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## The Basics of Music Licensing

The owner of a copyrighted work has the exclusive right to reproduce, distribute, publicly perform, display and adapt the copyrighted work. This includes the right to authorize or refuse to authorize others to exercise those rights. As a result, permission from the copyright owner – i.e., a license – generally is required any time copyrighted music is included in a broadcast. Under current copyright laws, songs written as long ago as 1923 could still be protected by copyright. This means that for most music included in mainstream broadcast programming, a license must be obtained and license fees must be paid. For different uses, different kinds of licenses will be necessary. The following is a brief overview of the principal music licensing issues faced by broadcasters.

The use of recorded music implicates two separate copyrights: the copyright in the underlying *musical composition* (that is, the notes and lyrics as they might be written out on paper) and the copyright in the particular recording of the song that is being used (i.e. the song as sung by a particular recording artist and contained in a CD, digital file, or other recorded medium; often referred to as the “sound recording” or “master recording”). In certain cases, particularly with older classical music, the underlying *musical composition* may have entered the public domain, although the more recently produced *sound recording* may still be protected by copyright. Typically, the copyright in the musical composition is controlled by a music publisher, although on occasion a songwriter will control the song directly. The copyright in the sound recording is usually owned by the record label. Depending on the type of use, a license may be needed from the music publisher, the record label, or both.

### 1. Public Performance Rights.

As noted above, the owner of a copyrighted work has the right to control its public performance. With respect to musical compositions, this means that a license must be obtained from the songwriter or publisher each time a recording of the composition is played as part of a broadcast. Songwriters and music publishers typically are affiliated with performing rights societies (e.g. ASCAP, BMI, SESAC), which are responsible for licensing nondramatic public performances. Rather than licensing each song separately, broadcasters enter into “blanket” licenses with each of the performing rights societies that authorize the use of all the musical compositions in the society’s repertoire. The blanket license authorizes the music to be played on the air. The current ASCAP and BMI licenses also cover the public performance right in the musical composition in connection with the streaming of a radio station’s over-the-air signal on the Internet.

Public performance licensing requirements are somewhat different for sound recordings. For historical reasons, the exclusive right to perform a sound recording is limited to performances that are made by means of a “digital audio transmission.” Therefore, although public performance licenses are required for the online use of a sound recording. However, in the United States, a public performance license generally is not required from the owner of the recording in the traditional over-

the-air broadcast context. However, the blanket license authorizes only the public performance of music in regular programming. For other broadcast uses, a synchronization license may be required, as described below.

## 2. Synchronization Rights.

Typically, when a broadcaster airs a program containing music, the public performance of the compositions contained in the program is covered by the broadcaster's blanket license. In the case of an online transmission, the public performance of the sound recording usually is covered by a license obtained by the webcaster or other transmitting organization. However, certain uses of music in broadcast programming may involve not just the public performance of music, but also the reproduction of the song and master recording. In these cases, additional licenses covering the reproduction must also be obtained.

When music is reproduced as part of a soundtrack of a film, television program or other similar production, the reproduction is called a "synchronization," and a license known as a "synch" license must be obtained from the music publisher or songwriter that owns the composition. Specifically, a synch license permits the reproduction of a composition in timed relation to moving images in an audiovisual work. The producer, not the broadcaster, typically is responsible for obtaining the synch license.

Similarly, when music is synchronized with moving images in a television or other audiovisual production, a license must be obtained for the use of the recording as well. This license is referred to as a "master use" license, and like the synch license, is usually obtained by the producer, not the broadcaster.

In radio or television, similar rights must be obtained before a sound recording is used in connection with a recorded commercial or recorded station promotional announcement. The blanket license only covers the public performance of music by itself, and does not cover the music being recorded in connection with a commercial or station promotional announcement. Rights to both the musical composition and the sound recording must be obtained before the song can be used in these contexts.

## 3. Fair Use.

In certain limited situations, copyrighted music may be used without a license. Under the doctrine of "fair use," the use of limited portions of copyrighted material may be permitted for purposes such as teaching, research, criticism, news reporting or parody. 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, outcomes are difficult to predict in legal disputes involving application of the fair use doctrine, and it is always prudent to consult with an attorney before relying on the doctrine.

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.

Thus, fair use should be relied on only in limited contexts, where only a portion of a composition or a recording is being used. For instance, an excerpt of a song used in a record review would probably constitute fair use. Or a limited amount of a song, heard as background noise in a news report, would likely be fair use. But using 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.

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The issues discussed above are only some of the myriad of copyright issues that come up in connection with the use of music on a broadcast station. 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.