Worldwide Collective Licensing Schemes And How They Affect Musical Composition And Sound Recording Copyright Owners

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The starting point for any discussion on collective licensing is "what is actually being licensed, for whom and by whom and for what purpose".

Most countries of the world exist in a world of 2 copyrights in music transactions-the copyright governing the underlying musical composition (the song) and the copyright governing the sound recording (the record). The scope of rights involved in each of these separate copyrights are primarily the jurisdiction of national legislatures with the meaning and scope of these rights normally handled by each countries judiciary-whether it be courts, tribunals, copyright boards or other designated bodies. Negotiated voluntary agreements between the users of music (websites, broadcast television, cable, radio, satellite, etc.) and large organizations organized to negotiate and collect for multiple copyright owners (performing right organizations, mechanical right organizations, etc.) or individual copyright owners themselves play a major role in deciding what the license fees should be as well as what the scope of the license is in any media.

In situations where voluntary agreements cannot be reached by the parties, federal rate courts (e.g. ASCAP and BMI in the U.S.), Copyright Tribunals (e.g. PRS for Music-MCPS/PRS- in the U.K.) or Copyright Boards (SOCAN, CMRRA and SODRAC in Canada) decide the issues and determine rates.

A somewhat simplified summary of a very complex world of music rights but one that at least sets up what were dealing with as to the issue of collective licensing.

At the time the Internet was just taking hold by consumers, the music business throughout the world had a long history of established rules and negotiations governing licensing and the establishment of rates. Though many of these license negotiations were restricted in the sense of territory and term, among other items, many were not(i.e. grant of the worldwide distribution right in feature film licenses). In the area of the song, integrating the internet into licenses by copyright owners(music publishers normally) was significantly easier to accomplish than integrating master recordings. In the U.S., Copyright Royalty Judges already had a history of dealing with the setting of rates in many areas and the most recent CRB hearing regarding the "mechanical rate", showed that the setting of rates for the online world of downloads, interactive streaming, limited downloads and ringtones as well as physical product could

be accomplished through the combination of a trial on some issues and a voluntary agreement by the parties on other issues.

In the world of the song/composition performance right(ASCAP, BMI and SESAC), negotiated industry agreements have been the norm with federal rate court alternatives(mandated by Consent Decrees with the government) coming into play only when ASCAP or BMI could not come to an agreement with a music user as to "what a reasonable license fee should be". This rate court option has been in effect since 1960 with ASCAP and was adopted by BMI in the 1990's and represents a primary way to resolve disputes and set collective licensing rates when the parties cannot reach an agreement. SESAC, the smallest of the 3 U.S. performance right licensing organizations, does not have a rate court alternative, a matter which is the subject of current litigation between the broadcasters and SESAC.

In the online world of music licensing, the ASCAP rate court(southern district court in New York) has been instrumental in deciding what the license fees should be in the online world as well as what is actually licensable by collective licensing organizations. In recent interim and final decisions involving music use by AOL, Yahoo, Real Networks, AT&T, YouTube, Verizon and others, a percentage of revenue formula has been applied taking into account among other factors, the amount of time music is performed versus the amount of total time spent on the site for all reasons-a business unit's revenue adjusted by a music use factor multiplied by a court set percentage figure. Though there is no final agreement yet as many of these cases and orders are currently under appeal(AOL excepted as they have settled), there is being established a direction for the collective licensing of online music involving the performance right.

On the record side, there has not been a long history of collective licensing efforts. A copyright for sound recordings came into effect in 1972 in the U.S.(long after the 1909 Copyright Law and exclusive rights for musical compositions) with the 1st recognition of a performance right in sound recordings coming in 1995 and 1998 via federal legislation-and then the right was a limited one applying primarily to websites, satellites and cable and not to terrestrial broadcasting. The industry's approach has been primarily to sue infringers in the online world-an approach generating among consumers not the best of publicity or results. The labels not only were slow to appreciate the fact that the physical world of sales was quickly disappearing but also did not have the history of different types of licensing negotiations and alternatives that the "song" copyright community had experienced over many years.

In recent years, U.S. Copyright Board decisions have been of help in determining the online value of sound recordings. The website decisions alone

have established industry wide fees and rates for non-interactive websites as well as a compulsory license in the field. Rates are either per song/per listener or a percentage of revenue or a percentage of expenses coupled with minimums. There is also an authorized collection and administration entity in SoundExchange to handle this area.

On the interactive side, individual negotiations prevail as sites must negotiate with the sound recording copyright owner as to what the fees should be. Some examples of the progress in this area are deals involving a percentage of gross revenue from subscribers and advertisers or a percentage of a net figure(gross minus certain expenses) with the resulting figure shared by the label with artists either on a contract royalty percentage basis or a 50/50 split. Payments to the labels are based on their pro-rata share of activity on each site or by each licensed entity.

In light of the multiple rights involved in licensing songs and records in an environment of worldwide and unlimited distribution of music created by the Internet, approaches similar to those used outside the U.S. would seem to help the cause of collective licensing. Variations of the joint online license utilized in the U.K., Canada, Australia and other countries would allow the online users of music to acquire many of the necessary music rights in a single transaction without having to conduct separate negotiations with multiple rights holders controlling multiple separate rights. Arguments and disagreements as to what rights are actually involved in a particular music use would be, in the main, academic as all the necessary rights would be acquired in one license for a specific fee. The fee would then be distributed amongst all of the interested copyright owners.

One problem when you combine multiple separate rights of copyright under one combined (joint) license is how do you divide up the license fee amongst the different licensed rights and also between the different types of uses within each right(i.e. should themes and underscore have different values than song performances as they do under the rules of many of the world's performance right organizations?). In countries where the alliance or joint venture of the performance society and the mechanical society allows them to issue a joint license, percentage allocations for each right are determined internally(e.g. 75 percent of the fee for a download goes to the mechanical/reproduction right with 25 percent going to the performance/communication right or a 75 percent performance/25 percent mechanical split for a stream). So as you can see, this potential problem is resolvable without affecting the ability of an online user to acquire a license.

The joint license does become a bit more complex in the U.S. where you have multiple performing right organizations each charging different rates and

employing different payment schedules, one primary mechanical collection organization with other entities doing it themselves as well as the fact there are court decisions, currently under appeal, that take the position that there is no performance right in a download-a position contrary to that of most major countries. Anti-trust issues would also have to be addressed but again, the obstacles are not insurmountable.

As to the issue of the territory covered by a license, past collective licensing schemes were covered by means of reciprocal agreements between societies-contractual agreements between each countries collection organizations with other countries collection organizations for the back and forth flow of license fees.. These agreements still apply in the non-online world but face significant change as well as challenge in the online world. The EU's pan European licensing directives and decisions, though not yet fully implemented or accepted, have already changed the face of online collective licensing in Europe as well with countries doing business with European collection societies. Whether the future results in a select few large societies or blocs of societies administering online rights over multiple territories or some other form of worldwide collective administrative body appears, that remains to be seen.

As to whether there should be a government mandated collective licensing regime or a system whereby ISP's employ an add-on to every consumer's bill to cover the use of copyrighted material, neither scenario seems to adequately address the issues of who sets the value of the use of copyrighted music on the Internet, what music use qualifies for a license (fair use issues, etc.) and how will it be administered and distributed. A better answer, I believe, lies both in the performance right analogy where private negotiations between interested parties is the norm with mandatory judicial mechanisms taking effect if the parties cannot come to an agreement as well as the methodology of the recent U.S. CRB decision regarding "mechanicals" where a trial was held and decision made on certain issues that could not be resolved between the parties coupled with a voluntary agreement by the parties on issues that could be resolved through private negotiation. Combine that with a standard form of joint license covering multiple rights as well as a new type of reciprocal agreement covering groups of countries or conceivably the world.

It is important to bear in mind that whatever solution(s) or method(s) take precedence in the online world of collective licensing, the possibility that they will flow, in some form, to the traditional worlds of music licensing is very strong-a fact that should be borne in mind in developing any final solution.