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Analysis of Background Music Services

B2B Music Service Working Group

1. Introduction

Business to Business (B2B) music services are a common phenomenon for most societies. Once deriving from a strict offline physical – "mechanical reproduction" – business model, these services are now transitioning to online delivery.

The major difference with B2C (Business to Consumer) services is the end user, which are public, often commercial premises. This distinction is also visible in price setting, where generally B2B-services set a higher price point for their music delivery, which will often include the curation of music in keeping with the brand, installation of hardware and ongoing customer service and maintenance.

This "two-business model" is equally reflected amongst the societies as often a separate and higher license fee is applicable to B2B-music services, reflecting that these services are approved music sources for public performance and the higher volume of use for average B2B customers compared to private persons.

In practice there is an overall increasing use of B2C-services on the B2B (public, commercial) market. This interference leads inevitably to the question as how we address this intertwining of both markets.

Current B2B-schemes are also varied amongst societies, with significant differences with regards to tariff(s), scope of license, rights granted, etc.

From an administrative point of view, these licenses could be offered as one stop shop licenses, including the copyrights and neighbouring rights, and/or offered directly either to the music service or the end user itself.

Throughout the past decade many B2B-music services have transformed from a strict offline music delivery model (hard drive/CD) towards a streaming service, similar to B2C-services in terms of functionality and technology. This leads to new challenges for societies as rights holders might tend to adopt the online licensing model, granting their rights directly to the service provider for multiple territories.

This note attempts to describe these varieties, challenges and opportunities based upon the current practise by some societies.

All descriptions in this document are meant as a source of inspiration and are in no way obligatory to use. Neither will any of these practises be presented as the ultimate solution for every challenge or issue. It is possible that these practises even need to be adapted to meet the specific requirements of local legislation and market circumstances.

2. B2C-services on the B2B-market

Context
From 2010 onwards, online B2C-services emerged as an accessible, low cost and legal solution for the personal use of music (instead of recorded media and/ (il)legal downloading). The Terms and Conditions of all of these services specify they can only be used for private and domestic consumption.
Most known brands are Spotify, YouTube (incl. premium), Apple Music, Tidal, Deezer, etc.
The increasing popularity of these consumer aimed services, together with a lack of monitoring by the services themselves, has resulted in their use outside the personal environment such as in retail stores, cafes, restaurants …

Issue
Societies often collect separate and higher license fees from B2B-music services. These B2B-services consider this to be unfair market competition. According to their reasoning a B2B-music provider pays a higher copyright remuneration than B2C-services who in their view pay "unknowingly" also for these public premises, even though B2C-subscriptions are not a legitimate music source for public performance. Consequently, they strive for a cleaner cut separation between the B2C and B2B markets and refer for

instance to mobile and cable providers who provide specific business packages. Another well used argument are the FIFA (and/or national) licenses for public broadcasting of football games.[1]
E.g. Australia - Belgium – Netherlands

Risk
Toleration may lead to legal procedures with (local) B2B-licensees for allowing unfair treatment + risk of compensation for the past.

Solution(s)

I. **Legalize** the public use of B2C-services ("Digital copy/Delivery" license):

Societies can offer a supplementary license for the right to public use of B2C-services as music source. This model is driven by the principle that it is not the responsibility of societies to police the restrictions (*'for personal use only'*) in the terms and conditions of these services – this should be the responsibility of the B2C provider.

- supplementary fee is charged directly by society to end user
- remuneration is the same (or higher) than B2B-tariff scheme(s)
- e.g. Australia (detailed description available on p. 6)

Benefits

- the argument of unfair market competition from existing B2B licensees is addressed
- complies with societies' mission, being a maximization of remuneration
- can be administered together with public performing rights licensing, as it is a shared customer base

Attention points

- additional licence is only possible if licence between society and B2C-service is restricted to private use only
- legalizing = allowing a music usage which is often explicitly not allowed in T&C of these B2C-services themselves, which may cause irregularities when B2C-services acts in a restrictive way towards the end user
- B2B-licensees may still not be satisfied for not acting in same playing level field (cfr. popularity and exposure of some B2C-brands + access to data regarding B2C-use)
- ultimately the end user who uses a B2C-service for commercial purposes will pay less than an end user who uses a B2B-music system (because no additional service costs or technical support), which may lead to declining revenues for B2B-licensees
- copyrights might be covered by this Digital copy/Delivery fee, but not necessarily the neighbouring rights; it depends on the mandate these producers grant to their local neighbouring rights society[2]
- Opportunity for joint licence with the local recording rights organisation
- Possible rights flow conflicts in the gap between a carved out B2C service and a blanket public performance license – what may a Digital copy/Delivery license for use of a carved out B2C service cover?

II. **Separate** B2B and B2C-market:

Societies may choose to keep both markets distinct from each other. To this end, people must be made aware of the extent & limits of both markets. An enforcement policy might then become inevitable.
Starting point is the presumption that public, commercial use of a B2C-service is in breach of the T&C of the B2C-service and therefore an unauthorised music source. This might be enhanced by restricting the

[1] By way of example the FIFA regulations for public viewing events during the 2018 world cup: https://img.fifa.com/image/upload/rtmpwdtc4emxm4siftik.pdf

[2] For example, In Australia and New Zealand sound recordings are covered through their Onemusic licensing initiative (https://onemusic.com.au/faqs/).

contract between the society and the B2C-service by limiting the scope of the service to be offered for personal use only.
E.g. Belgium (detailed description available on p. 9*)*

Benefits
- the argument of unfair market competition from existing B2B licensees is addressed
- meets the demand of B2B licensees + potential growth B2B market
- reducing risk of legal procedures and compensation for the past
- B2B license remains fully licensed (copyrights + neighbouring rights)
- Combination with legalization (by means of a supplementary fee) is theoretically possible

Attention points
- Control policy needed, including possible indemnities in case of persistent use of B2C-services
- Cost vs benefit: Awareness campaign = time consuming + a certain cost (e.g. flyer(s), mailings, publications, sectoral cooperation, etc. …)
- May discourage people to continue using music in their public premise with risk of public performance licence revenues declining as a result
- Possible negative perception in public opinion

III. **Align** B2B with B2C

This (theoretical) model departs from the principle of accepting that B2C-services cannot be banned from B2B-market and that an additional license for the public use of B2C-services is not an option (e.g. legal restrictions and/or from B2C-services themselves).
It must be noted that this model has not been practised at our knowledge, except in territories where no B2B license schemes exist (but then the issue does presumable not exist either).

Benefits
- the argument of unfair market competition from existing B2B licensees is addressed
- reducing risk of legal procedures

Attention points
- aligning with B2C will probably lead to a decline of revenues for rights holders
- B2B licensees could remain unsatisfied, because of competition with B2C-services (branding, low price setting, etc.)

Feedback from B2C-services
The initiative for the aforementioned solutions or approaches comes from the CMO's. There is no knowledge of a combined effort or strategy in alliance between CMO's and the B2C-services themselves. These streaming services seem to adopt a rather ambiguous approach towards the public and commercial use of their music apps. While explicitly and publicly stating that the use of their services is limited to personal, non-commercial use only, there are no consequences attached, nor enforcing measures taken by the B2C-service, when the end user is in breach on this particular condition of the user terms.

This dual approach exists not solely towards the end user, but also in relation with the CMO's. There are no requests known from B2C-services to elaborate with CMO's on a strategy for the B2B-use of their services, nor specific requests for an extended B2B-offering on top of their B2C-license[3], even though CMOs showed willingness to cooperate with B2C-services for this purpose. The illustrated examples from Australia and Belgium have caused no stirring nor any objection from B2C-services on these attempts to legalize (AU) or

[3] However, some B2C-services have developed a B2B model which is branded separately from their B2C-service and for which license requests are known. Examples are Soundtrack Your Brand (Spotify), Apple Music for Business, Deezer Business, etc.

enforce (BE) the B2B-use of their services[4]. B2C-services seem rather concerned to not be associated themselves with any CMO's strategy, and they waive every responsibility and justification for any action on the CMO themselves.

Based on the sparse feedback and experiences known the conclusion seems to be that CMOs are free to act as they see fit, but they will not be back-upped either.

3. Blanket vs. Repertoire Licensing

Traditionally, B2B licences offered by societies have been 'blanket' licences covering all repertoire of the society and its affiliates. The current domestic B2B licensing schemes can only afford domestic delivery for online services and distribution within the EEA (European Economic Area) for physical delivery. It is also common for affiliate societies, as a practical solution, to agree online delivery into their territory from another for a limited number of sites and low revenues.

With the movement of B2B services to multi-territory offerings, some rightsholders have begun to adopt the B2C online licensing model, whereby they will grant their rights directly to the service provider for multiple territories. It is clear also that publishers wish to have greater flexibility and choose whether to aggregate their rights into the blanket licence on a case-by-case basis.

This presents challenges for the societies, as a blanket licence is no longer available in the event that a direct licence is granted by the rightsholder and therefore consideration as to how this is managed needs to be had. The aim of societies should be to preserve the blanket licence where possible. This may mean reviewing existing licence schemes to ensure they meet rightsholders expectations in terms of value and rights offered, to enable them to include their rights within the licence. There may be benefits to retaining a blanket approach, such as a stronger negotiating position for agreeing better rates with the market sector and better market coverage of B2B suppliers could also benefit pubic performance incomes.

Where repertoire has been licensed directly to B2B providers, it may be necessary to undertake transactional licensing in order to identify works and shares that should be omitted from the royalty calculation, invoice and distribution. This may require investment in new processes and system development to achieve and given that revenues are likely to decline as a result, consideration should be given to deliver a viable, cost-effective solution.

Direct licensing results in an unfavourable fragmentation of the rights picture in a complex B2B environment. Regardless of whether it is possible to preserve a blanket license for B2B-licensing or not, the competition from pre-cleared/non-CMO music services suggests that local societies should strive for one stop-solutions including as many rights as possible in the relevant market. Bundling of composer/author rights with artist and master/label rights, rights for online delivery, rights for local storage/copy, rights for use as public performance source and rights to public performance in commercial premises may strengthen the CMO repertoire value in competition with the non-CMO music services.

4. Scope of Rights

Current B2B-schemes are varied amongst societies, with significant differences with regards to tariff(s), and scope of license.

The rights granted in B2B-licenses show great similarities across countries. In essence the following copyright relevant acts are mostly included.

- reproduction right for the following acts:

[4] Enclosures 1 & 2.

i) reproduction of recordings of musical works on the server(s) of the B2B service provider for the purpose of streaming and/or downloading by its B2B customers;
ii) the (cached) reproduction on the clients' business premises when streaming and/or downloading
iii) reproduction on physical carriers (e.g. CDs, USB Sticks, HDs) provided by the B2B service provider to the B2B customers for usage on the premises;

- communication to the public right (including making available right) for the online delivery of musical works in a linear or non-linear way to *(a group of)* public premises.

Often there is an internal split in the license fee to reflect the mechanical and public performing part of the copyright relevant acts, also for the purpose of distribution. In case of streaming the public performing part usually has a larger share than the mechanical reproduction part and vice versa in case of downloading and offline delivery. The exact split ratio may vary across the countries. Most societies also seem to adopt the same split ratio as applied on their B2C-licenses.

B2B services are licensed for use as a source for public performance in public premises, while B2C services are licensed for private, personal use only. This difference means that B2C services are not licensed as a source for public performance and should not be used as such. Some B2C license agreements even specify explicitly that the license excludes the use of the licensed service as a legal source for public performance.

The scope of rights is not entirely undisputed, both from the perspective from the licensee as from the licensor (CMO).

Licensee perspective
From a licensee perspective, the granted rights have recently been challenged in the Netherlands. More specifically the act of communication to the public by the B2B provider has been put to the test with the argument that, since the delivery of the music files is encrypted, there is no communication to a public taking place. This reasoning has not been followed in a first ruling (Dec '18), and this position of the first instance court has not been overruled in an interim ruling (Sept '20)[5]. A B2B-music provider, who is delivering musical works to an undefined number of public premises, is carrying out a communication to the public, as the different public premises together form a public on their own. Therefore the right of communication to the public is rightfully included in the B2B-license.

Licensor perspective
Comparing the scope of rights from licensor perspective between B2B and B2C licensees there seems to be little difference across the different countries, especially when it comes down to streaming services.

The scope of rights may be an issue when it comes down to cross-border licensing activities. Because of the public performance share in case of online delivery it could be questioned to which extent this license can be granted by a third party outside the domestic territory. It can even lead to a split license, in which the mechanical part is granted on a cross-border basis, while the communication to the public is licensed nationally. This does not necessarily meet the expectation of the licensees themselves who seek a pragmatic one stop shop solution, especially for a limited number of sites cross-border and with low revenues. A good understanding – and prior notification - between the CMO's concerned is to be preferred in order to determine the possibilities and limitations for cross-border licensing activities.

[5] Rechtbank Amsterdam 12 december 2018, C/13/629307 / HA ZA 17-530;

5. What justifies a higher B2B license fee?

The tariffs applied by CMO's towards their B2B-licensees vary a lot between countries. Often CMO's apply a separate and higher B2B tariff scheme than the tariffs applied to B2C-services. Other societies opted to use the same (percentage) rate.

A justification for an eventual higher B2B license tariff is not to derive from the scope of rights, but rather in the economic value of the use of the rights in trade.[6] And the economic value differs for the use of rights for B2B services as opposed to the use of rights by B2C services, because of the added value music generates for a company using music in its business; it is well known that music creates an atmosphere that makes people more comfortable in the environment, makes people sit longer in a restaurant and drink/eat more and inspires people to shop more goods in a relaxing or stimulating ambience. This added – commercial - value does not apply for private persons.

Licenses entitle licensees to use rights in a certain way. Licenses for private use include less permissions than licenses for commercial purposes because the latter allow for the use of the rights for public performances, which licenses for private use do not permit. Therefore, the broader scope and purpose of the B2B license justifies a higher license tariffthan the more limited scope of the B2C license (public vs private).

On the other hand the rate charged by a CMO to a B2B service and to a B2C service may be the same. Also in this case the license fee usually ends up being more for B2B-services, as the rate consists of a percentage of revenue deriving from subscription fees which are usually higher.

6. Royalty Free Music and Direct Licensing in B2B environment

More and more B2B music services emerge in European markets claiming to offer "royalty-free music" (i.e., music that does not require a license from the local CMO, also called "rights included music") for use by shop or restaurant owners, who, in turn, assert that they are entitled to publicly perform the works without making payments to the local CMOs. Instead these B2B music services remunerate directly the authors and composers, which could be considered as an act of collective management and thus a CMO related activity.

Although some of the music that these royalty-free music services offer may be written or composed by authors who are not members of any CMO or is otherwise in the public domain, it appears that some of the music is written or composed by songwriters or composers who are members of CMOs that allow their members to directly (i.e., without the participation of a CMO) license their rights, like U.S. CMOs ASCAP and BMI.

When ASCAP and BMI receive notice from a member that has entered into a direct license, they notify the impacted societies. This way, the local society knows that it is not expected to license or collect royalties for the use(s) covered by the direct license, assuming the direct license is valid under local laws.

Although a member of a (e.g. U.S.) CMO may have the right to enter into direct licenses, he or she may be precluded from licensing their rights through another CMO in a territory that is already covered by a local CMO who represents the rights of the member through the network of reciprocal agreements. As a result, the local CMO may face challenges in circumstances where the B2B music service that enters into such direct licenses adopts the features or functions of a CMO.

[6] Art 17 Para 2, 2nd subparagraph of Directive 2014/26/EU on collective management says: *"Tariffs for exclusive rights […] shall be reasonable in relation to, inter alia,* ***the economic value of the use of the rights in trade****, taking into account the nature and scope of the use of the work and other subject-matter".*

A directly licensed music service is therefore not necessarily to be taken for granted. Local legislation concerning collective management might even lead to questioning the validity of the direct licensed repertoire.

7. Conclusion

Since the introduction of B2C-services a decade ago, there is inevitably a worldwide public, commercial use of these services. On the other hand, the B2B-services are expanding as well given their development towards online music services, with big brands who commercialize their products & services worldwide. This logically leads to an interference of both markets.

Though these "tensions" do not occur yet in the same way for every country, it is already happening in countries with an established B2B-market. It is therefore advised to monitor the local markets on a regular basis in order to anticipate on the possible challenges that may lay ahead due to the entwining of both types of services.

There are different possible solutions available as detailed above, each with its pros and cons. There is no specific preference for any of these models and other solutions can also be envisaged either. Legalizing the B2C-market seems to be the more pragmatic way and may generate additional revenues. Keeping markets separate is more based on principles (B2B ó B2C) and is aimed to preserve the current B2B market and its licensees. Both models have in common that it aims to avoid any accusation of unfair market competition and consequently to reduce the risk of legal procedures. A collaborative approach with B2C-services, whichever the strategy adopted, is rather unlikely.

An intertwining of both markets is also about to occur from a licensing point of view, with rights holders potentially seeking direct license deals for their repertoire. However the role of a society cannot be underestimated as a single point of contact to achieve a remuneration model that meets the expectations from rights holders, including one stop shop licenses. Moreover, its capability to raise the awareness to (potential) end users may help to create best possible circumstances in which B2B-licensees may commercialize their products and services and ultimately should lead to increasing revenues for rights holders. These economic arguments may help societies in their attempt to convince rights holders to maintain the blanket license model.

Even though the scope of rights might not – or little – differ, there are sufficient economic arguments which justifies a different license and tariff approach between B2B and B2C-licensees.

The B2B-market is constantly changing and evolving. Combined with the diversity on how CMO's approach and license B2B-music services we encourage to exchange as CMO's each other practises, issues and opportunities, so every CMO can adopt an approach and strategy to all the issues and challenges described above.

Enclosure 1 -

APRA AMCOS – EXPERIENCE WITH BACKGROUND MUSIC SUPPLIERS AND USE BY BUSINESSES OF PERSONAL DIGITAL MUSIC SERVICES

This report is split into three sections, the first deal with APRA's arrangements with background music for public performance rights, the second with licence arrangements with those same entities for the making and supply of music and lastly our approach to the use of Spotify and other similar personal digital music services by businesses.

Background Music Suppliers – Agency Appointments

1. In around 1996 APRA was approach by the largest background music supplier at the time to seek an agency appointment from APRA to 'package' APRA background music tariffs with their product.

2. APRA agree to the request on the basis that all three parties (the supplier, business and APRA) would gain. For the supplier they are able to provide a complete package, the licensee won't have any surprise costs and APRA would gain market penetration. We agreed to a 10% commission. The supplier could pass that discount onto their clients or use it to cover their costs of administration.

3. Importantly, the agency appointment is limited only to the music they provide and the arrangement was made available to all suppliers that had more than 10 clients. The arrangement is purely voluntary. Some suppliers have taken it out, some haven't and for some they only offer to their larger clients.

4. In addition APRA required full reporting from the suppliers of (a) their list of clients/premises; and (b) music use. For their music reports this initially meant reporting the number of reproductions not performances, but for those suppliers that now provide music via streams, we receive performance data. There are two advantages to this – first it allows the supplier to market their product by saying that licence fees are paid directly to the music used; and secondly it discourages members from seeking to license direct.

5. APRA limits the type of business that can be covered by the agency arrangement to retailers and restaurants. APRA does this for two reasons – first these tariffs are relatively simple and second but more importantly, these types of businesses mostly do not use other music sources. Where a business does use, for example, music from a background music supplier and has a TV screen showing sport then we see that there is no reason to provide a discount because we would have to license the business directly anyway for the use of music not provided by the supplier. Even where a restaurant for example uses music from a supplier and has live music, APRA would not permit that premises to be covered under our arrangement with the supplier.

6. In around 2010 APRA reviewed its arrangements with suppliers. It was concerned that the total amount of lost revenue was significant and that improvements in our internal processes meant that the discount was greater than the cost of licensing the businesses directly. Furthermore the total number of businesses covered by the arrangements had plateaued and cannibalisation between suppliers replacing growth in market penetration. As a result we reduced the discount to 5%.

7. With the advent of OneMusic (a joint licensing initiative with the local licensor of neighbouring rights, PPCA) we will extend the arrangement to include the packaging of sound recordings as well. Note that PPCA already offers similar arrangements to APRA. We will reduce the commission further to 2.5% on the basis that the end dollar amount to the supplier will be approximately the same as now.

Background Music Suppliers – Licences for the Making and Delivery of Music

8. Unlike the APRA agency arrangement, which is voluntary, those suppliers must obtain a licence from AMCOS to make the recordings they provide to their clients. Originally the suppliers used CDs as the delivery medium but then moved onto hard drives and then downloads/streaming.

9. With the move to download and streaming, the suppliers also required cover from APRA for their exercising of the communication right.

10. APRA and AMCOS licensed their rights to suppliers on a percentage of revenue basis. Disputes started to arise as to the relevant revenue base against which the fee should be calculated. Suppliers were seeking the exclusion of for example, the supply of audio equipment and even their costs of curating playlists. Suppliers were also adopting digital delivery platforms without seeking the appropriate additional cover.

11. In response, APRA AMCOS undertook a consultation with licensees in late 2017 and moved to a fixed fee per location per quarter covering all rights. The new rates have been widely accepted, however there are two international clients with local subsidiaries (MoodMedia and Stingray) who are challenging them.

12. Once again APRA and AMCOS requires reporting of music use to make discrete distributions per supplier.

13. At the moment all out licences with suppliers are issued on a blanket basis, however we are aware that some publishers are looking at licensing them directly.

Use by businesses of personal digital music services

14. In the late 2000s APRA AMCOS noted that businesses were starting to source their music from iPods and using music purchased from iTunes. As all readers will be aware, the terms of use of iTunes (and Spotify etc) are only for personal use – as are our licences to the services themselves. Faced with this situation, APRA AMCOS had three options, which are not mutually exclusive:

    - We could have refused to license the use, on the basis that the music is being used in breach of a contract to which APRA AMCOS is not a party. The consequence of this is that the use is infringing, and it would be incumbent on us to commence proceedings. This would greatly increase compliance costs for APRA AMCOS, which would have a direct adverse effect on distributable revenue. It would also be burdensome for businesses, many of which are willing to obtain an APRA AMCOS licence.

    - We could have encouraged digital service providers to introduce a commercial subscription offering. This has been the subject, albeit unsuccessful, of discussions with service providers.

    - We could have licensed the use (communication, reproduction and performance) and pay copyright owners for the commercial use of their music. This was by far our preferred option and what we have implemented, as it ensures compliance by business (i.e. cures unlicensed use of our rights) and distributions to copyright owners.

15. Of course businesses rapidly moved to sourcing their background music from personal digital music streaming services. The requirement for the additional tariff arises still arises because at a minimum the business is using an existing recording for a purpose for which it is not licensed in the first place. That is, in the case of a personal digital music service, the service's server copies are not licensed for commercial use, so while there may not be a further copy made, the use itself requires licensing.

16. We had originally called the additional licence a "dubbing tariff". This has caused confusion in respect of streaming services and will be calling it our "Digital Copy/Delivery" tariff in the future with the launch of OneMusic. The OneMusic licences including for these uses will cover both musical works and sound recordings.

17. The rate is either a separate amount per year or is bundled in with the public performance fee. In the latter case, we have then created lower tiers that are available for music use that does not require that type of cover (e.g. where using a licensed background music supplier).

18. Although our introduction of the tariff was initially supported by background music suppliers because they believed it would "level the playing field", those suppliers are now vehemently against it. Recently they have formed an industry association and have put in an adverse submission to the ACCC as part of APRA's reauthorisation process. The fact of the matter is that businesses that use personal music streaming services are not infringing copyright as the suppliers claim provided the business has obtained a licence from APRA AMCOS or from the copyright owner. Where a business has obtained the necessary public performance licence, the use may well be outside the terms of the service of the personal digital music service but that is a contractual breach as between the service provider and its subscriber. It is not an infringement of the copyright in the musical works performed. APRA AMCOS has a responsibility to its members, and to copyright owners worldwide, and in the absence of any effective monitoring or policing of the use of personal music streaming services ***by the services themselves***, we introduced licences to authorise businesses for the reproduction, communication and public performance rights inherent with such use. That is, the use equally contravenes all of those rights and if we were not to offer a licence to businesses where they use such services, the loss of revenue would be tens of millions of dollars. Moreover, whether or not APRA AMCOS seeks to regularise and license the use of music on personal music streaming services by businesses, such use will still be in contravention of the service's terms and conditions. Our actions do not encourage businesses to use these services: they are doing it already.

19. Our legal advice is also that if we were to say to a business you can only obtain our licence if you also obtain permission from the personal digital music service itself, effectively third-line forcing, this would likely fall foul of Australia's federal competition legislation.

20. The suppliers believe that businesses are migrating from their services to personal services. That is not our finding. Because we have agency arrangements with those same suppliers we have been able to see that the total number of clients is static – there has been no drop off. It is our strong belief that the overwhelming majority of businesses using such services were previously using radio or CD to provide background music.

21. In recognition of the large number of business that use Spotify etc, as of last year we now pay licence fees from background music on a 50/50 basis to radio airplay logs and streaming figures from personal digital music services.

Enclosure 2 -

SABAM – EXPERIENCE WITH BACKGROUND MUSIC SUPPLIERS AND USE BY BUSINESSES OF PERSONAL DIGITAL MUSIC SERVICES

This report is split into two sections. The first concerns Sabam's licence arrangements with B2B music services for the making and supply of music. The second is about our approach to the use of Spotify and other similar personal digital music services by businesses.

Background Music Suppliers – Licences for the Making and Delivery of Music in Belgium

1. Sabam grants since the 80's licenses to B2B-music services, initially by applying a % on the turnover and nowadays by means of fixed fee per month per location.

2. The license covers the production and encrypted delivery (offline/online) of music to commercial premises such as cafés, restaurants, retail stores, parking lots, etc. It is still a 100% blanket – mechanical – license, though it is likely that this model becomes challenged in the near future by publishers seeking direct deals (cfr. Sound track Your Brand).

3. The average Sabam license fee varies between 1 EUR and 7 EUR per month, depending on the number of tracks stored on the local device and/or the (non-)interactivity in case of streaming services. These tariffs have not been challenged over the last 10 years by B2B-licensees and is considered to be overall accepted.

4. Sabam offers a one stop shop license to the B2B licensee, including copyrights and neighbouring rights, the latter based on a mandate received from the Belgian neighbouring rights society. The public performing rights remain licensed directly between Sabam and the public premise.

5. The B2B-licensees in Belgium represent a public market share between 8% and 12%. Radio usage remains the most popular music source for commercial use, with +/- 40% share. The market remains stable, i.e. no significant growth nor decline, though there is a shift on going from traditional catering industry (cafés, restaurants) to big(ger) store and hotel chains.

6. Two challenges in particular for B2B licensees, being (1) to convince radio users and (2) the use of B2C-music services in public, commercial premises.

7. Rights included music catalogues and/or direct licensed music services gain popularity, especially in retail and small independents, but not to alarming levels yet (< 1% impact on turnover public performance rights).

Use by businesses of personal digital music services

8. The year 2011 is considered to be a key moment in Belgium with the breakthrough of B2C-services for personal use. In 2017 a turning point occurred for the Belgian (record) industry with more income from digital (55%) than physical (45%). In between, an increasing use of B2C-services for public, commercial use has been noticed and reported.

    - The reasons for this increasing popularity are (1) the low price setting (between 0 EUR and 10 EUR per month), (2) the low entry threshold as the service is easily accessible and (3) the publicity and exposure created by the media.

    - This evolution has led to an increasing concern from B2B-licensees as this leads – according to them - to unfair market competition.

- As from 2012-2013 on Sabam has regularly been addressed with the request to keep both markets distinct given the different license schemes that are applied to B2B and B2C-licensees.

9. From 2013 on Sabam has developed a communication strategy to raise the awareness of the user limits of B2C-services. This strategy consisted of sending information letters to public premises when B2C-use was established during standard controls within the framework of public performance rights. The immediate effect was that 2/3rd of the premises abandoned further use of B2C-services, while 1/3rd persisted.

10. From 2017 on Sabam has introduced flyers (separate designs for catering industry and retail) which were handed out during controls and made available as well to B2B-licensees to be spread further through their communication channels. Sabam also succeeded to get the support of the most important sectoral federations to raise the awareness further through their newsletters, journals, website, FAQ's, etc.

11. The outcome is that the current public use of B2C-services is estimated at a market share of less than 5%, though it must be said that in general the transition towards a more (public) digital consumption is evolving slowly as well (e.g. 40% market share for radio).

12. Though the results of the awareness campaign were positive, doing nothing about the minority who knowingly persist in using their B2C-service would ultimately lead to increasing B2C-use in public premises over again. From 2018 on Sabam has installed a compensation fee in case of persistent public use of a B2C-service, i.e. only after a second control. This fee, charged directly to the end user, is the equivalent of the maximum annual fee that an interactive B2B-streaming service pays to Sabam for one premise.

13. The compensation fee is based on a breach in the terms and conditions (T&C) in the public performing rights agreement between Sabam and the public premise which states that only legally acquired music may be used by the premise. The public use of a B2C-service is not considered to be legally acquired given the restrictions of use in the T&C of the B2C-services themselves. The fee is not a legalization, but a compensation for the loss of copyrights for not using a valid alternative such as a B2B music service.

14. In 2018 the positive effect of the awareness campaign and control policy on the changing music consumption behaviour (from B2C to valid alternative) varies between 85% à 90%. It is expected that 2019 will show similar figures.

15. Currently no court procedures are ongoing. In 2020 the project will be evaluated, taking into account possible international developments as well.