

18th September 2009

CT 91/05, 92/05 and 93/05



IN THE MATTER OF REFERENCES UNDER SECTIONS 128A AND 128B OF THE
COPYRIGHT, DESIGNS AND PATENTS ACT 1988

CT 92/05: TARIFF 110 – PUBLIC HOUSES, RESTAURANTS AND CAFES

CT 91/05: TARIFF 111 – SHOPS AND STORES

CT 93/05: TARIFF 112 – FACTORIES AND OFFICES

Before: Henry Carr QC (Deputy Chairman)
Jeffrey Manton JP
Roger Field

BETWEEN


PHONOGRAPHIC PERFORMANCE LIMITED


and

THE BRITISH HOSPITALITY ASSOCIATION, THE BRITISH RETAIL
CONSORTIUM AND OTHER INTERESTED PARTIES

INTERIM DECISION

This is an Interim Decision of the Tribunal, and a further Decision will be made as to the form of order consequent on this Decision, if this cannot be agreed by the parties. This Interim Decision is confidential to Counsel and Solicitors, but a copy may be shown, in confidence, to the parties provided that neither the Decision nor its substance is disclosed to any other person or used in the public domain, and no action is taken (other than internally) in response to the Decision, until further direction by the Tribunal.


J. MANTON JP.
15/10/2009


HENRY CARR QC
15/10/2009
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R. Field
15/10/2009

A Introduction

1. These References concern the licensing schemes operated by Phonographic Performance Limited (“PPL”) for the public performance of sound recordings as background music in public houses, bars, restaurants and cafes, shops and stores, and offices and factories. These licensing schemes, respectively termed Tariff 110, Tariff 111 and Tariff 112 (collectively “the New Tariffs”) came partially into force on the 1st January 2005 and fully into force on the 1st January 2006. These are the first references concerning the Copyright Tribunal’s jurisdiction under Section 128A and B of the Copyright, Designs and Patents Act 1988 (“the 1988 Act”).

B The parties

PPL

2. PPL is a non-profit making collecting society. Its members include record companies trading in the UK that are willing to grant copyright licences in respect of certain uses of sound recordings in the UK. Included in PPL’s rights is the right under Section 16(1)(c) and 19(3) of the 1988 Act to play sound recordings in public. PPL licenses the playing in public of such sound recordings, and the copying of sound recordings where those copies are used to play sound recordings in public. After deducting its administrative expenses, PPL distributes the licence fees between the record companies and performers whose sound recordings and performances have been exploited by the copyright users. The record companies are of many different sizes and PPL’s repertoire includes the vast majority of sound recordings commercially available in the United Kingdom.
3. PPL acts on behalf of many thousands of performers and record companies. PPL emphasises that these proceedings are not simply about the entitlement to royalties of record companies. As Kitchin J noted in a Judgment¹ concerning the scope of the Tribunal’s jurisdiction on these References (“the Jurisdiction Judgment”) these proceedings also concern the financial entitlement of performers, many of whom are on modest means, and for whom royalties are a vital part of their professional income. At the time of the Jurisdiction Judgment, PPL acted on behalf of about 47,000 performers and 3,500 record companies. Updated information provided by PPL indicates that 938 new record companies joined in 2008, many of whom are small artist owned labels.
4. The organisations which object to the New Tariffs and which were represented before us (“the Interested Parties”) stress that PPL essentially exercises a *de facto* monopoly over the public performance of sound recordings in the United Kingdom. They point to the following passage in the Decision of the Copyright Tribunal in *BPI et al v MCPS et al*²
“45...The position is essentially this: the collecting societies have been accorded statutory (and indeed international) recognition in order to advance the proprietary (that is basically the financial) interests of the right holders who comprise their

¹ Phonographic Performance Ltd. v The British Hospitality Association and other Interested Parties [2008] EWHC 2715 (Ch)

² 19th July 2007 CT84-90/05

membership. But the effects of that responsibility may sometimes have to be tempered. An important purpose of the Tribunal (and indeed of its counterparts elsewhere) is therefore to curb any tendency to unwarranted gain as a result of the de facto monopoly position in which the collecting societies find themselves."

5. This is a principle that we have borne in mind. However, it should also be noted that the *de facto* monopolies operated by the collecting societies (including PPL) work in the public interest, as well as in the interests of the right holders, provided that they are reasonably and fairly exercised. Commercial organisations that wish to play sound recordings in public are not required to negotiate separately with each copyright owner. Instead, they are able to go to one body and obtain a licence to perform a very large repertoire of sound recordings in public.
6. The Copyright Tribunal in *BPI v MCPS* stated, also at paragraph 45:

"Overall however, the Tribunal's job as we see it is to favour neither side. It is to maintain a balance between copyright owners and users."

This is the approach that we have sought to adopt in this Decision.

The Interested Parties

7. At paragraph 3 of the Jurisdiction Judgment, Kitchin J described the Interested Parties as follows:
"The British Hospitality Association is the representative body for those owning and operating hotels, restaurants and cafes. Its members include 9,000 hotels, 11,000 restaurants and 18,000 contract catering outlets, employing over 500,000 people. The British Beer and Pub Association is the representative body for the beer and pub sector. It represents more than half of the 58,000 pub and bars owners in the UK, which together account for 98% of all beer brewed in the UK. The Eversheds Consortium consists of 17 music users, representative bodies and background music suppliers. They include two of the biggest UK retailers, ASDA and the Arcadia group, significant industry bodies such as the British Retail Consortium, the Association of Convenience Stores and the Music Users' Council and the vast majority of the specialist background music providers in the UK."
8. PPL emphasises that the Interested Parties include some of the most profitable and successful commercial ventures in the United Kingdom. This is true. However, the Interested Parties also include many small enterprises such as pubs, restaurants, cafes and shops, all of whom are affected by the New Tariffs.
9. Factories and offices were not represented before the Tribunal, and no formal opposition was received to the new Factories and Offices scheme. In their representations dated 9th March 2006, Eversheds observed that this may be due in part to the fact that there is no representative organisation which could respond on behalf of this category of users. At the hearing before us the parties were agreed that we should treat the Factories and Offices scheme under Tariff 112 in the same way, and subject to the same principles, as Tariffs 110 and 111.

10. In addition, the Tribunal has received written representations from a number of other representative bodies of users of copyright sound recordings, which support the position of the Interested Parties. By way of example, the Booksellers Association complains about "*the level of swingeing increases*" for those of its members that play background music in shops. Similarly, the HTA, a trade association for the UK garden industry which represents over 2,500 garden centres and shops, complains about what it describes as "*the disproportionate nature of PPL proposals and unjustified increase in licence fees.*"
11. Overall, a very large number of businesses from many different industry sectors have seen fit to complain about the New Tariffs promulgated by PPL.

C The Statutory Background

12. Until 2003, PPL was not able to license all public performances of its sound recordings. In particular, Section 72 of the 1988 Act stipulated that it was not an infringement of the copyright in a sound recording to play a broadcast sound recording in public (that is a sound recording contained in a broadcast). So PPL was able to license the public performance of sound recordings if the copyright user played records, tapes and CDs, but not if the copyright user played sound recordings via the radio or television. This was an unjustifiable anomaly, since under the Copyright Act 1956 and the 1988 Act commercial entities had always been required to obtain licences from the owners of the copyright in the musical works featured in broadcast sound recordings and had paid the copyright owner for licences through PRS in respect of the broadcast of such musical works.
13. On 31st October 2003, Section 72 was amended, pursuant to the Copyright and Related Rights Regulations 2003³. In summary, those Regulations made the public performance of broadcast sound recordings by commercial entities a restricted act requiring a licence. Such broadcast sound recordings are defined as "excepted sound recordings" (being "excepted" from the former free use right). This change in the law was accompanied by the introduction of the new jurisdiction of the Copyright Tribunal under sections 128A and 128B of the 1988 Act.
14. The starting point for our enquiry is 128B(1) which provides that:

"The Copyright Tribunal may make appropriate enquiries to establish whether a licence or licensing scheme referred to it by the Secretary of State under Section 128A(4)(a) or (5) is reasonable in the circumstances."
15. The reference to the making of "*appropriate enquiries*" indicates that the Tribunal is to act as an investigatory rather than an adjudicatory body. This is a role which the Tribunal has not performed in the past, and which it is ill-equipped ever to perform. Kitchin J explained the purpose of this provision, and the difficulties which it creates, in the Jurisdiction Judgment⁴:

³ S.I. No. 2498

⁴ Fn. 1 *supra*

“10. Clearly the intention of the Government was to create a procedure which would minimise costs for users. Schemes are subject to consideration by the Secretary of State and then, where appropriate, investigation by the Tribunal with the result that users need not be party to the proceedings and so can avoid the risk of being liable for costs in the event of an unsuccessful challenge. In practice, however, it has created such difficulties that UKIPO considers the sections should be repealed. One such difficulty is that the Tribunal itself does not consider it has the appropriate remit or resources to cope with the procedure. Another is that the two track nature of the Tribunal’s jurisdiction is overly complicated.”

16. In the present case we have had the benefit of numerous written representations and skeleton arguments from the parties, as well as oral submissions. This is clearly not a case where the Tribunal has been required to make its own investigations in the absence of assistance from the parties. Whilst, of course, we take into account the position of those parties who have made representations but have not appeared before us, and of factories and offices, otherwise we are satisfied that our duty to make appropriate enquires in the present case is fulfilled by considering the information that the parties have put before us.

17. Section 128B(2) provides as follows:

“When considering the matter referred, and after concluding any such enquiries, the Tribunal shall take into account -

(a) whether the terms and conditions of the proposed licence or licensing scheme have taken into account the factors set out in section 128A(7); and

(b) any other factors it considers relevant.

and shall then make an order under subsection 3.”

18. The factors set out in section 128A(7) are as follows:

“(a) the extent to which the broadcasts to be shown or played by a potential licensee in circumstances mentioned in subsection (1) are likely to include excepted sound recordings;

(b) the size and nature of the audience that a licence or licensing scheme would permit to hear the excepted sound recordings;

(c) what commercial benefit a potential licensee is likely to obtain from playing the excepted sound recordings; and

(d) the extent to which the owners of copyright in the excepted sound recordings will receive equitable remuneration, from sources other than the proposed licence or licensing scheme, for the inclusion of their recordings in the broadcast to be shown or played in public by a potential licensee.”

Pursuant to section 72 an excepted sound recording is a sound recording contained in a broadcast.

19. PPL places particular stress on the factors set out in Section 128A(7). It argues that, in contrast to previous tariffs which had been agreed in the past, it has specifically taken into account these factors and relied upon them in support of the New Tariffs. We consider this issue below.

20. Section 128 has been added to Chapter VII of the 1988 Act and forms a part of the provisions which allow interested parties to refer existing or proposed licensing schemes put forward by a licensing body to the Tribunal. In this regard, the Tribunal is required to take into account the matters referred to in Section 129 of the Act:
- “In determining what is reasonable on a reference or application under this Chapter relating to a licensing scheme or licence, the Copyright Tribunal shall have regard to –*
- (a) the availability of other schemes, or the granting of other licences, to other persons in similar circumstances, and*
- (b) the terms of those schemes or licences,*
- and shall exercise its powers so as to secure that there is no unreasonable discrimination between licensees, or prospective licensees, under the scheme or licence to which the reference or application relates and licensees under other schemes operated by, or other licences granted by, the same person.”*
21. Furthermore section 135 provides that:
- “The mention in Sections 129 to 134 of specific matters to which the Copyright Tribunal is to have regard in certain classes of case does not affect the Tribunal’s general obligation in any case to have regard to all relevant considerations.”*

D History of the References

22. The Secretary of State referred Tariffs 110, 111 and 112 to the Copyright Tribunal on 5th October 2005. The New Tariffs came fully into force on 1st January 2006. Copyright users seeking a public performance licence from PPL have had to pay fees calculated in accordance with the New Tariffs from the licensing year beginning in 2006.
23. The Copyright Tribunal issued a Practice Direction in respect of references under section 128 on 3rd January 2006. This Practice Direction provides for representations by the parties, but no pleadings or evidence. It also provides that, save in exceptional circumstances, the Tribunal will not hold a hearing. In the present case the Tribunal decided that the circumstances were exceptional because of the volume and complexity of the written representations and other materials submitted by the parties. Accordingly, an oral hearing took place on 30th July 2009 and was concluded on that day.
24. PPL points out that in the absence of pleadings, evidence and cross examination it is not possible to resolve disputes of fact. However, save where indicated below, the material facts were not in dispute. We have found it possible to reach our decision based on facts which were either agreed or appeared from contemporaneous documents that we were shown. It seemed to us that whilst certain issues were disputed, their resolution was not necessary to our Decision. In this regard, we are grateful to the parties for the Agreed Statement of Facts and Chronology which, pursuant to a direction from the Tribunal, they helpfully provided prior to the hearing.
25. In previous decisions, the Tribunal has drawn attention to the cost, duration and complexity of proceedings which have come before it. Excessive costs and delays act

as a deterrent to those wishing to invoke the jurisdiction of the Tribunal. These References are of great commercial importance but have been resolved following a one day hearing, without evidence or cross examination. The extent to which evidence is appropriate in future references and applications to the Tribunal could be considered at the Case Management Conference at an early stage. It will be helpful for the parties to define the issues to which evidence is to be directed, and the extent and relevance of disputed facts. For example, when considering comparable licences put forward by the parties, and depending on the nature of the case, the Tribunal may feel that factual or expert evidence is unnecessary (or only necessary on specific points) and that skeleton arguments and oral submissions are sufficient to resolve the issue.

E The issues between the parties

26. The key issue between the parties is the amount of annual fees sought by PPL under the New Tariffs. The Interested Parties also do not accept the structure of the New Tariffs, and in particular the bandings, which are explained in more detail below. In addition there are two more minor issues concerning (a) the definition of 'audible area' in relation to pubs etc. under New Tariff 110 and (b) whether there should be a surcharge for users who play sound recordings in public before obtaining a licence from PPL.

F The role of the Tribunal

27. PPL argues that whilst the New Tariffs may not be the only reasonable way of structuring the system for payment for public performance of its sound recordings, nonetheless its tariffs are properly categorised as "reasonable". In other words, there is a broad spectrum of schemes, all of which may be categorised as reasonable and the Tribunal's role is to decide whether the New Tariffs are within that broad spectrum.
28. That submission suggests that the function of the Tribunal is limited to one of review, which we do not accept. In particular, the statutory framework set out above makes clear that the Tribunal has to form its own judgment as to whether the referred scheme or schemes are reasonable in all the circumstances. The correct approach was set out in *BPI v MCPS (No 2)*⁵

"Mr Beloff suggested that we should approach the matter thus: take the scheme as advanced by MCPS and ask whether any aspect was unreasonable. Unless we so found we should leave it as it stands. Such an approach would in effect mean that this Tribunal was merely a review body acting in much the same way as a court in a judicial review considers whether any minister or public authority acting reasonably could have come to a particular conclusion.

Whilst the submission certainly has attractions as far as the workload of the Tribunal is concerned, we think it is wrong in law. Once we have decided to entertain a reference, Section 118 directs us to 'make such order, either confirming or varying the proposed scheme...as we may determine to be reasonable in all the circumstances.'

⁵ [1993] EMLR 86 at page 99

That language makes it very clear that the decision is to confirm or vary as appears to us to be reasonable. There is no presumption in favour of a referred scheme. Nor is there a presumption that a referred scheme should be varied.”

G The comparable licences relied on by the parties

29. It is well established that when considering reasonableness the Tribunal will take into account comparable licences. Indeed it is required to do so under Section 129 of the 1988 Act. The Tribunal expressed the matter thus in *BPI et al v MCPS et al*⁶:

“It is however common practice to identify an existing tariff as a starting point. If such a licence exists (and particularly, if it is recent) and addresses comparable subject matter – and even better if it was freely negotiated (rather than being as it were “imposed” by the Tribunal), that may be particularly relevant and helpful in determining the right tariff (and other terms) of a licence. Such an agreement, it has been said, is the best record of the market value of the relevant rights of the time.”

30. In that case, the Tribunal adopted the summary of Mr Richard Boulton, the applicants’ principal expert, as to the relevance of comparable licences:

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

31. As is almost invariably the case in contested applications before the Copyright Tribunal, the parties put forward different comparables which, they claim, support their respective positions. In particular, the Interested Parties rely upon previous tariffs in respect of the public performance of sound recordings, certain of which were negotiated between PPL and various industry bodies between about 1960 and 2001 (“the Previous Tariffs”). They argue that the Previous Tariffs constitute agreements between parties of equal bargaining position in respect of PPL’s sound recording rights and therefore, the closest possible comparable.
32. By contrast, PPL relies on a comparison with the tariffs charged by the PRS in respect of the public performance of musical works (“the PRS Tariffs”). PPL claims that the New Tariffs all compare very favourably with the equivalent PRS Tariffs, and there is no reason why owners of copyright in sound recordings should receive less than owners of copyright in musical works.

H The increases in rates introduced by the New Tariffs

33. The percentage increases in the New Tariffs over the Previous Tariffs are shown in a series of tables which were submitted by the Interested Parties and which are included as Annex 1 to this Decision. The scale of increase is demonstrated visually by graphs submitted by the Interested Parties. By way of example, the comparison of charges

⁶ 19th July 2007 CT84-90/05 at paragraph 49

under the Previous Tariffs and the New Tariff for pubs, bars and restaurants is illustrated below:



34. As to shops and stores, it will be seen from the first table at Annexe 1 that the New Tariff 111 is divided into bands which increase initially by 100m² (and the bands increase in width for larger shops). The annual charges increase from one band to another. So, for example, shops with an audible area of 101-200m² pay an annual charge of £150 under the New Tariff; and shops with an audible area of 201-300m² pay £200. The percentage increases over the Previous Tariffs are, in general, very considerable. For example, shops with an audible area of between 101-200m² are being required to pay an increase of 75% under the New Tariff; shops with an audible area of between 201-300m² are being required to pay an increase of 134%; shops of 301-500m² have an increase of 192%, and so on.
35. The same general picture emerges in relation to pubs and restaurants. Referring to the second table in Annexe 1, pubs and restaurants with an audible area of up to 100m² are required to pay an increase of 17% (subject to the concessionary discount referred to below); those with 101-200m² are required to pay an increase of 134%; those with an audible area of 201-300m² are required to pay an increase under the New Tariffs of 250%; those with an audible area of 301-400m² are required to pay an increase of 367%, and those with an audible area of 401-450 m² have a percentage increase of 419%.
36. The comparison of rates between the Previous and New Tariffs for factories and offices is more difficult, as the bands have been changed from a calculation based on floor area to number of employees. It appears from the third table at Annexe 1 that this results in increases for a number of bands of 17%. However this picture is far from consistent. In some cases the rates have dropped. In other cases they have increased very substantially.

37. Mr Pushpinder Saini QC, who appeared for PPL, pointed out that this is not the whole picture. In particular, he drew attention to the fact that under the New Tariffs, concessionary discounts are available for smaller premises playing broadcast sound recordings. For example, under Tariff 110, premises with an audible area under 50m² playing broadcast sound recordings receive a concessionary discount of 50%. That means that there is a lower fee for certain users, who would have paid more for their licence under the Previous Tariffs. Furthermore he points out that as well as looking at percentage increases it is necessary to look at the number of businesses which fall within each band. PPL has shown this in a series of charts for Tariffs 110 and 111 which we include as Annexe 2 to this Decision⁷.
38. Looking, for example, at the pie chart for Tariff 110 (public houses, bars, restaurants and cafes) in Annexe 2, it will be seen that approximately 5% of premises qualify for the concessionary discount. The majority of premises (approximately 69%) are either in the 1m-100m² or 101-200m² bands and therefore face increases of 17% and 134% respectively. 10% are within the 201-300m² band and face increases of 250% and 14% are within the 301-400m² band and face increases of 367% on the annual fee.
39. Overall this comparison shows a very substantial increase as between the Previous and New Tariffs, as PPL accepts.
40. Based on certain figures contained in Annexe 7 to PPL's skeleton argument⁸, Mr Robert Howe QC on behalf of the Interested Parties presented further comparisons of fees under the Previous and New Tariffs for pubs, bars, cafes and restaurants and shops and stores. These comparisons are contained at Annex 3 to this Decision. It will be seen that in respect of pubs, restaurants etc., the percentage total increase in annual fees for PPL under the New Tariff 110 is approximately 130%. Further, the fees collected for the public performance of PPL's sound recordings have increased from approximately £3.6 million under the Previous Tariff to approximately £8.3 million under the New Tariff. A similar picture emerges for shops and stores. The overall percentage increase for PPL is approximately 63%, and the annual fees have increased from approximately £6.6 million under the Previous Tariff to approximately £10.8 million under the New Tariff.

I The history of negotiation of the Previous Tariffs

41. Much of the history of negotiations and agreements in respect of the Previous Tariffs is set out in the Agreed Statements of Facts. In particular, there is a long history of negotiation and agreement between PPL and the British Beer and Pub Association ("BBPA") and the British Hospitality Association ("BHA") or their predecessors. Between 1960 and 1980 pubs were licensed on a sliding scale tariff based on the rateable value of the premises. During the 1980's the tariff was re-negotiated twice to introduce a flat fee licence for each pub (£20) which was slowly increased by further negotiation and agreement. Between 1989 and 1991, PPL sought to increase the tariff

⁷ Annexe 2 contains comparisons between PRS and PPL charges, and the validity of this comparison is controversial. We consider this issue below.

⁸ References in this Decision to PPL's skeleton argument are to the document dated 24th July 2009.

again and negotiations led to an agreed 60% increase phased in over 2 years. At that time, PPL agreed these new fees were reasonable and would rise in line with RPI unless there were “*some radical new factors*”.

42. Most recently, between June 1999 and February 2001, negotiations took place between PPL and the BBPA and BHA. Following these negotiations, agreed background music tariffs for hotels (Tariff 013), public houses and bars (Tariff 014) and restaurants (Tariff 015) were introduced on 1st May 2001. For the first time, the Tariffs included a sliding scale based on audible area. The minimum fee for up to 400m² was £80 with the Tariff then increasing in bands of £10 per 50m². It was agreed that rates would be frozen until September 2002 and would then increase annually by RPI.
43. The annual licence fee for shops and stores up to 600m² was identical to that for hotels, pubs and bars and restaurants falling into the first band of their tariffs, i.e. £80 subject to RPI increases. The same fee also applied to factories and offices with an audible area of up to 600m². In 2004, the last full year of operation of the Previous Tariffs, the licence fee for premises falling into the first band had increased to £85.63. A fuller history of the tariffs for shops and stores and factories and offices is not available, but it is understood that the Tariffs for shops and stores have mirrored those for hotels/pubs/bars/cafes for a considerable period of time.
44. To this agreed history, the Interested Parties adds some further observations. In particular they point out that, as a result of negotiations, in a period of 20 years between 1985 and 2005 the PPL Tariff for background music in pubs and bars increased from £20 to circa £88 – a percentage increase over two decades of around 300%, during a period when, for the early years at least, inflation was high. By contrast, under the New Tariffs a substantial majority of licensees have had very significant increases, and many have had one off increases greater than during the entire previous 20 year period, spanning three separate negotiations. They also point out that in 2001, after several years of negotiation, the representatives of the hotels, pubs, bars and restaurant industries agreed new terms for a Hospitality Tariff with PPL. PPL was very satisfied with the deal. PPL’s then Head of General Licensing stated in a letter dated the 6th February 2001 to the Brewers and Licence Retailers Association, the Restaurant Association and British Hospitality Association:
“I am delighted that after 2 and a half years of negotiations we have been able to reach a satisfactory and harmonious compromise which is undoubtedly in the interests of all our members.”

J The Interested Parties’ case in relation to the increase in rates

45. The Interested Parties suggest that the Previous Tariffs provide the closest comparable and the best possible guide to the reasonableness or otherwise of the New Tariffs. The Previous Tariffs were either negotiated and agreed, or mirrored negotiated and agreed Tariffs. They suggest that there is no reason to believe that PPL was in a weak bargaining position when it agreed these various rates. On the contrary, it enjoyed a *de facto* monopoly of commercial sound recordings in the United Kingdom. The Interested Parties also point to numerous decisions of the Copyright Tribunal where previous agreements between the parties have been regarded as good evidence of what the parties themselves regarded as reasonable. By way of example, they point to *BSkyB and*

*another v Performing Rights Society*⁹ – where, referring to previous agreements between the parties, the Tribunal stated:

“The negotiations which led to these and subsequent licences were between commercial parties negotiating at arm’s length. The figures they arrived at are relevant. They concern the same parties, the same rights and took place in the same market place.”

46. They also rely on *BPI et al v MCPS et al*¹⁰ where the Tribunal held that a licence agreed between the BPI and MCPS/PRS just before the hearing of the reference commenced was “*the most relevant comparator*” for the purpose of determining the fair and reasonable terms applicable to the other parties. Similar views were expressed by the Tribunal in *Scottish Ballroom Association v PRS*¹¹; *Barrington Electronics v PRS*¹²; *Working Men’s Club Institute Union Ltd v PRS*¹³; and *UUK v CLA*¹⁴
47. The point is not that the parties are bound by principles of contract or estoppel from departing from their previous agreements. Rather, the Interested Parties submit, and we accept, that the statements in these and other authorities are no more than common sense. The best possible indication of fair value and reasonable terms is what the parties, or other parties in a comparable position, have previously agreed - allowing for the fact that, in the case of a negotiation between a collecting society and a licensee, the negotiation is not fully free because the licensee is dealing with a monopoly supplier, and can only challenge what is on offer by taking the costly and time-consuming step of bringing a reference to the Tribunal.
48. Accordingly Mr Howe submits that the Previous Tariffs are likely to represent, if anything, a significant *over-valuation* of PPL’s rights; and where, as in the present case PPL has imposed very large increases on the longstanding rates (and, for hotels, pubs, bars, restaurants and cafes, previously expressly negotiated and agreed rates), it needs to provide a cogent and compelling justification as to why the fair and reasonable value of its rights has changed so dramatically. Whilst we do not regard the Previous Tariffs as an overvaluation of PPL’s rights, nonetheless, we do regard the Previous Tariffs as a relevant comparator when determining the reasonableness of the New Tariffs.

K PPL’s arguments in support of the increase in rates

49. PPL advances several arguments in support of the increase in rates in the New Tariffs as compared with the Previous Tariffs. In summary, it relies on (i) the change to

⁹ [1998] EMLR 193

¹⁰ 19th July 2007 CT84-90/05

¹¹ PRT.1/58

¹² PRT.5/60

¹³ CT1/89

¹⁴ [2002] EMLR 35

section 72 of the 1988 Act; (ii) the statutory factors in section 128A(7); (iii) a comparison with the PRS Tariffs; (iv) the suggestion that the absolute amounts payable are not very large; and (v) the suggestion that playing sound recordings as background music is of considerable value and importance to licensees. We turn to consider each of these arguments.

The change to section 72 of the 1988 Act

50. PPL points out that whereas prior to the statutory amendment, the public performance of sound recordings on, for example, radio was not an act restricted by copyright, it is now. Since such acts did not require a licence at the time when the Previous Tariffs were negotiated and agreed, the broadcasting right was not included in the considerations which led to those Tariffs. Since the broadcasting right for sound recordings is an additional right granted by statute, PPL submits that it is entitled to charge for it.
51. The Interested Parties submit that the change to Section 72 cannot justify any increase over the Previous Tariffs. In particular they submit that users of sound recordings fall into three categories of commercial enterprise:
 - those using only broadcast sound recordings;
 - those who never use broadcast sound recordings (for example who only play CDs);
 - those using both broadcast and non-broadcast sound recordings – hybrid users.
52. In respect of the first category, the Interested Parties point out that these enterprises represent new licensees for PPL and therefore a new income stream. Previously they did not need to take a licence from PPL, and now they do. Therefore PPL will get additional revenue from those users. In relation to the second category, the Interested Parties submit that since they do not use broadcast sound recordings at all there is no possible justification for an increase in their licence fee as a result of the change to Section 72. In relation to hybrid users, the Interested Parties suggest that the value of the licence enjoyed by those parties has not changed at all, because the content of the music has not changed. Hybrid users still have the right to play exactly the same repertoire as they did under the Previous Tariffs. All that has changed is that a delivery medium for which a licence was not previously required must now be licensed. Insofar as this right is of value the Interested Parties submit that PPL will get such extra money as it deserves from the new licensees who were not required to pay under the Previous Tariffs.
53. Whilst we see the force of these submissions, we are not able fully to accept them¹⁵. In particular we consider that the Interested Parties' submissions take account only of the position of the licensee and not the position of the licensor. PPL now has an additional right in respect of which it is entitled to charge. When the Previous Tariffs were arrived at, most recently in 2001, that right did not exist. Therefore to say that the position remains unchanged from 2001 is, we believe, incorrect.

¹⁵ We have borne these submissions in mind when considering the amount of increase that we consider is reasonable over the Previous Tariffs (see below).

54. Furthermore, PPL offers a licence which is “*delivery neutral*”. That means that a fee is paid by commercial enterprises irrespective of the means by which the sound recordings are performed in public. This gives to the licensee the *ability* to use broadcast sound recordings or non-broadcast sound recordings, as it chooses. The ability under a licence to perform an act restricted by copyright, if the licensee chooses, is a right which has some value. Accordingly, we consider that the new statutory right in respect of broadcast sound recordings entitles PPL to some increase in the rates under the Previous Tariffs, which were set at a time when this right did not exist. We consider the amount of this increase later in this Decision.
55. However, this is far from the end of the story. The Interested Parties submit that the amendment to section 72 could not possibly justify the very substantial increases over the previous rates which are represented by the New Tariffs. They suggest that there is no nexus between the new broadcast right and rates of increase under the New Tariffs. The increases do not represent any attempt by PPL to value the additional right. At the oral hearing, Mr Saini fairly accepted that the existence of the additional right in respect of broadcast sound recordings would not on its own justify increases at the levels represented in the New Tariffs. He based his case for increases of this magnitude on a comparison with the PRS Tariffs, which we consider below. PPL did not submit that it had attempted to arrive at an increased rate based on the new broadcast right and made no suggestion to the Tribunal as to what that increased rate should be.

The statutory factors in section 128A(7)

56. PPL submits that the Tribunal is required to take account of these factors. It further submits that the Previous Tariffs did not take account of these factors since they were not in the statute at the date when those tariffs were fixed, whereas the New Tariffs had been drafted with those factors in mind. In the light of those statutory factors PPL submits that it would be an error of law for the Tribunal to revert to the Previous Tariffs or to regard them as close comparables.
57. We do not accept that the Section 128A(7) factors justify the increases in the New Tariffs, for the following reasons: First, there is no connection between the Section 128A(7) factors and the level of fees which PPL has imposed under the New Tariffs. Those factors say nothing about whether a particular level of fee is justified. Of themselves, they provide no support for the significant increases over the Previous Tariffs. Indeed they provide no support for any increase.
58. Second, the Section 128A(7) factors relate exclusively to “*excepted sound recordings*” i.e. sound recordings contained in a broadcast. The New Tariffs are delivery neutral and apply irrespective of the medium through which the sound recording is publicly performed. Pursuant to Section 128B(2) the Tribunal is required to consider whether the terms and conditions of the New Tariffs have taken into account the factors set out in paragraph 128A(7). PPL accepts that in relation to excepted sound recordings, as distinct from other media, these factors have not been taken into account within the delivery neutral New Tariffs because there is no practical means of identifying and isolating the use of excepted sound recordings alone.

59. This second reason requires further explanation. Considering the factors in Section 128A(7) and the New Tariffs:
- (a) The New Tariffs have not taken into account the extent to which the broadcasts to be shown or played by a potential licensee are likely to include excepted sound recordings.
 - (b) PPL submits that the New Tariffs have taken into account the size and nature of the audience that would hear sound recordings by the structure of division into bands with increasing rates – the bands have been chosen so that they are likely to correspond to increasing sizes of audience. However PPL accepts that this exercise has not and cannot be done in relation to the sound recordings contained in a broadcast – there has been no specific consideration of the size and nature of the audience that would listen to radio broadcasts as distinct from any other method of delivery.
 - (c) Again there has been no consideration of what commercial benefit potential licensees are likely to obtain from playing radio or television broadcasts and there has been no attempt by PPL to value the additional broadcast right. PPL suggests that the PRS Tariffs which have always included the broadcast right is an indication of commercial benefit – we consider that further below.
 - (d) It appears that PPL does receive remuneration from sources other than the New Tariffs. Some premises play music which has been provided by dubbers (who provide copies of sound recordings to the premises) or by services that are beamed into stores, which is paid for separately. For example PPL receives licensing income from narrowcasters. However there is a dispute, which it is neither possible nor necessary to resolve, as to how much income this amounts to and it is difficult to see how, if at all, it has been taken into account in relation to the New Tariffs.
60. In summary, PPL's case in relation to the statutory factors really focuses on section 128A(7)(b). PPL submits that in relation to the Previous Tariffs, for example Tariff 013 in relation to hotels, all licensees paid the same rate up to 400m². Under the New Tariff 110 there are separate bands up to 100m², 101-200m² etc. Therefore PPL submits that the New Tariffs take into account audience size to a greater extent than the Previous Tariffs.
61. However, as pointed out by Mr Howe, all of the Previous Tariffs adopted a banding structure intended to reflect the size of the audience. So, for example, Tariff 013 in respect of hotels had one band up to 400m², another band with an additional charge between 401 and 450m², a third band with a further charge between 451m² and 500m² and so on. He submitted that there was no magic in the particular form of banding of the Previous Tariffs, save that this is what the parties had specifically agreed following their negotiations. Therefore it was an indication of what the parties themselves considered reasonable having regard to the size and nature of the audience in respect of PPL's licensed works. We accept this submission.
62. Further, as pointed out by the BHA and the BBPA in their representations dated the 9th March 2006 at paragraph 2, the Previous Tariffs 014 (pubs and bars) and 015 (restaurants and cafes) were agreed in 2001. They introduced the concept of banding for the first time. The parties discussed and eventually compromised on the number of bands and the size of the first band. The bands in those Tariffs therefore represent an

agreed compromise between the parties which, apparently, was considered to be reasonable in 2001.

63. In summary, a consideration of the size and nature of the audience does not suggest that starting at 400m² for the first band and going up in increments of 50m² is more or less reasonable or appropriate than starting at 100m² and going up in increments of 100m². There is, however, a different effect of the additional bands under the New Tariffs. Unless one reduces the rates in the first bands (a step to which PPL takes strong objection) then the inevitable result of having increased fees for an increased number of bands is that many licensees previously in the 400m² band will have their fees substantially increased. This is one reason why the Interested Parties object to the new structure.
64. Third, the Interested Parties submit that the statutory criteria in Section 128A(7) are not "new". The subsection simply lists out some of the typical factors which the Tribunal would normally take into account when assessing the fairness and reasonableness of a proposed tariff. Indeed, the Interested Parties point out that these factors were taken into account during negotiations to the same general extent as PPL have purported to consider them in relation to the New Tariffs. Therefore they do not justify any substantial increase in rate or change to existing structures. We agree with this submission.
65. Fourthly, the Section 128A(7) factors are not exclusive. As can be seen from the statutory scheme of which they form a part, the Tribunal is required to consider all factors that it considers relevant and all the circumstances of the case. The statutory factors must therefore be considered against the evidence concerning the Previous Tariffs which provide recent, objective evidence of what the parties themselves considered to be fair and reasonable for PPL's repertoire, in the absence of the new broadcast right.

The increases are justified by comparison with PRS Tariffs

66. This comparison was relied on strongly by PPL. It submitted that if one compares the PPL fees under the New Tariffs with the equivalent PRS fee, the PPL fee was still somewhat lower. This, PPL suggests, is a strong indicator that the New Tariffs are reasonable, both in relation to fees and structure, since there was no reason to differentiate between the rights licensed by PRS and the rights licensed by PPL.
67. We consider that there is a clear difficulty with this submission. During the history of negotiation and agreements in respect of the Previous Tariffs for pubs, bars, restaurants and cafes, PPL must have been aware of the equivalent PRS rates. Therefore, insofar as they were thought to provide a comparable, PPL could have relied on the PRS tariffs in support of a higher rate. So if the parties considered that a comparison with the PRS Tariffs supported higher rates one would expect that this would already have been taken into account.
68. PPL accepts that as a licensing body they were aware of the "licensing landscape", including the rates that PRS were charging from time to time, but suggests that the Previous Tariffs, including those to which PPL expressly agreed, seriously undervalued PPL's rights. However, since PPL were in at least an equal bargaining position during

those negotiations we do not consider that this provides either an explanation or a justification for the substantially increased rates represented by the New Tariffs.

69. Indeed, Mr Howe pointed out that during negotiations for the Previous Tariffs, PPL did deploy the PRS Tariffs in order to achieve agreed increases on earlier tariffs. In particular, in a memo from the Brewers Society to its members dated 28th July 1989, PPL's case for a net increase of 79% above inflation was summarised as follows:

"- RPI (from 1934)!

- Their view that previous deals (in 1981 and 1986) had not achieved what they wanted

- The qualitative and quantitative increase in their repertoire

- The increased use and value to users of their music especially in theme pubs

- The fact that PPL's charges compare very favourably with those of PRS"

70. Those arguments have achieved substantial increases for PPL over the years. They are essentially the same arguments (apart from the new statutory broadcasting right) that are now deployed by PPL in favour of very substantial increases beyond those agreed in 2001.
71. In summary, the Interested Parties submit that whilst the rights vested in PRS and PPL can *prima facie* be considered comparable, this is a weak comparison when compared with the recent and long standing agreements between the parties in relation to PPL's repertoire, and in respect of which the PRS Tariffs were already taken into account.
72. Furthermore, the Interested Parties suggest that it is extremely difficult to make any meaningful comparisons between the PRS tariffs and the PPL Tariffs. In relation to pubs, bars, restaurants and cafes it was suggested that the methods of charging in the PRS Tariffs HR and P were completely different from PPL's Tariff 110. In particular, Tariff HR splits background music charges into two types of areas; on the one hand, lounges, bars, restaurants, fast food outlets, dining rooms and other rooms for the general use of guests or customers (clause 4.4); and on the other, hotel bedrooms, corridors and foyers (clause 4.5); and applies different charges and a different method of charging to each. This difference does not appear in Tariff 110.
73. In relation to lounges, bars etc, unlike Tariff 110, charges in Tariff HR are not based on audible area, but rather on a combination of 'seating capacity' and the type of equipment on which the music is played. In relation to bedrooms, corridors, etc., unlike Tariff 110, charges are not based on audible area but rather on a combination of rates per 15 bedrooms (or part thereof) and the type of equipment on which the music is played. Further, there are a number of limitations and exceptions in Tariff HR (for example where music in bedrooms is calculated only by reference to the number of bedrooms fitted for musical performances, seasonal reductions etc.) which do not appear in Tariff 110.
74. Similarly, PRS Tariff P (public houses) does not base background music charges on 'audible area' but rather on a combination of 'bar area' and the type of equipment used to play the music (clause 3.4). There are only two bands – up to 120m² and 121m² or more. So, unlike the PPL Tariff 110, Tariff P does not increase beyond the maximum in the second band, however large the premises. Further, the Interested Parties submit that 'bar area' is defined in a way that is much more favourable to the licensee than

'audible area' in Tariff 110, because of a number of exclusions in Tariff P which are not present in the PPL Tariff.

75. Similarly, the Interested Parties submit that it is not possible to make a meaningful comparison between PRS Tariff I in respect of factories and offices and PPL Tariff 112, because the basis of charging is very different. The PPL Tariff charges on the basis of £100 per 25 employees. By contrast, the PRS Tariff distinguishes between music audible to workers at their workstations (clause 3.1) and performances in canteens (clause 3.2). Each is charged at different rates, and the charges are based on pence per half hour performance for each unit of 25 employees, and so depend on working hours, shifts, and other such factors.
76. In relation to shops and stores, PRS Tariff RS and PPL Tariff 111 appear to have similar banding, which suggests that a more meaningful comparison is possible. However the Interested Parties submit that PRS Tariff RS includes a number of exemptions not included in the PPL Tariff; that PRS Tariff RS charges for outside areas very differently; that it charges only for shop floor space "*to which the public are admitted and in which the music is audible*"; and that it charges one undifferentiated fee for live and recorded music. By definition Tariff 111 in respect of sound recordings cannot extend to live performances. These alleged differences were explained orally by Mr Howe QC during the hearing and, at the request of the Tribunal, set out in a note submitted subsequent to the hearing.
77. PPL then responded in writing to this note suggesting that the differences were not such as to render a comparison difficult, that some of the differences were irrelevant, and that several were based on policies no longer included in the PRS Tariffs. It also suggested that in making a financial comparison between the PPL and PRS rates the best source of information would be the Interested Parties, who paid fees to both PPL and to PRS.
78. This further written submission prompted a letter to the Tribunal from the solicitors for the Interested Parties dated 14th August 2009, which argued that there had to be an end to the parties' submissions. They suggested that PPL's new document went far beyond merely replying to the short document produced by the Interested Parties and made numerous new factual arguments not previously raised, with which the Interested Parties disagreed and which the Interested Parties had had no opportunity to address. Accordingly, they suggested that if the Tribunal was minded to take the new submission into account in any material respect the Interested Parties would need to be given a proper opportunity to consider it and prepare a response, which could not be done prior to the end of September.
79. As to the request for a comparison between the amounts paid by the Interested Parties to PPL and PRS, it was pointed out that the information was not readily available to the Interested Parties, not least because a number of them were representative trade bodies. The Interested Parties could not get information concerning a representative proportion from the thousands of businesses paying under the New Tariffs and the PRS Tariffs without carrying out lengthy, costly and time consuming surveys.

80. This letter prompted a further response from the solicitors for PPL dated 20th August 2009, which again asserted that the Interested Parties should provide further comparison evidence.
81. We agree that there has to be an end to the parties' submissions. We did not consider it appropriate to require the Interested Parties to provide further financial information (a) for the reasons given by the Interested Parties and (b) because the hearing had concluded. We did not invite the Interested Parties to make further submissions in answer to PPL's written document for two reasons. First, the Tribunal is satisfied that it has sufficient information to enable it to reach a decision in this matter. Second, as indicated by the Chronology prepared by the parties, this dispute has been continuing for too long. In particular, submissions were made by various of the Interested Parties to the Secretary of State in February 2005 and references were made by the Secretary of State to the Copyright Tribunal in October 2005. A considerable number of written representations and replies were then submitted during 2006 and the matter was further delayed (through no one's fault) by the jurisdiction hearing between November 2007 and early 2009. Against this background it seems to us that it would be wrong to delay resolution of this matter still further unless it was absolutely necessary to do so.
82. We can now state our conclusions in relation to the PRS Tariffs as a comparator. First, we are satisfied that differences in the method of charging and calculation of bands make a direct comparison difficult, most particularly in relation to pubs, bars, restaurants and cafes and factories and offices. Nonetheless, we also conclude that the PRS Tariffs appear to be higher than the Previous Tariffs, most recently established in 2001. In relation to shops and stores, even assuming that the Interested Parties are correct in their submissions as to different exemptions, reductions etc. it seems clear that the PRS rate is higher. This suggests that the PRS Tariffs for other commercial premises would also be higher, were a direct comparison possible.
83. We are not able to conclude, however, that the PRS Tariffs are necessarily the same as or higher than the New Tariffs because such a direct comparison of sufficient detail is not possible. Nor would it have made a difference to our overall conclusion even if we were satisfied that the PRS Tariffs were always the same as or higher than the New Tariffs, for the reasons set out below.
84. In our view, the differences between the PPL and PRS Tariffs were known to PPL at all material times during the negotiations and agreements in respect of the Previous Tariffs for pubs, restaurants etc. These differences could have been (and in fact were) deployed by PPL in achieving agreements for increased rates which are contained in the Previous Tariffs. Accordingly, it seems to us that any differences between the PPL and PRS Tariffs have been considered and factored into agreements in respect of the Previous Tariffs. We do not accept PPL's submission that, with full knowledge of the differences between the PRS and PPL Tariffs, they nonetheless undervalued their rights during negotiations, so that a very substantial increase from the Previous Tariffs is reasonable.
85. Furthermore, we accept the submission of the Interested Parties that the Previous Tariffs, voluntarily agreed, or based on voluntary agreements, in respect of PPL's rights in sound recordings, are a close comparable to the New Tariffs, and closer than the PRS Tariffs. This does not mean that we have ignored the PRS Tariffs as a comparable. The fact that, generally, they appear to be higher than the Previous Tariffs is a point that we

take into account when considering the level of increase for the new broadcast right in sound recordings, as explained below.

The absolute amounts payable are not very large

86. PPL suggests that the New Tariffs are reasonable, either because licensees are only paying small increases in monetary terms, or because the fees amount to only a few pounds a week, or because the absolute sums are small compared to the turnover of certain of the Interested Parties. We do not accept that this submission justifies the increases from the Previous Tariffs contained in the New Tariffs. As Mr Howe pointed out, the absolute amount of the fee provides no indication whatsoever of fair value. A monopoly supplier of flowers, eggs or milk would not be justified in trebling its prices on the ground that the absolute amount was not very much or amounted to only a few pounds a week. The question is not how the licence fees compare with the overall turnover of particular licensor, any more than it is appropriate to compare any other input (such as electricity) as a percentage of turnover in order to assess the value of that input.
87. Furthermore, we do not accept the suggestion that the sums involved are inconsequential to the licensees who have to pay them. The fact that so many businesses have chosen to complain (either as part of the Interested Parties or through other trade associations that have made written representations) indicates that the effect of the increased charges is a significant concern. For small businesses, the effect of a significant increase is obvious. For large businesses which own many premises, the total annual sum payable may well be considerable. For example, at paragraph 56 of its skeleton argument, PPL points out that the annual payment for Currys Digital under the New Tariffs for the year commencing 11 July 2009 was £149,833.26.

Playing background music is important for licensees

88. PPL stresses that music is played in many commercial environments and is of central importance. It quotes from public statements, for example from the Arcadia Group, which is part of the Eversheds Consortium and therefore amongst the Interested Parties, to the effect that music is extremely important in Arcadia stores for creating the right atmosphere for the brand.
89. There is no question that playing background music is important to many of the licensees. This is true of many business inputs. This is why licensees are prepared to pay a fee for playing sound recordings as background music. As licensor, PPL has at all times been in an excellent position during negotiations to stress the value of background music when seeking to increase the licence fees and has actually done so. In our view, the Previous Tariffs, most recently agreed in 2001, take into account the value of playing background music to those businesses for which it is particularly important, such as bars, pubs and hotels. There is no evidence that the value of PPL's repertoire has dramatically increased since 2001 and the Previous Tariffs provide for increases by RPI from 2002. Insofar as there has been an expansion of PPL's rights for which a licence is required, this is to be found in the creation of the new broadcast right in sound recordings, rather than an increase in the value of the repertoire.

L Our conclusions in relation to the rates and structures of the New Tariffs

90. In our view, the Previous Tariffs represent a close comparable to the New Tariffs. They represent a good indication of fair value and reasonable terms in that they are, or are based on, actual agreement between the parties in respect of PPL's rights. The very substantial increases in the New Tariffs over the Previous Tariffs are, in our view, unreasonable and unjustifiable.
91. On the other hand, we consider that there has been a material change of circumstance since 2001 when the Previous Tariffs were most recently revised. That is the creation of the new broadcasting right in relation to sound recordings. This is an additional right that PPL is entitled to license and for which it is entitled to require payment. As explained above, the licence offered by PPL, which is a licence in respect of its entire repertoire and is delivery neutral, entitles licensees to perform acts otherwise restricted by copyright in sound recordings, including the new broadcasting right. It is then the choice of the licensee as to the extent and manner in which it chooses to work its licence, and in particular whether it chooses to use its licence in respect of the broadcasting right. The additional broadcasting right is of value and it is reasonable that additional payment should be made in respect of it.
92. PPL acknowledges that the level of increase represented by the New Tariffs cannot be justified as a payment simply in respect of the new broadcasting right for sound recordings. Rather, PPL's case, which we have rejected, is that it undervalued its own rights by agreeing to the Previous Tariffs and the creation of the new broadcasting right provided the impetus for a very substantial upward increase.
93. In our judgment the New Tariffs 110, 111 and 112 are unreasonable. Pursuant to Section 128B(3) we propose to vary these proposed licensing schemes in the following manner. We consider that the Previous Tariffs in relation to shops and stores, public houses, bars, restaurants and cafes and factories and offices should all be re-instated (with the amendments set out below). Each of those Tariffs is already divided into bands with increasing charges. We do not consider that it is reasonable to remove that structure, which already takes account of increasing audience size, and replace it with the banding structure of the New Tariffs. In reaching this conclusion we have not ignored the factors set out in Section 128A(7). On the contrary we conclude that they have been taken into account to the same extent (albeit with somewhat different results) in the structure of Previous Tariffs as in the New Tariffs.
94. We consider that it is appropriate to keep the fee structure contained in each of the Previous Tariffs, but to apply an increase of 10% to each fee set out in those Tariffs to take account of the new broadcasting right in sound recordings. Those annual fees will also need to take account of changes in RPI since the Previous Tariffs were replaced by the New Tariffs. As the Tribunal observed in *BPI Ltd v MCPS and anr (no. 2)*¹⁶, this

¹⁶ [1993] EMLR 86 at 127

is necessarily a value judgment rather than the results of any precise mathematical calculation. Our reasons for arriving at the increase of 10% are as follows:

95. First, we have taken the tried and tested Previous Tariffs as the starting point, and increased the rates to take account of the change of circumstance. We consider that a greater than nominal increase is appropriate to pay for the creation and inclusion in the licence of the additional broadcasting right.
96. Second, we consider that the fact that the PRS Tariffs appear to be generally higher than the Previous PPL Tariffs provides some support for an increase, albeit a modest one, since this difference has already been considered during the course of negotiations for the Previous Tariffs for pubs, bars, restaurants and cafes.
97. Third, we have had regard to open offers submitted by the Interested Parties during the course of these proceedings, which were presented as alternative cases to their primary case that there should be no increase from the Previous Tariffs. In particular, in their Representations dated the 9th March 2006 at paragraph 7.1, the BHA and BBPA put forward an alternative proposal, in the interests of "*securing a workable compromise that was both fair and simple to administrate*". That proposal adopted the same bands as in Tariff 110 but with lower licence fees. As pointed out by PPL, the suggested licence fee for premises up to 100m² was £60, a substantial reduction as compared with the Previous Tariff and therefore unacceptable. This was, however, a consequence of using the additional bands proposed by PPL. If very substantial increases in the higher bands were to be avoided, the lower bands had to adopt a lower figure. We preferred the structure of the Previous Tariffs to this alternative proposal.
98. However, the BHA and BBPA stated that their alternative proposal would yield a net gain to PPL and an increased cost to the industry (based on sampling) of 14.3%. One reason for this alternative proposal was stated by the BHA and BBPA to be that:

"The new rights conferred by Section 72 of the 1988 Act have arguably conferred some added value to the music offered in premises covered by the proposed PPL Tariff 110 but it is very difficult to determine the level of the value."

In summary this offer represented a modest percentage increase over the Previous Tariff, and some attempt to value the new broadcasting right.

99. Similarly, in its Representations dated 17th February 2006 the British Retail Consortium ("BRC") proposed that the Tribunal, whilst disallowing the new fees suggested by PPL should (a) allow PPL to increase the level of its fees by the rate of increase of RPI; (b) allow PPL to introduce the banding tiers of the New Tariffs, with the proviso that the increment for each tier should be 10% of the previous tier with the maximum level applying to 9001m² and above. It was emphasised that this was only proposed by the BRC as an interim measure pending a final agreement. Again this alternative proposal recognised that something should be paid for the additional right created by the Act but far less than that proposed as an increase by PPL.
100. Fourthly, we have had regard to simplicity of administration. Since the Previous Tariffs, with their banding and charging structures, were in operation between 2001 and 2004 (and their predecessors for many years before that), and we have not heard that

they caused any complaint, we consider that a modest increase to those charges, whilst preserving their structures, provides a workable solution.

101. Because factories and offices were not represented, we have heard much less about their position. However, we have noted the increases imposed on factories and offices by the New Tariff 112, as compared with Previous Tariff 086, as shown in Annex 2. As agreed between the parties before us, we consider that the same principles should be applied to Tariff 112 as to Tariff 110 and 111. Therefore we propose to re-instate Tariff 086, including its banding structure, but to increase the rate by 10% and RPI.
102. We also consider that the increase of 10% for all of the Tariffs should be balanced by the following factor. The New Tariffs introduced concessionary discounts for smaller premises/businesses which did not exist in the Previous Tariffs. We consider that these concessionary discounts, for example in relation to pubs, bars, restaurants or cafes with an audible area of less than 50m², are reasonable and should form part of the licensing schemes which we intend to order.
103. We are of course conscious that these concessionary rates did not form part of the Previous Tariffs which we have considered to provide close comparables. However, we consider that the inclusion of the concessionary rates is justifiable for the following reasons.
104. First we have considered it appropriate to allow an increase of 10% over the Previous Tariffs to take account of the new broadcasting right for sound recordings. We are concerned that these charges should not fall too heavily on the smallest premises/businesses.
105. Secondly, we have had regard to the statutory factors in Section 128A(7) and consider in particular that sub paragraph (b) supports the concessionary rates. The smallest premises are likely to have the smallest audiences for sound recordings.
106. Third, we accept the Interested Parties' submission that as a result of the new broadcasting right, PPL will gain extra licensees which were not previously required to take a licence, for example small businesses who play the radio in public. This is supported by paragraph 54 of PPL's skeleton argument, which points out that there are thousands more licensees in 2008 as compared with 2005. We consider it reasonable that very small premises which have not previously been required to pay anything for playing the radio should have the benefit of these concessionary rates.
107. In relation to factories and offices in Tariff 086 the first band is an area of 1-600m². We consider that the concessionary rate should apply to factories and offices of 100m² or below.

M The definition of audible area in relation to pubs and restaurants

108. The Interested Parties complain that under the Previous Tariffs 013, 014 and 015, the definition of '*audible area*' was confined to publicly accessible areas where the music was audible. They assert that under the New Tariff 110 the area is stated to be '*the total area in which the music can be heard*' and is expressly not confined to the area to which customers have access. It therefore extends to areas behind the bar, staff rooms,

store rooms etc. This is said to be objectionable because, if additional areas are included then pubs and restaurants may be moved to a higher band and therefore pay higher charges.

109. In answer to this complaint, Mr Saini pointed out that the definition of audible area in Tariff 013 did not appear to be confined to areas of the premises to which the public had access. Rather it was intended to include all areas where the music was audible. Tariff 013 states that :

“The tariff is based on the total area of the premises where sound recordings are audible. This includes any public house, bar, restaurant, eating area, reception or miscellaneous area such as corridors, toilets, lifts and corridors”

110. This issue is resolved by our decision to re-instate the Previous Tariffs, with the amendments set out above. It follows that the wording contained in Tariff 013 should be re-instated in the licensing scheme that we order. Accordingly if New Tariff 110 changed the definition of audible area in a manner unfavourable to licensees, this will no longer be possible. If on the other hand, the Previous Tariffs applied to areas to which the customers did not have access, this will continue to be the case in the future.

N Surcharge

111. The Previous Tariffs contained no surcharge. The New Tariffs, however, impose a 50% surcharge for the first year if a licensee plays music without first obtaining a licence. Initially, we considered that such a surcharge was not reasonable. At first sight it does not appear to be related to any loss suffered by PPL, and the idea of some form of fine for late payment of the copyright licence fee is an unfamiliar one in civil proceedings. However, we were persuaded by Mr Saini that some surcharge is appropriate. Our reasons for reaching this conclusion are as follows:
112. First, some incentive needs to be provided for licensees to pay in a timely manner and some disincentive against late payment or payment only when discovered. Second, when promulgating a licensing scheme which is generally available it is undesirable and costly for PPL to be required to commence proceedings to recover unpaid fees if other means are possible. Third, there will be administrative costs incurred by PPL in chasing late payers. Fourth, the PRS Tariffs do contain a surcharge, and as we have said, whilst we do not regard them as the closest comparable nonetheless we take them into account.
113. Finally, in *Working Mens' Club and Institute Union Limited v The Performing Rights Society Limited*¹⁷ at page 13 the Copyright Tribunal approved a surcharge of 50% higher in the first year than those applicable in the second and subsequent years where a licence had not been applied for in advance. The reasoning was that *“it discourages users from staging public performance of music without having first obtained a licence and it compensates the PRS for their considerable administrative effort in detecting unauthorised performances of their music.”* In all the circumstances we consider that such a surcharge is reasonable in the present case.

¹⁷ CT 1/89

O **Further submissions**

114. We are conscious that there will need to be amendments to the Previous Tariffs to make clear that they cover the inclusion of excepted sound recordings within Section 72. Furthermore they will need to be altered to reflect the 10% increase over the Previous Tariffs that we have concluded is reasonable. Yet further, the Interested Parties seek consequential orders for repayment of royalties overpaid as from 1st January 2005 plus interest and we are at present unaware of the extent, if any, of such repayment in the light of the order that we propose to make. Finally there may be issues as to costs which the Tribunal needs to resolve. In the circumstances, if the parties are unable to agree all issues consequent upon our Interim Decision, we will receive further submissions as to the form of order, and if necessary, conduct a short further hearing.
115. On 17th September 2009, after the Tribunal had released a confidential draft of this Decision to the parties and their advisers, we received a letter from GSC suggesting that the publication of the Decision should be postponed until after any remaining issues have been resolved. The reasons advanced for this postponement are that the Decision affects over 100,000 sites in the United Kingdom, and it is important that when the Decision becomes public knowledge, PPL and its staff are ready to deal with all queries concerning the Decision. It is suggested that, after outstanding issues are resolved, it will be necessary to have a further short period so that PPL's staff are fully briefed. It is pointed out that a similar course was adopted by the Tribunal in the recent reference in *CSC v Video Performance Limited*. By a letter of the same date, Denton Wilde Sapte explained that the Interested Parties preferred that the Decision should be published now, as the trade organisations comprising the Interested Parties are keen to tell their members, who are at present unaware of the Decision, what it means in principle for them.
116. On this issue, we prefer the submissions of PPL. Regrettably, this Reference has taken years to resolve. Against that background, a few more weeks during which the confidentiality regime will continue will make no real difference, and will avoid any possibility of confusion or misinformation. However, the postponement of publication of the Decision until resolution of outstanding issues requires that, if a further hearing is necessary, this should take place at the earliest convenience of the Tribunal and the parties.

**The Copyright Tribunal
The UK Intellectual Property Office
Newport NP10 8QQ**

**Tribiwnlys Hawlfriant
Swyddfa Eiddo Deallusol y DG
Casnewydd NP10 8QQ**

ANNEX 1

Shops & Stores

Rates Paid under the Established Tariffs (2004) and the PPL Schemes (2005)

Audible Area (m)	January 2004 to December 2004 (£)	January 2005 to December 2005 (£)	Increase (£)	Increase (%)
Up to 100	85.63	100.00	14.37	17
101 to 200	85.63	150.00	64.37	75
201 to 300	85.63	200.00	114.37	134
301 to 500	85.63	250.00	164.37	192
501 to 600	85.63	300.00	214.37	250
601 to 650	93.04	300.00	206.96	222
651 to 700	100.45	300.00	199.55	199
701 to 750	107.85	300.00	192.15	178
751 to 800	115.26	350.00	234.74	204
801 to 850	122.66	350.00	227.34	185
851 to 900	130.07	350.00	219.93	169
901 to 950	137.47	350.00	212.53	155
951 to 1000	144.88	350.00	205.12	142
1001 to 1050	152.29	400.00	247.71	163
1051 to 1100	159.69	400.00	240.31	150
1101 to 1150	167.10	400.00	232.90	139
1151 to 1200	174.50	400.00	225.50	129
1201 to 1250	181.91	400.00	218.09	120

1251 to 1300	189.32	450.00	260.68	138
1301 to 1350	196.73	450.00	253.27	129
1351 to 1400	204.14	450.00	245.86	120
1401 to 1450	211.55	450.00	238.45	113
1451 to 1500	218.96	450.00	231.04	106
1501 to 1550	226.37	500.00	273.63	121
1551 to 1600	233.78	500.00	266.22	114
1601 to 1650	241.19	500.00	258.81	107
1651 to 1700	248.60	500.00	251.40	101
1701 to 1750	256.01	500.00	243.99	95
1751 to 1800	263.42	550.00	286.58	109
1801 to 1850	270.83	550.00	279.17	103
1850 to 1900	278.24	550.00	271.76	98
1901 to 1950	285.65	550.00	264.35	93
1951 to 2000	293.06	550.00	256.94	88

Public Houses & Restaurants

Rates Paid under the Established Tariffs (2004) and the PPL Schemes (2005)

Audible Area	January 2004 to December 2004	January 2005 to December 2005	Increase	Increase
(m)	(£)	(£)	(£)	(%)
Up to 100	85.63	100.00	14.37	17
101 to 200	85.63	200.00	114.37	134
201 to 300	85.63	300.00	214.37	250
301 to 400	85.63	400.00	314.37	367
401 to 450	96.34	500.00	403.66	419
451 to 500	107.04	500.00	392.96	367
501 to 550	117.74	600.00	482.26	410
551 to 600	128.44	600.00	471.56	367
601 to 650	139.14	700.00	560.86	403
651 to 700	149.84	700.00	550.16	367
701 to 750	160.55	800.00	639.45	398
751 to 800	171.25	800.00	628.75	367
801 to 850	181.95	900.00	718.05	395
851 to 900	192.65	900.00	707.35	367
901 to 950	203.35	1000.00	796.65	392
951 to 1000	214.05	1000.00	785.95	367
1001 to 1050	224.75	1100.00	875.25	389
1051 to 1100	235.45	1100.00	864.55	367

1101 to 1150	246.15	1200.00	953.85	388
1151 to 1200	256.85	1200.00	943.15	367
1201 to 1250	267.55	1300.00	1032.45	386
1251 to 1300	278.25	1300.00	1021.75	367
1301 to 1350	288.95	1400.00	1111.05	385
1351 to 1400	299.65	1400.00	1100.35	367
1401 to 1450	310.35	1500.00	1189.65	383
1451 to 1500	321.05	1500.00	1178.95	367
1501 to 1550	331.75	1600.00	1268.25	382
1551 to 1600	342.45	1600.00	1257.55	367
1601 to 1650	353.15	1700.00	1346.85	381
1651 to 1700	363.85	1700.00	1336.15	367
1701 to 1750	374.55	1800.00	1425.45	381

Factories & Offices

Rates Paid under the Established Tariffs (2004) and the PPL Schemes (2005)

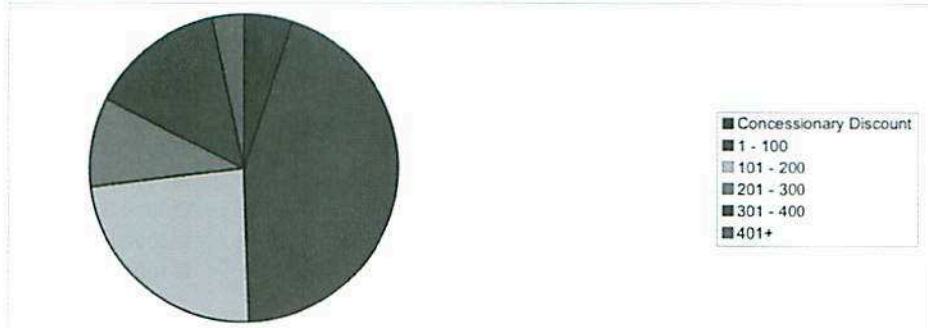
Floor Area (m)	No. of Employees	January 2004 to December 2004 (£)	January 2005 to December 2005 (£)	Increase £	Increase (%)
1 - 49	6 - 10	85.63	100	14.37	17
50 - 99	1 - 5	85.63	100	14.37	17
	6 - 10	85.63	100	14.37	17
100 - 149	6 - 10	85.63	100	14.37	17
	11 - 25	85.63	100	14.37	17
	1976 - 2000	85.63	8000	7914.37	9243
150 - 199	6 - 10	85.63	100	14.37	17
	6 - 10	85.63	100	14.37	17
250 - 299	11 - 25	85.63	100	14.37	17
	11 - 25	85.63	100	14.37	17
300 - 349	11 - 25	85.63	100	14.37	17
400 - 449	6 - 10	85.63	100	14.37	17
	11 - 25	85.63	100	14.37	17
	26 - 50	85.63	200	114.37	134
450 - 499	51 - 75	85.63	300	214.37	250
500 - 549	26 - 50	85.63	200	114.37	134
650 - 699	26 - 50	100.45	200	99.55	99

700 - 749	11 - 25	107.85	100	-7.85	-7
800 - 849	76 - 100	122.66	400	277.34	226
900 - 949	11 - 25	137.47	100	-37.47	-27
	51 - 75	137.47	300	162.53	118
1000 - 1049	6 - 10	152.29	100	-52.29	-34
	26 - 50	152.29	200	47.71	31
	101 - 125	152.29	500	347.71	228
1450 - 1499	11 - 25	218.96	100	-118.96	-54
1500 - 1549	11 - 25	226.37	100	-126.37	-56
1800 - 1849	11 - 25	270.68	100	-170.68	-63
2500 - 2549	6 - 10	374.57	100	-274.57	-73
6000 - 6049	51 - 75	893.27	300	-593.27	-66
10000 - 10049	326 - 350	1486.07	1400	-86.07	-6
16000 - 16049	1676 - 1700	2375.27	6800	4424.73	186
50000 - 50049	201 - 225	7414.07	900	-6514.07	-88
299950 - 300000	126 - 150	44456.66	600	-43856.66	-99

This table has been compiled using data from Section B: Question 2.3 of PPL's survey.

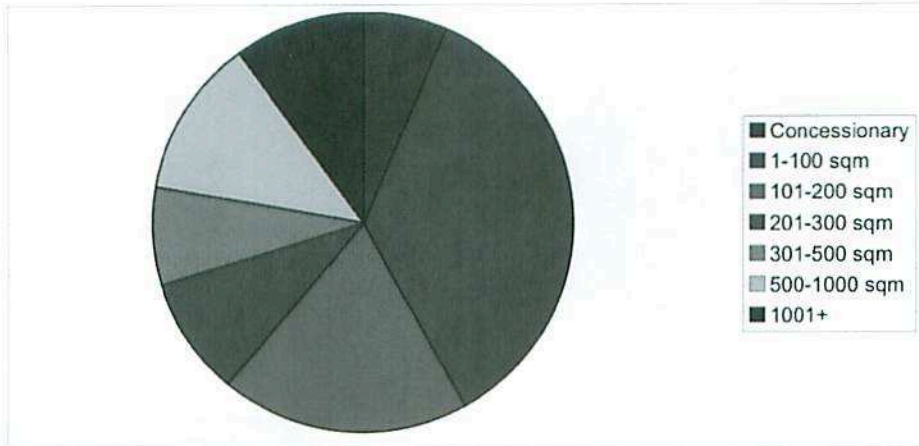
ANNEXE 2

Tariff 110 - Public Houses, Bars, Restaurants and Cafés



Band	%	2009 PPL Fee	2009 PRS tariff P (Pubs)	Comments
Concessionary Discount	6%	£58.10	£156.19 (Radio & TV) £86.77 (Radio only) £69.42 (TV only)	<ul style="list-style-type: none"> Would pay 71% more if licensed under the historical tariffs A public house playing the radio and television would pay £186.19 to PRS
1 - 100	45%	£116.20	£285.10 (Music Centre & TV) £215.68 (Music Centre only) £173.56 (Record Player only)	<ul style="list-style-type: none"> In many cases the PRS fee will be £50 to £100 higher than the PPL fee.
101 - 200	24%	£232.40	£156.19 (Radio & TV) £86.77 (Radio only) £69.42 (TV only) See above if 120m ² . See below if above 120m ² .	<ul style="list-style-type: none"> The 2009 PPL licence fee is around 64p per day Large public houses and bars will pay PRS just under £30 more for a record player and £90 more for a music centre.
201 - 300	10%	£348.60	£427.65 (Music Centre & TV) £323.52 (Music Centre only) £260.34 (Record player only) £234.29 (Radio & TV) £130.16 (Radio only)	<ul style="list-style-type: none"> The 2009 PPL licence fee is around 96p per day. The PRS fee for a record player and radio is over £40 more than the PPL fee.
301 - 400	14%	£464.80	£104.13 (TV only)	<ul style="list-style-type: none"> The 2009 PPL fee is around £1.27 per day. These large pubs & bars pay the same fee to the PRS as any site with an audible area of over 120m². Under the old tariff structure all these premises would have been included in the lowest fee band along with all of the above bandings.
401+	3%	Increase £116.20 per 100 sqm		<ul style="list-style-type: none"> The position of the Interested Parties is that all sites (save this 3%) would pay the same low fee.

Tariff 111 - Shops and Stores



Band	%	2009 PPL Fee	2009 PRS Tariff RS (shops)	Comments
Concessionary Discount	6%	£58.10	£73.60	<ul style="list-style-type: none"> • Would pay 21% more if licensed under the historical tariffs • 2009 fee is less than 10p per day
1-100 sqm	36%	£116.20	£136.70	<ul style="list-style-type: none"> • 2009 fee is around 30p per day • The PRS fee is 18% higher
101-200 sqm	19%	£174.30	£199.80	<ul style="list-style-type: none"> • 2009 fee is around 46p per day • The PRS fee is just over £25 higher
201-300 sqm	9%	£232.40	£263.00	<ul style="list-style-type: none"> • 2009 fee is around 64p per day • The PRS fee is around 13% higher
301-500 sqm	8%	£290.50	£326.10	<ul style="list-style-type: none"> • 2009 fee is around 80p per day • The PRS fee is approximately £35 more
500-1000 sqm	12%	£348.60-£406.70	£389.20-£452.30	<ul style="list-style-type: none"> • The fee is 96p to £1.11 per day • The PRS fee is 11% to 12% higher. • The position of the Interested Parties is that the 78% of premises in the bands above and those premises between 500m² and 600m² should all pay a lower, flat rate fee to PPL.

ANNEXE 3

COMPARISON OF FEES UNDER EST TARIFF v NEW TARIFF (USING PPL FIGURES AT ANNEX 7)

Pubs, Bars, Restaurants

Audible Area	Old Tariffs (014 & 015)	New Tariff (110)		Nos of Licensees	Fees under Est. Tariff/£	Fees under New Tariff/£
50	85.63	50	-41.61	2032	174000	101600
100	85.63	100	16.78	18378	1573708	1837800
150	85.63	100	16.78			
200	85.63	200	133.56	9703	830868	1940600
250	85.63	200	133.56			
300	85.63	300	250.34	3942	337553	1182600
350	85.63	300	250.34			
400	85.63	400	367.13	5793	496055	2317200
450	96.34	400	315.20			
500	107.04	500	367.12	596	63796	298000
550	117.74	500	324.66			
600	128.44	600	367.14	298	38275	178800
650	139.14	600	331.22			
700	149.84	700	367.16	173	25922	121100
750	160.54	700	336.03			
800	171.24	800	367.18	95	16268	76000
850	181.94	800	339.71			
900	192.64	900	367.19	45	8669	40500
950	203.34	900	342.61			
1000	214.04	1000	367.20	46	9846	46000
1050	224.74	1000	344.96			
1100	235.44	1100	367.21	17	4002	18700
1150	246.14	1100	346.90			
1200	256.84	1200	367.22	13	3339	15600
1250	267.54	1200	348.53			
1300	278.24	1300	367.22	13	3617	16900
1350	288.94	1300	349.92			
1400	299.64	1400	367.23	5	1498	7000
1450	310.34	1400	351.12			
1500	321.04	1500	367.23	8	2568	12000
1550	331.74	1500	352.16			
1600	342.44	1600	367.24	4	1370	6400
1650	353.14	1600	353.08			
1700	363.84	1700	367.24	5	1819	8500
1750	374.54	1700	353.89			
1800	385.24	1800	367.24	10	3852	18000
1850	395.94	1800	354.61			
1900	406.64	1900	367.24	1	407	1900
1950	417.34	1900	355.26			
2000	428.04	2000	367.25	3	1284	6000
2050	438.74	2000	355.85			
2100	449.44	2100	367.25	32	14382	67200

TOTALS:	41212	3613099	8318400
	% Total Increase for PPL:		130.23

Notes:

- 1) For illustration - assumes same broad breakdown of premises
- 2) PPL has listed 32 premises at "2000 sqm +". These have been calculated at 2100 sqm, but may of course be larger

COMPARISON OF FEES UNDER EST TARIFF v NEW TARIFF (USING PPL FIGURES AT ANNEX 7)

Shops & Stores

Audible Area	Est. Tariffs (064 & 065)	New Tariff (111)		Nos of Licensees	Fees under Est Tariffs	Fees Under New Tariffs
50	85.63	50	-41.61	3385	289857.55	169250
100	85.63	100	16.78	18944	1622174.7	1894400
150	85.63	150	75.17			
200	85.63	150	75.17	10257	878306.91	1538550
250	85.63	200	133.56			
300	85.63	200	133.56	4794	410510.22	958800
350	85.63	250	191.95			
400	85.63	250	191.95			
450	85.63	250	191.95			
500	85.63	250	191.95	4025	344660.75	1006250
550	85.63	300	250.34			
600	85.63	300	250.34			
650	93.04	300	222.44			
700	100.45	300	198.66			
750	107.85	300	178.16	4758	513150.3	1427400
800	115.26	350	203.66			
850	122.66	350	185.34			
900	130.07	350	169.09			
950	137.47	350	154.60			
1000	144.88	350	141.58	1708	247455.04	597800
1050	152.29	400	162.66			
1100	159.69	400	150.49			
1150	167.1	400	139.38			
1200	174.5	400	129.23			
1250	181.91	400	119.89	905	164628.55	362000
1300	189.32	450	137.69			
1350	196.73	450	128.74			
1400	204.14	450	120.44			
1450	211.55	450	112.72			
1500	218.96	450	105.52	758	165971.68	341100
1550	226.37	500	120.88			
1600	233.78	500	113.88			
1650	241.19	500	107.31			
1700	248.6	500	101.13			
1750	256.01	500	95.30	574	146949.74	287000
1800	263.42	550	108.79			

1850	270.83	550	103.08			
1900	278.24	550	97.67			
1950	285.65	550	92.54			
2000	293.06	550	87.67	426	124843.56	234300
2500	367.16	600	63.42	740	271698.4	444000
3000	441.26	650	47.31	666	293879.16	432900
3500	515.36	700	35.83	403	207690.08	282100
4000	589.46	750	27.24	208	122607.68	156000
4500	663.56	800	20.56	109	72328.04	87200
5000	737.66	850	15.23	85	62701.1	72250
6000	885.86	900	1.60	134	118705.24	120600
7000	1034.06	950	-8.13	61	63077.66	57950
8000	1182.26	1000	-15.42	56	66206.56	56000
9000	1330.46	1050	-21.08	48	63862.08	50400
10000	1478.66	1100	-25.61	32	47317.12	35200
11000	1626.86	1150	-29.31	11	17895.46	12650
12000	1775.06	1200	-32.40	16	28400.96	19200
13000	1923.26	1250	-35.01	27	51928.02	33750
14000	2071.46	1300	-37.24	38	78715.48	49400
15000	2219.66	1350	-39.18	13	28855.58	17550
16000	2367.86	1400	-40.87	6	14207.16	8400
17000	2516.06	1450	-42.37	3	7548.18	4350
18000	2664.26	1500	-43.70	4	10657.04	6000
19000	2812.46	1550	-44.89	2	5624.92	3100
20000	2960.66	1600	-45.96	6	17763.96	9600
21000	3108.86	1650	-46.93	16	49741.76	26400
				53218		
				Totals:	6609921	10801850
				% Increase for PPL:	63.42	

Notes:

- 1) For illustration - assumes same broad breakdown of premises
- 2) PPL has listed 16 premises at "20001 sqm +". These have been calculated at 21000 sqm, but may of course be larger