IT’S JUST A CLICK AWAY: HOW COPYRIGHT LAW IS FAILING MUSICIANS

JON WEBSTER & FIONA MCGUGAN
OCTOBER 2015
About This Paper

Written by:
Jon Webster & Fiona McGugan
Music Managers Forum 2015

themmf.net | @mmfuk

Special thanks to David Stopps and James Barton and all those who contributed to this paper

Published by:
MusicTank Publishing
University of Westminster
Watford Road, Harrow,
Middlesex
HA1 3TP
musictank.co.uk | @musictank

First published London, October 2015
Copyright © 2015 Music Managers Forum

The copyright in this publication is held by Music Managers Forum. This material may not be copied or reproduced wholly or in part for any purpose (commercial or otherwise) except for permitted fair dealing under the Copyright, Designs, and Patents Act 1988, without the prior written permission of University of Westminster. The copyright owner has used reasonable endeavours to identify the proprietors of third-party intellectual property included in this work. The author would be grateful for notification of any material whose ownership has been misidentified herein, so that errors and omissions as to attribution may be corrected in future editions.

ISBN: 978-1-909750-09-8
About The Music Managers Forum

The Music Managers Forum represents over 400 artist managers in the UK, who in turn represent over 1000 of the most successful acts on the planet. Since its inception in 1992, the MMF has worked hard to educate, inform and represent UK managers, as well as offering a network through which members can share experiences, opportunities and information. While this work continues, the MMF is also focusing more on providing a collective voice in this time of change, giving real, meaningful value for members and their artists, from helping to unlock investment and opening up new markets, to encouraging a fair and transparent business environment in this digital age.

themmf.net

Preface

This paper intends to demonstrate the legal mechanisms that occur behind each consumer 'click' on streaming platforms and how the payment structure to labels, publishers and artists can change with each one.

It has taken a long time and many consultants to write such a relatively short piece which goes to show just how complex this area of the music industry is and complements a subsequent in-depth analysis of the making available right itself - *Making Available, Communication To The Public & User Interactivity* - published concurrently.

The recent publication of the MMF's *Dissecting the Digital Dollar* report has gone a long way in expanding on these papers to clarify the rights involved and the journey of income streams from fans to artists.

The forthcoming MusicTank panel debate - *Creators’ Rights In The Digital Landscape*, Tue 10th November - will explore many of these issues and their nuances and consider what might be a realistic course of action, should it be found that one is needed.
It’s Just A Click Away:
How Copyright Law Is Failing Musicians

The place where copyright law has failed creators is in its definitions of words and how those words are interpreted and subsequently incorporated into local laws.

It may seem absurd but when a fan goes to listen to one track, one click can change the legal definition and framework by which the artist gets paid.

**Click**

In the music business there are two basic sets of rights:

(a) Rights of songwriters/ composers/ arrangers (technically authors’ rights) usually administered by, or assigned (sold) to a Publisher and/ or collecting society;

(b) Rights of performers (singers/ musical instrument players) usually administered by, or assigned to a Record Label (technically known as a phonogram producer) and/ or a collecting society.
Performers have a bundle of exclusive rights in their recordings – reproduction, distribution, rental, making available. These rights can be transferred by licence or assignment i.e. loan or sale in exchange for the certainty of being paid.

However some rights (Equitable Remuneration) are non-assignable.

Performers also have a separate Equitable Remuneration right (ER), which applies when any commercially published recording is broadcast or played in public. Distribution in this way is known in law as ‘Communication to the Public.’

This remuneration right cannot ever be given up - even by agreement - and is administered by collection societies. ER does not mean equal remuneration but actually means ‘fair’ remuneration.

**Click**

When a performer signs with a record label they transfer their exclusive rights to the label in exchange for a monetary advance and royalties from the sale of subsequent recordings. These performers are known as ‘Featured Artists’.

Along with any such advance and royalties, they share in income derived from broadcasts of the recordings through the Equitable Remuneration right.
When extra performers are brought in to augment recordings they are paid a session fee and do not share in royalties from sales or licenses. These are Non-Featured Artists. They, too, are entitled to share in income derived from broadcasts of the recordings – in other words the Equitable Remuneration – which is administered through collection societies, is split with these performers.

**Click**

If a track is broadcast (e.g. BBC Radio) or played in a public place (e.g. a hairdressers), the user (i.e. the BBC or the hairdresser) has to make two separate payments:

1. The first is paid to the collective management organisation PRS for the songwriters and publishers;

2. The second payment is made to the collective management organisation PPL for whoever owns the sound recording (the label/s), as well as the performers who played on it (both featured and non-featured).

This usage is defined as ‘Communication To The Public’ and the right to remuneration from that produces the income.
In the UK, ER in the context of broadcast of recordings is defined as 50% to the recording copyright owner (record label) and 50% to the performers that performed on a particular track, split between Featured and Non-Featured Artists by a series of agreed rules.

The ER right that PPL collects and administers has proved to be very important for both record companies and performers. The very valuable attachment to this right is that for performers it cannot be waived nor assigned in contract. This means that if a record label tried to insert a clause in the recording agreement saying that an artist transfers their right of ER to the record label, that clause would be illegal.

It does not matter whether or not an artist has recouped their advance from a record company in relation to the exclusive rights, they will continue to receive income from PPL for ER.

Similarly, on the songwriter’s side, (although the rights mechanisms are different) a songwriter will continue to receive income from PRS no matter what their recoupment position is with their publisher.

In the pre-digital era Featured Artists received advances against future recording royalties from record labels and some handouts when their tracks were played on the radio. Non-Featured Artists - the session guys who augmented the Featured Artists - received a one-off session fee and precious little more.
Double Click

Then the Internet appeared.

Consumers started to be able to play what they wanted when they wanted; the celestial jukebox began to take shape and the way in which music transferred to consumers shifted significantly.

Analogue copyright law began to be applied to digital means of delivery for which they were never intended. The pace of change quickened, and copyright law was left floundering.

Copying itself began to lose credence and access to copies rather than ownership of music is becoming pre-eminent. Simultaneously, reproduction and distribution rights are becoming less relevant as communication rights are becoming more valuable.

Click

The Making Available (MA) right was introduced in the Internet age because the concept of Communication to the Public had been superseded in an on-demand, digital world. MA is defined as:

“Performers shall enjoy the exclusive right of authorising the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.” - Article 10 of the WIPO Performer and Phonogram Treaty.
The crucial phrase here is “from a place and at a time individually chosen by them” i.e. on-demand. The purpose of this introduction was to remunerate and protect rights holders and creators in the digital age.

Click

The introduction of the MA and the interpretation of these words resulted in an imbalance of remuneration between creators, rightsholders and performers not receiving the income that was intended or that they deserved.

The rationale behind the implementation of MA as an exclusive right is that exclusive rights tend to yield more rewards; they are more valuable.

However, the failure of this plan is evident due to the fact that these rights can be legally assigned and have been so – often not explicitly.

Indeed, the MA right is acquired by default, as a consequence of the acquisition of all the other exclusive rights in artist-label contracts. Ironically, this right would work more in favour of creators if it had been implemented as a non-transferable remuneration right and therefore subject to separate negotiation.

Click

Between the ‘black’ of a sale and the ‘white’ of a broadcast, many shades of grey have appeared. First, there is a technical difference between webcasting and streaming:
• **Live Streaming** (also known as ‘webcasting’ or ‘simulcasting’) delivers content from a single source to multiple users concurrently in real-time, and demands an original source, from where data is captured, processed into a digital signal and transmitted to numerous users which is only accessible at the time which it is broadcast. It is therefore comparable to a traditional linear radio or television transmission.

• **On-demand** streaming permits the user to initiate the transmission of content, at a time and a place convenient to them. The nature of on-demand requires data storage on a central server from where the content is streamed at the users’ request.

Within On-Demand streaming there are further variations; whether a user listening to a stream of music can pause or skip a track, whether a user has been previously notified of queued tracks or whether they are being fed random tracks based on their listening history, whether the user can choose the particular artist they want to listen to but cannot choose the order of catalogue, whether the tracks are available on a completely ‘à la carte’ basis, and so-on.

The levels of user control are vast.

**Rewind**

As the Internet develops and a multiplicity of new methods of listening to audio tracks devised, the issue of how a consumer accesses a track - whether on-demand or not - has become crucial.
If the consumption of a track is deemed to be 'on-demand' (i.e. subject to the MA right), then the record company licenses that usage and pays the Featured Artists a royalty based on a physical consumption i.e. anything from 1-25+% of the income. The Non-Featured Artist receives nothing beyond their initial fee.

If the consumption is deemed not to be 'on-demand' (i.e. a Communication to the Public) then the income is split - 50% to the label and 50% to be shared between the featured and the non-featured artists). That’s a big difference. And that’s where we are today, and which can be summarised as follows:

<table>
<thead>
<tr>
<th></th>
<th>Copyright Owner (record label)</th>
<th>Featured Artists</th>
<th>Non-Featured Artists</th>
</tr>
</thead>
<tbody>
<tr>
<td>Broadcast</td>
<td>50%</td>
<td>35-50% (Paid direct by PPL)</td>
<td>0-15% (Paid direct by PPL)</td>
</tr>
<tr>
<td>On-Demand – Heritage Artist 2% royalty (i.e. a pre-digital era label contract)</td>
<td>98%</td>
<td>2% (Recouped from Advance)</td>
<td>0%</td>
</tr>
<tr>
<td>On-Demand – Modern Artist 20% royalty (i.e. a digital era label contract)</td>
<td>80%</td>
<td>20% (Recouped from Advance)</td>
<td>0%</td>
</tr>
</tbody>
</table>
The click has now become vital...it is 2015 and a consumer clicking to skip a track can drastically affect how much all performers (featured and non-featured) get paid and whether the copyright owner (usually the record label) receives 50% or 100% of the income from the play of a track and the performers receive 50% or nothing.

For heritage artists whose contracts pre-date the Internet age, the MA right did not then exist, yet most artists have suffered from ‘catch-all’ clauses in contracts from the 1980’s onwards that acquired that right and transferred it to record companies.

For those artists who didn’t even have catch-all clauses, record companies have simply assumed ownership of this little-known right, enabling them to assume digital usage with no further compensation due.

Surely it is time for a re-definition of copyright laws that govern the income flow from digital consumption rather than the unfair mess we have at the moment?

If you have any comments about this paper we would love to hear from you: IT’S JUST A CLICK AWAY – MY COMMENTS

The forthcoming MusicTank panel debate - Creators’ Rights In The Digital Landscape, Tue 10th November - will explore many of these issues and their nuances and consider what might be a realistic course of action, should it be found that one is needed. Please join us.