

Music and the Internet
by Alan S. Bergman

Internet Rights

The Internet is the hot topic these days; and use of music on the web presents new issues to owners, users, and lawyers. Music on the Internet involves the same two important copyrights that affect most other commercial users of music: performing rights and recording (or mechanical) rights. However, they are applied differently.

Traditionally, performing rights essentially relate to broadcasts and live performances while mechanical rights relate to recordings. An Internet recording is a much broader concept than the standard CD and contemplates encoding data on a server or series of servers, streaming (like a broadcast), and possibly downloading. Viewed another way, this process is one of uploading music to the website, listening to it (streaming), and then possibly downloading it by making a copy on your computer – or, in the case of custom compilations, on the computer of your vendor, who then makes a copy for a fee and sends it to you.

Conflicts

Performance and recordings overlap when it comes to the Internet, especially in the area of streaming or webcasting. “On demand” streaming means the listener can select what to listen to and when to hear or view it after it is recorded. This differs from streaming that is not on demand, which most often occurs via web radio. Streaming is further divided into events, which are available “live” or “live live.” While “live” is usually a live concert recorded for later transmittal, “live live” refers to an Internet broadcast of an event *while* it is taking place.

The Harry Fox Agency, which represents most U.S. music publishers, claims that music which is streamed on demand or downloaded creates not one but as many as *three* recording situations which should be licensed. First encoding on the server is a recording process for which a royalty would be payable under the Copyright Law if that recording exists for more than six months. Next, “on demand streaming,” means that a copy is

electronically transmitted to the viewer: that action replaces a sale and constituted a recording for which a mechanical royalty is payable. The download, if it takes place, is yet another recording requiring licensing.

American performing rights societies, ASCAP and BMI take the position that the streaming, whether on demand or not, is a performance - and therefore they are entitled to a performance fee for those rights, regardless of whether a mechanical royalty is also payable. They also argue that a download is a performance, as it requires a digital transmission in order to get the music to the end user.

But contents-providers point to the fact that no economic benefit is obtained from the streaming; and if there is a royalty payable for encoding and streaming as well as for downloading, plus a payment to the performance rights societies for the performance, they're paying *four* times for the same use. U.S. courts have yet to rule on these issues, and lawyers are divided as to how it would come out. The music business currently attempts to work it out through negotiations.

To those of us who deal with these issues all the time, it seems that publishers and their representatives in the mechanical and performing rights areas are not sure which way music will ultimately be used on the Internet. They are therefore trying to stake out positions that will protect their rights whichever way the technology goes. Fox and its publisher members are worried that at some point the streaming of music will be the only method of distribution - because if music is available everywhere, quickly, cheaply, and on demand, then why would anyone need to buy it? Performing rights societies are worried that downloads (such as MP3) will dominate the future and lessen the value of performances such as broadcasts. They are more concerned about issuing some sort of license to establish their rights than they are about generating income from an area that everyone knows produces far more publicity than income.

Potential Solutions

ASCAP has a blanket form license for Internet use whereby any licensee is free to use any of the compositions in the ASCAP catalog. The payment under that license is a

percentage of advertising income or a percentage of investment, whichever is more. BMI has a similar license. This is the same way performance rights are licensed in the broadcast industry: the societies are trying to apply those same methods to the new technology. This “square-peg-in-the-round-hole” approach may not work in the Internet world: the potential licensees, unlike radio and TV stations, have not grown up with the concept of paying for music with a percentage of income. The thought of actually having to pay based on their investment (which typically far exceeds their income) is totally objectionable.

Complicating this process is the fact that music on the Internet is transmitted simultaneously throughout the world; so a composition streamed in the U.S. might be downloaded or accessed in Europe or Japan. In the world of international music publishing, mechanical rights agencies and performing rights societies have had many years to work out reciprocal arrangements in their respective territories because international copyright laws have had a chance to develop in an interrelated way.

This is not the case on the Internet. The U.S. in one of the first countries to pass a law The Digital Millennium Copyright Act (DMCA) (an amendment to the U.S. Law) which actually puts in place laws and procedures to deal with licensing of web broadcasters and Internet Service Providers. This does not yet exist in Europe. With the emergence of the European Union (EU), Europe is trying to deal with these issues on a community-wide basis - a slow process after which each country must adopt its own laws consistent with this consensus.

Since 1909, the U.S. Copyright Law has included what is known as a *compulsory license* for recordings. This means that once a composition is recorded, anyone else has the right to record it without permission so long as the copyright owner - usually the publisher - is paid a statutory royalty. (For record sales, this royalty is currently 7.55¢ per composition of five minutes or less in length and 1.45¢ per minute for a longer composition.) Because the concept of compulsory license quite clearly applies to the Internet, the Harry Fox Agency cannot deny the use of its music for streaming or downloads. The only issue is

the royalty payable: that is determined by a Copyright Arbitration Royalty Panel (CARP) established under the DMCA.

This new Law also prescribes specific guidelines for content on a web broadcast-covering the number of cuts from an album or by an artist that can appear in any one program - and established a compulsory license for web broadcast. The Recording Industry Association of America (RIAA) is encouraging such broadcasts to secure a statutory license as well, but the rate to be paid under this license is also still being negotiated by another CARP created under the Law.

In Europe the mechanical royalty rate is a negotiated one that is higher than the U.S. rate. This leads to open competition between Fox and its European counterparts when dealing with international downloads and large multi-national publishers. While one might expect Fox would lose this battle to its higher-paying European counterparts, it gains support from the fact that most of the big “e-commerce” music sites (such as “e-music” and “MP3.com”) are U.S.-based. The incredibly efficient accounting possibilities offered by the Internet allow these companies to offer monthly, weekly, and possibly even instantaneous accounting to U.S.-based publishers - as compared to the one or two-year delays associated with European Societies such as GEMA in Germany and SACEM in France.

Although the law, both domestically and internationally, is evolving and enforcement is being pursued zealously by Fox, the RIAA, and performing rights societies all over the world, the establishments of rates and methods of collection and distribution still remain to be put in place. Therefore, much of the music used on the web - including music Webcasted, streamed on demand, or downloaded-is not being licensed at all; and to a great extent the owners of content remain uncompensated.

Jazz Applications

These are interesting times for lawyers, rights organizations, content owners, and the jazz community. Much being written about the so-called “loosening of the stranglehold major labels have over artists,” –a loosening which would certainly benefit Jazz artists long

ignored by major labels. Overall sales of Jazz on the web are far greater on a percentage basis than at the retail level, and the same goes for classical music. There is an obvious correlation between an interest in cutting-edge technology and cutting-edge music like Jazz.

Jazz education also lends itself to the interactive possibilities of the Internet; and with the advent of broadband access, we should see more of this - *which in turn will lead to more complicated rights administration, already a chronic problem in Jazz regarding areas such as photocopying of manuscripts for teaching purposes and the long-standing controversy surrounding the copyright status of Jazz arrangements and solos. I will cover these and other areas in subsequent articles and will also endeavor to update regularly the all-important evolution of the administration of rights for use of music on the Internet.

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