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Paying the music man- royalties assessed by the Copyright Tribunal

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What is an appropriate royalty for a broadcaster to pay for the right to include music in its broadcasts? This is a question the UK Copyright Tribunal considered recently in a rather dry but comprehensive decision.

The decision was under Section 126 of the Copyright, Designs and Patents Act 1988 ("CDPA") relating to a dispute between the television broadcaster ITV and PRS for Music ("PRS") (case CT 127/14). PRS is a "licensing body" as defined by Section 116(2) CDPA and the repertoire of musical works in which it holds rights is sufficiently large that ITV requires a licence from PRS to lawfully perform and broadcast musical works in its programming.

ITV has taken a succession of licences from PRS over a number of years. At the time of the reference to The Copyright Tribunal, the most recent licence granted by PRS to ITV covered the calendar years 2011 to 2013 inclusive (the "2012 Agreement"). In October 2013 negotiations between the parties commenced with a view to settling the terms of a new licence to take effect from the beginning of 2014. The parties could not reach agreement so a reference to The Copyright Tribunal under Section 126 CDPA was made.

The statute provides that the Tribunal can make an order for a licence on such terms as are "*reasonable in the circumstances*" (Section 126(4) CDPA). The only statutory guidance regarding the meaning of this phrase is provided by Sections 129 and 135 CDPA. The Tribunal summarised the effect of those provisions as being that the terms imposed by the Tribunal "*must not be discriminatory in relation to licences granted to other persons in similar circumstances although this is without prejudice to the Tribunal's general obligation to have regard to all relevant considerations.*"

ITV's position was that the royalty payment for each of the years 2014 to 2017 inclusive should be the same as that paid for 2013 under the 2012 Agreement. This was on the basis that the appropriate base royalty was that paid in the final year of the 2012 agreement (i.e. the amount paid for 2013) and that there had been no relevant changes in circumstances since 2013, so ITV should pay the 2013 royalty in each of the years from 2014 onwards.

PRS, on the other hand, argued that the royalty to be paid in years beyond those covered by the 2012 Agreement should be increased by reference to a number of proposed adjustors. According to PRS, the terms of the 2012 Agreement were not freely negotiated because they were agreed in the

shadow of a pending reference to The Copyright Tribunal, hence why those terms were expressly stated to be non-precedential. PRS argued instead that the most recent relevant and freely negotiated licence was an agreement reached in 2009 (the "2009 Agreement"), covering the years 2008-2010.

The Tribunal accepted PRS for Music's argument and then had to decide whether it took the royalty from 2008, 2009 or 2010 as the base royalty. Under the 2009 Agreement, a total royalty of £70 million (plus an additional royalty for Breakfast TV in each year) was agreed for the three years 2008-2010 inclusive. The Tribunal accepted ITV's contention that, due to the economic climate at the time of the 2009 Agreement, the royalty paid under the agreement was not intended to increase from 2008 to 2010 and so the same royalty (excluding the Breakfast TV payment) should be deemed to have been paid in each of the years 2008-2010 inclusive. Having accepted the contention that the royalty paid in each of those years (excluding the Breakfast TV payment) should be deemed to have been equal, the Tribunal took the royalty paid by ITV in 2010 as the base royalty for determining the royalty to be paid from 2014 onwards.

The Tribunal then had to decide what adjustors, if any, should be applied to the base royalty to determine the royalty to be paid in each year from 2014 onwards. The Tribunal relied on the so-called "BSkyB Adjustors" for this purpose, taken from the Tribunal's earlier decision in *British Sky Broadcasting Limited v The Performing Right Society Limited [1998] E.M.L.R. 193.* Those annual adjustors are: (i) the percentage change in viewer hours applied to 54.5% of the royalty; (ii) the percentage change in the retail price index applied to 100% of the royalty; and (iii) a flat rate increase for each additional channel broadcasting more than 20 hours per week.

The last of these adjustors could be ignored in this case because one of the terms of the 2012 Agreement that would continue by consent provided for a variation in the royalty owed due to the addition of new channels. In respect of the first adjustor, the Tribunal in this case simplified it to an adjustment by reference to the change in total viewing hours for ITV channels according to BARB viewing figures, applied to 50% of the base royalty. In respect of the second adjustor, ITV and PRS agreed that if an inflation adjustment were to be made then it should be done using the RPIJ measure of inflation rather than the RPI used in the BskyB case. The RPIJ index is a measure of inflation that assesses changes in the cost of retail goods and services. The index uses a different calculation to that used by the RPI index to align it with the Consumer Price Index, which is perceived as a more accurate measure of inflation.

In light of the above, ultimately the Tribunal decided that the royalty owed for 2014 should be calculated as follows:

The base royalty is the amount paid by ITV in 2010, including Breakfast TV. The royalty for 2014 will be that base royalty adjusted:

- by a percentage equal to half the percentage change in total BARB viewing figures for ITV between 2009 and 2013,

and further adjusted:

- by a percentage equal to the percentage change in RPIJ between those years.

The royalty for 2015 would be calculated in the same way, taking the royalty for 2014 as the base royalty and using the changes in BARB figures and December RPIJ one year in arrears, i.e.

between 2013 and 2014. The royalties for subsequent years would be similarly calculated.

This decision from the Copyright Tribunal provides a well-reasoned and carefully set out explanation, clarifying the approach the Tribunal will take in determining the appropriate level of royalties to be paid by UK television channels to PRS for the performance and broadcast of musical works used in their programming.

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