MMF and FAC response to Performing Right Society undertakings review by the Competition and Markets Authority

About the MMF and FAC

The Music Managers Forum (MMF) was established in the UK in 1992. The MMF is the largest representative body of artist managers in the world. The organization has over 450 members in the UK, representing more than 1,000 of the world's most successful recording artists. Our emphasis is on implementing positive actions to assist our members with a keen eye on the next generation of entrepreneurs and innovators. The MMF provides a collective voice and focuses on providing real, meaningful information and support for our members and the authors and recording artists they represent. We aim to help unlock investment, open new markets, encourage a fair and transparent business environment and drive a global agenda appropriate for this digital age. The MMF is allied closely to the Featured Artists Coalition ("FAC"), a body founded in 2009 to promote the interests of featured (or contracted) UK recording artists. The MMF members are not customarily right owners. Where rights acquisition does occur is where management has adapted to the changing market and evolving responsibilities of a manager. Managers today are increasingly required to be investors and CEOs of companies perform a multiplicity of functions in the development of an artist's career bringing branding expertise as well as sourcing commercial partnerships outside the traditional label/publisher model.

Background

Point 20 of the Issues Statement regarding this review asks "whether there has been a change of circumstances such that the undertakings [given in 1997] should be 5 superseded, varied, or released". The answer to that is an unequivocal "Yes".

After 1997 the advent of mass digitisation and the internet have drastically changed the recorded music business. This has happened in a number of areas that affect the operations of PRS:

1. Pre-1997 practically all licensing of rights (and much of the consumption of music) happened on a territorial basis. BBC Radio 2 was licensed by PRS (and PPL) in the UK and could only be consumed there apart from some unavoidable leakage into Ireland, France and Belgium. With the advent of the internet MP3 files could be shared on a worldwide basis (effectively the advent of digital piracy) and as consumption moved to computers consumers demanded that terrestrial radio be simulcast over the internet. In addition internet only radio stations launched. Both of these innovations meant that radio became a worldwide medium. It may be that services said they could geo-block internet transmissions but the interaction between a worldwide consumer market and the BBC suggests that this is not happening.
2. The cost of measuring consumption of music has dropped considerably. Digital fingerprinting and ease of identification means that accurate measurement of both what radio really plays and what consumers are actually listening to is becoming cheaper all the time. This should enable more accurate dissemination of income to songwriters and publishers based on real data rather than surveys. Obviously there has

to be continual cost/benefit analysis regarding measurement (PRS shouldn't spend £100 accurately paying out £95) but the principle is established.

3. Digital Service Providers (DSPs) started to obtain licenses for multi-territorial operation. Publishers realised that they were effectively paying a Collective Management Organisation (CMO) in each territory to license the same (mechanical) rights to the same DSPs such as Spotify. They realised it would be more efficient to do one deal for some, most and then all territories in Europe in one transaction. Partnerships were formed between large publishers and individual CMOs to license the rights and process and collect the income. Universal Publishing partnered with SACEM in France and EMI partnered with PRS etc.
4. The issue for authors was that these new deals were hidden behind Non-Disclosure Agreements (NDAs) that the DSPs and publishers signed. The terms of these agreements were very tightly controlled as to who could see them. What had previously been published as a tariff for all to see was now hidden behind the NDAs. Even boards of CMOs such as PRS were not allowed to see the deals (although some selected members have been shown them as a safeguard) and thus the creators have generally been left in the dark. The issue of NDAs is fundamental. Obviously if negotiations have been conducted directly from rights holders rather than collectively some commercial terms may have to be kept confidential but surely the whole ethos of CMO is in the first word. If an organisation is mandated and formed to act collectively in the best interests of members then they should do so and that cannot happen if rights are negotiated individually behind NDAs. (Generally our members prefer collective management and the certainty and clarity that provides over the nebulous benefits of direct licensing and the possibility of better rates behind NDAs). It is interesting that GEMA (PRS's German equivalent) refuses to sign NDAs leading to some deals not being completed however many still have. We are investigating how that model works in terms of accountability.
5. Publishing income has always been split between mechanical rights (usually assigned to publishers) and performance rights (usually assigned to a CMO). Life became very complicated when different uses (a download, a webcast, a non-interactive stream and an interactive stream) had different percentage splits between mechanical and performance decided individually by each society in each territory. So an interactive stream might be 50/50 mechanical/performance in the UK, 25/75 in Germany and 90/10 in France. Publishers will of course always want to maximise the mechanical income. DSPs however still had to license the mechanical rights from major publishers or aggregators of publishers and then do separate deals with territorial performance rights holders.
6. The major publishers decided this was also inefficient and asked the societies such as PRS if they could license the performance rights which exactly matched their mechanical license deals they had already done direct with the DSPs. Spotify would need both of those licenses to operate. As the performance rights were owned by the CMOs the easiest way to accomplish what the publishers wanted was to get permission

from the PRS Board for the large publishers to negotiate separate deals with a DSP – one for mechanical rights that they owned and one for performance rights which matched the mechanical rights that PRS owned. Of course these would not exactly match and generally PRS would only own the rights to UK writers but it would be close enough. The other rights would be obtained elsewhere.

7. Then the last level of complication arose. Executives of PRS were on the board of CELAS (the joint venture that PRS and EMI Publishing had formed). These executives could not know the deals that say Warner Chappell had done with the rights that they owned and the equivalent PRS rights because that would be against competition law. The solution would be that the Company Secretary of PRS would be the only executive to know the deals that Universal, Sony-ATV and Warner-Chappell had done for PRS's rights in 3 deals. The rest of the executive team could not know. We understand that the Board do not know details of the licensing of the rights they own . As far as we are aware this principle has never been put to the members for a discussion or vote yet it is fundamental surely to a membership organisation.

Representation

Our major issue with PRS is that the Board and executive want to deal only with their direct stakeholders i.e. publishers and songwriters. The MMF exists to educate, inform and represent our members. In the same way managers as well as similar professionals such as lawyers and accountants (many of whom are Associate members of the MMF) are there to represent creators such as songwriters, performers and producers. A recent survey of our membership showed that of the featured, performing artists that our members represent 98% of them are also songwriters. Creators like to create and employ professionals to carry out most if not all of their business for them. Some creators do take an interest in how their rights are managed but the time and expertise needed to keep up with the seismic changes of the last 20 years is enormous. That's why they have advisors. It would be disingenuous to say that creators don't know about rights and business but our experience says that that is exactly why they employ professionals.

The current representative situation with the PRS Board is flawed for 2 major reasons:

1. Elections. PRS is made up of 2 different rights holders – publishers and songwriters. They often work together and have the same interests but not always. An example might be when deciding whether a new method of delivery consisted of a performance or a mechanical. It would be in the interests of the publisher for the mechanical element to be as high as possible because that income is paid to them and can be used to recoup previously paid advances which could mean they retain all the money. The songwriter would want the performance element to be as high as possible because it would go to PRS where there are no advances and they get paid directly on a quarterly basis.

   The PRS constituency for elections is both publishers and songwriters. Together both constituencies vote for both the publisher representatives and the writer representatives on the board. A major publisher can have tens or even hundreds of subsidiaries who all have separate votes for the Board. One of those alone voting for (or against) a particular writer could make sure they were elected or stop them being elected. Surely publishers

should vote for publishers and writers for writers? This is the model that operates in Continental Europe.

2. Representation and Consultation. Once writers are elected to the Board there is no formal mechanism for them to meet or liaise with the constituency they represent or their professional advisors. There are meetings called "Major Writer Reps Meetings" which take place quarterly and which are attended by 2 writer reps from the Board who rarely engage. They are effectively meetings between our members and other professionals and the PRS executive. Subjects covered include the financial position of PRS and other major developments but they are always held retrospectively i.e. we have no knowledge in advance of issues that are due to arise at the Executive or Main Boards.

   In 2013 we wrote to Robert Ashcroft, CEO, about this issue advancing constructive ideas including having an MMF observer attend Board Meetings; changing the Mem. and Arts to allow artist reps to attend Board Meetings instead of elected writers; the appointment of a Consultant Director (as per section 38 of the Mem. And Arts. "Consultant Directors may be appointed by the Board on such terms and for such period as it shall deem expedient".) to safeguard our views; and having pre-Board meetings where an independent lawyer could apprise our constituency of upcoming topics at the next Board meeting so we would know what was being discussed. The initial letter was referred to Board Chairman Guy Fletcher who provided a disappointing reply prompting another letter from us in 2014. All 3 letters are attached as well as undated proposal of similar vintage. All our ideas were rejected. At the 2015 AGM a resolution was passed clarifying that elected writers could send managers, lawyers etc who satisfied limited criteria to Board Meetings in their stead – a small step.

Supplementary Points

When the Board approved the direct licensing of the performance right in association with publishers (see point 6 above) it was agreed that a report would be commissioned to assuage the concerns of the writer reps on the Board about the effects of the new deals. It took many months for us to get PRS to even agree that the report existed but we were then refused access to it. Surely the members and their representatives should be able to see a document justifying such a transformative change? Isn't this what recommendation 40 of the 1997 undertakings was meant to address?

Over the past few years an issue has arisen regarding the collection (and rebating) of performance royalties in the Netherlands represented locally by BUMA/STEMRA. The rebate practices used by Continental societies (but NOT we hasten to add, PRS) return to the live concert promoters refunds of the cash value of the live tariff of, in some cases, up to 40%. Promoters keep this rebate and it is not shared with the performer in the concert(s) in question. The effect is that a payment declared by a promoter to the performer in tour accounts of, say, €100 is in fact €60. This then becomes the sum allocated between the writers whose works have been performed (and their publishers). This rebate system penalises both writers and performers and is of considerable value annually to promoters (some of whom occupy a dominant position in the market for the promotion of live music). These sums have not been authorised by PRS, nor by the membership. It is to the discredit of the publisher community that it has been the Major Writers who have insisted this problem is

addressed internationally. This is of major concern for songwriters professional representatives. It has resulted in the loss to PRS members of millions of Euros of income and yet we have discovered recently that it has never been discussed by the main Board on the basis that the Board discuss policy not commercial issues. It has also recently become apparent that the same issues prevailing in the Netherlands are happening worldwide. While eventually PRS has provided us with worldwide tariffs and the effective rebates in each country, this is evidence of a systematic failure by societies other than PRS to protect the interests of PRS members. In this respect it is also regrettable that PRS has never audited a live music promoter. As evidence of this rebate system arose as early as the so-called U2 enquiry in the early 1990s, action to protect the value of the UK rights is long overdue.

Proposals

We would respectfully suggest that the undertakings given by PRS in 1997 be varied as follows:

1. That PRS recognise that the process recently introduced allowing songwriters representatives to stand for election to the Board has been a step forward but that the restrictive qualification criteria should be relaxed.
2. That writer representatives on the Board should develop a mechanism for consulting with the people who elected them on a regular basis before decisions are taken at the Board.
3. That a Consultant Director be appointed whose remit is to liaise, concerning all PRS matters, with all professionals such as managers lawyers and accountants and their trade bodies if relevant who represent songwriters. This person could also ensure that issue such as BUMA/STEMRA rebates would be dealt with.
4. That all NDAs be reviewed and that outline deals without commercially sensitive information should be available to all the membership.
5. That in elections publishers only vote for publisher representatives and songwriters only vote for songwriter representatives.
6. That major policy decisions such as changing the way PRS rights are licensed are always referred to the Board and that membership consultation should be held directly on fundamental changes.