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## MUSIC LICENSING FOR AUDIO-VISUAL CONTENT<sup>1</sup>

### Overview

Music licensing practices for synchronization with audio-visual works can be complex. The purpose of this whitepaper is to provide an overview of the applicable laws, practices, and issues involved in successfully sourcing and licensing music for synchronization with audio-visual programming.

#### A Cautionary Tale: “Blurred Lines”

It isn’t often that a court case comes down that illustrates music copyright infringement principles almost perfectly. Lucky for us, but unlucky for Robin Thicke and Pharrell Williams, their music composition “Blurred Lines” serves as an excellent example.

**The Facts:** Pharrell Williams and Robin Thicke co-wrote and performed “Blurred Lines” which was a global phenomenon reaching #1 on the charts. The estate of Marvin Gaye believed that “Blurred Lines” was a work derivative of Gaye’s 1977 chart topper “Got to Give It Up.” It accused Thicke and Williams of stealing the song, and Thicke and Williams countered by suing the estate for a declaratory judgment of non-infringement. That backfired and led to a \$7.4 million jury verdict against Thicke and Williams. The judgment is on appeal.

**Why it Matters to a Movie/TV/Game Distributor:** Copyright is strict liability. If one licensed “Blurred Lines” for synchronization with a movie, television show, or game or even simply distributed copies on a soundtrack related to an audiovisual title then they are also a potential defendant in the case. If they were to lose, they may become jointly and severally on the hook for the ENTIRE verdict. Part of the verdict might include an injunction against continued distribution of the product that includes the infringing work. The economic damages could be massive by way of lost profits!

Additionally, one legal strategy for plaintiffs in copyright infringement suits is to put pressure on the distributor defendant by suing the entire supply chain, including every retailer, knowing full well there is a chain of indemnity leading back to the master distributor. So a distributor could be on the hook for not only the verdict but the legal fees of every downstream indemnitee. With legal rates going \$500 or more dollars per hour, the legal fees can dwarf the verdict.

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<sup>1</sup> This white paper is intended to provide an overview of some of the copyright issues involved in licensing music for audio-visual content. It is not intended to provide legal advice. Individuals involved in licensing music for audio-visual content should seek competent legal counsel to assist them.

## **The Journey Begins: Determining Rights under the Copyright Act**

Licensing music begins with determining what sound recording or musical composition you want to license for synchronization with your audio-visual program. Once that is determined, the first threshold question is whether the music you want to use is currently under valid copyright protection. This matters because you might not have to get a license if the song is public domain or not subject to copyright protection. This will save you a bundle of money! Examples of this include if you are contemplating re-recording a very old song such as a Beethoven composition like "Für Elise," or a song that was published prior to 1964 and didn't have a copyright renewal filed or a simple sound from a stock music library.

A copyright is a form of intellectual property that generally provides the owner a limited term exclusive right to control the use and exploitation of a work of authorship. Generally, copyright attaches under the laws of the country of origin and is enforced globally under bi-lateral treaties, the primary being the Berne Convention. Copyright attaches to a work of authorship when it is fixed in a tangible medium of expression. In order to qualify for copyright protection, a work fixed in a tangible medium of expression must be independently created by its author and meet the *de minimus* creativity test. In summary, the work must show some level of creative expression that is more than just an expression of skill. Ideas on their own are afforded no protection under copyright.

### **Types of Music Copyrights: The one-two punch**

There are two forms of copyrights insofar as music is concerned: the Music Composition, which is the notes and lyrics as you would read them on sheet music, and the Sound Recording, which is a tangible expression of an auditory sound wave made from and embodying a Music Composition.

With regard to music compositions, the *de minimus* creativity requirement requires that it be more than a basic chord progression or a short few notes because there are not enough different ways to express such compositions to afford protection.

Regarding sound recordings, it is not uncommon for recording artists, producers, and DJs (especially in EDM and Hip Hop genres) to remix and mash up elements from different recordings embodying different musical compositions. These are derivative works. The definition of a derivative work is a work based on one or more pre-existing works in any form in which a work may be recast, transformed or adapted. It must incorporate the pre-existing work. The pre-existing work must be recognizable in the derivative work. The requirements to qualify the derivative work for a new copyright are all the general requirements plus: (i) it must be a recasting adaptation of a pre-existing work; (ii) the pre-existing work must be eligible for copyright; and (iii) the new work must incorporate the pre-existing work in a manner such that the pre-existing work is detectable.

Therefore, when licensing a sound recording that is a remix or mash-up for synchronization with a visual work (such as many Jay-Z and Master P recordings are), be sure the work is authorized and the licensor has clearance from the underlying compositional and sound recording copyright holders.

### **Copyright Era's: Understanding Licensing Based on When the Work Was Authored**

Copyright law in the United States has developed since its inception with several major amendments to the legislation. For the purpose of this paper we are going to focus on three significant eras: Works created pre-1978, works created post-1978 and older works that have fallen into the public domain.

The duration of a Copyright depends on two primary factors: (i) the era in which it was created and (ii) who owns it. Generally the duration of copyright is the life of the author plus 70 years; and if the work was created for hire for a third party then the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first (17 U.S.C. § 302(c)). However, the exact duration depends on when it was authored and published.

#### Public Domain Works

When dealing with music licensing for audio-visual works it is important to know if the sound recording and/or music composition is still copyrighted. If it is public domain, it is free to use. The public domain rules are somewhat complex.

*Works authored prior to 1909 and published prior to 1923.* These are public domain. If they were authored in this time frame and not published, then they are called 'straddle works' and are subject to the 1976 Act and should be treated in accordance with the 1978 or later rules.

*Works authored between 1909 and 1978.* Protection commences on first publication with notice for an initial 28 year term with a single 28 year renewal term. If the Work was not marked as copyrighted it didn't meet the formality requirements and falls into the public domain. Works published prior to 1964 need to have a renewal application filed. It must have been filed by the author or author's heirs. This renewal mechanism was a way to allow authors to reclaim the work. Transfers and licenses were held to die at renewal unless the transfer or license specified it survived the renewal. Hollywood made authors grant the right to use the work during the renewal period of the copyright. If the author died before the 28<sup>th</sup> year, the right to register would vest in the heirs, and they would not be contractually bound to Hollywood to renew under the contract. Works coming up for renewal between 1964 and 1977 have an automatic renewal for 67 years under the Sonny Bono Act so the total duration of copyright is 95 years.

#### IMPORTANT: Sound Recordings Prior to 1972

Music compositions have basically always been covered by copyright. However, it was not until February 15th, 1972 that Sound Recordings achieved protection under Federal law (there may have been state law protections).

#### Works authored after January 1st 1978

Protection commences upon first fixation and the duration of copyright is for the life of the author plus seventy years. The term for a work for hire is 95 years from first publication or 120 years from creation, whichever is shorter. The copyright goes until December 31st of the last year of copyright.

#### **Special Situations: Recordings of Live Performances**

Live performances fixed in a tangible medium of expression are a special area of copyright. When licensing live audio recordings for synchronization with visual works be sure to ensure that the recording is authorized by the performer.

With regard to audio and audio-visual recordings of live performances, generally, under the standard copyright law, if it hasn't been fixed in a tangible medium of expression whoever fixes it first acquires a copyright in that performance. However, the music industry lobbied and there are two notable federal laws that now pre-empt the general rule. First, the Live Broadcast Clause of the 1978 Copyright Act proclaims that "a work consisting of sound, images or both is fixed if a fixation of the Work is being made simultaneously with its live broadcast." Secondly, the Anti-Bootlegging Act makes it illegal to record or traffic in live musical performances recorded without the permission of the performer.

## Requesting a License: The Concept of Rights as a “Bundle

So you've identified one or more sound recordings or music compositions you want to license for inclusion in your audio-visual program. You've ascertained they are subject to copyright protection and any embedded works have been cleared; now it is time to request a license from the copyright owner or their agent. But first, what is a license and how does it work?

Copyright provides the owner the exclusive right to: reproduce, distribute, publicly perform, publicly display and make derivative Works.

The names below are common parlance in the music industry when processing licenses. Here we map them to the copyright rights:

- (1) Public Performance: same as public performance right.
- (2) Mechanical: same as reproduction right.
- (3) Synch: combination of reproduction, distribution, and derivation right.

As an audio-visual licensee you need to acquire a synchronization license from both the holders of the copyrights of the sound recording and the composition. This license will provide you the right to make a derivative work (the audio-visual program with music mixed in) and to reproduce, distribute, publicly perform and display the derivative work with the sound recording and/or music composition embedded.

If you intend to produce many copies of the audio-visual program, such as through home video unit sales, then you will also want to consider if you are acquiring the mechanical rights on a “buy-out” basis or if you will be doing so on a royalty basis. There are statutory rates for mechanical reproductions of music compositions in phonograms (CDs). They are currently 9.1 cents for compositions of five minutes or less. If you are paying on a royalty basis keep this in mind as a benchmark. You should be able to negotiate a lower piece rate directly with the publisher. Harry Fox Agency is a good licensing resource. More information can be found at [www.harryfox.com/public/FAQ.jsp](http://www.harryfox.com/public/FAQ.jsp).

Special Note: If you are commissioning an original work for your audio-visual program, it can be to your benefit to make it a work for hire because every time that a music composition is publicly performed there is a royalty due to the copyright owner. These royalties are collected by the performing rights organizations (commonly called “PROs”) and paid to the music composition rights-holders. Almost every country has at least one. In the United States the PROs are ASCAP, BMI, and SESAC. CISAC is the global trade group for PROs.

In many countries outside the United States, if the recording was authored in a country that recognizes a public performance right in sound recordings, there is also a royalty paid when the sound recording is publicly performed. In the United States the sound recording only receives a royalty when it is publicly performed by means of a digital audio transmission. SoundExchange collects these digital performance royalties in the USA and disburses them to the music rightsholders.

These royalties can be very meaningful if your audio-visual program is popular. It is common for a film or television producer to work with a music publisher on this side of the business model so please contact one if you want to value the opportunity.

### **Exceptions to Licensing Requirements**

Fair Use: The U.S. Copyright Act (section 107) says that the “fair use” of a copyrighted work is not infringement. Section 107 notes that “fair use” encompasses “criticism, comment, news reporting, teaching ..., scholarship, [and] research.” Parody is also a recognized fair use. Use for one of the purposes, however, is not automatically fair use. Rather, whether a particular use is a fair use is determined on a case-by-case basis by balancing various factors.

There are four statutory factors for courts to consider when determining fair use, but they can also look to other factors. The four statutory factors are:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.

It is important to note that a non-commercial use is not automatically fair use, just as a commercial use does not exclude a use from fair use. Additionally, the more transformative (as opposed to derivative) a use is, the less weight is given to factors 2-4.

Given the subjective nature of fair use, you should seek legal review if you intend to assert the fair use privilege. Here are some cases on the topic for further reading:

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

### **Finding the Owner: Data Data Data**

When researching repertoire, there are several good tools to determine who owns or administers the copyrights. There is the EDGAR search engine at Copyright.gov, which will show the authors of a work. There are the public facing websites for ASCAP and BMI for United States music composition repertoire. There is the CISAC database for international music composition repertoire. For sound recordings you can check any commercially available digital retail platform and look for the copyright information. The Compact Disc, Amazon, iTunes, and Spotify all list this information.

## **Making the Offer: Primary Players & their licensing practices**

So you've figured out if you need a license based upon your use case. Who do you call? What do you offer? Here is a short list of the major players in the United States:

### Sound Recording Owners (Labels)

- Universal Music Group (includes EMI)
- Sony Music
- Warner Music Group
- The Orchard
- Ingrooves Fontana
- Production Music Association (trade group for music libraries)

### Music Composition Owners (Publishers)

- Universal Music Publishing
- Sony/ATV Music Publishing
- Warner/Chappel Music Publishing
- Bertlesmann Media Group
- Kobalt
- Peer Music
- Wixen
- Ole

How much do you offer? Generally they want to see the nature of the use and you will be able to get them to quote you a price. In this manner they set the ceiling. You can negotiate down from there. Having multiple options for music will strengthen your position. In many cases, the music composition will have multiple owners. The reason for this is because there are multiple writers who each have a publisher. It is legal to cut a deal with just one of the co-authors or publishers because co-authors can license their entire work and account to their other co-author(s) but as a practical matter professionals in the music industry don't operate this way. In most cases, you will negotiate with one first then the other and they will usually quote you a price on a most favored nations basis, meaning that regardless of whoever extracts the best deal from you, they both get that deal.

## **Lastly: Practical Matters**

As a practical matter, it is advisable to purchase errors and omissions insurance for your program that includes coverage for copyright lawsuits due to the music infringing someone's rights. The reason for this is often times, especially in urban and EDM genres, the recording artist will use a selection, likely a direct sample, from an earlier recording from another recording artist. In some cases, the producers do it and the recording artist doesn't even know. These are oftentimes not cleared and can lead to nasty lawsuits. While data is difficult to come by, a prominent Los Angeles litigation attorney quotes the average copyright lawsuit cost at \$350,000 USD in legal fees to defend start to finish. Typically, it is \$25,000 to retain an attorney

simply to answer the complaint. The liability is up to \$150,000 per infringement if it is willful, but is likely much less in cases of ignorance, where actual damages will be levied. Most cases can be settled for a retroactive license payment less than \$25,000 except for the largest and most popular music and audio-visual programs.