

Why are the physical and digital distribution of music different ball games?

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Laws governing both football and cricket relate to ball games. They are otherwise entirely different. Football simply isn't cricket. Records sold by distributors to bricks and mortar retailers and etailers for sale to customers acquire their rights under a distribution agreement (generally exclusive) between the label and the distribution company. Rights granted are simply for the distribution and sale of physical product determined by Term; the Territory permitted for sale; the Distribution Fee; and provisions governing stock movement; returns; accounting and payment etc. It is a commercial agreement which so far as the 'Grant of Rights' provisions are concerned could easily apply to tins of baked beans as to records.

Digital distribution of music is, however, a different can of beans altogether. It involves rights of duplication and communication to the public being made available. Music is made available for digital downloading and for streaming by way of licence (generally non-exclusive) between label and distributor / aggregator / ISP – such licenses in many instances being a mix of all these things. The rights that the label has to grant to enable these forms of exploitation are not only by way of a licence of copyright in the recording; but also a licence of ancillary / related rights. Major issues facing each label are:

- Territoriality. Which countries it is willing / able to grant licences for – in licensing records internationally the reservation of digital rights becomes an ever more complex issue.
- Rights Granted. Primary rights – downloads; subscription; realtones. Secondary rights – right to digitise and encode recordings, artwork, photos, metadata (label copy; catalogue numbers etc). To ensure that it has this whole bundle of rights – often the right in the recording is clear – but the rights relating to the artwork and photos are not.
- Underlying Rights. Music copyright ('publishing') – either the obligation to obtain a licence and make all payments rests with the licensee or it remains with the label. In many deals originating in the USA the 'publishing royalties' are to be paid directly to the label. There is, however, no legal

entitlement for the label to be paid such monies – unless the compositions in question are licensed on that basis from the relevant publisher. The label may also have to warrant that the artist has waived his 'moral rights' (ie with respect to any changes that may be made to the recordings or for lack of accreditation to the artist).

- Delivery. The additional cost in delivering encoded and digitised recordings together with the metadata – liability has to be determined.
- Royalties. Accountings and payments from the licensee for downloads will generally be based on an agreed published dealer price while streaming / subscription monies will be based on a percentage of defined income under an agreed formula. Dependent on the terms of the label / artist recording agreement the label will pay the artist a 'record' based royalty for the downloads and a percentage of income for the streaming – unless the label / artist agreement is entirely based on net receipts.

It is undoubtedly the case that the digital game is far more complex. But then the same thing may be said about cricket.

Any views expressed are personal opinions of John Benedict who appears courtesy of Benedicts, Denton Wilde Sapte and AIM.