



UNIVERSAL MUSIC  
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Competition & Markets Authority,  
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**CMA's review of undertakings given by the Performing Right Society Limited**

Universal Music Publishing Ltd ("UMP") is pleased to have the opportunity to submit its views in relation to the above review.

UMP is one of the largest music publishing companies in the world and is a major publisher member of the PRS.

We wish to raise one key area of concern which has relevance to the MMC's recommendations to the PRS and to the questions raised in both paragraphs 21 and 22 of the review, before responding to certain of the general questions posed in the review.

**Key Concern: Cost Allocation**

UMP's repertoire includes music from all genres including pop, classical and production music. Each year UMP makes significant investments in the careers of songwriters and creators who enjoy major success in the UK market. As a result, revenue arising from repertoire invested in by UMP forms a material tranche of the revenues collected by PRS and is a key source of funding for costs incurred by PRS.

In its original report the MMC was concerned to explore whether costs incurred by PRS were correctly allocated against relevant income. Weaknesses were identified with a conclusion that activity-based costing would remove a number of inherent cross-subsidies. Recommendations 17 and 18 resulted from these concerns and we submit remain relevant and should be updated in the context of changes in the music industry identified at paragraph 22(c) of the CMA review document.

Following the changes in the way music publishers and CMOs now elect to organise arrangements to facilitate multi-territorial licensing of rights for the use of music online, PRS is already engaged in a joint-venture partnership with STIM and GEMA for the creation of (i) the Ice Services Hub for the provision of licensing services for online exploitation and (ii) the ICE Operations Hub for the provision of back office services. The ICE Services hub is in competition with other service providers for mandates from CMOs and right holders and so is a repertoire-specific project. Given the way the industry is evolving, it is a reasonable assumption that PRS will be engaged in future projects relating to repertoire-specific licensing and administration services.



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UMP's concern is that to date, PRS has not given sufficient consideration to the way costs incurred in relation to repertoire-specific projects are allocated. Our firm view is that costs for these projects should be borne only by those benefitting from them. It is entirely wrong to require any right holder or CMO which has elected to use the services of a competitor organisation for relevant services to have to contribute to the costs of a competing PRS structure it does not use. This also further distorts competition in the market for the provision of copyright administration services related to the grant of multi-territorial licences – a market in which PRS occupies the position of an indispensable partner because it has sole and exclusive control over Anglo performance rights (see further below).

[redacted] UMP and other non-participant right holders and creators are effectively forced to share in the risk of loan arrangements relating to ICE Services without any reassurances of suitable compensation by returns appropriate to the level of risk. In short, models for funding used by PRS are lagging behind the new realities of the repertoire-specific world of online licensing and need to be urgently reviewed to avoid cross-subsidies which distort competition.

Although our concerns to date have been specific to ICE Services, the same logic applies to all the special purpose vehicles already being set up by PRS and its society partners as repertoire specific licensing vehicles. A more intelligent and equitable solution needs to be found wherever it is apparent that the vehicle created will only be used for a sub-set of the PRS membership.

We believe that for all repertoire-specific structures, the users should pay for the full, not just incremental, costs of the service. The cost should include fully costed operating costs, including costs for any corporate or support services used by that vehicle as well as ultimately paying for capital and investment costs. Certainly in relation to ICE Services, this has not been confirmed to us.

Of course, subject to Board approval PRS can look to finance the repertoire specific investments using funds from its core services. However, the vehicle being funded needs to repay and deliver an appropriate return on that investment which is commensurate with the risks involved, given that PRS and its members are effectively equity funding. In determining the amount of funding any and all set up costs - whether incurred in the vehicle and within PRS - must be taken into account. This means that all investment and establishment work relating to the vehicle should be re-charged to that vehicle. This is necessary to achieve some transparency as to how that vehicle is financed. In relation to ICE Services, we are not confident that the loans put in place cover all relevant investments, nor that the returns required are appropriate.

We agree that how ICE Services or any PRS funded SPV chooses to charge and so repay that investment is not the business of the users of PRS' universal services. That is up to the ICE Services/SPV's business owners and users. However an understanding of how that charging is anticipated to cover stress situations impacts many of the risks associated with the business and hence the return required on the loans.

In response to question 21(c) of the review, our view is that the recommendations and undertakings dealing with cost allocation should be updated so as to ensure equitable solutions for





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repertoire-specific investments and prevent distortions of competition which could otherwise arise in this context. Given that ICE Services is already live, we would welcome the following specific undertakings:

- A. Operating and Investment Costs for ICE Services (repertoire specific licensing services not used by all PRS members) and ICE Operations (back office services used by all members) should be uncoupled and reviewed to ensure they are fully comprehensive of all costs incurred in all areas of the business.
- B. The loan arrangements are re-visited and adjusted to cover all investments made within all parties, and appropriate returns are made on those loans. We would suggest that a return of at least 10% p.a. is appropriate and consistent with normal market conditions.
- C. To overcome any confidentiality sensitivities which may prevent a full explanation being provided of the impact of decoupling costs and investments for ICE Services and ICE Operations we suggest an independent third party review overseen by the CMA of the costs allocation between the two projects, together with the appropriateness of the re-charging from PRS/STIM/GEMA. This third party review would aim to provide all non-participating right holders and CMOs with the assurances needed that ICE Services and other SPVs such as SOLAR (the licensing vehicle for Sony/EMI repertoire) are receiving their respective full allocation of central costs.

**Legislative Changes – review paragraph 22(b): are there additional protections provided by the undertakings beyond the protection provided by the CRM Directive?**

In its original report on the PRS, the MMC identified that its findings in paragraph 2.100 were omissions attributable to the existence of the monopoly situation. PRS remains as a monopoly and so the need for the maintenance of protections around transparency, good governance and specifically the need for members to be able to easily withdraw rights, remain. We would feel more comfortable if the Directive had already been implemented into national law and if the UK didn't face a referendum around its membership of the EU. While these matters (and particularly the EU Referendum) are pending, it seems premature to release the undertakings.

**Changes to the music industry**

**Review questions 22(c)(i) – (iii) The extent to which PRS members are able, in practice, to withdraw categories of rights and self-administer them or appoint other parties to administer them, practical difficulties and differences between withdrawals online and offline**

**Repertoire wide withdrawals**

The MMC noted that the PRS is unusual in relation to ASCAP, BMI and MCPS on its insistence on a non-negotiable exclusive assignment from writers to the PRS. This means that even though writers enter into song-writing agreements with publishers whereby they appoint publishers as the exclusive administrators of their rights (typically including the performing right, subject only to any prior grant to the PRS), the publishers are not able to exercise the right of withdrawal of rights from PRS for their composers. So despite investing in repertoire and having a direct contractual



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relationship with each composer represented by a publisher whereby performing rights are granted to that publisher, a publisher cannot effect a repertoire-wide withdrawal of rights from PRS. Instead this withdrawal has to be exercised individually by each writer member – even if a writer has contractually empowered a publisher to exercise this right on their behalf. This is in practise a key barrier to the effective ability of members to withdraw rights and is a fundamental barrier to the simplification of the licensing of music publishing rights. This barrier has become particularly relevant in the context of withdrawing rights for online usage because in relation to online usage both the performing right (claimed by PRS under its non-negotiable exclusive mandate) and the reproduction right (owned by the publisher) are implicated. Services need to clear both rights in order to operate their services and need to understand the aggregate cost of doing so.

The importance of the performing rights is reflected in the commitments imposed upon the PRS by the European Commission in the context of the clearance of the PRS/STIM/GEMA hub relating to the practise of allowing the performing right to follow the mechanical right which is an acknowledgement of the need to support the aggregation of the mechanical and performing rights for online licensing. However, the PRS has not so far published its Policy on the flow of the performing right and has reserved the Board's right to revise this Policy (whatever it is) at any time. It is essential that PRS is not allowed to distort competition by leveraging its exclusive control of the performing right [redacted].

A complimentary, effective and more robust measure to remove a key barrier to licensing simplification would be if the PRS were called upon to permit repertoire-wide withdrawal by publishers of online and making available rights if contractually authorised to do so by writers.

**Practical barriers to withdrawal of rights**

As a practical matter, processes and conditions applicable to the withdrawal of categories of rights remain clunky and difficult to implement.

By way of example, a key writer recently objected to use of her works in a staged musical production which was entirely dependent on the use of her image and profile for its success. In order to request the right to self-administer those live performance rights under Article 7(f) of PRS' Articles of Association, we were advised by the PRS that the following cumulative criteria had to be met:

“1. the theme is the life or work of a particular composer or artist or features a particular catalogue;

2. the production is to be staged in a venue predominantly or often used to stage dramatic productions rather than concerts;

3. the production is marketed and advertised in such a way as to be reasonably commensurate with or similar to the marketing of a dramatic show;





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4. there is already in existence or planned for staging in the near future (and demonstrably so) a dramatic compilation show or juke box musical featuring the work of the same composer, artiste or catalogue in respect of which production an Article 7(f) notice has already been applied for or granted.

The aforementioned conditions are subject to a proviso that where a non-dramatic show (which otherwise meets criteria 1-3) has been or may be licensed by PRS prior to there being a relevant dramatic show in existence or contemplation, an Article 7(f) notice may still be issued but only on reasonable notice to the actual or potential licensee of the non-dramatic show in question and upon the member requesting the Article 7(f) notice agreeing to indemnify the society for any claims against it by the producer or other existing or prospective licensee of the non-dramatic show in question."

The PRS has agreed with us that these requirements are too onerous and need review, but this acts as a useful example of the practical barriers which remain in relation to withdrawal of rights.

#### **Review question 22(c)(iv)**

**Whether the PRS is subject to increased competitive pressure compared with 1997, for example as a result of:**

**1. Overseas CMOs providing a multi-territory licence directly for online music disseminated in the UK;**

PRS is only in competition in its role as service provider for licensing for the MCPS in relation to the reproduction right. For local services operating primarily in the UK, PRS is not in practise subject to increased competitive pressure in relation to the mechanical right because publishers are generally aggregating their rights with MCPS.

For the performing right, PRS insists on an exclusive non-negotiable mandate from its members and is therefore able to exercise its discretion as to how its rights are administered. In the absence of a published PRS Policy for online licensing it is impossible for us to understand the extent of the PRS' commitment to the European Commission (made in the context of the clearance of the ICE hub) which may impact on this discretion.

**2. Some CMOs acting as rivals to be appointed by smaller CMOs to license works on a multi-territorial basis;**

It is an important pillar of the CRM Directive that larger societies capable of multi-territorial licensing and administration of rights should offer their services to smaller CMOs. In reality the combination of PRS, STIM and GEMA in the ICE hub has reduced the options for the provision of these back office and licensing services to either the ICE hub or SACEM (the French society which is UMP's online licensing partner) and in our opinion only these societies have the proven licensing experience and skill to provide these services so competition is currently limited. Competition is further hindered by the fact that PRS would need to make the Anglo performing right available to other licensing platforms and has not so far published its Policy on this issue.



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### **3. Entry of new players providing licensing services;**

In theory, ICE Services is now in competition with new players for licensing services. However, PRS's ownership of the Anglo repertoire performing right on a monopoly basis means that ICE Services is in a very strong position to resist competitive pressure which is why it is essential to prevent PRS from misusing its monopoly status over the performing rights.

### **4. The withdrawal of certain rights by major publisher;**

Publishers cannot currently effect repertoire-wide withdrawal of performing rights for their writers.

Mechanical rights for use in national only services are generally re-aggregated with MCPS (administered by PRS).

The ICE services and operations hubs are in competition with other societies for the licensing and administration of the mechanical right held by publishers in Anglo-American repertoire (and performance rights in US society-affiliated repertoire) for use in services operating on a multi-territorial basis. However, all competitors to ICE Services need to secure access to the Anglo performing right and the PRS has not yet published its Policy on this issue (which can in any event be revised at the discretion of the Board).

### **5. Any differences in competitive pressure between online and offline music segments, for example, live performances and physical sales;**

Online – Limited competitive pressure exists in relation to the provision of licensing and administration services for use of the mechanical right in Anglo-American musical works in multi-territorial online and mobile services between the very few societies capable of providing these services. In relation to the use of the performing right online, for so long as PRS continues to insist on an exclusive assignment of rights from its members, there is no greater competition than in 1997 because PRS retains its monopoly status over Anglo performing rights, and these rights are indispensable for any digital service to be effective.

Live performance - There isn't any real competition with other CMOs in relation to live performances, although delays in speed of distribution and high commission rates charged by overseas CMOs has led some key singer-songwriters to self-administer live performances.

Offline - In relation to physical sales competition exists between the larger societies for the right to administer the Central Licensing Agreements ("CLAs") for physical mechanical rights operated by the major record labels. The major labels contract with one society for a pan-European mechanical licence. Competition for the CLAs could be compared with competition for the right to represent major publishers for multi-territorial online licensing.





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We hope the above submission is useful to you. We would welcome the opportunity to discuss any of the issues raised or any other aspect of your review with you at your convenience.

Yours faithfully

ANDREW JENKINS

EXECUTIVE VICE PRESIDENT