USING MUSIC IN DIGITAL MEDIA: BUSINESS AND LEGAL ISSUES

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Digital media: The good news – and the bad

- The digital world opens vast new opportunities
- New outlet for creativity and engagement
- But whole new host of legal issues
- Some unfamiliar, particularly to non-media companies



Typical music uses in the digital era

- Streaming on website
- Downloads
 - Tethered Downloads (restrictions on use, e.g. Rhapsody or Napster)
 - Untethered Downloads (few or no restrictions on use, e.g. iTunes)
- Ring Tones, Ring Back Tones, etc..
- Non-Interactive Internet Radio (Webcasting)
- Interactive Internet Radio; Streaming on Demand (Virtual Jukebox)
- Podcasts
- Audio-visual programming



What licenses do you need?

- Depends on the nature of the use
- How and where the music is used will determine who gives permission and how much they are paid
- Consider which of the copyright owner's exclusive rights are implicated



Two different music copyrights

- Musical composition
- Sound recording



Copyright Owner's Exclusive Rights

- Copyright owners enjoy multiple distinct rights, including:
 - Reproduction
 - Derivative works
 - Distribution
 - Public Performance
 - Display
 - Public performance of sound recording by means of digital audio transmission



Public Performance Right - Compositions

- Public performance: Performance of a song in a place open to the public or to many people, whether they receive it at one time or different times, one place or many places
 - Live concert; television program soundtrack; radio; in bars, restaurants, retail stores
- Licensed by ASCAP, BMI, SESAC
 - ASCAP and BMI are non-profits
 - ASCAP and BMI are subject to antitrust consent decrees
 - Can't discriminate among similarly situated users, can't say no to potential users
 - SESAC is not subject to consent decrees it's a commercial business like any other



Digital Public Performance Right – Sound Recordings

- Historically, no performance right in sound recordings in the US
- In 1995, Congress created exclusive right of copyright owner to publicly perform sound recording by means of a "digital audio transmission"
 - Does not include recording embodied in audio-visual work
- Means that online streaming, Internet radio, satellite radio, digital cable all requires digital performance license for sound recordings
- Currently big fight over whether it should be extended to cover broadcast radio



Streaming Audio

- What licenses are required?
 - Composition: public performance
 - Master: digital public performance



Digital performance license for noninteractive services

- Licenses administered by SoundExchange nonprofit collective originally formed by RIAA
- Fees go 50% to copyright holders in sound recording (record companies), 50% to featured artists (45% to featured artist, 5% to other musicians
- Fees set by Copyright Royalty Board



Must not be an "interactive" service

- Non-interactive service not consumer directed
- No preannouncing when a song will play
- No more than 3 songs in a row by the same artist
- Not more than 4 songs by same artist in a 3 hour period
- No more than 2 songs from same CD in a row
- Identify song, artist and CD title in writing on the website as the song is being played.



Royalties

- Royalties Set By Copyright Royalty Board
 - 2010 \$.0019 per performance
- Per "performance" = per song, per listener
- For each listener, monthly fee At 10 songs per hour = \$13.70, at 15 songs an hour = \$20.50
- Lots of settlement agreements setting lower rates for specific groups – most that carry through 2015
- No CRB-imposed rates for 2011-2015 currently being litigated



Reaching the world?

- Sound recording royalties cover US streaming only
- Can subtract non-US performances in calculating obligations
- Few reciprocal agreements yet
- So foreign royalty agents could request payment too if you don't limit streams to US listeners



Reproduction Right

- Applies to both compositions and sound recordings
- When does reproduction occur lines are not clear? Examples:
 - Podcasts
 - When a sound recording is made of a composition statutory license available
 - Temporary copy in RAM or hard drive?
- Separate from public performance. Even if you have a public performance license, may still need to have a separate license covering any reproduction unless otherwise covered
- Who controls reproduction right?
 - Sound recording: record label
 - Composition: music publisher (through Harry Fox, direct licensing, or various aggregators for mechanicals)



Interactive/On-Demand Streams

- Not eligible for SoundExchange license
- Must negotiate with record label for performance rights for sound recordings
- Also need to pay plus public performance rights for musical work – and possibly mechanical royalty for the reproduction - which together total10.5% of gross under CRB royalties settlement
- Need to find music publishers to pay for mechanicals – no complete database, no universal license source



Streaming audio-visual programming

- What licenses are required?
 - Production
 - Composition: synch license
 - Master: master use license
 - Exhibition
 - Composition: public performance license
 - PRO license in place?
 - Master: no digital public performance license required for sound recording embodied in audiovisual work



Negotiating issues for master and synch license

- Sometimes multiple publishers
- Favored-nations requirements
- Don't rely on recording artist (or his or her management)!



Downloads

- What licenses are required?
 - Master: From record label
 - Composition:
 - Reproduction and distribution
 - Record label typically obtains mechanical license



User-generated content

- Sites that permit users to upload music or audio-visual programming containing music may wind up making available unlicensed music
- DMCA safe harbor may be available
- Need to avoid encouraging infringing use of music, need to register with the Copyright Office a contact person for complaints of infringement, and need to take down infringing content when notified that it exists
- Limits still being developed as to what is OK and what is not – extremes of original Napster and Grokster cases, to recent Limewire decision, to pending case dealing with YouTube



Cover Songs/Derivative Works

- Even if not using an existing track, permission from the owner of the composition will still be required
- Compulsory license is available under Section 115 for making and distributing phonorecords
 - Available only if purpose is to distribute phonorecords to public for private use
 - Phonorecords are "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed . . ."
 - Compulsory license is not available for purpose of recording a track for use in an audiovisual production
- Be careful about significant changes to the composition (e.g. lyric changes or translation, significant alteration of melody)



Fair Use?

- 4 non-exclusive factors:
 - Nature of use (commercial or not; transformative?)
 - Type of work (factual or creative)
 - Amount used (significant or limited)
 - Impact on market (can the owner sell the work?)
- No hard and fast rules fact-specific analysis
- Typically hard to prevail on a fair use argument in a commercial or promotional context
- Publishers and labels are aggressive when it comes to sampling
- Mash-ups, The Grey Album, etc. will create interesting issues.
- Parody v. Satire



Areas of controversy

- Are on-demand/unique streams a "public performance" or a "mechanical"?
- Is a download a public performance?
 - Should it be? Songwriters propose legislative changes.
- Reproduction license or payment required for incidental copies?
- Cloud computing
- User generated content issues
- Contributory infringement issues



Questions?

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