IN THE MATTER OF A REFERENCE UNDER THE COPYRIGHT, DESIGNS AND PATENTS ACT 1988 (as amended)

Before: His Honour Judge Fysh QC, SC (Chairman)
Rear-Admiral James Carine and
Colonel Roderick Arnold

BETWEEN:

(1) THE BRITISH PHONOGRAPHIC INDUSTRY LIMITED
(2) MUSICNET (UK) LIMITED
(3) YAHOO ! UK LIMITED
(4) AOL (UK) LIMITED
(5) REALNETWORKS LIMITED
(6) NAPSTER LLC
(7) SONY UNITED KINGDOM LIMITED
(8) iTUNES S.a.r.l.
(9) O2 (UK) LIMITED
(10) T-MOBILE INTERNATIONAL (UK) LIMITED
(11) VODAFONE UK CONTENT SERVICES LIMITED
(12) ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED

Applicants and Interveners

and

(1) MECHANICAL-COPYRIGHT PROTECTION SOCIETY LIMITED
(2) PERFORMING RIGHT SOCIETY LIMITED
(3) BRITISH ACADEMY OF COMPOSERS AND SONGWRITERS

Respondents and Intervener

INTERIM DECISION

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Representation:

Applicants and Interveners

28 September 2006 [ie prior to the partial settlement]

Ian Mill QC and *Mark Vinall* (instructed by *Olswang*) appeared on behalf of the British Phonographic Industry Limited.

Kenneth Steinthal (New York Bar), *Joe Salvo* (New York Bar) and *Kambiz Larizadeh* of *Weil, Gotshal & Manges* appeared on behalf of MusicNet UK Limited, Yahoo! UK Limited, AOL (UK) Limited, RealNetworks Ltd, Napster LLC and Sony United Kingdom Limited.

Tom Weisselberg (instructed by *Davenport Lyons*) appeared on behalf of iTunes S.a.r.l. (Interveners)

Henry Carr QC (instructed by Baker & Mackenzie) and *Ben Allgrove* of *Baker & McKenzie* appeared on behalf of O2 (UK) Limited, T-Mobile International (UK) Limited, Vodafone UK Content Services Limited and Orange Personal Communications Services Limited.

Respondents and Intervener

Lawrence Rabinowitz QC, *Robert Howe* and *Ben Jaffey* (instructed by *Denton Wilde Sapte*) appeared on behalf of the Mechanical-Copyright Protection Society Limited and the Performing Right Society Limited.

Charles Aldous QC and *Edmund Cullen* (instructed by *Denton Wilde Sapte*) appeared on behalf of the British Academy of Composers & Songwriters (Interveners).

15 November 2006 to 17 January 2007

Applicants and Interveners

Kenneth Steinthal (of the New York Bar), *Joe Salvo* (of the New York Bar) and *Kambiz Larizadeh* of *Weil, Gotshal & Manges*) appeared on behalf of Yahoo! UK Limited, AOL (UK) Limited and RealNetworks Ltd.

Tom Weisselberg (instructed by *Davenport Lyons*) appeared on behalf of iTunes S.a.r.l.(Interveners)

Henry Carr QC (instructed by Baker & Mackenzie)and *Ben Allgrove* of *Baker & McKenzie*) appeared on behalf of O2 (UK)

Limited, T-Mobile International (UK) Limited, Vodafone UK Content Services Limited and Orange Personal Communications Services Limited.

Respondents and Intervener

Laurence Rabinowitz QC, *Robert Howe* and *Ben Jaffey* (instructed by *Denton Wilde Sapte*) appeared on behalf of the Mechanical-Copyright Protection Society Limited and the Performing Right Society Limited.

Charles Aldous QC and *Edmund Cullen* (instructed by *Denton Wilde Sapte*) appeared on behalf of the British Academy of Composers & Songwriters (Interveners).

A Glossary[1]

The Academy or **BACS** : British Academy of Composers and Songwriters. Members of the Academy are generally also members of **PRS** and/or **MCPS**.

The Act: The Copyright, Designs and Patents Act 1988 (as amended), otherwise 'CDPA '88'.

The Alliance: PRS and **MCPS.** These are two collecting societies**.** Though separate legal entities, PRS and MCPS merged their operations in 1997. In order for any exploitation of music to take place online it is necessary both to make copies of musical works (see **MCPS** below) and to communicate them in public over the Internet or in the case of the MNOs, wirelessly over a mobile network (see **PRS** below). Hence the presence of the combination of the two in these Applications has been called 'the Alliance'.

The Applicants: Collectively (and in context), iTunes, the **MNOs** and the **Remaining MSP**s**.**

BPI: The British Phonographic Industry Limited. This is the UK record industry trade association and represents the interests of more than 300 record companies based in the UK.

CRCA: Commercial Radio Companies Association. The CRCA Agreement contains the Alliance's licence terms for commercial radio

DRM: Digital Rights Management. A technology applicable to downloads which requires the authorised user to obtain a licence to make use of protected material which he possesses.

FTD: Full track download. Approximately equivalent to a permanent download.

iTunes: iTunes s.a.r.l

JOL: A Joint Online Licence promulgated by **the Alliance.** There have been a number of these all of which have been proposed on an annual basis, the first having been promulgated in 2002. All of them have now been superseded.

[1] A glossary of technical and industry terms is to be found at Annex B to the Alliance's closing written submissions. By the time of writing this Decision, this glossary had been largely (but not completely) agreed between the parties.

The New JOL: The New Joint Online Licence. That is, the **JOL** as substantially amended as a result of a settlement with **BPI** (and others) on 28 September 2006 and which is in issue in these proceedings.
LD/ODS: Limited download/on - demand streaming
MCPS: Mechanical-Copyright Protection Society Limited. **MCPS** licences the mechanical right (i.e. the right to authorise or prohibit the making of copies of musical works)[2] on behalf of its members who are authors, composers and publishers.
MNO: Mobile Network Operator, being the following four[3] parties:
O2: O2 (UK) Limited
T-Mobile: T-Mobile International (UK) Limited
Vodafone: Vodafone UK Content Services Limited
Orange: Orange Personal Communications Services Limited.
The interest of the MNOs in these proceedings is both as retailers of online music (and who therefore require a licence from the Alliance) and also as mobile internet service providers for third party retailers of online music.
MSP: Music Service Provider. The MSPs in these Applications are referred to as '**The Remaining MSPs',** also referred to as **'The Webcasters':**
Yahoo !: Yahoo ! UK Ltd ,
AOL: AOL (UK) Ltd, and
RealNetworks : RealNetworks Limited .
PPL: Phonographic Performance Ltd. PPL was formed by EMI and Decca in 1934.
PRS: Performing Right Society Limited. PRS licences the communication of works to the public together with the performing right for the benefit of a membership similar to that of MCPS[4]. Both PRS and MCPS are collecting societies and licensing bodies within the meaning of the Act, s 116(2)
PRT: Performing Right Tribunal. The predecessor to the **Copyright Tribunal.**

Authorities cited in the Decision:

AIRC v PPL [1993] EMLR 181
AIRC v PPL 16 January 1986 (unrep. Harman J)
AEI v PPL [1998] EMLR 240, [1998] RPC 335
APRA v ABC (1985) 5 IPR 449
BPI v MCPS (no 2) [1993] EMLR 86
BSkyB v PRS [1998] EMLR 193 *BACTA v PPL* [1992] RPC 149
Cala Homes v McAlpine Ltd [1995] FSR 818
ITCA v PRS (PRT 38/81, unrep. October 19 1983)
Manx Radio v PPL (unrep) PRT 18/64 29 May 1965
PRS v BSkyB [1998] EMLR 193
PRS v BEDA (PRT unrep, 1 August 1989), and Hoffmann J [1993] EMLR 325.

[2] The Act, ss. 17 and 18.
[3] Of the five mobile network operators in the UK
[4] The Act, ss 19 and 20.

R v Chen [2006] EWCA Crim. 2526
Rockwater v Technip France SA [2004] RPC 919
SBC v PRS [1991] FSR 573
The Ikarian Reefer [1993] FSR 563
Universities UK Ltd v CLA [2002] RPC 693
Working Men's Club & Institute Union Ltd v PRS [1992] RPC 227

Dates of hearing:

28 September, 14-17, 20-24 and 28 November,
5-8 December 2006, 15-17 January 2007 and 16- 17 July 2007.

Documentary citations in the Decision

<u>Trial bundles</u> will be referred to by binder number, tab and where appropriate, page number: e.g. A3/2/18.
<u>Witness statements</u> and <u>Expert reports</u> will be referred to by the surname of the witness or expert followed by the number of his/her statement/report and the paragraph number: e.g. Ferguson 1/ §6
<u>Transcript evidence</u>: will be referred to by day, page and where appropriate, line number: e.g. D11/187/5

Terminology: 'online' and 'offline', 'downloads' and 'streams'.

Since these terms are used throughout this Decision and in spite of the fact that many readers of it will be well aware of what they mean, we have nevertheless thought it best to record the ambit and context of our usage of these terms. This case is concerned only with digital recordings of music. It is possible to access and to download a digital music file via the Internet. It is also possible to access digital music using mobile telephone handsets, the latter being served via mobile telephone networks which in turn are operated by **MNOs**. Both possibilities are collectively referred to as '**online'** music access. On the other hand, the delivery of music via a physical medium, typically a CD, a DVD, a tape or a vinyl (or other) record, *or* via a radio or television broadcast *or* by cable, has been collectively included within the term **'offline'** music. A **download** means a file of recorded music intended to be copied onto a consumer's local storage device from a remote source such as a website server. On the other hand, a **stream** is a file of continuous music which may be listened to through a consumer's receiving computer or device but only to the extent required to allow listening to the file at substantially the same time as the file is transmitted i.e. no playable copy of the music remains.

I INTRODUCTION

Prologue

1. This Decision concerns a number of references to the Copyright Tribunal ('the Tribunal') relating to the terms of licences issued by two collecting societies, PRS and MCPS (collectively called 'the Alliance'), which enable music legitimately to be made available online to members of the public.

2. More than twenty years ago music first became available in digital form; the CD began to replace tapes and vinyl records as the standard carrier of music. The next major development in the music industry has already proved to be considerably more radical than the digital revolution. Everywhere one now sees people of all ages wired into MP3[5] players such as iPods. They are enjoying the ubiquitous benefits of music downloaded from the Internet. Perhaps even more members of the public enjoy such music by being in possession of mobile telephones with Internet access and of course, of personal computers.

3. Those disputing the terms of the Alliance's licences are most of the powerful protagonists of the online music industry. We are aware that much is at stake in these proceedings. Though there has been a measure of compromise among the parties, the issues remaining have proved difficult to resolve largely as a result of the complex and changing nature of the online music offerings involved. There are in fact three very broad types of such offerings: permanent downloads, limited downloads and on-demand streaming/webcasting. However, as we shall show, what is actually happening in the music industry is more complex.

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4. Among the references to the Tribunal, this group of applications[6] must be unique.

- In the first place, this has been the first reference which is concerned with valuing the use of copyright material (in this case, the work of composers, writers and publishers of music), which is available *online* for sourcing and consumption.

- Secondly, these Applications originally involved more parties than any other before it of which we are aware, all of the parties being major players in various aspects of the online entertainment, communications and music industries.

- Thirdly, this Application is concerned with what one expert called 'new phenomena'. The means by which online music is made available to users and the manner in which it can be manipulated for consumption is complex and sophisticated and seemed to grow as the case went on. This appears to be the

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[5] MPEG-1 Audio Layer 3. A digital audio encoding and compression format.
[6] These were in fact both references and interventions (see Copyright Tribunal Rules 1989 ('CTR') rr. 3 and 7). For convenience we have used the word '**Applications'** to describe them collectively.

result of both rapidly advancing technology and innovative business models. Not surprisingly, this development has proved to be a lucrative forum for establishing all manner of advertising and subscription, thereby generating new revenue streams within the industry. The Tribunal is not therefore dealing with the traditional music exploitation such as by the sale of a physical product (such as a CD), by broadcasting or by making music available within a particular environment, say, a night club. We are now concerned with the availability of music embedded as it were, in a variety of electronic vehicles ('business models') devised by highly intelligent and motivated innovators for an increasingly sophisticated, user-led consumption[7].

- Before the hearing, a settlement of a major portion of the dispute occurred. The status of this very recent settlement as a relevant comparator for what remains to be adjudicated has been an important ongoing issue in the case.

- Finally, we believe that this reference must have been about the most costly ever to have been litigated in the Tribunal, the parties having spent (so we understand) some £12 million in costs by the date of the conclusion of the hearing [8]. We shall have more to say about this at the end of this Decision.

5. At the Tribunal's request, an agreed *dramatis personae* has been prepared (as **Annex 1** hereto[9]) which identifies (*inter alia*) the parties and epitomises their relevant commercial interests.

6. It is important at the outset to have an overview of the events leading to the Applications. We shall first identify the participants as they originally were when the Applications were initiated and then see how the position has changed. As may be seen from the title page of this Decision, the original Applicants were twelve in all. All were actively involved in one way or another in inter alia the online and mobile music industry[10]. They fell into three broad groups: the BPI, the MNOs and the MSPs.

7. Shortly before the hearing, a degree of settlement (both complete and qualified) reduced the number of Applicants - and also the number of contentious issues. The terms of the licensing schemes originally proposed by the Alliance for the use of online music which triggered these Applications ('the JOLs') were amended as a result of this settlement and became a new scheme, '**the New JOL.'**[11] This New JOL generated substantially amended (or supplemental) Statements of Case, all of which are to be found in Volume A6. We would add that all the licensing proposals which have been in issue have been 'schemes' within the meaning of the Act, s 116 (1).

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[7] Not all forms of online exploitation of the Alliance repertoire are covered by existing and proposed licences. Ringtones for example (though mentioned from time to time) are without the present terms of reference.

[8] According to a statement which was posted on the Alliance's website in December 2006.

[9] **Annex 1** is actually a combined *dramatis personae*, witness list (containing abbreviated details of both witnesses of fact and expert witnesses) and a chronology. There was partial disagreement in the detail of one item of this document and in addition, some suggestion that such detail was confidential. We have considered these suggestions and do not believe either to be sustainable.

[10] The Academy was a late intervener –a *respondent* intervener.

[11] H/1/13.

8. **The Alliance** were represented by Mr Rabinowitz QC, Mr Robert Howe and Mr Jaffey. In the Glossary, we referred to why a <u>Joint</u> Online Licensing agreement is needed. There is in fact a technical reason (see '*Dubbing*' below) why online exploiters of music need licences from both the PRS and the MCPS in order to make their services available to the public online.

9. Prior to trial, on 10 November 2006, the Alliance and the MNOs agreed certain facts which have been included in (inter alia) the MNOs' Revised Opening Skeleton Argument as Annex 1. The record of the agreement is referred to as 'the **Agreed Facts'**, the idea having been to reduce the scope of the evidence and argument to be advanced at trial. In correspondence with the Tribunal, iTunes also agreed facts 5 and 12. In what follows, we have made use of this document.

10. The **BPI** is the trade association of the principal record companies in this country and is responsible for over 90% of commercial sound and audio-visual recordings. The Agreed Facts (11) records the following:

> 'The BPI's members are most commonly content suppliers to music retailers, like the MNOs and the MSPs rather than music retailers themselves. In their capacity as content suppliers to music retailers, the BPI's members would not be licensed under the JOL, as they are not Music Service Providers.'

11. Shortly before the hearing (so shortly in fact, as to require an adjournment), a settlement was reached between BPI, iTunes and the MNO's on the one hand and the Alliance and the Academy on the other ('**the Settlement Agreements'**). Attached to the Settlement Agreements was the New JOL. BPI's settlement was comprehensive and it thereupon withdrew from *any* further participation in the proceedings. The settlement with iTunes and the MNOs however was conditional upon the resolution of an important item relating to the definition of 'Gross Revenue'. These were their so-called '**Disputed Contentions'** (see below).

12. Other parties[12] also settled but on the basis of a different definition of Gross Revenue ('the **Home Page Concession'-** see below) and with the benefit of any gains made by iTunes on the issue of Gross Revenue.

13. The **MNOs** offer a variety of items to the public via their content portals. This includes a broad mix of commercial products: games, audio and audio-visual downloads and streaming (music and non-music), news, sports, ringtones, 'wallpapers', audio-books mobile TV and probably by now, other services as well. Most of these have nothing at all to do with music or activities licensed under the New JOL and thus, what is essentially at stake in these Applications.

14. The New JOL provides for the payment of royalty to the Alliance in respect of identified revenue streams, being based on what is defined as '**Gross Revenue'**. The Disputed Contentions of the **MNOs** and **iTunes** were related and concerned the definition of Gross Revenue when music was offered (respectively) for free

[12] Napster, MusicNet and Sony

or at a subsidised rate, in either case as a result of advertising, sponsorship etc. The Home Page Concession on the other hand was part of a comprehensive settlement with the Alliance and hence there has been no further argument from the parties involved in that aspect of the definition.

15. That left the three **'Remaining MSPs[13]',** sometimes called '**The Webcasters**', whose online musical offerings primarily consist of webcasting services. They were represented by Mr Steinthal and did not participate in the Settlement Agreements[14]. Their submissions differed slightly from those of iTunes and the MNOs on the issue of Gross Revenue –and generally.

16. Mr Steinthal tended to distance the Remaining MSPs from most of the terms of the New JOL – in particular, those relating to webcasting. Looking ahead for a moment, the New JOL was not, he argued, a useful 'comparator' for the Tribunal principally because, so he submitted, those licensed thereunder had no present, practical interest in webcasting. Their core commercial interests were elsewhere. As far as its signatories were concerned, its webcasting terms had merely been part of a package – and, said Mr Steinthal, an unimportant part at that. Nonetheless, by the time of the hearing, Mr Steinthal did accept the propriety of some of its terms, including terms which prior to the Settlement Agreements, had been universally in contention.

Miscellaneous preliminary matters [15]

17. **The PRS** The PRS was incorporated in 1914 as a non-profit company limited by guarantee. The members of the PRS comprise:

    (a) composers of music
    (b) authors of lyrics
    (c) publishers of such music and lyrics, and
    (d) successors in title of deceased composers and authors.

18. The PRS exists to administer the rights of public performance, broadcasting and diffusion by cable given by the copyright in those works. Virtually all composers, lyricists and music publishers in the UK have assigned their relevant public performance copyrights to the PRS which thus has an effective *de facto* monopoly on the grant of licences for copyright music in the UK. The PRS' income derives principally from its licensing activities. It deducts administration costs and then passes on royalties to its members in accordance with its own rules of distribution.

19. The PRS has reciprocal arrangements with similar collecting societies all in other countries.

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[13] That is Yahoo !, AOL and RealNetworks
[14] Though Mr Steinthal had been involved in settlement discussions with other MSPs and the Alliance.
[15] In no particular order of importance.

20. The PRS' repertoire, which we refer to simply as 'the repertoire', comprises an enormous *corpus* of music and lyrics representing the collected output of many, many composers and lyricists over a very considerable time. There is of course some small amount of music which is not within the repertoire and in this case (as in numerous others), this fact has been raised to bolster arguments from would be licensees. In view however of the preponderance of material within the repertoire, we have taken no account of it. In doing so we have followed a long tradition of the Tribunal and of its predecessor.

21. ***The Academy*** The Academy entered these proceedings as late interveners and also participated in the Settlement Agreements. They instructed the same firm of solicitors as the Alliance (albeit using a different in-house team) and were separately represented by Mr Charles Aldous QC and Mr Edmund Cullen. Mr Aldous explained that many members of the Academy were self-employed freelance composers and writers who were also members of the Alliance. However, their interests, he said, were not always the same as those of the corporate members of the PRS - such as its influential publisher members. The Academy had therefore decided to intervene so as to ensure that the interests of writers and composers (whose works are after all, at the heart of these proceedings), were properly represented. Needless to say, the Academy endorsed the New JOL. We felt however that overall, the contribution of the Academy was inevitably a recapitulation of the Alliance's case. And where Mr Aldous made a submission which the Alliance had not made *expressis verbis*, it was endorsed by the Alliance. In fact (and despite the eloquence of Mr Aldous' presentation), we discerned no difference of substance between the Alliance's and the Academy's cases. Henceforth, when we refer (for example) to the submissions of the Alliance we intend to include those of the Academy – and *vice versa*.

22. ***Piracy*** This is a topic which we felt was more debated at the beginning of the proceedings than at the end. It is not in dispute (indeed it is notorious) that there is now a very high level of piracy in the music industry, online and offline[16]. There was a certain amount of evidence about how serious this is[17] and how it occurs. There was evidence (for example) of the use of filesharing technology to promote the distribution of music and of the unauthorised downloading of files containing music in the Alliance's repertoire via the Internet. We learnt of the practical problems associated with online liability and immunity and of the difficulty of pursuing the huge numbers of people who practice illegal filesharing and downloading.

23. We record that this is a matter which we (like many others) take most seriously; it is undoubtedly a huge problem for the music industry. Its relevance to these proceedings was twofold. First, it was said to be enough, to justify a '*New Format Discoun*t' which is still of concern to the remaining MSPs. This will be considered towards the end of the Decision. Secondly, iTunes (who have been pioneers in the downloading sector) regard piracy and the purchase of CDs (in that order) as their main competitors. In order to compete therefore, iTunes has

[16] For a recent example, see <u>R v Chen</u> [2006] EWCA Crim. 2526.
[17] See for example, the Alliance's expert Ms Enders, D11/117 and 122, the Applicants' second expert Mr Ridyard (Ridyard 1, §88) and the Alliance's second expert Mr Biro (Biro 2/61ff)

had to set up an attractive, easy to use, and *reasonably priced* online service in order to provide an alternative to piracy – which, said Mr Weisselberg, is ultimately to the benefit of the Alliance's members. It has thus had to shoulder *risks which the Alliance has not borne* and that the gravity of these risks was uncertain because of the uncertainty of the impact of piracy in the future - and thus upon its ability to offer attractive pricing in the future. As we shall show, whether there has been risk-sharing is indeed a relevant issue and piracy is (so it was argued) a factor for the Tribunal to take into account in what follows. Though we have much sympathy for the emotive argument that the Applicants are in truth the 'good guys' of the music industry and should be in a measure rewarded for being so, this is an appeal *ad hominem* which is rather more difficult to factor into the general principles within which our decision must be reached. Our conclusions have thus tended to be 'pirate neutral'.

24. ***Confidentiality of documents.*** A good deal of time was taken at the interlocutory stages of these Applications to devise means to prevent the disclosure, inadvertent or otherwise, of a considerable amount of disclosure material which the parties (particularly the Alliance) considered to be both relevant and confidential. The quality of such confidential information was categorised and its legitimate recipients were identified.

25. The principal order relating to confidentiality on disclosure is dated 10 February 2006 and was made by Mr Simon Thorley QC sitting as a Deputy Chairman of the Tribunal. First, two degrees of confidentiality were envisaged: Class 1 and Class 2 documents. The former was less sensitive, its disclosure being limited to the Tribunal, external legal advisers, experts and named individuals from the receiving party. Disclosure of Class 2 material was limited to the above persons except that there was to be a maximum of one recipient in the receiving party (if the receiving party elected to nominate a recipient at all)[18]. With the concurrence of the Tribunal, a 'confidentiality club' was therefore set up.

26. This régime seems to have worked well at trial. Nonetheless, the proliferation of confidential material during the course of this case has created for all those concerned a potential minefield. We have taken steps to exclude such material from this Decision though the narrative may have intermittently suffered as a result. We would add that Mr Rabinowitz sought to justify much of the lengthy evidence given by the Alliance's industry expert Ms Enders on the basis that without her synthesis of the mass of confidential and semi-confidential material filed, the Tribunal might never be able to form a reasonable picture of how the industry operated.

27. ***Factual Evidence*** As noted, the BPI withdrew all its factual evidence. Following the settlement, the Alliance has also withdrawn all its factual evidence, leaving only exhibited documents. The Academy has also withdrawn all its factual evidence. The MSPs on the other hand were busy filing supplementary evidence, factual and expert, right up to the time of the hearing – all of which has been admitted.

[18] The somewhat complex detail is to be found at A5/84.

28. ***Unanswered Evidence*** The evidence filed by the parties in this reference can with understatement be described as being voluminous – though it is fair to say that some of it pre-dates the Settlement Agreements. Not surprisingly therefore, there have been submissions by all the remaining parties that a number of items of written evidence remain 'unanswered' or 'unchallenged'. Whilst we have noted these matters, we have also taken into account part of an interlocutory order made on 9 November 2005 by Mr Thorley, QC which reads as follows:

> '15. It shall not be necessary for a witness to be cross-examined in order to challenge his evidence. This provision also applies to part of the statement of a witness who is cross-examined but not on those parts.'

29. Similar provisions are often to be found in interlocutory orders made by the Tribunal with a view to discouraging prolonged (and too often unprofitable) bouts of cross-examination at the hearing.

30. ***Demonstrations*** Another difficulty in preparing this Decision has been adequately to describe the many online services in issue. Sensing perhaps some unfamiliarity on the part of members of the Tribunal with the panoply of online services in question, the parties kindly arranged for a number of demonstrations to take place where the services could be demonstrated to us and more importantly, where we could access and use the services for ourselves. There were two principal demonstrations, the second having been arranged by the time the hearing was about mid-way. The demonstrations took place at the London offices of Mr Steinthal's firm, Messrs Weil, Gotshal & Manges in the City and there exists among the documents a short programme recording what we were shown. We record that we found these demonstrations to have been of immense assistance in the adjudication of this matter. They have however reinforced our view that no amount of prose can do justice to what we saw and heard and that for a proper appreciation of the issues in these Applications, there is no substitute for actually using the services for oneself.

31. ***Shifting positions.*** During the course of the hearing, much play was made by Messrs. Carr, Weisselberg and Steinthal on the fact that since the Applications had been made, the Alliance had substantially to moderate its demands on a number of major issues and continued to do so down to the time of closing speeches and even after[19]. In a word, it was said that they had been shifting their case from an outright attempt to obtain what Mr Weisselberg termed 'an unprincipled windfall', trying that is, to capture revenue streams to which they had no conceivable right, to demands of more modest proportion[20] . There may be some truth in this but we do not regard that as necessarily a bad thing –or indeed anything unusual in cases such as this. With technology and business models such as we are dealing with here, there must, we feel, be room for early ranging shots to be fired. The narrowing of issues in litigation is always to be

[19] After the conclusion of the evidence, the Alliance sent the parties a letter dated 4 December 2006 ('**the 4 Dec. Letter'**) purporting to elucidate certain issues in the light of the evidence and the observations of the Tribunal. The Alliance was given leave to make short post-hearing submissions in writing. This resulted in inter partes correspondence which concluded on 23 January 2007.

[20] In fact, Mr Carr argued that in some respects their most recent demands were subtly more covetous by being dressed in woolly language. Mr Weisselberg was also of the view that the Alliance's case had become more 'hardline' during the course of the hearing.

welcomed and is not necessarily symptomatic of (for example), a 'try on'. We would mention that many of the Applicants also modified their cases as proceedings progressed –as may be seen from the settlements. In other words, these manoeuvres have had no impact on our Decision.

32. ***Mr Kenneth Steinthal*** Mr Kenneth Steinthal (of the New York Bar) is a member of the law firm Weil, Gotshal & Manges whose London office instructs him on behalf of the Remaining MSPs as their trial lawyer. At a procedural stage before the hearing began, Mr Steinthal, together with his colleague from the same firm, Mr Joe Salvo, sought leave to address the Tribunal. There was no opposition to the application and audience was accordingly given to both gentlemen.

33. By the time of closing speeches however, both the Alliance and the Academy had launched a personal attack on Mr Steinthal on the basis that he had misled the Tribunal in a material respect. The matter was almost entirely argued by Mr Charles Aldous QC, but what he submitted was (as we understood it) endorsed by Mr Rabinowitz QC on behalf of the Alliance.

34. The attack arose in relation to a substantive argument on the relevance of proper comparators which Mr Steinthal had advanced in apparently similar proceedings before The US Copyright Royalty Board ('the Board') in Washington DC in December 2006. There he was representing the Digital Media Association and its member companies America On Line Inc and Yahoo! Inc, to which he referred as 'webcasters'. As we understand it, the latter companies are closely related to two of the three remaining MSPs for whom Mr Steinthal has appeared in London. Copies of the US webcasters' written Preliminary Statement and Conclusions of Law were produced by Mr Aldous to support the complaint that one of the arguments proposed by the Remaining MSPs before the Tribunal was precisely the opposite to that espoused by Mr Steinthal in Washington before the Board. He also suggested that had it not been for some astute research on behalf of the Alliance in Washington, the matter might never have come to light. The point essentially concerned the historic licensing for public performance on radio in the US of musical works and the suitability of such licensing arrangements as a comparator or 'benchmark' for the purposes of the assessment with which the Board was then concerned.

35. Mr Steinthal, who it should be said had no warning of this attack, spent over an hour of his closing speech explaining what in fact he had been arguing before the Board. He first said that the US proceedings, the existence of which the Alliance had at all material times been well aware, were conducted in open court; there was thus never any question of covert manoeuvre on his part. He next referred at length to various issues and details arising in the US proceedings, to relevant US copyright law on the public performance of sound recordings and to other matters as well. In this way he sought to explain and justify the allegedly contradictory position into which he was said to have fallen.

36. In view of the way Mr Steinthal met this accusation and to the manner in which we have reached our own conclusions, we do not find it either profitable or necessary to revisit the detail of this incident. We were certainly not misled.

37. ***Unfair Exclusion of the Remaining MSPs from negotiations?*** It was more than once suggested by Mr Steinthal that the remaining MSPs were somehow deliberately excluded from the negotiations which led to the settlements[21]. Since these Applicants were offered the same terms as those who did negotiate and moreover are major players in the online music world with impressive legal advice to hand, this appeal for sympathy rings hollow – particularly as Mr Steinthal represented certain MSPs who did settle.

38. Some account nevertheless needs to be taken of the fact that the Remaining MSPs were indeed absent from the Settlement Agreement. They were of course very important players in the business. The effect of their absence on the levels of royalty eventually reached for webcasting services by those who did settle, is we believe, a legitimate matter for consideration by the Tribunal.

II THE TRIBUNAL'S APPROACH: GENERAL PRINCIPLES

The Statutory framework

39. Chapter VII CDPA '88 is entitled 'Copyright Licensing'. Section 116(1) and (3) provide as follows:

> '(1) In this Part, a "licensing scheme" means a scheme setting out –
> (a) the classes of case in which the operator of the scheme or the person on whose behalf he acts, is willing to grant copyright licences, and
> (b) the terms on which the licences would be granted in those classes of case; and for this purpose a "scheme" includes anything in the nature of a scheme, whether described as a scheme or as a tariff or by any other name
> (2) …..
> (3) In this section "copyright licences" means licences to do or authorise the doing of any of the acts restricted by copyright.'

40. We highlight this section because a major issue raised by the Applicants is that 'Gross Revenue' as defined in the New JOL covers activities for which no copyright licence can conceivably be required at law; the classic 'copyright language' of sub-section (3) has, they say, been conveniently overlooked by the Alliance.

41. The Applications have been brought under ss. 119, 121 and 126 of the Act. The terms of these and other relevant sections of the Act are so well known as to make it unnecessary to set them out fully and they are therefore incorporated into this Decision by reference. The group of sections in the Act which touch upon the power of the Tribunal to make orders after a reference has been made, all end with the phrase '*as the Tribunal may determine to be* ***reasonable in the***

[21] This was said upon the evidence of e.g. Mr Gabriel Levy, General Manager of Label Relations at RealNetworks: see Levy 3,§ 8.2.

circumstances'- or variants of it. In the exercise of its powers, the Tribunal therefore has a discretion of the '*widest and most general form'*[22]. It has also been said that it is a determination which is '*notoriously difficult'* to arrive at[23], being at the end of the day 'a judgment call' taking into account a wide variety of factors.

42. Sections 129 and 135 offer some statutory guidance on the matters to be taken into account in the exercise of the discretion. Section 129 ('*General considerations Unreasonable Discrimination*') requires the Tribunal in coming to its decision, to have regard to the existence of 'other schemes or licences', a topic commonly referred to in this jurisdiction as 'comparators'. The section provides as follows:

> 'In determining what is reasonable in 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.'

43. Section 135 is in more general terms and confirms the breadth of the discretion:

> 'The mention in sections 129-134 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'.

General approach

44. Before considering the relevant principles to be derived from past decisions, we should record that we are mindful of this general fact: that copyright (and thus the régime under which collecting societies operate), exists for the benefit of right holders – in this case, authors, musicians, performers etc. That benefit to the right holder is the primary policy of copyright has been present from the beginnings of modern copyright law[24]. Statutory 'users' rights' as such are quite limited: see for example, the Act, Chapter III ('*Acts permitted in Relation to Copyright Works'*)[25].

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[22] Per Harman J , AIRC v PPL (unreported) 16 January 1986.
[23] AEI v PPL [1998] EMLR 240 at 250.
[24] See for example, the Preamble to the Berne Convention ('BC') 1886, Art 9(1) and the use in the original of the phrase '*droit d'auteur'*. See also the WIPO Copyright Treaty Arts. 6-8 and the Infosoc Directive (2001/29/EC), recitals 9 and 10 and Art. 5(5).
[25] See also BC Art. 9(2) ('C*ertain Special Cases'*).

45. We mention this in the light of Mr Steinthal's broadest submission on behalf of the Remaining MSPs that certain of the terms (which he termed 'demands') proposed by the Alliance were 'outrageous' and that in the circumstances, his clients' response had had to be over-generous to a fault. The Alliance was, he suggested, exploiting a serendipitous right to participate in developments in information technology in which it had played no part and in which it had taken no risks. Moreover, he seemed disinclined even to acknowledge the practical (and mutual) benefits of collective licensing, benefits which have long been given universal statutory recognition. We consider this to be an unbalanced approach. The position is essentially this: the collecting societies have been accorded statutory (and indeed international) recognition in order to advance the proprietary (that is basically, the financial[26]) interests of the right holders who comprise their membership. But the effects of that responsibility may sometimes have to be tempered. An important purpose of the Tribunal (and indeed of its counterparts elsewhere) is therefore to curb any tendency to *unwarranted* gain as a result of the *de facto* monopoly position in which the collecting societies find themselves[27]. Overall however, the Tribunal's job as we see it is to favour neither side. It is to maintain a balance between copyright owners and users.

46. There is no presumption in favour of the referred scheme nor is there a presumption that a referred scheme should be varied [28]. As to the burden of proof this hardly featured in argument. On an application to the Tribunal, the burden of proof is on the applicant to show that the *particular* licence offered to him is *un*reasonable; but he does not have to show that the proposals of the licensing body are unreasonable on any footing[29].

Tribunal decisions considered

47. A number of decisions of the Tribunal and of its predecessor[30] (and appeals to the High Court) were cited in argument. Save perhaps on the issue of Gross Revenue, there was no significant disagreement between the parties as to the general principles to be applied or as to the relevant law. The parties did however differ in the emphasis they laid on the relevance of certain of these decisions to the present case, particularly the relevance of some older decisions which were given at a time before the existence (let alone the availability) of online musical offerings. We have taken this into account and further record that we have not felt ourselves to be *bound* by any earlier decision of this Tribunal (or of the PRT).We record that three authorities assumed particular importance: <u>BPI v MCPS</u> (no 2), <u>BSkyB v PRS</u> and <u>AIRC v PPL.</u> We therefore turn to the guidance which is to be found from previous decisions taking these in no particular order.

[26] "*What counts is money in the end*." The oft quoted words of Mr Nicholas Lowe a solicitor and former Director of Broadcasting at the PRS.
[27] <u>BSkyB v PRS</u> [1998] EMLR 193 at 214-215.
[28] <u>BPI v MCPS</u> (No 2) [1993] EMLR 556.
[29] <u>Manx Radio Case</u> (18/64) PRT unrep. 29 May 1965.
[30] The Performing Right Tribunal ('PRT').

48. **Fairness**. In the exercise of its discretion and in the light of the evidence, the Tribunal must determine whether the *legitimate financial expectations* of (in this case) the Alliance, acting on behalf of its right holders, are *reasonable* in all the relevant circumstances. The Tribunal performs a discretionary, balancing exercise wherein the result must be

> " both fair to the licensee in terms of the value to the licensee of having access to the copyright sound recordings, and also fair to the licensee in giving him a proper reward for the effort put into the exploitation of the licensees' intellectual property rights"[31]

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 licensee and a willing licensee of the copyright repertoire[32]. 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*'). The Alliance submitted that this approach, though certainly not wrong, is simplistic since it often does not take into account the benefits to the licensee of collective bargaining. Nonetheless, our assessment of the centrality of this consideration and its relevance to this case, is undiminished.

50. **Comparators[33]** As noted above, s. 129 of the Act *requires* the Tribunal to take into account schemes and licences 'to other persons in similar circumstances.' Mr Richard Boulton, the Applicants' principal expert, put the position with admirable clarity in his first Report, thus[34]:

> *" The comparable royalties approach is often regarded as the best approach to use in circumstances where the parties do not agree on the level of royalty. Negotiations between a willing licensor and a willing licensee, in the circumstances, will provide, in theory, the best available information about the level of a reasonable royalty."*

51. In AIRC v PPL[35], the Tribunal stressed the importance of comparators:

> 'It is for the Tribunal in assessing the transactions cited as comparable to decide to what extent the rights licensed are of the same *or a similar kind*, whether the transactions were concluded at arm's length with neither side affected by stress, and whether they were affected by legal factors which do

[31] AEI v PPL [1998] RPC 335 at 343.
[32] See for example, Working Men's Club & Institute Union Ltd v PRS [1992] RPC 227 at 232.
[33] Also called 'a readily available or appropriate proxy' in some jurisdictions.
[34] B7/33/1442.
[35] [1993]EMLR 181 at 218.

> not apply in this case. It is then for the Tribunal to adapt any relevant comparators to the case under review.'[*Emphasis added*]

Thus, starting with a cited comparator, it is open to the Tribunal to take notice of it (or of parts of it) and to use it (or reject it entirely) as the case may require. The authorities show that whilst the utility of comparators has frequently occupied the Tribunal's time, in practice they appear to have been more of a legitimate quarry (or template) for particular terms and figures rather than as full precedents for a particular licence. In a few cases, comparators, particularly comparators from overseas, have proved to possess very little probative value whatever.

52. On the issue of royalty rates, comparators have featured strongly in the arguments of both the Alliance and of the Remaining MSPs, reliance being placed (by the Alliance) upon the licensing of the same rights (i.e. in the New JOL) and (by the Remaining MSPs) other rights alleged to be of a similar kind. Not surprisingly the Alliance characterised the New JOL as being 'a compelling comparator ' in all respects – a contention robustly challenged by Mr Steinthal. Rival comparators emerged during the course of the evidence and we shall have to consider them in due course.

53. When one is dealing with the licensing of 'similar' rights, some comparators may be more relevant than others. For example, in cases where the exploitation of music requires licences both from the owners of the rights in the composition (i.e. the Alliance representing composers and publishers of music) and that of the owners of the rights in the sound recordings (i.e. the record companies or the PPL), the Tribunal has held that (a) these two types of rights are legitimate comparators, and (b) there is no reason to treat one as being qualitatively superior to the other[36]. Therefore said the Alliance, since such licences do exist, it is relevant to compare the present proposals with what the record companies (or PPL) receive for exploitation of their rights.

54. Where there are sufficiently comparable licences, the Tribunal should adopt a similar rate "*absent any special circumstances*": <u>AEI v PPL</u> *supra* at 256.

55. What one usually finds in the authorities is evidence of a *degree* of comparability, ranging from the superficial to the more realistic. iTunes submitted that even where the comparability was rather inexact, one could nonetheless take the comparables into account "*but scale them down because of the differences.*"[37]

56. Finally, this must be said of comparables: though the Tribunal may impose different rates upon different parties in respect of essentially the same rights, it

[36] The <u>Manx Radio case</u> (supra); <u>BEDA v PRS</u> (1August 1989); AIRC v PPL (16 January 1986).There is no reason to assert , a priori, that either of the two forms of copyright has a higher or lower value than the other: see <u>AIRC v PPL</u> [1993] EMLR 181 where the Tribunal decided that the PRS and the PPL tariffs should be "*in the same general range*"

[37]Cf <u>BPI v MCPS</u> (no 2) supra at 116.

must not thereby discriminate between licensees (see above § 41) unless there is "a logical reason for it"[38]

57. **A simple and workable tariff** The tariff should be simple and workable having regard to the service being licensed – "*with a straightforward rate structure based on straightforward definitions"*. Most tariffs can be shown to produce anomalies in certain circumstances but a complex rate structure will be more likely to produce anomalies (and thus problems) particularly at the margins of its rates: AIRC v PPL [1993] EMLR 181 at 229. Simplicity of operation and clarity of expression should always be a *desideratum*. In Universities UK v CLA [2002] RPC 693, the Tribunal said:

> " Overall we have been seeking to achieve a simple, economic, universal system promoting good education for the benefit of staff and students whilst at the same time achieving fair and reasonable remuneration for the owners of the rights." (at p726)

58. In these Applications, the desiderata of simplicity and practicality present formidable problems in relation to the definition of 'Gross Revenue': see Part VII below. The difficulty arises partly as a result of an inherently changing and complex technology and partly because of the sudden viability of upgraded business models and new modes of delivery of the products to be licensed. We were told of additions to the business models available as the case went on. For example, a US downloading service called Spiral Frog® made its appearance during the hearing in this context. In fact, in our judgment, 'Gross Revenue' is more or less incapable of technically succinct definition without invoking a broad (and thus according to the Applicants, unacceptable) simplification favoured by the Alliance. Nonetheless, in reaching our decision on this aspect of the Applications, we have chosen what we believe to be reasonably simple and workable solutions to the problem of definition.

59. **The revenue-based approach to royalty.** The decision of the Tribunal in AIRC v PPL [1993] EMLR 181 at 229 *et seq* endorsed the use of a revenue-based approach to royalty. We say 'endorsed' because a revenue-based tariff had already been *agreed* between the parties. The Tribunal had been called upon to rule on what a reasonable royalty was for licensing sound recordings for use in commercial radio in the UK. The applicants had in fact proposed a royalty of 3.5% of net advertising revenue (subject to certain qualifications) whilst the PPL had proposed a royalty of 15% of 'relevant revenue' calculated by reference to usage. We note in particular the following observation of the Tribunal (at 229):

> "The revenue-based approach …proceeds on the reasonable assumption that the stations will seek to maximise their revenue for sound commercial reasons. It is *an imperfect measure* of value because the revenue on which it is based is created by the station's entire broadcast output, its promotion of itself and its image as an advertising medium. PPL's music is only part of this…. Under the revenue-based system, the licensing body has the disadvantage that its royalty may become adversely affected by economic recession or by commercial misjudgements of the licensee. On the other hand

[38] BSkyB v PRS at 208.

> there is no direct connection between revenue and profit and under this system the licensing body shares in revenue whether or not the management skills of the station turn it into profit. While both sides accept the limitations of a revenue based system, they accept that there is a logic to it and that it should remain the basis upon which royalty should be assessed" [*Emphasis added*]

60. That, we believe, has relevance in these Applications where a revenue-based approach to royalty was also *agreed* at an early stage. Such agreement obviously makes practical sense. However, like the Tribunal in AIRC v PPL (and in BSkyB v PRS), we have been alive to the fact that this enquiry is at heart concerned with the licensing of copyright and not merely with the endorsement of sensible commercial arrangements[39]. The Tribunal said[40]:

> " However, although a revenue-based tariff is urged by both sides and has been adopted by us in the Decision, it is an over-simplification to see a *direct causal connection* between the use of the PPL repertoire and the achievement of advertising revenue. The playing of PPL repertoire would not result in the level of advertising revenue which the stations obtain without the stations' programming mix, their sales strategy and their marketing and promotional efforts." [*Emphasis added*]

61. Therefore within such *inter partes* consensus on a royalty-based approach there must be more; there must also be a *nexus* (or *'direct causal connection')* between use of the Alliance's repertoire and revenues earned by the Applicants- however 'imperfect' a measure that may appear.

62. **Free music and '*faute de mieux*'**. We shall deal with this requirement in the paragraphs which follow but before doing so we must highlight an argument based on the AIRC v PPL which was at the forefront of Mr Carr's case on the MNO's Disputed Contention[41]: that in that case (unlike this) there was in truth *no other source of revenue on which to levy a royalty.* From the outset, commercial radio stations were fully funded by commercial advertising. AIRC v PPL was therefore, he said (borrowing words from the decision of the Tribunal in BSkyB), a '*faute de mieux*' situation; AIRC v PPL was not applicable when a consumer has fully paid for e.g. a permanent download or a stream of music – as in the normal case he would do here in the present case. It does not therefore arise *unless the music is offered free as a result of advertising*[42].

63. **'Adequate Nexus'** or **'Sufficient Connection'** The need for 'direct causal connection' was stated in AIRC v PPL (supra).This was a topic common to all the remaining parties after the Settlement Agreements; and in connection with the 'Disputed Contentions', it was in effect, the *only* issue.

64. In the past, the Tribunal and its predecessor have undoubtedly rejected as unreasonable a royalty based on a percentage of revenue. The several authorities cited under this head demonstrate the requirement that there must indeed be a

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[39] What the Tribunal called '*a pleasing agreement*' in BSkyB v PRS (supra) at 218.
[40] At 207.
[41] And to a degree, Mr Weisselberg's as well on iTunes' Disputed Contention.
[42] Or logically, at a rate subsidised by. advertising.

sufficiency of connection between the licensee's revenue and the use of the Alliance's repertoire so as to make that revenue source 'commissionable'. Put another way, the Tribunal must always look for a 'sufficient connection' or 'close, direct relationship' between revenue and repertoire so as to make it *reasonable* to relate the royalty for use of the repertoire directly to that revenue. In the recent past, the Tribunal's attitude to revenue-based royalty has been palpably hostile:[43]

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> " The Tribunal is unable to accept that there is any adequate correlation between the use of music from the PRS repertoire by the Companies and the [revenue] of those Companies…. The question is…whether the fact that the music is -or may be to a greater or lesser extent- part of the package which attracts the television audiences and accordingly generates [revenue], establishes or helps to establish a sufficient connection between music and revenue, to make it reasonable to relate the royalty for the music use directly to [revenue]. We are satisfied that it does not… First, the television programme or commercial is the product of a wide variety of artistic and technical skills of which music is only a part. and not we think, in general, the predominant part; the smaller the significance of the contribution of a part to the whole, the less certain can any attribution of a generative effect be. The contrast with sound radio and, say, grand opera, is we think, illuminating"

65. The principle has been re-stated in a number of Tribunal decisions[44] all of which, *on the facts*, reject the existence of a close correlation between the repertoire and the revenue of the users. For example, in PRS v BEDA (PRT, unrep. 1 August 1989) in order for royalty to accrue, the Tribunal required

> 'a close direct relationship between the value of the input and the value of the output[45].

66. The Tribunal's decision in BSkyB [1998] EMLR 193 affords particular assistance on this point even though in that case the Tribunal again *rejected* the submission of the PRS that the royalty should be calculated as a percentage of BSkyB's net revenue receipts[46].

> "What offends one's common sense is that a single component of a complex final product such as a television programme should be remunerated on a basis which rises and falls with the revenues obtained from the final product, when that component may have had nothing at all to do with those changes in revenue."

Nonetheless, the *possibility* of excise on revenue was, perhaps for the first time, positively acknowledged[47]

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[43] ITCA v PRS ,(October 19 1983 PRT 38/81, pp 68-69). The Tribunal went on to give reasons which were specific to factors in that case.
[44] PRS v BEDA, BPI v MCPS, AIRC v PPL and BSkyB v PRS (supra).
[45] p. 6. The Tribunal held that there was no close connection between PRS' music and the total receipts of a discotheque. There was no risk-sharing and no incentive to perform in a mutually advantageous way. Symbiosis is not enough.
[46] At 217.
[47] At 219.

> "What the decided cases show is that, before one can ever use revenue as a measure of the value of the music to a broadcaster, one must be satisfied that there is an adequate nexus between the use of the music and revenues earned."

and:

> " We do not consider it correct to approach the issue before us as one of whether the revenue basis … is correct 'in principle': if one adopted that approach one would be in danger of losing sight of the overall objective. What we are to endeavour to do is to determine what approach is most 'reasonable in the circumstances' i.e. the circumstances of this case."
>
> "The role music plays in a company's output can vary widely. At one extreme was an example discussed in argument of the music played in the lift of the offices of a bank….At the other extreme might be the sale of records or sheet music, where the music is the whole or at least a vast proportion of what the consumer pays for. At some point on this 'spectrum' it could become appropriate to adopt a revenue-based approach: the question we have to decide is whether it is appropriate to do so in the present case."[48]

67. The requirement for 'close causal connection' has also been considered in another offline case. In BPI v MCPS [1993] EMLR 86, under their CD licence, the MCPS does not get a share of any other revenue which might simply 'result from' or 'arise in relation to the provision of or be 'driven by' or even be 'derived from' music content. The royalty rate was expressed as a percentage of published price to dealers (PPD) even though the 'profits available' were a relevant consideration 'but should by no means be regarded as determinative.'

68. As noted, in this case it has been agreed that, with appropriate qualification, a revenue - based royalty *is* appropriate, the qualification being a matter of degree over which there is a dispute. This consensus was reached, it seems, on the basis that it has an established precedent in relation to offline music (physical product and radio – see above) which we were told, has worked well enough over many years. So much for the principle. What the authorities warn against however is the illegitimacy of over-broadening that revenue base; in the 'spectrum' referred to in BSkyB, there must be a defined *ne plus ultra*. If there were not, one runs the risk of undermining the legal justification for the 'royalty to revenue link' altogether.

69. We should record here that our attention was drawn to the fact that revenue - based royalty is a fact of life in collective licensing practice in overseas jurisdictions, even in those having a regime like our own: see: APRA v ABC (1985) 5 IPR 449 (Australia) and SBC v PRS [1991] FSR 573 (Singapore).

70. **Risk sharing** We shall next raise 'risk sharing' since it is quite clear (if it is not actually accepted) that the Alliance has borne no risk in delivering to the public any of the musical offerings with which we are here concerned.

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[48] At 221.

71. The question of risk sharing has been a relevant issue in numerous cases before the Tribunal. In the extreme case where there is no risk-sharing, the Tribunal in BSkyB considered that the revenue basis was actually a poor approach to remuneration for the use of music.

> "But where revenues may be rising or falling rapidly for reasons connected with the introduction of new technology and entrepreneurial risk-taking and unconnected with music, we think the revenue basis may be less appropriate." [49]

So risk sharing is an issue we have to factor into our decision on what is 'reasonable in the circumstances'.

72. In addressing the relevance of this consideration, Tribunals have referred to the analogy with revenue sharing arrangements and partnerships where revenue *and* risk are usually shared. On the other hand, in situations in which the issue is the use of the repertoire by a licensee, the norm is that PRS does not share in the commercial risk associated with the viability of the delivery means in question. This is a factor which the Tribunal will take into account in striking a tariff. In ITCA v PRS[50] for example, the Tribunal said:

> "We make one general point at this stage which we think of importance. The point is that it is not….right to regard those whom the PRS represents as co-adventurers in the business of television with the Companies. They are not."

III THE NEW JOL

The eve of trial settlements: An overview

73. We shall now consider the pre-trial settlements in more detail.

74. On 28 September 2006, the **BPI,** the Alliance and the Academy resolved their differences, the outcome being recorded in the Settlement Agreement. The Settlement Agreement has appended to it (as Schedule 1) the New JOL. As a result of the settlement, BPI agreed to withdraw its reference, its written submissions and its witnesses of fact evidence, the only evidence remaining being that of the experts Mr Richard Boulton and Mr Derek Ridyard who now gave evidence on behalf of all the Applicants. The New JOL has been drafted to cover all the online music services in which the Applicants are likely to be interested.

75. On the same date, **iTunes and the MNOs** also settled all their differences with the Alliance on the basis of the same terms and conditions *save for*:

[49] At 216 and 219.
[50] Supra at § 6.4.

(a) in respect of iTunes, 'the iTunes **Disputed Contention'**, and
(b) in respect of the MNOs , 'the MNOs' **Disputed Contention'**.

As a result of the settlements, both iTunes and the MNOs no longer rely upon a good deal of their evidence. Both however rely upon parts of Mr Boulton's reports. The MNOs also rely upon Mr Bill's first witness statement. iTunes also relied on some of the existing evidence including sections of Mr Eddy Cue's first and second witness statements. iTunes was formerly a member of the MSP consortium but since partial settlement, it parted company with them and is now of course, separately represented

76. These Disputed Contentions (which are not identical) are defined[51] in the Settlement Agreement and relate to the definition of '**Gross Revenue'**. The Disputed Contentions have this in common however: both address a situation where the full price of the music consumed is not paid, the difference having been made up by 'advertising revenue'[52]. Gross Revenue is considered *in extenso* in Part VII of this decision,

77. The ***MNOs Disputed Contention*** allows them to continue as Applicants solely for the purpose of contending that:

> *"revenue derived from advertising, sponsorship and commissions on or in connection with a **Mobile** Licensed Service should only be included within Gross Revenue [as defined] where that revenue is earned as a result of an advertisement, sponsorship or a click-through link located on a page of a Licensed Service from which the **Mobile** Licensed Service is actually offered (subject to apportionment where other services not requiring a licence are offered from the same page) and only where that Mobile Licensed Service is offered to the User **for free**."*

78. The ***iTunes Disputed Contention*** allows them to continue as Applicants solely for the purpose of contending that

> *" revenue derived from advertising, sponsorship and commissions on or in connection with a Licensed Service should only be included within Gross Revenue [as defined] where that revenue is earned as a result of an advertisement, sponsorship or a click-through link located on a page of a Licensed Service from which the Licensed Service is actually offered (subject to apportionment where other services not requiring a licence are offered from the same page) and only where the Licensed Service is offered to the User **at a price which has been artificially depressed to reflect such revenue.***

79. The difference in wording between the two Disputed Contentions has been emboldened and will require separate consideration.

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[51] H/1/3.
[52] Hereafter, advertising, sponsorship and commission revenue is most often collectively referred to as '**advertising revenue'.**

80. It is to be observed that:

(i) In both of the Disputed Contentions, the entrée for royalty to arise is advertising revenue generated from a page (that is, *any* page including the home page) from which a Licensed Service is 'actually offered'. The implications of music being 'actually offered' are discussed below under 'Gross Revenue'.

(ii) The possible need to apportion in order to calculate the revenue due is envisaged in both Disputed Contentions.

(iii) Neither of these Disputed Contentions formed part of the cases of either iTunes or the MNOs as originally pleaded.

(iv) iTunes and the MNOs agree that the approach to Gross Revenue adopted by the Alliance in the New JOL is both unreasonable and unacceptable.

(v) However, subject to these Disputed Contentions, iTunes and the MNO's fully endorse the New JOL. Thus, paragraph 12(d) of the Settlement Agreement reads:

[subject to the two Disputed Contentions]

(vi) the Settlement Agreement including the [New JOL] is a package deal and taken in its entirety, its terms are fair and reasonable; and

(vii) MCPS, PRS the Academy the BPI the MNOs and iTunes shall advance and defend the position in the Copyright Tribunal (or any appeal)….and shall contend that the [New JOL] represents the terms that should apply to all licensees for online and mobile music services within the scope of the Scheme for the purposes of the References",

(iv) Thus, iTunes and the MNOs now accept (subject to their Disputed Contentions) that when viewed as a whole, the New JOL is 'fair and reasonable as applied to <u>all licensees'</u> (our emphasis). Looking ahead, this acknowledgement therefore puts considerable space between these Applicants and the Remaining MSPs who at any rate at the start of the hearing, seemed to be contesting just about everything of importance except rates and minima for *permanent and limited downloads* (see below).

81. **Napster and MusicNet** settled their dispute with the Alliance on 6 October 2006 (the **Napster Settlement'**[53]) and on 10 October 2006, **Sony**[54] also settled

[53] H/6/82.

with the Alliance (the **Sony Settlement**). By these settlements, the parties withdrew their Applications and evidence and agreed to be bound by the Tribunal's decision on all webcasting issues and on the outcome of iTunes' Disputed Contention.

82. The Napster and Sony Settlements imported a significant limitation into the definition of 'Gross Revenue' contained in the New JOL. This limitation, which has been referred to as the Home Page Concession, relates *only* to advertising on the 'home page'. It has been endorsed by iTunes and the MNOs as a step in the right direction – but, so they argue, it still does not go far enough. We shall return to the Home Page Concession under 'Gross Revenue' below.

83. We have mentioned that the Napster/MusicNet and Sony Settlements were all expressly made subject to the outcome of the *iTunes* Disputed Contention. For this reason, Mr Weisselberg contends (in our view reasonably) that the iTunes Disputed Contention appears to have 'a degree of support' from Napster, MusicNet and Sony.

84. The **Remaining MSPs** have not reached any settlement with the Alliance. They began by pursuing their cases on a broad range of pleaded issues[55]: royalty rates, revenue base and minima for everything except permanent downloads, Gross Revenue, audio-visual deductions, new format discounts, proper licensee and non-alliance repertoire. By the close of the hearing however, we concluded that at any rate, *some* of these matters were no longer in contention.

85. All the parties' settlement documents have been conveniently collected in Court Bundle H. The New JOL governs the licensing of the signatories' online services for three years only, that is, from 1 July 2006. However, as it appears to be a groundbreaking event, its effect may be felt well beyond its expiry date.

86. We would observe that in terms of market share, the Alliance has now largely settled its differences with the majority of the online music industry in this country. Looked at another way, out of twelve original Applicants, only three of the MSPs (hence 'the Remaining MSPs') have failed to come to any sort of settlement. There is no need to elaborate on the facts leading to these settlements other than to say that the parties involved are major players in the online music industry (both national and international) who (as it appears to us), were driven by commercial considerations to strike a mutually beneficial bargain. In so doing, in addition to their extensive in-house expertise, they were assisted by an abundance of specialist lawyers and also by experts in the industry.

87. The importance of the New JOL to this case can hardly be exaggerated. Not surprisingly, it is the Alliance's 'compelling' comparator upon which their case largely turns. We have already considered the Tribunal's jurisprudence in relation to comparators but Mr Rabinowitz submitted (rightly in our view) that in this Application, the following observation of the Tribunal was particularly apposite:

[54] H/8/133.
[55] A6/1.

> "It is for the Tribunal in assessing transactions cited as comparable to decide to what extent the rights licensed are of the same or a similar kind, whether the transactions were concluded at arm's length with neither side affected by stress, and whether they were affected by legal factors which do not apply in this case. It is then for the Tribunal to adopt any relevant comparators to the case under review."[56]

88. As for 'stress', in spite of a suggestion by Mr Steinthal[57] that the negotiations were conducted under pressure to achieve a deal quickly[58] and *were* therefore conducted under 'stress', we have found no evidence to justify that submission. According to Mr Geoff Taylor[59], a major factor which led to the settlement was in fact a commendable desire to save money by not undergoing a trial.

89. In the light of this and the circumstances leading to the New JOL, Mr Steinthal evidently had an uphill task in trying to persuade us to adopt other (for instance, offline) comparators as being more relevant. We shall assess the relevance of the New JOL and these other comparators later in this decision.

The New JOL[60]: The Royalty Table

90. For the purposes of the hearing, the Alliance and the Academy made use of a synoptic summary of what had been agreed in the settlements regarding royalties for the services in issue. iTunes and the MNOs were also able to make use of this table without difficulty. We have referred to this as '**the Royalty Table**' and it is reproduced below.

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[56] AIRC v PPL [1993] EMLR 181 at 218.
[57] And at one stage by the Applicants' expert Mr Boulton.
[58] "*Necessity*" said Mr Steinthal, "*never makes a good bargain.*"
[59] Formerly General Counsel to the BPI
[60] H/1/13.

Service	*Rate*	*Minimum*
Permanent Download	**8%**	**£0.04** per download - reducing by degrees for larger bundles of tracks, or certain older tracks, to £0.02 (in respect of a bundle of thirty or more)
Limited Download or On Demand Service	**8%**	- Mobile Subscription: **£0.60** per subscriber per month - PC Subscription: **£0.40** per subscriber per month - Limited Subscription: **£0.20** per subscriber per month - All others: **£0.0022** per Musical Work communicated to the public
Special Webcasting (which means a premium or interactive service where more than 50% of the content is by a single artist or band)	**8%**	- **£0.0022** per Musical Work played (if not subscription) - if the service is subscription, minimum is to be negotiated in good faith
Premium or Interactive Webcasting	**6.5%**	- Subscription: **£0.22** per subscriber per month - Otherwise, **£0.00085** per musical work communicated to the public
Pure Webcasting	**6.5%**	- Subscription: **£0.22** per subscriber per month - Otherwise, **£0.0006** per musical work communicated to the public
Mobile Permanent Downloads and other Mobile services	Rates and minima as for the services above, except that: For Mobile Permanent Downloads, the applicable revenue is reduced by 15% For all other Mobile Services, the applicable revenue is reduced by 7.5% The above reductions apply until prices converge with non-mobile prices	

91. The categories of licensed services identified in the Royalty Table correspond with those identified in the definition schedule (Schedule 1) to the New JOL[61]. The Remaining MSPs took issue primarily with the webcasting items in the Royalty Table but in our view made no important submissions regarding the other parts of it. They had no comment on the *rate* for the On Demand Service but they did object to the existence of a minimum in relation to that service. With regard to the remainder, they took issue with the way the webcasting services were identified with the webcasting rates, with the need for minima and with the rates thereof.

92. We shall next consider these services in more detail.

Permanent downloads.

93. The Tribunal has often been concerned with determining rates for a spectrum of services and this case is no exception. In this case our task has been made easier since the settlements to which we have referred have at least yielded a highest rate (8%) which is not in dispute and which is undoubtedly relevant to what the appropriate level should be for other services[62] . This ceiling rate relates first to what are termed **Permanent Downloads**[63], that is, to transfers of music from a website to for example, a computer or mobile telephone for permanent retention and use whenever the purchaser wishes. We have regarded permanent downloads as the online analogue of a CD. A classic case of permanent download will be the purchase by a subscriber of an item offered for sale by say, iTunes' Store for use on an iPod[64]. Neither the need for a minimum royalty in this category of service nor its value have been questioned[65].

Limited downloads and on demand services

94. A **Limited Download** (also referred to as an LD) is similar to a permanent download and the royalty rate for it was agreed to be the same. Limited downloads differ from permanent downloads in that the consumer's use of the copy is in some way restricted by associated technology. A limited download may be intentionally ephemeral in nature commonly, by means of a technology called 'digital rights management' or DRM. This makes a file unusable when a subscription ends. The minima here are however different to those for a permanent download. In the same category are **on demand services (**or **on demand** s**treaming)**[66] where an offering is streamed to the listener to enable him to listen once, twice or a number of times during the period he subscribes to the service. 'On Demand Streaming' does not permit an offering to be downloaded for copying but the user has in many respects

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[61] See 'Music Service' in H/1/35
[62] Mr Boulton D4/164
[63] As far as we can tell, this was said by counsel to be synonymous with an FTD.
[64] In fact, the iTunes service is funded through retail sales revenue and not at present as a result of advertising. But, said Mr Cue, Global Vice-President of iTunes, iTunes may well carry advertising in future - hence their interest in these Applications.
[65] Which will be of significance when we examine the Remaining MSPs' reluctance even to contemplate the propriety of minima as such in relation to other services.
[66] 'Streaming' is a technique for transferring music in a continuous stream for use once and without retention of a copy. ODS is thus very similar to an LD and the two are often associated.

the same access to and ability to enjoy a piece of music as the owner of a digital copy.

95. In either case, the user simply initiates the more limited service but does not realistically interact with what he gets, once he gets it. We need say little more about either permanent or limited downloads since the Remaining MSPs did not take issue with the New JOL in relation to these categories of service. A disagreement arose regarding minima (and only minima) with on demand streaming

96. LD/ODSs are offered by a number of the MSPs. Regarding on demand streaming, Napster, a signatory to the Settlements, offers a subscription-funded limited download and on demand streaming service.

97. The rates for permanent downloads and LD/ODS' were established as the result of classic negotiation and compromise: the Alliance came *down* (12% to 8%) whilst the Applicants went *up*, both as to the rate applicable to the service itself and to the presence of relevant minimum rates[67].

98. The present significance of the position of permanent and limited downloads in the Royalty Table is that it fixes one end of a spectrum of services which involves an incremental degree of control or interactivity by the user on the delivery (i.e. form, duration and timing) of the music. The points on this spectrum are to some degree, interrelated.

Pure webcasting

99. At the other end of the spectrum is **Pure Webcasting.** Here the user receives a stream of back to back music, the stream consisting of pre-programmed music chosen *by the MSP*. It is in fact non-interactive and any potential for interactivity (including even pausing the stream of music or skipping and rating of tracks) is prohibited.

100. Mr Steinthal suggests that this is the online equivalent of a terrestrial commercial radio station broadcasting mainly music. Radio @ AOL, which has over a hundred channels available, is he says, an example of this kind of service. We were told that AOL's channels are largely 'genre specific'. Also in this category, RealNetworks apparently has an even larger mood -specific repertoire. In addition, with pure webcasting, there is no intrusion of the human voice. Since webcasting (or as he called it 'General Webcasting') formed the major part of Mr Steinthal's case, we shall return to it later in detail.

101. In between lie **Premium and Interactive Webcasting -** the so-called 'intermediate services'[68].This is webcasting which does not satisfy the pure webcasting prohibitions and includes such personalised services as LAUNCHcast and Pandora.

[67] Minima had hitherto been opposed as such.
[68] Also in Mr Steinthal's parlance, 'General Webcasting'.

Special webcasting

102. This is a service where the user can choose a stream of music, the majority of which comprises works from one source – an artist, a group/ensemble or the record of a particular concert, for example. This enables a listener to enjoy an entire album of a particular artist or event. Though we have no recollection of it being demonstrated to us, it seems to be very similar to on demand streaming and attracts a royalty of 8%. In fact, there was little evidence about special webcasting. Mr Steinthal said[69]:

> *" Put aside Special Webcasting...it is not something you should worry about. We do not know of anybody doing it right now in this market."*

Though he promised to return the special webcasting 'later', we cannot find relevant further reference to it. Evidently it is not yet an important offering and we need say no more about it.

IV THE WITNESSES

103. The names of those who gave evidence at the hearing together with a summary of their employment details are set out in **Annex I** to this Decision. The bulk of the evidence given at trial was expert evidence.

Witnesses of fact

104. We have already identified some of the witnesses of fact in the foregoing narrative. We have no particular comment to make on the quality of any of them as witnesses; they were we believe, all trying to assist the Tribunal and in addition, no serious attack was made upon any of them. The evidence of some was no doubt of more relevance than that of others but there is no need separately to dwell upon the relative contribution made by each. Evidence was offered on behalf of each of the three Remaining MSPs. Also, three witnesses, Mr Geoff Taylor (ex-BPI and General Counsel), Mr Mark Mooradian (MusicNet Inc.) and Mr Andrew Lee (T-Mobile) were called by Mr Steinthal by means of witness summonses. Mr Taylor's evidence was, we felt, particularly fair, helpful and clear. Mr Jonathan Bill, the former head of advertising and industry at Vodafone Ltd gave evidence which we found most useful on a number of aspects of the case. Another witness, Mr Eddy Cue, Vice-President of Apple's iTunes gave evidence from the USA by video link, which was in fact hardly challenged. He had been responsible for the development and implementation of the iTunes Store. The latter offers millions of tracks of music, audio-books, videos, movies, and no doubt other things too.

105. We found the evidence of fact relating to the range of online music services which are (and may soon become) available to have been particularly illuminating – and largely uncontroversial. This evidence confirmed our initial impression that in these Applications we are concerned with a rapidly developing and commercially

[69] D1/23

exciting area of business . We consider that this must have been well in the minds of all the signatories to the New JOL – whatever might have been their commercial interests at the time. We say this in response to Mr Steinthal's frequent assertion[70] that the settling parties had no immediate commercial interest in the terms of the New JOL in so far as they related to webcasting, that such terms were part of a 'package' and that they were therefore unreliable as comparators. We consider it unrealistic to regard the music industry as being blinkered and compartmentalised as Mr Steinthal (and to some extent Mr Boulton) suggested. Quite apart from the evidence relating to the extant interests of Vodafone in webcasting (see below), these terms were, we consider, given adequate commercial consideration by the signatories who in truth had at least *an* interest in these matters[71].

Expert witnesses.

106. Our assessment of the expert witnesses[72] cannot be summarised as we have done with the 'lay' witnesses - as Mr Rabinowitz has called them. In the first place, there was serious conflict as to how the Tribunal should treat some of the expert evidence, of what value it was (if any), and whether it was materially wrong. In essence:

(a) the Alliance devoted most of the cross-examination of Mr Boulton, the Applicants' main expert, to attacking his qualifications as a 'licensing expert', his credibility, his independence and the admissibility of some of his evidence - rather than going to his 'raw' evidence as such. With an expert of the calibre of Mr Boulton, this was a risky tactic.

(b) Ms Enders, one of the Alliance's experts, was said by Mr Carr to have misunderstood her role and to have spent inordinate time giving evidence which was in fact of little or no use to the Tribunal. Mr Weisselberg's criticism was that she was a 'poor and unimpressive witness'. Mr Steinthal's criticism of Ms Enders was even more radical.

We shall therefore have to go into the matter of the experts' evidence at some length.

107. **The expert's role** We shall first identify our approach to assessing the parties' contentions regarding the expert evidence. The general role of the expert is epitomised in CPR, r. 35 and the notes thereon. In the light of the massive quantity of expert evidence filed by both sides, we first reproduce the following words of CPR, Part 35.1[73]:

> 'Expert evidence shall be *restricted* to what is reasonably required to resolve the proceedings.'[Emphasis added].

108. In addition to the well-known observations of Creswell J in The Ikarian Reefer [1993] FSR 563, there are numerous other authorities relating to the role of expert

[70] See for example, his opening speech: D1/8.
[71] This was actually confirmed by Mr Taylor of BPI: D6/71.
[72] Whose names and provenance are also set out in **Annex I.**
[73] See also The Chancery Guide 2005 (" Expert Evidence") §§ 4.6-4.9 and 8.16-8.18.

witnesses. Though stated in relation to a patent action, we believe that in a case like this there is good sense in the further characterisation of the court expert given by Jacob LJ in Rockwater Ltd v Technip France SA and another [2004] RPC 919. He said:

> "…they come as teachers…What matters is how good they are at explaining things."

In Cala Homes (South) Ltd v McAlpine Ltd [1995] FSR 818 at 843, Laddie J said:

> "But in the case of an expert witness the court is likely to lower its guard. Of course the court will be aware that a party is likely to choose as its expert someone whose view is most sympathetic to its position. Subject to that caveat, the court is likely to assume that the expert witness is more interested in being honest and right than in ensuring that one side or another wins. An expert should not consider that it is his job to stand shoulder to shoulder through thick and thin with the side which is paying his bill."

In AEI v PPL (supra) at 357, the Tribunal said:

> "It is obviously difficult to draw a line between what is relevant evidence and what is either legal argument and comment on facts as to which the witnesses have no real relevant experience or expertise. Nevertheless for the future, we would suggest that it is a waste of time and money for the parties to file argument under the guise of accounting evidence."

109. Before considering the expert witnesses, we would record that:

(a) all such witnesses possessed both academic and professional qualifications appropriate to issues in these Applications. These are to be found in their witness statements and need not be set out here.
(b) most of the written evidence had been served before the time of the settlements and the relevance of much of it was in our view diminished if not overtaken by the appearance of the New JOL; and
(c) one of the Applicants' witnesses, a Mr Derek Ridyard of RBB, an economist, made two reports, largely dealing with permanent downloads. Since he was neither cross-examined nor hardly even mentioned at the hearing, we need say no more about him.

110. **The Experts' Fees** The principal expert witnesses were Ms Claire Enders of Enders Analysis for the Alliance and Mr Richard Boulton of LECG Ltd for the Applicants. Towards the end of the hearing, we became concerned with the value of much of the evidence of these experts and invited the parties to state in round figures the professional fees charged for preparing their reports (that is, excluding VAT and their charges for attendance at the hearing). Ms Enders informed us that her firm had charged the Alliance about £ 750,000[74] whereas Mr Boulton said that his firm had charged the Applicants a little less, some £685,000[75]. Mr MacGregor,

[74] D11/198.
[75] D12/85.

another expert called by the Alliance, booked fees of £810,000[76]. Add to these the fees of one other expert and the cost of their attendance at the hearing, one arrives at a very substantial sum of money.

111. Incurring expert fees of this order of magnitude (and even taking into account the existence of the Settlement and the substantial sums of money at stake), was in our view, seriously disproportionate. The blame for this, we feel, must fall on all the parties.

112. Finally mention was made by the Alliance of the need to disregard expert evidence which is directed to a question in issue for the court, since this may usurp the role of the court or tribunal. We detect however some slight change in the attitude of the courts to an expert opining on an 'ultimate question' which is not one of law (see for example, Rockwater, *supra*). However whilst such an opinion may now be admissible, the court need not of course accept it. It may nonetheless consider the underlying reasons for any relevant opinion to assess its cogency.

113. **Ms Claire Enders** Ms Enders is an 'industry expert' and is Chief Executive of Enders Analysis which analyses industry facts and compiles assessments on strategic issues facing the media and telecommunications industries[77]. She is thus (as Mr Carr said) a commentator or a 'highly-paid industry observer" (as Mr Steinthal said), rather than being a lively participant in any relevant field – such as for example, Mr Cue of iTunes. We do not however regard this as a damaging criticism of this witness; one hardly needs to be a member of a football team to have an informed view about its performance. Ms Enders told us that she had never before appeared in court as an expert witness. She was cross-examined, vigorously and at length, by Messrs Carr, Steinthal and Weisselberg during which she made it clear on a number of occasions (rightly, in Mr Rabinowitz's view) that unlike Mr Boulton, she was not a 'licensing expert'. This statement was characterised by the Applicants merely as an unhelpful avoidance tactic.

114. With an eye no doubt on comparables, Ms Enders gave evidence about trade practices in a large number of media businesses and in particular in the online, offline and telecoms industries - and indeed in certain satellite industries (such as the place of music in the commercial radio and entertainment industries). She also gave evidence on potentially comparable markets, products and services on which licences had been granted by collecting societies. In particular, she gave evidence to refute the suggestion that webcasting and commercial broadcast music should be regarded as comparable products.

115. The MNOs made no personal criticism of Ms Enders but said that she had misunderstood her role and thus that her evidence was of little assistance to the Tribunal. It was said by all the Applicants that her evidence was unreliable (because it had been largely collated from third party sources) and in relation to comparables, was of little assistance to the Tribunal.

[76] D12/83
[77] Her CV is to be found at E7/17/1770.

116. Even taking into account Ms Enders' inexperience in this jurisdiction, her performance as an expert was, we thought, rather uninspiring. Her reports (which comprised a fulsome lever arch file of evidence together with numerous lever arch volumes of exhibits thereto) consisted to a large extent of data which had indeed been sourced by others, sometimes by a team which she herself led and the reliability of whose work she (often unquestioningly) relied on - only to find it wanting on closer examination. We certainly sympathise with the impossibility of mastering everything within so large a corpus of material. Nonetheless, on a number of key issues she seemed confused, occasionally inaccurate[78] and, more importantly, sometimes unable to provide reasons for the assumptions upon which her evidence was based. Surprisingly, she had not actually read the New JOL but relied on a summary thereof. We do not wish to give the impression however that Ms Enders' evidence was misleading; it was not. But we were not greatly assisted by it.

117. **Mr Richard Boulton** is a director of LECG Ltd ('LECG') and had been an accountant with Arthur Anderson for some 20 years[79]. LECG is a global expert services firm which provides courts, lawyers, regulators and governments with independent advice and analysis on matters of economics, finance and strategy. Mr Boulton gave evidence as a forensic accountant and in addition (and to a greater extent), as what he called a 'licensing expert'. He had in fact a double advantage over Ms Enders: he has given evidence before the Tribunal (and to the courts) on the licensing of IP rights (and on other issues) on *many* previous occasions - and he is also a practising barrister. Generally speaking, he was a knowledgeable witness in the field of licensing IP rights and had ready answers to what was put to him. Moreover, he gave a polished and confident performance as an expert.

118. As will be seen, his status as a 'licensing expert' was nonetheless subject of particular criticism by the Alliance and a number of attacks were made on Mr Boulton personally [80]– all of which in our view, failed.

119. In his first report, Mr Boulton said that his instructions were to make a report[81]:

> *" based upon [his] experience in licensing negotiations, on the structure and level of a reasonable royalty for the supply of music content online."*

120. Our attention was however drawn by Mr Rabinowitz to the order of the Tribunal regarding experts (which is always made on such occasions)[82] and in particular to the fact that his role as expert on 'licensing' as such was neither suggested nor sanctioned therein. Both Mr Rabinowitz and Mr Aldous further submitted that this emerging yet unapproved expert *persona* enabled Mr Boulton to stray into impermissible territory in that (in particular) it was inappropriate for him to express opinions about what royalty rates or minima should prevail for particular services – or indeed what general terms should be present in a licensing agreement of the sort under consideration. The Alliance in fact recorded their objection to Mr

[78] For example in relation to Ofcom Reports
[79] His CV is at B7/33/1612-1619.
[80] Such as suggesting, that his present evidence was inconsistent with evidence given in other cases.
[81] B7/1383.
[82] A5/82/2.

Boulton's role at an early stage. In the result, said the Alliance, the parts of Mr Boulton's reports most relied on by the Applicants were little short of extended submissions, rephrased later by counsel as submissions. The confusion of roles on Mr Boulton's part demonstrated a serious lack of objectivity, so they submitted.

121. We have found the demarcation of expertise in this jurisdiction to be a rather grey area and have noted that other Tribunals have found likewise. As a forensic accountant, Mr Boulton was of course free to give evidence on matters such as costs, investments, revenue streams and their relevance etc and to provide comment and criticism of industry reports on topics such as statistics, revenue sources and similar technical matters. Indeed he did so. In our view he was also entitled to express an opinion about which comparable licence agreements (or parts thereof) might (or might not) be relevant comparables (see above). But in our view it was not helpful in this case for him to opine on what rates of royalty (or minima) were reasonable for a particular service, what deductions should apply and so on. Such evidence tends to become "*a mere bit of empty rhetoric*" Wigmore, *Evidence,* (Chadbourn rev) § 1920. These are core matters for the decision of the Tribunal in the light of the evidence. The Tribunal's function on terms and rates must not be usurped by the views of a 'licensing expert', however experienced. In reaching our decisions, we have in fact borne well in mind both Mr Boulton's considerable experience as an expert and our essential tasks as a Tribunal. We have not allowed his views as to the 'ultimate questions' to cloud our judgment – but neither have we as it were, struck them out. We have made frequent use of Mr Boulton's general expertise in the field of IP licensing, as will be seen.

122. Two other experts gave evidence for the Alliance, a forensic accountant, **Mr Gervase MacGregor** and an economist, **Mr Zoltan Biro**. Mr MacGregor was a practicing chartered accountant with the firm BDO Stoy Hayward LLP[83]. Mr MacGregor's evidence was largely directed to challenging Mr Boulton's facts and figures. He disagreed with Mr Boulton on a number of accountancy matters and complained (with justification in our view) of the limited extent of the Applicants' disclosure which he said, he needed in order to prepare his response. He said that he had no material adequately to challenge Mr Boulton's raw inputs. However, as many of these issues were of more significance before the Settlement Agreements, we need not now analyse these debates or their outcome. We were however to some extent assisted by his evidence.

123. **Mr Biro** leads a consultancy specialising in economic analysis: Frontier Economics Ltd[84]. Mr Biro gave evidence as to how different technologies might lead to different values being attributed to the music content of offerings to the public. He also considered that the Tribunal might gain assistance on royalty rates from consideration of the agreements made between the MSPs and the record companies/PPL. We found Mr Biro to be a most helpful witness, having a clear manner of delivery and explanation combined with confidence in what he said.

[83] His CV is at E6/15/1386
[84] His CV is at E6/13/1325

V COMPARATORS

Is the New JOL a proper 'comparator'?

124. We shall next consider whether the New JOL may be regarded as the nearest 'comparator' in enabling us to reach a view on the statutory test of 'reasonableness'. We have already set out the terms of s. 129 of the Act[85] which *inter alia* requires[86] consideration of comparators in reaching a conclusion as to whether the terms of a licensing scheme are '*reasonable in the circumstances'*. This issue concerned only the Remaining MSPs' licence, on whose behalf, Mr Steinthal submitted that the New JOL was not at all suitable in this respect[87].

125. **The Alliance's case.** This aspect of the case, said the Alliance, was clear. The New JOL was a classic example of the outcome of a balanced compromise between a willing licensor and a willing licensee; it is indeed a 'compelling' comparable. Moreover, it is recent, has involved most of the major players in the industry and was concluded after protracted negotiation with the benefit of ample legal and technical back up. As against the Remaining MSPs' proposals, it could hardly be more relevant, said both Mr Rabinowitz and Mr Aldous. In its entirety it articulates the proper 'going terms' and the Tribunal should have no qualms about applying them to the Remaining MSPs' licence. Moreover, the Remaining MSPs' did not even attempt to try and work out a compromise with the Alliance when they had the opportunity to do so.

126. **The Remaining MSPs' case.** The comparator pleaded by the MSPs was traditional commercial radio:

> 'The Webcasters maintain that the most appropriate comparator for determining a reasonable rate for General Webcasting[88] is traditional radio broadcasting."[89]

127. Mr Steinthal was initially dismissive of even the general *relevance* of the New JOL. His submission was that as webcasting is "functionally identical to" terrestrial radio, the main agreement relating to the latter (an agreement referred to as 'the CRCA Agreement') was the best comparator. Furthermore, he submitted that those subscribing to the New JOL were not in reality commercially concerned with any form of webcasting. Thus, he said, those parts of the New JOL which were concerned with webcasting (in particular) were quite unreliable as comparators and should be disregarded: " *Plainly, no entity with a meaningful interest in webcasting was at the table"*[90]. Referring to the services available in the New JOL, his invitation to us was to disregard not only most of the categories of service identified

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[85] Para 42 above
[86] '*shall have regard'*.
[87] The definition of 'Gross Revenue' in the New JOL (in either the BPI version or with the Home Page Concession) cannot of course be used as a comparator against iTunes and the MNOs as they deliberately excepted themselves from it.

[88] According to Mr Steinthal's submissions, this means all webcasting except perhaps, special webcasting.
[89] A6/1/11.5.5
[90] D1/28

but also the rates for anything 'below' that of on-demand streaming. The position of the Remaining MSPs was epitomised by Mr Gabriel Levy of RealNetworks[91]:

> *" ..the New JOL from our perspective, is nothing more than the Alliance's unilateral imposition of webcasting terms and conditions upon the Webcasters….I simply fail to see how a document negotiated by parties with little or no commercial interest in webcasting can purport to bind webcasters to its terms and conditions or be proffered as 'the result of arm's length negotiations between sophisticated commercial parties.'."*

Ms Shannon Ferguson, Managing Director of Yahoo Music Europe Ltd, was of a like view:

> *"..plainly there was no 'side' representing the interests of Webcasters in the negotiations leading to these settlements."*[92].

128. In our view, in adopting this approach, Mr Steinthal has had to overlook a number of important primary facts.

129. First, the parties' experts *all* regarded the New JOL as being a *relevant* comparator as a whole[93] . We do not regard this view as being conclusive since the assessment of comparables must be one for the Tribunal in the light of the evidence, particularly that touching Vodafone's Radio DJ Service - which is next considered; but it is certainly persuasive.

130. **Vodafone's Radio DJ Service** Secondly, a company within the Vodafone Group related to one of the MNOs (hereafter 'Vodafone'), has already actually launched a subscription-funded service called the Vodafone Radio DJ service. This is indisputably a webcasting service since it enables the user to influence the playlist. In addition, it runs an on demand music video streaming service. Evidence about these services was given by Mr Jonathan Bill, the former head of advertising and industry development at Vodafone Ltd both in his witness statement and in cross-examination[94]. Vodafone currently charges £7.50 per month for its Vodafone Radio DJ webcasting service. This supports § 8 of the MNOs' pre-Settlement Agreement written submissions, where Mr Carr QC wrote[95]:

> *" It should be noted , though, that one MNO, Vodafone, does presently offer a webcasting product charged for on a subscription basis……and so Vodafone and the MNOs generally, do have an interest in the treatment of webcasting under the 2006 Scheme"*[Emphasis added]

131. Furthermore, according to the evidence, Vodafone (and other MNOs) are already trialling advertising on various services.

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[91] Levy 3, §§ 8.2, 8.4
[92] Ferguson 3, § 5.2
[93] Mr Boulton at first being cautious in so doing: Boulton 5, §§ 8,10 but later agreeing in answers to questions from the Tribunal, that the New JOL *as between the parties there present*, fulfilled the 'willing buyer, willing seller test'.: see B7/33/1385 quoted in § 133 below and D4/161-162.
[94] Bill 1,§ 13 and D5/14-15. We would add that we found Mr Bill to be a good witness.
[95] X1/5/4.

132. Thirdly, we do not believe that the interests of the record companies and the BPI must be seen as being *confined* to permanent or limited downloads; the Royalty Table covers services which are part of what has been called '*the music value chain*'. Mr Taylor gave helpful evidence in this connection. He had been General Counsel to BPI and was at the time he gave his evidence to us, General Counsel and Executive vice-president of IFPI. In our assessment, he was also a reliable witness. Though we accept that BPI had no current direct interest in webcasting in September 2006, in our view BPI (who represent over 300 record companies) had at least enough of *an* interest in webcasting to agree to parts of the New JOL which concerned webcasting. As a matter of common sense, a major player like BPI would we think, be most unlikely to have agreed to theoretical or let alone otiose terms in so important an agreement. Vodafone's position is of course even stronger. Their settlement with the Alliance was subject of a separate agreement; they were not, as Mr Steinthal would have us believe, swept into settlement by a tsunami created by BPI.

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133. Before considering the Remaining MSPs' case, we were reminded that Mr Boulton correctly and succinctly epitomised the characteristics of a reasonable royalty when he said that it was an agreement[96] :

> *" between a willing licensor and a willing licensee acting at arm's length in a competitive market."*

He then went on to identify the most common approaches used to determine a reasonable royalty one of which, the comparables approach, is that which has been used in this case.

134. Finally, we have several times drawn attention to the developing and shifting nature of the online music industry. In the light of this, when it came to negotiation, it seems to us inconceivable that the numerous signatories to the Settlement Agreement (and the New JOL), every one of them major players in the industry, were somehow blind or worse, unconcerned as to what developments might lie ahead. Existing business opportunities and substantial sums of money were involved. And judging from the witnesses we have seen, those involved were shrewd and experienced men of business.

135. In our view, as against the Remaining MSPs, the New JOL is indeed the most relevant comparator. It is not even the record of an agreement relating to some 'proxy' activity (such as an offline music service). Neither is it a record of say, an overseas experience, neither is it a commercially or technologically outdated agreement. Nor was it entered into under 'stress'. It was for the Remaining MSPs effectively to challenge the relevance of its terms. They have failed to do so; it is the nearest comparator.

The need for minima.

136. This short topic may conveniently be addressed at this juncture. It has two limbs. First, there is a general issue: whether minima are appropriate in respect of

[96] Boulton 1[B7/33/1385.]

any category of webcasting (and on demand streaming). Secondly, if provision for minima is considered reasonable, the minimum royalty rates themselves will need to be determined.

137. In our view, the presence of minima in the New JOL provides a strong indication that in this field of licensing, the application of minima to each category of service is generally reasonable in the circumstances. Our view is strengthened by the fact that, as we shall show, minima provide a practical way of compensating the Alliance for any underpricing of music by licensees. Underpricing will assume particular importance in the second part of this Decision under the topic '*Gross Revenue'*.

138. The Alliance's statement of purpose in insisting on minima was one of the Agreed Facts (12):

> 'The Alliance's stated purpose for including minima in the JOL is to ensure the Alliance's members receive a minimum level of compensation for the exploitation of their rights, to protect the Alliance's members against extreme underpricing and to assist in resolving difficult unbundling issues.'

139. In their post-hearing written submissions[97], the Alliance elaborated their intentions thus:

> (a) The Alliance minima were agreed as part of the New JOL. That is where they 'came from'.- they are apparent on the face of the document, the outcome of the negotiations between the negotiations between the settling parties.
>
> (b) The minima are, further, closely comparable to the record company and PPL charges. They lie between the per stream sum in the PPL Webcasting scheme, and the charges which one principal webcaster has agreed to pay certain of the record companies.

140. The Remaining MSPs have continued to oppose the inclusion of minima (whether on a per stream or per subscriber basis) in relation to all forms of webcasting and in addition, in relation to on-demand streaming. It was Mr Steinthal's opening case that there was no need for minima in relation to any such category of service - save a minimum that was intended to cover the costs of licensing[98]. So minimalist a gesture, as Mr Rabinovoitch pointed out, would be cold comfort to songwriters and composers. By the time of his closing address however, we detected a more flexible tone in Mr Steinthal's approach; it seemed that he now accepted the propriety of the presence of minima in the licence *in principle* but challenged some of the levels stipulated in the New JOL quantum.

141. It was not in dispute that minimum royalties are frequently provided for in agreements relating to the licensing of intellectual property – as may be seen (for example) in the numerous reports of compulsory licence cases in the patent and design fields. Minima are required for the protection of the licensor in the event of say, an adventitious market change, in the event of giveaways by the licensee so as

[97] 19/1/07 §15.
[98] See D11/175-176.

to make neighbouring services more attractive, as a result of a deliberate policy of underpricing by the licensee, by the manoeuvres of an unscrupulous licensee - or for whatever reason.

142. In the present case, minima have been proposed to meet a variety of possible situations: they may be required for example, if for some commercial reason (e.g. the presence of advertising), the licensee underprices a service. Minima may also be required where the business model of the licensee is not structured so as to maximise revenues from exploitation of the repertoire; in which event, the provision of minima may have more bite than a 'best endeavours' clause. Minima may also be required to address the complex unbundling problems which arise where, as in this case, music content is sold bundled with other services and it is not possible easily to ascribe particular prices for separate elements in the bundle.

143. In our judgment, the New JOL provides a compelling comparable for the presence of minima in a licence of the kind presently under consideration. Originally all the Applicants opposed the introduction of minima on principle. The settling parties have, however, agreed that it is reasonable to make provision for the payment of minima, albeit at levels significantly below those originally proposed by the Alliance. This, in our view, amply demonstrates the reasonableness of the inclusion of minima in all categories of service.

144. Moreover, since the Remaining MSPs do not seem to oppose the provision of minima for *permanent* or *limited downloads* (or even the rates for such services), it seems illogical for them to oppose minima *in principle* in relation to the other online services.

145. We have no doubt that the provision of minima for all online services must be a feature of any licence from the Alliance and our findings on the definition of Gross Revenue in the latter part of this Decision require it. We also consider that (as with headline rates for permanent and limited downloads) the rates provided in the New JOL must be benchmark rates for such minima.

146. We shall next consider minimum rates for the several webcasting services in question but before doing so we must consider the nature of the services themselves.

VI THE MUSICAL OFFERINGS

147. The Royalty Table provides a convenient summary of the musical offerings with which the New JOL is concerned. We should say at once that so far as the Remaining MSPs are concerned, the webcasting categories within the Royalty Table are in their view, improperly defined. As noted, the presentation in the Royalty Table is in the form of a spectrum, determined by the degree of control which the consumer has in relation to the music he receives. At one end are permanent downloads whilst at the other, is pure webcasting, the latter being the Remaining MSP's particular interest.

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Back to back music: Pure Webcasting

148. Though prior to this case, we were rather unfamiliar with the *arcana* of the online music world, as listeners we were familiar with commercial radio programmes. When Mr Steinthal first made submissions relating to the equivalence of the webcasters' service and that of commercial radio, we were frankly puzzled and, it must be said, at the end of the day we remain so. Though no doubt involving a degree of subjective impression, the two services strike us as being *quite different*. However in deference to the time (and evidence) devoted to the point, we shall shortly revisit what was urged. We shall do so in two parts, the first being to examine what was argued regarding the suggested comparability of online and offline services as such. We shall then consider Mr Steinthal's submissions regarding the allegedly comparable CRCA Agreement and reach an interim conclusion on such comparability.

149. Before doing so however we should briefly mention **'simulcasting'**. Simulcasting is the simultaneous re-transmission by a licensed radio (or television) station over the Internet (or via an MNO) of broadcast material. The person receiving the simulcast normally makes no permanent copy of it. It is like listening to the radio and is an offline service even though available via the Internet. In what follows, we shall place simulcasting in the offline category of services. Nevertheless, in recent times, traditional terrestrial broadcasters have begun to offer what Mr Steinthal described as 'side channels'. There was evidence for example of the opportunity to listen (or listen again) to programmes first broadcast earlier in the day, the opportunity to 'pause' a broadcast while answering the telephone and so on. We do not regard these activities as the equivalent to online offerings; they are qualitatively different.

150. The existence of 'nothing but music' services has in fact exercised the Tribunal on previous occasions in relation to offline references. In AEI Rediffusion v PPL [1998] RPC 335[99], for example, the Tribunal was of the view that independent commercial radio offered quite a different service to a 'music, music, music'[100] service and that different terms were necessary to reflect the increased use of music. A similar attitude to increased use of music in broadcasting has been adopted by PPL (see below). Mr Rabinowitz submitted that this philosophy is equally applicable to a webcasters' services.

151. The following struck us being the more relevant matters raised in evidence and argument relating to the differences between online and offline services – taken in no particular order:

(a) first and most importantly, in relation to pure webcasting, we have already referred to both the uninterrupted stream of musical output available online and to the large number of truly genre-specific offerings available. Though there may be broad differences in bias between commercial radio stations (jazz, classical, indie, 'golden oldies', easy

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[99] See in particular at p 348
[100] See the Chairman's remarks: D7/13

listening, ethnic etc), these are simply not of the same order as the mood- specific channels offered by say, Radio@AOL[101]

(b) in pure webcasting therefore the music in an online ‘music’ service makes a *far* greater impact on the listener and thus has a greater connection with the revenues it generates.

(c) a terrestrial broadcaster in this country must have a licence from Ofcom and such a licence compels it to broadcast a substantial quantity of non-music material. In this connection, Mr Boulton has estimated that in a commercial broadcast from a ‘music’ station, a fair average music/speech mix is 70% music[102]. The webcaster does not add value to the output in the way a commercial radio station does – for example, through the voice of a popular disc jockey, the programme contents, the format etc.

(d) though Mr Steinthal made a number of observations about increased listener interactivity which commercial radio stations now make available and encourage (e.g. by phone-in or the e-mailing of requests), none in our view even approach the degree of interactivity which may be achieved through premium and interactive webcasting

(e) there was conflicting expert evidence concerning the costs of setting up and operating a webcasting service in comparison with that of even a modest terrestrial broadcasting service. We shall not go into this since the evidence was unnecessarily detailed and the upshot self-evident. The webcasters’ music output is derived from a virtually automatic source[103] . Yahoo! for example, employs just two music programmers for this purpose and[104]

(f) some of the new options available to listeners of commercial radio in fact have nothing to do with the broadcasters at all: the pause and rewind facility availability on the latest Roberts® DAB Portable Radio is an example of this.

In this connection, it is well to bear in mind what the Tribunal had to say about commercial radio stations in <u>AIRC v PPL</u> [1993] EMLR 181 at 206-207:

> “It has been suggested to us that these stations are merely ‘jukeboxes of the air’. Such a description ignores the contribution which the presentation and selection of the music makes to the success of a station and the considerable attraction of its talk and features.’

[101] Calling a service ‘Radio@AOL’ or ‘Vodafone Radio DJ’ does not of course make them a radio station.
[102] Boulton 1 § 12.34 [B7/33/1540]
[103] D729-30.
[104] Fergusson 2§16.8 [C1/11/210]

Is the CRCA[105] Agreement a proper comparator?

152. The fragility of Mr Steinthal's 'comparison' becomes even more apparent when one considers the agreement upon which he principally relies: the CRCA Agreement with PRS[106]. Under this agreement, independent commercial radio broadcasters were charged a sliding scale of rates ranging from 3% to 25% for both broadcasts and simulcasts. Nevertheless, it was said by Mr Steinthal to cover activities 'functionally equivalent' to (at least) pure webcasting in the New JOL and thus, that the financial terms of the former could justifiably be extrapolated to the latter. We would add that though this view was espoused by Mr Boulton in the early stages of his evidence, by the time of his cross-examination we were far from sure that he still adhered to this view.

153. In answer, the first point made by Mr Rabinowitz is that the CRCA Agreement does not cover a number of the activities upon which Mr Steinthal relied. It grants a licensee to '*broadcast as part of its licence from the Radio Authority or to perform in public the PRS repertoire or any part thereof.*' Thus, the transmission in question has to be '*a broadcast*' within the definition in the Act[107] and must therefore be made simultaneously to members of the public or transmitted at a time solely determined by the broadcaster. Internet transmissions are actually excluded unless they fall within one of the exceptions in s 6(1)A of the Act: see also s. 19(2) of the Act. In our view, the only *online* activity which is unarguably licensed under the CRCA Agreement is simulcasting.

154. The Alliance also pointed out that there is an additional difference between what is licensed under the CRCA Agreement and the online music presently under discussion: the CRCA Agreement does not licence the MCPS' mechanical right, the exploitation of which ('dubbing') is important to the way in which webcasters (but not broadcasters) make their music available to users. In our view this is an important point which justifies a higher rate of royalty.

155. **'Dubbing' and the ephemeral right**. 'Dubbing' as we understand it, means simply making a copy of a track. Traditional radio broadcasters do not need a dubbing licence if ab to the extent that they can rely upon the 'ephemeral right' provisions under s 68 of the Act. Webcasters are however in a different position as they rely upon the use of a permanent (and enormous) database of tracks in order to provide their services through instant user selection, streaming etc. We believe that the Alliance is right when it submits that the Remaining MSPs must also pay the MCPS for the right to maintain millions of tracks of music in their immense databases.

[105] Commercial Radio Companies Association
[106] E3/8/755.
[107] I.e. '*transmitted for simultaneous reception'*.

156. At this point, we were also referred to current PPL policy on such matters. If a ‘music,music,music’ service wishes to be licensed by PPL, it would *not* be so licensed under the PPL/CRCA Agreement but rather, would seek to grant a licence under new terms recently published by PPL which require a *much higher* (20%) headline rate[108].

157. Our conclusion in the light of the foregoing is that neither terrestrial commercial radio broadcasts nor the CRCA Agreement to which it relates, are fit comparators when it comes to assessing the royalty rate for pure (or indeed any other sort of) webcasting. In our view, the CRCA Agreement is not the closest comparable. Moreover, our conclusion is for the same reasons, equally applicable to answer Mr Steinthal’s suggestion that such a finding would result in ‘*unreasonable discrimination between licensees or prospective licensees’*[109]. In spite of Mr Steinthal’s forceful submissions, in our view, the outstanding comparable in this part of the case, remains the New JOL.

158. Turning to royalty rates, Mr Boulton’s initial view was that since the CRCA Agreement was the closest comparable, on that basis, he could justify a rate for pure webcasting of no more than 5%. In the light of the conclusion to which we have come, we need not go into the evidence by which he reached this figure nor his cross-examination on it[110]. In relation to a comparison with commercial radio alone, the reasonable royalty rate for pure webcasting *must* at least be greater than Mr Steinthal’s 5%. In fact the mark-up must be even greater than that when one also takes ‘dubbing’ into account.

159. **Mr Boulton on comparables** Before leaving this section we should turn to some evidence from the cross-examination of Mr Boulton since it shows, we believe, an important qualification to the evidence he originally gave in relation to this issue of comparables. He agreed that

> *:”…what is in the New JOL is agreed between a willing licensor and a licensee; they are at arm’s length. It is a competitive market….As I look at the New JOL, Sir, the places where I draw back from saying that [it] provides the right answer are where it does not appear that those with an economic interest [in] the outcome are part of the New JOL”*[111]

And later, in answer to questions from Mr Steinthal[112]:

> *“ That is where I do not see the New JOL as being a reasonable royalty agreed between willing licensor and willing licensee, because it does not appear to me that the webcasters themselves were represented in the negotiation. It is not an agreement between a webcaster and the Alliance as to a webcasting rate.*
>
> *THE CHAIRMAN: Because they were not there.*

108 See G2/23/557
109 cf s.129 of the Act
110 See for example D10/95-96
111 D4/161
112 D4/163.

A, Yes. And because the parties had agreed to it. Sir, if this was 'five webcasters were there and two were not', you would look at it and say: of course it is a relevant comparable because webcasters signed up to it and it becomes a product of willing licensor and licensee negotiations. If it is agreed by parties who do not webcast, it seems to me Sir, it cannot in itself be a comparable for webcasting

THE CHAIRMAN: At all?

A. I do not think it can, Sir. If webcasters are not represented in the negotiations they have had no say in what the rates could be. The rate might have been agreed at 50% if no webcasters were there…The fact that 8% has been agreed for downloads would of course be relevant to what the webcasting rate should be…It appears to be accepted that webcasting is a lower value product in terms of music use and it would be a lower royalty.." [Emphasis added]

We accept that had more webcasters been present at the negotiations, that fact might well have led to a more favourable result from their point of view. But a webcaster of substance *was* of course present at the settlement negotiations: Vodafone.

Other online comparators

160. The Alliance drew our attention to two online licence agreements with *recording companies* and submitted that they would be of far more assistance to the Tribunal as comparators than the CRCA Agreement. We agree. There are two aspects to the submission. First, on authority[113], the licences granted by the owner of the recording right are usually regarded as being relevant comparators for the licences granted by the owner of the publishing right. Secondly such licences must be doubly relevant if they are licences for an online activity.

161. The first such agreement was the PPL agreement for pure webcasting which may be found at G2/12/415. The second was in fact a group of agreements entered into by Yahoo! with certain record companies, the details of which remain confidential. Both agreements were the result of recent arm's length negotiation. We consider that Mr Biro's evidence in this area was particularly important. He thought that it would be 'interesting' first to compare the relative treatment of the sound recording copyrights in the offline environment with those in the online environment and did so: see D12/43ff. In the *offline* world the comparison revealed levels of PPL royalty comparable with that which the PPL receives in the CRCA Agreement which we have already considered. On the other hand in the *online* world, the licence fees were considerably greater. In fact, the per play rates in the New JOL and the PPL agreement for pure webcasting are approximately six times those which Mr Steinthal submitted could be derived from the royalties paid under the CRCA Agreement. As to that, Mr Biro had this to say[114]:

[113] See §66 above.
[114] D12/29.

> *“One would need to ask oneself why the same would not apply [for the Alliance] in a commercial negotiation in a competitive market.”*

And later:

> *” What I can say is that the record companies are producing a sound recording, the composers are producing the composed work and as a matter of logic that same 1:6 ratio should apply equally. I cannot see a reason why it should not…The absolute levels that people could earn could differ because people make different contributions. But that ratio from commercial to webcasting if it applies to the record companies, I cannot see why it should not apply equally to the composers when they are in competitive negotiations.”*

162. The upshot of this evidence is that subject to argument regarding the valuation of the categories of webcasting services, it confirms that the general royalty figures and minima reached in the New JOL Agreement may safely be taken as being approximately at the right level.

The categorisation of the licensed services.

163. The Remaining MSPs also took issue with several of the *categories* of webcasting services provided for in the Royalty Table[115] . As they saw it, there should be but one category of webcasting : ‘*General Webcasting*’. Within that, so they submitted, all forms of webcasting could legitimately be subsumed. The core issue then is whether, considering the tariff for webcasting, one may ignore the categories of service provided for in the Royalty Table and replace them simply with ‘General Webcasting’.

164. In addressing this issue, we must again consider comparators. Mr Rabinowitz, submitted that the categorisation of webcasting services established in the Royalty Table makes practical sense and *must* have been the subject of consideration and careful drafting by those who subscribed to it, all of whom were among the most knowledgeable about such matters in the Kingdom – and one of whom was in any event, a webcaster at the time. In addition, Mr Aldous argued that one may take into account the fact that the Remaining MSPs have not (for some reason) quibbled about the first four categories in the Royalty Table, so why should they do so over those remaining?

165. To buttress his submission on General Webcasting, Mr Steinthal had to import a notion from US copyright law: ‘**DMCA Compliance’**. ‘DCMA’ stands for the Digital Millennium Copyright Act of 1998 - which is of course, a US statute relating so we were told, to inter alia compulsory statutory webcasting licensing matters and the terms thereof. Mr Steinthal said that a webcasting service *in this country* should properly be so called only if it qualified the webcaster for a compulsory licence to webcast sound recordings under the US Copyright Act 1976 s. 114(d)(2)(C)(i) to (x) as amended by the DMCA. In other words, he was suggesting that it was reasonable (and likely) that negotiations in this country

[115] Save for special webcasting-see above.

for a licence in respect of any webcasting would be concluded on the basis of a definition of subject matter imported from a US statute. This was desirable he suggested on the basis of international understanding in relation to this novel and international area of economic activity. For reasons which are given below, we have not thought it necessary to go into the workings of the DMCA in any detail.

166. In response, the Alliance described these submissions as being hopeless. Whilst it was true that the DMCA definition included a number of interactive services, there was no compelling reason why parties negotiating for an online licence in this jurisdiction would ever want to invoke the rather complicated (and apparently controversial) provisions of a foreign statute to settle the important question of what exactly was being licensed in the UK. No doubt out of an abundance of caution, the Remaining MSPs also led some evidence, none of it conclusive, about the DMCA[116] and its effects. At a certain stage we felt that this sub-enquiry had become so off target that we indicated to counsel at the time that we were not impressed with it. Perhaps as a result, interest in the DMCA subsided - on both sides. We therefore need make no findings on the matter other than to re-iterate our belief that invoking the DMCA does not assist us in the resolution of the dispute on the identification of webcasting services. The best (and in truth, the only) comparator in the UK remains the New JOL and we shall therefore work to the categories of service set out in the Royalty Table

Conclusions on comparators and royalty

167. In the light of the foregoing, our conclusions on this part of the case are as follows

- The categorisation of online services set out in the Royalty Table has been recognised by the relevant commercial interests in the UK, is apparently workable and should therefore remain unamended.

- We believe that the royalty rate and the minimum agreed by the parties in respect of premium or interactive webcasting (i.e. a royalty of 6.5%) are reasonable in the circumstances and should be carried over unamended into the licence with the Remaining MSPs.

- With regard to the pure webcasting service, the level must (as we have said) be higher than the offline PRS figure of 5.25 % but should not we think, be as high as the 6.5 % provided for in the New JOL. We feel that had the Remaining MSPs been present at the Settlement Negotiations, their collective bargaining power would have achieved a *slightly* more favourable outcome from their point of view within this category of service. We should say that this is not some notional adjustment driven more by charity than by fact; neither has it a mathematical basis. It is a value judgment based upon our

[116] Including evidence of extant litigation in the USA touching inter alia the scope of its definition of webcasting.

overall assessment of the evidence and the commercial circumstances. In addition, we have taken into account the fact that commercially speaking, more favourable results were achieved by the physical presence at the negotiations of iTunes and the MNOs (with their insistence on the Disputed Contentions) and Napster, MusicNet and Sony (with the Home Page Concession).

- We shall therefore fix the royalty figure for Pure Webcasting at **5.75%.**

- With regard to corresponding minima, we would reduce the subscription rate to **£0.20 per subscriber** per month and otherwise, to **£0.00055 per musical work** communicated to the public.

VII GROSS REVENUE

The New JOL: 'Gross Revenue' defined

168. In the New JOL, the parties are agreed that royalty should be based on a *percentage of revenue*. But what revenue? There are of course a number of possible revenue streams, in particular, revenue arising from the purchase of music together with revenue arising from advertising, subscription and in other ways. In this part of the Decision we address which revenue streams are in our view suitable for royalty excise in the light of authority and the evidence. With regard to revenue arising from the actual sale of music (at full price), only the Remaining MSPs have a problem, and that is an issue of wording rather than one of principle. As for the rest, we have found it to be a particularly difficult task adequately, simply and fairly to identify the revenue streams which should reasonably attract royalty.

169. The Alliance has invited us at this stage simply to identify the relevant revenue streams, to establish the 'general principles' to be applied and not to attempt to re-draft the definition of 'Gross Revenue'; that, they suggested, will come later.

> "Once the Tribunal has given its decision, formulating suitable expert determination clauses should not be controversial."[117]

170. The invitation is indeed tempting in the light of past events. There are two definitions of Gross Revenue in the New JOLs[118]. Then there are the two formulae proposed in the Disputed Contentions and another espoused by the Remaining MSPs. Finally, since the Settlement, the Alliance has come up with arguably, three further modifications[119]. Ironically perhaps, there seems to be no dispute about 'general legal principles', at least a broad level of generalisation.

[117] 4 December 2006 letter, final paragraph.
[118] Not to mention other definitions in antecedent JOLs
[119] Though this has been characterised by the Alliance as 'drafting improvements'.

The devil, it seems, is as ever, in the detail. We will accept the Alliance's suggestion and in what follows, avoid any attempts at drafting. Rather, the parties should collaborate in drafting a definition in the light of our interim decision. The outcome will then be reflected in our final Decision.

171. In the online world, revenue from music usage may be generated in several ways. First, it will most commonly arise from the direct purchase of music from a page by the consumer – usually by activating a tab, image, photograph or icon or by selection from a list which includes (for example) the word 'music'. As we understand it, such revenue is as yet hardly affected by the presence of advertising on a page or within a service. But this may soon change. A familiar site for such a transaction is iTunes' Store. Music and music-related services may also be paid for by means of customer subscription. Lastly, it is the Alliance's case that revenue relevant to these Applications will now increasingly arise from advertising and sponsorship *at or near* the point of access to and/or consumption of music. It is the definition of this last stream that is at the heart of the second principal aspect of these Applications.

172. Revenue streams likely to arise from advertising, sponsorship and commissions are recognised in the New JOL. The royalty base against which headline rates are to be applied is called the '**Gross Revenue'** and is defined in Schedule 3 of the New JOL as follows[120]:

> *"'Gross Revenue' means, subject to the provisions of the Schedule :*
>
> *(a) all revenue received (or receivable) by the Licensee from Users in relation to the provision of the Licensed Services:*
>
> *and*
>
> *(b all revenue received (or receivable) by the Licensee as a result of the placement of advertising on or within the Licensed Services.*
>
> *and*
>
> *(c) all revenue received (or receivable) by the Licensee as sponsorship fees in relation to the provision of the Licensed Services:*
>
> *and*
>
> *(d) all revenue received (or receivable) in the form of commissions from third parties as a result of the Users accessing and/or purchasing from a service of a third party via the Licensed Services:*
>
> *and*

[120] H/1/44.

> *(e) any other revenue received or receivable by the Licensee arising in relation to the provision to Users of the Licensed Services (including without limitation, such revenue received in relation to donations, barter or contra deals, such deals to be valued for these purposes);*

and in each of the above cases such revenue shall, for the avoidance of doubt, include any such revenue whether received or receivable by the Licensee or any associate, affiliate, agent or representative of such a party.

Subject to the remainder of this Schedule 3, there shall be no other deduction or set-off from the above revenues other than refunds to Users for services that they were unable to use due to technical faults in the licensed services. "

173. After the Settlement Agreement, the Alliance, the MNOs and iTunes agreed to amend the definition of Gross Revenue in relation to the home page (the so-called **'Home Page Concession'**) in the light of the Alliance's settlement with Napster, Sony and MusicNet – see below.

174. '**Licensed Services'** is defined to mean *'the **Music Services** set out in Schedule 6'*: New JOL, Appendix 1§1 '*Definitions*'. Schedule 6[121] contains 'boxes' to be filled in by the licensee, none of which actually refers to the 'Music Services'. There is however a box entitled 'Licensed Services'. Schedule 6 therefore seems to be tailor-made for each 'User'. Concerning Schedule 6, the Alliance hoped to clear up any confusion concerning the phrase 'Licensed Service' with the following explanation:

> 'rarely had any disputes with licensees over this in the five years or so that the JOL has been operating…The Alliance appreciates that the details of the Licensed Service are important to licensees as they are in effect key to the extent of the revenue base. The Alliance also appreciates that this mechanism might not be apparent to licensees on the face of the New JOL because it will actually involve a discussion with each potential licensee on a case-by-case basis. The Alliance does not believe it is possible to create hard and fast rules for this definition '.

We record that have not been much assisted by that explanation.

175. '**Music Service'**, which more or less corresponds to the items in the Royalty Table, is defined in Schedule 1[122] as being

'a service or the relevant part of a service which is:

(a) a Permanent Download Service
(b) an LD/ODS Service
(c) a Premium and [*sic*] Interactive Webcasting Service
(d) a Pure Webcasting Service; or
(e) a combination of (a) to (d) above'

Items (a)-(d) are further defined in that Schedule.

[121] *'Licence Details'* see H/1/48
[122] H/1/35 '*Definition of Music Service'*

176. We have mentioned above the MNOs' '**Home Page Concession'.** This affects home pages (only) where the music content of a home page is '*insubstantial*' An example of a Yahoo! home page where music is said to be only an insubstantial part of the suite of services offered, is appended to the Alliance's Answer to the MNO's Supplemental Statement of Case as **Exhibit B**. The only relevant item in Exhibit B appears to be the word 'music' which occurs in a list of online offerings providing links to other (presently irrelevant) services. If actuated, the music service provides a sub-page from which it can actually be downloaded.

177. Paragraph 3.1.2 of the same pleading records the following 'common ground':

> *" (a) The parties are agreed that revenue from advertising on a home page is <u>not</u> within the scope of Gross Revenue where the home page offers a variety of services , of which music is only one, no music is actually offered from the home page and music is only an insubstantial part of the suite of services offered….*
>
> *(b) However, if music is actually offered from a home page, ….or if music is not an insubstantial part of the page, the Alliance should receive a royalty based on an appropriate proportion of the advertising revenue from that page.*
>
> *(c) Importantly, the Alliance does not and has never contended that it should receive a royalty based on all the advertising revenue, only a fair apportionment…"*

178. *A propos* the foregoing, we would mention that:

> (a) in the light of authority, sub-paragraph 3.1.2 (a) above seems more a statement of the obvious than a 'concession';
>
> (b) the words '*music…actually offered'* assume importance in relation to the conclusion we have reached later in this decision, and
>
> (c) the practical determination of what constitutes an 'insubstantial part' of music on the home pages of a number of parties whose home pages are in flux, changing perhaps at an hourly rate, struck us as having an element of unreality about it.

179. We have noted that the fact that the parties have agreed that royalty should be based on revenue has given rise to no great difficulty in relation to sub-paragraph (a) in the definition of Gross Revenue. This sub-paragraph may be thought of as covering FTDs and is akin to the sale of a digital CD recording. We would record here however that in sub-paragraph (a), we favour the use of the words 'consideration for' rather than 'relation to'[123]. The problems arise

[123] The phrase suggested by iTunes and the Alliance.

whenever advertising etc revenue crops up in the context of sub-paragraphs (b), (c) and (d) of the definition.

180. Sub-paragraph (e) was evidently intended to be a broad, unspecific omnibus clause and no doubt for this reason alone it was the subject of sustained objection by the Applicants. This did not surprise us. In our view, clause (e) should have no place in a licence of this character. Apart from classic legal objection on the basis of 'lack of nexus', the clause seems to us on its face to lack certainty and thus to be a recipe for contention in the future. In our view, it must go; it is simply too vague.

181. Schedule 3 para 1 ('*General*') contains some explanatory exclusions. For example revenue from non-music voice content, non-music products and text services are excluded.

182. Paragraph 2 (a), (b) and (c) of Schedule 3 of the New JOL *('Advertising and Sponsorship Revenue'*) is also relevant to the Applicants' cases. These paragraphs read as follows:

> (a) Gross Revenue obtained in the form of advertising or sponsorship revenue shall be reduced by 5% to reflect the costs of obtaining it.
>
> (b) By way of clarification, advertising and sponsorship revenue shall be included in the definition of Gross Revenue if it is derived in relation to pages within the Licensed Service, including music related pages which do not contain or enable *direct access* to Repertoire Works (e.g. content consisting of concert or music reviews).
>
> (c) Where advertising or sponsorship revenue is derived from pages which include both music and non-music related services (e.g. on a home page or sub-home page of a service), then a reasonable proportion of such revenue shall be included in the Gross Revenue (such proportion to reflect the relative dominance of the music and non-music content).' [Emphasis added]

Mr Steinthal took issue with the propriety of all three paragraphs[124] whilst iTunes and the MNOs took issue with paragraphs (b) and (c) only.

Various forms of advertising

183. We should next say something about the more common forms which online advertising may take. During the demonstrations, we were in fact shown a number of examples of online advertising.

184. The only advertising with which the definition of Gross Revenue is concerned is third party advertising. This should be spelt out in the definition.

[124] In relation to sub-paragraph (a), Mr Steinthal sought a deduction in the Gross Revenue base of 15%. We shall deal with this later in Part IX: '*A deduction for advertising costs'*

185. We shall first consider website pages and pages of MNO ‘phone content portals’ where advertising (if any) is at present mainly of two types[125]. First and most common is **banner advertising** which is a basic graphical Internet advertisement occurring on *any* page. This takes the form of rectangles (or sometimes squares or ovals) which contain advertising material (usually in colour) having both a literary and pictorial content. There may also be links to other web pages (or web sites) which have been selected *by the advertiser*. Such links are common examples of a ‘click-through’ – of which more later. ‘Clicking’ on the image may also lead to expansion of the advertisement itself. The examples of banner advertising which we saw featured some well known trade marks for goods and services. Banner advertising may be placed in different positions on a page and (as we also saw for ourselves) may be of different sizes thus striking the viewer with unequal degrees of prominence. In the same category is **skyscraper advertising** which also takes a tall rectangular form and runs vertically to the side of the main content of the page. Some advertisements may also have an audio content.

186. **In-stream advertising** (also referred to as ‘in-download’ advertising) is of considerable importance to this part of the Applications since it is the only mode of advertising which the parties all agree should fall within the definition of Gross Revenue. It may be visual, audio or audio-visual in form and as we understand it, it always occurs *after the consumer has initiated the downloading or streaming* operation. It is perhaps analogous to the advertising material. which is sometimes added to a purchased DVD, trailing a forthcoming film for example, and which the purchaser has to view. The nature of in-stream advertising was epitomised in the Alliance/MNOs’ Agreed Facts (2(b))[126]. This states that (in relation of course to the provision of music) in-stream advertising is:

> ‘…advertising included within a webcasting stream or advertising immediately preceding or immediately after a particular content download or on-demand content stream so as to be part of the same content delivery.’’

The MSPs provided the following definition[127]:

> “ Audio or audio-visual advertising played before, during or between music tracks or streams and which either interrupts the music service or is played while a file is downloaded.”

Mr Cue of iTunes put it in a similar way[128]:

> “*The placement of third party advertising at the start, end or during actual delivery of a Repertoire Work to a customer by way of a permanent download.”*

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[125] Pictures in colour of an MNO’s **possible** ‘phone content portal which well illustrate banner advertising are to be found in Annex B of the Agreed Facts (see Annex 1 to the MNOs’ Revised Opening Skeleton).
[126] It is similarly defined in the Alliance’s Answer to the MNOs’ Supplemental Statement of Case;A6/5/109A where a simple example of it is annexed to the pleading as **Exhibit A**
[127] Annex B **(‘***Draft Glossary’*) to the Alliance’s closing skeleton of argument
[128] Cue 3: I/9/24.

187. Though there could be subtle differences between these records of what 'in-stream' advertising actually is (or may be), we felt that there was sufficient consensus of understanding for us safely to use the expression as a 'term of art' – and we shall henceforth do so.

188. We should also mention **sponsored search advertising** and **click-through commissions** which will be considered below. Revenue arising from these are essentially derivatives of advertising revenue and can arise at the same time as banner and in-stream advertising.

189. In view of the ingenuity which we have seen deployed in this area of the advertising business, there may well be other forms of advertising which we have not mentioned.

Music 'actually offered'

190. We need next to consider some further threshold concepts in order to understand what follows. In this part of the case, much use was made by the parties, particularly by the Applicants, of the phrase '**music actually offered'** in relation to website pages. In our view, it is indeed a key phrase in the context of the definition of Gross Revenue and we have adopted it; it is the trigger for the operation of 'in-stream' advertising and also, of both the Disputed Contentions. It is important therefore to understand the concept of music being 'actually offered' from a page.

191. In what follows, by music **'actually offered'**, we refer to music which is enabled or is made directly available to the consumer for downloading or streaming from *any* page on an online service. In the language of the New JOL, it is where the Licensed Service can actually be consumed by a User and in most cases, where the music is purchased. Pages which identify music 'actually offered' may of course also carry advertising, and/or music-related material or indeed, other material as well.

192. The Alliance did not favour the use of the phrase music 'actually offered' in excepting advertising revenue from Gross Revenue; it was, they said, unfairly prescriptive –though it did make use of it from time to time. Two paragraphs from their Answer to the MNOs' Supplemental Statement of Case[129], under the rubric '*Actually Offered'*, sufficiently epitomise their position:

> '4.4 No good reason has been advanced for the contention that music must be actually and immediately accessible on a page in order for composers and songwriters to receive a fair share of advertising revenue. The mere fact that there is an intermediate page between identifying music and making the purchase is a matter of form, not substance, and not a good reason for depriving composers …of any share in advertising revenue. Where the music content provided by the Alliance's members is driving advertising revenues, it is fair and proper that composers….should share in that income.

[129] Though essentially the same point arises against the other Applicants as well.

4.5 The MNOs' proposal also provides an unhealthy incentive to the MNOs to structure their services so that Users have to pass through pages of adverts before making a making a final choice to download music. The MNOs would receive revenue from these adverts. Users would be watching the adverts solely because they wished to use the Licensed Services, yet composers would receive nothing.'

'Non-music' and 'Music-related' pages

193. By contrast, there are pages which 'actually offer' no music but which mention 'music' or are concerned with music-related items - and which may of course also carry advertising[130]. We have already mentioned the MNOs' home pages as being examples of this. Such pages are unarguably without the scope of the Gross Revenue definition – even when they contain 'music-related' items. In this category we have in mind:

(a) '**Non-music' items or pages**: pages offering items such as news, sport, games, mobile TV, audio books, travel, horoscopes, 'chat and community' and so on; and,

(b) '**Music-related' items or pages;**. These will include such downloadable material as music and concert reviews[131], singers' biographies, ringtones, posters, T-shirts and other pop group paraphernalia, audio-books and suchlike, being material which falls outside the scope of the New JOL.

Music 'actually offered' may be found together with 'non-music' and 'music related' items on 'mixed pages' (see below) and such mixed pages are at the heart of the disagreement between the Applicants and the Alliance.

'Gross Revenue' further considered

194. Put broadly, iTunes, the MNOs and the Remaining MSPs have a shared (but not a coincident[132]) interest in opposing what they believe to be an overly broad and unclear definition of Gross Revenue in the New JOL. They object to this definition as having the propensity to capture 'advertising revenue'[133] generated when there is no (or no sufficient) 'causal nexus' between the contribution of the Alliance's repertoire and the revenues of the licensee. Were the present definition of Gross Revenue (including the Home Page Concession) to be sanctioned, it would (they say), be in serious derogation of the standards laid

[130] See for example, Annex B (i) to the Agreed Facts.
[131] Even if such reviews contain illustrative excerpts of the music in question.
[132] It was suggested that the differences between the Applicants in the definition of Gross Revenue reflected their differing forecasts of how advertising was to feature in their products.
[133] In fact, revenues derived by licensees from advertising, sponsorship and commissions which are all referred to (as before) simply as '**advertising revenue'**.

down and applied by previous decisions of this Tribunal and those of its predecessor – particularly in BSkyB (supra).

195. On several occasions, we have referred to the core requirement (which derives from the Act itself) that in cases such as this, the relevant base revenues must be '*directly attributable'* to a licensee's use of the Alliance's repertoire -and that it is for the Alliance to show that this condition is met. In these Applications, the problem arises in relation to the Alliance's proposed imposition of royalty upon '*all revenue received ….in relation to the Provision of Licensed Services*" and was, we think, exacerbated by their reliance upon a construct of Mr Rabinowitz's which he called '*the Music Site'*. The Alliance based their submissions upon the 'draw' that the repertoire possessed; this they said resulted in a close connection between advertising revenue and accompanying music. The two were in a way, symbiotic. The Alliance's position was succinctly stated in their opening written submissions where[134] they asserted that Gross Revenue should include:

> (a) All advertising, sponsorship and commissions revenue generated by a page which is '*within the Licensed/Music Service'*, and
>
> (b) an *apportionment* of revenue generated by pages '*outside the Licensed/Music Service*', if music is 'actually offered' from that page, unless the music content of the page is an *insubstantial* part of it[135].

196. iTunes and the MNOs have identified some practical examples where, it was said, the Gross Revenue definition in the New JOL is unduly overreaching and should not conceivably attract royalty – which they do (so *they* say[136]) under the present definition of 'Gross Revenue'. In this category, the more important examples seemed to be:

(i) Outstandingly, banner advertising on 'mixed' pages
(ii) Sponsored search and click-through' advertising, and
(iii) Advertising which enables or permits a 'double recovery', otherwise known as 'double dipping'.

.

The Remaining MSPs agreed with the MNOs' and iTunes' submissions and, if anything, were more radical in their objections. In support of their cases, the MNOs and iTunes also gave examples from the *offline* world of the limits of legitimate (and of illegitimate) royalty tribute to collecting societies and in particular, drew attention to the working of the CD licences which are promulgated by MCPS.

197. The Alliance, particularly in their 4 December 2006 letter, tried to allay the Applicants' fears of excessive royalty being demanded. This did not however satisfy the Applicants who saw it as a further example of 'creeping concession' on the part of the Alliance, of an even greater uncertainty in character and

[134] §§ 8.30.1 and 8.30.2
[135] The words in italics identify points of difficulty for the Applicants.
[136] The Alliance disagree in part at any rate with *their* construction of the definition.

generally, of the still unsatisfactory definition of 'Gross Revenue'. The ongoing concern of the Alliance was stated as follows in that letter:

> 'Encapsulating [the exploitation of their repertoire] in drafting a definition is far from easy, particularly because no two online and mobile services are the same. Furthermore, the Alliance does not know what business models are around the corner. Therefore, precise drafting is difficult. The Alliance has learned from experience as a licensing body that any attempt to draft the definition of Gross Revenue in too prescriptive a manner may lead to evasion of royalty payments and can result in inadvertent discrimination between licensees operating varying business models.'

The general problem facing all the parties (and indeed the Tribunal) was also well characterised by Mr Weisselberg in his opening address[137]:

> *"What the MNOs and the MSPs offer is a range of services; the services are provided in a number of ways. There are often multiple revenue streams, they are not always linked in a straightforward manner to any particular service."*

198. ***Evidence*** In our view, the Alliance's case on the scope of 'Gross Revenue' is built more on submission than on evidence. They *believe* that it is the presence of the music that so strongly draws consumers and subscribers to avail themselves of pages and that this is so whether the page is devoted entirely to music 'actually offered' or whether the page has non-music or music-related content as well i.e. within mixed pages. We are not in doubt about the sincerity of their belief, particularly in the light of evidence from a number of witnesses of the importance (sometimes, the centrality) of music offered within the mix of services. In the case of mixed pages however, the assessment must, they agree, be a question of degree when apportionment should yield a fair result. At trial, this was called the 'spillover effect'.

199. Nevertheless, the apparently unchallenged evidence of Yahoo![138] and AOL[139] is distinctly less enthusiastic about the power of music. Moreover, discussing the impact of music on online advertising, Mr Bill[140] of Vodafone drew our attention to the actual experience of Vodafone Live! He was of the view that whilst music was certainly an 'important component' in their mix of products and services, it was not at all a 'driver of traffic'.

> *" Of the mix of products and services ….in respect of Vodafone Live! Music is certainly an important component. However, I would say that the addition of advertising to the music elements of the Vodafone Live ! service has a downside in the sense that advertisements may distract customers from the purchase of music content which remains our core business in respect of music The inclusion of advertising on music pages is therefore something that Vodafone is approaching with caution."*.

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[137] D2/73
[138] Ferguson I, C1/10/179-180.
[139] Wolffe I C1/1/10-13.
[140] I/8/19.

200. Mr Lee of T-Mobile said that the greater part of their revenue from music related services was actually from ringtones (which are not within the scope of the present enquiry) and not from FTDs[141].

201. We accept this evidence but note that these are early days. Like a number of other matters covered by evidence in these Applications, the witnesses were to a degree speculating as to the likely turn of events during the term of the licence.

202. In addition, having viewed for ourselves these mixed pages and assessed their impact overall, we are not persuaded that in many cases the availability of music (still less, music-related items) has the immediate, compulsive effect for which Mr Rabinowitz contends. In our view the placing of a few music 'buttons' (even if music is thereby 'actually offered') on a mixed page does not *ipso facto* come near to establishing the required 'nexus' with the Alliance's repertoire. The matter is, we feel, to be judged as being one of degree. Considered as the Tribunal did in BSkyB, there will exist a 'spectrum' of factual connection with the repertoire upon which the Tribunal must come to a value judgment in the manner of a jury[142]. If (as often happens) the sole or predominant part of a website page (excluding any advertising) is devoted to music 'actually offered', then it is obvious that the 'driver of traffic' on that page is likely to be the Alliance's repertoire. On the other hand, a page with say, a single 'button' for music downloading cannot be regarded as the *raison d'être* of the page from either the point of view of the proprietor or the consumer.

203. In the form of progressive questions, the basic issues appear to us to be these:

> (a) Should Gross Revenue *ever* cover more than what consumers actually pay to purchase or use the Alliance's music in an online service and if (as seems to be agreed) should it cover more,
> (b) Can it legitimately include associated advertising revenue and if (as also seems to be agreed) it can,
> (c) Where in the kaleidoscopic world of online services does one 'draw the line' on legitimate royalty-attracting advertising revenue. As Mr Rabinowitz put it in the post-hearing written submissions:
>
> > " The debate is as to where the nexus ceases to be sufficient."

Then there is the 'wild card' which so vexes the MNOs and iTunes,

> (d) What should happen if the music service is paid for (in whole or in part) as a result of advertising revenue i.e. it is offered to the consumer, free or at a subsidised rate? Are these the unique cases where one is justified in looking 'outside in-stream advertising' ?

And overall

141 D5/163.
142 See § 65 above.

(e) How may the result be articulated in a simple yet practical manner?

204. Our chief problem in devising a fair, working definition of 'Gross Revenue' has of course been in the context of webcasting. We were invited to consider many actual examples of how advertising might appear when a consumer downloads music on a webcasting service. During the demonstration sessions, representatives of the Applicants put their clients' offerings through their paces. Similar illustrations were also provided at the hearing itself by means of an overhead projector, particularly by Mr Carr. On these occasions we were invited to view selected (and often, we suspect, selectively problematic) material to illustrate and bolster particular arguments of Counsel. A number of photographs of web pages were also put to the Alliance in correspondence accompanied by the question: "*Please tell us, is this 'in'?*" The Alliance's refusal to answer until a later stage (characterised by Mr Weisselberg as 'coyness') was the subject of sustained comment. In this connection, we have also been shown how for example, the home page of the iTunes Store is frequently changed.

205. To further complicate matters, there was evidence that the content on Vodafone's home page changes on a daily or even possibly on an hourly basis[143]. On some webcasting services, customers can actually 'personalise' their content; one consumer can choose pure music offerings for his homepage, whilst another may prefer news, sport or say, music videos.

206. ***The Alliance's Position***. As a practical matter, said Mr Rabinowitz, one should avoid formulae which are tailor-made for a particular music service. To do so might even require the definition to be construed before its *possible* application - in the manner of words in say, a contract or a patent claim. This would be most unsatisfactory. It would be unfair to composers and songwriters and would moreover be a recipe for future dispute and wasted money. That, said Mr Rabinowitz, was why a simply-worded formula for Gross Revenue had been chosen for the New JOL. Moreover, so he argues, unduly restrictive wording would encourage avoidance and become a temptation to 'game the system' [144]. It is all too easy, say the Alliance, to use music to sell advertising and to do so in such a way that the advertisement does not actually appear on the same page or at the same time as the music offered. We shall therefore consider the question of 'gaming the system' below.

207. ***The Applicants' positions***. The response of the Applicants was simple and predictable: the Alliance, they submitted, had no unqualified right to impose so broad a definition under the guise of simplicity so as to capture streams of revenue to which they were not entitled. They had no right to demand licences to make use of material in respect of which they do not own (or control) the copyright. This said Mr Weisselberg, would be an 'unprincipled windfall'. Only in the limited cases envisaged by the Disputed Contentions (and by in-stream

[143] 21/11/51 and 84
[144] See the example given in the Alliance's Answer to the Remaining MSPs' Statement of Case : A6/2/88 §6.15 – and see below.

advertising –see below) could a royalty possibly be justified. Difficult cases would undoubtedly arise (for example with 'bundled' material[145]) but these could be assessed *ad hoc* and if necessary, apportioned for liability by an **independent online assessor**. The present definition of Gross Revenue may indeed look simple, they said, but it was also open to so broad a construction as to enable the Alliance to benefit beyond their legal entitlement.

208. In a separate argument, the Applicants pointed out that the Alliance had contributed nothing to developing, implementing and launching either the music services in question or a fortiori, the mix of services in which it was embedded. It had no input into the basic technology and neither did it share in the considerable business risks involved in getting user-friendly and commercial online products to the public – and indeed, in promoting them once they were there.

> *"Significant to the success of Vodafone generating advertising revenue is its ability to secure subscribers to its network. This will be determined by the range of products and services offered by Vodafone including its voice and text services and pricing plans, its customer service, its content offerings (both music and non-music), the handsets that it offers consumers, its marketing, its network coverage and its reliability."*[146]

An overgenerous definition of Gross Revenue would be manifestly unjust, they argued, in the light of the *rationale* of e.g. BSkyB .

209. The importance of **minima** to this discussion was stressed[147]. In the New JOL. minima had been agreed for the very purpose of addressing a suggestion by the Alliance of a possible policy of deliberate underpricing by a licensee in the future. Mr Weisselberg also reminded us that in cross-examination by Mr Carr, Mr Biro had agreed that the application of appropriate minima and not an extension of the definition of revenue base, was the appropriate answer to the possibility of underpricing: D12/8-9. He also regarded the use of minima for this purpose as being both fair and non-discriminatory. So, it was argued, the Alliance was in any event protected by the minima to which it had agreed.

210. We are impressed with Mr Biro's evidence on minima. We have therefore taken the view that the function of minima is indeed to provide a safety net to protect the Alliance from inter alia the vagaries of underpricing. Music could for instance be substantially subsidised (or given away) as a result of (for example) the availability of healthy advertising revenues. We shall return to the question of underpricing in the practical context of iTunes and the MNOs' Disputed Contentions below.

211. In connection with the Applicants' cases on Gross Revenue, we found helpful a synoptic chart of the parties' positions on the New JOL (as amended by the Home Page Concession), the original New JOL having been marked-up in different colours. This New JOL as 'amended' forms Annex 2 to iTunes' written

[145] See Kershaw I, §§26-30
[146] Bill I , I/8/§18
[147] See §§136-148 supra.

closing submissions and also incorporates the relevant parts of Mr Steinthal's proposed New JOL as 'amended'. The Alliance, so we were told, had declined to collaborate in the preparation of this document.

A pervading mutual mistrust: 'Gaming the System'

212. Ms Enders explained what 'gaming the system' means[148].

> *"It is not cheating….Gaming the system is using whatever loophole there is in order to avoid doing something or other which involves paying copyright [royalty]. …Gaming the system means using whatever advantage there is in order to do that and that can be creating a website that has infinite inventory or does various things. It is very easy to do with software. It is very hard to do in the offline world but it is very ,very easy to do with software."*

213. Whilst we have noted Ms Enders' opinion, there is no evidence of licensees actually indulging in gaming the system and in the context of the present Applications, we are unable to assess the potential magnitude of this activity. Moreover, we also believe that it would be in the commercial interest of users of the repertoire to maximise their additional revenues[149]. If music is the powerful draw the Alliance says it is, gaming the system might run counter to it. Lest it be thought otherwise, we record that we have not regarded 'gaming the system' as being in some way a dishonest activity.

214. We sensed on the part of the Alliance a near certitude that given the chance, the Applicants *would* 'game the system' whenever they could. The Applicants on the other hand, felt that with so broad a formula for Gross Revenue, the monopolistic opportunism of the Alliance would know no bounds and in addition, that the present formula would be a prescription for dispute – and that it would be likely also to be discriminatory. In other words, on the issue of Gross Revenue, a palpable degree of mutual mistrust suffused the parties' cases.

215. We record that as matters stand, we remain of the view that gaming the system is more a hypothetical problem than a real one. Time will no doubt tell.

Borderline cases

216. In determining what is 'reasonable in the circumstances', the Tribunal has been faced with an unusually difficult task of fairly balancing the parties' interests. The existence of troublesome, borderline cases is not a new problem in this jurisdiction. We are aware that perfection in devising an acceptable definition of Gross Revenue even if desirable, will seldom if ever, be achieved. We are aware too that the experience of licensed use during the short period of operation of this licence may throw up unforeseen difficulties which may require subsequent cure. In the competition between the problems posed by

[148] D10/67-68.
[149] See Mr Cue 3,§29 , I/9.

borderline cases on the one hand and the danger of over generosity to the Alliance on the other, the need for a workable and simple outcome must we think be our foremost consideration

> " We approach this decision with a preference that the tariff should be as simple as possible with a straightforward rate structure based on straightforward definitions. Any tariff will produce anomalies. Whatever tariff is adopted, some situations will fare better than others; but in our view, a complex rate structure is more likely to produce anomalies, especially at the margins of its rates."[150]

Though expressed in terms of the tariff in the AIRC case, the principle is germane to the operative aspects of many a copyright licence. We therefore regard the need for clarity of expression and simplicity of operation in the formulation of the definition of Gross Revenue as being general *desiderata*, even if there may be some degree of quantitative inequity or anomaly at its limits. In the end, we have come to recognise that probably no definition of Gross Revenue will perfectly balance the interests of all concerned.

217. Before turning to the core aspects of this part of the Applications, we are fortunately in a position at this juncture to make two general findings: the first relates to the need for an independent online adjudicator and the other to in-stream advertising. Both issues seem to us to be clear cut – and by the conclusion of the hearing, both seemed to be common ground between the parties. We should nonetheless set them out.

An independent online adjudicator

218. Our first proposal in attempting to resolve the problem of possible disputes as to the interpretation of the terms of the New JOL, arose out of what struck us as an obvious operational *lacuna*. We suggested to the parties during the course of the hearing that the New JOL should be amended to provide for a dispute resolution mechanism via the appointment of an online adjudicator, being a suitably qualified and independent person who would be the first port of call in the event of dispute on the interpretation of *any* clauses in the New JOL. A decision as to whether or not a particular offering fell within the definition of Gross Revenue in the New JOL would of course be well within his terms of reference.

219. At the time, this suggestion drew remarkably little interest from the Alliance, though it should be said that both iTunes and the MNOs proposed an independent adjudicator in their Statements of Case[151]. By the conclusion of the hearing however, the Alliance seemed to have accepted the sense of such a proposal. In the event of our insisting upon provision being made for the adjudicator, Mr Rabinowitz undertook to try to define his qualifications and role with his colleagues in a draft amendment to the New JOL. On 16 January 2007

[150] AIRC v PPL (supra) at 229.
[151] MNOs' Statement of Case A6/4/ii(b) and 16(c) and iTunes' Statement of Case A6/6/17. The independent adjudicator was also advocated by Mr Carr in his opening submissions.

Mr Rabinowitz handed up the Alliance's proposed drafting, which he informed us was agreed by the other parties. We *do* insist on provision being made for an adjudicator and we would now invite the parties to settle an appropriate form of wording to meet this requirement for incorporation in our final Decision.

220. We would expect the parties to summon the adjudicator only if negotiations between the parties failed. A period of say 14 days should be allowed for this

In-stream advertising with music fully paid for

221. By the time of the hearing, a cautious compromise had been reached on the liability of at least one stream of advertising revenue to royalty. All the Applicants were agreed that revenue arising as a result of '*in-stream' (or in-download) advertising* is sufficiently linked to the delivery of the Alliance's repertoire as *arguably* to warrant the payment of royalty. The Alliance were not however satisfied with the inclusion merely of in-stream advertising; they argued that this 'concession' did not sufficiently compensate their members for the use of the repertoire online in either present or future offerings and in addition, was inconsistent with other features of their cases.

222. We have noted the word 'arguably' in the compromise but accept it as a *fait accompli*. For example, this is what Mr Bill of Vodafone said about this development:[152]

> *"While as a matter of principle, Vodafone thinks that in-stream advertising should not be included in the revenue base where consumers pay for a music service, it has, in a spirit of compromise, accepted the inclusion of revenue earned from such advertising in the revenue base. This is intended to give the Alliance and its members some comfort that they will benefit if any shift from paid music services to advertising funded music services materialises, without those music services going all the way to being offered for free."*

We have also assumed for present purposes that the compromise proceeds on the basis that the consumer has **fully paid** for the content he has downloaded for 'in-stream' consumption. On that basis, we accept this consensus as a practical and sensible way of dealing with the liability of at least one *locus* for online advertising royalty and we also consider that there exists here a sufficient nexus between the music and its consumption to justify a royalty. We shall also consider the position if a consumer has *not* paid (or has only partly paid) for what he has consumed because of the presence of advertising, when we come to consider the two Disputed Contentions.

223. We have already recorded our understanding of what in-stream advertising means: see § 183. It is understood to occur

> *immediately* before,
> during (such as in between tracks)or
> *immediately* after

[152] I/8/16

a download – which has already been initiated by the consumer[153]. Advertising '*immediately before'* a download would not however qualify for 'in-stream' status if it occurs on what is called a 'music home page[154]' – such as one sees for example in iTunes' Store – even though music is 'actually offered' there; that would be outside 'in-stream' advertising as we understand it – a topic dealt with in the following section.

224. As we understand it, such advertising could in principle arise as a result of the activation of most of the services identified in the Royalty Table -.but it must always be part of the same 'content delivery'. The MNOs provided schematic 'photograb' illustrations of possible in-stream advertising as Annex C to the Agreed Facts.

225. The Alliance suggested however that this 'concession' (as they called it) substantially eroded iTunes' and the MNOs' arguments on their Disputed Contentions since it disclosed

> 'No principled reason … as to why this type of advertising alone should be exempted from the revenue-narrowing proposals of the MNOs' Disputed Contention.'.

226. We disagree. Under in-stream conditions, it is our view that the 'close nexus' is clearly present. Music *is* actually being consumed as a result of selection of an offer from a web page and moreover, in visual and audio-visual terms the music and advertising are symbiotic. It therefore appears logical to treat these three potential locations for advertising equally *a propos* advertising revenue for inclusion in the definition of Gross Revenue. In BSkyB terms, this revenue is at the top end of the 'spectrum' of association with the repertoire.

227. In addition, since in-stream advertising is inextricably connected with the actual consumption of the music purchased, such consumption has to be recorded and accounted for by users in any event. So in practice, there should be no problems.

228. So much for 'in-stream' advertising as such. This is a justifiable revenue stream for royalty purposes and in our view, it must be spelt out in the definition of Gross Revenue. iTunes and the MNOs have proposed slightly different versions of wording on this point for inclusion in the revised Gross Revenue definition[155]. The Remaining MSPs cover this in different wording as follows:

> "..provided that such advertisement …appears at the same time as a Repertoire Work is being utilised by or served from the Licensed Service."

229. We prefer the MNOs' version which reads as follows:

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[153] We have been shown relevant advertising immediately before and during download. We have not however seen advertising immediately *after* download.
[154] Or perhaps a music sub-home page.
[155] Annex 2 to iTunes' closing written submissions.

(b) all revenue, including by way of sponsorship and commissions, received (or receivable) by the Licensee as a result of the inclusion of third party advertising "in-stream) as part of the Licensed Service, being advertising placed immediately at the start, end or during the actual delivery of a Repertoire Work to a User, …"

Outside 'in-stream' advertising: 'Music only' pages and mixed pages

230. The consensus on in-stream advertising assists us somewhat in establishing whether a nexus exists between music and advertising in outside in-stream situations and if it does, where the 'line of sufficient connection' should be drawn. The enquiry arises of course, only when music is 'actually offered' online

231. The MNOs' and iTune's positions were that in such circumstances, revenue can arise *only* in the circumstances envisaged by their respective Disputed Contentions i.e. full payment for the music downloaded exhausts all further tribute.

232. The Remaining MSPs (as we understood it) contended that in-stream advertising was the only revenue stream which the Alliance could legitimately lay claim to.

233. In our view however, there are three categories of pages which are outside 'in-stream' pages, all of which *ex hypothesi* may carry advertising. First, there are those pages which have no music or music-related content. These have already been considered and no further mention need be made of them.

234. Secondly there are pages where (the advertisement apart) the **entire operative content** of the page comprises 'music actually offered'. Choice of any item on such a page will lead to a music download and for this reason, such pages were sometimes referred to as '**music only pages'** or as '**music home pages'**. It seems to us that the association of such pages with the Alliance's repertoire must in real terms be about as close as it is with 'in-stream advertising' and may logically be considered to be part of it. All advertising revenue from such pages should therefore in our view, also be subject to royalty being paid – for the same reason. 'Music only pages' must now be specifically mentioned in the new definition of Gross Revenue.

235. Of greater importance to this case is the third category, the so-called '**mixed pages**'. By 'mixed pages' we mean web pages where non-music (and/or music-related[156]) services are simultaneously offered with music for direct downloading. As we understand it, mixed pages may occur virtually anywhere online but for the purposes of illustration, a home page was often cited for this purpose. In such cases, as both the Disputed Contentions and the Home Page Concession recognise, the relative 'contributions' of the music and non-music

[156] See § 190.

parts (again disregarding the advertising itself) may vary between the 'insubstantial' and the predominant.

236. Whereas the discussion at trial (and before it) focussed more upon the effect of the 'music offered' being *insubstantial* in relation to the whole, we consider it to be both realistic, more practical and in line with principle to look at the situation the other way around. The relevant question therefore is: Does the character of the **predominant part** of the page (disregarding the advertisement itself for this purpose) make it a royalty attracting page when advertising is present?

237. In our view, if ' music actually offered' comprises the predominant part of the entire content displayed on a web page (which *ex hypothesi* also carries advertising –which may be ignored for present purposes), then advertising revenue arising from it <u>may</u> legitimately be included in the definition of Gross Revenue. In practical terms, this conclusion thus disposes of the Disputed Contentions.

238. ***Apportionment***. This is a strategy which has been proposed on several occasions to tackle the revenue calculation on mixed pages in hopefully, a fair way. Both the Disputed Contentions, the Home Page Concession and the arguments of counsel on other related issues, have from time to time raised the spectre of trying to separate on a mixed page, services not requiring a licence from those that do, followed by an exercise in some sort of apportionment. It stands accepted that precision is unlikely ever to be achieved in practice and that once again, the assistance of the adjudicator is likely to be sought. In the light of what we saw at the demonstrations, we find the likelihood of repeated, detailed apportionment exercises as being something to be avoided if at all possible. Subject therefore to the paragraph following, we wish to avoid detailed apportionment exercises.

239. We would therefore add the following regarding our view of what the **'predominant part'** of the content of a mixed page should be. Here, the assessment must primarily be visual[157]. It will be the result of examining the *area* of a page actually occupied by the mixed offerings and establishing the 'relative dominance' of the music and non-music elements – the advertisement itself being disregarded for this purpose. For the avoidance of doubt, we record that by the '**predominant part**' of the entire content of a mixed page, we envisage the page to contain 75% or over of 'music actually offered'. Though this is another value judgement, we feel that this apportionment is relatively easy to carry out whilst at the same time serving the need for a close connection between the music and the revenue generated from advertising on that page.

240. Should there be difficulty about either what is to be regarded as being 'in-stream advertising' or whether the 'predominant part' of a mixed page is indeed related to 'music actually offered', this could, we feel, conveniently be left for the adjudicator's determination.

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[157] We were not addressed at any length on how to deal with the assessment of 'audio only' advertising.

The Alliance's 'Music Site'

241. Prior to trial, the Alliance often used the phrase '*within/outside the Licensed/Music Service'*[158] to identify the royalty-attracting 'zone': see for example § 192 above. However, during the trial, Mr Rabinowitz began to identify the Alliance's principal royalty-attracting revenue streams as arising at (and around) what he called a '**Music Site'.** The notion of the Music Site seemed to us to come to a head in the Alliance's 4 December 2006 letter (p. 3) where it was identified thus:

> 'What constitutes a 'music site' should *in most cases* be obvious to the casual observer. The music site will be that part of the MSPs' or the MNOs' offering which is *built around* the offering of the music licensed under the New JOL.' [*Emphasis added*]

242. We learned this much more about Music Sites (principally again, from the 4 December letter):

> (a) Music Sites are separately branded and have their own 'look and feel'.
>
> (b) They are in some way broader than a Music Service[159] since
>
> > *" it is not limited to the Music Services as defined in Schedule 1 of the Scheme. If it were, Advertising Revenue qualifying as Gross Revenue would on Mr Carr's construction, only be generated from pages from which music is' actually offered'."* ,
>
> (c) Music Sites are "*generally.. identified with the word 'music' or some related description*".
>
> (d) "*Of course, under the New JOL it may be necessary to have a discussion with a potential licensee about the extent of its Music Site."*

243. The Alliance's position concerning their proposed 'Music Site' was this: Mr Rabinowitz said that all revenues earned thereabouts should 'in general' be within the royalty base. Nevertheless, the Alliance also laid claim to undefined territory outside the Music Site. Here however, Mr Rabinowitz recognised that a more complex situation prevailed and in fairness, an apportionment of revenues based on subjective assessment might be required – if necessary, with the intervention of the adjudicator. Since the foregoing still left us unenlightened as to where the line was to be drawn, we must evidently look more closely into the limits of the Alliance's 'Music Site'.

244. First, according to the Alliance, as the Music Site royalty-attracting advertising is evidently intended to include at least

> (a) 'in-stream' advertising, and

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[158] Or simply 'the music service'.
[159] Defined: see § 168.

(b) advertising which is present where there is provision for downloading music (i.e. ‘music actually offered’).

245. However we view the Alliance’s idea of a Music Site with suspicion in so far as it lays claim to more than this. Like the Applicants, we question the use of the phrase ‘*built around’* the offering of the licensed repertoire; this is a relative term and if questioned, may inherently be prone to debate and misunderstanding. As we observed at trial: Where does the perimeter to what has been ‘built around’ lie? Mr Carr’s response was in effect, that the perimeter was elastic[160]:

> “*There are not any limits because it is all in their discretion.”*

246. This is obviously unsatisfactory. If (as it appears in view of the foregoing) the meaning of ‘Music Site’ is to a significant degree, indeterminate (or its application is capricious), its use in the definition of Gross Revenue would be likely to give rise to problems. It should not be used in our view.

Music fully paid for: Conclusions

247. *When music is fully paid for* there are three situations where in our judgment, advertising revenue should attract royalty:

- when the advertising is ‘in-stream’,
- when the ‘music actually offered’ forms the sole content of a page on which advertising is also present (ie a ‘music only’ page), and
- when the ‘music actually offered’ forms the ‘predominant’ part of a page on which advertising is also present (i.e. a ‘mixed page’)

In the second and third cases, the part of the page in question occupied by the advertising itself will be disregarded for the purposes of estimation. In the third case, ‘predominant’ will be understood to mean that the music actually offered forms 75% or over of a mixed page. Mathematical precision is not envisaged and disagreement on any of the foregoing matters can be referred to the adjudicator. If music is not ‘actually offered’ on a page, the issue of royalty on advertising revenue does not of course arise.

Music not fully paid for: The ‘Disputed Contentions’ and minima

248. So far, we have assumed that the consumer will be paying the *full price* for music downloads. But the full price may not always be required and in such a case, two possibilities will arise, both of which underpin the Disputed Contentions. First, there is the MNOs’ Disputed Contention which envisages downloaded music being offered *free*, its cost having been entirely defrayed by

[160] D2/38.

concomitant advertising[161]. Secondly, there is iTunes' Disputed Contention where music is offered at an '*artificially depressed'* price, that is, by *subsidy* from concomitant advertising. The music for consumption must of course be 'actually offered'. In either situation, subject to the comfort of minima (see above), the Alliance considered that their members might lose out on royalty from the sale or use of the music – all because of the presence of the advertising associated in some way with it. That said the Alliance, would be unfair.

249. The Alliance's argument is however flawed in that it completely ignores the presence and negotiated purpose of minima: see §§ 138-139, supra. . Nonetheless, we shall examine the arguments.

250. The iTunes' proposal was, said Mr Weisselberg, a more 'nuanced' position than that taken by the MNOs. Indeed, iTunes' 'concession' was acknowledged by Mr Rabinowitz to represent the 'middle ground' and was thus more reasonable from the Alliance's point of view. However, it was one which still did not go far enough for the Alliance.

251. Whenever the full price *is* paid for music, the Applicants submit that ('in-stream advertising' apart), the Alliance's members will have been sufficiently rewarded for the use of the repertoire. No royalty is therefore due on advertising. On the other hand, the MNOs and iTunes *are* prepared to pay royalty when the music is free or is subsidised by advertising. When this occurs, royalty for use of the music can *only* be levied on the advertising revenue with which it is associated since there is nothing else to go on. In justifying this approach, Mr Carr drew support from the *faute de mieux* basis upon which the Tribunal had to act in the commercial radio case, AIRC v PPL [1993] EMLR 181 (supra). There, it will be recalled, there was also no alternative to a royalty based on advertising revenue, commercial radio being free to the consumer.

252. We have in effect rejected the word 'only' in the phrase '*should only be included within Gross Revenue'* which is to be found in both Disputed Contentions. We have thus rejected the premise on which the Disputed Contentions are based because, we believe, that even when the music is fully paid for, there are circumstances where royalty on advertising revenue should still be available to the Alliance; see the previous ***Conclusions.*** The situations envisaged in the Disputed Contentions are merely, *a fortiori*.

253. Pointing to an apparent illogicality in the positions of iTunes and the MNOs on this point, Mr Rabinowitz said that if free or subsidised music apparently creates a 'sufficient nexus', how could it be said that music offered at full price in the same situation did not? We understand that argument. We are not however sure that the *faute de mieux* order for royalty in AIRC is expressed to be based on the need for a 'sufficient nexus' between broadcasting of the music and its associated advertising. The award arose because compensation based on advertising royalty was the *only* solution which the Tribunal found 'reasonable in the circumstances'.

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161 Actually, in both cases, 'advertising, sponsorship and commissions'.

254. We shall certainly follow the AIRC approach in this part of our own decision without analyzing its *ratio*. We believe however that there is further justification for doing so. When music is free or subsidised, that very fact must also fuel an increased draw to the page whence the music is actually offered. For that reason, there, is a separate 'close connection' between music and advertising. Consumers are obviously attracted to free (and subsidised) offers; ask any pirate.

255. ***iTunes' calculations***. For all its engaging 'nuance', iTunes' proposal has an uncomfortable pinch about it. When online music is offered free there is, of course, unlikely to be a problem. But that is not the case when any degree of subsidy is present.

256. In our view, the iTunes Disputed Contention suffers from the seriously unattractive feature that it would be difficult to operate in practice. Part of the difficulty may be appreciated merely by looking at para (c) of the iTunes' proposals for amending the New JOL which are incorporated in the synoptic marked up version which is Annex 2 to their written closing submissions. Royalty revenue due on artificially depressed pricing is expressed in terms of a formula which requires an assessment of inter alia the number of underpriced Musical Works sold. The artificial depression could be determined as follows:

$$A \times \frac{UMV}{NUMW}, \qquad \text{where}$$

A=Applicable royalty revenue received in respect of the period when an underpriced musical work is offered for sake

UMW = Number of underpriced Musical Works sold, and

NUMW = number of Musical Works sold

257. The above formula presupposes however that there will be antecedent agreement about when a Musical Work is 'underpriced'. But this appears to be no easy matter. For example, the evidence of Mr Bill of Vodafone, gives two real illustrations of disputes over whether the price for FTD was in truth 'underpriced'[162]. On this point, Mr Bill also described the iTunes proposal as being "*subjective and difficult*"[163]. We accept this evidence. In cross-examination, he also said[164]:

> *"..I am not suggesting that it would be impossible. I am saying it is convoluted and perhaps less black and white than the proposal that we put forward."*

162 I/8/§25.
163 I/8/§25.
164 D5/79-80.

258. iTunes tried to meet this difficulty in two ways. First, it proposed a practical mechanism whereby underpricing shall be *deemed* to have arisen[165]. The proposal reads as follows:

> " The price payable by the user shall be deemed to have been artificially depressed …where 8% of the ex-VAT price to be paid to by the user for a Musical Work would have produced a royalty of less than half the applicable minimum payment".

259. Secondly, Mr Weisselberg having accepted that in practice it might not be easy to decide when the price paid by the User has in fact been subsidised by advertising revenue (and if so, to what degree), was therefore compelled to put forward the hard-pressed online adjudicator to resolve any dispute on the issue.

260. For the foregoing reasons, we have come to the conclusion that the iTunes Disputed Contention is in any event unacceptable. It would, we think, be a prescription for serious practical difficulty in the future. The *degree of subsidy* (which is its *raison d'être)* cannot be ignored. Other parties submitted that what was needed was a relatively simple, workable definition which on the authorities is always a *desideratum*. That, says Mr Carr, is a reason why the MNOs' proposal should be accepted.

261. We believe first that when *any* element of subsidy or underpricing is present in the sale or use of the repertoire online, that state of affairs should be presumed to be due to concomitant advertising. We further believe that the degree of subsidy should be ignored; free music and subsidised music should be treated in the same way.

262. Mr Steinthal's submission on this part of the case was again based on the criterion that for royalty to accrue, advertising must in all circumstances be '*directly attributable'* to the repertoire. That is of course correct. The Remaining MSPs' formula for triggering the operation of royalty accrual in respect of online advertising is, as we understand it, remarkably similar to the conclusion we have reached in relation to the downloading of fully paid music outside 'in stream' advertising. It reads thus[166]:

> "(b) All revenue received (or receivable) by the licensee in the Territory as a result of the placement of third party advertising on or within the Licensed Services, provided that such advertisement appears on the same webpage adjoining or immediately proximate to the use of Repertoire Works, or [in-stream – see above]"

Overall conclusions

263. In summary, we accept on authority, that the Alliance is entitled to participate by royalty in some of the advertising revenue in limited circumstances outside

[165] Again from the 'marked-up' New JOL, being Annex 2 to iTunes closing submissions. We have assumed that this proposal will be workable within the industry.
[166] All three proposals for amendment of the New JOL definition of Gross Revenue at this juncture introduce the concept of 'the Territory'. We see no harm in retaining this.

in-stream advertising. We are minded to treat all the cases basically on an equal footing, that is, whether the music is fully paid for or whether it is either free or it is artificially depressed by advertising. When the sole or predominant part of a page relates to 'music actually offered', royalty is due. Furthermore, in relation to the 'sole or predominant' requirement, our view is that it should also be understood in the same way in all cases.

264. It is of course true that when music is not fully paid for, the Alliance may to some degree 'lose out' on the sale. But that is surely why minima are present in the Tariff.

Sponsored search advertising and 'click through' sales

265. These days, various sorts of sponsored search are a common (and useful) feature of web pages. Sponsored search advertising is the return of links to advertisers on a search results page where the user uses a search facility on say, an MNO's content portal. Such advertising is akin to the 'sponsored links' that are often returned on an Internet search engine's results page. In Annex D to his closing written submissions, Mr Carr provided an illustration of sponsored search advertising by showing the results page of a Google search on 'Robbie Williams' . This showed 10 results, two of which (entitled 'Sponsored Links') enabled one to download Robbie Williams songs *via a third party website*. The remainder of the results page related to stories and articles of various kinds concerning the singer.

266. In our view, a search facility is a distinct non-music service offered to consumers who, in the case of customers of the MNOs, expect to search content wherever they are within the service. It may be regarded in the same way as the music button on a home page. It may be music-related or it may not be. More importantly, this form of advertising has in our view, only a tenuous a link with the use of the repertoire *by the MNO (or by iTunes) and* in our judgment sponsored search advertising cannot qualify for inclusion in the definition of Gross Revenue. The final licence should therefore explicitly spell out this exclusion.

267. Third party sales are in any event excluded from the Gross Revenue by the New JOL: H/1/44-45 § 1 (b)(ii).

Rearrangement of page content

268. We have already mentioned this recent phenomenon but were not addressed on the topic at any length. In theory, rearrangement could possibly lead to advertisements being moved by the consumer into new positions relevant to this enquiry. Such re-arrangement is in our view, out of the hands of the MNOs or MSPs and is thus without the scope of the Gross Revenue provision. In addition, a general direction to the customer referring to the provision of a facility for rearranging the content of an offering is, we consider, also without the scope of the present enquiry. This is so on the basis of the narrow meaning given by the

courts to ‘authorisation’ in copyright cases: see for example CBS Songs Ltd v Amstrad Consumer Electronics plc [1988] AC 1013 at 1054[167].

VIII ‘DOUBLE DIPPING’

269. This was another ‘quia timet’ topic if we may so call it. The Alliance was from time to time accused of a desire to collect royalty on the same revenue stream twice and examples of this possibility were put forward. In response, the Alliance vehemently denied any wish (or indeed entitlement) to do so and sought to clarify their position in their letter of 4 December 2006. Double dipping is obviously objectionable in the present context but it is to be contrasted with two separate revenue streams generated from two separate acts of exploitation of music. That is not the same thing. We have considered the evidence regarding the possibility of double dipping and do not believe that the likelihood of its happening to be sufficient to require it to be addressed specifically in the definition of Gross Revenue.

IX A DEDUCTION FOR ADVERTISING COSTS

270. The Remaining MSPs seek a deduction from the Gross Revenue base of 15% for the costs of securing advertising revenues. All the other parties have settled with the Alliance on the basis that there should merely be a 5% deduction under this head.

271. The basis for the Remaining MSPs’ contention seems again to hark back to the position of the commercial radio broadcasters. In the case in question, AIRC v PPL [1993] EMLR 181 at [217], the Tribunal found as a fact that the cost of obtaining direct advertising was “ *in many cases …probably greater than 15% of sales revenue. In some cases it is as much as 30%”*. Nevertheless the Tribunal applied a 15% deduction.

272. Two points which are presently relevant may be gleaned from this decision. First, that these figures were based on actual evidence of advertising rates and costs. Secondly that the Tribunal applied a deduction which was intended to cover only a *proportion* of the costs of obtaining advertising.

273. In this case, the most important factor for us to take into account is undoubtedly the existence of the New JOL as a comparator. For the reasons upon which we have already elaborated, we are of the view that in this aspect of the case, the New JOL must indeed be regarded as a compelling comparator. We should therefore require cogent evidence to be persuaded that the settlement figure of 5% was *not* fair and reasonable in the circumstances.

274. In addition, the evidence touching the actual costs of advertising in this case falls far short of that standard in our view. Some relevant *estimates* were provided by Yahoo! and calculations were made by Mr Boulton on behalf of

[167] Not referred to by counsel.

AOL. The outcome struck us as derivative in character and in addition, was criticised by Mr MacGregor. On the other hand, the evidence of Mr Bill on behalf of the MNOs suggests that at the time of the settlement, they indeed had an ongoing commercial interest on this question of advertising costs.[168]. This also supports our view that the New JOL is the best comparator in this matter

275. We have reviewed the material under this head and find that the Remaining MSPs have failed to justify a deduction beyond that already agreed by the settling parties to the New JOL

X A DEDUCTION FOR AUDIO VISUAL MATERIALS

276. A reduction in the *royalty rate* (but no reduction for *minima*) in respect of audio-visual materials of 15% was agreed between the Alliance and all the other settling parties (iTunes and the MNOs included) in the New JOL. However, the Remaining MSPs have argued for a 25% reduction in both the royalty rate and minima on the basis that the music provided by the Alliance only forms a relatively small part of a more valuable product.

277. Mr Boulton stated that the New JOL has "*some merit as a comparable*" on this point[169] . For the reasons already given, we regard the New JOL as being the best comparator under this head as well. This is an area where iTunes had a real interest, Mr Cue stating that audio-visual materials had a "*huge potential*" as far as his company was concerned. In fact his company is already offering audiovisual downloads (of various kinds) in a number of markets. He also confirmed in cross-examination that in September last year, his company's interest was as great as it is today in this business area[170]. Evidence on this topic was also given by Mr Bill and Mr Lee. These parties evidently well knew what they were doing when they signed the Settlement Agreements.

278. We have reviewed the material before us on this topic and have unhesitatingly reached the view that the position agreed by the settling parties in the New JOL is fair and reasonable – and should apply to all new licences. The Remaining MSPs case on this point is therefore rejected.

XI A 'NEW FORMAT' DISCOUNT?

279. The Remaining MSPs were also seeking a 'new format' discount. Their proposal was that only one third of the rates determined by the Tribunal should apply to the 'nascent webcasting services market' for a period of at least 5 years: Supplemental Statement of Case § 18.1. It was said that 'the webcasting industry when compared to the commercial radio industry is 'underdeveloped and still in its infancy'. Relying on precedent (BPI v MCPS [1993] EMLR 86 at 115) it was submitted that in situations such as this, a 'new format' deduction

[168] I/8/10
[169] G1/6/32
[170] D7/99-101

was amply justified. Needless to say, this submission was strongly opposed by the Alliance.

280. There is no provision for a 'new format' discount in the New JOL. Moreover, though the Remaining MSPs' position on this issue was never abandoned, we gained the impression that this a was a topic which by the time of the closing speeches, Mr Steinthal was not pressing as strongly as he was in opening.

281. The evidence on this point comes first from Mr Boulton upon which he notably disagreed with the Remaining MSPs. Confirming our own view (and for the reasons previously given) he agreed that the New JOL was a valid comparator on this issue. Ms Enders firmly rejected the suggestion that webcasting was a 'nascent' industry. We accept this evidence. In addition, the Remaining MSPs' argument has a hollow ring when one considers that they themselves were the first to launch on the UK market and take licences from the Alliance[171] For these reasons, we are of the view that the Remaining MSPs have failed to establish their case that there should be provision for a 'new format' discount.

XII COSTS IN THE COPYRIGHT TRIBUNAL

282. References to the Tribunal have become more frequent and so too has been the criticism by users and potential users (many of them of modest means) about the heavy cost of resolving disputes with the collecting societies. Invoking the assistance of the Tribunal to resolve disputes must not become the preserve of the powerful and the wealthy by reason of costs. It is, so we consider, the duty of users of the Tribunal, particularly the collecting societies, to ensure that these references are conducted in a thoroughly proportionate and economic manner, and overall, in accordance with the requirements of CPR, Rules 1.1-1.4, that is, the **Overriding Objective**.

283. In Universities UK v Copyright Licensing Agency Ltd [2002] RPC 36, the Tribunal said this[172]:

> "The written evidence is extensive and extremely detailed. No point, however irrelevant, is allowed to go unanswered with the result that the second round witness statements turned out in some cases to be longer than the original ones…..
>
> "To do its job effectively, the Copyright Tribunal must be accessible at reasonable cost. It exists at least in part, to prevent unreasonable terms being imposed on licensees who have little choice but to take a licence. Yet in the present case, we heard evidence from both sides that a reference to the Copyright Tribunal was regarded as a last resort: a failure of a most serious kind. The reason for this view is the perception that the proceedings are necessarily extremely costly, intolerably lengthy and highly complex. The danger that lurks in such a state of affairs is that the cost of a reference to the

[171] RealNetworks was licensed from July 2002 for example and Yahoo! and AOL a year later.
[172] § 16.

Tribunal could be seen as an incentive to the acceptance of unreasonable terms, in conflict with the above objective".

284. Though the parties' presentation of court material has been excellent, we feel that more thought could and should have been given to trying to save costs on the way. In particular, in this case:

(a) The overkill on expert evidence has already been noted and commented upon, and
(b) The parties' unabated enthusiasm for the generation of long-winded *inter partes* correspondence seemed quite unstoppable – and to have been arguably unnecessary.

XIII EPILOGUE

266. We have noted on several occasions that as far as we are aware, this Decision has been made in virtually uncharted waters[173]. In addition, our decision on a number of issues has been reached more by hypothesis than as a result of experience. Only time will tell whether the way a number of matters have been resolved proves to be fair and satisfactory. We therefore feel it appropriate to conclude with the following two observations, the first being a quotation from the judgment of Hoffmann J (as he was) in an appeal from the Tribunal in PRS v BEDA [1993] EMLR 325, which we believe to be particularly apposite to the present decision:

> "Thus the Tribunal found itself with very little guidance other than its own expertise and general impressions of the evidence, engaged in an exercise in which it is notoriously easier to be right than to explain why."

267. Secondly, the licences which become effective as a result of the final Decision will have a relatively short period to run. By the same token, the technology of delivery, the online offerings themselves, the advertising strategies and even the music are all in a state of development and flux which seems to be as rapid as it is unpredictable. Whilst we of course have confidence in the 'reasonableness' of the conclusions we have reached in this Decision, its effect and utility as a working prescription for the future will have to be tested by experience.

The Copyright Tribunal	**Tribiwnlys Hawlfriant**
The UK Intellectual Property Office	**Swyddfa Eiddo Deallusol y DG**
Newport NP 10 8QQ	**Casnewydd NP10 8QQ**

[173] We have however been sent (and have read) the decision of the Copyright Board of Canada relating to the tariff of royalties to be collected by CMRRA/SODRAC INC on online musical services, dated March 16 2007.

Annex 1

DRAMATIS PERSONAE and CHRONOLOGY

PARTIES

Current Parties | **Webcasters' position**

Yahoo! UK Limited

UK-subsidiary of Yahoo! Inc., a global internet company trading.

Yahoo! UK provides a range of internet-content services in the UK. Its online music services consist of:

1. "LAUNCHcast", a free advertising-supported webcasting service comprising:

(a) about 80 pre-programmed channels programmed by Yahoo! by way of genre, artist, era etc., and

(b) a user-customised channel which can be made available by the user to other users.

Each of these channels allows the user to rate artists, albums, songs and genres and, thus to influence the playlist generated by Yahoo! for the channel. Each channel also allows the user to pause the stream, to skip forward through an unlimited number of tracks, to turn off explicit lyrics and to see a list of recently listened to songs.

2. "LAUNCHcast Plus", an additional webcasting service comprising 11 extra channels made available only to subscribers to the BT Yahoo! Broadband service.

3. Free on-demand music video streams which will be followed by pre-

Webcasters' position:

Each of these channels allows the user to rate artists, albums, songs and genres and thereby have some influence over the playlist generated by Yahoo! for the channel. Each channel also allows the user to pause the stream, to skip forward to the next (unidentified) song in th to turn off explicit lyrics and to see a list of recently listened to songs. Channels within the LAUNCHcast service allow only 5 skips forward per hour.

3. Free on-demand music video streams which will be followed by pre-programmed streams of further music videos selected by Yahoo! At any time, the User may choose

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	programmed streams of further music videos selected by Yahoo! If the User wishes, he may select another on-demand video at any time.	to restart this process by selecting another video on demand.
AOL (UK) Limited	UK-subsidiary of TimeWarner Inc (formerly AOL TimeWarner Inc.), a global media and entertainment company trading. AOL (UK) provides a range of internet-content services and a broadband internet access subscription service (which is currently being sold to CarphoneWarehouse subject to regulatory approval). Its online music services consist of: 1. “Radio@AOL”, a webcasting service comprising about 120 in-stream advertising-free channels currently made available only to AOL broadband internet subscribers. AOL (UK) intends to make this a free advertising-supported service available via its web portal in the near future. 2. “Sessions@AOL”, free advertising-supported on-demand video streaming service comprising specially recorded sessions/concerts by selected artists. 3. Free advertising-supported on-demand music video streams. 4. “Listening Post”, a free advertising-supported on-demand streaming service of a limited number of audio-only tracks.	UK-subsidiary of TimeWarner Inc (formerly AOL TimeWarner Inc.), a global media and entertainment trading company. 1. “Radio@AOL”, a webcasting service comprising about 120 channels currently made available only to AOL broadband internet subscribers. These channels currently do not contain in-stream audio advertisements; but banner ads are sold on web pages associated with AOL's radio service. AOL (UK) intends to make this a fully free-to-the-consumer, advertising-supported service available via its web portal in the near future. 2. “Sessions@AOL”, a free-to-the-consumer advertising-supported on-demand video streaming service comprising specially recorded sessions/concerts by selected artists. 3. Free-to-the-consumer advertising-supported on-demand music video streams. 4. “Listening Post”, a free-to-the-consumer advertising-supported on-demand streaming service of a limited number of audio-only tracks.
RealNetworks Ltd	UK-subsidiary of RealNetworks Inc., a multi-national software and internet company. RealNetworks Ltd provides media player software to internet users and its online	

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	music services consist of: 1. RealMusic, a subscription webcasting service offering a selection of advertising-free webcasting and simulcasting channels and on-demand music video streams. 2. SuperPass, a subscription video service which includes music videos.
iTunes SARL	Luxembourg-incorporated subsidiary of Apple Inc. (formerly Apple Computer, Inc.), a global computer software and hardware company. Apple Inc. manufactures the personal music player, the iPod. iTunes operates an online store for permanent downloads. It has music and non-music content. Its music content consists of both audio-only music downloads and music videos. Its non-music content currently includes audio book downloads, games and short animated films. It also provides a directory of podcasts available from third-party providers. It is the largest provider of permanent music downloads in the UK.
O2 (UK) Limited	UK mobile network operator which is ultimately wholly-owned by Spanish telecommunication company, Telefonica SA. O2 provides a range of mobile network access and content services in the UK. Its music service comprises offering its mobile network users a permanent download music service. In the past O2 has also, on a few occasions, streamed content from live music concerts.
T-Mobile International UK Limited	UK mobile network operator which is wholly owned by T-Mobile International AG & Co KG whose ultimate parent company is the German telecommunications company, Deutsche Telekom AG. The T-Mobile group provides a range of mobile network access services in the

	UK. Its music service comprises offering its mobile network users permanent music download services.
Vodafone UK Content Services Limited	Content subsidiary of UK mobile network operator which is part of Vodafone Group plc. Vodafone provides a range of mobile network access and content services in the UK. Its music service comprises offering its mobile network users permanent full track music downloads, music video streams and music video downloads and Vodafone Radio DJ, a subscription webcasting service.
Orange Personal Communications Services Limited	UK mobile network operator which is ultimately wholly-owned by French telecommunication company, France Telecom SA. Orange provides a range of mobile network access and content services in the UK. Its music service comprises offering its mobile network users a permanent download music service. Its affiliate, Orange Home UK plc, offers a permanent download music service via the Internet.
Mechanical Copyright Protection Society	UK collecting society for the licensing of mechanical rights in musical works. It has approximately 14,000 individual composer and songwriter members and approximately 5,000 music publisher members. It distributed over £210m to its members in 2005.
Performing Rights Society	UK collecting society for the licensing of performing rights in musical works. It has approximately 38,000 individual composer and songwriter members and approximately 3,400 music publisher members. It distributed over £270m to its members in 2005.
British Academy for Composers and Songwriters	UK trade body for composers and songwriters. It has approximately 2,500 members.

Former Parties

British Phonographic Industry Limited	UK trade association for producers and licensees of audio and audio-visual recordings of music. Over 300 members (including all the 4 major record companies, Universal, SonyBMG, EMI and Warner) together responsible for over 90% of commercial sound recordings.	
MusicNet UK Limited	UK-subsidiary of MusicNet Inc., a US-based "white-label" business-to-business, online music service provider which offers permanent download, on-demand and webcasting services to third parties. MusicNet UK provides permanent download and on-demand music services to Virgin Digital and HMV Digital.	UK-subsidiary of MusicNet Inc., a US-based "white-label" business-to-business, online music service provider which offers permanent download and on-demand services to third parties.
Napster LLC	A multi-national online music service provider. In the UK, Napster SARL, a wholly-owned subsidiary of Napster LLC, offers consumers subscription limited download and on-demand streaming services. These services can be PC-based only (Napster PC Music Service) or for portable music players as well (Napster to Go). It also offers UK users a permanent download music service (Napster Light).	
Sony United Kingdom Limited	UK-subsidiary of Sony Corporation, a global computer hardware, communications and entertainment company. In the UK, SonyConnect offers users a permanent download music service.	

FACTUAL WITNESSES (who gave oral evidence at trial)

For the MSPs

Gabriel Levy General Manager Label Relations

	(and formerly Head of Music, Europe) at RealNetworks	
Andrew Lee	Head of Legal Department at T-Mobile International UK Limited. Gave evidence under a witness summons.	
Paul Brown	European Managing Director of Pandora Media Inc. Pandora Inc. is a US-based free advertising-supported webcasting service which plans to launch its service in the UK. Pandora's service allows the user to create his own personalised channel, to select an artist for the first track to be streamed, to pause the stream, to skip forward through up to 6 tracks per hour and to rate tracks, albums and artists thus influencing the playlist generated by Pandora for the channel.	European Managing Director of Pandora Media Inc. Pandora Inc. is a US-based free-to-the-consumer advertising-supported webcasting service which plans to launch its service in the UK. Pandora's service allows the user to create his own personalised channel, to select an artist for the first track to be streamed and to rate tracks, albums and artists, and thereby to influence the playlist generated by Pandora for the channel. Pandora's service also allows the consumer to pause the stream and skip forward to the next (unidentified) song in the channel playlist up to six tracks per hour.
Geoff Taylor	General Counsel and Executive Vice-President of the International Federation of the Phonographic Industry (IFPI), the trade association of the international recording industry (and formerly General Counsel to the BPI). Gave evidence under a witness summons.	
Mark Mooradian	Vice-President Strategic Planning and Business Development for MusicNet Inc. Gave evidence under a witness summons.	
Christopher Johnstone	Head of Legal at Music Choice Ltd. Music Choice is a provider of digital music broadcasting services via TV and intends in the future to operate a video on-demand service. It operates a permanent download online music store and video on-demand service in the UK.	

David Wolffe	Chief Financial Officer and Senior Vice President of AOL (Europe) (and formerly CFO and Senior VP of AOL (UK)).
Christopher Hicks	Interim Manager and Director of Finance for UK Audience Business at AOL (UK).
Shannon Ferguson	Managing Director of Yahoo! Music Europe.

For iTunes

Eddy Cue	Global Vice-President of iTunes.

For the MNOs

Jonathan Bill	Former Head of Advertising and Industry Development at Vodafone Limited.

EXPERT WITNESSES

For the Applicants/Interveners

Richard Boulton	LECG.
Derek Ridyard	RBB (did not give oral evidence).

For the Alliance/BACS

Claire Enders	Enders Analysis.
Gervase MacGregor	BDO Stoy Hayward.
Zoltan Biro	Frontier Economics Ltd.

Chronology

--/10/1995	MCPS trial licence of Cerberus – the first online MCPS licence: Porter 1 para 16 (E1/6)
09/08/1996	MCPS licence of Cerberus for music downloads service: E2/178
--/--/1997	RealNetworks UK operation incorporated: Levy 1 para 9 (C1/121)
01/01/2002	Commencement date for the first online scheme promulgated by the Alliance: E2/216
01/07/2002	RealNetworks' music service launched: E2/520
24/03/2003	Orange launched 7-week video trial: E3/578
14/04/2003	O2 launched audio download trial service: Porter 1 para 35(h) (E1/16)
06/05/2003	Orange retrospectively agreed licence terms for its 7 week video trial: E3/581
19/05/2003	O2 agreed online licence with the Alliance for its trial service: E3/585
--/06/2003	Yahoo!'s UK music services launched: Ferguson 1 para 12 (C1/176)
25/06/2003	AOL agreed online licence with the Alliance: E2/468. This agreement was subsequently extended on 24/10/03 (E2/472), 9/12/03 (E2/475) and 29/01/04 (E2/477)
--/08/2003	AOL Sessions music service launched: Wolffe 1 para 23 (C1/9)
09/09/2003	Hutchinson 3G UK launched mobile music service: Porter 1 para 36 (E1/17)
--/10/2003	Radio@AOL music service launched: Wolffe 1 para 23 (C1/9)
19/11/2003	O2's permanent download music service launched: E3/589
--/--/2004	Vodafone permanent download music service launched: Kershaw 1 para 9 (D1/3)
--/03/2004	MusicNet UK formed: Mooradian 1 para 12 (C1/58)
18/03/2004	New AOL online music licence with the Alliance: E2/479. This agreement was subsequently extended on 14/12/04, 21/03/05 and 31/05/05: E2/486
--/05/2004	Napster launched UK music services: McAuliffe 1 para 12 (C1/91)
--/06/2004	T-Mobile launched the Mobile Mix "jukebox" permanent download music service, which offered short remixes of audio tracks: Porter 1 para 40(a)

	(E1/18)
07/06/2004	Hutchinson 3G UK agreed online music licence with the Alliance with retrospective effect to 9/9/03: E3/595
11/06/2004	Napster agreed online music licence with the Alliance: E2/489. This agreement was subsequently extended on 11/08/04, 17/09/04, 19/11/04, 21/01/05, 23/03/05, 01/06/05 and 02/11/05 (E2/492-505)
14/06/2004	iTunes agreed online music licence with the Alliance: E2/441
28/06/2004	iTunes Music Store launched in the UK: Cue 1 para 8 (C1/30); Enders 1 para 93 (E7/1639)
30/06/2004	DVD1 licence settlement agreement between BPI and MCPS: B5/1089
05/07/2004	Sony launched online music service: Ashcroft 1 para 9 (C1/158)
07/07/2004	Sony agreed online music licence with the Alliance expiring on 31/12/04: E3/539. From then until its settlement agreement in these references, Sony's download service was unlicensed.
01/10/2004	Orange launched audio music download service Musicplayer and video service: Porter 1 para 35(g) (E1/16)
08/10/2004	O2 agreed (under protest) online music licence with the Alliance for 2004 with retrospective effect to 19/11/03: E3/587 and 590
10/12/2004	Yahoo! agreed online music licence with the Alliance: E2/506. This agreement was subsequently extended on 31/10/05: E2/516
14/12/2004	RealNetworks agreed online licence with the Alliance (with retrospective effect to the launch of its service): E2/520. This agreement was subsequently extended on 31/10/05: E2/527
--/03/2005	Vodafone launched music video download and music video streaming services.
28/06/2005	BPI referred the Alliance's 2005 JOL (Joint Online Licence) to the Copyright Tribunal under section 119 of the CDPA Napster, RealNetworks, AOL and Yahoo! served references under section 126 of the CDPA MusicNet and Sony served references under section 119 of the CDPA See Statements of Case at A1 tabs 1 and 3 to 8
28/06/2005	iTunes served notice of intervention in each of the references and a Statement of Interest: A1 tab 2
05/08/2005	MNOs served notices of intervention in each of the references

26/08/2005	MNOs' Statement of Case served: A1 tab 11
02/09/2005	MusicNet's Amended Statement of Case served: A1 tab 7
--/09/2005	MusicNet UK concluded distribution agreements with HMV Digital and Virgin Digital for their UK permanent download and on-demand streaming services: Mooradian 1 para 12 (C1/58)
03/11/2005	Alliance served Requests for Information in relation to each of the Applicants'/Interveners' Statements of Case: A3 tabs 32-40
08/11/2005	BACS served notice of intervention in each of the references
09/11/2005	Directions hearing before Mr Simon Thorley QC. For copies of the transcript of hearing and the order made see A5 tabs 81 & 82 respectively
02/12/2005	Alliance's Answers served: A2 tab 13 and A3 tabs 14-22
02/12/2005	BPI, the MNOs, Napster, Sony, Yahoo!, AOL and RealNetworks served Preliminary Replies to the Alliance's Requests for Information: A3 tabs 41-42; A4 tabs 44-47 and 49
05/12/2005	MusicNet and iTunes served Preliminary Replies to the Alliance's Requests for Information: A3 tab 43; A4 tab 48
09/12/2005	BACS' Statement of Case served: A3 tab 22
02/02/2006	Replies of the BPI, MSPs and MNOs served: A3 tabs 23-31
02/02/2006	BPI, MSPs and MNOs served Replies to the Alliance's Requests for Information in relation to their Statements of Case: A4 tabs 50-58A
02/02/2006	BPI served Requests for Information in relation the Alliance's Answer: A4 tab 59
03/02/2006	MSPs served Requests for Information in relation the Alliance's Answer: A4 tab 60
09/02/2006 &10/02/2006	Directions hearing before Mr Simon Thorley QC. For copies of the transcript of hearing and the order made see A5 tabs 83 & 84 respectively
23/02/2006	Alliance served Preliminary Replies to the BPI's and the MSPs' Requests for Information: A4 tabs 61-62
--/03/2006	T-Mobile launched its full track download "jukebox" service.
09/03/2006	Alliance served Requests for Information in relation to each of the Applicants'/Interveners' Replies: A4 tabs 63-71
22/03/2006	Directions hearing before Mr Simon Thorley QC. For copies of the transcript of hearing and the order made see A5 tabs 85 & 86 respectively

29/03/2006	Alliance served Replies to the BPI's and the MSPs' Requests for Information in relation to their Answers: A4 tabs 62A and 62B
10/04/2006	BPI, MSPs' and MNOs' served Replies to the Alliance's Requests for Information in relation to their Replies: A4 tabs 72-80
13/04/2006	Alliance's Amended Answer to BPI Statement of Case served: A2 tab 13A
28/04/2006	Mutual Non-Disclosure Agreement concluded between all parties to the References for certain information to be classified as Class 1 and Class 2 Confidential Information and for each party to nominate Recipients of such information.
26/05/2006	1st round exchange of witness evidence (factual and expert) and disclosure
26/05/2006	MNOs' Amended Statement of Case served: A1 tab 11A
14/06/2006	Directions hearing before HHJ Fysh. For copies of the transcript of hearing and the order made see A5 tabs 87 & 88 respectively
28/06/2006 and following few days	Following an Order by the Tribunal made 14 June 2006, the Applicants/Interveners provided further disclosure relating to their sound recording licensing agreements with the record companies and certain financial information.
01/07/2006	Vodafone launched Vodafone Radio DJ subscription webcasting service in the UK.
14/07/2006	MSPs' served their Answer to the Alliance's case in relation to podcasting services: A3 tab 30A
19/07/2006	Without prejudice expert meeting took place between Mr Boulton (for the Applicants/Interveners) and Mr MacGregor (for the Respondents).
26/07/2006	2nd round exchange of witness evidence (factual and expert) and further disclosure
25/08/2006	BPI's Amended Statement of Case served: A1 tab 1
12/09/2006	Mr Boulton wrote a letter ("Boulton 3") to his instructing solicitors regarding the without prejudice meeting with Mr MacGregor held on 19 July 2006. This letter was sent to the Tribunal and the Respondents on 14 September 2006: B8 tab 34A. On the same date, the Respondents asked the Tribunal not to look at the letter: inter-solicitor correspondence bundle 2, page 614.
12/09/2006	Alliance served Claire Enders' third expert report: E7 tab 19
13/09/2006	Directions hearing before HHJ Fysh. For copies of the transcript of hearing

	and the order made see A5 tabs 89 & 90 respectively
14/09/2006	BPI's Re-Amended Statement of Case served: A1 tab 1
20/09/2006	Mr Boulton served his fourth report ("Boulton 4"): G tab 6
28/09/2006	Mr MacGregor wrote a letter to his instructing solicitors (sent later that day to the Tribunal and other parties) in response to Mr Boulton's letter of 12 September 2006 regarding the without prejudice meeting between them on 19 July 2006: G tab 10 pages 164-169. This letter (plus the letter from Mr Boulton to which it referred) was attached to Mr MacGregor's third report served by the Respondents on 3 November 2006.
28/09/2006	Settlement agreement concluded between Alliance, BACS, BPI, MNOs and iTunes: H tab 1. From this point iTunes was represented separately from the other MSPs in relation to the References.
28/09/2006	Substantive hearing before HHJ Fysh, Colonel Arnold and Rear Admiral Carine starts and is adjourned. For a copy of the transcript of hearing see A5 tab 91
06/10/2006	Settlement agreement concluded between Alliance, BACS, MusicNet and Napster: H tab 6
10/10/2006	Settlement agreement concluded between Alliance, BACS and Sony: H tab 8
16/10/2006	MNOs' and iTunes' Supplemental Statements of Case served: A6 tabs 4 and 6
20/10/2006	AOL, Yahoo! and RealNetworks served their Supplemental Statement of Case: A6 tab 1
27/10/2006	Alliance's Answers to the MNOs' and iTunes' Supplemental Statements of Case served: A6 tabs 5 and 7
30/10/2006	Alliance's Answer to the Supplement Statement of Case of AOL, Yahoo! and RealNetworks served: A6 tab 2
03/11/2006	3rd round exchange of witness evidence
15/11/2006	1st day of hearing