



The Copyright
Tribunal

IN THE COPYRIGHT TRIBUNAL

CT121/13

IN THE MATTER OF A REFERENCE TO THE COPYRIGHT TRIBUNAL UNDER
SECTION 125 OF THE COPYRIGHT DESIGNS AND PATENTS ACT 1988
APPLICATION FOR INTERIM ORDER UNDER RULE 35 OF THE COPYRIGHT
TRIBUNAL RULES

Date: May 17, 2013

Before:

Ms Colleen Keck, Mr Manny Lewis and Ms Sam Madden

Between:

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

Applicant

- and -

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

Respondent

Lindsay Lane (instructed by BBC In-House Law Dept.) for the Applicant

Tom Weisselberg (instructed by Morgan Cole) for the Respondent

DECISION

Background:

1. The BBC broadcasts a number of services including BBC Radio Cymru, BBC Radio Wales and BBC One Wales. Each of these services, but particularly BBC Radio Cymru (which is the only dedicated Welsh-language broadcasting radio station), requires a repertoire of Welsh language music for its broadcasting services.
2. Eos is a licensing body under section 116(2) of the Copyright, Designs and Patents Act 1988 (**CDPA**) whose members (the **Artists**) are primarily (but not exclusively) composers, authors and/or publishers of Welsh language music. The Artists that are members of Eos are also members of the Performing Rights Society Limited (**PRS**).
3. Until December 31, 2012 the BBC licensed its entire Welsh language music repertoire for its broadcasting services from two other collecting societies, PRS and the Mechanical-Copyright Protection Society Limited (**MCPS**). Since 2006 this has been achieved through a licence agreement (the **Alliance Agreement**) between PRS, MCPS and the BBC pursuant to which the BBC licenses, for a lump sum fee (the **BBC Revenue**), all rights controlled by PRS and MCPS for all of the BBC's services including the Welsh language services referred to above. PRS and MCPS determine how the BBC Revenue is shared between them and how it is distributed to their respective members. The BBC has no control over this although the BBC must provide reports to PRS and MCPS on how the licensed music has been used in its various services.
4. From about 2007, PRS changed its distribution policy in relation to its members. This change affected not only distribution of the BBC Revenue but also the revenue PRS receives from other PRS licensed use e.g. the UK public performance revenue which is collected from public venues (**Public Performance Revenue**) and the licence fee paid by S4C, the Welsh language Public Service Broadcaster. As a result of the changes to the PRS distribution policy the Artists, as well as some other PRS members, receive considerably less revenue from PRS than they had received prior to 2007. Unhappy with this state of affairs, effective as of January 1, 2013 the Artists withdrew two specific categories of rights, the broadcasting right and televising right, from PRS and granted those rights to Eos such that Eos now has the right to license those two categories of rights on behalf of the Artists. The Alliance Agreement continues to govern the rights controlled by MCPS. Also a number of composers, authors and publishers of Welsh language music remain members of PRS. Accordingly the BBC continues to license Welsh language music under the Alliance Agreement.

Interim Application to the Tribunal

5. The BBC and Eos entered into negotiations towards the end of 2012 but were unable to agree the terms of a licence for the Eos repertoire. From January 1, 2013 this caused considerable disruption to the Radio Cymru services such that on February 1, 2013 the BBC applied under Rule 35 of the Copyright Tribunal Rules (the **Rules**) for an interim order to permit the BBC to use the Eos repertoire at such a rate and on such terms as the Tribunal shall consider reasonable in all the circumstances pending a substantive hearing. We offered a number of dates between February 18, 2013 and March 1, 2013 for an interim hearing of the matter but on February 11, 2013 the parties agreed an interim licence (**Interim Licence**) pursuant to which the BBC

agreed to pay Eos a licence fee of £10,000 per month (exclusive of VAT) for a licence of all rights controlled by Eos. The parties also agreed a number of other matters including that the final Tribunal decision following the substantive hearing of this matter shall apply retrospectively to the date of the Interim Licence.

6. We urged the parties to consider whether the Interim Licence could remain in place until the final determination of the matter, thereby avoiding the costs of an interim hearing, in light of the retrospective effect the final decision will have. We also sought to alleviate Eos' concern that the Interim Licence might be in place for a long period, potentially years, by indicating that we intended to finally determine this matter before the end of 2013. However, the parties could not agree that the Interim Licence should remain in force until a final decision of the Tribunal and instead agreed that, unless a full or further interim licence was agreed between them prior to an interim hearing, the interim application made by the BBC should proceed and the Interim Licence would be replaced by the interim order made by the Tribunal. This is the decision on the interim application made by the BBC.
7. Thus it falls to the Tribunal to determine the provisional fee that should be paid by the BBC for a licence of all rights held by Eos until the Tribunal's final determination of this matter.
8. There is some dispute over the precise repertoire of Welsh language music currently controlled by Eos and PRS. The BBC considers that Eos controls 38.1%, and PRS controls 35% of the music used by the BBC on Radio Cymru, with some of the remainder being in dispute. It is also not clear at this stage how the change in PRS distribution policy changed the distribution to PRS members of the BBC Revenue, as opposed to distribution of Public Performance Revenue or other revenue of PRS. We do not consider it necessary to make a determination on these issues at this stage. It is not in dispute that without a licence from both PRS and Eos the BBC's Welsh language services will be severely disrupted.
9. There also appears to be agreement that due to the nature of the Welsh music industry, composers, authors and/or publishers of Welsh language music derive most of their music related income from collective licensing bodies and that other forms of music related revenue (e.g. CD sales) for Welsh language music is very limited. Accordingly the BBC Revenue and the Public Performance Revenue represent a very important element of the music related income of the Artists. We mention this because it is apparent that it is in the interests of both the BBC and the Eos members (and therefore Eos) that the BBC has a licence from Eos. Eos and the BBC are mutually dependant on each other, and Eos has not sought to argue that the BBC should not have a licence of the Eos repertoire. The dispute between the parties is limited to the financial and other terms of that licence.

The provisional fee

10. The BBC argues that the status quo should prevail and that the provisional fee should be the amount payable under the Interim Licence, namely £120,000 per annum (or £10,000 per month), exclusive of VAT. Eos says this amount is too low and seeks a provisional fee of £325,000 per annum (or £27,083.33 per month) exclusive of VAT.

11. This is the first time the Tribunal has had to consider an application under Section 35 of the Rules. Both parties accept that the Tribunal has a wide discretion in determining the provisional fee. Eos argues that it is a 'blue sky' discretion and that the Tribunal can take into account any factors it considers relevant. The BBC argues that the Tribunal should be guided by authorities regarding the grant of interim injunctions and orders for interim payments in the exercise of its discretion. We consider that both parties are correct. The Tribunal has a very wide discretion and can take into account any factors it considers relevant in setting the provisional fee. However, in exercising its discretion we consider it would be prudent to consider the guidance offered by authorities regarding the grant of interim injunctions and interim payments, not least because such guidance can assist us in reaching a just result. In particular, in fixing the provisional fee we are of the view that, consistent with that guidance, it is right to consider what will happen if the amount we order by way of a provisional fee turns out to be wrong.
12. The BBC argued strongly that a critical factor was Eos' ability to repay to the BBC the amount of any overpayment if the BBC succeeds at the substantive hearing. The evidence suggests there is a risk that Eos will not be able to repay to the BBC any amount which is overpaid should the provisional fee exceed the final fee determined to be payable following the substantive hearing. By its own admission Eos is in a difficult financial position and unlikely to have the funds immediately available to it for such a repayment, although it says that any overpayment could be recouped by the BBC from future payments and/or it could recover overpayments from its members.
13. Eos argues that if the provisional fee is not substantially more than £10,000 per month this is very likely to prompt a substantial number of Eos members to leave Eos and seek to make their own licensing arrangement individually and directly with the BBC. Although for the reasons set out below we do not accept this fragmentation of the Eos membership is likely to happen before the end of 2013, we do accept, based on the evidence from Eos, that there is a risk this could happen following the end of 2013 if the final fee determined by the Tribunal is less than £10,000 per month. If this was the final result (i.e. a final order resulting in a fee of less than £10,000 per month, and a fragmentation of Eos' membership), we foresee potential difficulties in the BBC either recouping its overpayment against future payments, or compelling Eos to recover the overpayments from its members. It bears recalling that the BBC's case is that £10,000 per month already represents an overpayment. In our view, if there is an overpayment it would be an unjust result if the BBC could not recover any overpayment, and the greater the overpayment the greater the potential for an unjust result. The converse is not true because the BBC will be able to make good any underpayment.
14. Eos recognises that its ability to repay is a factor to consider in setting the provisional fee. However Eos argues that there are other more important factors which should cause the Tribunal to order a higher provisional fee. In particular Eos argues:
 - i) that unless the BBC pays Eos a higher provisional fee, Eos will not have 'equality of arms' with regard to legal representation in these proceedings and will have to downgrade its arrangements for legal representation. Eos says that in exercising its discretion the Tribunal should have regard to the overriding objectives of the Rules as set out in Rule 3, which includes ...*'so far as practicable...ensuring that the parties are on an equal footing.'* In

essence, Eos argues that the BBC should be ordered to support Eos' legal costs. This is irrespective of the outcome of the final hearing because, as noted above, there is a risk that Eos will not be able to repay any overpayment if the BBC is ultimately successful;

- ii) that if the interim rate of £10,000 per month is not increased it is very likely the arrangements currently in place for the collective licensing of Welsh language music will break down before the Tribunal issues its final decision. This is because continuing at the current rate is likely to prolong and exacerbate the financial hardship that is already being suffered by Eos' members and thereby prompt a substantial number of them to leave Eos;
- iii) that it was never intended between the parties that the £10,000 per month fee should continue until the Tribunal issues its final decision;
- iv) that there is at least a realistic prospect that the final fee that will be considered reasonable by the Tribunal following a substantive hearing will be substantially greater than the provisional fee now sought by Eos, namely, £325,000 per annum.

15. Addressing each of the above arguments in turn:

- i) We do not accept the BBC must support Eos' legal costs. If Eos considers that it has grounds to seek a prospective costs order against the BBC, it should do so, and not seek to obtain its costs, prospectively, through the provisional fee. It is also unclear why Eos considers it is the responsibility of the BBC to fund Eos' participation in these proceedings. We note that the BBC has already made a substantial contribution to Eos' legal costs, and waived its right to seek costs from Eos should the BBC be successful in these proceedings. We do not consider that it would be appropriate to exercise our discretion in a manner that would, through the back door of a provisional fee, result in a prospective costs order against the BBC.
- ii) We do not believe the risk of fragmentation of the Eos membership arises in relation to the provisional fee (as opposed to the final fee, as noted above) for the simple reason that under the terms of the Eos membership agreement the Eos members are bound into Eos until at least the end of 2013, and we intend to issue our final decision on this matter before the end of 2013. With regard to the argument that the current rate will prolong and exacerbate the financial hardship being suffered by Eos members, whilst we are sympathetic to the plight of individual Artists, this appears to be a relatively longstanding issue. Eos indicated that there is likely to be only one distribution by Eos between now and the final decision. Any increase in the provisional fee that is distributed will be spread over a number of members and may need to be recouped. Increasing the fee for this relatively short period of time is therefore unlikely to make a material difference to the Welsh music industry or any individual Artist. For these reasons it is not a factor that we weigh heavily in the balance in determining the provisional fee.
- iii) While this is a factor to be considered it does not assist us in determining what the provisional fee should be.

- iv) The facts in this case are complex and many are in dispute. Both parties have indicated they will be presenting further evidence on the issue of what reasonable licence fee the BBC should pay for the rights controlled by Eos. The parties have widely divergent views on what a reasonable licence fee should be – the BBC says it should be £100,000 per annum and Eos says it should be £1.5 million per annum. We are not in a position to pre-judge the final outcome of this matter and cannot now conclude with any certainty what the final fee may be.
16. That leaves the Tribunal to decide on the amount of a provisional fee. Considering in particular what will happen if the amount we order by way of a provisional fee turns out to be wrong, we have concluded that the balance of justice is best served by maintaining the status quo.

Conclusion

17. We order that the BBC continue to pay to Eos a provisional fee of £10,000 per month (exclusive of VAT) until final determination or resolution of this matter.



Colleen Keck

Chairman

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