



**The Copyright  
Tribunal**

IN THE COPYRIGHT TRIBUNAL

**CT121/13**

IN THE MATTER OF A REFERENCE TO THE COPYRIGHT TRIBUNAL UNDER  
SECTION 125 OF THE COPYRIGHT DESIGNS AND PATENTS ACT 1988

Date: 16 December 2013

**Before:**

**Ms Colleen Keck, Mr Manny Lewis and Ms Sam Madden**

**Between:**

**THE BRITISH BROADCASTING  
CORPORATION (the BBC)**

**Applicant**

**- and -**

**EOS-YR ASIANTAETH HAWLIAU DARLLEDU  
CYFYNGEDIG (Eos)**

**Respondent**

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Lindsay Lane (instructed by BBC Intellectual Property Legal Dept.) for the Applicant

Gwion Lewis (instructed by Morgan Cole) for the Respondent

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**DECISION**

## Background:

1. The factual background to this matter and how this application arose are set out in the Tribunal's decision of 17 May 2013 (the "**Provisional Licence Decision**"), and these facts are briefly repeated below for convenience:
  - i) The BBC broadcasts a number of services including BBC Radio Cymru, BBC Radio Wales and BBC One Wales. Each of these services, but particularly BBC Radio Cymru (which is the only dedicated Welsh-language broadcasting radio station), requires a repertoire of Welsh language music for its broadcasting services.
  - ii) Eos is a licensing body under section 116(2) of the Copyright, Designs and Patents Act 1988 (**CDPA**) whose members (the **Artists**) are primarily (but not exclusively) composers, authors and/or publishers of Welsh language music. The Artists that are members of Eos are also members of the Performing Rights Society Limited (**PRS**).
  - iii) Until 31 December 2012 the BBC licensed its entire Welsh language music repertoire for its broadcasting services from two other collecting societies, PRS and the Mechanical-Copyright Protection Society Limited (**MCPS**). Since 2006 this has been achieved through a licence agreement (the **Alliance Agreement**) between PRS, MCPS and the BBC pursuant to which the BBC licenses, for a lump sum fee, all rights controlled by PRS and MCPS for all of the BBC's services including the Welsh language services referred to above.
  - iv) Having become discontented with PRS, effective as of 1 January 2013 the Artists withdrew two specific categories of rights, the broadcasting right and televising right, from PRS and granted those rights to Eos such that Eos now has the right to license those two categories of rights on behalf of the Artists. The Alliance Agreement continues to govern the rights controlled by MCPS as well as online rights. Also a number of other composers, authors and publishers of Welsh language music remain members of PRS. Accordingly the BBC continues to license Welsh language music under the Alliance Agreement.
  - v) The BBC and Eos entered into negotiations towards the end of 2012 but were unable to agree the terms of a licence for the Eos repertoire. From 1 January, 2013 this caused considerable disruption to the Radio Cymru services such that on 1 February 2013 the BBC applied under Rule 35 of the Copyright Tribunal Rules for an interim order to permit the BBC to use the Eos repertoire at such a rate and on such terms as the Tribunal shall consider reasonable in all the circumstances pending a substantive hearing.
  - vi) On 11 February 2013 the parties agreed an interim licence (**Interim Licence**) pursuant to which the BBC agreed to pay Eos an interim licence fee of £10,000 per month (exclusive of VAT) for a licence of all rights controlled by Eos, pending the Tribunal's Provisional Licence Decision on the matter. The parties also agreed a number of other matters including that the final Tribunal decision following the substantive hearing of this matter would apply retrospectively to the date of the Interim Licence.



2. The Provisional Licence Decision determined that the provisional licence fee to be paid by the BBC to Eos under the Interim Licence should remain at £10,000 per month (exclusive of VAT) pending the Tribunal's final decision on this matter.
3. A substantive hearing of the application was heard by the Tribunal on September 23-27 in Caernarfon (which, incidentally, was the first time the Tribunal heard a case outside its London base). The Tribunal must now determine the terms of the licence from Eos to the BBC for the entirety of the Eos repertoire (the "**Eos Licence**"). At this stage we have been asked to finally determine the following three issues:
  - i) the amount of the licence fee payable under the Eos Licence. The BBC's position is that the licence fee should be no more than £100,000. Eos' position is that the licence fee should be £1.5 million.
  - ii) the timing of payments to be made under the Eos Licence. The BBC's position is that the annual licence fee should be paid in equal instalments monthly in arrears. Eos' position is that the annual licence fee should be paid in equal instalments monthly in advance for the first five years of the Eos Licence, and thereafter payments should be monthly in arrears.
  - iii) the term of the Eos Licence. The parties agree the term of the Eos Licence should be for approximately three years from the date of the application (1 February 2013) and the Tribunal agrees this is a reasonable term. The BBC proposes that the Eos Licence should expire on 31 March 2016 and Eos proposes that it should expire on 31 December 2015.
4. As is usual in these cases, once the Tribunal has determined these three issues the parties will endeavour to agree the other terms of the Eos Licence and, once agreed, those terms will be referred to the Tribunal for review and approval. To the extent the parties are unable to agree any other terms of the Eos Licence, either party can apply to the Tribunal to have such other terms determined by the Tribunal.
5. This decision is therefore a conclusive decision on the three issues outlined above and a comprehensive conclusive decision encompassing all of the terms of the Eos Licence shall be issued following the Tribunal's approval or determination (as applicable) of the other terms of the Eos Licence.

### **The Legal Framework**

6. This application has been made under section 125 of the CDPA. It is common ground that Eos is a licensing body, and the BBC is a prospective licensee, for the purposes of section 125. Section 125(3) of the CDPA directs that "*If the Tribunal decides to entertain the reference it shall consider the terms of the proposed licence and make such order, either confirming or varying the terms, as it may determine to be reasonable in the circumstances*".
7. The discretion of the Tribunal in determining the reasonable terms of a licence is not unfettered. The CDPA directs the Tribunal to take into account certain factors in coming to its decision. Section 129 is relevant to this application and provides as follows:

*“In determining what is reasonable on a reference or application under this Chapter relating to a licensing scheme or licence, the Copyright Tribunal shall have regard to –*

*(a) the availability of other schemes, or the granting of other licences, to other persons in similar circumstance; and*

*(b) the terms of those schemes or licences,*

*and shall exercise its powers so as to secure that there is no unreasonable discrimination between licensees, or prospective licensees, under the scheme or licence to which the reference or application relates and licensees under other schemes operated by, or other licences granted by, the same person.”*

8. Section 135 of the CDPA is also relevant. It states:

*“The mention in sections 129 to 134 of specific matters to which the Copyright Tribunal is to have regard in certain classes of case does not affect the Tribunal’s general obligation in any case to have regard to all relevant considerations.”*

9. The BBC raised the issue of whether the requirement imposed on the Tribunal by the final part of section 129, to exercise its powers to secure no unreasonable discrimination between licensees, requires the Tribunal to take into account the terms of the Alliance Agreement in order to ensure that there is no discrimination as between the BBC under the Alliance Agreement and the BBC under the Eos Licence. Although PRS and Eos are not ‘the same person’ previous decisions have held that section 129 is not limited to a comparison between licences granted by the same person and that section 129 requires the Tribunal to seek to secure that there is no unreasonable discrimination between licences. (See *PPL v Candy Rock Recording Ltd* [2000] EMLR 618 at paras 30-31 and *Meltwater Holding BV v The Newspaper Licensing Agency Ltd* CT 114/09 Interim Decision 14<sup>th</sup> February 2012 at paras 26-27).
10. We do not consider that anything turns on this point as section 135 clearly imposes an overriding obligation on the Tribunal to have regard to all relevant considerations. Paras 60-63 of Arnold J’s judgment in *PPL v BHA* [2009] EWHC 209 (Ch) succinctly summarise and approve the approach to be adopted by the Tribunal in dealing with comparable licences or comparators. This approach has been adopted by the Tribunal in a number of its decisions including most recently in the *Meltwater* case cited above (see paras 28-30 of *Meltwater*). The Tribunal has followed this approach in coming to its decision in this case. The authorities are clear that although the Tribunal should take comparators into account, it is for the Tribunal to then adapt any relevant comparator to the case under review, in particular taking into account any special circumstances. It is also clear that the Tribunal may discriminate between licensees where there is a logical reason to do so. We have therefore taken the Alliance Agreement into account, but also taken other relevant factors into account in reaching our decision.



## The Alliance Agreement as a comparator

### *Willing Licensor*

11. The BBC's position is that the Alliance Agreement is a relevant (indeed the only relevant) comparator and therefore it is the logical starting point in valuing the Eos repertoire. Eos rejects the Alliance Agreement as a comparator.
12. We first consider whether there is any rational basis on which the Alliance Agreement can be considered, at least prima facie, a comparator to the Eos Licence. We found the evidence of the BBC's expert, Mr Boulton, to be helpful on this point. He identified four key factors which indicate the Alliance Agreement is a relevant comparator, and in cross examination it was acknowledged by Eos' expert, Mr Young, that the Alliance Agreement and the Eos Licence have in common three of the four factors identified by Mr Boulton, namely, that both licences:
  - i) relate to the same type of rights (copyright for works of music);
  - ii) relate to the same use of the copyright (broadcast television and radio services); and
  - iii) take into account the benefits of collective licensing.

*(See corrected transcript of Day 3, Wednesday Sept 25 page 131 lines 2-4; page 133, lines 4-5.)*

13. The fourth factor put forward by Mr Boulton was that the Alliance Agreement should be considered a comparator because it had been freely negotiated between a willing licensor and a willing licensee. The evidence presented by the BBC is that the BBC and PRS negotiated the Alliance Agreement at arm's length and Eos's expert Mr Young accepted this in cross examination, stating "*they would have negotiated it tough and hard both ways, yes*" (*See corrected transcript of Day 3, Wednesday Sept 25 page 134 lines 9-10*). However, Eos argues that the Alliance Agreement was not freely negotiated, and PRS was not a willing licensor, in relation to the Eos repertoire because (a) there is no evidence that Eos members were in any way separately represented in those negotiations and did not directly participate in the negotiations, and (b) that when negotiating the Alliance Agreement, neither the BBC nor the PRS asked itself how the particular part or genre that now represents the Eos repertoire should be valued.
14. We do not consider that the lack of specific representation of or participation by the Eos members in the negotiation of the Alliance Agreement, or the failure to specifically consider the value of the particular part or genre that now represents the Eos repertoire, leads to the conclusion that, in relation to the Eos repertoire, the Alliance Agreement was not freely negotiated by a willing licensor. Such specific representation or participation in a negotiation by different classes of members of a collective licensing body would clearly not be practicable and would undermine the purpose and benefits of collective licensing. For similar reasons, in the context of a licence granted for the entire repertoire of a collective licensing body, it would not be practical to specifically consider, much less define, the value of each genre of music included in the repertoire. Further if such criteria were adopted, it would lead to a

situation where no collective licence of a large and diverse repertoire could ever be said to be freely negotiated by a willing licensor in relation to any part of the licensed repertoire, as specific members or classes of members simply do not directly participate in negotiations in this way. It would be an enormously complex (and lengthy) negotiation if each genre of music had to be separately valued, not least because it would be very difficult in many cases to determine the different genre, and to allocate any individual work into a specified genre. To demonstrate the difficulty of such an approach, by way of example, the Eos repertoire is not exclusively Welsh language music; some of it is instrumental. Also, it is arguable that Welsh language music is not one separate genre, as within that class there is likely to exist a number of separate genres e.g. folk music, hymns, pop music etc.

15. We consider that to determine whether a licence agreement entered into by a collective licensing body was freely negotiated and entered into by a willing licensor the following criteria are relevant:
- i) did the collective licensing body (in this case the PRS) have the authority of the relevant members to conclude the licence?; and
  - ii) in the negotiations for that licence did the collective licensing body independently and in good faith represent the collective interest of those members, without any collusion with the licensee?

Applying this test, the evidence is that at the time the Alliance Agreement was concluded PRS had authority to act on behalf of the Eos members, that the Alliance Agreement was freely negotiated and that PRS independently and in good faith represented the collective interest of those members, without any collusion with the BBC. We therefore conclude that PRS (and thereby each of its members at the time) was a willing licensor under the Alliance Agreement and that the Alliance Agreement is an agreement made between a willing licensor and a willing licensee.

*Other Eos objections to the use of the Alliance Agreement as a comparator*

16. Eos raised a number of other objections to using the Alliance Agreement as a comparator, or suggested that these were at least factors which indicated the Alliance Agreement should be given very little weight in determining the amount payable under the Eos Licence, as follows:
- i) The Eos repertoire that was licensed under the Alliance Agreement represents only 0.26% of the repertoire licensed under the Alliance Agreement, and it is not logical, indeed it is manifestly absurd, to try to identify the value of 0.26% of the Alliance Agreement repertoire by reference to the value of the 99%+.
  - ii) Use of the Alliance Agreement is based on the assumption that all music has the same underlying value, and does not make any allowance for the rarity of the Welsh works and the fact that the value of the Eos repertoire comes from this element alone. This objection was put forward by Eos both as a separate independent objection for rejecting the Alliance Agreement as a comparator, and as a reason to support the objection in para 16(i).



- iii) The fact that the BBC has come to the Tribunal to obtain a licence, instead of simply carrying on with only the PRS Welsh language repertoire, demonstrates that the BBC needs the more popular music in the Eos repertoire, which in turn demonstrates that this repertoire is more valuable than the Welsh language repertoire licensed under the Alliance Agreement.
17. The Tribunal has concluded that none of the objections raised by Eos are sufficient to reject the Alliance Agreement as a relevant comparator. Dealing in turn with each of the objections raised by Eos:
- i) Eos has not provided any cogent reason to support the assertion that it is not logical, or is manifestly absurd, to try to identify the value of 0.26% of the Alliance Agreement repertoire by reference to the value of the 99%+. Its case on this point appears to rely entirely on assertion. Firstly, as a point of correction we must point out that the BBC's case is not to value 0.26% of the Alliance Agreement repertoire by reference to the value of the 99%+, but to value the 0.26% by reference to the value of 100% of the Alliance Agreement repertoire (*See corrected transcript of Day 3, Wednesday Sept 25, page 15 lines 10 and 11*). Secondly, the Tribunal considers it entirely logical to use, as a starting point in valuing the subset of a class, the known value of the entire class, or in other words, to start with 100% of the known value of the whole (the entire amount payable under the Alliance Agreement) and then determine what portion of that 100% is attributable to a constituent part (the 0.26% that represents the Eos repertoire). As noted above Eos suggested one reason was that it was not logical to try to identify the value of 0.26% by reference to the other [99%+ (*sic*)] because this valuation does not make any allowance for the rarity of the Welsh works and the fact that value comes from this element alone. However, the rarity of the works is a different point which we consider further below. The alleged rarity of the Welsh language works is an issue that is unrelated to the relative size of the Eos repertoire.
  - ii) We accept that rarity of works may be a factor that affects the value of those works. However, we do not accept this is a reason to entirely reject the Alliance Agreement as a starting point. To the extent the rarity of the works is a relevant factor for valuing the Eos repertoire, the comparator of the Alliance Agreement can be adjusted to take this factor into account. We would however note that these same rare works were licensed under the Alliance Agreement and thus formed part of the value of the 100% payable under that licence.
  - iii) We do not accept that the fact that the BBC had an alternative course of action to taking a licence from Eos, namely that it could have carried on with just the PRS Welsh language repertoire, is evidence that supports a higher valuation of the Eos repertoire now that it is controlled by Eos, as opposed to the value of that same repertoire when it was controlled by PRS. To come to such a conclusion would provide a perverse incentive to collective licensing bodies not to agree licence terms as it could always increase the amount it was entitled to be paid by way of a reasonable licence fee simply by forcing the licensee to come to the Tribunal. We consider that the BBC's application to the Tribunal is evidence only of the fact that the parties were unable to agree the terms of the Eos Licence.



We have therefore concluded that the Alliance Agreement is a relevant comparator and that the fee paid under the Alliance Agreement is a reasonable starting point for determining the reasonable licence fee to be paid under the Eos Licence.

### **The Audience Consumption Model**

18. Having concluded that the fee paid under the Alliance Agreement can be used as a reasonable comparator, as the licence fee payable by the BBC to PRS under the Alliance Agreement is a fixed fee for the entire PRS repertoire (which at the time the fee was agreed included the Eos repertoire) we must determine what part of that fixed fee is attributable to the Eos repertoire. The BBC's case is that this should be determined by reference to how much the repertoire is consumed by an audience, and to determine this, the BBC has proposed a methodology called the "audience consumption model". The audience consumption model is a methodology that the BBC uses to internally allocate the fee paid under the Alliance Agreement to its individual stations for budgeting purposes. This model is based on the number of "listener hours", sometimes also called "viewer hours" or "audience hours". A listener hour in relation to a radio station is a measure of the size of that station's audience and the extent to which that station uses the licensed musical works, in this case the Eos repertoire.
19. Confidential Annex 1 to this decision sets out the specific calculation of the amount payable under the Alliance Agreement that is allocable to the Eos repertoire if the audience consumption model proposed by the BBC is applied to the amount payable under the Alliance Agreement (using 2012 figures). We have relied on the expert reports of Mr Boulton for the explanation of the methodology and the specific numbers and calculation. Although the calculation and numbers are confidential, the following is an explanation of the proposed methodology, using the licence fee payable under the Alliance Agreement as the starting point:
  - i) Ignore the fact that the Alliance Agreement relates to online and recording rights, as well as to the right to broadcast. The BBC says its methodology therefore overstates the value of the Eos repertoire as Eos does not control the online and recording rights. Any difference in value as a result is likely to be at the margins and ignoring this element has the benefit of simplicity. Therefore the Tribunal also ignores this difference in determining the licence fee payable under the Eos Licence.
  - ii) Allocate the fee payable under the Alliance Agreement between radio and television. This is necessary as it is not in dispute that the Eos repertoire is used almost exclusively on radio. The split of the fee between television and radio that the BBC has proposed is the split that has been negotiated by PRS and the BBC under the Alliance Agreement. In his report Mr Boulton explained that the BBC and PRS each internally adopt a somewhat different split. However, the split in the Alliance Agreement has been negotiated and thus could be said to represent an arm's length position. Also, it falls somewhere between the split adopted by each of the parties.
  - iii) For each BBC radio station (or class of stations), determine the total "listener hours" for all the music that was licensed under the Alliance Agreement (the



**“PRS listener hours”**). The PRS listener hours for each station are determined by the BBC using RAJAR data.

- iv) Once the PRS listener hours have been determined, determine the number of listener hours attributable to the Eos repertoire (**“Eos listener hours”**). There is a lack of clarity on this issue. The BBC in its calculation for Radio Cymru has relied on a percentage range put forward by Eos as indicating the percentage of the repertoire that it now controls but which had previously been controlled by PRS. (Simply put, Eos has said it controls between X% and Y% of the total music played by Radio Cymru in 2012, and the BBC has relied on this range.) This range is set out in confidential Annex 1 to this decision. In its calculation the BBC has used the mid-point of this range for determining the Eos listener hours in relation to content played on Radio Cymru.
  - v) Once the total Eos listener hours have been determined for each radio station, work out what percentage the Eos listener hours represent of the PRS listener hours.
  - vi) Apply this percentage to the fee allocated under the Alliance Agreement to radio (as the Eos repertoire is used almost entirely on radio).
  - vii) Make an adjustment to take into account use of the Eos repertoire on the BBC’s television services. This use is not significant, but such use as there is should be compensated through the licence fee.
20. In applying this calculation for radio stations other than Radio Cymru, the assumption was that the split of repertoire between Eos and PRS reflects the division of the 2012 PRS distribution between members who have and have not elected to withdraw rights from PRS. It was not disputed that there has been very little use of the Eos repertoire on radio stations other than Radio Cymru and thus we consider the PRS distributions are a reasonable proxy for the value of this use. With regard to television, again the BBC relied on the PRS 2012 distribution of the BBC fee to Eos members related to television. A modest uplift was made to the fee to reflect use on television. Again, it was not disputed that there has been very little use of the Eos repertoire on television. Given the small amount of use on other radio stations and television, neither of these elements have a material effect on the amount of the licence fee.
21. Based on this methodology and using the mid-point, the BBC’s position is that the appropriate licence fee under the Eos Licence is £46,000 per annum.
22. Although Eos has not disputed the specific figures put forward by the BBC in applying the audience consumption model, it is Eos’ contention that it is wholly inappropriate for the Tribunal to rely on the audience consumption model in determining the licence fee. Also, and unsurprisingly as Eos strongly argued that the Alliance Agreement was not an appropriate starting point for determining the fee payable under the Eos Licence, Eos did not propose any other methodology for determining the licence fee which uses the Alliance Agreement as a starting point. Although we have concluded that the Alliance Agreement is a useful starting point we must consider whether the audience consumption model is an appropriate methodology for calculating the fee to be payable under the Eos Licence. We therefore consider Eos’ objections to the audience consumption model, and also



consider ‘cross checks’ made against the amounts resulting from the application of the audience consumption model that have been proposed by the BBC.

### Objections to the Audience Consumption Model

23. Even before application of the audience consumption model, Eos asserts that the BBC method for splitting the fee payable under the Alliance Agreement between television and radio is flawed because the main purpose of such a split is for the BBC to allocate its expenditure internally and it is therefore not instructive of the value of the Eos repertoire. Eos pointed to certain confidential evidence (set out in Confidential Annex 3) which supports its contention that the split of the fee between radio and television is entirely a BBC internal allocation. Eos also noted that the Tribunal has in previous cases decided that it would be unsound to rely on a formula based on the BBC’s own internal allocation of expenditure as between radio and television, and urged us to follow this precedent (see *BBC v PRS Ltd* (1972) PRT 24/71 [K/2/1708-1720]).
24. We recognise that how the fee paid under the Alliance Agreement is allocated between television and radio is a sensitivity in the BBC methodology, and that there are a number of options for this allocation. However, as noted above, we consider the Alliance Agreement to be a good starting point, and as the Eos repertoire is used almost exclusively on radio, it is logical to first determine a reasonable allocation of the Alliance Agreement fee between radio and television. Eos has not proposed an alternative allocation of the Alliance Agreement fee for us to consider. In his report, Mr Boulton considered two other options, the BBC internal allocation and the PRS internal allocation. No evidence was put forward as to the basis of the PRS allocation and therefore we do not have the means to consider it further. The BBC allocation is more favourable to Eos than the allocation under the Alliance Agreement, as is shown in confidential Annex 2. We have been told that the internal BBC allocation arises out of the 1972 *BBC v PRS* case referred to above. We consider that, with the addition of many more BBC television channels and programmes, it is unlikely that the relative use of repertoire between radio and television in 1972 bears much resemblance to its relative use today, although this allocation does have the benefit of being based on an objective albeit historic determination.
25. The allocation agreed under the Alliance Agreement, although having the defect referred to in confidential Annex 3, also has the benefit of some degree of objectivity as it is at least agreed between the parties in negotiation, and not simply determined by one party. It is also important to note that this allocation is relied on by the parties when subsequently determining the fee paid under the Alliance Agreement, so it is not a purely theoretical number. It also represents a middle ground between the BBC’s internal allocation and PRS’ internal allocation. We consider that these factors override the defect referred to in confidential Annex 3, and therefore consider that the allocation under the Alliance Agreement is the best option. However, in determining the overall fee, we bear in mind this sensitivity in the allocation, and that the internal BBC allocation would have resulted in a slightly higher licence fee payable for the Eos repertoire after application of the audience consumption model (as shown in confidential annex 2).



26. Eos made the following submissions as to why the audience consumption model is not a proper basis for valuation, and why therefore a new and novel approach to valuation is required:
- i) There is no commercial pressure in the relationship between the BBC and Radio Cymru, it being simply two offices within the same organisation. This makes it impossible for the BBC to suggest that the fee recharged to Radio Cymru reflects the price that the BBC would pay commercially for Welsh language music. Although not stated explicitly, the implication is that if Radio Cymru had the autonomy to determine the licence fee it paid for Welsh language music, it would choose to pay a much higher licence fee for Welsh language music.
  - ii) At no point in the exercise does the BBC even address its mind to the relevant question, namely, what is the specific value of the Eos repertoire?
27. Considering these two submissions:
- i) We do not accept this argument for the simple reason that it is the BBC that pays the licence fee under the Eos Licence, not Radio Cymru, and because Radio Cymru is the BBC. As they are not separate organisations but one and the same, it is entirely illogical to say the BBC pays or would have paid 'X' but Radio Cymru pays or would have paid 'Y'. What Radio Cymru does, or doesn't do, is exactly what the BBC does or doesn't do, and vice versa. In any multifaceted organisation the centre necessarily exercises some budgetary control over its individual parts as this is the only way the organisation can be sure it will stay within its overall budget, and the BBC is no different in this regard. Also, there was no evidence that Radio Cymru would pay a higher licence fee if left to its own devices. On the contrary Ms Gwynedd, the head of Welsh Language Programmes and Services at the BBC and the person in charge of Radio Cymru, made it clear in her evidence that if Radio Cymru had to pay a substantially higher licence fee to Eos then it would have to cut back somewhere else and make editorial decisions that would be possibly difficult. Ms Gwynedd also pointed out in her evidence that, in addition to the licence fee, the BBC, through Radio Cymru, spends considerable sums supporting Welsh music in other ways which she considers should also be taken into account when considering the BBC's financial support to the Welsh music industry. In response to a question posed by the Tribunal the BBC provided evidence that in 2011/2012 it spent approximately £3 million supporting Welsh language music related content, some directly with Artists through live performances and commissioning of musical works. Ms Gwynedd also declined to express a view on an appropriate licence fee which should be paid for the Eos repertoire, indicating she did not feel qualified to make this assessment. We agree that the substantial sums (in addition to the licence fee) paid by the BBC to support Welsh language music must also be taken into account when considering the level of support given by the BBC to Welsh language music, and when considering the relationship of the BBC and the Welsh language music industry as a whole.
  - ii) Throughout this reference the BBC has addressed its mind to little else but the question of the specific value of the Eos repertoire. They have very clearly



said that their view is that this value should be determined by using the Alliance Agreement as the starting point and applying the audience consumption model to determine how much of the fee paid under the Alliance Agreement is attributable to the Eos repertoire.

28. Eos also argued that the audience consumption model is flawed because it is predicated on the premise (Eos referred to it as an “absurdity”) that all PRS music starts out as being of the same inherent value (“music is music is music”) and fails to take into account the fact that:
- i) sometimes people need to be treated differently if they are to be equal in the end;
  - ii) not all music comes from the same position of cultural strength, and a particular value attaches to music that is the product of a minority culture, and also in this case, an indigenous minority language culture which the BBC needs in order to meet its public service obligations.
29. We do not consider the premise that all PRS music (or indeed, all music) starts out as being of the same inherent value (“music is music is music”) is an absurdity, but rather a logical premise that has been adopted widely in the music industry (as seen through cross checks). In fact this premise has been adopted by Eos itself in its distribution policy. How this premise manifests itself in the context of the broadcasting (and televising) rights being considered here is that (a) each musical work starts out with a value of zero, and (b) it acquires value only when it is broadcast. This approach is consistent with copyright law as a licence of the broadcasting/televising rights is only required, and therefore a payment is only required (or value only accrues), when the work is broadcast (or televised).
30. We note that under its distribution policy Eos will distribute funds only in respect of musical works that have been broadcast. In other words, Eos ascribes the same starting value (zero) to all musical works it controls, and a work in its repertoire acquires value only when it is broadcast.
31. A corollary of this methodology is the common sense conclusion that the more ‘popular’ a musical work is, the more valuable it is. Eos has also recognised that the particular value of any specific musical work is determined by its level of ‘popularity’ as it argued strongly that the Eos controlled Welsh language repertoire is more valuable than the PRS Welsh language repertoire because it contains the more popular works.
32. Unfortunately Eos did not propose a methodology for measuring relative ‘popularity’ (or corresponding value) of the works it controls. The audience consumption model is however one method of measuring ‘popularity’ (and therefore value) of musical works; the touchstone for ‘popularity’ in this methodology is the number of ‘listener hours’ a musical work achieves. Although as put forward by the BBC the audience consumption model considers an aggregate of works rather than individual works, this does not detract from its inherent logic as a method of determining popularity (something Eos itself recognises as an indicator of value) and therefore value of musical works.



33. Although the specific issues raised by Eos as set out at para 28(i) and (ii) above have merit it is not clear how these factors are translated into the value of musical works. With regard to the first point, the amounts earned from radio broadcasting varies enormously between individual Artists, and it is highly likely that there are English language Artists who will earn the same as or less than many Welsh language Artists from their music. Thus it is not clear what 'equal in the end' means in this context, and Eos did not assist us in this. It is however clear that it does not mean that each Artist, or each musical work, must earn the same amount, and we are not sure that looking at broad averages assists in this regard as these mask huge divergences between individual Artists and works.
34. With regard to Eos' submission that the licence fee should take into account that not all music comes from the same position of cultural strength, and that particular value attaches to music that is the product of an indigenous minority culture, we accept this is a factor that may influence value, although we do not consider it a sufficient reason to entirely dispense with the audience consumption model as a methodology for determining the licence fee. To the extent appropriate, this factor can be accommodated by a suitable adjustment to the baseline figure that results from the application of the audience consumption model. As to the extent it is appropriate in this case we note that Eos' own distribution policy places the same value on Welsh language music and non-Welsh language music, as both types of music are treated exactly the same in terms of distributions. Mr Roberts, a director of Eos, confirmed this in his response to a question posed by the Tribunal. (*See corrected transcript of Day 2, Tuesday, 24 September, page 131 lines 2-7 and lines 9-25.*) This suggests that Eos itself does not place any additional value on a musical work by virtue of it being in the Welsh language.
35. For the sake of completeness we also note there are a number of other sensitivities in the audience consumption model:
- i) The unknown extent of the Eos controlled repertoire versus the PRS controlled repertoire of the music played on Radio Cymru. There is still some uncertainty about the extent of the repertoire controlled by Eos versus PRS.
  - ii) The relative value of the Eos and the PRS repertoires. Eos asserts that, aside from volume of works, the works it controls are 'more popular' and therefore more valuable than the PRS repertoire.
  - iii) The RAJAR data used in the model to establish listener hours is based on sampling. It is therefore of course subject to possible error. Eos asserted in particular that the number of listeners in Wales sampled by RAJAR was insufficient to get a true view of listener hours for Radio Cymru. Also for use on radio stations other than Radio Cymru and on television the model has relied on PRS distributions to establish the percentage of repertoire Eos controls.
  - iv) The time period used for the different variables in the calculation. The BBC used 2012 figures on the basis they were the most recent and therefore the best available. However, using different years, or an average over e.g. three years, would result in slightly different numbers.

36. Considering each of these:

- i) The BBC endeavoured to address this issue by putting forward a fee calculated using the lowest percentage, the midpoint and highest percentage, ultimately adopting the midpoint as set out in confidential Annex 1. Even at the higher end, some discount should be applied to that number to take into account the uncertainty that Eos has the rights to the relevant works. As a baseline we consider the midpoint to be a logical starting point, although in setting the overall licence fee we have taken this sensitivity into account and consider that the licence fee that we have set takes account of the range put forward in evidence as set out in Confidential Annex 1. We also note that the parties intend to include in the Eos Licence a term which would allow for adjustment of the licence fee in the event of changes to the Eos repertoire, and thus once the actual percentage is known, if it deviates materially from the range set out in Confidential Annex 1, the licence fee can be adjusted accordingly to reflect this. In relation to deviations outside this range which would not be sufficiently significant to trigger an adjustment, we have taken this into account in determining the licence fee.
- ii) Eos did not present a methodology for determining ‘popularity’. It is therefore impossible to place any significant weight on this factor. We note however that the audience consumption model embodies one measure of ‘popularity’, namely listener hours.
- iii) It is acknowledged that the RAJAR data is not perfect. However, it is also acknowledged that it is the best information that is available, and is relied upon by commercial radio stations which demonstrates that it has credibility in the industry. With regard to use on stations other than Radio Cymru, and use on television, both parties acknowledged that use of the Eos repertoire on other radio stations and on television is very small and therefore such use will not have any discernible impact on the licence fee. However, in setting the overall licence fee we have taken all of these sensitivities into account.
- iv) We accept that the number of ‘listener hours’ will vary from year to year, either because the use of the licensed works changes, or because the audience changes. As with the extent of the Eos repertoire, we understand that the parties intend to include in the Eos Licence a term allowing for adjustment to the licence fee in the event of material changes to listener hours. In relation to any difference which would not be sufficiently significant to trigger an adjustment, we have taken this sensitivity into account in setting the overall licence fee.

#### **The Eos case supporting a licence fee of £1.5 million**

37. For the reasons given above the Tribunal considers that the Alliance Agreement is a relevant comparator, and can be used as a starting point for determining the licence fee, and that the audience consumption model, although it has some sensitivities in it, provides a logical methodology to assist us in determining the licence fee payable under the Eos Licence. However, that is not the end of the matter.



38. In rejecting the Alliance Agreement and the audience consumption model Eos indicated that Eos appreciated the very substantial difficulty the Tribunal would have determining a licence fee in the absence of any comparator to assist the valuation exercise. It is important to note that Mr Roberts, Eos' expert, did not put forward a suggested licence fee, or a methodology by which we could determine a licence fee. The Eos case is that this is a novel problem that calls for a novel solution, and Eos invited the Tribunal to take a bold approach. We must therefore consider the case made by Eos to support a licence fee of £1.5 million and determine whether the Eos approach is also a reasonable approach that can assist us in determining the licence fee. In addition, a number of other factors were raised by Eos which, while they do not support the valuation of £1.5 million proposed by Eos, are factors that Eos say are relevant to, and should be taken into account in, determining the licence fee.

*Factors indicating a different basis of valuation*

39. Eos argued that the following factors indicate that in this case the buyer and seller attach a very particular value to the Eos repertoire, which justify valuing Welsh language music differently from (and more highly) than other music:

- i) The BBC's Charter obligations and Radio Cymru's service licence. The BBC is in a unique position as a public service broadcaster, and the public interest must inform the BBC's activities. This is articulated in the BBC's Charter Agreement which imposes on the BBC a wide range of service obligations including a specific commitment to strengthen cultural identities through original content, and to have regard to the importance of appropriate provision in minority languages. The BBC has publicly stated that it puts a substantial value on diversity and recognises the importance of supporting the indigenous languages of the UK. Similarly Radio Cymru's service licence, which describes the important characteristic of Radio Cymru, makes it clear that Radio Cymru should nurture Welsh and other UK talent, and Welsh music and arts, in particular by commissioning works from new and established talent, and that it must broadcast distinctive wide-ranging music primarily in the Welsh language. None of this is in dispute. Eos' position is that (a) these public service commitments make the BBC responsible for ensuring there is a regular supply of new distinctive and wide ranging Welsh language music and (b) given the nature of the Welsh music industry, the BBC can only ensure there is a regular supply of such Welsh language music if it pays more for the Eos repertoire.
- ii) The use of the Eos repertoire is causally linked with changes in the Radio Cymru audience. Eos initially asserted a relationship between the popularity of Radio Cymru and the presence and absence of the Eos repertoire, saying this was supported by the RAJAR data. When challenged by the Tribunal on this point in closing submissions counsel for Eos slightly modified this position stating that the RAJAR data showed a most unusual pattern in terms of listening figures for Radio Cymru in the period immediately before and during the withdrawal of the Eos repertoire and immediately after its restoration to Radio Cymru. He says one is bound to ask in those circumstances whether there could have been a causal connection between such an unusual pattern and the truly exceptional events of that period of time



that were linked with the Eos controversy. Eos asserts that this is a connection that can reasonably be made.

- iii) Minority indigenous language music should be treated differently from other music including other minority music. Treating Welsh language music differently does not mean other minority musicians (the examples of brass band music and jazz funk music were used during the course of the hearing) must also be given exceptional treatment because (a) this additional support is very much focused on the commitment to strengthen indigenous languages; (b) these other minority genres do not rely on the revenue received from airplay on BBC Radio to the same extent Welsh musicians rely on revenue from airplay on Radio Cymru, because this other minority music can be played on several radio stations, despite its limited popularity; and (c) the Charter Agreement does not say the BBC has a responsibility to support any particular music genre above any other, but it does require the BBC to make appropriate provision in minority languages. This exceptional treatment is therefore limited to provision in minority indigenous languages.

40. Considering each of these points in turn:

- i) The BBC's Charter obligations and Radio Cymru's service licence. The Tribunal must determine a reasonable licence fee for the Eos repertoire. It is not for the Tribunal to determine whether or not the BBC is meeting its Charter obligations, or whether Radio Cymru is meeting the terms of its service licence, nor is it for the Tribunal to determine how the BBC should meet these obligations. Even if that was an issue for the Tribunal, no evidence was presented as to why a £1.5 million licence fee would achieve this result. Finally, in assessing the financial commitment made by the BBC to Welsh language music, the licence fee cannot be considered in isolation from other sums Radio Cymru spends in developing Welsh language music or the significant financial contribution the BBC has made to Eos' start-up costs, and to Eos' legal fees to support Eos' participation in these proceedings.
- ii) The use of the Eos repertoire is causally linked with changes in the Radio Cymru audience. We note that Eos has been inconsistent in its reliance on the RAJAR data, as in the context of considering the appropriateness of the audience consumption model Eos argued that the RAJAR data is not to be relied upon. In any event, the reliability or unreliability of the RAJAR data is not relevant to this issue as we do not agree that the RAJAR data supports a causal relationship between the Eos repertoire and changes in the Radio Cymru audience. The biggest drop in audience for Radio Cymru occurred before the Eos repertoire was withdrawn. Even if the controversy between the BBC and Eos led to an unusual audience pattern in the Radio Cymru audience, this is a different reason to the use of the Eos repertoire. The RAJAR data is entirely inconclusive on causality, and does not demonstrate a causal relationship to the use, or non-use, of the Eos repertoire. This is therefore not helpful in assisting us in determining a value for that repertoire.
- iii) Minority indigenous language music should be treated differently from other music including other minority music. This argument was made by Eos in a number of different ways. It is a similar point to that of placing a value on



indigenous minority language works, or paying a premium for indigenous language music because it is a 'niche product' or because it is a 'scarce resource' or comes from a position of different cultural strength. We accept this is a factor that may influence value, although we do not consider it a sufficient reason to entirely dispense with the audience consumption model. Instead, it can be dealt with by a suitable adjustment to the baseline licence fee that results from the application of the audience consumption model. We do not accept Eos' assertion that other minority genres do not rely on the revenue received from airplay on BBC Radio to the same extent Welsh Artists rely on revenue from airplay on Radio Cymru as no evidence was presented to support this assertion.

*The Reed Smith Letter to PRS*

41. In setting a value of £1.5 million on the Eos repertoire, Eos placed great reliance on a letter dated 21 December 2012 sent by the BBC's solicitors, Reed Smith, to PRS. This letter sets out the difficulties the BBC is facing in concluding a licence with Eos and the difficulties Radio Cymru will face if it is unable to use the Eos repertoire from 1 January 2013. The penultimate paragraph of the letter states: *".....it is appropriate to indicate at this stage that the BBC considers the reduction in value [of the fee payable under the Alliance Agreement] taking all the factors into account, is of the order of £2,000,000 for the year 2013. The BBC reserves its position as to the loss of value for subsequent years."*
42. Eos argued strongly that the £2 million figure put forward in the letter as the loss of value of the Alliance Agreement to the BBC following the withdrawal of the Eos repertoire should be used as a starting point to determine the licence fee. Eos accepts that the £2 million also included allowance for other matters, namely (a) the additional costs to the BBC of negotiating the licence with Eos and (b) a degree of loss of premium value given that the PRS repertoire was no longer comprehensive. However, Eos considers a reduction of £500,000 is sufficient to allow for these factors, and that the balance of £1.5 million reflects the BBC's own valuation of the Eos repertoire.
43. The Tribunal does not accept that the Reed Smith letter reflects the BBC's own valuation of the Eos repertoire for 2013 or any other year; nor does the letter assist us in valuing that repertoire. It is plain from reading the letter in its entirety that the £2 million figure put forward by the BBC was predicated on the assumption that the BBC would effectively be forced to pay Eos the licence fee it was demanding (an amount in excess of £1 million) to avoid severe disruption to Radio Cymru. It is also clear that the BBC did not consider this licence fee to be a reasonable fee or that the amount being demanded by Eos represented the value of the Eos repertoire. Para 3 of the letter states: *"The BBC is now facing a demand for an annual licence fee well in excess of £1 million from Eos...The demand is patently unreasonable but it has not proved possible to negotiate a reasonable licence and 1 January 2013 is fast approaching"*. Para 11 states *"To be able to continue to use this repertoire the BBC will be forced to incur the very substantial costs of making a reference to the Copyright Tribunal (potentially several hundred thousand pounds) and in the meantime, pending the Tribunal's decision, to make payment of totally disproportionate and unreasonable licence fees to Eos, with very little prospect of being able to recover either the costs of the reference to the Tribunal or the excess*



*licence fees paid prior the Tribunal's decision*". Further evidence that the BBC did not apply the suggested value to the Eos repertoire is that the BBC decided not to pay the licence fee requested by Eos, but instead decided to deal with the disruption to Radio Cymru caused by the loss of the Eos repertoire, negotiate an interim fee with Eos and apply to the Tribunal to have the licence fee determined.

*The cost of alternative Welsh language content and other avoided costs to the BBC*

44. Eos asserts that if the BBC decided not to use the Eos repertoire, it would need to find alternative Welsh-language content, and the cost of this alternative content would be more than £1.5 million. To arrive at this figure they calculate that Eos members contribute approximately 20% of the output of Radio Cymru. The total cost of Radio Cymru content in 2012 was £12.5 million, 20% of which is £2.5 million. Eos then applies a rough discount to account for more expensive types of programming such as news, drama and sport; this leaves an amount of £1.5 million.
45. The Tribunal considers this methodology to be flawed for the reasons given by Mr Boulton both in his report and in cross examination. Mr Boulton rightly pointed out that the 'content costs' which form the basis of the calculation incorrectly include (a) amounts payable to other collecting societies for this very same content (as not all rights in this content are controlled by Eos), (b) the amount currently paid to PRS under the Alliance Agreement for the rights now controlled by Eos, and (c) overhead costs, and therefore this methodology cannot be relied upon. There is also no evidence to support the figure of a £1 million deduction to account for what was acknowledged to be more expensive types of programming.
46. Eos also put forward some alternative calculations based not on the costs of content overall, but based on the cost of spoken radio versus music radio. It is clear from the evidence at the hearing that spoken content is priced very differently from music content largely because the cost of producing this type of content is different and the way it is used is very different. Ms Gwynedd gave clear and uncontested evidence that if the Eos repertoire was not available, Radio Cymru would not simply replace music content with spoken content as, apart from budgetary constraints, this would not be considered to result in acceptable programming, and thus some other solution would be found. This is supported by the evidence that during the period the Eos repertoire was not available, Radio Cymru reduced its hours and changed the nature of its content but did not simply replace music content with spoken content.
47. In short we are not persuaded that the costs of other very different types of content are useful comparators to use in determining the value of music content.

*Payment of a "premium" for indigenous language services*

48. Eos presented evidence that the cost to the BBC of broadcasting in Welsh is 11.3 times the cost per user hour, and 24.3 times the cost per head of population, when compared to the per user hour cost, or the per head of population cost, of broadcasting similar content in English. The equivalent figures for broadcasting in Gaelic were 10.1 times the cost per user hour and 414.3 times the cost per head of population, as compared to broadcasting in English. Their contention was that this is evidence that the BBC is prepared to pay a premium, and of evidence that it is plainly reasonable to pay a premium, for the use of Welsh language music. Whilst, as noted above, the



Tribunal is inclined to consider whether indigenous minority language music merits some degree of distinctive treatment, we consider this methodology to be fundamentally flawed because it confuses the cost of providing the service with paying a premium for a specific input (music) of the service. As Mr Boulton correctly pointed out, the reason it costs more to broadcast in the Welsh or Gaelic language versus the English language is not because a “premium” is paid for any particular input of that service but solely because the non-premium cost of each input is spread over a much smaller listener base. It is not economically logical to conclude that because the ‘per unit’ cost of supply is higher as a result of supplying fewer units, this justifies increasing the input price of any element of the unit. To adopt such an approach would simply result in a self-reinforcing inflationary circle.

49. Eos also suggested that it is necessary to pay a premium to Welsh-language musicians because it is necessary to ensure a sustainable supply of Eos product that the BBC needs to ensure that Radio Cymru meets the expectations of the Welsh-speaking licence fee payers. They acknowledge that this does not generate a value for the premium but submitted that this reinforced their £1.5 million valuation arrived at through the approach described above. As we do not consider any of the approaches put forward by Eos assist us in determining the licence fee, they cannot serve to reinforce the value arrived at using any of those approaches. Also, there was no clear evidence that there is currently a shortage or lack of sustainable supply of Welsh language music. Eos presented some indirect evidence on this issue through the 2009 Bangor Report, but this was more in the nature of speculation or prediction that such a shortage may result if the Welsh language music industry is not supported. The best direct evidence on this issue was given by Ms Gwynedd in response to a specific question from the Tribunal, who stated that *“I would say that currently we do have a sufficient supply of Welsh music if we have access to the full repertoire and that includes the PRS repertoire and Eos repertoire. We put an emphasis, as a station, on trying to encourage young bands and new talent, so that there is new talent and bands coming through and we also put an emphasis on commissioning programmes that create new music as well.”* (See corrected transcript of Day 2, Tuesday, 24 September page 41 lines 13-165.)

#### *Comparison with Commercial Radio Stations*

50. Both experts agreed Radio Cymru would not be viable as a commercial radio station. Nonetheless both parties used commercial radio as a cross check in support of their valuation. Eos’ position was that if Radio Cymru’s costs were treated as equivalent to its revenues the BBC would pay approximately £549,892 for the right to broadcast the Welsh language music. However, no explanation was given as to why Radio Cymru’s costs should be treated as equivalent to revenues for the purposes of comparison with commercial radio stations. Mr Boulton, in his first report, points out that, to make this assumption, you need to assume that, if Radio Cymru was a commercial radio station, the revenues of Radio Cymru from advertising would cover its costs.
51. We agree with Mr Boulton’s assessment that if a comparison is to be drawn with commercial radio, the correct approach is to estimate what Radio Cymru’s revenues might be by reference to the revenues of radio stations of a similar size and demographic as Radio Cymru. Mr Boulton’s evidence was that applying this more appropriate assumption results in revenues of approximately £1.7 million, barely more



than the £1.5 million licence fee proposed by Eos. If one applies the PRS fee structure applicable to commercial radio stations, the resulting licence fee for all music content for Radio Cymru would be approximately £78,000, and a portion of that would be attributable to the repertoire Eos controls. Using the maximum percentage that Eos estimates it controls, the resulting number is £58,000, and the midpoint number is £48,000. It is apparent that the comparison to commercial radio does not support a licence fee of £1.5 million.

52. For the reasons indicated above, (a) we do not accept that any of the approaches proposed by Eos assist us in determining the licence fee; (b) we find the Alliance Agreement to be a useful starting point in determine the licence fee; and (c) we find the audience consumption model to be a logical methodology to use in attributing a reasonable proportion of the fee paid under the Alliance Agreement to the Eos repertoire. To be confident that the application of this methodology results in an appropriate licence fee, we have also considered the cross check with commercial radio, and to a lesser extent, with the PRS distributions.

### **Cross Checks**

53. The cross check with commercial radio stations as outlined above presents a useful confirmation that the methodology proposed by the BBC to determine the licence fee is a reasonable methodology. We note that the resulting fee of £48,000 (using the midpoint) determined using commercial radio as a comparator is broadly consistent with the £46,000 fee arrived at through the application of the audience consumption model proposed by the BBC. It does not produce a licence fee that is of the same order of magnitude as the £1.5 million licence fee proposed by Eos.
54. Another cross check that was presented by the BBC was the amount of the PRS distributions to Eos members in respect of broadcast and television rights. Eos argued strongly this was not a relevant cross check. We have not placed a great deal of weight on the PRS distributions as a cross check but note that the 2012 amount was £58,000, of which £51,000 related to Radio Cymru, which numbers are again broadly in line with the licence fee proposed by the BBC.
55. We also note that looking back over the years the highest distribution by PRS to Eos members in respect of BBC usage was £134,500 in 2006. We understand that reductions since then are partly attributable to the BBC using less music, and partly to changes in PRS distribution policy. Again, although not a significant factor, it is notable that in terms of order of magnitude, this 'highest' number is much closer to the licence fee proposed by the BBC than the licence fee proposed by Eos.

### **Niche product status/State of the Welsh language music industry**

56. The Tribunal considers that, in essence, the Eos case comes down to a number of inter-related issues:
- i) The earnings of Welsh language music Artists have dropped to an all-time low, for various reasons. The BBC licence fee must include a premium so that these Artists can be sustained as this is the main source of revenue for these Artists. Otherwise Welsh language Artists will not have the means to continue



to produce new works, and thus Radio Cymru will cease to have a sufficient flow of Welsh language music for its programming.

- ii) The relationship between Radio Cymru, as the sole dedicated broadcaster of Welsh language music, and the Welsh language music community is a unique relationship of mutual dependence, and this should be recognised in a licence fee that is at a sufficient level to sustain the Welsh language music industry.
  - iii) Welsh language music, as minority indigenous language music, occupies a special place in the culture of the United Kingdom in general and in the culture of Wales in particular, and this special status warrants additional support through a premium licence fee.
  - iv) Welsh language music, being the product of a minority indigenous language is a 'niche' product, and this qualitative element deserves recognition through the payment of a premium in the licence fee.
57. The Tribunal does not consider that the BBC is or should be solely responsible for the survival of the Welsh language music industry. If Welsh language music cannot survive as a commercial proposition, and if, as a policy matter, the preservation of Welsh language music is considered a 'public good' (and the Tribunal considers that is so) correspondingly, the public has a duty to support Welsh language music through public resource. It is not reasonable to impose the entirety of this obligation on a single licensee. However, we are very sympathetic to the position of the Welsh language Artists and do believe the evidence indicates that the BBC, through Radio Cymru, and the Welsh language Artists and industry have a unique mutual dependency that justifies some uplift of the licence fee over and above the baseline figure arrived at by application of the audience consumption model and using the Alliance Agreement as a starting point. We have also come to the view that the uniqueness of Welsh language music, being one of only two minority indigenous languages, should be reflected through such uplift.
58. We also consider that the BBC implicitly recognises this mutual dependency, and the uniqueness of Welsh language music, by indicating it is being 'pragmatic' in contemplating a licence fee of up to £100,000, notwithstanding that a strict application of the audience consumption model produces a licence fee of £46,000. We emphasise that the application of an uplift is limited to the unique circumstances reflected in this case, namely where the BBC and the Artists producing music in a minority indigenous language are in a relationship of mutual dependence as the BBC is virtually the exclusive avenue through which the Artists can earn revenues from their music, and the BBC can obtain music in the minority indigenous language only from a limited number of Artists who create it.
59. We consider that in these unique circumstances, Welsh language music, as indigenous minority language music, requires a degree of special treatment because of the unique qualitative contribution it makes to the richness and diversity of the culture of the entire country. We also emphasise that the uplift applies only to minority indigenous language music, and no other music, controlled by Eos. It is also only payable where the BBC is, in essence, the only broadcast outlet for that minority indigenous language music, and where other sources of revenue for recordings of that music are very limited. For example, if Welsh language music started to become a regular



feature of commercial radio, a key element justifying the uplift would no longer exist. Also, if Eos or other collective licensing bodies continued to make no distinction in their distribution policy between minority indigenous language music and other music, this would be strong evidence that the minority indigenous language music has ceased to justify an uplift as even those most closely involved with that music would be treating it the same as any other music.

### **Some other factors relating to the licence fee**

60. Eos supported a number of its submissions using collections of paintings, or physical art works, as examples. We did not find the comparison to painting or other physical artwork relevant or helpful to the issue of determining the licence fee because (a) as pointed out by Mr Boulton, a physical work of art such as a painting can only be consumed once as it exists in only in one version, whereas many people can enjoy a licensed recorded musical work at the same time and licensing it to one person does not deprive other people of the opportunity to enjoy that same musical work, and thus the comparison between the two is strained to say the least; and (b) the examples given focused on the supply side, and ignored the demand side, of the equation. One example given was where there is one painting of Llandaff Cathedral, Cardiff and 20,000 paintings of St Paul's Cathedral, London, all of the same artistic merit. Counsel submitted that in this example it was self-evident the one painting of Llandaff Cathedral would be worth much more than any of the 20,000 because it was a scarce resource, and drew the comparison to Welsh language music versus English language music. However, we do not think it is self-evident that the Llandaff Cathedral painting would necessarily be worth more than any of the paintings of St. Paul's Cathedral. In this example, whether the one painting of Llandaff Cathedral is worth more or less than a painting of St Paul's Cathedral depends upon how many people want to buy a painting of Llandaff Cathedral versus how many want to buy a painting of St Paul's Cathedral. If a million people want to buy a painting of St Paul's, but only one person wants to buy a painting of Llandaff, it is highly likely that each of the 20,000 paintings of St Paul's will be worth more than the one painting of Llandaff, because demand outstrips supply. In determining price demand as well as supply must be taken into account.
61. Eos submitted that the licence fee should have an uplift to reflect the benefits of collective licensing, and the proposed valuation of £1.5 million includes an appropriate degree of uplift for the extent of collective licensing currently offered. However, if one uses the fee paid under the Alliance Agreement (another collective licence) as the starting point the benefits of collective licensing are already captured in that fee, and therefore a further uplift would be double counting that benefit. Like the parties, we have ignored the fact that the benefits of collective licensing are now somewhat less as the BBC must negotiate with both PRS and Eos, as this does not materially affect the amount of the licence fee.
62. A great deal of time was spent discussing the decline in public performance revenues paid to the Eos members as a result of a change in the PRS distribution policy. The BBC asserted that Eos is simply attempting to make up the decline in these revenues to the Eos members by increasing the BBC licence fee. The Tribunal accepts that the decline in public performance revenues was probably a catalyst for the Eos members leaving PRS and establishing Eos, and that this decline caused the Eos members (and therefore Eos) to look more closely and critically at all sources of revenue they were



receiving, including from the BBC licence fee. However, we also accept that Eos has approached the issue of the amount of the BBC licence fee on its own merits, and is not seeking to replace public performance revenues with BBC licence fee revenues.

63. There was also evidence presented about the music form known as “Cerdd Dant”. Other than illustrating the difference between the price of spoken content and music content, we do not consider anything turns on this.

### **Determining the Licence Fee**

64. We have not found any of the approaches proposed by Eos in support of a licence fee of £1.5 million persuasive. We find the BBC methodology, which relies on the Alliance Agreement as a comparator, allocates the fee paid under the Alliance Agreement between television and radio based on the allocation agreed under the Alliance Agreement, and then applies the audience consumption model based on listener hours to determine an allocation of that fee, to be logical and helpful in establishing a ‘baseline’ licence fee for the Eos repertoire. Applying this methodology (and using the midpoint of the range of music controlled by Eos) produces a baseline licence fee of £46,000 per annum, as demonstrated in confidential Annex 1. We are confirmed in the view that this is a reasonable approach from the results of various cross checks, particularly the cross check with commercial radio which produces a figure of the same order of magnitude (£48,000). Also, although we place much less weight on it, the same is true of the cross check with PRS distributions. In adopting this approach to establish a baseline amount, we also take some comfort from the fact that historically, although the amounts have varied over the years, the amounts received by Eos members have been, even in its best years, much closer to £46,000 than to £1.5 million.
65. As noted, the methodology proposed by the BBC has certain sensitivities in it and we consider that the licence fee arrived at by the strict application of the audience consumption model would benefit from some adjustment to account for these sensitivities. As noted above, the licence fee we have set takes these sensitivities into account.
66. There is no formula or methodology to assist us in determining a precise number to address these sensitivities or in determining a precise number for the uplift that should apply to reflect the uniqueness of Welsh language music as an indigenous minority language in the UK, and the unique relationship it has with the BBC. Therefore we do not attempt to determine a specific number for either of these elements. Instead, considering the licence fee as a whole, we have concluded that £100,000 represents a reasonable licence fee for the Eos repertoire. We consider that this amount includes both a generous allowance for all the sensitivities in the model and a very substantial uplift from the baseline figure that would be arrived at by an application of the audience consumption model (using the Alliance Agreement as a starting point), and after making allowance for the sensitivities in the model.

### **Timing of Payments/Term of the Licence**

67. The BBC’s position is that the annual licence fee should be paid in equal instalments monthly in arrears. Eos’ position is that the annual licence fee should be paid in equal instalments monthly in advance for the first five years of the Eos Licence, and

thereafter payments should be monthly in arrears. Eos is seeking to establish itself as a collective licensing body and payment monthly in advance would assist its cash flow position. We are sympathetic to this argument and do not consider it will cause the BBC undue hardship to pay the fee in equal instalments monthly in advance.

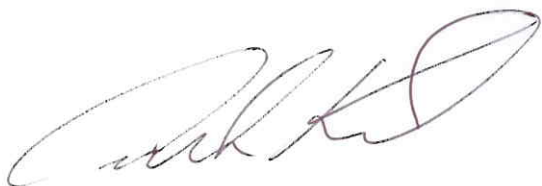
68. Eos has asked that the payments be made monthly in advance for a period of five years, and thereafter the payments could be monthly in arrears. As the term of the Eos Licence is to be for three years (approximately) we are of the view the order regarding the payments should run concurrently with the term of the Eos Licence. If the parties cannot agree on payment terms in the course of negotiating a renewal term of the Eos Licence either party is of course free to apply to the Tribunal to have the issue determined.
69. The parties agree the term of the Eos Licence should be for approximately three years from the date of the application (1 February 2013). The Tribunal agrees that three years is a reasonable term.
70. The BBC proposes that the Eos Licence should expire on 31 March 2016 to make it co-terminus with the Alliance Agreement. Also, a 31 March date would alleviate the need to re-negotiate the Eos Licence over the Christmas period when there is often limited availability.
71. Eos proposes that the Eos Licence should expire on 31 December 2015. Members of PRS are able to withdraw their rights from PRS, and Eos members are able to withdraw their right from Eos, with effect from 1 January of each year, by providing three months' notice of termination (We note that although the Eos constitution and the Eos members' contract was inconsistent on this point, we were told by Eos that its members' contract would be amended to be consistent with the Eos constitution and reflect this position). Eos points out that because of the notice period both parties will know whether individuals will belong to either PRS or to Eos from 1 October, and during the negotiation period. Also, the joining or departure of members will coincide with the date the renegotiated licence became effective.
72. Both positions have merit, but the Tribunal considers that the BBC is better placed than Eos to cope with the administrative inefficiency of an inconvenient expiry date, and therefore we accept the expiry date proposed by Eos, namely 31 December 2015.

## **Conclusion**

73. We order that:
  - i) the BBC shall pay to Eos a licence fee of £100,000 per year (exclusive of VAT) during the term of the Eos Licence;
  - ii) the licence fee shall be paid to Eos in equal monthly instalments payable in advance in each month until expiry of the term on 31 December 2015; and
  - iii) the term of the Eos Licence shall run from 1 February 2013 (being the date of the BBC's application to the Tribunal) and remain in force until 31 December 2015.



74. As the provisional fee payable under the Interim Licence exceeds the final licence fee, under the terms of the Interim Licence the BBC is entitled to reclaim from Eos the overpayment made through the provisional licence fee. Given Eos' financial circumstances we would urge the BBC to be pragmatic in seeking to recover any overpayment from Eos.



Colleen Keck  
Chairman  
The Copyright Tribunal  
The UK Intellectual Property Office  
Newport NP10 8QQ

Tribiwnlys Hawlfraint  
Swyddfa Eiddo Deallusol y DG  
Casnewydd NP10 8QQ



**IN THE COPYRIGHT TRIBUNAL**

**IN THE MATTER OF A REFERENCE UNDER SECTION 125 OF THE COPYRIGHT,  
DESIGNS AND PATENTS ACT 1988**

**Before the Tribunal:  
Colleen Keck (Chair)  
Sam Madden  
Manny Lewis**

**16 December 2013**

**BETWEEN**

**THE BRITISH BROADCASTING CORPORATION**

**Applicant**

**and**

**EOS-YR ASIANTAETH HAWLIAU DARLLEDU CYFYNGEDIG**

**Respondent**

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**ORDER**

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**UPON** the trial of this Application on 23-27 September 2013

**AND UPON** the Tribunal handing down its Decision in the Application

**IT IS ORDERED that:**

1. The Applicant will be licensed by the Respondent under all works controlled by the Respondent in accordance with the paragraphs 4, 5 and 6 of this Order.
2. The other terms of the licence shall be agreed between the parties and referred to the Tribunal for review and approval. In default of agreement on any other terms of the licence, each of the parties has permission to apply to the Tribunal for determination of those terms. An order compassing all of the terms of the Eos Licence shall be issued following the Tribunal's approval or determination (as applicable) of the other terms of the licence.

3. The term of the licence will run from 1 February 2013 (being the date of the Applicant's Application to the Tribunal) and remain in force until expiry of the term on 31 December 2015.
4. The Applicant shall pay to the Respondent a licence fee of £100,000 per year (exclusive of VAT) during the term of the licence.
5. The licence fee shall be paid to the Respondent in equal monthly instalments payable in advance each month until the expiry of the term on 31 December 2015.
6. Pursuant to Rule 20(3)(p) of the Copyright Tribunal Rules 2010, each of the documents and parts of documents listed in the Confidentiality Schedule annexed to this Order, shall be kept confidential and not be further disclosed, notwithstanding the fact that they were read by the Tribunal and referred to at the hearing held in public on 23 – 27 September 2013.



Colleen Keck  
Chairman  
The Copyright Tribunal  
The UK Intellectual Property Office  
Newport NP10 8QQ

Tribiwnlys Hawlfraint  
Swyddfa Eiddo Deallusol y DG  
Casnewydd NP10 8QQ



**IN THE COPYRIGHT TRIBUNAL**

**IN THE MATTER OF A REFERENCE TO THE COPYRIGHT TRIBUNAL UNDER SECTION 125 OF THE COPYRIGHT, DESIGNS AND PATENTS ACT 1988**

**BETWEEN**

**THE BRITISH BROADCASTING CORPORATION**

Applicant

-and-

**Eos-Yr Asiantaeth Hawliau Darlledu Cyfyngedig**

Respondent

**AGREED SCHEDULE OF CONFIDENTIAL INFORMATION**

| <b>Document</b>                                 | <b>Confidential Information</b>  | <b>Owner</b> | <b>Bundle ref</b>             |
|---|--|--------------|-------------------------------|
| 1. Amended Response                             | <ul style="list-style-type: none"><li>• The S4C primetime per minute rate at the end of 2012 (para 56.1)</li><li>• The figures comprising the “comparable BBC blanket” and the process by which these are arrived at (para 56.2)</li></ul>   | S4C          | Bundle A1/Tab 3/page 34       |
| 2. Confidential Annex 2 to the Re-Amended Reply | <ul style="list-style-type: none"><li>• In BBC consumption model calculations for 2010, 2011 and 2012, the figures which represent:<ul style="list-style-type: none"><li>- The Total PRS licence fee allocation for radio</li><li>- The Cost per PRS listener hour for Radio Cymru</li><li>- The PRS Cost Per Music Minute</li></ul></li></ul> <p>The method of calculation is not confidential.</p> | BBC          | Bundle A2/Tab 5/pages 98 - 99 |

| Document   | Confidential Information   | Owner     | Bundle ref                      |
|--|--|-----------|---------------------------------|
|  | The Proportion of Licence fee allocated to Radio Cymru's budget (shown in the Result column, line D) and the range based on the PRS assessment of Eos controlled works for each year (highlighted in yellow) can be referred to in open court. |           |                                 |
| 3.   | <ul style="list-style-type: none"> <li>All data in the spread sheets Radio Data for 2010, 2011 and 2012, other than the proportion of the PRS Licence Fee to be allocated to Radio Cymru (for each year).</li> </ul>                           | BBC/Raiar | Bundle A2/Tab 5/pages 100 - 102 |
| 4. Confidential Second Witness Statement of Robert Kirkham | <ul style="list-style-type: none"> <li>The penultimate sentence which refers to the Alliance Agreement and the status of the allocation of the Alliance fee for adjustment purposes (para 26)</li> </ul>                                       | BBC/PRS   | Bundle C/Tab 1/page 519         |
| 5.   | <ul style="list-style-type: none"> <li>Percentage split of centrally negotiated copyright costs between radio and television applied by BBC Finance (para 37)</li> </ul>   | BBC       | Bundle C/Tab 1/page 521         |
| 6.   | <ul style="list-style-type: none"> <li>Percentages applied on year on year in the second sentence and the individual percentages for the years 2010, 2011 and 2012 which quotes from Confidential Annex 2 (para 41)</li> </ul>                 | BBC       | Bundle C/Tab 1/page 522         |
| 7.   | <ul style="list-style-type: none"> <li>Percentage of collecting society licence fees applied by BBC Finance to Radio (para 42)</li> </ul>  | BBC       | Bundle C/Tab 1/page 522         |
| 8.   | <ul style="list-style-type: none"> <li>BBC Finance forecast for PRS costs for Radio Cymru in 2011/12 and 2012/13 and the figures at (i)(ii)and (iii)(para 43)</li> </ul>   | BBC       | Bundle C/Tab 1/page 522         |
| 9.   | <ul style="list-style-type: none"> <li>All figures and percentages in paara 44. The share of the Alliance Agreement licence fee to Audio (Radio) and AudioVisual (Television) – the figures and percentages (para 44)</li> </ul>               | BBC       | Bundle C/Tab 1/page 523         |
| 10.  | <ul style="list-style-type: none"> <li>Adjusted Radio allocation figure used for the Music Team's 2012 calculations (para 44)</li> </ul>   | BBC       | Bundle C/Tab 1/page 523         |
| 11.  | <ul style="list-style-type: none"> <li>Adjusted Radio Allocation figure used in for Music's 2010</li> </ul>  | BBC       | Bundle C/Tab 1/page 523         |



|     | Document  | Confidential Information   | Owner | Bundle ref                      |
|-----|---|--|-------|---------------------------------|
| 12. |   | <ul style="list-style-type: none"> <li>calculations (para 44)</li> <li>Total amounts distributed by PRS to Radio services in 2010/11, 2011/12, 2012/13, response to PRS question 5.5 (paras 45)</li> </ul>   | PRS   | Bundle C/Tab 1/page 523         |
| 13. |   | <ul style="list-style-type: none"> <li>The amount distributed by PRS for use of music on Radio Cymru, response to PRS question 5.5 (para 46)</li> </ul>  | PRS   | Bundle C/Tab 1/page 523         |
| 14. |   | <ul style="list-style-type: none"> <li>Total amount distributed by PRS to BBC radio services in 2012/13 (para 46)</li> </ul>   | PRS   | Bundle C/Tab 1/page 523         |
| 15. |   | <ul style="list-style-type: none"> <li>S4C per minute rate at the end of 2012 (para 89)</li> </ul>   | S4C   | Bundle C/Tab 1/page 532         |
| 16. |   | <ul style="list-style-type: none"> <li>S4C per minute rate at the end of 2012 (para 90)</li> </ul>   | S4C   | Bundle C/Tab 1/page 532         |
| 17. |   | <ul style="list-style-type: none"> <li>Non prime time S4C rate (para 91) and prime time rate.</li> <li>The calculation applied to the Radio Cymru rate by reference to the S4C rate and the multiple applied (para 91)</li> </ul>  | S4C   | Bundle C/Tab 1/page 532         |
| 18. |   | <ul style="list-style-type: none"> <li>S4C blanket licence fee (para 92)</li> </ul>  | S4C   | Bundle C/Tab 1/page 532         |
| 19. |   | <ul style="list-style-type: none"> <li>Contents of the confidential letter from S4C to the Tribunal dated 10 May (para 93)</li> </ul>  | S4C   | Bundle C/Tab 1/page 532-533     |
| 20. | Confidential Fourth Witness Statement of Robert Kirkham | <ul style="list-style-type: none"> <li>The total annual PRS licence fee for radio in 2012 (previous and corrected figures) (para 8(b))</li> </ul>  | BBC   | Bundle C/Tab 8/Page 571         |
| 21. | Confidential Annex RK23                                 | <ul style="list-style-type: none"> <li>PRS letter of 17 June 2013, response to question 6.11, from the sentence "The table below shows an extract from the calculation of the UK analogies at October 2011...to the end of response 6.11.</li> </ul>   | PRS   | Bundle E(1)/Tab 2/pages 668-669 |
| 22. | Confidential Annex RK24                                 | <ul style="list-style-type: none"> <li>PRS Letter of 8 July 2013, response to questions 5.2, 5.3 and 5.5: <ul style="list-style-type: none"> <li>The total amount allocated to BBC radio services for the years 2010/11, 2011/12 ad 2012/13</li> <li>The amount of the annual BBC licence fee allocated to each BBC radio service</li> </ul> </li> </ul> | PRS   | Bundle E(1)/Tab 2/page 756-758  |
| 23. |   | <ul style="list-style-type: none"> <li>PRS Letter of 8 July 2013, response to question 10.4: the annual total value of the Welsh Analogy Line for the years 2010, 2011 and 2012</li> </ul>   | PRS   | Bundle E(1)/Tab 2/page 764      |

| Document                      | Confidential Information  | Owner   | Bundle ref                        |
|-------------------------------|---|---|-----------------------------------|
| 24. Confidential Annex RK25   | <ul style="list-style-type: none"> <li>The Alliance Agreement – The entire agreement, in particular but without limitation, the TV/radio splits given for the purpose of the adjustment mechanism</li> </ul>  | BBC/PRS   | Bundle E(1)/Tab 2/page 766-894    |
| 25. Confidential Annex RK26   | <ul style="list-style-type: none"> <li>BBC Finance Excel spread sheet - entire document, including: <ul style="list-style-type: none"> <li>internal allocation of collecting society fees to the BBC's services in total and for PRS/MCPS</li> <li>percentage allocations for radio and TV</li> <li>forecasts for 2011-12, 2012-13, 2013-14 and 2014-15</li> <li>monthly breakdown of allocation</li> </ul> </li> </ul> | BBC   | Bundle E(1)/Tab 2/pages 896-912   |
| 26. Confidential Annex RK27   | <ul style="list-style-type: none"> <li>Rajar listener hours for all BBC radio services</li> </ul>   | BBC/Rajar   | Bundle E(1)/Tab 2/pages 914-919   |
| 27. Confidential Annex RK28   | <ul style="list-style-type: none"> <li>All data in the spread sheets for 2010 and 2011.</li> </ul>  | BBC/Rajar   | Bundle E(1)/Tab 2/pages 924 - 925 |
| 28.                           | <ul style="list-style-type: none"> <li>All data in the spread sheets for 2010 and 2011.</li> </ul>  | BBC/Rajar   | Bundle E(1)/Tab 2/pages 930 - 933 |
| 29. Confidential Annex RK29   | <ul style="list-style-type: none"> <li>BBC Finance spread sheet showing how the radio station copyright apportionments were originally calculated – entire document</li> </ul>  | BBC/PRS/PPL   | Bundle E(1)/Tab 2/page 935        |
| 30. Confidential Annex RK30   | <ul style="list-style-type: none"> <li>The contents of the table setting out the proportion of PRS distribution for each BBC station which is attributed to Eos members in 2012</li> </ul>  | Can be used to calculate BBC confidential information | Bundle E(1)/Tab 2/pages 937-939   |
| 31. Confidential Annex RK34   | <ul style="list-style-type: none"> <li>Total annual Alliance Agreement licence fee and total licence fee over the licence period.</li> </ul>  | BBC/PRS   | Bundle E(2)/Tab 4/page 1007       |
| 32. Confidential Exhibit RK36 | <ul style="list-style-type: none"> <li>All SAC rates in Eos supply and demand model</li> </ul>  | SAC   | Bundle E(2)/Tab 6/pages 1042-1043 |
| 33.                           | <ul style="list-style-type: none"> <li>Table of issues to be resolved by BBC, PRS and Eos and Eos' handwritten notes regarding SAC</li> </ul>   | Eos   | Bundle E(2)/Tab 6/pages 1044-1045 |
| 34.                           | <ul style="list-style-type: none"> <li>Graphs showing blanket payment as % of income and PRS licence as % of income in respect of SAC</li> </ul>  | Eos   | Bundle E(1)/Tab 6/pages 1046-1049 |
| 35. Confidential Exhibit RK37 | <ul style="list-style-type: none"> <li>Entire content of correspondence re negotiations between</li> </ul>  | SAC/Eos   | Bundle E(2)/Tab 6/pages           |



| Document  | Confidential Information   | Owner  | Bundle ref                        |
|---|--|--|-----------------------------------|
|   | Eos and SAC for licence and SAC/Eos 'Licence' including licence fee  |  | 1051 – 1076                       |
| 36. Confidential Exhibit RK38                                       | <ul style="list-style-type: none"> <li>Confidential SAC letter to Tribunal dated 10 May 2013</li> </ul>  | SAC  | Bundle E(2)/Tab 6/pages 1078-1079 |
| 37. Confidential Exhibit RK42                                       | <ul style="list-style-type: none"> <li>See comments re BBC amended pleadings above.</li> </ul>   | BBC  | Bundle E(2)/Tab 11/page 1138      |
| 38. Confidential Exhibit RK43                                       | <ul style="list-style-type: none"> <li>Proportion of PRS licence fee allocated to Radio Wales and BBC's cost per PRS music minute for Radio Wales</li> <li>Previous and corrected figure for Total PRS Radio Licence fee in 2012</li> </ul>                      | BBC  | Bundle E(2)/Tab 11/page 1142A     |
| 39. Confidential DMR3   | <ul style="list-style-type: none"> <li>Eos Monthly Cashflow: All figures in rows titled: "SAC licence fee (Commission only)", "SAC licence fee (Members portion)", "Total Income", "Income less Expenditure", "Opening balance" and "Closing balance"</li> </ul> | SAC<br>Including figures which can be used to calculate SAC confidential information | Bundle F/Tab 2/page 1210          |
| 40.   | <ul style="list-style-type: none"> <li>Eos/SAC licence – entire document</li> </ul>  | SAC/Eos  | Bundle F/Tab 2/page 1211A         |
| 41.   | <ul style="list-style-type: none"> <li>PRS/BBC side letter – entire document</li> </ul>  | BBC/PRS  | Bundle F/Tab 2/page 1213A-1214A   |
| 42. Exhibit DMR4  | <ul style="list-style-type: none"> <li>Eos estimated revenues in 2010, 2011 and 2012 income from Welsh analogy line? (re PRS question 10.4)</li> </ul>   | PRS  | Bundle F/Tab 4/page 1226A         |
| 43. Letter from PRS to the parties dated 17 June 2013 and enclosure | <ul style="list-style-type: none"> <li>See comments re Exhibit RK23 at 1 above</li> </ul>  | PRS  | Bundle H/Tab 3/page 1397          |
| 44. Letter from PRS to the parties dated 8 July 2013 and enclosure  | <ul style="list-style-type: none"> <li>See comments re Exhibit RK24 at 22 &amp; 23 above</li> </ul>  | PRS  | Bundle H/Tab 3/page 1434          |
| 45. Email from Michael Simkins LLP to BBC dated 9 July 2012 (10:12) | <ul style="list-style-type: none"> <li>Clarification to dates in response to question 5.5</li> </ul>   | PRS  | Bundle H/Tab 3/page 1435          |
| 46. Letter from Eos to Michael Simkins LLP dated 11 July 2013       | <ul style="list-style-type: none"> <li>Eos estimated revenues in 2010, 2011 and 2012 income from Welsh analogy line (re PRS question 10.4)</li> </ul>  | PRS  | Bundle H/Tab 3/page 1438          |

|     | Document   | Confidential Information   | Owner   | Bundle ref                 |
|-----|--|--|---|----------------------------|
| 47. | Letter from Eos to Michael Simkins LLP dated 30 July 2013              | <ul style="list-style-type: none"> <li>Eos estimated revenues in 2010, 2011 and 2012 income from Welsh analogy line (<b>re PRS question 10.4</b>)</li> </ul>   | PRS   | Bundle H/Tab 3/page 1440   |
| 48. | Letter from Michael Simkins LLP to Eos and the BBC dated 2 August 2013 | <ul style="list-style-type: none"> <li>Table setting out total public performance revenue for premises in Wales and calculation of those figures in 2010, 2011, 2012 and 2013</li> </ul>   | PRS   | Bundle H/Tab 3/page 1445   |
| 49. | Radio Publishers Association Agreement                                 | <ul style="list-style-type: none"> <li>Internal BBC notes in bold text</li> </ul>  | BBC   | Bundle I/Tab 2/page 1493.2 |
| 50. | Radio Publishers Association Agreement                                 | <ul style="list-style-type: none"> <li>Internal BBC notes in bold text</li> </ul>  | BBC   | Bundle I/Tab 2/page 1493.3 |
| 51. | Email from PRS to the BBC dated 2 January 2013 (12:52)                 | <ul style="list-style-type: none"> <li>All figures in table setting out distributions to Eos members in respect of BBC services and proportion of repertoire.</li> </ul>   | Can be used to calculate BBC confidential information | Bundle I/Tab 2/page 1493.9 |
| 52. | Expert report of Richard Boulton                                       | <ul style="list-style-type: none"> <li>Annual adjustment mechanism under Alliance Agreement (<b>para 2.8</b>)</li> </ul>   | BBC/PRS   | Bundle J/Tab 1/page 1505   |
| 53. |  | <ul style="list-style-type: none"> <li>Comparison with S4C/Eos licence (<b>para 2.11(2)</b>)</li> </ul>  | S4C   | Bundle J/Tab 1/page 1505   |
| 54. |  | <ul style="list-style-type: none"> <li>Details of S4C/Eos licence (<b>paras 2.17-2.18</b>)</li> </ul>  | S4C   | Bundle J/Tab 1/page 1507   |
| 55. |  | <ul style="list-style-type: none"> <li>Radio allocation under Alliance Agreement, in the first year of the licence and the adjusted figure for 2012 (<b>para 4.23</b>)</li> </ul>  | BBC/PRS   | Bundle J/Tab 1/page 1519   |
| 56. |  | <ul style="list-style-type: none"> <li>BBC finance team allocation to radio: Percentage split and figure for 2011/12 (<b>para 4.24(1)</b>)</li> </ul>  | BBC   | Bundle J/Tab 1/page 1520   |
| 57. |  | <ul style="list-style-type: none"> <li>PRS allocation to radio for the purpose of calculating distribution to its members in 2012/13 (response to questions 3.5 and 3.8 (<b>para 4.24(2)</b>))</li> </ul>  | BBC/PRS   | Bundle J/Tab 1/page 1520   |
| 58. |  | <ul style="list-style-type: none"> <li>The figure that lies approximately mid-way between the BBC finance team and PRS allocations (<b>para 4.27</b>)</li> </ul>   | BBC/PRS   | Bundle J/Tab 1/page 1520   |
| 59. |  | <ul style="list-style-type: none"> <li>All percentages of content controlled by Eos of weekly BBC listener hours by radio station in 2012 in the column titled "Eos content" and figure in row titled "total as percentage of listener hours" (<b>Table 4-1, para 4.28</b>)</li> </ul> | PRS/Eos   | Bundle J/Tab 1/page 1521   |
| 60. |  | <ul style="list-style-type: none"> <li>Percentage of BBC's music listener hours in 2012 relating to</li> </ul>   | BBC   | Bundle J/Tab 1/page 1521   |



| Document | Confidential Information   | Owner  | Bundle ref               |
|----------|--|--|--------------------------|
|          | the broadcast of Eos repertoire (para 4.29)  |  |                          |
| 61.      | <ul style="list-style-type: none"> <li>At footnote 57: Total annual radio allocation under the Alliance fee and percentage (para 4.29)</li> </ul>  | BBC/PRS  | Bundle J/Tab 1/page 1521 |
| 62.      | <ul style="list-style-type: none"> <li>Figures listed under "Radio component of Alliance Agreement" for the radio allocation of licence fee under PRS allocation 2011/12, Alliance Agreement adjustment mechanism 2012/13, BBC finance team, 2011/12 (Table 4-3, para 4.37)</li> </ul> | BBC  | Bundle J/Tab 1/page 1523 |
| 63.      | <ul style="list-style-type: none"> <li>BBC finance teams standard split of the Alliance Agreement fee (para 4.40(3))</li> </ul>  | BBC  | Bundle J/Tab 1/page 1523 |
| 64.      | <ul style="list-style-type: none"> <li>licence fee using apportionment of Alliance fee based on population size (para 4.43)</li> <li>Total Alliance fee allocated to radio and percentages in footnotes 64 and 65</li> </ul>   | BBC/PRS  | Bundle J/Tab 1/page 1524 |
| 65.      | <ul style="list-style-type: none"> <li>Percentages of repertoire used by each BBC service in 2012 withdrawn from PRS by Eos members (Table 4-5, para 4.63)</li> </ul>  | PRS/BBC  | Bundle J/Tab 1/page 1530 |
| 66.      | <ul style="list-style-type: none"> <li>S4C licence fee (para 6.1)</li> </ul>   | S4C  | Bundle J/Tab 1/page 1538 |
| 67.      | <ul style="list-style-type: none"> <li>S4C primetime per minute rate and multiple used in Eos calculation of licence fee (para 6.3)</li> </ul>   | S4C  | Bundle J/Tab 1/page 1538 |
| 68.      | <ul style="list-style-type: none"> <li>Calculation and multiple used in Eos assessment of licence fee by reference to S4C (para 6.4)</li> </ul>  | S4C  | Bundle J/Tab 1/page 1539 |
| 69.      | <ul style="list-style-type: none"> <li>S4C primetime rate and non-primetime rate and multiples of PRS rate (para 6.8)</li> </ul>   | S4C  | Bundle J/Tab 1/page 1539 |
| 70.      | <ul style="list-style-type: none"> <li>Content of S4C's letter to the Tribunal dated 10 May 2013 (para 6.9)</li> </ul>   | S4C  | Bundle J/Tab 1/page 1540 |
| 71.      | <ul style="list-style-type: none"> <li>Eos forecast for March – December 2013: Figures in the rows titled "S4C licence fee", "Total Licence Fees" and "Total" (Table 8-1, para 8.6)</li> </ul>   | S4C<br>Including<br>figures which<br>can be used to<br>calculate S4C<br>confidential | Bundle J/Tab 1/page 1548 |

| Document | Confidential Information   | Owner   | Bundle ref               |
|----------|--|---|--------------------------|
| 72.      | <ul style="list-style-type: none"> <li>Amount and percentage of licence fee income Eos intends to distribute to members (para 8.7)</li> </ul>  | Can be used to calculate SAC confidential information | Bundle J/Tab 1/page 1548 |
| 73.      | <ul style="list-style-type: none"> <li>Amount of licence fee income not distributed to members (para 8.9)</li> </ul>   | Can be used to calculate SAC confidential information | Bundle J/Tab 1/page 1548 |
| 74.      | <ul style="list-style-type: none"> <li>Details of SAC licence</li> </ul>   | SAC   | Bundle K/Tab 1/page 1580 |
| 75.      | <ul style="list-style-type: none"> <li>All figures in column titled "Annual listener hours"</li> </ul>   | BBC   | Bundle K/Tab 1/page 1584 |
| 76.      | <ul style="list-style-type: none"> <li>All percentages in the column titled "Eos repertoire" (column [F])</li> <li>All figures in column titled "BBC/Eos Fee" (column [G])</li> </ul>  | Can be used to calculate BBC confidential information | Bundle K/Tab 1/page 1584 |
| 77.      | <ul style="list-style-type: none"> <li>The reference in line 5 to the figure for the Public Performance Analogy payment which appears to be taken from PRS response 6.11 which PRS express to be confidential</li> </ul>                             | PRS   | Bundle D/tab 1/page 583  |
| 78.      | <ul style="list-style-type: none"> <li>PRS letter of 17 June 2013, response to question 6.11, from the sentence "The table below shows an extract from the calculation of the UK analogies at October 2011...to the end of response 6.11.</li> </ul> | PRS   | Bundle F/1/1178-1179     |
| 79.      | <ul style="list-style-type: none"> <li>All information contained in the Confidential Schedule to the Applicant's skeleton argument</li> </ul>  | BBC   |                          |
| 80.      | <ul style="list-style-type: none"> <li>Second sentence of paragraph 56 which appears in square brackets regarding a provision of the Alliance Agreement at E1/2/788/8.2</li> </ul>   | BBC/PRS   |                          |



|     | Document   | Confidential Information   | Owner   | Bundle ref |
|-----|--|--|---------|------------|
| 81. | Confidential Annex 1,<br>Confidential Annex 2,<br>Confidential Annex 3 to the<br>Copyright Tribunal Decision<br>dated 16 December 2013 | <ul style="list-style-type: none"><li>• All information in the Confidential Annexes 1,2 &amp;3</li></ul> | BBC/PRS |            |