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The Basics of Music Licensing in Digital Media: 2011 Update

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Businesses that are involved in digital media use music in many ways—and most require some sort of license to make the use legal. Whether the music is used in an advertisement or a music video, on a Web site or delivered via another digital platform, licenses are usually required. Unfortunately, there are a variety of rights that may be needed, depending on how the music will be used, so knowing what you need to do to avoid liability is not always easy.

Making it even more complicated is that fact that the different rights are often obtained from different individuals or groups, and it is not always easy to determine where to go to get the necessary rights. This advisory provides a basic description of some of the rights necessary for some of the most common uses of music under United States laws and where to obtain such rights.

Current copyright laws

Before discussing where to get permission to use music, you must first understand the different rights that can be implicated by the use of music.

Under current United States copyright laws, songs and other creative works first published as long ago as 1923 could still be protected by copyright. Section 106 of the Copyright Act gives the owner of a copyrighted work a number of exclusive rights with respect to the work, including the right to reproduce the work, the right to distribute the work, the right to prepare "derivative works" based the work (e.g., a new arrangement of a song or a translation of its lyrics into another language) and, in many cases, the right to publicly perform and publicly display the copyrighted work. The copyright owner also has the right to authorize or refuse to authorize others to exercise any of these rights. As a result, permission from the copyright owner—i.e., a license—generally is required any time copyrighted music is used.

The particulars of the permission that is required depends on the nature of the use and which of the various exclusive rights under Section 106 of the Copyright Act are implicated. In most cases, licenses must be negotiated with the copyright owner, although, as set forth below, there are certain music rights that can be obtained through a "statutory license" (i.e., a license that all affected copyright owners are required by law to grant and for which a license fee is established by the government). For certain uses of music, various rights societies (which are sometimes subject to government antitrust review), also offer "blanket licenses."

To make matters more complicated, for each piece of recorded music, there are two separate copyrights, which are often held by different owners. First, there is the copyright in the underlying *musical composition* (that is, the notes and lyrics as they might be written out on paper). Copyrights in popular songs are usually controlled by a music publishing company (and sometimes multiple publishing companies, if the song has multiple writers with different publishing arrangements). Second, there is the copyright in the particular recording of the song that is being used (i.e., the song as sung or performed by a particular recording artist and contained in a CD, digital file or other recorded medium). Such recordings are referred to in the Copyright Act as "sound recordings" and in the music business usually are referred to as *master recordings*. For most popular recordings, the copyright is held by the record company. However, in some circumstances, copyrights in musical compositions and sound recording may be controlled directly by the songwriter and/or recording artist, particularly in the case of recordings by independent artists of songs that they have written.

In certain instances, particularly with older classical music, the underlying *musical composition* may have entered the public domain, while the more recently produced *sound recording* is still be protected by copyright. Depending on the type of use, a license may be needed with respect to the musical composition, the master recording, or both.

Streaming audio

Rights to the musical compositions

As noted above, the owner of a copyrighted musical composition has the exclusive right to control its public performance. "Public performance" is not limited to a live performance of a song in a concert or similar setting. Rather, the Copyright Act defines a public performance as one that occurs in any place open to the public or that is transmitted or otherwise made available to many people, whether they receive it in one place or many, or at one time or different times. An example of a public performance of music in a traditional context would be the broadcast of music as part of a television or radio program. Similarly, in the digital world, a public performance of music occurs in an Internet radio stream or when individual songs are streamed on a Web site.

A digital public performance of music—such as the streaming of music on a Web site—will trigger an obligation to obtain a public performance license from the songwriter or publisher. In situations where one or a small number of musical

compositions are being performed via a Web site or other digital service, the operator will typically license the compositions directly from the songwriter or publisher. When larger numbers of songs are being used, or when the particular song performed varies (as in an Internet radio operation), licensing is most commonly done through a "blanket license" from a performing rights organization (PRO) that provides the rights to use all the music in the catalog of the PRO, which it licenses on behalf of the copyright owners.

Songwriters and music publishers in the United States are typically affiliated with one of three PROs (ASCAP, BMI, SESAC), which are responsible for licensing nondramatic public performances (i.e., performances of songs other than in dramatic productions such as an opera or a musical where the song is a part of and carries forward the plot, although the right to publicly perform songs from such productions in a nondramatic fashion can be licensed from the PROs). ASCAP and BMI are governed by antitrust consent decrees, administered by the federal courts. By law, they are required to offer licenses to all who seek them, and they must set rates that are uniform for all similarly situated users. Where rates for a user category cannot be established by negotiation, they are set through a rate court hearing in the district courts. Many of the standard licenses for existing categories of music users (with information about the rates) are available on these organizations' Web sites. SESAC, as the smallest of the PROs, is not subject to an antitrust decree, though a group of television stations recently brought an action to seek to compel antitrust review of their practices. SESAC, unlike ASCAP and BMI, is a for-profit company. Thus, many of their rates are not publicly available, and SESAC does have the ability to negotiate individually on the rates that they charge.

Some music users, to minimize costs, have considered trying to live without a SESAC license. However, SESAC licenses the music of some very important writers whose songs are covered in many music genres (including Bob Dylan, Neil Diamond, and even some of the production music from certain commercial production companies). Thus, it is difficult if not impossible to do without a SESAC license if one seeks to perform a broad range of popular songs.

Rights to the sound recordings

Public performance licensing requirements are different for sound recordings. In the United States, until recently, there has been no exclusive right to publicly perform a sound recording, and accordingly no public performance licenses have been required with respect to public performances of sound recordings in broadcast and other traditional media. However, in 1995, Congress created for the first time a public performance right in sound recordings, but limited that right to performances that are made by means of a "digital audio transmission."

Unlike the public performance right in musical compositions, the sound recording performance right does not extend to performances made in over-the-air broadcasts, in retail establishments or in other brick-and-mortar businesses and public places. Nor does the digital performance right cover sound recordings used in "audio-visual" works (such as television programming or other audio-visual programming streamed online). Efforts are underway in Congress to extend public performance rights in sound recordings to cover some of these uses (in particular, over-the-air radio broadcasting), but at the moment no public performance royalty must be paid for the use of the sound recording outside of the limited context of digital audio transmissions.

Because of the digital public performance right in sound recordings, companies that stream recorded music digitally—such as Internet radio services and any company that streams recorded music on its Web site[1]—must have licenses to digitally transmit those recordings to their listeners. For webcasters and other covered digital media companies, there is a statutory license available, which is administered on behalf of the record labels by a nonprofit company called SoundExchange. The royalties can be negotiated between groups of similarly situated users and SoundExchange. If these negotiations are unsuccessful, the royalties are set by a government body—the Copyright Royalty Board—usually for periods of five years.

Digital transmissions under this statutory license must be made within very specific limitations. Uses must not be part of an "interactive" service. (While the exact manner in which the statutory definition of "interactive" applies to various types of music services is still to be determined, a recent appeals court decision held that a certain degree of user influence is permitted without the service being classified as interactive.) Services operating under this statutory license also must limit the number of songs played from the same album or by the same artist in given periods of time, must show information about the song being played visually on the Web site, and must comply with other rules designed to limit digital music piracy.

For audio services that involve more interactivity—e.g., allowing on-demand streams where users know what music is coming up, or where they can select the artist or song that is to be played—the service provider must obtain public performance licenses in the sound recordings directly from the copyright holders. In most cases involving popular music, this will be the record company that released the recording.

Streaming videos and commercials

As noted above, a broadcast of music as part of a television program constitutes a public performance of the music. The same is generally true of the streaming of an audio-visual program including music via a Web site or other digital service. Accordingly, as in the brick-and-mortar world, those who transmit audio-visual programs generally must obtain public performance licenses with respect to the musical compositions contained in those programs when streamed on a Web site

or in another digital format.

The public performance license is not the only license that is necessary. When a composition is recorded in a production with spoken words or video, such as when music is included as part of the soundtrack of a film, television program or other similar video production, or is recorded as part of a commercial or other recorded promotional announcement, another license is needed. This type of reproduction of the musical composition is usually referred to in the music business as a "synchronization," and a license known as a "synch" license must be obtained from the music publisher or songwriter that controls the composition. The producer of the video typically is responsible for obtaining the synch license.

The synch license issued by the publisher or songwriter relates only to the composition, and does not include the right to use any pre-existing master recording (i.e., the song as recorded by a particular artist). (If the licensor intends to create a new recording rather than using a pre-existing one, the right to do that should be granted in the synch license.) Accordingly, when a pre-existing master is synchronized with moving images in a film, television or other audiovisual production, or is recorded as part of a commercial or other recorded promotional announcement (even if that recording is audio-only), a license must be obtained for the use of the master as well. This license is referred to as a "master use" license, and like the synch license, is usually obtained by the producer of the audio or video production.

With respect to major label recordings, the record label will be the entity that will usually issue the master use license. In most audio-visual works, the label and publisher will insist on "favored-nations" treatment (i.e., both will receive the same license fee).

For use in commercials, artists often have their own concerns about being associated with particular products, and thus each use of a master recording may be subject to a unique negotiation with the record company or artist management company representing that artist. And if the owner of the master insists on a high licensing fee, that will also drive up the cost of the synch license for the composition if a favored-nations requirement is in effect.

Downloads

Providing downloadable master recordings online involves a reproduction and distribution of the masters and underlying musical compositions. Thus, as with the other situations described above, rights to both the musical composition and the sound recording must be obtained. Typically, an online music store or other service that sells music will obtain the necessary rights from the record labels, which own the master recordings and are responsible for obtaining from the publishers or songwriters the right to reproduce and distribute the recorded composition.

However, where a site is not using major label recordings, but is instead transmitting recordings provided or made by a local or independent musical group, the site must be sure that the rights to the underlying musical compositions have been obtained even if the performers clear the use of the sound recording. For instance, a school may provide on its Web site the ability to download the spring choral concert. In doing so, although the school will own its recording of the concert, the school should be sure that it has also cleared the rights to the musical compositions performed in that concert. A radio station may want to post on its Web site for download recordings of bands that have performed in its studios. Even if a band has consented to the use of the recording of its performance, if the band does not also control the rights to the songs it performed, the radio station must make sure that it licenses the rights to those musical compositions.

Rights can be obtained from the publisher or songwriter through a statutory license, which is available for any musical work that has previously been recorded and requires prior notification to the copyright holder. In addition, these licenses—known as "mechanical" licenses—also can be obtained directly from the publishers or songwriters or, in many instances, through the Harry Fox Agency, which acts on behalf of many owners of musical compositions in connection with mechanical licensing. Unlike ASCAP, BMI and SESAC, Harry Fox does not provide rights to virtually all songs that a potential licensee would want to use, but it does have rights to an extensive catalog, and thus may be a convenient first stop in trying to obtain such licenses. There are a number of private companies that will also help to clear the underlying licenses to use the musical composition.

Podcasts

Many companies are creating some form of "podcast," i.e., an on-demand program that can be downloaded onto a digital device for later replay (and can usually be played immediately on someone's computer as well). The use of music in a podcast will usually require specific permission for the inclusion of both the musical composition and the sound recording, just as is the case in a video or a download. Simply having public performance rights from the PROs or from SoundExchange will typically be insufficient to cover the use of music in a podcast.

Areas of controversy

While the simple distinctions outlined above may seem easy to apply, in practice, things frequently become less clear in situations involving new media and platforms, as the lines between different types of services often get blurred.

For instance, the question of when a digital use of music constitutes a public performance has been raised in a number of court cases and is still the subject of some dispute in the music industry. In the brick-and-mortar context, the definition of

"public performance" is often relatively easy to apply—if a performance is to a number of people in a public setting, it is a public performance. A performance in a concert hall, or a stadium, or a bar or on the radio clearly fits within the definition. However, the application of the definition to certain digital music services is less clear. For example, when a webcasting service sends out one stream to hundreds of people, the webcaster is operating much like a radio service, so there would seem to be a public performance. But when the service is interactive, so that unique streams are served up to each customer, is that really a "public" performance? Likewise, has a "public" performance taken place when a particular song is streamed to a user at that user's request and is not simultaneously transmitted to other users?

In a recent decision, the Copyright Royalty Judges established a royalty formula for the digital delivery of musical compositions via interactive streaming in which a baseline percentage of revenue royalty is paid for the reproduction and distribution of the musical compositions, but that amount is to be offset by public performance royalties paid to the PROs in connection with such streaming. However, the Copyright Royalty Judges did not definitively answer the question of whether, and under what circumstances, such streaming actually constitutes a public performance for which a payment to the PROs is required. Similarly, because of some ambiguity in the language of the Copyright Act, some PROs have asserted that a download of a recording involves a public performance of the underlying musical composition, and similar questions have been raised with respect to the delivery of compositions in the form of mobile phone ringtones. While the courts have, thus far, disagreed with that assertion, we may not have heard the last of that issue.

When the copyright owner's exclusive reproduction right is implicated is another area of dispute. In any digital transmission process, there are multiple "copies" of a work made in the course of the process. Typically, copies are made in the server of the transmitting entity, and on the servers through which any transmission passes as it makes its way through the Internet to the recipient. Copies are also made on the RAM of any computer, and sometimes in the hard drive as well. Some of these copies may exist for only seconds, while others may persist longer. Are any of these copies, even made in a pure, wholly noninteractive stream, "reproductions" for which compensation should be paid? The Copyright Office has wrestled with this question, and suggested that copies are being made. But the issue has also been argued in the courts, and there has been no definitive, final answer to this question.

Pre-1972 sound recordings first recorded in the United States are not subject to Federal copyright laws. In certain recent cases, copyright holders have argued that the failure of Federal law to cover such recordings may mean that copyright holders have greater rights under various state laws that were enacted to prevent the bootlegging of recordings. There have, for instance, been arguments that protections granted to digital services for user-generated content do not extend to these recordings covered by state laws governing sound recordings. The Copyright Office is currently looking at many issues relating to pre-1972 sound recordings, and whether they should be brought under Federal laws.

These are but a few of the unresolved issues that remain to be decided in the digital world. Questions of liability for copyrighted works used in user-generated content supply an endless debate over who owes what duty to whom to weed out uses of copyrighted music for which no royalty has been paid. Look for these and other areas to be the subject of litigation over the coming years unless Congress steps into the process and provides clearer guidance—an unlikely prospect unless the major players in the debates can themselves reach a consensus that can be reflected in a legislative remedy.

"Fair use"

In addition to all of the licensing issues, many music users grapple with the potential application of the "fair use" doctrine to their uses of music. Under the doctrine of fair use, the use of limited portions of copyrighted material for purposes such as teaching, research, criticism, news reporting or parody is permitted without the authorization of the copyright owner. Unfortunately, the law does not clearly indicate exactly which uses constitute fair use and which do not. Rather, it provides a set of guidelines that are interpreted by the courts with reference to the facts of each situation. For that reason, it can be difficult to identify with precision the types of music uses that may be deemed fair use.

In general, when determining whether an unlicensed use of music or other copyright works should be permitted as a fair use, courts will consider four factors: (i) the nature of the use, including whether such use is for a commercial purpose or rather for an educational or nonprofit purpose; (ii) the type of copyrighted work being used (more latitude is given for the unlicensed use of purely factual material than creative material); (iii) the amount of the original work that is being used in relation to the whole (i.e., is it just a short excerpt, or a significant portion of the original); and (iv) the effect of the unlicensed use on the market for the original work. In general, in a commercial context, courts will be reluctant to permit unlicensed use of creative copyrighted works, particularly where, as in the case of music, there is an established licensing market.

Because of the fact-specific nature of the fair use analysis, for most commercial users of music it will make sense to rely on the fair use doctrine only in limited situations, where only a portion of a composition or a recording is being used, where some type of commentary on the song or recording or some other "transformative" activity (such as a parody[2]) is taking place, and where the use is not of a type for which licenses are generally obtained. For instance, using an excerpt of a song in a record review would probably constitute a fair use, but the use of a song in a commercial, even a funny version of the song (where the comedy comes from the commercial message—and not from making fun of underlying the song itself), probably would not be fair use.

Exceptions

In connection with many of these rights, there are a variety of exceptions developed through case law or by statute—too numerous to specify here. In some cases, noncommercial uses are allowed at reduced or, in some case, at no fee. In other cases, small businesses are treated differently than large ones (e.g. certain small retail outlets using home audio equipment are exempt from public performance obligations that larger businesses would pay). Thus, small businesses and nonprofit associations should consider what exceptions may be available to them.

Foreign Rights

The rights we have discussed above are those that exist under US laws. Rights in other countries differ—sometimes substantially. And in some cases (e.g. the public performance of sound recordings by a non-interactive service in Canada), the price that services will pay is still in the process of being established. Most countries have a more expansive public performance right in sound recordings than does the United States (applying to businesses, theaters, concert halls, and audio-visual works). Many countries also have a wider ranging definition of when a reproduction is made than in the US (e.g. US rights organizations typically do not collect for "ephemeral" copies made in a non-interactive transmission, while many other countries do). Fair use rights may also be more restricted in other countries. Thus, if your use of music is likely to involve international distribution or transmissions, you should check the international implications of that use.

The issues discussed above are only some of the myriad of copyright issues that come up in connection with the use of music in the digital world. Be familiar with these issues as improper use of music can lead to copyright violations, which can, in some cases, carry large monetary penalties. Enjoy your music carefully.

FOOTNOTES

1 Satellite radio and digital cable radio also pay these royalties. The Internet radio royalties, in most cases, currently cover streaming of noninteractive music streams to mobile phone platforms. While background music services do not pay a public performance royalty, the Copyright Act does require that the services themselves (as opposed to the retail establishments that may use these services) pay for the "ephemeral copies" of sound recordings made in the digital transmission process, i.e., the server and buffer copies made in the digital transmission process. Effectively, this acts much like a public performance royalty for the sound recordings used by these "business establishment services."

2 A "parody" in a copyright context has a very specific meaning. While some might think that a re-recording of the tune of a familiar song, with different funny lyrics is a parody, the law finds a parody only where the comedic use is making fun of the original musical work—not where it has some independent comedic value. This is an important distinction, as many times advertisers have sought to use the tune of a familiar song as the basis for a commercial message—and in virtually all advertising contexts, this will not be a "fair use," and thus permission from the copyright holder will be necessary for this derivative work.