

# **Sports and Entertainment Law Symposium**

NSU Sports and Entertainment Law Society  
NSU Shepard Broad College of Law

## **FILM/TV LAW PANEL**

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## **Music Licensing in Film and Television**

### **(General Points and Considerations)**

Obtaining the proper license for the use of copyrighted music in a film or television can become quite involved. There are many nuances to this area of law. Various licenses may be required depending on how the music is intended to be used. A basic understanding is helpful, however, in maneuvering through the licensing process.

As a practical consideration, the time frame involved for a filmmaker or television producer to obtain a license(s) from the musician, the publisher, and/or the appropriate agency (i.e. licensors) can vary significantly. It may be accomplished fairly quickly or it may take several months. In some cases, an agreement may not even be reached because the parties may not be able to concur on the specific terms of the license. Also, the intended licensor may want to view the content or synopsis of the film or television show to determine whether they perceive the content as favorable to be associated with.

The United States Copyright Act of 1976 (17 U.S. Code) protects original works of authorship, including music, and is one of the most important and relevant bodies of law related to music licensing and avoiding copyright infringement.

The copyright in the *sound recording* is separate from the copyright in the *composition*. In simplified terms, the sound recording or "master" is the recorded performance of the original composition. Record labels typically manage copyrights for sound recordings, while music publishing companies typically manage the

copyright in the composition. Music publishers often promote the use of their compositions in films and television in order to bring in additional revenue. Since the artist's publisher traditionally handles the copyright registration and the sale of the composition, a filmmaker may wish to contact them first if seeking licensing rights. In addition to differentiating between the music's composition and the sound recording, different types of licenses may be required.

A *mechanical license* allows the right to reproduce and distribute the *composition* in an *audio-only* version (referenced as a "phonorecord" in the U.S. Copyright Act.) Once a musician records and publishes a song a person desiring a mechanical license may utilize compulsory licensing provisions. This is statutorily based and appears in Section 115 of the U.S. Copyright Act. The licensee must pay a royalty fee set by statute and file a notice of obtaining compulsory license.<sup>1</sup> The current fee is 9.1 cents or 1.75 cents per minute of the songs playing time multiplied by the number of digital or physical units made and distributed. Compulsory mechanical licenses can be organized through the Harry Fox Agency.

As mentioned, the compulsory licensing procedure provided for by statute only applies if the composition has been previously "published" by the original musician/copyright owner. If not, the individual seeking the license must contact the song's owner directly to negotiate the mechanical license. The U.S. Copyright Act defines *publication* as, "distributing copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending. Publication also includes offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display. A public performance or display of a work does not of itself constitute publication." 17 U.S. Code § 101.

It is essential to emphasize that the mechanical license only pertains to the audio configuration of the composition. If the audio accompanies an *audio-visual* work, *as is often the case in a movie or television show*, a synchronization license will be required.

A *synchronization license* is a separate license that allows a particular piece of music to be synced with other visual elements such as would be seen in a music video, movie, or television show. By way of illustration, a synchronization license may enable an entire composition to be played during the opening scene of the film or a portion of a composition to be played during a specific scene. It will also provide the right to publically perform the composition in the specified platforms such as Internet, movie theater; or it may provide a catch-all license for every form of media.

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<sup>1</sup> If a music composition already has a publisher associated with it, the publisher may grant a mechanical license directly, thereby avoiding the need to obtain the statutory compulsory license. Often the publisher gives these mechanical rights to a licensee at an even lower rate than the statutory rate.

Keep in mind that if the copyright holder has already licensed the work to a Performing Rights Organization, the “PRO” would need to be contacted as well. (See below on PROs and a public performance licenses.)

Promotional materials, trailers, and advertisement containing the same musical composition synced with the same visual content will usually also be covered by the synch license.

There may be times when clearance must be obtained to use a master sound recording of the composition. This involves a *master use license*. This would apply if the filmmaker wanted to use a very specific version of the music held by a certain record label. If procuring this license is challenging or expensive a filmmaker may attempt to avoid it by commissioning another artist to record the song's composition. In general, when a master license is needed the underlying musical composition rights are necessary as well.

A *public performance license* is needed when the music composition is broadcast to the public in a venue such as a club, concert, restaurant or on the radio, TV or the web. This *may* be covered by the previously-discussed synchronization license. Three (3) performing rights organizations (PROs) ASCAP, BMI, and SESAC, handle public performance rights in the U.S. Such agencies represent the publishers and songwriters and the funds collected are paid as performance royalties, using very specific calculations. Often times the venue where the compositions are being performed may already have a blanket public performance license which may cover this. Checking with the three agencies is recommended.

Many filmmakers may opt to have original music created specifically for their film and television show. This serves to avoid having to obtain licenses to use already-existing musical pieces. If this is done great care should be taken to ensure comprehensive work-for-hire agreements are drafted and signed by all parties involved in the making of the original musical selections. If this is not done there may be negative ramifications for the filmmakers as the hired musician may later attempt to claim ownership and copyright rights.

Overall, there are many intricacies to obtaining the proper licenses for the use of copyrighted music in a film, television show, or other media. While the above summary may provide a very general overview it is recommended that the filmmaker consult with an attorney regarding the specific goals and the intended uses of the musical selection in his or her creation.