

Negotiations and Licensing Practices Between Collective Management Organisations and Broadcasting Organisations in Europe

Lars Henriksson
Legal Counsel
STIM

Some background

- Media licensing is usually a financially very important licensing area for collecting societies
- Broadcasting organisations are generally very large music users
- Broadcasting organisations may have several million households as potential as well as actual audiences
- Broadcasting organisations and collecting societies often have or will have a long relationship
- In a sense a co-dependence

Some background

- Collective rights management has for decades proven to be a fundamental cornerstone in relation to broadcasting organisations
- In spite of not always sharing each others view on the value of music, more often than not a balance is reached and agreements entered into
- The relationship facilitates for a modern and efficient handling of rights in relation to television – securing access to repertoire for the broadcaster and securing income for the composers

Mutual interest

- Collective rights management organisations and broadcasters thus share mutual interests and are co-dependent of each other
- The broadcaster needs to obtain legally valid licenses for music, covering the need of a very large music user
- The Collective rights manager has an interest in putting its repertoire to the markets disposal for a fee, thus creating income for its rightsholders

Mutual benefits

- The collective rights managers purpose is to simplify and enable for the market to obtain legally secure licenses for music use at a reasonable price level
- Instead of having to reach individual agreements with each and every composer, the broadcaster can obtain his license from one party
- Both parties thus benefit from the efficiency this system provides for
- In some territories, extended licensing schemes exist giving legal certainty to broadcasters

Collective Management – certain traits

- Collective management differs substantially from other businesses
- Collecting societies administer other people's rights and thus money – not our own
- Thus the collecting society needs to respond to rightsholder demands
- Dualistic function – on one hand responsibilities to the rightsholders and on the other services towards the market
- Rightsholder demands and music users' wishes often in direct conflict
- The influence of competition law

Copyright Law ./ Competition Law

- Collective Management Organisations is in a dominant position
- Copyright law governs the rights themselves
- The administration however is under the scrutiny of competition law

Copyright ./ Competition Law

- Competition law conflicts appear in cases where there are competition limiting concerted actions and/or where a dominant party abuses its dominant position
- Dominant position is abuse in cases of discrimination and/or imposition of unfair trading conditions, for instance overpricing
- A number of cases involving collective management in Sweden has been triggered by competition law infringement claims

Reaching the agreement

- Some european countries has a copyright tribunal system – tariffs can be "pre-approved" or tried after the fact
- Other european countries lacks such a system – tariffs are reached via negotiations or (if such negotiations fails) litigation
- In cases of litigation – often preceded by a revokation of the rights (if an extension) or a refusal/banning of using the rights
- May trigger further involvement from competition law authorities

Reaching the agreement

- Of all terms and conditions the tariff is the essential point of any agreement and constitutes the foundation of the agreement
- However, since the tariffs generally are based on the amount of used music, music reporting terms and conditions are also crucial
- Reporting crucial not only to establish the tariff but also in order to facilitate and secure that the rightsholders receives distribution
- Reporting systems often built in co-operation with broadcasters in order to secure reporting quality and standard

Administiring the agreement

- Any agreement that are reached needs to be administered further
- Broadcaster agreements often extensive and complicated in scope
- Administrating brings the licensor and the licensee closer together since it should lie in both parties interest that music reporting, invoicing, payment etc functions smoothly
- Routines formed around the administration of the agreement will further develop over the years under which the relation is maintained

Fee systems – free commercial television and radio

- The most common fee system used in Europe and indeed the world is the percentage fee system (royalty) – the broadcaster pays a percentage of its advertising income
- The percentage fee/royalty fee can be constructed in many various ways, but usually constructed with a music amount comparision to the percentage level – the more music the higher the percentage
- A number of variations when it comes to calculating the revenue subject to royalties – which income that is deemed relevant for such calculation

Fee system – pay tv system

- Another revenue based fee system is applied on high pay TV in the form of a percentage on the subscription fees
- Variations between countries in the view whether pay TV is competing with free commercial ad funded TV

Fee system – public service television and radio

- Usually different sets of fee structures for public service broadcasters as opposed to commercial ones
- Not possible to apply a percentage of revenue. Need to find alternative fee structures
- In Sweden, STIM has applied a comparison model to the commercial broadcasters in order to find an appropriate level
- Quite often that public broadcasters are the first ones established in a certain region which often has lead to a long lasting relationship between public service broadcasters and collecting societies

Relationship between public service and commercial broadcasters

- Even if not comparable regarding the respective broadcasters' businessmodel and financing, difficult to justify too large differences
- Again, as an example, STIM is obliged to treat commercial and public broadcasters equally in relation to fees, administrative burdens etc
- It is argued that commercial and public broadcasters compete over the same viewers

Some general traits in licensing schemes

- The fee structure is usually based on an evaluation per channel, i e even when negotiating with a large organisation broadcasting a number of channels the fees and music reporting conditions are established per channel
- Since larger broadcasters also have more offerings than via a television channel, the fee structure is furthermore evaluated per platform, for instance mobile networks, websites etc
- Normally one tries to collect all the offerings within one agreement, since a lot of conditions – for example music reporting quality – will be the same irrespective of channel

Some general traits in licensing schemes

- Broadcasters are often keen trying to license all channels and all platforms for one joint price
- Important to bear in mind the different circumstances for the various channels and platforms in the broadcasters offerings and keeping those separated in negotiations
- Arbitration clauses are often part of broadcast agreements in order to avoid costly litigation
- In case of international broadcaster, clauses regarding applicable law and court system are often present in the agreement

Some general traits in licensing schemes

- Audit clauses are important parts of any such agreement in order to enable the collective rights manager to secure correct music reporting and financial accounts
- When drafting clauses regarding non-disclosure to third parties, it is important to bear in mind that the collective rights manager needs to be able to disclose terms and conditions to its rightsholders (including sister societies)

If push comes to shove...

- Any claim regarding tariff made against broadcasters when the parties cannot agree voluntarily needs to be resolved in court (or in the Tribunal system)
- Easier when the tariff in question is established and accepted by other players in the market
- More difficult when the collecting society is establishing a new tariff in which case it may be of importance to have an international outlook regarding tariff levels and also what levels that the rightsholders wishes to accomplish
- Also difficult in cases where a collecting society wishes to raise the tariff level in which case one needs to show objective criterias justifying the raise

If push comes to shove...

- In any case important to make the claim and invoice according to the tariff combined with claims for interest for late payment
- Music prohibition - i e not give the broadcaster any rights, needs however to be proportional
- Injunction orders may be sought and issued directed towards the broadcaster
- On account payments awaiting final verdict/decision or finalised agreement
- Court cases may take time

A few words on neighbouring rights management

- When it comes to broadcasting, neighbouring rights are normally handled collectively by for instance local IFPI organisations and performer organisations
- Radio – recorded music represent a very large portion of music performed, and thus a large representation
- Television – recorded music (if not a music television channel) represents fairly low portion of music performed. Theme songs, music in drama production, music in films

Tariff levels in Europe

- Important to bear in mind that tariffs is not always easily comparable
- Revenue subject to royalties, deductions for sale costs, grace periods, deduction for certain periods of time and certain levels, different tariff schemes, minimum tariffs etc
- The tariff construction often takes into account the music amount/share and audience establishing the level of percentage
- Sometimes also including more rights than authors rights
- Percentage levels thus ranging

By way of example – STIM

- STIM tariff television:

Music share	Percentage	Music share	Percentage
19 – 22 %	1,4 %	50 – 52 %	3,4 %
23 – 25 %	1,6 %	53 – 55 %	3,6 %
26 – 28 %	1,8 %	56 – 58 %	3,8 %
29 – 31 %	2,0 %	59 – 61 %	4,0 %
32 – 34 %	2,2 %	62 – 64 %	4,2 %
35 – 37 %	2,4 %	65 – 67 %	4,4 %
38 – 40 %	2,6 %	68 – 70 %	4,6 %
41 – 43 %	2,8 %	71 – 73 %	4,7 %
44 – 46 %	3,0 %		
47 – 49 %	3,2 %		

Example - GEMA

- GEMA tariff television:

Music share	Percentage
0 – 10 %	0,32 %
10 – 20 %	0,96 %
20 – 50 %	2,25 %
50 – 75 %	4,02 %
75 – 100 %	5,63 %

In conclusion

- Collecting societies and broadcasters have a lot of shared interests and in some sense co-dependent
- Tariffs in Europe varies in both levels and constructions but are generally a percentage of revenue depending on the channels music share
- Apart from the tariff the terms and conditions governing music reporting is imperative both in order to establish the tariff and facilitate distribution
- There are advantages in assessing a broadcasters offerings channel per channel and platform per platform

In conclusion

- Legal battles are sometimes necessary and may be a long process why also options of intermediary legal actions such as injunctions could be contemplated
- When making claims it is an advantage to have as detailed terms and conditions ready as possible, preferably a draft agreement
- Also important to combine the claim with claims for interest on late payment
- On account payments important to reach even if the final tariff is not agreed to as of yet



Thanks for your kind attention

Lars Henriksson
lars.henriksson@stim.se
+46 8 783 95 09