[GB] Factors to be Considered by the Copyright Tribunal When Determining Interim and Final Royalty Awards Relating to a Minority Music Genre

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On 17 May 2013 the United Kingdom Copyright Tribunal upheld the BBC's (British Broadcasting Corporation) decision to pay a monthly interim royalty of GBP 10,000 excluding VAT (Value Added Tax) to the Welsh music licensing body Eos-Yr Asiantaeth Hawliau Darlledu Cyfyngedig (Eos) pending the determination of a final licence fee. Subsequently, at the full hearing and the approved decision granted on 16 December 2013, the Copyright Tribunal held that the BBC were entitled to use the Performing Rights Society (PRS) Alliance Agreement as a starting point to calculate royalties. Although Welsh Music was a minority or niche music genre there was no responsibility on the BBC to support Welsh music over any other type of music. Music has a value when it is broadcast. The Copyright Tribunal considered that the base value for annual royalties was GBP 46,000 and this included undertaking a cross check by comparison with potential royalties that could be earned on commercial radio.

Although the cost of providing minority radio stations, such as the Welsh Language station BBC Radio Cymru, carried a higher cost per listener, the fact that it was a minority channel did not in itself merit awarding higher than normal royalties, as compared with more popular radio stations. However, the Copyright Tribunal did recognise that Welsh Language Music, as an indigenous-language music, required a degree of special treatment because of its unique qualitative contribution to culture. Whilst it retained such status that special treatment would apply. The Tribunal considered it was reasonable to award some uplift in annual royalty payment from GBP 46,000 to GBP 100,000, but not as much as the GBP 1.5 million sought by Eos.

The Copyright Tribunal exercised this unfettered discretion pursuant to sections 125(3) and 129 of the Copyright, Designs and Patents Act 1988 so as to confer licensing terms that are reasonable in the circumstances.

The background was that until 31 December 2012, the BBC licensed all its Welsh language music repertoire for its broadcasting services from the Performing Rights Society Limited (PRS) and the Mechanical- Copyright Protection Society Limited (MCPS). Artists were unhappy with changes to how revenues were being distributed and decided to transfer licensing of broadcasting rights and televising

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rights to Eos with effect from 1 January 2013.

The BBC and Eos entered into negotiations as to what the new royalty rates should be, but agreement could not be reached so the BBC applied, pursuant to Rule 35 of the Copyright Tribunal Rules for an order determining what would be a reasonable rate on an interim basis pending a full hearing of the substantive issues.

The BBC contended that GBP 10,000 per month exclusive of VAT was a reasonable figure as they did not wish to overpay and were concerned that if the final determination by The Copyright Tribunal was for a lower monthly royalty rate there was doubt that Eos would be able to repay the overpayment. Eos was seeking an interim award of GBP 27,083.33 per month exclusive of VAT.

Eos contended that the Copyright Tribunal had a “blue sky” discretion, and that the Tribunal could take account of any factors it considered relevant. Whereas, the BBC contended that the Tribunal should be guided by authorities when determining interim payments.

The Tribunal considered that it had a very wide discretion, but in exercising that discretion it had to exercise prudence and take account of the guidance offered by existing authorities. According to the Tribunal, it was reasonable to consider what would happen if it transpired that the interim award was too much, and monies had to be reimbursed to the BBC.

Eos admitted that it had a difficult financial position and that it was unlikely to have the funds to repay immediately any overpayment of royalties; further the Tribunal foresaw the difficulty that Eos may have in recouping any overpayments from its members.

The Tribunal was of the view that maintaining a royalty payment of GBP 10,000 plus VAT per month until final determination was not likely to be detrimental to the Welsh music industry, and taking into account concerns about Eos’s ability to repay any overpayment found that the BBC should continue to a pay a provisional sum of GBP 10,000 per month exclusive of VAT pending final determination. The December 2013 decision meant the interim award was higher than the final award, and the Tribunal asked the BBC to be pragmatic as to how it recovered the overpayment.

Decision of The Copyright Tribunal CT121/13 The British Broadcasting Corporation v. Eos-Yr Asiantaeth Hawliau Darlledu Cyfyngedig (Eos), 17 May 2013

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