



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 decided that all European societies should 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 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, each society is allowed to collect on a non-exclusive basis from the labels in its territory of operation the mechanical rights that the labels have collected from digital service providers in the US and that each society will send the rights due to the members of each of her sister society to that sister society under the conditions set forth in the representation agreement between them.

Ms. Laure MARGERARD

BIEM

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Paris, October 25, 2016

Dear Laure,

Please find below my legal opinion concerning the modification of the scope of reciprocal representation agreement.

More precisely, the question at stake is to know whether it would be legal to modify the compulsory standard agreement (as provided by article 2.6) of the BIEM's statutes) in order to enable BIEM's members societies to receive the mechanical royalties due to their members for download made in the U.S, directly payed to U.S record producers).

These royalties when they are transferred to some European record producers and the modification of the standard agreement would allow to perceive the moneys from these producers in order to distribute to the relevant rightholders of the BIEM's members societies.

First of all, this modification is clearly possible under BIEM's statutes from the standpoint of French law (applicable under article 35) which governs these statutes.

Article 2.6) of the BIEM's statutes expressly confirm that the scope of the reciprocal agreement encompasses the management of mechanical rights.

In this respect, there is no doubt that the perception/repartition by a BIEM's society of mechanical rights held by a third party (record company) and belonging to a member of one BIEM's society does fall within the ambit of the reciprocal agreement provided by BIEM's statutes.

Moreover, according to article 2.1) of the BIEM's statutes, BIEM shall contribute to the defense and the development of copyrights as long as the mechanical right is concerned.

There is no doubt that this role covers the perception and the distribution of the mechanical rights at stake.

Therefore, there is no doubt in my view that the contemplated modification of the standard agreement is absolutely consistent with BIEM's statutes.

Secondly, the contemplated modification has to be reviewed under antitrust law. In this respect, the question to be addressed is to know whether this modification could stifle competition between BIEM's societies (it has to be recalled that the European Commission considers that societies are competitors vis à vis rightholders).

As such the contemplated modification belong to the basic tasks of collective management (which has never been challenged by the competition authorities) i.e. collecting and distributing moneys from the users.

I understand that in the present case, there is no competition between societies since royalties belong for the relevant royalties to only one society.

Therefore, my understanding is that only one society (the one which manages the rights at stake) is legally entrusted with the task of distributing the royalties to its members

I do not see any competition between society concerning the distribution of royalties collected by labels from any digital service providers such as Youtube and iTunes.

Consequently, I do not see any restriction of competition as a result of the contemplated modification.

However, theoretically, one could imagine that the society which manages the rights held by a record company located in an another territory of exercise than the one of this society could be willing to obtain directly the moneys from this record company located abroad.

One cannot exclude indeed that the competition authorities could consider that, as far as collecting the moneys due by the record producers, they could be a competition between societies.

In my view, there is a very straightforward solution to address this issue. It is sufficient indeed to insert in the standard reciprocal agreement a provision which would expressly state that the mandate is not exclusive as far as the collecting of the mechanical rights from the record company is concerned.

If you have any questions or comments on the above, do not hesitate to call me.

I remain of course at your disposal.

Sincerely yours,


Hugues Calvet