

**PART C**

**SCHEDULE**

Universal has set out in this Schedule a number of observations on statements made in the BIEM Reply. This Schedule consists of a commentary on the inaccuracies and misrepresentations set out in the BIEM Reply and complements the comments which Universal has addressed in the main body of its Rejoinder. Universal does not comment on the numerous typographical errors that are apparent throughout the BIEM Reply. Nevertheless, Universal wishes to set the record straight on a number of inaccurate or inappropriate comments contained in the BIEM Reply and has therefore compiled this schedule as a means of addressing some of the more salient and egregious comments.

	<b>BIEM Reply Reference</b>	<b><i>BIEM Reply Comment</i></b>	<b>Universal's Observations</b>
1.	Page 7, §4	<i>BIEM negotiates with the International Federation of the Phonographic Industry ("IFPI"). IFPI's members include the five most powerful Record Producers, which together dominate the record-producing market: BMG, EMI, Sony, Time Warner and Universal ("The majors"). These majors are part of media conglomerates whose turnover, financial resources, man power and information are incommensurately greater than those at the disposal of BIEM. IFPI is also an organisation with funding and resources far superior to BIEM.</i>	Consistent with much of the BIEM Reply, this statement is emotive and is not relevant to the issues under consideration. It suggests that IFPI members are not entitled to representation, and the suggestion that this is because of the market power of the majors does not bear scrutiny. Unlike BIEM membership, members of IFPI do not constrain IFPI in its commercial activity..

**Commentaire** : Emotive misinterpretation

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations	
	Page 7, § 5, footnote 5	<p><i>In its provisional statement of objections in TimeWarner/EMI, the Commission has highlighted his bargaining power and analysed he factors t its basis.</i></p>	<p>First, Universal would point out that, by its very nature, a statement of objections is a preliminary document and cannot be said to express the Commission's views. For this reason alone, it cannot be relied upon by BIEM as supportive of BIEM's arguments.</p> <p>Secondly, BIEM is referring to a document that was produced in a totally different context to that relating to the Complaint. It concerned a merger (that did not proceed), rather than a complaint about breaches of Articles 81(1) and 82 and it therefore has no probative value.</p> <p>Thirdly, it is simply misleading to suggest that IFPI has greater bargaining power than BIEM. The whole purpose of the negotiations between BIEM and IFPI is for the organisations to arrive at a balanced and fair agreement taking full account of current market conditions. BIEM ignores the fact that it is a monopoly, made up of national monopoly members with various sources of income in addition to mechanical royalties, <b>whereas IFPI members are effectively a one product industry almost totally dependent upon mechanical copyright licences, and have no other source of income.</b></p>	<p><b>Commentaire</b> : What does it express then?</p> <p><b>Commentaire</b> : Like? No cross subsidising!!!!</p> <p><b>Commentaire</b> : Emphasis added by BIEM</p>

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
			<p>As a monopoly, BIEM has a responsibility to behave in accordance with the obligations of dominant undertakings. Crucially, it must be able to justify the restrictions it places on competition. <u>It has singularly failed to do this.</u> The major record companies are not immune from economic and commercial developments in the marketplace and there is no reason why BIEM's members should be immune.</p>
3.	Page 8, § 5	<p><i>In the United States, authorities are investigating the behaviour of the majors as regards artists' contracts. In the same country legislators have had to address highly unfair clauses in licensing contracts whereby the majors systematically diminish creators' income.</i></p>	<p>BIEM's language is emotive and its statement inaccurate and misleading. Legislation in the mid-1990's prohibited reduced rates for controlled compositions for recordings made after 22 June 1995. <u>There is no evidence, however, of a scheme enacted by the majors "systematically" to diminish creators' income, because none exists.</u></p> <p>This is presumably a reference to the hearings held in the Californian Senate on the exception obtained by the record companies from the Seven Year Rule (which limits the amount of time anyone can be held to a contract for his or her personal services to a maximum of seven years) and on accounting practices more generally. The Chair of the Senate Select Committee on the Entertainment Industry, Senator Kevin Murray, acknowledged that there was a genuine difference of</p>

**Commentaire** : It is up to Universal to prove, not us to disprove

**Commentaire** : They do not pass on any of their savings in manufacturing etc

**Commentaire** : We believe that Universal continues to pay ¾ rate for recordings made after this date.

**Commentaire** : Refer to quotes from the hearings

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
			<p>view between the majors and artists on some of these points. He also noted that, <i>“this all must be read in the context of a crisis in the recording industry. Sales are down and piracy is rampant with many of the most popular songs and albums available over the Internet for free”</i>.</p> <p>Although the argument was made at the hearings that artists were forced to accept “unfair” contract terms , contrary to <i>BIEM’s</i> insinuation, this was not a competition case. Moreover, there was no allegation of collusion between the majors, and of course, the terms of the contract which are most significant to artists (term, advance royalties, marketing commitments, etc) do vary from deal to deal. In contrast, BIEM wants the same terms for all agreements.</p> <p>The Chair also noted the different approaches being taken by the majors in these areas, such as BMG's recent announcement that it would be streamlining its royalty accounting system and Universal indicating its intent both to streamline royalties and eliminate audit restrictions (both of which are now being implemented in the US).</p>

**Commentaire** : Check for quote from hearings illustrating that there are strong similarities and positions from where no company will diverge

**Commentaire** : This was all done because there was no problem.....

**Commentaire** : Forced into it – tacit acknowledgement of what the artists have been saying. Elimination of packaging deductions case in point.

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
4.	Page 8, § 7	<i>It is also a gross distortion to say that BIEM can insist on any condition because record producers unilaterally depend on BIEM.</i>	<p>On the contrary, BIEM is grossly distorting the facts. Record companies rely much more on BIEM than composers do on record companies and indeed on BIEM. In this regard, Universal refers to the United Kingdom Copyright Tribunal decision of 1991, which BIEM has cited. In section V sub-section (c), the Tribunal states:</p> <p><i>"...what would happen if the agreement broke down.. .it would be the record companies which would be subject to injunctive relief. Of course the composers would lose too but collectively they could probably stand a short period of injunction whilst a record company, starved of new product, could not".</i> Universal does not deny that composers rely on record companies in order to exploit their creations. Nevertheless, mechanical rights are only one source of income for composers, whilst record companies have no other source of repertoire.</p>
5.	Page 8, § 8	<i>For these reasons, the Court of Justice has acknowledged as far back as 1974 that collective copyright management was absolutely necessary to protect the rights and interests of creators.</i>	<p>Universal does not dispute this. However, the Court of Justice has not stated that the BIEM trade association of collecting societies was absolutely necessary to protect the rights and interests of creators and it has certainly not stated that a common royalty rate across the EEA is absolutely necessary to protect such rights. Indeed, in this regard,</p>

**Commentaire** : This does not illustrate the point – it acknowledges that apart from a short time, both would suffer equally. The agreement has broken down but no-one has yet sought injunctive relief.

**Commentaire** : For a class of composers, mechanical income is the basis of their livelihood.

**Commentaire** : Does Universal want a common royalty rate? They argue strongly for a continuation of the Standard Rate, only cheaper.

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
			<p>John Temple Lang, in an article on multimedia and EU anti-trust law (see <i>Antitrust Law, Media, Multimedia and European Community, Antitrust Law</i>, Fordham Corporate Institute, New York City, 17 October 1997, pp55-56, <a href="http://europa.eu.int/comm/competition/speeches/text/sp1997_070_en.pdf">http://europa.eu.int/comm/competition/speeches/text/sp1997_070_en.pdf</a>), referring to excessive royalties imposed by performing rights societies, but whose comments apply equally to mechanical rights societies, stated:</p> <p>"[a royalty rate] is also less likely to be lawful if it is a single rate imposed on everybody, rather than a series of rates adjusted to the circumstances of each group of licensees..." While Universal supports the principle of the Standard Rate, it believes that Mr. Temple Lang's assessment supports its argument that the rate must take into account circumstances and current commercial usage.</p>
6.	Page 9 § 11	<p><i>This is the language of exploitation: "give me your creation, leave its commercialisation in my hands and wait and see what earnings remain for you."</i></p>	<p>Once again, BIEM is being unreasonably emotive. What it describes as exploitation is in fact a reasonable and commonplace system of calculating royalties in many other fields, such as book publishing and pharmaceuticals. In fact, as the Ordovery Report shows at paragraph 62, it is likely that a change in the basis for calculating the</p>

**Commentaire** : Which to the extent possible it does

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations	
			<p>Standard Rate to one that is based on average or actual realised price is likely to allow record companies to increase sales revenue. Rather than exploiting composers, therefore, the creators are likely to benefit from the changes.</p>	<p><b>Commentaire</b> : Does not convincingly demonstrate that composers would be any better off.</p>
7.	Page 9 § 11(2)	<p><i>It would be "abusive" to force creators to be remunerated on the basis of transactions between the majors and third parties which are not only beyond the sphere of influence of creators, but are also not transparent.</i></p>	<p>Universal refutes the description of the basis for royalties of actual realised price as "abusive". Any concerns about transparency can be overcome by rights holders exercising their right to audit record companies' accounts. Furthermore, as discussed at point 33 below, creators cannot influence the level of PPD and yet this is acceptable to BIEM; it is therefore difficult to see why the fact that creators cannot influence discounts should be treated differently by BIEM. As the Ordovery Report points out in paragraph 56, "BIEM has previously agreed to a royalty discount that reflected, however imperfectly, the discounts offered by record companies to retailers. Consequently, BIEM cannot consistently claim that while a linkage was relevant in the past, it is somehow not appropriate to adjust the linkage now to better reflect record companies' actual discounting practices."</p> <p><i>The Ordovery Report goes on to show why it would not remotely be "abusive" to force creators to be remunerated on the basis of actual</i></p>	<p><b>Commentaire</b> : Actual realised price is a myth – that is why the constant reference to "average" ARP</p> <p><b>Commentaire</b> : It is the only transparent parameter</p> <p><b>Commentaire</b> : If the discounts are adjusted to reflect market conditions and the packaging deduction is adjusted to reflect changes there the net results would not be helpful to the record companies</p>

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
			<p>realised price. The Report states (at paragraph 58):</p> <p><i>“Moreover, assuming that there is something to be said for tying royalties to PPDs, it is worth noting that a more extensive use of discounts could also stabilize base prices (PPDs), which should unambiguously affect composers’ per CD income. In particular, extensive reliance on discounts in response to changing market conditions enables the record companies to maintain more stable PPDs and to respond instead with targeted reductions to the various retailers”</i></p>
8.	Page 9 § 11(2)	<p><i>In the past, creators have been forced into certain royalty schemes which already take account of the majors’ commercial decisions or transactions.</i></p>	<p>It is not true to say that BIEM has been forced to accept anything, or that the royalty scheme already takes account of commercial decisions or transactions. IFPI does not have a superior bargaining position to BIEM and is therefore not able to force BIEM to agree to something. Further, what has been negotiated in the past, such as a reduced rate on CDs when they were first introduced, has reflected the commercial realities at the time of negotiation. Those commercial realities have changed in recent years, but now BIEM seems no longer willing to take into account technological changes or current commercial practice. For example, it gives no new format allowances</p>

**Commentaire** : What does this mean?

**Commentaire** : BIEM had great difficulty in getting rid of the CD rebate long after any justification for it remained.

**Commentaire** : What about the 25% deduction currently in the SC

**Commentaire** : It does but this was also grossly abused by the industry in the past



	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
			<p>for secure formats and allows no rebate to be offered to record companies. Instead, it seeks to force IFPI to accept terms that do not reflect current commercial practice. Such behaviour by BIEM constitutes an abuse of its dominant position.</p> <p>Universal does not propose to repeat its summary of the recent history of discounts negotiated by powerful retailers, but refers the Commission to sections 5.13 to 5.16 of the Complaint.</p>
9.	Page 10 § 11(3)	<i>To reach agreement, creators have already been forced to accept very significant deductions from their income in order to take account of benefits that record producers grant to retailers.</i>	<p>Universal refers the Commission to point 8 above. BIEM has not been “forced” to agree to anything. Indeed, the suggestion that BIEM, as a monopolist, can be forced to agree to anything is misconceived.</p>
10.	Page 10 § 12	<i>The complainant suggests that the majors' individual dealings with artists be the yardstick for royalties that creators receive for copyright licences,</i>	<p>BIEM is isolating and exaggerating a comment Universal makes in the Complaint.</p> <p>Rather than BIEM's suggestion that Universals dealings with collecting societies should mirror those with artists, in fact, what Universal is suggesting is that creators share in a more equitable manner than at present, the risks and rewards in the industry. It is disingenuous for BIEM to take a specific point of comparison made by Universal and</p>

**Commentaire** : What rate is Universal paying for SACD and DVDA?

**Commentaire** : The failure of the record companies to pay on DVD music video for example demonstrates who is abusing their market position.

**Commentaire** : The record companies together are an oligopoly

**Commentaire** : Record companies are monopolists

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
			<p>make it into this general proposition. The point being made in the Complaint is that unlike competition between BIEM collecting society members, there is strong competition for artists' services between record companies and that this is reflected in licensing arrangements. Universal is not suggesting that such contracts can be or should be a yardstick for the Standard Contract but merely that they should be used to illustrate that full account should be taken of prevailing market conditions.</p>
11.	Page 11 § 14	<i>It is noteworthy that the majors, in addition to being record producers, also act as publishers, In their capacity as publishers, they are all members of BIEM society. They dispose of most of the musical copyrights worldwide that are of economical importance.</i>	<p>Universal acknowledges that, in addition to the Universal group being a record producer, it acts as a music publisher. However, that observation has no relevance to an analysis of the Complaint; by refusing to negotiate terms of the Standard Contract to reflect market conditions, BIEM is acting contrary to Articles 81(1) and 82.</p>
12.	Page 11 § 15	<i>Members [of collecting societies] are democratically represented and in full control of their societies.</i>	<p>Universal notes that with tens of thousands of members, it is scarcely credible that all those members described are in full control of their societies. Indeed, given their large membership, Universal maintains that collecting societies are effectively answerable to no one and</p>

**Commentaire** : See US comments about similarities in agreements and non-negotiable positions accepted by all the majors.

**Commentaire** : Like the share holders in Universal?

**Commentaire** : Is this the case with the neighbouring rights societies?

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
			therefore currently immune from the commercial pressures that effect most commercial organisations.
13.	Page 11 § 15	<i>Membership is voluntary.</i>	<p>The BIEM response regularly raises the paradox of, on the one hand voluntary membership of collecting societies and, on the other the <i>de facto</i> necessity for creators to join collecting societies. On the one hand, there are comments such as this at paragraph 15 and at paragraph 19 of the BIEM Reply. On the other, for example, at paragraph 24, there are remarks such as, “<i>If (creators) were left on their own, few would be able to obtain a fair remuneration.</i>” Indeed, Universal notes that BIEM has cited so much of Advocate General Mayras’ opinion in the <i>BRT y SABAM and Fonior</i> case, when this citation contradicts BIEM’s comments from the earlier paragraphs 15 and 19. Rather than repeating in full the Advocate General’s comments, Universal cites just one, as follows: “<i>En effet, l’exploitation personnelle en est matériellement irréalisable</i>”. Universal agrees with Advocate General Mayras. In order to exploit their mechanical rights, creators are effectively forced to join collecting societies..</p> <p>As stated in the Rejoinder, Universal has no objection to entities forming collecting societies and for those societies to</p>

**Commentaire** : Indeed it is the better option but not the only option

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
			<p>enter into reciprocal agreements. With this exceptional right, however, comes a special position of responsibility not to abuse a dominant position or to act against consumer welfare. The right to form monopolistic collecting societies should benefit consumer welfare and not act to its detriment. It was therefore with this in mind that the ECJ held in the <i>Tournier</i> case that:</p> <p><i>“Copyright-management societies pursue a legitimate aim when they endeavour to safeguard the rights and interests of their members vis-à-vis the users of recorded music. The contracts concluded with users for that purpose cannot be regarded as restrictive of competition for the purposes of Article 85 unless the contested practice exceeds the limits of what is necessary for the attainment of that aim.”</i></p>
14.	Page 12 § 17	<i>Contrary to the Complaint, no creator or publisher is required to make copyright assignments to societies.</i>	<p>Universal refers to its comment at point 13 above and, with an eye to AG Mayras' opinion, points out that if a creator or publisher wants to collect all monies due to it from mechanical reproduction, it must assign copyright to the collecting societies and use their services.</p>
15.	Page 12 § 20	<i>Reciprocal representation contracts... do not provide for any exclusivity.</i>	<p>Universal notes that as monopoly organisations, already have exclusivity and do not therefore need specifically collecting societies</p>

**Commentaire** : Consumer welfare or Universal's profits?

**Commentaire** : But it is not required to do so

**Commentaire** : Does not follow – creators can choose to release their own records

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
16.	Page 13 footnote 16	<i>To describe societies as mere data processors is similar to describing the majors as passive exploiters of creative talent (which we do not).</i>	Universal notes that in its Reply, BIEM has not demonstrated that its members' principal mechanical rights activity is anything more than data processing.
17.	Page 13 § 22	<i>In case of online exploitation, both the mechanical reproduction right and the performing right are involved.</i>	Universal does not accept that it is necessarily the case that both these rights are involved in online exploitation.
18.	Page 13 § 24	<i>Only the system of copyright management societies enables all creators to benefit from the use of their works.</i>	See point 13 above.
19.	Page 14 § 25	<i>For small record producers, collective licensing is the only gateway to the market. To extort impracticably low rates is to jeopardise collective licensing and to jeopardise collective licensing is a means to put smaller record producers out of the market.</i>	First, Universal is not attacking, in its Complaint, collective licensing per se, but rather anti-competitive practices carried on by the collecting societies' trade association. Secondly, this statement is a crude attempt by BIEM to suggest that by making its Complaint, Universal will damage the business of independent record producers. This statement is wholly untrue and Universal would note that in the context of the abusive terms in the Standard Contract imposed by BIEM.

**Commentaire** : But does not show the contrary

**Commentaire** : US hearings show that record companies not competent to perform accounting. Other activities of societies

**Commentaire** : Then we disagree on this, societies believe that both rights are involved

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
			<p>BIEM has supplied no evidence that this is in fact the case.</p> <p>Conversely, both Telstar and Edel have written letters of support to Universal's Complaint. BIEM cannot therefore insinuate that it is only the majors who are likely to support the Complaint. Finally, the suggestion that the Complaint can in some sense jeopardise collective licensing is entirely unsubstantiated and is clearly without foundation.</p>
20.	Page 15 § 29	<p><i>BIEM is a non-profit organisation and is confined to one mission: to ensure fair remuneration for creative persons.</i></p>	<p>Universal notes that it has been held in the past that it does not matter how certain organisations describe themselves, they may still amount to a cartel. For example, <i>IFTRA (75/497/EEC: OJ (1975) L228 pp3 -16 at p7)</i>, which stated:</p> <p><i>"The mere labelling of an agreement between undertakings as rules against unfair competition does not suffice to remove the agreement from the ambit of Article 85(1) of the EEC Treaty. In the present case the agreement in question contains several clauses which in fact either discourage competition directly or give the parties the opportunity and means to take joint action to prevent normal methods of competition."</i></p> <p>Furthermore, the fact that BIEM considers itself a non-profit</p>

**Commentaire** : Getting rid of collective licensing would hurt small companies more than the majors.

**Commentaire** : These are big independents

**Commentaire** : Is IFPI a buying cartel?

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
			organisation does not alter the fact that it is in a monopoly position and as such, can dictate the terms of the Standard Contract.
21.	Page 17 § 37	<i>All BIEM societies have undertaken to conclude reciprocal representation contracts with all other BIEM societies.</i>	As already noted in point 13 above, Universal does not object to these reciprocal representation contracts. Rather, it is the abusive royalty rate set by BIEM to which Universal objects.
22.	Page 17 § 38	<i>Consequently, society A has the certainty that society B will manage the repertoire of society A as far as possible on the same terms and conditions as society A itself.</i>	Universal does not object in principle to reciprocal representation, except where it is used as a conduit to impose abusive terms throughout the EEA. Universal would note that BIEM has provided a classic description of a cartel-like arrangement. <b><u>Clearly, the reciprocal arrangements between the societies are for the most part beneficial to Universal and to consumer welfare more generally.</u></b>
23.	Page 19 § 39	<i>This policy (single licence ["licence unique et globale"]), and its effects are already set out in the notification of the BIEM Statute to the Commission, which was the basis for the comfort letter.</i>	Universal was not a party to the notification of the BIEM Statutes to the Commission. Since it has not seen a copy of the notification, it cannot comment further but calls upon BIEM to supply Universal with a copy of the notification in order that it can address this matter more fully..
24.	Page 19 § 43	<i>The Complainant also contends that the</i>	Universal refutes this statement. The confidential LECG economic

**Commentaire** : Emphasis added by BIEM

**Commentaire** : Should we do this? Or consider this as a business secret?

**Commentaire** : BIEM has no obligation to supply Universal with anything. Universal must prove its case.

**Commentaire** : Why is this secret? How can we comment on matters which are hidden?

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
		<p><i>Standard Contract has limited technical progress and consumer choice. This is another misrepresentation, ... without a substantiated basis in the Complainant's Statement of Facts.</i></p>	<p>Analysis of Annex 16 of the Complaint relating to the economic impact of discounts, minimum royalties and maximum tracks illustrates how the Standard Contract has a detrimental effect on the development of technology and consumer choice. Universal also refers to the Ordovery Report which shows (at paragraphs 62 to 82) how the provisions of the Standard Contract have limited consumer choice.</p>
25.	Page 19 footnote 27	<p><i>BIEM has granted royalty breaks to promote technical progress (the introduction of the music cassette and later the CD). A decreased royalty regime still applies today to Minidiscs and Digital Compact Cassettes (DCC).</i></p>	<p>Universal acknowledges that BIEM has granted royalty breaks to promote technical progress in the past, such as a flat rate deduction of 20% in 1972 to promote the sale of cassettes. This demonstrates that BIEM acknowledges in some contexts the need to take into account commercial considerations and market forces, but it refuses to acknowledge the need to do likewise in relation to the matters under consideration in the Complaint, including the level of the Standard Rate. In this context, we refer to the letter from the Chairman and Chief Executive Officer of IFPI to the President of BIEM, dated 14 April 2000 at the Annex to this Schedule.</p> <p>Universal also acknowledges that BIEM has granted decreased royalty rates for the sales of Minidiscs and DCCs. Nevertheless, Universal notes that the effects of these are minimal, and always</p>

**Commentaire** : Nothe that BIEM asked for a copy but was not provided with one

**Commentaire** : We disagree. The analysis is fatuous.



	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
			were. DCC was a failure and no longer exists as a format and the revenue from Minidisc sales was always negligible. Further, as noted in point 8 above, BIEM has not granted royalty breaks for more recent technological progress, such as DVDA and the SACD secure format.
26.	Page 19 footnote 28	<i>The sole cause for limitations of consumer choice is the majors' decision to develop sales volume with supermarkets offering little choice, and to decrease business with small retailers offering a wide choice.</i>	This statement is simply untrue. Universal can not choose specific categories of retailers to which to sell its products, or discriminate between them. Indeed, market forces determine the retailers that wish to sell Universal's product and the suggestion that Universal is also in some way controlling the market is typical of BIEM's perception of its own status vis à vis its members.
27.	Page 20 § 44	<i>On 29 June 2000, BIEM sent a circular to its members in which it recommended to continue with the application of the Standard Agreement. This was to avoid a vacuum and to enable all concerned to stay in business. All Record Producers continued on that basis, as at present.</i>	Universal and other record producers had no alternative than to continue on the basis of the expired agreement. In this regard, Universal refers to the 1991 UK Copyright Tribunal Decision, cited above, which suggests that if the Standard Contract broke down, the record companies could not survive. (See point 4 above).
28.	Page 20 § 46	<i>The Presidents of BIEM and IFPI had several</i>	Universal disputes this chronology of negotiations. Following the conclusion on 28 January 1998, a joint working

**Commentaire** : It will no take the initiative, the industry stopped negotiating!

**Commentaire** : Are Universal paying royalties on these formats at the Standard rate? Illustrating the power of the record companies.

**Commentaire** : This is not a response to the remark

**Commentaire** : If Universal gives huge discounts to supermarkets and none to small retailers they are indeed discriminating and controlling the market. They have a monopoly over their artists.

	<b>BIEM Reply Reference</b>	<b><i>BIEM Reply Comment</i></b>	<b>Universal's Observations</b>
		<p><i>Informal discussions in respect of the Standard Agreement. Formal negotiations only began on 19 February 2002 in London.. .The negotiations have not been formally closed by either party.</i></p>	<p>group was set up to investigate and discuss the practicalities of introducing a royalty rate calculated on actual realised price. Following a pre-meeting on 2 June 1999, this group had its first meeting on 11 June 1999. Several meetings and correspondence between the two parties relating to this issue ensued, culminating in a letter from BIEM of 31 March 2000 rejecting IFPI's proposals for actual realised price. On 3 May 2000, IFPI wrote to BIEM proposing "average realised price" as an alternative to actual realised price. This was followed on 16 May 2000 by a Standard Contract negotiating meeting between IFPI and BIEM. The Standard Contract terminated on 30 June 2000, following which correspondence between the parties continued and there was another negotiating meeting on 30 August 2000 which dealt with the rates for developing markets and online negotiations. Informal negotiations continued between the parties until, as BIEM suggests, a formal negotiation committee was held on 19 February 2002.</p> <p>Further informal negotiations have taken place in February 2003, but these have not addressed the substantive issues raised in the Complaint.</p>

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
			<p>This chronology shows that whilst BIEM is correct in stating that “formal” negotiations only began on 19 February 2002, informal negotiations had continued since the agreement of the 1998 Standard Contract and the positions of the two parties were therefore well known.</p> <p>Moreover, it is somewhat disingenuous of BIEM to claim that negotiations have not broken down. Any reasonable person would consider that the negotiations on the substantive issues that form the subject of the Complaint, which began long before February 2002, have broken down.</p>
29.	Page 20 footnote 29	<p><i>It is then considered that the subject of the Standard Agreement for this meeting is exhausted and that IFPI needs to reflect on the situation after the meeting it will have with some societies in Europe on the subject of online exploitation,</i></p>	<p>Universal would note that BIEM's account of this meeting is misleading. Cees Vervoord opened the meeting by emphatically stating that, “there will be no change to the Standard Contract at all”. All that BIEM offered was a €3.5 million per annum anti-piracy fund; an area where the lion's share of the effort is undertaken and funded by the record companies. BIEM expressly confirmed to IFPI that, “there was no element of the Standard Contract on which BIEM was willing</p>

**Commentaire** : The failure to agree to Universal's wild ambit claims is not an indication of negotiations with the industry as a whole.

**Commentaire** : Societies are active in anti-piracy themselves.

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations	
			<p>to move". There was certainly no mention of this discussion ending "for this meeting" only. It seems clear, therefore that negotiations have been closed.</p>	<p><b>Commentaire</b> : Informal negotiations continue</p>
30.	Page 22 § 54	<p><i>The Complaint is directed against the royalty of 9.009% of the PPD... the complainant concedes it receives 2.5% of the royalties paid by it from the central licensing society MCPS under a central licensing agreement with MCPS.</i></p>	<p>Universal reiterates that the royalty is in fact 9.2% of PPD after taking into consideration minimum royalty and maximum track provisions; something which BIEM seems to ignore. As a percentage of the average price record companies receive for the records they sell, the rate is 10.8%. The collecting societies have agreed amongst themselves that no rebate may be granted by one collecting society to a record company without the prior approval of all other relevant members. This agreement is the subject of a separate complaint by Universal to the European Commission.</p>	<p><b>Commentaire</b> : Again Universal refuses to acknowledge that at the time of making the submission, the rate was much lower by virtue of the rebate.</p> <p><b>Commentaire</b> : And the publishers</p> <p><b>Commentaire</b> : If this is relevant we should see it.</p>
31.	Page 23 footnote 34	<p><i>In a letter to BIEM dated 17 June 1982 ... the Commission advised that: [T]he basis of the royalty is an artificially - calculated and therefore fictitious retail price. This 'reconstructed retail price' could often be inadequately related to the</i></p>	<p>This statement by the Commission (which has not previously been seen by Universal) reinforces Universal's Complaint that the royalty and its basis of assessment must reflect "the reality of prices", actual pricing structures and current market conditions. This citation from the Commission's letter to BIEM of 24 November 1983 appears to</p>	

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
		<i>prolong and maintain traditional and unrealistic price structures as well as differences between markets." "Cette référence nouvelle garantit que le producteur n'aura plus désormais à payer de redevances sur une base qui échappe à toute influence directe de sa part, comme cela avait été le cas dans le système antérieur."</i>	support Universal's argument that royalties should be paid on a basis over which the record companies have some influence; for example, taking discounts into account.
32.	Page 24 § 58	<i>BIEM and IFPI agreed as follows: On the one hand, a lower price was introduced as the calculation basis for royalties (the PPD instead of the average retail price). On the other hand, a higher rate was introduced, namely 11% (instead of 8%). This change became effective as of 1 November 1985. Contrary to the complainant's allegations, this resulted from negotiations between BIEM and IFPI. It did not result from mathematical deduction.</i>	As a consequence of discussions with IFPI, Universal understands that the PPD was calculated to reflect the average European retail mark-up as disclosed by annual surveys of IFPI national groups at the time. Whilst there was a negotiation between BIEM and IFPI, this focussed more on the size of any deduction.

**Commentaire** : That is why average ARP is a fabricated and unreal figure.

**Commentaire** : Refer to enclosure 1 to the commented version of PART A : minutes of a BIEM/IFPI negotiating meeting in 1985 illustrating BIEM's statement. The minutes were further commented by IFPI's secretariat on various points but not that one. Both 11% and the deductions were discussed.

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
33.	Page 24 § 60(1)	<i>The introduction of the PPD as the calculation basis had the following effects: Creators' income depends on factors which are transparent and not on factors which are beyond the sphere of influence of creators (such as transactions between producers and retailers).</i>	By this statement, BIEM suggests that Creators can influence the level of PPD. <u>This is of course incorrect; they have as little control on PPDs as they have over discounts (i.e. none).</u> The introduction of PPD as a basis of assessment followed negotiations between BIEM on behalf of creators and IFPI on behalf of record producers, following intervention by the Commission. The same applied to the discount deduction which was intended to take into account the actual level of discount at the time PPD was introduced as a basis of assessment.
34.	Page 25 § 61  Page 25 footnote 35	<i>Rates have continuously decreased as the Complainant has acknowledged.  Record companies are paying lower standard rates than previously,</i>	BIEM is isolating and misquoting a section from the Complaint. The Complaint actually reads as follows:  <i>"Although it may appear at first glance that record companies are paying a lower Standard Rate now than previously, in reality, the Standard Rate has remained the same, since the gain resulting from small royalty reductions has been obliterated by record companies having to increase their discounts considerably to customers given the very power which their customers now enjoy compared to 1985".</i>
35.	Page 26 § 63	<i>In 1989 and 1990, B/EM agreed to transitory deductions of 15% and 10% respectively for</i>	Universal acknowledges that a 15% deduction for 1989 and a 10% deduction for 1990 for CDs were agreed to by BIEM. Universal notes,

**Commentaire** : There is no such suggestion, transparent does not mean that it can be influenced

**Commentaire** : The PPD is transparent – secret discounts and deals are not.

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations	
		<p><i>compact discs. These were a contribution by the creators to the introduction of new technology, They highlight B/EM'S openness for negotiations on the occasion of breakthrough developments, such as technology.</i></p>	<p>however, that that was a reducing allowance which has now ended and as such, is a strange reference.</p> <p>This only highlights the lack of credibility in BIEM's current refusal to take account of developments in technology (which BIEM in this paragraph claims to recognise and which was originally accepted by BIEM), such as online distribution, DVDA or SACD.</p>	<p><b>Commentaire</b> : Where is the refusal?</p>
36.	Page 27 § 66	<p><i>The disproportion of the packaging deduction is evidenced by letters from IFPI where they accepted that the packaging costs of the most important formats was below 10% of PPD.</i></p>	<p>Universal considers the packaging deduction to be an important part of the total royalty calculation and it is happy to defend it if necessary.</p>	<p><b>Commentaire</b> : It is necessary yes</p>
37.	Page 28 § 69	<p><i>[the deduction for discounts] is not affected by individual discounts which record producers negotiate with specific retailers on a case by case basis and which may vary from transaction to transaction and from retailer to retailer (e.g, special incentives to enlarge the sales volume of a record producer, early payment bonuses, or end of year bonuses).</i></p>	<p>In this paragraph, BIEM implies that it is unreasonable of Universal to attempt to mitigate payments made in advance. Universal refutes this. First, whilst Universal does grant early payment bonuses, they amount to a very small discount, an average of at most ( ). Secondly, as the Ordovery Report points out, no record company would grant discounts unless those discounts helped grow the market..</p>	<p><b>Commentaire</b> : Not the market but the market share, the current state of the market indicates therefore that Universal should stop granting discounts forthwith as they do not help!</p> <p><b>Commentaire</b> : Why wouldn't a record company grant a discount that produced a benefit for them – such as early payment – but in no way grew the market?</p>

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
38.	Page 28 § 70(1)	If the calculation of royalties were based on a system taking account of all individual discounts, then societies would have to verify all these discounts in each case.	<p>Universal would note that the discounts offered are to increase sales and this in turn increases the revenue of creators. Furthermore, BIEM has ignored in its Reply that an alternative to discounts is a reduction in PPD.</p> <p>As BIEM well knows, there are more than adequate audit mechanisms to verify actual realised price but as is equally clear (see, for example, the letter from the Chairman and Chief Executive Officer of IFPI to the President of BIEM, dated 14 April 2000 at the Annex to this Schedule) BIEM has rejected the implementation of actual realised price out of principle, rather than because of any difficulties in verification..</p>
39.	Page 29 § 71	The Standard Agreement provides for minimum royalties and for maximum track numbers per record. Both devices follow the same purpose: to protect the creator's income against dilution. Both ensure that the creator receives fair remuneration, whatever the commercial or technical conditions may be on which Record Producer mechanically	Here, BIEM further demonstrates that its primary objective is to immunise the Standard Contract from the effects of market forces. Universal notes that it is exactly this type of insulation from market forces that the Commission complained about when the royalty rate was in fact retail based and which resulted in its change to a PPD based system.

**Commentaire** : A reduction in the PPD is transparent.

**Commentaire** : Not true - That's not what it demonstrates.



	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
		reproduce the creator's work and sell the ensuing records.	
40.	Page 29 § 72	<i>Minimum royalties and maximum track numbers protect the creator against extremely low list prices... extremely low income per track and... against possible mismanagement by record producers...</i>	<p>Universal would note first the somewhat obvious point that as a commercial enterprise, it seeks to maximise income from its products.</p> <p>Contrary to BIEM's claims, the minimum royalties and maximum tracks provisions are not necessary to safeguard against pricing by Universal that would lower composers' income. This is because of the parties' identity of interest, as explained in the Ordovery Report, at paragraphs 44 and 45. The Ordovery Report responds in some detail to BIEM's assertions about the effect of the minimum royalties and maximum track provisions. Taking the minimum royalty provision first, it states at paragraphs 68 and 69:</p> <p>"BIEM's argument seems to equate a higher royalty payment per CD with a higher royalty income accruing to composers.. (A) composers' royalty income depends on the royalty payment per CD and the quantity of CDs sold. Thus, the overall effect of the minimum royalty provision on composers' aggregate income cannot be ascertained merely by calculating the per CD revenue from those CDs <i>to which the minimum royalty provision currently applies. Put another way,</i></p>

Commentaire : Seeks to maximise PROFITS

Commentaire : Minimum royalty per work widely accepted

	BIEM Reply Reference	<i>BIEM Reply Comment</i>	Universal's Observations
			<p>whether the composers' aggregate income increases or falls when the provision is removed depends on the trade-off between smaller revenues per CD sold against the higher volume of sales and de novo sales of CDs that otherwise may not have been released. Simple economics teaches that a removal of the provision should have the stimulative effect along the lines suggested above." The Ordovery Report, at paragraph 71, also discusses the benefits for creators of removing the minimum royalties provisions: "(The sale of CDs at "promotional" low prices) are designed to extend the life of certain repertoire and to stimulate sales possibly of other, more expensive CDs. As such, these promotional policies likely conduce to the overall benefit of composers."</p> <p>The Ordovery Report goes to point out, at paragraph 71, that the minimum royalty provision tends to favour successful composers to the detriment of those who are lesser known and most in need of exposure and royalty income. This is due mainly to the fact that the provision, "discourages record companies from pricing at budget level those CDs containing older repertoire or music by lesser known talent</p>

**Commentaire** : Simplistic economics

**Commentaire** : No empirical evidence to support these assertions

**Commentaire** : This is Ordovery talk

**Commentaire** : No evidence and wrong

	<b>BIEM Reply Reference</b>	<b><i>BIEM Reply Comment</i></b>	<b>Universal's Observations</b>
			<p>and.. .in some cases. altogether eliminates the record companies' incentives to release such albums."</p> <p>Similarly, lesser known composers are likely to suffer most for the maximum tracks provision. The maximum tracks provision typically affects compilation albums and in particular multi-artist compilations. The provision effectively limits the number of tracks/composers' works that will be featured on such compilations, thereby depriving exposure and royalty income to those composers whose tracks would have been included but for this provision. The Ordovery Report concludes as follows on this point (at paragraph 81):</p> <p>"In my view, marginal composers, e.g., those who are lesser-known, likely comprise the group most significantly harmed by the maximum track provision. A 30-track compilation will per force include some tracks that are less desirable from a consumer standpoint. These less desirable tracks are the ones most susceptible to deletion should the record company opt to produce a recording with fewer selections, and in the process, marginal composers would lose some (likely) badly needed exposure."</p>

Commentaire : Nonsense

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>	
41.			Finally, BIEM's assertion here contrasts with the general position in its Reply, addressed in section 1 of the Rejoinder, that mechanical royalties do not impact on consumer prices.	
42.	Page 30 § 75	<i>The two thirds minimum rate is based on a concession by BIEM: it is a reduced minimum rate in comparison with the minimum rate under the original 1975 version of the Standard Agreement, which was fixed at three quarters.</i>	The marginal decrease in minimum royalty since 1975 does not in any sense answer the fundamental objections made in the Complaint against the clause.	<b>Commentaire</b> : Marginal?
43.	Pages 30-31, § 76-79	<i>In addition to the normal regime there is a special regime providing for a still lower minimum royalty.</i>	Universal acknowledges that it did not deal in its Complaint with the relief offered by the minimum budget royalty provision of the Standard Contract. However, its effects on royalty payments are very modest and were included in the figures set out in Annex 9 of the Complaint, which shows the overall effect of minimum royalties. Furthermore, this provision does not change Universal's fundamental objection that minimum royalty provisions themselves should be deleted from the Standard Contract.	<b>Commentaire</b> : They are modest because Universal has chosen not to use the category  <b>Commentaire</b> : According to the technical specifications of the CD and CDs published by PHILIPS and SONY in 1982 ('So called Red Book') : Storage capacity of a CD audio is 74 minutes digital stereo, and of a CD single is 20 minutes. In practice those time can go respectively up to 79 and 22 minutes". Limitation the SC are 80 minutes for a CD and 23 minutes for a CDs.
	Page 32 § 84	<i>The allegation is incorrect factually. The technical specifications in the Standard Agreement correspond to market categories.</i>	Universal notes that BIEM does not provide any evidence for this comment and would be interested in seeing such evidence which BIEM alludes it could provide (in footnote 45).	

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
44.	Pages 32-33, § 85	<p><i>For example, the complainant claims that maximum track numbers oblige it to create albums with more than one record.. .the final price of records is influenced by many other factors than royalties before they reach the market.</i></p>	<p>BIEM's arguments in this section suggest that the cost inputs in producing a sound carrier have no effects on its final price, which on BIEM's analysis would mean that recording companies can charge whatever price they like. As acknowledged by the MMC in its report on CD pricing (see MMC Report, The Supply of Recorded Music, June 1994 (Cm 2599, at paragraphs 1.13 and 2.114)) this is manifestly not the case.</p> <p>Universal's primary concern is to provide products that will improve consumer welfare, in other words to provide products that will sell in large numbers and thereby benefit Universal, the creators and consumers. BIEM, on the other hand, is clearly not concerned with the consumer. In this section BIEM ignores Universal's comments that show that the maximum track provision restricts Universal in the type of product it can sell to the consumer, regardless of whether it is in the consumers' best interests to have such a restrictive product available for purchase. The Ordovery Report deals with this in some detail at paragraphs 74 to 80. See also Universal's observations at point 40 above.</p>

Commentaire : Not royalties alone

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
45.	Page 33 § 87	<i>Contrary to Complainant's allegation, decreases on royalties have never impacted on consumer prices,</i>	Royalty rates, along with all other cost elements, directly impact on the pricing of CDs. Moreover, the paragraph relied upon by BIEM considers the specific issue of the impact of the maximum track provision and the Standard Rate. Decreases in royalties have not kept pace with discounts. The Ordovery Report deals with BIEM's paragraphs 87 to 93 in detail at paragraph 83.
46.	Page 33 § 88	<i>Royalties decreased from 9.504% in 1991 and are at 9.009% since 1997. Nevertheless, from 1991 to 2001, retail prices in Austria, Finland, Italy, Spain, Sweden and the United Kingdom rose...</i>	Universal disputes that royalty rates decreased over the period 1991-1997; royalty rates actually increased because recording companies were required to give their customers greater discounts. BIEM's example of the United Kingdom should be disregarded, as BIEM does not represent the UK mechanical rights collecting society.
47.	Page 34 § 89	<i>The share of creators in consumer price is roughly between 6% and 7.5%...</i>	This representation is misleading. It ignores all those recordings that fail to achieve commercial success but which are costly to record companies. Paragraph 1.13 of the MMC's Report on <i>The Supply of Recorded Music</i> concluded: "The record industry is a high risk business. The great majority of recordings do not sell enough copies to recoup their initial investment." Record companies invest large sums of money in artists' initial

**Commentaire** : So they gave higher discounts and the consumer price stayed the same

**Commentaire** : This exactly proves our point, the royalty rate has no influence on the consumer price!

**Commentaire** : So the UK is not a "comparable country"

**Commentaire** : It does

**Commentaire** : And therefore has no consumer price!

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>	
			careers and in 9 out of 10 cases, not all of this money is recouped. This investment appears to be disregarded by BIEM.	
48.	Page 35 § 92	<i>The complainant requests lower royalties to grant higher discounts to retailers.</i>	<p>Universal simply did not state this. It is one thing to observe that as a result of discounts, the Standard Rate is abusively high since it bears no relation to actual realised price. It is quite another to say (which it does not) that collecting societies should set lower royalty rates in order to allow discounts to be granted to retailers.</p> <p><b>Universal does argue that a more equitable share of the risks in the music industry would enable record companies to grant target discounts in order to boost sales and thereby increase not only the profits of the record companies, but also total income paid to composers through royalty payments. Consumers also benefit from lower prices and increased output/greater choice.</b> Universal refers the Commission to section III of the Ordoover Report, commenting on risks and returns and showing why reducing the level of the Standard Rate would mitigate any potential imbalance in the parties' relative risks and returns and would thus be conducive to economic efficiency.</p>	<p><b>Commentaire</b> : It seems still to be good business, and given the fact that Universal mad a net profit of €500 million not at all loss making!</p> <p><b>Commentaire</b> : Publishers are often the first to invest</p> <p><b>Commentaire</b> : This is the result of the statement</p> <p><b>Commentaire</b> : Emphasis added by BIEM</p> <p><b>Commentaire</b> : Gobbledegook – voodoo economics</p>
49.	Page 35 § 92	<i>Retailers do not automatically pass such</i>	It is of course entirely consistent with competition law that record	

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
		<p><i>discounts on to the consumer.. retailers alone decide what to do with the benefits derived from discounts.</i></p>	<p>companies do not dictate to their customers any resale prices. Universal is therefore astonished that BIEM, at paragraph 91, should suggest that Universal determines retailers' prices. In this regard, BIEM's opening sentence at footnote 50 is extraordinary:</p> <p><i>There may be a case against the majors on whether retail price differences between Member States can be justified under the competition laws".</i></p> <p>Universal would be interested to know how, under competition law, it and its competitors can control retailers' pricing policies.</p>
50.	Page 35 footnote 50	<p><i>Si le prix du disque est plus cher en France que dans d'autres pays,..., il faut peut-être d'abord se tourner vers les maisons de disque pour y remédier.</i></p>	<p>For the record, Universal's prices in France are very similar to those elsewhere in Europe. Moreover, Universal and the other major record companies have recently been investigated by the Commission in respect of their CD pricing policies and that investigation, now closed, did not find that the majors had breached EC competition law. (see Commission press release IP/01/1212, of 17 August 2001.) Universal suggests that BIEM pays more attention to official statements from the Commission, based on a lengthy and thorough investigation of the major record companies' pricing policies, rather than an unofficial comment by a Commission spokesperson in a journal unconnected to the European Commission.</p>

**Commentaire** : Lets explain this in detail

**Commentaire** : And therefore Universal cannot say that a lower royalty has an impact on the consumer price!

**Commentaire** : See Italian case



	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>	
51.	Page 35 § 94	<i>There is no "cross price elasticity".</i>	Universal does not understand what BIEM means by this phrase. Either cross price elasticity is low or high, but it is unlikely not to exist.	<b>Commentaire</b> : It is so low that it is practically non existent
52.	Page 36-37 § 97	<i>As the Commission has determined in Time Warner/EMI, retailers have low bargaining powers vis à vis the majors.</i>	This is a misrepresentation by BIEM. A statement of objections from the Commission can in no way be described as a determination. Rather, a statement of objections sets out the Commission's preliminary thinking on a matter. Further, the statement of objections to which BIEM refers was produced in an entirely different context to the subject of this Complaint. A statement of objections drafted during a merger investigation has no probative value for a consideration of Universal's Complaint.	<b>Commentaire</b> : emotive
53.	Page 37 § 98	<i>The majors enable retailers not specialised in music (e.g. supermarkets) to use sound carriers as a means to generate shop traffic in other fields than records (e.g. consumer hardware).</i>	Universal does not understand why BIEM seems to suggest that Universal and the other major record companies should be able to control the commercial policy of retailers not specialised in music. Is BIEM actually suggesting that Universal and other majors should discourage price competition at the retail level?	<b>Commentaire</b> : how naïve! Universal co-operates in generating shop traffic by its hunt for volume <b>Commentaire</b> : Does Universal grant supermarkets greater discounts than to specialized music retailers?
54.	Page 37 § 99	<i>As the Commission has determined, this policy of increased volumes, financed through discounts, stems from a concerted practice.</i>	Universal refutes the suggestion that the Commission determined that a policy of increased volumes financed through discounts stemmed from a concerted practice. The Commission did not in its statement of objections suggest that the majors were engaged in a concerted practice.	

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
			<p>What it did consider is the potential for co-ordinated activity between competitors in the event of a merger.</p> <p>Further, as stated in point 52above, BIEM's language amounts to a misrepresentation. A statement of objections from the Commission can in no way be described as a determination; it sets out the Commission's preliminary thinking on a matter. The statement of objections to which BIEM refers was produced in an entirely different context to the subject of this Complaint and has no probative value for a consideration of Universal's Complaint.</p>
55.	Page 37 footnote 55	<i>Moreover, the majors are undercutting the small record producers through a volume of discounts which these small producers cannot meet.</i>	<p>Universal would be interested to know first, why small producers cannot meet the majors' volume discounts and secondly why the collecting societies object to the majors offering volume discounts.</p>
56.	Page 38 § 101	<i>In a market economy the normal reaction to decreasing turnover should be increased efforts to compete. In the sector here concerned, the key to competition is innovation,</i>	<p>It is the height of hypocrisy for BIEM, a monopolist, insulated from any competition, to talk in terms of recording companies increasing their efforts to compete. It is of course the recording companies' efforts to compete by granting discounts to stimulate sales which BIEM wants to</p>

**Commentaire** : this hurts universal!

**Commentaire** : Because by their nature small companies do not have the sales volume of a major!

	BIEM Reply Reference	<i>BIEM Reply Comment</i>	Universal's Observations
			<p>discount entirely from the assessment of royalties under the Standard Contract.</p> <p>Universal operates in a highly competitive market and is somewhat surprised that an organisation such as BIEM, which is immune from both external and internal competition, purports to advise Universal on how it should carry on its business competitively. Further, Universal and its competitors are extremely innovative in terms of A&amp;R and creating artists. However, this in no way detracts from the fact that the level of the Standard Rate is abusive, and certain terms in the Standard Contract are similarly anti-competitive. Indeed, with its sole emphasis on innovation, is BIEM implying that recording companies should not compete on price?</p>
57.	Page 40 § 107	<i>Universal has made no effort whatsoever to raise its concerns directly with B/EM before lodging its complaint.</i>	<p>This is simply untrue. BIEM's representatives have been aware for a long period of Universal's views on the legality of the terms of the Standard Contract that are the subject of this Complaint. Further, as the chronology set out in point 28 shows, BIEM has been aware of the concerns of the record industry for several years. Universal has specifically sought to avoid using complaints to the Commission as a negotiating lever in respect of the Standard Contract. However,</p>

**Commentaire** : BIEM is implying that one of the woes of the music industry has been the inward looking, merger mania that has distracted from the development of new and innovative A&R and marketing

**Commentaire** : BIEM has been aware and has been negotiating with IFPI, not Universal

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
			Universal had no other option or available remedy except to submit a complaint to the Commission.
58.	Page 40 § 107	<i>Either the complainant wishes to strengthen IFPI's hand, or the majors are divided among themselves.</i>	Universal is harmed by the anti-competitive effects of certain aspects of the Standard Contract and has raised its concerns with the Commission. Universal believes its Complaint has substantial industry support and indeed a number of its competitors have expressed their support directly to the Commission.
59.	Page 40 footnote 64	<i>In a letter dated 28 May 1982 to MCPS (Case/V-30.370-GEMA/MCPS), the Commission advised that: "it is neither within the competence of, nor intended by, the Commission to determine how, on what, or at what rate, sound record producers are to pay royalties for production and distribution of protected works."</i>	This is addressed at section 4 of the Rejoinder. Universal accepts that the Commission is not a price regulator but it is certainly within the competence of the Commission to determine the compatibility of the relevant provision of the Standard Contract with Articles 81(1) and 82. Universal has not been provided with details of the letter referred to by BIEM in this paragraph and is therefore unable to comment further on it.
60.	Page 40 § 108	<i>The Commission, acting as a competition authority, does not have a role as a price determining regulator.</i>	Universal's declarations in its Complaint are clear; BIEM should look at the relief sought in the Complaint. Universal is not looking for the Commission to determine a new price and recognises the limits of the

**Commentaire** : Standard contract. Society rebates, online licensing

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
			Commission's jurisdiction. Universal seeks a declaration from the Commission that the Standard Rate is abusively high.
61.	Page 41 § 109(2)	<i>In our view, neither competition policy nor the circumstances of the case require an investigation. To show this, we make two points:  (1)... 2) The existing system is self-regulatory. The questions raised in the Complaint can be fully dealt with through negotiations or by national courts or authorities.</i>	This is addressed at section 4 of the Rejoinder. The Complaint is made in relation to the compatibility with Articles 81(1) and 82 with the most significant pan-European licensing agreements which clearly have a community interest.  The system is far from self-regulatory; there being no independent review mechanism in relation to the arrangements as a whole, other than the Commission's exercise of its jurisdiction under Regulation 17.
62.	Page 43 § 113	<i>We submit that the Complainant should wait for the outcome of the negotiations of a new Standard Agreement between B/EM and IFPI. None of the two associations has declared that their current negotiations have come to an end.</i>	As Universal has stated in point place in February 2002, since when there has been no further negotiations on the substantive issued raised in the Complaint. BIEM has shown itself to be totally unprepared to take forward any form of constructive negotiations (see, for example, the letter from the Chairman and Chief Executive Officer of IFPI to the President of BIEM, dated 14 April 2000 at the Annex to this Schedule) since BIEM is able to enjoy the "quiet life" of a monopolist and sit back and insist

**Commentaire** : Then there are two possibilities, either the standard rate is replaced by individual rates

**Commentaire** : What's the difference?

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
			upon the terms of the now expired Standard Contract. In the meantime, Universal and other recording companies have to sell recordings to stay in business.
63.	Page 44 § 116	<i>One advantage from the Community standpoint would be that the scope of review of the German Courts would be much broader than that of the Commission, which is limited to the Community Competition rules.</i>	There is a fundamental flaw in BIEM's example of using national courts and regulators. A German court could only examine how the Standard Rate is applied in Germany. It cannot look at the Standard Rate which applies throughout Europe. The territory of the EEA is different to the territory of Germany. Further, the German courts currently cannot consider Article 81(3). The issues raised by Universal in the Complaint raise substantial questions of European Competition policy and it is entirely appropriate that they be considered by the Commission. Indeed, BIEM and the Commission have recognised this in the past. For example, BIEM notified its statutes to the Commission, and the Commission has in the past considered the Standard Rate.
64.	Page 44 § 117	<i>There is in our view no community interest to investigate the Complaint.</i>	BIEM's Standard Rate is a pan-European rate. It stands to reason that it appreciably affects inter-state trade and does have a substantial community interest.

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
5.	Page 45 § 120	<i>A comfort letter has already been issued by the Commission on the basis of the full facts.</i>	It would appear that the comfort letter to which BIEM refers was issued without any form of public consultation. It was therefore issued without the benefit of bringing to the Commission's attention all the facts and matters which are set out in the Complaint. Further, BIEM can only take limited "comfort" from a comfort letter. It is an established principle of community law that comfort letters are subject to all relevant facts; and matters being brought to the Commissions attention and that they can be reviewed in light of changes in circumstances. Finally, the comfort letter relates only to the BIEM Statues, not the Standard Contract.
66.	Page 46 § 121	<i>The Submission relates to collective arrangements that ... do not directly affect third markets or third parties.</i>	Again, this is not true. The collective arrangements affect Universal and Universal is a third party.
67.	Page 46 § 123	<i>The attainment of fair remuneration and of social protection for hundreds of thousands of creators would be seriously undermined if internal or external collective arrangements were subject to scrutiny under Article 81 (1) EC.</i>	It is well established that social objectives cannot override competition law. For example, in the Commission's decision of 23 December 1992 - CaseIV/33.814-Ford Volkswagen - The Commission stated: <i>'In the assessment of this case, the Commission also takes note of the fact that the project constitutes the largest ever single foreign</i>

	BIEM Reply Reference	<i>BIEM Reply Comment</i>	Universal's Observations
			<p>investment in Portugal. It is estimated to lead, inter alia, to the creation of about 5,000 jobs and indirectly to create up to another 10,000 jobs, as well as attracting other investment in the supply industry. It therefore contributes to the promotion of the harmonious development of the Community and the reduction of regional disparities which is one of the basic aims of the Treaty. It also furthers European market integration by linking Portugal more closely to the Community through one of its important industries. This would not be enough to make an exemption possible unless the conditions of Article 85(3) were fulfilled, but it is an element which the Commission has taken into account."</p> <p>In fact, the Court has never declared that the membership rules of a trade association such as BIEM or that collecting societies themselves fall outside Article 81 (1). <b>They can be compatible in certain circumstances with competition law, if the restrictions they impose are indispensable to their aims.</b> As Universal has made plain in its Complaint those criteria simply do not apply in this case.</p>
68.	Page 47 § 125	<i>The Court has already held that collective</i>	BIEM bases this erroneous argument on cases involving employment law. They are not a suitable comparison for membership rules of a

**Commentaire** : Emphasis added by BIEM



	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
		<i>bargaining agreements ...fait outside the scope of Article 81(I) EC.</i>	trade association or that association's agreements with third parties.
69.	Pages 47-49 § 127-132	<i>The comfort letter issued by the Commission to BIEM in respect of Article 7 of BIEM's Statutes.</i>	Universal refers the Commission to section 5 of the Rejoinder.
70.	Page 51 § 141	<i>The Complainant has always fulfilled its obligations under the Four Points (even during the two years since the expiration of the Standard Agreement).</i>	As has already been stated, no alternative is available to Universal than the Standard Contract.
71.	Page 52 § 146	<i>[The Complainant] had to explain why, in its opinion, those post-1998 facts had caused the Standard Agreement to become "unfair" as of today even though IFPI and the majors had accepted the Standard Agreement as «fair" in 1998.</i>	As the Commission is no doubt aware, both IFPI and Universal have previously expressed the view that provisions of the Standard Contract and the Standard Rate infringe Articles 81(I) and 82. In fact, IFPI wrote to BIEM on 23 January 1998 stating its objections to the provisions of the Standard Contract that are in issue in this Complaint but saying that it had no option but to agree to them for the time being. The Complaint is a last resort consequent on BIEM's refusal to consider Universal's and IFPI's Complaint in this regard.
72.	Page 52 § 144	<i>This presumption is corroborated by the fact that creators and their associations, but also IFPI</i>	Universal disputes that there is freedom of contract. Universal is obliged to reach agreement with BIEM or its collecting society

**Commentaire** : The Standard Contract is all about collective bargaining.

**Commentaire** : Considered and rejected for good reason

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
		<i>enjoy freedom of contract It is settled case law that this freedom must not be discarded fight/y through the application of competition law.</i>	members in order to continue in business. The BIEM Statutes, and in particular Article 7, prevent Universal or other recording companies from enjoying any freedom of contract.
73.	Page 52 Footnote 91	<i>One basis for this suspicion is that the Complainant plays a leading role in the IFPI negotiating committee</i>	The IFPI is Universal's trade association. It is entirely appropriate that Universal should play a role in the IFPI negotiating committee.  However, the negotiations conducted by IFPI with BIEM are done on behalf of all IFPI's members. It is only when those negotiations failed, after several years (see point 28 above), that Universal took the step on its own accord to submit the Complaint. However, as the Commission knows, Universal has the support of many of IFPI's members.
74.	Page 53 Footnote 93	<i>We recall that BIEM had been forced to accept these deductions.</i>	This characterisation of BIEM being forced to accept terms contrasts oddly with the emphasis BIEM puts elsewhere on the essential nature of the arrangements. It appears that any point which might on the face of it appear to favour IFPI's members is apparently "forced" upon IEM, but on the contrary that does not apply to points that appear to favour BIEM.
75.	Page 53, § 148(2)	<i>BIEM has to stress that dealings between</i>	Universal refers the Commission to, the examination of what might be

Commentaire : And vice versa

Commentaire : And vice versa

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
		<i>copyright management societies and Record Producers are governed by two 'usages' on which the complainant remains silent.  (2) Royalties must be such that creators receive fair remuneration</i>	"fair remuneration" at paragraphs 26 to 43 of the Ordover Report.
76.	Page 54 § 151	<i>The Complainant states nowhere with precision what sort of additional [specific] deductions of claims. We understand, however, that, in any case, a "specific deduction" would be one that follows specific transactions between Record Producers and third parties (like an analogous wave).</i>	The "specific deductions" to, which BIEM refers in its Reply are the actual discounts that record producers grant to customers.
77.	Page 54 § 153	<i>If societies were to finance the majors' Risk Business ...</i>	By this comment, BIEM shows its true colours. BIEM believes that its members should be entirely insulated from market forces. It believes that the Standard Contract should be imposed outside the commercial context in which it operates. This statement constitutes an acknowledgement by BIEM that currently its members assume no risk

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
78.	Page 55 § 155	<i>Creators' royalties would be calculated on the basis of factors over which creators have no control</i>	This emotive comment ignores the fact that the creators do not Control PPD anymore than they can actual or average realised price. Therefore it does not progress BIEM argument in the slightest. Universal refers the Commission to the Ordover Report, and in particular paragraphs 58 to 61
79.	Page 55 § 157	<i>The price of a supplier always impacts on the profitability of the buyer.</i>	Universal agrees with this statement. It does, however, contradict BIEM's stance that the royalty rate makes no difference to record producers' businesses.
80.	Page 56 footnote 98	<i>If BIEM and BIEM's societies did not do their very best for creators' remuneration, also in respect of saved money, they would cease to be the «best solution" for creators and begin to fait apart.</i>	All evidence points to "doing their very best for creators", being synonymous with BIEM simply exercising its market power in an anti-competitive or abusive way. It is only when faced with competitive forces that BIEM is prepared to take into account market realities. For example, it was only prepared to lower its commission rates when faced with the prospect of direct distribution in 1996 (the First Cannes Agreement).
81.	Page 57 § 163	<i>The Complainant at one point requests that rates be calculated «by reference to a percentage of</i>	Universal submits that BIEM seems to have misunderstood the gravamen of the Complaint. Universal's starting point in relation to

**Commentaire** : We should invite Universal to comment on this

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
		<i>actual or average realised price." This is puzzling because the Complainant at another point states that it does not object to the price list ("PPD) as the calculation basis.</i>	royalty rates is PPD. However, Universal believes that this cannot remain as the basis of calculating the royalty rate when PPID does not reflect market conditions. In its section on the fixed discount allowance (paragraphs 48 to 64), the Ordovery Report addresses the issue of why the calculation of the rate by reference to a percentage of actual or average realised price may be better than that based on PD. However, whichever point of reference one takes, what is important is that the Standard Contract reflects a realistic and economically efficient relationship between the royalty rate and market conditions.
82.	Page 56 § 158	<i>Like ail members, the publishing entities of the majors' benefit when lowered overhead of societies leads to higher earnings. There is no reason why the majors should benefit from this in their capacity as Record Producers and in the form of lowered rates.</i>	BIEM is trying deliberately to mislead the Commission with this statement. The fact that the majors operate both as music publishers and record producers is of no relevance to the Complaint or the BIEM Reply. Furthermore, Universal would note that the majors would not be the only recording companies which would benefit from a reduction in royalty rates, but also independent record producers and Universal invites BIEM to provide evidence to the contrary.
83.	Page 59 § 167	<i>The Complainant further relies on an "IFPI analysis at the time" (1997 or 1998?) concerning</i>	For the record, Universal would note that the IFPI analysis was finalised in March 1999 rather than 1997 or 1998.

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
		<i>the effect of a further change of the calculation basis.</i>	
84.	Page 59 § 169	<i>The Court has also stressed that, in examining allegations of abuse" made by Record Producers against societies, account must be taken of the specific mission of societies and of the superior bargaining power of exploiters, including Record Producers to which societies are exposed in their actions to protect creators.</i>	Universal has addressed the issues of the "specific mission" of collecting societies and in particular, their exposure to competition law, and the question of the relative bargaining strengths of the parties in its Rejoinder. It therefore refers the Commission to sections 1 and 2 of the Rejoinder.
85.	Page 61 § 177	<i>... in the case of musical works, there can be no comparison between the cost of production and the royalties. The reason is that it is impossible to determine the cost of a musical creation.</i>	Universal submits that taking this argument to its logical conclusion, BIEM would be in a position to obtain any level of royalty it so wished. With this in mind, Universal notes that if this were the case, consumer choice would be reduced significantly as record companies would not gamble on artists whom they felt would not sell records, thereby limiting output and affecting consumer welfare. Further, royalties constitute a significant input into the cost of recording music. More generally, Universal refers to the Ordovery Report and in particular the section entitled "An Assessment of Expected Returns in the

**Commentaire** : Do record companies now gamble on artists who they feel won't sell?

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
			Production of a Musical Recording" at paragraphs 38 to 42, where the author has estimated composers' opportunity costs.
86.	Page 62 § 181	<i>Firstly, to establish "abuse", regard may only be made to rates within the Common Market.</i>	Universal refers the Commission to paragraph 3.7 of the Rejoinder.
87.	Page 63 § 183	<i>The term "indication" means that BIEM could present an objective justification for the price disparities.</i>	The considerable differences in royalty rate between the Standard Rate and comparable jurisdictions mean that the burden is on BIEM to justify its Standard Rate. Universal therefore invites BIEM to present an objective justification for the price disparities. BIEM has failed to do so up to, this point.
88.	Page 63 footnote 118  Page 63 § 184	<i>In the present submission, we shall only state our view that the Complainant has not proven royalty disparities of a kind that would be relevant under Tournier, that is: royalty differences between the Common Market and [are] comparable on a homogenous basis. It is striking that the Complainant only cites examples from third countries. Linder Article 82 EC, such examples are irrelevant.</i>	Universal refers the Commission to, its Rejoinder, at paragraphs 3.1 to 3.2, which explain why third countries such as Japan and the US are correct comparables. The only countries in the EEA which are not bound by the BIEM rate are the UK and Republic of Ireland. In both these countries, royalty rates are significantly lower than the Standard Rate.

Commentaire : Compulsory licenses

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
89.	Page 63 § 185	<i>It must also be borne in mind that BIEM has no responsibility for all the levels of royalties worldwide.</i>	Universal does not suggest that BIEM is responsible for all the Levels of royalties worldwide. What Universal is saying is that there is a burden on BIEM to explain why its rate is so much higher than rates elsewhere.
90.	Page 63 § 186	<i>What the Complainant advocates, in fact, is a «worldwide race to the bottom» that is: the prevalence of the cheapest rate of the day, wherever in the world it is charged, and irrespective of the context in which this rate has come about.</i>	BIEM appears to suggest that any challenge to the Standard Rate is illegitimate. Universal has never stated that the royalty rate which it is obliged to pay to BIEM must be the cheapest worldwide. What Universal is looking for is a proportionate rate which fairly reflects the circumstances of the market in the EU and which benefits consumers, creators and Universal itself.
91.	Page 64 § 187  Page 64 § 188	<i>In Tournier the Court has taken care to emphasise that the price differences as such are not conclusive evidence for an “abuse” They may “indicate” an abuse, but only if (i) a comparison is made on a homogenous basis, and (ii) this comparison shows that the disparity is “appreciably high”.  Comparison of rates in different countries is a</i>	BIEM has gone to some lengths to challenge the legitimacy of comparing the Standard Rate with royalty rates elsewhere. Universal refers the Commission to its Rejoinder for a full response in this regard. As Universal has made clear in its Complaint and does so again in the Rejoinder, it is entirely legitimate to refer to rates in comparable territories as a proxy to assisting in assessing what is a reasonable royalty rate. The Tournier case confirms this as an appropriate course to take and Universal points out that the

Commentaire : Mainly Universal



	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
	Page 65 § 189	<p><i>matter of great delicacy [ .. ] obviously, this difficulty is still greater in relation to third countries.</i></p> <p><i>Whilst demonstration of comparability and "comparables" may be cumbersome, there is no reason why the Complainant should be relieved of this burden and why the Commission should start an investigation based on mere rumour.</i></p>	<p>comparable rates it has provided support the arguments Universal has raised in its Complaint.</p>
92.	Page 65 190	<p><i>In relation to rates in the United States, one special remark is warranted. Although irrelevant, the Complainants reliance to these rates reveals that it has set its mind for purely symbolic remuneration of creators. Until 1978, United States legislation provided a compulsory mechanical royalty rate, which that same legislation limited to 2 cents per composition; multiplied by the number of copies distributed. When the United States Congress provided</i></p>	<p>BIEM's argument here is entirely emotive. Universal included information on the position in the US in respect of royalty rates as a comparison. It is simply not correct to suggest that Universal is trying to achieve a purely symbolic remuneration for creators and language used in the BIEM Response such as 'purely symbolic remuneration of creators" and "creator looting", is a gross misrepresentation of what Universal says in its Complaint.</p> <p>The US rates are charged in respect of the same copyright work and the onus is on BIEM rather than Universal to show that the rates are not good comparables. This BIEM has clearly failed to do.</p>

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
		<i>modest adjustments of the two cents rate in 1978, Record Producers instituted restrictions ... in their contracts with creators that eliminated the greater part of these adjustments. Should this world of «creator looting» serve as a benchmark for the Community as the Complainant suggests?</i>	Significantly, US rates are set by an independent third party, who decides what rate is appropriate. To the best of Universal's knowledge, the Standard Rate has never been the subject of similar arbitration.  Universal's Complaint is based on a need for a fair and reasonable market based royalty rate.
93.	Page 66 § 191 foot note 127	<i>Case 226184 British Leyland v Commission [ECR] 1986 3263, § 27: an undertaking with an administrative monopoly was liable of an "abuse" where it had charged for its services fees which had been disproportionate to the economic value of the service rendered (which value is also not assessable in case of artistic creations).</i>	Universal agrees that proportionality is the appropriate test to apply to the Standard Rate and the terms of the Standard Contract which are the subject of the Complaint. When one looks at current market conditions and previous practice, Universal believes that all the, elements exist to make an assessment as to the disproportionate and unreasonable level of royalties sought by BIEM.
94.	Page 66 footnote 129	<i>The Complainants reliance on the Visa case is inappropriate for many reasons ... the single most important difference to the present case is that the "fee earners" (the Banks) had fixed</i>	Universal refers the Commission to paragraph 2.5 of the Rejoinder.

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
		<p><i>conditions in concert and under the auspices of an association ("Visa International Services Association"), whilst the "fee payers", that is: the retailers, were only persons "from the people" and were not at all organised.</i></p>	
95.	Page 67 § 193	<p><i>As demonstrated above (points 87 to 93), lower royalties would not result in lower consumer prices. There is no economic interrelation (let alone a linear interrelation) between the two. The final price of records will be influenced by many other factors before they reach the market.</i></p>	<p>As the Ordovery Report sets out in detail a lower, more equitable, royalty rate is likely to increase the opportunities for record companies to make targeted discounts in product. As BIEM itself has pointed out, there is competition between traditional music retailers and powerful retailers such as supermarkets, with the result that there is intense competition, which translates into lower prices for consumers. It is likely, therefore, that lower royalties will lead to greater discounts being offered by record companies which results in lower consumer prices.</p> <p>The effect of discounts on sales volumes of CDs is assessed at paragraph 1.9 of the Rejoinder. To this end, Universal refutes the proposition that the royalty rates have no effect on consumer price of product. Further, it is strange that BIEM accepts that there are a variety of factors that affect consumer prices, but those factors do not include the mechanical rate.</p>

**Commentaire** : The Ordovery report is nonsense with a scientific touch, but it remains nonsense!

**Commentaire** : No proof only theory

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
96.	Page 67 § 194	<i>We understand that, with the term "quiet life", the Complainant wishes to refer to a situation where the demand side depends on one supplier for the provision of certain goods or services which are essential for the demand sides existence or operations and where, consequently, the supplier can lean back and extort any amount.</i>	BIEM appears to have misunderstood Universal's point. Universal means that currently creators are partially insulated from market forces. The Ordoover Report, for example at paragraph 56, shows how, whereas previously BIEM was willing to amend the terms of the Standard Contract in order to reflect market conditions, it is now not willing to do so. Universal reiterates that it has no alternative to, negotiations with BIEM, whilst BIEM itself is subject to no competitive pressure.
97.	Page 67 § 195	<i>The Complainant conceals that royalties have destined significantly over the last years as far as copyright licenses for mechanical reproduction are concerned.</i>	This statement is misleading. The overall level of royalties has increased given the increased level of discounts that recording companies have been forced to grant to their customers.
98.	Page 68 footnote 132	<i>In a speech on 26 June 2002, GEMA's President and Chief Executive Officer had emphasised.  "and if you consider a further slump in the German audio carrier market in the first six months of 2002, then it is quite obvious that this is a trend clamouring for change".</i>	It would appear that GEMA's President supports Universal's proposition that changes in economic circumstances justify changes in the Standard Contract.

**Commentaire** : And to which the consumer has not benefited at all

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
99.	Pages 68-69, § 198-202	<i>The necessity to protect intellectual property and culture</i>	BIEM's arguments concerning how a mechanical royalty rate should be fixed are inconsistent. On the one hand, in this section, it implies that governments should fix and protect rates for cultural protection reasons, on the other, elsewhere in its Reply, it appears to accept that the rate should be reached at by negotiation.
100	Page 69 § 202	<i>One factor must never be overlooked. Cheaper royalties are obtained by a forced reduction of creator's income have a cultural price: the incentive to create is diminished, and fewer songs and other pieces of music will appear.</i>	This statement is purely anecdotal and backed by no evidence. Indeed, Universal would be interested to review any evidence offered by BIEM to support the theory that a reduction in royalty rate would lead to a corresponding reduction in song-writing. Universal refers to the Ordovery Report (at paragraph26) which suggests that in fact a reduction in royalty rate may lead to more investment in activities likely to expand demand for and, thus, sales of recorded music. As such, it may lead to an increase in total royalty income if sales expand proportionately by more than the reduction in the royalty rate.
101	Page 70 § 204	<i>We respectfully submit that in an economy based on the interplay of market forces, a competition authority should be prudent as to whether it should interfere with prices and</i>	There is a certain irony and inconsistency in this statement by BIEM, to suggest on the one hand that the Standard Contract has been agreed on an arm's-length basis but on the other that competition authorities should not be entitled to review its terms. This appears to

**Commentaire** : Which is rejected by BIEM

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
		<p><i>conditions that have been reached by way of arms-length negotiations.</i></p>	<p>be the only time when BIEM accepts that market forces have any relevance. BIEM's current negotiating position is that it should be shielded from market forces. This is a view that has been shared by the UK's Copyright Tribunal in relation to collecting societies in general. For example, it stated that, "the agreement to stick to PPD therefore is an advantage to the copyright-holders who are cushioned from such market forces." (see <i>British Phonographic Industry Limited v Mechanical-Copyright Protection Society Limited</i>, 1 November 1991, section T, p30, line 34). The Ordover Report addresses this issue further in sections 57 to 58.</p>
102	Page 70 footnote 136	<p><i>As the Commission knows (in respect of the royalties complained of leading, to grossly unjust results), empirical evidence often consists of anecdotal events from business practice. However, the Complainant has not cited any project in its business practice that failed precisely on the ground of licensing contracts with societies.</i></p>	<p>As is made clear in the Complaint and in the Ordover Report, the general effect of the minimum royalties, maximum tracks and fixed discounts provisions of the Standard Contract is to stifle output and the ability of record companies to price competitively, leading to reduced output and limited consumer choice. Universal refers the Commission to paragraphs 49 to 81 of the Ordover Report in this regard.</p>

**Commentaire** : The Copyright Tribunal ended up agreeing to base royalties on PPD

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
			<p>Box set CDs are also significantly affected. The application of the minimum royalty has a particularly marked impact on multiple CD box sets and double CDs. Universal would generally price a double CD, for example, at only [ ] of the top price for a single CD. Similarly in relation to box sets, Universal would not charge the multiple of the price charged for a single CD but would sell a large number of CDs at a significant discount to create an attractive consumer proposition.</p> <p>However, the effect of the minimum royalty is such that Universal is severely restricted in the number of such multiple CDs that it is able to viably release. Universal refers to paragraphs 72 and 73 of the Ordover Report.</p>
103	Page 70, § 205-206	<i>One would expect that the Complainant presents (1) concrete empirical evidence or (2) verifiable economical models</i>	<p>Universal refers the Commission to the Ordover Report for both concrete empirical evidence and verifiable economic models to support its position as set out in the Complaint.</p>
104	Page 71 § 207	<i>We also note that the Complainant has not presented any reactions from retailers or consumers, despite its heavy reliance on the</i>	<p>It is difficult to what know what BIEM considers retailers would add to the matters under consideration in the Complaint. Mechanical royalties are one cost element in the total price that the retailer (and</p>

Commentaire : ????

Commentaire : No true

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
		<p><i>alleged effects which the royalties have on retailers and consumers. This statement bears no relevance and is wholly inappropriate to the Complaint.</i></p>	<p>ultimately the consumer) has to pay for sound carriers. Further, previously BIEM has suggested that mechanical royalties have no impact on the price of sound carriers. There is therefore a clear tension between these two positions.</p>
105	Page 71 211	<p><i>Indeed, the PPD is "fair" because it protects creators' income in [two essential respects] of which no other calculation basis can take account:</i></p> <p><i>(i) Only the PPD is easy for creators and societies to control.</i></p>	<p>The Standard Rate is not fair. First, the BIEM rate was previously based on retail prices. Therefore the idea that a rate based upon actual or average realised price constituting an incalculable obstacle is in stark contrast with the position up until 1985. Secondly, creators and societies do not have any control over PPD. Thirdly, there is no reason to suggest that societies and creators cannot calculate actual or average realised price. One could include in the contract the normal protection granted to licensors, such as the right to conduct audits. As the Ordovery Report suggests there is no insurmountable obstacle to BIEM auditing actual prices, which is common practice in many other licensing contracts.</p> <p>Finally, Universal notes that artists are paid on the basis of the net realised price and therefore does not understand why this would not be acceptable to the publishing community also.</p>

**Commentaire** : There is not, the effect is extremely small

**Commentaire** : In general this is not true

**Commentaire** : See comments re artist contracts. Artists also share in the up-side with royalty escalations following certain sales levels



	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
106.	Page 72 § 214	<i>... The creator must not be remunerated on the basis of prices agreed between the user of the relevant work and a third party.</i>	<p>Universal is unclear as to what BIEM means by the term "user".</p> <p>Further, the assertion by BIEM that the creator must not be remunerated on the basis of a retail price clearly demonstrates that BIEM does not wish to be susceptible to market forces. To this end, BIEM clearly wishes to change the basis on which it has previously negotiated the Standard Contract.</p>
107.	Page 73 footnotes 142 and 143	<p><i>The Complainant refers to a case before the Australian Copyright Tribunal, This reference is selective out of context and misleading.</i></p> <p><i>The Complainants quotation is from a decision on interim relief In a portion of §15 of that decision that the Complainant does not quote, the Tribunal said.</i></p> <p><i>«For the present purposes [interim relief] it is neither necessary nor appropriate to determine whether a royalty based on the actual selling price is to be preferred over a royalty based list price.</i></p>	<p>This citation in the Complaint from the Australian Copyright Tribunal shows that there may be grounds to choose a method of calculating royalties on either basis (PPD or average realised price). BIEM's citation from the Australian Copyright Tribunal does not contradict Universal's position. The Australian Copyright Tribunal merely stated that, because it was an interim order, it was not necessary for the Tribunal to determine whether royalties should be paid as PPD or actual realised price. Nonetheless, Universal maintains, as the Australian Copyright Tribunal suggests, that a royalty based on the list price of a record may unduly burden the manufacturer to the advantage of the copyright owner.</p>

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
		<p><i>Discussion was postponed until the main case; that is the only meaning of the words «hot frivolous" on which the complainant relies. Grossly misleading is the Complainants reference to an "opinion" of the "Swiss Competition Authority" [...] The Swiss Competition Authority was not involved. The Preisüberwachung in its recommendation tried to come to terms with a lack of evidence for the proper price and only expressed a tendency away from the current tariff. However the Arbitration Committee [...] rejected the recommendation of the "Preisüberwachung" and approved an extension of the current tariff...".</i></p>	<p>not frivolous", when used by the Australian Copyright Tribunal, illustrates the Tribunal's belief that Universal's argument was a serious part of its case, was potentially valid and warranted consideration at a full hearing.</p> <p>The Ordover Report makes it clear; it is possible to have a PPD-based rate that reflects market conditions. The relevant point is that BIEM is refusing to adjust to market conditions and that this is having the effect of distorting competition in the market for sound recordings.</p> <p>In this regard, IFPI Switzerland faced the same difficulties as Universal does today, in that both are confronting a monopoly that can force terms upon them. Universal does not dispute that the Arbitration Committee rejected the recommendation of the Preisüberwachung. However, the Arbitration Committee did hold that SUISA would have to examine developments on the market in conducting future tariff reviews, to ensure that the rate reflected market realities.</p> <p>The Price Regulator, in its decision, states that its practice is to focus on issues with both a price control and a competition law aspect. It</p>

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
			took the view that royalty rate of 9.306% of PPD was too high, on the grounds that it was calculated by reference to PPD, which ignored current market realities of actual realised price, due to the substantial discounts that recording companies have to grant to retailers.
108	Page 74 § 220	<i>The Complainant is not opposed to minimum royalties as such.</i>	BIEM is incorrect in its statement. Universal believes that the minimum royalty provisions in the context of the Standard Contract distort competition for the reasons given in paragraphs 5.26 to 5.36 of the Complaint.
109	Page 75 footnote 146	<i>In particular, the Complainants reliance on that [UK Copyright Tribunal] is out of context As is clear from the Complainants own quotation from that division, the Tribunal decided only "on the figures before us» An important part of the context was the Tribunal, acting as a straight forward regulator had charged the standard rate from about 8.2% to 8.5% of PPD.</i>	BIEM has not understood Universal's point. The Copyright Tribunal was sceptical as to "how reliable the nominal [BIEM rate] really is" (see Tribunal decision p 34 Section V at line 12). Further, the Tribunal found that all of the offensive clauses which are the subject of the Complaint were unacceptable.  Universal would also note that even with the increase in Standard Rate from around 8.2% to 8.5% held by the Tribunal, the BIEM rate is currently significantly higher. The purpose of Universal's Complaint is not to request the Commission to set a royalty rate but to seek a declaration that the Standard Rate in BIEM's Standard Contract is not compatible with the EC

Tableau mis en forme

	BIEM Reply Reference	BIEM Reply Comment	Universal's Observations
			law.
110	Page 76 § 221	<p><i>One example where minimum royalties may apply is the practice of "give-aways"[...]. These the Complainant states in relation to a "six-track CD sampler" give away at no extra charge:</i></p> <p><i>"As a promotional product, the recording artists waive their respective royalties entitlements on sales of the sampler in recognition of its promotional value. "</i></p> <p><i>We do not see why creators should do the same as artists: to give up income in recognition of "promotional value"</i></p>	<p>Universal would note that it is not commercially credible for it to give product, away unless that offer were to stimulate sales, leading to higher income for Universal and higher royalty payments for composers. The Ordo Report, at paragraph 64, confirms that targeted discounts, as opposed to an across-the-board reduction in PPD, constitute a more effective mechanism to stimulate sales and royalty payments. Promotions enhance output and benefit the consumer and creators.</p>
111	Page 76 § 225	<p><i>Contrary to the Complainants allegation, minimum rates do not compare to lower consumer prices.</i></p>	<p>Universal would simply note that royalties are an important element of record companies' overall costs. Furthermore, lower costs will inevitably produce lower retail prices, as savings can be passed to the consumer.</p>
112	Page 78 § 234	<p><i>Creators would become disinterested in</i></p>	<p>There is no suggestion that Universal does not wish to pay a fair royalty to composers. What it does want is to pay a proportionate</p>

**Commentaire** : Give away the works of one composer to stimulate sales of another

**Commentaire** : Where is the actual evidence that this has ever occurred?

**Commentaire** : And we believe the rate is proportionate, so where do we go?

	<b>BIEM Reply Reference</b>	<b>BIEM Reply Comment</b>	<b>Universal's Observations</b>
		<i>collective licensing. Societies, would lose members, and would no longer dispose of the entire world repertoire. Lack of a full repertoire would cause reciprocal representation contracts and the system of collective licensing to crumble.</i>	rate. Universal recognises the benefits of collective licensing and does not wish to see the system of reciprocal representation contracts break down, as clearly all parties benefit from them. This emotive scenario depicted by BIEM is pure conjecture.
113	Annex 2 Summary of BIEM's contacts with the Commission		Universal refers the Commission to paragraphs 5.1 to, 5.4 of the Rejoinder.
114.	Annex 4 Letter from the President of BIEM to the Chairman and Chief Executive Officer of IFPI, in relation to information concerning BIEM's position on the negotiations for a new standard agreement		Universal refers to a letter from the Chairman and Chief Executive Officer of IFPI to the President of BIEM, dated 14 April 2000 at the Annex to this Schedule.

	<b>BIEM Reply Reference</b>	<b><i>BIEM Reply Comment</i></b>	<b>Universal's Observations</b>
115	Annex 5 - table illustrating the 10 year development of CD pricing.		Universal refers to the Ordover Report at paragraphs 84 to 86.
116	Annex 6 - A graph comparing Warner's and BMG's German PPD of a full price CD with BIEM rates.		Universal refers to the Ordover Report At paragraph 87.
117	Annex 7 - The composition of the price of a CD		Universal refers to the Ordover Report. At paragraph 88.
118	Annex 9 - Table showing PPD comparison in Europe		Universal refers to the Ordover Report at paragraphs 91 to 93.