The Copyright Tribunal

27 June 2016

CT 127/14

IN THE MATTER OF A REFERENCE UNDER SECTION 126 OF THE COPYRIGHT, DESIGNS AND PATENTS ACT 1988 (AS AMENDED)

His Honour Judge Hacon (Chairman)
Roger Field
Jeffrey Manton JP

BETWEEN :-

ITV NETWORK LIMITED

Applicant

- and -

(1) PERFORMING RIGHT SOCIETY LIMITED

(2) MECHANICAL-COPYRIGHT PROTECTION SOCIETY LIMITED

Respondents

DECISION

Introduction

1. In this reference, made pursuant to s.126 of the Copyright, Designs and Patents Act 1988 ('the Act'), the applicant acts on behalf of the several

commercial television broadcasters within the ITV group. The respondents are both holders of rights in a repertoire of musical works and are licensing bodies within the meaning of s.116(2) of the Act. The repertoire is sufficiently extensive to afford the respondents something close to a monopoly of the right to license the broadcasting of musical works in the United Kingdom. Accordingly the companies in the ITV group require a licence from the respondents, through the applicant, to permit the lawful performance and broadcast of musical works used in the course of their programming.

2. Over the years there has been a succession of such licences. Most recently on 18 June 2012 the parties entered into an agreement which, partly retrospectively, covered the calendar years 2011 to 2013 ('the 2012 Agreement'). In October 2013 negotiations began with a view to settling a new licence to be jointly granted by both respondents, but without success. The existing licence has continued pending the outcome of this reference, initially by agreement and since the reference was issued on 30 July 2014 pursuant to s.126(3) of the Act.

3. For convenience we will refer to the companies in the ITV group and the applicant interchangeably and collectively as 'ITV'.

4. The first respondent ('PRS') licenses the right to perform the works of its members in public, to communicate such works to the public and to carry out certain acts of film synchronisation. For obvious reasons it is impractical for creators of musical works individually to negotiate licences to all those who wish to make use of their music and thereafter to police the licences granted. Therefore almost all creators assign their rights to PRS which administers the licensing of those rights on their behalf. Similarly, the second respondent ('MCPS') oversees the grant and enforcement of licences granted in relation to its members' musical works protected by copyright. After deductions for administrative costs, the royalties collected by the respondents are passed on to their respective members, that is to say composers, lyricists, music publishers and their respective successors in title. The overlap of interests of the two sets of members has led the respondents frequently to operate together

under the joint name 'PRS for Music'. In these proceedings they can for the most part be treated as a single unit, referred to as 'PRSfM'.

5. The terms of the proposed licence between ITV and PRSfM have largely been agreed. Subject to relatively minor points the dispute is about royalties. ITV argues that the royalties should remain unchanged and seeks a licence for the calendar years 2014 to 2017 at the rate of £23.5 million for each of those years, that is to say the same paid for the year 2013 under the 2012 Agreement. PRSfM contends that the royalty should be increased by reference to adjustors which we will come on to consider. These would operate to give the figure of £28.46 million for 2014 and adjusted royalties in succeeding years. PRSfM's primary case is that the new licence should cover only 2014 to 2016, but they are content to have it settled also for 2017 provided their proposed adjustors to the royalty are applied for the whole of that period.

6. ITV was represented by Ian Mill QC and Tom Cleaver instructed by Olswang LLP. Robert Howe QC and James Segan appeared for PRSfM instructed by Michael Simkins LLP. We are grateful to both legal teams for the quality of presentation of the evidence and arguments.

The witnesses

7. Evidence was given by six witnesses of fact, of whom five were cross-examined. On ITV's side these were Andrew Garard, General Counsel and Company Secretary, Jonathan Vandermeer, Controller of Acquisitions, Rights and Regulatory, and Claire Emmerton, Head of TV Audience. There was also a witness statement from Rachel White, Controller of Music for ITV which was unchallenged. For PRSfM we had written and oral evidence from Andrew Shaw, former Managing Director of Broadcast and Online, and Andrew Harrower, Director of Broadcast Licensing.

8. ITV adduced evidence from three experts. The first was Roger Gane, who gave evidence about the Broadcasters' Audience Research Board ('BARB'), which is the organisation that compiles TV ratings in the United Kingdom.

The second was Dante Quaglione, an expert in statistics and the third was Daniel Ryan, an expert in economics. PRSfM had two experts: Farid El-Husseini who is a statistician with expertise in broadcasting who gave evidence about BARB and Zoltan Biro whose evidence concerned economics.

9. Each side alleged that witnesses for the opposing party were either biased, tendentious, defensive or inconsistent. While we accept that on occasion some of the witnesses tended towards arguing a case rather than simply stating the facts as they saw them, or just giving their expert opinion, as the case may be, we take the view that on the whole each witness was doing his or her best to assist the Tribunal.

The Act

10. Section 126 of the Act provides:

126 Reference to tribunal of expiring licence.

(1) A licensee under a licence which is due to expire, by effluxion of time or as a result of notice given by the licensing body, may apply to the Copyright Tribunal on the ground that it is unreasonable in the circumstances that the licence should cease to be in force.

(2) Such an application may not be made until the last three months before the licence is due to expire.

(3) A licence in respect of which a reference has been made to the Tribunal shall remain in operation until proceedings on the reference are concluded.

(4) If the Tribunal finds the application well-founded, it shall make an order declaring that the licensee shall continue to be entitled to the benefit of the licence on such terms as the Tribunal may determine to be reasonable in the circumstances.

(5) *An order of the Tribunal under this section may be made so as to be in force indefinitely or for such period as the Tribunal may determine.*

11. The only statutory guidance as to what terms qualify as "reasonable in the circumstances" is given in ss.129 and 135:

129 General considerations: unreasonable discrimination.

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 circumstances, 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.

135 Mention of specific matters not to exclude other relevant considerations.

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.

12. In summary the terms, including the royalty, must not be discriminatory in relation to licences granted to other persons in similar circumstances although this is without prejudice to the Tribunal's general obligation to have regard to all relevant considerations.

Earlier decisions relating to licences for TV broadcasting

13. Previous decisions of this Tribunal in relation to television broadcasting offer more precise guidelines and an indication of what may be counted among "all relevant considerations". There have been four occasions on which the Tribunal (including its predecessor, the Performing Right Tribunal) has been required to determine a reasonable licence royalty for general television broadcasting. They are:

(1) *The British Broadcasting Corporation v The Performing Right Society Limited*, PRT 22/67.

(2) *The British Broadcasting Corporation v The Performing Right Society Limited*, PRT 24/71.

(3) *The Independent Television Companies Association Limited v The Performing Right Society Limited*, PRT 38/81 ('*ITCA*').

(4) *British Sky Broadcasting Limited v The Performing Right Society Limited* [1998] E.M.L.R. 193 ('*BSkyB*').

14. The Tribunal in *BSkyB* set out principles taken from the previous decisions and we believe that the following can be drawn from *BSkyB* and *ITCA*:

The overall approach to be taken

(1) Section 129 of the Act expressly directs the Tribunal's attention to comparable licences granted to other parties so that unlawful discrimination may be avoided. However, the Tribunal is not required to impose the terms which are the same as those in other licences since the governing circumstances may differ and thus a difference in terms may be lawful (*BSkyB* at para. 5.4).

(2) There is a formidable objection to comparing the royalty payable by the BBC with that appropriate in a licence to a commercial broadcaster. One affords no more than a most generalised check on the other (*ITCA* at paras. 81-83). BSkyB and the BBC are as different

as the BBC and ITV and each provides no more than a very rough comparable (*BSkyB* at para. 7.12).

(3) The overall task of the Tribunal, set out in s.135 of the Act, is to settle terms which are reasonable in all the circumstances. The terms need not coincide with those proposed by any of the parties (*BSkyB* at para. 5.6).

(4) The correct approach is to decide what royalty for the first year is reasonable in all the circumstances of the case and then decide whether that royalty should vary in subsequent years according to factors that the Tribunal considers to be fair and reasonable (*BSkyB* at para. 6.3).

Matters to be taken into account

(5) The royalty figures in previous licences agreed between the parties, negotiated at arm's length, concerning the same rights and taking place in the same marketplace, are relevant, though changes in circumstances must be kept in mind (*BSkyB* at para. 8.1). Such negotiations represent the most direct evidence of what the parties consider reasonable (*BSkyB* at para. 8.18).

(6) The number of hours of music broadcast is a factor which should be given some recognition in the royalty, although not in anything approaching a direct proportional relationship (*BSkyB* at paras. 7.3-5).

(7) The broadcaster's share of the total audience, if it is accurately measureable, is a relevant factor in the settling of the royalty (*BSkyB* at paras. 7.1-8).

(8) Other factors which may be considered relevant are (i) changes in the size of the music repertoire being licensed, (ii) changes in the retail price index, (iii) substantial changes in the general standard of living, (iv) changes in the relevant administration costs of the licensing body,

(*ITCA* at para. 76)[1] and (v) the number of channels involved (*BSkyB* 8.18-22).

(9) The Tribunal's duty is to moderate the monopolistic aspects of the licensing body's position by settling a reasonable royalty. It is therefore fair to take into account the extent to which the broadcaster needs the full scope of the repertoire and the extent to which it benefits from the collective administration of the rights. These are, however, vague and non-quantitative considerations (*BSkyB* at para. 5.28).

Matters to be disregarded

(10) The royalty is not to be settled by determining how much a broadcaster would pay on the basis that the only alternative to a licence would be no right to broadcast music at all. Neither is it appropriate to investigate how much the broadcaster would have to pay if it negotiated separate agreements in a free market with each copyright owner (*BSkyB* at paras. 5.27-28).

(11) The royalty should not be based on a percentage of the broadcaster's revenue. Music is a single component of a complex final product in the form of a television programme. Revenues from television programmes may rise or fall for reasons which have nothing to do with the music used. Moreover, the members of the licensing body are not to be regarded as co-adventurers in the business of the broadcaster (*BSkyB* at paras. 6.1-20; *ITCA* at paras. 74 and 77).

Other decisions of this Tribunal

15. We were referred to a number of decisions of the Tribunal concerning licences in fields other than TV broadcasting. We think it is sufficient to note only one

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[1] Of these, changes in the size of repertoire, changes in the general standard of living and changes in the administration costs of the licensing body did not feature in *BSkyB*. Neither were they relied on by any party in the present case.

principle which emerges from these and indeed which goes no further than emphasising a point made in the TV broadcasting decisions: the correct royalty rate is generally that which would have been freely negotiated between a willing licensor and willing licensee at arm's length. An existing tariff freely negotiated between the parties to a reference is likely to provide a particularly helpful starting point (and possibly a finishing point if, as ITV argued in the present case, there have been no relevant changes in the interim). By way of example, in *British Phonographic Industry Ltd v Mechanical Copyright Protection Society Ltd* [2008] E.M.L.R. 5 the Tribunal said this:

> "[49] *The willing buyer/willing seller test.* This is a classic test in this jurisdiction whose present applicability has been expressly endorsed by all concerned. In assessing a reasonable tariff, the Tribunal has frequently addressed the matter on the basis that the proper rate is that which would be negotiated between a willing licensor and a willing licensee of the copyright repertoire. Before examination of the relevant circumstances to be taken into account in this notional exercise, it is however common practice to identify an existing tariff as a starting point. If such a licence exists (and particularly, if it is recent) and addresses comparable subject matter – and even better, if it was freely negotiated (rather than being as it were, "imposed" by the Tribunal), that may be particularly relevant and helpful in determining the right tariff (and other terms) of a licence. Such an agreement it has been said, is the best record of the market value of the relevant rights at the time (see below "Comparators")."

16. Of course the application of the 'willing licensor/willing licensee' test must always be subject to the statutory obligations on the Tribunal set out in the Act. These are not so prescriptive as to impose on the Tribunal a particular analytical structure and methodology, see *CSC Media Group Limited v Video Performance Limited* [2011] EWCA Civ 650, at [73]-[74]. In the present case it was common ground first, that willing licensor/willing licensee was the correct test and secondly, that in applying it the best starting point was the royalty found in the most recent relevant licence between the parties.

ITV's financial position

17. Without disputing the proposition of law referred to in paragraph 14(11) above, we think that it requires some further explanation. PRSfM argued that as a matter of law ITV's financial position was wholly irrelevant to the settlement of the royalties. This was backed up by referring to case law dealing with an inquiry as to damages, possibly prompted by an observation from the Tribunal's chairman. There are obvious parallels. In an inquiry in which the court assesses damages on the 'user principle', the court must decide what sum the defendant would have agreed to pay the claimant for the right to carry out the infringing acts following a hypothetical negotiation between the parties, as willing licensor and willing licensee, immediately before the start of such acts. In that context PRSfM referred to the judgment of Jonathan Parker LJ (with whom Brooke and Schiemann LJJ agreed) in *Irvine v Talksport Ltd* [2003] EWCA Civ 423; [2003] F.S.R. 35. Jonathan Parker LJ had considered the judgment of the House of Lords in *General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd* [1976] R.P.C. 197 and those of Fletcher Moulton LJ in *Meters Ltd v Metropolitan Gas Meters Ltd* (1911) 28 R.P.C. 157 and Sargent J in *A.G. für Autogene Aluminium Schweissung v London Aluminium Co Ltd (No.2)* (1923) 40 R.P.C. 107. He said this:

> "[106] It is clear from Lord Wilberforce's speech in *General Tire* that a reasonable endorsement fee in the context of the instant case must represent the fee which, on the balance of probabilities, TSL *would have had to pay* in order to obtain lawfully that which it in fact obtained unlawfully (see in particular the passage from the judgment of Fletcher Moulton J in the *Aluminium* case, quoted by Lord Wilberforce). It is not the fee which TSL *could have afforded* to pay: hence the judge was correct to conclude (in para. [16] of the second

judgment) that TSL's financial situation is irrelevant."[2] (Original italics)

This is powerful authority but we bear in mind that the Court of Appeal in *Irvine* and the cases referred to in this passage had a different context in mind. These cases show that where a defendant has infringed the right of the claimant he may not plead poverty to minimise the damages due for such infringement. He must always pay the going rate. There may be a policy aspect to this. We are not sure that in the context of settling a licence such as the present one the financial position of the broadcaster licensee is similarly irrelevant. We have, in fact, the example of a side letter dated 7 May 2009, the same date on which the parties agreed the licence for the years 2008-2010, in which PRSfM did agree to reduce the royalties due from ITV because of ITV's financial difficulties. We discuss this further below. A real and freely negotiated concession such as that one makes it difficult to dismiss altogether the idea that in a hypothetical negotiation to settle the terms of this licence the parties would to some degree have borne in mind ITV's financial state at that time. As will be seen, because of ITV's healthy finances by the end of 2013 we do not believe the point arises in this case. We make it clear, however, that the proposition of law advanced – that the licensee's financial position is always wholly irrelevant – has not been accepted and so plays no part in our decision.

The *BSkyB* formula for the adjustment of royalty over time

18. In *BSkyB* the Tribunal started with figures previously negotiated between the parties, then took into account audience share, broadcast music hours, the number of channels and inflation, made a very rough comparison with royalties paid by other broadcasters and with what it regarded as appropriate adjustments arrived at a figure for the royalty payable for the first year of the licence to be settled. The Tribunal then set out a formula by which the

[2] The reference to Fletcher Moulton J was presumably intended to be to Sargent J.

royalties due in subsequent years were to be calculated. The formula was as follows:

- The figure for the first year ('the base royalty') was divided into two: 'Component A' being 54.5% of the base royalty and 'Component B', the remaining 45.5%.

- To calculate the royalty for the second year of the licence:

    - Component A was to be adjusted by the percentage change in total viewer hours which BSkyB attracted. This figure was further adjusted by the percentage change in the retail price index ('RPI').

    - Component B was to be increased by a flat rate increment of £10,000 for each new channel broadcasting in the second year for more than 20 hours per week, or pro rata for a new channel broadcasting for less than 20 hours per week. A corresponding reduction was to be made for any channel which ceased broadcasting. This figure would then be further adjusted by the percentage change in RPI.

  The combined figures for Component A and Component B thus adjusted would be the royalty for the second year of the licence. The royalty for subsequent years would be calculated in the same way, using the previous year's figure as the base royalty.

Previous licensing history

19. As we have said, it was common ground that the starting point in determining the correct royalty for 2014-16 (and possibly 2017) is the royalty found in the most recent relevant licence agreed between the parties. There is a dispute as to which licence that is. This needs to be put into context by considering the licensing history between the parties.

20. The following discussion concerns the licences granted to all ITV companies except in relation to Breakfast TV. In a helpful summary table provided in PRSfM's skeleton argument and closing submissions, the fees for Breakfast TV are set out. We have not found it easy to source these figures from the agreements between the parties provided in the evidence, but those stated in PRSfM's written submissions are modest – typically around 3% of the figure for the principal royalty – and were not challenged. For simplicity we ignore them in this part of the Decision.

2005-2007

21. Before 2006 ITV licences were separately negotiated with PRS and MCPS. On 10 January 2007 the respondents entered into a joint licence with ITV for the years 2005 to 2007. The total fee was £21 million for 2005, rising to £21,828,365 in 2006 and £22,160,270 in 2007. The 2007 figure used 2006 as the base royalty, adjusted by 50% of the change in aggregated viewer hours and 100% of the retail price index. In other words, the parties agreed an increase calculated by using something close to the *BSkyB* formula.

2008-2010

22. In a written agreement dated 7 May 2009 the parties stated that ITV should pay £70 million for the period 2008-10, which amounted to £23⅓ million per year. This agreement, which for the most part retained the terms contained in the January 2007 agreement, is referred to in the preamble as the 'Extension Agreement'.

23. It appears that the figure of £70 million was settled towards the end of 2008. But by the time the agreement was signed in May 2009 the economic downturn, which began with the collapse of Lehman Brothers on 15 September 2008, had taken its toll on ITV advertising revenues. This led to a change of heart: the parties agreed that the royalties should be reduced starting from April 2009. The solution adopted was that the £70 million figure remained in the agreement of 7 May 2009 but a side letter of the same date was signed by both parties. The side letter included this:

"In light of the current economic downturn and the decrease in ITV's television advertising revenues, the Licensors have agreed, subject to the terms and conditions set out below, to grant ITV (i) a discount on the Licence Fees agreed under the Extension Agreement for the periods 1 April 2009 to 31 December 2009 and 1 January 2010 to 31 December 2010 and, (ii) alternative payment terms to those set out in the Extension Agreement. The Licensors have agreed to the foregoing terms and conditions *on a strictly non precedential basis* and such agreement shall not commit the Licensors to agree similar terms in future agreements or licences between the parties." (Italics added)

The letter provided for a reduction of £250,000 per quarter in royalties due, spelling out that this required ITV to pay £5,583,333.34 per quarter from the second quarter of 2009 to the final quarter of 2010. There was a provision for a claw-back should ITV's advertising revenues rise above a set amount in any quarter. In the event ITV repaid £500,000 of the £1 million discount for the year 2010.

24. Two matters emerge from the side letter. First, in free commercial negotiations the parties apparently recognised that it was appropriate to make some adjustment to the royalty according to ITV's ability to pay. Secondly, the parties were conscious that any reduction in royalty agreed had the potential to affect the royalties agreed or imposed by this Tribunal in subsequent years. They took pains to ensure that the reduction would have no such effect. It was not in dispute that were the Extension Agreement of 2009 to serve as a starting point for the determination of the royalty in the present proceedings, the discount provided for in the side letter should be ignored.

2011-2013

25. Between June 2010 and March 2011 ITV and PRSfM engaged in negotiations to settle the terms of a licence for the years 2011-13. The existing licences were twice extended to allow discussions to continue. ITV proposed a total fee of £60 million; PRSfM sought £80.7 million. The parties decided more or

less to split the difference and an agreement dated 18 June 2012 ('the 2012 Agreement') provided that ITV should pay £69.25 million in total, divided into £22,875,000 for 2011 and 2012, and £23,500,000 for 2013.

ITV's case for the years 2014 to 2017

26. ITV say that the royalty payable for the last year of a freely negotiated licence between the parties was £23.5 million for 2013. There have been no relevant changes in circumstances since then, so ITV should pay £23.5 million for each of the years 2014-17. Alternatively, if the fee is to be adjusted for changes in music hours broadcast by ITV, the correct figure is around £22.3 million per annum.

PRSfM's case for the years 2014 to 2016

27. PRSfM argue that neither the royalties agreed for 2013 nor those for any of the other years provided for in the 2012 Agreement can provide a starting point for the calculation of royalties in the present licence. This is because the terms of the 2012 Agreement expressly state that it is 'non-precedential'. The royalty agreed was a compromise figure reached in the shadow of a pending reference to this Tribunal and by giving the Agreement non-precedential status the parties in effect agreed that its terms, specifically the royalty, should not be used as a basis for determining any future royalty.

28. It follows, PRSfM say, that the most recent *relevant* freely negotiated licence is the Extension Agreement of 2009 (which hereafter we refer to as 'the 2009 Agreement'). That provided for a payment of £70 million for the three years 2008, 2009 and 2010. There were no annual adjustors of the type previously agreed which would normally have resulted in an increase over the course of the three years. This was because the 2009 Agreement was negotiated towards the end of 2008, a time of exceptionally unstable economic circumstances so the parties opted for simplicity rather than building appropriate increases in royalties each year. By inference, therefore, the parties averaged out the appropriate royalties to a single figure for each year – in effect over-charging for 2008 and under-charging for 2010. The figure of

£23⅓ million per year accurately reflects the parties' freely negotiated royalty for 2009, which is the correct reference year. To this must be added the 2009 licence fee for Breakfast Television of £738,202. The starting point for the present calculation is therefore the £24,071,535 paid for 2009.

29. PRSfM argued that this figure must then be adjusted according to the formula for annual adjustments set out in *BSkyB*. It will be recalled that these adjustments were made according to (i) percentage change in viewer hours applied to 54.5% of the royalty, (ii) percentage change in the retail price index applied to 100% of the royalty and (iii) a flat rate increase for each additional channel broadcasting more than 20 hours per week (see *BSkyB* at para. 12.3). The third element can be ignored because among the terms of the 2012 Agreement to be continued by consent, there is already provision for a variation in the royalty due to new channels.

30. That leaves viewer hours and inflation. PRSfM proposed that the *BSkyB* formula should be simplified so that the adjustment to the starting figure of around £24 million for 2009 (the base royalty) should be: (i) an adjustment by reference to the change in total viewing hours for ITV channels according to BARB applied to 50% of the base royalty and (ii) an inflation adjustment applied to 100% of the base royalty. The parties are agreed that if an inflation adjustment is to be made at all, it should be done using the RPIJ measure of inflation which measures inflation using a geometric (Jevons) formula, as opposed to an arithmetic formula applied in the conventional RPI index. This results in a figure of about £28.46 million for 2014. PRSfM argued that a proportion of this figure should be paid pro-rata for the last five months of 2014 (i.e. for the period following the issue of the present reference). The whole figure, in each case adjusted for viewing hours and inflation, should be paid for 2015, 2016 and 2017 (in the latter case only if the Tribunal accepts the adjustments).

Issues arising out of ITV's response to PRSfM's case

31. The first issue is the effect of the term 'non-precedential' as used in the 2012 Agreement.

32. Secondly, having construed the 2012 Agreement, we must determine the year in which the base royalty was paid, that is to say the royalty which provides the appropriate starting (and possibly finishing) point for assessing the royalties to be determined in this reference.

33. The third issue is whether the *BSkyB* adjustors should be applied to the base royalty, i.e. one for inflation and one for viewing hours. ITV argues for no adjustors; alternatively, if there is to be an adjustment for hours viewed ITV submits that it should be for *music* hours viewed. PRSfM prefers its simplified version of the adjustors in *BSkyB*.

34. Fourthly, if, contrary to ITV's primary case, the Tribunal were to accept (a) that the base royalty is that of the year 2009 (or 2010) and (b) there should be an adjustment according to viewing hours, whether such adjustment should take account of what ITV regards as a statistical anomaly caused by a change in the viewing panel used by BARB.

35. Finally both sides referred to the royalties paid by other broadcasters. We will consider whether these provide any guidance as to the royalty to be paid by ITV.

The change in the way that musical works are consumed

36. Before turning to these issues we make a general observation. The Tribunal is fully aware – it is inescapable – that in recent years there have been dramatic changes in the way that recorded music reaches an audience. At a very general level that may or may not have affected the market value of recorded music. It may or may not have had another effect on the value of musical performances. During the hearing there was occasional allusion to this. But the Tribunal can only attempt to quantify royalties in a reference on the basis of the evidence presented. The parties did not hold themselves back in filing evidence but it did not address the quantification of a royalty by reference to

this point. It seems that the parties may reasonably have concluded that it was not yet possible to file such evidence.

37. If ever it can be argued that developments in technology have a quantifiable bearing on the royalties to be settled by the Tribunal in a reference such as this one, resolution of that argument must await the availability of clear and sufficient evidence.

Whether the 2012 Agreement provides a starting point

38. The 2012 Agreement constitutes the most recently freely negotiated agreement between the parties in which the royalty due from ITV to PRSfM was settled. ITV argues that applying the willing licensor/willing licensee test, which both parties endorse, there can be no doubt that the 2012 Agreement is the first and only needed port of call when looking for a starting point in the determination of the royalty in this dispute.

39. PRSfM points out that in the 2012 Agreement the parties stated, in terms, that the Agreement was 'non-precedential'. In other words, PRSfM submits, it was expressly agreed that notwithstanding the parties' willingness to come to an agreement rather than prolong the reference to this Tribunal, they accepted that the terms of the 2012 Agreement could not be used as a basis for calculating any future royalty should it subsequently come to that.

40. We make two preliminary points. The first is that where in earlier decisions such as *BPI v MCPS* this Tribunal emphasised the value in beginning with the most recent freely negotiated deal between the parties, the Tribunal did not, we believe, have in mind an agreement in which the parties had freely decided that the agreement should not be used as a basis for the calculation of future royalties. A standard way of indicating this is to state that the agreement is 'non-precedential'. In *CSC Media Group Limited v Video Performance Limited* (CT/94/05, 7 September 2009) this Tribunal said at [118]:

> "... [non-precedential] licenses are no evidence of either the reasonableness of particular financial terms or a fortiori, of an ongoing

> acceptance of (for example) particular financial obligations for the future. We believe that the presence of such non-precedential clauses in such agreements records a trade practice which, if we may say so, seems eminently reasonable. They achieve short-term, interim legitimacy without necessarily, ongoing finality. Indeed, we consider that such agreements were likely to have been settled only because they would not be held up later against the licensee as comparators. Non-precedential clauses form an integral part of the license and in our view, should be accorded due weight and effect. At the hearing, a number of such licenses were put forward by VPL for consideration as possible comparators. We think this should not have happened. Like the 2003 Agreement (and its Extension Letter), they are, so we believe, of no real assistance to us in fixing a headline rate."[3]

If, on a proper construction of the 2012 Agreement, it is 'non-precedential' in that sense, the parties' joint intention must be observed: the agreement cannot be used in that way. The side letter of 7 May 2009 shows that the parties were well aware of the possibility of invoking the term 'non-precedential' to prevent the use of an agreed royalty as a precedent.

41. Secondly, we do not think that the views of those who negotiated the 2012 Agreement assist us in reaching a correct construction of its terms. There was evidence about the negotiations and what the parties are now said to have had in mind from Mr Vandermeer and Mr Harrower but we have not taken such evidence into account. The law in this regard is well settled and was recently summarised by Lord Neuberger in *Arnold v Britton* [2015] A.C. 1619, with whom Lords Sumption, Hughes and Hodge agreed:

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[3] These statements of principle were noted, without disagreement, by Floyd J on a successful appeal by the licensing body: *CSC Media Group Ltd v Video Performance Ltd* [2011] R.P.C. 3 at [32] and [37]. The Court of Appeal, reinstating the decision of the Tribunal, found that the Tribunal's approach to comparators had been based upon a "clear and proper statement of the correct legal approach", see *CSC Media Group Ltd v Video Performance Ltd* [2011] EWCA Civ 650 at [72], per Etherton LJ, with whom Wilson and Longmore LJJ agreed.

"[15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *Prenn* [1971] 1 WLR 1381 , 1384-1386; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989 , 995-997 per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 , para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky* [2011] 1 WLR 2900, paras 21-30, per Lord Clarke of Stone-cum-Ebony JSC."

Lord Neuberger went on to emphasise seven factors of which the first is particularly relevant in the present context:

"[17] First, the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in *Chartbrook* [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision."

This is not one of the very unusual cases in which there could be useful recourse to commercial common sense via the hindsight evidence of those involved in the drafting of the 2012 Agreement.

42. We therefore turn to the terms of the 2012 Agreement itself. The recitals state:

> "(A) *A dispute arose between the parties relating to the terms on which blanket copyright licences were and are to be granted by PRS/MCPS's repertoire by the ITV Parties in the production, broadcasting and other exploitation of television programmes including for the period from 1 January 2011 up to and including 31 December 2013 (**the Dispute**).*
>
> *(B) References were commenced on 31 March 2011 in the Copyright Tribunal (with numbers CT 117, 118, 119/11) by the ITV Parties against PRS/MCPS regarding the Dispute (**the Proceedings**).*
>
> *(C) The parties have now agreed to settle the Dispute and the Proceedings on the terms set out in this agreement on a binding and non-precedential basis."*

43. The licence granted is set out in clause 4. This refers to a 'Primary Licence', which related to broadcasts in the UK and a 'Secondary Licence' under which royalties were paid on revenues derived by ITV from sales of its programmes overseas (and which can be ignored for the purpose of this reference).

> "*4. THE LICENCE*

4.1 *The parties have agreed that under the Primary Licence, ITV Network Limited (on its own behalf and as agent for the Network Licensees (as defined in the Primary Licence)) shall pay to PRS/MCPS a fixed lump sum payment in consideration for the rights granted under the Primary Licence. This is on the basis that the parties acknowledge and agree that:*

(a) *the Primary Licence does not include any express licence fee adjustment mechanism which takes into account any factors which either party considers relevant to the calculation of the licence fee, including those factors which PRS considers to be the most relevant but in respect of which the ITV Parties expressly reserve their position, namely (i) changes in the music usage on the Licensed Services (as defined in the Primary Licence), (ii) the number of viewer hours of the Licensed Services and (iii) annual changes in the Retail Price Index. The factors which each party considers relevant have, however, been taken into account by that party in determining the terms of this Settlement and Primary Licence;*

(b) *the ITV Parties are granted broad rights under the Primary Licence in respect of their on-demand activities, in particular with no limits on the volume of exploitation which is covered under the Primary Licence. During negotiations for the Primary Licence, PRS/MCPS agreed to include such rights within the licence fee as PRS/MCPS felt that the level of the ITV Parties' on-demand activities during the term of the Primary Licence would be relatively low;*

(c) *none of the ITV Parties has had access to or taken into account in entering into this agreement, the Primary Licence or the Secondary Licence any comparable*

PRS/MCPS agreement(s) or any information contained therein, including, without limitation and for the avoidance of doubt, any agreement between PRS/MCPS and any other major broadcaster in the UK as disclosed to the ITV Parties' advisors in the Proceedings; and

(d) *this agreement is entered into on a non-precedential basis.*"

44. ITV advanced a number of arguments. They were as follows.

45. First it was said that clause 4(1)(a) is careful to specify matters that were taken into account and these included everything the parties considered relevant. The only reason for doing so was because the parties envisaged that the 2012 Agreement probably would be examined in the future as a basis for new terms, including the royalty.

46. We do not agree. A more obvious reason for stating that each party had agreed the lump sum royalty payments, taking into account all factors which that party considered relevant, was to reinforce the finality of the 2012 Agreement, notwithstanding the absence of an annual adjustment mechanism for the royalty. Ensuring finality was something which the parties had firmly in mind – see clauses 5 and 6. This is not inconsistent with providing that the 2012 Agreement should not provide a precedent for future settlement of royalties.

47. In its second argument ITV again drew attention to the second sentence of clause 4.1(a), namely the statement that each party has taken into account all factors it considers relevant in determining the terms of the Primary Licence, including by implication the lump sums due for each of 2011, 2012 and 2013 (set out in clause 6 of annex A to the Primary Licence). ITV suggested that the effect of the second sentence is that clause 4.1(d) cannot operate as an evidential estoppel preventing it from arguing that the 2012 Agreement represents the parties' view of the fair value of the rights.

48. That may well be the case, but in our view it is beside the point. PRSfM does not rely on an estoppel. It simply argues that by clause 4.1(d) the parties agreed that the 2012 Agreement should be non-precedential in the sense considered by this Tribunal in *CSC Media*.

49. Thirdly, ITV focussed on the first sentence of clause 4.1(a). This records that the lump sum payment was agreed despite PRSfM's reservation that an adjustment mechanism would have been appropriate. ITV argued that the Tribunal must therefore be entitled to take the figure of the lump sum into account. Moreover, that figure does not appear in the 2012 Agreement but in an annex to the Agreement and cannot be affected by the non-precedential qualification of clause 4(1)(d).

50. We find this difficult to follow. The figures for the lump sum payments are indeed to be found by reference in an annex but we fail to see the relevance of that. It is also true that PRSfM agreed the lump sums despite reservations, as clause 4(1) makes clear, but this tends to support the suggestion that the terms of the 2012 Agreement were agreed only on the basis that they were a stop-gap solution and not to be used for any future calculation of a royalty.

51. Fourthly, ITV argued that in clause 4.1(d) the words "this agreement" means only the agreement of clause 4 regarding the fixed lump sum payment and that it would make no sense if "this agreement" referred to the 2012 Agreement as a whole.

52. Construing "this agreement" in clause 4.1(d) to apply to the Agreement as a whole is only nonsensical if one starts with ITV's premise that this is not what the parties intended. The term "this agreement" appears in every other clause of the 2012 Agreement, apparently referring to the whole of the Agreement. We can see no reason to give those words a special narrow construction solely in clause 4.

53. Fifthly, ITV relies on clause 7 of the 2012 Agreement:

> "7. *FUTURE CLAIMS*

Clauses 5, 6 and 10 are subject to the right of each of the ITV Parties and of PRS/MCPS to raise and maintain any and all of those arguments which the ITV Parties and PRS/MCPS or any of them relied upon in the course of the Dispute and/or the Proceedings in relation to any dispute or proceedings between the parties or any of them which arises or arise after the Effective Date of this agreement."

Clauses 5, 6 and 10 are in broad terms concerned with the full and final settlement of the parties' claims ('the Released Claims') (clause 5), an agreement not to sue in relation to the Released Claims (clause 6), and the grant of an indemnity by each party against losses incurred either (a) by a breach of warranty provided under clause 9 or (b) in consequence of proceedings in relation to Released Claims brought in breach of clause 6 (clause 10). These three clauses therefore give the 2012 Agreement full and final effect and require that any party improperly seeking to re-open the dispute indemnifies the other against costs thereby incurred. On the other hand, clause 7 ensures that such finality does not prevent the parties from re-running any argument in a dispute which arises *after* the effective date of the 2012 Agreement (which was 18 June 2012). Thus, in new negotiations for a subsequent licence the parties can resurrect any point they ran in relation to the 2012 Agreement.

54. ITV argues that the safeguard provided by clause 7 can only serve a purpose where the 2012 Agreement is taken as the starting point in a new dispute. There would be no need for clause 7 if the 2012 Agreement as a whole were non-precedential.

55. We do not agree. Clause 7 is there to prevent an over-developed interpretation of clauses 5, 6 and 10, namely the conclusion that any argument – such as the need to include an annual adjustment of the royalty according to music usage, viewer hours and RPI – which did not prevail in the settlement of the 2012 Agreement was forever out of bounds because of the finality of the Agreement. This is entirely distinct from the question whether the terms

which *did* form part of the 2012 Agreement, in particular the royalty, must form the basis for determining the appropriate royalty in a subsequent licence.

56. Sixthly, ITV argues that if PRSfM's construction of clause 4(1)(d) is correct, nothing in the 2012 Agreement can be taken as a precedent. This, says ITV, would be commercially absurd as is borne out by the fact that the parties have consented to the vast majority of the terms of the 2012 Agreement being introduced into the proposed new agreement.

57. Again we do not agree. The effect of clause 4(1)(d) is that neither party can unilaterally rely on any part of the 2012 Agreement as a precedent. Of course that did not prevent the parties from reiterating terms in a new licence that were contained in the 2012 Agreement, where by common consent it made sense to do so. The point of the sub-clause is that neither party is entitled to insist that the 2012 Agreement should serve as a precedent.

58. Seventhly, ITV argues that PRSfM's reliance on Recital (C) is of no effect since a recital does not of itself have legal effect and cannot affect the meaning of a substantive provision. That is true, but we think Recital (C) is in fact consistent with the meaning of clause 4(1)(d).

59. Eighthly, ITV advances a more general argument: here it accepts that the effect of clause 4(1)(d) is that PRSfM is not bound by the royalty settled in the 2012 Agreement. This, ITV says, does not absolve the Tribunal from its duty to take the royalty into account, bearing in mind the statutory requirement that the Tribunal must consider all relevant circumstances. Clause 4(1)(a) shows that the royalty was determined following reference to all relevant factors. The royalty must therefore be an indication of the market value of those rights at that time and therefore, unavoidably, it is a relevant circumstance which the Tribunal must consider.

60. In our view this argument contains a false assumption. It is clear that the parties took into account all relevant factors sufficient for them to reach a satisfactory commercial settlement rather than pursue the reference to this Tribunal. It does not follow that these factors included everything relevant to

the market value of the rights. In fact clause 4(1)(d) indicates the opposite. The parties wanted to finalise a licence; they agreed a royalty that all could live with, but they also agreed and acknowledged that this was *not* a sum which reflected a fully resolved market value unless by coincidence. Although Recital (C) has no contractual effect, it indicates what we believe to have been the parties' intention: they wanted to be sure that the 2012 Agreement was binding, but the parties remained free to enter into future negotiations afresh without the Agreement serving as a starting point.

61. Finally, ITV distinguishes *CSC Media* on the facts, arguing that this was a case in which the 'non-precedential' agreement was clearly interim and experimental. *CSC Media* does not establish that there is a magic and invariable meaning to be attached to the term 'non-precedential' when used in an agreement.

62. We agree that each agreement must be considered separately and that it is not impossible for a term like 'non-precedential' to be given different meanings in different agreements. However *CSC Media* provides an indication as to what that term is generally taken to mean and the side letter of 7 May 2009 is further example of a common understanding of the effect of that term. If that commonly understood meaning, when applied in the context of the 2012 Agreement, is consistent with the rest of the 2012 Agreement, a burden rests on ITV to show that it is in fact being used in a different and unusual sense. We do not believe that ITV has shown that 'non-precedential' means anything other than what a reasonable reader of the 2012 Agreement would initially expect it to mean: the 2012 Agreement, and in particular the royalty specified, is not to be taken as having any bearing on the determination of an appropriate royalty in any future licence.

The year and amount of the base royalty

63. It follows that the base royalty – the starting point for the calculation of the appropriate royalty in the present reference – is not to be found in the 2012 Agreement. By common consent, in the event that the 2012 Agreement is not

available as a precedent, we must go back to the 2009 Agreement and its award of £70 million for 2008 to 2010 (plus a further sum each year for Breakfast TV).

64. We have already stated PRSfM's position above: in brief, the £70 million should be taken to accommodate an assumed increase over the three years, so 2009 as the middle year provides the most accurate indication of the parties' view as to the market value of the licence.

65. ITV says that there was no such assumed increase and the Tribunal should minimise the period between the base royalty and the term of the licence to be fixed in the present reference since this will minimise the scope for unwarranted divergence from the parties' view of the market value of the licence. So the base royalty should be the £23⅓ million plus the fee for Breakfast TV agreed for the year 2010.

66. Whether the Tribunal should adopt 2009 or 2010 as the starting point depends whether, viewed objectively, the parties contemplated an increase in royalty for each year over the term of the 2009 Agreement at the time it was concluded. This is once more a matter of construction.

67. Assumptions made by experts in this regard do not assist, nor does the evidence of anyone who took no part in the negotiations. Even the evidence of those who did, namely Mr Vandermeer for ITV and Mr Shaw for PRSfM, could only help to the limited extent of providing background which may be relevant.

68. Mr Vandermeer and Mr Shaw agreed that the 2009 Agreement was reached against a backdrop of economic uncertainty and ITV's difficult financial position, recognised by the side letter signed at the same time in May 2009. Mr Shaw said this in his first witness statement:

> "20. In agreeing a fixed fee, both parties recognised the value of certainty in an uncertain next few years. The solution therefore was to agree a lump sum over the term of the licence. From PRSfM's

perspective, the absence of any "Viewer Hour" or RPI adjustors meant that we traded (a) an expected reduction in the annual licence fee, under any "Viewer Hour" adjustment, caused by a continuing fall in ITV's audience, against (b) potential increases generated by RPI. PRSfM also accepted ITV's argument that its current primary on-demand catch-up and clips service was principally a support offering to its core broadcast business. In return, ITV agreed to restrictions on the volume of "made for on-demand" content and that its archive would remain limited during the term of the licence.

> 21. The reason we did not press for any adjustment to the fee for inflation was that RPI (which was the index typically used in measuring inflation for such licences) was very volatile at the time. Again, certainty was paramount for ITV and we felt that the risk to PRSfM of excluding this adjustor was acceptable on this occasion because by agreeing to a lump sum we avoided exposure to a potential negative impact on the fee given the unpredictability of RPI"

69. This suggests that in May 2009 PRSfM did not understand that the deal reached involved receiving an accurate royalty in 2009, more than was due in 2008, and less than was due in 2010. On the contrary, RPI was volatile and to the extent it increased, PRSfM thought that this would be balanced by a decrease in ITV's viewing hours. By implication PRSfM's best estimate in May 2009 was that, leaving aside Breakfast TV, £23⅓ million was about right for each of the years 2008 to 2010. By the time of his cross-examination Mr Shaw gave evidence inconsistent with that:

> "I'm suggesting that the fee that we would have agreed would have assumed that there would be an annual increase based on all the criteria that we had had in discussion" (day 3, page 26).

Yet he could also be consistent with his witness statement:

"...it would be extremely unusual, if there was a different amount for each of the three years, for that not to be documented in the contract." (day 3, page 25).

70. In any event, what counts is what the 2009 Agreement says and we think this last quoted observation of Mr Shaw's is right. The 2009 Agreement provides for the same royalty for each of the three years without any suggestion that the £70 million fee was intended to take into account a contemplated increase in royalties across the term of the licence. The factual background was that the recession was under way and the parties do not seem to have been optimistic about ITV's viewing figures in the immediate future. This is all consistent with ITV's contention that the parties simply agreed a constant royalty for each of 2008, 2009 and 2010, payable monthly. We accept that contention.

71. We also agree with ITV that other things being equal, the most recent year is the one appropriate to use as a starting point because it provides the most recent indication of a freely agreed royalty rate. The base royalty for the purpose of the present assessment should therefore be that of 2010, being £23⅓ million plus £738,202 for Breakfast TV: £24,071,535 in total.

Whether the *BSkyB* adjustors should be applied to the base royalty

72. ITV argues that there should be no *BSkyB* style adjustment in order to go from the 2010 base royalty to the royalty for 2014. It advances four arguments.

73. The first is that the Tribunal is required by the statute to consider all the circumstances, not to apply slavishly a formula that was devised in *BSkyB* 17 years ago in relation to a television market that was very different to today's.

74. We accept that there should be no slavish application of the ruling in *BSkyB* or any other decision – taking this to mean an unthinking adherence. *BSkyB* should be followed only to the extent that it is appropriate to do so. The mechanism for annual adjustments in *BSkyB* was done in order to determine the increase in royalties over the five years of the licence settled in that case. Since then this mechanism or something similar has been used by PRSfM and

broadcasters other than ITV to settle licences without reference to this Tribunal, no doubt to the benefit of all concerned. That comes as no surprise since, speaking generally, there is much to be said for maintaining the value of an agreed royalty and the obvious way to do that is to tie the sum paid to an inflationary index. Also it accords with good sense that the broadcaster should pay a royalty which is at least broadly in line with the benefit conferred by the licence. One obvious way to achieve that end is to adjust the royalty in some sort of relationship with the viewer hours enjoyed by the broadcaster. We take ITV's opposition to 'slavishly' following *BSkyB* to imply that the *BSkyB* formula is arbitrary and that the application of the formula, or something close, in the present reference would not accord with the duty of the Tribunal. We do not accept that. We take the view that the formula provides a useful basis for adjusting the base royalty to arrive at the royalties to be settled in the present reference. Of course alterations may be appropriate.

75. ITV's second argument is that the *BSkyB* formula has not been used by these parties before. That is true, although on one occasion since the joint licensing of PRS and MCPS began in 2005 they came close. Also, before the days of joint negotiations both PRS and MCPS separately negotiated fees by applying the *BSkyB* adjustors or something very similar. Recently the parties have chosen to arrive at agreed royalties by other means, as is their prerogative. But this has no bearing on whether the formula is a useful tool for this Tribunal in carrying out the function required by statute.

76. Thirdly, ITV submits that PRSfM's reliance on *BSkyB* while at the same time arguing that the 2012 Agreement is not relevant, is both opportunistic and unprincipled. We do not see why. The question whether the 2012 Agreement is relevant is a matter of construction, see above. It has no bearing on the pragmatic value of the *BSkyB* formula.

77. Fourthly, ITV refers to anonymous concerns said to have been expressed by other broadcasters in relation to negotiating tactics used by PRSfM. We are in no position to reach any view as to whether these concerns have any real substance and even if they do, why. Besides, we see no likelihood of a

connection between such concerns and the usefulness or otherwise of the *BSkyB* formula in the present reference.

78. ITV's fifth point refers to the respondents' agreements with other major broadcasters, a topic we consider below.

79. ITV's sixth point re-heats its objection to disregarding the 2012 Agreement, which it characterises as a 'dramatic departure' from the *BSkyB* formula. We have discussed this already.

80. We find none of ITV's arguments under this head compelling. By contrast we think that the *BSkyB* formula provides a practical means of updating the royalty by reference to inflation and ITV's viewing hours, both of which seem to us to be matters which should be taken into account. Therefore subject to matters considered below, we will broadly apply the *BSkyB* formula to the base royalty in 2010, both to arrive at an appropriate royalty for 2014 and to adjust that royalty for subsequent years covered by the licence.

Inflation

81. The parties are agreed that if there is to be any adjustment for inflation, it should be done by reference to RPIJ.

82. ITV now submits that no adjustment is appropriate. Its original pleaded position was to accept that the licence would be adjusted for inflation. On 12 June 2015 it filed an Amended Statement of Grounds in which it contended that having obtained expert evidence (from Mr Ryan) it no longer accepted that there should be an uprating of the licence fee by reference to inflation.

83. ITV's first argument against such an adjustment was that there was none in previous settlements between the parties. For reasons we have discussed, those settlements provide no guidance as to whether there should be an inflationary uplift here.

84. We accept the basic premise of ITV's second point, namely that we have to decide whether, in the hypothetical negotiations, the parties would have taken

the view that an adjustor for inflation was appropriate, both for calculating the 2014 royalty and for settling a formula to determine the royalties due in the years following 2014.

85. ITV submits that it would never have agreed to bear the burden of an inflationary increase in royalties because it was not able to adjust the prices it charges advertisers in line with inflation. Mr Garard said that in relation to the vast majority of its advertising, prices are set by reference to the money which the advertiser spends on ITV channels and the audience figures for those channels.

86. We will assume that ITV's premise – that it cannot pass on an increase in royalties linked to inflation to its advertisers – is correct. The implication is that in the hypothetical negotiation PRSfM would agree to take on the whole burden of higher costs due to inflation. That does not seem likely. It is true that the side letter of 9 May 2009 indicates that in circumstances of severe financial pressure on ITV PRSfM is willing to accept a reduction in royalties, but that was not specifically to do with inflation, just a pragmatic concession by PRSfM because of ITV's overall financial difficulties. The fact that ITV's advertising revenue is not calculated by reference to inflation does not mean that ITV could not bear an increase in royalties. ITV has done well in recent years both in relation to its advertising and non-advertising revenue. Mr Garard confirmed that in the last six years its non-advertising profits have increased much faster than inflation. As Mr Ryan accepted, ITV is in an overall financial position to pay royalties increased in line with inflation. The date of the hypothetical negotiations can be taken to be 31 December 2013, i.e. immediately before the start of the licence. By that time ITV was not under the sort of financial pressure which would have led PRSfM to concede a discount of the sort negotiated in May 2009.

87. There is in fact no ground for supposing that in the hypothetical negotiations the parties would have discussed the technical question whether ITV could index its charges to advertisers by reference to inflation. We think it is likely that the simple point for consideration by the parties, so far as ITV's income is

concerned, would have been that ITV's (healthy) finances were not a limiting factor on the reasonable royalty to be agreed or, therefore, on whether there should be an inflationary link.

88. The third argument from ITV regarding an adjustment for inflation was a negative one: the Tribunal in this reference should not be guided by the fact that inflationary adjustors had been adopted by the Tribunal in the past. We disagree. The logic behind an inflationary adjustor in the Tribunal's earlier decisions has not been overtaken by events. Those decisions provide a strong prima facie reason to use a similar adjustor in the present reference. Effectively ITV must show why this reference is sufficiently different from earlier cases to warrant no such adjustor and it has not done so.

89. Fourthly, ITV argues that its successful financial performance of the last few years is not a good reason for it to bear an inflationary adjustor as a matter of principle. We agree. ITV's financial success is of itself no good reason either for or against an inflationary adjustor, as a matter of principle. The relevance of ITV's financial success is that there was at the time of the hypothetical negotiations no financial bar to an inflationary adjustor which the parties might, on one view, have otherwise borne in mind.

90. Finally, we should refer to the evidence of Mr Biro, whose stated view on behalf of PRSfM was this (first report at [72]):

> "From the perspective of the licensor, applying inflation to the [base royalty] will ensure that the remuneration of composers is maintained in real terms. Moreover, all else being equal, one would expect the end-user value from the use of music by [ITV] (i.e. the value derived by ITV's viewers from Music Consumption) to increase over time in line with general inflation. End-user value, which is most meaningfully measured by the willingness to forgo income to consume the copyright content, will naturally increase with inflation as the purchasing power of any forgone nominal income declines."

91. We think the point made by Mr Biro in his first sentence is self-evidently right. ITV did, however, join issue with the rest of that paragraph. This raised one of the matters in dispute which, it seemed to the Tribunal, were the product of an imperative felt by both sides to take almost any point. For instance, the debate referred to by Mr Biro regarding whether ITV viewers are willing to forego their income to consume the copyright content (and the argument about what might be the activities of ITV viewers foregone in preference for watching TV with music in it and so on) became an interesting exchange, but conjectural largely to the point of irrelevance. There were other disputes either similarly conjectural, or peripheral, or both. Without any implied criticism of the experts and other witnesses, for the most part we do not refer to such matters.

92. We think that the members of PRSfM are entitled to have the royalties for their musical works and performances protected against inflation. An inflationary adjustment should be applied to arrive at the royalty for 2014 and the years thereafter.

Adjustment for consumption of the licensed works and performances

93. ITV submitted that no adjustor linked to consumption of the licensed material by ITV viewers (such as hours viewed, or music hours viewed) is appropriate because there is no measure of such consumption which would accurately reflect the value attributed by the parties to the use of the music and performances.

94. We think it is self-evident that *prima facie* it makes good sense for the licence to contain an adjustment linked to ITV's use of the rights licensed. The more they are used, the greater must be the benefit to ITV and so the more it ought to pay PRSfM's rightholders. The apparently successful use of viewer hours in *BSkyB* for this purpose indicates that viewer hours is one way to go.

95. It will always be possible to complain that an adjustment mechanism is less than completely accurate, whatever it is. That said, subject to practical considerations, the more accurate it is the better.

Viewer hours or MHV

96. The two alternative bases for calculating ITV's consumption of the rights licensed are (a) viewer hours and (b) music hours viewed, or 'MHV'.

97. In *BSkyB* the Tribunal used viewer hours, that is to say the total number of BARB viewer hours attracted by the broadcaster (there multiplied by about 55%). PRSfM argued that this was both simple and practical and that the Tribunal should adopt the same approach. PRSfM was willing to make the formula simpler by giving it a weighting of 50%. We can see merit in that.

98. Adjusting by reference to the number of *music* viewer hours that ITV attracts over a year would be a more accurate way of gauging the change in benefit to ITV from one year to the next. It was for this reason that ITV preferred this measure. On the other hand, the experts agreed that this would be more complicated for the parties, though they disagreed to what extent. The dispute largely boiled down to how the balance between simplicity and accuracy could best be struck.

99. Largely, but not entirely. ITV pointed out that an advantage in using MHV would be that it would, to some extent anyway, allow ITV to control its royalty payments by altering the amount of music broadcast. We accept this in principle but are not sure about the extent to which it would be a practical, as opposed to a merely theoretical advantage. Rachel White's evidence showed that music is used by ITV across a very wide range of its broadcasting and it was not clear on the evidence whether and how, in practice, ITV could or would fine tune its broadcasting to make a significant difference to its royalty payments.

100. As to practicalities of calculation, Mr Biro for PRSfM said that given the numbers it was easy to calculate MHV although the ease or difficulty of obtaining the numbers in the first place was outside his expertise. Mr Harrower, also for PRSfM, said that in his experience the use of MHV was very unwieldy. It has been used in a licence with another major broadcaster and Mr Harrower said that it had caused a lot of work. Mr Ryan for ITV said

that it was a "simple metric to apply". But he was also at some pains to show that it would be necessary to measure MHV separately for PRS and MCPS to avoid a problem of false averaging and double counting. His written evidence explaining all this did not convincingly support his claim that the calculation would be simple.

101. On balance we have come to the view that the simpler viewer hours criterion used in *BSkyB* is the better approach to measuring ITV's consumption of the rights licensed.

The value of ITV's broadcasts to PRSfM's rightholders

102. Rachel White, Controller of Music for ITV, gave unchallenged evidence about ITV's use of music across the range of its broadcasts. Music can be a prominent part of the show, or alternatively used as background in dramas, or as a signature for a show and so on. Ms White also explained that music broadcast by ITV can sometimes be of positive benefit to PRSfM's rightholders, aside from generating royalties. Where, for instance, music is used on a show such as 'The X-Factor' or 'Britain's Got Talent' this may have a promotional effect on the music and thus benefit the composers or performers. Mr Garard and Mr Ryan also spoke about this promotional effect. The implication was that an adjustment to the royalty linked to consumption of the rights by ITV should be tempered by the fact that such consumption can also benefit PRSfM's rightholders. However, despite this evidence from ITV, it was not a topic addressed by ITV in argument, either orally or in writing.

103. Mr Harrower, for PRSfM, said in his witness statement that any promotional effect would have been taken into account in the parties' negotiations in previous years. Therefore royalties settled in this reference would automatically take it into account if based on earlier royalty payments. Mr Harrower was not challenged on this and his evidence possibly explains why ITV said nothing about this matter in argument.

104. The upshot is that we accept that the promotional effect exists although we have no means of telling how significant it is when weighed against the

overall benefit of the licence to ITV. In any event, the effect will be taken into account by basing our award in this reference on a previous licence between ITV and PRSfM.

Change in the BARB panel

105. The audience panel used by BARB to measure viewing figures for TV is in a constant state of flux with a proportion of the panel being replaced on a regular basis. From time to time the panel is changed wholesale and this happened in 2009. The new panel was used to generate viewing figures from the start of 2010. There was a recorded increase of 7.13% in ITV's viewing figures between 2009 and 2010 which was larger than in previous years. ITV alleged that much of the increase was a statistical aberration caused solely by the change of panel and it should be discounted. There was a lot of evidence from both sides on this point, including a regression analysis, theories of statistics presented by the statisticians and evidence from experts about the workings of BARB.

106. There has been no change in the BARB panel since 2009 beyond the usual churn and, as we have indicated, we believe that the base royalty should be that for the year 2010. At first this seemed to mean that we should take no account of the BARB panel point. However after a draft of this Decision was provided to the parties in the usual way, it emerged that the point remained live. We had not taken account of the second sentence of footnote 6 to paragraph 32 of PRSfM's Re-Amended Response. Paragraph 32 of the Re-Amended Response discusses the *BSkyB* formula and the application of the two updating adjustments. The second sentence of the footnote says this:

> "For each 'Year', the change in RPI and Viewer Hours is calculated on the change between the *two preceding years*, e.g. 2011 reflects the change between 2009 and 2010" (italics added)

107. PRSfM explained to us after provision of the draft Decision that the parties need to know the relevant royalty rate at the start of each year. If, as would be more logical, the royalty for 2011 were calculated by reference to the change

in RPIJ and viewer hours between 2010 and 2011, it would be necessary to wait until the end of 2011 to know what the figure is. To avoid this delay for commercial reasons, the parties apply the *BSkyB* formula using the changes in BARB viewing figures and RPI one year in arrears. PRSfM submitted that therefore in order to calculate the royalty for 2011 (and from that, subsequent royalties) we must use the change in the BARB figures and RPIJ between 2009 and 2010.

108. In ITV's response it was not denied that in the past adjustors have been applied using changes in RPI and viewing figures one year in arrears, by the parties' consent. However ITV did not accept that it would be commercially disruptive to alter that now and to use instead the contemporaneous changes in RPIJ and viewing figures from year to year. ITV urged the Tribunal to abandon the use of changes one year in arrears and thereby avoid the issue raised by the new BARB panel. Alternatively, contemporaneous changes in viewer hours and RPIJ could be used to calculate the royalty for 2011 and from a convenient year thereafter the parties could revert to changes one year in arrears to cope with the commercial difficulties which PRSfM claimed to exist.

109. At the request of PRSfM there was a hearing following the delivery of the draft Decision at which the parties developed their arguments. When asked, Mr Mill conceded that formally, at that late stage, ITV was seeking to change its case. The Tribunal ruled that it was not entitled to do so. Furthermore we have no doubt that to date the parties have gone to the trouble of using the changes one year in arrears for sound practical reasons and that this should not be disturbed. We must therefore deal with the arguments relating to the change in the BARB panel.

The overall arguments

110. It was common ground that BARB took great pains in arranging the change of panel in 2009 and made extensive preparations for the switchover. Part of the process involved running the old panel and the new panel in parallel in the

latter part of 2009 to allow comparisons to be made. On 25 November 2009 Tony Wearn, Research Director of BARB, delivered an industry briefing. We were shown a copy of his notes and slides. Mr Wearn referred to the data generated from the parallel run:

> "The parallel run data has been available continuously since April and has proved vital as a diagnostic tool to identify early anomalies in the data. Latterly it has increasingly been used to show the differences between the two panels."

Mr Wearn then focussed on the average daily viewing figures recorded for both panels in the 4 weeks ending 8 November 2009:

> "For a recent 4 week period (up to 8th November) total average daily viewing is indexing at 104.3 on the new panel versus the current panel. In other words the 2010 panel is delivering 4% more viewing. This has been fairly consistent during the panel run."

The second quoted sentence may suggest that Mr Wearn did not believe that the numbers for a 4 week period were sufficiently accurate to merit a figure for difference in viewer hours measured to one decimal point and therefore rounded the recorded 4.3% increase down to 4%.

111. ITV argued that the difference in viewing figures between the old and new panel reported by Mr Wearn accurately quantified the aberrant increase in viewing figures between 2009 and 2010 due to the panel change. ITV preferred 4.3% over 4%. The total recorded increase was 7.13%. For reasons explained by Mr Gane in his first witness statement paragraph 23(b)(iv) of ITV's Re-Amended Reply proposed 2.72% as the correct figure.

112. PRSfM made three overall points. First they argued that ITV had failed to prove that the 4 or 4.3% difference in viewing figures represented a systemic difference between the old and new panels. It could have been an arbitrary difference which had dissipated over time.

113. Secondly, even if the difference were systemic, the new panel was likely to be the more accurate of the two. The old panel was under-reporting viewing figures and so the 4 or 4.3% jump was nothing more than a correction which ought to be taken into account anyway.

114. Thirdly, ITV was apparently happy to use the BARB figures generated by the new panel in order to sell its advertising. Having represented to its customers that these figures were accurate and, PRSfM asserted, having reaped the financial benefit from doing so, ITV could not now reject the figures when it came to paying PRSfM.

The industry view of the panel change

115. ITV was able to show that within BARB itself and elsewhere among those concerned with the broadcasting industry there was a general expectation that the change in panel would lead to a systemic change in viewing figures. BARB's bulletin of December 2009 said:

> "During the past two [years] BARB has been specifically overseeing the set-up of a completely new panel which is generating data daily. A newly constructed system with a new panel will inevitably generate some different output."

116. The Office of Communications ('Ofcom'), which is the regulator and competition authority for the communications industry in the UK, published a report in August 2013 on public service broadcasting, which included this:

> "In 2010 a new BARB panel was introduced. The effect of this is data pre and post 2010 are based on different viewer panels and refined geographic boundaries were introduced. As a result, data comparisons pre and post 2010 should be considered with caution."

The regression analysis

117. PRSfM decided to support its case on this issue by having one of its experts conduct a regression analysis. PRSfM pointed out that ITV's argument

relating to the BARB panel change regard rested entirely on the 4.3% figure provided by Mr Wearn – or as Mr Wearn would prefer, 4%. PRSfM submitted that this was a very slender basis for a large argument. A more rigorous statistical analysis was called for. PRSfM provided an analysis in a report from Dr El-Husseini, an expert in statistics.

118. Dr El-Husseini took Mr Wearn's figure of 4% difference in viewing figures between the old and new panels, not 4.3%. He stated that the 4% difference was within the sampling error range to be expected for a four week period. Since, by inference, the 4% figure could not be trusted, some other means was required to assess whether the change in panel of itself had given rise to an increase in reported viewing hours.

119. Dr El-Husseini therefore carried out a multivariate regression analysis on viewing figures over the years starting in 2002, which appeared in his first report. As he explained, a multivariate regression analysis is a technique used by statisticians to determine how two or more variables (the 'independent variables' or 'explanatory variables') might explain variation in a 'dependent variable'. The dependant variable will be the one that the study is interested in. In this case the dependant variable is the figure for viewing hours. Dr El-Husseini proposed that the state of the economy and the weather might well provide the most reliable predictors of or explanations for viewing figures. He therefore used (i) lagged employment rate in the UK (6 months in arrears) and (ii) mean temperature in the UK averaged over 3 months as his explanatory variables. His analysis also used the effect of the panel change in 2009 ('the Panel Change Indicator') as a third independent variable, albeit characterised as a 'dummy variable'. Having carried out the analysis using two alternative models, Dr El-Husseini found that in his models both the lagged employment rate and the mean temperature proved to be statistically significant – i.e. they were shown to have a significant impact on viewing figures. By contrast, the Panel Change Indicator was not statistically significant. He concluded that the effect of the panel change on viewing figures was likely to have been negligible.

120. Dr El Husseini's conclusions were the subject of detailed criticisms in reports from Mr Gane and Dr Quaglione on behalf of ITV. Mr Gane's qualification to speak with authority on matters of statistical analysis was challenged. We accept that he did not have the academic standing of Drs El-Husseini and Quaglione in this field but it did not follow that none of his criticisms carried any weight. Dr Quaglione's expertise was also challenged but we can see no real basis for that.

121. Any analysis of statistics will seldom involve the strict application of mathematics to produce an unambiguous answer. In the present case, for instance, there was a choice of variables and models. We take the view that Dr El-Husseini, Mr Gane and Dr Quaglione could reasonably differ as to which variables and models could be relied upon to provide an accurate predictor of viewing figures in the UK, and which should be discounted as unreliable. We also think that the experts largely argued each other to a standstill over this.

122. However certain aspects of the dispute did emerge clearly. Dr El-Husseini's starting point – that the 4% difference in viewing figures between the old and new panels was within statistical error – was flawed. This assertion was based on an approach espoused in a paper by Tony Twyman and Steve Wilcox (*Measuring Small Audiences: The Challenge to Audience Measurement Systems*, April 1998). In cross-examination Dr El-Husseini admitted that he had pushed the Twyman and Wilcox analysis to its limits. In fact, had he used even 4.3% as the relevant figure, he would have been obliged to conclude that 4.3% did not fall within the margins of statistical error. More importantly, Dr El-Husseini applied the 4% figure on the basis that this was the difference between the two panels over just 4 weeks. He admitted in cross-examination that extending the relevant period to 3 months would have meant that the difference of 4% between the old and new panels could not be accounted for by statistical error. As to which period was relevant, we think Mr Wearn's briefing was clear enough: the 4% difference between old and new panels had been "fairly consistent during the parallel run". The briefing implies that the parallel run lasted about 7-8 months. Dr El-Husseini seems to have assumed it

was 6 months. No matter. In our view Dr El-Husseini was wrong to assert that the 4% difference in viewing figures between the old and new panels falls within statistical error.

123. Dr El-Husseini also admitted that this assertion formed his premise for using a regression analysis. It seems that Dr El-Husseini never had a sound reason to conduct his multivariate regression analysis in the first place.

124. But he did. Having done so, he produced a graph of the daily minutes of total TV viewing as reported by BARB, averaged out over quarter-years, against time. The numbers generated by BARB's old panel were used up to the end of 2009 and the new panel numbers from the start of 2010. In the same graph Dr El-Husseini plotted the line for viewing figures that would be predicted in his Regression Model Forecast, Models 1 and 2. There was quite an impressive alignment of actual and predictive lines for both Models.

125. In response, the main argument advanced by Dr Quaglione for ITV was that Dr El-Husseini's Regression Model Forecast fell apart if applied to the years preceding 2002. Dr El-Husseini's response was that the TV landscape was different before 2002: in particular Freeview was launched in 2002 which ushered in a new era of many digital channels, as opposed to the 5 terrestrial analogue channels. This explained why his models did not reliably predict the figures for 2001 and earlier. In cross-examination Dr El-Husseini qualified this to a degree, saying that research would be needed before a conclusion could be reached one way or the other.

126. No doubt that is true. But assuming, as Dr El-Husseini did, that the proliferation of TV content caused by the launch of Freeview would affect the predictive quality of his models, this did not happen suddenly at the start of 2002. As was common ground, it happened largely between 2002 and 2006. One would therefore expect either an increasing alignment of actual viewing figures with those predicted by Dr El-Husseini's models over that period, or alternatively one may have to conclude that this important change in TV broadcasting had no real effect on those models.

127. We are left with the impression that Dr El-Husseini is probably right that the state of the economy and the weather have an influence on TV viewing figures. We can also see that over the crucial period of 2009 to 2010, Dr El-Husseini's graphs suggest a high correlation between actual viewing figures and his Regression Model Forecasts notwithstanding the change in viewer panel. On the other hand, Dr El-Husseini was free to select from a wide variety of variables until he found the best fit. It is possible that the selection of alternative variables would have revealed a similarly close fit but with a mismatch between actual viewing figures and predicted figures around the start of 2010, although ITV did not present any such alternative.

128. We conclude that some part of the increase in BARB's viewing figures for ITV between 2009 and 2010 may have been caused solely by the change in the panel. Mr Wearn's figure of 4% is all there is to go on. We have found that it was not shown to have been within statistical error but it does not follow that it accurately quantifies a systemic increase in viewing figures caused by the change in the BARB panel.

The extent to which this matters in the present dispute

129. We have discussed the statistical arguments relating to the effect of the change in panel in a little detail in deference to the very considerable effort devoted to those arguments by the parties. But in the end we have taken the view that they are beside the point.

130. Mr Wearn's briefing to the TV industry of 25 November 2009 makes it absolutely clear throughout that BARB's intention in changing panels at that time was to improve the panel's performance. In other words, the idea was that the new panel should record viewing figures more accurately than the old panel had done. In cross-examination Ms Emmerton admitted that this had been BARB's goal and did not suggest that BARB had failed in its aim.

131. On the balance of probabilities, if and to the extent that there was a rise in viewing figures solely due to the change in panel, the reason for it was that the new panel captured TV viewing by the public in the UK which had escaped

the old panel. In other words, the old panel had been under-estimating the amount of viewing of ITV channels by the UK public. In that event the correction by BARB was appropriate and should not be discounted.

132. Finally under this head, PRSfM argued that if there had been an increase in BARB viewing figures attributable solely to the change in panel, ITV relied on that increase to its benefit when it was selling advertising on the basis of BARB viewing figures, including those published since 2010. If correct, this was potentially relevant, see the observations of Sir Nicolas Browne-Wilkinson V-C in *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320, at 1329. Mr Gane said in cross-examination that ITV used the BARB figures when selling advertising and that he assumed that no adjustments had been made for panel change. However, as Mr Mill pointed out in closing, ITV's ability to rely on the change in BARB figures to sell advertising was not put to any of its employees who gave evidence. He also submitted that a jump in BARB figures caused by panel change would potentially improve the viewing figures of all commercial TV companies equally so that ITV's share of advertising spend would be unaffected by it.

133. We are not satisfied that the allegation of inconsistency on the part of ITV has been made out. It makes no difference. It is likely that any change to BARB's viewing figures due solely to the change in panel at the end of 2009 can be ascribed to improved capture of viewing by the public and therefore greater accuracy. For that reason it should not be discounted when applying the *BSkyB* formula.

OMBs as 'sense checks'

134. A comparison with the respective licence royalties negotiated with any of the other major broadcasters ('OMBs') could, at most, provide what the parties rightly described as nothing more than a 'sense check'. Such licences were in no sense a starting point for assessing the royalties due in the present reference.

135. Mr Ryan adopted five different alternative approaches to comparing the OMBs with ITV. Yet his analysis and all the figures he produced in his report ignored one of the OMBs for no reason we found convincing. Mr Biro took that OMB into account. He produced a graph which purported to show that the royalties being sought by PRSfM were in line with those negotiated by OMBs – but only if a second OMB (preferred by Mr Ryan as a comparator) was dismissed as an outlier. Mr Ryan and Mr Biro were not very far apart in relation to the PRS component of the royalty, but differed widely when it came to the MCPS component. Their rival contentions depended in large part on whether it was appropriate to ignore this or that OMB.

136. The experts' dismissal of one or other OMB as a suitable comparator was in each case quite easy to justify. The OMB licences vary widely because of the disparate ways in which broadcasting businesses are conducted. None of the significant OMBs has a business model close to that of ITV. Rather, it was when the experts fixed positively on their preferred OMBs as suitable comparators that we found their evidence unpersuasive. Exactly as Tribunals have repeatedly asserted over the years, there is very little which can be drawn from such comparisons.

137. The parties took the common position, at least by the end, that the time spent on OMBs had not been productive. In its closing submissions ITV observed:

> "The issue of OMB comparators has turned out to be of limited significance."

PRSfM's closing submissions said that the OMB issue:

> "... has generated a huge volume of evidence of great complexity, with contested and inconclusive outcomes. There is little agreement between experts as to either basics of approach, or comparators, or methods of calculation. This in itself demonstrates that the Tribunal is unlikely to derive any real benefit from these attempts – as happened in *ITCA*."

138. We agree. We did not find the evidence about OMBs helpful, even as a sense check.

Other matters

Duration of the licence

139. ITV wants a four year licence. PRSfM agrees, provided there are updating provisions. We will settle a licence for four years: 2014 to 2017.

Right to renegotiate in the event of a material change of circumstances

140. ITV seeks the introduction of a term allowing the parties to renegotiate, and by implication to walk away from, the licence during its term if there is a material change of circumstances. PRSfM suspected that this was only suggested to make ITV's wish for an unchanged and unchanging licence royalty more acceptable to the Tribunal.

141. We leave the last point to one side and consider the suggestion on its merits. The term proposed would risk introducing uncertainty as to the enforceability of the licence, possibly in quite a short time. That may turn out to be unattractive to both sides. We think that the licence should have contractual force like any other and be open to termination and renegotiation before it expires only in the exceptional circumstances allowed under the usual principles of the law of contract. We see no need for the term proposed.

Cap on VOD and DTO

142. ITV provides video on demand ('VOD') and download to own ('DTO') services to its viewers. The terms that have been agreed would license the rights for these services. PRSfM seeks a cap on the use of music and performances on VOD and DTO, above which additional fees would fall due.

143. It is common ground that the suggested caps are not yet close to being engaged. For that reason Mr Vandermeer, for ITV, said that the introduction of a cap would cause no theoretical harm, although ITV maintained that a cap

at this stage would be premature. PRSfM insisted that now is the time to address this issue.

144. We do not think that this is a matter which needs to be resolved yet. PRSfM's proposed cap is unlikely to be engaged so its absence is unlikely to make any difference. If it were to be engaged, we have heard scant evidence as to how reasonable the proposed cap is and what additional fees would be imposed in the event of its breach. We think that, if appropriate, this is a matter to be addressed in the next round of negotiations between the parties when there may be a proper basis on which to assess whether there should be a cap and if so, what additional royalties there should be.

Trailers

145. ITV supplies trailers of its shows to third party websites or other platforms, for instance theguardian.com. The trailers commonly use music and so ITV seeks a term that would make such trailers licensed. ITV contended that the trailers are of no commercial value and therefore should not attract a further fee. PRSfM said that the trailers must be of commercial value because they will promote the viewing figures for ITV's shows.

146. We have no evidence to suggest that the trailers shown on third party platforms make much difference to ITV's viewing figures. If they do, the higher viewing figures will increase royalties through the link with viewer hours. We take the view that there should be a term licensing these trailers for no extra payment.

In-home streaming and sideloading

147. Viewers of TV can stream channels to several devices in their homes ('in-home streaming') and copy recorded programmes from one device to another ('sideloading'). ITV says that the permission it gives to viewers to do both is licensed already under the proposed terms but concedes that there could be debate about it centring on the correct construction of section 70 of the Act. To avoid further dispute, ITV submits, the licence should be expressly

contained in the terms to be settled. PRSfM argues that the two services are not licensed to ITV under the proposed terms on a correct interpretation of s.70 and that it would be better to grant a licence through set-top box providers such as Sky and Virgin. PRSfM also points to the cross-examination of Mr Vandermeer, for ITV, who said that it would not be unreasonable for PRSfM to ask for an additional fee. Yet Mr Vandermeer also said that he did not think that any further payment would be appropriate.

148. We think it would be unsatisfactory if the question whether a licence is required were to be left to satellite litigation over the construction of s.70 and equally unsatisfactory for in-home streaming and sideloading to be left possibly unlicensed.

149. There is consumer demand for streaming and sideloading. Mr Harrower's position for PRSfM was that if the right to do these things had no value they would not require a licence. We find that hard to follow. Mr Vandermeer said that ITV is not typically able to charge a fee to platforms such as Sky and Virgin in return for their viewers being permitted to stream and sideload because the platforms regard such freedom as a necessary part of the services they provide.

150. If streaming and sideloading increase ITV's captured viewing hours, this will increase the royalty payments to PRSfM in any event.

151. It seems to us that underlying the hypothetical negotiations discussed above there would be a reasonable assumption that ITV should be free to provide its programmes with music content to platforms such as Sky and Virgin and the platforms in turn should be able to offer unfettered viewing of ITV by their customers. Specifically, the customers should not be told that they may not stream and side-load, a freedom they have now come to take for granted. We believe that although royalties negotiated in the past, including the base royalty of 2010, were probably settled without consideration of streaming and sideloading, they were nonetheless agreed on the basis that ITV would be able to provide its programming to the platforms for unfettered viewing by the

platforms' customers. That assumption should not be disturbed. We therefore think that the licence should expressly permit ITV to allow home streaming and side-loading.

152. If in-home streaming and sideloading significantly increase ITV's viewing figures and this increase is not captured in the viewing figures used to adjust the licence royalty, there may in the future be grounds for an adjustment to the royalty to take into account streaming and sideloading. We are not satisfied that there is any evidential basis for such an increase in the present licence.

Conclusion

153. The base royalty is £24,071,535, i.e. the amount paid by ITV in 2010 including Breakfast TV. The royalty for 2014 will be that base royalty adjusted:

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

and further adjusted:

(ii) by a percentage equal to the percentage change in RPIJ between those years.

154. The parties were agreed that the December RPIJ figures should be used, so it will be the RPIJ change from December 2009 to December 2013.

155. The royalty for 2015 will be calculated in the same way, taking the royalty for 2014 to be the base royalty and using the changes in BARB figures and December RPIJ one year in arrears, i.e. between 2013 and 2014. The royalties for subsequent years will be similarly calculated.

156. The foregoing is subject to s.126(3) of the Act and we will hear submissions on the effect of that subsection.

157. Terms other than royalties will be included in the licence according to the various matters decided above.

Chairman

For and on behalf of the Copyright Tribunal

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