Mechanical Royalties coming from US downloads in Europe

The Management Committee held in Paris on 3 December 2015 was informed that some mechanical royalties have been paid to record producers following the exploitation of musical works in US downloads. Some European record labels confirmed that they had obtained statutory remunerations from iTunes for the mechanical rights related to lyrics and compositions in their sound recordings that were sold in the US. In this regard, the Management Committee advises all European societies to contact local record producers on this matter.

In the US it is customary for record labels to not only license the rights related to sound recordings to digital platforms such as iTunes, but also the mechanical rights related to the musical compositions and lyrics embodied in those sound recordings used in the US. The US compulsory licensing system - reflected in section 115 of the US Copyright Act - allows this practice under certain conditions [1] making the authors and composers dependent on the record labels to provide them with the appropriate remuneration for the use of their work.

The compulsory system does not apply in Europe. Whereas the US record labels and distributors are equipped to deal with the administration of mechanicals to right holders directly, this is not the case in Europe where record labels and distributors rely on collecting societies to perform that role.

Record labels do not have sufficient copyright data to correctly distribute the remunerations for US downloads to the right holders, and the local society can only collect from labels and distributors the rights for its own members as the representation contracts do not cover mechanicals from US downloads.

Therefore, in order to enable BIEM member Societies to receive the royalties due to their members, we have prepared a draft text to be included in a letter that can be sent to that effect by each society to its sister societies, as follows:

> *We have been informed that some European record labels have obtained a payment from iTunes for the mechanical rights related to the lyrics and compositions in their sound recordings that were sold in the US, based on the US compulsory licensing system as enacted in Section 115 of the US Copyright Act.*
>
> *However, these labels are not in a position to pay the remuneration to the concerned creators due to lack of information on such creators and need to rely on the authors' societies with such necessary information.*
>
> *Therefore, in order that our right holder members receive the remuneration due for the exploitation of their works which the labels have collected, we hereby ask you to collect from the labels in your territory(ies) of operation that have collected from i-Tunes mechanical rights in the US [and more generally from any other digital service provider that has collected mechanical rights in the US,] and to send us the rights due to our members [in the conditions set forth in our representation agreement / in conditions to be agreed further between us].*

If you agree with the above, we would appreciate it if you could send us back the present letter duly countersigned.

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[1] More information regarding this practice can also be found in the recently published report of the US Copyright office. See pages 28-30 and 131-132. http://www.copyright.gov/docs/musiclicensingstudy/

Ms. Laure MARGERARD
BIEM
20-26 Boulevard du Parc
92200 Neuilly-sur-Seine

Paris, March 8th, 2016

Dear Laure,

Please find below my opinion under antitrust law concerning the document "Mechanical Royalties from US Downloads » (hereafter the Document).

First of all, it is extremely important to note that the Document provides guidance to Biem's members in order to recover the royalties due to the right holders (authors and composers) . This is the fundamental role of the collecting societies and it is even their strict fiduciary duty . As such , this task is absolutely consistent with the traditional antitrust case-law which has always recognized the legitimacy of the core tasks of collective management . Moreover I do consider that societies (which are viewed as holding a dominant position by the competition authorities) could be challenged under antitrust law should they not perform their duties vis-à-vis their members . If record companies which have perceived royalties from iTunes in the Us are not in a practical position to distribute the monies to the right holders , it is obviously necessary for the collecting societies to intervene in order to protect the interest of their members.

Therefore as such the aims of the document do not violate any principle of antitrust law.

The second point is to check whether the course of action as proposed by the Document could stifle competition between the societies . We do know indeed that at this stage antitrust law views collecting societies as competitors in particular vis-à-vis right holders . However I do understand that in the present case there is no competition between societies since the royalties belong to one right holder who belongs for the relevant royalties to only one society . In other words, my understanding is that one and only one society (the one which manages the rights at stake) is legally entrusted with the task of distributing the royalties to is members . Against this background , the consequence is very logical : there is no competition between societies concerning the distribution of the royalties collected by the labels from iTunes . Against this background, collecting societies do not in this case collect the money from users but are only used as a tool by the record companies to distribute the money they collected to the authors/

rightholders. Those rightholders are the rightholders/members from each society and (through the mandate) the rightholders of other societies.

Consequently , the Document should not restrict in any way competition.

I remain of course at your disposal.

Sincerely yours.

Hugues Calvet