Neighbouring rights in the digital era

Sound recording producers, artists and performers have everything to win in finding a consensus on neighbouring rights in the digital era. **Annabelle Gauberti** explains why

All music industry insiders agree that growth lies with digital income, which now accounts for 46% of total music industry revenues. Specifically, streaming is going from strength to strength with music digital subscription services, including free-to-consumer and paid-for tiers, growing by 39% in 2014, while the other component of digital revenues – downloading - declined by 8%.

Streaming subscription revenues predictably offset declining downloading sales to drive overall digital revenues, pushing subscriptions to the heart of the music industry's portfolio of businesses, representing 23% of the digital market and generating $1.6bn in trade revenues.

Music industry experts predict that streaming and subscriptions will grow by 238% from 2013 levels to reach $8bn in 2019, while download revenues will decline by 39%. They also forecast that streaming and subscriptions will represent 70% of all digital revenues by 2019.

While the evolution towards more music streaming is very customer friendly (who does not want to have the option of selecting and potentially hearing millions of tracks anywhere in the world on a device no bigger than the size of a jeans pocket?), new legal and business issues have arisen as a result.

In particular, rights owners of musical content (ie, rights owners in the musical composition on the one hand – typically songwriters, composers and music publishers or collective licensing organisations – and rights owners in the recorded performance of that composition on the other – typically the record label, the recording artist-performer and non-featured musicians and vocalists), repeatedly ask themselves how they are financially benefiting from this surge in streaming consumption and income. How do they get paid?

In addition, as the surge in musical digital consumption and income is being evidenced, certain categories of income streams are developing and taking more of a preponderant role. In particular, sound recording performance rights, otherwise known as neighbouring rights, are a growing source of global revenue for recording artists and record labels. While recorded music sales of physical products - CDs, cassettes and vinyl - have declined by 66% since a high in 1999, revenues from overall neighbouring rights have increased dramatically, reaching €2bn globally in 2013. Where are musical neighbouring rights going? How are they collected then distributed to right owners?

Getting to grips with neighbouring rights in the digital era

Neighbouring rights, also called related rights, were consecrated by law step by step, in order to ensure that people who are auxiliaries to the creation and/or production of content (artists, performers, music producers, film producers, non-featured musicians and vocalists) can have more control over their creative endeavours.

There is no single definition of neighbouring rights, which vary much more widely in scope between different countries than authors' rights or copyright.

However, the rights of performers, phonogram producers and broadcasting organisations are certainly covered by related rights and are internationally protected by the 1961 Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations.

Aside from the Rome Convention, the 1996 World IP Organization (WIPO) Performances and Phonograms Treaty (WPPT) addresses the protection of neighbouring rights in the musical sector.

At the European Union level, three directives have been instrumental in developing a harmonised legal framework relating to neighbouring rights: the directive of 27 September 1993, relating to the coordination of certain rules on authors' rights and neighbouring rights applicable to satellite broadcasting; the directive of 29 October 1993, which was replaced by the directive n. 2006/116/EC of 12 December 2006, on the term of protection of copyright and certain related rights; and the directive n. 2001/29/EC of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society.

Sound recording performance rights represent the bulk of all neighbouring rights collected worldwide and they are a growing source of global revenue for recording artists and record labels.

For example, in the US, SoundExchange, the organisation responsible for collecting and distributing sound recording performance royalties, distributed $590m in 2013, a dramatic increase from the $3m it distributed in 2003. In the decade since SoundExchange's inception, the organisation has generated $2bn in royalties to artists and record companies.

Out of a total of €2bn of neighbouring rights collected in 2013, 49% originate from Europe (€1.1bn), 30% from North America (€681m), 12% from South America (€268m) and 9% from Australasia (€192m).

With a 28% share of worldwide royalties, the US is the main market for neighbouring rights, even though the collection of such rights is limited to the public performance

of sound recordings on digital medium only, such as online radio like Pandora, satellite broadcasting like Sirius/XM and online streaming of terrestrial radio transmission like iHeartRadio. Unlike most of the world, the US does not apply sound recordings performance rights to broadcast radio, terrestrial radio or the performance of sound recordings in bars, restaurants or other public places.

Globally, sound recording performance rights are administered by music licensing companies or collecting societies. These organisations are responsible for negotiating rates and terms with users of sound recordings (eg, broadcasters, public establishments and digital service providers), collecting royalties and distributing those royalties to performers and sound recording copyright owners.

There are around 60 collecting societies around the world focused on sound recording performance royalties.

Collecting societies and neighbouring rights: the future is bright

How are neighbouring rights protected and collected on a territorial basis?

While it could appear that neighbouring rights are protected and remunerated in a very homogenous way around the world, thanks to the structured international and European legal framework described previously, these related rights and the business practice of collecting societies are in fact very different and vary from territory to territory.

Each of the 60 collecting societies operate in a territory that recognises performances in slightly different ways and has a specific business practice. For example, the US Copyright Act grants owners of sound recordings an exclusive right to "perform the copyrighted work publicly by means of a digital audio transmission". This right is limited by a statutory licence for so-called non-interactive digital audio transmissions. Therefore, services that comply with the statutory licence may stream sound recordings without the permission of the copyright owner, subject only to remitting data and payment to SoundExchange. The US Copyright Act specifies how SoundExchange divides and distributes the royalties: 50% goes to the sound recording copyright owner; 45% is distributed to the featured recording artist; and 5% is sent to an independent administrator who further distributes those royalties to non-featured musicians and vocalists.

In the UK, the Copyright, Designs and Patents Act grants sound recording copyright owners exclusive performance rights in their sound recordings. In addition, the UK act gives performers on those sound recordings a right of equitable remuneration for a share of the licensing proceeds for the use of the sound recordings. Therefore, when a sound recording is broadcast in the UK, the performers on the recording have a right to a share of the producer's revenue from that usage. From a legal standpoint, it is very different to the US statutory licence regime, where the featured artist's share is against the user of the sound recording, not the record company. The UK is the second largest market for related rights globally. According to the 2014 financial results of UK collecting society PPL, it collected a total of £187.1m in licence-fee income from broadcast, online, public performance and international revenue sources.

"Neighbouring rights is, and will remain, one of the most talked-about legal topics in the musical industry."

In France, the IP Code also grants sound recording copyright owners exclusive performance rights in their sound recordings, through a statutory licence. Like in the US, digital service providers that comply with the statutory licence may stream sound recordings without the permission of the copyright owners, subject only to remitting data and payment to the Société Civile des Producteurs Phonographiques (when the record producer is a major), Société Civile des Producteurs de Phonogrammes en France (when the record producer is an independent label), Société pour l'Administration des Droits des Artistes et Musiciens Interprètes (for performers) and La Société de Perception et de Distribution des Droits des Artistes-Interprètes (for non-featured musicians and vocalists). The IP code provides that 50% of the royalties go to the sound recording copyright owner, while the other 50% goes to the performers and non-featured musicians and vocalists.

How are neighbouring rights protected and collected on a cross-border basis?

One of the recurring questions that artists and labels ask themselves is how they are protected from one territory to another. Indeed, music is a global business, especially in the digital era – artists successful in one territory are often successful in others.

Worldwide success implies that the sound recordings of artists are going to be performed publicly in territories other than where they reside. How, then, can performers and producers collect sound recording performance royalties in territories where they are not nationals and may not have direct agreements with the relevant societies?

The answers are complex and derive from the application of the provisions set out in the Rome Convention and the WPPT mentioned before.

Article 2 of the Rome Convention details the level of protection granted to nationals of contracting states in each other's territories. In short, contracting states owe nationals of other member states the same level of protection they recognise for their own nationals. This concept of national treatment is key to international copyright treaties and works to ensure that members do not unfairly discriminate against nationals of other contracting states.

When seeking to maximise the amount of royalties one collects for artists and record companies abroad, the concepts of national treatment and reciprocity are critical to keep in mind. Understanding what qualifies for full national treatment and what qualifies for limited reciprocity can have an impact on the amount of neighbouring rights revenue an artist or label realises.

Eligibility for royalties is often a fact-based, case-by-case analysis focused on the nationality of performers and producers, where recordings took place and where they were first published. Knowing these important facts is crucial to ensuring that artists and labels receive what they are owed.

Collecting societies play an important role here: not only do they collect fees from users in their own territories and distribute those to their domestic royalty recipients, but they often act on behalf of their member artists and labels to collect undistributed royalties abroad.

Neighbouring rights is, and will remain, one of the most talked-about legal topics in the musical industry. Now is the time for rights owners to position themselves in order to maximise related rights, arbitraging which territory, legal framework and collecting societies are doing the best job at collecting and distributing as much national and international royalties as possible to sound recording producers, sound recording artists and performers.

Author

Annabelle Gauberti is the founding partner of music law firm Crefovi, which specialises in advising the creative industries, out of Paris and London.