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KOHN ON MUSIC LICENSING

THIRD EDITION

AL KOHN
BOB KOHN

First Published as
The Art of Music Licensing



ASPEN LAW & BUSINESS
A Division of Aspen Publishers, Inc.
New York Gaithersburg

of the Theater Guild put on an in-
draperies and curtains for a new
s and Lorenz Hart contributed sev-
nance. Max Dreyfus called Rodgers
clusive songwriter agreements with
ontributed five songs to the Green-
until 1928 when Irene Bordoni's
ocative French accent caused Max
his already well stocked staff of

arms, Inc. office at 62 West 45th
osers made it a habit to meet at
George Gershwin play the piano.
oadway music publisher, whose
ur Schwartz, Bert Kalmer, E.Y.
Herman Hupfeld, Howard Dietz,

audience at New York's Warner
utter his famous, "Wait a min-
othin' yet. Wait a minute, I tell
months after his release of the
er, film producer Jack Warner
ic would play in the making of
Bros. had purchased the entire
k Music Corporation, and Max
ould never be the same.

NG TODAY

ssified into three main cate-
e major worldwide publisher,
(3) the self-publishing song-

the above categories would
y AOL Time Warner), EMI
with catalogs in excess of
ublishing companies include

Music (owned by Universal Music Group.), Sony Music (for-
by CBS Music), and BMG Music (owned by Bertelsmann Music
). A small group of major publishers are those such as Polygram
Music, Virgin Music, and Chrysalis Music who are affiliated with
major record companies.

There are a large group of publishers who would fall in the cat-
gory of independent music publisher, who publish music written by
others, but leave the mechanical aspects of publishing administration
to others. These independent publishers engage in some creative ac-
tivities, but many of them, at their core, perform the function of ad-
ministering the administrators — that is, they may contract with one
of the major worldwide publishers to perform their administration
functions on a worldwide basis or they may engage one of the majors
to administer their rights in the U.S. and separately contract with
music publishers around the world for local overseas administration.
Examples of independent music publishers include Peermusic Pub-
lishing, Zomba Music, Irving/Almo Music, and Jobette Music. Many
motion picture studios and production companies have their own
music publishing companies which are used to administer the com-
positions written for their motion pictures and television programs.

The third category is the writer who maintains his own publishing
rights and sets up his own publishing company. These may include
popular recording artists who write their own material and don't re-
quire the creative services of a major or independent publisher. Ex-
amples include Bob Dylan, Bruce Springsteen, and Neil Diamond.
Often, the objective of these composer/publishers is to get the best
administration at the lowest possible price, and, to that end, enter into
administration deals directly with the majors and overseas music pub-
lishers. The terms of administration agreements are discussed in Chap-
ter 4. The vast majority of music publishers existing today are in this
third category.

III. SOURCES OF MUSIC PUBLISHING INCOME

The sources of a music publisher's income can be divided into
three categories: (1) major sources of income (i.e., where the largest
share is derived); (2) secondary sources of income, (3) and emerging

sources of income (i.e., other sources that may be minor today, but could play an important role in the future of music publishing).

The *major* sources of music publishing income include the following kinds of uses:

- Sound recordings
- Public performances
- Theatrical motion pictures
- Television programs
- Videocassettes and video laserdiscs
- Advertising

The *secondary* sources of music publishing income include:

- Printed music
- Foreign subpublishing
- Radio programs (broadcast and closed circuit)
- Music boxes and other consumer musical products
- Non-theatrical motion pictures
- Non-theatrical videocassettes and laserdiscs
- Dramatic performances
- Dramatic adaptations

The *emerging* sources of income include:

- Computer software, multimedia, and new media products
- Digital transmission (e.g., Internet)

The business and legal aspects of each of these sources of music publishing income are discussed in the chapters which follow, organized by the type of license agreement used as the basis of the under-

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closed circuit)

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and new media products

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ach of these sources of music
 chapters which follow, organ-
 sed as the basis of the under-

lying transaction. These sources of income and their related licenses
 are summarized below:

A. Major Sources of Income

Music used in sound recordings, and distributed in compact discs
 and audiocassettes, is permitted by the grant of what is known, for
 historical reasons, as a *mechanical license*,² and these generate *me-
 chanical royalties*. Music that is publicly performed on, for example,
 radio and television, is generally permitted under a *performance li-
 cense* issued to the user on a *blanket* basis by a *performance rights
 society*,³ which pays *performance royalties* to songwriters and music
 publishers. Music that is embodied in copies of motion pictures for
 theatrical distribution generate *synchronization royalties*, the licensing
 for which is granted in a *theatrical synchronization license*.⁴ Music
 that is embodied in copies of television programs for television broad-
 cast also generate *synchronization royalties*, the licensing for which is
 granted in a *television synchronization license*.⁵ When a previously
 produced theatrical motion picture or television program, or newly
 produced video program (e.g., nature film or music video), is embod-
 ied in videocassettes or laserdiscs for home distribution, a separate
 license, commonly called a *videogram license*, is required.⁶ When mu-
 sic is used as part of a commercial advertising campaign a *special
 commercial advertising synchronization license* is required.⁷

B. Secondary Sources of Income

Music used in *sheet music*, *music folios*, and other printed copies
 of music is permitted by the grant of a *print license*,⁸ and these gen-
 erate *print royalties*. Income from sources outside of the United States

² For a full discussion of mechanical licensing, see Chapter 12.

³ For performance licensing, see Chapter 17.

⁴ For theatrical synchronization licensing, see Chapter 14.

⁵ For television synchronization licensing, see Chapter 14.

⁶ For videogram licensing, see Chapter 15.

⁷ For advertising in television, radio, and print, see Chapter 20.

⁸ For print licensing, see Chapter 11.

is generally derived from agreements with international music *sub-publishers*, who engage, in their local countries, in many of the same licensing activities as the music publishers they represent. Music used in sound recordings that are intended to be used solely for public radio or closed-circuit broadcast (e.g., the music you hear in elevators and on airplanes) is permitted by the grant of what is known as an *electrical transcription license*,⁹ and these generate *electrical transcription royalties*.

When music is embodied in a music box or similar musical product, such as a talking doll or singing greeting card, a *music box license* or *consumer musical product license* is required.¹⁰ Music used in promotional or training videos produced by corporations is licensed under a *non-theatrical synchronization license*¹¹ and when these videos are distributed in videocassette or laserdisc form, a *non-theatrical videogram license* is required.¹²

Though rarely a significant source of publishing income, a *dramatic performance license* is required by anyone who wishes to render a dramatic performance of a song — that is, when the song is used to carry forward the plot or story of a dramatic work, such as a motion picture, television program, or theatrical play. A dramatic performance license should not be confused with a *grand performance license*, the latter of which is not a license strictly for music — it is a license to perform a grand opera or grand musical play, or portion thereof.¹³ Finally, if you desire to produce a dramatization of a musical composition, or more accurately, its lyrics (i.e., much like one would produce a motion picture adaptation of a novel or short story), you would require a *dramatic adaptation license*.

C. Emerging Sources of Income

In the emerging sources of music publishing income may be found the very beginnings of the future of the music publishing business.

⁹ For electrical transcription licensing, see Chapter 13.

¹⁰ For videogram licensing, see Chapter 15.

¹¹ For non-theatrical synchronization licensing, see Chapter 14.

¹² For non-theatrical videogram licensing, see Chapter 15.

¹³ For dramatic performance licensing, grand performance licensing, and dramatic adaptation licensing, see Chapter 18.

publisher (with the exception of
rights, which are routinely licensed
society, such as ASCAP or BMI).
make anything less than full rights,
iously unpublished material, for
measure of financial risk to pro-
consider carefully any decision to
ider copyrights, giving particular
decision may have on the value
whole copyright may be greater

Use on a Non-Exclusive Basis

iving income from music copy-
permission to use the music on
nly known as *issuing* or *granting*
all licenses for the use of music
following exclusive rights under

opies: the *reproduction right*,

: the *performance right*,

derivative works: the *adaptation*

e copies: the *distribution right*.

USES FOR MUSIC

wner of copyright the exclusive
the copyrighted work, to make
recordings of the work, and to
have said, these exclusive rights
clude others, through the power

of the legal system, from performing those acts. It is this *right to exclude* that forms the basis of the *right to license*, or, in other words, *right to give permission*. The various types of licenses that a copyright owner may grant are defined by *the use* for which permission is sought.

The following are the primary forms of licenses customarily used in the music industry:

A. Print Licenses

A *print license* is a permission that authorizes one to make printed copies of music, such as sheet music and printed music folios, and reprints of lyrics in books, magazines, and print advertising. Print licenses are discussed in Chapter 11.

B. Mechanical Licenses

A *mechanical license* is the form of permission that authorizes one to make mechanical reproductions of a musical composition, that are not accompanied by a motion picture or other audiovisual work, and which are made for the purpose of distributing them to the public for private use. Examples of such mechanical reproductions include music embodied in piano rolls, record albums, audiocassettes, digital audio tapes, compact optical discs, and computer chips. Motion picture films, videotapes, and audiovisual laser discs that contain music accompanied by motion pictures or other audiovisual works are never the subject of mechanical licenses. Mechanical licenses are discussed at length in Chapter 12.

C. Electrical Transcription Licenses

An *electrical transcription license* is the form of permission that authorizes one to make mechanical reproductions of a musical composition, that are not accompanied by a motion picture or other audiovisual work, and which are made for radio broadcast or for purposes other than distribution to the public for private use. Mechanical reproductions of music for radio broadcast are called, "electrical transcriptions," or simply, "transcriptions," the term "electrical" being a holdover from the days before magnetic tape. Examples of transcriptions include recordings of radio theme music, musical intro-

ductions, and background music for commercial advertising made specifically for radio broadcast, as well as recordings compiled for use in syndicated radio programs. Electrical Transcription licenses are discussed at length in Chapter 13.

D. Synchronization Licenses

A *synchronization license* is the form of permission that authorizes one to make mechanical reproductions of a musical composition, that are accompanied by a motion picture or other audiovisual work, for use in connection with motion picture theatrical performance and television broadcast. Examples of such reproductions include, motion pictures, television programs, and music videos, embodied in any form, such as film, tape, and optical laser disc. Technically, the music is not always "synchronized" or recorded, as some licenses say, "in timed-relation with" the motion picture, but these terms convey the notion that the permission to make reproductions of the music is strictly limited to copies embodying the specified motion picture together with the music. Most synchronization licenses contain a further restriction relating to how the copies of a motion picture which embodies a recording of the licensed music may be distributed: these licenses limit the distribution of the motion picture to only those copies that are directly related to effecting the performance of the picture in motion picture theaters and on television. These licenses may impliedly or explicitly restrict any other form of distribution, including distribution on videocassette laser discs for the home video market. Synchronization licenses are discussed at length in Chapter 14.

E. Videogram Licenses

A *videogram license* is the form of permission that authorizes one to make mechanical reproductions of a musical composition, that are accompanied by a motion picture or other audiovisual work, and which may be distributed on videocassette, optical laser disc, or other home video device for distribution into the home video market. Videogram licenses are discussed at length in Chapter 15.

F. Commercial Synchronization Licenses

A *commercial synchronization license* is the form of synchronization license, that authorizes one to make reproductions of and broad-

commercial advertising made specifically as recordings compiled for use. Mechanical Transcription licenses are dis-

form of permission that authorizes one to make mechanical reproductions of a musical composition, that are for use in radio, television, or other audiovisual work, for theatrical performance and television reproductions include, motion picture recordings, embodied in any form, including laser disc. Technically, the music is recorded, as some licenses say, "in connection with the motion picture," but these terms convey the meaning that the reproduction of the music is in connection with the specified motion picture. Synchronization licenses contain a further restriction on the motion picture in which the music may be distributed: these licenses restrict the motion picture to only those copying the performance of the picture for television. These licenses may restrict the form of distribution, including licenses for the home video market. See at length in Chapter 14.

of permission that authorizes one to make mechanical reproductions of a musical composition, that are for use in radio, television, or other audiovisual work, and cassette, optical laser disc, or other to the home video market. Video in Chapter 15.

Licenses

license is the form of synchronization license that authorizes one to make reproductions of and broad-

cast performances of a musical composition in connection with the promotion or advertising of a commercial product. See Chapter 20 for a more detailed discussion of licenses for the use of music in commercial advertising.

G. Musical Product Licenses

A *musical product license* is the form of permission that authorizes one to make mechanical reproductions of a musical composition in connection with the distribution of a commercial product, such as wind-up music boxes, singing dolls, and musical greeting cards.

This form of license may resemble either a mechanical license or a videogram license, depending on whether the use of music in the product is accompanied by audiovisual images. See Chapter 21 for a more detailed discussion of musical product licenses.

H. Multimedia License

A *multimedia license* is a "catch-all" term for the form of permission that authorizes one to make reproductions of a musical composition in connection with the distribution of multimedia compact discs, computer software, karaoke, and other new media devices. See Chapter 22 for a more detailed discussion of these emerging forms of licenses.

I. Digital Transmission Licenses and Digital Reproduction Licenses

The forms of licenses that authorize one to digitally transmit musical works and to reproduce them by means of digital transmissions do not have generally accepted names yet, but they are discussed in Chapter 23 on *Licensing Musical Works and Sound Recordings on the Internet*.

J. Performance Licenses

A *performance license* is a permission that authorizes one to perform a work publicly. Performance licenses are discussed in Chapter 17.

K. Dramatic Performance Licenses and Grand Performance Licenses

A *dramatic performance license* is a permission that authorizes the performance of a song dramatically — that is, when the song is used to carry forward the plot or story of a dramatic work, such as a motion picture, television program, or theatrical play. A *grand performance license* is not a license in music at all — it is a license to perform a grand opera or grand musical play, or portion thereof. The rights that form the basis of these types of licenses are discussed at length in Chapter 18.

L. Dramatic Adaptation Licenses

A *dramatic adaptation license* is a permission that authorizes one to make a dramatization of a musical composition, or more accurately, its lyrics. Just as a motion picture can be a dramatic adaptation of a novel, a motion picture or television program may be a dramatic adaptation of the lyrics of a song. Although a motion picture adaptation of a song may include a performance of the song, a dramatic adaptation license does not authorize one to render a dramatic performance of the song, a license for which must be acquired separately. This type of license is discussed in Chapter 18.

X. DIFFERENCES IN THE RIGHTS AND PRIVILEGES OF HOLDERS OF EXCLUSIVE RIGHTS AND NON-EXCLUSIVE LICENSES

The copyright law entitles the owner of any exclusive right, to the extent of that right, “all of the protection and remedies accorded to the copyright owner.”²⁷ This means, for example, that a person holding an exclusive right to do something, such as perform a particular composition on television may sue in his own name anyone who infringes that particular right, even though the undivided copyright remains in the hands of someone else. By contrast, a non-exclusive

²⁷ 17 U.S.C. Sec. 201(d)(2).