

## Music Licensing 101

A Guide for Filmmakers, Television Producers, Music Publishers, and Songwriters  
October 5, 2011

**As seen in *Indie Slate Magazine*.**

This article was written to help independent filmmakers, television producers, music publishers, and songwriters understand and navigate the convoluted and often perilous world of copyrightable interests in music and the requisite licenses needed to legally use music in various contexts, whether they be audio-visual (e.g., film, television, internet) or audio-only (e.g., CDs, digital downloads). Rights and licenses discussed include *synchronization*, *videogram*, *mechanical*, *master use*, and *public performance*. Each refers to a specific copyrightable interest in music and each requires its specific form of license in order to avoid claims of copyright infringement by the rights holder. Also included in this article is a discussion of key terms commonly found in music licensing agreements, and why a failure to understand and appreciate these terms can prove disastrous for a given project. Various music licensing strategies are also discussed the article provides insights and suggestions for music licensing strategies applicable to various contexts. The author's goal with this article is threefold: to assist filmmakers, television producers, advertisers, music publishers, and songwriters in (1) spotting key issues relevant to their music licensing needs, (2) developing appropriate and cost-effective music licensing strategies, and (3) in avoiding claims of copyright infringement and other hazards that often befall the unwitting or disinterested.

### *Music Licensing.*

The United States Copyright Act of 1976, as amended (Title 17 of the U.S. Code) (the "Copyright Act") protects original works of authorship – e.g., music and audio-visual works. Under the Copyright Act, exclusive rights are granted to the author, and the author may retain, license, or outright sell these exclusive rights to others interested in owning or commercially exploiting them. A copyright enables the owner or holder to prevent the use of the material without the express consent of the owner. Any unauthorized use of another's copyrighted work constitutes copyright infringement, for which the infringing party may have to immediately cease use of the work, pay money damages (possibly including lost profits or statutory damages up to \$150,000 per work for acts of willful infringement).

Music licensing is the process of obtaining permission to use a copyrighted work in a desired context, whether that be in film, a television program or ad, an audio-only sound recording like a CD or digital download, on the internet, or a ringtone. The act of obtaining this permission is generally referred to as “clearing the rights.” For anyone interested in using a piece of music, it is prudent to assume the multiple copyrightable interests in that music are owned by one or more individuals or entities from which you will need to clear the rights to legally use it. This applies to all music – even the incidental, background music heard in certain scenes of a film or television program. Filmmakers and television production companies will need to ensure such “source” music is properly licensed to avoid infringement claims. While some such incidental or *de minimis* uses are protected by the doctrine of “fair use,” this exception is beyond the scope of this article and should not be relied upon without first consulting an experienced copyright attorney.

Music licensing requires an understanding of the precise rights needed for a particular use. As a threshold issue, one needs to understand the distinction between a **musical composition** and a **sound recording** embodying a performance of a particular musical composition (both are separate and distinct copyrights). A musical composition consists of the music (i.e., the melodic, harmonic and percussive components) along with the title and any lyrics. The rights to a musical composition are occasionally owned or controlled by the original songwriter, but are more frequently owned or controlled by a music publishing company, to whom the songwriter assigned its copyright in return for a split of revenue generated by the latter’s efforts in marketing, promoting, and commercially exploiting the musical composition. The sound recording refers to the embodiment of a particular artist’s performance of a musical composition as fixed in a specific medium (e.g., CD, other various digital formats, or analog tape). The sound recording (often referred to as a “master recording” or “master”) consists of the particular sounds the listener hears: the singer’s voice, the bass, drums, guitars, strings, horns, etc. Sound recordings or masters are generally owned by record companies or labels.

### *The Synchronization Right and License.*

Any time music is used in an audio-visual work (e.g., film, television, music video) the producer or creator of the audio-visual work must obtain permission from the owner or owners of the musical composition (generally, one or more music publishers). This permission is referred to as a synchronization or “synch” license. A synch license confers upon the “licensee” (e.g., a filmmaker or television producer) the right to synchronize the musical composition in timed relation with visual content and to reproduce the musical composition, or a portion thereof, in recordings of the audio-visual content. Prospective licensees must understand and recognize musical compositions are often owned by multiple publishers (in equal or unequal shares) and synch rights need to be secured from *each* publisher in order to avoid infringement

claims.

A synch license will generally confer upon the licensee several specific rights. First among them is the right to reproduce a portion of the musical composition for a specified number of particular uses. For example, the license may permit one background vocal use, of approximately 2:40 in length, over the end credits of a film. The licensee must ensure that the particular use language fits the requisite needs of the audio-visual work. Second, the synch license will grant the right to *publicly perform* the musical composition as used in the program in specific forms of media (e.g., motion picture theatres, television broadcast, internet) or perhaps, for very broad synch licenses, “in all forms of media now known or hereafter devised.” If the licensor has previously licensed the public performing rights to a performing rights organization (“PRO”), the license will require the licensee to obtain a public performance license from the affiliated PRO. (See the discussion of *public performance rights* and PROs below).

Third, if the program is to be distributed on DVD or Blu-ray disc or other home video devices, the license will need to confer this right, in the form of a sub-license often referred to as a “videogram” license. The videogram language in a synch license will closely resemble following: “Licensee may distribute copies of the musical composition, as reproduced in the program, in all forms of home video exploitation, now known or hereafter devised, for private home use.” Finally, synch licenses will generally permit the licensee to use the composition in the advertising or promotion of the audio-visual work (e.g., film trailers), but will typically limit the right to “in-context” uses. This means that in advertising or promoting the film or audio-visual work, the musical composition may only be paired with the specific visual or video content as it is contained in the original program or film. To pair the musical composition with different video content for advertising purposes, the licensee will require a license of “out-of-context” rights. Publishers will generally charge an additional premium for out-of-context rights.

Synch licensing fees are generally one-time, flat fees, negotiated directly between the contractual parties. The fees can range from nominal fees to tens of thousands of dollars depending upon the specific rights needed, the scope and budget of the program, and the relative leverage and bargaining power of the parties involved. For filmmakers and television producers, it is important to license only those rights needed otherwise the licensee may end up paying more in licensing fees than necessary.

### *The Mechanical Right and License.*

Like the synchronization license, the “mechanical license” pertains to rights held in the musical composition as opposed to the sound recording. A mechanical license permits the licensee to manufacture, reproduce and distribute the musical composition in audio-only configurations referred to as “phonorecords” in the Copyright Act (e.g., CD, vinyl LP, digital download, etc.). If the musical composition at issue has not previously been

recorded, manufactured, and distributed on a phonorecord, the prospective licensee must negotiate the mechanical license directly with the song's owner. If, however, the composition has previously been recorded, manufactured, and distributed, the licensee may take advantage of the "compulsory" licensing provisions found in Section 115 of the Copyright Act. These provisions permit the licensee to legally use the composition without the express permission of the copyright owner provided the licensee complies with certain statutorily-prescribed requirements. Among these are the requirement the licensee file a "notice of intention to obtain compulsory license" with the U.S. Copyright Office and pay a statutorily-mandated royalty to the copyright holder for use of the composition. At present, this royalty rate (referred to as a "mechanical royalty") equals \$0.091 per composition (or \$0.0175 per minute for compositions over 5 minutes in length) multiplied by the number of phonorecord units made and distributed. The compulsory licensee must also adhere to other rather stringent requirements (e.g., providing accountings and statements to the publisher every 45 days). In practice, compulsory licenses are not often required as publishers freely grant mechanical licenses for their compositions, and often at rates that are 75% of the statutory rate (i.e., \$0.06825 per each song under 5 minutes in length).

#### *The Master Use Right and License.*

In addition to clearing the rights for the legally permissible use of the musical composition, the licensee must clear the rights to use the specific master sound recording embodying a specific artist's performance of the composition. This license is generally referred to as a "master use" license. It confers upon the licensee the right to fix the master in specific media and to make copies of that recording in return for a flat fee or per-unit royalty payment to the copyright owner (masters are generally owned by record labels). A master use license would be required, for example, if a producer wanted to use Talking Heads' recording of "Take Me to the River" (as opposed to Al Green's version) in a film, tv commercial, or on a compilation album). (In addition, a synch or mechanical license would be required from the publisher of the song, in this case JEC Publishing Co./Al Green Music (BMI)). For the master license, the licensee may have to pay, in addition, certain union or guild costs (often referred to as "new use" or "re-use" fees) for the use of an existing master where the musicians or others involved in the performance or recording of the master are union members.

"Sampling" – the process of incorporating in one's own work a copied portion of a pre-existing sound recording – generally requires a master license (along with a separate license for the musical composition). As a good rule of thumb, whenever master use rights are needed, the rights to the underlying musical composition are also needed. However, the inverse is not always true. One could license the rights to a particular musical composition, and if the record label holding the rights to a particular sound recording of that composition demanded exorbitant fees (or refused to grant the license for any other reason), the licensee (e.g., filmmaker or television producer) could

commission another artist to record the song for less money. In this case, the filmmaker or producer would then own the copyright in the master recording.

### *Public Performance Right and License.*

Copyright owners enjoy an exclusive right to publicly perform the musical composition. This so-called “public performance right” is required any time a musical composition (or, in limited contexts, a sound recording) is played in a place where people gather or whenever the musical composition is broadcast to the public (e.g., radio, television, and streaming non-interactive internet). Public performance licenses are generally granted and monitored by performance rights organizations (“PROs”), the largest and most prominent of which are Broadcast Music, Inc. (BMI), the American Society of Composers, Authors and Publishers (ASCAP), and SESAC, Inc. The PROs represent songwriters and publishers and negotiate and issue blanket licenses to television and radio stations, shopping malls and retail stores, restaurants and bars, music venues, colleges, hotels, web sites, stadiums, sports teams, and airlines for the right to “perform” any song in the PRO’s catalog. The licensing fees collected from radio and television stations, restaurants, music venues, etc., on behalf of registered songwriters and publishers are then paid, in the form of “performance royalties,” to the songwriters and publishers based upon a formula involving the frequency and scope of usage of each musical composition.

### *Specific Licensing Terms and Issues.*

What follows is a brief description and discussion of some of the more important provisions contained in the majority of music licensing agreements.

A. *Fee/Royalty.* To reiterate, the fee or royalty payable in connection with any particular license will depend upon the type and scope of the rights conferred by the license and will further reflect the popularity of and demand for the composition or master. The licensing fee will also reflect how prominently the composition or master is to be featured in the production (e.g., foreground vs background use) and the form of media in which the composition or master is to be configured. In addition, some of the terms discussed below also factor in the determination of licensing fees. For example, some licenses may provide for certain options exercisable by the licensee whereby the licensee has the right to increase the rights conferred under the license for additional fees. To illustrate, a filmmaker may option the right in its synchronization license to manufacture and distribute the film in home video devices (e.g., DVDs, Blu-ray discs). If the licensee exercised the option and released the work on DVD, the licensee would pay an additional predetermined fee to do so. However, if the picture ultimately does not warrant the manufacture and distribution of home video devices, the filmmaker has, through use of the option, avoided having paid for what is, under the circumstances, a useless right. In addition, options may, for an additional fee, permit the use of the

composition or master in a later theatrical release of the production whereas initially, the license only provided for television, internet, or film festival exhibition. So-called “step deals” offer parties another means by which to more efficiently license music. Under step deals, royalty rates increase as sales exceed certain pre-determined targets.

B. *Territory*. This provision reflects the geographic restrictions placed upon the use of the composition or master. Often the territory will be either the United States or *worldwide*, depending upon the needs of the licensee. However, due to the ever-accelerating pace of technology and space exploration, some licensees are now seeking to license the composition or master throughout the *universe*. Where the territorial needs of the licensee are not quite as expansive, a licensee may be able to secure reduced fees for the license. For example, filmmakers interested in licensing music for use in films where the distribution and exhibition of the film is to be limited to a short run at film festivals, can often license the music for reduced rates under a so-called “festival license.” However, such licenses (and the associated fees) will need to be re-negotiated upon any commercial exploitation of the film.

C. *Term*. Since music licenses are almost without exception non-exclusive, publishers and labels are generally willing to license the composition or master *in perpetuity*, although the length of the licensing term may be stated for a shorter period of time. In some cases, a licensee may be able to secure reduced fees by combining a shorter, finite initial term (e.g., 10 years) with an option for another 10 years (or in perpetuity), exercisable by the licensee for an additional fee.

D. *Representations and Warranties*. Licensing agreements generally contain provisions whereby one or both parties make assertions that are true at present (“representations”) and promises that such assertions shall remain true in the future (“warranties”). As a prospective licensee, one would like the licensor (the individual or entity that owns or controls the music copyright) to represent and warrant that he or she owns or controls 100% of the rights being licensed, that the licensed material does not infringe upon the rights of others, and that the licensor has the full right and authority to enter into the licensing agreement. Licensors, conversely, often seek to limit their reps and warranties to a simple statement that the licensor has all requisite authority needed to enter into the licensing agreement.

E. *Indemnification*. Music licenses will often include language whereby the parties agree to indemnify (make whole) the other party for any breach by the counterparty of its representations and warranties and any other covenant or obligation under the licensing agreement. Licensors will often seek to have this indemnification limited to the amount of compensation paid by the licensee for the license. However, given that successful claims of copyright infringement can yield sizable judgments against a licensee (well in excess of the licensing fee paid), most licensees with sufficient leverage will resist any limitation on the dollar amount of indemnification.

F. *Injunctive or Equitable Relief.* In projects that involve the licensing of multiple pieces of music (e.g., a film or compilation album), the licensee will want to seek a provision in the licensing agreement whereby the licensor waives its right to seek injunctive or equitable relief from a court of law in the event of an alleged breach of the licensing agreement by the licensee. Injunctive relief could permit a court to halt the distribution or exhibition of the project until the dispute can be fully adjudicated. Accordingly, licensees will often seek language in the agreement that the licensor's sole remedy for any breach by the licensee will be an action at law for money damages. In other words, the licensor may be able to successfully sue the filmmaker, production company, or record label in court and be awarded a monetary judgment, but would not be permitted to unilaterally stop the exhibition or distribution of the project.

G. *Most Favored Nations.* "Most favored nations" or "MFN" provisions entitle the licensor to more favorable licensing terms or conditions that may be granted other licensors for the use of the same or different musical compositions or sound recordings in the film, album, or project. MFN provisions can be tailored to apply to all terms of the license or can be limited to the economic terms (i.e., the licensing fee or royalty payable). MFN language without this economic limitation could, arguably, relieve a licensor from more stringent reps and warranties and indemnification language contained in *its* license if *other* licenses included less stringent reps and warranties.

While vigilant and responsible use of MFN provisions can work to a filmmaker, production company, or record label's benefit in helping to clear licenses (by assuring prospective licensors that they will receive no less favorable terms than those granted by the licensee to other licensors). However, these provisions can undermine a project's budget if not approached in a vigilant and comprehensive fashion. For example, let's assume a filmmaker wants songs A, B, and C used in the film. In clearing the rights, he agrees to MFN terms for all three. So far so good, as he has now been able to secure the rights and C has agreed to accept a lower fee, having been assured that the licensors for A and B will not receive more favorable terms. Weeks later the filmmaker discovers that he absolutely has to have song D for a particular scene and nothing else will do. If D refuses to license the composition or master for the same amount as the filmmaker has agreed to pay A, B, and C, then the filmmaker will either have to forego use of D in the film or accept that he has to pay A, B, and C the same fee as is demanded by D by virtue of the MFN provisions contained in A, B, and C's licenses. Accordingly, any licensee will need to closely monitor the MFN provisions when clearing multiple licenses for a project.

*Conclusion.*

Music licensing involves multiple endeavors, from researching the owner of the various copyrights at issue, to obtaining clearances and quotes, to negotiating, drafting, or

revising the licensing agreement. The process may take as little as a few days, under favorable conditions, to several weeks or months. And, with the exception of compulsory mechanical licenses issued pursuant to Section 115 of the Copyright Act, there may be circumstances under which the licensing of a particular composition or master is very difficult, if not impossible. For example, a prospective licensor may simply not want to license its composition or sound recording rights because the licensor objects to the content of the film, album, or product and does not want to be associated with it. The licensor may also be concerned that licensing its composition or master for this particular use would foreclose other, more lucrative or beneficial licensing opportunities in the future. Or finally, the parties may simply be unable to agree upon the terms of the deal, financial or otherwise. It is often prudent to enlist the assistance of a competent music supervisor, music clearance company, or entertainment attorney to assist in the clearance process. Where the composition or master at issue is owned or controlled by a larger commercial entity (i.e., an established music publisher or major record label), that entity will likely insist upon using its own pre-approved form license. Conversely, where the composition or master is owned by an independent artist or smaller company, the licensee, whether a filmmaker, television production company, or otherwise, will likely be expected to provide the license agreement. In either case, an experienced entertainment attorney should be consulted to draft or review the agreement to ensure the license confers the appropriate rights sought for the specific intended use (and no more, to keep licensing fees appropriate) and protects the client against claims of copyright infringement and the other all-too-common hazards and pitfalls described in this article.

## **Related Files**

- [Indie Slate – Music Licensing 101](#)