

**THE COMMITTEE ON ENTERTAINMENT LAW
OF THE
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK**

January, 2003

The Committee gratefully acknowledges the contributions of prior chairpersons, Noel L. Silverman and Victoria G. Traube, and of H. Joseph Mello, the initial editor.

MUSIC RIGHTS PRIMER

Introduction

This Primer is intended to assist lawyers who are not actively engaged in the music sub-specialty of entertainment law, but who, from time to time, may be involved with matters pertaining to that area. It is also intended for law students and non-lawyers who have an interest or involvement in the entertainment industry.

We envision this Primer to be used primarily to explain the different rights that fall under the generic term “music rights”, and to delineate generally which rights are necessary for projects or product in this medium. It is not intended as a replacement for an exhaustive treatise and should not be considered a substitute for specialized legal representation required to resolve the complex issues that often arise in transactions involving music rights. Rather, it is designed to highlight issues and to provide the basic understanding of the foundations of a music project. Specialists in the field should be consulted when additional legal assistance is needed. They can easily be found in New York, Los Angeles and Nashville, and to a lesser extent, in other parts of the country.

This Primer deals with music rights in the United States only. While many of the principles discussed below apply in other countries as well, there may be significant differences, and resolution of foreign issues is outside the scope of this Primer. In general, if it is intended

that particular rights may be exercised outside the United States, the license with the rights owner should specify all territories granted.

Music Copyright Versus Sound Recording Copyright

At the outset it is important to distinguish between rights in a song, and rights in a sound recording that may embody the song. When we hear a recorded song, two separate and distinct intellectual properties are involved that need to be identified and understood. The first property is the music composition, itself—the words and music composed by the songwriter(s). The second property is the sound recording—the fixed embodiment of sounds resulting from the recorded performance of that musical composition. Publishing rights in a song include the right to exploit the song in any medium, and are unrelated to the identity of the performer or performers of a particular recorded version of the song. Sound or master recording rights, on the other hand, include only the rights in a particular fixed performance of a musical composition. A user will have to consider obtaining separate rights for both the use of the song and the sound recording.

The author of each property—as to the musical composition usually the songwriter, and as to the sound recording the producer (often, the record company)—is the initial owner of the intellectual property, in each case a copyright.

Copyright affords its owner the following exclusive rights which are itemized in Section 106 of the Copyright Act (17 U.S.C.106):

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

“Publishing” Rights

So-called music publishing rights generally encompass the right to record, the right to perform, the right to duplicate, and the right to include the work in a new or different work, sometimes called a derivative work. In order to facilitate the exploitation of the songwriter’s songs, the songwriter generally transfers the publishing rights to an entity identified as “the publisher,” pursuant to a music publishing agreement that assigns the copyright or administration rights to the publisher, which then shares publishing income with the songwriter as stipulated in the agreement. In music parlance, the categories under the umbrella called publishing rights—all derived from Section 106 of the Copyright Act—are referred to as mechanical rights, synchronization rights, print rights and public performance rights.

Mechanical Rights

The right to reproduce and distribute to the public a copyrighted musical composition on phonorecords (which include audiotapes, compact discs and any other material object in which sounds are fixed, except those accompanying motion pictures and other audiovisual works), is called the mechanical right. (The terminology “mechanical” dates from the days of the player piano, when a perforated cylinder was inserted into the mechanism and a composition literally was “mechanically reproduced.”)

Licenses granted to the user to exploit the mechanical rights are called mechanical licenses. Once the copyright owner of a musical composition authorizes the public distribution of phonorecords embodying the composition for the first time, anyone else may then also record that musical composition and distribute phonorecords of that new recording by following the procedure established by the Copyright Act, which requires giving notice to the owner and paying a statutory royalty for each phonorecord manufactured and distributed. This is called a compulsory license. Publishers may, and more frequently do, issue such licenses voluntarily;

many utilize The Harry Fox Agency (see "Resources" at the end of this Primer) to handle mechanical license grants on their behalf.

The compulsory license is available only for audio recordings which are manufactured for distribution primarily to the public for private use. It does not extend to use of music in audiovisual works such as television programming or motion pictures (see "synchronization rights," in next section), nor to services which furnish background music to commercial establishments (see "public performance rights"), nor to broadcast transcriptions.

As of January 1, 2002, the statutory mechanical rate is 8 cents per song or 1.55 cents per minute of playing time per unit sold/distributed (whichever is greater). This rate is scheduled to increase in 2004 (8.5 cents) and 2006 (9.1 cents). The statutory rate applies only if the record company elects to utilize the compulsory mechanical license provisions of the Copyright Act or if it is incorporated by reference in a consensual license. However, the record company is free to bargain with the publisher for a lower rate.

Synchronization Rights

The right to record a musical composition in synchronized relation to the frames or pictures in an audiovisual production, such as a motion picture, television program, television commercial, or video production, is called the synchronization (or "synch") right. There is no compulsory license for this right; it is subject to the licensor and licensee reaching mutual agreement as to terms. In addition to mechanical rights, The Harry Fox Agency represents many music publishers in handling synchronization licensing.

As a result of antitrust claims in the middle of the last century, the synchronization right for a theatrical motion picture must also afford to the film producer the theatrical performance right (see "public performance rights" below), that is, the right publicly to exhibit the motion picture, including the song, in theaters. On the other hand, the producer of a television show which includes a musical composition generally acquires only the synchronization license, while

the television station—the broadcaster—must acquire the public performance license, discussed below.

Print Rights

The rights to print and sell single song and multiple song (or folio) copies of sheet music of musical compositions are the print rights licensed by the publisher. Over time, income from sales of single song sheet music have diminished. An active market exists, however, for folios and other compilations, which often are constructed around specific artists, styles of music, record albums, Broadway shows, motion pictures, and similar themes.

Public Performance Rights

Just over 100 years ago the Copyright Act recognized the right of public performance in musical compositions. Today, this is generally the most lucrative source of income for many, if not most songwriters. The Act defines public performance in part as: “to perform or display [the work] at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.”

Public performance rights can be broken down into two categories – “small” or “non-dramatic” rights, and “grand” or “dramatic” rights. Small performance rights include concert and other so-called “live” performances, incidental and background music on television programs, and radio airplay. A grand right covers performance of music in a dramatic setting or in any way which directly advances the plot of the production in which it is included.

However, the public performance right is not self-enforcing. Performances of copyrighted music were so numerous, widespread, and transitory that it was virtually impossible to police the right. By the same token, it was impractical for a performer or band to negotiate a license for every song played at each performance or venue. This led to songwriters and publishers joining together to create performing rights organizations, which act as licensing clearinghouses to facilitate licensing and monitor compliance. In the United States there are

three such organizations: ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music, Inc.) and SESAC (Society of European Stage Authors and Composers), which represent songwriters and publishers domestically and, through reciprocal arrangements with similar organizations in other countries, around the world. (See "Resources" section for contact information).

Performing rights societies offer so-called "blanket" licenses of their entire catalog, licenses for a particular production or so-called "per-program" licenses, and individual licenses. Alternatively, a license may be negotiated directly with the publisher. Performing rights societies do not, however, grant dramatic ("grand") performing rights, and such a license must be obtained directly from the publisher or songwriter, as their respective interests may appear.

A songwriter and a publisher may belong to only one performance rights society. Since music publishers may acquire music from writers affiliated with any of the above societies, they typically form separate companies to affiliate with each society.

Distribution of Income

Income received by the publisher from mechanical rights, synchronization rights, print rights, and other licenses are shared with, and paid directly by the publisher to, the songwriter pursuant to the terms negotiated in the music publishing agreement. Such sharing may be governed by a variety of formulas which generally reflect the bargaining power of the parties. However, income from licenses of performing rights issued by performing rights societies do not pass through the publishing agreement. ASCAP and BMI generally pay fifty percent of licensing income directly to the songwriter, and fifty percent directly to the publisher, after deduction of the costs of administration.

Master Recordings

The term Master Recording (or "Master" for short) refers to the original, produced recording of sounds (on a tape or other storage form) from which a record company makes CD's or tapes (or in the old days, LP's) which it sells to the public. Federal copyright protection was established for sound recordings fixed on and after February 15, 1972. Sound recordings first fixed before February 15, 1972 may nonetheless enjoy protection under various state common law theories or antipiracy statutes. A potential licensee of a master recording who clears the mechanical rights to use the underlying composition on a record yet fails to secure the master use right to reproduce the sound recording may be subject, depending on the circumstances, to action under the Copyright Act or state law.

Because the Master Recording embodies creative material from a number of different persons, it can be complicated to obtain the proper clearances. Below is a basic checklist of the creative rights that need to be secured in order to create a Master to be released to the public by or under the authority of the copyright owner pursuant to Section 106(3) of the Copyright Act.

The Songs

The starting point for any Master is the music—the songs. Whether the songs included on the Master are written by the performing artist or by another songwriter, the record company is required to obtain a license to use those songs—the mechanical license (discussed above). If the song is written by the recording artist (or musical group), that license is either included in the recording agreement or the rate(s) at which such license must be issued is specified. Musical compositions written or controlled and performed by a recording artist are called “controlled compositions.” If the song was controlled by a third party, a mechanical license to use it must be obtained either through a clearance company such as The Harry Fox Agency or directly from the publisher.

The Arrangements

The musical arrangements often represent a creative contribution separate from the songs that are arranged. For example, Frank Sinatra often recorded standards by the likes of George and Ira Gershwin, arranged by the well-known arranger Nelson Riddle. In this example, the producer of the Frank Sinatra recording would need a license to use both the Gershwin composition *and* the Riddle arrangement. If the arranger is a member of the American Federation of Musicians (“AF of M”), care must be exercised because of certain rules requiring payments for what qualify as “new uses.”

The Performances

The fixation of the actual performances embodied on the Master also constitute a creative contribution, generally owned or controlled by the owner of the Master. This pertains to everyone who performs on the Master, both vocalists and musicians. Usually, this is accomplished by the recording agreement between the owner of the Master and the performer. Often, for back-up musicians who are members of the AF of M, a transfer of rights is included in the standard union contract. However, as in the case of arrangers, those union contracts are not without strings and do provide for additional payments for so-called “new uses.”

The Producer

The Producer and sometimes others (perhaps the engineer) make many creative contributions to the final Master. Most of those contributions relate to choices of various technological settings that can significantly alter the final sound. Producers normally select or consult on the compositions to be recorded, the arranger and the supporting musicians, supervise the recording session as well as the mixing and mastering process, and determine the order of performance of the recorded compositions. To avoid any problems, record companies routinely seek to provide in their agreements with the Producer that the Producer’s contributions and those of the other participants in the production are owned by the owner of the Master.

Limitations on Rights To The Master

While the record company owns the Master, such ownership does not convey unlimited rights to the Master's use. Rather, the Master owner's rights are a matter of contract between the parties. For example, if the owner of the Master does not also own the copyright in the music embodied in the Master, then (absent specific language and clearance), while the Master owner would have the right to license the Master to be used as part of a movie or television soundtrack, such license does not include synchronization rights in the music, and the licensee must obtain the consent of the owner of the song. Thus, in order to synchronize Frank Sinatra's recording of Kander and Ebb's "New York, New York" in a film soundtrack, the film company would need a synchronization license from both the music publisher of the song and the record company which owns the Sinatra recording. If the record company wishes to use the name and likeness of the artist to promote the Master or its business activities in general, the agreement with the artist should include a provision authorizing such use (although such explicit permission might not be required for the promotion of the Master).

Reproduction Rights

"Master recording rights" or "master use rights" are required to reproduce and distribute a sound recording embodying the specific performance of a musical composition by a specific artist. A potential licensee who seeks to manufacture an existing recording must contact its copyright owner. The Copyright Act does not, however, recognize a public performance right in sound recordings (except for digital audio transmission), so that a license is not needed to perform the recording (in contrast to any copyrighted music embodied in the recording). Yankee Stadium needs a BMI license to publicly perform the Sinatra recording of "New York, New York" after Yankee ball games, but does not need a license from the owner of the Sinatra recording.

New Technologies

This Primer is not intended to provide a comprehensive discussion of the many important changes in copyright law and music industry business practices that have occurred in response to the Internet and other new technologies. What follows is a succinct outline of these developments.

Public Performance Rights for Digital Audio Transmissions and Webcasting

The Digital Performance Right in Sound Recordings Act (DPRSRA) of 1995 created a new right for owners of certain digital sound recordings. (See "Music Copyright Versus Sound Recording Copyright," above.) Under the DPRSRA, owners of copyrights in the sound recordings covered by the Act were given exclusive "public performance" rights for the purposes of "digital audio transmissions." This means that an on-line music service may not be able to use pre-recorded music covered by the Act without permission.

Notwithstanding this new digital public performance right in sound recordings, certain digital music services are entitled to a compulsory license to use pre-recorded music. The Digital Millennium Copyright Act of 1998 provided for a statutory license that granted "webcasters" the automatic right to use sound recordings in their non-interactive streamed programming, sometimes referred to as "Internet radio." Downloading, which refers to making permanent copies of music, and on-demand streaming, which permits listeners to hear particular recordings on demand, are not within the scope of the compulsory license. Thus, those wishing to provide digital downloads and inter-active streaming must negotiate with sound recording copyright owners to do so.

The Digital Millennium Copyright Act also limits the compulsory license by setting up stringent restrictions that are intended to avoid displacement of record sales. For instance, the compulsory license may only be secured if the webcaster does not play in any three-hour period more than three songs from a particular album, including no more than two consecutively, or

four songs by a particular artist or from a boxed set, including no more than three consecutively. These restrictions contemplate that a listener will not use the webcasting service to create his own custom designed loops featuring a single artist or album.

Downloading and On-Demand Streaming

With respect to the digital downloading of sound recordings, a mechanical license is necessary because downloading results in a new copy of a musical composition. However, a "compulsory" license also applies to downloading or "DPDs". The licensee is required to pay the same license fee (currently the greater of 8 cents, or 1.55 cents per minute of playing time or fraction thereof) required for traditional copying of musical compositions. In addition, at least one court has found that a mechanical license is indeed necessary to digitally stream music (see *The Rodgers and Hammerstein Organization v. UMG Recordings Inc.*, 60 U.S. P.Q. 2d 1354 (2001)).

Finally, playing musical compositions on the Internet is a "public performance" requiring permission from copyright owners of the songs through ASCAP, BMI and SESAC.

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Resources

The American Society of Composers, Authors and Producers (www.ascap.com)

Broadcast Music Inc. (www.bmi.com)

The Harry Fox Agency (www.nmpa.org)

Music Publishers' Association of the United States (www.mpa.org)

Recording Industry Association of America (www.RIAA.com)

SESAC (www.sesac.com)

The Songwriters Guild of America (www.songwriters.org)

The U.S. Copyright Office (www.loc.gov/copyright)