Music Rights 101 and Beyond

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MUSIC RIGHTS 101

KINDS OF RIGHTS IN MUSIC

(1.) Musical Composition

(2.) Sound Recording
What is a Musical Composition?

WHAT IS A SOUND RECORDING?

• Roy Orbison’s Oh Pretty Woman ★
• Van Halen’s Oh Pretty Woman ★
• 2 Live Crew’s Oh Pretty Woman ★
So How Do I Get Rights?

Well, that depends. What do you want to do?

You need **separate** rights for each use:

- Combining music with video
- Broadcasting music
- Playing music in public
- Putting music on the internet
- Making copies of music
- Doing a cover
**A Chart To Make It Easier:**

<table>
<thead>
<tr>
<th>If you want to:</th>
<th>Then you need:</th>
<th>From the Owner of the:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Musical Composition</td>
</tr>
<tr>
<td>Put music in an ad or video or other audio-visual work</td>
<td>synchronization rights</td>
<td>✓</td>
</tr>
<tr>
<td>Make a physical copy of a song (like a CD or other tangible item)</td>
<td>a mechanical licence</td>
<td>✓</td>
</tr>
<tr>
<td>Broadcast or play the music in a public place</td>
<td>to pay a fee</td>
<td>✓</td>
</tr>
<tr>
<td>Play the music on the Internet or other digital media</td>
<td>to pay a fee</td>
<td>✓</td>
</tr>
<tr>
<td>Cover a song</td>
<td>a compulsory licence (or other permission)</td>
<td>✓</td>
</tr>
<tr>
<td>Reprint the lyrics</td>
<td></td>
<td>✓</td>
</tr>
</tbody>
</table>

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**Music Rights Requirements**

<table>
<thead>
<tr>
<th>Composition Holder</th>
<th>Sound Recording Holder</th>
<th>Artist</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mechanical</td>
<td>Sync</td>
<td>Mechanical</td>
</tr>
<tr>
<td>Audio</td>
<td>Over-the-air</td>
<td>Blanket</td>
<td>Need to Clear</td>
</tr>
<tr>
<td>Audio</td>
<td>Single song stream</td>
<td>Need to Clear</td>
<td>Need to Clear</td>
</tr>
<tr>
<td>Audio</td>
<td>Multi song stream</td>
<td>Blanket</td>
<td>Blanket</td>
</tr>
<tr>
<td>Audio</td>
<td>Podcast/downloads</td>
<td>Need to Clear</td>
<td>Need to Clear</td>
</tr>
<tr>
<td>Video</td>
<td>Podcast/downloads</td>
<td>Need to Clear</td>
<td>Need to Clear</td>
</tr>
<tr>
<td>Video</td>
<td>Stream</td>
<td>Need to Clear</td>
<td>Need to Clear</td>
</tr>
<tr>
<td>Live</td>
<td>Live events</td>
<td>Need to Clear</td>
<td>Need to Clear</td>
</tr>
<tr>
<td>Embeds</td>
<td>Embedded audio/video</td>
<td>Need to Clear</td>
<td>Need to Clear*</td>
</tr>
</tbody>
</table>

*This applies only if one is making a recording of a live performance.
Key Players in the Music Marketplace

Musical works and sound recordings can be – and often are – created, owned, and managed by different entities

- Songwriters
- Music Publishers
- Performing Rights Organizations (PROs)
- Mechanical Rights Administrators
- Recording Artists and Producers
- Record Companies

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**Key Players in the Music Marketplace:**

*Songwriter*

- The authors of a musical work are composers, lyricists and/or songwriters
  - A songwriter may contribute music, lyrics, or both
- Trade organizations that represent the interests of songwriters include the Songwriters Guild of America (SGA), Nashville Songwriters Association International (NSAI), and the Society of Composers and Lyricists (SCL)
KEY PLAYERS IN THE MUSIC MARKETPLACE:

MUSIC PUBLISHERS

• Songwriters often enter into publishing agreements with music publishers
  ➢ Publisher may pay an advance to the songwriter against future royalty collections to help finance the songwriter’s writing efforts
  ➢ Publisher promotes and licenses the songwriter’s works and collects royalties on the songwriter’s behalf
  ➢ How to split royalties can be difficult considering many songs have multiple songwriters, each with his or her own publisher and publishing deal

• Trade organizations that represent the interests of music publishers include the National Music Publishers Association (NMPA) and the Association of Independent Music Publishers (AIMP)

KEY PLAYERS IN THE MUSIC MARKETPLACE:
Performing Rights Organizations (PROs)

• Songwriters and publishers almost always associate themselves with a PRO, which is responsible for licensing their public performance rights

• The two largest PROs - The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) – represent over 90% of the songs available for licensing in the United States

• They both operate on a not-for-profit basis and are subject to antitrust consent decrees that impose constraints on their membership and licensing practices
The right to make and distribute phonorecords of musical works – i.e., the mechanical right – is subject to compulsory licensing under Section 115 of the Act. In practice, because of the administrative burdens imposed by the license, mechanical licensing is often handled via third-party administrators. The oldest and largest third-party administrator is the Harry Fox Agency, Inc. (HFA). Mechanical licenses are also issued and administered directly by music publishers in many instances.

Most commercially successful sound recordings are the product of contractual relationships between recording artists and record labels. Record labels usually finance the production of sound recordings, promote the recordings (and sometimes the artists themselves), and arrange to distribute the recordings via physical and digital distribution channels. Record labels typically handle the licensing for the sound recordings they own. Major record labels include Universal Music Group (UMG), Sony Music Entertainment (SME), and Warner Music Group (WMG). There is common corporate ownership of major record labels and major music publishers; for example, Warner/Chappell Music is a division of WMG. Trade organizations that represent the interests of record labels include the Recording Industry Association of America (RIAA) and the American Association of Independent Music (A2IM).
**Blanket Music Licenses**

- **Fair Use**: Complies with copyright fair use
  - Fair use not always understood or easily determined.

- **Formal Source License**: Legal documents from rights holder(s)
  - Administratively burdensome to manage
  - Expensive
  - Typically for a limited time period

- **Informal Source License**: E-mail permission from artist/representation to use music
  - May not fully cover risk
  - Difficult to manage documentation of e-mail

- **Licensed Music**: Use fully licensed music from online music library
  - Music not necessarily of the best story-telling quality

- **Commission Composition**: Commission original music
  - Significant effort
  - Expensive

- **No Permission**: Use music without permission
  - Significant legal and financial risk

**Permission Scenarios**

Unlike broadcast, each instance of music used in podcasts requires some type of permission or clearance. There are several means of justifying or clearing use of music.
REAL PROBLEMS YOU MIGHT ENCOUNTER:

- Corporation For Public Broadcasting (CPB) blanket licenses only apply to CPB covered broadcasts and music streamed on CPB covered websites.

- If you need a supplemental license, it takes time. Permissions departments are notoriously slow.

- They might not grant permission.

Statutory License for Public and Noncommercial Broadcasting

The activities of public and noncommercial educational broadcasters are subject to a hodgepodge of music licensing protocols.

Section 118, which only applies to over-the-air broadcasts, provides a statutory license that covers such entities’ public performances of musical works and reproductions and distributions that enable such performances

- Noncommercial broadcasters must clear digital performance rights for musical works (i.e., for internet radio) with the PROs
- Section 118 license does not extend to the use of sound recordings by noncommercial broadcasters (instead, look to Section 114(b))
Blanket licenses

**ASCAP**
- Streaming license effective through 2017. Broadcast license also expires in 2017. ASCAP wants to combine streaming & broadcast into a single agreement. Currently in negotiations.
- CRB initiated a Sec 118 proceeding for broadcast, but we hope to enter into an agreement to avoid the proceeding.

**BMI**
- Streaming license expired in 2015 and we have a temporary license in effect and are negotiating terms.
- Broadcast expires in 2017. Trying to negotiate before a Sec 118 proceeding begins.

Sound Exchange

- We have a 5-year agreement in place from 1/1/16 through 12/31/20. Next proceeding will begin 1/1/19.
- Covers compliant streaming in digital platforms for “sound recordings” only.
**A WRINKLE: PRE-1972 RECORDINGS**

- Recordings made before February 15, 1972 are covered by a patchwork of state laws.
- A big question is whether state laws cover the public performance of pre-1972 recordings.

- Online services address this in different ways.
  - YouTube and Spotify negotiate licenses with record labels to obtain performance rights.
  - Others, like Music Choice, make payments to SoundExchange which follow a statutory licensing framework, as if their uses were covered by those licenses, which they aren’t.
  - Still others, like SiriusXM, don’t pay royalties at all for their performances of pre-1972 recordings.

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**A WRINKLE: PRE-1972 RECORDINGS**

- These practices have, of course, spurred litigation.

- Some courts have ruled that unauthorized public performances of pre-1972 sound recordings violated applicable statutory/common law.

- Federal and state courts in California both ruled against SiriusXM as did a federal court in New York.

- These rulings were not expressly limited to digital performances and thus could have implications for terrestrial radio performances of pre-1972 sound recordings.

- Similar lawsuits alleging unauthorized use of pre-1972 recordings have been filed against Pandora, Google, Apple and Rdio.
Archival Rights for Live Performances

Nine Recommended Positions for Label Agreements

Background

- Evolution of music business from media sales, to downloads, to streaming.
- Changing perception of public radio stations by labels.
- SRG initiative to identify and negotiate music rights needed by stations to fulfill their missions and serve their artist and listening communities.
- Starting point: nine positions.
Right to Create an Archive

- Each station that broadcasts a live performance should be able to record the performance, both audio and video, for archival distribution.
  - Our communities expect us to produce these archives, and to make them available on our websites and other platforms (e.g., VuHaus, YouTube).
  - Moreover, the cost to the stations of broadcasting a performance, without accompanying archival rights, far outweighs the benefit of the ephemeral broadcast.
  - Most importantly, the archive allows the artist to create and build a following.

Ownership of Master

- Each station should own the master recording for each archive it creates.
  - These archives are recorded, edited and produced by station personnel, at significant cost.
  - Archived performances include intellectual property belonging to the stations, including production value, look-and-feel, etc., which builds station brand and identity.
  - Finally, the stations are not in the business of serving as an outsource production house for labels. “Co-ownership,” a very fuzzy concept in the world of intellectual property, is not a meaningful alternative.
Distribution by Label

- The label generally should be able to distribute the archive of a live performance at some point after the station commences distribution.
  - The station does not own all intellectual property within an archived live performance.
  - The label should be able to distribute the archive, after a reasonable “head start,” subject to a few restrictions. The use should be restricted to streams on sites like YouTube, Vimeo or Vevo (i.e., no podcasts or use on albums), and any such use should include a credit with a link to the producing station.

Perpetual Distribution for Proprietary Archives

- Each station should be able to distribute its proprietary archives in perpetuity.
  - Archives of performances that occur in-studio or at a station event embody proprietary elements, e.g., production value, look-and-feel, etc.
  - If a station is forced to concede ownership of a live performance master to a label, the station should nevertheless receive a perpetual license if the live performance occurs in a proprietary setting.
  - Finding or maintaining success for an artist requires that the archive continue to promote the artist for more than, e.g., three months or a year. The long tail is very real.
  - Moreover, the stations would not be fulfilling their music discovery missions if the artist’s content is subject to takedown after an arbitrary period.
Limited Term for Non-Proprietary Archives

• After one or two years, a label should be able to request a takedown of an archive recorded at a non-proprietary event (e.g., an official stage at ACL).
  — Unlike in-studio or other station-staged events, music festival or nightclub events do not embody the “character” of the station to the same degree.
  — Non-proprietary events are those where the station’s brand, look-and-feel, curatorial skills, production values, etc. are diluted or commingled with others.

Full Performance and Individual Songs

• Each station should be able to distribute the artist’s full live performance, as well as each song within the performance.
Distribution Through Multiple Channels

- Each station should be able to distribute its archives through any channel(s) it selects.
  - In addition to the stations’ individual websites, stations should be able to distribute through other channels and platforms, including VuHaus, YouTube and others, now existing or yet to emerge, whether commercial or not-for-profit.
  - All of the stations are public stations with non-commercial missions. They are not prohibited, however, from seeking revenue from commercial enterprises, e.g., record labels that pay for banner ads on station websites, or commercial video platforms like YouTube that share revenue with content providers.

Publishing Rights

- The labels should assume responsibility for clearing publishing.
  - The labels are uniquely positioned to clear publishing for archived live performances.
  - Often stations are unable even to determine who may hold publishing rights without help from the labels.
Downloads

• No station should allow downloads of its archived content without specific consent from the label.
  – Labels should be able to insist that the public not be able to download podcasts, as opposed to streaming, of single-song performances.
  – Full performance downloadable podcasts, with station editorial content (e.g., a DJ interview), should be included in rights granted to the station.