

Use of Music in Broadcast Commercials and Promotions

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While television and radio stations pay music performance licensing fees to ASCAP, BMI, and SESAC, those licensing fees only permit the broadcast of licensed songs on the station and not the reproduction of those songs in commercial spots, promos, or PSAs. To use popular or other copyrighted music in spots, a station must secure additional licenses. These are generally called “reproduction,” “mechanical,” and/or “master use” licenses; they are specifically called “synchronization” licenses for music “synched” to video for television commercials.

To understand how music licensing works, it is important to understand that all recorded music consists of two distinct copyrights. First, there is a copyright in a song’s “musical composition,” also known as a “musical work.” In general, this copyright is typically owned by the songwriter and/or his or her music publisher and basically protects the sheet music, which is comprised of the written music notes and lyrics. Second, there is a copyright in a song’s “sound recording,” which is the actual recording of the music, as contained on a CD, a computer hard drive, or other media for audio playback. A song’s sound recording copyright is typically owned by a record company. Thus, while sometimes one person or entity may own a recorded song’s musical composition and sound recording copyrights, often there are at least two parties (the music publisher and the record company) with protectable interests in a recorded song.

The number and types of licenses required for use of copyrighted music in broadcast commercials depend on the broadcaster’s or advertiser’s intended use of the music. If the station or advertiser intends to “dub” an original recording into the commercial, then the station or advertiser must have permission from both the owner of the musical work and the owner of the sound recording. If the station or advertiser intends to re-record (i.e., not dub or copy an existing recording) a song (which could also involve changing the lyrics), then the station or advertiser only needs permission from the owner of the musical work.

Unfortunately, there is no easy and streamlined way to secure the proper licenses for use of copyrighted music in commercials and similar programming. At one time, the Harry Fox Agency (offered synchronization licenses for most popular music; however, the Harry Fox Agency discontinued that service in 2002. So, to secure a license for a musical work, you will need to contact the publisher directly. You can obtain publisher contact information using the repertory databases maintained by ASACP (www.ascap.com), BMI (www.bmi.com), SESAC (www.sesac.com),

and/or the Music Publishers' Association (www.mpa.org). If a sound recording license is also needed (e.g., for dubbing an original recording), you will also need to contact the record company directly. Record company contact information can sometimes be obtained by the music publisher and is often also available on the copy of the recording (e.g., the CD liner notes). Publisher and record company contact information may also be located on the U.S. Copyright Office's website (www.copyright.gov).

Of course, music publishers and record companies are not required to grant a broadcaster or advertiser commercial reproduction licenses. And even if the copyright owners are agreeable to a license, the license fees can range from nothing to hundreds of thousands of dollars. Sometimes owners may be reluctant to license a song for commercial use for fear that an identification with a specific product or service may dilute or adversely affect the popularity of the song.

Those who wish to secure commercial reproduction licenses may wish to seek assistance from legal counsel.

The complexities of music licensing are the primary reasons broadcasters and advertisers often purchase content libraries containing "canned" or "needle-drop" music (typically original, recorded instrumental music). As long as such a content library expressly permits the music content to be used in commercials, then no further licenses are required and the licensing process described above can be avoided.

Finally, please note that under certain circumstances a broadcast station or others can be held liable for copyright infringement in a commercial spot even if they did not produce the spot. So, for such spots, you should always confirm that the advertiser has obtained the proper copyright clearances. Additionally, you should make sure that your standard advertising contract contains indemnification language so that you have recourse against the advertiser in the event the advertiser's spot infringes a copyright and the station incurs liability.

In recent years, record companies and music publishers have vigorously enforced their copyrights. Statutory damages for copyright violation can amount to \$150,000 per infringement and criminal infringement is punishable by up to 10 years imprisonment. Therefore, it is very important for broadcasters to monitor carefully the use of music in commercial spots (and PSAs and promos) and to secure all necessary copyright licenses.

If you have questions regarding the above, please contact attorney Coe Ramsey.

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