



## COMPETITION APPEAL TRIBUNAL

### **NOTICE OF AN APPLICATION TO COMMENCE COLLECTIVE PROCEEDINGS UNDER SECTION 47B OF THE COMPETITION ACT 1998**

#### **CASE NO. 1634/7/7/24**

Pursuant to rule 76(8) of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (“the Rules”), the Registrar gives notice of the receipt on 28 February 2024 of an application to commence collective proceedings, under section 47B of the Competition Act 1998 (“the Act”), by Mr David Alexander de Horne Rowntree (the “Proposed Class Representative”) against (1) the Performing Right Society Limited; and (2) PRS For Music Limited (the “Respondents/Proposed Defendants”). The Proposed Class Representative is represented by Maitland Walker LLP, 22 The Parks, Minehead, Somerset, TA24 8BT (Reference: Julian Maitland-Walker / Adrian Render).

According to the Collective Proceedings Claim Form (“CPCF”), owners of copyright in a musical work have the exclusive right to communicate to the public their copyright-protected musical works. This right constitutes a “performing right” in the musical work. Any person who seeks publicly to use a musical work (e.g., by playing the work in a bar, on television, on the radio or by streaming it) must obtain a licence from the copyright owner and pay a royalty.

A songwriter (which includes the composer of the music or the lyricist) will invariably be the initial copyright owner of the musical work. A musical publisher typically promotes the songwriters’ musical works in return for the songwriter assigning a portion of the copyright and/or a share of the royalties generated.

The Proposed First Defendant, the Performing Right Society Limited (“PRS”) is the collective management organisation (“CMO”) in the United Kingdom representing songwriters and publishers. PRS, through its wholly owned subsidiary, the Proposed Second Defendant, PRS for Music Limited (“PRS for Music”) collects and distributes performing right royalties to its members in the United Kingdom. Save where otherwise provided, the Proposed Defendants are termed “PRS”.

PRS has more than 165,000 members, most of which are songwriters. PRS members (songwriters and publishers) typically assign their worldwide performing rights in their copyright musical works to PRS which, as a result, is the copyright owner of performing rights in millions of musical works created by its members across a variety of musical genres.

PRS collects royalties direct from licensees in the United Kingdom (such as television broadcasters, radio stations, restaurants, and bars) who play the musical works of PRS members in public in the United Kingdom. In respect of the performance of a musical work outside the United Kingdom and in the case of multi-territorial online streaming licences, PRS collects royalties from foreign CMOs (e.g., GEMA in Germany) or indirectly from Digital Services Providers (e.g., Spotify). PRS then distributes these royalties to its members. PRS is in a dominant position in the service market for the administration in the United Kingdom of performing right royalties to songwriters and/or to songwriters and publishers.

The purpose of this application is to enable opt-out collective proceedings by PRS songwriter members. The collective proceedings claim damages suffered by songwriters caused by PRS unfair royalty distribution policies that constitute breaches of Chapter II of the Act (the “Chapter II Prohibition”) and/or Chapter I of the Act (the “Chapter I Prohibition”), as well as (until 31 December 2020) Article 102 of the Treaty on the Functioning of the European Union (“TFEU”) and/or Article 101 TFEU.

The CPCF states that the unfairness arises because PRS pays royalties to publishers which likely belong to songwriters and should be paid to them. More specifically the claim relates to the portion of performing rights royalties collected by PRS which cannot be matched with the correct songwriter or publisher because

of inter alia incomplete reporting by licensees or data issues, including on the PRS database. While the musical work may be identified, failings frequently arise as to the identity of the songwriter, and much less frequently as to the publisher. For example, the songwriter's name may have been misspelt. These unmatched royalties are described colloquially in the industry as "Black Box".

The majority of Black Box royalties held by PRS belong to writers because (a) the vast majority of the 165,000 PRS members are songwriters and there will therefore be more reporting and data issues applicable to songwriters; (b) PRS collects royalties on behalf of songwriters in respect of use worldwide, but, by contrast, tends to collect royalties on behalf of publishers only in respect of use in the United Kingdom. Entities abroad (such as foreign CMOs) tend to pay publishers direct whereas they account to PRS for the songwriter share of the royalties collected abroad.

Thus, the CPCF states, the reporting and data issues are more likely to apply to the songwriters and PRS administers a larger proportion of royalties belonging to songwriters. It is likely therefore that the majority of Black Box royalties are songwriter royalties.

The Proposed Class Representative alleges that PRS has not been transparent and/or clear as to how it distributes Black Box royalties.

Black Box royalties are typically paid by PRS on a pro rata basis or what PRS has described to the Proposed Class Representative as on an "identified usage" basis. It is understood and averred that Black Box royalties held by PRS, which comprise both songwriter and publisher unmatched royalties, are in essence distributed to songwriters and publishers in the same proportions as was the case with matched royalties (matched correctly by PRS to songwriters and publishers). Accordingly, if publishers received 40% of the initial distribution based on matched usage, publishers would receive 40% of the Black Box unmatched royalties. As there are significantly fewer data issues with information held on publishers, they receive a larger proportion of the royalties than is in fact due to them (i.e., publishers should receive less than the 40%). This, the CPCF states is unfair to the songwriters.

The Proposed Class Representative seeks an end to this alleged unfair royalty distribution practice and to recover for PRS songwriter members those royalties which should have been paid to them but were instead paid to publishers.

The proposed class ("Proposed Class") comprises any person (including any deceased person through the personal or authorized representative of his or her estate) who between 9 March 2017 and the date of issue of these proceedings was a PRS songwriter member. The Proposed Collective Proceedings are brought on an opt-out basis and seek an aggregate award of damages.

The Proposed Collective Proceedings would combine "standalone claims" under section 47A of the Act for damages caused by alleged breaches of statutory duty by the Proposed Defendants.

The CPCF states:

1. As a consequence of the breaches of statutory duty by PRS, the Proposed Class Members have suffered loss and damage. The Proposed Class Members are entitled, by way of an award of damages, to be placed in the position that they would have been in had the infringement not occurred.
2. As a consequence of the infringements, Proposed Class Members were at all material times not paid, and continue not to be paid, the entirety of the performing rights royalties owed to them as a class.
3. The Proposed Class Representative seeks an aggregate award of damages for the Proposed Class pursuant to s.47C(2) of the Act. The common methodology for the Proposed Class will estimate the extent of damages on a class-wide, aggregate basis.
4. The Proposed Class Representative claims compound interest by way of damages on the loss and damage suffered by the Proposed Class Members through additional finance costs resulting from

unlawful conduct (both charges on a compound basis and financing costs in respect of the borrowed sums) and/or through having reduced savings or investments as a result of the unlawful conduct. Murgatroyd 1 provides a common methodology for purposes of assessing the compound interest claims across the Proposed Class.

5. Alternatively, simple interest is claimed pursuant to s. 35A of the Senior Courts Act 1981 and Rule 105 of the Rules, on such sums and at such rate as the Tribunal thinks fit.
6. The Proposed Class Representative claims costs.
7. Finally, the Proposed Class Representative seeks such further and other relief as the Tribunal may think fit.

The Proposed Class Representative submits that it would be just and reasonable for him to act as class representative because:

1. He will act fairly and adequately in the interests of the class members:
  - (a) Mr Rowntree, a PRS songwriter member, is a professional musician, radio DJ, computer animator, non-practising solicitor, and politician. He is the drummer in the pop band Blur, as well as working in film and TV soundtrack composition and launching a solo career in 2021. As co-founder of the Featured Artists Coalition, he has in-depth knowledge of the music industry, including in respect of matters pertaining to performing and mechanical rights royalties.
  - (b) Mr Rowntree has the organisational and representational skills required for these Proposed Collective Proceedings, as well as being able to give appropriate instructions to the lawyers instructed on behalf of the class.
    - i. Mr Rowntree is a qualified solicitor of England and Wales with a number of years of litigation experience.
    - ii. He has stood for elections variously as councillor and MP and was county councillor for the University division in Norwich between 2017 and 2021.
    - iii. He is a patron of Amicus, an organisation that provides legal representation to people on death row in the United States.
    - iv. He was involved in promoting the Beagle 2 Mars space project, including lobbying the UK Government and European Space Agency to help finance the project.
    - v. Mr Rowntree has engaged leading competition experts in both counsel and solicitors to pursue the Proposed Collective Proceedings on behalf of the class members. He has also engaged an intellectual property junior who has experience of advising on performing rights royalty matters to assist the competition team.
    - vi. Mr Rowntree has entered into a litigation funding agreement with a leading third-party litigation funder which has agreed a sufficient budget to cover the costs associated with bringing these Proposed Collective Proceedings, including the litigation costs of the Proposed Class Representative's legal and expert team and the costs associated with administering the claim.
  - (c) Mr Rowntree was consulted on and has approved a Litigation Plan for the Proposed Collective Proceedings that satisfies the criteria laid down in Rule 78(3)(c). The Litigation Plan includes:

- i. A method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings (pursuant to Rule 78(3)(c)(i)).
  - ii. A procedure for governance and consultation which takes into account the size and nature of the class (pursuant to Rule 78(3)(c)(ii)).
  - iii. An estimate of, and details of arrangements as to, costs, fees, or disbursements which the Tribunal may order that the Proposed Class Representative provide (pursuant to Rule 78(3)(c)(iii)).
- (d) Mr Rowntree does not have a material interest that is in conflict with the interests of the class members in relation to the common issues.
- (e) Mr Rowntree is not aware of any other applicant seeking to be representative in connection with the same claims.
- (f) Mr Rowntree has taken out a significant ATE insurance policy with A-rated insurers that means that he will be able to pay the Proposed Defendants' recoverable costs if ordered to do so.

The CPCF states that the claims are eligible to be brought in collective proceedings because:

1. The Proposed Collective Proceedings are brought on behalf of an identifiable class of persons.
2. The claims raise common issues from the perspective of the law, facts, and expert economic evidence. In fact, all of the issues to be determined in the Proposed Collective Proceedings constitute common issues and there are no individual issues requiring determination. The common issues for certification comprise:
  - i. Whether PRS is dominant on the relevant market implicated by the claims;
  - ii. Whether PRS's distribution policies in respect of Black Box royalties, are unfair to the detriment of the Proposed Class and thereby constitute an abuse of dominance;
  - iii. Whether PRS's distribution policies in respect of Black Box royalties constitute an agreement and/or decision by an association of undertakings and, if so, whether they appreciably distort competition;
  - iv. Whether the alleged unlawful practices have an effect on trade in the United Kingdom and/or between EU Member States;
  - v. Whether and to what extent the alleged competition law breaches have had an impact on the royalties and investment income received by Proposed Class Members;
  - vi. The appropriate interest rate at which to adjust damages suffered by Proposed Class Members in the past to compensate for the passing of time, additional finance costs, and/or a loss of return on investment; and
  - vii. Whether interest should be awarded on a simple basis or as damages on a compound basis.
3. The claims are suitable to be brought in collective proceedings in the sense that collective proceedings are more suitable than individual proceedings:

- i. All issues to be determined in the Proposed Collective Proceedings are common issues that can fairly, efficiently, and proportionately be dealt with in collective proceedings. There are no individual issues to be determined.
- ii. Individual proceedings on behalf of a Proposed Class, which it is estimated will exceed 160,000 writer members, are plainly not a relevant alternative to the Proposed Collective Proceedings. The majority of the claims are likely to be individually low in value and it would be unviable for individuals to bring what would be complex competition law damages actions against the Proposed Defendants. Indeed, bringing such claims would involve substantial and costly exercises that the Proposed Class Members could not reasonably be expected or afford to undertake individually. Without the Proposed Class Representative's willingness to undertake and publicise the Proposed Collective Proceedings and to explain the basis for the proposed claim, Proposed Class Members would not even be aware that they have a claim or of their potential entitlements.
- iii. The impact of the infringement can be assessed on a class-wide basis pursuant to a common methodology applied across the Proposed Class. The common methodology will assess damages on an aggregate basis pursuant to s.47C(2) of the Act. To assess the damages incurred by each member of the Proposed Class on an individual basis would be impracticable and disproportionate, having regard to the substantial number of Proposed Class Members and vast numbers of affected royalty payments during the class period.
- iv. The claims are suitable for an aggregate award of damages pursuant to s.47C(2) of the Act and Rule 73(2) of the Rules.
- v. The benefits of continuing the Proposed Collective Proceedings outweigh any costs for the members of the Proposed Class, the Proposed Defendants, and the Tribunal. These costs are fair and proportionate in light of the loss suffered as a result of the infringement which would otherwise not be addressed, the size of the class, and the aggregate value of the claims.
- vi. The Proposed Class Representative is not aware of any separate proceedings making claims of the same or a similar nature having been commenced.
- vii. The size and nature of the Proposed Class (likely to total over 160,000 Proposed Class Members) mean that the claims are suitable to be brought by way of (opt-out) collective proceedings.
- viii. The Proposed Class definition is clear and simple, and it is possible to determine in respect of any person whether that person is or is not a member of the Proposed Class.
- ix. Finally, as per Rule 79(3) of the Rules, the strength of the claims and the fact that it would not be practicable for them to be brought on an opt-in basis render them appropriate to be brought in opt-out collective proceedings.

The relief sought in the Proposed Collective Proceedings is:

1. Damages to be assessed on an aggregate basis pursuant to section 47C(2) of the Act.
2. Compound interest or alternatively simple interest pursuant to s.35A of the Senior Courts Act 1981 and Rule 105 of the Rules, on such sums and at such rate as the Tribunal thinks fit.
3. The Proposed Class Representative's costs.
4. Any such further or other relief as the Tribunal may see fit.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at [www.catribunal.org.uk](http://www.catribunal.org.uk). Alternatively, the Tribunal Registry can be contacted by post at Salisbury Square House, 8 Salisbury Square, London EC4Y 8AP, or by telephone (020 7979 7979) or email ([registry@catribunal.org.uk](mailto:registry@catribunal.org.uk)). Please quote the case number mentioned above in all communications.

*Charles Dhanowa OBE, KC (Hon)*

Registrar

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