

DIGITAL MUSIC LICENSING GUIDE

FOR PUBLIC RADIO BROADCASTERS AND INDEPENDENT AUDIO PRODUCERS

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INTRODUCTION

The licensing of music in the United States has always been complicated; exponentially more so with the widespread use of digital music. It is complicated because each use of music implicates a different right under copyright law, and a different license needed from the copyright holders. Since generally two separate copyright holders have rights in all recorded music, each with their own sets of rights, multiple licenses are needed in almost all cases to use a single piece of recorded music.

THE OLD DAYS

In the old days, say, fifteen years ago, the licensing of recorded music was easy compared to today. For those in the radio broadcasting industry (including public radio), it was even easier. From the broadcaster's perspective, since their only use of music was generally to broadcast it over the radio, they only needed to obtain a "blanket" public performance license for the musical composition from the performing rights societies, and they were done. For the independent audio producer (or radio producer as they were once known), it was even easier. If they used recorded music in their work, and their work was broadcast on the radio, the independent producer did not need to obtain any license. The broadcast radio station was responsible for obtaining the license. (Don't worry if you are unfamiliar with any of the terms. They will be covered later in the guide.)

TODAY

Today, in the “new world” – the digital world – while the general rules of licensing have not changed, the distribution and uses of music by broadcasters and independent producers has. Music licensing is considerably more complex because of these new and changing uses.

OVERVIEW OF THE GUIDE

The **first section** of this guide will discuss the source of copyright law in the U.S., giving some legal background.

The **second section** will explain the “dual” copyright in recorded music, an essential concept for understanding music licensing.

The **third section** will give an overview of the most typical types of licenses needed for music in a digital environment.

The **fourth section** will start to put it all together by focusing on the ways in which public broadcasters and independent audio professionals distribute their work digitally, the licenses needed, and the sources of the license.

The **fifth section** will briefly discuss the concept of “Fair Use.”

Finally, at the end of the guide, will be a reference chart for public radio broadcasters and independent audio professionals for licensing music for use in a digital environment.

This guide is intended to give public radio broadcasters and independent audio producers a general overview of the music licensing landscape in the United States for their most common. It cannot, and does not, cover the entire music licensing landscape in the US or internationally.

The necessary legal caveat: The information provided in this guide is intended for your education, and hopefully your amusement. It is not legal advice, or a substitute for legal advice. For that, you need to consult with your attorney, and are encouraged to do so.

AND NOW: ON WITH THE SHOW.

PART 1

THE SOURCE OF U.S. COPYRIGHT LAWS

Copyrights are a bundle of specific rights that the law gives to the creators (authors) of works. Think of copyrights as a bundle of spaghetti, the different rights separable into different strands, and each strand breakable into smaller pieces.

The origin of US copyright law is found in the US Constitution. Article I, Section 8, known as the Copyright Clause, which empowers the United States Congress:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

With this power in hand, since revolutionary times, the Congress has enacted various copyright laws. Today, the Copyright Act of 1976 (the “Act”) largely governs copyright law. It finds its home in Title 17 of the United States Code. Since 1976, the Act has been amended several times to do such things as expand the length of the term of the copyright protection, codify “fair use,” and take into account technology changes such as digital audio. The Act spells out the specific rights of copyright holders.

The specific rights protected under copyright law (the spaghetti strands) are found in §106 of the Act (17 U.S.C. §106), which grants six exclusive rights to copyright holders:

- The right to **reproduce** (copy) the work into copies and phonorecords,
- The right to **create derivative works** of the original work,
- The right to **distribute** copies and phonorecords of the work to the public by sale, lease, or rental,
- The right to **perform** the work **publicly** (if the work is a literary, musical, dramatic, choreographic, pantomime, motion picture, or other audiovisual work), and
- The right to **display** the work publicly (if the work is a literary, musical, dramatic, choreographic, pantomime, pictorial, graphic, sculptural, motion picture, or other audiovisual work).
- The right to **perform** a sound recording **by means of digital audio**.

This bundle of copy “rights” belongs exclusively to the copyright owner. As the exclusive owner of those rights, the copyright owner generally has the right to authorize others to use one or more of the exclusive rights, and generally has the right to refuse others to use the copyrighted work. This means, in order to use someone else’s copyrighted musical work, you need their permission. This comes in the form of a license. This also means, if you don’t obtain permission, you likely have infringed on the copyright, and may be liable for money damages to the copyright owner, and possibly criminal prosecution.

PART 2

THE DUAL COPYRIGHT

To understand music licensing, it is critical to understand the “dual copyright” that exists in all recorded music. In all recorded music, there are two copyright holders. One owns the copyright in the musical composition. The other owns the copyright in the sound recording itself. It is important to understand the dual copyright because, as will be discussed below, for most uses of recorded music, more than one license is required to use a single piece of music, and the sources of those licenses will likely not be the same.

Musical Composition: When music is written, the composer or composers of the music (both words & music) have a copyright. This is known as the right in the “musical work,” “musical composition,” “the underlying musical composition,” or simply, “song right.” This right belongs to the composers, and is usually administered on their behalf by a music publishing company. To make matters a bit more complicated, if there is more than one composer, more than one publishing company may be involved in administering the song rights for a single song. For the purpose of this guide, this right will be referred to as the Musical Work right, and the term “music publisher” refers to the person or company that holds the copyright in the musical composition.

Sound Recording: When a recording artist records a musical composition, a second copyright arises in the sound recording: the CD, the record, the digitally downloadable file, or any other fixation of the recording. This is often known as the “sound recording right,” or simply, the “recording right.” The recording is also known as the “master recording.” For popular music, typically the record company owns and administers this right. However, in this age of easy “home” recording, there are many independent recording artists that own the recording rights themselves. For the purposes of this guide, this right will be referred to as the Master Recording right, and the term “record company” refers to the person or company that holds the copyright in the sound recording

An Example. A practical example may help to illustrate how the dual copyright works. When John Lennon & Paul McCartney composed *All My Loving*, they each obtained a copyright in the music. This is the musical composition right. They assigned their rights in the musical composition to a music publisher, who administers it on their behalf. In their case, the publisher is Northern Songs, Ltd., which is further administered by Sony / ATV Music.

When The Beatles recorded this song, Apple Records obtained a copyright in the recording itself. That is the sound recording right.

So, if you want to use the Beatle’s recording of “All My Loving,” you will likely need to obtain a license for both the musical composition as well as the sound recording. More about this below.

PART 3

TYPICAL MUSIC LICENSES AVAILABLE

The license or (more properly) licenses needed to use music in a digital environment, and the cost and availability of those licenses, will depend on how your produced work is distributed and/or publicly performed. For some uses, licenses are available as a matter of law. For other uses, licenses must be separately negotiated with the copyright holder.

Terms to know:

Statutory or Compulsory License: A statutory license is a license for the use of music that is available because the law requires it. It is compulsory, meaning that if the law requires it, then all copyright holders of music are required to grant the license to all comers, and the law establishes a process for setting the price.

Blanket License: For certain uses of music “blanket licenses” are available. These blanket licenses give users access to the broad catalogue of music available from a Performing Rights Organization (PROs, discussed in the next section). Instead of licensing music song-by-song, a blanket license grants you access to an entire catalogue of music.

Types of Licenses:

Mechanical License: A Mechanical License is the license for the reproduction and distribution of musical works (the composition), e.g., the license from Lennon & McCartney.

Master Use License: A Master Use license is the license for the reproduction and distribution of master recording (the sound recording), e.g., the license from Apple Records.

Public Performance License: A Public Performance License is the license for the public performance of either the musical work or the sound recording.

Section 101 of the Act defines “perform” and to perform “publicly.”

To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

To perform or display a work “publicly” means—

- (1) To perform or display it at a place open to the public or

PRACTICAL NOTE

Many record companies do not like to deal with license requests from small users. As a result, do not be surprised if your license request is denied or ignored. Also, do not be surprised if the price charges is cost prohibitive. Sometimes, because of agreements record companies have with the recording artists and others, permission to use the work may be difficult or impossible to obtain.

at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) To transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

In other words, if more than a small, private group of individuals can hear the work, this is a public performance. Both radio broadcast and broadcasts by means of digital audio transmissions (e.g., Internet broadcast and Internet streaming) are examples of a public performance.

Audiovisual Licenses: Pub-casters and independent audio producers are increasingly making audiovisual (“AV”) works available online. Additional licenses (plural) may be needed to use music along with moving images. The license needed will depend on how the AV work is distributed. The AV specific licenses include:

Synchronization License: A “synchronization” license, sometimes called a “sync” license, permits the video producer to reproduce the music in timed relation to the moving images.

Videogram License: Traditionally, a videogram license allows a video producer to make and distribute an AV program containing music in “hard” media, such as a DVD. The key is, the AV program is primarily intended for sale to the public for in-home use (in other words, not a public performance).

PART 4
TYPICAL DIGITAL USES OF MUSIC
THE LICENSES NEEDED
AND THE SOURCES OF THE LICENSES

1. NON-INTERACTIVE STREAMING – INTERNET RADIO

What is Non-interactive Streaming?

In its simplest, non-interactive streaming is broadcasting on the Internet. It is also known as webcasting. Webcasting generally refers to either live or on demand online streaming of an audio source to various simultaneous users. This may be Internet-only or a re-transmission of terrestrial AM/FM broadcast. It is termed “non-interactive” because the end-user listener generally cannot control the stream and what they are listening to. In addition, there are specific rules that the webcaster must be follow, such as limiting the number of songs played from the same album or by the same artist in given periods of time, showing information about the song being played visually on the Web site, and complying with other rules designed to limit digital music piracy.

What licenses are needed for non-interactive streaming?

Two licenses are needed by the webcaster:

- 1) A public performance license for the musical work, and
- 2) A public performance license for the sound recording.

What are the Sources of Licenses?

Public Performance License for the Musical Work: Public performance licenses for musical works are generally obtained from the Performing Rights Societies (the PROs).

The PROs represent songwriters, composers, music publishers. They are responsible for licensing “nondramatic” public performances of musical works. The PROs issue blanket licenses covering all works in their respective catalogues.

In the U.S., there are two major and one minor PRO. The two majors are: The American Society of Composers, Authors and Publishers (ASCAP), and Broadcast Music International (BMI). The minor is SESAC. ASCAP and BMI are non-profits and operate under a long-standing anti-trust consent decree that requires them to issue licenses, the general terms of those licenses, and how rates are set. By law, ASCAP and BMI are required to offer licenses to all who want one.

Licensing information, rates, and the songs in ASCAP and BMI's catalogue are available online: www.ascap.com and www.bmi.com.

SESAC is different. SESAC is a for-profit company and is not (for the time being) subject to the antitrust decree. This means, their rates are not publicly available, and SESAC has the ability to negotiate individually with licensees on the rates charged. More information can be found at: www.sesac.com

Public Performance of Sound Recordings: The license for public performance of sound recordings is obtained from an organization called SoundExchange (SX). SX issues statutory license. The license allows webcasters to stream any sound recordings while paying a fixed rate for each play.

- See more at: <http://www.soundexchange.com/about/general-faq/#sthash.IYvtrb9T.dpuf>

Who is typically required to obtain the webcasting licenses?

Typically, the "broadcaster" of the non-interactive stream would acquire both of the necessary public performance licenses. For example, a public radio station that streams its terrestrial broadcast on the Internet would obtain a public performance license for both the musical work as well as the sound recording. These are two separate licenses. These licenses are in addition to the license needed by a radio station for its over-the-air broadcast.

Note: A separate license is needed from each of the PROs to use the music in their catalogue.

Note: There is no public performance right for the terrestrial broadcast of a sound recording. As a result, a terrestrial broadcaster only needs to obtain a public performance license for the musical work. None is needed for the sound recording.

Note: For qualified public radio stations, the Corporation for Public Broadcasting has negotiated a license with SESAC that covers distribution by public broadcasters of musical compositions in the SESAC catalogue over the Internet. In other words, CPB pays for the SESAC license. <http://www.cpb.org/stations/musicrights/about.html>. Because ASCAP and BMI must issue licenses, stations can easily obtain a license from them directly.

CPB, NPR, and SRG have also reached an agreement with SoundExchange setting the rates for public radio stations for use of the sound recordings. If your station is covered under the agreement, CPB will pay the licensing fees. If you are eligible to be covered under the CPB / SX agreement you have to obtain a license directly from SX.

2. INTERACTIVE STREAMING

What Is Interactive Streaming?

Interactive streaming is "on-demand" streaming, allowing a user to listen to a recording at their request via digital transmission. More specifically, interactive streaming allows the end-user (the listener) to specify the music file or play list they want, and the end user can control (pause, start, fast forward, rewind), the sound file. Interactive streams are not downloadable.

The precise definition of an "interactive" stream is actually still a matter of debate. As it relates to music, users of an on-demand stream know what music is coming up, or can select the artist or song that is to be played, can scroll through tracks and can start/stop at their request, without having to download an audio file. Examples of interactive streaming include services such as Spotify, Rdio, and Rhapsody.

What licenses are needed for interactive streaming?

Believe it or not, four licenses may be needed by webcasters for interactive streaming:

- 1) A **public performance** license for the musical work.
- 2) A **mechanical license** for the musical work.

If the music being interactively streamed contains recorded music, then

- 3) A **public performance** license for the sound recording.
- 4) A **master use license** for the sound recording.

What are the **sources** of the licenses?

Public Performance License for the Musical Work: These are obtained from the PROs, as discussed in the preceding section.

Mechanical license for the Musical Work: This is a compulsory license. The copyright holder of the musical work must issue it upon request. It is obtained from the license holder – typically the music publisher – or from The Harry Fox Agency, or newer rights organizations like Limelight (discussed below).

The compulsory mechanical license is also known as a "Section 115" license because the procedure for obtaining a compulsory mechanical license is found in Section 115 of the Act. As explained in Section 115, if there is a musical composition you want to license, and a publisher cannot be located, you can obtain a license by notifying the Copyright Office.

The maximum fee that can be charged for the mechanical license is established under the law, and as a practical matter, it is possible to negotiate the rate downward if you are dealing directly with the publisher. *Gratis* (or free) licenses are sometimes available. See: <http://www.copyright.gov/carp/m-200.pdf>

Harry Fox Agency: Like the PROs, The Harry Fox Agency (www.harryfox.com) represents songwriters – composers. It is responsible for collecting and distributing mechanical royalties to its members.

Limelight: A new player in the mechanical licensing field, Limelight provides a simple way to secure a mechanical license and pay mechanical royalties for digital, physical, and ringtone releases.

Public Performance License for the Sound Recording: This must be obtained from the license holder, typically the record company. There is no compulsory license available, and the license is not available from SX. Each license must be separately negotiated.

Master Use License for the Sound Recording: This must be obtained from the license holder, typically the record company. There is no compulsory license available. Each license must be separately negotiated.

3. DIGITAL DOWNLOADS

What is a Digital Download?

A digital download is where an end-user downloads a music file (e.g., an MP3 file of a song), and keeps the file. These are not podcasts (discussed below). Generally, these are individual, discrete, full-song, downloads, also called Permanent Digital Downloads, or PDDs. iTunes is an example of a site offering PDDs.

What licenses are needed for digital downloads?

Since the end-user winds up with a digital copy of the original file, this implicates the copyright owners' rights both to reproduce and distribute the music. Therefore, the licenses that may be needed for music downloads are:

- 1) **Mechanical license**, to license the musical work.

If the downloadable file contains recorded music, then

- 2) A **master use license** is needed for the sound recording.

Other licenses that may be (but probably are not) needed:

3) A **public performance license** for the musical composition. It is not clear if downloading of music also requires a public performance license. This is still unsettled, but to date the courts have not agreed with the PROs, and the Copyright Office takes the position that this is not a public performance. The PROs are not actively pursuing public performance licenses. (Note, however, that if the PDD can be streamed from the website, then a public performance license is likely needed.)

4) A **public performance license** for the sound recording. While it is still uncertain if a public performance license is necessary for digital downloads, if one is needed for the musical composition, then one is needed for the sound recording as well.

What are the sources of the licenses?

Mechanical License for the Musical Work: This is a statutory license. It is available from music publishers directly, or from The Harry Fox Agency.

Master Use License for the Sound Recording: This is obtained from the license holder, typically the record company. The license for each piece of music must be separately negotiated. There is no compulsory license available.

Public Performance for the Musical Work: If needed, these are obtained from the PROs, or directly from the music publishers.

Public Performance for the Sound Recording: If needed, this would be obtained from the license holder, typically the record company. Each license must be separately negotiated.

4. PODCASTING

What is Podcasting?

Podcasts are something that most pub-casters and independent producers are familiar with. They are generally full-length audio programs that can be downloaded by an end-user and saved to their device. Typically, they can also be streamed from the website offering the podcast. In a sense, they are a hybrid, because they offer the opportunity for the podcaster to allow the listener to stream the program and save it on their device for later listening.

What licenses are needed to podcast?

Because Podcasts can be downloaded and saved, the licenses needed are:

- 1) **Mechanical license** to license the musical work.

If the downloadable file contains recorded music, then

- 2) **Master Use license** to license the sound recording.

If the podcast can also be streamed from the website, the following two licenses *may* be needed:

- 1) **Public Performance license** to license the musical work.

If the downloaded podcast contains recorded music, then

- 2) **Public Performance license** to license the sound recording.

What are the sources of the licenses?

Mechanical License for the Musical Work: This is a statutory license. It is available from music publishers directly, or from The Harry Fox Agency.

Master Use License for the Sound Recording: This is obtained from the license holder, typically the record company. The license for each piece of music must be separately negotiated. There is no compulsory license available.

Public Performance License for the Musical Work: There is still controversy as to whether a podcast is a “public performance” requiring licenses. As stated by the US Copyright office, this is an “unsettled” point of law. The PROs take the position that podcasting IS a public performance. They make podcasting public performance licenses for the musical works available. However, common sense suggests that podcasting, which is akin to a CD, is not a public performance. If you are worried about potential liability, and are using music controlled by BMI, ASCAP and/or SESAC, you may want to obtain a license from the relevant PRO as well.

Public Performance License for the Sound Recording: As with the public performance license for the musical work for a podcast, the necessity of this license is not resolved. If you are worried about potential liability, and want to obtain this license, the source would be the record company or other holder of the copyright in the sound recording.

5. ONLINE AUDIOVISUAL WORKS

What are online audiovisual works?

An audiovisual (AV) work is a combination of moving images with sound. If the AV work contains music, then licenses are needed. An online AV work is simply an audiovisual work distributed digitally. Think: Youtube or any other form of streaming video or downloadable video (a video podcast).

What licenses are needed for an online audiovisual works?

As with purely audio works, the licenses needed to use an AV work online depends on how it is being used. There is still uncertainty about what licenses are needed for online AV licensing,

with different players asserting different rights for each use. An assortment of up to six different licenses may be needed.

1) **Sync:** a special license called a synchronization (or “sync”) license is necessary to reproduce the musical work in timed relation to the moving images.

2) **Master Use:** If the music used in the AV work is from a sound recording, then a master use license, analogous to the sync license, is needed for the sound recording.

3) **Public Performance license** to license the musical work: If the AV work is streamed (a la Youtube), this is arguably a “public performance.” Some PROs argue that it is a public performance, and the courts have still not settled the matter. Therefore, if the music is streamed, a public performance licenses may be needed to license the musical work.

4) **Public Performance license** to license the sound recording: If the AV work is streamed (a la Youtube), this is arguably a “public performance.” Some PROs argue that it is a public performance, and the courts have still not settled the matter. Therefore, if the music is streamed, a public performance licenses may be needed to license the sound recording.

5 + 6) **Videogram Licenses:** If copies of the audiovisual work are being distributed such that the end user can download a copy of the complete file and watch the file off-line on their device (sometimes called video podcasting), then a “videogram” license from each the copyright holder of the musical work and the sound recording may be needed.

The law is unsettled as to whether a videogram license is needed. As you might imagine, the copyright holders will argue that this license is needed if you distribute copies of the AV work. Prudence (which is to say law suit avoidance) suggests that if you allow downloads of your AV work, a videogram licenses should be obtained too. The permissions granted under public performance, sync, and master use licenses do not cover distribution of copies.

What are the sources of the licenses?

Sync: This license is obtained directly from the music publisher. Harry Fox does not offer Sync licenses. No statutory license is available. The cost and availability are negotiable.

Master Use: This is obtained directly from the record company or other holder of the sound recording. No statutory license is available. The cost and availability are negotiable.

Public Performance for the Musical Work: This license is obtained directly from the music publisher or other holder of the musical work. No statutory license is available. The cost and availability are negotiable.

Public Performance for the Sound Recording: This is obtained directly from the record company or other holder of the sound recording. No statutory license is available. The cost and availability are negotiable.

Videogram for the Musical Work: This license is obtained directly from the music publisher. Harry Fox does not offer Videogram licenses. No statutory license is available. The cost and availability are negotiable.

Videogram for the Sound Recording: This is obtained directly from the record company or other holder of the sound recording. No statutory license is available. The cost and availability are negotiable.

PART 5

A FEW WORDS ABOUT FAIR USE

“... *fair use is not a referendum on fairness in the abstract* ...”¹

“Fair use” is a doctrine incorporated into the Copyright Act. Under the doctrine, the use of limited portions of copyrighted material for purposes such as teaching, research, criticism, news reporting or parody is permitted without the authorization of the copyright owner. Great, right?

There are two problems with relying on the Fair Use Doctrine instead of obtaining a license to use a copyrighted work. First, fair use is not clearly defined under the law. It is deliberately vague, and the courts will look at each case on its unique facts, and make a case-by-case determination of what is (and what is not) fair use.

The courts have issued Fair Use guidelines by way of a four-part balancing test:

(i) The purpose and character of the use. The Supreme Court emphasized this factor as being a primary indicator of fair use. The question the court will look at is whether the copyrighted material being used has been used to help create something new, or whether the copyrighted work was just copied. The courts ask whether the copyrighted work was “transformed” in the new work.

(ii) The nature of the copyrighted work. In other words, is the work being used a creative work or factual work? Courts will tend to be more protective of creative works, and thus less likely to find fair use. The opposite is true of factual works.

(iii) The amount and substantiality of the portion taken. This is a matter of the facts. The amount: Was it a large amount of a short work? A short amount of a large work? The substantiality: Was it the signature or heart of the work: the first four notes of Beethoven’s Fifth Symphony? the first line of Ginsburg’s poem Howl?

(iv) The effect of the use upon the potential market. Is there a market for the copyrighted work?

The second problem with relying on the Fair Use Doctrine relates to the first. Fair use is a *defense* to a lawsuit alleging a copyright violation. Given the uncertainty of what use a court might find to be fair use, the only way to be certain your use of someone else’s copyrighted work *is* fair use is to use it without a license, get sued, and then raise fair use as a defense. The problem is, lawsuits are prohibitively expensive.

¹ *Capitol Records Inc. v. Alaujan*, 2009 WL 5873136 (D. Mass., 7/27/09).

As a result, fair use is often uncertain ground. There are some obvious circumstances where fair use applies. But, as a practical matter, given the uncertainty, most producers either seek licenses, even if they may not be necessary, or choose not use the music at all.

Some examples of Fair Use in action²:

Fair Use:

A person running for political office used 15 seconds of his opponent's campaign song in a political ad. Important factors: A small portion of the song was used and the purpose was for purposes of political debate. *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957 (D. N.H. 1978).

A television film crew, covering an Italian festival in Manhattan, recorded a band playing a portion of a copyrighted song. The music was broadcast during a news broadcast. Important factors: Only a portion of the song was used, it was incidental to the news event, and it did not result in any actual damage to the composer or to the market for the work. *Italian Book Corp. v. American Broadcasting Co.*, 458 F. Supp. 65 (S.D. N.Y. 1978).

Comedians on the late-night television show parodied the song "I Love New York" using the words "I Love Sodom." Only the words "I Love" and four musical notes were taken from the original work. Important factors: The parody version did not compete with or detract from the original song. *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D. N.Y.), aff'd 632 F.2d 252 (2d Cir. 1980).

The rap group 2 Live Crew used the opening musical tag and the words (but not the melody) from the first line of the song "Pretty Woman." The rest of the lyrics and the music were different. Important factors: The group's use was transformative and borrowed only a small portion of the original song. It was essentially a different piece of music. (**Note: The rap group had initially sought to pay for the right to use portions of the song but were rebuffed by the publisher, who did not want "Pretty Woman" used in a rap song.**) *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

Not Fair Use:

Downloading songs is not a fair use. A woman was sued for copyright infringement for downloading 30 songs using peer-to-peer file sharing software. Important factors: Since numerous sites, such as iTunes, permit listeners to sample and examine portions of songs

² Stanford University <http://fairuse.stanford.edu/overview/fair-use/cases/>

without downloading, the court rejected this “sampling” defense. *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005).

A defendant in a music file sharing case could not claim a fair use defense since he had failed to provide evidence that his copying of music files involved any transformative use (an essential element in proving fair use). Important factors: The court held that the defendant was confusing “fairness” and “fair use.” “In the end, fair use is not a referendum on fairness in the abstract ...” *Capitol Records Inc. v. Alaujan*, 2009 WL 5873136 (D. Mass., 7/27/09).

Likely not Fair Use³:

A public radio podcaster uses the copyrighted music of Frank Zappa for the intros and outros of their podcast about science and technology. The podcast has nothing to do with commenting or critiquing the music played. Conclusion: This is likely not a fair use.

An attorney uses copious examples of “fair use in action” from an academic website about copyright law. Conclusion: This is likely fair use.

³ Podcaster’s Legal Guide:

http://wiki.creativecommons.org/Podcasting_Legal_Guide#Examples_Of_Fair_Use_That_May_Apply_In_Podcasting.

Part Final

A FEW FINAL (EDITORIAL) THOUGHTS

“The opposite of a free culture is a ‘permission culture’ — a culture in which creators get to create only with the permission of the powerful, or of creators from the past.”

- Lawrence Lessig, *Free Culture: The Nature and Future of Creativity*

Clearing music rights for digital uses can be difficult, confusing, expensive, time consuming, and frustrating. The complexity in the digital environment was discussed in a recent green paper published by the US Department of Commerce:

“[D]igital music services must navigate an often-confusing licensing landscape, featuring a combination of statutory licenses and direct negotiations with right holders. Music licensing is particularly complex due to the existence of two categories of works – sound recordings and musical compositions – which must be separately licensed, the fact that the different rights in musical compositions are administered by different entities, and long-standing limitations on the ability to license multiple musical compositions in a single transaction.”

Copyright Policy, Creativity, And Innovation In The Digital Economy, The Department Of Commerce, Internet Policy Task Force, July 2013, p. 81

This echoes the sentiment of the former Register of Copyrights, who explained in 2005:

[I]n many situations today it is difficult to determine which rights are implicated and therefore whom a licensee must pay in order to secure the necessary rights. Faced with demands for payment from multiple representatives of the same copyright owner, each purporting to license a different right that is alleged to be involved in the same transmission, licensees end up paying twice for the right to make a digital transmission of a single work. . . . But whether or not two or more separate rights are truly implicated and deserving of compensation, it seems inefficient to require a licensee to seek out two separate licenses from two separate sources in order to compensate the same copyright owners for the right to engage in a single transmission of a single work.

Statement of Marybeth Peters, the Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary (June 21, 2005), <http://www.copyright.gov/docs/regstat062105.html>.

So, what is a lowly, small-budget public broadcaster or independent audio producer to do, when budgets and deadline pressures do not allow them to “clear” all of the rights they contracted to

clear, or when the broadcaster or independent audio producer wants to distribute their work using all of the digital distribution methods available?

Unfortunately, for most uses of music the easiest choice is not to use it at all. But, music is an essential ingredient in most productions. There are a few “work arounds.” None are entirely satisfying.

Seek out and use copyright free music. See, Public Domain Information Project:
<http://www.pdinfo.com/>

Use music licensed under a Creative Commons license. See, Creative Commons:
<https://creativecommons.org/legalmusicforvideos>

For larger projects, where theme song music is needed, time is less critical, and budgets allow: hire a composer to compose original theme music, and hire musicians to record the theme music, making sure that with all concerned appropriate contracts are in place to grant the producer all rights free and clear, up front.

Some sources of further information about copyright and music law:

- **Electronic Frontier Foundation:** <http://www.eff.org>
- **Creative Commons:** <http://www.creativecommons.org>
- **Stanford University:** <http://www.fairuse.stanford.edu>
- **TechDirt, *The Insanity Of Music Licensing: In One Single Graphic:***
<http://www.techdirt.com/articles/20100813/17380410623.shtml>
- **SoundExchange:** <http://www.soundexchange.com/service-provider/licensing-101/#q2>
- **ASCAP:** www.ascap.com
- **BMI:** www.bmi.com
- **SESAC:** www.sesac.com
- **Harry Fox Agency:** www.harryfox.com
- **Limelight:** <https://www.songclearance.com/>
- **CPB, Music Rights for Public Broadcasters:** <http://www.cpb.org/stations/musicrights/>

THE PUBLIC BROADCASTING DIGITAL MUSIC RIGHTS CHEAT SHEET

TYPE OF USE	LICENSE NEEDED	SOURCE OF LICENSE	TYPE OF LICENSE
Non-Interactive Streaming			
e.g., webcasting or Internet radio	Public Performance - musical works	Performing Rights Organizations (PROs): ASCAP / BMI / SESAC	Compulsory / Blanket
	Public Performance - sound recording	SoundExchange	Compulsory / Blanket
Interactive Streaming			
e.g., Rdio, Spotify,	Public performance - musical works	PROs	Blanket
	Public performance - sound recording	Copyright holder of sound recording (typically record company)	Negotiable
	Mechanical - musical works	Harry Fox Agency (HFA) / Limelight / publisher or musical composition copyright holder	Statutory
	Master Use - sound recording	Copyright holder of sound recording (typically record company)	Negotiable
Digital Downloads			
e.g. iTunes	Mechanical - musical works	HFA / publisher or musical composition copyright holder	Compulsory
	Master Use - sound recording	Copyright holder of sound recording (typically record company)	Negotiable
Podcasts:			
	Mechanical - musical works	HFA / publisher or musical composition copyright holder	Statutory
	Master Use - sound recording	Copyright holder of sound recording (typically record company)	Negotiable
	Public Performance - musical works (if podcast is streamed) - <i>likely not needed</i>	PROs / maybe publisher or musical composition copyright holder	Blanket if through PROs
	Public Performance - sound recording (if podcast is streamed) - <i>likely not needed</i>	Copyright holder of sound recording (typically record company)	Negotiable
Web Videos			
	Sync License - musical works	Music publisher or musical composition copyright holder	Negotiable
	Master Recording license - sound recording	Copyright holder of sound recording (typically record company)	Negotiable
	Public Performance - musical works	Music publisher or musical composition copyright holder	Negotiable
	Public Performance - sound recording	Copyright holder of sound recording (typically record company)	Negotiable
	Videogram - musical works (if copies are distributed; video podcasts)	Music Publisher or musical composition copyright holder	Negotiable
	Videogram - sound recording (if copies are distributed; video podcasts)	Copyright holder of sound recording (typically record company)	Negotiable

ABOUT THE AUTHOR

Spencer W. Weisbroth is a Peabody Award-winning attorney with offices in San Francisco, California. Spencer has been an integral part of the public broadcasting world for more than two decades, as both an attorney and producer. Spencer has worked with many of the best public radio producers, whose programs are regularly heard on hundreds of stations in the United States on NPR and PRI, as well as internationally. His practice is focused on working with businesses, non-profits and social entrepreneurs on a full range of transactional matters.

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