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Music Licensing for Broadcast Commercials

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Music can add great value to many forms of programming including commercial advertising and other types of promotions. In this context, music sets the mood, helps convey information about products and services, and makes the commercial message more memorable. In producing a commercial, there are different alternatives for obtaining the music to be used. A composer can be hired to write a new song, or an existing song can be used. The growing trend is to use existing songs for commercials, rather than commissioning new music. What kind of licensing is required in order to use and broadcast an existing song in a commercial?

Radio and television broadcast stations routinely obtain blanket music performance licenses from and pay fees to the three U.S. performance rights societies—ASCAP, BMI and SESAC—so that they can entertain their audiences. However, those licenses and fees do not authorize a station to broadcast music that is contained in commercials. To broadcast copyrighted music contained in commercials, a station must obtain additional licenses which, depending on the circumstances, are generally called “reproduction,” “mechanical,” and/or “master use” licenses. A “synchronization” license which allows the music to be “synched” to video must be obtained if the music is synchronized to video for television commercials.

In order to understand the full scope of music licensing, it is important to understand the multiple layers of rights which exist in recorded music. There are two distinct sets of copyrights involved. First, there is the copyright in the song itself. The “song” is the musical composition, including both the music and the lyrics of the song. Song copyrights are usually owned by the music publisher and/or the songwriter. Second, there is a copyright in the “sound recording.” A sound recording is a specific recorded version of a song. Sound recording copyrights are usually owned by the record company, which shares royalties with the performers of a song.

The specific licenses that are required in order to use copyrighted music in commercials depends on the specific use that the station or advertiser intends. If the commercial will include dubbing or copying of

a sound recording into a commercial, then the station or advertiser must obtain two licenses - one from the song copyright owner and the other from the sound recording copyright owner. On the other hand, if the Station or the advertiser creates a new recording of an existing or new song for use in a commercial, rather than using an existing sound recording of a song, then only one license is required from the song copyright owner.

There is no streamlined way to obtain the music licenses needed to use music in commercials. Rather, to obtain a license to use a specific song in this way, one must directly contact the music publisher that owns the copyrights in that song. A station can ascertain the relevant music publisher and its contact information by using the repertory databases maintained by the Music Publishers' Association¹, ASCAP², BMI³, and/or SESAC⁴.

As discussed above, if a station intends to dub or copy a sound recording, the station will also need to contact the record company directly to seek a second, separate music license. Record company information is often available on the CD or other media that contains the sound recording, or in the liner notes. Also, this information can often be obtained from the music publisher that owns the copyrights in the song.

Contact information for the music publisher and record company may also be located on the U.S. Copyright Office's website⁵.

Unfortunately, music publishers and record companies are not required to grant these licenses; they are free to refuse permission. Some copyright owners do not allow their songs or sound recordings to be used for commercials, or allow use only in very limited circumstances. There are various reasons for declining to grant a license. For example, some copyright owners are concerned that by allowing their music to be used in commercials they may be deemed to endorse a particular product or service while others believe that commercial use may adversely effect the popularity of their music.

Moreover, even if the copyright owners are willing to grant a license for the intended use, the licensors can charge whatever license fee they wish. License fees for music used in commercials can range from gratis to six figures, depending on the circumstances.

Stations or advertisers who wish to obtain music licenses for commercials can seek assistance from legal counsel. Counsel can help ascertain the relevant copyrights and licenses required and develop a licensing strategy, as well as negotiate the specific license terms and prepare or review the written license agreement.

To simplify the music license clearing process, stations and advertisers can purchase or license production music libraries – also referred to as “canned music” or “needle-drop” music. Production music is typically original, recorded instrumental music which offers the advantage that it usually comes with the necessary rights. Such music is usually categorized by genre and generally does not include commonly recognizable songs or sound recordings. However, it is important to make sure that the license from the production music



¹ Music Publishers' Association, www.mpa.org

² ASCAP, www.ascap.com

³ BMI, www.bmi.com

⁴ SESAC, www.sesac.com

⁵ U.S. Copyright Office, www.copyright.gov

library expressly permits use of the music content in commercials. If so, no further music licenses will be needed and the station or advertiser can avoid the direct licensing process described above.

Stations must also ensure that the music licenses permit use of the music for all of the intended distribution channels for the commercials. This issue must be considered whether direct licensing has been obtained from the copyright owners or production music was used. If, for example, a station intends to use a commercial on the internet, it is important to make sure that the music licenses permit internet transmission/distribution in addition to traditional over-the-air broadcasts.

A station should also be aware that in some circumstances it can be held liable for copyright infringement that occurs in a commercial, even if the station was not the producer of the commercial. Thus, for any commercials that the station does not produce, the station should confirm that the advertiser has obtained the proper music licenses. Also, a station should make sure that its advertising contracts contain suitable indemnification language so that there is recourse against the advertiser and/or the ad agency if a commercial infringes a copyright and the station is sued for such infringement.

Failure to obtain all of the necessary licenses for music used in commercials can have significant adverse consequences. Particularly in light of the current financial challenges faced by the music industry, music publishers and record companies are now vigorously protecting their copyrights. If a copyright is timely registered by the copyright owner, statutory damages for infringement can be as high as \$150,000 per work infringed and the copyright owners can also seek to recover the attorneys' fees and costs incurred in enforcing their rights. In addition, criminal copyright infringement is punishable by up to 10 years in prison. It is thus quite important for stations to be aware of all uses of music in commercials that they broadcast and to obtain the necessary music licenses or ascertain whether such licenses have already been obtained by the advertiser. The need for proper music licenses applies whether the program material is contained in commercials or in other types of program material such as public service announcements.

Live Links

Music Publishers' Association

ASCAP

BMI

SESAC

U.S. Copyright Office

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