MEMORANDUM TO:	**The Chairman and Panel of the Competition and Markets Authority**
SUBJECT:	**Undertakings Given by the Performing Right Society Ltd**
FROM:	**A J Harcourt of Entertainment Rights Management**
DATE:	**13 January 2016**

INTRODUCTION:

I am writing in my capacity as the owner of a boutique intellectual property consultancy from which I provide legal, business and strategic advice for international clients drawn from within the copyright industries. I have balanced my consultancy work with academic posts at post-graduate level, at law faculties in the UK and USA. Competition law and the collective management of copyrights formed the basis of my honours thesis for my UK law degree in the early 1990s and I continue to write and lecture upon the subject. I have longstanding experience of the activities of the PRS for Music as outlined below. I have more recently advised an audio-visual collective management organisation on compliance with the EC Directive on Collective Management.

My client base includes artists, writers, music authors, performers, film directors, designers, trade associations for the creative community, small audio-visual producers and audio-visual CMOs. I have held consultancy positions at senior level with the two largest film television production companies in the world, Bertelsmann's Fremantle Media and Endemol. Further details of my background can be found at LinkedIn:
https://www.linkedin.com/profile/view?id=AAIAAAIDftsBfDQoPWZ0QKx_ceaCTyoIOGU_VEw&trk=nav_responsive_tab_profile

At the time of the Monopolies and Mergers Commission (as it then was) Enquiry into the supply of services of administering performing rights ("1996 PRS Enquiry") I was General Secretary of the largest EU music authors trade association, the British Academy of Songwriters Composers and Authors. On the instructions of and on behalf of the music author members of the Academy, I drafted an initial and (at the request of the Commission) a second follow up written submission to the 1996 PRS Enquiry. I also attended to give oral evidence. A summary of these submissions can be found at pp 157 to 160 of the 1996 Report.

In addition, earlier while in private practice, I had acted as the case officer on a wide ranging international enquiry into the administration of live performance royalties by PRS and associated societies overseas and other related administrative matters on behalf of clients, Irish writer/performers U2. As a result I was asked by the MMC for oral evidence reflecting my prior professional experience of the PRS' activities. A brief summary of my oral comments can be found at p 160 of the Report. Much of the evidence used as the basis for the submission made by U2 in conjunction with PolyGram (found at pp 180 to 183 of the Report) was drawn from my researches. It should be noted however that, at this distance, I cannot support the entirety of the arguments put forward by PolyGram in the Report.

I propose to respond with general comments in relation to Issues 22 (a), (b) and (c) of the Issues Statement.

22 (a) Internal Changes:

The PRS has changed significantly since the original Report. The 1996 Report's usefulness in helping drive the society's reform is undeniable. PRS also appears to me to have been ahead in implementing some of the requirements now enshrined in the CMO Directive and in some areas operates policies that other societies elsewhere in the world would do well to emulate.

The most obvious internal change in which I have been directly involved is the quarterly meetings held by senior management with the major writer members of the society ("Major Writers Meetings"). I have been attending these on behalf of major writer members and have witnessed a subtle but significant shift in the conduct of this forum. One is positive and the other disappointing.

The positive observation is the willingness of the PRS senior management to engage with the concerns of the writers and their representatives who attend. Clear and frank presentations about PRS policy developments, Tribunal hearings, and significant licensing discussions have been useful. These meetings on occasion feature very vigorous exchanges of views between members and management. This is healthy. Visits from senior management from other societies have been facilitated to share concerns as to the operation of foreign organisations.

Notwithstanding this forum, I believe it is fair to emphasise the frustration felt by many at the Major Writers Meetings in two respects (i) the discussion of policy largely after the fact and (ii) at the non-disclosure conditions in licensing agreements which appear to be imposed on PRS (particular by digital licensees). In the case of the latter, GEMA, by contrast, is freely able to share details of licence terms with members. Support for PRS to enable the society to share such detail more meaningfully with members would be welcome.

> *It is true that as a matter of general policy GEMA refuses to sign non-disclosure agreements with users that would prevent GEMA from disclosing the details of the agreement (in particular concerning the remuneration) to its members. This has been one of the reasons why GEMA still has not signed a licensing deal with Youtube. However, with all other major DSPs (including Google Play and Spotify) GEMA has been able to reach an agreement without being prevented from disclosing licensing terms to its members.*[1]

What has been disappointing at these Major Writers Meetings is the lack of any meaningful dialogue between the writer members of the Board (those that attend) either at this forum or outside it. It is recognised within the writer community the disadvantage in terms of expertise that some writer members of the Board suffer from in comparison with their publisher colleagues. Publisher Board members are either proprietors with business experience or drawn from the legal or financial part of the publishing companies that employ them. This can place writer Board members at a disadvantage in terms of legal or commercial expertise. Attempts by representatives

[1] https://www.gema.de/en/press/popular-subjects/youtube.html

of many major writers to engage with writer Board members on an informal but regular basis to augment their legal and commercial knowledge and give them support in the challenging work they do at Board level have regrettably not borne fruit.

22 (b) Legislative changes: (ii) "potential conflicts between the undertakings and the CRM Directive and any concerns that arise from this…"

At a recent Major Writers Meeting a question was raised as to the degree of transparency that will result at PRS in response to the CRM Directives requirements about the annual transparency report (Chapter 5 Article 22 and Annexe; Article 9(3) and Article 10 2 (c)) and in particular right owners' individual revenue statements.

PRS advised that, although writer Board members were sensitive about revealing their personal annual revenues, the publisher Board members were not supportive at all of publishing the annual revenues of their employer (or business of which they are proprietor). Their justification for this is disingenuous, difficult to maintain and exposes a potential conflict that the PRS Board must resolve (if necessary with help).

The publisher Board members apparently argue that they are NOT elected as a representative of their employer, but in their personal capacity(ies). Thus, as they have no <u>personal</u> entitlement to revenues as right holders per se, this declaration requirement does not apply to them.

As a result of pressure from representatives of major writers to improve writer representation PRS has, with the support of the members, introduced a change in the Society's rules. Writer members who collect their income via personally owned publishing or service companies may nominate their CEO, or MD or company officer to stand for election to the Board as a <u>writer</u> member. Such a full-time officer employed by or with an interest in a writer-owned publishing company is only entitled to be elected as a writer Board member if specific conditions are met. We shall call them writer/officers. This change accommodates both the reality of a major successful writer's personal commercial arrangements and the calls upon their time which hamper their ability to serve on the Board in their personal capacity as writers.

If we apply the publishers' argument about disclosure to such a writer/officer elected as a writer Board member, a clear anomaly arises.

The Directive requires Board members to declare their annual revenues to meet the transparency report requirements. Do such writer/officers declare as writers? They cannot declare the revenues they receive in their own right as they are not writers themselves. If we apply the publisher director arguments, these owners/directors/employees of the writer-owned company have been elected as persons in their own right, <u>not</u> in terms of their relationship with the writer-owned publisher. This is wholly inconsistent with both the transparency principles enshrined in the CMO Directive, as well as with the terms of and the motivation behind the change in the PRS rules; namely to benefit highly successful writers and give them an opportunity for better understanding of their society and promote more expert writer representation.

If the publishers' arguments are to stand, this is a contradictory position and a failure to afford equal treatment to the two categories of elected Board members. I cannot see that there can be any justification for any Board member failing to declare annual revenues especially where writer members of the Board are willing to sign up to openness in this respect.

22 (c) Changes to the music industry:

Before commenting in this respect it is essential that clarification is made of the contractual relationship between the PRS and the two categories of member, writer and publisher.

Direct writer members of PRS assign their public performance right (communication and making available) under personal contracts that grant the society a global, exclusive licence to license the performing right in their musical compositions. The right to issue performing right licences lies solely with the society of which an author is a direct member, in the present instance PRS. An author's music publishing contract carves out this strand of the copyright bundle of rights and it does not form part of the assignment from writer to publisher (unless complete resignation from PRS by the writer at which point the right will vest in the publisher, but NOT otherwise).

Publishing contracts only give the publisher a right to share in the revenue from the performing right, but not ownership of the right itself. It is the right of reproduction that is vested in the publisher and not the right of communication to the public or making available to the public.

The so-called Special Purpose Vehicles that certain music right holders use to license online music services are bolted together with the CMOs for exactly this reason – they have to be in order to offer the twin rights the service requires – that of the reproduction right and the making available right.

This exclusivity of assignment between writer and society remains the legal position in every music authors' society with the exception of those operating in the USA. No music publisher in the UK can withdraw any rights from the PRS as they have no rights per se to withdraw. Any notice of withdrawal must be agreed and tendered by both the writer(s) and the publisher. The writer requires the publisher's agreement if the writer wishes to make an application for selective withdrawal (under say the GEMA categories or the PRS' own categories at Article 7 (cc) and (cd)) in order to safeguard that publisher's contractual right to revenue.

As long as U2 in Ireland, Ulvaeus and Andersson in Sweden, Coldplay and Adele in the United Kingdom, Michel Legrand in France, Lorde in New Zealand, Björk in Iceland etc. continue as members of their local CMO, no publisher can withdraw the performing right nor can they issue licences for the right of communication or making available to the public of musical works the writers have created.

It is essential that in deliberations by the CMA on this subject this limitation to the music publishing community's position is borne in mind, particularly when considering any statements the publishing community might make in respect of direct licensing via "rights withdrawal" from PRS (itself a misnomer for this constituency).

The two most noticeable changes in the industry since the original 1996 Report are, I submit, the consolidation of ownership in the music publishing sector and the rise of online dissemination.

The consolidation has created three powerful publishers that dominate the market, Sony (now Sony/ATV), Universal (UMPG) and Warner Chappell. The sale of EMI (recordings largely to Universal Music Group and publishing to Sony) further strengthened the market power of Sony/ATV. Research shows that in 2014 these three companies had respectively 29.5% (Sony/ATV), UMPG 23% and Warner Chappell 12.5%[2].

One can assume that when competition clearance was being sought by these music companies (in this case by Sony/ATV for it purchase of the EMI publishing catalogue) both in Europe and the USA, the publisher argued that their enormous new market power could not be used to distort the market because of the existence of collective management organisations which set licence fee levels and were regulated by (in the UK) the Copyright Tribunal. To permit "rights withdrawal", however such a mechanism were to be managed, would make a mockery of any representations the music publishers have made as to safeguards against market manipulation and arguably act against competition approvals that might have been granted in part based upon such assurances.

Whilst on the subject of market dominance, I am perplexed by the logic of revisiting the PRS' former undertakings in a market place where there are these three major corporate players. One could argue, they should themselves be the subject of scrutiny, or more targeted regulation – of which more below.

The loss of reproduction right income caused by the drop in the value of the CD market is of course of concern to music publishers and their shareholders as well as to the writers. However, annexing the rights administration territory occupied by the PRS (and other collective management organisations) seems inappropriate. The rights in question (communication and making available) are neither controlled by music publishers nor necessarily would be administered in the best interests of the widest range of writers of varied levels of success were publishers to be enabled to become the licensors. It is in the best interests of a varied and active music culture for all kinds of music to be available to audiences not just that created by the successful few, a few which might be "persuaded" by their publishers to agree to a direct licensing option in a cherry-picking exercise.[3]

For members of the music publishing community to be the licensor of these rights currently vested in the PRS would expose writers in a manner that is of great concern to my writer clients and to the wider writer community (particularly the middle and lower ranking writers). Aside from data concerns, the obligations of the publishing companies are in the first instance to their shareholders

[2] Music and Copyright Ovum Annual Survey 2014

[3] The confusion and cost to the wider writer and publishing community is usefully demonstrated by the DMX background music direct licensing debacle in the USA some years ago. In this instance direct licences were issued for works many of which the US publishers did NOT control and with the knock on effect (after a combination of rate court hearings and Copyright Royalty Board proceedings) of some $150 million to the entire community.

and not to the authors upon whose works the corporation's commercial strength has been built and upon which it depends. Writers cannot be sure how licence revenue will be applied. All but the most powerful writers have contracts that only entitle them to share in revenues "directly and attributably" to their catalogue. Lump sums paid by music users as blanket fees to publishers may not benefit the writers at all!

Audit rights in music publishing contracts do not give an individual author either complete or transparent access to revenues collected by a right owning corporation.

On this head, it may be of interest to the Authority to review public comments made by the UK Featured Artists Coalition (FAO) and the Music Managers' Forum[4] (MMF) to the Music Licensing Study conducted by the USA Copyright Office in 2014. In particular I refer the Authority to comments made about the auditing of major corporations that own copyrights created by the FAO and the MMF's members' clients, songwriters and performers. Comments shared (anonymously, for obvious commercial reasons) by an experienced industry auditor included:

> "…….I experienced an occasion where a label has asserted that they are not aware of the receipt of lump sum monies from licensees and has insisted that I, as auditor, identify a particular example of such a lump sum before they can comment. However, I am not able to obtain this information as the licensees have signed NDAs. In the case of other types of lump sums received by labels, such as settlements with copyrights infringers or audio and video public performance income, I am sometimes told that it is not possible to share this income with artists as there is no way of breaking the income down by recording. But the systems are NOT incapable of allocating the money. The PRS and other rights organisations can allocate blanket licence fee money to individual songwriters. Data is always available which can be used to make a reasonable allocation.
>
> On the occasions that this income is shared with the artists, I have no ability to verify the allocation as there is no audit trail leading back to the income received from the source. I am told that this financial detail is not available to me as the source amount relates to all artists on the label and I am not entitled to that information as I am auditing at the request of an individual or single band. The company may in some cases describe a mechanism for allocation but I am not permitted to see the various stages of the calculation going back to the source of the funds. Also, where a payment is received in, say, the USA, for a global or a UK/USA deal, often the UK office is simply sent an amount, being the internal UK allocation. They themselves are not being given any detail of the original value of the licence."[5]

[4] The members of the Music Managers Forum (MMF) represent over 1000 of the most successful recording artists in the world and have an active outreach operation with US managers. They collaborate with the Featured Artists Coalition on policy matters. The Featured Artists Coalition is the collective voice of the UK's featured recording artists, and is itself a member of the global grouping the International Artists' Organisation (IAO). The IAO also consults on policy with CIAM, the respected global body representing the authors of music.

[5] http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf

In this respect, it is worth perhaps noting that, despite the unhelpful wording of Article 3 (a) of the CMO Directive, a definition which I regrettably cannot stretch to include music publishers[6], the UK definition of a licensing body, as defined in Chapter VII of the Copyright Designs and Patents Act 1988 arguably applies also to right owning record labels and publishers, to wit:

> S 116 In this Chapter a "licensing body" means a society or other organization which has as its main object, or one of its main objects, the negotiation or granting, either as owner or prospective owner of copyright or as agent for him, of copyright licences, and whose objects include the granting of licences covering works of more than one author.

By promoting direct licensing by corporate right owners, the industry risks confusing licensees and driving up their transaction costs as well as increasing the market fragmentation – the latter a problem that collective management is in part designed to solve. But one also has to enquire the extent to which music publishers seeking a direct licensing arrangement with licensees will cheerfully submit to the jurisdiction of the UK Copyright Tribunal in instances of dispute as to licence levels and terms. Can authors (and performers) expect the corporate world within the music industry to be prepared to meet the same standards of accountability and transparency that apply to a CMO?

In considering any recommendations that might lead to a reconfiguration of the rights administration sector of the music industry one would hope (expect?) policy to protect and promote the nation's key economic drivers as a priority. The music industry's joint lobbying and research body UK Music produced figures in its 2014 Measuring Music Report[7]. The report clearly demonstrates that of the £4 billion industry it is the authors and performers, at £1.9 billion, who contribute the largest slice of the total value of the combined industry sectors. It is these two constituencies that are largely UK taxpayers – consolidated music corporations, publishers, labels and giant concert promoters such as Live Nation, are not necessarily domiciled in the UK for tax purposes.

I expect the Authority will receive submissions about the stalled Global Repertoire Database and the accuracy of ownership and works labelling. I respectfully submit that comments in this regard be considered in the context of the respective rights and obligations of writer and publisher and the terms of a music publishing agreement. A writer assigns or licenses their copyrights to a music publisher in exchange for the publisher assuming certain obligations in respect of both the writer and the musical works that are the subject of the contract. The writer agrees to share with the publisher the revenues generated by the communication to the public right and the making available right – which rights the writer (outside the USA) vests globally and exclusively in the CMO of the writer's choice. In return the publisher supplies financial support via an advance (recoupable from income) and assumes various responsibilities for the catalogue – reproduction or mechanical and other bi-lateral licensing activity (the fees from which are shared subject to recoupment), monitoring and acting on infringements and, crucially, registering the copyrights

[6] "…….to manage copyright or rights related to copyright as its sole or main purpose and which is owned or controlled by its members."

[7] http://www.ukmusic.org/assets/general/Measuring_Music_2015.pdf

with the CMO system to enable blanket licence revenues to flow in accordance with CMO distribution policies and shared in accordance with the contract's commercial terms.

I have long considered as unbalanced a system whereby the costs of cleaning up data is largely borne by the CMO network. Works registration and data review is the obligation by contract of the publisher. In addition, each publisher is paid their contractual share of revenue domestically via their local offices worldwide. It is the half share of the revenue, attributable to writers, that flows through the CMO network. When the costs of creating a clean CMO network of databases are being only met by the CMOs this is largely writer money paying to clean data that, ab initio, has been the responsibility of the publisher to create. It is unhelpful and unfair if concerns about defects in CMO data accuracy, or conflicts in ISWC allocation are laid solely at the door of the PRS, or any other CMO. I refer again to the submission made by the FAC and MMF in 2014's USA Copyright Office Music Licensing Study:

> "When an author signs a music publishing contract it is the responsibility of the publishers to register the works worldwide in order to access revenues. It is the registration and monitoring of licences and income that form the basis of the services that an author receives in exchange for assigning their copyrights to the publisher. The inconsistencies in global works labelling and registration would appear to us to signal a longstanding fundamental failure fully to deliver on the part of the publishing community.[8]"

This is most emphatically not to say there are no data problems. Personal experience supports these statements by the FAC and MMF. On behalf of clients over the last four or five years I have been involved in the clearance of music publishing rights for commercial uses. These clearance processes have meant making applications to the publisher right owners (large and small) as the projects my clients were working on did not qualify for a blanket licensing arrangement. I have been disappointed by the data quality and the slow speed of the commercial dealings I have encountered. Some right owners have been unable to confirm the ownership position of the works in question, some have given conflicting information that suggested internal difficulties with data, and I also encountered conflicts between the data in publishing houses and the records shown at the various CMOs when cross-checking information.

The Authority will doubtless receive evidence to demonstrate failures in record keeping. But the solution does not lie in a radical shift in the licensing landscape's structure and mechanisms. The solution to data defects lies in data cleaning, not the removal of rights vested by contract in the one area of the music industry where authors have some influence over policy and practices.

The final words are best delivered by the creators themselves. In January 2015, when MEP Julia Reda questioned the efficacy of the collective management system for authors in her role as Rapporteur of the European Parliament Legal Affairs Committee, she drew a robust response

[8] http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf

from the very creators she sought to engage in discussing copyright reform.[9] Writing on behalf of tens of thousands of authors worldwide, CISAC Presidents composer Jean Michel Jarre, and Vice-Presidents poet and scriptwriter Javed Akhtar, singer songwriter Angelique Kidjo, sculptor Ousmane Sow and film director Marcelo Pineiro, global talents all, wrote:

> "Creators work alone and a collective voice is critical for us to be heard. We are therefore astounded that you question whether the various collecting societies (we prefer the term Authors' Societies, or Collective Management Organisations) that license our creative works really reflect our interests. The network of societies across Europe and the rest of the world is the one sector where creators do in fact have a voice. We, the creators, elect our representatives to serve on the boards of our societies. With few exceptions, it is we, the creators that form the majority of the board composition. It is the strength of the our societies that guards our rights against what appears to us to be the relentless erosion of the value of our work in the face of powerful internet giants, who have built global businesses and amassed enormous profits on the back of the work of creators you purport to support."

13th January 2016

[9] http://www.cisac.org/Newsroom/News-Releases/Creators-React-to-MEP-Reda-s-Draft-Report-on-Copyright-Calling-for-a-Fairer-Digital-Market-for-Authors