

USING MUSIC IN DIGITAL MEDIA: BUSINESS AND LEGAL ISSUES

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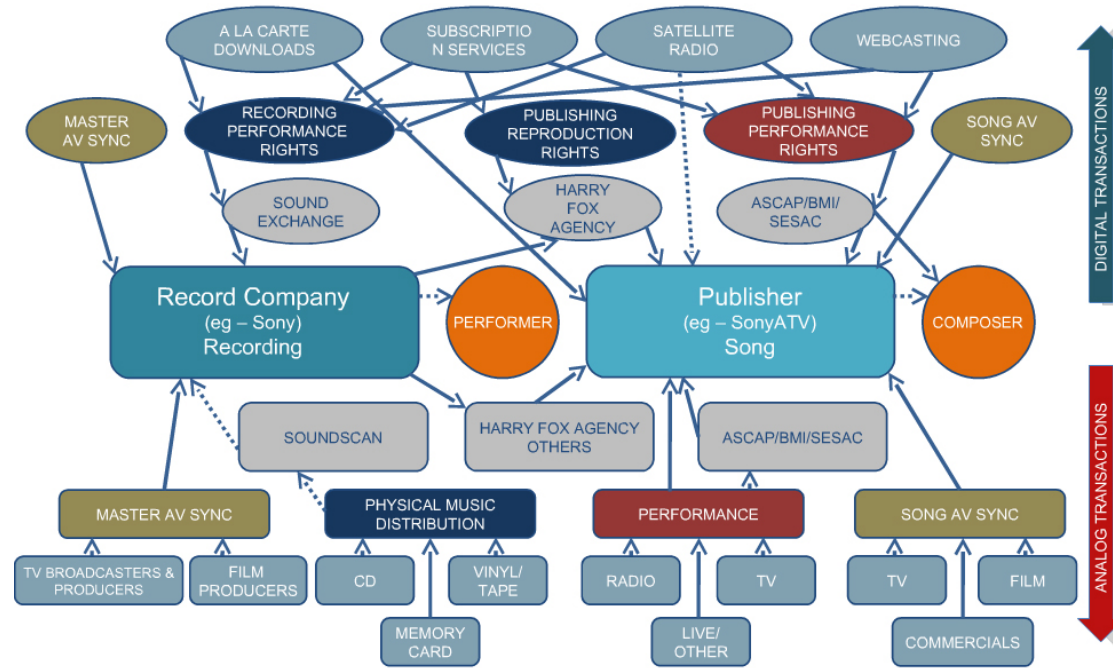
Digital media: The good news – and the bad

- The digital world opens vast new opportunities
- New outlet for creativity and engagement
- But whole new host of legal issues

Why is it so confusing?

(chart courtesy of Music Reports Inc, Woodland Hills, CA, www.musicreports.com)

Problem-The Royalty Payment Ecosystem



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
- Production of commercials, promos and other audio or video programming where music is one element

Copyright Basics

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

Two different music copyrights

- Musical composition
- Sound recording

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

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
 - SESAC is not subject to consent decrees

Digital Public Performance Right – Sound Recordings

- Historically, no performance right in sound recordings
- 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

Reproduction Right

- Applies to both compositions and sound recordings
- When does reproduction occur? Examples:
 - When a composition or master is recorded with images in an audio-visual production
 - When a sound recording is made of a composition
 - Temporary copy in RAM or hard drive?
- Separate from public performance. Even if you have a public performance license, still must have a separate license covering any reproduction.
- Who controls reproduction right?
 - Sound recording: record label
 - Composition: music publisher (through Harry Fox for mechanicals)

Right to Make Derivative Work

- Taking existing copyrighted work, and using elements of it to make a new work
- Copyright holder retains the rights to authorize derivative work
- Most Common Example – taking the tune of a song and putting new words with that tune
- Subject to fair use, you need to get the permission of the musical composition copyright holder to make a derivative work

Streaming Audio

- What licenses are required?
 - Composition: public performance
 - ASCAP, BMI, SESAC
 - For the most part, standard agreements, subject to rate court review
 - Master or Sound Recording: digital public performance
 - Non-interactive – SoundExchange, rates set or approved by Copyright Royalty Board
 - Interactive – private negotiations with copyright holder

Digital performance license for non-interactive 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 meet certain guidelines to qualify

Must not be an “interactive” service

- Non-interactive service – not consumer directed
- Observe the requirements for music licensing
- 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.
- Exceptions granted by private agreement to radio stations who stream their ***over-the-air signal***

Royalties

Standard Rates (subject to appeal):

- 2011 - \$.0019 per performance
- 2012 - \$.0021 per performance
- 2013 - \$.0021 per performance
- 2014 - \$.0023 per performance
- 2015 - \$.0023 per performance

Many other rates available for different classes of webcasters, e.g. broadcasters, noncommercial entities, small webcasters, NPR affiliates, etc.

Radio Broadcaster Royalty Rates

- 2011 - \$.0017 per performance
- 2012 - \$.0020 per performance
- 2013 - \$.0022 per performance
- 2014 - \$.0023 per performance
- 2015 - \$.0025 per performance

For new broadcasters who begin webcasting, and probably as a default rate for all broadcaster streams (though subject to appeal)

What Does Broadcaster Royalty Mean?

- 2011 - \$12.24 per month, per average simultaneous listener (assuming 10 songs an hour)
- 2015 - \$18.00 per month, per average simultaneous listener (assuming 10 songs an hour)
- Looking at it another way:
 - 2011 - \$17 per 1000 listeners per hour
 - 2015 - \$25 per 1000 listeners per hour

Reaching the world?

- Royalties cover US streaming only
- Can subtract non-US performances
- But few reciprocal agreements yet
- So foreign royalty agents could request payment too

Interactive/On-Demand Streams

- Not eligible for SoundExchange license
- Must negotiate with record label
- Also, on the composition side, may need rights from music publishers separate from ASCAP, BMI and SESAC

Streaming audio-visual programming

- What licenses are required?
 - Composition:
 - public performance license
 - synch license
 - Master:
 - No digital public performance license required for AV programming
 - Master use license
- Same process for fixing synching recorded music with other audio files, e.g. taking a recorded song to use it in an audio-only commercial or promo

Negotiating issues for master and synch license

- Sometimes multiple publishers
- Favored-nations requirements
- Remember to clear both the composition and the master (sound recording)

Downloads

- What licenses are required?
 - Composition:
 - Reproduction and distribution
 - Record label typically obtains mechanical license
 - Many publishers are represented by Harry Fox Agency
 - On-line services available to get rights to make “cover tunes”
 - Master
 - From record label

Derivative Work

- Essentially same process as for audio-visual work
- Question of parodies often arises – fair use issue

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

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
- Remember to follow all requirements of safe harbor – registration of agent, notice on website, take-down obligations, appropriate warnings in terms of use, etc.

Areas of controversy

- Are on-demand/unique streams a “public performance”?
- Is a download a public performance?
 - Should it be? Songwriters propose legislative changes.
- Reproduction license or payment required for incidental copies?

Questions?

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