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From left: McCormick, Stein, and Yeargan

SCRIPTING A RESOLUTION
The Advantages of Mediation in the Entertainment Industry
By Stanton “Larry” Stein and Ashley R. Yeargan

INAUGURAL ISSUE
MUSIC ROYALTIES 101

By Jeff Brabec & Todd Brabec

INTRODUCTION

LISTEN CLOSELY TO THE NEXT SONG YOU HEAR and you might be able to pick out a sound that’s part of neither the written music nor the performance. If you listen just right, what you’ll hear is the sweet ka-ching of music royalties being paid to those who bring us the melodies and lyrics. But, like a club DJ’s crossfade, music royalties are in transition, sometimes for the worse and sometimes for the better. As some distribution channels fade in importance, others increase in value and acceptance. Those changes present challenges for all stakeholders, including lawyers, advisors, producers, lenders, investors and, of course, creators and music publishers — the entities that generally administer song catalogs.

Listening to and enjoying music is one thing, but getting paid for it as a songwriter, composer or lyricist is another. This article will provide a quick explanation of how writers of music and lyrics and their music publishers receive compensation from some of the primary media which generate income and how the music licensing process that generates that income works. This field comprises micro pennies in compensation for many while making millions of dollars in royalties for others.

In any discussion involving a song though, it is important to understand the difference between a musical composition — the song — and the sound recording — the record. Under U.S. Copyright Law, each has its own distinct copyright, as well as rights accompanying that copyright. Also, in most cases, the owners will be different with a music publisher owning the song and a record label owning the master recording. Therefore, in most cases where a song and record are being licensed together for use in a project (e.g., a Beatles or Bruno Mars song and the original recording being used in a feature film), separate license negotiations with the song and sound recording owners must be conducted before permission can be granted.

TELEVISION

The United States broadcasted 455 scripted original television programs in 2016 on network, cable and digital programs among countless unscripted programs. This variegated reality in television can provide composers, songwriters, lyricists and the publishing companies that represent them with enormous opportunities for short and long-term earnings.

Sometimes the licenses are simple and straightforward as in the case of successful dramatic series. Other times, in the case of music- and dance-centric competition series, they can be extremely complex, with multiple options for different media, term, duration and territory all exercisable by the licensee, the production company, at some designated time in the future (e.g., within 24 months of the broadcast of the episode or the airing of the final episode of a particular season). But, one thing all television licenses for compositions share in common is that they all are what are called synchronization or “sync” licenses, a term that reflects the concept that the music is being played in timed synchronization with the picture.

On one end of the spectrum is the “all media excluding theatrical” synchronization license, which allows the producer of a television series or program to distribute the series episode in virtually every medium “now known or hereafter devised” (including home and personal video) excluding only theatrical (motion picture theater) exhibition. This type of license — which is virtually always a long term “life of copyright” license — is more expensive because of the almost unlimited media distribution that it allows. Because of its flexibility and duration, this license is the favored type of agreement for licensing pre-existing music for many network television programs.

In effect, once a composition is put into an episode of a series under an “all media excluding theatrical” license, there will be one fee paid to the music publisher with no additional payments due from the producer. However, there will be songwriter and music publisher “backend” performance royalties from ASCAP, BMI, SESAC, Global Music Rights and foreign performing rights societies throughout the world when the series episode containing the composition is exhibited via television, the internet or other media licensed by the societies. This type of “all media excluding theatrical distribution” license will expand to include theatrical — with an additional fee paid — in the future with the advent of select television episodes being shown in motion picture.
theatres (e.g., the last two season four episodes of Game of Thrones, which were released in the IMAX format in motion picture theaters in the United States).

On the other end of the spectrum are television sync licenses with a fairly limited initial distribution territory and fairly short durational terms from two to five years, but which feature multiple options to expand the rights, territory, media and term in the future depending upon the success of the series and the needs of the producer. The value to the producer of these types of “multiple option” licenses is that the rights to compositions can be secured for a lesser initial price because the term and rights granted are limited in nature. This structure also affords the producer the flexibility to maintain and expand its rights to continue to use the music if there is a reason to do so as in the case of a series becoming popular on a worldwide rather than limited territory basis.

The benefit of this type of option approach is that there will be additional fees paid if and when each option is exercised by the producer. Some examples of the type of series that utilize such an approach are The Voice, So You Think You Can Dance, Dancing with the Stars and America’s Got Talent.

Contract options available to the producer, depending on the program, may include:

- Changing the territory of a U.S. and Canada license to the world or universe;
- extending the initial short term for a subsequent identical term or to the life of copyright;
- permitting the use of a composition and scene from the series to be shown on a jumbotron as part of a live tour of performers after the season finale;
- providing the right to use short portions of a composition as part of recaps in subsequent shows;
- permitting use of the composition as a bumper — the music that is played in and out of commercials — or in an app which uses all or a portion of a performance from the show, or as a ringtone or ringback or audio or audio-visual download; and
- many others.¹

Another lucrative area is the use of compositions in the promos for upcoming television programming. Fees for this type of license are set on a weekly or monthly basis depending on the nature of the promo, including the territory and media in which it will be distributed. For example, promo licenses may refer to all forms of television, all forms of television and radio, unlimited internet, radio only, all television media in the United States and unlimited internet on a worldwide basis and so forth. The duration of the promo license is usually between one to two weeks but can be up to four weeks or even a number of days, all with a separate price point.

**Motion Pictures**

The use of music in motion pictures, whether it be scores or compositions written specifically for the film or the licensing of pre-existing compositions, continues to be lucrative. Whether in domestic or foreign films from the major studios, major indies, the many other independents or film festival entries, student films, or internet productions which are also

Jeff Brabec and Todd Brabec at SXSW 2017. Credit: Jeff Brabec and Todd Brabec.
distributed theatrically, the opportunities for the use of music in this area remain strong.

In the case of original music score or background music, the motion picture company almost always owns the entire copyright and music publishing rights to the music pursuant to a writer-for-hire agreement. Under these agreements, a one-time fee is paid to the composer. The structure of the agreement depends on whether the contractual relationship is one of a pure composer fee agreement—a fee paid only for writing the music—or a package deal whereby the composer is responsible for paying most of the costs, in which his or her retained compensation would be the difference between the negotiated music package fee and the actual costs of creating, recording and delivering the music that is finally used in the film.

In a variant of these structures, if the composer has sufficient leverage or if the film is an independent with a small music budget, the film company might only be entitled to own fifty percent of the publishing royalties with the writer’s publishing company entitled to co-own or monetarily participate in the remainder and the film company having control over the worldwide administration of the score. This co-ownership scenario, however, is not common with respect to the score but is somewhat common when a song is written specifically for a motion picture by a successful writer artist with the requisite bargaining power.

When an existing song is used in a motion picture, however, the contractual arrangement is totally different since this is a pure license agreement with no transfer of the copyright or publishing rights to the film company. Additionally, as opposed to compositions written for a film, there are virtually no restrictions put on the writer’s publishing company as to licensing the composition to other projects (other than in the case of competing biopic projects where one producer might demand some form of exclusivity to prevent the composition from being used in the other production).

The terms of the “existing composition” synchronization license are fairly standard in that there is a one-time fee to place the composition in the film with the term being for life of copyright, the media being extremely broad (virtually all media now or hereinafter devised), and the territory being either the world or universe. Even though physical home video sales and downloads are included in the media grant and there are no extra fee or royalties for this area regardless of the number of sales that may occur, the use of a composition in a film can drive substantial “backend” royalties generated by performances of the film throughout the world including via television, the internet, theatrical distribution outside of the US, mechanical royalties from soundtrack album/track sales and performances of the compositions on terrestrial radio and the many digital music streaming services. For example, it is not uncommon for a major hit single from a motion picture to earn both the songwriter and music publisher in excess of $750,000 in royalties from the performing rights organizations.

Another lucrative area related to motion picture music licensing is out-of-context trailers and promos. Studios frequently use a composition in film promos exactly as it was used in the film (e.g., including a portion of a scene from the film in a promo), known as an “in-context” use, for no additional cost. However, many film marketing campaigns use compositions and recordings that are not contained in the film itself or are used differently than they are used in the film (e.g., used as background music over a number of scenes from the film). As in the television area, this is called an “out of context” use. Since the marketing budgets for films are separate from the production budget, the fees in this area can be substantial, particularly since the right song and performance can resonate powerfully with potential audiences.

Another valuable income area which will continue to generate substantial music publisher and composer/songwriter royalties income is the performance royalty stream earned from the theatrical distribution of motion pictures in theaters outside the United States. This source of income is based on the ability of foreign performing rights societies to collect a percentage of the gross box office receipts for theatrical distribution of films, which is then distributed as royalties to the writers and publishers of music used in motion pictures.

**Video Games**

The video game industry continues to generate substantial income for existing compositions and master recordings whether they are featured as the primary focus of a game — as in dance or music featured games — or are used as background music in dramatic scenes to story line games.

There are two types of licenses used when licensing existing music into a video game. The first is a one-time buy out, much like the payment for a motion picture synchronization license. This approach is used in games which focus on a dramatic
story line such as *Grand Theft Auto*, major console games such as *Call of Duty*, or sports games like *Madden NFL*. The other type of license, which is employed in music or dance centric games such as *Just Dance, Rock Band* or *Guitar Hero*, is a royalty based compensation formula where payments are based on the success of the game. For example, a composition might receive two cents for every game that is sold, with an escalator if sales reach certain levels such as 1,500,000 units, 2,000,000 units, etc.\(^3\)

In addition, many of music or dance themed games have downloadable content (“DLC”) royalties for compositions or masters not in the original version of the game but that players can download into the game. These royalties are usually based on a percentage of the retail price of the individual download or a pro-rata portion of a multi-composition downloadable bundle.

As to composing original music for the video game, the contracts are very similar to those for scoring for motion pictures. For example, they are writer-for-hire contracts with the game producers owning the copyright. Composing fees are often set on a completed and accepted per minute of music basis.

**MECHANICAL ROYALTIES**

Royalties, which are paid to music publishers by record companies for the sale of audio physical product (e.g., CDs, Vinyl) and permanent digital downloads (e.g., iTunes) are called “mechanical royalties.” This term also encompasses royalties paid by digital music services for such diverse uses as interactive streams, subscription based non-permanent downloads and locker services.

These mechanical rates are established by the Copyright Royalty Board. The current statutory rate in the United States for sales of audio only products is 9.1 cents for each composition on an audio recording of five minutes or less in duration, 1.75 cents per minute for recordings longer than five minutes, and 24 cents for ringtones. On March 28, 2017, the Copyright Royalty Board extended these rates for a period of five years without any change.\(^4\)

As an example of the type of income that can be earned in mechanical royalties in this area, if a hit song is downloaded 1,000,000 times on iTunes in the United States, the music publisher will be paid $91,000 in mechanical royalties using the 9.1 cent rate. The publisher will then pay the songwriter his or her share according to the terms of the songwriter agreement (generally between 50% and 75% of the monies received for the sales).

Additionally, there are statutory mechanical royalty rates for the use of music by interactive streaming services as well as for limited downloads, locker services and music bundles, to name a few. Here, the music publisher/songwriter/composer royalty formulas are complex. Depending on the service and type of offering being provided, these formulas may be based on a percentage of revenue, a percentage of the royalties paid to the record companies that own or control the master recordings being performed, the amount of income paid to the applicable performing rights organization in the United States, and minimum per-subscriber payments depending on whether the particular service is subscriber based or ad supported.

All of these interactive rates are set to change in just a few months, as proceedings are currently occurring before the Copyright Royalty Board in Washington D.C. to determine the statutory mechanical royalty rates for the five year period from January 1, 2018 through December 31, 2022.\(^5\) The Board is required to set the new rates by December 15, 2017, but this has been extended to January 2018. But, rather than the Board determining the rates in a vacuum, negotiations to arrive at an agreed upon consensus have occurred between the major music publishers and songwriter organizations (the National Music Publishers’ Association and the Nashville Songwriters Association International), and the digital service companies (e.g., Apple, Amazon, Google, Pandora Media and Spotify) in hopes of coming to mutually satisfactory rates to present to the Board for review and ratification. This procedure has been used in past Copyright Royalty Board proceedings as well. In the current proceeding, a formal hearing has taken place and all parties have submitted post-trial briefs and closing arguments to the Copyright Royalty Board for a decision.

**PERFORMANCES**

The Performance Right, one of six primary rights of copyright under the U.S. Copyright Act of 1976, gives the owner of a copyrighted musical composition the exclusive right, with certain exceptions and limitations, to perform the work publicly. What this means is that in practically every type of situation where music is being performed, a license is required from the copyright owner and compensation normally paid — whether it’s on a broadcast of a television, cable or streaming service series, a
traditional over-the-air radio station or audio streaming service, a live concert performance or a website. The copyright owner of a work is initially, in most cases, the writer of the work who many times assigns the work and all rights to a music publisher in return for the worldwide exploitation and administration of the work as well as the collection and distribution of royalties due the work. For many writers and publishers, the performance right represents the main source of royalty income over the copyright life of their compositions.

In the United States, songwriters, composers, and music publishers join one of four performing rights organizations, or PROs, whose primary purpose is to negotiate license fee agreements with music users — individual entities or associations representing entire industries — for the use of each organization’s repertory, collect the license fees, and then distribute them back to the writers and publishers of the compositions on which the licensed performances are based. The four PROs are the American Society of Composers, Authors and Publishers (ASCAP), a nonprofit writer and publisher membership association founded in 1914, Broadcast Music Inc. (BMI), a nonprofit broadcaster-owned corporation organized in 1939, SESAC, a for-profit corporation founded in 1930 originally as a family owned enterprise, and Global Music Rights (GMR), a for-profit corporation established in 2013. These are big businesses: ASCAP and BMI had recent annual revenues of slightly more than one billion dollars each, and SESAC’s revenues are estimated at $225 million. Newcomer GMR’s remain unknown as they do not publish revenue figures. Outside the US, a multitude of similar organizations (e.g., PRS for Music in the UK, SACEM in France, GEMA in Germany, SOCAN in Canada and APRA in Australia/New Zealand) serve their respective countries’ songwriters, composers, and music publishers, as well as those from the US.

The concept of repertory, or catalogue, is important. If a song is written entirely by a writer member of ASCAP, that song would be in the ASCAP repertory and would be solely licensed by ASCAP. Similarly, if a song was written solely by a BMI writer, that composition would be in the BMI repertory. The same would be true of SESAC or GMR. On the other hand, if a song is written by multiple writers who are members or affiliates of different PROs, the work would be a “split work” with each respective writer’s share being licensed by that writer’s PRO. As a result, any music user is required to have licenses with all of the involved PROs in order to perform the work.

There are a number of licenses available with the broadest being the “blanket license,” which is negotiated by PROs with music users and allows unlimited use of a PRO’s entire repertory of compositions for a set fee. This license is commonly used by the traditional over-the-air radio industry, the major television networks and the live concert and club area, among many others. It is also the license that is most commonly used in every other country in the world.

A “per program license,” on the other hand, is a license for the entire repertory of a specific PRO with payment — a % of program revenue — made only for programs that contain that specific PRO’s repertory, which is not directly licensed by the writer or publisher copyright owner. Since ASCAP and BMI writer and publisher agreements are “non-exclusive,” they have the right to negotiate “direct licenses” with users (broadcasters, etc.) or “source licenses” with program producers for the use of their musical compositions thereby bypassing the ASCAP or BMI license entirely. The “per program” license is one that is used by many local television stations as well as by other users where it makes financial sense based on their particular mix of programming.

Two additional types of licenses are the “adjustable fee/carve out blanket license,” which is a blanket license whose fee can be subsequently reduced by the number of direct licenses a user negotiates and a “through-to-the-audience license” with a fee that takes into account the “value of all performances made pursuant to the license including all further transmissions by users with an economic
relationship to the licensee.” A good example of the latter are network licenses when a television network (ABC, CBS, NBC) broadcasts its programming to all of its affiliated stations. This network license would cover all music on the network programs broadcast by those stations with no further license required by the affiliated stations.

If that multiplicity of licenses sounds complex, it is. Adding to the confusion are complex regulatory strictures that apply to ASCAP and BMI, namely consent decrees and “rate courts.” The consent decrees, which date to 1941 settlements with the Department of Justice and which have been updated a number of times since, control to a certain degree how these two organizations operate and function both in the licensing field, as well as in their relationships with and responsibilities to their writers and publishers. Meanwhile, the so-called rate courts, established by the consent decrees, are not actually new courts at all, but rather a right granted to any music user as well to the PROs. In practice, this means large users such as networks and digital services are able to apply to the US District Court for the Southern District of New York to set license fees for new types of uses or revise existing license fees.

With new media on the rise and technology significantly expanding the ability to disseminate copyrighted works, there are a number of areas of concern as to how the licensing of the performance right will function in the future.

Among the issues of importance are whether the Department of Justice will amend the ASCAP and BMI consent decrees and what effect such an amendment will have on the negotiation of future license fees. One aspect of this process involved ASCAP and BMI requesting a system of mandatory binding arbitration rather than the current “rate court” requirement if voluntary license fee negotiations were unsuccessful between the PRO and the user. The PROs argued that the current process was extremely expensive as well as lengthy.

Another issue involved the fact that many new media companies need multiple different types of rights (the right to display lyrics, the mechanical right for downloads, etc.) in the conduct of their business rather than just the standard performance right and in the case of audio-visual programming, the “synch” right, for the traditional media of broadcast radio and television. ASCAP and BMI requested that they be allowed to “bundle” and license multiple rights of copyright in addition to the performance right-in-effect, a “one stop shop” licensing approach.

In addition, music publishers requested that they be allowed to selectively withdraw their licensing rights from ASCAP and BMI for specific media (digital, primarily) so that they could conduct “free market” negotiations with users rather than being forced to abide by “rate court” decisions.

The user community, in their comments to the DOJ, voiced objections to all of the PRO requests. They felt that the PROs should be subject to continued oversight as to anti-competitive behavior and that partial publisher repertory withdrawals not be allowed, as the major music publishers market share could lead to exorbitant license fee demands.

In the end, the DOJ rejected, at least for now, all of the PRO requests and added a new controversial element into the future licensing mix. The Department issued an opinion — contrary to all past ASCAP and BMI licensing practices — that all ASCAP and BMI licenses were to be considered “full work 100% licenses,” whereby a license from one PRO would cover all works written by that PRO’s writers in addition to the shares of any works that were co-written with writers from competing PROs. In other words, an ASCAP license would not only cover all works written 100% by ASCAP writers but also those “split works” written with BMI or other PRO writers. This opinion, currently under appeal, would, if implemented, entirely change the “fractional” licenses that ASCAP and BMI have licensed users with, whereby a license with a specific PRO only covers the shares of musical compositions written by members of that PRO and nothing more.

On the other hand, SESAC and GMR, the two smaller U.S. PROs, are not under consent decrees or under any government oversight. SESAC did though, in its recent settlements of anti-trust litigation brought against it by both the local radio and local television industries, agree to mandatory arbitration when negotiated license fee agreements cannot be reached. In addition, SESAC agreed to not interfere with any of their writers’ or publishers’ efforts to issue direct licenses to users. GMR, however, is completely unregulated and, in many cases, is the exclusive licensor of its writers’ and publishers’ works-issues which are at the heart of anti-trust litigation between the radio industry and GMR.

**User Generated Content**

User generated content, or UGC, presents unique issues, because non-pro users frequently post what they want and obviously do not seek out licenses for the music they may use. Early on, in the history of
Internet video — which is to say, in the history of YouTube — such unlicensed uses often went undetected. If these uses were detected, they resulted in a takedown notice from the rights holder.

User generated content presented a Hobson's choice, since it meant either tolerating infringement or potentially outraging users. Ultimately, YouTube developed automated detection software, plus a clever, innovative third solution offered by other websites: monetizing user content with advertising and sharing a portion of the ad revenue with the rights holders.

The compensation depends on whether the commercially released master recording or only the composition itself is used. If the original master is used, the publisher, on behalf of itself and the songwriter, will receive fifteen percent of the net advertising revenue related to the particular UGC video, and the master recording owner (generally the record company) will receive thirty five percent with YouTube retaining the remainder. Otherwise, the publisher will receive fifty percent, which can be reduced to thirty five percent if YouTube elects to pay the UGC creator a portion of the revenue.

CONCLUSION

Platforms and media do, and will invariably change, with some becoming more valuable and others less so. The changes will sometimes be quick and dramatic, and in other cases, gradual and perhaps almost imperceptible. As the business changes and new ways of listening to and experiencing music are introduced, so do the contracts. The melodies of the future are unknowable, but the tune is unmistakable. As long as people continue to love music, music licensing will thrive both creatively and monetarily.

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1 See Jeffrey Brabec & Todd Brabec, MUSIC, MONEY AND SUCCESS: THE INSIDER'S GUIDE TO MAKING MONEY IN THE MUSIC BUSINESS 204-09 (7th ed. 2011).
2 *Id.* at 265-272.
3 *Id.* at 389-90.

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