RIAA Ex. D-105-DP

IN THE COPYRIGHT TRIBUNAL

IN THE MATTER OF a reference (No. CT 7/90) to the Copyright Tribunal under Section 118 of the Copyright, Designs and Patents Act 1988

BETWEEN:

THE BRITISH PHONOGRAPHIC INDUSTRY LIMITED

Applicant

and

MECHANICAL-COPYRIGHT PROTECTION SOCIETY LIMITED

Licensing Body

and

COMPOSERS' JOINT COUNCIL

Intervener

Before Mr. R. Jacob Q.C., Chairman; Mr. A.G. Rayner; Mr. L.P. Farrington; and Mr. E.F.T. Cribb

Appearances: *Mr. S. Kentridge Q.C., Mr. C. Hollander*, and *Miss V. Rose* instructed by *Frere Cholmeley* for the Applicants; *Mr. R. Englehart Q.C. and Mr. C. Carr* instructed by *Taylor Joynson Garrett* for the Licensing Body; *Mr. M. Beloff Q.C. and Miss A. Page* also instructed by *Taylor Joynson Garrett* for the Intervener.

Hearing dates: 6th - 27th September 1991 (16 days)

DECISION

INTRODUCTION

A THE PARTIES

The applicant (the "BPI") is a trade association representing the interests of record companies issuing the vast majority (at least 90%) of commercial records in the

UK. Its membership includes the 6 so-called "majors", i.e. UK subsidiaries of large multi-national record enterprises, and a fairly large number of independent companies. There are about 150 members. The BPI acts as the British national group for the International Federation of Producers of Phonograms and Videograms ("IFPI"), a worldwide association of record producers. Although this is not a matter in dispute (indeed one of the few matters not in dispute) we have satisfied ourselves that the BPI is representative of persons requiring licences under the proposed Scheme we have to consider.

The licensing body (the "MCPS") is a licensing organisation and collecting society concerned with the UK copyright in musical works (which include lyrics) so far as they are reproduced on records ("mechanical copyrights"). Unlike some other foreign collecting societies the MCPS does not own any mechanical copyrights. Also again unlike some foreign (particularly European) collecting societies the MCPS is not concerned with performing rights, which in the UK are mostly owned and administered by the Performing Right Society. The MCPS only acts as agent for its members. There are about 5,000 members, ranging from large publishers (who will often be copyright owners by assignment) to individual composers. Just over half the membership consists of individual composers. The MCPS has affiliation with numerous foreign collecting societies so that it controls the recording, reproduction, importation and distribution right in the vast majority of records made, imported or distributed in the UK. It has, we were told, about 1.3 million copyright works in its data base and controls the vast majority of musical works that are actively exploited in the UK[1]. The MCPS is therefore clearly a licensing body within s.116(2) of the Copyright, Designs and Patents Act 1988 ("the Act"). MCPS is a member of BIEM[2], an organisation of mechanical royalty collecting societies from 23, mainly European (and obviously not exclusively EEC) countries. A number of foreign collecting societies have closer to 100% coverage - mainly because they also control performing rights, making it more advantageous for copyright owners to vest their rights in an all-embracing (and therefore powerful) society. The MCPS is a wholly-owned subsidiary of the Music Publishers' Association Ltd.

---

[1] Mr. Grover, Day 5 p.40 indicated that about 80% of EMI's mechanical copyright payments went to the MCPS; Mr. Montgomery of the MCPS acknowledged this, Day 6 p.57.

[2] An acronym for Bureau International des Sociétés gerant les Droits d'Enregistrement et de Reproduction Mécanique.

The Intervener (the "CJC") represents the interests of British composers and lyricists. Its membership consists of 5 bodies, the Association of Professional Composers, The British Academy of Songwriters, Composers and Authors, The Composers' Guild of Great Britain, the Incorporated Society of Musicians and the Musicians Union. All kinds of composers and lyricists are represented - from serious to light, from jazz to rock, from popular to classical.

B THE APPLICATION

We have before us a reference dated 11th June 1990 by the BPI under s.118 of the Act for variation of three standard form contracts called AP1, AP2 and AP2A (AP stands for "audio product") which constitute a proposed licensing scheme ("the Scheme") to be operated by the MCPS. Save in certain respects the MCPS resist variation, and in this they are supported by the CJC who have intervened so as to ensure that the composers' perspective is brought directly to bear on our decision.

The Scheme relates to the grant of licences under UK copyrights for the mechanical recording of musical works and the distribution in the UK for retail sale of records of such works. The Scheme came into force on the 1st July 1990. The parties have sensibly made interim arrangements, particularly relating to putting monies into escrow pending the determination of the reference. AP1 is the main version of the Scheme; AP2 and AP2A concern licensees who for one reason or another may not qualify under AP1.

The dispute is, not surprisingly, mainly over the rate of royalty. Unfortunately this is not all. The parties have been unable to agree a host of other matters in relation to the Scheme. These were called "Systems Points". Some of these points have some effect on the rate, others do not. It would seem that whilst the reference was looming and pending the parties have felt unable to negotiate on Systems Points. We apportion no blame, though we have to say we are sorry that this has happened. It has significantly increased the expense and scope of the reference, and what we have to decide. We hope that following this decision, which covers a large number of

Systems Points in principle (though we are not confident all - there are so many if one goes to the fine detail), the parties will be able to agree a final version of the Scheme. If not, then there will have to be a further hearing concerning these details. The letter accompanying this decision sets out our directions in this regard. Our findings in relation to Systems Points should not be regarded as set in stone in this sense: that if the parties reach some alternative or additional arrangement then we would be willing to consider that. Only if there is no agreement must the ultimate Scheme be in accordance with our present findings. We have in mind particularly that the parties may wish to reach alternative arrangements in relation to items H and S.

C THE HISTORY OF MECHANICAL ROYALTY IN THE UK

From the commencement of the Copyright Act 1911 until the coming into force of the relevant provisions of the 1988 Act on 1st August 1989 the rate of mechanical royalty was set by Parliament. Before 1911 it was not an infringement of copyright to reproduce a musical work on a record. The 1911 Act[3] made such act, if unlicensed, an infringement. It further provided that it was not an infringement for a record (quaintly called a "contrivance" in the 1911 Act) to be made of a musical work where records had previously been made with the licence of the owner of the musical copyright and where certain conditions as to notice were complied with and royalties paid by the record company. The rate was initially 5% of "the ordinary retail price". Provision was made for the rate to be altered by order of the Board of Trade (subject to Parliamentary confirmation). It had to appear to the Board, after holding a public inquiry, that "such rate is no longer equitable". The Board could make an order "either decreasing or increasing that rate to such extent as under the circumstances may seem just."

The justification for the "compulsory licence" was said to be that the fledgling record industry needed protection from all-powerful publishers.

In 1928 there was a public inquiry by a Committee appointed under the 1911

[3] s.19(2).

Act, following which the rate was raised to 6¼%. By then the industry had flourished: the Committee said that it had "attained vigorous manhood." Moreover the price of records had substantially fallen compared with inflation. It was this latter fact which seems to have been the principal reason for raising the royalty. Some of the characteristics of the modern industry were established by that date. It is noteworthy, for instance, that the word "hit" was used in the record industry's observations. We note one major difference between then and now. The Committee commented that "the manufacturers seldom if ever bring out a new work or procure its initial popularity." That has long ceased to be the case. A number of matters were argued then which have been re-argued before us, as they seem to have been before all other tribunals concerned with this question, both here and abroad. We note particularly that at that time the publishers (representing copyright interests) not only claimed that record company profits were relevant, but that these were high and that the royalty ought to be higher as a consequence.

When copyright law was amended by the Copyright Act 1956 (the "1956 Act") no significant change was made with respect to mechanical rights, the preceding Gregory Committee in 1951 seeing, with slight reservation, no sufficient reason to change a system which had worked for 40 years. Section 8 of the 1956 Act continued the previous statutory scheme at the same rate, namely 6¼% of the "ordinary retail selling price" which was to be calculated in a prescribed manner. Again there was provision for review by the Board of Trade following a public inquiry. Again the test was whether the rate had "ceased to be equitable". The Whitford Committee considered the law in 1977 and recommended no change other than that the machinery for changing the rate should be made "less cumbersome" by transferring it to the Performing Right Tribunal with suitably widened powers[4]. Even while Whitford was deliberating the "cumbersome" public inquiry procedure had been invoked. Mr. Hugh Francis QC, assisted by two others, was appointed to hear the inquiry. Following some 27 days hearing, Mr. Francis presented his report to the Secretary of State in May 1977. It was presented to Parliament[5] in August of that year. The Francis report recommended no change.

---

[4] Whitford noted the suggestion that "a possible advantage of the present procedure is that it enables the Government to review any decision in the context of the wider public economic interest whereas the same would not be true of a decision by a tribunal".

[5] Cmnd. 6903.

The parties before the Francis Inquiry were much the same as now. The BPI's members (73 then) dominated the record industry whilst associations of composers and publishers joined together to seek an increase in royalty. Perhaps because of this we received an early submission from Mr. Kentridge along the lines of some sort of pseudo *res judicata*. It went like this: (1) Francis had to consider what was equitable, (2) there is no difference between what is equitable and what is reasonable, (3) so we should come to the same conclusion as Francis unless a material change in circumstances could be proved. Attractive though this would be from our point of view, we reject it. Mr. Francis had to decide whether the rate had "ceased to be equitable". This is not quite the same as deciding what is an equitable rate. We have to decide what we think is "reasonable in all the circumstances". In short, we have to make up our own collective mind. What Francis considered is of course helpful in that exercise and both sides sought to rely upon bits of the Francis report said to favour their case.

What we think is important to recognise is that the UK record industry has developed and thrived since the time of the Francis report to the benefit of record companies, composers, artists and the public interest. To this we shall return.

Almost as soon as Mr. Francis had reported, a practical problem arose. Under the statutory scheme the 6¼% was to be paid on the ordinary retail price and this was being taken, following the abolition of retail price maintainance, as the manufacturer's recommended retail price. However by the early 1980s manufacturers were finding that the concept of a recommended retail price was nc longer possible. And there was no easy way to find out what the ordinary retail price was in a market in which retailers could charge what they liked. So the BPI and the MCPS and the Mechanical Rights Society (a body merged with the MCPS in 1989) entered into a sensible arrangement in 1982 (updated in 1988) whereby the royalty was paid instead on a percentage of what was called "PPD", i.e. in broad terms the price published by the record company for sales to dealers. The agreement provided for a payment of 6¼% of the PPD uplifted by varying amounts depending on the type of record, e.g. 31% on pop albums[6]. The agreement was intended to have the same effect as the statutory

[6] The agreement referred to pop long-playing records with a PPD (exclusive of VAT) greater than

rate.

In 1983 a Green Paper suggested that "the recording of music would be better left to the operation of competitive forces in the market, as is the case in all other areas of copyright." This was followed by a White Paper in 1986 indicating an intention to abolish the "statutory recording licence." The White Paper speaks of "the breakdown of the consensus in its favour." The Act abolished it but provided for disputes to be settled by this Tribunal.

This background was suggested by the MCPS to indicate a Governmental expectation that the rate fixed by the Tribunal would be higher than the abolished statutory rate. The thesis was that market forces would be brought to play and that the only limiting factor on the royalty would be the copyright owners' self-interest in not setting the rate too high - so as to kill, or at least disable, the source of golden discs. The argument then proceeded on the basis that we ought to expect to raise the royalty, the only debate being about how much. We reject this thesis. First we note that the idea that competitive forces in the market will decide the rate is tempered by the very fact of our jurisdiction. Secondly, we confess that we do not understand what the Green Paper meant when it said that in "all other areas of copyright" competitive forces operated. As the Monopolies and Mergers Commission remarked in their report on "Collective Licensing"[7]:

> "Collective licensing bodies ..... are by their nature monopolistic ... and it is widely accepted that appropriate controls are needed to ensure that they do not abuse their market power. The Performing Right Tribunal was established ..... under the Copyright Act 1956 to provide such a control ....."

This Tribunal is the successor to the Performing Right Tribunal with a similar but wider jurisdiction. Thirdly we find the concept of "competitive forces" in the present context unreal. The MCPS is a de facto monopoly. The record companies cannot go anywhere else for music. Indeed whilst all other record company costs (labour, artists' royalties, and so on) are subject to competitive forces, the recording licence royalty is

---

£2.75; the mark-up when the price was lower was 36%.

[7] Cm 530,1988 p.6

not. This is a worldwide feature of the recording business. It is not surprising that several countries have tribunals which set royalty rates. Further the composers need the record companies: without records most composers would not get far these days. Even for performing rights the source of the performance is often the record. There are undoubtedly economic forces at work, but they are not market or competitive forces.

All that can be said arising from the abolition of the statutory licence is that, if the parties cannot agree, then we must fix the rate at what appears to us to be reasonable in all the circumstances. The rate may go up or down or stay where Francis left it. There are no presumptions one way or another.

D THE TRIBUNAL'S JURISDICTION

Our task is, by s.118(3) of the Act:

> "to make such order, either confirming or varying the proposed scheme .... as the Tribunal may determine to be reasonable in the circumstances."

Section 135 makes it clear that we must have regard to "all relevant circumstances". Section 129 expressly makes "comparables" relevant, though one might have thought this would have been self-evident in any event. It directs us to have regard to

> "(a) the availability of other schemes, or the granting of other licences, to persons in similar circumstances, and
>
> (b) the terms of those schemes or licences"

Beyond that, the Act gives us no guidance. Again, self-evidently as a matter of principle, we must not take into account irrelevant circumstances: the *Wednesbury* principle applies as much to this Tribunal as to any other inferior tribunal[8]. Some matters put in evidence before us were said by the MCPS and CJC to be wholly

[8] See *per* Harman J in *Association of Independent Radio Contractors v Phonographic Performance*, unrep., 16th January 1986 at p.12. The case was concerned with our predecessor Tribunal, the Performing Right Tribunal, but the same must apply here.

irrelevant. To this we shall return.

In relation to jurisdiction it was also pointed out that Parliament seems to have created an odd situation. The restricted acts relevant to the activities of making and selling records are two-fold, namely copying the work (restricted by s.17) and issuing copies of the work to the public (restricted by s.18). The rights given by the sections can conveniently be labelled the "copying right" and the "distribution right[9]" respectively.

However s.117 says that ss.118-123 relate to licensing schemes "so far as they relate to licences for ... copying the work" and certain other restricted acts. There is no reference to the distribution right.

Accordingly, at first sight, it would be open to the MCPS to refuse to grant any licences under the distribution right save on its terms and outside the jurisdiction of this Tribunal. The MCPS could provide a scheme for manufacture only. Such a scheme would in effect be a licence only to fill warehouses with records or export them. This would make no commercial sense. The MCPS has sensibly not promulgated such a scheme. Its Scheme provides for licences to manufacture records for retail sale.

The MCPS mildly suggests that the fact that two restricted acts are licensed by the Scheme whereas under the statutory scheme only a reproduction right was in effect licensed should in itself result in an increased payment. It goes on to point out that, in the case of some major record companies who press their records in continental Europe[10], all it is in effect licensing in the UK is the distribution right and the making of the master recording where that occurs here; and, it says, that it is only because it, the MCPS, is a member of a wide international system with links with foreign copyright holders, that it is able to put forward a single comprehensive licensing Scheme. Whilst this is true, we do not consider that it makes any difference to the questions we have to decide.

We think that the fact that the rate is a payment for the licence to carry out both forms of restricted act, and the System terms likewise relate to both forms of restricted act, means that we can look at the Scheme as whole. The omission by

---

[9] The publication right constitutes a statutory reversal of the decision in *Infabrics v Jaytex* [1982] A.C. 1 where it was held that the corresponding right under the previous Act was limited to first publication.

[10] e.g. CBS (Sony) who press vinyl in Holland and Warner (WEA) who press most of their product in Germany.

Parliament of an express jurisdiction in relation to the distribution right makes no difference to the commercial issues raised in this reference. And commercial considerations are relevant as being part of all the circumstances of the case. In fact all the parties' evidence was founded on the basis that the distribution right was an inseparable part of one single licence and that its value was a matter for us to consider in connection with the associated copying right.

We think the parties were right. We must look at the substance of the matter. Accordingly we do not consider that the curious deficiency on our formal jurisdiction affects what we have to decide within that jurisdiction.

E THE ONUS OF PROOF

Mr. Beloff suggested that we should approach the matter thus: take the Scheme as advanced by MCPS and ask whether any aspect was unreasonable. Unless we so found, we should leave it as it stands. Such an approach would in effect mean that this Tribunal was merely a review body, acting in much the same way as a Court in a judicial review considers whether any Minister or public authority acting reasonably could have come to a particular conclusion.

Whilst the submission certainly has attractions so far as the workload of the Tribunal is concerned, we think it is wrong in law. Once we have decided to entertain a reference, s.118 directs us to "make such order, either confirming or varying the proposed scheme .... as we may determine to be reasonable in all the circumstances." That language makes it very clear that the decision is to confirm or vary as appears to us to be reasonable. There is no presumption in favour of a referred Scheme. Nor is there a presumption that a referred Scheme should be varied.

We have to decide what we think is reasonable in all the circumstances. In so deciding we are very conscious that there may be other reasonable solutions. Indeed in some instances we have been faced with conflicting reasonable answers and have chosen one or the other or reached our own answer - in each case trying to decide what is the most reasonable.

The main issue is rate, but, because a number of the systems points affect rate, it seems sensible for us to deal with those first, and it further seems sensible to deal with all Systems Points together. Our decision relates primarily to AP1. Of our Systems Points decisions below, those in sections G, H, I, K, L, M, N, O, P, R, and S apply to AP2 and AP2A as well.

F "BLANKET" LICENCE

Under the Scheme, a record company wishing to make a new record must first apply to the MCPS for "clearance", listing - with specified particulars about each - all the musical works to be recorded. MCPS first seeks to identify the individual works and the persons owning or administering the copyright. If any of the works is not already in its data base, MCPS makes enquiries of copyright owners likely to have an interest. If some of the works or owners have not been identified by the time when MCPS is required to respond to the application, it informs the record company of the results so far and continues its enquiries. It seemed clear that the original form of AP1 did not give record companies a licence unless and until they had obtained clearance. This plainly caused the record companies operational problems because the time taken to get clearances was too long. Mr. Grover (of EMI) exampled how, for a particular record, the MCPS repeatedly updated information, clearing more and more of the tracks on the record. Mr. Rust (of the MCPS) explained why this occurred, but did not suggest any way of speeding up clearances. Whether or not it was originally intended by MCPS that, without a clearance, there should be no licence was uncertain, though it is surprising from the language used if it was not so intended. However by the time of the hearing it was made clear (by an offer to delete provisions in Article X) that it was no longer intended that the clearance procedure should hold up the grant of a licence.

We have no doubt that in the normal case the licensing body should grant a blanket licence for all material within, or which in the future comes within, its

repertoire - in short there should be a blanket licence for records for retail sale[11]. This is subject to the first recording licence - see below.

G MATERIAL BREACH AND ITS CONSEQUENCES

The decision in principle for the grant of a blanket licence does not fully resolve the issue because it remains to be decided what should be done where the record company is in breach of its licence. The MCPS now proposes that the licence granted should be "conditional upon the Producer not being in material breach" of the agreement. The BPI says that this is both vague and oppressive: vague in that "material breach" is too woolly an expression and oppressive in that a record company dare not raise a bona fide dispute over an alleged such breach for fear of losing its licence retrospectively.

We do not agree that the words "material breach" are too vague. It is not possible to envisage all the possible eventualities which might constitute such a breach: at one extreme is deliberate false accounting, at the other is some minor administrative error, e.g. accidental non-persistent failure to mark certain records in accordance with the rules provided for in the Licence or even an accidental failure to notify the MCPS of the use of a particular track until the record had already been made. We had an example of the latter and were shown how it was put right on a friendly basis. Persistent or deliberate breaches of minor terms may, depending on the circumstances, add up to a material breach. Courts regularly have to assess the materiality of a breach of contract and we see no reason why this general rule should not apply here.

However we do have some sympathy with the view that the proposed MCPS clause is draconian. First we think it should be modified so that a record company in alleged default is given a *locus poenitentiae* to remedy any alleged breach where this is possible. So we think that, save in the case of alleged irremediable breach (see below), the MCPS should be obliged to give written notice specifying in sufficient detail

[11] Records made for other purposes, e.g. simply for the purpose of broadcasting, are not and should not be, within this licence.

an alleged material breach of the agreement and calling for the breach to be remedied within a specified period of time before the licence is suspended. We leave the time for negotiation or argument. If the MCPS says the breach is not remediable (e.g. fraud) then it must give full reasons.

We do not think the licence should be terminated *ab initio*, i.e. from the original date of the licence in any case[12]. Termination should occur as follows: in the case of a remedial breach on the date when, following service of the notice, the breach has not been remedied in accordance with the notice; in the case of an irremedial breach, on the date when notice is given. Furthermore, we think that termination of the licence should not be the only remedy for which provision is made. There may well be cases where it would be sufficient to change the terms for the future, e.g. so as to put the record company on the AP2 or AP2A version of the Scheme. We think the Scheme should provide for this alternative, though we would leave the discretion as to which remedy is chosen to the reasonable judgment of the MCPS.

See standard contract

In the case of an alleged fraud, other irremediable breach, or unremedied remedial breach, our proposed provision to the effect that the MCPS can terminate forthwith upon written notice specifying the breach leaves the copyright holders with a number of remedies. They can obtain an injunction in respect of any records in stock[13] or even distributed to third parties after termination provided such third parties have been given notice of the position[14]. They will also have a remedy in damages against the record company for any breach of the agreement prior to termination and for infringement of copyright after termination. There may also be remedies against individuals.

---

[12] AP1 is perhaps worded so as have this meaning.

[13] Pursuant to the distribution right under s.18.

[14] This is the effect of s.22.

H FIRST RECORDING LICENCE

The old statutory scheme did not apply to first recordings of a musical work. The Scheme does, but there is an understandable desire by MCPS not to grant a blanket licence in respect of first recordings. The BPI respects this desire. The dispute is over the administrative arrangements under which first recordings become licensed.

The MCPS understandably says that it cannot grant permission for a first recording until its member has notified it of his willingness. The BPI says that in most cases the record company is certain or near certain that it has got or will get permission, yet inquiry with the MCPS may initially lead to a "no" answer. The trouble arises because it takes time for notification of such willingness to reach the MCPS. Apart from any delay in registering a new work with the MCPS, publishers are apt to refuse first recording rights as a matter of routine when making the registration. Mr. Rust of the MCPS indeed told us that in "99 something per cent of cases the record company would never know a restriction had been firstly placed." So the system operates thus: the record company asks the MCPS, the MCPS specifically asks the publisher, the publisher perhaps consults his composer or an agent and the answer comes back down the line. This all takes time. The MCPS introduced a "fast track" system which recognised the problem but did not satisfy at least one major record company. Experience indicated that the "fast track" was not all that much faster in any event. The process must rightly seem ridiculous to a record company in the common instance where the composer is the singer/songwriter and the record company knows that he not only consents but is keen for them to get on with release of his recorded work.

The BPI proposes that the blanket licence should cover all first recordings within the MCPS repertoire unless the work is on a list of first recording reservations circulated by the MCPS. We do not see how this would resolve the administrative problem. If a publisher operates as now and routinely puts in such a reservation with the MCPS the BPI member will be no better off. We reject this suggestion.

We can see no perfect solution to the problem, which we are satisfied is of more significance than suggested by the MCPS. Part of the problem arises because the BPI member has to go through the MCPS to get his first recording licence. The copyright holder gives the MCPS the "sole and exclusive power in its capacity as agent[15]" to grant the licence. We see no reason why the Scheme should prevent other ways of getting that licence, provided that any route other than direct from the MCPS was treated as via the MCPS. We hold that the licence granted should specifically cover a first recording licence granted directly by the MCPS, or by the copyright owner or his authorised agent where the copyright owner is a member of the MCPS. As a practical matter in the case of a singer/songwriter the record company could obtain permission, say on delivery of the master, and perhaps by the use of a standard form which is copied to the MCPS. In the case of a dilatory American copyright holder (of which we were told some exist) the record company would have the option of going direct for permission, again informing MCPS of such a direct licence. Where a licensing party is not a member of MCPS but subsequently become so, his prior given permission could automatically be registered with the MCPS either by him or the record company.

In making our suggestion as to machinery we do not overlook the fact that MCPS is sole and exclusive agent. For the purpose of grant of a first recording licence only it would be necessary that the copyright owner is treated as acting for the MCPS in giving a "direct" permission.

We also see an advantage in including within the Scheme a requirement that the MCPS will, within a specified short period, respond to any bona fide inquiry made in respect of a particular work, whether or not there is a first recording reservation. We do not think it appropriate that failure to respond should give rise to a deemed first recording licence if the work is within the MCPS repertoire. We are sure that the MCPS would actively co-operate in operating such a scheme. Moreover if it failed to respond at all and it turned out that the record company had to make extensive and expensive inquiries which were unnecessary, then we think the MCPS should reimburse the record company for its costs in this regard.

We think generally that the MCPS could usefully tighten up the procedure

[15] Membership Agreement, clause 1.

whereby it obtains first recording permission from its members. It does seem a pity that this problem seems to be of sufficient scale that it has reached us. The root is the large number of unnecessary reservations which are made routinely.

We say no more at this stage in the hope that the parties can now reach agreement on detailed terms.

I PROMOTIONAL COPIES

The MCPS wants a limit put on the number of royalty-free promotional copies which a record company may distribute. The BPI says this is unreasonable. There was no provision for such copies under the statutory scheme, but the character of record promotion has undergone a vast transformation since that was first introduced - or indeed continued in 1956. We approach the matter afresh.

The MCPS argues that its members have no control over the number of promotional copies, nor of the manner in which they are distributed. It is said that such copies sometimes appear in second-hand shops. Whilst all this is true, we do not think it matters. The record companies, their artists, and the composers have a common interest in promotion. All would lose money if the market were flooded with free records. It must be left to the commercial judgment of the record companies how many records by way of promotion they should make and give away in an endeavour to increase sales. We think it reasonable that there should be no limit to the number of such royalty-free records in the Scheme. Self-interest should prevent the giving away of too many such records. No doubt the promotion will sometimes not succeed and, in retrospect, it may seem that too many promotional copies were distributed. That is the nature of the business. Similarly a record company will sometimes spend large sums on other forms of promotion (e.g. television) only to obtain fewer than hoped for sales.

Of course the royalty-free records must be genuine promotional records. To that end the Scheme should refer to "genuine promotion" and the records and

packaging must be clearly marked as promotional records at the time of manufacture unless the copyright holder agrees to dispense with this. The record company should also supply information to the MCPS as to the numbers of promotional records made and distributed.

J RETURNS AND DEDUCTIONS

Record companies of course sometimes distribute for sale more records than are sold. Then the shops return the records, which are finally destroyed as unsaleable. What is to happen about royalties on these? Should there be a deduction, if so, how much? Under the statutory scheme royalties were technically payable.

The disputed provisions as to returns and deductions are complex. Rather than decide the details now we confine ourselves to resolving certain matters of principle. We hope the parties can agree appropriate provisions.

First we hold that the most reasonable object of the provisions should be that royalties are paid on net sales. Records distributed but then returned unsold should ideally not carry any royalty.

Secondly, however, we think it reasonable that the MCPS should not have to make any refunds to record companies. Once it has received royalties the MCPS must be free to distribute them and it would be impracticable for it to obtain re-payment from its members. Nor (subject to small amounts in the case of AP2/2A) do we think that the MCPS should be put in the position of making retentions before distribution - especially because in the case of AP1 these might involve substantial but unknown amounts.

Thirdly, the record companies should be able to carry forward into subsequent accounting periods any negative figures arising from returns in earlier periods.

Fourthly, if in the end it turns out that there have been negative figures carried forward which cannot be offset by subsequent sales (e.g. because the record is deleted), then in such cases the record companies must bear the loss, just as they bear the loss of other costs in relation to those records. In this context only, different formats of the same recording should be lumped together so that, for instance, a negative figure in relation to a discontinued format can be transferred to the account of a still current format.

As to whether the record companies should be able to make extra retentions of royalties against future returns in the case of TV promoted records we are open to further argument, and, if necessary, further evidence. As we understand the position, in relation to such records the companies not only spend substantial sums by way of promotion but, in the hope of success, they must distribute larger quantities of records than normal in advance of the promotion. If the promotion fails to come up to expectations, these records will end up as unsaleable returns. It would increase the financial risk involved in such promotions if large quantities of the returns were royalty bearing. Such risk must be a factor in assessing whether or not to undertake the promotion at all. Arrangements which favour efforts to increase sales benefit both record companies and composers. We hope the parties can reach some positive conclusion on this point, thus saving further argument.

K MAXIMUM TRACKS

The Scheme contains provision under which if a record contains more than a specified number of musical works or parts of works, the royalty increases. The justification for this is said to be that a composer will get only a smaller royalty if he has to share it with more than a set number of other composers. No doubt this is true, but on the other hand there is likely to be less use of his work on a highly tracked record. It is said that in some cases a highly popular work may be used as part of a multi-track record to attract sales, with the consequence that the composer of the popular work only receives a much reduced percentage. That may well be: the A side may well "carry" the B side of a single (Mr. Waterman, a highly successful record producer and composer, gave us a vivid example with a work called

Locomotion), and the A track of an album may carry all the other tracks, whether they are B to G or B to Z. But we are not concerned with fairness as between composers. Owing to the collective nature of the Scheme there is no difference in rate for works of different quality. Indeed the parties are agreed that there should be a uniform rate for all formats and all classes and quality of work. We consider it reasonable that a record company should pay the same rate of royalty per record of given format, whether that record contains one or many tracks. Accordingly we hold that a maximum track provision should not be contained within the Scheme.

L MINIMUM ROYALTY

The Scheme contains a provision for minimum royalty per record. Old section 8 also contained such a provision, though it had little practical relevance for many years because inflation had reduced it to such a low level. It is the practice for some companies, often after a full price record has ceased to sell, to re-release the recording at a much cheaper price on a so called "budget label." There are also some companies (e.g. Pickwick) which specialise in low price records, often sold through outlets other than normal record stores (e.g. supermarkets). A minimum royalty would, on the figures before us, constitute a very substantial rise in costs for such records - indeed making the cheapest variety wholly unviable. The MCPS argued that if the standard royalty produced too little on a budget price then the composer should get more by way of a minimum - that it was wrong for a song to go for a song. Mr. Greenaway (a successful composer) expressed this view strongly. However, he fairly recognised that other composers might have other views. Moreover, the argument overlooks the fact that budget records breathe new life into old works and that the lower royalty per record is often more than compensated for by substantially increased sales. What a composer receives is not a percentage: it is money calculated as the product of sales and a percentage.

Further, the object and effect of a minimum royalty is to upset the normal distribution of costs on low priced records in favour of composers. We find no commercial justification for such special treatment at the expense of the other participants in the record.

We hold that it is more reasonable not to have a minimum royalty provision than to have one. Moreover we are not attracted by the MCPS suggestion that their

provision should be modified so that the rate does not have too dramatic an effect on companies like Pickwick.

M RENTAL

The Scheme covers distribution of records for their "sale to the public for private use". So a sale by a record company of records direct to a library would not be covered by the Scheme. On the other hand the composers could not stop anyone running such a library (even for profit) from buying retail records. This is because the rental of a record made with the licence of the music copyright holder is not in itself a restricted act so far as the musical copyright is concerned, though it is in relation to the record company's sound recording copyright[16]. The record companies do not, we understand, demand payment for what may be called "public library" rental of their records. The MCPS agrees that in those circumstances composers too should not receive payment. If however the record companies receive royalties in respect of any rental rights then the MCPS considers that its members should have a share in such royalties. We agree, even though the MCPS members do not have any direct right of action in respect of rental. It is their music which would assist in generating any such revenue. We see no reason why the Scheme should not cover the supply by record companies direct to libraries for free (or essentially free) loan.

The parties seem close to agreement on this issue and, in the circumstances, we do not propose to take the question any further at this stage.

N MORAL RIGHTS

Chapter IV of the Act creates "moral rights" in respect of, inter alia, musical works. It is an aspect of these rights that works should not be subject to "derogatory treatment"[17] as defined, namely, in the case of a musical work, an arrangement (other

---

[16] s.18(2).

[17] s.80

than mere change of key or register) which amounts to a distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the composer. We take it that the right does not forbid any arrangement: after all, arrangements are a commonplace feature of recordings and any arrangement may be said to distort the original - that is the point of re-orchestrating or making a variation of a musical work. It is only arrangements which are prejudicial to the honour or reputation of the composer which are prevented by the moral right. Probably as a practical matter this could generally apply only to the lyrics of a song.

The Scheme currently allows the record company to make what it calls such "modifications" of the relevant works as the record company considers necessary to satisfy the requirements of the relevant recording. But it otherwise prevents modifications which "alter the character" of the work. We find this vague and unnecessary and unreasonable. The Scheme also forbids any alterations whatever to lyrics, "dramatico-musical works" or classical works, whether the alterations are derogatory or not. Again we find this unreasonable.

The BPI proposes that the record company should be able to make any modification which it considers necessary to satisfy the requirements of the relevant recording subject only to the moral rights protected by the Act.

The MCPS says that the composer should not be obliged to give a blanket licence for recordings which infringe his moral rights - but the BPI is not asking for this. The MCPS then argues that the making of arrangements is a distinct restricted act. Indeed it is not a matter over which we have any express jurisdiction. They say that the composer should be able to choose what arrangements are made of his work.

We reject the MCPS argument. As a practical matter it was acknowledged that arrangements "have to happen every day"[18]. So as a practical matter, just as the Scheme must cover the distribution right, so it must cover arrangements, and the only question is what limit should be put on arrangements. The meaningless or near

[18] Montgomery, Day 6 p.53.

meaningless "alter the character" test in AP1 seems to have no real point. What matters is that the arrangement should not be derogatory.

It was particularly suggested that a classical composer might object to any arrangement at all (Sir Michael Tippett was instanced by Mr. Montgomery of the MCPS). We wonder whether this is really so provided that the arrangement is not derogatory and royalties are paid. "Pictures at an Exhibition" has been re-arranged and varied many times by other (many great) composers. No harm has been done to the original work. Certainly we have not been made aware of any significant evidence from any composers, classical or otherwise, on this point.

Accordingly we find in favour of the BPI on this point. We note that their draft provision (Art. III) expressly preserves the composers moral rights and further provides that the record company is not to get any share of what might be called the "arrangement copyright" unless otherwise agreed. Again that seems reasonable.

O INDEMNITY

The BPI seeks a general indemnity in respect of any breach of any obligation of the MCPS under the Scheme. MCPS resists. It is accepted by both parties that any breach by either side will lead to a liability in law. In general therefore we see no need for an express indemnity. However in respect of one matter we think there should be such an indemnity. It is fundamental to the Scheme that the MCPS actually has the authority which it purports to have to grant licences to make records. Suppose it does so in respect of a work in respect of which it transpires that it has no authority? The record company would be an infringer and would be exposed to legal action. We think that in such a case an express indemnity should be granted such that the MCPS could be joined as a third party and made liable for all damages and costs to which the record company was exposed by reason of the purported licence. Since it is now agreed that there should be a blanket licence (under AP1), this indemnity should only arise once the MCPS has done some positive act (particularly issuing a "clearance") indicating that a work is within the Scheme. Such an indemnity should expressly be without prejudice to the rights of either side in respect of any other

breaches of the agreement.

P NEW FORMATS

The Scheme covers "pre-recorded audio-only records, tapes and cassettes other than DAT (digital audio tapes), such as were known and already exploited at 1st January 1990." In short MCPS wants to exclude any new format. The BPI wants all new formats to be included. The MCPS relies upon potential problems with DAT, in particular the ease with which perfect copies might be made illegally from CDs (compact discs). But home copying and piracy are matters which both parties must wish to reduce or suppress. We are concerned with pre-recorded formats which are not directly relevant to these matters. It would be regrettable if the development of a new technology were hampered by the absence of a licence for suitable "software". The past experience with the introduction of cassettes and CDs does not suggest that the existence of a blanket licence under the former statutory scheme caused any diminution of the income of the MCPS's members. On the contrary the introduction of CDs produced a welcome boost for both record companies and copyright owners and the parties sensibly co-operated over an initial reduction in royalty so as to facilitate that introduction. We conclude that the blanket licence should cover new formats.

But at what rate should such new formats be? The BPI suggest that in default of agreement the matter could be referred to the Tribunal. What we propose to do is to fix the rate as the same for other formats (and on PPD). In so doing we recognise that the parties may agree an initially different rate (as they did for CDs). The Tribunal would have jurisdiction for the matter to be referred to it under s.120 of the Act and would in all probability make a consent order varying the rate for the new format. Absent an agreement, a reference could be made solely relating to this question. Such a reference should be capable of determination in a quick and inexpensive manner.

Q OPTION TO ACCOUNT

Under the AP1 version of the Scheme, the MCPS carries out the invoicing and royalty calculation procedures. For this it requires from the record companies a statement of outgoings on the 21st day following a quarter. The MCPS then delivers an invoice on the 38th day and the record company must pay on the 45th day.

Two questions arise. First, should the record companies have an option to account themselves and, secondly, should the 7 day period[19] which the record company has for checking the invoice in some way be extended?

We heard substantial evidence in relation to these matters. Indeed the issue at times seemed to generate more feeling than the question of the rate itself. It is normal in most intellectual property licensing for the licensee to make returns and accompanying payments on a periodic basis and we do not see sufficient grounds for departure from that practice here. We find the BPI's arguments persuasive on this matter and think that record companies should have an option to account as they have done in the past. Of course if the MCPS system is proved in practice to provide a more efficient and comprehensive service, the record companies may find it pays to use it. An element of competition here is no bad thing.

However we are concerned that if a record company exercises this option, the MCPS and its members should not be losers. Accordingly we think that there should be an express indemnity to the MCPS in respect of any errors arising from a record company doing its own accounting: and that unless the MCPS agrees otherwise, the record companies should provide the MCPS with the same information, at the times stipulated in the Scheme, as would be required if the Scheme were applied without the option for the record companies to account. Furthermore since the MCPS can only distribute after they have checked a return, we think that if a record company exercises the option to do its own accounting it should deliver an account some time before the

[19] i.e. 5 working days.

45th (payment) day - precisely how long can be argued if not agreed.

Where the MCPS does the accounting, there remains the problem of the 7 day checking period. We agree with the BPI that this is insufficient. One way to give a longer period is to advance the date on which the statement of outgoings is supplied by the record companies and keep the MCPS to its 17 day period for preparation of the invoice. Accordingly we hold that where the MCPS does the accounting, it must deliver the invoice within 17 days of receipt of the statement of outgoings. If not so received, the excess will be added to the 45 day period. It also follows that if the record company delivers the statement of outgoings earlier than now envisaged (21 days) then it will have longer to check the invoice.

R CONTROLLED COMPOSITION CLAUSE

AP1 contains an Article (I(3)) aimed at preventing so-called "controlled composition" clauses. The Article has the effect of preventing a record company from entering into a lower-royalty arrangement with, particularly, singer-songwriters. The mechanical royalty would be reduced and (perhaps) the artists' royalty increased as a consequence. The Article works by making the Scheme override any other royalty arrangement which may have been made.

This type of clause is apparently not uncommon in the USA. It may indeed (we heard no evidence) affect the effective rate (i.e. mechanical royalty/record sale receipts) which is one reason for not placing substantial reliance on the US Tribunal decision. Publishers obviously do not like the clause since they get a percentage of the mechanical royalty. But, apart from publishers, we heard clear and convincing evidence that composers themselves greatly fear such clauses - as in effect undermining the Scheme. Hence Article (I(3)).

The BPI attitude was odd. It conceded that if the Article were removed there would be nothing to stop anyone introducing controlled composition clauses. But then the record companies gave clear evidence that they had no desire to introduce such

clauses. So what was the objection to forbidding them? In the end Mr. Kentridge merely relied upon the general spirit of freedom of contract espoused by, for instance, the Green Paper. The suggestion seemed to be that the Article forbade such clauses "inter alia", and was generally objectionable. Mr. Englehart asked what "alia". We never received an answer.

In these circumstances we think the Article should stay. It will not harm, or indeed even affect, the record companies on their evidence. But it is a matter seen as of great importance to the composers.

S AP1, AP2 and AP2A

The BPI submits that the reference relates to what is essentially one licensing Scheme with 3 variants, called AP1, AP2 and AP2A. We agree, and it follows that the question as to how it is to be decided which variant shall apply to any particular licensee comes within the reference. It follows that we have to decide this matter and as well as what is reasonable in all the circumstances in relation to each variant.

(i) Who decides which variant applies and how?

The most important version of the Scheme is AP1, applicable to by far the largest portion of the market. Its variants, AP2 and AP2A, are to deal with licensees of lesser financial standing or small size. The MCPS reserved the right to decide in its own wholly unfettered discretion upon which variant to put a record company. The BPI objected to this, saying that unless there were some objective criteria, this unfettered discretion could operate unfairly.

We think that there is some force in what the BPI submits. On the other hand we do not accept that the basic position should be that any licensee should be entitled to be on AP1 unless good reason is shown otherwise. Small companies and companies of lesser creditworthiness must be treated differently. One could not dictate to a bank

manager that he must give credit unless good cause is shown otherwise. So also with the MCPS.

Accordingly we hold that the decision as to which variant should apply to a record company must lie with the MCPS. The Scheme should however provide that the MCPS shall exercise its judgment expeditiously and reasonably, taking into account such factors as financial standing, creditworthiness, accounting systems, management, size and volumes. We hope that the parties can agree an Article along these lines operating without prejudice to the generality of the MCPS's duty to act reasonably. Such an Article should set out factors which must be taken into account by the MCPS. It will form part of the Scheme.

Inevitably there are certain disadvantages accruing to organisations using the AP2 and AP2A agreements. We express the hope that the parties will set up some sort of informal joint system (possibly with an independent chairman) for dealing with disputed cases along the lines suggested by the BPI. An industry appeals procedure to ensure that fairness is effected and seen to be effected would, we think, create a far-reaching confidence in MCPS decision making which would benefit both applicants and the MCPS.

Certainly this Tribunal, in dealing with any application under s.121 by a person claiming that the MCPS had not acted reasonably in accordance with the Scheme, would act expeditiously, would take into account any attempts at alternative resolution and would not hesitate to award costs if necessary on an indemnity basis if it found the MCPS had acted unreasonably. Any unreasonable failure to enter into an alternative dispute resolution would itself be likely to affect the question of costs.

(ii) The details of the variants, AP2 and AP2A

We take the view that small recording companies are an important and

special part of the record industry. They should not be penalised for being small. At the very extreme are small charities, church and school choirs and the like who have a few records made for special purposes. The licence agreement ought not to inhibit the making of such recordings.

We hold in particular that so far as is possible, companies on the AP2 or AP2A versions ought not to have to pay for records which are not marketed - the equivalent of returns under the AP1 version of the Scheme. Under both variants royalties are required on pressings, whether or not there are sales or distribution. We find that unreasonable. It means that a small company must judge its production requirements just right or risk either overpayment of royalties or running short of stock. Because records are produced in batches it is unlikely it will easily be able to order a few more if it runs short.

We do accept, however, that the MCPS should be protected against financial or other failure of the small company. Under AP2 (the most stringent variant) the MCPS can, we hold, require payment in advance in respect of all potential sales, namely on all ~~actual pressings~~. Under AP2A we hold that the same principle shall apply except that payment may be deferred for a stated period as at present; failure to pay would consist merely of a debt and not lead to the consequence of infringement.

In order to operate the principle that payments should be only on actual sales we think that in the case of these companies their payments should not be distributed by the MCPS immediately. They should be held for a period of time (the MCPS gaining the benefit of the money) until returns have been received from the record companies at stipulated intervals notifying the MCPS of actual sales: the MCPS would release the advance royalty payments to their members as such returns are received. As some later stage, the parties would have a "winding-up", which might involve destroying records or agreeing to release the remaining advance royalty or some commercial settlement.

Those licensees which do not have a PPD calculate their royalty on a selling price. In disposing of their final stock they might well wish to reduce their selling price and would be entitled to pay a lower royalty on those sales.

We are conscious that this requirement will place an administrative burden on the MCPS, but their powerful computer systems should be able to cope with this requirement without undue difficulty in the interests of intrinsic fairness and near parity with AP1.

We at this stage do not propose to examine the details further. We hope that they can be agreed on the basis of these findings of principle, though, as we have said, we would be happy to approve some other agreed reasonable solution.

RATE OF ROYALTY

T COMMON GROUND

We now turn to the most important question: rate. The parties have agreed some basic matters and we think they were reasonable to do so:

(1) The rate should be the same for all different kinds of music - from advanced modern classical to heavy metal with everything in between. This seems to have been a near uniform practice both here and in other countries and whether the rate is determined by a tribunal or agreement. This uniform and collective nature of the Scheme is important to bear in mind at all times.

(2) The rate should be expressed as a percentage of the PPD. The record company will not normally receive the PPD on a substantial part of its sales. Large retailers will, in the competitive UK market, be able to get discounts from PPD. This will cover substantial volumes of records, though the record company may save some distribution expenses by bulk deliveries. The agreement to stick to PPD therefore is an advantage to the copyright holders who are cushioned from such market forces. It results in an effective rate of royalty on sales which, when expressed as a percentage, is higher than the percentage of PPD itself.

(3) The rate should be the same for all existing formats. This was the case under the statutory scheme. Although the basic rate of 6¼% was in principle maintained through the 1980s, in practice agreement on different rates of mark-up for different formats from PPD to a notional retail price resulted in different rates of royalty on PPD - ranging from 7.8% on singles to 8.5% on mid-price pop and classical records. But apart from that quasi-exception and the US Tribunal method of fixing a price per track, a standard rate whatever the format seems to have been the standard practice. We have already held that the same rate should apply to new formats, though with the expectation that the parties may agree some sort of initial variation analogous to the "CD break".

(4) There should be "pro-rating" in the case of any record only part of the music of which is in copyright. The remainder may be either in the MCPS repertoire or belong to a copyright holder outside the Scheme. Under the statutory scheme if any part of a record (even just a cadenza) was of copyright music then the full royalty was payable even if the remainder was in the public domain. This was a somewhat unfair feature of the old scheme which the MCPS, rightly in our view, do not suggest should continue. Under the Scheme a record is apportioned into MCPS repertoire and other, the royalties to the MCPS members being reduced by an appropriate amount.

U THE BROAD NATURE OF THE DISPUTE

The heart of the BPI case was that we should be guided by "profit sharing" from the "available profits." This meant sharing, between the mechanical copyright holders and the record companies, the net profit before tax plus the mechanical royalty. In other words one takes the record company's entire income, deducts its entire expenses save for mechanical royalties, and then considers some equitable division between the parties of the sum left. The case advanced was that if one looked at UK companies as a whole (including the UK subsidiaries of large multinationals as distinct entities from their parent and sister companies), the industry is not very profitable, less profitable than corresponding continental European companies. These companies got a larger share of available profits than their UK counterparts. So, in order to bring profit sharing into line, there should be a reduction of royalty here. This would not harm composers, for they benefit greatly from the considerable international success of

UK recordings. Ultimately the BPI suggested a rate of 6.8% on PPD - an approximately 20% reduction on what was being paid.

The BPI also asked us to take the position as it was just before the proposed scheme was introduced and consider what departure we were making from that. In other words we should take the current factual state of affairs as a starting point.

The heart of the MCPS case was that, following s.129, we should have regard to "comparables". In particular we should have very close regard to an agreement reached between IFPI and BIEM ("BIEM/IFPI"). BIEM/IFPI was said to be strong evidence of the bargain a willing licensor/licensee would reach if they were negotiating here. Indeed it was put higher than a mere close comparable. It was submitted that the agreement should be taken to be in effect a bargain between the parties[20]. This was because it was negotiated between representatives of the composers/publishers and representatives of the same multi-national record groups whose UK members form the predominant part (in volume share) of the BPI members; or, put another way, because it was negotiated between the international organisations of which the BPI and MCPS are members.

BIEM/IFPI was most recently re-negotiated in 1988 (in relation to discounts only). The rate is reached in a roundabout way. It is in fact 9.504% of PPD, subject to national variation nominally on 4 matters only. We discuss this further below. The Scheme follows BIEM/IFPI and sets the same 9.504% rate, reached in a most convoluted way namely via Article V(3), Annex IV, Article V(4)(a) and (b) and Article V(23)(a).

The MCPS further submitted that we should ignore the current factual position in the UK as a starting point.

[20] Mr. Montgomery said "the negotiation has already taken place in Europe, and a compromise reached there."

So the difference between the parties is the difference between 6.8% and 9.5%, i.e. 2.7%. In money terms in 1991 this is a difference of the order of £20 million p.a. The rate which was being paid before the AP contracts was approximately 8.2%[21] of PPD. So it can be seen that the MCPS is seeking a very substantial increase and the BPI a very substantial decrease in royalty payments. As the arguments developed it became clear that the main BPI thrust was to resist a substantial increase in royalty rather than secure a reduction, though the claim for a reduction was pursued to the end. For the BPI, Mr. Lawrence of Coopers and Lybrand Deloitte ("Coopers"), the well known accountants, estimated the increase claimed by the MCPS to be about £11 ± 1 million p.a. Putting it another way the effect on a particular major record company would be to increase its mechanical royalty payments by about £1 million p.a., compared with its annual profits of £10 million. Hence the intensity of the dispute.

Each party has vigorously attacked the other's position. The BPI claims that the BIEM/IFPI agreement is not a true comparable for a variety of reasons. The MCPS and CJC defend BIEM/IFPI and attack the BPI profit sharing approach as wholly irrelevant in law. If that be wrong, they say it is of only marginal relevance. Moreover they say it is unreliable on its accountancy facts and inherent assumptions.

It is easier to find fault with each of the parties' arguments than it is to say what is right. In the end we have to determine what we think is reasonable in all the circumstances. What we propose to do is to consider the main points of each argument in turn, making our findings of fact (and where relevant, law) as we proceed.

V BIEM/IFPI AS A COMPARABLE

The BIEM/IFPI scheme has a long history. It dates back to 1933 when the rate was set at 7½% of retail price. It has been regularly revised and amended over the years. In 1947 the rate was raised to 8% of retail price. From 1985 (following a

[21] This rate was calculated on 1989 figures for the surveyed UK companies after adjusting the royalties to what they would have been if the temporary reduction for CDs had already ended.

European Commission Notice), the rate has been set on PPD. It is now set, as we have said, in a roundabout way. One starts with 11% on PPD. One then deducts 10% (for packaging) and 4% from the balance (for discounts). Taking these deductions one after the other one gets by mathematics to 9.504% of PPD. The deductions under the agreement are standard and are not related to actual packaging costs or discounts in any particular country. Then under the agreement there can be local (i.e. national) variation in respect of 4 matters only, namely returns, intra-group exports, exports to non-European countries other than the USA and Canada, and promotional records.

If we were satisfied that BIEM/IFPI was indeed a close comparable or indeed should be regarded as in effect a bargain already made by the parties then we would have placed great reliance upon it. We could then have followed the course described by Dillon LJ in a patent case[22]:

> "a common approach in any exercise of valuation, or assessment of compensation, where there are 'comparables' which are not entirely comparable, is to take them into account, but scale them down because of the differences."

However we do not find BIEM/IFPI to be a "close" enough comparable to be treated in this way. Nor do we think it fair to regard it as a bargain already made between the parties. Yes, it helps in showing that the sort of figure we arrive at is generally of the right order (e.g. 5% would be out of line); but no, it is not sufficiently comparable to lead us to the nearest percentage point, still less fraction of a point[23]. It is not possible to "scale down" BIEM/IFPI in any precise mathematical way. Nevertheless we did conclude that a rate somewhat lower than the BIEM/IFPI rate would be appropriate for the UK.

Our main reasons (a number of which overlap) for so concluding are as follows:

---

[22] *Allen & Hanbury's (Salbutamol) Patent* [1987] R.P.C. 327 at p.213.

[23] Or, still less, to the nearest thousandth of a percentage point.

(a) Although the BIEM/IFPI rate is 9.504% it is subject not only to minor deductions which can vary from country to country but also to at least one other unwritten deduction. In the course of the cross-examination of M. Tournier, the President of BIEM and General Manager of SACEM[24], the French collecting society, it emerged that in France a further deduction for television promoted records was being made. We have to say that M. Tournier's evidence was not satisfactory in this regard. There was no hint of this derogation in his evidence (or that of any other MCPS witness). He sought to defend the derogation on the grounds that such records were promotional and thus within one of the four allowed local variations - being sold retail they are obviously not. He further acknowledged that there were similar derogations from BIEM/IFPI in other countries. This makes us uncertain as to how reliable the nominal 9.504% really is, and to what extent there is in reality a uniform rate throughout continental Europe.

(b) The history of the negotiation of BIEM/IFPI shows to our mind a rigidity more characteristic of the wielding of a monopoly right than a mere agreement as to price assessing the true worth of the licence. The rate was described as like "a locked room in Bluebeard's castle[25]" and "a sacred cow[26]". It is true that there have been negotiation on standard deductions which may bring the rate down, but this itself gives only limited room to manoeuvre. The roundabout way in which the overprecise 9.504% is reached, to our mind reflects this limited room.

(c) In most of the countries concerned the collective copyright holders have had a stronger legal basis from which to negotiate. There has been, save for Germany, no court or tribunal to control the position, either within States or at a European level. No doubt the negotiations have been friendly and there has been no "bullying". But the inevitable background has been a consideration of what would happen if the agreement broke down (so that the parties entered what M. Tournier called a "contractless period"). It would be the record companies which would be subject to injunctive relief. Of course the composers would lose too but collectively

---

[24] Société des Auteurs, Compositeurs et Editeurs de Musique.

[25] By Mr. Stuyt, who holds high office in Polygram Europe and is Chairman of IFPI.

[26] By Mr. Thomas, Director General of IFPI.

they could probably stand a short period of injunction whilst a record company, starved of new product, could not. The internal 1959 IFPI documents exhibited by Mr. Thomas are instructive on this point. We cannot see that the considerations would be different today and it was not suggested they would be. The analogy is perhaps with a monopoly labour union striking when its employers stocks are low.

(d) The nature of the recording industries the subject of BIEM/IFPI is significantly different from the UK industry. There is no dispute that the UK recording industry is very important in the world record business. We heard that although the UK market is only some 6-7% of the world record business (itself a high figure compared with most other manufactured products), UK recordings account for 25-30% of records issued worldwide. Since the time of the Beatles and Rolling Stones in the 1960's, UK artist/composers in the pop field have been both successful and popular worldwide. Although they form only one part of the "collective" we have to consider, they form the most significant part.

We conclude that the industry the subject of the Scheme is not closely comparable to the industry within BIEM/IFPI. It is true that the product of the UK recording will find its way to continental Europe if it is successful here initially (even US product is often introduced to Europe this way) but we think there is a real difference between the nature of the licensees here and in continental Europe. The forensic questions are posed: "What is that to a composer? Why should he get different rates for the same music from licensees in different countries? Why should he get a lesser percentage per record here than in, say, France?" The reason, if one is considering comparables, is that the composer here is getting more than just a rate. He is getting a licensee who, viewing the matter collectively, is likely to do more for his work.

(e) Another answer to the composer's forensic questions is this: they are the wrong questions. What the composer gets per record depends upon the rate *and* the PPD. The PPD varies from country to country quite significantly[27]. The MCPS suggest that the rates are "converging" but there is no guarantee of this. In 1989 the

[27] File P p.42.

German PPD for a full price LP was 37% higher than in Italy, so the composer would get 37% more for a record sold in Germany than in Italy. The differences in the case of CDs was less marked but nonetheless significant. In the case of CDs, Italy had the highest PPD.

(f) The nature of the actual record markets is different. Undisputed figures (there are few enough of these) show that the UK market is now the largest of any European country. The per capita spend on records is higher in the UK and the market has been increasing in relative terms over the years since Francis. This may reflect the fact that record companies try harder here because the UK is "the gateway to Europe". Because they compete amongst themselves they drive up the size of the overall market. This may increase their costs, but composers are beneficiaries of the competition.

(g) Historically, probably for cultural reasons, it seems likely that in continental Europe a greater "intrinsic" value was placed on music copyright than here. This is reflected by the fact that copyright periods are in some countries longer than here and in a few countries the record companies still have no rights of their own[28]. This may be a partial explanation as to why the 1932 rate was agreed at 1½% higher than the UK rate set only a few years earlier in 1928. Another example was the opposition by BIEM to the amendment of the Berne convention so as to include copyrights in sound records. The effect of M. Tournier's evidence was that BIEM was not against record companies having rights as such but that it seemed inappropriate for such rights to come within the treaty for truly creative works.

The MCPS and CJC submitted that this was not merely a false point, but a point in their favour. They said the new Act was "copyright friendly", upgrading the position of copyright holders in a number of ways. Those ways were abolishing the statutory licence for second and subsequent recordings, adding the distribution right, and adding moral rights. So, they said, we should follow the greater intrinsic value placed on the works as indicated by the statute. This is, of course, all highly

[28] So by taking a licence they are buying protection. Although this is so it was made clear from Mr. Stuyt's cross-examination that that factor did not form part of the bargaining process for BIEM/IFPI.

unquantifiable, and in any event the upgrading did not go so far as to create an absolute right as in most continental countries: this Tribunal is interposed to hold the ring. In the end we could not make much of all this in concrete terms, though we do regard the increase in rights as something of a small plus factor in MCPS's favour rather than a wholly neutral matter.

(h) The investment and risks involved in marketing a record in the UK are different from those on the continent. The MCPS says that the risk is incurred not only for the UK but in the greater expectation of success in a wider field. This point is valid, but that does not mean that the continental and UK situations are the same or equivalent.

(i) The marketing spend/net receipt ratio is much higher in the UK than on the continent. So also is the A&R ("artist and repertoire") spend/net receipt ratio. We examine "net receipts" further below, for there is an issue as to what should be taken into account for these. However whatever figures are taken the proposition is valid.

(j) There is a substantial independent record company sector of the market in the UK as compared with the continent[29]. This sector has increased significantly in the years since Francis, providing greater competition between record companies and greater opportunity for composers to have their works exploited. Successful release by an independent in the UK may lead to successful release by way of licensing elsewhere.

(k) There is greater competition for top artists in the UK than on the continent. A top artist obviously has a greater chance of successful exploitation (with benefit to the composer) than one of lesser talent.

(l) The negotiations between BIEM and IFPI have, at least in the past,

[29] Though we were told that France has a substantial independent sector operating in the field of French music with little international appeal.

included wider considerations than just rate. For instance in 1959 IFPI considered its own viability as a "union" (just as a monopoly labour union is concerned with "blacklegs") and the political problems which might arise if relations with BIEM became too hostile - such as BIEM's attitude in negotiations concerning international copyright treaties. Again, when the rate was raised to 8% of retail price in 1947 (which is what the unnegotiable 11% of PPD of today is intended to represent) one of the considerations was forbearance by BIEM from pursuing a claim by its members that they should have 50% of record industry broadcasting and public performance revenues.

(m) The BPI denied that it was represented by IFPI in the BIEM/IFPI negotiations or that its members were in any way party to them. We accept this denial. If the negotiations were to cover the UK (and perhaps they could have done in 1988) then they would have done so expressly.

We should, perhaps, say a word about "harmonisation." So far as the EC is concerned, the Court of Justice has indicated that different rates may be justified in different member states if there are different market conditions[30]. What was submitted to us was that it was desirable that the mechanical royalty rate should be harmonised: it was not submitted that we were required by law to harmonise. The BPI said, and we have accepted, that the market was different here from that on the continent. Moreover it is said why harmonise up and not down? We do not think we should be influenced by the idea of harmonisation.

W THE UMBRELLA AGREEMENT

As a further "comparable" the MCPS and CJC relied upon the agreement of the Umbrella Organisation Limited to the AP contracts. Umbrella is an organisation of small UK record companies (about 112 we were told). We do not know the share of the UK market of Umbrella's members - it must be quite small in view of the fact that BPI's members account for at least 90% of commercial records. Nor do we know

[30] *Ministère Public v Tournier* Case 395/87 [1989] 4 C.M.L.R. 248. The point arose when it was suggested that the rates charged by SACEM for performing rights were contrary to Art. 86 of the Rome Treaty.

much about the character of the members: the most direct evidence we had was from Mr. Jenner, a member of the Umbrella Council, who acts mainly as an artist's manager but who also owns, with a partner, a small record company (of what size we were not told). His evidence was mainly about his activities as a manager. The fact that we know so little about Umbrella members detracts somewhat from the value of the agreement as a "comparable".

We were told that Umbrella had agreed to the AP terms and an exchange of correspondence evidences this. The Chairman of Umbrella wrote to the MCPS as follows:

> "The Umbrella regards the BIEM/IFPI rates as being both fair and reasonable. We also believe that it is in the best interests of the industry as a whole that there should be parity between the rates for UK mechanical royalties and other European territories."

He also said that Umbrella's members regard the AP terms as "both fair and reasonable". Further it was made clear by Umbrella's Solicitors that the Umbrella agreement was negotiated as a result of its members approaching the MCPS and truly reflected the views of its members.

By the agreement the members agree to the AP rate, but there is a transitional period before the full AP rate applies. The higher rates are introduced in two stages (from 1st July 1990 to 30th June 1991, and from then to December 1991). So in fact the full AP rates are not yet being paid. It was of course known that this reference was on its way when the Umbrella agreement was made on 15th June 1990 and it was to be expected that we would reach our decision before the end of 1991. The agreement contains a provision to the effect that if this Tribunal fixes some other rate, that other rate will apply from the date of our decision. So Umbrella members have, at comparatively small cost, avoided the cost and expense of becoming a party to this reference, avoided the dangers inherent in a "contractless situation", and yet they have secured the benefit of any reduction of royalty we may make, such benefit coming into immediate effect. This is very sensible, though this does mean that the agreement loses some substantial value as a true comparable. Umbrella were to a large measure sitting on the sidelines agreeing to join the BPI record companies if they got a better

result than the AP contracts.

Having said that, we think this agreement does assist us to some small degree incapable of numerical quantification. It is one of the factors supporting a slight increase from the present position and reducing the force of some of the BPI submissions. The BPI, for instance, suggested that the rate of 9.5% would be such as to drive at least some smaller record companies out of business. However here we see some other small companies saying that the rate is "fair and reasonable" and ultimately agreeing to pay if this Tribunal does not reduce the rate. Mr. Beloff suggested that if the BPI were right, the Umbrella agreement is a "suicide note". The point is well made, but cannot be taken too far for the reasons we have given.

X "AVAILABLE PROFITS"

(i) Legal Considerations

We now turn to "available profits" as a factor affecting royalty rates. Before going further we must consider the MCPS/CJC submission that such profits are irrelevant in law. The submission is put this way (by the CJC):

> "If the result of imposing a particular rate will be to dissuade record companies from making records to the overall disadvantage of copyright owners, that would obviously be material; but the fact that a higher rate might dent or diminish the profits of record companies is immaterial."

The point may be tested thus: suppose there were no evidence before us save as to record company profits and suppose the level of profits was unchallenged. Would we have no relevant evidence before us at all, unless the level of profits established that the record companies could not pay a higher royalty? At what point does the level of profits become irrelevant?

Harman J said this[31]:

---

[31] *AIRC v Phonographic Performance* 16.1.86 at p.17

"If this [the "guideline" consisting of the financial performance of the broadcasting companies] means that the Tribunal is entitled to say 'Look, these people make large profits ..... so let us charge them a high royalty', that would be, in my judgment, a wrong approach and an error of law. On the other hand it must be proper for the Tribunal to consider "Are the companies solvent and making profits or are they struggling and unable to afford any substantial sum?", since this must affect what is 'reasonable'. It could not be 'reasonable' to charge a royalty that would put the broadcasting companies out of business."

Harman J added these important words (missing from the CJC quotation):

"In my view the guideline as expressed does not demonstrate any error of law in itself. Its application will need to be carefully considered on any further application herein."

We conclude from this that profits available are a relevant consideration, but should by no means be regarded as determinative. High profitability in a licensee may be due to a variety of causes and it would not be right for a high royalty to follow automatically, any more than, say a monopoly gas company should charge profitable companies more for its gas. We noted earlier that composers have, in their time, relied upon a profits available approach (in 1928) and we do not doubt that they would do so again if the profits were high.

We are reinforced in our view by the approach of the Court of Appeal in the *Cimetidine* case[32]. In that case the circumstances were very different from here. The patentee (whose sales were being lost to the licensees on virtually a replacement basis) was the party who created and maintained the market. It relied upon 3 approaches - reimbursement of cost coupled with return on capital (called "section 41"), "comparables" and profit sharing. The profit sharing approach was the least attractive to the court, but it was not ruled out as irrelevant in law. In that case, unlike here, there was a very close comparable indeed and it was the primary (but even then not the sole) factor in determination of royalty. Lloyd LJ pointed out one of the troubles with a profit sharing approach is that:

"it puts matters so to speak, the wrong way round. It makes the licensee's

[32] *Smith Kline & French Ltd.'s (Cimetidine) Patents* [1990] R.P.C. 203.

reasonable remuneration the measure of what is an appropriate royalty instead of [the licensor's]"

And as Lloyd LJ went on to point out, the approach would lead to the conclusion that if the licensee made no profits, then there would be no royalty at all. Indeed logic would dictate that if the licensee is in loss the licensor should pay the licensee - i.e. there should be a negative royalty. Of course that is not, in individual cases, entirely absurd: some authors pay publishers to publish their books. But that cannot be anything like the norm, or appropriate for a collective problem such as we have before us.

Finally in relation to this point of law we note that the US Copyright Tribunal is enjoined by Statute to consider, inter alia,"a fair income" for record companies which would of course include their profits. That Tribunal is given the following objectives:

"(a) To maximise the availability of creative works to the public;

(b) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

(c) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respective relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression, and media for their communication;

(d) To minimise any disruptive impact on the structure of the industries involved and on generally prevailing industry practices."

Mr. Beloff, consistently with his submission, said that not all these considerations are relevant here, even though we are to take into account "all the circumstances of the case". We cannot see why each of those matters (even "relative roles" if we could) is not "a circumstance of the case". We are not entirely sure about a question of "pure" public interest (e.g. in a substantial and healthy record industry as such, or lower record prices to the public as such). We say we are not sure because what is being licensed is a private right and the public interest as such is not self-evidently a relevant consideration to that. This is the point noted by the Whitford Committee. We note that Mr. Francis in rejecting a commercial agreement as relevant considered that what

was "equitable so far as the parties were concerned" might not be equitable to the public. However we do not think that this point matters, for the public interest in this reference appears to us to coincide with the interests of the parties. The stronger the industry, the better off are composers, artists and all concerned. And a short-term gain to the public if the royalty rate were reduced (assuming it were passed on in reduced prices) might operate to prejudice the public interest in composition.

(ii) Factual position and weight

Coopers conducted an investigation into "available profits". They surveyed both UK and continental record companies both large and small. The returns of individual companies were confidential so the MCPS and CJC have had no opportunity of checking the underlying data. The response to the survey was not complete - for the UK it was about 75% of the industry (including all the "majors") and for the European countries surveyed rather less. Coopers cross-checked from audited or management accounts wherever possible. We are satisfied they did their best. It does not follow that the figures obtained should be taken as reliable to the precision indicated in the Coopers report. The concept of "soft" and "hard" numbers was canvassed in argument and one of our problems is that we are not able to tell how "hard" a particular number may be.

One thing we can say. The most substantial attack on the Coopers' conclusions was based upon a misconception as to "licence income". To measure the profits Coopers had to take account of royalties paid by and received by UK record companies. Mr. Renshall of KPMG Peat Marwick McLintock ("Peats"), another distinguished firm of accountants suggested that the amount of royalties paid to UK companies was considerably understated. We are satisfied that the reasons he gave (though no fault of Mr. Renshall or Peats) were erroneous. That is not to say we were satisfied about the licence income in the Coopers' calculations. It seems that sister companies in multi-national record companies pay each other a standard rate for all items in their respective catalogues. This was taken as 22%. We find this conception (although in no way underhand or devious) somewhat artificial and distorting. An actual arm's length bargain for items actually taken might have given a different overall figure.

We do not find it necessary to delve further into the fine details of the figures. We conclude overall that the UK record companies as a whole are not making exorbitant profits having regard to the risks involved. We do not think it greatly matters that the major companies are parts of multi-national enterprises - we are essentially looking at the UK position in order to fix the UK royalty rate. And the UK subsidiaries are independently financially accountable.

The level of profitability is, moreover, in our view only a factor to be taken into account in assessing royalty - more as a cross-check than anything else. The figures we have are for 3 years only - and as the MCPS pointed out, vary from year to year. We note that before the US Tribunal the record companies urged that they might go bankrupt if the rate was raised substantially. Here Mr. Kentridge put it less dramatically - as curtailing their activities somewhat. Mr. Beloff says the record companies are merely "crying wolf". We do not find either position taken as being necessarily true. As we say, it is sufficient for our purposes to decide that the companies are not making exorbitant profits. The weight to be attached to such finding is to indicate that a substantial increase in royalty should be viewed with care, and no more. If we had been satisfied that the mechanical copyright was truly worth 9.5% then we would not have regarded the level of profitability as necessarily preventing us from affirming the higher rate.

Since the BPI case for lowering the royalty was founded entirely upon "available profits" and a comparison between profits here and in Europe, it follows that we reject it. Available profits are too flimsy a basis for such an approach.

Y OUR CONCLUSION ON ROYALTY RATE

We have concluded that the rate should be 8.5% of PPD. This is a value judgment rather than the result of any precise mathematical calculation. We do not think any such calculation is possible. It is based on our overall assessment of all the evidence and arguments of both sides. Before setting out our principal reasons and

stating our conclusions on particular points, we take comfort from what Hoffmann J said recently in an appeal from this Tribunal[33]:

> "Thus the Tribunal found itself with very little guidance other than its own expertise and general impressions of the evidence, engaged in an exercise in which it is notoriously easier to be right than to explain why."

Z OUR MAIN REASONS FOR OUR CONCLUSION ON RATE

(a) We started by taking the current factual position. The basic 6¼% of retail price established in 1928 had lasted for over 60 years[34]. The record industry had thrived in that time internationally. And of especial importance, the UK recording industry had established a particularly important position in the world - especially in the last 20 years or so. The existing rate was a feature of that recording industry. The success of the industry was of course contributed by and to the benefit of all, companies, composers and artists. It seemed to us that we ought not to disturb the existing position substantially unless we found good cause.

(b) We then asked ourselves whether there was any objective evidence that composers as a class were being underpaid. Of course such evidence would be hard to come by. Whatever the rate, there would be composers earning little from their mechanical royalties. Modern classical composers mostly fall within that class, as was the case at the time of Francis and nothing can be done about it by this Tribunal. We were not given any figures by the MCPS as to how composers' mechanical earnings are spread, but a PRS document showing brackets of performing rights earnings indicated that there must be a few very high earners and many who earn not much[35]. Further it must of course be the case that earnings will go up and down from year to year so that a composer in a higher bracket one year may fall down a bracket for the next. What would have persuaded us that the established rate is too low is evidence that *collectively* the craft or profession of composition was earning so little that it was in

---

[33] *PRS v BEDA* 9th March 1991, unrep.

[34] Translated by agreement into uplifts on PPD from 1982 but this made no material difference.

[35] In 1989 68% of writer members of the PRS received £250 or less. Publisher members figures were not given by the PRS

decline.

In fact the evidence pointed somewhat the other way. With the success of the industry there have been both more works and more successful works. This suggests that the composition craft or profession is collectively still attractive. Of course this may in part be for other than commercial reasons, but certainly there is no indication that composers are not coming forward because of the money.

(c) We should add that we of course received subjective evidence from individuals who considered the rate too low, sometimes based on the composers' forensic questions. But then there will always be people who would like to earn more. As Mr. Waterman put it:

> "It is very difficult when somebody says: 'But you have got enough dosh aint you?', the question I ask is: 'Does anybody ever have enough dosh?'"

We also received subjective evidence the other way, that composers were getting enough. Mr. Dickens of WEA (Warner) saw the matter as a moral question. His view was based upon what he saw as the relative contribution of composer and record company. We did not find such expressions of personal opinion as helpful either way.

(d) We had, of course, already considered "comparables" but for the reasons we have given did not find any close comparable. As we have indicated we concluded that BIEM should be "scaled down" and that our final figure was not an inappropriate "scaling down" from 9.5% allowing for the other matters in which we have differed from BIEM. And as we have indicated we thought that Umbrella and the increase in legal rights were plus factors.

(e) We took into account those features of the "Systems" matters which affected rate somewhat, namely items I, J, K, and L. We also took into account the fact that the record companies gain a little from the fact that MCPS takes over

distribution to authors[36]. Further, as compared with the statutory scheme, MCPS lose the benefit which came from the absence of pro-rating in the statutory scheme.

(f) We considered the submission of the BPI that under the Scheme as operated there was earlier distribution to composers than there was in continental Europe. However we also heard that in some parts of continental Europe record companies paid advances in respect of royalties. Moreover mere slowness by the copyright holder's agent in paying him appears to be a matter solely between those two parties. So in the end nothing turned on this point.

(g) We also considered the problem another way - via "effective rates." There are problems with these: of ascertaining with accuracy what sales receipts and royalties paid actually are (as to which there must be some "softness" in the figures) and the problem of ascertaining how much of the sales is of non-copyright material. Attempts were made to allow for this (and for the "CD break") But again the figures given have a degree of uncertainty about them. Given all that, Coopers suggested that the proposed MCPS royalty rate would push the UK to the top of the European league[37]. We are not satisfied that the numbers are precise enough to say that, but we think that the figures do show firstly that the position is not the same in all European countries (again showing that BIEM/IFPI is by no means a uniform rate) and secondly that the rate we have fixed is not out of line with other countries. It is towards the lower end of the scale and no more. And the special position of the UK industry justifies its being in that area.

(h) The MCPS raised a further point on "effective rate". They said that it had fallen since the time of Francis. Whether it has in other countries was not investigated. In the end we were able to form no clear conclusion on this point. Nor do we think it important: of more significance is the preceding point.

---

[36] Coopers ascertained from their UK respondents that they put the cost to them of accounting direct to publishers at about 0.17% of net receipts from record sales. Like many other figures it cannot be taken as too accurate. Continental European companies do not account direct.

[37] Allowing for the fact that in France there was a reduction in effective rate from the Coopers table because of the television advertised products referred to above.

(i) We of course bore in mind that the statutory rate only applied to second and subsequent recordings but also in effect set the rate for a first recording[38]. But that in itself did not seem significant.

(j) Another approach we considered was by a comparison with artists' royalties. If the artists' share had risen significantly in recent years it might have been some sort of indicator that composers' royalties had fallen behind. However we received conflicting evidence on the point. We formed the overall view that artists' royalties had risen somewhat. But the net effect of the increase was difficult to gauge because there was evidence that in many cases artists were required to meet out of royalties a larger part of some of the production and promotion costs than they would have met at the time of Francis. Further, not only are such royalties individually negotiated but it is frequently the case that a non-returnable advance of substantial size is made. On the other hand it was said that composers' costs had risen too and certainly some composers now use expensive equipment, though there were no figures as to this for comparison as a class. In the result we were unable to make any finding based on a parallel with artists' royalties.

(k) One other figure did seem to us of some importance. We learned that the proportion of mechanical royalties paid by composers to publishers in recent years had fallen. Now, as some sort of norm, the figure is 25% of the income; in earlier years it was more of the order of 50%. The BPI submitted that this reflected the fact that it was the record companies who were doing more and more to promote the sales of records and thereby, inter alia, to create a market for the music itself. It was said that the publishers now had a lesser role and so were being paid less. Certainly the picture has changed dramatically since 1928 when, as we noted above, the record companies were not the innovators in introducing new works.

We say this is of some importance because it is normally the case in the licensing of an intellectual property right that regard is had to the relative functions of licensor and licensee in bringing the product the subject of the right to market. If it is the licensor who does all the work and take most of the risk and the licensee merely rides on that work, then this is a factor pointing to a higher royalty. But if it is the licensee who does most of the work then he would normally expect to pay less by way

[38] The rate was both a floor and ceiling in practice.

of royalty.

We add that we heard evidence that publishers do perform a number of important functions, e.g. in some cases provide studios for making of demo tapes; some composers also employ managers who discharge some of the functions which publishers might have undertaken before; and some of the remarks by some record company witnesses seemed exaggerated. But we found the anecdotal evidence less convincing than the change in shares of the royalty; and to the extent that that change further reflects the assumption by the record companies of some of the erstwhile promotional functions of the publishers, we regard it as a factor pointing to a somewhat lower rate of royalty than would otherwise have been awarded.

We also heard particularly sterile[39] evidence and debate as to the relative *creative* roles of composers on the one hand and record companies and performers on the other. What song the siren sang may not be beyond all conjecture, but what certainly is beyond us is any assessment as to whether there has been any change in their relative importance over the years.

(l) Finally we should say something about the decisions of foreign tribunals, namely those in the USA, Germany and Australia. None of the tribunals in those countries was able to perform a precise calculation, which does not surprise us. Although it was interesting to see what was argued, none of these decisions could really assist us more than to provide a cross-check on the figure we settled upon ourselves - to make sure the UK was not well out of line with other countries.

CONCLUSION

We wish to conclude by thanking all the parties for their exceptionally high standards of presentation of the voluminous papers and their mutual co-operation in enabling this reference to be heard. We express the hope that they will now also be able to co-operate in working out the fine detail of the Scheme. We also hope that the Scheme as finally worked out will be sufficiently "user-friendly" that record companies in the UK will not (as one company has at present done) find it preferable

[39] To use Mr. Francis' word.

to use the services of a continental collecting society, the effect of which, amongst other things is, that copyright holders may receive less because they have to pay higher overall commissions.

5

Robin Jacob

1st November 1991

For the Tribunal