DISSECTING THE DIGITAL DOLLAR

Part One

How streaming services are licensed and the challenges artists now face

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This is Part One of 'Dissecting The Digital Dollar' which sets out to instigate and inform a debate amongst the artist, management and wider music community. Part Two will report on those discussions. Follow the MMF online for details of that report.

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DISSECTING THE DIGITAL DOLLAR Part One

How streaming services are licensed and the challenges artists now face

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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.

ABOUT CMU INSIGHTS

CMU is a service provider to the music industry best known for its media: free daily news bulletin the CMU Daily and premium services the CMU Digest and CMU Trends Report.

CMU Insights provides training and consultancy to music companies and companies working with music. This includes a regular seminars and events programme, and CMU Insights @ The Great Escape, the UK's biggest music business conference at the heart of Europe's leading festival for new music.

CMU also runs an education programme for new talent called CMU:DIY providing workshops and online resources for aspiring artists, songwriters and music entrepreneurs.

ABOUT THE AUTHOR

Chris Cooke co-founded CMU in 1998, and continues to contribute to the title as Business Editor. Having written about the music business daily for almost fifteen years, he is a leading expert on the sector, and often comments on developments in it for other media, most notably the BBC. With degrees in English and Law, he is a particular expert on music rights, and has closely documented the evolution of digital music.

Chris also heads up CMU owner 3CM UnLimited, through which he publishes cultural recommendations service ThisWeek London and Edinburgh Festival magazine ThreeWeeks Edinburgh, and helps run the award winning PR training charity the Taylor Bennett Foundation, which is enabling more ethnic diversity in the communications industry. He co-hosts the CMU and TW Podcasts and recently debuted his first spoken word show 'Chris Cooke's Free Speech'.

Section One: Executive Summary

The rise of digital has created both challenges and opportunities for the music industry. The challenges around piracy have been widely documented, but working with legitimate digital services has also been challenging for music rights owners, especially as we have seen a shift from downloads to streams, because licensing these platforms requires a new approach to doing business.

Over the last decade the music rights sector has been busy evolving new licensing models, and new industry standards are now starting to emerge. However, issues remain, and there is some debate as to whether both the fundamentals and the specifics of these new business models are the best possible solutions, and whether or not they have been created to be more beneficial to some stakeholders in the music community than others.

And even where standards are emerging, there remains much confusion in the wider music community as to how, exactly, streaming services are being licensed, how it is calculated what digital service providers must pay, and how that money is then processed and shared by the music rights industry.

There are various reasons for this confusion...

- The complicated nature of the streaming deals.
- The record industry and music publishers do not always license in the same way.
- The way services are licensed and royalties processed can vary from country to country.
- Most streaming deals are ultimately revenue share arrangements, making exact payments per usage less predictable.
- The specifics of many streaming deals are secret due to non-disclosure agreements in key contracts.
- Those who have led on the development of new licensing arrangements have often done a poor job of communicating them to other stakeholders.

In evolving these new licensing models, record companies, music publishers and collective management organisations have had to navigate copyright laws and other music industry conventions which were not specifically developed with the digital distribution of recorded content in mind.

In doing so, some assumptions have been made which perhaps, with hindsight, require more consideration, either by lawmakers, courts or the wider music community. Or, at least, a more unified approach across the industry, and across the world.

DISSECTING THE DIGITAL DOLLAR

In order to inform this debate, the UK's Music Managers Forum commissioned this report, to review and explain how music rights have been exploited in the past, how digital licensing has evolved, and what issues now need to be tackled. We spoke in-depth to over 30 leading practitioners from across the music, digital and legal sectors, and surveyed 50 artist managers in five markets who, between them, represent artists signed to all three major music companies and over 100 independent labels.

The way music rights work varies around the world, partly because of differences in copyright law, and partly because of different practices and conventions that have evolved in each market. This variation is in itself a challenge in a digital sector where so many services aspire to be truly global.

It also poses challenges in explaining how music copyright works on a general level, because different rules, technicalities and terminology may apply in any one country; and there are significant differences of emphasis between so called 'common law' jurisdictions, like the UK and the US, and 'civil law' systems, like France and Spain.

Although we have tried to be 'market neutral' in describing the basics of music copyright in this report, we are arguably starting from a common law and possibly UK perspective, but we will try to be clear where the key differences exist between different systems.

MUSIC RIGHTS & DIGITAL PLATFORMS: HOW IT WORKS

1. Copyright provides creators with controls that can be exploited for profit

Copyright is ultimately about providing creators with certain controls over that which they create, either as a point of principle, and/or to encourage and enable creativity by allowing creators and their business partners to exploit these controls for profit.

Exactly what controls a copyright owner enjoys varies from country to country, but they commonly include the exclusive right to make and distribute copies of a creative work, to adapt the work, to rent it out or communicate it, and to perform it in public.

Copyright makes money when third parties wish to exploit one of these controls, because the third party must get permission – or a licence – from the copyright owner. The licensor will usually charge the licensee a fee to grant permission.

2. The core music rights

The music industry controls and exploits various kinds of intellectual property, though the core music rights are the separate copyrights in songs (lyrics and composition) and sound recordings, what civil law systems might refer to as the separate 'author' and 'neighbouring rights'.

Both copyright law and the music industry routinely treat these two kinds of copyright differently. Within the business, music publishers generally control song

Which copyrights and controls are you exploiting?

You burn a copy of a track onto CD

You are exploiting the 'reproduction control' of both the song and recording copyright

(what music publishers call the 'mechanical right')

You perform a song at a gig

You are exploiting the 'public performance control' of just the song copyright

You play a track on the radio

You are exploiting the 'communication control' of both the song and recording copyright

You synchronise a track to a TV show

You are exploiting the 'reproduction control' of both the song and recording copyright when you actually synchronise the track...

and then the 'communication control' of both the song and recording copyright when the TV show is broadcast

You download or stream a track

You are exploiting both the 'reproduction control' and the 'communication control'* (probably the specific 'making available control') of both the song and recording copyright

*This can vary from country to country, for example in the US only a reproduction rights licence is required for downloads, while only a performing rights licence is required for personalised radio services.

copyrights while record companies control recording rights.

This is important for anyone wishing to license a recording of a song, because it means they will need to do separate deals with both record companies and music publishers, and the labels and publishers may have different ways of doing the deal.

3. The licensing process will differ depending on usage

How labels and publishers go about licensing any one licensee will often depend on which of the aforementioned 'controls' said licensee wishes to exploit.

For example, if they wish to exploit the reproduction and distribution controls – what might be called the 'reproduction' or 'mechanical rights' – they may be licensed in a different way than if they wish to exploit the performance or communication controls – what might be called the 'performing' or 'neighbouring rights' (this being an different use of the term 'neighbouring rights').

Sometimes rights owners license 'collectively', as opposed to individual rights owners and licensees having a direct relationship. When this happens all labels or all publishers appoint a 'collective management organisation' (CMO) to license on their behalf. This may be done for practical reasons, or because copyright law instigates a 'compulsory license', meaning that a rights owner cannot refuse to license in a certain scenario, even though licensees are still obliged to pay royalties. Collective licensing is usually subject to extra regulation with a statutory body or court ultimately empowered to set royalty rates.

In the main (there are exceptions, for example in sync), labels commonly license reproduction rights directly but performing rights collectively, whereas publishers often license both sets of rights through their CMOs, but possibly different CMOs (in the UK, MCPS and PRS respectively).

4. It is important to know who controls each copyright

Unlike other kinds of intellectual property, copyright is not usually registered with a statutory authority, which can make identifying owners tricky.

Copyright law usually defines 'default' or 'presumed' owners of new works, though these rules vary from country to country, and can be different for songs and recordings. Default owners can also usually transfer ownership, or at least control, to another party – usually in return for money – through so called 'assignment' or 'licensing' agreements.

As a result, whatever default ownership rules may say, most songs are either owned or at least controlled by music publishers, and most recordings are either owned or at least controlled by record companies. Singer songwriters, involved in creating both songs and recordings, will usually have separate deals with separate companies covering their respective song and recording rights.

Though there is an important distinction to make when it comes to songs, in that a songwriter may actually directly appoint a CMO to control some elements of their copyright and a music publisher to control the other elements. So in the UK, a songwriter assigns performing rights to PRS but all the other rights to their publisher. The publisher then has a contractual right to share in performing rights revenue, but does not actually control that element of the copyright.

Who controls the different music rights?

A label sends artists into the studio to write and record new music ... a song and a recording is created

SONG COPYRIGHT

WHO OWNS THIS?

By default, usually the songwriter or songwriters, though they will often transfer ownership and/or control to other parties.

WHAT RIGHTS? The copyright provides a number of 'controls'. The songwriter commonly transfers some controls to a 'collective management organisation' and the other controls to a publisher. In the UK: 'performing rights' to CMO, other rights to the publisher.

PERFORMING RIGHTS OF THE SONG COPYRIGHT

→ **CMO** (PRS in the UK)

→ CMO handles licensing

→ CMO passes 50% of income to publisher and 50% to songwriter

OTHER ELEMENTS OF THE SONG COPYRIGHT

→ **MUSIC PUBLISHER**

→ Publisher either licenses direct or via a CMO (MCPS in UK)

→ Publisher pays royalty to songwriter according to publishing contract

RECORDING COPYRIGHT

WHO OWNS THIS?

Default owner varies according to local copyright law – could be label or artist – though artist will often transfer ownership and/or control to another party.

WHAT RIGHTS? The copyright provides a number of 'controls', all of which will usually be transferred to a record label. However, the artist's separate right to 'equitable remuneration' (ER) on performing rights revenue cannot usually be transferred to the label.

ALL ELEMENTS OF THE RECORDING COPYRIGHT

→ **RECORD LABEL**

→ Label either licenses direct or via a CMO (PPL in UK)

→ Label pays royalty to featured artist according to record contract

ARTIST'S 'ER' RIGHT ON PERFORMING RIGHTS INCOME

→ **ARTISTS' CMO** (PPL in the UK)

→ CMO collects Performer ER

→ CMO passes Performer ER income to both featured artist and sessions musicians

*Default ownership and equitable remuneration rules, and the way the different elements of the song right are split, varies from country to country. And, of course, artists and songwriters don't only create when sent into the studio by a label!

Finally, copyrights can be co-owned. This is particularly common with song copyrights, because collaboration is common in songwriting. Where a song is co-owned, a licensee will usually need permission from each and every stakeholder to make use of the work.

5. Creator & Performer Rights

Artists and songwriters often assign – or as good as – the copyright in their recordings and songs to record labels and music publishers; this is especially true with new talent who need their corporate partners to make risky investments in their careers in the form of artistic development, content production, marketing and cash advances.

But artists and songwriters will still retain some rights in relation to those recordings and songs through their record and publishing contracts, in particular the right to share in any revenue generated by their work, and maybe also rights to consultation, approval or veto.

In addition to these contractual rights, artists and songwriters may also enjoy other rights directly from copyright law, commonly called moral and performer rights. For recording artists, the most common performer rights relate to 'approvals' and 'performer equitable remuneration'.

Approval must usually be gained to record an artist's performance and to then exploit that recording. Artists may also often enjoy an automatic (ie non-contractual and non-waivable) right to share in certain (though not all) revenue streams associated with their recordings, most often performing rights income.

Licensees should be aware of these additional creator and performer rights, which co-exist with the actual copyright that will likely be controlled by a corporate entity.

6. Digital Licensing

In the physical product domain, a record company exploited its own sound recording copyright, and licensed the rights to exploit the accompanying song copyright from the relevant music publisher or publishers, usually via the collective licensing system. The CD was then provided to the retailer 'rights ready'.

With just a few exceptions, in the digital domain, download stores and streaming services need to have separate licensing relationships with both record companies and music publishers and/or their respective CMOs. Labels generally license all but online radio directly, though personalised radio services may also be licensed by the CMO in some territories (especially the US, where a compulsory licence applies). Publishers license most digital services collectively, though the big publishers now sometimes license Anglo-American repertoire directly, albeit via joint venture vehicles with the CMOs.

As an extra complication, downloads and streams exploit both the reproduction rights and the performing rights of the copyright.

On the publishing side, this is important because these two elements of the copyright are often licensed separately (remember, in the UK PRS controls the performing right and the publisher the reproduction right).

Outside the US, publishers usually try to provide digital services with 'combined rights licenses', which means that, where reproduction and performing rights are

controlled by different entities, those two entities need to work together. For example, where publishers license digital direct, they must do so in partnership with the CMOs which control the performing rights.

On the recordings side, the label is able to license both elements of the copyright, though by convention performer equitable remuneration was often due on performing rights income but not reproduction rights income, making the fact that both elements of the copyright are being exploited relevant. Except, most labels argue that a specific and separate performing right, first introduced in the mid 1990s and called the 'making available right', is what the digital platforms actually exploit, and that that is exempt from performer equitable remuneration. Not all artists agree.

7. The Streaming Deal

Most streaming services are licensed in more or less the same way. The deal between the rights owner and the streaming platform is ultimately a revenue share arrangement.

Each month the streaming service works out what percentage of overall consumption came from any one label or publisher's catalogue. It then allocates that percentage of its overall advertising and/or subscription revenue (after sales tax) to the rights owner, and pays them a cut based on a pre-existing revenue share arrangement. Every deal is different, and usually secret, though labels generally see 55-60% of revenue allocated to their catalogue whereas publishers see 10-15%. Overall the streaming service aims to retain about 30%.

In addition to the core revenue share arrangement, rights owners will usually seek to minimise their risk by having the streaming service pay minimum rates, for example per play, so that they are guaranteed certain income based on consumption oblivious of the streaming service's revenues. Rights owners will also often demand upfront advances from the streaming services, while labels may seek equity in start up services and other kickbacks.

8. Money Flow

Payment of streaming royalties can be complex. Streaming services generally assume that whichever label provided it with a track owns the copyright, and pays that label its share of the revenue, or the minimum guarantee, whichever is higher.

The label will then usually be obliged to share that income with the artist, subject to the terms of said artist's record deal. Most labels pay artists the same share on digital income as physical income, or maybe a few percent more. There has been much debate as to whether this is fair, while some artists with pre-digital record contracts argue this is an incorrect interpretation of their original agreements.

Every record deal is different, but usually artists will receive a minority cut of income – commonly 15-20% – and only after some or all of the label's initial and ongoing costs have been paid (exact terms are set out in the record contract). There is some confusion in the artist and management community as to what ongoing costs many labels are deducting from digital income.

On the publishing side, the streaming service does not usually know which publisher or publishers own the rights in any one song. Therefore the streaming service reports all consumption to each licensor. The rights owner then calculates what it is due and invoices the streaming service, which then needs to ensure it isn't

being invoiced twice for the same song (or that two licensors aren't both claiming to own 60% of a song).

Once the publishing sector has been paid, money then needs to be split between the performing and reproduction rights. What happens next depends on the country. In the UK, performing rights income goes to PRS, which pays 50% to songwriter and 50% to publisher. Reproduction rights income goes to the publisher (sometimes via MCPS) which will pay a share to the songwriter according to their publishing contract.

ISSUES

The interviews conducted as part of this research, coupled with our survey of the artist management community, identified seven key issues that the music industry must now address.

1. Division of streaming revenue

Is the division of streaming income between each of the stakeholders fair? This includes the split between the streaming services and the music community, between the recording and the song rights, between the reproduction and the performing rights, and between the artist and the label.

2. Performer equitable remuneration and making available

Performer rights in many countries say that all artists are due equitable remuneration when their 'performing rights' are exploited. However, as mentioned above, most labels argue that digital services exploit a specific and separate performing right called the 'making available right', and that equitable remuneration is not due on this income. Not all artists agree, while some acts with pre-1990s record contacts argue that labels cannot exploit this right anyway without their specific approval.

3. Digital deals and NDA culture

Labels, publishers and CMOs have created templates for streaming service deals, with revenue share arrangements, minimum guarantees, advances, equity and other kickbacks. Artists and managers are often kept in the dark about these arrangements; are rarely consulted on the merits of each component of the deal; and many feel artists are being unfairly excluded from profits generated by advances, equity and other benefits offered to corporate rights owners.

4. Safe harbours and opt-out services

While some streaming services only carry content provided by label partners, others – including YouTube and SoundCloud – allow users to upload content. Rights owners can then request that content be removed, or allow it to remain for promotional purposes, or in some cases – as with YouTube – choose to monetise it on the platform. These services rely on the so called 'safe harbours' in US and European law to avoid liability for copyright infringement while hosting unlicensed material users have uploaded. Some question whether the safe harbours were designed for this purpose, and whether the existence of 'opt-out' streaming services of this kind is distorting the wider digital music market.

5. Data

The music industry is now having to process unprecedented amounts of data, as revenues and royalties are increasingly based on consumption rather than sales. The lack of decent copyright ownership data also hinders efficiency, especially on the publishing side. There are almost

certainly 'big data' solutions to these problems, the challenge is who should lead this activity, and will labels, publishers and CMOs share the crucial copyright ownership data that is in their control?

6. Collective licensing

The labels license most digital services directly, while the publishers often use their CMOs. For various reasons, both artists and songwriters often prefer money to go through the CMOs rather than their labels and publishers, though there is an argument that this is not always the most efficient way to process revenue and data. Either way, artists and songwriters often feel excluded from the debate over the pros and cons of collective licensing.

7. Adapting to the new business models

One of the biggest challenges for everyone in the music community is simply adapting to a new way of doing business, where sustained listening rather than first week sales matter, and where successful tracks and albums will deliver revenues over a longer period of time, rather than via a short-term spike. Adapting to this new way of doing business is arguably just a fact of life, though some stakeholders may be shielded more than others from any short-term negative impact.

QUESTIONS

As we said, the aim of this report is to inform and initiate debate. From the seven issues we have identified, here we pose fifteen key questions for the wider music industry to discuss, consider and answer.

1. How should digital income be split between the music industry and the digital platforms themselves?

2. Of the 70-75% of streaming revenues paid to the music industry, how should these monies be split between the two copyrights, ie the recordings and the songs?

3. Downloads and streams exploit both the reproduction and communication controls of the copyright – ie both the reproduction and the performing rights. How should income be allocated between the two elements of each copyright?

4. Where a record label owns the copyright in a sound recording but pays a royalty to the featured artist under the terms of their record contract, what royalty should the label pay on downloads and streams compared to CDs?

5. What kind of digital services exploit the conventional performing rights and what kind exploit the specific 'making available right', and should copyright law be more specific on this point?

6. Should performer equitable remuneration apply to all streaming services, including those exploiting the making available right?

7. Do record labels need a specific making available waiver from all artists before exploiting their recordings digitally?

8. Should record companies and music publishers demand equity from digital start-ups, and if so should they share the profits of any subsequent share sale with their artists and songwriters, and if so on what terms?

9. Should record companies and music publishers demand large advances from

new digital services, and if so should they share any 'breakage' (unallocated advances) with their artists and songwriters, and if so on what terms?

10. Should record companies and music publishers demand other kickbacks from new digital services, and if so should they share the benefits with their artists, and if so on what terms?

11. Can it be right that the beneficiaries of copyright are not allowed to know how their songs and recordings are being monetised, and should a new performer right ensure that information is made available to artists, songwriters and their representatives?

12. Should the safe harbours in European and American law be revised so companies like YouTube and SoundCloud cannot benefit from them, however good their takedown systems may or may not be?

13. How is the music rights industry rising to the challenge of processing usage data and royalty payments from streaming services, what data demands should artists and songwriters be making of their labels, publishers and CMOs, and is a central database of copyright ownership ultimately required?

14. Are streaming services best licensed direct or through collective management organisations; if direct what is the best solution when societies actually control elements of the copyright; and are artists and songwriters actually told what solutions have been adopted?

15. Is the biggest challenge for the music industry simply adapting to a new business model which pays out based on consumption rather than sales, and over a much longer time period; and what can artists and songwriters do to better adapt?

Section Two: Music Rights & Controls

Copyright is ultimately about providing creators with certain controls over that which they create, either as a point of principle, and/or to encourage and enable creativity by allowing creators and their business partners to exploit these controls for profit.

2.1 THE KEY MUSIC RIGHTS

The music industry owns and exploits two distinct sets of copyright[1]:

- The copyright in songs (lyrics and musical compositions) – known as 'author rights' under civil law systems and generally referred to as 'publishing rights' within the music industry.
- The copyright in sound recordings – known as 'neighbouring rights' under many civil law systems and generally referred to as the 'recording' or 'master rights' by the music business.

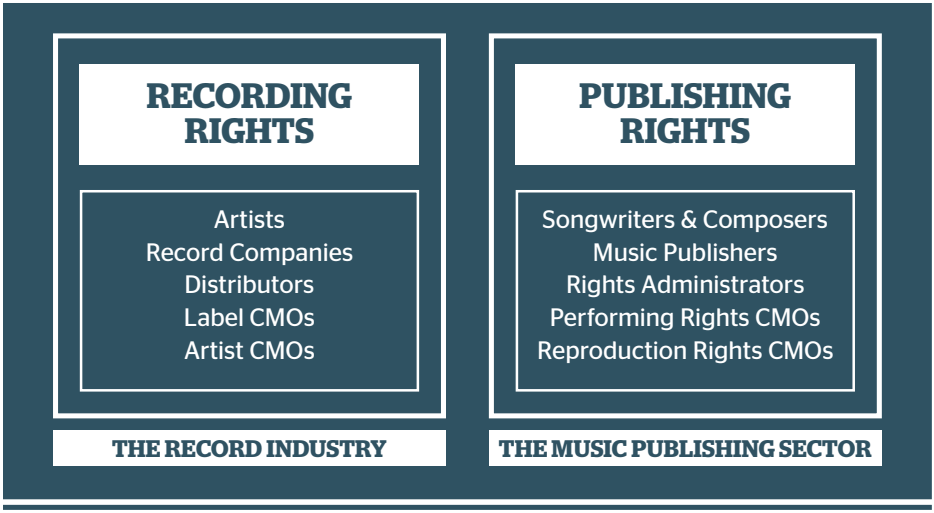
The distinction is important for various reasons:

- In some countries, copyright law will apply different rules to the publishing rights and the recording rights. For example, in the US, AM and FM radio stations must secure licences from and pay royalties to publishing rights owners, but they do not need to pay similar royalties to recording rights owners[2].

1: The music industry controls plenty of other kinds of intellectual property too – including audio-visual, artistic and other literary works – but these are the core music rights that this report will focus on.

2: The US record industry is currently lobbying to change this so to move into line with the rest of the world.

Introducing the music rights sector



- Even when that is not the case, the music industry itself will treat the publishing rights and recording rights differently, and will often license them in different ways. This is especially true when it comes to so called 'collective licensing'.
- Whilst many music rights businesses deal in both publishing and recording rights, they will usually do so through separate autonomous companies. Anyone wishing to make use of recordings of songs will need to deal with both entities.
- Whilst many artists will be involved in the creation of both songs and recordings[3], they will often work with different companies to exploit the two sets of rights – so will negotiate separate publishing and record deals with two completely separate businesses. By convention, key elements of these two deals will usually differ, in that publishing deals tend to be more generous to songwriters than record deals are to artists, for reasons we will explain below.
- The music rights industry can therefore be split into two: the 'music publishing industry' controlling and exploiting song copyrights, and the 'record industry' controlling and exploiting recording copyrights.

2.2 COPYRIGHT CONTROLS

Copyright law provides rights owners with a number of 'controls' over how each piece of content they own is used.

Copyright law does not usually refer to these controls as 'controls' – UK copyright law calls them "acts restricted by the copyright"[4] – but terminology varies from country to country and here we will use the word 'control' as a clear and neutral term. The exact list of controls also varies around the world, and sometimes differs between publishing and recording rights. The UK system lists six distinct controls, most of which can be identified, in one form or another, in other copyright systems too.

They are as follows:

REPRODUCTION CONTROL

DISTRIBUTION CONTROL

RENTAL CONTROL

ADAPTATION CONTROL

PERFORMANCE CONTROL

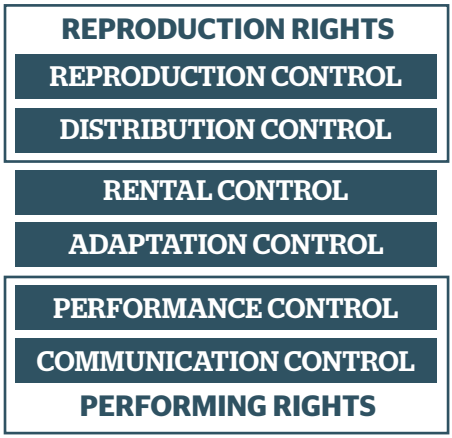
COMMUNICATION CONTROL

- **The Reproduction Control** is the true 'copy' right, in that it gives the rights owner the exclusive right to make copies of a work.
- **The Distribution Control** provides the rights owner with the exclusive right to issue copies of a work to the public[5].
- **The Rental Control** provides the rights owner with the exclusive right to rent or lend copies of a work to the public.
- **The Adaptation Control** provides the rights owner with the exclusive right to make adaptations of a work.
- **The Performance Control** provides the rights owner with the exclusive right to perform or display a work in public (with 'public' usually being defined widely to cover pretty much anything outside the private home or car).
- **The Communication Control** provides the rights owner with the exclusive right to communicate a work to the public, which traditionally means broadcast but also covers communication through digital channels

(the latter sometimes being referred to specifically as the separate 'making available' control, depending on how the user accesses the content).

In the music industry, the reproduction and distribution controls (or similar) are often grouped together and called the 'reproduction rights' or 'mechanical rights'. We will use the former as a neutral term in this report, because within the music business the term 'mechanical rights' tends to be associated more with songs than recordings.

The music industry also usually groups together the performance and communication controls (or similar) and calls them the 'performing rights' or 'neighbouring rights'. Again, we will use the former as a neutral term in this report, because while 'neighbouring rights' is an increasingly popular phrase in the record industry, the term is confusing because of its different definition under some civil law systems (as mentioned above).



Which copyright control or controls are being exploited at any one time is important because, again, the rules set out in copyright law may differ depending on which specific control is in play, and even when that isn't the case the music industry itself routinely treats and manages each control, or set of controls, differently.

2.3 HOW COPYRIGHTS MAKE MONEY

Copyrights make money when third parties – called licensees – want to exploit one or more of these controls: so they want to copy a work, or adapt it, or perform it, or communicate it, and so on.

Because the copyright owner has the exclusive right to exploit their content in any of these ways, the third party needs to seek permission[6]. And permission is usually granted in return for payment.

Licensees may want to exploit more than one copyright – and more than one control – at any one time. For example:

- If a third party wants to make a copy of a recording of a song, they are exploiting the separate copyrights in the recording and the song, and therefore need to secure permission for both.
- If a third party wants to stream a track, they are exploiting both the reproduction and communication controls of both the

3: In our survey of artist managers, 93% of the acts they represent are involved in the creation of both songs and recordings.

4: Copyright, Designs And Patents Act 1988 Section 16

5: Though this right is usually limited so that the rights owner has no control over the subsequent resale of copies it first issued (providing no additional copying is required to resell, so this principally applies to physical copies).

6: Copyright law routinely provides certain scenarios where permission is not, in fact, required, such as private copies, critical analysis or parody. These are usually called copyright 'exceptions' or 'exemptions', or 'fair use' and 'fair dealing', and again rules vary from country to country.

recording and song copyrights, and need to ensure all the right permissions are secured.

2.4 DIRECT, COLLECTIVE AND COMPULSORY LICENCES

When a third party wants to exploit a copyright work they must get a licence – so permission – from the copyright owner or owners. At a basic level, the licensee must identify and locate the rights owners[7] and then negotiate terms. The rights owner will usually demand some form of payment in return for granting a licence.

The rights owner can usually ask for whatever sum of money they like, though – assuming they are seeking to do a deal, which most rights owners are[8] – they are constrained by market realities, such as what the licensee can realistically afford and how important it is to the licensee that this specific deal is done.

But beyond these commercial constraints, in most countries copyright law does not generally seek to particularly regulate these directly negotiated deals.

Collective licensing

However, in some circumstances the music industry chooses to license collectively. This is where a large number of rights owners decide – instead of doing direct deals with each and every individual licensee – to put all their rights into one pot and appoint a standalone organisation to license on their behalf.

These organisations are often referred to as 'collecting societies', or 'performing rights organisations' (PROs), or 'collective management organisations' (CMOs). We will generally use the latter term.

The CMO then agrees terms with licensees (often with whole groups of licensees together), collects any monies that are due, and distributes income back to the rights owners often (though not always) based on what songs or recordings are used.

The music industry generally chooses to license collectively for practical reasons. Mainly to reduce legal and administration costs where you have a set of licensees that is either large or which uses a lot of music, or both, but where per-usage or per-licence income is relatively modest. Or where direct licensing would simply be impractical, or unenforceable, and would likely lead to music being used without license resulting in lost income overall.

Both the record industry and the music publishing sector routinely license collectively, though separately[9]: radio stations, clubs, jukebox operators and public spaces that play recorded music. The publishers also usually license collectively the live performance of songs in public and the reproduction and distribution of recordings of published songs. Though precise rules can vary from CMO to CMO, and territory to territory.

7: This in itself can be challenging, as generally copyright ownership is not registered with any statutory body (international copyright treaties say registration is not required) and there is no one-stop-shop copyright ownership database provided by the music industry.

8: Though not always; a rights owner may simply wish not to do a deal, or more likely the artist or songwriter involved in creating a recording or song may have a contractual veto right that stops a corporate rights owner entering into a certain kind of deal without their permission, and the artist or songwriter may exercise that veto for ethical, reputational or other reasons.

9: In that the record companies and music publishers appoint separate CMOs, even though many licensees need to exploit both sets of rights. In some countries record industry and publishing sector societies may offer joint licensees, though these are still the exception rather than the norm.

The regulation of collective licensing

Legislators generally support collective licensing, despite the market power it arguably gives the CMOs, because of the convenience it provides the potential licensee. Nevertheless, such an approach does create competition law concerns, because if all rights owners license as one, the licensee has nowhere else to go to secure a licence, which could potentially lead to anti-competitive behaviour.

For this reason collective licensing is usually subject to further regulation, which usually includes provisions for licensing negotiations to be escalated to a 'copyright tribunal', or similar authority, which has the power to rule on royalty disputes and therefore ultimately set the rates a licensee must pay. Collective licensing rules again vary from country to country.

Compulsory licenses

In some countries copyright law instigates a number of compulsory licences, specific scenarios in which rights owners are obliged to issue a license. For example, rights owners are often obliged to license radio stations via a compulsory licence, while record labels in the US are obliged by copyright law to license personalised radio services such as Pandora.

Where such licences apply, rights owners are still due payment for the use of their content, but they lose the right to walk away from deal negotiations, which obviously weakens their negotiating hand somewhat. Rights owners usually provide compulsory licences through the collective licensing system, and are often obliged to do so under law, with copyright courts or statutory bodies ultimately setting rates.

Section Three: Ownership & Royalties

Unlike other forms of intellectual property, copyrights are not usually registered with a statutory authority[10], rather copyright 'crystallises' when a work is 'fixed' in material form[11], providing certain criteria are met. Because of this, copyright law provides rules or guidance on who the 'default' or 'presumed' owners may be, ie when a work is fixed and the copyright crystallises, who by default owns the copyright? These rules vary from country to country, and according to the kind of copyright.

3.1 DEFAULT OWNERSHIP RULES

Generally with lyrics and musical compositions the default owners are the lyricist and the composer, ie the 'creator' or 'author'. Co-written works are co-owned by all parties, though it's for the creators to decide on how the copyright is split between each contributor[12]. The main exception here is when a work is created by an employee as part of their job description – often called 'work for hire' in the US – in which case the employer may be the default copyright owner, depending on local rules[13].

With sound recordings, default ownership rules vary from copyright system to copyright system. In some countries, the individual or company that funds (ie pays for) a recording, rather than the performers who appear on it, will be the default owner of the resulting copyright. These funders, usually record labels, are often referred to in copyright law as the 'producer', but shouldn't be confused with studio producers.

It's also worth noting that, where performers are, by default, owners or co-owners of recording rights, statutory provisions or work for hire clauses within contracts may take effect, making their employer, ie the label, the default owner.

3.2 ASSIGNMENT

Although the law provides default ownership rules, the default owner can usually transfer ownership of their copyrights (both existing and future) to other parties, usually in return for money. Many systems allow full transfer of ownership, usually called 'assignment'. Even where this is not possible, such as in Germany, copyrights can be licensed in their entirety and in perpetuity to a third party, which practically amounts to the same thing[14].

When record companies and music publishers sign new talent who will inevitably require some sort of upfront investment (eg an advance, artist development, marketing) with no real guarantee of a return, the corporate entities will usually seek outright ownership of all the copyrights created under that first contract or, in the case of publishing, outright ownership of at least some elements of the copyright (that is to say, ownership of some of the controls outlined above, and a revenue share from any others, more on which below).

Any resulting agreement will be structured in such a way as to make the label or publisher actual or de facto rights owner according to copyright law in the local jurisdiction. Of course the record company may be the default owner of the sound recording copyrights by statute anyway, but agreements will be written to avoid any ambiguity.

Copyrights don't last forever, but usually have pretty long terms (50-95 years from release for recordings, and life of the creator plus up to 70 years for songs[15]). With new talent record deals, the label will usually want ownership for 'life of copyright'. In publishing contracts though, rights may revert to the songwriter at some point – by law in the US, or by agreement elsewhere – but usually only after a significant period of time.

An artist or songwriter who assigns their rights may also, if successful, be able to renegotiate contracts at a later date giving them ownership or co-ownership of any copyrights created, though this is not usually a given in first deal contracts.

3.3 THE CONTRACTUAL RIGHTS OF ARTISTS AND SONGWRITERS

Although artists and songwriters routinely assign[16] – and therefore give up – the copyright in works they created to record companies and music publishers, they will likely retain certain contractual rights over or in relation to those works. These will be set out in their assignment contract (or similar).

It is worth mentioning that, on the sound recordings side, it is so called 'featured artists'[17] who routinely retain rights of this nature through contract. Session musicians who appear on recordings will often be paid a set fee for their time and then have no future involvement in the exploitation of their work.

Both featured artists and session musicians still enjoy 'performer rights' under law (more on which in section four), but it is generally the former that also benefit from the contractual rights we are about to discuss (studio producers do often get a royalty from recordings they produce, but other rights may be limited).

Royalties

The most important of these contractual rights relate to royalties, ie the artist or songwriter's right to share in any money generated by the exploitation of any copyrights they helped create.

10: Statutory or commercial copyright registries do exist in some countries, but logging works with them is usually voluntary. In the US, certain remedies are not available in court for unregistered works (though this mainly applies to domestic rather than foreign works).

11: So, it is transcribed, recorded, filmed, etc.

12: Though if two people collaborate with one writing the lyrics and the other writing the musical composition, under some copyright systems – such as the UK – they each own outright their respective copyright, ie the copyright in the lyrics and the separate copyright in the composition. But if they both contribute to both the lyrics and the score in a manner whereby their individual contributions cannot be separately identified, they would both co-own both copyrights.

13: Where this is the case, copyright law and/or case law will normally provide a definition of what constitutes an 'employee' in this context, and/or when 'work for hire' applies.

14: There may be some significant differences though, such as what happens if a licensee goes into liquidation, though day-to-day the corporate licensee acts as if it owns the copyright.

15: Where there are multiple creators, the copyright term is usually 70 years after the last surviving collaborator dies.

16: Or similar, such as exclusive licence in perpetuity.

17: Featured artists are the musicians whose name or names any one recording is released under, as opposed to session musicians who are simply credited in the small print. Record labels generally sign record deals with featured artists.

A record and publishing contract will usually state that featured artists and songwriters must receive a share of any revenue generated by their work. How payments are calculated and paid, and what percentage the artist or songwriter receives, will vary from contract to contract, and within the contract will often vary according to how revenue is generated.

The label and publisher will also usually have the right to recoup (often exclusively from the artist's share of revenue) some or all of their upfront costs, which includes any advances paid, before any income is shared at all, and will often have the right to deduct other ongoing costs from revenues before any royalties due to the artist or songwriter are paid.

There are some extra points to note here too.

- Firstly, newer record deals may also give the label a cut of revenue generated by the artist beyond their sound recordings, such as live activity or merchandise for example. These are often called '360 degree deals' and the other income streams the label shares in are referred to as 'ancillary revenues' or 'non-recorded income'. Each contract needs to state whether ancillary revenues do or do not count towards the label's unrecouped costs.

- Secondly, in publishing, some elements of the copyright will likely be allocated – or actually assigned – to a CMO, which will then usually pay the songwriter their share of subsequent revenue directly. This often means that the songwriter receives their share of this income from day one, ie payment is not subject to recoupment. The publisher has to recoup its investment from those revenue streams not allocated to the CMO.

  Outside the US, there is usually a direct contract between the songwriter and the CMO covering those elements of the copyright assigned to the society. The songwriter's publishing contract then does two things: it assigns those elements of the copyright not allocated to the CMO to the publisher, and gives the publisher a simple contractual right to share in the revenue generated by the elements that the CMO controls.

  What rights the CMO actually controls, how songwriters are paid, and whether or not these payments are subject to recoupment, varies according to the operating mandate and internal rules of each society.

Every contract is different, and more established artists and songwriters will usually secure better deals than new talent. Though as a general rule, record contracts are tipped in the label's favour, allowing them to keep the majority of revenues generated, whereas publishing contracts are likely to be more favourable to the songwriter. Record labels would justify this by arguing that they usually take a much bigger financial risk than the publisher, especially when working with new artists.

It is worth noting that the calculation and payment of royalties by labels and publishers is a common cause of tension between music rights companies and the artists and songwriters they work with, especially when artists have stopped working with a label on creating new content, but are still receiving royalties from past assignment deals.

Many artists believe that their business partners are "twisting the rules" or "playing the system" – actively or through inactivity – to reduce the royalties they have to pay out. After all, once a label no longer requires

an artist to create or promote new content, arguably it has little incentive to interpret or fulfill contractual obligations in a way that favours artists over its shareholders.

Record and publishing contracts usually provide artists and songwriters with the right to audit a label or publisher, but in real terms many artists cannot afford to enforce this right effectively. And where there are contractual ambiguities, many artists will be nervous about pursuing expensive litigation, given the big rights owners are nearly always better resourced to fight such legal battles (and if an artist is well resourced, labels and publishers may agree to secret deals to avoid test cases in court and the resulting precedent).

Vetoes and other contractual rights

In addition to royalties, record and publishing contracts may give talent other rights too. This includes rights to consultation and approval (what might amount to a veto), which provide artists and songwriters with certain controls over how their content is exploited.

A veto right usually requires a label or publisher to get specific approval from an artist or songwriter before allowing their work to be used in specific scenarios, eg in an advert or on a new digital platform. Vetoes vary from contract to contract – some are in the artist's absolute discretion, some are subject to the artist being 'reasonable' – and more established artists will negotiate more of these rights into their deals.

3.4 DISTRIBUTION AND ADMINISTRATION DEALS

Of course songwriters and artists can choose to retain ownership of all the copyrights in the songs and recordings they create, and many do. Though new talent may struggle to find a label or publisher willing to pay a cash advance, and to invest in artist development, content production and marketing activities, without receiving a copyright assignment in return (or the equivalent under local copyright law).

But where artists and songwriters require less or no upfront investment, they can engage the services of a label and publisher while retaining copyright ownership through what were traditionally known in the record industry as 'distribution deals' and in the music publishing sector as 'administration deals', but which may now be called a 'licensing' or 'services' deal.

Many labels and publishers will provide creative, administrative, distribution and marketing services on a fee or revenue share basis without assignment where their risk is minimised; indeed many labels have separate divisions to work with artists on this basis.

In addition to that, a big growth area in the music rights sector has been in the 'label services' domain, that is to say standalone companies that provide rights management, distribution and/or marketing services, sometimes to other labels and publishers, but increasingly directly to artists and songwriters.

A by-product of this is that while artists and songwriters – and especially more established talent – may retain ownership of their copyrights, they will usually appoint a label, publisher and/or other service provider to manage and represent their rights. Said companies will then be mandated to act as if they owned those copyrights until any deal with the artist or songwriter expires.

3.5 THE ROLE OF COLLECTIVE MANAGEMENT ORGANISATIONS

The aforementioned CMOs also act as rights owners, sometimes actually and other times as agents. As explained above, the CMOs are usually involved where the music industry decides to licence collectively rather than via direct deals.

Recordings v publishing rights

In any one country, the record and music publishing industries will each appoint one or more CMOs to represent their interests in collective licensing scenarios. Record companies and music publishers have formed separate CMOs, meaning that licensees making use of recordings of songs will usually need to seek separate licences from at least two societies.

Performing v reproduction rights

Meanwhile in the publishing sector, a distinction is often made between the collective licensing of reproduction rights and the collective licensing of performing rights, with autonomous divisions of the same societies – or totally separate CMOs – appointed for each set of rights.

Not all CMOs are the same

Although all CMOs are basically providing the same services for their members – negotiating deals, analysing data and distributing revenue – the status, structure, membership and power of the societies varies from country to country, and between the record industry and the music publishing sector.

A key differentiator is the aforementioned convention in the song rights domain whereby songwriters, outside the US, actually allocate some elements of their copyrights to a society rather than a publisher. Where this occurs, the songwriter is giving the CMO the exclusive global right to represent those elements of his or her copyrights, and the publisher is simply a beneficiary of those rights.

This means two things. First, these CMOs are not simply agents for corporate rights owners that negotiate deals wherever collective licensing is employed, they actually control the rights they represent. Second, both songwriters and publishers are members of the society, and the CMO will be governed by a board made up of both songwriter and publisher members. Both these facts arguably make these CMOs more powerful.

Aside for the UK and Italy, songwriters and composers actually constitute a majority on the board of all the CMOs in the European Union. Nevertheless, many songwriters believe the publishers have more influence at board level, which, if true, may simply be due to publisher board members having greater business expertise. But either way, the society must be representative, and be seen to be representative, of both songwriter and publisher members.

Not all CMOs representing song rights are structured in this way. The US societies operate differently, and in those countries where reproduction rights are managed by separate CMOs, these may also differ. For example, in the UK, PRS represents performing rights and is structured as just described, but MCPS represents reproduction rights and its board consists mainly of publishers, and it acts more as an agent for its members than an actual copyright owner.

In the record industry, where record companies control both the performing and reproduction rights, the labels' CMOs

again usually act as simple agents for the corporate rights owners wherever collective licensing applies. Artists are not normally members of these societies, though the artist community in each country will usually have their own CMO to collect revenue associated with their performer rights, more on which in section four below (in the UK and US, the same societies that represent the labels, PPL and SoundExchange respectively, also administer some or all performer rights income).

Perhaps the most important difference between those CMOs which are assigned rights, versus those which act as agents for corporate rights owners, is that labels and publishers could in theory unilaterally withdraw their repertoires from the latter (where compulsory licences do not apply of course, and subject to the society's own rules), whereas publishers could never unilaterally withdraw from CMOs which have been assigned rights by songwriters.

Collective licensing worldwide

Where collective licensing applies, rights owners traditionally appoint their local CMOs to issue licenses to individuals and companies operating in their home territory. CMOs commonly provide licensees with a 'blanket licence', which allows them to make use of all and any of the songs or recordings in the society's repertoire, on either a fixed-fee-per-usage or revenue share basis. Participation in these blanket licences is often then compulsory for all society members.

Of course more prolific licensees will likely require access to more than just domestic repertoire, so reciprocal agreements are made between CMOs around the world, meaning that in any one market the local society is empowered to license songs or recordings from all over the globe.

Revenues are then passed onto foreign societies if and when songs or recordings in their repertoire are exploited by a licensee.

This arrangement gives users operating under a blanket licence permission to use a vast catalogue of songs and recordings. So vast, in fact, that even though there will be gaps in the repertoire (where a rights owner hasn't affiliated with a society or where reciprocal agreements between two countries are yet to be made), many licensees assume the licence allows them to legally use any song or recording that is protected by copyright.

Traditionally reciprocal agreements usually only allowed a CMO to license the repertoire of other societies in its home territory. So while a society can license something nearing a global catalogue in its home country, it can only license its own repertoire worldwide (and only then if expressly empowered to do so by its members). This usually means that a licensee operating in multiple territories must seek separate licences in each country via the local society (and for all rights and controls as required).

This has proven challenging in the digital era, where many more licensees seek to operate in multiple countries. Some of the publishing sector's CMOs have sought to provide multi-territory licenses, partly in response to licensee demand and, in Europe, partly to accommodate the European Commission, which says that societies within the European Union should compete for members and licensees in order to comply with competition law. CMO sources indicate that some 200 plus pan-territorial music services are currently licensed across European borders, meanwhile reciprocal agreements and CMO licensing conventions continue to evolve.

3.6 COMPLEXITY THROUGH FLEXIBILITY

Copyright law does not usually seek to regulate the specifics of assignment or licensing agreements, or how the ownership and control of individual copyrights is divided and transferred. This flexibility is a good thing, but it results in complexity.

An artist, songwriter or rights owner may assign or license their copyrights to different entities in different countries; they may assign or license their rights for a set period of time rather that the full copyright term; and they may assign each element of the copyright – so each control – separately to different parties. Rights owners can appoint CMOs or other middle men for some licensing scenarios, but continue to deal direct in others[18]. And entities which acquire copyrights are usually at liberty to sell them on to other parties down the line.

And, of course, you have co-ownership of copyright. This is particularly important with song copyrights, because collaboration is common in songwriting, and collaborating creators – and their publishers and CMOs – will share in the copyrights they create. The law doesn't dictate what the split in ownership might be, instead this is agreed between participating parties. But there is no one central repository where these agreements are documented and there may be disagreements regarding agreed splits after the fact.

18: Collective licensing regulations and individual CMO rules may limit rights owners' abilities to opt in and out of collective dealing, though there is generally some flexibility across the wider copyright.

The data dilemma

Finding accurate and comprehensive data detailing who owns and controls copyright works is a significant issue, because there are so many variables and, in most countries, no formal registration of rights.

Numerous companies and organisations, and especially the CMOs, have their own databases recording who owns what song or recording copyrights. But few of these databases are publicly available, and no one database lists every song and recording. And information (especially in relation to splits in co-owned works) may differ from one database to another, with no central authority to deal with such conflicts.

Efforts by the music publishing sector to form a single Global Repertoire Database collapsed last year. Even if it had succeeded, that database would have only covered song copyrights, and would have then had to be linked to the record industry's databases.

Section Four: Performer Rights & Equitable Remuneration

As well as providing rights owners with a series of controls over how their content is utilised and distributed, copyright law also often gives creators and performers certain additional and concurrent controls over any of the works they help create, even (and especially) when they have no claim to the actual copyright in those works.

These controls are often called 'moral rights' or 'performer rights'. The extent and positioning of these rights varies greatly from country to country, though a key consideration is whether or not they can be waived in a record or publishing contract. Where they can be waived, corporate rights owners will usually insist that they are, which may make these rights ineffective in real terms.

The evolution of performer rights in the digital era is a particularly interesting area. In most countries two main sets of performer rights exist, which originate in the Rome Convention of 1961 and apply to all artists who participate in a sound recording, including both featured artists and session musicians (and, in some cases, the studio producer, depending on their involvement). Terminology will vary from country to country, but we will refer to these two sets of rights as Performer Approvals and Performer Equitable Remuneration (or Performer ER).

Performer approvals

Performers enjoy certain controls in relation to their sound recordings, from the initial 'fixation' of the recording itself, to any subsequent exploitation by the copyright owner or third parties. These controls are usually similar or identical to the controls enjoyed by the actual copyright owner as defined in section two above, though will also include that initial 'fixation control', ie the right to make a recording of a performance at all.

In real terms these controls take the form of 'approvals', in that a copyright owner must secure the approval of all performers (or, in some cases, secure the assignment of this performer right from the artist) to make and subsequently exploit a recording. These approvals (or assignments) are usually gained from featured artists through their record contracts, and from session musicians on a case-by-case basis.

Where approval is not sought, a record company, say, has no right to make a recording of a performance, or to subsequently exploit it, even if they are clearly the copyright owner according to default ownership rules.

Performer ER

Performers also usually have a right to 'equitable remuneration' from certain specific exploitations of their recordings, most commonly the exploitation of performing rights (ie the public performance and communication controls). Of course artists may be due a share of income generated by their

recordings through contract anyway, but this performer right exists beyond any contractual arrangement between musician and label.

Crucially, this right is usually 'non-waivable' or 'unassignable', so a rights owner cannot demand artists waive their remuneration right in a contract. Whenever a recording is exploited in a way that is subject to Performer ER, the artist must be remunerated. Usually it is the licensee's responsibility to ensure remuneration is negotiated and paid, though in the UK the statutory responsibility lies with the copyright owner of the recording.

Copyright law is often silent on what 'equitable remuneration' actually means, though in most countries the label and artist communities have agreed that income generated by the exploitation of the performing rights in sound recordings will be split 50/50 between copyright owners and all performers, and that such remuneration will be deemed 'equitable'.

In most countries the artist community establishes its own CMO (or CMOs – featured artists and session musicians may have their own organisations) which, jointly with the labels' CMO, collects performing rights revenue from licensees and then distributes the money to its members, usually pro-rata based on usage.

In the UK, PPL – although owned by the labels – collects and distributes performing rights income for both labels and artists. Artists become 'performer members' of the society and are paid their share directly. The same is true in the US for featured artists, who receive equitable remuneration for income generated through SoundExchange directly from that body (though session musicians receive their cut via middle-men organisations).

Section Five: Monetising Music Rights Before Digital

5.1 PHYSICAL RECORDINGS

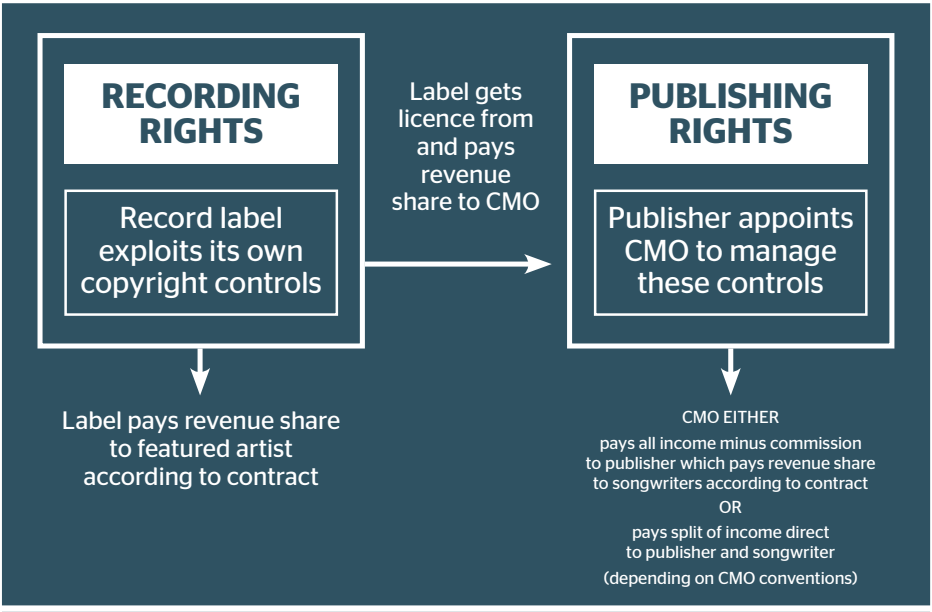
For the latter part of the Twentieth Century the single biggest revenue generator in the music industry was the sale of physical copies of sound recordings (whether pressed to vinyl, cassette, CD or more niche formats).

When selling physical copies in this way, record companies are, in the main, directly exploiting the reproduction rights of their own sound recording copyrights (labels do also license each other's content – mainly for compilations and sample-based tracks – though direct exploitation of copyright is most prevalent).

But the labels do not usually own the copyright in the songs embodied within their recordings, so they are exploiting the reproduction rights of another copyright owner, usually a publisher (or perhaps a CMO).

They therefore need to secure a reproduction rights licence – what would usually be called a 'mechanical rights licence' – which, for straight cover versions of published songs, is usually provided through the collective licensing system at industry-standard rates (or where a compulsory licence applies possibly at a 'statutory rate', as in the US).

Licensing and royalties for CD



Because labels take all the risk in producing, pressing, distributing and marketing physical releases, it is generally accepted that they should keep the majority of the revenue generated, with the publisher usually receiving less than 10% of the wholesale price of the record.

It's important to note that in the physical market, there is just one licensee: the record company. The label exploits its own sound recording copyright and licenses the song copyright. The finished product – the record – is therefore provided to distributor and retailer 'rights ready' so that they do not need to worry about copyright. It is then the responsibility of the record company, which receives from the retailer the wholesale price for each record sold, to account to the publishing sector's mechanical rights CMO.

Royalties

The label then needs to pay a royalty to the featured artist (and any other beneficiaries) according to the terms of each artist's record contract. Every record contract is different, though an average artist with an average record contract would probably expect to see about 15% of record sales income, though that 15% may be calculated after various other costs have been deducted from monies received by the label.

How the songwriter is paid, after the label has accounted to and paid the publishing sector's CMO, varies from country to country. In continental Europe, 50% of the money paid by the label to the CMO (or possibly more, depending on the contract between writer and publisher) would be directly distributed to the songwriter (possibly subject to recoupment). Elsewhere, all monies paid by the label would be distributed to the publisher, which would then share that income with their songwriters according to contract.

5.2 BROADCASTING AND LIVE PERFORMANCE

The other key revenue stream for the pre-digital music rights sector – and especially for the music publishers – was income generated through the sale of licenses to companies and individuals (though mainly companies) that wanted to perform or communicate songs or recordings. Broadcasters and concert promoters are the big clients here, though any individual or business playing or performing music in public needs a licence.

As noted above, this is the area where both the record industry and the publishing sector has relied heavily on collective licensing, with rights owners appointing CMOs to issue licences and collect royalties, which are then passed on, minus admin fees, to the labels, publishers, songwriters and artists based (in theory at least) on how often their works were played by licensees.

With regard to the song copyright – where performing and reproduction rights are often split – it is principally the CMOs which control the former that operate in this domain, because licensees are primarily looking to exploit either the performance or communication control. Though where a licensee also needs to make a copy of a recording before playing it – so a radio station needs to copy tracks to its server – the reproduction rights CMO may also issue a licence.

19: Where it is a recording of a song that is being communicated or performed. Obviously where it is a live performance of a song, so no recording is exploited, only the owner of the song copyright earns any royalties.

20: There is a specific digital performing right, more on which later.

How CMOs charge for broadcast and performance licences varies according to usage, with fee-per-licence, fee-per-play, annual-lump-sum and revenue share arrangements all regularly employed. More lucrative licensees – including commercial broadcasters and concert promoters – will usually be on revenue share arrangements, so that rights owners benefit as the licensee's business grows.

Royalties

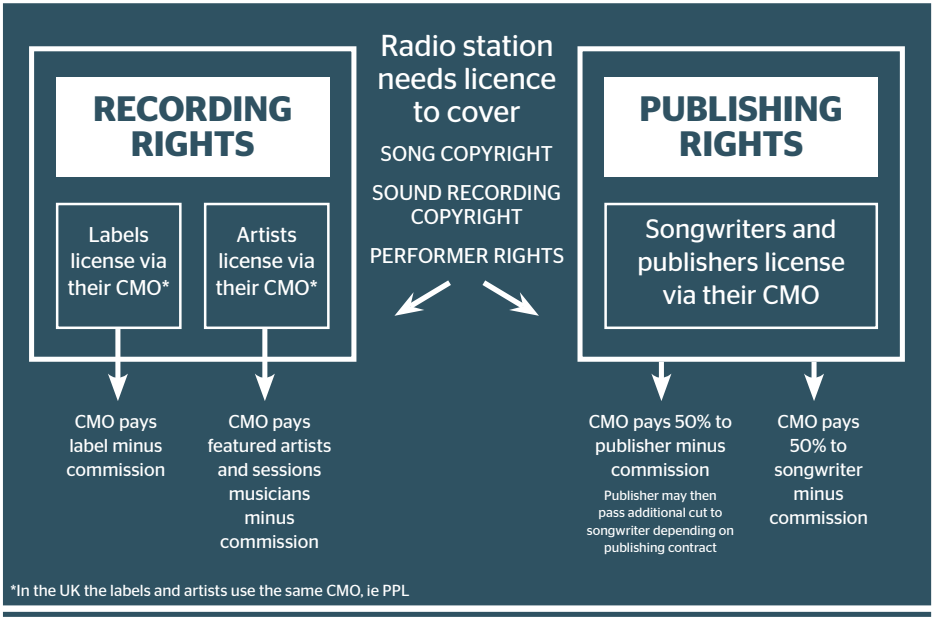
Unlike with record sales, broadcast and performance income is often split more equally between the two sets of music rights[19]. Once money has been allocated between the recording and song copyrights, it must then be split between labels, publishers, artists and songwriters.

On the publishing side, by convention, the CMO will commonly pay 50% direct to publisher and 50% direct to songwriter. On the recordings side, this is where Performer ER often applies, so by convention 50% of income goes to the labels via their CMO and 50% to the artists via their society or societies (as mentioned above, in the UK PPL handles both the label and artist share).

This means that broadcast and performance revenue is the one area where income is often more or less split four ways between the labels, publishers, artists and songwriters.

An important exception here is the US, where under federal law there is no 'general' performance or communication control as part of the sound recording copyright[20]. This was the result of a deal between the record industry and the radio sector (which was keen to reduce its royalty payments) when the labels first lobbied Congress for

Licensing and royalties for AM/FM radio



a federal sound recording copyright in the late 1960s, and was based on the argument that radio was an important promotional channel for record companies.

The labels have actually been calling for a general performing right pretty much ever since[21], but so far without success, meaning labels and artists earn nothing when recordings are played on AM/FM radio or in public spaces within the US. Owners of song copyrights do enjoy a general performance control, however, and so license broadcasters, concert promoters and other users of music in the same way as their counterparts elsewhere in the world.

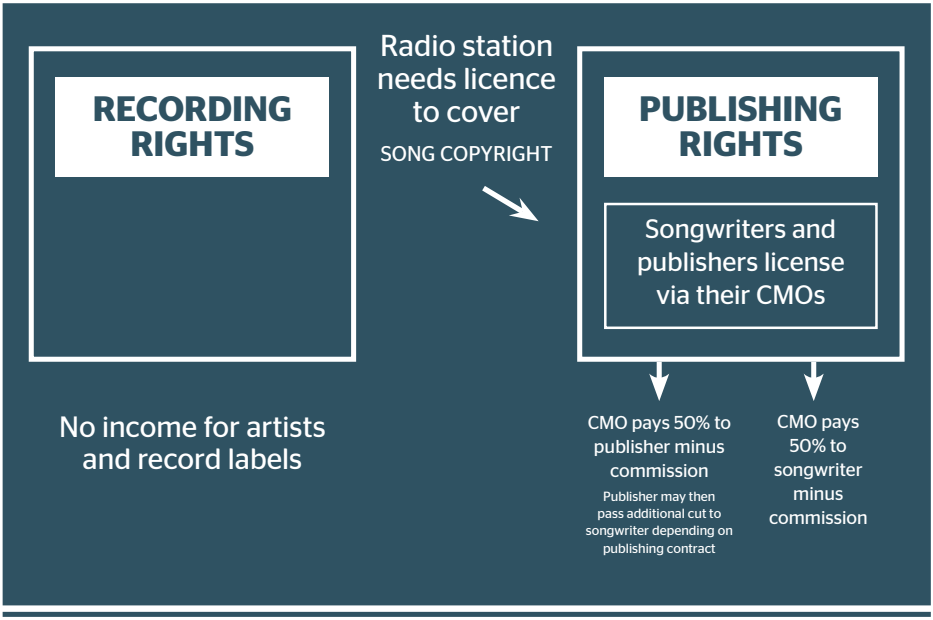
As an aside, federal copyright law only applies to sound recordings released since 1972, with older recordings protected by state-level copyright law. These copyright systems are generally unclear on whether or not performance and communication controls exist for sound recordings, though recent court rulings in California and New York suggest that, in those states at least, they do, even though no label has ever exploited these controls against terrestrial radio or similar to date.

If these court rulings are upheld, it could result in the bizarre situation where pre-1972 sound recordings enjoy more copyright protection than post-1972 recordings.

The US Copyright Office recently proposed that federal law should be extended to all sound recordings that are still in copyright to overcome this idiosyncrasy, though – while the record industry would normally support such harmonisation – in this case

21: This campaign is currently focused on the proposed Fair Play, Fair Pay Act.

Licensing and royalties for AM/FM radio in the US



it might actually reduce their rights unless a general performance control is won at a federal level.

5.3 SYNCHRONISATION

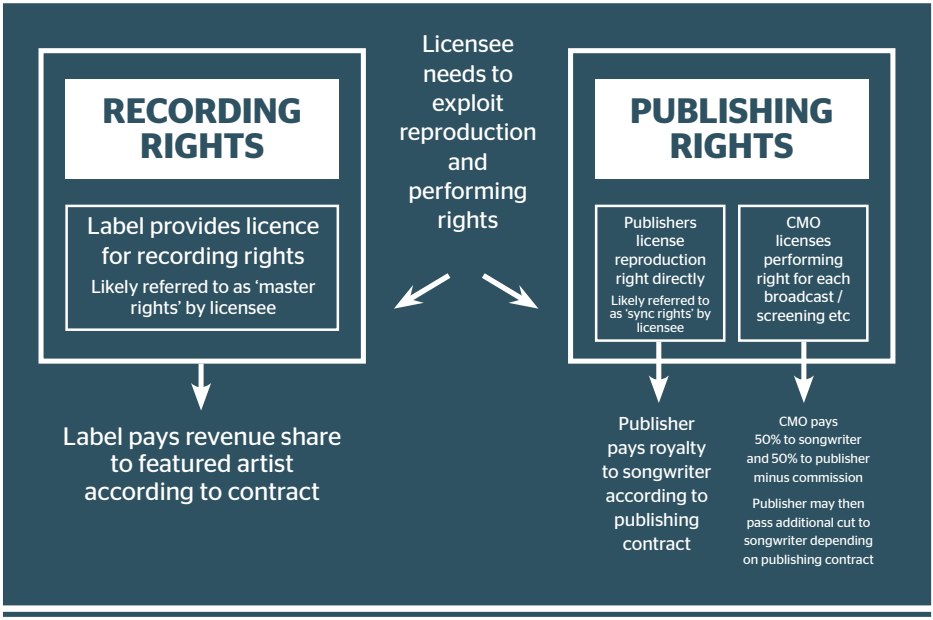
The third pre-digital revenue stream of note is sync, where film, TV, advert or video game producers wish to 'synchronise' existing songs and/or recordings to moving images. As with broadcast and performance, this was traditionally a bigger deal revenue stream for publishers than labels, though the record industry has stepped up its efforts in the sync market considerably since CD sales peaked in the late 1990s.

Obviously a sync licensee must secure licenses from all and any rights owners who have a stake in the song and/or recording they wish to use. Sync licensing normally begins with direct deals, though TV sync is done via CMOs and blanket licences in some countries.

Broadly, where a copyright is co-owned, any one rights owner can usually refuse to license, scuppering the deal. Under US copyright law, any one rights owner actually has the power to agree a deal for all, providing the other parties are paid their share pro-rata, though industry courtesy and contractual agreements between collaborating songwriters often prevents this.

A sync licensee often needs to exploit both the reproduction and the performing right elements of the copyright. The former when they actually sync the audio to video (which constitutes a reproduction of the work) and the latter whenever the video is

Licensing and royalties for directly negotiated sync (eg film, adverts)



played in public (which constitutes either a performance or a communication).

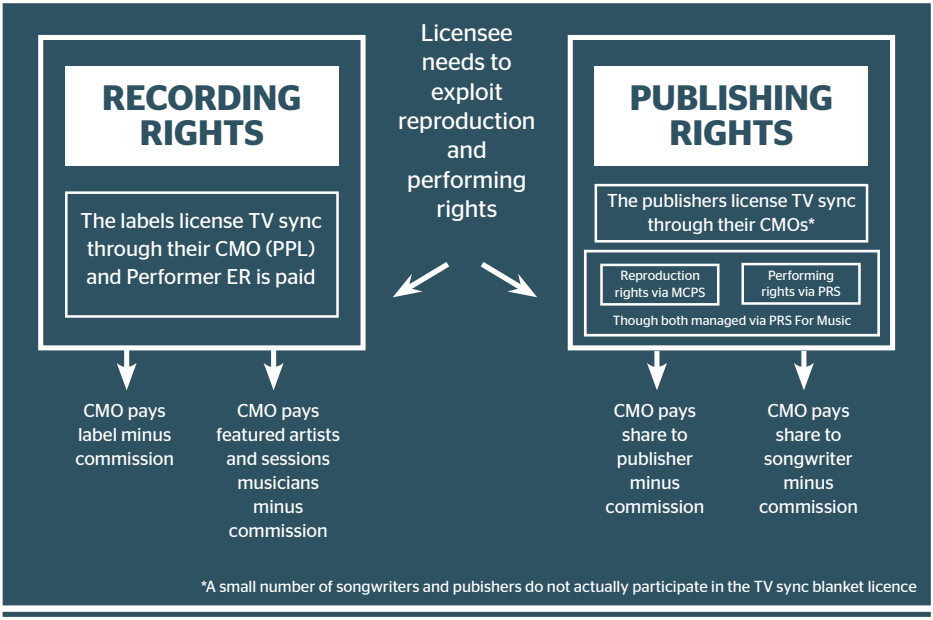
The reproduction rights part of the deal is done first directly with the publisher and the label (except where blanket licences are available for TV sync). The sync industry usually refers to the rights being licensed through these deals as the 'synchronisation rights' on the publishing side and the 'master rights' on the recordings side.

The performing rights element may also be part of that initial deal, or – more commonly on the publishing side – will be paid via the collective licensing system each time the finished work that contains the synced music is broadcast or performed, with additional royalties due according to the relevant CMO licence in addition to any fee paid under the original synchronisation deal.

These additional performing rights royalties, where they apply, will usually be factored into the negotiations around the initial sync deal. This cuts both ways. For example, if the final product is to be aired or screened in a market where the collection and distribution of performing rights income is ineffective, the rights owner may seek a premium in the original deal around the reproduction rights.

Where a sync licensee is negotiating directly with multiple rights owners, in theory each deal is separate and subject to its own terms. Though rights owners will often use so called 'most favoured nation' clauses to ensure that all stakeholders in a song and recording earn the same fees for the sync (pro-rata to their stake in the copyright). These clauses mean that whichever rights owner does the deal first could see the fees agreed increase,

Licensing and royalties for TV sync in the UK



if another stakeholder subsequently negotiates more favourable terms.

This also often means that the owners of the sound recording copyright and the song copyright will see more or less the same income from any sync deal involving a recording of a song, unless the song is much more famous than the recording. Though, in theory at least, the publisher does generally have a stronger negotiating hand in sync deals, because it is much easier for a licensee to re-record a song than it is to re-write it.

Royalties

The value of sync deals can vary enormously, depending on the budgets of the licensee, the prestige of the songs and recordings being licensed, and quite when and how the music is being used.

Once a deal is done, the publisher and label must then share any income with songwriters and artists according to the terms of their contracts. As a general rule, under record contracts artists will receive a significantly bigger share of sync than record sale income, commonly 50%.

On the publishing side, any additional performing rights income subsequently collected by the CMOs will be split between publishers and songwriters in the usual way.

5.4 OTHER REVENUES

Other pre-digital revenue streams for music rights owners include:

- Selling and licensing sheet music.
- Licensing covermount and promotional CDs.
- Licensing music and lyrics to karaoke services.
- Licensing CD rental services including libraries.
- Non-commercial licensing, eg individuals or not-for-profits pressing short run CDs of concerts.

Section Six: Digital Licensing

The evolution of the world wide web and the growth of internet access in the 1990s presented both challenges and opportunities for the music industry. While the challenges of piracy have been well documented, other challenges related to legitimate digital platforms: how to license these services, on what terms, and how to process data and royalties. Not all these challenges have, as yet, been fully met.

6.1 WEBCASTS

The first digital services that required licences were online radio stations, ie online services that pretty much replicate traditional radio (and, indeed, are often simulcasts of services already going out on AM or FM).

As webcasts are similar to broadcasts, both the record industry and the publishing sector often opted to license these services through the collective licensing system, ie as with traditional radio. Also following the broadcast model, royalties were often split more or less equally between the recording and publishing rights (the US being the exception here, more on which below).

From a copyright perspective, the main difference between online and traditional radio is that when content is delivered digitally the broadcaster actually exploits both the reproduction and communication controls of the copyright, whereas traditional broadcast only exploits the communication control. (A reproduction may take place if a conventional radio station copies tracks onto its servers – and this process needs to be licensed – but the broadcast itself only involves a communication to the public).

Webcasts and publishing rights

This is particularly important on the publishing side of course, because traditionally reproduction and performing rights are dealt with separately. As webcasters would rather not have to seek two separate licences – one for reproduction rights, one for performing rights – often the publishing industry has sought to provide joint licences, with reproduction and performing right CMOs – where separate – collaborating.

Again the US is different here, in that the big performing rights organisations do not get involved in the licensing of reproduction rights, and ASCAP is not allowed to under the so called 'consent decree' that regulates its operations.

Either way, when joint licences are provided, a decision needs to be made as to how monies paid by a webcaster should be split between the reproduction and performing right elements of the copyright. This may seem like a mere technicality, given that the ultimate beneficiaries are the same, though in countries where songwriters receive their share of performing right income directly from their CMO but their cut of reproduction right monies via their publisher, the distinction is important. Especially if the songwriter hasn't recouped on their publishing contract, so income coming in from the publisher is set against

their advance rather than paid to the writer.

How webcasting income is divided between the reproduction and the performing rights varies from country to country, and is decided by the industry – often via their CMOs – because copyright law provides no guidance on what this split should be.

A common split for webcasts is 75% performing rights and 25% reproduction rights. Though that said, in some countries some webcasts – especially simulcasts of AM or FM radio services – may be treated as only exploiting the performing right.

For example, in July this year the BBC decided it could no longer play songs by a handful of writers who are not members of the UK's reproduction rights society MCPS, because a new caching function for offline listening within its smartphone app meant a reproduction rights licence would be required. Which suggests all the other webcasting services already offered by the BBC, but without caching, were covered by its performing rights licence from PRS.

Webcasts and recording rights

On the sound recordings side, the record labels' CMOs are empowered to license both the reproduction and performing elements of the copyright to webcasters. Technically Performer ER is only due on the performing right element, though artists may still receive 50% of total income. That said, Performer ER rules for webcasts do vary from country to country.

A key difference on the sound recordings side here is the US. As mentioned above, under federal copyright law there is no general performance control with the sound recording copyright. However, a specific digital performance control was added into federal law by new legislation in the 1990s, meaning that while conventional broadcasters are not obliged to secure a licence from sound recording rights owners, webcasters are.

But the same legislation included a compulsory licence for non-interactive webcasting services, meaning that sound recording rights owners are obliged to license webcasters through the collective licensing system. As the US record industry did not have an existing CMO to license traditional broadcasters (it not having previously needed one), SoundExchange was set up to administer this compulsory license, with the rates ultimately set by America's Copyright Royalty Board.

It is worth noting that while sound recording rights owners are obliged to license webcasters through SoundExchange at statutory rates, licensees can opt to negotiate deals directly with the record companies if they so wish. Rights owners might be willing to do such deals if a webcaster provides marketing benefits in addition to royalty payments.

As for how artists are paid in the webcasting domain, this new law introduced Performer ER (in certain circumstances) into US copyright for the first time. The concept hadn't existed in America before, mainly because the revenue stream on which Performer ER is customarily paid elsewhere – performing rights income from sound recordings – didn't exist in the US.

The new law that introduced the digital performing right said that Performer ER (set at 50%, as elsewhere) must be paid on this revenue stream, but only when the webcaster is licensed through SoundExchange. This technically means that if a label could persuade a webcaster to license directly it could avoid paying

Performer ER, meaning it could offer the webcaster a 25% discount while earning 25% more itself.

That said, few labels have pursued this arrangement, and the major labels have informally committed to always license webcasters through SoundExchange. Labels would still be obliged to share some of this revenue with featured artists under contract anyway, so that the financial benefits of a direct deal may not be so significant. And the majors may also be aware of the PR damage that could be done if they actively circumvented Performer ER in this way.

A final thing to note on webcasting is this: whereas in most countries the licensing of webcasters closely mirrors the licensing of broadcasters, in the US there was no existing framework, because in traditional broadcast a license was only required from the music publishers, so things have evolved differently. In particular, because the publishing sector's CMOs generally have a revenue share arrangement with webcasters (as they do with broadcasters) whereas SoundExchange often charges a per-play fee, the labels can end up earning considerably more.

6.2 DOWNLOADS

While webcasters were relatively easy to license, given the many similarities with traditional broadcasters, the first big innovation in digital music provided more challenges. This was, of course, downloads sold through a la carte download stores of the iTunes model. Although in many ways the iTunes music store was as close to a real world record store as was possible in the digital domain, there were three important differences from a copyright perspective: labels becoming licensing companies; publishers licensing the retailer instead of the label; and the making available right. We will consider each of these in turn.

a. Labels become licensing companies

With downloads, the labels were no longer directly exploiting their own sound recording copyrights by reproducing their own masters.

Instead they transferred digital copies of their recordings onto the download store's servers, and then gave the download store operator permission to give their customers permission to download, and therefore reproduce, their recordings, on a pay-per-download basis.

The labels, for whom direct exploitation of copyright had always been their primary business, were now following the publishers lead in becoming first and foremost licensing companies.

b. Publishers license the retailer instead of the label

When the download market first emerged, the publishers decided to have their own licensing relationships with the download stores, whereas with CDs the label handles song licensing and the retailer receives the finished product 'rights ready', never having to worry about copyright matters. There were three main reasons for this.

Firstly, download stores, unlike traditional retailers, were already in the licensing game, because that was the nature of their relationship with the labels. So it wasn't so big an "ask" that they have a licensing relationship with the publishers too.

Secondly, many publishers felt they'd receive payment quicker and get better sales data if they liaised directly with the

download store operators, rather than allowing the labels to be middle men.

Thirdly, this way publishers could consider each new digital business, and digital business model, themselves, and weigh up the value of the song rights to that business.

With hindsight, some of the issues faced today, outlined in section eight below, could have been avoided had publishers continued to license labels, and then have the labels provide download stores with a combined licence (a so called 'pass-through licence'). Though many publishers still feel licensing digital platforms directly, rather than via labels, is the better option.

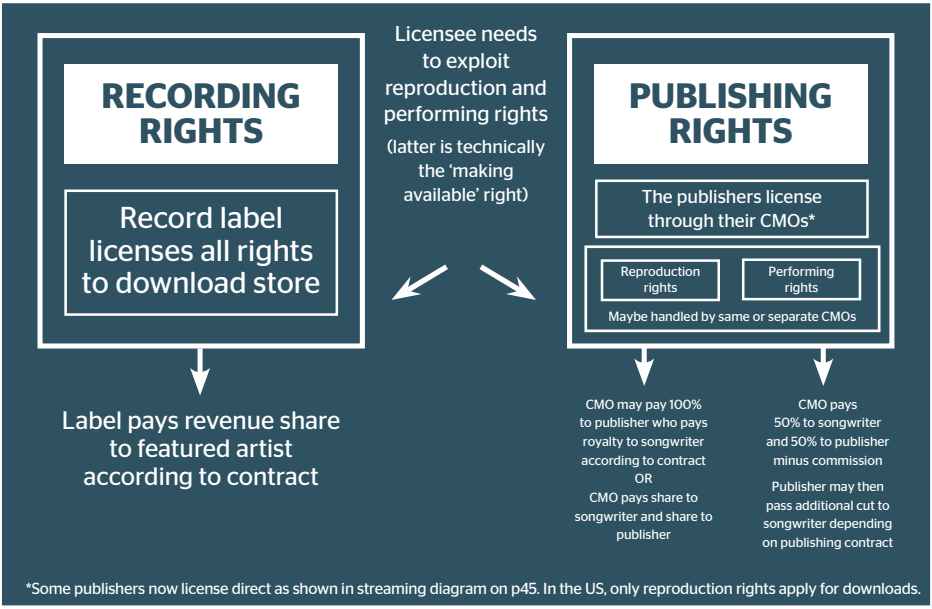
There are some exceptions to this principle. In the US, the compulsory licensing system meant that the pass-through licence approach had to be adopted on download stores, and in some emerging markets, most notably India, pass-through licensing was agreed to by the publishers for logistical reasons.

c. The making available control

As with a webcast, a download arguably exploits both the reproduction right and performing right elements of the copyright, or to be more specific the reproduction control and the communication control. However, the communication control, where defined in copyright law, traditionally related to conventional broadcasting which, while easily extended to webcasting, might not apply to other kinds of digital transmission.

To ensure digital communication of this kind would still be restricted by copyright, and perhaps to distinguish it from the existing controls that covered

Licensing and royalties for downloads



*Some publishers now license direct as shown in streaming diagram on p45. In the US, only reproduction rights apply for downloads.

broadcasting[22], some rights owners lobbied to have a separate control added to copyright law called 'making available'. The making available right was formally introduced in World Intellectual Property Organisation treaties in 1996 and in the European Union in 2001.

This control has two distinct features to it, firstly that the transmission is 'electronic', and secondly that members of the public "may access it from a place and at a time individually chosen by them". Generally treated as a separate control within the music industry, and usually referred to as the 'making available right', making available could be seen as a sub-category of the existing communication control (and it is formally described as such in UK copyright law).

Since becoming part of most copyright systems in the early 2000s, a number of questions have been raised about making available, notably: when, exactly, it applies; whether labels need a specific performer approval to exploit this right; and the impact of making available on Performer ER. All of these will be dealt with in section eight.

Downloads and recording rights

From the outset, the record industry decided to license download stores directly, while the music publishers inititally opted to license collectively. The record industry opted for direct licensing mainly because a la carte download stores were generally seen as the digital equivalent of the CD market, and labels had always had direct control over their content when it came to physical products, while publishers licensed CDs through their CMOs.

Also, while iTunes initially forced standardised pricing on all rights owners, the labels successfully persuaded Apple to allow variable pricing controlled by the record company, and that is easier to manage under a direct licensing scenario.

Despite now being in the licensing game – rather than directly exploiting their own copyrights – labels generally treat downloads in much the same way they do CDs, in terms of wholesale pricing and how income is processed. And also in how revenue is shared with featured artists, even where record contracts pre-date iTunes and therefore make no specific provision for the download business. This has proven contentious in the artist community, as we will discuss in section eight.

Downloads and publishing rights

As with webcasting, the publishers generally provide licences for downloads through their CMOs, though there is now some direct licensing, which we will describe when discussing on-demand streaming below. These licences often cover both the reproduction and performing right elements of the copyright, even when the two sets of rights are ultimately controlled by different parties (except in the US, where a download is treated as just a reproduction). Where you have joint licences, income again needs to be split between the reproduction and performing rights as it is processed. Songwriters would receive their 50% of the performing rights revenue direct from their CMO, while their share of reproduction rights revenue would either be paid direct or via their publisher, depending on the rules of their local society.

6.3 PERSONALISED RADIO

While download stores were still in their infancy in the early 2000s, a number of start-ups began experimenting with a form of webcasting where content is

22: Which could be subject to compulsory licences.

personalised for each user, rather than radio-style webcasting where all users hear the same content to which they can simple tune in or tune out. Commonly referred to as personalised radio services, the most famous of these platforms today is probably Pandora.

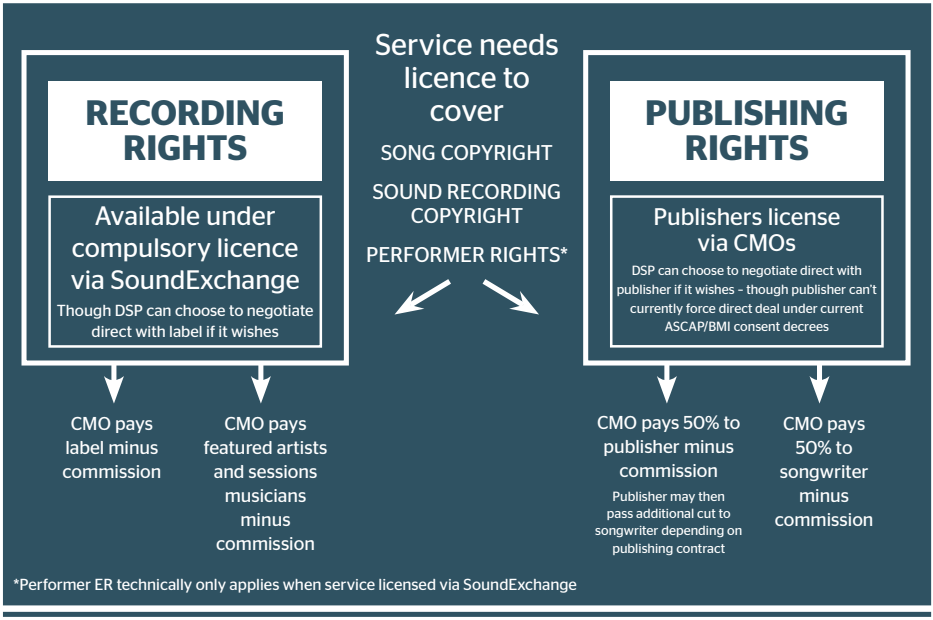
Personalised radio and recording rights

In the US, the question was quickly raised as to whether or not personalised radio services could license the sound recording rights through SoundExchange, under the same compulsory licence used by more conventional webcasters. If so, the labels – which were still nervous of innovative digital business models at this point – would be obliged to license these services, and the service providers would pay rates ultimately set by the Copyright Royalty Board.

The compulsory licence introduced in the 1990s was arguably intended for more conventional webcasting, to ensure the labels didn't block the growth of standard online radio, and Congress certainly didn't envisage that this licence would apply to fully interactive streaming services like Spotify. However, the operators of some personalised radio platforms argued that their services were not, in fact, properly interactive so the compulsory licence should apply.

With the law that provided the compulsory licence not conclusive on this point, Yahoo, which had acquired a personalised radio service called Launch, tested the reach of the compulsory licence in court and won, confirming that services of this kind could indeed operate under a SoundExchange licence, paying royalties at rates set by the CRB.

Licensing and royalties for personalised radio in the US



With the publishers also licensing these fledgling companies through the collective licensing system, this made it much easier for such services to legally launch in the US, which is why the personalised radio market grew so early and so quickly there, and why this kind of streaming service, and especially Pandora and iHeartRadio, remain so significant in the country, despite fully on-demand streaming dominating in Europe.

It is important to note that music rights owners have come to resent the way Pandora is licensed, especially since the company's IPO made its founders rich and its finances public, while subsequent and seemingly relentless efforts by the digital company to persuade the CRB and the collective licensing courts to reduce its royalty payments have exacerbated that resentment.

Personalised radio and publishing rights

While the American labels are pretty much locked to licensing Pandora through SoundExchange (unless new legislation can be passed), the big publishers in the country have sought to stop licensing services of this kind through their collecting societies, forcing the digital service providers into direct deals. It is arguably a more pressing issue for publishers and songwriters, because under the current system they earn much less than the record companies

However, the US courts have ruled that current American collective licensing rules – aka the 'consent decrees' that govern the CMOs BMI and ASCAP – forbid partial withdrawal of rights from the performing rights organisations, meaning to force Pandora into direct deals the publishers would need to start licensing all customers of their performing rights – including AM/FM radio stations and concert promoters – directly, a move that would pose both logistical and legal challenges.

The publishers have successfully forced a review of US collective licensing rules by the US Department Of Justice, which is expected to conclude partial withdrawal should be allowed (subject to conditions). Though this too will create logistical and legal challenges. For example, can publishers simply withdraw the digital performing rights of their songs from ASCAP and BMI without explicit permission from songwriters?

Meanwhile, with international repertoire, licensed by ASCAP and BMI through reciprocal agreements with other CMOs around the world, which often exclusively mandate the US societies to act as licensors, withdrawal would not be possible without the approval and, likely, the participation of those societies. How would that work?

Though, when Pandora previously did negotiate direct deals with the big publishers – fearing, for a time, imminent withdrawal from the CMOs – the rights owners secured higher rates, so there is an incentive to meet these challenges and make direct deals work.

Personalised radio outside the US

Outside the US there are fewer personalised radio services, and those that have launched have not always gained traction on the same level as Spotify-style platforms. Though some fully on-demand services – most notably Rdio – offer personalised radio on their freemium levels.

Outside the US labels may license personalised radio services directly, though in some countries they may also allow their CMOs to license services where

SoundExchange would license in the US, even though they are not obliged to under law. Where they have done so, Performer ER may or may not be paid depending on local conventions.

Publishers outside the US also initially licensed these services through CMOs in a similar way to more conventional webcasts, though some repertoire may now be licensed directly in the way we will outline in the next section. In both scenarios, income again needs to be split between reproduction and performing rights, which may affect how songwriters are paid.

6.4 ON-DEMAND STREAMING

The biggest growth area in recorded music today is fully on-demand streaming, so digital service providers (DSPs) like Spotify, Apple Music, Deezer, Rdio, Tidal, Google Play and Napster/Rhapsody.

These services first began to emerge around 2006 (though Napster and Rhapsody existed earlier with different models), and really took off after 2008, when the record companies – and particularly the majors – seemed to have a change of heart regarding digital, and started to more proactively investigate and consider new approaches to monetising their content, albeit providing the DSPs agreed to some sizable upfront demands.

On-demand streaming and sound recording rights

With the SoundExchange compulsory licence in the US definitely not applying to these services, the record industry worldwide opted to license fully on-demand streaming platforms directly, though most indies either rely on digital rights body Merlin to negotiate their deals or they piggy-back on a distributor's existing arrangement.

Fully on-demand streaming services, whether advertising or subscription funded, required a very different approach to licensing on the labels' part. Unlike the CD and download market, where the labels charge a set wholesale price per sale to the retailer or download store, streaming services are usually licensed on a revenue share basis, similar to the way performing rights organisations often license bigger concert promoters and broadcasters.

That said, because when a streaming service first launches there is very little revenue in which to share, and because some DSPs will fail before generating any serious income, the labels build in a number of contingencies, meaning these deals have at least four and maybe five components.

- Firstly, there will be the core revenue share element. Labels generally seek 55-60% of any revenue generated by the DSP that can be allocated to their recordings.
- Secondly, there will be a series of minima guarantees for the label, which means that whatever revenues a DSP generates, the label will receive a minimum sum of money each time one of their tracks is streamed, and possibly for each subscriber the DSP signs up as well.
- Thirdly, there will be an upfront cash advance, so whatever happens the label knows it will make a minimum sum of money in any one licensing period. Further royalty payments by the DSP begin once the advance has been recouped.
- Fourthly, with start-ups the labels will usually demand equity in the company, aware that the single biggest revenue generator may be the sale of the streaming business, either to an existing major tech or media firm or through flotation on a stock exchange (IPO).

- Fifthly, on first deal some labels add an admin or technology fee to cover the costs of providing and ingesting content to the DSP's specific requirements.

Where a DSP has both an ad funded and subscription level, and/or partnerships that bundle paid-for subscriptions in with a mobile, ISP or other services, the label will likely negotiate a separate deal for each option. Each month revenue and usage data will need to be provided, and royalties calculated, separately for each part of the deal

Once the deal is in place, each month (or thereabouts) the DSP will report to the label for the period just gone all of the following for each category:

A	Total number of subscribers.
B	Total revenues after sales tax has been deducted.
C	Total number of streams.
D	Total number of streams from the label's catalogue.
E	Proportion of total streams that came from the label's catalogue (so C divided by D).

The DSP then calculates what proportion of overall revenue could be attributed to the label's recordings, based on the proportion of the total number of streams that came from the record company's catalogue (so B divided by E). It then pays the label 55-60% of that money depending on the terms of its specific deal.

Unless, that is, the minimum rate for the total number of streams (so D multiplied by the per-play minimum rate) – or indeed any other minima that has been guaranteed – is higher, in which case the DSP pays that sum to the label instead.

In theory, as a streaming service matures, most elements of the original deal should become irrelevant. Equity and admin fees will probably only be demanded on first deal, and as a service becomes successful – so that monthly revenues always exceed minimum payments – the minima should become irrelevant too (though ad-funded services may always be at the whim of the advertising market, so revenues will fluctuate).

Once the labels have been paid, they must then share the income with featured artists according to their record contracts. As with downloads, most labels have based the artist's share of streaming income on the splits they already received on CD sales (either explicitly in new contracts or by interpreting pre-digital contracts in this way), which is usually a relatively low split (commonly 15%, maybe a few percent more for streams).

As with downloads this has proven controversial, and indeed even more so, because many artists feel that the label's costs and risks are reduced in the streaming domain. There is also an argument that, because streaming arguably exploits performing rights more than reproduction rights, Performer ER should be paid on some of this income.

However, the labels argue that the performing right element of streaming constitutes 'making available' rather than straight 'communication to the public', and that Performer ER does not apply when that is the case. Both these arguments are contentious and we will return to them in section eight below.

On-demand streaming and publishing rights

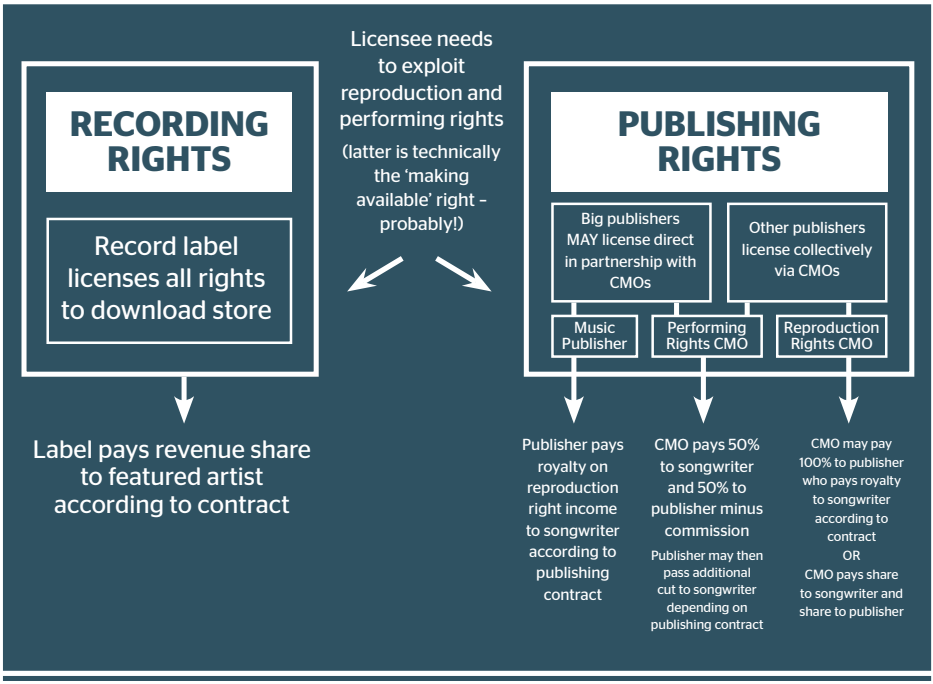
On the publishing side of streaming, the distinction between reproduction and performing rights becomes important once again, as does the role of the CMOs. While the publishing sector initially licensed streaming services collectively – and still does in the US, where compulsory and collective licensing rules restrict alternatives – in some other markets, and especially Europe, the big publishers have started to license some repertoire – principally Anglo-American repertoire[23] – directly.

However, this move to direct licensing posed a challenge because – as discussed above – outside the US the publishers do not control song copyrights outright, rather the songwriter assigns (basically) some elements of the copyright to their CMO instead. The publisher then enjoys just a contractual share of the revenue generated by those elements of the copyright. This means that, whereas the record companies can easily cut their CMOs out of the deal making process, the music publishers do not have that power, especially if the licensee needs to exploit both performing and reproduction rights.

Nevertheless, as the digital market matured the big music publishers in Europe decided they wanted to start licensing some digital services directly, arguing that this would benefit both corporate rights owners and songwriters if it resulted in higher royalties

23: The definition of 'Anglo-American repertoire' can vary, though commonly includes songs registered with CMOs in UK, Ireland, US, Canada, Australia and South Africa.

Licensing and royalties for on demand streaming



overall, while digital service providers would also benefit, because direct deals could usually be completed quicker and on a multi-territory basis[23].

The big publishers were confident direct dealing would result in better rates, not least because direct deals would not be subject to collective licensing regulation, strengthening their negotiating hand. And, unlike in the US, European collective licensing rules (formulated in response to a line of cases from the Court Of Justice Of The European Union) said that publishers could exercise so called 'partial withdrawal' and license digital directly while continuing to license other sets of users, like radio and concert promoters, though the collective licensing system.

However, because the CMOs actually control some of the elements of the copyright that the DSPs seek to exploit, the publishers couldn't simply start licensing direct on their own. So instead they each formed joint ventures with one or another European society, called 'special purpose vehicles', or SPVs.

Each of these ventures was then empowered to represent the reproduction rights in its parent publisher's Anglo-American catalogue, and would then gain permission from relevant CMOs to also represent the performing rights of the same songs. This means the SPV can then negotiate a direct deal with each DSP that covers all elements of songs in the publisher's repertoire. The deal making is led by the publisher, but terms must be approved by participating CMOs.

Publishers which have gone this route are:

- **Sony/ATV/EMI** via SOLAR, a joint venture (JV) with PRS and GEMA.
- **Universal** via DEAL, a JV with SACEM.
- **Warner/Chappell** via PEDL, a JV with various societies but mainly PRS.
- **BMG** via ARESA, a JV with GEMA.
- **Kobalt** originally via a JV with STIM, and now via AMRA, the society Kobalt bought but which continues to operate as an autonomous body.
- Some of the bigger indies are now moving in this direction via the IMPEL initiative, which works with PRS.

As with other digital licences, once streaming revenue is received it is split between the performing and reproduction rights (splits vary from country to country). Once collected and split between the two sets of rights, income then works its way through the system, some going direct to the publisher, some through the CMO, with the songwriter again possibly receiving their share from two sources, ie from both publisher and society.

Of course, while the five publishers now negotiating digital deals direct control a lot of repertoire, they do not control it all, and the direct deals only generally cover Anglo-American catalogue. And whereas on the recordings side, where if a DSP doesn't have a deal in place with a smaller rights owners it just doesn't carry that label's content, on the publishing side it is more complicated because co-ownership of copyright is so common and ownership data is not always easy to come by.

This means that a DSP may receive a recording from a label, and have deals in place with publishers that control 80% of the song, but not with the one indie publisher which controls the other 20%. In theory the DSP shouldn't stream this recording because it is not fully licensed. But it can be hard for the digital service to

23: Some CMOs do now offer multi-territory licences and this trend is growing, though licensing in that way is arguably simpler with direct dealing.

know that it hasn't got all the licences it needs in place for that individual song, and even if it is aware of that issue, it probably won't know which independent controls the remaining 20%.

This basically means DSPs need to get licensing deals in place with pretty much every publisher to make things work. This 'mop up' can generally be done through the collective licensing system. So basically a DSP in Europe needs to do deals with SOLAR, DEAL, PEDL, ARESA and AMRA, and then an individual deal with the local collecting society in each and every country in which it wishes to operate (always ensuring that both performing and reproduction rights are covered).

DSPs do not like this arrangement, though the societies are trying to reduce the total number of deals digital services are required to do. For example, with the 'hub' that has been created by PRS, GEMA and STIM (the UK, German and Swedish CMOs respectively) which will provide one multi-territory licence covering all three societies' repertoires (not including songs represented by one of the SPVs). PRS also manages licensing for the aforementioned IMPEL, and those rights are included in this hub project.

The publishers' deals – whether directly or collectively negotiated – are similar to those of the labels in that they are ultimately revenue share arrangements, but with some minimum guarantees and an upfront advance. Publishers generally seek 10-15% of any revenue that can be allocated to their songs and payments are calculated in a similar way to with the labels.

Though it is worth noting that co-ownership and the lack of good ownership data creates challenges here. Because there is no central database identifying who owns and controls each song copyright or – where songs are co-owned – what the respective splits are, the DSPs generally rely on the publishers and CMOs to tell them what they are due based on what songs have been streamed in any one month.

So a DSP provides the SPVs and CMOs with a spreadsheet recording every single stream that took place in the preceding month. The SPV and CMO must then identify every stream that exploited a song it controls, and then work out what it is owed based on its revenue share or minima arrangement, and according to what percentage of the song it owns or controls.

This 'back reporting' creates two problems. First, processing that level of data is a massive task. The CMOs are now having to process unprecedented amounts of data, and the total amount increases each month as the streaming services grow. Many have struggled with this.

And second, there are discrepancies between different publisher's and CMO's databases as to who controls what songs, and especially what the percentage splits are in co-owned tracks. Meaning the DSPs are sometimes asked to pay out more than 100% of the monies due on any one stream. Where this happens digital services usually delay payment until the conflict is resolved, which delays payment to the publisher and songwriter.

The aforementioned PRS/STIM/GEMA hub also hopes to tackle these challenges too, by pooling the data processing efforts of the three societies and the SPVs they are involved in, and by having one central pool of ownership data so that disputes over splits are less likely to happen (PRS and STIM already had a data sharing arrangement in place called ICE). Nevertheless, worldwide these challenges remain.

Section Seven: Manager Survey

The licensing of digital services by the music industry is clearly pretty complex, and has evolved somewhat since the first download stores and webcasters needed licences. This evolution has been primarily led by record companies, music publishers and CMOs, even though artists and songwriters may also be rights owners, and are certainly beneficiaries of music copyrights via both contractual and performer rights.

To ascertain how digital licensing is being explained to artists and their management teams, and what access to information about digital deals artists and managers are given, we surveyed 50 artist managers from across the world, including the UK, Ireland, France, Australia, Canada and the US, who together work with all three major record companies and over 100 independents.

7.1 ARTIST PROFILE

We firstly questioned these managers about the artists they represent, the kinds of copyrights those artists were involved in creating, and the deals they had done with corporate rights owners.

Specifically, we asked, "of the artists you manage"...

Approximately what proportion have...

Assigned ALL their recordings	38%
Retained ownership of ALL their recordings	45%
Assigned some recordings, retained others	17%

Approximately what proportion are...

Signed to deals that specifically mention digital income	63%
Signed to deals that do not mention digital income	37%

Approximately what proportion are involved in the creation of...

Only sound recording copyrights	3%
Only song copyrights	4%
Both sound recording and song copyrights	93%

Approximately what proportion are signed to...

Major labels or publishers	42%
Independent labels or publishers	58%

7.2 KNOWLEDGE OF DIGITAL DEALS

We then asked managers what they knew about some key elements of the digital deals that have been struck between the labels, publishers and CMOs they work with and, specifically, the streaming services; and

also how those deals have been organised and structured. This included...

I know the revenue share arrangement between label and streaming services for...

All my artists	9%
Some of my artists	20%
None of my artists	57%
I'm not sure	14%

I know minimum payments agreed between label and streaming services for...

All my artists	9%
Some of my artists	4%
None of my artists	67%
I'm not sure	20%

Do you know any of the following?

Why the labels license some services collectively (ie via CMOs) and some services direct (ie not via CMOs)	41% did
Whether your artist's publishing rights are being licensed to digital services via CMO-negotiated deals or publisher-negotiated deals	47% did
Whether your artist's publishing royalties from digital are being paid via their CMO, their publisher, or a combination of the two	9% did
What percentage of a stream is deemed 'reproduction right' and what percentage of a stream is deemed 'performing right' by your artists' CMOs.	3% did

7.3 DIGITAL ROYALTIES

Next we asked what information had been provided about the way corporate rights owners calculate and pay royalties to artists and songwriters on digital income. This included...

I know what charges and deductions labels are making on digital income before calculating royalties for...

All my artists	9%
Some of my artists	25%
None of my artists	46%
I'm not sure	20%

Digital income is clearly presented on royalty statements for...

All my artists	24%
Some of my artists	45%
None of my artists	13%
I'm not sure	18%

I have seen labels pay a share of digital 'breakage' – that is advances paid by DSPs that exceeded per-play royalties owing for any one year – for...

All my artists	0%
Some of my artists	7%
None of my artists	38%
I'm not sure	55%

7.4 COMMUNICATION ABOUT DIGITAL DEALS AND ROYALTIES

With managers clearly lacking information on key elements of many of the digital deals done by corporate rights owners and CMOs – and on the way digital income is being processed and shared – we then asked whether respondents had actively requested that information, whether any briefings on digital deals had been provided, and whether they would attend such briefings.

Which of the following have you requested information on... (percentage who had)

Revenue Share Arrangements	31%
Minimum guarantees	31%
Charges made on digital royalties	39%

Which of the following have invited you to briefings about digital income and royalties?

Your artists' labels	18%
Your artists' publishers	20%
Your artists' CMOs	29%
A DSP	37%

If they invited you, which of the following would you attend a briefing from?

Your artists' labels	96%
Your artists' publishers	96%
Your artists' CMOs	89%
A DSP	98%

7.5 ROYALTY SPLITS

Next we asked managers about the way digital income is split between different stakeholders, something that has proven contentious in recent years and which will be discussed in more detail in section eight below.

What do you think is a fair label/artist split on streaming income?

60% to label, 40% to artist	10%
50% to label, 50% to artist	39%
It will always depend on the record contract, every deal is different	51%

Labels currently receive four to six times more of streaming service revenues than publishers/songwriters. Do you think...

The current split is fair	11%
The money should be split 75% to label, 25% to publisher	37%
The money should be split 60% to label, 40% to publisher	11%
The money should be split 50% to label, 50% to publisher	26%
I have no opinion on the split of money between labels/publishers	15%

When should equitable remuneration be paid to artists?

All digital services (downloads and streams)	78%
All streaming services but not download services	13%
Just personalised radio services like Pandora	9%

7.6 ISSUES AND PREDICTIONS

Finally we asked respondents what they considered to be the key issues regarding digital rights and royalties (selecting from a list of issues we identified) and then what future developments they anticipated.

The most important issues managers wished to tackle with record labels were as follows (number of respondents who said this was the most important issue in brackets)...

1. Labels should increase the artists' share on streaming income. (38%)

2. Labels should tell artists and their representatives the specifics of each digital deal (revenue share, minimum guarantees, advances, equity). (29%)

3. Labels should provide artists and their representatives with a clear breakdown of how digital income is processed and what charges are made before royalty splits are calculated. (15%)

Meanwhile the issues that managers would most like government to assist on were as follows (number of respondents who said this was the most important issue in brackets)...

1. That labels be forced to share information about their digital deals with any beneficiaries of the copyrights they control (or their representatives) (34%)

2. That performer equitable remuneration be extended to cover all streaming services, ie including on-demand services such as Spotify (28%)

3. That services like YouTube be prevented from using so called 'safe harbours' in order to run services where content owners have to opt-out rather than opt-in (28%)

In terms of predictions about the future...

- 74% said streaming services would be the single biggest revenue stream for the record industry by 2020.
- Though only 18% thought streaming services would ultimately replace download platforms altogether, meaning the majority think the two models can co-exist.
- Showing an air of pessimism, only 2% thought the record industry will see growth as streaming services come of age, and only 2% thought labels would become more transparent as the digital market matures.
- With this in mind, only 4% thought new artists would continue to primarily sign to record companies for the foreseeable future.

Section Eight: Issues

8.1 DIVISION OF REVENUE

As the primary way recorded music is commercialised has shifted from physical to digital, and more recently from downloads to streams, there has been much debate as to how monies generated by digital services should be divided between the different stakeholders, ie between the digital platforms, labels, publishers, CMOs, artists and songwriters. There are various components to this debate.

a. The rights owners / digital platforms split

Question one: How should digital income be split between the music industry and the digital platforms themselves?

Most DSPs – both download stores and streaming platforms – see themselves as the new retailers. This meant that, when the early digital services first began negotiating with the record companies, music publishers and CMOs, there was some precedent on which the digital services could base their proposed business models, in that they knew what cut of the pie traditional CD sellers had taken.

This has resulted in most streaming services keeping approximately 30% of their post-sales-tax revenue. Though it is worth noting that this is very much an approximate figure, because each rights owner has a different revenue share arrangement with each streaming service, meaning that the DSP might have to share anywhere between 65% and 75% of the revenue attributed to any one stream. Some streams, therefore, will be more costly than others. Across the board it averages out at about 70%.

Though most deals between rights owners and DSPs put more of the initial risk on the latter, in that the digital service is obliged to make certain minimum payments to the labels and publishers irrespective of revenue, as outlined above. This may not always apply during trial periods that are completely free to the user, but does with ad-funded freemium and post-trial-period premium when the DSP is yet to reach critical mass.

This means that, in the early days, a start-up streaming service will likely be making payments to the rights owners that exceed their entire revenues. This is why it is an expensive business setting up a new streaming platform. Nevertheless, there are some in the music community who propose that the streaming services should be paying more than 70% of their revenues to the rights owners. Though, in the main, the DSPs are unsurprisingly resistant to this proposal.

A report published earlier this year by the UK's Entertainment Retailer's Association, which counts the key DSPs amongst its membership, argued that the mainly loss-making streaming services are already struggling to grow their businesses on a 30% split, given the infrastructures they have had to build and the advances and guarantees they have had to pay. The report contained the quote: "70% is tough enough, but at 80%, we would have to shut up shop. Somebody should explain that 80% of nothing is... nothing".

Demanding that the DSPs take a cut below the 30% average, therefore, is possibly optimistic at this time. Though since the Jay Z led acquisition of Tidal, and as that

company has tried to portray itself as the "artist-friendly streaming service", it has indicated a willingness to pay 75% of its revenues to the music industry. Meanwhile Apple Music insists that it will also be more generous than the industry standard long-term. So perhaps there is some room for manoeuvre.

But it could go either way. Recent developments at Spotify and Deezer have seen both streaming services expand their platforms to include speech and video content, and in the former's case more originally commissioned content too. If the streaming platforms become more like media companies, and invest in their own content around the music, they may wish to share less revenue with the music industry.

Though for the time being, the rights owners/digital split seems likely to stay somewhere between 70/30 and 75/25.

b. The recording rights / publishing rights split

Question two: Of the 70-75% of streaming revenues paid to the music industry, how should these monies be split between the two copyrights, ie the recordings and the songs?

Each rights owner has its own deal with each digital platform and the exact terms of those deals are secret. But we know that sound recording owners will likely have a revenue share arrangement of around 55-60%, while song owners will likely have a revenue share arrangement of between 10-15%. Which means the label is likely to be taking four to six times more than the publisher.

This disparity is not new. Indeed in the CD domain the label/publisher split would be tipped even more to the former's advantage. There are various reasons for this, including the facts that:

- A sound recording copyright owner only earns from their one specific recording of a song, while the publisher earns on every version and variation of the work.
- The owner of the song also earns every time the work is performed live, and so also enjoys a cut of the live sector's income.
- A sound recording copyright term lasts for a fixed time after release (50-95 years, depending on country), whereas the song term runs for the life of the creator and then a set period of time (50-70 years depending on country), meaning song copyrights usually last significantly longer than recording copyrights.

But most importantly, the sound recording owner – ie the label – does a lot more work in getting the CD to market. It pays for the recording to be made, for CDs to be pressed and distributed, and for the marketing campaign that will, if successful, result in sales. The publisher, while paying an advance to the songwriter, has none of this risk, and with risk comes reward. Which is principally why the label earned so much more from CD sales than the publisher.

However, when it comes to other uses of recorded music – such as the broadcast or public performance of sound recordings – in the main both rights owners often receive a similar sum of money from licensees (outside the US that is, in America labels actually receive nothing because, as mentioned above, there is only a digital performing right with the sound recording copyright). So, while it may often be down to the label to get new recordings to radio stations and club DJs, the assumption here is that record companies are taking a much lower risk and so the rewards are shared out more equally.

In the main, something akin to the CD model has been applied to both downloads and streams. Even though it could be argued that, while iTunes was the digital evolution of the record shop, Spotify is actually the digital evolution of radio. That logic might suggest a publisher/label split more inline with traditional broadcast, so that any revenues paid to the music industry are split more equally between the two copyrights.

Though few are actually proposing a 50/50 arrangement between the record industry and the music publishing sector on streaming income. And many record companies argue that such an arrangement would almost certainly put them out of business. Because even if there are parallels between Spotify and traditional radio, the labels continue to take a considerable risk when creating new recorded content to pump into the streaming services.

And while the costs of distribution may be considerably less in digital than physical, there are still significant costs associated with creating new recorded music and marketing those releases, while digital rights administration still requires some resource. Labels have also had to digitise their catalogues and invest in systems to get their content onto the digital platforms.

But are the labels really taking as big a risk in the digital age as when they were primarily selling CDs? And won't their risks decline further as digital-only releases become the norm and the initial set-up costs of the industry's shift to digital are paid off? And aren't many labels now partly securing their investments in new talent by taking a cut of revenue streams beyond the sound recording copyright, such as merchandise, live income and brand partnerships?

Some in the music publishing industry are now starting to publicly bemoan the level of income they are receiving from the booming streaming sector, and songwriters in particular have become vocal on this issue in the last year. And while these complaints have been partly aimed at the DSPs themselves, and in the US at the compulsory and collective licensing rules that impact what publishing royalties digital services pay, some are now also questioning why there is such a disparity between label and publisher payments on streaming music.

In our survey, artist managers generally supported a shift, so that the split between recording and song copyrights becomes closer to 75%/25%.

Though some in the publishing sector argue that publishers and CMOs should continue to focus on getting the best possible deals for their respective repertoires, rather than getting into a turf war with the labels. But given that most digital platforms license recordings first (indeed many go live with some publishing deals still pending), the fact that up to 60% of revenue is already committed to the record companies before the DSPs do their deals with the publishers will surely always limit what the digital services can afford to pay for the song rights.

Though quite how this matter can be resolved is not clear (though in the US task one is reforming the aforementioned compulsory and collective licensing rules). The problem is exacerbated because the publishers and their CMOs opted to have their own commercial relationships with the DSPs, rather than licensing the labels and letting them provide content to the streaming platforms with all rights covered (remember, in the CD domain, the label not the retailer was the publisher's licensee).

As mentioned above, the main reason for this was that the publishers and their CMOs generally felt that, by having their own separate arrangements with the DSPs, they would get paid faster and would have better access to usage data.

With hindsight, there is also an argument that the labels would have been more resistant to the bigger publishers subsequently going the direct licensing route as they have with digital in Europe (via their SPV joint ventures with the CMOs), the record companies having generally paid publishers set rates through the collective licensing system in the past.

All these reasons for the publishing sector licensing the DSPs rather than the labels are still sound. But this arrangement means that there is no direct commercial relationship between the labels and the publishers when it comes to digital licensing, leaving the DSP somewhat caught in the middle if the two sides of the music rights industry start to dispute the way digital royalties should be split between the different music copyrights.

Except, of course, many music rights firms – and all of the majors – own both labels and publishers, so there is a commercial link at the top of these businesses. Though music rights companies with interests in both sound recording and song copyrights would likely prefer the status quo – ie the majority of the money coming in through their labels – because generally record companies pay artists a much smaller share of income than publishers do songwriters (and at least some of the publishing income is paid direct to songwriters via the CMOs).

Meanwhile, the record industry at large likely hopes that publishers and songwriters will be placated down the line as streaming revenues boom and even a minority split of the money becomes lucrative. Though with the wider recorded music market still pretty flat, and with gains in streaming income now having to compensate for declines in both CD and download sales, it may be sometime before the publishers and songwriters start to feel optimistic about digital.

c. The reproduction rights / performing rights split

Question three: Downloads and streams exploit both the reproduction and communication controls of the copyright – ie both the reproduction and the performing rights. How should income be allocated between the two elements of each copyright?

Recording rights

On the sound recording side, it could be argued that this distinction is an academic one, because the record company routinely controls both elements of the copyright, and artist contracts don't usually distinguish between reproduction and performing rights when it comes to royalties (record contracts are more likely to distinguish between 'sales' and 'licence' income, more on which below).

That said, Performer ER is relevant here. Under most copyright systems Performer ER is due when the performing rights of a sound recording copyright are exploited, but not when the reproduction rights are used.

However, Performer ER has not been paid on most digital income to date for reasons outlined below. But if it were, it would only be due on the performing right allocation of digital revenue, not the reproduction right allocation (where featured artists would instead be due royalties as set out in their label contract), so at that point how digital

monies were allocated between the two elements of the copyright would become important to both labels and artists.

Publishing rights

But the reproduction/performing rights split is already important on the publishing side, especially in the US and in countries where monies from the different rights flow through the system differently, like the UK.

It is important in the US because reproduction and performing rights are still licensed separately, meaning DSPs need to seek two sets of licenses, one to cover reproduction rights and one to cover performing rights. In the UK, as with the rest of Europe, the publishers and CMOs provide DSPs with joint reproduction/performing right licenses, but the way monies are then paid to publishers and songwriters differs depending on which element of the copyright has been exploited.

Under the UK system, 50% of performing rights income is always paid directly to the songwriter by PRS, oblivious of whether or not they have recouped on their publishing deal. But all reproduction rights income is paid to the publisher, which then pays the songwriter their share according to their specific publishing contract. For signed songwriters, therefore, it will likely be beneficial for more digital income to be allocated to the performing right than the reproduction right (especially if they are yet to recoup on their publishing deal).

Copyright law does not actually define what controls are exploited in a download and stream, nor what the split should be between the two controls. Therefore the industry defines these splits itself.

Common practice has been to assume that the download is more reproduction than performing right, but the stream is more performing than reproduction right. So download income may be split 75% to reproduction and 25% to performing right, while streaming income may be split 25% to reproduction and 75% to performing right. Though these splits vary from country to country, have changed over time, and may be 50/50.

d. The artist / label split

Question four: Where a record label owns the copyright in a sound recording but pays a royalty to the featured artist under the terms of their record contract, what royalty should the label pay on downloads and streams compared to CDs?

There has been much debate since the early days of iTunes as to how digital income should be shared between labels and artists. There has been much less debate about the similar split between publishers and songwriters, possibly because publishing contracts are traditionally much more generous to songwriters than record contracts are to artists, usually because labels make much bigger upfront investments than publishers[24].

Every contract is different, of course, though publishing contracts will always see the songwriter take at least 50% of revenue and possibly, in more modern contracts, significantly more. On the label side, while some indie label deals may offer a 50/50 net split with the artist, a more common arrangement will see the record company keep the majority of core income streams.

Sales v licence

A convention of record contracts is that the royalties paid by the label to the artist often differ according to revenue stream,

24: Though this side of the debate is possibly now underway as songwriters have seen their income drop significantly as digital shifts from downloads to streams.

so that while the label may keep 85% of record sale monies, a more generous 50/50 arrangement may apply to other income, such as sync. This distinction was often described in pre-digital contracts using the terms 'sale' (where money was generated by directly exploiting the copyright, eg selling CDs) and 'licence' (where money was generated through licensing deals, eg sync).

This has created a problem for record companies with legacy contracts that do not specifically mention downloads or streams because digital is clearly a licensing rather than sales scenario, in that the label gives permission to the digital platform to exploit their copyrights, rather than directly making and selling copies of their recordings. A strict interpretation of a conventional pre-digital record contract, therefore, could require the label to pay the higher 'licence' royalty on all digital income.

In the main this has not happened, with the vast majority of labels paying the lower 'sales' royalty on downloads, and many on streams too. A significant number of veteran artists have sued their record companies on this point of contractual interpretation, albeit mainly in the US.

The landmark case is FBT Productions v Universal Music, relating to the stake producers Mark and Jeff Bass have in the early recordings of Eminem, who is signed to Universal label Interscope. After long-drawn out litigation on the sales v licence point, FBT Productions won the case, subsequently securing a higher royalty on digital income stemming from the Eminem recordings.

Universal insisted that this case did not set a general precedent that labels should pay a licence royalty on digital. Nevertheless, countless other artists sued for higher digital royalties, some securing class action status for their litigation, meaning any artist with a similar contract with the same record company might be able to claim higher royalties if the lawsuits prevailed.

Despite the high number of lawsuits, few cases have reached court and in the main the majors have sought to settle these actions. Though those settlements that have been made public – mainly those relating to class actions – have generally seen the majors offer only slight increases on download royalties, usually with some provision for past royalties and legal costs to date. The outcome is that most artists are seeing at most just a few per cent more for downloads than CD sales, though higher profile legacy artists may have secured more preferential rates via confidential out-of-court arrangements.

It is worth noting that most of these cases focused on download rather than streaming income (relating to a period in time when the former revenue stream vastly outperformed the latter). The argument for a stream being treated as a licence over a sale is surely even stronger than with downloads. Some newer digital royalty lawsuits do cover streams as well, and not all these cases are as yet resolved, so this matter could as yet return to court.

Risk and transparency

Newer record contracts, of course, clearly set out what royalties are due on digital income (possibly also separating out downloads and streams).

Artists may secure a slightly better rate on downloads than CD, and a slightly better rate again on streams over downloads, though they are unlikely to achieve anything close to a 50/50 split on digital, unless working with an independent label that always worked on a 50/50 net revenue share basis (and which would almost

certainly be making a significantly lower investment at the outset).

Beyond the above described contractual interpretation disputes, there is a separate debate to be had on what label/artist split is fair on digital. Record companies would argue that they continue to be the primary risk takers in the music industry, and therefore need to keep the majority of the recorded music revenue stream when an investment successfully launches a new artist and/or album.

Though artists and managers, like the songwriters and publishers above, might argue that, while that is true to an extent, surely the risks are less in digital than physical, and therefore labels should be more generous in how they share the profits (39% of the managers we surveyed said a 50/50 split would be fairer). And this argument is arguably even stronger for legacy artists where the label recouped on its initial investment long ago, and the costs of getting that catalogue to market are now considerably smaller.

Of course, when it comes to new rather than ambiguous legacy record contracts, the label could argue that if the artist wasn't happy with the splits they are receiving on downloads and streams, they shouldn't have done the deal. And 51% of the managers we surveyed agreed that – beyond the sales v licence debate on old contracts – digital royalty rates are for artists and labels to agree in contract. And if new talent needs a label's investment – and most do – they may have to accept terms they don't especially like.

Of greater concern to many managers of artists with post-digital record contracts is transparency. To quote many a lawyer, you may be on a 20% split on streaming income, but "20% of what, precisely?"

Under conventional contracts, record companies are allowed to make deductions from income before calculating what the artist is due under their revenue share arrangement. Quite what deductions can be made varies from contract to contract, but might include packaging costs, the cost of lost and damaged stock, and fees for international subsidiaries of a record company that provide additional local marketing and distribution services.

These deductions have always been a point of contention between artist and label, especially once the two parties are not actively working together on new content, so that the record company arguably has no real incentive to placate an artist and may instead seek to maximise its own profits by reducing artist royalty payments wherever possible.

If anything, deductions have become more contentious in the digital era, for a number of reasons. Some labels seem to continue making deductions for things that can only apply in the physical age, such as lost or damaged stock. And some managers question how international subsidiaries can continue to take the same cut of revenue as with physical, when digital distribution and social media activity, for example, could be done on a global basis by the label in the artist's home country.

These problems are exacerbated by the secrecy that surrounds digital deals, more on which below, and are further complicated because different labels apply, refer to and report deductions in different ways, making it hard for artists and managers to track what is going on.

"Transparency" has been on managers' lips for a few years now, and has become a definite buzz word in the music rights industry this year. Digital licensing is an

area where more transparency is definitely needed.

8.2 PERFORMER ER AND MAKING AVAILABLE

As mentioned above, although copyright law does not define either downloads or streams, it is generally accepted that the distribution of recorded content through digital channels exploits both the reproduction and performing right elements of the copyright.

But which performing right? Under most systems, the 'performing rights' traditionally cover both the performance and communication controls of the copyright. Which – when it comes to sound recordings – conventionally means, respectively, the playing of recorded music in a public space and the broadcast of recorded music over AM, FM and DAB radio channels or terrestrial, satellite and cable TV networks.

The making available right

Question five: What kind of digital services exploit the conventional performing rights and what kind exploit the specific 'making available right', and should copyright law be more specific on this point?

While it would seem reasonable to suggest that the communication control that covers traditional broadcasting should also cover webcasting – ie radio or TV style services delivered over the internet – as mentioned above, in the early days of the world wide web there were concerns about more interactive forms of digital distribution, principally downloads.

To that end a new more specific control called the 'making available right' was formally introduced in World Intellectual Property Organisation treaties in 1996 and in the European Union in 2001, and subsequently added to many individual copyright systems.

According to the WIPO treaty, this applies to electronic transmission "in such a way that members of the public may access the recording from a place and at a time individually chosen by them". So neither broadcasts nor online simulcasts of TV or radio, but definitely downloads and possibly other interactive digital channels too.

Though which interactive digital channels specifically? A distinction has sometimes been made to the effect that personalised radio services should come under the conventional communication control, while fully on-demand streaming platforms should come under the newer making available right.

But not everyone agrees, and there is further confusion in that most fully on-demand streaming services like Spotify also offer a personalised radio option within their platforms.

Performer ER on digital

Question six: Should performer equitable remuneration apply to all streaming services, including those exploiting the making available right?

This distinction is not just a semantic one, because of Performer ER. As mentioned above, in most countries Performer ER is due when the performing rights of a sound recording copyright are exploited, but the making available right – despite arguably being a subset of the communication control – is commonly excluded from this. So if a streaming service is exploiting the conventional communication control Performer ER should be paid, but if the

making available right is at play, no automatic (ie non-contractual) payments to performers are due. This makes the ambiguities around the definition of the stream, in terms of copyright law, perplexing for the performer community.

Depending on how making available has been implemented in any one copyright system, there are two possible arguments against the current approach...

- First, that making available should only apply to downloads, meaning that all and any streaming services are exploiting the conventional communication control, meaning Performer ER is due.
- Or second, that Performer ER should be due whenever the making available right is exploited anyway, and that the exclusion of Performer ER from making available was a mistake.

If it was decided that Performer ER was due on all streaming income – either by classifying streams as communication rather than making available, or by applying Performer ER to the making available right – digital services would be obliged to pay royalties directly to performers as well as labels, most likely through the collective licensing system. (In the UK, it would be the labels' obligation to ensure performers received ER).

This would mean a significant shift in negotiating power for featured artists unable to secure better digital royalties from their labels, while opening up a new revenue stream for session musicians who usually have no contractual right to a share of digital income, but who would receive ER payments in the same way they do from broadcast and public performance. Quite how this would all work isn't clear, though there have been some developments on this issue in some European countries.

The performer's making available control

Question seven: Do record labels need a specific making available waiver from all artists before exploiting their recordings digitally?

There is another area of contention regarding making available. While Performer ER may not apply, making available is nevertheless included in the list of controls provided to recording artists by their performer rights. As with the other performer controls, labels need artists to waive or assign their making available right through contract in order to subsequently exploit that element of the copyright. As such, new artist contracts will specifically state that the performer's making available right is waived or assigned.

But what about legacy contracts which pre-date the addition of the 'making available' right to copyright law in the mid-1990s? Obviously these contracts cannot include a term specifically waiving the making available control, because there was no such control at the time the contract was written. It could therefore be argued that to exploit the making available right through downloads or streams, a record label must first secure a new agreement with each and every legacy artist waiving this new performer control. Those artists could then use that moment to negotiate better digital royalties.

However, record companies have assumed that all legacy artist contracts already provide them with the right to exploit the making available control. There are two arguments why this might be the case:

- Making available is a sub-set of the existing communication control which may be referenced in the original contract.
- A vague catch-all term may have been

included in the original contract in which the artist waives both current and future performer controls.

However, many artists dispute both these points, arguing that making available is a distinct performer control and that vague catch-all terms are not enforceable. This dispute is currently the subject of test cases. The two key cases to date involved Finnish rock band Hurriganes and Swedish musician Johan Johansson.

In the former case, Hurriganes prevailed in a legal dispute with Universal Music on whether or not a legacy contract could waive a performer control that did not exist at the time the contract was written. Though there was an added complication in this case, in that neither side could actually produce the record contract in question. Johan Johansson, meanwhile, won a lawsuit against the record company MNW over whether it, despite owning the copyright in the recordings on which Johansson appeared, nevertheless had the right to distribute that content to streaming services that exploit the making available right.

These are recent cases, and appeals may follow, so it remains to be seen if they set a precedent in Finland and Sweden, or beyond. But these cases and/or other future litigation on this issue could as yet confirm that the record companies' assumption regarding making available is incorrect.

8.3 DIGITAL DEALS AND NDA CULTURE

Most of the music industry's deals with the DSPs are confidential, with only a small number of people at each label, publisher or CMO party to the specifics of the arrangement. This means that the non-corporate beneficiaries of the copyrights being exploited by the digital platforms – ie artists and songwriters – are not allowed to know the terms under which those copyrights are being used.

Nevertheless, the basic structure of these arrangements is known, as described above. Most digital deals are ultimately revenue share arrangements, but with the DSP also committing to minimum guarantees and upfront advances, and possibly additional fees and the provision of equity to the rights owner. Despite not usually knowing the specifics of the deals, many artists and managers have raised concerns about some of these key elements.

Equity

Question eight: Should record companies and music publishers demand equity from digital start-ups, and if so should they share the profits of any subsequent share sale with their artists and songwriters, and if so on what terms?

Some rights owners require equity when first licensing start-up streaming businesses. This is particularly true of the three major record companies and the previously referenced indie labels digital rights body Merlin.

As noted above, there is a logic to rights owners taking equity in new DSPs as they license them for the first time. Many of those who invest in new tech start-ups do so assuming they will profit from their investment not when the company itself becomes a profitable concern but when it is sold to an existing major media or tech business, or via an IPO.

It may be that the biggest profits to be made from a start-up business will stem from this first transaction, and if that's when

the start-up's backers will profit most, the labels want a cut of that action too.

Most artists and managers understand this logic, but there is still a point of contention: what happens to any profits made if and when the label sells its equity stake in the start-up? The assumption is that many labels will keep these profits in their entirety, citing clauses in artist contracts that say the record company is only obliged to pay royalties to artists on income directly and identifiably attributable to a specific recording.

Artists and managers argue that this is unfair because the label was only able to demand equity in the first place because of the combined value of its artists' recordings, and therefore artists should share in the profits of any equity sale. Additionally, if labels are not obliged to share this income with artists, they may agree to less favourable terms on revenue share and minimum guarantees, where income is shared with the artists, in return for a better deal on equity.

In an ongoing legal battle, Sony Music recently said unapologetically that it was perfectly entitled to structure deals in this way if it so wished. Though many labels would actually counter that the monetary value of any equity stake is uncertain and not accessible for the foreseeable future, so they are unlikely to forego other short-term revenues in return for a better equity deal. Nevertheless, ambiguities around what equity labels have in what DSPs, what value those shareholdings could have if and when a sale takes place, and what will happen to that money, all mean this remains a contentious issue.

Many independent labels did sign up to the World Independent Network's Fair Digital Deals Declaration in 2014, committing to "account to artists a good-faith pro-rata share of any revenues and other compensation from digital services that stem from the monetisation of recordings but are not attributed to specific recordings or performances". But few artists and managers are clear as to what this will actually mean if and when an equity sale takes place, and the position of the major record companies on this issue is even less clear.

Advances

Question nine: Should record companies and music publishers demand large advances from new digital services, and if so should they share any 'breakage' (unallocated advances) with their artists and songwriters, and if so on what terms?

Most rights owners will request upfront advances, often in the millions, from DSPs. A leaked Sony Music deal with Spotify in the US provided a $9 million advance in year one, $16 million in year two, and $17.5 million in an optional third year.

These advances are usually recoupable for the DSP over a set time period, but are non-refundable if revenue share or minimum guarantee-based royalties due in that period do not exceed the advance paid. So if the DSP pays a $1 million advance for the next year, but then the record company's catalogue generates only $750,000 under its revenue share or minimum guarantee arrangement, the rights owner gets to keep the extra $250,000.

Again there is a logic to the advances: many start-ups ultimately deliver little in the way of revenue, initially or ever, so the rights owner wants to build in some guarantees to justify going to the effort of doing the deal. And, in real terms, any business likes to be paid upfront if at all possible.

But artists and managers have raised two concerns about the advances.

First, the size of the advances arguably makes it hard for new DSPs to enter the market, because a service needs considerable funds available to pay multi-million advances at the outset. This ultimately reduces consumer choice, and makes it hard for niche services to launch, a concern also expressed by the UK Entertainment Retailers Association in its manifesto document earlier this year.

Second, there is the issue of what happens to unallocated advances, what has often been dubbed as 'breakage'. So in the example above the record company was $250,000 up on the deal, because it was due $750,000 based on the consumption of its repertoire but had been paid a $1 million advance. So what happens to the $250,000? Does the label simply bank the surplus, or does it share it with its artists?

As of June 2015, all three of the major record companies have made commitments to share any such surplus with artists. Universal and Sony made their commitments after breakage fell under media scrutiny, while Warner had been committed to sharing this revenue for sometime. Many independents, meanwhile, are signatories to the aforementioned Fair Digital Deals Declaration.

That said, it remains unclear exactly what these commitments on breakage mean in real terms, ie how surpluses are allocated to artists and when such allocations began.

Some have also noted that once a successful streaming service is established advances are nearly always recouped by the DSP, so there is no surplus. Therefore it may be that some of the major record companies have committed to share these surpluses with artists only now that there isn't any money to share.

Other kickbacks

Question ten: Should record companies and music publishers demand other kickbacks from new digital services, and if so should they share the benefits with their artists, and if so on what terms?

Rights owners may also receive other kickbacks over and above equity and advances. The label or publisher may be able to charge administration, technical or legal fees to the DSP, and may receive other benefits, for example in the aforementioned leaked Sony/Spotify contact the record company received an allocation of advertising on the DSP's freemium service which it could use or sell on.

As with equity, many artists and managers fear that rights owners may agree to less favourable terms on key revenue share and minimum guarantee arrangements in return for these extra kickbacks, because the artists must share in the former but can be excluded from the latter. While this may simply be paranoia on the part of artists and managers, the secrecy that surrounds so many digital deals adds to this distrust.

The NDAs

Question eleven: Can it be right that the beneficiaries of copyright are not allowed to know how their songs and recordings are being monetised, and should a new performer right ensure that information is made available to artists, songwriters and their representatives?

Which brings us to the issue most commonly raised by artists and managers regarding the music industry's digital deals (as demonstrated by our survey), the secrecy that surrounds each arrangement,

which means that artists and songwriters, despite being beneficiaries of music copyrights, are not allowed to know how these copyrights are being valued or exploited.

While there is a tendency for both rights owners and DSPs to blame each other for the 'NDA culture' that has grown up around the digital music market, it seems likely that the wide ranging non-disclosure agreements that surround most digital deals were originally requested by the services, they being so common in the tech sector. Though it seems that many rights owners have overly embraced the NDAs in subsequent years, usually citing competition concerns for the need for secrecy.

Of course, any company wants a degree of confidentiality around its commercial deals, so confidentiality clauses are common in any contractual agreements. And rights owners might argue that their negotiating hands would be weakened if each new digital service knew precisely what deal its competitors had secured, and a weaker negotiating hand would be to the detriment of all the stakeholders in music copyright.

However, as a result of the secrecy surrounding the music industry's digital deals, artists and songwriters, despite being beneficiaries of music copyright, are in the dark as to how those copyrights are being commercialised. This results in a number of problems:

- It makes it hard for artists and songwriters to properly audit the royalties they receive to ensure they are being paid what they are contractually due.
- It makes it hard for artists and songwriters to assess whether, in their opinion, a label, publisher or CMO is behaving in a fair way, an assessment that could affect the artist or songwriter's subsequent deals and agreements.
- It makes it hard for artists and songwriters to assess whether a label, publisher or CMO is securing the best deals and processing payments in the most efficient way, an assessment that could affect the artist or songwriter's subsequent deals and agreements.
- It makes it hard for artists and songwriters to assess the relative value of their music being consumed on rival digital platforms.
- These facts inevitably result in a breakdown of trust between labels and artists, and publishers and songwriters, and/or public criticism of digital services by high profile artists and songwriters which may or may not be justified.

Beyond these many and various issues, it could be argued that there is an ethical element to this debate. Can it be right that a legal beneficiary of a copyright can be deprived of crucial information required to calculate exactly what benefit they are due? Should the right to such information be a moral right under contract or copyright law? And should the right to information about the exploitation of a sound recording be added as a new additional performer right?

A recent report by Berklee College Of Music's Rethink Music programme proposed a Creators Bill Of Rights, which includes the line "every creator deserves to know the entire payment stream for his/her royalties (eg which parties are taking a cut and how much)". Meanwhile in France, a government-led initiative involving artists and labels recently resulted in a code of conduct under which the latter, in the words of the International Federation Of The Phonographic Industry, would seek to

"bring greater clarity and understanding on the distribution of revenues to different parties".

But given the NDAs already entered into, and the competition concerns expressed by DSPs and rights owners to justify these agreements, it may well be difficult to persuade every label, publisher and CMO to share all the information artists and managers say they need. Though if a 'right to information' was added to the list of performer rights, it could force the rights owners' hands.

The current position of the management community seems to be that – while NDAs may be necessary – artists, songwriters and managers should be brought 'inside the NDA', so that they too know the specifics of the digital deals. Of course there are a lot of artists, songwriters and managers, and it could be argued that once you have hundreds if not thousands of people 'inside the NDA', the confidentiality clause becomes unenforceable, because the information will inevitably leak and it would be impossible to identify who did the leaking.

A possible compromise is that artists and songwriters are allowed to request that their accountants have access to this information for auditing purposes, which would overcome some though not all of the problems outlined above. This would reduce the number of people party to the confidential information, and given accountants are usually subject to specific professional standards, it would provide some formality as to the how the information is used.

Another option would be simply to make the fundamentals of each digital deal – revenue share, minima, advance, equity – public domain, given most services now have very similar arrangements, and rights owners often lock their deals to those of their competitors anyway, through the use of the kind of 'most favoured nation' clauses we mentioned when discussing sync above.

And if all this information was public domain, so that most DSPs and most rights owners were operating under the same arrangements, success would become wholly about having the most users and the most content consumed (respectively), rather than how good a deal you scored at the outset.

8.4 SAFE HARBOURS AND OPT-OUT SERVICES

Question twelve: Should the safe harbours in European and American law be revised so companies like YouTube and SoundCloud cannot benefit from them, however good their takedown systems may or may not be?

Both American and European law provides protection for internet companies which provide tools or channels used by others to distribute copyright works without licence. These protections originate in America's Digital Millennium Copyright Act 1998 and the European Union's Electronic Commerce Directive 2000/31 and are commonly referred to within the industry as 'safe harbours'.

How the safe harbours work

From a copyright perspective, the safe harbours were intended to protect the then emerging market occupied by internet service providers, server hosting companies and similar businesses from liability for copyright infringement if and when those companies' customers used the internet access or web storage they bought to distribute copyright infringing material.

Early on, internet companies argued that without such protection from liability, their business models would become unfeasible – owing to the difficulty of identifying infringing content amongst incredibly high volumes of traffic – and that growth in internet usage would therefore be curtailed

A condition of the safe harbour protection is that the internet company has a system in place via which copyright owners can flag copyright infringing content or material, and that the internet firm then removes this content once made aware of it. These are often called 'takedown systems', and people in the music industry often refer to 'DMCA takedowns', even in Europe where it is European law rather than the DMCA that actually applies.

The quality of the takedown systems operated by websites claiming safe harbour protection vary greatly. Nevertheless, rights owners now routinely issue large numbers of takedown notices to such companies, with the US and UK record industry being particularly prolific in this domain.

The debate over what kinds of services should have protection

Over the last few years, and especially in the last twelve months, representatives of the record industry and music publishing sector have begun to argue that these safe harbours are being used by a much more diverse range of businesses than was originally intended by lawmakers in Europe and the US.

The kind of business the labels and publishers are mainly thinking about here are user-upload platforms like YouTube, Dailymotion and SoundCloud, where users upload audio or video files to the DSP's servers – some of it including other people's copyright work without the requisite licenses having been obtained – and then the DSP aggregates that content. This content is then accessible from a central home page and search engine, and users can organise it into playlists.

The outcome of this process is that sites like YouTube and SoundCloud soon boast music libraries very similar (and often larger) to those of services like Spotify, and therefore start to compete with those platforms. But unlike Spotify, which accesses content as a result of its licensing deals with the record companies, the user-upload services do not rely solely on the labels to provide the music. Instead, any labels and publishers that do not wish their content to appear on these platforms must issue takedown notices (and/or pursue legal action against the actual individual uploaders, which is not a desirable option).

From the rights owners' perspective, this makes these 'opt-out' rather than 'opt-in' streaming services. Some labels and publishers believe this runs contrary to the basic principle of copyright: ie the rights of the copyright owner extend beyond the mere right to have content removed in hindsight, and that permission should always be sought before a copyright work is exploited, even if that is a tricky process.

That said, these rights owners are not objecting to the concept of safe harbours outright, recognising the practicalities that led to their introduction in the first place. Rather, they are questioning whether user-upload platforms – which are arguably content providers as well as providers of internet services – should enjoy protection. This poses a number of questions...

- Does US and European law as it is currently written provide user-upload platforms with safe harbour protection? The operators of such platforms would

almost certainly answer with an unequivocal "yes", arguing that legal precedent is on their side. Rights owners might argue that current law is less clear cut than that and still open to interpretation.

- Even if current law does provide these services with safe harbour protection, should it? Did lawmakers in the 1990s ever imagine services like YouTube and SoundCloud benefiting from the safe harbours? And even if they did, is the current situation having a sufficiently detrimental affect on copyright and/or the copyright industries to justify a rethink?

Of course some user-upload services have actually sought licenses from the music industry. These licenses allow rights owners to upload and monetise content on these platforms themselves, and also to claim and monetise (or remove) any songs or recordings they own which have been uploaded to the platform by third parties.

Most notable in this domain is YouTube, which has long-established licensing deals with many, and probably most, music rights owners, and which has built a system called Content ID to help rights owners monitor, remove and monetise content uploaded by third parties (whether that content is audio-only, an official music video, a cover version of a published song, or a recording synced to a third party video).

Nevertheless, many rights owners who have benefited from these licensing deals remain critical. The argument goes that the safe harbours give YouTube an unfair advantage in licensing negotiations, because it can basically say "we have your content already, either license us on our terms, or you'll be left with the cost of monitoring our networks on a daily basis". User-upload services might counter that rights owners always have to dedicate some resource to monitoring unlicensed use of their content, while YouTube could argue that Content ID removes many of the costs anyway.

Though rights owners would likely say that no automated rights management system is 100% reliable and there will always be admin costs associated with running even a Content ID account; all of which makes it harder for rights owners to walk away from the negotiating table. This, some labels and publishers argue, results in licensed user-upload services getting preferential rates creating a 'value gap' in the music rights sector.

The debate over takedown systems

There is a second element to the debate around safe harbours in the music industry: how sophisticated should the takedown systems be? Many music rights owners now issue takedown notices on an industrial scale against sites that claim safe harbour protection. But as recordings are removed from said sites, exact replacements are often immediately uploaded by users to the same platforms. Rights owners are therefore required to constantly monitor these sites for new uploads and to issue a flood of new takedown notices each day. This process has commonly been compared to a game of Whac-A-Mole.

The music industry would prefer more sophisticated takedown systems so that when a recording is removed from any one site for the first time it then stays down, ie the site takes measures to ensure it is not re-uploaded. But how sophisticated a takedown system must websites operate in order to enjoy safe harbour protection? There is some ambiguity here, though the American courts have not generally set the bar particularly high with regards what a takedown system should look like under the DMCA.

Rights owners suspect some user-upload platforms operate deliberately poor takedown systems because their business models rely on a steady stream of copyright infringing content.

For example, some in the music industry criticised the takedown system operated by the now defunct user-upload streaming service Grooveshark. Though the litigation that led to that service's closure centred on music allegedly uploaded by staff rather than users, so didn't test safe harbour law.

The current criminal action against the defunct file-transfer service MegaUpload, if it ever reaches court, may further consider what American law says about takedowns; or specifically, whether safe harbours should still apply if a company can be shown to have been 'willfully blind' about users distributing content without licence and/or to have encouraged such activity, even if a nominal takedown system was in place.

Of course in Content ID, YouTube has built what is probably the most sophisticated takedown system. Though, as noted, that doesn't mean it is 100% reliable, and to date it has been much more effective for managing recording rather than song rights on the video platform. That said, YouTube continues to evolve the technology, and the music community might benefit from being more vocal and more clear on what it would like this system – and any other takedown system for that matter – to achieve.

Where do user-upload platforms fit in?

With copyright law under review in Europe, the music rights industry has put safe harbours at the top of its lobbying agenda this year. It argues that, however the law may have been interpreted over the years, safe harbours were never intended for user-upload services like YouTube, and that said services have in effect been exploiting a loophole in the law to build massive content platforms without paying market-rate (or any, in some cases) royalties to copyright owners.

The music industry is basically asking for lawmakers to revisit safe harbours, and ask the questions we expressed above about what kind of services should enjoy this kind of protection, and what impact the current situation is or is not having on the copyright industries. On one level this is an issue that unites the wider music industry, in that trade groups representing labels, publishers, collective management organisations, artists and songwriters have all called for safe harbour rules to be revisited in this way.

That said, there are some side debates. YouTube will likely argue that without the safe harbours it could not operate as a viable business, because it would have to manually monitor every single upload to its platform, which would be far too cost prohibitive. And the last thing marketing teams at record companies want is to kill off YouTube, it being one of the most important marketing channels in the modern music business.

There is also an argument that, with Content ID, YouTube has actually helped the music industry create new revenue streams, monetising previously lost or forgotten content that users rather than rights owners have digitised, and creating new income from user-generated content and bedroom-produced cover versions.

And, with consumers sharing unlicensed content in numerous ways online, it could be argued that there are benefits for rights owners in having this sharing occur

on platforms where rights can be more effectively managed and monetised.

If a change to safe harbour rules really did result in a cut-back YouTube, these benefits of Content ID could go too. Though more bullish music industry executives might argue that YouTube's claim it could not operate without safe harbour protection is a bluff, and therefore there is less to lose than it might seem.

Yes, YouTube might have to invest in order to more proactively monitor uploads to its networks, but given the revenues the service presumably generates, coupled with the valuable data and traffic it provides for the wider Google network, some think that that is an investment the company would make, if it had to. Not least because the removal of safe harbours for its direct competitors would give YouTube a competitive advantage, in that it is better positioned to take on monitoring duties than its rivals.

Though even if YouTube could and would adapt to revised safe harbour rules, the tech industry at large is likely to express concern about the wider impact such changes might have on other online businesses, such as social networks where users routinely post photos and articles owned by third parties without permission. Beyond the specifics of services like YouTube and SoundCloud, the music industry may need to also address concerns about these "unintended consequences" in order to win this debate.

As we said, part of the reason rights owners are now lobbying on the safe harbour issue is the perceived 'value gap' that they argue the existence of user-upload platforms has created in the digital music market. Most user-upload platforms are free-to-access and, where monetisation is possible, are usually ad-funded. But many in the music community are frustrated that ad-funded platforms enjoy much bigger audiences to paid-for services, but generate much less income.

Though it seems inevitable that the digital music market will always be based around a majority who consume via low-value (for the industry) platforms and a minority who use high-value premium services. The challenge is growing ad revenues to increase the value of the free services, and to find better ways to convert freemium users into premium users, either by the user-upload services upselling their own pay-to-use packages, or having them integrate better with other premium platforms.

The music industry knows it must now rise to this challenge, and would likely say that lobbying for safe harbour reform is part of that process. Though it should continue to concurrently explore ways that both ad revenue and premium upsell on the user-upload platforms can be increased.

8.5 DATA

Question thirteen: How is the music rights industry rising to the challenge of processing usage data and royalty payments from streaming services, what data demands should artists and songwriters be making of their labels, publishers and CMOs, and is a central database of copyright ownership ultimately required?

As mentioned above, the shift from downloads to streams has created significant data challenges for the music industry. Whereas before rights owners needed to know each time a single track or album was sold in order to calculate what they were due from a retailer or download

store, now they need to know every single time every single track is listened to by every single user. This has resulted in a flood of usage data for labels, publishers and CMOs to process.

At the same time, whereas each line of 'sales' data would relate to at least pennies of income and often (for the label at least) pounds, each 'listen' will generate fractions of a penny in revenue. Data processing and any subsequent auditing, therefore, must be as efficient as possible, so that administration costs do not eat up all the revenue.

There are, of course, technology solutions to this problem, and rights owners have started to invest in building or buying in such systems. But this has been a steep learning curve and it's highly likely that data processing and therefore revenue distribution was not perfect when the streaming services first started to gain momentum.

Indeed the music rights sector is still tackling this challenge, and for labels, publishers and CMOs, developing such systems is an often hidden cost, with many on the outside seeing streaming as a much cheaper model for the rights owners, which it ultimately might be, but in the short term shifting to this new model has required considerable investment. Nevertheless, artists and songwriters should continue to put pressure on their business partners in this domain, not least by considering data processing abilities when deciding which labels, partners and CMOs to work with.

The data problem is exacerbated by the lack of a central database of copyright ownership information, which limits what the DSPs can do to help with this process. This is more of a problem for songwriters and publishers.

As outlined above, the DSP assumes that whichever label or distributor provides it with a track controls the recording copyright, and therefore should receive usage data and royalties linked to that recording. However, the label or distributor does not tell the DSP who controls the song copyright, and there is no central database where the it can access that information.

As we said, this means the DSP has to provide every publisher and every CMO it has a relationship with a complete list of all content usage every month so each rights owner can work out what it is due. This significantly increases the data each and every rights owner has to process, as well as delaying payments whenever there is a dispute between two rights owners about who should be paid for the use of a specific work (ie two publishers between them claim to own 120% of a specific song).

Attempts by the music publishing sector to build a publicly accessible Global Repertoire Database, with an inbuilt system to settle disputes where multiple rights owners claim ownership of the same work, collapsed last year. There are still moves by some CMOs – principally PRS, GEMA and STIM in Europe – to combine their respective ownership data to create a regional repertoire database. And some hope that, if similar collaborations take place around the world, these RRDs could eventually be merged to create the GRD.

However, there doesn't currently seem to be any plan to make these RRDs publicly available to all (with concerns about the confidentiality of commercial agreements being one objection given to full disclosure). So, while alliances such as that between PRS, GEMA and STIM may reduce how much data processing takes place month to month, the current system must remain, which is arguably less efficient, can deprive

song rights owners of real time data, and reduces what the music industry can expect from the DSPs.

8.6 COLLECTIVE LICENSING

Question fourteen: Are streaming services best licensed direct or through collective management organisations; if direct what is the best solution when societies actually control elements of the copyright; and are artists and songwriters actually told what solutions have been adopted?

As we have mentioned above, sometimes digital services are licensed through the music industry's collective licensing system, and sometimes through direct deals with rights owners.

In the main, beyond webcasts that are basically online versions of radio, and those covered by the SoundExchange compulsory licence in the US, the record industry has chosen to license most digital services directly.

Whereas publishers more often license digital collectively, sometimes because the CMOs themselves control key elements of the copyright so can't be cut out of the licensing equation, and sometimes because the CMOs have the best song ownership data so are best positioned to calculate and distribute royalties. Though, as we have seen, in Europe the big publishers are now licensing direct, albeit in partnership with the CMOs.

Given collective licensing was traditionally used where you had licensees using large amounts of music but paying relatively low royalties per-usage, you could argue that it would make more sense for all streaming services to be licensed in this way.

And many artists and songwriters would prefer this approach, possibly because they trust their CMO more than their label or publisher; or because payments via CMOs often circumvent contractual terms that enable labels or publishers to retain income; or because they feel collective licensing is fairer to all, because everyone earns the same per play fees, rather than bigger artists or rights owners having a better deal.

That said, the labels and bigger publishers would argue that there are many benefits to direct deals. Collective licensing regulations in law, and each CMO's own rules, can slow down deal making and reduce the strength of the rights owner's negotiating hand. CMOs are not always empowered or equipped to negotiate the multi-territory licences digital services need. And not all CMOs are so transparent about how money is processed, resulting in ambiguities and delays.

So there are pros and cons to involving the CMOs. Though where the involvement of CMOs is either attractive or – as with publishing in Europe – necessary, because of the rights the societies control, it is possible that a widespread review of both the statutory regulation of collective licensing and each CMO's own rules and regulations is required. Certainly some of the issues raised by songwriters and publishers in relation to digital licensing are as much to do with their own CMO's rules as they are the way the DSPs are doing business.

It maybe that the collective licensing of digital actually needs to be separated from other forms of collective licensing, with the former operating on a global basis, while the latter continues to operate on a territory by territory basis. You sense this is the message being implied by AMRA, the collecting society bought and

relaunched by Kobalt, which is now seeking to represent the digital rights of publishers and songwriters on a global basis.

8.7 ADAPTING TO THE NEW BUSINESS MODELS

Question fifteen: Is the biggest challenge for the music industry simply adapting to a new business model which pays out based on consumption rather than sales, and over a much longer time period; and what can artists and songwriters do to better adapt?

One final challenge for the wider music community is simply adapting to a new business model, where rather than a record company setting a wholesale price for each record sold, income from which is then shared between label, publisher, artist and songwriter, instead the music industry receives a monthly cut of monies generated by streaming platforms, which is then divided up between stakeholders based on consumption.

This new model means that repeat listening rather than first week sales is key, and monies will come in over a much longer period of time, rather than via a quick spike after an album is launched.

It also means that records and songs that fans listen to again and again over a long period of time will be more lucrative, whereas previously albums that consumers stopped listening to soon after purchase made just as much money for the music industry as albums that were played on a regular basis for years.

And whereas songwriters who contributed to 'filler' songs that consumers perhaps used to skip would still earn their cut under the CD model, they will not under the steaming system, where only those tracks on an album that are actually played earn royalties.

Much of this is stating the obvious of course. Except that critics of the streaming music model often apply old metrics to the new business.

As we said at the outset, it's not a given that the streaming service licensing models that have been developed over the last ten years are the best, the fairest or the most efficient way of doing business. Though, however these models evolve in the future, labels, publishers, artists and songwriters will have to adapt to the fact their music will generate income in different ways and on different timescales.

Glossary

Anglo-American Repertoire
The exact definition can vary, though this commonly refers to songs registered with CMOs in the UK, Ireland, US, Canada, Australia and South Africa.

Assignment
When ownership of a copyright is transferred from one party to another, often from an artist or songwriter to a label or publisher. Assignment is possible under many though not all copyright systems.

Author Rights
A term from civil law systems which, from a music perspective, means the rights in songs and compositions as opposed to the rights in recordings.

Collective Licensing
When music rights owners license as one, appointing a collective management organisation to license on their behalf. Collective licensing is often subject to extra regulation to overcome competition law concerns.

Collective Management Organisation (CMO)
Organisations that represent rights owners when they license collectively. CMOs usually represent either publishing rights or recording rights, and may only represent reproduction rights or performing rights. On the publishing side, CMOs may actually control some elements of the copyrights they represent, rather than simply representing them as an agent for their members. CMOs are also referred to as collecting societies, performing rights organisations or PROs.

Compulsory Licence
When copyright law obliges rights owners to provide a licence to a certain group of licensees, thus limiting the rights owners' negotiating power. Rights owners are still due royalties, but these will usually be ultimately set by a copyright tribunal or court. Compulsory licences are usually managed by CMOs.

Digital Service Provider (DSP)
A term used to refer to companies which provide digital music services, including download stores and streaming platforms.

Featured Artist
The musicians whose name or names any one recording is released under, as opposed to session musicians who are simply credited in the small print. Record labels generally sign record deals with featured artists.

Making Available Right
The specific copyright control exploited by services that make content available via digital channels in a way where the user "may access it from a place and at a time individually chosen by them". Applies to download platforms and probably at least some streaming services (though there remains some debate about this).

Mechanical Rights
How publishers usually refer to their reproduction rights, especially when exploited by labels through the recording and distribution of songs.

Music Publisher
Companies that own and control song copyrights. So called because their original business was to publish books of sheet music.

Neighbouring Rights
This term is used to mean a number of different things. In some civil law systems it refers to the sound recording right, as opposed to the 'author right' which covers songs and compositions. In the record industry it is now often used to refer specifically to the 'performing rights' element of the sound recording copyright. Or it is sometimes used to specifically refer to the performer equitable remuneration that is paid on performing rights income.

Performer ER
One of the performer rights, 'performer equitable remuneration' is when artists – including featured artists and session musicians – enjoy an automatic right to a share in sound recording revenues. This is a statutory rather than contractual right, and usually cannot be waived or assigned by contract. Performer ER only applies to certain revenue streams, commonly performing rights income.

Performer Rights
The specific rights of performers over recordings on which they appear that co-exist with the rights of the copyright owner, where the performers are not the copyright owners. Performer rights include controls over the fixation and subsequent exploitation of recordings, and the right to equitable remuneration from certain revenue streams.

Performing Rights
The specific controls that copyright owners enjoy over the public performance and communication of their works.

Publishing Rights
The copyright in songs, or specifically lyrics and compositions.

Record Company/Record Label
Companies that own and control recording copyrights, and also commonly a key investor in artists, especially new artists.

Recording Rights
The copyright in sound recordings.

Reproduction Rights
The specific controls that copyright owners enjoy over the reproduction and distribution of their works.

Special Purpose Vehicle (SPV)
The name used to refer to the joint ventures that have been struck up between the big publishers and CMOs to licence Anglo-American repertoire to digital services, representing both the publisher's reproduction rights and the CMOs' matching performing rights.

Sync
When film, TV, advert or video game producers 'synchronise' existing songs and/or recordings to moving images.

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