Copyright World
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SETTING THE VALUE
WHAT IS THE CORRECT ROYALTY TARIFF FOR DOWNLOAD MUSIC?

Copyright itself is of little value. It is only if someone wants to use a protected work that a transaction may take place and a market price will emerge. However, for new forms of exploitation, this can be a difficult and painful process. Consider the current move to offer traditional broadcasting content via telephone wires, made possible by the rapid evolution of broadband technology. Should the internet distributors pay the broadcasters for exploiting their content, or should the broadcasters pay the internet distributors for making a wider audience available? Nobody knows yet. For digital downloads of music, a booming business since Apple launched iTunes at US$0.99 per song in 2003 (Europe 2004), royalty tariffs are currently the subject of proceedings before the UK Copyright Tribunal.

For individual transactions, the market will eventually decide. Exchanges between willing buyers and sellers may indicate that I write this column for free while you pay the publisher for it (even though I own the copyright). For collective transactions, or licensing schemes, the picture is confusing. In the music industry, longstanding traditions have arrived at hundreds of different tariffs. For example, the “mechanical” rate at which a label pays the copyright owners for the pressing of a recording of a work had been set for many years at about 9% of the published price to dealer (ppd) of a CD (for most of Europe collectively negotiated between BIEM and IFPI). In Asian countries, royalties may be as low as 3-6% ppd, while in the US (set by statute) and in Canada (collective bargaining) the mechanical rate is calculated per track, amounting to the equivalent of about 6-8% ppd. For radio broadcasting of copyright works of music, rates are generally calculated as a percentage of the station’s net revenues (between 1% and 6% depending on a broadcaster’s music content and turnover). For TV, tariffs may derive from a rate for 30-second slices of broadcast content while for public performances, the capacity of the venue provides the yardstick. Even apparently transparent rates can be clouded by “payola” practices under which labels pay broadcasters for airplay, using dubious constructions such as “promotion payments” via third parties.

Now tell me: which of these practices value copyright correctly? Quasi-judicial bodies, such as the Copyright Tribunal (UK), Copyright Board (Canada), Congressional Copyright Arbitration Royalty Panels CARP (US) or Patent Office Arbitration Panel (Germany) have the unenviable task of setting such royalty rates, either by statute or in the arbitration of disputes. An important current reference to the UK Copyright Tribunal is a dispute between the record industry and digital music sellers on the one side, and music publishers, composers and songwriters on the other, about the tariff payable for digital downloads. The MCPS/ PRS Music Alliance, the UK collecting societies acting for music publishers and authors, have offered since 2002 a Joint Online Licence (JOL, covering both mechanicals and performing rights), initially at a rate of 8% of any download sale. This was advertised as a discount to facilitate the market, and an increase to 12% had been demanded from January 2006.

In June 2005, digital services such as Apple’s iTunes store, Napster and AOL, mobile phone networks such as Vodafone, and the record industry’s own services (eg Sony Connect, MusicNet) challenged the licence, demanding instead a decrease in the rate to 6.5%. According to record industry trade association BPI, leading the UK Copyright Tribunal reference, the UK mechanical publishing royalty of 8.5% ppd amounts to 6.5% of the retail price of a CD. The Music Alliance’s new online tariff therefore would almost double this benchmark. In a counter-submission, filed with the Tribunal last month, MCPS/ PRS claim that record labels earn between 40 and 50 pence from a 79p download sale, far in excess of conventional retail margins.

According to the UK Copyright Tribunal's standard of review, a licence must be "reasonable". In common law jurisdictions, this is generally thought to mean: emulating a market rate. In Europe, similarly, the ECJ construed remuneration for the use of phonograms as equitable "in the light of the value of that use in trade" (SENA v NOS, Case C-245/00, 6 February 2003).

Under section 129 of the UK Copyright, Designs and Patents Act (CDPA) 1988, in determining what is reasonable the Tribunal must have regard to "(a) the availability of other schemes, or the granting of other licences, to other persons in similar circumstances, and (b) the terms of those schemes or licences" – in other words: comparables or proxies. However, as my brief review of the historical accidents of existing tariffs indicates, we cannot presuppose that any of these rates is one that would occur in a market transaction between willing individual buyers and sellers, as they are typically the result of collective bargaining between two monopolists (a collecting society, and a trade association). Market emulation appears so elusive that economists come to wildly differing conclusions about what would constitute an efficient royalty rate.

In 1988, after the CDPA was passed, the UK Monopolies and Mergers Commission (now Competition Commission) published a "Report on Collective Licensing" arguing that the Tribunal should not have the function of determining where the public interest lay in any dispute referred to it (cf. Laddie et al. The Modern Law of Copyright, chapter 13). However, it seems to me that in the absence of an acceptable alternative standard of review, that this is precisely what the Tribunal must do.

The current 8% Joint Online Licence remains frozen while proceedings take place. Hearings before the Copyright Tribunal are not expected before October 2006. I shall report in due course.

About the author
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