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**IN THE COMPETITION**

CaseNo: 1634/7/7/24

**APPEAL**  
**TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Wednesday 12<sup>th</sup> - Friday 14<sup>th</sup> February 2025

Before:

Justin Turner KC  
Professor David Ulph CBE  
Hugh Kelly

(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

Mr David Alexander de Horne Rowntree

**Proposed Class Representative**

V

(1) the Performing Right Society Limited  
(2) PRS For Music Limited

**Proposed Defendants**

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**A P P E A R A N C E S**

Aidan Robertson KC and David Went On Behalf of Mr David Alexander de Horne Rowntree  
(Instructed by Maitland Walker LLP)

Meredith Pickford KC and Charlotte Thomas On Behalf of the Performing Right Society  
Limited and PRS For Music Limited (Instructed by Macfarlanes LLP)

Wednesday, 12 February 2025

(10.30 am)

(Proceedings delayed)

(10.35 am)

THE CHAIRMAN: Just give me a second. Thank you. (Pause)

I understand that the livestream is not working at the moment. Is that your understanding?

MR ROBERTSON: Yes.

THE CHAIRMAN: Yes. So when it comes on, I am meant to warn people about not making recordings, but there is no point in warning them when they are not there.

Right.

MR ROBERTSON: So, members of the Tribunal. I appear for the applicant, Mr Rowntree, the proposed class representative, together with my colleague, Mr David Went. My learned friends Meredith Pickford KC and Charlotte Thomas appear for the respondents, which we will refer to collectively as "the PRS".

This is an application for a collective proceedings order, a CPO, under section 47B of the Competition Act. Before I turn to the detail and arrangements for the hearing, can I just check housekeeping?

Housekeeping

MR ROBERTSON: The Tribunal should have a hearing bundle, a trial bundle, which I will refer to. If it is in hard

1 copy, then there are three volumes, A, B1 and B2.

2 THE CHAIRMAN: Yes.

3 MR ROBERTSON: For the authorities bundle, there are  
4 volumes A to E; in hard copy, A and B form one bundle; C  
5 and D form a second bundle; and then volume E is in two  
6 bundles.

7 THE CHAIRMAN: Yes, thank you.

8 MR ROBERTSON: There is an agreed list of issues which  
9 I will mention just --

10 THE CHAIRMAN: Give me a second. I think we might -- I am  
11 trying to identify everything. We have one carousel  
12 between the three of us. (Pause)

13 MR ROBERTSON: So there is an agreed list of issues which  
14 I am not going to take the Tribunal to, it is a very  
15 short list of issues, but just for the note, that is in  
16 trial bundle B, in tab 89. You should also have the  
17 parties' skeleton arguments that were exchanged on  
18 3 February. They are separately uploaded on --

19 THE CHAIRMAN: Yes, we have got those. Thank you.

20 MR ROBERTSON: As the Tribunal is aware, there was  
21 an application to cross-examine Mr Rowntree which the  
22 Tribunal ruled against, in a ruling handed down on  
23 31 January. There has been a second more recent  
24 document, as it were, from the PRS, which is a second  
25 witness statement from Mr Arber, taking issue with some

1 points made by Mr Rowntree and Mr Savage. That is in  
2 trial bundle B2, tab 98, pages 1 to 3, {B2/98/1-3}. If  
3 I can just check that the Tribunal has Mr Savage's third  
4 report in response to that, which is at trial bundle  
5 B22, tab 103, {B22/103}.

6 THE CHAIRMAN: I have some things loose. I have the second  
7 witness statement of Mr Arber loose.

8 MR ROBERTSON: Yes. You should also have the third report  
9 served yesterday.

10 THE CHAIRMAN: Where did you say?

11 MR ROBERTSON: It is in tab 103 of volume B2 or it should  
12 be.

13 THE CHAIRMAN: B2. (Pause)

14 No, I do not have that, so if you could -- could we  
15 have a copy at some point?

16 MR ROBERTSON: Yes. We will make sure that you have that.  
17 We will not be spending any time on it, I hope,  
18 I suspect.

19 As to timetabling, Mr Pickford and I discussed this  
20 yesterday. We have not agreed, so I will outline how  
21 I would propose that the hearing proceeds over the next  
22 two days.

23 As this is our application, I will make our  
24 application. I am dividing the oral submissions with  
25 Mr Went. I would be expecting to complete mine by about

1           2.30 this afternoon and I will bear in mind that the  
2           transcribers have requested a break in the usual course,  
3           both morning and afternoon, so I would aim to finish  
4           about 2.30, handing over to Mr Went, who would aim to be  
5           finishing at about 3.30.

6       THE CHAIRMAN: What is Mr Went dealing with? What topic?

7       MR ROBERTSON: He is dealing with the issues in our skeleton  
8           argument which are listed at paragraphs 42 to the end.  
9           So they are the three issues: that there is no conflicts  
10          within the class. That is paragraphs 42 to 44 of our  
11          skeleton; that the fund arrangements do not unfairly  
12          favour the funder. That is paragraphs 45 to 52 of our  
13          skeleton; and that exclusions from the proposed class  
14          are not too narrow, and that is paragraphs 53 to 55.

15           I was just actually outlining that indicator. What  
16          I propose that we do is we just simply follow the order  
17          of our skeleton; a controversial proposition to some,  
18          but just follow the order of our skeleton, and that way  
19          you have a very clear roadmap to our submissions.

20           I would then propose handing over to Mr Pickford  
21          at 3.30, who can then respond. He also has a summary  
22          judgment and strikeout application and he is making that  
23          as part of the reasons why certification should be  
24          refused to Mr Rowntree's application.

25           If Mr Pickford finishes, usual chess clock rules, by

1 3.30 tomorrow afternoon, that gives us time for a short  
2 reply to his submissions and it also gives time for him  
3 to make a short reply to our reply to his summary  
4 judgment strikeout application. I think formally that  
5 comes last. So we might be on our feet 3.30 to 4  
6 tomorrow afternoon; Mr Pickford again at 4 to 4.15.

7 So that is how I propose timetabling the hearing.  
8 I think Mr Pickford has some different ideas, which  
9 I might hand over to him to make.

10 MR PICKFORD: Thank you very much. I do not have any strong  
11 objections to the way that Mr Robertson has outlined  
12 matters. When we spoke about it yesterday, my  
13 suggestion and my submission to the Tribunal is that it  
14 might be more convenient from the Tribunal's point of  
15 view for me in fact, after a short summary of  
16 Mr Robertson's claim, to open the points that we take  
17 against him because essentially they are ones on which  
18 we are making a running; not just the strikeout, but  
19 generally speaking we are articulating the problem which  
20 we say he has to meet. But I am not going to seek to  
21 push that hard. If the Tribunal is content with  
22 Mr Robertson's outline -- I think it has some  
23 disadvantages, but I do not think we need to get into  
24 a major spat at the beginning so I am broadly happy to  
25 adopt that, if that is what the Tribunal wishes to do.

1 THE CHAIRMAN: Yes. Mr Robertson, you are going to have to  
2 deal with some substantive issues on the nature of your  
3 claim in any event.

4 MR ROBERTSON: Yes.

5 THE CHAIRMAN: So to some extent, once I have heard from  
6 both of you on that, we will have, I think, dealt with  
7 pretty much everything, I think, so let us keep with the  
8 suggestion that you have.

9 We do have some -- can I just highlight some areas  
10 that we are particularly interested in? These are not  
11 the only areas, I would stress.

12 I think, first of all, how you define the class, and  
13 that raises the question whether there are losses  
14 properly attributed to the class as opposed to those  
15 specific writers who are not receiving royalties they  
16 would otherwise be entitled to. So I think that is --  
17 you are going to have to help us on that.

18 The factual basis for the assertion in paragraph 10  
19 of your pleading -- let me find the reference -- yes,  
20 that the reporting and data issues are more likely to  
21 apply to some writers, a larger proportion of royalties  
22 belonging to songwriters, so really the factual basis  
23 for that.

24 Why the complaints that you are raising are  
25 anti-competitive, and we are interested in how this fits

1 in with the case law. We are also conscious that your  
2 collective proceedings claim form does not propose  
3 an alternative way of allocating unallocated royalty  
4 streams.

5 We are also interested in proportionality,  
6 particularly given the size of the costs that has been  
7 suggested. For that we need to understand what is the  
8 size of the misallocation. Obviously that is not the  
9 same as the size of the Black Box, so your position on  
10 that.

11 Then, finally, damages. How are they going to be  
12 paid? Will you not end up having effectively to take  
13 money from a class to pay the class, how you -- just  
14 your thoughts on that.

15 So those are areas which are among those which are  
16 of particular interest to us, I think, and you can pick  
17 those up as you go.

18 MR ROBERTSON: I will pick those up as we go along, and the  
19 Tribunal will no doubt pick me up if I have failed to.

20 Application by MR ROBERTSON

21 MR ROBERTSON: So, as I said, I was going to follow the  
22 order of our skeleton.

23 (Discussion about the microphone)

24 Is that better? So I am following the order of our  
25 skeleton. Section 2 of our skeleton deals with the



1        legal framework, and this is paragraphs 6 to 10. I do  
2        not believe there is any major substantive difference of  
3        any significance between the parties as to the relevant  
4        statutory conditions to be applied in the present  
5        application although of course we have differences of  
6        interpretation. The statutory provisions are to be read  
7        purposively, as we say at paragraph 9 of our skeleton.

8                There is one point that I do want to pick up,  
9        though, on the significance of Canadian jurisprudence,  
10       and this is in relation to paragraph 10 of our skeleton.  
11       Essentially this is significant to the interpretation of  
12       section 47C(2) of the Act, as to which, if I can ask you  
13       to pick up authorities bundle A, and it is at tab 2,  
14       page 5, {AUTH-A/2/5}, and the relevant provision,  
15       section 47C(2), reads:

16               "The Tribunal may make an award of damages in  
17       collective proceedings without undertaking an assessment  
18       of the amount of damages recoverable in respect of the  
19       claim of each represented person."

20               In other words, the Tribunal can award aggregate  
21       damages, not just simply totalling up, as it were,  
22       a series of individual claims.

23               That was explained by the Court of Appeal in  
24       *LSEr v Gutmann*, which is at authorities bundle E1,  
25       tab 49, {AUTH-E/49/13}, where the Court of Appeal --

1 THE CHAIRMAN: Sorry, I am just catching up with you. The  
2 bundles are not ... (Pause)

3 Sorry, tab ...?

4 MR ROBERTSON: Tab 49. It is the last tab in the hard copy  
5 bundle and it is page 13. The section begins halfway  
6 down the page:

7 "Canadian law works well without a system of  
8 aggregated liability."

9 So there LSER was seeking to resist an approach to  
10 aggregate liability. That had been rejected by the  
11 Tribunal, as we see over the page, {AUTH-E/49/14}, and  
12 there Lord Justice Green, giving the single judgment of  
13 the Court of Appeal, sets out a lengthy citation from  
14 the Tribunal's judgment, that being a Tribunal chaired  
15 by the current acting president. In particular, the  
16 Tribunal distinguished the approach in Canadian law to  
17 common issues and, in particular, you see there at  
18 paragraph -- in the cited passage, paragraph 108 at the  
19 bottom of the page:

20 "'Common issue' is the statutory term used in the  
21 legislation of the Canadian common law provinces. That  
22 expression does not appear in the UK statute which  
23 refers to the requirement for 'the same, similar or  
24 related issues of fact or law' ..."

25 Then, when you come across the phrase "common

1 issues" in the CAT Rules, that is only a shorthand for  
2 the statutory term.

3 Then, on the next page, {AUTH-E/49/15}, you will see  
4 a reference to the Supreme Court of Canada in *Vivendi*,  
5 pointing out that there's a difference between the  
6 common law approach in Canada and that in Quebec. There  
7 we see, at subparagraph (2) of 108:

8 "... it is not expected to be the approach where the  
9 class representative puts forward a tenable claim for  
10 aggregate damages."

11 So what we are dealing here -- and the conclusion is  
12 over the page on {AUTH-E/49/16}, paragraph 43:

13 "... when interpreted purposively section 47C(2) is  
14 sufficiently broad to encompass liability and this  
15 conclusion is needed to ensure that the system of  
16 collective redress is workable."

17 So they are pointing out that the approach under the  
18 UK legislation is to allow aggregate liability, not just  
19 a series of individual claims, and that is in response  
20 to my learned friend's point that he has made in his  
21 skeleton, that you cannot identify individual claims  
22 from individual claimants. Well, that is not the  
23 approach in section 47C(2).

24 So I think that is the only point I wanted to make  
25 on the statutory framework. I will turn now to the

1           authorisation condition, if I can just show you that.

2           That is covered in our skeleton at 11 to 12, and it is  
3           in section 47B(5) (a), which is to be found in  
4           authorities bundle A, tab 2 --

5       THE CHAIRMAN: Obviously we are familiar with this. What do  
6           you want to show us in particular?

7       MR ROBERTSON: Well, if you are familiar with the  
8           authorisation conditions, then I do not need to waste  
9           time --

10      THE CHAIRMAN: No, unless there is a particular point you  
11           wanted to --

12      MR ROBERTSON: It is covered in our skeleton. The same  
13           thing goes -- and my learned friend for the PRS raised  
14           three objections on authorisation at paragraph 28 of  
15           their skeleton and we will come to address those in due  
16           course.

17           On eligibility, that is set out in our skeleton,  
18           paragraphs 13 to 17, to which the PRS respond in their  
19           skeleton at paragraphs 29 to 30. Again, I am not --  
20           taking that indication I am not going to go to the  
21           particular statutory provisions. We will deal with  
22           their objections, the three objections raised in  
23           paragraph 30 of their skeleton, later on.

24           I just want to deal with the big picture, what they  
25           say is the central issue, which is conflicts within the

1 class. They cite the *UK Trucks* claims case as being  
2 an example of conflicts which prevent claims being  
3 brought together.

4 The *UK Trucks* claims case concerned a very obvious  
5 conflict between claims brought for damages by new truck  
6 purchasers on the one hand and used truck purchasers of  
7 a resale pass-on. Each class of purchasers were laying  
8 claims to the same amounts of money, so they were  
9 diametrically opposed claims, and you will see that  
10 encapsulated in that case, in authorities bundle B,  
11 which is tab 15, page 19, {AUTH-B/15/19}, paragraph 56,  
12 which is at the top of the page, and this is Mr Jowell  
13 explaining to the Court of Appeal the nature of the  
14 conflict.

15 In a nutshell the conflict was because the  
16 overcharge on a used truck purchase was damage suffered  
17 by the used truck purchaser but as a benefit and thus  
18 a reduction of damage for the new truck purchaser  
19 affecting the resale or buyback, so they were laying  
20 claim to the same amount of money.

21 That is not the case here. It might be the case  
22 that the class included both publishers in their  
23 capacity as such and writers in their capacity as such,  
24 but it does not. It only includes writers in that  
25 capacity entitled to royalties for songwriting, not for

1 publishing.

2 For that, if I could take you to the claim form,  
3 which is in trial bundle A, tab 1, page 29, {A/1/29}.  
4 It is paragraphs 100 to 106:

5 "The Proposed Class comprises any person ... who  
6 between [the start date] 9 March 2017 to the date of  
7 issue of these proceedings was a PRS songwriter member."

8 Then paragraph 102, at the bottom of the page:

9 "The Proposed Class definition comprises any  
10 songwriter member of PRS since [the start date for the  
11 claim]."

12 Then paragraph 106, over the page on {A/1/30}, as to  
13 how many members there are of the class:

14 "PRS states that it has more than 165,000 members.  
15 While this figure includes publisher members, the  
16 Proposed Class Representative believes that the vast  
17 majority of its members are songwriter members and that  
18 the class will therefore likely exceed 160,000."

19 That is the nub of it, 165,000 members.

20 So the case is about writers' royalties for  
21 songwriting wrongly being paid over to publishers not  
22 about any dispute as between writers.

23 THE CHAIRMAN: When you say "wrongly", what do you mean by  
24 "wrongly"?

25 MR ROBERTSON: Well, royalties that have been earned by

1           writers but are not being paid to writers. That is what  
2           I mean by "wrongly". So they end up in the hands of  
3           publishers --

4       THE CHAIRMAN: This would be a writer who does not get their  
5           royalties?

6       MR ROBERTSON: Yes.

7       THE CHAIRMAN: A particular writer, say Harriet for present  
8           purposes. So Harriet does not receive her royalties and  
9           they end up --

10      MR ROBERTSON: -- being distributed.

11      THE CHAIRMAN: Why does it matter to Harriet whether they  
12           get paid to another writer or to a publisher or to  
13           a charity? The fact is the wrongness is that they are  
14           not being paid to her.

15      MR ROBERTSON: Yes, and when looked at from a class  
16           perspective on an aggregate basis, the wrongness is that  
17           writers are not being paid royalties which are due to  
18           them as a class.

19           Now, it is not an individual claim, as I have  
20           already been at pains to point out under 47C(2) --

21      THE CHAIRMAN: I understand your complaint is not the  
22           failure to pay Harriet. That is a consequence of  
23           an error occurring at some point and we do not know  
24           whose fault it is.

25      MR ROBERTSON: The wrongness is --

1 THE CHAIRMAN: The wrongness is not her being paid. You say  
2 the wrongness is what is done with that money which is  
3 not finding its way back to Harriet.

4 MR ROBERTSON: Yes.

5 THE CHAIRMAN: Your claim would be the same, as I understand  
6 it, if that money was paid to a charity, let us say.  
7 Harriet again would be not receiving her money, so if  
8 that money was paid to a children's charity to help  
9 promote music in inner cities, the same point could be  
10 made, that it is not just from Harriet's perspective.

11 MR ROBERTSON: No, it should be money that is paid to  
12 writers as a class. Writers as a class are being  
13 under-remunerated for the fruits of their --

14 THE CHAIRMAN: So this is -- one of the issues we are  
15 interested in understanding better is why this is  
16 a class in that sense. These are -- you understand the  
17 point, I think, that my questions go to.

18 MR ROBERTSON: Yes. It is writers as a class. It has to be  
19 because it is an aggregate claim.

20 THE CHAIRMAN: Yes, but that is the tail wagging the dog.

21 MR ROBERTSON: Well, there is -- because of the messy data  
22 problem, this is not a series of individualised claims,  
23 so you have to look at this from the perspective of  
24 remuneration of writers as a class, not about  
25 compensation to an individual writer for not getting his



1           or her particular royalties for a particular  
2           composition.

3       THE CHAIRMAN: Just to be clear I understand, your complaint  
4           does not involve a complaint that the particular writers  
5           are not receiving their royalties. The particular  
6           writers wrote or were in the copyright in  
7           an unidentified FAC. Your complaint is not that they  
8           are not receiving royalties. Your complaint is where  
9           the royalties end up?

10       MR ROBERTSON: It is where they end up, but it is also that  
11           writers as a class are being under-remunerated.

12       THE CHAIRMAN: Yes, I understand that.

13       MR ROBERTSON: That is why it is an aggregate claim.

14           I should say that Mr Went will address you later  
15           on -- it will be this afternoon -- in more detail on the  
16           alleged conflicts raised by my learned friends. He was  
17           involved in the *UK Trucks* claim case, where he was led  
18           by the late James Flynn KC.

19           So the other points raised about eligibility, as  
20           I say, we will come to those later on: the strikeout  
21           summary judgment point, the *Microsoft* methodology point  
22           and cost benefits suitability.

23           So the only point I am going to raise at this point,  
24           when we are just going through the legal framework, is  
25           in relation to the cost benefit objection. My learned

1 friends have referred to that in -- or imply -- in  
2 paragraph 30(c) of their skeleton that it is a cost  
3 benefit test. That is not -- it is not a test in the  
4 sense that it is a threshold to be surmounted. It is  
5 a factor for the Tribunal to take into account in the  
6 exercise of its judgment as to eligibility.

7 We have explained that in paragraph 17 of our  
8 skeleton, citing the Supreme Court in *Merricks*. I think  
9 it is actually worth looking at the Supreme Court in  
10 *Merricks* --

11 THE CHAIRMAN: Yes.

12 MR ROBERTSON: -- on this point. It is in authorities, E1,  
13 at tab 46, {AUTH-E/46/23-24}. (Pause)

14 THE CHAIRMAN: Tab 46, yes. Which page?

15 MR ROBERTSON: So it is page 23, {AUTH-E/46/23},  
16 paragraphs 59 to 62 there. Just to emphasise at  
17 paragraph 59 they have set out the general background of  
18 the law and procedure, and then the following points --  
19 and this is Lord Briggs giving the judgment of the  
20 majority in the Supreme Court in *Merricks*. Then he  
21 makes these observations:

22 "First, the Act and Rules make it clear that,  
23 subject to two exceptions, the certification process is  
24 not about, and does not involve, a merits test. This is  
25 because the power of the CAT, on application by a party

1 or of its own motion, to strike out or grant summary  
2 judgment is dealt with separately from certification.  
3 The Rules make separate provision for strikeout and  
4 summary judgment in rules 41 and 43 respectively, which  
5 applies to collective proceedings as to other  
6 proceedings before the CAT. There is no requirement at  
7 the certification stage for the CAT to assess whether  
8 the collective claim form, or the underlying claims,  
9 would pass any other merits test, or survive a strike  
10 out or summary judgment application, save that the CAT  
11 may, as a matter of discretion, hear such an application  
12 at the same time as it hears the application for  
13 a CPO ..."

14 That is why we have Mr Pickford's summary judgment  
15 and strikeout application, but they are conceptually  
16 separate for a certification process. The certification  
17 process does not involve an assessment of the merits.

18 At paragraph 60 the point is made that -- as  
19 a reference to the strength of the claims in  
20 Rule 79(3)(a), but that is only in the context of the  
21 choice between opt-in and opt-out proceedings, so it  
22 does not apply separately to certification. So it makes  
23 the point that the approach taken in the UK legislation  
24 is different from that in British Columbia. The point  
25 there is, at the end of paragraph 60:

1           "By contrast with the conditions for certification  
2           in British Columbia, which do require that the pleadings  
3           disclose a cause of action, not even this basic merits  
4           threshold is prescribed in the UK by the Act or the  
5           Rules."

6           "Secondly ..."

7           This is picking up the precise point as to the cost  
8           benefit factor:

9           "Secondly, the listing of a number of factors  
10          potentially relevant to the question whether the claims  
11          are suitable to be brought in collective proceedings in  
12          rule 79(2), within the general rubric 'all matters it  
13          thinks fit' shows that the CAT is expected to conduct  
14          a value judgment about suitability in which the listed  
15          and other factors are weighed in the balance. The  
16          listed factors are not separate suitability hurdles,  
17          each of which the applicant for a CPO must surmount.  
18          The hurdles ... are only that the claims are brought on  
19          behalf of an identifiable class, that they raise common  
20          issues and that they are suitable to be brought in  
21          collective proceedings ..."

22          It is not a condition that the claims are suitable  
23          for an award of aggregate damages. That is only one of  
24          many relevant factors for the suitability assessment.

25          Then, thirdly, in paragraph 62, {AUTH-E/46/24},

1       there are observations there about common issues and  
2       whether the issues are indeed common issues, and I have  
3       already made the point that that actually means the  
4       same, similar or related issues of fact or law. That is  
5       actually what the legislation says. "Common issues" is  
6       just a shorthand. That is, of course, where the CAT  
7       unfortunately, in the *Merricks* case, fell down by not  
8       appreciating that merchant pass-on was a common issue,  
9       ruling that ...

10       So that is all I wanted to say on the legal  
11       framework. That takes us through to --

12       PROFESSOR ULPH: Sorry, can I just ask you a question about  
13       this cost benefit question. It seems to me there are  
14       two other separate issues of cost benefit. Your claim  
15       is that the rule that the PRS uses when allocating Black  
16       Box funds, namely that it does that in the same  
17       proportion as matched funds, is the wrong rule, and  
18       given your assumption -- or it could be more than  
19       an assumption -- that the propensity or revenues  
20       accruing to songwriters to be mismatched is higher than  
21       that for publishers, then it follows that, by following  
22       that rule, you will under-reward songwriters. But there  
23       then has to be some kind of counterfactual policy for  
24       allocating the Black Box funds that PRS could have used,  
25       but that has to be a cost-efficient method of doing it.

1           You cannot just suppose that PRS goes through  
2           an enormously exhaustive procedure to try to come up  
3           with an alternative way of allocating Black Box funds if  
4           that itself is not cost-efficient.

5           So there is the cost-efficiency of doing your  
6           damages calculations but there is the cost-efficiency  
7           that PRS would have to satisfy itself that there is  
8           an alternative way of allocating Black Box funds that is  
9           not prohibitively expensive. Am I right in that?

10          MR ROBERTSON: That is a relevant factor for the Tribunal to  
11          take into account. At this stage, in advance of  
12          disclosure, we cannot see how the PRS are actually  
13          operating their published rules.

14          PROFESSOR ULPH: Okay.

15          MR ROBERTSON: So trying to identify more cost-efficient  
16          ways of achieving a fairer outcome to the class is  
17          something that we do not currently have the evidence on.  
18          I think it has to be an evidence-driven exercise.

19          PROFESSOR ULPH: But in some sense, for there to be a claim  
20          that the PRS has done something wrong, it seems to me  
21          that has to be that there was some credible alternative  
22          which was cost-efficient that PRS could have pursued in  
23          allocating Black Box funds which is different from the  
24          exercise of establishing all the facts necessary for  
25          damages calculations.

1 MR ROBERTSON: Well, I think the answer to that, at present,  
2 is in the proposed distribution of damages, which is  
3 that you could take the sums that come in on Black Box  
4 writers' royalties and just distribute them to writer  
5 members on a per capita basis. That would achieve  
6 fairness across writers as a class. So you would not  
7 distribute writers' royalties, any of them, to  
8 publishers.

9 PROFESSOR ULPH: I accept that. I thought we had  
10 established that this is a claim about aggregate damages  
11 and that the reason why you think the aggregate payments  
12 to songwriters out of Black Box damages is wrong is  
13 twofold. One is that they are using the same  
14 proportions as in the matched funds and secondly the  
15 propensity for songwriter revenues to be misallocated or  
16 mismatched is higher than that for a publisher. So  
17 those are the two elements in your argument. But to  
18 establish that there is a harm being done by PRS, it  
19 seems to me that you would establish that there is some  
20 alternative rule that PRS could have used to allocate  
21 the Black Box funds that would itself be  
22 a cost-efficient rule.

23 MR ROBERTSON: Yes.

24 PROFESSOR ULPH: Year on year it has to do this. It has to  
25 do these calculations every single year.

1 MR ROBERTSON: So if you take that sum, that part of Black  
2 Box royalties which are attributable to writers'  
3 royalties, and none of that is distributed to publishers  
4 but is instead distributed to writers as a class, that  
5 would be a fairer outcome. At the minute, we can only  
6 say that this is capable of being done on a per capita  
7 basis. That is the basis on which distribution has been  
8 approached.

9 Mr Savage has said -- it may be that, when I get  
10 into the details of how this is being operated on  
11 disclosure, I can propose something more targeted, but  
12 that is in the approach to damages, but that would be  
13 the approach to cost benefit as well. As to putting  
14 precise figures on it, which you would have to do on any  
15 worked cost benefit process, we do not have that data so  
16 I can only outline it in principle.

17 But, in principle, writers' royalties should not be  
18 paid to publishers. You can distribute them on  
19 a per capita basis to writer members. It is perfectly  
20 obvious who the -- the data is to who were writer  
21 members. You would just do it as a per capita  
22 distribution as part of the PRS cheque that they get  
23 every quarter, so that is --

24 PROFESSOR ULPH: So the ...

25 (Pause)



1 MR ROBERTSON: So I wanted to deal with -- yes. So I am  
2 turning now to section 3 of our skeleton argument, and  
3 this is at paragraph 18 of our skeleton argument.  
4 I want to deal with, at the outset, a legal objection  
5 that has been raised in my learned friend's skeleton  
6 argument at paragraph 4, which is that it is  
7 inappropriate for Mr Rowntree to rely on  
8 a Select Committee report as evidence, citing *Warsama*,  
9 which I am not going to turn up, but for your note it is  
10 in authorities bundle B1, tab 8, {AUTH-B/8/1}. The  
11 argument is based on Article 9 of the Bill of Rights  
12 1689, which is, so far as I am aware, the first time  
13 this provision has been cited to this Tribunal. So time  
14 to brush off your constitutional law, for those of us  
15 who are lawyers anyway.

16 Article 9 provides that the freedom of speech and  
17 debates or proceedings in Parliament ought not to be  
18 impeached or questioned in any court or place out of  
19 Parliament. *Warsama* concerned a report of an inquiry  
20 ordered to be published by the House of Commons into  
21 child abuse in the British overseas territory of  
22 St Helena. The claimants in that case were social  
23 workers on St Helena who wished to challenge the  
24 findings of the report. It was held that the report was  
25 protected by parliamentary privilege and the claimants

1           were improperly seeking to dispute the findings of that  
2           inquiry, contrary to Article 9 of the Bill of Rights.

3           In the present case, by contrast, Mr Rowntree refers  
4           to evidence submitted to the Department for Culture,  
5           Media and Sports -- DCMS -- Select Committee and the  
6           findings of the committee in support of this case about  
7           the existence of Black Box royalties. He is in no sense  
8           seeking to impeach or call into question any finding by  
9           the committee or any evidence submitted to that  
10          committee. The report and the evidence published with  
11          the report simply provide factual support for his  
12          pleaded case.

13          If we can just look at that report, it is in trial  
14          bundle A. It was annexed to our claim form, and it is  
15          in tab 1 -- well, I will take you to the claim form  
16          first to show you what use to make of it. {A/1/14},  
17          paragraph 47, where -- paragraph 47, we set out, at the  
18          head there, the reason why we are relying upon this  
19          report. We have described the PRS rules and  
20          regulations, but we have had difficulties getting more  
21          detail out in pre-action correspondence:

22          "Pending disclosure, the best particulars that the  
23          Proposed Class Representative can provide as to how PRS  
24          distributes unmatched Black Box royalties are as  
25          follows."

1           Then on to {A/1/15}, subparagraph 47.5:

2           "Evidence from Ms ... Lindvall, a professional  
3 songwriter and Chair of the Ivor Novello Awards and the  
4 Ivors Academy Songwriter Committee, cited in the Report  
5 into the Economics of Music Streaming by the [DCMS]  
6 Committee ... explains that any royalties that are  
7 unallocable are distributed according to 'market share'  
8 (which is understood to be another way of referring to  
9 pro rata distributions or distributions over identified  
10 usage) and this in effect means that the major  
11 publishers receive the overwhelming majority of it as  
12 their data are more likely to be in order."

13           We then go to references -- further references are  
14 made at paragraphs 82.2 and 82.9 on {A/1/23} of the  
15 claim form, which just referred to the fact that we are  
16 annexing the report and Ms Lindvall's evidence to the  
17 claim form. The report is annex 8 of the claim form,  
18 which is in tab 9 of trial bundle A, {A/9/1}. We see on  
19 the first page it is a report into the economics of  
20 music streaming. This is obviously a highly important  
21 issue for the music industry.

22           My 14-year old daughter does not own any records in  
23 the sense that I did when I was 14, a proud possessor of  
24 Genesis LPs and gatefold sleeves, before punk arrived,  
25 but she listens to loads of music. It is all streamed.

1           It is all on Spotify in our household.

2       THE CHAIRMAN: We are aware of this, yes, yes. We may be  
3           elderly, but we are not that elderly!

4       MR ROBERTSON: It is a very modern Tribunal, I would say.

5       THE CHAIRMAN: Thank you. Flattery will get you everywhere.

6       MR ROBERTSON: Well, I hope so.

7           Then if we look at the report -- so this is the  
8           Select Committee. If you turn to -- so it is {A/9/4}.  
9           The membership of the committee is set out there. Then  
10          there is a description of its powers:

11                 "The Committee is one of the departmental select  
12                 committees, the powers of which are set out in the House  
13                 of Commons Standing Orders ..."

14                 So it is a Select Committee.

15                 Then the reference to -- there is a summary of what  
16                 the report finds at page {A/9/7}, which then sets out  
17                 a summary of the conclusions. The third paragraph  
18                 summarises the conclusions:

19                 "... songwriters ... receive only a small proportion  
20                 of revenue due to poor royalty rates and because of the  
21                 valuation of song writing and composition, relative to  
22                 the recording ... Poor remuneration risks  
23                 disincentivising successful, professional musicians ..."

24                 Then they say:

25                 "We recommend a broad yet comprehensive range of

1 legislative reforms and regulatory interventions to deal  
2 with these issues."

3 In the middle of the paragraph:

4 "We have deep concerns about the position of the  
5 major music companies and call on the Government to  
6 support the independent sector and take advice from the  
7 [CMA] as to whether competition in the recorded music  
8 market is being distorted."

9 So it is not the equivalent of a CMA report. It is  
10 a report from a representative select committee into  
11 public interest issues.

12 The issues with metadating the streaming services  
13 are discussed starting on {A/9/53}. So starting at  
14 page 53, paragraph 89, under the heading "Metadata", it  
15 essentially sets out the factual position in relation to  
16 streaming.

17 Paragraph 90, over the page on {A/9/54}:

18 "There is widespread consensus across the music  
19 industry and amongst the music streaming services that  
20 issues with the metadata are a significant challenge to  
21 efficient and correct rightsholder remuneration."

22 Further on it says:

23 "... songwriters often lose out altogether when  
24 music is streamed."

25 Black Box is addressed at paragraph 93, {A/9/55}:

1           "At best, mismatched, incomplete or missing metadata  
2           can result in delays to creator royalties for months or  
3           even years. At worst, this can result in payments being  
4           misallocated or otherwise consigned as unclaimed or  
5           non-attributable royalties to 'Black Boxes'. Black  
6           Boxes consisted of \$2.5 billion in unallocated income in  
7           2019 alone."

8           For that they cite their evidence to the committee,  
9           and you will see -- sorry, I should have drawn attention  
10          to footnote 364, "At worst, this can result in payments  
11          being misallocated ..." -- and that is Ms Lindvall's  
12          evidence to the committee -- "... or otherwise consigned  
13          as unclaimed or non-attributable royalties to 'Black  
14          Boxes'". That is evidence from the Ivors Academy of  
15          Music Creators to the committee.

16          Then it points out that:

17          "After a period of time, Black Boxes are then  
18          assigned pro-rata to streams that have been correctly  
19          identified, which is established in standard publishing  
20          agreements. This means that those creators and  
21          companies, particularly who are most listened to, are  
22          effectively ... paid twice: first for their own streams,  
23          and then for streams that cannot be allocated. More  
24          recently, Phonographic Performance Limited ... the  
25          performer collecting society, has changed how it

1           allocates Black Box income."

2           So that is the paragraph --

3       THE CHAIRMAN: Are they giving away to charity now?

4       MR ROBERTSON: Yes, they are giving it away to charities.

5       THE CHAIRMAN: Right. So you --

6       MR ROBERTSON: We are not relying upon that, no.

7       THE CHAIRMAN: But you do not want them to be. Your action

8           is not to --

9       MR ROBERTSON: We are on behalf of writers --

10      THE CHAIRMAN: Yes.

11      MR ROBERTSON: -- the creatives --

12      THE CHAIRMAN: Yes.

13      MR ROBERTSON: -- the people who actually create the songs.

14      THE CHAIRMAN: Yes, I know who you represent, but the PPL

15           have come up with an alternative, which is -- whereby

16           these unattributable royalties are paid to charities,

17           and that is not something that you are commending to

18           this Tribunal?

19      MR ROBERTSON: That is not part of our claim for damages,

20           no.

21      THE CHAIRMAN: No.

22      MR ROBERTSON: It may well be that --

23      THE CHAIRMAN: But why are we referring to this, then?

24      MR ROBERTSON: To point out that you can change the approach

25           to Black Box royalty distribution. PPL did that. So it

1 is not the solution for which we are contending in our  
2 damages claim. Of course, at some point in the future,  
3 if the PRS actively engages with writers, who knows what  
4 future arrangements might be put in place, but that is  
5 not part of the case that I am advancing as part of the  
6 CPO application.

7 Then we see the --

8 THE CHAIRMAN: But is there anything in this report which  
9 supports your position as to what should be happening?

10 I do not think it is --

11 MR ROBERTSON: No.

12 THE CHAIRMAN: I may be wrong but I do not think it is  
13 disputed that unallocated income is a problem and  
14 a problem that needs addressing and PRS will say is  
15 addressed.

16 MR ROBERTSON: No.

17 THE CHAIRMAN: But what else do we get out of this? We did  
18 not need to look at the report for that --

19 MR ROBERTSON: My learned friend says I am not allowed to  
20 refer to this report because of Article 9 of the Bill of  
21 Rights. We are not calling into question the report.

22 THE CHAIRMAN: Okay, but before we write a lengthy judgment  
23 on the Bill of Rights and the subsequent cases referring  
24 to parliamentary materials, what is the relevance of any  
25 of this?



1 MR ROBERTSON: It is to establish that the case we are  
2 pleading in our claim form is grounded in fact.

3 THE CHAIRMAN: Yes, sorry, I just want to make sure I am not  
4 misunderstanding the scope of the dispute between the  
5 parties. As I understand, it is common ground there are  
6 such things as unallocated royalties and that they --  
7 that is a problem that needs to be addressed. That is  
8 common ground. So we probably do not need to resolve  
9 this --

10 MR ROBERTSON: Well, it is a focused exercise in  
11 constitutional law, so I do not think need to take you  
12 to *Bradley* or *Gardner*, which established that in fact  
13 select committees can be referred to, unsurprisingly.  
14 So it is a pity, perhaps, we had to go down that. It  
15 was only because the point was raised in my learned  
16 friend's skeleton, and I am just repeating it.

17 MR PICKFORD: To be clear, the problem, of course, is if he  
18 refers to a Select Committee report which we do not  
19 agree with, then we are then in the territory of  
20 considering the Select Committee report, which this  
21 Tribunal is not permitted to do.

22 THE CHAIRMAN: Yes.

23 MR PICKFORD: That is, I think --

24 THE CHAIRMAN: I do not think, in practice, we need to worry  
25 about this. It may be an important point in another

1 case --

2 MR PICKFORD: Well, quite, but if he did not need to rely on  
3 it, then obviously it does not arise.

4 MR ROBERTSON: That is an explanation as to why we plead the  
5 case that we have.

6 THE CHAIRMAN: That is fine. Where next?

7 MR ROBERTSON: In that case, infringements. That is our  
8 skeleton argument, paragraphs 19 to 24.

9 THE CHAIRMAN: Have we dealt with our questions on the class  
10 or are you coming back to that?

11 MR ROBERTSON: I am --

12 THE CHAIRMAN: You are coming back to that. That is fine.

13 MR ROBERTSON: So infringements. This I think will address  
14 your question as to why is this anti-competitive. We  
15 would ask the Tribunal to bear in mind, of course, the  
16 prohibitions and abuse of dominance, and it is the abuse  
17 that is unlawful. I will come on to the case law on  
18 unfair trading conditions as an abuse. I am going to  
19 take you to the two most recent cases on that, although  
20 there is actually a number of cases. So that is what  
21 I am dealing with under the heading of "Infringements".

22 THE CHAIRMAN: Which page are you on -- sorry -- in your  
23 skeleton argument?

24 MR ROBERTSON: So I am in our skeleton argument,  
25 paragraphs 19 to 24. As I say, we have -- I do not

1 think I am going to detain the Tribunal on the existence  
2 of Black Box royalties. Just to draw attention to the  
3 fact that it is not just the DCMS Select Committee  
4 report and Ms Lindvall's evidence to the  
5 Select Committee that we rely upon, we have also put in  
6 a lengthy witness statement with the claim form from  
7 Mr Karabuda, who is a very senior executive in the  
8 Swedish music industry, sits on all sorts of European  
9 bodies, sits on the board of the equivalent of the PRS  
10 in Sweden, STIM, which is actually one of the PRS' joint  
11 venture partners in ICE. His statement, at trial  
12 bundle A, tab 11, also explains the problem with Black  
13 Box royalties.

14 THE CHAIRMAN: Yes. As I understand it, at least subject to  
15 anything Mr Meredith [sic] says, we are working on the  
16 assumption that there are such things as Black Box  
17 royalties, they are not insubstantial, but still that  
18 does not answer the question of proportionality with  
19 regards to misallocation and so forth, as you are going  
20 to come to.

21 MR ROBERTSON: So as to the legal basis for pursuing this  
22 claim, that is set out in paragraphs 23 to 24 of our  
23 skeleton argument. We have cited a number of older  
24 cases which I am not going to take you through, but  
25 I will just summarise them. But it is well established

1           that copyright management organisations, such as the  
2           PRS, can be held dominant and could be held to abuse  
3           their dominance in relation to the terms on which they  
4           deal with their members. That is established in  
5           relation to the German organisation, GEMA, in a series  
6           of three cases --

7       THE CHAIRMAN: Again, I think that is not something we need  
8           to dwell on unless Mr Meredith [sic] is taking a point  
9           on that.

10      MR ROBERTSON: It is "Mr Pickford", not "Mr Meredith".

11      THE CHAIRMAN: Sorry, Mr Pickford. I do apologise.

12      MR ROBERTSON: So there are the old cases. There is *BRT v*  
13           *SABAM*, so all these cases that we studied when we first  
14           studied EEC law. Then bringing us up to the modern era,  
15           we have got two more recent authorities which I think  
16           I should take you to, *Preventx* and *Gutmann v LSER* in the  
17           Court of Appeal. We have also provided the Tribunal  
18           with extracts from the leading textbooks in this area,  
19           and they are in the authorities bundle, E2, at 65 and  
20           66. That is Whish and Bailey and O'Donoghue --

21      MR KELLY: Can you give us the relevant bits?

22      MR ROBERTSON: So E2, tab 65, {AUTH-E/65/1}. (Pause)

23           {AUTH-E/65/3}, "Unfair trading conditions", it is  
24           one of the heads of abuse. Here it is referring to  
25           Article 102(2)(a), but it is the same provisions as the

1 Competition Act.

2 There, citing at the outset *LSER v Gutmann*:

3 "The law relating to abuse is concerned with  
4 consumer unfairness when an undertaking is dominant it  
5 is, by definition, freed from the competitive shackles  
6 which otherwise incentivise and discipline it to  
7 maximise consumer welfare and benefit. This is why most  
8 laws worldwide which prohibit abuse of dominance include  
9 within the prohibition the imposition of some 'unfair'  
10 terms and prices."

11 THE CHAIRMAN: Yes, that is a general proposition, yes.

12 MR ROBERTSON: Yes, and that is the proposition on which we  
13 rely.

14 THE CHAIRMAN: But is there any case law which gets you  
15 closer to the very unusual facts of this case? At this  
16 point, the answer is obviously "No", but anyway --

17 MR ROBERTSON: I will let you say it. The older cases, *GEMA*  
18 *1, 2 and 3* and *BRT v SABAM* are cases of unfairness to  
19 members of a copyright management organisation --

20 THE CHAIRMAN: Right.

21 MR ROBERTSON: -- issuing an abuse.

22 THE CHAIRMAN: Right. But what is unusual about this case,  
23 as we have been discussing, the unfairness, if one  
24 wanted to ascribe an unfairness, is the fact that  
25 somebody who has written a song is not getting royalties

1           for that song, but that is not your claim.

2       MR ROBERTSON: It is that writers as a class are not getting  
3           royalties because as a --

4       THE CHAIRMAN: Right, but that is just repeating yourself.

5           That is not an answer to the problem or a solution to  
6           the problem, I should say. The problem is that people  
7           who, as you rightly point out, have engaged in the hard  
8           work and creativity are not getting royalties for that  
9           creativity. The fact that that money is then given to  
10          someone else is not an answer to that problem that they  
11          are not getting the royalties. So if you want to solve  
12          this problem, the plain way to solve it is to make  
13          use -- to say to the PRS or to the writers or whoever it  
14          is, "Please can you improve your system so this  
15          misallocation does not occur?", and -- but that is not  
16          your claim here and it is really trying to understand if  
17          there is any case law which assists you in the fact --  
18          you are not saying that what is wrong is Harriet not  
19          receiving her royalties. What you are saying is wrong  
20          is who the undeserving recipient is.

21       MR ROBERTSON: I think the nearest case is *Gutmann* on  
22          boundary fares.

23       THE CHAIRMAN: Right.

24       MR ROBERTSON: That is the nearest. So I think it would be  
25          worthwhile --

1 THE CHAIRMAN: I think we should look at that, yes.

2 MR ROBERTSON: -- turning that up. The other case

3 I mentioned of *Preventx* was a claim by an individual  
4 undertaking interim injunctions so that is not really on  
5 point. But *Gutmann* is to be found in tab -- we have  
6 already looked at it, in fact. Bundle E1, tab 49,  
7 {AUTH-E/49/1}. (Pause)

8 THE CHAIRMAN: Yes, in the Court of Appeal. Yes.

9 MR ROBERTSON: This is a claim for abuse of dominance by  
10 train companies which were not publicising the  
11 availability of boundary fares, and you see that  
12 described at paragraph 6, {AUTH-E/49/3}. So passengers,  
13 customers in the modern jargon, who have travelcards  
14 paying for travel to the end of their travel zone were  
15 buying tickets from start to finish when they only  
16 needed to buy tickets actually from the edge of the  
17 boundary from which they held the travelcard to their  
18 destination. That is described at paragraph 6 on page 3  
19 and it concludes at paragraph 6:

20 "Put another way [train operating companies] charged  
21 twice for the ... leg of the journey [covered by the  
22 travelcard]."

23 THE CHAIRMAN: Where are you reading?

24 MR ROBERTSON: That is paragraph 6 on page 3.:

25 "The nub of the claim is that the defendant TOCs

1           failed to make Boundary Fares available either at all or  
2           in a way that was sufficiently available."

3       THE CHAIRMAN: Right, thank you.

4           (Pause)

5       MR ROBERTSON: The discussion of unfair trading conditions  
6           is at paragraphs 93, which is --

7       THE CHAIRMAN: Can we just look at the class?

8       MR ROBERTSON: Yes, that is on page 4, paragraph 10,  
9           {AUTH-E/49/4}. (Pause)

10      THE CHAIRMAN: It was not all passengers. You had to have  
11          a rail fare to travel in all or in part from a station  
12          within ... right, okay.

13      MR ROBERTSON: So the passage on unfair trading conditions  
14          commences at paragraph 93, on page 30, {AUTH-E/49/30} --

15      THE CHAIRMAN: Yes.

16      MR ROBERTSON: -- under the heading "The law on abuse by the  
17          imposition of unfair prices or other unfair trading  
18          conditions". At paragraph 93:

19          "The law relating to abuse is concerned with  
20          consumer unfairness because when an undertaking is  
21          dominant it is, by definition ..."

22          This is the passage that is cited in Whish  
23          and Bailey that --

24      THE CHAIRMAN: Yes, okay. I think that is uncontroversial,  
25          yes.



1 MR ROBERTSON: Yes. Then it refers to European case law,  
2 where people -- where the abuse consisted essentially of  
3 making ... (Pause)

4 THE CHAIRMAN: We need five minutes for the shorthand  
5 writer. Would this be a convenient moment while you are  
6 navigating through this?

7 MR ROBERTSON: Well, if I could ask the Tribunal -- because  
8 this is the last authority I wish to refer to -- to  
9 read 93 to 102.

10 THE CHAIRMAN: Yes. We will do that when we get back.  
11 I think this is important. If this is your best case,  
12 I think we need to spend a bit of time on it so I am not  
13 just going to --

14 MR ROBERTSON: I am relying on it as a statement of the  
15 principle. I am not relying on it to say that the facts  
16 are on all fours or anything like that.

17 THE CHAIRMAN: They may not be on all fours but do they  
18 offer any assistance at all?

19 MR ROBERTSON: The statements of principle do.

20 THE CHAIRMAN: The statements of principle you rely on are  
21 what?

22 MR ROBERTSON: That treating people unfairly, treating  
23 members unfairly, as a class is capable of being  
24 an abuse.

25 THE CHAIRMAN: Right. Thank you.

1 (11.43 am)

2 (A short break)

3 (11.53 am)

4 THE CHAIRMAN: Yes, please.

5 MR ROBERTSON: Sir, we were in *Gutmann*; and it is in  
6 authorities E, tab 49, page 30 {AUTH-E/49/30} and I had  
7 just started referring to paragraph 93.

8 Perhaps, rather than reading it out, if I could ask  
9 the Tribunal to read to -- it is quite a lengthy  
10 passage, but it is Lord Justice Green setting out  
11 a comprehensive survey of the authorities on unfair  
12 trading conditions. If I could ask the Tribunal to read  
13 through to paragraph 102, which is on page 36  
14 {AUTH-E/49/36}.

15 (Pause)

16 So I would summarise it as being two propositions to  
17 take from *Gutmann*. You might wish to keep that bundle  
18 open, because I am going to go back to a previous case.  
19 But the two propositions are essentially that the law on  
20 the abuse of imposing unfair trading conditions is  
21 developing and is capable of catching a wide range of  
22 unfair conduct. The examples are there discussed by  
23 Lord Justice Green, even cases as apparently radical as  
24 the *Facebook* case under provisions of German law.

25 So we say that our claim is well within the ambit of

1 the concept of an unfair trading condition, and it is at  
2 least arguably within the ambit, and that is sufficient  
3 to withstand any claim for summary judgment or  
4 strikeout.

5 The second point I wish to make, and this is  
6 an answer to one of the questions you asked me at the  
7 outset, which I adumbrated an answer to a little while  
8 ago, is set out in paragraph 102, at the end of the  
9 passage in Gutmann, where -- the question you asked me  
10 was: well, is it anti-competitive? The answer I started  
11 to give was: well, the provision is on abuse of  
12 dominance, and you do not have to separately consider  
13 anti-competitive effect on the market, although conduct  
14 here does wildly distort the market, in our submission.

15 But you see there, at the conclusion of  
16 paragraph 102, Lord Justice Green discussing what is  
17 relevant to whether a term is unfair:

18 "But that is but one means of establishing abuse in  
19 cases of consumer harm. In neither [Deutsche Post] nor  
20 DSD ... did the [Court of Justice] consider whether the  
21 terms in question would have been imposed in a genuinely  
22 competitive market. In both cases the Court simply  
23 examined the fairness of the disputed term as  
24 a stand-alone proposition. The same point was made in  
25 *Facebook* at paragraphs 65 [and following] of the

1 judgment of the [German] Federal Supreme Court."

2 So that is the answer to that question.

3 Now, if I could ask the Tribunal just to turn back,  
4 going back to our discussion on --

5 THE CHAIRMAN: That is correctly picking me up on my loose  
6 use of language when I said "anti-competitive" and  
7 "abusive", but there is still the more substantive issue  
8 as to why -- when the unfairness is that Harriet is not  
9 getting her royalties, why your case -- how you square  
10 your case with that.

11 MR ROBERTSON: That is our -- our case is that it is unfair  
12 for writers as a class not to be -- to be deprived of  
13 remuneration that is earned by writers as a class but is  
14 being paid to publishers. So it is looking at it  
15 collectively. It is not looking at the individual  
16 position of Harriet -- we have made that submission --  
17 or, to take another PRS member, my brother-in-law, Mick,  
18 who has also complained to me about the activities of  
19 the PRS as he is a songwriter, but anyway ... But the  
20 passage I wanted to go back to --

21 THE CHAIRMAN: But I expect that your brother, Mick,  
22 complains to you; not wishing to personalise this more  
23 than we have to. He does not say that, "I think it is  
24 really unfair that my unpaid royalties are not going to  
25 other people". I expect he is saying, "I think it is

1           really unfair my unpaid royalties are not going to me".

2       MR ROBERTSON: What he is saying is that it is really unfair  
3       the way the PRS deals with him and refuses to engage  
4       with him. That is what really irks him. Anyway, I will  
5       leave my brother-in-law out of this.

6           If I could go back to *Merricks* in the Supreme Court  
7       to explain why we say you have to look at this  
8       collectively. I should have taken you to this paragraph  
9       when we went to *Merricks*, paragraphs 59 to 62, and I did  
10      not. It is the preceding paragraph, paragraph 58, so it  
11      is in this bundle, E1, {AUTH-E/46/23}, so back to the  
12      judgment of Lord Briggs. At paragraph 58:

13           "Another basic feature of the law and procedure for  
14      the determination of civil claims for damages is of  
15      course the compensatory principle, as the CAT  
16      recognised. It is another important element of the  
17      background against which the statutory scheme for  
18      collective proceedings and aggregate awards of damages  
19      has to be understood. But in sharp contrast with the  
20      principle that justice requires the court to do what it  
21      can with the evidence when quantifying damages, which is  
22      unaffected by the new structure, the compensatory  
23      principle is expressly, and radically, modified. Where  
24      aggregate damages are to be awarded, section 47C of the  
25      Act removes the ordinary requirement for the separate

1           assessment of each claimant's loss in the plainest  
2           terms. Nothing in the provisions of the Act or the  
3           Rules in relation to the distribution of a collective  
4           award among the class puts it back again. The only  
5           requirement, implied because distribution is judicially  
6           supervised, is that it should be just, in the sense of  
7           being fair and reasonable."

8           Now, Harriet might say, "Hang on, I am not getting  
9           my royalties". Well, looked at it collectively, we have  
10          to have a just and fair and reasonable way of  
11          distribution and it may just not be feasible to identify  
12          your particular claim for damages. But you are viewed  
13          as collectively one of a class. If it is just and  
14          reasonable to the class, then that is an appropriate --

15       THE CHAIRMAN: So the writer members, let us assume there  
16          are 160,000, do we know how many of them suffer from  
17          this problem in any one year of not receiving royalties?  
18          Is that an unknowable?

19       MR ROBERTSON: It is not unknowable. It is definitely  
20          knowable, and that is the exercise that Mr Savage  
21          proposes to carry out through auditing distribution --  
22          the approaches to distribution Black Box royalties.

23       THE CHAIRMAN: My head spun a little bit when I read  
24          Mr Savage's evidence. Just in two sentences explain to  
25          me how you are going to do that.

1 MR ROBERTSON: He is going to take what he describes as  
2 a "fairly standard approach" to auditing, what he does  
3 on behalf of clients who want to check their PRS  
4 royalties. It is --

5 THE CHAIRMAN: That is why I do not understand his evidence  
6 on this. How are we going to determine -- how is it  
7 going to be determined which writers have not received  
8 royalties to which they are intended, because until you  
9 can do that, you cannot know the number.

10 MR ROBERTSON: It is going to be done by sampling, so  
11 obviously you cannot get across all 160,000. So you  
12 have to --

13 THE CHAIRMAN: One could, but, yes, they would be -- let us  
14 assume -- but it does not matter how many. Take half  
15 a dozen. How are you going to do it?

16 MR ROBERTSON: It is not going to be half a dozen either.  
17 He is going to approach this through taking samples of  
18 writers.

19 THE CHAIRMAN: Okay. So I have got my sample. What happens  
20 next?

21 MR ROBERTSON: Yes, well, I think I am going to have to take  
22 you to Mr Savage's report.

23 THE CHAIRMAN: No, we are -- well, just tell me. Just tell  
24 me. If you want to come back to this after lunch, that  
25 is fine, but I just want to understand it crisply, what

1           it is that you are going to do. So you have now  
2           identified a sample of writers and you are trying to  
3           work out whether or not some or all of them have not  
4           been paid royalties. How are you going to do that?

5       MR ROBERTSON: I think I will discuss that with Mr Savage at  
6           lunchtime. I will take you to the parts of his  
7           report --

8       THE CHAIRMAN: Yes, I would also like to hear submissions on  
9           it, not just run round in circles in his report. I find  
10          his report difficult to understand on this point, so it  
11          may be that I have missed the key sentence, but if you  
12          could make sure you understand it and explain it to me  
13          after lunch.

14       MR ROBERTSON: My understanding is that this sort of  
15          auditing of royalties is something he engages in for  
16          clients in the music industry, so it is a larger  
17          exercise but dealing with a representative sample --

18       THE CHAIRMAN: Let us deal with that at 2 o'clock.

19       MR ROBERTSON: Let us deal with it at 2 o'clock, yes. So  
20          that is paragraph 58 of *Merricks*, dealing with why we  
21          approach this on a collective basis. It is a radical  
22          departure from the previous approach to damages in  
23          English law, and that is reflected in the fact that we  
24          have a new scheme -- it is not that new any longer --  
25          for collective proceedings and aggregate awards of



1 damage --

2 THE CHAIRMAN: Yes, I think we have got that point.

3 MR ROBERTSON: Yes. Well, in that case, I can then move on  
4 to paragraphs 25 to 26 of our skeleton argument, where  
5 we address the issue of what is the loss. Really that  
6 is something we have been discussing now at this stage.  
7 There is a relatively limited amount of detail available  
8 to us. Our submission is that it is, on any view,  
9 substantial. The only figure we have seen from the PRS  
10 is Mr Arber's reference, at paragraph 83 of his first  
11 witness statement, to what he refers to as "market  
12 residuals" in his joint venture, ICE, which are in  
13 effect MTOL, so multi-territorial online Black Box,  
14 royalties being reduced in 2023 by the sum of  
15 €70 million. So that gives some sort of sense that we  
16 are not talking about rounding errors here.

17 THE CHAIRMAN: So -- right. But in the -- it is a different  
18 thing -- different things at a different stage happen to  
19 undistributed royalties, but when you get to the final  
20 analysis after three years or whatever it is, how much  
21 is attributable to writers? You have got to --

22 MR ROBERTSON: We do not have a figure on that.

23 THE CHAIRMAN: So how do you know these proceedings are  
24 proportionate?

25 MR ROBERTSON: We get a sense that the scale of the figures

1           are very large.

2       THE CHAIRMAN: Right. So just help us with that. Where do  
3           you get that?

4       MR ROBERTSON: Well, we get Mr Savage referring in his first  
5           report, at paragraph 4.14, to the view from the chief  
6           executive officer, the CEO, of the Music Managers Forum  
7           expressing a view that some 20% to 30% of MTOL streaming  
8           royalties are Black Box. Mr Karabuda's evidence, at  
9           paragraph 16 of his statement, is that the scale of the  
10          Black Box royalty issue --

11       THE CHAIRMAN: Can we have a look at these because I think  
12          this is not an unimportant point so --

13       MR ROBERTSON: Yes. So Mr Savage is in bundle A -- trial  
14          bundle A, tab 23, page 10, {A/23/10}, paragraph 4.14.

15       THE CHAIRMAN: Hang on. Give me a second. (Pause)  
16          Yes.

17       MR ROBERTSON: There he is referring to an estimate given --  
18          and that is in footnote 10 -- from Annabella Coldrick,  
19          the chief executive officer for Music Managers Forum and  
20          Graham Davies, the chief executive officer of the  
21          Ivors Academy. Also it is in Ms Lindvall's evidence  
22          that some 20% to 30% of streaming royalties from MTOLs  
23          are Black Box.

24       THE CHAIRMAN: So is that in dispute, I mean, for present  
25          purposes as opposed to at trial?

1 MR ROBERTSON: It is sufficient to plead.

2 THE CHAIRMAN: Right. That was not my question. Is it in  
3 dispute? Is this evidence from ...?

4 MR PICKFORD: We do not have evidence on that for this  
5 application. It is certainly not accepted more  
6 generally, but for the purposes of our strikeout  
7 application we are not saying, "This should be struck  
8 out because here is the evidence as to why it is wrong".

9 THE CHAIRMAN: No, but on questions of proportionality, one  
10 of the things the Tribunal needs to understand is  
11 whether -- looking at the size of the cost bill, whether  
12 this is proportionate, and that requires some  
13 understanding of the size of the claim.

14 MR PICKFORD: That is understood. That is not the easiest  
15 thing for us to provide information on because we do not  
16 fully understand the claim. We do not really understand  
17 ultimately what the counterfactual is and those issues  
18 would bear on.

19 THE CHAIRMAN: Right. But we are not talking about that.  
20 We are talking about the unallocated royalties in the  
21 Black Box then get allocated. What is the size of that  
22 sum?

23 MR PICKFORD: Well, I cannot point you to evidence on that.  
24 I am very happy to take instructions about whether we  
25 can provide further assistance to give a bit more of

1 a sense to the Tribunal.

2 THE CHAIRMAN: It would be helpful to have some ...

3 MR ROBERTSON: The other item of evidence to refer to on  
4 that is Mr Karabuda's evidence, submitted with the claim  
5 form, which is in bundle A, tab 11, page 7,  
6 paragraph 16 --

7 THE CHAIRMAN: Hold on, hold on.

8 PROFESSOR ULPH: Can we just go back to that previous  
9 paragraph, {A/23/10}? I am thinking about  
10 paragraph 4.14.

11 MR ROBERTSON: 4.14, so it is {A/23/10}, paragraph 4.14.

12 PROFESSOR ULPH: Yes, so it is talking about MTOL royalty  
13 payments.

14 MR ROBERTSON: Yes.

15 PROFESSOR ULPH: It says that about 20% to 30% of streaming  
16 royalties are Black Box.

17 "In some cases, PRS receives MTOL royalty payments  
18 for both publishers and writers, but in most cases it is  
19 only the writer share that PRS receive with the  
20 publishers receiving the publisher share ... directly."

21 So would it then be possible for PRS to say, "We  
22 have a revenue stream coming in, but on MTOL. Let us  
23 classify that as being songwriter revenue", rather than  
24 stick it in a Black Box and say, "We do not know which  
25 songwriter", but that is a different issue, but at least

1           they would know that that sort of revenue that  
2           essentially belongs to songwriters. So would that be  
3           a way of narrowing down the range where it is quite hard  
4           to distinguish whether it is publisher or royalty  
5           revenue that you are dealing with if you have already  
6           labelled this as being songwriter?

7       MR ROBERTSON: In principle that sounds feasible --

8       PROFESSOR ULPH: Okay.

9       MR ROBERTSON: -- because we do not know how -- until we  
10           have disclosure, then we do not know actually how this  
11           looks like when it comes in and whether that is a basis  
12           for -- it is certainly the case that publishers have  
13           direct deals with streaming.

14       PROFESSOR ULPH: Yes, I understand that. Yes. I guess my  
15           question then is: is there enough information that PRS  
16           would receive, when it got an MTOL payment, that they  
17           will be able to say, "This is definitely for  
18           a songwriter", or it would still be ambiguous as to  
19           whether it is --

20       MR PICKFORD: If it would help, I can explain that the very  
21           kernel of this, the real problem here, as we understand  
22           what is being complained about, is unmatched works. It  
23           is where there is some usage data and it appears to be  
24           in respect of some work possibly that the PRS has, and  
25           yet, when it analyses the data, there is no work that

1 matches up against that, and that could be for a number  
2 of reasons. It could be because there is a mistake by  
3 the licensee, it could be that there is some mistake on  
4 the PRS' system, but, in any event, you do not know what  
5 work the royalties are in respect of.

6 PROFESSOR ULPH: Okay.

7 MR PICKFORD: If you do not know what work the royalties are  
8 in respect of, you are stumped, that is it, because the  
9 next stage is then you go on to look at -- if you know  
10 what the work is, you then go on to look at the work  
11 share picture and you say, "Okay, I now see that this is  
12 work X and BMG is entitled to 50% of these royalties and  
13 Mr Rowntree is entitled to 50% of these royalties.  
14 Great, I now know what to do." If you do not know what  
15 the work is, you simply cannot get past base one, so one  
16 of our points is that there is no such thing as  
17 a songwriter box that we can create because we simply do  
18 not know.

19 PROFESSOR ULPH: Okay. Thank you.

20 MR ROBERTSON: I was going to take you to Mr Karabuda's  
21 evidence --

22 THE CHAIRMAN: Yes, yes.

23 MR ROBERTSON: -- which is at bundle A, tab 11, page 7,  
24 paragraph 16, {A/11/7}. You will have seen Mr Karabuda  
25 is a -- as I say, he is the board member of the

1 equivalent of the PRS, but he has held many other  
2 positions. He is a very senior music industry  
3 executive. Paragraph 16:

4 "The scale of the Black Box royalty issue should not  
5 be underestimated and is in fact enormous. In the Fair  
6 Music Project application for EU funding ..."

7 That is a project which is now being funded by  
8 the EU, which he describes in paragraphs 9 to 14. It is  
9 a carefully designed interdisciplinary group of academic  
10 and industry partners due to report in 2026. So:

11 "In the Fair Music Project application for EU  
12 funding, for example, it was noted that Black Box  
13 royalties, which are distributed on a so-called  
14 'pro rata' basis each year, total around US\$7 billion.  
15 Within PROs, Black Box royalties tend to represent  
16 a substantial amount of the turnover of those  
17 organisations and I have no reason to suppose that the  
18 position is any different for PRS."

19 So this is someone who has been on the board of the  
20 PRS' Swedish equivalent. It is an informed view.

21 THE CHAIRMAN: So Mr Pickford said that we do not know -- we  
22 do not have in evidence what the undistributed royalties  
23 are of PRS --

24 MR ROBERTSON: We do not --

25 THE CHAIRMAN: -- but he may be able take instructions.

1 MR ROBERTSON: Mr Arber covers many things in his witness  
2 statements but he does not touch upon that.

3 THE CHAIRMAN: Then do we have the figures for how much gets  
4 distributed to writers and how much gets distributed to  
5 publishers?

6 MR ROBERTSON: We do not have specific figures.

7 MR PICKFORD: We do. There is a table that is in the  
8 correspondence bundle -- I think I can get the reference  
9 for it, but there is a table that is attached to  
10 a letter from Macfarlanes --

11 THE CHAIRMAN: Right, okay.

12 MR PICKFORD: -- which I think is at {A/13/32}, if that  
13 would help. This is an appendix to a letter from those  
14 instructing me, responding to Mr Rowntree's solicitors,  
15 and it shows the breakdown.

16 THE CHAIRMAN: Sorry, where is this? This is in -- I have  
17 seen this, actually.

18 MR PICKFORD: Yes. So this is an appendix to a letter from  
19 my -- those instructing me to Mr Rowntree's solicitors,  
20 and it shows what the --

21 THE CHAIRMAN: So is there a bundle reference for this?

22 MR PICKFORD: Yes, it is {A/13/32}. (Pause)

23 So what it shows is that, on average, roughly 50%  
24 goes to writers, roughly 30% goes to publishers and  
25 roughly 20% gets paid out to affiliates, that is other



1           organisations where the returns are being made because  
2           of --

3       THE CHAIRMAN: We have got the --

4       MR PICKFORD: -- because of their (overspeaking).

5       THE CHAIRMAN: Yes. So that is the -- sorry. So this is --  
6           apologies, I am just catching up. So appendix A is --  
7           school teachers will be very upset. This is not  
8           properly labelled. What is in this table?

9       MR PICKFORD: My understanding is that it is the total  
10          amounts of royalty payments in each of the --

11      THE CHAIRMAN: Okay. So this is not Black Box?

12      MR PICKFORD: No, it is not Black Box.

13      THE CHAIRMAN: But those are the proportions you would have  
14          used for the Black Box distribution?

15      MR PICKFORD: So, in effect, yes, because, as I think the  
16          Tribunal may understand, what we do is we allocate  
17          pro rata by what has been matched --

18      THE CHAIRMAN: This represents pro rata?

19      MR PICKFORD: That represents that, yes.

20      THE CHAIRMAN: Then there is a letter -- we have got  
21          a letter here -- I do not know where it is in the  
22          bundle -- maybe -- it is a letter of 16 May 2022 from  
23          Macfarlanes, and it says:

24                >Your clients' unsupported allegations count less  
25                than 1% of the PRS revenue which is distributed on

1 an annual basis [as read]."

2 So that figure may or may not be accurate on  
3 reflection, but that would give us a -- if you could  
4 take instructions on that, if it is 1% and you apply  
5 the 1% to those figures, then we get the --

6 MR PICKFORD: Yes. There is also other evidence that --  
7 yes, sorry. There are other figures that are in  
8 evidence and I can go back and give you the percentage  
9 in due course. In particular, the references -- in  
10 particular, Mr Arber, I think it is, does deal with the  
11 extent to which --

12 THE CHAIRMAN: I would like you to take me through those  
13 quite carefully. Then we have got to then work out the  
14 calculation or the misallocation, so if it was going to  
15 be done another way, what is the difference on a damages  
16 claim. Then that gives us a feel for the size of the  
17 claim. I appreciate that you are assuming against  
18 yourselves all sorts of things to get to that point.

19 MR PICKFORD: That sounds to me -- myself and those behind  
20 me and my clients will endeavour to provide whatever we  
21 can, and to the solicitors, yes.

22 THE CHAIRMAN: So perhaps that can be done over the short  
23 adjournment, yes.

24 MR PICKFORD: Yes.

25 MR ROBERTSON: Just while we are in Mr Karabuda, I would

1           just also draw your attention --

2       THE CHAIRMAN: But just picking that up, so we have got  
3           total royalties of 686 million. So if we are talking  
4           about 1%, we are talking about 6 million total in Black  
5           Box. That is just taking the figures we have discussed.  
6           Issues of proportionality go right to the front when you  
7           are starting to spend 70 million-plus on a damages claim  
8           of that sort on a class action, so you are going to have  
9           to confront that and tell us why --

10       MR ROBERTSON: (overspeaking) -- from those instructing me.

11           But meanwhile, as I say, paragraph 18 -- yes -- of  
12           Mr Karabuda, tab 11, bundle A, page 7, {A/11/7}:

13                 "Although issues with usage reporting and data  
14           problems can arise for both publishers and writers, my  
15           work has shown me that the overwhelming majority of  
16           Black Box royalties belong to writers ..."

17                 Over the page, {A/11/8}, paragraph 21 --

18       THE CHAIRMAN: Less well known because ...?

19       MR ROBERTSON: Well, there is a problem with getting paid on  
20           streaming services. That is a whole separate issue.

21       THE CHAIRMAN: Yes. That is a separate issue, yes.

22       MR ROBERTSON: Yes.

23       THE CHAIRMAN: So especially smaller, less-well-known  
24           writers? (Pause)

25       MR ROBERTSON: Yes.

1 THE CHAIRMAN: So what is the basis of that, as opposed to  
2 writers in general? Why does it target the smaller,  
3 less well known? I assume "smaller" means less  
4 successful, as opposed to "shorter". (Pause)

5 MR ROBERTSON: I do not think I can assist in trying to  
6 elaborate on his ...

7 THE CHAIRMAN: Okay.

8 MR ROBERTSON: Just, essentially, the very larger writers  
9 are probably capable of making sure that their data  
10 entries on PRS are kept up to date and they can employ  
11 people to do that for them. The less-well-known writers  
12 have to do it themselves and are more likely to make  
13 mistakes. But even that -- Mr Rowntree's evidence is  
14 that he gets misattributed by the PRS on certain  
15 compositions, and that is in his second statement, so it  
16 is not uniquely the smaller, less-well-known writers.

17 Then paragraph 21, {A/11/9}, Mr Karabuda's evidence  
18 is that essentially:

19 "... when you take into account all Black Box  
20 payments made to publishers, publishers -- especially  
21 the larger publishers -- are paid the majority of Black  
22 Box royalties as they received the majority of royalties  
23 in the original distribution round ..."

24 THE CHAIRMAN: Yes, and you are going to assist us with  
25 that.

1 MR ROBERTSON: Yes. So that is the scale of the loss. The  
2 next issue, proposed class, we have addressed that at  
3 paragraph 27 of our skeleton, and Mr Went is going to  
4 come back to the issue about alleged conflicts in the  
5 class in due course.

6 THE CHAIRMAN: But the proposed class are writers, and you  
7 are defining writers by owning copyright and being  
8 a member of the PRS?

9 MR ROBERTSON: Yes. They are identified by the PRS as -- it  
10 has two classes of members, publishers and writers, so  
11 this is the writers.

12 THE CHAIRMAN: Right. So they are the owners of copyright  
13 or have they assigned copyright to the publishers?

14 MR ROBERTSON: What they have done with their individual  
15 copyright, they will have -- yes. It then gets assigned  
16 to the PRS, who then exploit it. But by being writers,  
17 they are the original generators of the copyright.

18 THE CHAIRMAN: Right, but they have assigned their interest  
19 in the copyright and they have --

20 MR ROBERTSON: Yes, so the PRS --

21 THE CHAIRMAN: All they own is a royalty stream?

22 MR ROBERTSON: Yes.

23 THE CHAIRMAN: Is that true in all the cases of the writers?

24 I mean, in some cases are the writers still owners of  
25 the copyright? Again, perhaps you can take

1 instructions.

2 MR ROBERTSON: I do not think I know.

3 THE CHAIRMAN: You will need to get in ...

4 MR ROBERTSON: My understanding is for the PRS to be able to  
5 exploit their copyright, it needs the copyright assigned  
6 to it. I do not think they work on the basis of jointly  
7 owned copyright.

8 MR PICKFORD: That is our evidence, is that, as Mr Robertson  
9 has described --

10 THE CHAIRMAN: So all copyright is now owned by the PRS?

11 MR PICKFORD: Yes, that is the way the organisation --

12 THE CHAIRMAN: But also copyright and the words and music?  
13 Copyright in the recordings would be owned by the PRS,  
14 but copyright in the words and the music ...?

15 MR PICKFORD: So it is the performance rights, the  
16 copyright, because that is what we collect.

17 THE CHAIRMAN: Yes, indeed. So the performance rights have  
18 nothing to do with the -- sorry. This may be wrong. It  
19 is a question rather than a statement. But the  
20 performing rights have nothing to do with who owns the  
21 copyright and the music and the words? There is  
22 literary copyright in the words, there is musical  
23 copyright in the music, and then that may be performed  
24 by a whole bunch of people and they will all have their  
25 own performing rights?

1 MR PICKFORD: So my understanding is -- actually it gets  
2 a little bit complicated because the PRS also operates  
3 on behalf of the MCPS, I think it is, if I have got it  
4 right, and -- but things like streaming -- again my  
5 understanding, but I will be corrected by somebody  
6 telling me if I have got it wrong -- is that there is in  
7 fact -- there are defined percentages that define what  
8 is attributable to performance and what is attributable  
9 to basically the underlying song, so that you have  
10 I think quite -- a relatively complicated situation  
11 particularly for streaming because of it effectively  
12 having replaced what people used to do, which was to go  
13 and buy records.

14 THE CHAIRMAN: I am not sure whether the streaming makes  
15 a -- I think there is an issue how you define the class,  
16 so the class could be defined in a number of different  
17 ways within the wording you are using. I do not think  
18 these are insurmountable problems necessarily but  
19 I think some position will be necessary at some point in  
20 the next couple of days. Are you saying it is the  
21 people historically who wrote the music? Are you saying  
22 it is the people who own the copyright in the words and  
23 the music? Are you saying it is the people who are  
24 registered on the PRS as writer members? It could be  
25 any and all of those and -- just saying "writer" is not

1           an answer.

2       MR ROBERTSON: Well, I am instructed that it is writer  
3           members of the PRS. That is the class.

4       THE CHAIRMAN: Right.

5       MR ROBERTSON: So it is not defined by their underlying  
6           intellectual property rights.

7       THE CHAIRMAN: I see. Okay.

8       MR ROBERTSON: I am glad I took the decision about 30 years  
9           ago to switch from intellectual property to competition  
10          law.

11                So I am going to move on to authorisation --

12       THE CHAIRMAN: Sorry, sorry. Apologies. Mr Pickford, I do  
13           think it would just be helpful to get -- nothing may  
14           turn on it -- clarity with regards to the writer  
15           members, and there may not be an easy answer. Typically  
16           will they own copyright in the words, the music?  
17           I think we have agreed probably they do not in the  
18           recordings because they are probably assigned.

19       MR PICKFORD: I will get --

20       THE CHAIRMAN: There may not be an easy answer, but at least  
21           if there is not an easy answer, I can ...

22       MR PICKFORD: I mean, the essence of the point certainly is  
23           that what they do not own is what the PRS collects  
24           because the whole point of the PRS is that it collects  
25           on their behalf --



1 THE CHAIRMAN: On their behalf.

2 MR PICKFORD: -- the rights -- and the -- (overspeaking).

3 THE CHAIRMAN: As I understand the evidence, that is on the

4 basis of an assignment as opposed to the basis of

5 an exclusive licence, which of course would be --

6 MR PICKFORD: Exactly, yes. All of the intellectual

7 property that the PRS is responsible for collecting has

8 been assigned to it --

9 THE CHAIRMAN: Has been assigned, yes.

10 MR PICKFORD: -- from its members.

11 THE CHAIRMAN: Yes.

12 MR PICKFORD: The difficult question for you probably

13 slightly is what other bits of intellectual property are

14 there potentially still around to --

15 THE CHAIRMAN: I am not sure it matters particularly, but it

16 would just be helpful to have that background. Thank

17 you.

18 MR ROBERTSON: Going back to the roadmap of our skeleton,

19 the next topic is authorisation, which we have covered

20 at paragraphs 28 to 30 of our skeleton, and in summary

21 we submit that Mr Rowntree meets the authorisation

22 criteria for the reasons set out there. In summary he

23 has long-campaigned for artists' rights in the music

24 industry and, as a non-practising solicitor, formerly

25 a practising solicitor, he is evidently qualified to

1 bring this claim and, as the Tribunal knows from our  
2 response to the cross-examination request, he now has  
3 the support of an advisory panel, comprising  
4 Sir Gerald Barling and Professor Amelia Fletcher CBE, so  
5 expert legal and economic --

6 THE CHAIRMAN: Let us see how Mr Pickford -- let us see how  
7 Mr Pickford develops this and what he says.

8 MR ROBERTSON: So that is all I wanted to say on  
9 authorisation. Eligibility is paragraph 31 of our  
10 skeleton.

11 THE CHAIRMAN: Yes.

12 MR ROBERTSON: We submit that we meet the eligibility  
13 criteria for these claims for the reasons set out in the  
14 skeleton. I want to turn now to section 4 of our  
15 skeleton and the objections raised by the defendants to  
16 certification.

17 The first is that the claims should be struck out or  
18 summary judgment granted against them. We have  
19 addressed that at paragraphs 33 to 37 of our skeleton.  
20 I do not think there is any -- likely to be any great  
21 difference between the parties as to the legal test as  
22 to when a case should be struck out.

23 Summary judgment, the test is helpfully summarised  
24 in a Tribunal judgment which you chaired in  
25 *JJH Value Licensing v Microsoft*, which is in the

1 authorities, E2 at tab 58. I do not propose turning it  
2 up, but it sets out the normal principles of strikeout  
3 summary judgment which I would not imagine this Tribunal  
4 needs further addressing on.

5 The point to highlight is that it is -- there is  
6 Court of Appeal authority in *Intel v Via* that if there  
7 is a developing area of --

8 THE CHAIRMAN: Yes, it is well established. Yes.

9 MR ROBERTSON: Yes. So just for your note, *Intel v Via* is  
10 in the authorities, authorities E1 at tab 43. It is  
11 also applied in *Gutmann v South Western Trains* by the  
12 Tribunal. That is authorities E1, tab 48. I have  
13 already addressed you on how this is a developing area  
14 of law by reference to particularly the *Gutmann v LSER*  
15 case. So that is why we say this is --

16 THE CHAIRMAN: So what did you run in *Gutmann*?

17 MR ROBERTSON: That this is a developing area of law, the  
18 line of authority from paragraphs 93 to 102 --

19 THE CHAIRMAN: Yes, okay.

20 MR ROBERTSON: -- which I --

21 THE CHAIRMAN: Did they explicitly say that? I cannot  
22 recall. Did they say it was a developing area of law?

23 MR ROBERTSON: Sorry?

24 THE CHAIRMAN: In *Gutmann*, was it said it was a developing  
25 area of law?

1 MR ROBERTSON: Well, in our submission, it plainly is  
2 because it is -- the way in which it is leading up to  
3 the *Facebook* case, and the final paragraph which I did  
4 specifically take you to --

5 THE CHAIRMAN: Yes.

6 MR ROBERTSON: -- that is paragraph 102. So it is plainly  
7 a developing area of law of the sort set out in *Intel v*  
8 *Via*. So we say it simply does not meet the threshold at  
9 which a claim can be struck out or summary judgment  
10 granted against it.

11 The PRS -- I will just respond to this point, which  
12 is that they characterise all of this claim in their  
13 skeleton -- well, in paragraph 7 of their response and  
14 then paragraphs 5 to 7 of their skeleton as nothing more  
15 than an internal membership dispute.

16 Now, in our submission, it is impossible to see why  
17 that should preclude a claim for abuse of dominance  
18 being brought by a member. No authority is cited by the  
19 PRS to support that.

20 THE CHAIRMAN: Do you say, in fact, there may be political  
21 solutions -- "political" with a small p -- to the  
22 problem? One, the membership does not move the dial one  
23 way or the other as to whether or not it is also  
24 an abuse?

25 MR ROBERTSON: Yes.

1 MR PICKFORD: I can help on this. That point does not go to  
2 strikeout. That point goes to cost benefit, as to  
3 whether this is a sensible thing to be dealing with.

4 MR ROBERTSON: Well, since I have got the notes open, I will  
5 just deal with it anyway, which is that it is certainly  
6 the case that a claim for abuse of dominance can be made  
7 in relation to the terms on which someone is a member of  
8 an organisation, such as a copyright collecting society,  
9 and that is *GEMA 1*, 2 and 3, it is *BRT v SABAM*, all of  
10 those.

11 THE CHAIRMAN: You have got those references in your ...?

12 MR ROBERTSON: Those references are *GEMA 1*, that is --

13 THE CHAIRMAN: Sorry, and in your skeleton?

14 MR ROBERTSON: In our skeleton argument they were all listed  
15 at --

16 THE CHAIRMAN: Footnote 29, is it?

17 MR ROBERTSON: That is I think ... footnote 29. You are  
18 right. Shall I give the bundle references?

19 THE CHAIRMAN: Yes, that would be helpful. Thank you.

20 MR ROBERTSON: So *GEMA 1*, authorities E1, tab 33; *GEMA 2*,  
21 authorities E1, tab 34; *GEMA 3*, E1, tab 36; *BRT v SABAM*,  
22 E1, tab 35. *GEMA* and *SABAM* are the German and Belgian  
23 equivalents of the PRS, similarly structured as  
24 membership organisations.

25 If the point needs driving home that there is

1 an entitlement to sue for damages a party with whom you  
2 are in a contractual relationship, that is the case of  
3 *Courage v Crehan*.

4 THE CHAIRMAN: Wait a moment, yes.

5 MR ROBERTSON: I also wanted to -- the authorities --

6 THE CHAIRMAN: It is a brewery case, yes.

7 MR ROBERTSON: Yes. That is the one, E/67. That is  
8 helpfully reported in the QBs with a headnote at 1 to 2,  
9 so that is just now well established law. I also wanted  
10 to mention that case because that was -- if someone is  
11 going to do a greatest hits compilation for my  
12 instructing solicitor, Mr Maitland Walker, that is  
13 side 1, track 1. He instructed David Vaughan -- the  
14 late, great David Vaughan QC, who won that case for  
15 Mr Crehan in Luxembourg. So the ... (Pause)

16 Fundamentally the position is that a songwriter in  
17 the UK has no realistic choice but to claim royalties  
18 through the PRS. It is an unavoidable trading partner;  
19 the classic hallmark of dominance.

20 THE CHAIRMAN: Yes.

21 MR ROBERTSON: The second objection is that we failed to  
22 satisfy the *Microsoft* test on methodology. That is  
23 addressed in our skeleton argument at paragraphs 38 to  
24 39. Again, I do not think there is any dispute as to  
25 the applicability of *Microsoft* and it has been applied

1 in the Tribunal, and you have to show that you have got  
2 a workable methodology in order to achieve  
3 certification. You cannot just conjure something out of  
4 thin air.

5 Now, the PRS criticised methodology in their  
6 response. Mr Savage addressed --

7 THE CHAIRMAN: I just want to look at the references you  
8 have got here, the reply references, in 27. (Pause)

9 At 24.1 you are saying you are looking at the  
10 monetary amount of Black Box royalties that are due to  
11 PRS writer members over the class period, and that is  
12 the bit at the moment I have not got clear in my mind  
13 how that is done. You say you would sample --

14 MR ROBERTSON: That is the point on which I am going to take  
15 instructions over --

16 THE CHAIRMAN: Over the lunch adjournment, yes.

17 MR ROBERTSON: You want -- there are one or two references  
18 to -- there will be references to Mr Savage and then we  
19 will make submissions.

20 THE CHAIRMAN: Yes, thank you.

21 MR ROBERTSON: So that is why we say we have got a workable  
22 methodology.

23 THE CHAIRMAN: Yes, but we are going to come back to that.  
24 We cannot really address this until we have understood  
25 that, the part of the methodology.

1 MR ROBERTSON: Yes, yes. So I will address that after the  
2 short adjournment.

3 THE CHAIRMAN: Yes, that is fine. Yes.

4 MR ROBERTSON: In which case the third objection -- so  
5 I will come back to that at ...

6 THE CHAIRMAN: Mm-hm.

7 MR ROBERTSON: So skipping on to the objection that we lack  
8 a sensible distribution plan, that is addressed in the  
9 skeleton at paragraphs 40 to 41, and this is the cost  
10 benefit point that we have already discussed.

11 THE CHAIRMAN: We still have the problem that ultimately,  
12 the only way -- the money has to come from the members.

13 MR ROBERTSON: It has to come from the PRS --

14 THE CHAIRMAN: The PRS gets its money from the members.

15 MR ROBERTSON: Well, if it has been wrongly paying royalties  
16 to publishers, then it is the publisher members.

17 THE CHAIRMAN: Well, it is -- the PRS is going to have to  
18 raise money, and you are saying you should do that --  
19 how is it going to do that? Does it have a claim  
20 against the publishers? It does not have a legal claim  
21 against them because it is entirely in accordance with  
22 the rules, as I understand it. That is your complaint.  
23 So how does it get the money?

24 MR ROBERTSON: Well, let me just take it in stages. First  
25 of all it is the publishers who have wrongly been paid,



1           on our case, Black Box royalties.

2       THE CHAIRMAN:   Yes, yes.

3       MR ROBERTSON:   They are the deep pockets, that is for sure.

4           They are major publishing businesses.

5       THE CHAIRMAN:   Right.   The court cannot make an order on the

6           off-chance that someone volunteers to dig into their

7           pockets and -- they have got shareholders and fiduciary

8           duties to people.   They cannot just -- it is not

9           straightforward.

10      MR ROBERTSON:   Well, there may be mechanisms in the PRS'

11          rules to allow for recovery from publishers.

12      THE CHAIRMAN:   Right.

13      MR ROBERTSON:   If we go to trial bundle A/2, page 7 --

14          sorry.   It is at {A/2/7}.   Forgive me, I am not sure

15          I have the right reference there.

16               There is a lesson to be learned.   There are always

17          lessons to be learned about advocacy.   If you have

18          an invariable practice of having your authorities bundle

19          on the right-hand side and your trial bundles on the

20          left-hand side, do not depart from it.

21      THE CHAIRMAN:   I am impressed you are that organised.

22      MR ROBERTSON:   No, I was not.   So it is trial bundle 2 --

23          trial bundle A, tab 2, page 7.   These are the rules and

24          regulations -- on this paper, they are the rules and

25          regulations of the PRS, {A/2/7}.

1           If we look at rules 2(i) and (j) -- that is on  
2           page 7 at the bottom -- it enables --  
3   THE CHAIRMAN:  Sorry, I beg your pardon.  Which paragraph  
4           again?  Sorry, I am not --  
5   MR ROBERTSON:  Sorry, so we are dealing with, at the bottom  
6           of page 7, (h).  
7   THE CHAIRMAN:  (h)?  
8   MR ROBERTSON:  No, I was looking at (i), (j).  
9   THE CHAIRMAN:  (j), okay.  
10  MR ROBERTSON:  "The Society may recover from any member any  
11           sums paid in error by deducting such sums from any  
12           monies distributable to such member."  
13           So that is --  
14  THE CHAIRMAN:  They are not paid in -- these sums are not  
15           paid in error.  
16  MR ROBERTSON:  Well, they are payable --  
17  THE CHAIRMAN:  They are paid deliberately.  I mean, they are  
18           not in error.  I do not see how your case gets off the  
19           ground.  
20  MR ROBERTSON:  If they have been paid under error of law  
21           that they are entitled to pay them and they will not, it  
22           was an abuse of dominance to do so, then that is  
23           arguably within the scope of (j).  
24  THE CHAIRMAN:  But they have got a set of rules saying how  
25           these -- just show me where the rules are as to how the

1           Black Box royalties get distributed. (Pause)

2       MR ROBERTSON: That is in -- on the same page, just above  
3       the first holepunch, do you see:

4           "All sums deemed non-distributable ... shall be  
5       dealt with in accordance with the following provisions."

6           Then the particular key provision is (gc)(ii):

7           "... all sums other than sums referred to in  
8       Rule 2(gc)(i), shall be credited to such revenue  
9       accounts as the Council shall from time to time direct  
10      and distributed pro rata amongst the persons entitled to  
11      participate in the distribution at which the sums were  
12      allocated."

13      THE CHAIRMAN: So that is the abuse, you say?

14      MR ROBERTSON: Yes, that is identified in our claim form.

15      THE CHAIRMAN: Yes, yes, but you cannot seriously construe  
16      (j) to say that they have acted in accordance with  
17      2(gc)(ii). I mean, that is a bit of a stretch.

18      MR ROBERTSON: That is the provision that we can identify --

19      THE CHAIRMAN: Yes, but I mean ...

20      MR ROBERTSON: -- otherwise there may have to be  
21      contribution claims by the PRS against its members, its  
22      publisher members.

23      THE CHAIRMAN: I am not sure how that would work.

24      MR ROBERTSON: Well the -- if the PRS had been found to be  
25      acting --

1 THE CHAIRMAN: It has a general power to bill members to  
2 remove its operating costs from the royalties received.  
3 Where is that power? Is there any discretion on how  
4 that is used? It may be that we can look at that, too,  
5 as well, if you see what I mean. Maybe there is some  
6 scope for adjustment.

7 MR ROBERTSON: If the PRS has been found to have committed  
8 an abuse of dominance and it is held liable in  
9 damages --

10 THE CHAIRMAN: Yes, it will raise the money from its  
11 members.

12 MR ROBERTSON: It could bring contribution claims against  
13 those that participated in that. If it turns out that  
14 the publishers were -- it is just and reasonable that  
15 they should make contribution under the Civil Liability  
16 Contribution Act, then --

17 THE CHAIRMAN: You are not saying they are part of the same  
18 undertaking. You are not attaching --

19 MR ROBERTSON: My learned friend is making the point to me  
20 that it is not pleaded and it is not and it has not been  
21 raised previously and I am just attempting to assist  
22 you, sir, with the answer. But I see no reason in  
23 principle why the PRS should not be able to bring  
24 a contribution claim against other persons who  
25 contributed to the abuse of dominance.

1 THE CHAIRMAN: How have they contributed to the abuse? That  
2 is the bit that is ...

3 MR ROBERTSON: At this stage --

4 THE CHAIRMAN: If it is not clear that they have campaigned  
5 for this distribution system or --

6 MR ROBERTSON: Until we get --

7 THE CHAIRMAN: -- exerted unfair pressure on the PRS to --  
8 if they are just the recipient of money, is that ...

9 MR ROBERTSON: We do not know to what extent publishers  
10 are --

11 THE CHAIRMAN: Yes, that is --

12 MR ROBERTSON: -- involved in the decision to maintain --

13 THE CHAIRMAN: You have not got a positive case that they  
14 are involved in the decision-making analysis so I am not  
15 sure how your contribution claim is going to be -- we  
16 need to see this written down.

17 MR ROBERTSON: I think we would need to see firstly  
18 a disclosure of how the PRS actually decides to operate  
19 this system and the extent to which publishers are  
20 involved because publishers sit on their council.

21 THE CHAIRMAN: As do writers.

22 MR ROBERTSON: Yes, as do writers.

23 THE CHAIRMAN: There are minutes.

24 MR ROBERTSON: Yes. If there are minutes that say that,  
25 "The issue of Black Box royalties came up and there may

1           be problems with our monopoly", and we know that they  
2           have made references to that in public documents  
3           previously, then the publishers may well be aware that  
4           there was a potential exposure to liability. Remember  
5           that the test under liability --

6       THE CHAIRMAN: Anyway, on your feet, you have made the  
7           submission. Overnight it would be quite nice to see it  
8           written down in a paragraph, if that is a flyer. On  
9           reflection, you may decide it is not, but it is quite  
10          important for the shape. I mean, this is a class action  
11          and we would need to look at all elements of it before  
12          certifying.

13       MR ROBERTSON: No, that is understood. So --

14       THE CHAIRMAN: We still have hanging over this question  
15          of -- I do not think you justified paragraph 10, your  
16          basis for paragraph 10. Have we covered that? You have  
17          shown us a couple of materials. You have shown us the  
18          statement from the Swedish gentleman.

19       MR ROBERTSON: Yes.

20       THE CHAIRMAN: So it is paragraph 10 of your pleading --

21       MR ROBERTSON: Yes. The basis for that is the factual  
22          evidence that we have looked at.

23       THE CHAIRMAN: Just give me the references again for that.

24       MR ROBERTSON: So that is principally Mr Karabuda.

25       THE CHAIRMAN: He just asserts it. He does not explain why.

1 MR ROBERTSON: In our submission, given his experience in  
2 the industry, he is --

3 THE CHAIRMAN: We are all experienced in lots of things that  
4 we do not necessarily know the answers to questions. If  
5 there is an explanation as opposed to an assertion, we  
6 need to know what it is.

7 MR ROBERTSON: Right.

8 THE CHAIRMAN: I mean, he said that actually there are  
9 differences between writers, as I recall, so there is  
10 a subclass of unknown writers, and you were not able to  
11 assist me on that.

12 MR ROBERTSON: No, I did not. If we can just have a look at  
13 his evidence at paragraph 19 --

14 THE CHAIRMAN: Yes, I am sorry. You will have to give me  
15 the reference.

16 MR ROBERTSON: -- which is bundle reference {A/11/8} --

17 THE CHAIRMAN: Yes.

18 MR ROBERTSON: -- paragraph 19:

19 "There are a number of reasons why writers have more  
20 Black Box royalty issues than publishers."

21 Then he sets that out.

22 THE CHAIRMAN: Right. I still do not quite -- I mean,  
23 I still -- it just seems horribly speculative. So if  
24 there is a recording which is coming out with a series  
25 of percentage hashes, asterisks and some gobbledygook

1 attached on to the end of it and it comes to the PRS and  
2 they go, "I do not know who this is, I have no idea",  
3 and they do a manual check, they are not going to know  
4 the publisher or the writer, so why is it -- which is  
5 these class of things where you are known but the  
6 publisher will not know the writer?

7 MR ROBERTSON: Well, it is where royalties are being  
8 provided without the correct data to enable the match to  
9 be --

10 THE CHAIRMAN: Yes, but they may have the writer's name  
11 misspelled. They may have the -- I guess, if they can  
12 find the writer, they can probably identify the  
13 publisher, but to know that there is a significant  
14 mismatch between the identification of the publishers  
15 and the writers, I do not at the moment understand how  
16 that hangs to(?) getting to that and therefore the basis  
17 for paragraph 10.

18 MR ROBERTSON: Ultimately we do not run -- we do not have  
19 disclosure at this stage as --

20 THE CHAIRMAN: No, but for your case you have to -- you  
21 cannot just do it on assertion that the writers are  
22 being unfairly treated because they are more often  
23 misidentified than publishers. That is --

24 MR ROBERTSON: This is not --

25 THE CHAIRMAN: (Overspeaking) -- something anyone can say,



1           but we need some prima facie case.

2       MR ROBERTSON: This is not done on one individual assertion.

3           This is done on the basis of experience -- well,  
4           evidence from someone who is highly experienced in the  
5           industry. We have got evidence from senior  
6           representatives, songwriters, given to the DCMS. The  
7           DCMS do not seem to have taken issue with --

8       THE CHAIRMAN: So the DCMS, just -- sorry, this is quite  
9           important. The DCMS statement again? Can we --

10      MR ROBERTSON: That is at tab 9 of bundle A, and it is  
11           paragraph 93, on {A/9/55}. (Pause)

12      THE CHAIRMAN: It says:

13                 "After a period of time ..."

14                 Let us just read it clearly:

15                 "At best, mismatched, incomplete or missing metadata  
16                 can result in delays ... At worst, this can result in  
17                 payments being misallocated ..."

18      MR ROBERTSON: That is Ms Lindvall's evidence.

19      THE CHAIRMAN: But we are not concerned with that.

20                 " ... or otherwise consigned as unclaimed or  
21                 non-attributable royalties to 'Black Boxes'. Black  
22                 Boxes consisted of \$2.5 billion in unallocated income in  
23                 2019 alone."

24                 It is unclear how broad her term "Black Boxes" is at  
25                 that point. But then it says:

1           "After a period of time, Black Boxes are then  
2           assigned pro-rata to streams that have been correctly  
3           identified, which is established in standard publishing  
4           agreements. This means that those creators and  
5           companies, particularly who are most listened to, are  
6           effectively are paid twice ..."

7           So "creators", I am assuming is writers. So the  
8           successful writers are being paid more than the  
9           unsuccessful writers, or the most listened to.

10          "... for their own streams ..."

11          Nowhere does it say -- I just do not see how that is  
12          support, at the moment, for paragraph 10. I am just  
13          reading it.

14          It is a different point; an important point, but  
15          a different one.

16       MR ROBERTSON: Well, the pleading -- and bearing in mind we  
17          are not applying a merits test here, under *Merricks*, so  
18          it is sufficient, in my submission, to make a pleading  
19          on the basis of information that has been given,  
20          evidence that has been given by a highly experienced  
21          music industry executive who has occupied a board  
22          position on a major European equivalent to the PRS.

23       THE CHAIRMAN: But you have not got anyone from the PRS  
24          giving this evidence, former employees or something.  
25          Does he know what happens at the PRS? I mean, the PRS

1           may be better at allocating, may be worse at allocating,  
2           than the Swedish institute. That seems to be, sort of,  
3           a bit of a jump.

4       MR ROBERTSON: This evidence, in our submission, is  
5           sufficient to plead paragraph 10.

6       THE CHAIRMAN: Mm-hm, okay. That is your submission; yes?

7       MR ROBERTSON: Yes.

8       MR PICKFORD: This evidence that you are talking about is  
9           reported --

10      MR ROBERTSON: Karabuda -- Mr Karabuda.

11      THE CHAIRMAN: Thank you. I have just noticed the time,  
12           sorry. I have been asking you lots of questions. How  
13           are we doing for time? Are you pretty much there,  
14           subject to the questions?

15      MR ROBERTSON: Still amazingly on track.

16      THE CHAIRMAN: Good.

17      MR ROBERTSON: We will do some cogitation at lunchtime.

18      THE CHAIRMAN: Yes. If you need overnight -- obviously,  
19           I appreciate it is not always easy to take instructions  
20           over lunch. We have two days so there is no particular  
21           urgency.

22      (1.03 pm)

23                           (The short adjournment)

24      (2.00 pm)

25                           (Proceedings delayed)

1 (2.06 pm)

2 THE CHAIRMAN: I think we might have the livestream working  
3 now. Yes. So for those of you who are joining us via  
4 livestream, an official recording is being made and  
5 an authorised transcript will be produced, but it is  
6 strictly prohibited for anyone else to make  
7 an unauthorised recording, whether audio or visual, of  
8 the proceedings and breach of that provision is  
9 punishable as contempt of court.

10 MR ROBERTSON: So we are just handing up Savage 3 to the  
11 Tribunal in case you have not received a hard copy.

12 THE CHAIRMAN: Yes, thank you. (Handed)

13 MR ROBERTSON: This is responsive to Arber 2, which we  
14 received on Friday evening. This was served yesterday.  
15 (Pause)

16 THE CHAIRMAN: Right. Where is that going to go?

17 MR ROBERTSON: It goes into B/103, at the back end of trial  
18 bundle 3, the third trial bundle. (Pause)

19 THE CHAIRMAN: I have just had a -- sorry. It is just that  
20 we --

21 MR ROBERTSON: I thought you might.

22 THE CHAIRMAN: First of all, do the publishers -- is there  
23 any evidence as to whether the publishers share the  
24 Black Box royalties with writers?

25 MR ROBERTSON: It depends on the terms of the publishing

1           contracts. I do not think we have any specific  
2           publishing contracts in evidence, but in principle it is  
3           possible.

4       THE CHAIRMAN: But it may or may not I think is where we are  
5           at the moment.

6           Are there any contractual provisions that -- sorry,  
7           this is a basic question -- are there contractual  
8           provisions which mean that writers are entitled to Black  
9           Box royalties, leaving aside how they should be  
10          apportioned? Is that a contractual entitlement?

11          (Pause)

12       MR ROBERTSON: Writers or publishers?

13       THE CHAIRMAN: Well, writers or publishers. It would be  
14          nice to know the position on both.

15       MR ROBERTSON: There is nothing in evidence that I am aware  
16          of.

17       THE CHAIRMAN: So it is a voluntary distribution by the PRS  
18          in that sense? Is there a contractual -- in the PRS  
19          rules and regulations, is there a -- are there  
20          contractual arrangements with the writers is really what  
21          I am after. Is there a promise to pay undistributed  
22          royalties?

23       MR ROBERTSON: The obligation of the PRS is to distribute,  
24          under its rules, 50/50, publishers and writers.

25       THE CHAIRMAN: Yes; just show me -- sorry. Show me where

1           that is. That is actually -- as opposed to an  
2           indication of what they do, that is actually  
3           a contractual term, is it? You can come back to that --

4       MR ROBERTSON: I will come back to that.

5       THE CHAIRMAN: -- or Mr Went, yes.

6           So two other questions which are related.

7           First of all, within the writers' class -- so we  
8           have got the publishers and we have got the writers and  
9           we have got the undistributed royalties and the  
10          apportioned -- within the writers' bit there is  
11          an apportionment dependent upon -- so the successful  
12          writers will be getting far more Black Box royalties  
13          than the unsuccessful writers because there is  
14          an apportionment within the classes, not just between  
15          the classes?

16       MR ROBERTSON: Because successful writers are much more  
17          likely to be matched.

18       THE CHAIRMAN: Exactly -- no, not because --

19       MR ROBERTSON: They are more likely to have their details  
20          correct, not to --

21       THE CHAIRMAN: No, we are talking about unapportioned. So  
22          when it comes to unapportioned royalties -- the  
23          apportionment is based on the apportionment of known  
24          royalties, as I understand it --

25       MR ROBERTSON: Yes.

1 THE CHAIRMAN: -- so that means Paul McCartney, if I may  
2 rudely use him as an example, will be getting far more  
3 Black Box royalties than an unknown.

4 MR ROBERTSON: Yes, yes.

5 THE CHAIRMAN: So there is an inherent unfairness within the  
6 writers' class, according to your --

7 MR ROBERTSON: Yes.

8 THE CHAIRMAN: Okay. Within that class, what would the  
9 median be or the mean, if you prefer? Ideally it would  
10 be quite nice -- so take the median writer, what are  
11 they actually getting in Black Box royalties? That may  
12 be a question for the PRS rather than for you, as I --

13 MR ROBERTSON: I do not think we have a way of knowing that.  
14 Again, I do not think that is in evidence.

15 THE CHAIRMAN: Right. Mr Pickford, it would be nice to have  
16 some idea of that. Obviously you will have to do that  
17 on instructions, I expect.

18 MR PICKFORD: That is heard, sir. I anticipate, given the  
19 instructions I was able to receive over lunchtime, that  
20 we are not going to be able to tell you that, but we  
21 will ask.

22 THE CHAIRMAN: You may have to go away and find it out even  
23 if you cannot do it in this hearing.

24 MR PICKFORD: I am not sure we would ever be able to tell  
25 you that, but I can enquire why.

1 THE CHAIRMAN: Right. Okay. We will come back to that.

2 You should be able to tell us the total Black Box.

3 MR PICKFORD: No, and I will come on to explain.

4 THE CHAIRMAN: You will come on to explain --

5 MR PICKFORD: We do not think about these things in the way  
6 that Mr Rowntree does.

7 THE CHAIRMAN: Thank you.

8 MR ROBERTSON: There is one small point I want to mention in  
9 relation to Mr Karabuda's evidence, just to dispel the  
10 notion, if there is a notion, that he is sitting there  
11 in Sweden isolated from all of this. I just want to  
12 emphasise, as I have already mentioned, the organisation  
13 of which he is a board member is a joint venture partner  
14 with the PRS through ICE. They operate the same  
15 database so he is in a position to know.

16 The second point, it is really just a point of  
17 information. You were taken to the appendix A table  
18 this morning. I am not going to go back to it now, but  
19 we are going to put in a note on that, with your leave,  
20 first thing tomorrow morning.

21 THE CHAIRMAN: Give me the gist. Give me the gist. What is  
22 the point?

23 MR ROBERTSON: Those figures are out of context as it  
24 ignores a whole lot of other publisher royalties that  
25 come directly, in particular, from DSPs, digital service



1 providers, streaming companies.

2 THE CHAIRMAN: Okay, which is in addition to this?

3 MR ROBERTSON: Which is -- going back to the position of my  
4 14-year-old daughter, they are massive.

5 THE CHAIRMAN: Yes, understood.

6 MR ROBERTSON: The third point I just wanted to cover is in  
7 relation to audit, the question that you had about, "How  
8 is this all going to be carried out? What is the scale  
9 of it?", so you can get some sense of the  
10 proportionality of it.

11 THE CHAIRMAN: Well, yes, and how you are going to do it,  
12 yes.

13 MR ROBERTSON: Yes, how we are going to do it. Well, how we  
14 are going to do it is described in detail by Mr Savage  
15 in his first report at section 7, and that is {A/25/20}.  
16 Sorry, did I say "25"? I think I meant "23", {A/23/20}.

17 THE CHAIRMAN: It would be quite nice -- because I did find  
18 it a bit confusing. It is not that I am not ready -- it  
19 would be quite nice to get the overview before we look  
20 at the detail.

21 MR ROBERTSON: Well, the overview is this: PRS -- he  
22 describes the categories of data he will need to review.

23 THE CHAIRMAN: Right.

24 MR ROBERTSON: The object of the exercise is essentially --  
25 to take as the starting point, you would expect to see

1 royalties being distributed 50/50 between publishers and  
2 writers because that is the basis on which the PRS  
3 works. So you look at each of the categories of income  
4 coming into the PRS and then being disbursed.

5 THE CHAIRMAN: This is undistributed, is it? This is not  
6 undistributed?

7 MR ROBERTSON: This is all income.

8 THE CHAIRMAN: Right. Yes.

9 MR ROBERTSON: Then you work out is it being distributed  
10 50/50. If it is not, what proportion is being  
11 distributed because it cannot be matched and therefore  
12 is ultimately ending up as a Black Box distribution?

13 THE CHAIRMAN: Right. So all income is distributed 50/50,  
14 is it? I thought it cannot be more than 50/50.

15 MR ROBERTSON: Yes. In principle you should have -- if  
16 everything was matched perfectly, 50% will go to the  
17 publishers --

18 THE CHAIRMAN: But why do you say that? All right. Well,  
19 let us work on that assumption and maybe we will come  
20 back to that.

21 MR ROBERTSON: Right. Sorry, I have Mr Pickford on one side  
22 saying that that cannot possibly be right and my  
23 instructing solicitor telling me, "No, that is right",  
24 so here I am.

25 So the purpose of the exercise is to follow the

1 income to see whether in fact it is being distributed  
2 50/50 or whether there is essentially a bias in the  
3 distribution ultimately leading to publishers, and is  
4 that due to unallocation --

5 THE CHAIRMAN: Okay, so it should be 50 -- on your  
6 assumption, which I understand may be in dispute, that  
7 it should be 50/50, but are not Black Box royalties  
8 being distributed 50/50 as well? I am sure you are  
9 right, but -- sorry -- I have not got it quite straight  
10 in my mind.

11 MR ROBERTSON: It is essentially to identify the income  
12 stream coming into the PRS and its distribution, and  
13 then trying to identify where the areas are, where it is  
14 not being distributed 50/50, and --

15 THE CHAIRMAN: Right, because the unallocated is biased  
16 towards the writers --

17 MR ROBERTSON: Yes.

18 THE CHAIRMAN: -- you say, then that will show up in the  
19 data --

20 MR ROBERTSON: Yes.

21 THE CHAIRMAN: -- because it will not be 50/50?

22 MR ROBERTSON: Yes.

23 PROFESSOR ULPH: So would it be the case that then the ratio  
24 would be higher than 50%?

25 MR ROBERTSON: Sorry?

1 PROFESSOR ULPH: Would it be the case that where it was not  
2 50%, it would be higher than 50% going to publishers?  
3 Is that the scenario?

4 MR ROBERTSON: Ultimately, if the 50% that should be going  
5 to writers is in fact going to publishers because of  
6 Black Box issues, that is what should show up on the  
7 audit. You asked for the big picture.

8 THE CHAIRMAN: Okay. No, that is helpful, yes. I get the  
9 gist now. Now let us look at the evidence.

10 MR ROBERTSON: Okay. Well, I think on the evidence it is  
11 detailed, and so I will just give you the references,  
12 rather than tracing you through them paragraph by  
13 paragraph. I think there is one paragraph I do want to  
14 show to you. But it was initially set out by Mr Savage  
15 in his first report at sections 7 to 12, which commence  
16 at {A/23/20}:

17 "Methodology for identifying Black Box, amounts due  
18 to writer share and distribution values to PRS writer  
19 and PRS publisher members."

20 Then sections 8 to 12, which is on {A/23/22}, just  
21 then go through the various income types.

22 THE CHAIRMAN: Right.

23 MR ROBERTSON: So that is a sort of detailed exposition.

24 THE CHAIRMAN: So where is the bit you have just said, that  
25 you can tell what is going wrong from the inability to

1           note the 50/50?

2       MR ROBERTSON: That is on the basis of instructions and  
3           having discussed the matter with --

4       THE CHAIRMAN: So it is not in --

5       MR ROBERTSON: It is not in terms in there. That is what  
6           this is driving at. You said you wanted the gist so  
7           I asked for the gist outside.

8       THE CHAIRMAN: Right. Okay. So the ... (Pause)

9           But we need to see that in writing, do we not? It  
10          is not in your skeleton and it is not in evidence.

11       MR ROBERTSON: I am perfectly happy to put that in as part  
12          of a supplementary note. The note that I said we would  
13          deal with the appendix A issues --

14       THE CHAIRMAN: Yes.

15       MR ROBERTSON: -- we will put it in that, if that makes  
16          sense.

17       THE CHAIRMAN: Mr Pickford needs to see it in good time to  
18          discuss it with his advisers.

19       MR ROBERTSON: We will draft that part of the note up.  
20          I will put it in an email to Mr Pickford when we get  
21          back from court.

22       THE CHAIRMAN: Mr Pickford?

23       MR PICKFORD: Yes. I mean, I am not going to make my  
24          complaint about it now because obviously -- but just so  
25          the Tribunal knows where we are going to come to on

1           this. If it is now being said that the core -- the  
2           kernel of the methodology that is going to be relied  
3           upon is coming in a report on the end of Day 1 or Day 2  
4           of the hearing, I am going to complain about that  
5           because it does not matter whether it comes at  
6           5 o'clock, that is not going to be sufficient time for  
7           us to grapple with it.

8       THE CHAIRMAN: Yes, but the answer to that may be we adjourn  
9           this hearing.

10       MR PICKFORD: Well, possibly, but I do not --

11       THE CHAIRMAN: Well, of course.

12       MR PICKFORD: In our submission that is a pretty major  
13           failing, if that is how it transpires.

14       MR ROBERTSON: In our submission you have got a detailed  
15           exposition of how the -- the methodology, how it would  
16           be carried out, and that is --

17       THE CHAIRMAN: If you could show it in here, albeit in  
18           technical language, such that I did not pick it up, and  
19           then I think you need to simplify it for the benefit of  
20           the Tribunal, that is one thing. But if it is not in  
21           there at all, which I thought was your submission, then  
22           plainly we would have a problem. But when can you get  
23           this note to the Tribunal and to Mr -- more importantly,  
24           to Mr Pickford?

25       MR ROBERTSON: Well, with the note it will be this evening.

1 THE CHAIRMAN: I would like a time.

2 MR ROBERTSON: 7 o'clock? Yes, 7 o'clock.

3 THE CHAIRMAN: Mr Pickford, you will get a note at 7.

4 I appreciate you will have to reserve your position.

5 MR ROBERTSON: In the second report from Mr Savage -- so  
6 Mr Arber takes issue with Mr Savage. Mr Savage put in  
7 his second report in response, dealing with his  
8 methodology. The key section of that is section 3,  
9 which is in bundle B, tab 32, page 5, {B/32/5}.

10 THE CHAIRMAN: Yes.

11 MR ROBERTSON: In particular -- so that runs from  
12 {B/32/5-8}. But the particular paragraph I wanted to  
13 draw the Tribunal's attention to is paragraph 3.7 on  
14 {B/32/6}, where he says:

15 "In sections 8-12 [of his first report], I also set  
16 out the various information and data that I expect to be  
17 available and which will allow me to undertake my  
18 proposed methodology. The Proposed Defendants have not  
19 given any indication that the information I have stated  
20 I expect to be available for my methodology is not  
21 available and I therefore believe that this must imply  
22 that it will be feasible for me to undertake my proposed  
23 analysis and methodology."

24 So the response from Mr Arber is, "Well, we are  
25 doing everything fine". It is not, "Listen, what you

1           propose to do is impossible because the bench(?) is not  
2           there".

3       THE CHAIRMAN:   Right.   That sounds like a lawyer's advocacy  
4           point rather than a technical point, really.

5       MR ROBERTSON:   Well, it is a technical point in that it is  
6           Mr Savage saying, "This is the data I expected to have  
7           reviewed to carry out the exercise I have proposed and  
8           I have not been told that it is not available".

9       THE CHAIRMAN:   Six minutes to go.

10      MR ROBERTSON:   So I think that has done to death for the  
11           time being paragraphs 38 to 39 of our skeleton, which is  
12           on methodology satisfying the *Microsoft* test.

13           The final topic for me to address is the  
14           distribution plan, which is in our skeleton at  
15           paragraphs 40 to 41.   We have already covered the cost  
16           benefit test.   I have already addressed the Tribunal on  
17           the fact that it is not a test.   It is a factor that has  
18           been taken into account.   We have obviously had  
19           a discussion.   For the Tribunal to grant certification,  
20           you have to be satisfied as to proportionality, and  
21           that -- we accept that.

22           We have explained the approach to distribution in  
23           our skeleton argument.   As the claim is brought on  
24           behalf of writer members, identifying the class should  
25           be relatively straightforward as the PRS has their



1 details. This is not a claim where distribution is  
2 going to rely upon class members identifying themselves.  
3 The PRS should be able to identify them. It is their  
4 membership.

5 So the authorities that my learned friend relies  
6 upon about difficulties of distribution, which is the  
7 *Consumers' Association v Qualcomm* and the *Spottiswoode*  
8 case, those were cases where there would be difficulties  
9 in identifying class members, thus leading to a small  
10 take-up by the class members. Those problems should not  
11 arise here. The PRS knows who our class members are  
12 and --

13 THE CHAIRMAN: I mean, how did these proceedings start? Is  
14 there a complaint, a historic complaint, among class  
15 members about the distribution of Black Box royalties?  
16 How does this -- does this start with the lawyers --

17 MR ROBERTSON: It is a historic complaint most certainly.  
18 You will see in the authorities bundle a book  
19 co-published by the PRS in 2004 which identifies the  
20 Black Box issue as being a topic of contention and  
21 setting out the PRS --

22 THE CHAIRMAN: But there is no correspondence or -- 2004 is  
23 a long time ago. There is no --

24 MR ROBERTSON: Mr Rowntree's involvement in this comes  
25 through his -- well, ultimately him setting up the

1           Featured Artists Coalition in 2009 --

2       THE CHAIRMAN:   Right.

3       MR ROBERTSON:   -- for the interests of writers.   That is  
4           explained --

5       THE CHAIRMAN:   I got the impression from his evidence that  
6           he came later to the litigation, so the litigation was  
7           being formulated and then you needed a class  
8           representative.

9       MR ROBERTSON:   Yes, yes.   The DCMS report has been -- I am  
10          not going to identify other clients, but it is a hot  
11          potato in the recording industry so it has attracted  
12          a lot of attention.

13      THE CHAIRMAN:   Yes, yes.

14      MR ROBERTSON:   So that is what -- that is what --

15      THE CHAIRMAN:   There are a lot of concerns.   I am not for  
16          a moment doubting that there are a lot of concerns about  
17          the distribution of royalties to writers, particularly  
18          those less successful writers or less popular writers,  
19          I should say, but this particular issue of distribution  
20          of Black Box royalties, apportionment of Black Box  
21          royalties, that is quite a distinct subset of  
22          complaints.   I wondered when that had been -- whether  
23          there is any correspondence or any representations  
24          having being made by class members to the PRS.   (Pause)

25      MR ROBERTSON:   It was much discussed in the music press and

1           that is how it came to be on our radar as a potential  
2           claim.

3       THE CHAIRMAN:   You have not seen -- are board minutes  
4           public?   The PRS board minutes, are they public?

5       MR ROBERTSON:   I do not believe they are, but that is not  
6           the genesis of this complaint.

7       THE CHAIRMAN:   Quite, but the point that is made against you  
8           is they are not -- one way this should be sorted out is  
9           within the membership of the PRS.   I just wanted to know  
10          if any steps had been taken to try and resolve it in  
11          that way.

12      MR ROBERTSON:   Well, you see in the claim form, annex 11,  
13          a letter sent by recorded delivery twice and an email  
14          from a PRS member.

15      THE CHAIRMAN:   Yes, I have seen that.

16      MR ROBERTSON:   Ms Cross.

17      THE CHAIRMAN:   I mean --

18      MR ROBERTSON:   Well, there is an attempt by a PRS member to  
19          engage, which she did in 2020 --

20      THE CHAIRMAN:   Yes.

21      MR ROBERTSON:   -- and no response was forthcoming.   There  
22          has been some correspondence yesterday from PRS saying,  
23          "Well, we have not got a record of having receiving  
24          these letters ..."

25      THE CHAIRMAN:   Well --

1 MR ROBERTSON: Sorry, if I may finish -- "We have not got  
2 a record of receiving these letters or this email" --  
3 this was in mid 2020, around the time of the Covid  
4 lockdowns and so on, so it may have been due to the  
5 pandemic -- to which our response was, "Well, we told  
6 you about the letter in the first letter before action,  
7 in ..." -- well, the third anniversary is coming up this  
8 Friday. It was 14 February.

9 THE CHAIRMAN: Anyway, I have that point. But in terms of  
10 the -- there have been no attempts to resolve this  
11 dispute through the politics of the organisation, as far  
12 as you are aware, that is?

13 MR ROBERTSON: Well, our only evidence on that is an attempt  
14 by a PRS member to engage, and we were told in their  
15 skeleton argument, "Well, you should have just looked at  
16 the website". They seem perfectly satisfied with the  
17 way in which they are doing things so frankly I do not  
18 see that engaging is going to -- by raising questions  
19 with them, even if they are prepared to answer the  
20 correspondence, is going to make any difference.

21 THE CHAIRMAN: Mm-hm.

22 MR ROBERTSON: So I do not think there is a political  
23 solution to this. As ever, that is when the courts get  
24 involved.

25 THE CHAIRMAN: Have the parties considered mediation, the

1           possibility of having this matter resolved going  
2           forward, at least?

3       MR ROBERTSON: I do not think I can waive privilege.

4       THE CHAIRMAN: But you would not object to that, to this  
5           Tribunal imposing that requirement?

6       MR ROBERTSON: At an interim stage -- that is always within  
7           the power of courts and Tribunals --

8       THE CHAIRMAN: Mm-hm.

9       MR ROBERTSON: -- so I cannot say that that is not within  
10           your powers. We look upon it rather skeptically simply  
11           because of the frostier response of the PRS so far and  
12           Ms Cross being effectively blanked when she tried to  
13           raise it. So I think that is all I wanted to say on  
14           distribution. You have got the rest of our submissions  
15           in our skeleton argument and --

16      THE CHAIRMAN: Yes, I understand the point. You say that  
17           you have got a register of who will be -- this is on the  
18           spectrum, on the easy side of -- once you decide how you  
19           are going to distribute the royalties, the mechanics are  
20           going to be pretty straightforward?

21      MR ROBERTSON: Yes. That is 2.30 on the nose. I will let  
22           Mr Went into the hot seat.

23                           Submissions by MR WENT

24      MR WENT: Good afternoon. So I am left just to deal with  
25           the alleged conflicts, the funding and class exclusions.

1 THE CHAIRMAN: Yes.

2 MR WENT: Turning first to alleged conflicts within the  
3 class, we deal with that at paragraphs 42 to 44 of our  
4 skeleton. PRS raised conflicts at the level of  
5 authorisation and the eligibility conditions. It covers  
6 alleged conflicts between class members but also as  
7 between the PCR and class members, although I think the  
8 alleged conflict between the PCR and class members in  
9 this context is really just part and parcel of the  
10 alleged conflicts between class members.

11 Under the authorisation condition, the relevant test  
12 is in 78.2(b), whether the PCR has, in relation to the  
13 common issues for class members, a material interest  
14 that is in conflict with interests of the class members.

15 The headline point here is that there are no  
16 fundamental conflicts between members of the proposed  
17 class or between the PCR members of the proposed class,  
18 and attempts by PRS to point these out are speculative  
19 and not based on the claims advanced by the PCR.

20 If I could briefly first turn to one authority. It  
21 is the Tribunal's decision in *Ennis*. That is  
22 authorities bundle {AUTH-B/25/1}. I think it is in the  
23 first hard copy authorities bundle. While you are  
24 getting that, let me briefly summarise the case there.

25 So the class in *Ennis* are app developers who sell

1 16% of apps distributed on the Apple Store, on which  
2 Apple charges commission. The class representative in  
3 that case claims that the commission is unfair and  
4 abusive, and it is counterfactual as to the lower flat  
5 rate that would apply to the commissions. Apple alleged  
6 there were conflicts within the class, including on the  
7 basis of a cross-subsidy issue. Apple's argument was  
8 that class members varied as to the extent to which they  
9 paid commission on apps, varying -- bearing in mind that  
10 Apple charges no commission on 84% of the apps, and  
11 that, as a result, developers whose mix of apps meant  
12 they do not currently pay much commission would not want  
13 to claim that cross-subsidy as unfair because that would  
14 risk needing to pay commissions on apps or sales which  
15 are currently free.

16 If we just pick up the case at paragraph 28. That  
17 is at {AUTH-B/25/14}. I might just ask you to read  
18 paragraphs 28 to 30. (Pause).

19 THE CHAIRMAN: Sorry, 28 to 30?

20 MR WENT: Paragraphs 28 to 30, please. (Pause)

21 THE CHAIRMAN: What do we get out of *Ennis*?

22 MR WENT: *Ennis* is unlike the *Trucks* claims, which involve  
23 mutually inconsistent claims in relation to pass-on, so  
24 this is a very different type of situation. Whether or  
25 not a PCR is in a position of conflict of interest has

1 to be assessed by reference to the claims advanced by  
2 the PCR and not by reference to any alternative claim  
3 and not by reference to how the proposed defendant might  
4 seek to comply with competition law. So those are the  
5 points I want from that case.

6 The case law has also emphasised that it does not  
7 matter if some class members do better than others in  
8 a claim but success for one member should not result in  
9 failure for another. We cited case law on that in  
10 paragraphs 43.2 and 43.3 of our skeleton. I do not need  
11 to go to those.

12 THE CHAIRMAN: That will be the case here because, I mean,  
13 you will say everyone will benefit. The more successful  
14 writers will benefit more in monetary terms, at least,  
15 because they get a bigger --

16 MR WENT: If I can come to that in a moment, because I do  
17 not think the evidence is clear on that. Let me come to  
18 that in a moment.

19 THE CHAIRMAN: Right.

20 MR WENT: I was going to say also the case was emphasised  
21 that it is not appropriate in a certification hearing to  
22 engage in objections and eligibility bases and  
23 speculative counterfactuals or speculative examples, and  
24 we cited cases at footnote 70 of our skeleton on that,  
25 and that includes the recent carriage dispute between



1           BIRA and Professor Stephan and the claim against Amazon.

2           If I can look at the objections raised by the PRS.

3           If I can take that up in their response. The reference  
4           for that is {B/26/24}. That is the hard copy bundle B1,  
5           I think.

6       THE CHAIRMAN: Sorry, which paragraph? You are talking  
7           about the skeleton; yes?

8       MR WENT: No, no, this is in the response. I want to  
9           take -- so this is where this point was first formulated  
10          so I want to take you to that.

11       THE CHAIRMAN: Okay, so let us --

12       MR WENT: So it is {B/26/24}. (Pause)

13           The context is that published writers may have  
14           agreements with their publishers by which they are  
15           entitled to receive not only their own songwriter  
16           royalties directly from PRS but also a proportion of the  
17           publishing royalties distributed to their publisher by  
18           PRS. So we have heard the basic allocation should be  
19           50/50 as between writers and publishers by PRS, so PRS  
20           pays 50% of the royalties to writers and 50% to  
21           publishers. Some published writers may have agreements  
22           under which they are entitled to some money -- some  
23           portion of the payments being made to publishers, if  
24           that is clear.

25       THE CHAIRMAN: But it is always done that way. It is never

1           that the publisher takes a smaller chunk from the PRS.  
2           They always take their 15 quid back.

3       MR WENT:   That is our understanding, yes.   That is the way  
4           it is --

5       THE CHAIRMAN:   Okay.

6       MR WENT:   Mr Arber's evidence in support of this, he says it  
7           is common for published writers to have such  
8           conditions(?), that is paragraph 38 of Arber 1; while  
9           Mr Savage says those arrangements will become more  
10          common over time.   That is at paragraph 5.3.2 of  
11          Savage 2.

12                 If we then look at what PRS says at paragraph 72(a).

13       THE CHAIRMAN:   Sorry, this is still in your reply?

14       MR WENT:   This is the response, yes.   So it is 72(a) here.

15                 If we look at five lines down in this subparagraph,  
16                 where it starts "For such persons", so for published  
17                 writers:

18                 " ... any shift in PRS's policies which favours  
19                 distribution to songwriters over distribution to  
20                 publishers may be disadvantageous, because they will  
21                 lose out on their additional share of the 'publisher'  
22                 royalties, and this may not be compensated for by the  
23                 receipt of further 'songwriter' royalties."

24                 Then the last sentence of this paragraph:

25                 "Any approach which seeks to make 'void'

1 distributions of so-called Black Box royalties to  
2 publishers, might also result in published songwriters  
3 having to give such royalty money back."

4 So it is obviously immediately evident the  
5 speculative terms in which this has been written. In  
6 fact, the PCR has made clear that the claim does not  
7 extend to Black Box writer royalties that are paid back  
8 to writers; it only relates to Black Box writer  
9 royalties that remain with independent publishers. You  
10 can see that, for example, at paragraph 73.3 of the  
11 reply -- that is at {B/27/19} -- whilst Mr Savage has  
12 confirmed that there is a methodology for looking at  
13 this, and that is paragraph 5.6.1 of his second report  
14 at {B/32/20}.

15 So, therefore, there is certainly no question of any  
16 published writers needing to return any Black Box writer  
17 royalties to the publisher, but it also means that the  
18 interests of published writers with these types of  
19 contracts -- their interests align with interests of all  
20 other writers in the claim, and that is to maximise the  
21 return of Black Box royalties that have remained with  
22 independent publishers, so equally success on the common  
23 issues and the claim will therefore mean success for all  
24 class members.

25 PRS also, in paragraph 72(a), suggests that

1 publishers -- published writers might be worse off if  
2 there is any shift in PRS' policies which favours  
3 distribution to songwriters on the basis that published  
4 songwriters will lose out on the additional share they  
5 get from publishers and that this may not be compensated  
6 for by receipt of further songwriter royalties. That is  
7 presumably focusing on what might happen post-claim and  
8 I think we make three points in response to that.

9 First, we say that looking for potential conflicts  
10 beyond the four corners of the claim is not appropriate,  
11 and that is clear from *Ennis* that I took you to. It is  
12 entirely possible, of course, that distribution of Black  
13 Box writer royalties post-claim might include taking  
14 into account the amount of matched royalties that are  
15 paid to the writers whilst also ensuring the writers --  
16 all writers receive a portion of these Black Box  
17 royalties, but, in any event, as to precisely what might  
18 happen, that is a matter of speculation and ultimately  
19 a matter for PRS as to how it complies with competition  
20 law and should not be a matter relevant in determining  
21 at this preliminary stage whether or not proceedings  
22 should be certified. So that is the first point.

23 The second point is that there is, in any event, no  
24 hard evidence or data to back up the points being made  
25 about this, so it is not clear how many published

1       writers there are as a portion of all PRS writer members  
2       that have these -- sorry, it is not clear how many  
3       published writers there are full stop within the whole  
4       class of PRS writers and it is not clear what portion of  
5       those have publishing deals that entitle them to money  
6       back from publishers. It is not clear for those  
7       published writers what portion of the publisher  
8       royalties they are entitled to and it is not clear  
9       whether the contract or practices of the publishers mean  
10      that the Black Box royalties are in fact paid by  
11      publishers back to writers under those contracts or that  
12      Black Box writer royalties are even identified in a way  
13      that would enable publishers to pay them back to  
14      particular writers. So those are the points we make in  
15      terms of the lack of evidence on this point.

16           I might just briefly draw your attention to -- this,  
17      I think, was to some extent a point that was addressed  
18      in Arber 2 that came in on Friday. Just to note that  
19      Mr Savage, in his third report -- sorry. Let me start  
20      with his second report. He says it is not clear to him  
21      that publishers are contractually required under the  
22      publishing agreements to pay any portion of Black Box  
23      royalties they receive to songwriters, and that is at  
24      paragraph 5.3.3 of Savage 2, but then, in the further  
25      report that was submitted yesterday, he has explained

1           that he is aware of situations in which Black Box  
2           royalties -- Black Box royalties are paid to publishers  
3           without reference to particular works and that MTOL --  
4           the multi-territorial online licensing Black Box  
5           royalties are paid as a lump sum to publishers without  
6           reference to specific compositions, so -- and I should  
7           say that that is at paragraph 4.2 of Savage 3, which is  
8           at {B/103/6} for the reference.

9           So this is to counter the idea from PRS that  
10          publishers will know full well when they are paid these  
11          additional royalties because they are always allocated  
12          to specific works when they get those royalties, and  
13          that is to make clear that that is not, in fact, the  
14          case, and it is Savage 3 that points to that.

15          So those are the first two points, the second point  
16          about lack of evidence. Third, it is worth noting that  
17          there would be a larger pot of Black Box royalty --  
18          writer royalties to be distributed amongst writers  
19          without the alleged abuse. It would involve not only  
20          the Black Box writer royalties, a portion of which might  
21          be paid back by publishers to published writers, but  
22          also the far larger portion that remains currently with  
23          independent publishers. Mr Savage, at paragraph 5.3.4  
24          of his second report -- that is at {B/32/19} -- comments  
25          that writers -- comments on the extent to which those

1       Black Box writer royalties remain with the publishers,  
2       so that is that point.

3           So that is published writers. Just turning now to  
4       72(b) of the response -- so just going back to that, it  
5       is at {B/26/24}. You have got it there. Great.

6           So this now is looking at self-published  
7       songwriters, so these are writers without an agreement  
8       with an independent publisher but they may have  
9       a self-owned publishing vehicle and they would have  
10      registered with the PRS as both a writer and  
11      a publisher.

12          So if we look at what PRS says in response here, in  
13      the second sentence PRS speculates that the PCR's case  
14      is that on success some portion of the current publisher  
15      royalties paid to self-paid publishers ought to be given  
16      away and given to the writers' group instead. So that  
17      is the premise on which this conflict is said to arise.  
18      However, that premise is wrong. The PCR's case is that  
19      the claim does not extend to Black Box writer money that  
20      has been paid to the self-publishing arm of the  
21      writer --

22      THE CHAIRMAN: Sorry, I am being very slow, but the  
23           self-published songwriters will be registered as  
24           publishers and songwriters?

25      MR WENT: Yes, exactly.

1 THE CHAIRMAN: You say you are only talking about the bit  
2 that goes to the publisher arm?

3 MR WENT: The independent arm. That is at paragraph 34.3 of  
4 our reply, just for your reference. Mr Savage also  
5 confirms he has a methodology for that. That is at  
6 paragraph 5.6.2 of Savage 2.

7 Returning to the paragraph 72(b), {B/26/24}, PRS  
8 makes some further points as it did with published  
9 writers. It comes around seven lines down. Again it is  
10 a similar point in relation to published writers. So:

11 "For such persons, any shift in PRS's policies which  
12 favours distribution to songwriters over distribution to  
13 publishers is likely to be disadvantageous, because they  
14 will lose out some portion of their 'publisher'  
15 royalties, and this is unlikely to be compensated for by  
16 the receipt of further 'songwriter' royalties. This is  
17 because ... the idea behind Mr Rowntree's case appears  
18 to be that some of the 'publisher' royalties to which  
19 such songwriters are currently entitled in full should  
20 be taken away and diluted by being shared between a much  
21 larger number of songwriters, so that only a small  
22 portion of the entitlement will come back in the form of  
23 'songwriter' royalties."

24 In terms of the case -- the claim advanced by the  
25 PCR, there is no suggestion that any royalties that have



1           been paid to self-published writers should be taken  
2           away. Therefore, as with published writers,  
3           self-published writers will have the same interest as  
4           all PRS writer members in maximising the Black Box  
5           royalties that have remained with independent --

6       THE CHAIRMAN: That sidesteps the problem of where any of  
7           this money comes from.

8       MR WENT: I am sorry?

9       THE CHAIRMAN: That sidesteps the problem we discussed  
10           earlier of where any of this money comes from. It is  
11           coming from PRS members. It is not coming from anywhere  
12           else.

13       MR WENT: Yes. I mean, what we have focused on is --

14       THE CHAIRMAN: You say it is not coming from writers, but it  
15           is coming from members.

16       MR WENT: No, but what we have focused on are what we say  
17           are the Black Box writer royalties that end up with  
18           independent publishers, and, as has been explained, that  
19           is what we say is the unfairness arising from --

20       THE CHAIRMAN: Yes, so we have some -- we do not know how  
21           big it is.

22       MR WENT: Well, and we will put in a submission on that.

23       THE CHAIRMAN: But for the purposes of the conversation we  
24           are going to have on this, that -- I mean, the funds  
25           to -- will be distributed to collect that missing sum of

1 money. Money needs to be collected and then it needs to  
2 be distributed. It does not seem to be assuming that it  
3 is going to be collected from the publishers and I don't  
4 know -- I am still somewhat perplexed by that  
5 suggestion. So it does -- your suggestion is not coming  
6 from the writers. It assumes we have solved that  
7 problem.

8 MR WENT: Well, I am assuming that for the purposes of these  
9 submissions, that is correct. But assuming that is  
10 correct for the purposes of the submissions, PRS is  
11 suggesting that self-published writers might be worse  
12 off if there is any shift in PRS' policy, again, as with  
13 published writers because they will have a smaller share  
14 of Black Box royalties, and much the same points I have  
15 already made in relation to publishers, the self- --  
16 some of the published writers apply here as well, so one  
17 should not just look to the four corners -- one should  
18 be limited -- should not look beyond the four corners of  
19 the claims advanced.

20 Second, again, the contention --

21 THE CHAIRMAN: But you still -- you say you are parking that  
22 point, but you have now assumed that the publishers are  
23 paying, so you are taking money from the right hand and  
24 the self-publishers and giving it back to the left hand.

25 MR WENT: No, no, that is -- I am sorry.

1 THE CHAIRMAN: Because the --

2 MR WENT: Maybe you had not understood what I said or I have  
3 not been clear enough.

4 THE CHAIRMAN: Well, it is where the money is coming from,  
5 to start off with.

6 MR WENT: We are saying that any writer Black Box money that  
7 is paid to writers, whether they are writers or they are  
8 publishing arms of those writers, that remains these  
9 writers'. That is not part of the claim. We are not  
10 suggesting that that assumes to be --

11 THE CHAIRMAN: (overspeaking) that is the left hand.

12 MR WENT: But we are not suggesting that needs to be  
13 recouped from the publishing arms of the PRS writer  
14 members. That is not part of our claim.

15 THE CHAIRMAN: Well, you do not say where that money is  
16 coming from. You just say it is coming from publishers.

17 MR WENT: No, sorry. What we are saying is that there is  
18 a pot of Black Box writer money that is distributed by  
19 PRS. Some of that will already make its way to writers.  
20 That would include the publishing arms of writers, but  
21 it would also be paid to independent publishers that are  
22 writer members of PRS, and it is that latter pot that  
23 the claim is about, the Black Box writer money that has  
24 remained with independent publishers.

25 THE CHAIRMAN: Independent publishers?

1 MR WENT: Well, I use that word just to distinguish them  
2 from the self-publishing vehicle of a writer member of  
3 PRS, for example, who has chosen to self-publish  
4 themselves.

5 THE CHAIRMAN: I see. So we now have three classes of  
6 people. We have got writers, we have got publishers who  
7 are not -- who might be writers as well or might not --  
8 I mean, how would Apple Records have fitted into all of  
9 this, for example?

10 MR WENT: The --

11 THE CHAIRMAN: It is a hugely successful label owned by the  
12 Beatles, if my memory is correct. There was even  
13 a case -- there was a case about it. So how does  
14 that -- so are they in or are they out? Are they  
15 publishers? Are they independent publishers? Are they  
16 writers? I mean ...

17 MR WENT: Well, we are saying that, "If you are a PRS writer  
18 member that happens to be self-published ..." --

19 THE CHAIRMAN: Right.

20 MR WENT: -- "... that we are not for a moment suggesting  
21 that our claim extends to the Black Box writer royalties  
22 that might be paid to your publishing arm".

23 THE CHAIRMAN: Right, but you are going to take it?

24 MR WENT: No, that is not part of the claim. It is just  
25 the --

1 THE CHAIRMAN: But your claim does not say any of this.

2 This is a -- you say it is not part of your claim. Your  
3 claim does not say one way or the other where any of  
4 this money is coming from, so it is obviously very easy  
5 for you to say that it is not part of the claim, but, as  
6 I understand it, money has to come from somewhere to pay  
7 the writers.

8 MR WENT: Yes.

9 THE CHAIRMAN: You are proposing -- and we have put a big  
10 question mark over how this is going to work -- you are  
11 proposing it comes from publishers. PRS itself does not  
12 have assets, so it is coming from publishers.

13 MR WENT: Yes. We are saying it has been unlawfully  
14 distributed by the PRS to publishers.

15 THE CHAIRMAN: So when it comes to what you are calling  
16 "self-publishers", who may be hugely successful  
17 publishers among the more successful artists, they are  
18 not -- it is not going to come from them?

19 MR WENT: No.

20 THE CHAIRMAN: It is going to come from Virgin Records, but  
21 it is not going to come from Apple Music -- sorry,  
22 Apple -- the case is Apple Records. It is not going to  
23 come from Apple Records. It is going to come from what  
24 the equivalent today is. It is going to come from --  
25 only from Virgin Records?

1 MR WENT: Yes.

2 I can move over this briefly. I make the same point  
3 in relation to published writers as well, that there is  
4 no -- that the contention raised by PRS is not backed up  
5 by any hard evidence.

6 Just for your note, in Savage 2, he says he  
7 considers it is the large independent publishers who are  
8 likely to receive most of the Black Box royalties, and  
9 that is at paragraphs 5.4.2 to 5.4.3 of Savage 2. The  
10 same point again, there will obviously be, we say,  
11 a much larger pot to be distributed amongst the writers  
12 post-claim.

13 The final point is unpublished writers, that is at  
14 72(c) of the response, but we do not need to dwell on it  
15 because I think the point made is much the same as in  
16 relation to self-published writers and our response to  
17 that is the same as well.

18 So those are the points I was going to make on  
19 conflicts, the alleged conflicts. There is another  
20 conflict point or an alleged conflict point in relation  
21 to -- on the funding side, and I will come to that now.  
22 So we deal with funding at paragraph 45.3(?) of our  
23 skeleton. There appear to be three live points, with  
24 PRS reserving its position on whether the LFA is  
25 a DBA(?) or whether the collective proceedings regime

1 allows part of the funder's return to be paid before  
2 distribution of damages to class members (inaudible) at  
3 the moment.

4 In terms of the live issue, the first one relates to  
5 the level of the funders' return. We have dealt with  
6 the point raised in PRS' response at paragraph 50 of our  
7 skeleton, but, in fact, the point now raised in PRS'  
8 skeleton for today is different. In the response, the  
9 point -- the point was the relevant provisions involved  
10 a cliff edge, but --

11 THE CHAIRMAN: I am so sorry. Just remind me of where the  
12 funding agreement is in the bundles.

13 MR WENT: The funding agreement is at {B/88}. I was going  
14 to come to that in a moment.

15 THE CHAIRMAN: So we have got these significant ...

16 MR WENT: All I was going to say initially is that the point  
17 made in their response has morphed into a different  
18 point, so the point they are now making is that the  
19 funder's returns are excessive and distortive(?).

20 THE CHAIRMAN: It is not just the points they make. This is  
21 also a matter for the Tribunal.

22 MR WENT: I understand that. I understand that. We have  
23 obviously heard what you have said already about  
24 proportionality and I -- and I appreciate --

25 THE CHAIRMAN: But do we understand why the dispute about

1 a PRS agreement is costing so much for litigating? Do  
2 we have any sort of breakdowns as to how much is going  
3 to the various advisers, I mean, the law firms, the  
4 accountants? We seem to have two firms of accountants  
5 working on it as opposed to one.

6 MR WENT: Well, I --

7 THE CHAIRMAN: Do we have an idea of how much the various  
8 sums are apportioned in your estimate?

9 MR WENT: I do not know whether it will show the  
10 apportionment as between the different expert advisers.  
11 There is a budget that has been updated, and that is at  
12 {B/101}, so that is an updated budget.

13 In terms of two sets of expert advisers, they are  
14 dealing with different points and --

15 THE CHAIRMAN: Are they? Why?

16 MR WENT: Yes, well --

17 THE CHAIRMAN: Why can one firm of accountants not do this?

18 MR WENT: One are competition economists who are looking at  
19 issues like dominance. I should think -- that is one of  
20 the main issues they are looking at. The other is  
21 a specialist accountancy firm, dealing -- active in  
22 this, so they have been brought into the claim to deal  
23 with --

24 THE CHAIRMAN: I don't understand -- I mean, numbers are  
25 numbers. Why do they need to be (overspeaking) in



1           respect of --

2       MR WENT: I don't know. I am not sure that our competition  
3       economist is an accountant, for example. I don't know  
4       whether his outfit has an accountancy practice as well.  
5       But it is not clear in any event that they have the  
6       sector expertise that is required here.

7       THE CHAIRMAN: Why is sector expertise required? I have  
8       some difficulty with that. I mean, this happens to be  
9       a copyright royalties claim, but it could be anything.

10      MR WENT: We say, in terms of looking at the financials  
11      of -- from PRS, it is certainly helpful to have the  
12      sector expertise and having dealt with this area.

13           In terms of the points that --

14      THE CHAIRMAN: Can we just have a look through this, the  
15      budget?

16      MR WENT: The budget? Yes, of course.

17      THE CHAIRMAN: I have turned it up.

18      MR WENT: That is at {B/101/1}.

19      THE CHAIRMAN: The total seems to have gone up or is that my  
20      imagination because VAT has been added or some --

21      MR WENT: So this is a slightly revised budget from the one  
22      that went in with the claim form. It is worth noting  
23      that on the right-hand column -- this includes full  
24      rates, for example, for the legal teams is my  
25      understanding, so the 17 million-odd figure does not

1           represent the outlay as committed by the funder. So the  
2           funder outlay is --

3       THE CHAIRMAN: So we have got the totals on the right-hand  
4           column?

5       MR WENT: Yes. As I was saying, it totals up to 17.9 at the  
6           bottom, but the --

7       THE CHAIRMAN: So we have the solicitors -- this is a bit  
8           confusing because counsel have got pence in there for  
9           some reason. I will not ask who is charging the 77p.

10      MR WENT: I do not think I am guilty of that.

11      THE CHAIRMAN: You can waive that, I would have thought.

12           Then -- no. So 5 million -- nearly 6 million for  
13           solicitors; 4 million for counsel; economic accountants,  
14           2 million. What do the other disbursements of  
15           3 million -- what would they be? "Experts/  
16           Disbursements", how do they go -- just explain how the  
17           economic accountants seem to appear as --

18      MR WENT: Which bit are you looking at?

19      THE CHAIRMAN: Sorry, I am looking at -- so we have the  
20           legal team. I think maybe it just gets repeated. You  
21           then have "Economic, accountants and other experts".

22      MR WENT: Yes.

23      THE CHAIRMAN: Then you have "Expert/Disbursements" and the  
24           total. That is just the addition of all the figures  
25           before, is it? I think it is, yes. Okay. Then you

1           have got the insurance, the after the event insurance;  
2           VAT, right. (Pause)

3           Right, okay. I have got that, yes.

4       MS THOMAS: If I may, while we have this document open, this  
5           is the new budget that was provided on Tuesday, and  
6           I think from our side we understand what the other  
7           disbursements figure is, the 463,912 figure --

8       THE CHAIRMAN: Sorry, which one? The ...

9       MS THOMAS: Yes, I appreciate the font is very small. In  
10          the first column, under "Claim Form & CPO Application",  
11          there is a figure called "Other disbursements", which is  
12          the final figure under the "Experts/Disbursements Total"  
13          that my learned friend --

14       THE CHAIRMAN: Sorry, I am being shown the 463 ...

15          Okay, right. Sorry. I have got it now. Thank you.

16       MS THOMAS: The 463,912 figure --

17       THE CHAIRMAN: So it is nearly half a million.

18       MS THOMAS: Yes. I apologise for interrupting, but it may  
19          help, when I come to this, if we could understand that  
20          figure now.

21       THE CHAIRMAN: What is the £460,000-odd of disbursements?

22       MR WENT: I am told it is a number of things, but it  
23          includes things like data hosting, disclosure -- for  
24          example, in relation to any disclosure database.

25       THE CHAIRMAN: Is this not -- sorry. Is this not up to

1           today? Am I misreading that?

2       MR WENT: I am told it may be unfortunately in the wrong

3           column.

4       THE CHAIRMAN: Ah, right.

5       MR WENT: I think that may explain why. So that is not --

6       THE CHAIRMAN: That should be further down because it is

7           relating to -- okay.

8       MR WENT: Further down.

9       THE CHAIRMAN: Okay. If you could just produce an amended

10           table overnight, making sure we have it in the right

11           place. Thank you.

12       MR WENT: I am grateful. So turning back to {B/88} and the

13           LFA --

14       THE CHAIRMAN: I beg your pardon.

15       MR WENT: Oh, back to the litigation funding agreement, if

16           we can go to clause 1.11. That is at {B/88/4} of this

17           document. Just picking up on a few definitions as we go

18           through because you may just like to read "Capital

19           Deployed".

20       THE CHAIRMAN: I have that one.

21       MR WENT: 1.41 on {B/88/7}, "Recovery", and then 1.50 on the

22           next page, {B/88/8}, "Undistributed Damages". So

23           "Undistributed Damages" are part of the recovery and are

24           not claimed by class members.

25           Then turning to class 9 at {B/88/13}, so this is

1           dealing with receipt and distribution of any recovery.

2           Then over the page, {B/88/14}, on clause 9.3:

3           "The Claimant shall seek approval from the Tribunal  
4           for the payment from any Recovery of the Claimant's  
5           costs, fees and disbursements (including ... the  
6           Funder's Fee ...) ..."

7           So it does not say explicitly that the PCR must  
8           apply to the funder's fee to be paid from damages  
9           pre-distribution, but the agreement clearly contemplates  
10          that that might happen so you can see that from  
11          clause 9.6 onwards. So 9.6 is dealing first with the  
12          payment of the funder's fee other than from wholly from  
13          undistributed damages. That is of course subject to the  
14          Tribunal's approval.

15          Then on the next page, {B/88/15}, you see the  
16          relevant multiples that would apply if that is the  
17          relevant situation, and that goes from 2 times capital  
18          deployed up to 4.5 capital deployed, amounts increasing  
19          0.25 every six months from the date the LFA was entered  
20          into in September 2021. Then at five years the multiple  
21          ceases to increase and then there is a 30% annual  
22          compound interest provision.

23          Then from clause 9.8 --

24          THE CHAIRMAN: So what are the -- are there -- in the  
25          industry, have we got to the stage where there are

1 industry standards for these -- I mean, there is  
2 an implied interest rate with those multiples. Are they  
3 in accordance with industry standards or --

4 MR WENT: I was going to take you --

5 THE CHAIRMAN: 4.5 plus 30% sounds mind-boggling to me,  
6 but --

7 MR WENT: I was going to take you very briefly just to  
8 a couple of cases, just to look at what has happened in  
9 other cases and the test that is applicable to  
10 certification. This is all subject to the Tribunal's  
11 approval again today as well. That point is important.

12 THE CHAIRMAN: Mm-hm.

13 MR WENT: I was just going to point out, in clause 9.8, just  
14 to complete it, it deals with the equivalent multiples  
15 if the funder's fee comes from undistributed damages.

16 THE CHAIRMAN: Yes. So how long do you expect this action  
17 to take?

18 MR WENT: I think on -- based on the timetable in the  
19 litigation plan, we are envisaging until March 2028,  
20 I believe.

21 THE CHAIRMAN: So three years?

22 MR WENT: Yes.

23 THE CHAIRMAN: When is the start for the purposes of  
24 understanding these --

25 MR WENT: As I said, it is from the date of the -- that the

1           litigation agreement was entered into, which was  
2           September 2021.

3       THE CHAIRMAN: Right, so you are already --

4       MR WENT: So you would be at the upper multiples  
5           by September next year.

6       THE CHAIRMAN: Right. (Pause)

7           So -- sorry, just give me those dates again. It  
8           started in September?

9       MR WENT: September 2021, so the upper level of multiples  
10          would be next year, September 2026. (Pause)

11          As I said, the PRS, in their skeleton, at  
12          paragraph 78, make the point that it is excessive and  
13          distortive. The Tribunal in Gormsen -- I do not think  
14          we need to turn it up. It is authority B/20 -- set out  
15          the relevant test at the certification stage, where  
16          payment of the funder's return --

17       THE CHAIRMAN: (Overspeaking) In tab 20?

18       MR WENT: Yes. It is paragraphs 34 and following. If Opus  
19          can get up {B/20/1} on the screen -- sorry, yes, the  
20          authorities bundle. Excuse me, {AUTH-B/20/1}, and  
21          paragraph 34 onwards.

22       THE CHAIRMAN: Yes. I do remember this, actually.

23       MR WENT: So the relevant test at the certification stage is  
24          whether the payment of the funder's return is ultimately  
25          subject to the control of the Tribunal, as it is here,

1           as to whether the funder's return is sufficiently  
2           extreme as to warrant calling out. In that case, the  
3           multiple which was applied to the whole project cost,  
4           from the outset part of it, six times the first one to  
5           two years, then increased to 14 times a couple of years  
6           later.

7       THE CHAIRMAN: Sorry, where was that? Apologies.

8       MR WENT: Well, this is in the judgment, {AUTH-B/20/23}.

9           (Pause)

10           I think it is in 34 -- can you carry on?

11       THE CHAIRMAN: Oh, it is 39.

12       MR WENT: Down again.

13       THE CHAIRMAN: 39?

14       MR WENT: Yes, {AUTH-B/20/25}.

15           You will see in this case the project costs were  
16           50 million, and so the funder's return started at  
17           350 million and increased to 750 million.

18       THE CHAIRMAN: That was coming out of ...?

19       MR WENT: So these provisions that the Tribunal thought were  
20           sufficiently extreme to call out at some stage, so then  
21           those ended up being revised and we do not have the  
22           revised figures. The Tribunal does not comment on those  
23           in the judgment.

24           But in any event we say we are not in this extreme  
25           territory, even including compound interest. My learned



1 friend, in his skeleton, has added some examples,  
2 including the compound interest. The multiple is less  
3 than 5 from pre-distributed damages and less than 7 from  
4 undistributed.

5 THE CHAIRMAN: There is no evidence about how you have  
6 entered into this funding agreement, how many -- there  
7 was no class representative at this stage, when this was  
8 negotiated, or there was?

9 MR WENT: I do not know whether the ... (Pause)

10 So the class representative was not involved at that  
11 stage.

12 THE CHAIRMAN: Right. So what -- this has been --

13 MR WENT: Well, there was a broker involved and there is  
14 a witness statement, I believe, from the broker, so --

15 THE CHAIRMAN: Can we just have a look at that?

16 MR WENT: Yes. So that is at ... (Pause)

17 So it is at {B/35/1}. (Pause)

18 I think this explains the general process to start  
19 with that the broker goes through more generally when  
20 engaged on this type of project.

21 THE CHAIRMAN: Right.

22 MR WENT: It explains, you know -- for example, at  
23 paragraph 15 -- 14 and 15 onwards, {B/35/4}, there is  
24 a formal competitive tender that goes on.

25 THE CHAIRMAN: Was there in this case?

1 MR WENT: Yes.

2 THE CHAIRMAN: Is there evidence that it was done in this  
3 case?

4 MR WENT: So then, if you go to this case, it is from  
5 paragraph 21 onwards --

6 THE CHAIRMAN: Okay.

7 MR WENT: -- which explains that. So he dealt generally  
8 with how these cases are approached up until  
9 paragraph 21.

10 THE CHAIRMAN: "We approached seven funders ...", {B/35/5}.  
11 (Pause)

12 But it does not say on what basis, why they  
13 considered these to be the most attractive.

14 MR WENT: I know the Tribunal is being cautious about  
15 getting involved in precisely the negotiations that may  
16 have taken place.

17 THE CHAIRMAN: I am not feeling any great caution at this  
18 point in understanding -- I mean, there was no class  
19 representative involved in this. This was all tidied  
20 away before the class representative was involved. So  
21 the question then arises, who was -- who were the  
22 "interests of the class" part, as opposed to the,  
23 obviously, solicitors and counsel and the ...  
24 necessarily -- there is nothing wrong with it  
25 necessarily when it comes to the funding for litigation,

1           so there is no -- so that is why the process from the  
2           Tribunal's sake is of interest.

3       MR WENT: Yes, the agreement obviously will not have been  
4           signed until the PCR was --

5       THE CHAIRMAN: Yes, but the PCR was not involved and did not  
6           review the funding agreements and go, "Yes, this is the  
7           right one", as I understand it.

8       MR WENT: For what it is worth -- obviously I need to be  
9           careful because I am not seeking to waive privilege --  
10          but the PCR did receive independent legal advice in  
11          relation to the agreement.

12       THE CHAIRMAN: One is not really thinking about the legal  
13          advice. One is thinking about the value. Is that  
14          privileged? We know what the figures are. That is  
15          privileged, I take it?

16       MR WENT: Yes. As I say, the evidence of John Astill --  
17          Mr Astill is that there was a competitive tender and  
18          competitive terms were negotiated and agreed when --

19       THE CHAIRMAN: Yes. I mean, it is just unfortunate he does  
20          not say -- he says it is more attractive to the  
21          interests of the proposed class, but he does not say  
22          why -- more attractive in what sense. Is it more  
23          attractive in that they are more reliable and less  
24          likely to need funding? Is it more attractive because  
25          they are competitive in the market? We do not know.

1 (Pause)

2 Right. Where do we go next? (Pause)

3 MR WENT: So I think the next point is clause 16.4.2. That  
4 is at {B/88/22}. (Pause)

5 Those agreements terminated pursuant to clause 16.1,  
6 and we can see that as well, {B/88/21}. That is:

7 "If the Funder reasonably considers that the merits  
8 of any Claim are no longer satisfactory or that any  
9 Claim is no longer economically viable ..."

10 Or pursuant to clause 16.2, {B/88/22}, so the funder  
11 breaches any term of the agreement:

12 "The Funder's right to be paid the Funder's Fee from  
13 any Recovery pursuant to clause 9 shall continue as if  
14 this Agreement had continued in force ..."

15 Obviously with the termination clause, in terms of  
16 the PCR, they can terminate regardless of whether the  
17 breach is material or not. The point taken against us  
18 is that the clause is unfairly weighted towards the  
19 funders, that the PCR would still have a substantial  
20 liability to the funder and it would be difficult to  
21 find alternative funding. However, we say, since the --  
22 there is no materiality threshold in respect of any  
23 breach by the funder before the PCR can terminate the  
24 LFA, we submit that there is not unfair weighting  
25 towards the funder in that circumstance.

1           We also say, of course, it is never going to be in  
2           the funder's interest to syphon the claim, because of  
3           course they would never be -- (overspeaking).

4   THE CHAIRMAN:  (Overspeaking) So the independent legal  
5           advice, is that shared with the class representative?

6   MR WENT:  Well, again, to be clear, I am certainly not  
7           waiving any privilege over legal advice that has been  
8           provided, but my --

9   THE CHAIRMAN:  Well, it has not been provided yet.  I am  
10           talking about, {B/88/21}, "If the Funder reasonably  
11           considers that the merits of any Claim are no longer  
12           satisfactory or [it is not] economically viable ... the  
13           Funder may give the Claimant not less than thirty ...  
14           Business Days ...", but they are not -- the first thing,  
15           what is "independent"?  Is that an independent law firm  
16           that does business with the funder or is that  
17           an entirely independent KC?

18   MR WENT:  I believe it is an independent KC.

19   THE CHAIRMAN:  Well, it does not say so, so I think maybe  
20           that should be amended, which is fine.  Then why is that  
21           advice not shared with the class representative and,  
22           indeed, the class representative's legal advisers?

23           (Pause)

24   MR WENT:  Sorry, Mr Chairman.  Can I just have the question  
25           again?

1 THE CHAIRMAN: Yes. So at 16.1, as I understand, "If the  
2 Funder ... considers that the merits of [the] Claim are  
3 no longer satisfactory ... [and] (such views to be  
4 reached based on an independent legal and expert advice  
5 ...) ..." -- we have just clarified that. It would be  
6 an independent KC. Then "... the Funder may give the  
7 Claimant not less than thirty ... Business Days ...",  
8 and my question was: why is that advice not being shared  
9 with the class, so it is the class of legal  
10 representatives and the class representative? If the  
11 funding is being pooled on the basis of a legal opinion,  
12 it seems odd that they are not allowed to say, "Well,  
13 hold on, actually there is a misunderstanding".

14 MR WENT: Yes. Well, it may be that that needs to be made  
15 clear. Sorry, it may be that that needs to be included.  
16 Yes, that needs to be included.

17 THE CHAIRMAN: Okay. Where next?

18 MR WENT: So ... (Pause)

19 I think the last point is the argument at  
20 paragraphs 81 to 83 of PRS' skeleton. The point is made  
21 that clause 9.3 of the LFA, which you have obviously  
22 looked at, requires the PCR to seek an order that  
23 prioritises payment -- a payment under or before(?) the  
24 class.

25 THE CHAIRMAN: But that is all subject to the

1 Court of Appeal, is it not?

2 MR WENT: Well, I am happy to leave it there, but the point  
3 is taken against us.

4 THE CHAIRMAN: Well, at the moment there is a judgment in  
5 your favour which may be right or may be wrong. We will  
6 find out. It is being heard very shortly.

7 MR WENT: Yes. I think just the other point taken against  
8 us is that there has been a misunderstanding on the part  
9 of the PCR as to how the provisions operate. I do not  
10 propose to go back through the points on that because we  
11 dealt with it in our reply at paragraph 42 -- that is  
12 {B/27/23} -- and paragraph 52 of our skeleton. It is  
13 also dealt with, in part, in submissions in which the  
14 Tribunal -- in response to the application to  
15 cross-examine the PCR, where we make clear that there  
16 has not been any misunderstanding on the part of the  
17 PCR.

18 So my last point, which I think I can deal with  
19 briefly, is the class exclusions. I mean, in  
20 a nutshell -- you have the point already, obviously,  
21 that PRS boards are made up of writer and publisher  
22 members, as well as independent members.

23 Originally in the claim form we proposed that anyone  
24 who was a PRS writer member at the time the claim was  
25 issued or during the current proceedings should be

1 excluded from the class. We suggest actually now that  
2 that may be too broad and that actually there is no  
3 reason to exclude PRS writer members from the claim.

4 The point taken against us --

5 THE CHAIRMAN: Sorry. Why were they -- sorry. Why were  
6 they not part of the claim? Sorry, I think I may be  
7 misunderstanding that.

8 MR WENT: Well, I think it is normal for directors of  
9 defendants, for example, to be excluded from the class.  
10 That is a standard provision in exclusions.

11 THE CHAIRMAN: Yes.

12 MR WENT: But we are saying in this case that things are  
13 different, and so there is --

14 THE CHAIRMAN: (Overspeaking) Oh, I see.

15 MR WENT: (Overspeaking) -- to exclude them.

16 THE CHAIRMAN: But if that is included, who is the claim  
17 for?

18 MR WENT: No, no, these are people -- PRS writer members  
19 that sit on the board.

20 THE CHAIRMAN: Oh, sit on the board.

21 MR WENT: Sit on the board. The point taken against us is  
22 that they may hold privileged and confidential  
23 information. We say that to the extent that --

24 THE CHAIRMAN: How many of them are on the board?

25 MR WENT: There are two sets of boards and I think it is



1           between five and ten writers, depending upon which board  
2           you are looking at, but obviously they change over time.  
3           To be clear, the submission by my learned friend is that  
4           anyone who is ever a writer member sitting on the PRS  
5           board should be excluded from the claim.

6       THE CHAIRMAN: That may not be -- so that any board members  
7           going forward being excluded from the claim seems to --  
8           seems to be attractive(?) because they are looking at --  
9           looking after the interests of publishers and writers.

10       MR WENT: Yes. Well, I will not --

11       THE CHAIRMAN: It sounds like it is not a big point.

12       MR WENT: I will not push that point.

13       THE CHAIRMAN: What about the proposed class representative?  
14           What is his position? Is he --

15       MR WENT: So he has waived any right to --

16       THE CHAIRMAN: He has waived any right, right.

17       MR WENT: The same applies to Ms Fletcher as well, who sits  
18           on the consulting committee, because she is actually  
19           a PRS member as well.

20       THE CHAIRMAN: Did you see the class representatives'  
21           remuneration?

22       MR WENT: He has not been paid.

23       THE CHAIRMAN: He has not been paid. That is what  
24           I thought, yes.

25       MR WENT: Oh, just expenses.

1           Those are the points I intended to make. Unless  
2           I can assist the Tribunal any further, it may be  
3           appropriate to take a break.

4   THE CHAIRMAN: Yes, sorry, the transcriber break.

5   (3.28 pm)

6                               (A short break)

7   (3.38 pm)

8   THE CHAIRMAN: We just have one further question. So we  
9           spoke earlier about the difficulty in coming to  
10          a quantum of damages, but what struck me was looking at  
11          the discussion around costs. If we look at a multiple  
12          of 6.5 times 18 million, we end up in a world of costs  
13          of over 100 million. Just putting it against the  
14          context of what the potential damages might be, what one  
15          is left with, presumably somebody on the claimant's side  
16          has done some analysis to justify the total costs going  
17          over 100 million.

18   MR ROBERTSON: We are going to deal with this in the note,  
19          what I call the "appendix A 1% note", but can you leave  
20          that with us to address this evening? I should say that  
21          this -- Mr Went was keen. That does not have a 7 pm  
22          deadline, does it?

23   THE CHAIRMAN: What does --

24   MR ROBERTSON: The appendix A 1% -- the financial  
25          calculations note.

1 THE CHAIRMAN: I cannot remember what the 7 pm deadline  
2 is --

3 MR ROBERTSON: The 7 pm deadline is for when I set out the  
4 gist of the survey -- sorry, the sampling, the audit.  
5 If you recall, I took you to the Savage report and you  
6 said, "What is the gist?".

7 THE CHAIRMAN: Yes, it was not actually there.

8 MR ROBERTSON: So I said I would put that down in what would  
9 be a short note, and that --

10 THE CHAIRMAN: Well, to submit all the notes in good time  
11 for Mr Pickford to --

12 MR ROBERTSON: The more detailed one, including answering  
13 that question, that will, of necessity, take longer. We  
14 will aim to get those in this evening so that  
15 Mr Pickford has those first thing in the morning, but --

16 THE CHAIRMAN: Well, we will see. Get them to Mr Pickford  
17 as soon as you can.

18 MR ROBERTSON: Yes.

19 THE CHAIRMAN: You know, if there are -- if this hearing has  
20 to be adjourned to give Mr Pickford time to consider  
21 those notes, you can -- obviously he is going to be  
22 asking for the costs of the adjournment.

23 MR ROBERTSON: There is one other note, which was just to  
24 set out formally our response to your question, "Who  
25 pays the damages? Can the PRS recover them from

1 publisher members?". But the answer will be as I gave  
2 it on my feet and I will just set that out formally.  
3 There were two bases for it. It was the Rule 2(j) that  
4 I took you to and it is -- if it were to transpire that  
5 publishers were involved, also in the --  
6 (overspeaking) --

7 THE CHAIRMAN: I think my question was, "Do they have  
8 a contractual entitlement?".

9 MR ROBERTSON: Yes.

10 THE CHAIRMAN: Do they -- not --

11 MR ROBERTSON: Well, the answer is to be found in the rule  
12 to which I took you, and I appreciate --

13 THE CHAIRMAN: Just let us have a look at that again. If  
14 you put that in the note -- that sounds like that is not  
15 going to take long so that can be put all together in  
16 one note for Mr Pickford as soon as possible otherwise  
17 this hearing will be adjourned. These are really  
18 fundamental points that should have been in the  
19 documents.

20 Mr Pickford, apologies for calling you incorrectly  
21 once again. Apologies once again.

22 MR PICKFORD: Not at all.

23 Submissions by MR PICKFORD

24 MR PICKFORD: Mr Chair, members of the Tribunal, I am going  
25 to address the Tribunal on the first three points that

1           we have raised, so that is the strike-out reverse  
2           summary judgment point, the *Microsoft* point and the cost  
3           benefit point, and then Ms Thomas is going to take the  
4           same points as Mr Went took, namely conflicts, funding  
5           and exclusions from the class.

6           So I would like, if I may, before getting drawn into  
7           our points, to actually begin with some factual  
8           background because I think it is actually quite  
9           important to understand the background here to then  
10          properly understand the claim. So I am going to cover  
11          the PRS and its membership, how distribution works at  
12          a very high level, problems that can arise and  
13          essentially what we do in relation to problems.

14          So in relation to how the PRS works, this covers  
15          actually something that I answered in a question to the  
16          Tribunal earlier, but in respect of what the PRS does,  
17          any songwriter who has interest in copyrights relating  
18          to the performing rights of their works -- and that  
19          extends to the words and the music insofar as it is  
20          a right to the performing rights that derive from  
21          that -- they are able to, and the members do, assign  
22          those rights to the PRS and then the PRS exploits them  
23          on behalf of members. So that is how it works.

24          THE CHAIRMAN: So what happens when these -- which everyone  
25          seems to be doing at the moment -- these artists then

1           sell their catalogue, monetise it to some bank or --  
2           Michael Jackson bought the Beatles catalogue, did he  
3           not -- and things like that? They are actually buying  
4           the royalty stream rather than the copyrights?

5       MR PICKFORD: Exactly. So there will be an assignment -- my  
6           understanding is that, when one of those sales takes  
7           place, the seller will be required to enter into a deed  
8           presumably or some other contract which says, "I am now  
9           going to make sure that on the PRS database all of what  
10          I am assigned gets paid to you instead", so the PRS then  
11          knows that it has to pay the new owner instead. It is  
12          dealt with, as I understand the facts, at paragraph 39  
13          of the first Arber. That is the reference for that.

14       THE CHAIRMAN: Right, so ...

15       MR PICKFORD: So that is kind of the first step, as it were,  
16           in terms of what --

17       THE CHAIRMAN: Can I ask another very basic question, which  
18           is --

19       MR PICKFORD: Yes, of course.

20       THE CHAIRMAN: So if I am a pub in Aberystwyth and I want to  
21           start a claim using the pub, how do I actually get the  
22           music, get the recordings? Do I get them from the PRS  
23           or do I just download them from the web somewhere or  
24           something?

25       MR PICKFORD: No. My understanding is that, if you are

1           a pub in Aberystwyth, then you want to -- what you would  
2           need to do is to enter into a licence with the PRS and  
3           what that will enable you to do is to play music.  
4           I will come on to the different types of licences,  
5           but --

6       THE CHAIRMAN: The PRS does not provide the recordings. You  
7           have to get the recordings somewhere --

8       MR PICKFORD: Exactly. They can source them from wherever  
9           they want, from Spotify, a CD or whatever. But insofar  
10          as they are playing them in their pub --

11       THE CHAIRMAN: Yes, of course, they need a licence.

12       MR PICKFORD: -- they need a licence. Just to tie that  
13          together, the kind of licence they will take is  
14          a blanket repertoire, like, for instance -- so they will  
15          just pay a fee and it will be a fee determined on the  
16          fact that, you know, they are a pub in Aberystwyth or  
17          whatever, and that will then entitle them to play music,  
18          and the PRS --

19       THE CHAIRMAN: The (overspeaking) -- the PRS will never know  
20          which tracks they play.

21       MR PICKFORD: They will never know exactly which tracks they  
22          will play, so again this is anticipating something I am  
23          going to come on to, but I might as well just explain it  
24          briefly now. What the PRS does is it will have Ipsos go  
25          and do surveys for it in pubs, and on the basis of those

1 surveys it will then conduct a -- some kind of analysis,  
2 whether it is statistical or probably a written  
3 analysis, in fact, against known usages of works that  
4 seem likely to be representative of the pub.

5 So what it will do is say, "Okay, we have got this  
6 statistical analysis of what happens in pubs. That  
7 seems to us to be able to be modelled quite well by  
8 a percentage of Radio 1, a percentage of Radio 2, plus  
9 a little bit of Classic FM, etc". Then they create that  
10 as the basis for then an analogy by which they then  
11 distribute the blanket licence. So they then create  
12 effectively a dataset which is hypothetical because it  
13 is not exactly what gets played; it is just their best  
14 estimate of what is likely to have been played.

15 THE CHAIRMAN: Right. So this is -- it is not a criticism  
16 of the PRS at all, but this is right at the heart of the  
17 system, perhaps a necessary but a major injustice in  
18 that the writers who actually get their music played may  
19 be recovering very little -- the pub in South Somerset  
20 may play very different music to the pub in -- well,  
21 I can assure you it does -- the pub in Aberystwyth, and  
22 the owner may have a quirky taste in, I do not know,  
23 1950s skiffle music and the authors of the -- the  
24 writers of the music may actually be really shortchanged  
25 because it is not a perfect audit, so, as you say, it is



1           an estimate.

2       MR PICKFORD:  In -- well, I certainly would not accept it is  
3           a grave injustice.  It is simply the way that the system  
4           has to happen.

5       THE CHAIRMAN:  It is -- yes.  It equates to the type of  
6           injustice, perhaps, that the claimant is complaining  
7           about in this case.

8       MR PICKFORD:  Well, maybe, but we are going to have to come  
9           on to that because actually we have quite a lot of  
10          difficulties in actually really understanding what they  
11          are saying in a number of places about what their claim  
12          really is.

13                So, yes, I got to the stage, prior to discussing  
14          those points with the Tribunal and answering their  
15          questions, about assignment of rights.  Then what the  
16          PRS does is it then collects in royalties and  
17          distributes according to the rules that everyone has  
18          signed up to.  That is how the organisation works.  It  
19          is a membership organisation.  It is run for the benefit  
20          of its members.  That is set out -- I am not going to  
21          take you to it, but that is Fishman 1, paragraphs 7  
22          to 13.  The two defendants are both controlled by  
23          boards, which comprise equal numbers, as you heard  
24          earlier, of songwriter members and publisher members,  
25          together with a smaller number, as I understand it, of

1 non-executive members as well. So that is how the PRS  
2 seeks to balance the interests of publishers on the one  
3 hand and songwriters on the other hand.

4 THE CHAIRMAN: Are the board minutes published, out of  
5 interest, or ...?

6 MR PICKFORD: Yes.

7 THE CHAIRMAN: That is what I want to --

8 MR PICKFORD: Yes. I believe the answer is "Yes".

9 THE CHAIRMAN: Okay.

10 MR PICKFORD: Now, notwithstanding that control structure,  
11 what Mr Rowntree says is, "Well, I think something is  
12 unfair here in relation to songwriters, so I am going to  
13 pit songwriters against the organisation as a whole",  
14 which actually includes songwriters, and that leads to  
15 some of the points that you were discussing with  
16 Mr Rowntree's representatives earlier on about where is  
17 the money going to come from, and I am going to come  
18 back to that issue.

19 To be clear, the point here about the oddity of this  
20 claim by one subgroup of the members organisation  
21 against the members organisation in general is not, we  
22 say, something that then takes it outside of competition  
23 law. That is not our point. We are not saying that it  
24 does not mean they could not, in principle, potentially  
25 have a case. Our point is that you have to scrutinise

1           this case particularly carefully, and that probably  
2           comes through in the legislation most clearly in terms  
3           of cost benefit analysis. But we say it also applies  
4           generally that -- because it is very unusual, the  
5           Tribunal really does need to be sure that it is  
6           a sensible thing to certify because, for reasons I am  
7           going to explain, we say this case is not sensible at  
8           all. It is going to be positively detrimental to --

9       THE CHAIRMAN: Well, there is that, but you are also saying  
10           it is strikable.

11       MR PICKFORD: Yes, there is that, exactly. So it comes --  
12           my point is it comes home particularly acutely when one  
13           is considering the cost benefit equation and whether  
14           this is really a sensible thing for anyone to be  
15           pursuing.

16           So turning then to how distribution works -- and  
17           again I have slightly anticipated some of this already  
18           in answer to a question from you, sir -- what steps are  
19           taken to effect distribution of royalties? There are  
20           essentially three ways in which the usage of works can  
21           be assessed.

22           So the first is the census basis, and that happens  
23           with, as an example, online streaming. So in that case  
24           it is unlike the pubs. In that case Spotify will  
25           provide a full record of all usage that it believes took

1           place by Spotify users.

2       THE CHAIRMAN:   Total, not sampled?

3       MR PICKFORD:   Total, not sampled, yes.   So that is one  
4           approach.   One might say that is kind of the gold  
5           standard insofar as it is proportionate to do it, but  
6           clearly it would not be proportionate to do it every  
7           time something is performed -- for instance, the pub in  
8           Aberystwyth is not going to have the resources to adopt  
9           that approach.   So that is the first basis.

10           The second basis is in fact called the "sample  
11           basis", and how that works is that, for example, a --  
12           say, a broadcaster -- in this case the example that  
13           I understand this applies to is TNT Sports -- who uses  
14           a very small and fairly repetitive repertoire may have  
15           their usage assessed on the basis of a sample.   So  
16           because they are always playing the same kind of tunes  
17           that one plays to underpin sports programming, samples  
18           are taken of their usage, but it is not done on a full  
19           census basis, so it is kind of -- it is one step removed  
20           from that.

21           Then there is the third approach, which is the one  
22           that I described for the pub, which is the analogy  
23           approach.   So that has some elements of sampling in it  
24           because, as I explained, it involves a sampling process  
25           carried out by, say, Ipsos.

1 THE CHAIRMAN: So I know this is not your evidence, but just  
2 remind me, how do the radio stations --

3 MR PICKFORD: So radio stations -- I think it depends  
4 potentially on the radio station, but the main radio  
5 station, so, for instance, say, Radio 1, Radio 3,  
6 Radio 2, even -- I am showing what I listen to -- they  
7 report on a census basis. So because they have very  
8 clear scheduling programming, they are big  
9 organisations, they know exactly what they -- at least  
10 they believe they know what they have played and they  
11 will report on a census basis, whereas obviously the  
12 kind of -- the further away you get from a business who  
13 could be expected to keep that level of detail of  
14 records, the more likely it is that you will use  
15 either --

16 THE CHAIRMAN: Some radio stations obviously have playlists.  
17 If you listen to them, they are playing the same songs  
18 quite often, and then two months later they seem to have  
19 a --

20 MR PICKFORD: Yes.

21 THE CHAIRMAN: Is that -- that is nothing to do with  
22 reporting royalties? That is just -- they have got  
23 their own reasons for doing that?

24 MR PICKFORD: To my knowledge, yes. I do not think we have  
25 any evidence about that. But my understanding is --

1           certainly if we are talking about, say, Radio 1, it will  
2           have -- the playlists will obviously influence what gets  
3           reported because, if something is on the playlist, it is  
4           going to push up the number of times it gets played, but  
5           the playlist itself is not the basis for the reporting.  
6           The reporting is based on the census.

7       THE CHAIRMAN:   Yes.

8       PROFESSOR ULPH:  Can I just ask, over what period of time is  
9           this sampling taking place?  Is it every single week or  
10          three months or ...?  How is it actually done in terms  
11          of the distribution over time because it could be some  
12          songs that are very popular at one time in the year and  
13          then people get bored with them and new ones emerge, so  
14          what is the timing sequence?

15       MR PICKFORD:   So if it is sampling, I would have to take  
16           instructions.  I am afraid I do not know the answer.  
17           The broad overview of what I have explained is set out  
18           in Mr Arber's statement at paragraph 12.

19       THE CHAIRMAN:   Yes, yes, it is.  Yes.

20       MR PICKFORD:   There are some bits -- for instance, how  
21           analogy works, I have just been explaining because that  
22           is how it has been explained to me and I thought it  
23           would be helpful to answer the question, but that level  
24           of detail is not there.

25           So the first point to make, therefore, about those

1           three different methods is that, although in the  
2           sampling and analogy approaches there is some estimation  
3           going on, that is a deliberate approach to the licensing  
4           of the music. It does not represent a mistake. It is  
5           not like there is a data problem.

6           So our understanding, at least, is that Mr Rowntree  
7           is not seeking to make any claim in respect of those --  
8           the application of those methods at all. What he is  
9           concerned with is when there is some sort of data error  
10          that is not what anyone in the --

11       THE CHAIRMAN: No, I understand (overspeaking).

12       MR PICKFORD: -- but comes along. So the next point of  
13          background to explain -- it is dealt with in Mr Arber's  
14          statement again at 14 to 17 but I am just going to give  
15          you an overview -- is the two main different types of  
16          licensing, and this corresponds to some degree to  
17          a point I have just been making.

18          So there is repertoire-specific licensing, that is  
19          type A, and that is where the payment obligation in the  
20          licence is by reference to specific usage of repertoire.  
21          The core -- indeed my understanding, basically, the  
22          only, at least, main examples of repertoire licensing  
23          are the licences for the Spotifys and the Apples of this  
24          world, so they actually pay by reference to the  
25          particular things that were played. I am going to

1 explain some things because I can tell this might -- you  
2 might be thinking, "What about BBC radio?".

3 THE CHAIRMAN: Or seeing movies, really. If you are getting  
4 a soundtrack for a film and you want to play ten  
5 well-known songs on your film, could that be  
6 repertoire-specific?

7 MR PICKFORD: Well, I am afraid I do not know the  
8 specific -- as to whether that is repertoire-specific or  
9 not. I would have to take instructions. Certainly in  
10 terms of the main royalties, my understanding is the  
11 core repertoire-specific one -- by which I mean that the  
12 payment obligation can be variable. You do not know  
13 whether it is going to be in advance. You get your  
14 licence and then you say, "Okay, I am going to pay you  
15 for everything that I then license", and then you report  
16 and then you see what in fact you played and then you  
17 work out what you owe. That is --

18 THE CHAIRMAN: I understand. I understand. Yes, yes.

19 MR PICKFORD: The alternative, which in fact covers pretty  
20 well all other licensing, is blanket repertoire  
21 licensing, and that can cover both the pub example that  
22 I gave, where in fact it is a blanket licence and no one  
23 actually knows specifically what the pub played, or it  
24 can also cover the BBC Radio 1 example, where there is  
25 a blanket licence under which there is a set fee for the



1           period of the licence and the BBC would be allowed to  
2           play whatever they liked in return for the money that  
3           they have paid under the licence, but then they still  
4           account -- they provide data on a census basis so the  
5           PRS knows what to do in terms of trying to then pay PRS  
6           members.

7       THE CHAIRMAN: I see. Okay.

8       MR PICKFORD: So --

9       THE CHAIRMAN: It is really a complicated industry, yes.

10      MR PICKFORD: Yes. It is all set out in Mr Arber's  
11      evidence, as I said, particularly that bit, 14 to 17.

12           So then the final point to cover on this aspect of  
13      background -- there are some more aspects to come, but  
14      in terms of the very basics of how the system works,  
15      when it is working, in order to trace through from  
16      usage, which I have been talking about, to payment,  
17      there are three steps that have to be gone through, so  
18      again set out by Mr Arber at 25 and following of his  
19      evidence, but I am going to just summarise it for you  
20      now.

21           So the first step is that royalties attach to works.  
22      That is the unit in respect of which the copyright  
23      resides. So the first stage in the payment chain is  
24      that you need to identify what the work is that is  
25      associated with the usage for which the PRS is

1 reasonably assigned(?). So in the example that I was  
2 giving of, say, Spotify, Spotify will provide  
3 information about the works that it believes it has  
4 played and then what the PRS will do, it will seek to  
5 match up those -- that data about those works with what  
6 it understands to be the works where it represents the  
7 parties that have assigned copyright to it.

8 So step one is that you need to match a work. That  
9 is fundamental because, without that, you cannot really  
10 do anything. You are going to have to match it in  
11 actuality or you have to have at least a view on what  
12 work it was likely to have been; see pubs.

13 PROFESSOR ULPH: So can I just be clear? If you have a song  
14 that is performed by many different singers --

15 MR PICKFORD: I am sorry, there was a slight cough and I did  
16 not actually catch that.

17 PROFESSOR ULPH: If you have a song that might be performed  
18 by many different singers, so there are many different  
19 instances that that same song could be recorded or  
20 played -- so what you are trying to do is to match not  
21 the particular performance; you are trying to go back to  
22 the original song and say, "Despite the fact that this  
23 time it was Jolly Blaster(?) singing it and this time it  
24 was somebody else, it is still the same song". So that  
25 is what you are trying to do. You are trying to match

1           the work according to the --

2       MR PICKFORD:   (Overspeaking) So I think -- and I am going to  
3           just turn around and seek some instructions and make  
4           sure I am right about this -- I think that a different  
5           recording is capable of being a different work.

6       THE CHAIRMAN:  Different mechanical rights, but it will be  
7           the same lyrics and music so you will have a complex --  
8           you will have the same --

9       MR PICKFORD:  Exactly.  So it may be that it is -- so --

10      THE CHAIRMAN:  You will have the same composer, you will  
11           have the same lyricist, and they should all track back,  
12           but there will be different recordings.

13      MR PICKFORD:  Yes, so I think that -- that accords with my  
14           understanding.  It gets potentially quite complicated,  
15           but that is -- I was turning round looking for some  
16           reassurance that I got that right and --

17      THE CHAIRMAN:  Everyone is ignoring you!

18      MR PICKFORD:  -- everyone is turning round to get some  
19           reassurance!  There is a guy outside, actually.  (Pause)  
20           Thank you.  So I think actually, Professor Ulph, you  
21           might have been slightly closer to the truth than I was,  
22           but I think the Chair was still right, which is that, as  
23           far as the PRS is concerned, because the PRS is dealing  
24           with the intellectual property that relates to the  
25           writer, it does not deal with the intellectual property

1 relating to the performer. The PRS' approach is  
2 works-based in the way that you described. That does  
3 not, however, represent the entire picture in relation  
4 to intellectual property because of course the performer  
5 may vary and they will have their own rights, but they  
6 are not being collected by the PRS. They will be  
7 collected by another organisation.

8 PROFESSOR ULPH: I just wanted to understand what you meant  
9 by "matching the work" --

10 MR PICKFORD: Yes.

11 PROFESSOR ULPH: -- if I have understood that right.

12 MR PICKFORD: Yes, thank you.

13 Yes. So I think I have addressed the first stage,  
14 which is the works matching, albeit it is, as everything  
15 here, not necessarily as simple as it first seems.

16 The second stage is that, once you have identified  
17 a work that you have matched to some usage, you then  
18 need to look at the royalty shares that are attributed  
19 for that work. So whenever a work is registered with  
20 the PRS -- and again Mr Arber explains this -- there is  
21 an obligation on the publisher, if it is a published  
22 work, to register the shares, who owns what. They are  
23 not allowed to just register their own shares. They are  
24 obliged under the rules to register both themselves and  
25 the songwriters. So assuming that that data is good,

1           then the next stage -- you judge by the work. You then  
2           see who is entitled to be paid in respect of it. Then  
3           the third stage is payment, so then someone actually has  
4           to have money put into their bank account.

5           All of those three stages have to be ones where you  
6           can trace through and it works, and if you get a data  
7           error in any of those three stages, then you potentially  
8           have some royalties that have not gone to the true  
9           person in respect of whom they should have if the system  
10          was perfect.

11          So that is -- and in my submission --

12       PROFESSOR ULPH: Can I just ask you about the question that  
13       was raised earlier? So if a publisher has agreed that  
14       they will share some of their royalties with  
15       songwriters, PRS would know that or would they just  
16       leave that for the publishers to handle?

17       MR PICKFORD: So what PRS will know is the shares that the  
18       publisher has agreed to be recorded with the songwriter  
19       in the PRS system, and in addition to that, above and  
20       beyond that, it is possible -- and that is one of the  
21       points that we make about the conflicts -- it is  
22       possible -- and indeed in many cases it happens -- that  
23       the publisher would have a separate agreement where it  
24       says, "Okay, well, I am entitled to 50% or 40% or  
25       whatever it is under the arrangements that we have put

1 in place with the PRS, but, actually, for this  
2 particular song or for this group or whatever, I am  
3 actually going to give you back a further 30% because of  
4 a side deal that we have done", and the PRS will not  
5 know about that. The PRS will only know about the bits  
6 that are required to be put on its system.

7 THE CHAIRMAN: There was a discussion earlier about the  
8 50/50. That is the maximum, I think, that the  
9 publishers are allowed to --

10 MR PICKFORD: That is exactly right. That is the maximum.  
11 So the publisher cannot give itself 51% but it can  
12 certainly record 51% for the songwriter.

13 THE CHAIRMAN: That does happen, does it, as a practical  
14 matter in the PRS, so the publishers are not all 50/50,  
15 50/50?

16 MR PICKFORD: No. My understanding, and indeed Mr Arber's  
17 evidence is there is a sample(?) agreement which has 50%  
18 shares in it, so it is obviously -- I think it is  
19 probably quite likely that many agreements will have 50%  
20 in them --

21 THE CHAIRMAN: Do we have any evidence as to what the range  
22 is?

23 MR PICKFORD: Yes. Well, we have got -- what we have got,  
24 of course, is the table that I showed you that shows how  
25 the distribution made by PRS breaks down between the

1           songwriters --

2       THE CHAIRMAN:   You can infer it from that, but not  
3           necessarily because you may -- I do not know.   Can you  
4           infer it from that?

5       MR PICKFORD:   Well, what one can infer from -- I do not  
6           think you could infer necessarily the exact split across  
7           all agreements, but what one can see is that, in terms  
8           of the way that it is approached by the PRS, 50%, pretty  
9           well on average, goes to songwriters and 30% on average  
10          goes to publishers and then 20% goes outside the system  
11          to others, other societies.

12       THE CHAIRMAN:   Sorry, say that again.

13       MR PICKFORD:   So I showed you annex 1, and what that showed  
14           is for a typical year there was a -- let us call it  
15           £700 million that was distributed in royalties by PRS  
16           and 50% of those royalties went to songwriters  
17           and 30% --

18       THE CHAIRMAN:   30% go to publishers.   What about the other  
19           20%?

20       MR PICKFORD:   20% gets remitted to other equivalent  
21           organisations to the PRS in other countries.

22       THE CHAIRMAN:   In other -- to match the royalties with  
23           the --

24       MR PICKFORD:   Yes.

25       THE CHAIRMAN:   Okay.

1 MR PICKFORD: Now --

2 THE CHAIRMAN: But why is 50% going to songwriters? Are  
3 a lot of those songwriters registered with other  
4 collecting societies overseas? So if it is a US --  
5 a lot of music is going to be from the US, one could  
6 imagine, so what happens with all those writers? There  
7 must be money -- I see, going to those collecting  
8 societies and then they get distributed to the -- but  
9 I do not know why -- if 50% is going to the writers, is  
10 that just the way it works out by happenstance?

11 MR PICKFORD: Well, I think it reflects that more  
12 ultimately, under the systems that PRS, just -- under  
13 the systems that PRS has for distribution currently, it  
14 is approximately -- and it is approximately -- in some  
15 years it was actually slightly less than 50%, but  
16 approximately --

17 THE CHAIRMAN: Yes.

18 MR KELLY: I think that -- that is the picture of the total  
19 disbursements, and that includes disbursements, payment  
20 of royalties by the PRS that come in from international  
21 sources which might just be the writer's share, so you  
22 cannot really infer anything about the net -- the  
23 average share or the type of royalties that you have  
24 been talking about, whether it is a 50/50 split, because  
25 the total receipts to PRS include international payments



1           which just relate to writer shares.

2       MR PICKFORD: Well, I think you can infer this, which is  
3           that the complaint is, "Well, the way that you  
4           distribute ultimately favours publishers because ..." --

5       THE CHAIRMAN: I think there is another point floating  
6           about. We have not got the claimant's note yet. The  
7           claimant seems to start off on the hypothesis that the  
8           division between publishers and writers is 50/50, and  
9           then, if in the data you can see a disturbance of that  
10          ratio, that can be attributed to the -- a problem with  
11          the Black Box distribution. We have not seen the note  
12          yet, but that seems ...

13                So the basis -- so I am not talking about annex A.  
14       I am talking about the hypothesis that 50% goes to -- it  
15       is not the hypothesis -- the suggestion that only 50%  
16       can go to publishers and 50% to writers.

17                Is that in fact what happens or is that just --  
18       well, you are shaking your head, but where is the  
19       evidence on that?

20       MR PICKFORD: Well, so --

21       THE CHAIRMAN: It is not very satisfactory for us to have  
22           a no score draw on that. It would actually be quite  
23           nice to know the answer.

24       MR PICKFORD: Yes. So I think I can probably give you some  
25           references to specific paragraphs of Mr Arber's

1 statement, which my very learned junior is going to  
2 supply with me very shortly.

3 THE CHAIRMAN: Is Mr Arber in court?

4 MR PICKFORD: He is not. He was on a livestream, if we are  
5 still on a livestream.

6 THE CHAIRMAN: It does not matter.

7 MR PICKFORD: But he is not in court.

8 THE CHAIRMAN: But he is contactable overnight?

9 MR PICKFORD: Yes, he is contactable overnight. Yes.

10 MR KELLY: There is a simple point, that if your net  
11 disbursement was, let us say, 50/50 and you assume that  
12 the incoming royalties include a large amount of  
13 writer-only royalties, the net output -- if there was  
14 a 50/50 distribution of royalties where it is a 50/50  
15 share, then there is a greater share of Black Box  
16 revenues going to publishers and not songwriters?

17 MR PICKFORD: Sorry, the premise for that was if ...?

18 MR KELLY: If there is a significant amount of royalties  
19 coming into the PRS which are writer-specific royalties,  
20 so from, say, let us say, Spotify -- if those are --  
21 publishers pay separately, and let us say you have total  
22 revenues of 150, 50 coming from Spotify, those are  
23 purely for writers, you then have 100, say, in the UK  
24 under publisher agreements which gets to the 50/50, you  
25 would expect to see 75 going to writers and 50 going to

1 publishers. If you actually see 50/50, then that  
2 implies automatically that the publishers are getting  
3 a disproportionate amount of Black Box revenues.

4 MR PICKFORD: Yes, although my -- well, there are two  
5 answers to that. One is this seems to be based on a new  
6 case, as of this afternoon, that we are going to be  
7 receiving this afternoon, and, you know, I cannot really  
8 respond very effectively to that. I am really doing my  
9 best as it is, but I have not taken instructions on any  
10 of that.

11 Secondly, I think if the complaint -- because  
12 I understand at least part of the complaint or at least  
13 I did until the potential reworking of the claim this  
14 afternoon -- was that the unallocated royalties get  
15 split by reference to what we do know, the matched  
16 royalties that is currently used by the PRS -- that  
17 seems to be at the heart, I understood, of the  
18 complaint -- well, we know that the split that is  
19 currently used favours songwriters, at least in the  
20 sense that songwriters are getting 50% relative to the  
21 30% that goes -- that go to publishers. So if we were  
22 to introduce a new system where it went 50 -- where we  
23 said, "Okay, well, we ..." -- so if ...

24 So it is very hard for -- I think certainly for me  
25 to understand that, if currently that is how ultimately

1           these royalties are being allocated, ie 50% to writers,  
2           30% to songwriters, how the PRS -- sorry, how  
3           Mr Rowntree can come along and say, "Okay, well, I have  
4           got a new methodology. The new methodology is that it  
5           is just a 50/50 split".

6   THE CHAIRMAN: Okay. Sorry, until we have seen Mr --  
7           I think, it is so easy for us all to get at  
8           cross-purposes because there are so many variables and  
9           the language you use I think is necessarily not always  
10          making clear what the various findings are. So we will  
11          see Mr Rowntree's note overnight, if you are able to  
12          deal with it tomorrow, and --

13   MR PICKFORD: Yes.

14   THE CHAIRMAN: -- then we can perhaps revisit this. But  
15          I think in the meantime it would be useful at least for  
16          you to take further instructions as to this 50/50 point.

17   MR PICKFORD: Yes.

18   THE CHAIRMAN: So leaving aside the royalties coming in from  
19          overseas, where we understand there may be bias towards  
20          writers; just royalties coming in from the UK. Is it  
21          a 50/50 split or not? Is it very variable?

22   MR PICKFORD: Yes. So the reference is paragraph -- it is  
23          27 and, in particular, 32 of Mr Arber's first statement.

24   THE CHAIRMAN: Just give me the reference?

25   MR PICKFORD: Yes, of course. Sorry, yes. Bundle B,

1           tab 34, and then --

2       THE CHAIRMAN: Hold on. (Pause)

3           {B/34/9}, tab 34.

4       MR PICKFORD: Yes.

5       THE CHAIRMAN: Sorry, which paragraph?

6       MR PICKFORD: So paragraph 27 is the paragraph that deals

7           with the evidence that I referred to, that there is

8           a standard agreement for the industry which would be

9           a 50/50 split. Now, implicit in that is that that is

10          not a requirement; it is just a --

11       THE CHAIRMAN: (Overspeaking) Yes, I understand that.

12       MR PICKFORD: Then at 32 {B/34/10}, there is the explanation

13          that PRS does not accept works registrations that seek

14          to allocate more than 50% of the performing right share

15          to the publisher.

16       THE CHAIRMAN: Sorry, 32?

17       MR PICKFORD: 32, the final sentence of 32, that says that

18          the publisher cannot --

19       THE CHAIRMAN: Yes. That is the same point, though.

20       MR PICKFORD: Yes. But implicit in that is that they can

21          allocate more than that to the songwriter.

22       THE CHAIRMAN: They can, but what in practice happens? That

23          is what we are after.

24       MR PICKFORD: I will happily seek instructions on that.

25       THE CHAIRMAN: Then the other thing we need you to get

1 instructions on is what the median or mean payments to  
2 writers is Black Box royalties. I hesitate, I do not  
3 know if -- I think the Black Box can get divided  
4 a little bit. I am not quite sure what -- we can find  
5 out the definition of that, but undistributed royalties,  
6 what percentage. Now, how much does that mean to  
7 a writer?

8 MR PICKFORD: So can I give you a two-minute response --

9 THE CHAIRMAN: Yes, of course. If you can answer now, even  
10 better.

11 MR PICKFORD: -- to manage the expectations of what I can  
12 and cannot provide?

13 So there is a divergence here between the way  
14 Mr Rowntree looks at the world and the way the PRS looks  
15 at the world. We believe that we can estimate for the  
16 repertoire-specific MTOL licences a figure that seems to  
17 roughly accord with what Mr Rowntree thinks of as Black  
18 Box because of the way in which that reporting -- that  
19 happens, and the fact that there will be a certain  
20 proportion that we just know we cannot match up.

21 Indeed, I can --

22 THE CHAIRMAN: So this is all census material, is it?

23 MR PICKFORD: That is census, yes, but specifically it is  
24 where the licence is based on the value of the licence.  
25 What is paid under the licence is based on what was

1           actually paid. So that is Spotify and Apple and other  
2           streaming services, and basically just them.

3           Now, we can give you an estimate that broadly  
4           corresponds to what Mr Rowntree is calling Black Box for  
5           that. That accounts for about one-third of royalties;  
6           and for the whole period of the claim, that is in the  
7           order of about £10 million for the six years that are  
8           being claimed for.

9       THE CHAIRMAN: So £10 million --

10      MR PICKFORD: £10 million.

11      THE CHAIRMAN: -- is the Black Box figure?

12      MR PICKFORD: Sorry, to be clear. 10 million -- I beg your  
13           pardon -- is the total amount that went to publishers  
14           and, therefore, must be an absolute bound on the claim,  
15           because Mr Rowntree, at least not any longer, is  
16           suggesting that publishers should not get anything.

17      THE CHAIRMAN: Over what period?

18      MR PICKFORD: Over the six years of the claim, between --  
19           sorry, it is actually a seven-year period, sorry -- from  
20           2017, March 2017, which is when Mr Rowntree came to us.

21      THE CHAIRMAN: So that third of your total income is from  
22           these MTOLs?

23      MR PICKFORD: Yes.

24      THE CHAIRMAN: Right. Then you would be able to --

25      MR PICKFORD: So that is the bit that --

1 THE CHAIRMAN: Then from that, you can tell us what the mean  
2 or the median is for songwriters and what the range is,  
3 presumably.

4 MR PICKFORD: I can certainly tell you what the mean is.  
5 The mean is about £66 per songwriter, if there are 160  
6 songwriters. I am not sure I could do better in terms  
7 of -- I think ranges, no.

8 THE CHAIRMAN: Well, it is -- whether the mean is  
9 representative or the median. The median is probably  
10 a better figure, because there will be a couple of  
11 people who drag them(?). But it may not matter.

12 MR PICKFORD: I do not think we could give you a median  
13 because what we have done -- that is at a high level  
14 which simply says, "Okay, what is the total pot here and  
15 how many people are there?", and -- (overspeaking)

16 THE CHAIRMAN: That is £66 over seven years.

17 MR PICKFORD: Yes, over seven years, so less than £10 per  
18 year. Now, the second part --

19 THE CHAIRMAN: That is not uncommon in class actions. That  
20 does not mean --

21 MR PICKFORD: No. The second part of the equation, which  
22 is, "What about all the other blanket licences?",  
23 that I --

24 THE CHAIRMAN: That is the remainder 70%?

25 MR PICKFORD: Yes, that is the remainder 70%; probably a bit



1       less than 70% but that order of magnitude. We cannot  
2       really give a very sensible view on that figure because  
3       it is not how the PRS approaches matters because, in  
4       relation to a blanket licence, what it typically does is  
5       there is an amount that it gets paid and then it simply  
6       distributes that over its known usage and it does not  
7       record what might have been distributed had only it had  
8       more information because there is the invisible --  
9       (overspeaking).

10      THE CHAIRMAN: There is no such thing as a Black Box ...?

11      MR PICKFORD: There is no such thing as a known Black Box or  
12       what could ever be a known Black Box amount because in  
13       that context the way that the PRS operates is --  
14       I accept there will be some works that are effectively  
15       invisible in that distribution. If there is some  
16       problem in the registration somewhere --

17      THE CHAIRMAN: I thought that what I was putting to you --  
18       you were necessarily sensitive about my language  
19       earlier, but the point I was putting to you is that  
20       there is necessarily rough justice across this 70%  
21       because you are not matching a song to -- you are not  
22       matching a song to a composer -- you are just not -- or  
23       to a recording artist or whatever, so the system is  
24       necessarily rough and ready, at least for that 70%.  
25       That is not a criticism; it is just -- it is the way it

1           is done. It is just the way it is done.

2       MR PICKFORD: It is certainly necessarily approximate,  
3           I think. Of course, there is census data for things  
4           like Radio 1, but what gets -- if something gets  
5           missed --

6       THE CHAIRMAN: So the census data is falling in the -- you  
7           have got some census data --

8       MR PICKFORD: There is some census data in both types of  
9           licence.

10      THE CHAIRMAN: Well, the other type is all census data.

11      MR PICKFORD: Yes.

12      THE CHAIRMAN: Okay, so you have some census data.

13      MR PICKFORD: Yes. But the point is, even where there is  
14           census data there, so it is probably about as good as it  
15           is going to get, let us say that there is a 5% error  
16           rate.

17      THE CHAIRMAN: On the census data, in the 70%.

18      MR PICKFORD: On the census data, in the 70%. I am just  
19           plucking through data to explain the point.

20           As I understand it, we do not say: okay, well, we  
21           are nominally going to allocate anything to that part  
22           where there is a data error. It is simply not recorded.  
23           All that happens is that the PRS just takes the songs  
24           that it knows about, which for the purposes of  
25           assumption is 95% accurate, but it is 5% inaccurate, and

1           just takes the blanket licence and then spreads the  
2           blanket licence over the usage of the works that it  
3           knows about.

4           So we do not have the data that we do, in the same  
5           way that I was able to give you a 10 million figure for  
6           repertoire-specific licensing, so --

7   THE CHAIRMAN: Right. So this is where one might level  
8           a criticism. You say that you have got a 5% -- we are  
9           using that, I appreciate, as an example -- you have got  
10          5% of songs that are unallocated, and they are not  
11          seeing their fair share of the blanket royalties, and  
12          they are not getting an approximate compensation for it  
13          either.

14   MR PICKFORD: No, because they are, in effect, invisible,  
15          and the claim against us is --

16   THE CHAIRMAN: They are no more invisible than the people in  
17          the other category, the MTOL category. You have got  
18          a census, so you have got Radio 1 saying -- I mean,  
19          Radio 1 may have a blanket licence, I think --

20   MR PICKFORD: Yes, it does.

21   THE CHAIRMAN: They are feeding back information. They  
22          say -- they give you a name and there are two  
23          possibilities: one is that it is nonsense and one is  
24          that you can identify the publisher but you cannot  
25          identify the composer. So perhaps we need to think

1           about both of those eventualities. But in those  
2           circumstances you do not have any extra revenue to  
3           allocate. You are just allocating the revenue. So,  
4           sorry, with the MTOLs -- I realise I am not  
5           understanding this -- but for the MTOL, are you being  
6           paid per track?

7       MR PICKFORD: Yes. We are being paid per play, as  
8           I understand it.

9       THE CHAIRMAN: Per play. So then, when you get an error,  
10           you go, "I have got 5 quid here, I do not want to give  
11           it to you"?

12       MR PICKFORD: (Overspeaking) Exactly, exactly.

13       THE CHAIRMAN: But with the other, because the licences are  
14           not structured --

15       MR PICKFORD: Exactly.

16       THE CHAIRMAN: -- you do not really think in those terms.

17       MR PICKFORD: Exactly. So that is why I am able to answer  
18           your question, roughly speaking, for MTOL, precisely  
19           because there is £5 and then it is like, "Oh, but we do  
20           not know what that is".

21       THE CHAIRMAN: But where is the best explanation of that  
22           last bit in your evidence? I am not saying it is not  
23           there. I am just --

24       MR PICKFORD: So probably Mr Arber's statement at  
25           paragraphs 70 and 71 for non-MTOL.

1 THE CHAIRMAN: In his first statement?

2 MR PICKFORD: In his first statement, yes.

3 THE CHAIRMAN: Sorry, I have read all of this quite

4 carefully, but my head was spinning a little bit by the

5 time -- and I now know why. Okay.

6 MR PICKFORD: So I have asked(?) a lot of questions.

7 THE CHAIRMAN: So really, I will re-read from 65.

8 MR PICKFORD: Yes. So the key bits for the non-MTOL are 71

9 through to 72.1, and it is actually just two paragraphs

10 that gets to the nub of it there. Then for MTOL --

11 THE CHAIRMAN: It is really -- I mean, I will re-read,

12 I think, 65 to the end, yes.

13 MR PICKFORD: Thank you.

14 THE CHAIRMAN: Yes.

15 MR PICKFORD: If that is a convenient moment?

16 THE CHAIRMAN: Yes, it is.

17 (Pause)

18 Housekeeping

19 THE CHAIRMAN: How are we doing on time generally?

20 MR PICKFORD: I have not made as much progress as I had

21 hoped, to be totally honest, in terms of getting through

22 my notes, but I have obviously been trying to assist as

23 best as I can.

24 THE CHAIRMAN: It is not your fault. Shall we start at

25 10 o'clock tomorrow?

1 MR PICKFORD: That would be great. Thank you.

2 THE CHAIRMAN: Let us do that.

3 (Pause)

4 (4.33 pm)

5 (The hearing adjourned until 10.00 am on Thursday,

6 13 February 2025)

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