PROPOSALS FOR CLAUSES TO CLARIFY THE RESPONSIBILITY FOR THE PAYMENT OF MECHANICAL REPRODUCTION ROYALTIES FOR AUDIO-VISUAL PRODUCTIONS

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INTRODUCTION

Repeatedly collecting societies are faced with problems regarding the payment of mechanical reproduction royalties collected for the reproduction of musical works in audiovisual productions. Those problems appear due to the fact that the main actors in the process, namely the publishers, the producers and the distributors of audiovisual productions, refer to each other when mechanical reproduction royalties need to be paid.

The problem is often driven by vague and/or ambiguously formulated clauses regarding the scope of the licensed copyright authorization in, on the one hand, the contract between the publisher of a musical work and the producer of the audiovisual production, and, on the other hand, the contract between the producer and the distributor of that audiovisual production. Because of this, the producers and the distributors could believe that no copyright needs/remains to be paid to the collecting societies as all the copyrights were covered in the contract with the publisher. Or the distributor of the audiovisual production could believe that the mechanical reproduction royalties owed for the reproduction of a musical work were already paid by the producer to the appropriate collecting society.

In order to remedy this problem, it seems appropriate to formulate three examples of standard clauses which can be used in the different contracts between the publisher, the producer, the distributor and the collecting society. It may also raise the awareness of those actors with a view to clarifying the situation regarding mechanical reproduction rights.[1]

[1] All clauses formulated in this document are meant as a source of inspiration and are in no way obligatory to use. The clauses will always need to be adapted to meet the specific requirements of a contractual situation.

#1 | CONTRACT BETWEEN THE PUBLISHER AND THE PRODUCER

Context

In the contract between a publisher of a musical work and a producer of an audiovisual production, the publisher grants a copyright authorization to the producer in order to use the musical work in this audiovisual production. This authorization will stipulate certain terms/limits to the commercialization of the audiovisual production. Under commercialization is generally understood the following exploitations:

- in cinemas;
- in broadcasting;
- on audiovisual carriers (DVDs, Blu-ray,etc.);
- online (Netflix,etc).

The scope of this copyright authorization is often misinterpreted as also including the copyrights that automatically flow from the above. Nevertheless, the scope of the authorization granted by the publisher of the musical work has to be limited to the right to synchronize the musical work with the audiovisual production, and subsequently excluding the right to communicate the work to the public and the right of reproduction.

Example of a clause regarding the scope of the copyright authorization

"The Licensor (meaning the publisher) grants the Licensee (meaning the producer) the authorization to include the Musical Work (reference needs to be made) or part thereof in the Audiovisual Production (reference needs to be made). This authorization covers the following types of exploitation of the Audiovisual Production:

- *in movies;*
- *in broadcasting;*
- *on audiovisual carriers;*
- *online;*
- *for video on demand.*

This authorization does not include the right of communication to the public nor the mechanical reproduction right of the publisher applicable to the Musical Work. The Licensee remains solely responsible for obtaining a licence with the relevant collecting society in order to cover these copyrights."

#2 | CONTRACT BETWEEN THE PRODUCER AND THE DISTRIBUTOR

Context

Many cases exist in which the producer and the distributor of an audiovisual production shift responsibility to one another regarding the payment of the mechanical reproduction royalties for the reproduction of a musical work in an audiovisual production. Often the distributor believes that these copyrights are already settled between the producer and the relevant collecting society or even previously settled between the publisher and the producer. However, the mechanical reproduction rights often have not yet been settled. For the collecting societies it doesn't matter if it is the producer or the distributor who will pay the mechanical reproduction royalties, as long as it is contractually clear who eventually will be responsible for their payment. Practice shows however that in most cases the distributor will be responsible for the payment of the mechanical reproduction royalties. Therefore, the example of a clause below holds the distributor responsible. Nevertheless, a clause holding the producer responsible for the payment of the mechanical reproduction royalties is also a perfectly plausible option.

Example of a clause regarding the responsibility for the payment of the mechanical reproduction royalties

"The Producer and Distributor agree that the Distributor will be solely responsible for obtaining the necessary mechanical reproduction rights authorization needed to manufacture respectively distribute in the Territory (reference needs to be made) the Audiovisual Production (reference needs to be made) containing the Musical Work (reference needs to be made). Consequently, the Distributor will be solely responsible for the accounting and the payment of the mechanical reproduction royalties owed to the relevant copyright society."

#3 | CONTRACT BETWEEN THE DISTRIBUTOR AND THE COLLECTING SOCIETY

Context

In order to limit the risk of audiovisual productions being distributed which don't have the necessary mechanical reproduction rights authorization, the collecting societies could include in their contract with the distributor of the audiovisual production a clause demanding to consult the contract between the producer and the distributor in order to see who is held contractually responsible for the payment of the mechanical reproduction royalties.

If this contract doesn't clearly state which of the two parties will be responsible for the payment of the mechanical reproduction royalties or if the contract states that the producer is the responsible party, but the latter hasn't fulfilled this obligation, then, in those two situations, the collecting society will hold the distributor responsible for the payment of the mechanical reproduction royalties. This is called the principle of 'Second Mechanical Liability'.

Example of a 'Second Mechanical Liability' clause

"In the event that the Licensee (meaning the distributor) is of the opinion that, not the Licensee but the producer of the Audiovisual Production (reference needs to be made) is responsible for the payment of the mechanical reproduction royalties for the Exploitation (reference needs to be made) in the Territory (reference needs to be made) in consequence of the Licensee's contract with the producer of the Audiovisual Production, then the Licensee will without prejudicing any confidentially obligations, send digitally and without charges a copy of the relevant contract to the Licensor (meaning the collecting society).

If the Licensor cannot undisputedly deduce from that contract that the producer is responsible for the payment of the mechanical reproduction royalties, then the Licensee remains responsible for the payment of the mechanical reproduction royalties.

If that contract states that the producer of the Audiovisual production is responsible for the payment of the mechanical reproduction royalties, but the Licensor can demonstrate that no mechanical reproduction royalties have been paid to a relevant collecting society by the producer, then the Licensee will be held responsible for the payment of the mechanical reproduction royalties."

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