

MORRISON & FOERSTER LLP

# Digital Music Delivery: Navigating One's Way Through a Legal Minefield

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# Forms of On-line Music Business

- Streaming, *e.g.*,
  - ◆ Webcasting
    - Simulcasting (of traditional stations)
    - Webcasting live events
    - Web-specific channels
  - ◆ On-demand
    - Sampling
    - Celestial juke boxes
- Offering downloads

# Fundamental Issues

- For each activity
  - ◆ What rights must one clear?
  - ◆ For which territories?
  - ◆ Through whom?
  - ◆ What are the real risks, and how much risk and uncertainty will you tolerate?

# Basic Subject Matter and Rightholders

- Two types of protected subject matter
  - ◆ Underlying *musical work*
  - ◆ *Sound recording* (phonogram)
- Two categories of rightholder
  - ◆ *Author* (composer, lyricist, arranger, etc.)
  - ◆ *Performer* and *producer*

# Relevant Rights

- Authors' rights
  - ◆ Reproduction right (“mechanicals”)
  - ◆ Communication to public/making available
    - WCT Article 8
    - Copyright Directive Article 3
    - Existing EC Member State laws (in varying formulations)
  - ◆ Distribution right
- Neighbouring rights
  - ◆ Performer and producer of phonogram have analogous rights

# Overview of the Rights Implicated

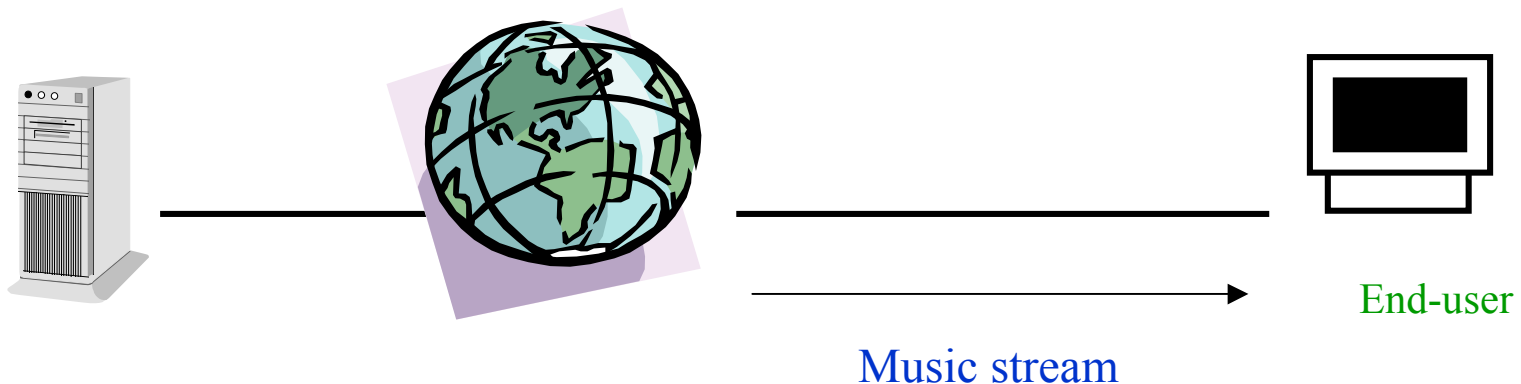
<i>Types of on-line music</i>	Authors' copyrights (in composition and in sound recording embodying the composition)			Performer and producer's neighboring rights (in sound recording)		
	Reproduction right (mechanical license)	Communication to the Public/Making available (performance license)	Distribution right (distribution license)	Reproduction right (mechanical license)	Communication to the Public/Making available (performance license)	Distribution right (distribution license)
Music download	X	X	-	X	X	-
Music streaming	?	X	-	?	X	-

# Who Manages the Rights?

- Professional composers and songwriters usually transfer their economic rights to a *music publisher*
- Music publisher in turn often entrusts management of these rights to a “mechanical rights” *collecting society*
- Neighbouring rights of performers and producers sometimes managed by “performance rights” collecting societies
- But, major labels may self-manage neighbouring rights, especially on-line rights

# Example: Streaming

- Example: Tokyo on-line radio station engages in webcasting from Japan
- What rights, if any, must be cleared for Europe?
- From whom can you obtain those rights, and under what circumstances?





# Streaming Legal Analysis

- Which law applies?
- Where does the infringing act occur?
- Who engages in the infringing act?

# Streaming Legal Analysis

- Likeliest result:
  - ◆ European courts will apply their own laws
  - ◆ Infringement will be deemed to occur in Europe, and communication to public/making available license will be needed for every European country (and beyond)?
  - ◆ Under Copyright Directive Article 5.1, neither network copies nor end-user temporary copies are likely to need reproduction (“mechanicals”) license

# Sources of Rights

- Does the streamer need to obtain the communication to public/making available rights for Europe from each national collecting society?
- “Santiago agreement” may be a step forward, but a limited one
  - ◆ Covers only authors’ rights, not performers’ or producers’ rights
    - “Bortloff Agreement” on producer’s rights
  - ◆ Serious competition law issues

# Competition Law Concerns

- Collecting societies' licensing practices
  - ◆ Customer allocation in Santiago eliminates competition among collecting societies
- Collecting societies' membership rules
  - ◆ Members' inability separately to license on-line rights
- Concentration in on-line music industry
  - ◆ AOL/TW, Vivendi/Seagrams, Pressplay, MusicNet

# Competition Law Concerns

- Microsoft's bundling of Media Player into operating system
  - ◆ Leveraging into server market
  - ◆ Effect on competing standards
  - ◆ Limited support for most popular format (MP3)
- Anti-competitive aspects of levies
  - ◆ Breach of Article 82 through excessive pricing, discrimination, limits on technical development

# Conclusion

- Perhaps progress is being made, but development of on-line music market is being hindered by:
  - ◆ Uncertainty about choice of law
  - ◆ Uncertainty about which rights are required for which territories
  - ◆ Confusion, conflict and secrecy about who can grant which rights for which territories, and under what conditions
  - ◆ Anti-competitive behaviour, especially by European collecting societies