

Negotiating Music Licensing and Structuring Deals: Digital Sampling, Royalty Rates, Music Copyright

TUESDAY, AUGUST 7, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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INTRODUCTION TO MUSIC CLEARANCE

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MUSIC CLEARANCE

Definition

- Music Clearance means obtaining all necessary permissions and licenses covering the use and inclusion of specific copyrighted songs and musical recordings in a particular project, such as films, television programs, instructional videos, etc.
- There is a separate type of blanket music clearance concerning the “batch-clearing” of compositions and recordings that David Oxenford will be speaking about in his portion of the presentation.

COPYRIGHT PROTECTION FOR MUSIC COMPOSITIONS AND SOUND RECORDINGS

- Music clearance is necessitated by the fact that music compositions and sound recordings are protected by copyright.
- Public domain musical works do not require clearance.
- It is critical to remember that there are two separate copyrights implicated by music clearance – (i) the copyright in the music composition; and (ii) a separate copyright in the sound recording. These are often referred to as the two “sides” of music clearance.
- Example – “Roll Over Beethoven” by Chuck Berry as performed by The Beatles.

Duration of Music Copyrights

- If a music composition was first published prior to 1923 (that is in 1922 or earlier), it is public domain in the United States.
- The duration of copyright for works first published in 1923 through 1977 is 95 years from the date of publication.
- The duration of copyright for works first published in 1978 to the present, is the life of the author plus 70 years.
- Copyright durations vary from country to country, which impacts global clearance.
- Sound recordings are a special category of copyrighted works. Generally one should never assume that a sound recording is PD.

EXAMPLES OF MUSIC CLEARANCE PROJECTS

- The 2011 Royal Wedding of William and Kate
- 2015 U.S. Papal Visit
- The Motion Picture “Nixon”
- Dick Clark’s “So You Think You Can Dance”
- Singing Figurines from Publisher’s Clearinghouse
- Embroidering of lyrics to “How Great Thou Art”
- Inclusion of “This Christmastide” in Jackie Gleason film “The Wool Cap”, TNT Movie of the Week

Typical Fees and Rates

- Fees vary widely depending type of use, license duration and popularity of music composition and sound recording.
- Kohn on Music Licensing by Al Kohn and Bob Kohn is considered the “bible” for clearance issues, as well as “typical” rates.
- Publishers are used to fielding unusual requests.

THEY WANT PERMISSION
TO SCRATCH YOUR LYRICS
ON TEN PIECES OF TOAST
AND SELL THEM AS LIMITED
EDITIONS ON E-BAY.



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Creative work-arounds to facilitate music clearance and reduce licensing fees

- Re-recording
- Indy Bands
- Music Libraries
- PD music compositions
- “Step” deals
- Commissioned music

Complicating Factors

- Use of music from video footage
- Multimedia Presentations

Important License Terms for Licensees

Warranties and indemnifications.

Assignability

Inadvertent failure to properly credit

Music Licensing - When One Song Won't Do....

David Oxenford

Strafford Publishing Webinar

August 7, 2018

What We'll Talk About

- What to Do When You Need to License More Than One Song.....
 - Bars, Restaurants, Stadiums, Retail Outlets
 - Music on Hold, Background Music
 - Radio and TV
 - Music Streams on Websites
 - Digital Music Services
- Who do you call and who do you pay?
- How rates are set
- Pending issues in Congress and the Courts

Who Makes the Rules on Music Rights?

- No central regulatory agency
- Copyright Office for the most part does not make law, or even enforce it – registers copyrights, other administrative functions, and makes policy recommendations to Congress
- Congress set most rules through statute
- Some rules set through antitrust laws
- Some rate decisions by Copyright Royalty Board and “rate courts”
- Lots of agreements between parties
- Lots of litigation
- States even get involved on a few issues

Music Royalty Basics

- Rules made by Congress are broad and create much confusion in the use of music
- Two copyrights in all recorded music
 - One in the words and music (the “musical composition” or “musical work”)
 - One in the recording itself (the “sound recording” or “master recording”)
- Musical work usually owned by songwriter or publishing company, sound recording by recording artist or record label

Music Royalty Basics – Part 2

- Different rights in the musical work and the sound recording are recognized by copyright law
 - Right to Perform the work in public – think radio, TV, music in bars and restaurants
 - Right to reproduce the work – think CDs and records
 - Right to distribute the work – right to sell
 - Right to make derivative works – right to put new words to old tune, to use song in connection with other medium (like an “audio-visual work” – a movie, TV show, music video)
- Rights complicated because each of these rights are usually administered by different groups with different rules on who pays what for what service

Further complications

- Rights drawn up for an analog world – last major revisions of the law in Digital Millennium Copyright Act in 1998, and that hardly contemplated today's music world
- In analog world, it was clear what was a reproduction versus a public performance
- In the digital world, much more complicated
 - Digital download – functionally like pressing a record or CD
 - Webcasting – functionally like a radio station
 - Conditional download? On-demand stream? Personalized stream?
 - Even in webcasting, copies made in server, buffers, caches – in downloads transmissions to ultimate recipients

Public Performance – Musical Works

- When music is performed to the public (outside circle of friends and family), public performance arises
 - Whether distributed simultaneously or not
 - Public performance rights exemptions, §110, playing radio or TV (including cable or satellite), with no admission charge and:
 - “Homestyle” exception for single device to entertain staff
 - Small business exceptions
 - Retail space less than 2,000 sq. ft.
 - For audio, no more than 6 speakers, no more than 4 in any one room
 - For TV, no more than 4 TVs, no more than 1 in any room, no bigger than 55 inches, or
 - Food & Beverage business less 3,750 sq. ft. with same limits on number of speakers or TVs
 - Other exceptions for classroom use, religious music in religious service, fraternal or veteran associations playing music to their members, government organizations at county fairs, and similar nonprofit uses – all very limited and specific – be sure to check limitations

Public Performance – Who Do You Pay?

- Songwriters and publishers generally assign collection rights on non-exclusive basis to Performing Rights Organizations who generally grant a “blanket license”
- PRO’s job is to collect performance royalty – music users pay to PRO, get rights to all songs in PRO “repertoire”, and PRO distributes royalties to songwriters and publishers
- In most countries there is one PRO
- In the US, there have been three – ASCAP, BMI, and SESAC – now a 4th has formed – GMR
- If you pay all four, you generally have the rights to everything you need – though some concerns that more PROs will be coming

Who Sets PRO Rates?

- ASCAP and BMI governed by antitrust consent decrees – must treat all songwriters and all services that are similar in the same way
- If services can't agree on rates, go to “rate courts” – right now, specific judges in US District Court in SDNY, one for ASCAP, one for BMI
- SESAC has been unregulated – until recent antitrust cases brought by radio and TV industry – settled with agreement for arbitration to set rates if no voluntary agreement, but only for radio and TV so far
- GMR – litigation right now with radio industry over whether they should be governed by similar principles
- Rates are set based on the kind of business involved and how it uses music – some pay on percentage of revenue, some flat fees, some based on number of admissions – generally ASCAP and BMI have public rates as they must treat all similar users in the same way – SESAC and GMR can be a negotiation (though they have usual rate card but there can be some negotiation for special circumstances)

Public Performance – Sound Recordings

- In most countries – collection organization for these too – sometimes called “neighboring rights”
- In US, there has never been a public performance right for sound recordings except in the digital world
 - Copyright in fixed expression of creative work – initially questions of whether a performance of a sound recording was sufficiently creative
 - Then general agreement that broadcast was like a commercial for the song – promotional value of recording
 - Digital right granted because fear of copying of songs – “perfect digital copies”
- In the last decade, arguments over whether analog broadcasters and others (bars, restaurants, retail) should pay – but no requirement yet

Public Performance – Digital Sound Recordings

- “Noninteractive” services – includes broadcaster’s simulcast streaming have “statutory license”
 - Rates Set by Copyright Royalty Board
 - Collected by SoundExchange
 - Pandora and other digital services can be noninteractive if listener can’t pick the next song, and rules called “performance complement” are met
 - Gives music service rights to play all songs legally recorded in the US
 - Rates about 1/5 of a penny per song per user for webcasters – different rates for satellite radio, digital background music services, cable radio
- Interactive – deemed to be more than just a public performance
 - Rates negotiated with the copyright holder
 - Usually negotiations with the record company – but some artists have rights to veto licensing of their songs to digital services and others

Other Music Uses

- Using music in video productions, podcasts, or any on-demand service (like Spotify or Apple Music) usually requires direct licenses from copyright holders – reproductions, distributions and derivative works
 - The process discussed in the first part of the presentation
- Clearances needed for both musical work and sound recording – and sound recording owners don't need to give it
 - Some sound recording copyright holders withhold their music – Prince just became available on on-demand services last year, the Beatles just over a year before that
 - Musical works statutory license is available for downloads and on-demand streams – but not “synch rights” for videos
 - No one-stop clearing house for most of these rights – yet....

Fair Use and User-Generated Content

- Fair Use – No royalties needed for certain uses that have public benefits
 - Fair use analysis – looks at 4 factors – rarely clear cut answer
 - Nature of work
 - Amount of work used
 - Nature of use
 - Effect on copyright owner’s ability to monetize
 - No blanket exception for 30 seconds (or 15 seconds or even 5 second clips)
- User-generated content – safe harbor for website owner from copyright violations but need to take certain steps including terms of use that prohibit infringing uses, don’t actively encourage it or profit from it, register person to get take-down notices with the Copyright Office, and take down material when you get proper notification

Hot Legislative and Litigation Issues

- Music Modernization Act – currently pending in Congress – one version passed the House, another adopted by Senate Committee and waiting full Senate consideration
 - Sets up collective to collect mechanical royalties for musical works from on-demand music services – and statutory royalty rate setting by CRB
 - Gets rid of single judge to administer all ASCAP and BMI consent decree cases
 - Requires Congress to get involved before changes in consent decrees
 - Creates music database and limits rights to sue unless registered
 - Resolves issues with pre-1972 sound recordings
- Other copyright reform floating around in Congress
 - Structure of Copyright Office
 - Bills on broadcast sound recording performance royalty
 - Looking at user-generated content like YouTube
- Court cases
 - Fractional licensing
 - Spotify reproduction rights
 - GMR antitrust coverage

For More Information

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