative charge for the registration of each new work. Many contracts between publishers and between publishers and writers required the publisher to notify all works to the PRS and there would therefore be an immediate heavy charge to be borne by the publishers on new works and works of overseas writers sub-published by them in the UK. While many works were written, relatively few received commercial exploitation. It was by no means guaranteed that even a successful writer would have his or her works performed or recorded soon after composition. Very often a member was not aware of when a work would first receive a performance. There would clearly be an incentive provided by such a charging structure for writers and publishers to register works only when they knew they were being performed: and that would often be after they had actually received performance. The PRS would encounter severe difficulties in analysing performances and posting works which could not be traced to an active works file. Present and future methods of automatch would be similarly incapacitated. Inaccurate information would inevitably result in errors in distributions to members. The basis of future developments in unique works numbering depended on holding all data correctly at source in order to match against performances. Disincentives to registration ran counter to that objective which had been set by all the major collecting societies.

14.57. With regard to an annual membership subscription, research was under way to produce a number of alternatives for future consideration. At its simplest, such a subscription might be small enough to allow for the fixed cost of maintaining certain data on PRS systems and the costs of stationery and postage associated with keeping members informed about the PRS and its distributions. Another form of membership subscription might take in some degree of variable cost associated with the numbers of works registered or handled, the number of performances handled, and the complexity of such analysis—for example, automatching a single performance on a radio station was far cheaper than collecting and analysing a live music programme from a significant venue. This would have its own problems. It was probably fair to say that a simple membership subscription, coupled with varying rates of administration deduction from the various distribution pools, would offer the best way forward.

14.58. The PRS sought every opportunity to improve efficiency by working with other organizations. This ranged from the joint registration of works with the MCPS to sharing litigation costs with PPL. Currently, the PRS was working to extend practical co-operation with both of these organizations, as well as with other bodies, including broadcasters. The PRS had an open mind about the nature of such practical arrangements, which could range from the buying or selling of data to a formal joint venture.

## MCPS

14.59. It was unlikely that the joint venture with the MCPS (see Chapter 8 and paragraphs 13.7 to 13.9) could ever have succeeded in the way planned by the MCPS. The underlying principles of setting up a joint venture were basically flawed and the detailed proposals deficient in important areas. By the time the MCPS called off the negotiations, both parties had separately concluded that the differences between them were fundamental and that the efforts to bridge them were having a seriously debilitating effect on the two companies. Behind the apparently non-contentious concept of a joint venture for administration functions only, there remained the real need for the PRS to be able properly to protect all its members' interests. Some members saw the PRS as the only body through which writers and small independent publishers could exert significant influence on their industry. Equal control over any joint venture, including the data used and amassed within that operation, was therefore essential. It was also essential for any arrangements to cope with tensions already existing and to avoid introducing additional conflicts of interest. At the time the proposed venture failed both these requirements.

14.60. First, there were unresolved issues about the data which prevented the PRS from obtaining a guarantee of 50:50 ownership with the MCPS. Historically BPI had claimed ownership of certain rights in the data the MCPS held. It was believed that at least four major record companies had stated in writing that they owned the rights to these data. The PRS was concerned that one or more of these companies, or BPI, would have insisted on formally sharing in control and ownership of the joint venture. The PRS could then have found itself outvoted by its co-venturers.

14.61. Secondly, the PRS would have been faced with paralysing conflicts of interest. Its partners in the joint venture would have been entities controlling broadcasters, record companies, publishing companies, film/television companies and even competing rights organizations. It was common knowledge in the industry that some major publishing companies were considering taking on their own rights administration and other groups were strengthening and building vertical links with broadcast/satellite companies. In all probability, the clear loser would have been the writer and the small independent publisher. Given the proposed extent of the remit for the joint venture, it was possible that the PRS Council could have lost effective control over its own operational decision-making.

14.62. Apart from the issues of principle, there were many other matters of concern. The underlying business and financial cases for the venture were far weaker than had initially been supposed, and had significant risks attached. The PRS firmly believed, and still believed, that similar, or better, benefits could be achieved in the same time-frame, with less risk, by steady improvements within the PRS and the MCPS. The negotiations revolved around a constantly shifting definition of the scope of the proposed venture. These shifts were not supported by additional research or the amendment of the business case. The PRS believed the sheer size and scope of the proposal (bringing together between 500 and 700 staff and developing new systems and working methods over a five-year period) required careful and formal research, planning and project control. Instead, the MCPS had required an unequivocal commitment to the setting up of the company at the outset, without detailed planning and before all the legal, business and practical implications had been investigated and agreed.

14.63. The PRS had pledged to its membership that, after PROMS, it would follow best practice in IT or other large developments (the remit intended for the joint venture was assessed as nearly twice as large as PROMS). Even the MCPS base system which would underpin the joint venture was then two years away from completion. The PRS could not accept a 'leap of faith': there had to be deliverable stages, properly planned and with the General Council having the right, at reasonable intervals, to vet progress, assess success or otherwise, and consider whether it would be in members' interests to go further.

14.64. Among the major issues which remained unresolved or areas where there was disagreement, or where no detail had been provided, were set-up costs, the basis of sharing savings, Board composition and voting rights, termination rights, deadlock resolution, details of the service level agreements between the joint venture and each of its parents, changes in IT practice, financial issues (related to loans, tax, pensions, assets), staff and locations. The Heads of Agreement appeared to limit contractually the Council's ability to change, for example, the PRS's own distribution practice or rules, while at the time the MCPS did not require a detailed and costed systems development plan prior to contract. The PRS needed this to verify the total cost and the risk for its membership.

14.65. The PRS believed the industry and the members of the PRS and the MCPS (and PPL) could still benefit from a closer working relationship, but that in the future this would be based on approaches such as the CISAC common information system, which involved interlinking individual databases rather than building large, central databases. Joint working arrangements would be sought wherever possible. Smaller, less risky incremental changes would bring benefits both to members and to music users, and it was intended to involve them in the new developments. The PRS and the MCPS were steadily getting involved in joint projects such as ISWC, joint notification and data clean-up. Significant progress had also been made in agreeing the underlying data models and standards for systems, including electronic communication.

14.66. Asked which areas of data and of activity were common to the PRS and the MCPS, and which were different and to what extent, the PRS said that almost all UK publishers were members of both societies, and so the UK published repertoire administered by the two societies was largely common. The unpublished repertoire administered by the PRS was far greater than that administered by the MCPS. Between 20 and 30 per cent of the notified PRS repertoire was unpublished. Writers could be members of the MCPS if their works were unpublished, which enabled the MCPS to pay the mechanical income to the writer, but only 5,000 writers were members of the MCPS compared with 26,000 who belonged to the PRS. The international repertoire administered by the two societies was largely identical. In all, about 70 to 80 per cent of the total repertoire was common to both societies, a fact reflected in the joint works registration procedure.

14.67. Prevailing industry practice was for the writer and publisher to enter into one agreement which covered both the mechanical and performing rights in a work or a number of works. However, apart from general identification information, the PRS and the MCPS were concerned with different parts of these publishing agreements in relation to the separate rights and the different allocation of royalties for each of the rights to the interested parties. The crucial royalty data which each society used to make distributions was entirely different and had almost no overlap. There were also differences in distribution practice.

14.68. The structure of the overseas business was very different because of the way in which rights were administered and in particular because of central European licensing by major record companies. The PRS understood that mechanical income was usually collected internationally via a sub-publishing network and the publisher then accounted to the writer. Where a publisher had not been appointed, the mechanical royalty flowed through the mechanical rights societies' network. The MCPS therefore needed to hold data only on the UK publisher to make a distribution and did not need to concern itself, in the main, with writers' royalties.

14.69. Because the performing right was owned by the performing right societies which paid their writer members direct, the writer's share was not paid to the publisher, but flowed through these societies, regardless of the sub-publishing network. The PRS therefore needed to hold full details of the agreed contractual splits between writers and publishers for every territory so that it checked that the revenue it received from overseas societies had been divided accurately. It also needed to hold details of sub-publishing agreements which granted the right for an overseas society to pay its own publisher member for a work originating in the PRS repertoire.

14.70. The PRS was interested only in works which were performed and broadcast and the MCPS only in works which were recorded. The commonality was the active works which were both recorded and performed. Though both societies had the central activity of identifying usages of works, these activities differed in scale. The majority of MCPS licensing was product licensing which was understood to require a one-off link to be made between a work, a recording and a product, whereas PRS performance posting (although it might involve the same works) was a far higher-volume process, linking annually about 9 million performances to the works performed. The PRS said that its transaction volumes were therefore significantly higher than those of the MCPS.

14.71. It was clear from much discussion with the MCPS that the two organizations were not agreed on the extent of the overlap of data and activity, the MCPS believing it was much greater than did the PRS, despite both organizations employing independent consultants to investigate the overlap between the businesses. The PRS believed this difference in perception might have been avoided had more work been done jointly to quantify the difference and possibly had there been more understanding of the specific

needs of a membership society. Other reasons for the difference in attitude to risk and project planning stemmed, it was believed, from the lower risk to the MCPS (it appeared from the financial model proposed that the PRS would be required to pay the lion's share of the development costs). The PRS had a firmly held view that the difference in data and processes, the lack of analysis, the weakness of the business case and the apparently different attitude to risk would have posed a serious threat to both businesses.

## **Accountability to members**

14.72. PRS management was directly accountable to the elected General Council and its committees. There was a comprehensive system of checks and balances which had improved over the last two to three years with the appointment of new senior management, including an internal auditor reporting directly to the Chairman and Council. As previously stated, there was a strong service ethic involving a sense of duty, stewardship and trust. The wider membership had regular opportunities to discuss operations and put forward proposals. In addition to AGMs and EGMs, there were members' representatives, as well as Council members, at meetings of the Distribution Committee and the Live Music Working Group.

14.73. The PRS pointed to the substantial improvements that had been made in recent years in communication with its members. Monthly membership surgeries and regional forums (five of the latter in 1995) existed for potential and provisional members. At members' request, 'theme' surgeries were held to cover specific topics. Monthly Writer/Publisher Discussion Groups and Media Music Distribution Groups took place and regular meetings were held with the Music Services Management Committee (for classical music), the International Managers Forum, the Alliance of Composer Organisations, the MPA and the MU which provided an opportunity for discussion of PRS policies and members' objectives. The PRS pointed to a number of important developments which had emerged from these meetings (e-mail links to PRS data on the active works file, e-mail facilities for members' queries, and a file for unidentified films). The PRS also sent out three or four mailings annually to all 28,000 members which embraced a wide range of topics. For the future the PRS was looking to harness further the energies of its membership. The Strategy Group had identified the need for an independent Membership Division to crystallize the requirements and views of the membership and to underline the Society's dedication to being active and responsive to the membership's needs, which were no different from the PRS's own aims and objectives.

14.74. The PRS recognized that it had duties to its members commensurate with the obligations membership imposed on them, and that there was an obligation on it to collect accurate distribution information and to maximize revenue in the UK and from overseas. The obligations were set out in Clause 3 of the deed of assignment (to pay the assignor the money to which he is entitled) and in Rule 2(a) (to exercise and enforce for the benefit of members all statutory rights).

14.75. These provisions did not oblige the PRS to pay royalties in respect of each exploitation of each work of each member. If it did so all royalties collected would be spent on administration, leaving nothing to distribute. (For the problems of logging public performances, see Chapter 6.) The vast majority of members appeared satisfied, or at least not dissatisfied, with the PRS's current obligations, which compared favourably with obligations of the MCPS and comparable societies to their members. An author who was unhappy with the PRS's administration of his or her rights was not without possible redress, either through the courts or through the democratic process. There was no way of ensuring that each voter would be happy with each Council decision on distribution, but the PRS's composition was a way of ensuring that the interests of the membership as a whole were paramount over the perceived interests of individual members.

14.76. A code of conduct had been agreed by the PRS and its European affiliated societies in GESAC. The code was designed to regulate the practices of collecting societies in Europe and to harmonize their activities as well as to increase their efficiency. It covered such issues as the democratic participation of members, non-discrimination, transparency and the appropriate level of charges to music users.

14.77. The PRS continuously sought to simplify procedures and to improve the presentation of material available to members. As well as the targeted channels of communication already described

(paragraphs 14.72 and 14.73), rules and procedures were clearly explained in the Members' Handbook, the Yearbook and other publications, and distribution statements were as informative as possible, eg by giving the date and place of a live performance. The membership was very large and from diverse backgrounds; every effort was made to explain to members any policy changes and the workings of the PRS. The Membership Division and Public Affairs had put considerable effort into improving members' understanding, with acknowledged success.

14.78. For both overseas and domestic distributions the Society provided work title, interested party, share and royalty information to its members and overseas affiliates. For domestic broadcasting distributions the Society also supplied cash value tables enabling a member to equate the royalty received with the value of a performance per minute. Queries were checked back to the performance source for accuracy and royalties adjusted if necessary. Direct e-mail links with members, enabling them to input new or revised information, were being tested.

14.79. The Society provided to members all the information it received from foreign affiliates, with two exceptions. At present there was a small number of cases where 'general' and 'broadcasting' income were combined in the PRS statement. Work was in progress to show these two sources separately. In a few cases revenue from an overseas society was too low to justify cost-effective independent analysis, and another society's statement which was similar in content might be used. With improvements in systems this was a diminishing practice and now represented less than 0.5 per cent of annual overseas income. Where large credits were identified they were extracted from those statements not otherwise analysed and paid separately. The PRS regularly made technical visits to affiliated societies to analyse the systems in operation and to ensure that PRS members were receiving what was due to them. The Society recognized the need to improve the quality of the data it received from overseas affiliates. Such provisions were a feature of the new reciprocal contract along with the right to audit the other society's accounts. It was widely acknowledged that the PRS's detailed statements were the best provided by national performing rights organizations.

## **Termination of membership**

14.80. Termination of membership usually occurred because a member was transferring to another Society. The period of notice required had been reduced in 1995 from three years to three months, expiring at the end of a calendar year. The requirement that termination should be at the year end was to avoid cutting across the general performance and broadcasting distributions, and to enable mutual arrangements to be made with the other Society so as to ensure that there was neither a gap nor a period of overlap. However, a member could seek to withdraw at any time and if the circumstances were such that a date other than the end of the calendar year was appropriate, the request would generally be granted. The actual termination date and the notice period were both ultimately flexible.

## **Tariffs and the Copyright Tribunal**

14.81. Any greater bargaining power that derived from the PRS's monopoly position was tempered by the ability of the user to refer the PRS to the Copyright Tribunal. The strength of the PRS's negotiating position was in its ability to offer virtually the whole world-wide repertoire of copyright music. If music users were obliged to negotiate with individual composers, they would demand a considerable decrease in licence fees or tariff rates. They would not, on balance, gain (because of the extra costs they would incur) while composers and publishers would lose substantially.

14.82. The invariable practice of the Copyright Tribunal and its predecessor the PRT had been to decide on a rate lower than that sought by the PRS and other licensing bodies. Thus in 1986 the PRT had awarded a basic rate of 3 per cent of gross box office receipts for the LP tariff, against the 6 per cent claimed. For tariff V the PRT had awarded 2 per cent of box office receipts against 5 per cent claimed. In 1987 the PRT had refused a tariff based on a percentage of gross total admission receipts or gross takings, as had been sought by the PRS as a result of the advent of discothèques. The PRS's wish to raise the live music rate at clubs from 2.5 to 6 per cent of expenditure on music, over several years, had also been frustrated following a PRT decision. Tribunal decisions affecting other collecting societies (*AIRC v PPL* (1991) and *BPI v MCPS* (1990)) were cited to similar effect.

14.83. By a reservation declared in relation to Article 11 of the revised Brussels text of the Berne Convention, the UK remained free to promulgate any legislation it thought necessary in the public interest to prevent or remedy any abuse of the exclusive rights of a copyright owner. The declaration was made in order to allow the jurisdiction of a tribunal (such as the Copyright Tribunal). However, no provision had been made to enable the Tribunal to substitute its own commercial evaluation for that of a licensing body.

14.84. The terms of reference of the Tribunal as set out in the 1988 Act (see Chapter 4) had nevertheless had the effect (as had the previous 1956 Act) of giving the Tribunal power to substitute its own views for those of the licensing body as to the appropriate terms and conditions of the licence scheme. This was not the intention of Article 11 of the Berne Convention, which gave the author an exclusive right to authorize public performance, nor of the UK reservation, which related only to the question of abuse of rights and not to the question of determining reasonableness. It did not follow that simply because a tribunal had a different point of view from a licensing body on the terms and conditions that those proposed by the latter constituted an abuse. In practice the approach the Tribunal had taken in exercising its jurisdiction in disputes between copyright owners and users had devalued the repertoire held on behalf of its members by the PRS.

14.85. The PRT had said in a 1986 case (*PRS v Theatres National Committee and others*) that the evidence relating to other countries had been of little help in deciding what would be reasonable tariff rates in the UK. The Tribunal said that it had 'been unable to make any direct comparison with any particular country and had only used the rates as background against which to decide the matter before them'. The lack of guidance available to the Tribunal had been acknowledged in the courts (see the remarks of Hoffman J cited in paragraph 5.21). In the PRS's view, the terms of reference should be recast so that the Tribunal should be entitled to reduce a licensing body's proposed rate only if it considered the rate abusive. In any event, the onus should not be on the licensing body, as it was at present, to show that the proposed rate was reasonable.

14.86. The PRS accepted that it was necessary to compare like with like and that the conditions in continental Europe and elsewhere differed from, and could not always easily be compared with, those in the UK. However, the consistent policy of the Tribunal had been to dismiss foreign comparisons, which in the PRS's view were always *prima facie* relevant. The time had now come for the Tribunal to be given a specific duty to take into account the terms of licences in the EC. This was particularly important in those cases where the licensing of rights in one country directly affected the enjoyment of those rights in another country.

14.87. An important current example, where foreign comparisons were both relevant and appropriate, was satellite broadcasting. Directive 93/83/EEC of 27 September 1993, on satellite broadcasting and cable retransmission, provided for harmonization that 'should not allow a broadcasting organisation to take advantage of differences of levels of protection by relocating activities, to the detriment of audio-visual productions'. In fact such relocation was already taking place, with the result that the UK could become the 'bucket shop' for European satellite broadcasters. Five services directed to Scandinavian audiences, and another in Flemish, already uplinked from the UK. The Directive required member states to ensure that authorization (of satellite communication of copyright works) may be acquired only by agreement, but without prejudice to the regulation of the activities of collecting societies. If the jurisdiction and terms of reference of the Copyright Tribunal were left intact, harmonization would be illusory because the Tribunal's approach deprived music copyright owners of the remuneration they could legitimately expect for pan-European broadcasting of their works.

14.88. The PRS consulted satellite broadcasters with a view to publishing a tariff. Because of the divergence of views and lack of consensus it was decided reluctantly to proceed instead by way of individual negotiations with broadcasters. The PRS had now begun this process having proposed a royalty to BSKyB of 1 per cent of relevant revenue (as defined in the consultation paper) for the year beginning 1 July 1995 rising to 3 per cent of relevant revenue from 1 July 1997 onwards. The PRS believed such a rate was fair and could be justified by reference to European comparisons. However, it was by no means certain that the Copyright Tribunal (if the matter were referred to it) would accept a royalty based upon a percentage of revenue nor take into account broadcasting rates in continental Europe.

14.89. The PRT in a 1981 case (PRT 38/81) had refused to award a royalty based on a percentage of independent television companies' revenue, again rejecting overseas evidence. The Australian Copyright Tribunal, for example, had said that 'a percentage of revenue has a long history of acceptance as a measure of the worth of copyright', while the comparable body in Singapore had said that the English decision appeared to run counter to world-wide trends. A royalty based on a percentage of revenue, in the PRS's view, established a common measure of value which could apply fairly to a large number of licensees. It also avoided the need for numerous individual negotiations since changes to take account of audience, hours and times of transmission, number of channels involved and changes in costs and prices were effectively built into the percentage formula.

14.90. The PRS had been a consistent loser before the Tribunal in recent years. One of the reasons it had not made any references to it since 1989 was its reluctance to spend time, effort and members' money in preparing and fighting a case when there was little prospect of success. Nevertheless, if all else failed, the PRS would demonstrate its resolve to pursue equitable royalty rates through the Tribunal. Cases brought by users were generally brought by representative bodies or by powerful and well-resourced individual organizations such as broadcasters, which were well-experienced, well-funded and well able to argue and defend their positions.

14.91. Replying to a suggestion that the tariff structure should be simplified, the PRS said that while there were over 40 public performance tariffs, together with other licensing arrangements, this variety had grown over many years to accommodate the wishes of music users as well as the PRS. The user needed to understand only the tariff designed for his business or negotiated with his representative body. Steps had been taken (and more had been taken during the inquiry) to simplify the structure. However, while a very simple tariff based on square metreage might be adequate for a general retail store, it was not for, say, a public house. Quite small premises could contain several bars or other areas with different facilities. Users themselves often wanted tariffs to be very specific in order to differentiate clearly the charges they would be paying, while the PRS needed a reasonable amount of performance data in order to make equitable distributions. The best solution was a structure separately stating every relevant type of music use, from juke-box to live event, while ensuring that the terms relating to those separate uses were not complicated.

## **Overseas societies**

14.92. Reductions in delays in payment and in the amount of deductions made by overseas societies were being aggressively pursued by the PRS. Because of the unsatisfactory nature of the old CISAC model form of agreement, the PRS had written its own contract of reciprocal representation which it now insisted be used as the basis of any renegotiation (see Chapter 9). The relationship between affiliated societies was, however, symbiotic in nature, and the room for negotiation was limited. The PRS had investigated the possibility of seeking to remedy the practices complained of through national courts, but litigation overseas would not be without its difficulties, including the cost to members and the deterioration in working relationships which would result. Further assistance from the UK Government (already forthcoming in Japan) would be welcome. The PRS's Articles, Rules and reciprocal contracts with European societies had been notified to the European Commission with reference to Articles 85 and 86 of the EC Treaty and, following discussions, the Commission had informally indicated that it was not investigating them.

14.93. Deductions of 10 per cent of net distributable revenue for social and cultural purposes, as permitted by the CISAC model agreement, amounted to millions of pounds in Germany, for example. In some countries, eg France, much of this money went into local members' pensions. It was deducted from money due to PRS members but was of no benefit to them. Other factors operated which might double the effective rate of these deductions. Some societies deducted  $\frac{1}{24}$  if there was a local 'arrangement' of a piece of music, eg a song, even if (as was often the case) it was the original work and not the arrangement which was performed. The PRS had made, and was increasingly making, energetic efforts to address this unsatisfactory state of affairs, but, as stated above, could not impose its solutions on foreign societies.

## **Distribution**

14.94. The PRS noted that the distribution policy was regularly reviewed to maintain the balance between equity and efficiency in distributions. It was always possible to improve the former, but a full analysis of music used in public performance would cost so much that little if anything would remain to be distributed. Given the breadth and the differing requirements of the membership, a reasonable balance was achieved. The Society's distribution policy was always subject to review and was not designed to favour large, well-established writers, composers and publishers (a question the MMC had raised). Those who fell into this category were, however, naturally likely to feature more regularly in performance data. A sample-based analysis which then applied a multiplier to determine the value of a performance could be argued to be unfairly discriminatory in favour of some *less* popular works, in that the sample might catch the only performance of the work in a given period, in which event the 'missing' performances reflected by the multiplier would not actually have occurred.

14.95. On the question of whether the distribution system could be simplified, the PRS said that members demanded discrimination and detail in distributions. It would be easy to concentrate only on the major interested parties or to pay approximate lump sums but this would not meet the needs of all its members. The lead sheets accompanying distributions were being simplified and improved (evidence of this was supplied during the inquiry). There were now specific contacts with major members to talk through distributions and statements. The Society's methods of distributing general performance income were explained in the Members' Handbook, in other publications and in the lead sheets.

14.96. The PRS told us at a hearing that the responsible bodies scheme, which had been part of the 1986 Live Music Policy, had not been particularly successful, with the exception of one or two categories. It depended on breadth and depth of knowledge of a particular genre and a degree of impartiality that had not always been forthcoming. The present sampling system for broadcast music returns was consistent across all non-full-census broadcasters and applied to just under 13 per cent of the total hours broadcast.

14.97. If members were to be earning money from the PRS, by and large they had to get recorded, to get on juke-boxes or on radio. They had to have a greater degree of public exposure than occasional venues on the live circuit. In a public house, for example, the live fee might be something like £5 a night, in the course of which as many as 60 works might be performed.

14.98. Asked about non-payment to arrangers of copyright works, of which the MU and others had complained (see paragraphs 11.72 and 11.122), the PRS said that it was entirely open to writers, arrangers and publishers to enter into their own arrangements, but it was not for the Society to determine whether somebody should have a percentage share in the work.

14.99. New styles that emerged were brought to the attention of the Distribution Committee and others, especially if there was a sizeable sum of revenue which could be identified and attributed to a particular style. Many changes of fashion were transitory and dictated by the record company marketing departments. Discussions were proceeding with a view to obtaining from an external organization information gathered electronically at point of sale in several thousand record shops throughout the country. This would assist in assessing the use of minority genres that the charts currently used tended to ignore.

## **Exclusivity**

14.100. The PRS said that it regarded the exclusive assignment of rights as essential partly because if its exclusive right were removed, it would no longer be able to sue for infringement in its own name and enforcement would become much more difficult. It would permit any member or prospective member to subdivide rights by category, either within the categories set out in the GEMA cases or any other category which was legally and economically practicable, or by territory. It held, however, that live and non-live performances were merely two facets of the same act restricted by copyright, namely the right to perform the work in public, and that it was impracticable to subdivide this right (as requested by U2, for example) for the following reasons:

- (a) it would give rise to difficulties in relation to monitoring, collation of information and collection of royalties;
- (b) it would forgo the advantages of simplicity and effectiveness offered by the present system;
- (c) licence fees for individual public performances were generally of low value relative to the costs of licensing, collection, enforcement, monitoring and distribution;
- (d) it was impractical for any individual member to monitor every live performance of his or her works anywhere in the world, and to collect the royalties due;
- (e) at most, if not all, live performances works by a number of members were performed; supporting bands also appeared. It would therefore be necessary for the organizers of a performance to negotiate agreements with more than one rightholder;
- (f) if the public performance right in respect of live performances was reassigned to members a state of considerable uncertainty would arise, especially for the organizers of live performances; and
- (g) if the PRS were to be excluded from certain negotiations there would be a knock-on effect and loss of consistency as between one licensee and another.

14.101. Among other considerations put forward by the PRS were that its revenue would be reduced but its costs for administering the rights for some of the works controlled by it would not only remain the same but would be expected to rise, as a result of the need to build in additional safeguards: members would therefore receive less money. Members would be able to enforce the copyright themselves only in a few venues, with the result of rendering their copyright partially unenforceable, thereby diminishing its value. If organizers agreed to pay live performance royalties direct to members, it was unlikely that they would also be willing to pay the PRS or the relevant overseas society the collective licence rate for the concert. Changing the system laid down by the PRT in 1986, whereby a fixed percentage of the gross receipts from a popular concert was payable to the PRS, would increase administrative expenses and operate to the disadvantage of members who had not opted out of collective licensing (and also members of overseas societies).

14.102. The PRS did allow some members to license performances directly under the provision of Article 7(f), but this was almost exclusively in relation to compilation shows in theatres. As regards any supposed analogy with grand rights, it was not the nature of the performance (live or non-live) but the nature of the works themselves which gave rise to administrative differences and which should determine whether or not they remained within the Society's licensable repertoire. Experience showed that pop concerts rarely, if ever, simply involved major performers using exclusively their own material. The number of interested parties involved in live event tours added to the licensing of such performances a degree of administrative complexity not present in grand right performances, which typically involved the performance at a very limited number of venues of a work of sole or joint authorship the copyright in which was vested in a single publisher. Most live performances also involved support acts, probably playing their own works and also works of other interested parties.

14.103. Moreover a grand right involved the public performance of a single work, or a series of works whose sequence was fixed and which formed a coherent whole. This was entirely distinct from performances which were no more than the aggregate of stand-alone works in a permutable sequence. The inclusion of new or different works did not detract from such performances, and there was far greater likelihood of this occurring.

14.104. There was no prohibition on other collecting societies licensing performing rights. Although the PRS was a *de facto* monopoly, there was nothing to stop another society (for example, an affiliated society in the EC, with which the PRS's agreements were non-exclusive) from licensing performing rights in the UK. The impact on users of any such development would, however, be considerable, and *a fortiori* if members were allowed to license performances directly.

## Comments on views of other parties

14.105. The PRS commented on summaries supplied by the MMC of the views of other parties (see Chapters 10 to 13), drawing attention to the contrasting and often conflicting views expressed. It said that inevitably not all members had the same interests, but the PRS sought to develop policies which were fair and that took all interests into account. Many of the representations by other parties had already been dealt with, expressly or by implication, in the response to the issues provisionally identified by the MMC, as set out in the preceding paragraphs of this chapter.

14.106. The following is a selection from the numerous additional points made by the PRS by way of rebuttal of criticisms:

- (a) It was not true that the PRS had been responsible for frustrating the work of the Music Copyright Reform Group (paragraphs 11.55 and 12.11). The issues had been debated on several occasions and efforts made to find common ground. Some of the suggestions for policies to be adopted by the Music Copyright Reform Group could, if followed, have jeopardized the revenue from the performing right from new services, without assuring that at least equal additional revenue would be payable to composers and publishers.
- (b) The PRS did not accept that there was a lack of accountability, transparency or control of the international collection of revenue (paragraph 12.42). It circulated fiches internationales of its own active repertoire to overseas societies in agreed format and, through its technical visits, was ensuring that full use was made of the fiches. It also submitted magnetic tapes of works data for inclusion on the CISAC World Works List, administered by ASCAP. Overseas revenue was accounted for at the quarterly distribution immediately following receipt, assuming it was received in time to process. Distribution lead sheets *did* specify the period covered; the PRS was trying to achieve the removal of social and cultural deductions; the proposal to apply the principle of 'reciprocity' in its distributions to affiliated societies, when the PRS was a net exporter and continental societies were net importers, would have a negative effect on the PRS's income flow to the detriment of PRS members.
- (c) The PRS agreed that the most effective means of ensuring that each society was furnished with full work details was via data exchange by performing right organizations; ultimately this might free the sub-publishing network from this task completely (paragraph 12.67). This would lead to each society improving its data quality and would be substantially cheaper than the present method.
- (d) The figures of 27 per cent and 17.8 per cent (paragraph 12.68) were incorrect. Writer members received overseas revenue via the PRS; that revenue would already have suffered local societies' administrative deductions. The PRS waived its own administrative deductions from remittances from the EC and the USA, those charges being recovered from non-licence revenue allocated to writers alone.
- (e) Each work was registered only once (paragraph 12.69); only active works were transferred to the AWF and there was no separate agreements file linked to the AWF.
- (f) The PRS commented in detail on BASCA's suggested amendments to the rules and articles (paragraph 11.23), pointing out *inter alia* that the objection to Article 84 appeared to rest on a confusion between the provisions relating to employees and those relating to directors and officers of the company. The latter were extremely limited in scope and went no further than was permitted by section 310 of the Companies Act 1985, as amended.
- (g) The suggestion that there be a minimum threshold for title-by-title distribution (paragraph 11.25) was neither workable, nor fair, nor cost-effective. It would distort the accuracy of any distribution and yet incur the same, if not higher, costs.
- (h) The opinion that the PRS incurred substantial costs in having a large number of low-earning members (paragraph 11.47) was mistaken. The cost of membership was no more than £20 to £25 a year, including an appropriate share of overheads. Most costs were transaction-based and incurred in processing distributions.

- (i) It was too simplistic to say that 67 per cent of classical writers were 'worse off' (paragraph 11.50), because this looked at only one section from which classical writers received distributions of live revenue. It would be nearer the mark to say that 50 per cent were better off and 50 per cent worse off than under the 1986 policy. The change in the policy had inevitably led to a shift in the relative participation of members of all genres and others were receiving revenue for the first time. Other alternatives had been considered.
- (j) The PRS commented extensively on the submission made by the MCPS (paragraphs 13.2 to 13.8-see also paragraphs 14.58 to 14.70). There was a fundamental difference between the MCPS and the PRS in that the latter owned its rights through the deed of assignment from the writer and was obliged to pay the royalties to the writer and to divide fees in accordance with any publishing contract entered into by the writer subject to a 50 per cent minimum to the writer. There was no area of PRS business analogous to the MCPS's specific work licensing, which accounted for 84 per cent of the revenue the MCPS distributed. In this case all analysis was possible at the time of application for licence or clearance under blanket agreements. The MCPS's commission charges reflected these inherent advantages. On distribution of blanket licence revenue from broadcasters, the PRS had been told that there was a longer delay between the performance period and the receipt of payment from the MCPS than from the PRS. PRS data was generally believed to be superior to the MCPS for pre-1981 registrations, CAE numbering of writers and details of writer/publisher agreements. As explained elsewhere, there were substantial differences in scale between the PRS's and the MCPS's operations. The 1994 negotiations between the two societies are dealt with in Chapter 8.
- (k) The PRS responded fully to the comments of the WDO (paragraph 10.60), pointing out that DJs at a rave event played a mix of the music and lyrics from many different works prepared in a studio or mixed on turntables on stage. Only DJs who wrote their own work could join the PRS (as some were doing). It was often not the case that when PRS members' music was included this happened 'accidentally' or 'inadvertently'. The WDO and the DJs who performed at major WDO events had not co-operated in providing programme returns. Tariff DP was specifically designed to license large-scale events where mostly featured recorded performances took place. It was set at 3 per cent of box office receipts, directly comparable to tariffs LP and LC. The WDO had refused to accept the need for a licence for a series of events it had put on at Lydd Airport. A joint seminar had been held with the PRS, the MCPS and PPL, and another was planned, to explain the role of the collecting societies to the underground dance scene.
- (l) The complaint of Copyright Income Administration Ltd (Mr Harold Spencer) (paragraphs 12.84 to 12.87) related mainly to a Supreme Court of India judgment in 1977 which appeared to say that if a composer entered into a commissioning agreement with a film producer, then the film producer was automatically the first owner of copyright. The PRS accepted that this was the situation in India, but had consistently taken the position that the judgment did not have extraterritorial effect and was not relevant for the purpose of deciding who was the copyright owner in the UK. This view had been confirmed by an opinion obtained from leading Counsel (a copy of which was supplied).
- (m) With regard to the views of the AIRC (paragraphs 10.20 to 10.23), in practice the PRS always offered to extend an existing licence on similar terms, subject to retroactive adjustment in accordance with a later agreement or order of the Copyright Tribunal. This had been done in the case of the AIRC. The PRS was not obliged to make such extensions, but believed it was fair to licensees to do so. There was no risk of the PRS refusing to grant a licence, nor was it true that there was no redress under the 1988 Act. Whether or not the case was covered by a licensing scheme, the user could apply to the Tribunal.
- (n) The PRS had entered into discussions with several members who had written to the MMC, for example Jelly Street Music, Magnum Music Group and Savera Music, and had made progress in dealing with their problems. The PRS provided details of the relevant meetings and correspondence.

- (o) The PRS's reply to BSKyB's views (paragraphs 10.10 to 10.15) was that its intention in issuing the consultation document had been to establish, if possible, a tariff for satellite services. Although a reasonably short period had been proposed for responding, many requests for an extension had been received and had been freely granted. Because of the diversity of responses, the PRS had decided that it must after all proceed by way of individual negotiations. There was no connection between a licensing scheme as such and the concept of licensing on a percentage of revenue. That concept gave a fair measure of the value of the right to use the PRS repertoire and automatically took account of the relevant factors of audience, hours and times of transmission, the number of channels and changes in costs and in the standard of living. It was an accepted method of licensing the broadcasting of musical works around the world (see paragraphs 14.86 to 14.88). The PRS General Council had considered very carefully the options open to it before coming to a decision.
- (p) Replying to the representations from IMRO (paragraphs 13.16 and 13.17), the PRS said that the practice of grading arrangements recognized that a greater creative effort was generally required in producing original works than in producing adaptations or arrangements, though where an arrangement contained a lot of new work or completely revised orchestral parts it would be awarded <sup>12</sup>/<sub>12</sub>. When little original work was involved, as was usual with arrangements of traditional works from the public domain, the proportion of royalties was correspondingly less. While IMRO's members might profit if no grading of arrangements was made, this would be to the detriment of the international repertoire as a whole because it would reduce the share of revenue distributed to new works. In signing a contract of reciprocal representation with the PRS at the beginning of 1995, IMRO had accepted, in full knowledge of PRS distribution rules, the principle of national treatment, ie that each society should treat the other's works in the same way as its own. The PRS provided a schedule showing the practice in this respect of other societies in Europe and elsewhere; 10 out of the 14 listed operated a system of grading for arrangements. The PRS challenged the notion that the significant venues policy had not been implemented correctly and set out the relevant distribution processes.
- (q) In commenting on Mr Tomlinson's views (paragraphs 11.110 to 11.121) the PRS said that they had been debated by the Live Music Working Group and the General Council, but had not won support. The policy applying to both LP and LC events at significant venues was to gather all programmes for distribution: anything less might be open to criticism as unfair. It was not accepted that the effect of the Unsolicited Programmes Scheme was that most LC events were missed for distribution purposes. While the licensee might delegate the task of obtaining programme information, the only practical way for the PRS to enforce the requirement was to impose the obligation on the licensee with whom it had a contractual relationship. The PRS did not agree that past experience showed that other methods could be relied on. During Mr Tomlinson's 30-year period as a director of the PRS, the criteria for membership had been tightened rather than widened. The cost of providing services to non-earning provisional members was minimal.

14.107. The PRS also commented on the views of other members and of music users. It must be emphasized that the foregoing subparagraphs are a selection of the points that appeared most significant to the MMC from a much larger number made by the PRS. The absence of reported comment on any other matters recorded in Chapters 10 to 13 does not mean that none was made, nor does it carry any implication of PRS acquiescence.

### **Comments on possible remedies**

14.108. The PRS was invited to comment on the possible remedies the MMC had in mind to explore, as set out in Appendix 2.2, on the understanding that no conclusions about the public interest had been reached and that the remedies were therefore hypothetical. Its written comments, and its views as expressed at a further hearing, are summarized in the following paragraphs.

### ***Corporate structure***

14.109. In the light of the Cadbury report, the PRS had commissioned an extensive study of its own corporate governance. Much of Professor Clarke's report was being implemented. There would be a smaller General Council, with independent and executive directors, an Executive Committee with a

defined mandate and authority levels, and a Chief Executive had been appointed. As a result, roles and responsibilities would be clear and decision-making improved. The Strategy Group was considering the committee structure. Rules for election or appointment to the Executive Committee would be reviewed and, where necessary, clarified and formalized.

14.110. The Council was firmly of the view that elected writer/publisher representatives, reduced in numbers say to eight or ten, must remain on the Executive Committee. This was essential to represent a diverse membership and to protect the interests of that membership and of the wider music industry and the public. The Council recognized that over the last few years it had had to spend too much of its time on detail of issues that ordinarily would not occupy it. That matter was now being addressed. The Council also recognized that an improvement could be made in the setting of objectives and in corporate planning, so that executive management had clear guidelines. Such an improvement was being brought about, initially through the work of the Strategy Group. While the Council accepted that it should be a representative and supervisory body, it reserved the right, as part of its duties (and members' expectations), to re-examine, if necessary in some detail, the decisions of the Executive and other committees.

14.111. The PRS confirmed in response to questions that the new Executive Committee would be substantially different from its predecessor and that the intention was that there would in practice be a great deal more delegation from the General Council.

### ***Assignment of rights***

14.112. The PRS continued to maintain that exclusivity was necessary except in certain extremely limited circumstances. The PRS assumed from the way the proposed remedy was worded that the MMC asked the PRS to comment on the position if the PRS were still to take an exclusive assignment from its members but would return rights to them in specific situations. It did not believe this was desirable or in the public interest. The right to perform live in public could not be severed from the entirety of the public performance right which the PRS administered on behalf of its members. As had already been stated (paragraph 14.102), it was not the nature of the performance (live or non-live) but the nature of the works themselves which gave rise to administrative difficulties and should determine whether or not they remained within the Society's licensable repertoire.

14.113. A member could only be granted the right to perform works written by him/her and yet it was almost never the case that a live performance did not feature a variety of works written by other members of the PRS and affiliated societies. In their 1993 tour U2 had performed 13 copyright works written by other members of the PRS or affiliated societies. They were supported by acts performing works created by 113 composers and authors who were members of 13 different societies. The works were performed 231 times at 43 venues. A major 1994/95 tour involved at least 25 other interested parties to be paid for their interests in the works performed by the main band and each of the 26 different support acts employed generated its own set list which would be due for payment. The complexities of the administration and the protection of members and members of affiliated societies led the PRS to believe its current practice was necessary.

14.114. To whom would the works be reassigned or licensed to enable self-administration to take place? Assuming works were not unpublished, rights (subject to those assigned to the PRS) would already have been assigned to a publisher. The rights returned would therefore in most cases be controlled by the publisher, not the composer. Self-administration would be impossible without the agreement of both, which might not be forthcoming. Even if it were, they would have to negotiate with each venue and agree a fee for the performing right (or agree to waive it). They might well not be subject to the jurisdiction of the Copyright Tribunal. Any licence fee negotiated would have to be acceptable to the other interested parties consenting to the performance of their works, who might be numerous (over 100 in the case of the U2 tour cited above). Third parties who consented to such an arrangement would have to rely on the performer/composer and/or publisher for prompt and accurate payment of the correct share of the licence fee. The PRS would be unable to assist in the verification of the performance or royalties on behalf of those members relying on other members for payment. Nor could the PRS be responsible for programme collection or checking works or agreement data, as this would incur costs for the whole membership.

14.115. It was likely that a number of interested parties would be members of foreign societies, some of which might take an assignment from their members and some not. The member concerned would have to negotiate with a member of a foreign society, or with that society itself, and would have to reach agreement with the foreign interested parties, whether composers, publishers or performing right organizations, all of whom might impose different terms as a condition of acceptance of self-administration. All this assumed a clear set list confirmed before each concert or tour. No practical solution could be foreseen for the clearance of spontaneous performances.

14.116. In the UK, venues would continue to require a licence from the PRS under its tariff LP if *any* interested party or foreign society declined to have its works licensed through the member in question. The PRS would be bound by decision of the Copyright Tribunal to charge 3 per cent of box office receipts irrespective of the number of copyright works it controlled for a particular concert. The rates to be charged by self-administering members might not be subject to the jurisdiction of the Tribunal: if so, they could charge as little or as much as they could negotiate. An apportionment of two entirely different charging rates or methods could lead to untold administrative complexities, if it was achievable at all.

14.117. It was the firm belief of the PRS that the effect of self-administration by a limited number of composer and publisher members would be the reduction or elimination of live performance income for the industry as a whole to the detriment of all composers and publishers in the long term. Given the structure of the live performance side of the industry, the beneficiaries of self-administration were likely to be the promoters at the expense of the composer and publisher. The MMC had already been informed of the other public policy and wider effects of the subdivision of rights weakening copyright overall (paragraphs 14.100 and 14.101).

14.118. A further practical difficulty was the split between the main act and subsidiary acts. The PRS distributed its royalties on the basis of the works performed, irrespective of who performed them. If the intention of the self-administering member were to take a bigger slice of the cake for works performed by the headline act, not only would agreement have to be reached with each interested party, but royalties would have to be apportioned between those agreeing to such an arrangement and those who wished their works to continue to be administered by the PRS.

14.119. If a member wished to administer rights overseas, the PRS would (subject to obtaining the consent of the interested parties) have to write to affiliated societies to tell them that it no longer owned the rights for a forthcoming concert or tour. Foreign societies might wish to license the concerts themselves (for example, if some of the works were written and performed by local groups). The PRS might have to ask the foreign society to license the concert but only in respect of certain PRS works and not others. Yet more complications would ensue if some of the works were written by composers belonging to third party societies.

14.120. All this only scratched the surface. There would be knock-on effects on the PRS's relations with licensees and affiliated societies, both of whom would be put to extra time, trouble and cost. Licensees might find themselves required to take out many licences. The PRS would be subject to further work and costs which could not be recovered from the members who had asked for self-administration because the PRS would no longer own the rights in respect of that form of exploitation. Costs would be incurred in granting back the rights, for example as a result of ensuring that all interested parties consented. If some did not, the PRS would have the administrative burden of licensing particular concerts on their behalf but only obtaining a portion of the royalty. Income would go down but costs would increase. In the event of a dispute, problems would arise that were currently met by holding money in a suspense account. If self-administration were permitted, disputes over ownership might go unregulated and potential disputes might remain unidentified.

14.121. The PRS recognized that the difficulties perceived by small earners and supergroups might be different, but the complexities of licensing and the long-term effect on income were the same. It was not in the interests of the industry as a whole to allow self-administration. If a member earned revenue from one or two discrete sources only, the most practical solution might lie in terminating membership of the Society. The small earner's concerns would be addressed by the forthcoming changes to the sampling system and a clear statement of what members could expect from the PRS.

14.122. Asked whether experience in the USA did not show that exclusivity of assignment, however desirable, was not essential, the PRS said that the environment was entirely different and not comparable with that in the UK for economic, geographic and legal reasons. Members of the PRS did choose to join ASCAP or BMI but primarily because they were resident in the USA or because the USA was their major market. Competition for members between societies had adverse effects, public performance (non-broadcasting) revenue was already relatively low in the USA and current state legislation was making the situation worse, while major licensing deals, for example with the BBC, would be undermined if the PRS could not offer the entire copyright repertoire. It would be a slippery slope that could have disastrous consequences. It might be in the interests of particular performers or promoters if more were paid for the performer's appearance but nothing for the actual performing right. The PRS would be strongly opposed to any move in this direction, even on an experimental basis.

## ***Finance***

14.123. The PRS accepted that the cost allocation process should be taken further. Transparency in its operations, the provision of detailed accounting information to those who wanted it, and the refinement of target-setting were all current objectives. In seeking to explain the extent to which costs could be reanalysed and reallocated to distribution pools, the PRS faced a number of problems. Some members did not appreciate why certain sources of revenue were more expensive to collect and distribute than others. While some costs (for example, those of regional offices) were perfectly clear, various formulae had to be used to allocate others. Explanation of the sophisticated formulae which lay behind administration costs was potentially difficult to communicate to members. A balance had to be struck between the cost of improving cost allocation and the value of doing so. The PRS was increasingly in a better position to make more detailed cost assumptions available to members. The publication of target administration deductions for all UK and Irish sections for the current income year, and up to two years ahead, should be achievable within the next few months.

14.124. The General Council was prepared to take to the membership the principle of formal subsidy where income was reallocated in substantial amounts. This would include the classical subsidy and the EES. The PCA, for missed performance identification, was not regarded as a subsidy. If imprecise cost allocation were considered to be a subsidy, there would be a danger that highly technical matters would have to go to the membership at annual intervals, seriously affecting the efficiency of distributions.

14.125. Key performance indicators could be made more specific and communicated to members. A number would be in place for the financial year beginning in January 1996. They might differ between the several revenue stream businesses. Those interested in live music might see an increased cost of collection and analysis in order to ensure that the wide variety of genres was better represented. Those concerned principally with commercial radio station income would probably expect to see decreasing administration percentages and the further reliance on sampling.

14.126. The General Council had sympathy with an annual membership fee but had rejected a works registration fee (see paragraph 14.56), which would act as a major disincentive to registering works and result in many difficulties when works became active. Standardization of work identification codes was recognized as a key issue for the music business (not just for performing right societies) and the PRS was collaborating in this process.

## ***Members***

14.127. The General Council accepted the need to make clearer the Society's purpose and objectives, which would be done in a series of documents at different levels. The main aims and objectives included:

- (a) ensuring that as many performances and broadcasts of its members' works as possible are licensed on the best available terms and that licence fees for such use are duly paid;
- (b) distribution of the revenue with a minimum of delay to those authors and rights owners whose works have been used, except in cases where expenses incurred in identifying their works are disproportionate to the revenue collected; and

(c) use of best endeavours to ensure administration of rights in the most cost-effective way.

14.128. The PRS accepted that it should make clear to existing and prospective members these objectives and what the Society could do for its members and what the current limitations were. These objectives would supplement the obligations to members which are already to be found in the Society's Deed of Assignment and its Rules and Articles. Work would also commence to collate the more detailed distribution information which existed in PRS documentation to provide a clear overview of the Society's distribution function. A statement on the flexibility of requirements for the termination of membership could be included in the Society's literature, but nevertheless it remained more convenient and cost-effective to have termination at the year end.

### ***Overseas societies***

14.129. Very broadly, the PRS supported the suggestion about achieving maximum possible accountability and transparency in relation to overseas societies made by the MMC, which had been informed of the recent achievements that had been made in this area. Further improvements being sought included the provision of more information about the distribution practices of overseas societies, the effect of these practices on PRS distributions and the amounts the overseas societies deducted. A GESAC code of conduct codifying the responsibilities of EC societies and principles of their operations had been adopted. International agreement on the ISWC and the completion of the PRS's on-line distribution system would also help. There were still practical obstacles in terms of the adequacy and format of the data supplied by affiliated societies.

### ***Distribution***

14.130. The PRS strove towards a credible and equitable distribution policy which gave due regard to the often conflicting interests of members, the vast majority of whom understood and accepted this. The Council accepted that it was time to undertake a complete review of the basic model underlying the PRS's sampling practices and recognized that over time the data collected to drive the distribution process was liable, in certain areas, to become less representative. Outside statistical and/or market research expertise, of an unimpeachable nature, would be commissioned to look at the problem. A second phase would consider issues such as the impact of electronic performance capture. It was possible that the work might result in members being offered a choice of cost/service models. The Council would welcome co-opted members to a steering committee, though their selection would have to be considered with care.

14.131. A 100 per cent census (as suggested by the MMC) if taken to mean 100 per cent analysis of performances would be unaffordable, impracticable and unacceptable to both members and music users. However, improvements could be made not only in sampling technique but also by collecting additional details of music use, eg the specific type of music used in, for example, a club, on a juke-box or by a small radio station. To illustrate, the PRS pointed to the fact that it licensed over 50,000 premises known to have some element of 'live' public performance. To check actual music use or works performed in every licensed premises would result in a cost burden disproportionate to the revenue collected.

### ***Appeals Board***

14.132. The Council accepted that a mechanism for the consideration of members' grievances, after they had exhausted normal procedures, might be appropriate. The structure would need to be considered with extreme care, taking account of practice elsewhere and of the interests of the membership as a whole. The Council would retain ultimate power to make policy decisions, but the Appeals Board could decide on the application of policy in an individual case and recommend that the Council debate or review a policy or decision. The PRS explained in reply to questions that while the board would not be able to overturn Council policy decisions, it was equally the case that the Council would not seek to overrule the board on individual cases.

## ***Efficiency and information technology***

14.133. The new Chief Executive would be asked to produce in 1996 a full three- to five-year plan. A report from the Strategy Group, an IS strategy proposal and the 1996 operating plan were all due to be put to the Council by the end of 1995. While management incentives were accepted in principle, considerable work needed to be carried out to identify where and how they might appropriately be employed in the particular circumstances of the PRS, whose revenues were attributable to members at least as much as to management.

## ***Copyright Tribunal***

14.134. Asked to comment on points the MMC had in mind to make in relation to the Copyright Tribunal, the PRS said that while it welcomed the proposed comments on the relevance of foreign comparisons, it was disappointed that the MMC appeared not to be pursuing the points already made (paragraph 14.84) to the effect that the Tribunal's jurisdiction should be confined to abuse of rights, and that the onus should be on the user to show that there was abuse. It was not the PRS's policy to refuse a licence and it did not regard provision for a statutory licence as necessary or desirable. In principle it agreed that interest should be payable where orders had retrospective effect. There were many considerations relating to costs, among others that in Tribunal cases there was not usually a 'winner' or a 'loser'; there might be merit in each side paying its own costs.

## ***Further comments***

14.135. In response to the further points made to the MMC by third parties involved in the consultation on hypothetical remedies, the PRS said:

- (a) In relation to the exclusive assignment of rights, exclusivity was necessary for the reasons given to the MMC and set out earlier (paragraphs 14.100ff and 14.112ff); without an exclusive assignment it would be difficult for the Society to enforce the rights it holds.
- (b) In relation to the issue of competition in rights administration, it was not the case, as one submission had suggested, that competition would be achieved by requiring a non-exclusive assignment of rights. There was no statutory or legal obstacle to the formation of another society in the UK. It was possible to have two societies administering exclusive rights in the same territory though the PRS's view was that this created administrative difficulties in licensing and duplication leading to increased administration costs which would be passed on to the member and to affiliated societies; the benefit of economies of scale for licensing, collection and performance analysis by a single society would be lost; there was a risk that societies in competition would scale down their public performance licensing coverage as a cost reduction measure, thus reducing the revenue and weakening copyright as a whole; and that in order to fulfil its licensing requirements a society would be required to tie in repertoire beyond the period of membership.
- (c) In relation to self-administration, the effect of allowing a member to administer rights for live performance of works written by him/her would not be in the interests of the membership as a whole:
  - (i) The PRS would continue to be required to license every event for the performance for the works of other interested parties. Even where a set list of a self-administering member contained only his/her own works, the PRS would be required, in order to protect all its members, to monitor and oversee to ensure that there was no dispute over what works were played and to ensure that PRS rights were not infringed.
  - (ii) Agreement as to the split of royalties between the self-administering member and the PRS-controlled element would be required on an event by event basis and would be dependent on the number of interested parties due to participate. Increased cost was inevitable.

- (iii) Additional costs would be certain to arise from verifying the consent of members to performance of their works by another member, negotiating the relevant share of the royalty between PRS-controlled works and the self-administering element of a performance, ensuring that any necessary financial guarantees were in place, monitoring the performance to identify works and keeping records in the event of later disputes over interested parties in works, ensuring that there was no duplication over licensing and providing any audit required by members.
- (iv) For a self-administering member to pay the correct shares to other interested parties requires access to data on ownership at the date of the performance and in respect of each territory.
- (v) On the proposal to involve the concert promoter, the PRS's experience of licensing led it to believe this would not be in the interests of its composer and publisher members; the PRS believed there was an inherent conflict between the interests of a promoter who sought to maximize his income from an event by reducing outgoings and expenses and the expectation of a large number of composers and publishers to be paid for the performance of their works.
- (vi) The suggestion that the support act would be willing to enter into the arrangements with the headline act ignored the fact that the support act would in most cases also be performing works of other interested parties; it was not possible to regard the fact that in some cases a support act will pay to perform at an event as a substitute for performing right royalties-the beneficiaries were often quite separate.
- (vii) Disputes either over what was performed or over the identity of the interested parties in a work would be more difficult to resolve in an event licensed by a promoter or PRS member.
- (viii) The proposal might discourage the use of works of non-performing writers; with successful writer/performers benefiting to the detriment of other writers.
- (ix) Generally, the idea of self-administration is only pursued by those in favour because the PRS would still be able to pick up unresolved matters and to represent the interests of other members, notwithstanding that it would be at greater cost and administrative difficulty for the PRS and those members.

D G GOYDER (*Chairman*)

I S BARTER

R O DAVIES

J S METCALFE

E C TRITTON

A J NIEDUSZYNSKI (*Secretary*)

29 November 1995