

UA2 Understanding Licensing and Royalties

Let's say you are reading Rolling Stone magazine, and you find an article about an ad campaign that Phillips has launched. The ads feature the Beatles hit "Getting Better" with a voiceover from the lead singer of the band Gomez. In the article you read this:

~~"But according to the licensing expert, the company paid the Beatles for the Beatles hit an estimated \$1 million. The source suspects Gomez made no more than \$100,000."~~

This ad campaign is using the Beatles song as the theme music. It is also using the voice of the lead singer of the band named Gomez laid on top of the Beatles original. The speculation is that Philips paid \$1 million to use the song, and that Philips paid the band Gomez \$100,000.

This is the world of music licensing -- a world where the rights to use music are bought and sold every day. This world is most obvious to us in a case like the one described in this example. A popular song that everyone knows gets embedded in a TV commercial or a popular movie.

It turns out, however, that music licensing is something that happens constantly, all around us. When you listen to music on the radio, that music is licensed. When you hear music in a restaurant, that music is licensed too. In this essay, you will have the chance to learn about all the different forms that music licensing can take.

UK copyright law fact sheet states:

"The law gives the creators of literary, dramatic, musical, artistic works, sound recordings, broadcasts, films and typographical arrangement of published editions, rights to control the ways in which their material may be used.

The rights cover; broadcast and public performance, copying, adapting, issuing, renting and lending copies to the public.

In many cases, the creator will also have the right to be identified as the author and to object to distortions of his work.

International conventions give protection in most countries, subject to national laws."

Source: http://www.copyrightservice.co.uk/copyright/p01_uk_copyright_law

These rights have grown into a booming trade, and are considered by some to be the backbone of the music business. There is a massive amount of money to be made if a song reaches number one in the charts just through royalties, because customer-service businesses will want to play the music in their stores, and often there is demand for the song to be used in commercials. This works through the concept of licensing fees.

Broadcasting is perhaps the most widely used and commonly understood of the group. Broadcasting, in the context of music licensing, means the playback of pre-recorded or live music for groups of people other than the licensed purchaser of a given work, beyond what might be normally expected in a social setting. There has been some legal wrangling over the years about what, exactly, constitutes a broadcast for the purpose of license/copyright enforcement. Legal claims are filed frequently against bookstores, bars, and live music venues that broadcast music without paying for it.

The music broadcast in supermarkets and elevators is a service that is purchased from one of many organizations that offer it (the largest of these is Muzak). Part of the fee paid for this service is used to cover licensing costs.

Radio stations pay fees for the rights to broadcast music. Fees are paid to licensing bodies such as Broadcast Music Incorporated (BMI) and the American Society of Composers and Performers (ASCAP). Radio stations calculate payment to license holders by periodically auditing the music being played. The audit results are submitted to the licensing relevant body for the station's territory. This information is used to calculate the average number of plays each artist has received.

What do ASCAP and BMI do and how do they do it?

Imagine if your band signed a major recording deal with Sony records, and your song is getting heavy rotation on MTV. 20 years later, classic rock stations around the country are playing your song and you hear a muzak version of it on the elevator to your job each morning. Should someone be paying you?

At the time the Warts signed their deal with Sony/CBS, your manager or lawyer should have had you join ASCAP or BMI (you cannot join both). As a member of ASCAP or BMI, you authorise them to license public performances of your compositions and to collect and distribute fees to you. The fees collected are distributed in accordance with a formula based on the number of public performances of any given song. Radio, television and commercially distributed music reels (e.g., Muzak) are factored into the equation, but live performances are not. License fees, however, are collected for live performances. If your band plays out but does not get any radio, television or music reel airplay, you will be generating fees for the royalty pot, but you will not share in the royalties distributed. If you are getting airplay, you may receive public performance royalties which, if the song in question is successful, could be substantial (e.g., in the tens of thousands of dollars). The thing to remember, however, is that a public performance royalty is paid to the owner of the copyright in the song (e.g., the songwriter and/or the publisher), not in the recording or performance of that song. So, if you cover a song and make it popular, the public performance royalties will be paid to the copyright owner of the underlying composition, not to you. (This law is subject to debate and could be changed in the near future to provide for royalties to performers, as well.)

The typical method of royalty payment is that of mechanical royalties. Mechanical royalties are the royalties paid to songwriters and their publishers from the sale of records. It sounds simple enough, but the process can be quite complex.

In the old copyright act of 1962, there was the "compulsory license" provision. This meant that once a song had been made available commercially anybody could then cover that song without permission of the songwriter. The copyright act of 1994 removed that provision. Hence the law stated that it was an infringement of copyright to make a mechanical copy of a musical work without permission of the copyright owner. There is a large culture of independent labels and releases, and many artists in the UK record and release their own records. Hypothetically, if an artist records a song written by a UK songwriter who is not signed to a music

publisher, in this situation the artist must get permission from the songwriter. That permission process will establish the rate that the artist pays. The norm is for the artist to pay the songwriter the "industry rate" which is 5.6% of the recommended retail price. However, the songwriter can, in essence, establish whatever royalty rate they like. It is up to the artist to agree to that rate or not.

As well as this, the songwriter might insist that the royalty is paid up front - i.e. if the artist wants to make 300 CDs and sell them for £10 each then the mechanical royalty can be calculated and the songwriter can invoice the artist before the CDs are manufactured. The benefit to the songwriter is - they won't have the potential credit problems of ensuring royalties are paid once sales are made. Let's look at a test case.

Say an artist - Steve - wants to record two of their own songs and two songs by other songwriter friends of his. Steve would request permission from them to record their individual songs and establish a royalty rate. One friend - Joe - might want the "industry rate" of 5.6% of RRP. But Joe's close friend Dave is happy with 2.5% of RRP.

Steve then records the four songs and presses 300 CDs. Over a series of live shows he sells 260 of them for an average of £10 each (he is not GST registered). The royalties are then paid out as follows:

As there are four songs on the CD; each song receives a quarter share of the appropriate royalty base.

Joe receives $1/4 \times 5.6\% \times 260 \times £10 = £36.40$ per song

Dave receives $1/4 \times 2.5\% \times 260 \times £10 = £16.25$ per song

Here is another case:

An artist records a song where the songwriter is signed to a music publisher. In this situation, the artist must complete a Manufacture Licence through the PRS office. The PRS mechanical rights division processes these licences. The rate for recording a published is the same for all songs and is the "industry rate" of 5.6% of the RRP. Let's look at a test case.

Steve, flushed with the success of his CD decides to record a CD of his mother's favourite tunes. There are only two - *Bohemian Rhapsody* and *Fool's Gold* that are covers. The third track is one his mother wrote herself called *I Like Bacon*. Her mother says he can have the tune free-of-charge.

Steve records the tunes and intends to press 300 copies and sell them for £10 each. He applies to PRS for a manufacture license. From the completed Manufacture Licence, PRS identifies those songs that are from their Publisher member's repertoire; In this case, *Bohemian Rhapsody* and *Fool's Gold* will be identified as

published by PRS publishers. The third track *I Like Bacon* will not show up in the PRS search as it is unpublished (not signed to a music publisher), so PRS then charge Steve for the three hundred CDs he is about to manufacture and for Manufacture Licences are made prior to manufacture. As two songs out of the three are PRS publisher repertoire, PRS will charge 2/3 (often called a pro rata charge) of the industry rate. □□

PRS receives: $2/3 \times 300 \times 5.6\% \times £10 = £112$. (£56 to each of the relevant publishers).

Whereas a mechanical license permits a user to mechanically reproduce an underlying musical composition on a compact disc, prerecorded tape, phonorecord, or other audio only format, the synchronization license permits the accompaniment of a moving image with the underlying musical piece. Consequently, the synchronisation license is required for videos, motion pictures, television, commercials, and other visual formats that are combined with musical works.

The synch license is generally a grant from the publisher or his/her licensor to the producer of the visual work which authorizes the utilization of the underlying musical composition. Similar to a mechanical license, any proceeds go to the benefit of the publisher and/or writer (i.e. the owner of the copyright in the underlying work). Licensing agencies such as the Harry Fox Agency and AMRA issue synchronization licenses on behalf of their affiliated publishers and give fee quotations for such synchronization.

The "synch" license itself does not permit the use of any specific recording of the particular musical composition. A separate recording or master use license is required for such a use or, in the alternative, a new recording of the work would have to be produced.

If a performance is captured live on a medium such as television, the first airing of that show containing that performance does not require a synch license (though it will require a "performance license"). Subsequent broadcasts of that same performance, however, would require the appropriate synchronization license.

Fees and advances for synch licenses vary greatly depending upon the prospective use (e.g. whether the song will be used as a title song of a movie or in a commercial), the prominence of use (background music or featured performance), the popularity of the song and/or the songwriter, the media in which the song is to be used (e.g. television, motion pictures or even a video arcade game), the budget of the potential licensee, and the amount of goods that are to be initially manufactured, as well as other factors. For motion picture use payment in full, from the producer to the licensor is the norm.

Furthermore, new technological uses have created new markets and the potential for greater earnings through synchronisation. In addition, questions have arisen regarding such new technological uses as cable, pay per view, pay television, satellite rebroadcast, home video, interactive video, and the internet.

In the past, one of the most troublesome areas in synchronization license fee negotiations had been home video. In the mid 1980's when home video quickly

became a mass consumer market, it was a relatively new phenomena and thus there were no real firmly established standards. Along those same lines, similar issues have arisen for existing media, as many agreements for previously licensed musical works were negotiated prior to the advent of the "video age." Therefore, many licenses granted were sometimes limited to the existing technology by reference as they sometimes failed to include language allowing broader use for newer media, thus posing a similar problem at the advent of internet technology.

Due to such limitations or failures, rights owners had to turn to the courts to determine whether an initial synch license, entered into many years ago, included the previously unanticipated release of the film or program on new medias such as home video, or the internet. A 1988 Circuit Court decision seems to indicate that such a license does not.

Faced with the possibility of litigation, users of licensed music must consider going back to the source of the original synch license for new rights or risk the consequences. For example, old agreements which provided for eight millimeter films for home use now probably need to acquire new home video synch licenses and/or internet use licenses.

It is now more common for contracts to include a catch-all phrase such as "...any and all media now known or hereafter invented when addressing to scope of the synch license" This phrase, or similar language, is used by attorneys and production companies to keep up with and anticipate technological developments. Thus, uses in such newer technologies as laser optical disc, compact disc video, or live audio and video streaming, can be accounted for even if not specifically anticipated when negotiating the original synch license.

PRS was mentioned earlier in this essay in regards to royalties and copyright. But what is PRS and what do they actually do?

Formed as the MCPS-PRS Alliance in 1997 with the PRS for Music brand adopted in 2009, the organization brings together two royalty collection societies; MCPS and PRS. They exist to collect and pay royalties to their members when their music is exploited in one of a number of ways – when it is recorded onto any format and distributed to the public, performed or played in public, broadcast or made publicly available online. Similarly to MCPS-PRS is the Phonographic Performance Ltd. Through its licensing, PPL allows hundreds of UK radio and television stations, other broadcasters and internet radio stations to legally use sound recordings and music videos in their transmissions. Similarly PPL's public performance licences allow thousands of clubs, shops, pubs, restaurants, bars and other music users across the UK to play sound recordings and music videos in public.