

# Music Licensing 101

## A Legal Guide for Creators of Motion Pictures

By Darren M. Richard, Esq.

Understanding and navigating the convoluted world of copyrightable interests in music can be fraught with peril for the uninitiated. In order to legally use music in moving image media — film, television, Internet, etc. — or audio-only formats — e.g., CDs, digital downloads, ringtones — rights and licenses are needed. Those rights and licenses involve legally defined terms such as *synchronization*, *mechanical*, *videogram*, *master use*, and *public performance*. Each term refers to a specific copyrightable interest in music and requires a specific form of license in order to avoid claims of copyright infringement by the rights holder. Failure to understand and appreciate these terms can prove disastrous for a project.

What follows will help filmmakers, TV producers, advertisers, music publishers, and songwriters to spot key issues relevant to music licensing needs, develop appropriate and cost-effective music licensing strategies, and avoid claims of copyright infringement and other hazards.

### 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 such as 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 his or her express consent. 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 and 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 in an audio-visual or an audio-only format. The act of

obtaining this permission is referred to as “clearing the rights.” For anyone interested in using a piece of music, it’s prudent to assume that the multiple copyrightable interests in it are owned by one or more individuals or entities from which you’ll need to clear the rights.

This applies to *all* music — even incidental, background music audible in any scene. Film and TV producers need to ensure that such “source” music is properly licensed in order 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).

### Rights and Licenses

Separate and distinct copyrights are required for both a “musical composition” and a “sound recording,” which embodies a performance of a particular musical composition.

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 has assigned the copyright in return for a split of revenue generated by the publisher’s efforts in marketing, promoting, and commercially exploiting the musical composition. The two types of rights and licenses for compositions — synchronization and mechanical — are discussed in the sections following this one.

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., various digital formats, CD, 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.



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### Synchronization Rights and Licenses

When a producer or creator of a motion picture project wants to obtain permission to use a musical composition, s/he must seek a synchronization or “synch” license from the owner(s) of the composition, which, as noted previously, is likely to be one or more music publishers. A synch license confers upon the “licensee” 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 keep in mind that synch rights need to be secured from every person or company that owns a copyright interest in the desired composition in order to avoid infringement claims.

A synch license generally confers the following specific rights:

1. Right to reproduce a portion of the musical composition for a specified number of particular uses. For example, 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.

2. 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 (a “PRO”), the license will require the licensee to

exploitation, now known or hereafter devised, for private home use.”

4. Permission to use the composition in the advertising or promotion of the audiovisual work (e.g., movie trailers), typically limited to “in-context” uses. This means that in advertising or promoting the work, it may only be paired with the specific visual content as contained in the original program. To pair the composition with different content for advertising purposes, the licensee must obtain “out-of-context” rights. Publishers 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 amounts to tens of thousands of dollars depending upon the specific rights needed, the scope and budget of the project, and the relative leverage and bargaining power of the parties involved. Filmmakers and other visual media producers will want to license only those rights needed in order to avoid paying more than necessary.

### Mechanical Rights and Licenses

A “mechanical license” permits the manufacture, reproduction and distribution of the musical composition in audio-only configurations referred to as “phonorecords” (e.g., CD, vinyl LP, digital download). If the musical composition 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 of the Copyright Act, which permit the licensee to legally use the composition without the express permission of the copyright owner provided certain statutory requirements are met. Among these are the requirement for the licensee to file a “notice of intention to obtain compulsory license” with the U.S. Copyright Office and pay a royalty to the copyright holder for use of the composition. At present, this “mechanical royalty” equals \$0.091 per composition (or \$0.0175 per minute for compositions over five minutes in length) *multiplied* by the number of

phonorecord units made and distributed. A compulsory licensee must also adhere to other rather stringent requirements (e.g., providing accounting statements to the publisher every 45 days). Note that, 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.

### Master Use Rights and Licenses

When seeking to use a specific master sound recording that embodies a specific artist’s performance of a musical composition, a licensee must, in addition to clearing the rights for the composition, obtain a “master use” license. A master use license confers 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). For example, a master license would be required if a producer wanted to use the Talking Heads’ recording of *Take Me to the River* (as opposed to Al Green’s version) in a film, TV commercial, or 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).

Note that a licensee may also have to pay 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 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 could commission another artist to record the song for less money. In this case, the licensee would then own the copyright in the master recording.

### Public Performance Rights and Licenses

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., via radio, TV, 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 on a formula involving the frequency and scope of usage of each musical composition.

### Expert Assistance

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 under Section 115 of the Copyright Act, there may be circumstances for which the licensing of a particular composition or master is very difficult, if not impossible. For example, a rights owner may simply not want to license composition or sound recording rights because s/he 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

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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 protects the client against claims of copyright infringement and the other all-too-common hazards and pitfalls.

## Key Legal Terms

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Following are brief discussions of some of the more important provisions contained in the majority of music licensing agreements.

### Territory

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 movies where distribution and exhibition 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.

### 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 for additional fee.

### Fee/Royalty

The fee or royalty payable in connection with a license will depend upon the type and scope of the rights conferred, 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 or background use) and the form of media in which the composition or master is to be configured.

Additionally, some of the following terms discussed also factor into determining licensing fees. For example, for an additional fee, options may 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. However, if the picture ultimately does not warrant theatrical release, through use of the option the filmmaker has avoided having paid for what is, under the circumstances, a useless right.

### Next:

- **Representations and Warranties**
- **Indemnification**
- **Injunctive or Equitable Relief**

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