CT 130/17

IN THE COPYRIGHT TRIBUNAL

IN THE MATTER OF AN APPLICATION UNDER SECTION 120 OF THE COPYRIGHT, DESIGNS AND PATENTS ACT 1988 TO VARY PRS TARIFF LP (LIGHT AND POPULAR)

14 May 2018

His Honour Judge Hacon (Chairman)
Manny Lewis
Roger Field

DECISION

The Reference

1. On 27 July 2017 Performing Right Society Limited ("PRS") made a reference to the Tribunal to vary PRS Tariff LP (Light and Popular) ("Tariff LP"), filing its Statement of Grounds on the same day, including proposed draft amendments to Tariff LP. The draft amendments were prepared in consultation with potential licensees.

The Intervention

2. PACE Rights Management LLP ("PACE") was given permission to intervene in the reference and filed a Statement of Intervention dated 5 January 2018. PRS filed a Response on 26 January 2018 and PACE a Statement in Reply dated 9 February 2018. PRS and PACE have also filed evidence and correspondence in the intervention.

3. PACE is a body formed in 2016 to facilitate the licensing of public performance rights by rightholders without using PRS: so-called 'direct' licensing. PACE has an interest to the extent that Tariff LP affects those rightholders wishing to license directly, potentially through PACE.

4. At an interim hearing on 22 February 2018 PACE confirmed that its substantive objection to the draft amendments to the Tariff LP proposed by PRS was that the draft would not comply with The Collective Management of Copyright (EU Directive) Regulations 2016 ("the Regulations") for the reasons given in PACE's Statement of Intervention.

5. At that hearing the Tribunal was informed of a meeting which PRS intended to hold with individuals from bodies who represent a significant proportion of licensees under Tariff LP and by implication parties whose interests might be affected by direct licensing. These bodies were referred to as Live Sector Parties ("LSPs"). The LSPs comprise The Concert Promoters Association, The Association of Festival Organisers, The Association of Independent Festivals, Society of London Theatre, UK Theatre Association, British Association of Concert Halls, National Arenas Association, Glastonbury Festivals Events Limited and Music Venue Trust. As explained by Paul Clements, Commercial Director of PRS, in a witness statement dated 27 July 2017, in 2016 members of the LSPs collectively accounted for 71% of the total royalties received by PRS under Tariff LP in 32% of the events. The remaining events were often smaller, run by smaller operators, many of whom pay the minimum royalty under Tariff LP: £15 per event under the Modified Tariff.

6. Consecutive bilateral meetings took place on 27 March 2018 between representatives of PRS, the LSPs and PACE. A further meeting between those representing PRS and the LSPs followed on 12 April 2018

7. In a letter to the Tribunal dated 23 April 2018 PRS provided a draft amended Tariff LP ("the Modified Tariff") agreed between the representatives of PRS and the LSPs at those meetings, subject to the approval of the members of PRS and the LSPs. The Modified Tariff provided for the licensing of events at which some rightholders would grant licences through PRS and others license directly.

8. In a statement annexed to an email dated 19 April 2018 PACE had earlier stated its contention that the Modified Tariff did not comply with the Regulations for the reasons there set out.

9. By an email to the Tribunal dated 25 April 2018 the solicitors acting for PRS confirmed that PRS members had approved the Modified Tariff. By an email dated 1 May 2018 the solicitors liaising with the LSPs confirmed that all the LSPs had approved the Modified Tariff.

10. The Tribunal has reached the view that it has sufficient information to decide the issues raised by PACE in its intervention in writing and to decide the reference as a whole. The decision follows.

Decision

11. Subject to the compliance of the Modified Tariff with the Regulations and the arguments advanced by PACE in that regard, the Tribunal is satisfied that the Modified Tariff should be approved by the Tribunal. The reasons set out by PRS in its Statement of Grounds (filed before PACE's intervention) are accepted, taking into account that PRS has subsequently accommodated direct licensing in the Modified Tariff. For brevity those reasons will not be set out here. The Tribunal further notes that the Modified Tariff has been agreed by the LSPs and thus infers that at least a significant proportion of the parties principally and directly affected by Tariff LP approve the proposed amendments.

12. In the statement annexed to its email dated 19 April 2018 ("the April Statement") PACE set out its arguments on the compliance of the Modified Tariff with the Regulations. These are narrower than those stated in its Statement of Intervention since the Modified Tariff includes provisions for direct licensing. However, for the avoidance of doubt the Tribunal is satisfied that the objections raised in paragraphs 6.1, 6.2, 6.3.1 and 6.3.2 of the Statement of Intervention are not valid objections in relation to the Modified Tariff.

13. With regard to paragraphs 6.3.3 and 6.3.4, to the extent that the objections in those paragraphs are maintained by PACE, we address them as reformulated in the April Statement.

14. The key terms of the Modified Tariff to which PACE takes objection are the following, contained in Appendix 2, which is headed "Direct Licensing Mechanism":

"1 At live events licensed under Tariff LP where certain works are Directly Licensed, the charge under Tariff LP that would be made by PRS if there were no Directly Licensed public performances, i.e. the standard PRS royalty payable under Clause 3 of the tariff, will be reduced by an amount equivalent to the PRS royalty distribution payment that PRS would have paid to its Member(s) in respect of those performances (before the deduction of PRS's commission) in accordance with PRS's royalty distribution policy in force from time to time.

2. In alignment with current PRS royalty distribution policy, the charge adjustment mechanism will vary in relation to concerts and festivals as follows:

2.1.1 at concerts it will be based only on the aggregate performance duration of the PRS-licensed works and the directly licensed works respectively; and

2.1.2 at festivals it will be based on the aggregate duration as well as the respective stage capacities where the PRS-licensed and the directly licensed performances are given."

15. These are the Regulations cited by PACE:

3. A collective management organisation –

(a) must act in the best interests of right holders whose rights it represents;

...

15. (2) A collective management organisation must ensure that licensing terms are based on objective and non-discriminatory criteria (but see paragraph (3)[1]*)*

...

(4) A collective management organisation must ensure that –

[1] Paragraph (3) is neither relied on by PACE nor otherwise relevant.

(a) *right holders receive appropriate remuneration for the use of their rights;*

(b) *tariffs it determines for exclusive rights and rights to remuneration are reasonable in relation to matters such as –*

(i) *the economic value of the use of the rights in trade taking into account the nature and scope of the use of the work and other subject matter; and*

(ii) *the economic value of the service provided by the collective management organisation;*

and;

(c) *it informs the user concerned of the criteria used for setting of those tariffs.*

16. PACE's objections fall under five heads, which we will consider in turn.

Pro rata temporis

17. Under the Direct Licensing Mechanism, in respect of concerts PRS will distribute the licence income received between the performers in proportion to the duration of each performance (see above). PACE contends that distribution of income in this way is in breach of regulations 3(a), 15(2), 15(4)(a) and 15(4)(b)(i).

18. PACE argues first that such a system is not in the best interests of right holders within the meaning of regulation 3(a) because (i) it is costly to operate and (ii) rights holders are not provided with accounts that are sufficiently transparent.

19. We see no sound basis in PACE's submissions for either of these objections, which appear to be speculative. The obligations on PRS imposed by the Regulations are in relation to its members, not those who elect to license their rights directly, whether through PACE or otherwise. The LSPs have raised no complaint about the cost of assessing royalties by reference to the duration of performance and we have no reason to doubt that we are entitled to infer that the majority view at least of the LSPs' members represents the majority view at least of the totality of PRS's members.

20. PACE proposes an alternative yardstick for dividing royalty income. It contends first that duration should be ignored and secondly that the distribution of income should be weighted according to the fame and drawing power of the artist concerned.

21. In our view, devising an index of fame or drawing power to be applied to the distribution of remuneration would invite difficulty. Such an index would be unlikely to meet with universal approval and would tend to generate satellite disputes, with corresponding waste of time and costs.

22. We accept that ignoring the duration of artists' performances would simplify the assessment of remuneration. But there would then be an obvious objection from artists whose performances are much longer than those of others. It is also likely that headline acts will perform for longer than supporting acts, so PACE's concern about underpayment to headline acts is met in part by the proposal in the Modified Tariff.

23. We therefore reject PACE's first argument.

24. The second argument is that the Modified Tariff would not ensure that licensing terms are based on objective and non-discriminatory criteria (see regulation 15(2)). PACE's objection is that the criterion of duration of performance is the wrong one. Distributing remuneration according to the drawing power of the artist would be more objective.

25. We disagree. Famous acts will draw larger audiences and thereby generate larger remuneration from the event. As we have already said, if there are support acts their performances will probably be briefer, so they will share less of the pot. Devising an index of fame to weight the distribution of money is more, not less, likely to run into problems of discrimination and lack of objectivity.

26. The third argument is that the distribution of royalties according to duration of performance would neither ensure that right holders receive appropriate remuneration for the use of their rights (regulation 15(4)(a)) nor ensure that the tariff is reasonable in relation to the economic value of the use of the rights (see regulation 15(4)(b)(i)).

27. This is another way of presenting the same objection. For the reasons we have given in relation to regulations 3(a) and 15(2) we reject it.

28. *Pro-rata temporis* distribution has long been used by PRS to divide remuneration between its members (to date non-members have not been taken into account). There is no evidence that this has met with objection from PRS's members. We believe its use should continue, including use under the Direct Licensing Mechanism.

Reduced Tariff where booking and similar fees are included

29. The financial charge made by PRS to license an event is calculated as a percentage of gross receipts. Under both the existing Tariff LP and the Modified Tariff the relevant percentage is reduced if the organiser of the event elects not to include within its gross receipts

> "all booking, administration, service, handling or like fees and charges …, whether charged to the consumer by the licensee or an Affiliate, or by any third party engaged by the licensee, or charged to the licensee by any third party engaged by the licensee"

30. PACE argues that the dual licensing rate is not transparent and thus not in the best interests of right holders under regulation 3.

31. This seems to us to be entirely speculative. If rightholders had found it objectionable they would have said so.

Optional features purchased by the consumer

32. In both the existing Tariff LP and the Modified Tariff the gross receipts of an event, from which PRS's charge is calculated, are defined to include:

> "insofar as not included within the Admissions, any optional features purchased by the consumer that have a nexus with the public performance of PRS repertoire (examples are set out in Appendix 1(i)."

The examples in Appendix 1(i) are pre-event performance, soundcheck, upgraded or enhanced seating or standing in a controlled area with a view of the stage/performance area, VIP viewing platform and Q&A session with artist(s) including a music performance.

33. PACE argues that it is not clear how PRS would distinguish between optional features with a nexus with the performance from those which frequently occur and which have no such nexus. While no regulation is expressly cited by PACE, this appears to be another allegation of lack of transparency and thus objectionable under regulation 3(a).

34. We have no evidence on which we could conclude that this provision has caused difficulty in the past or is likely to in the future. We therefore reject the objection.

Royalty distribution at festivals according to stage capacity

35. Under the Modified Tariff, in respect of festivals (only) the distribution of remuneration would be based not only on duration of performance but also on-stage capacity. PACE argues that this is in breach of regulations 3(a), 15(2), 15(a)(a) and 15(4)(b)(i).

36. The arguments are similar to those made in relation to the distribution of remuneration according to duration of performances. We accept that the size of the stage on which the artist is performing may not always accurately reflect the ticket or other income generated by the artist. But it is likely to be relatively easy to measure and probably goes some way towards meeting PACE's primary objection that distributing royalties solely according to the duration of the performance is too crude. It will only work at festivals where there is more than one stage, so is not appropriate for concerts. It has also been agreed by the LSPs.

PRS' review of its distribution policy

37. PRS is currently engaged in a review of its distribution policy. In an email dated 24 April 2018 to the Tribunal, PACE argues that it is premature for the Tribunal to approve the Modified Tariff and that the present reference should be adjourned until after PRS has completed its review and all interested parties, including PACE, have had an opportunity to consider any amendments to the distribution policy.

38. PRS has expressed forceful disagreement with this proposal. In addition, the Tribunal has been sent an email dated 26 April 2018 to PRS from Louis Castellani, a partner in

Harbottle & Lewis, the solicitors who are liaising with the LSPs. The email states that an adjournment would not be beneficial to the LSPs' members, adding

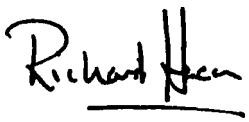
> "The slippage to the timeline for implementing a new tariff (we were all hopeful for September 2017) has already caused many LSP members a great deal of uncertainty around their business planning and financial modelling of future events."

39. We accept that if PRS were to amend its distribution policy after consultation with its members, that may lead to a further reference to the Tribunal. However, any such further reference may not happen and if it does, it will apparently not happen soon. We believe that we should be primarily guided by the interests of the licensees, whose views are represented at least in large part in the email from Harbottle & Lewis referred to above. We do not agree to an adjournment.

Conclusion

40. For the foregoing reasons, we approve the Modified Tariff in the form proposed by PRS save that, as agreed by PRS and the LSPs, the effective date will be four weeks from the date of the Tribunal's Order, which will follow this Decision.

For and on behalf of the Tribunal



Richard Hacon (Chairman)