



Music Licensing: Considerations for Advertisers

Rob Newman, Loeb & Loeb LLP

Music can set both the literal and figurative tone of an advertising campaign, and advertisers routinely spend significant amounts to secure the right music for their spots. However, the importance of music to many 21st century marketing endeavors is often matched by the complexities associated with music licensing.

The music industry is often based on relationships and customs, rather than black-letter law. As such, while not intended to be comprehensive, the following checklist of common music law considerations is designed to help the marketing law generalist navigate the music licensing maze.

Music Licensing Basics

- When you license a sound recording for use in advertising, there are generally two copyrights you need to consider: the copyright in the master sound recording (the “Master” or “Sound Recording”) itself and the copyright in the underlying musical composition (the “Composition”).
 - A record label generally owns the Master.
 - A recording artist could also be an owner.
 - This license is generally referred to as a master license.
 - A publishing company generally owns the Composition.
 - A composer or group of composers could also be an owner.
 - This license is generally referred to as a synchronization (or “synch”) license.
 - When licensing both the Composition and the Master, the deals are often done on a most-favored-nations basis.
 - There may be several record labels and publishing companies that own portions of a given Master or Composition.

The information contained in these materials is not intended as, nor should it serve as a substitute for, legal advice, which turns on specific facts. You should seek advice of counsel to answer specific questions about music licensing matters.

Requesting Quotes

- When you request a quote to license a Master or Composition, consider asking the licensor to disclose any past and pending use of the music in advertising. Clients will be upset if they learn their newly licensed (expensive) music has been used in competitive or incompatible third-party advertising.

Common Music License Provision

- When drafting or reviewing a music license on behalf of an advertising agency or brand client, consider each of the items outlined below.
 - Licensor
 - Remember that more than one entity may own rights in the Master and Composition. Some licensors will allow all rights to be obtained in a single license, other deals may necessitate licenses with various parties.
 - Licensee
 - Consider whether the advertising agency will license the music on behalf of its client.
 - Composition and Master
 - Consider whether you also need rights to use the name of the song and/or the names of the composers and/or recording artists in or in connection with your commercial.
 - Many advertisers like to make reference to the song names, particularly in social media; merely licensing the right to use a song in a commercial may not necessarily convey the right to use the song title or the composers' name in the campaign.
 - Commercial
 - Identify the number of commercials and the lengths of the commercials.
 - Do you need edits, lifts, versions, revisions, translations, tags, or any other variations?

- Term
 - Begin the term of the agreement on the first public airdate of a commercial using the music (e.g., “one (1) year from the first public airdate of the Commercial”).
 - But be careful to not tie things like exclusivity to the “Term” because you will likely want exclusivity from the day you started negotiations (or even earlier).
- Territory
 - Include territories, possessions, commonwealths, etc.
 - If possible, provide for Internet use without territorial restrictions.
 - Alternatively, consider sites directed to the territory, e.g. North American-directed websites (.com, .us, .ca, etc.) and top level gTLDs directed to the applicable industry.
 - Provide that inadvertent or unintentional spillover shall not constitute a breach of the license or copyright infringement.
 - Consider expressly providing that the licensee will not be liable for unauthorized third party uses of the Master, Composition, and/or commercial.
- Media
 - Consider needs for non-traditional media such as podcasts, cell-phone use, downloads, etc.
- Fee
 - Establish when payment will be due.
 - For example, thirty (30) days from receipt of Licensor’s invoice, which invoice may be sent upon full execution of the License.
 - Avoid provisions that indicate that the license is not effective until payment is received.
- Options
 - Identify any additional territory, media, term, and other options that may be desired, together with the price for each option and the applicable timeframe during which such an option may be elected.
- License Grant
 - Do you need the right to re-record?
 - If so, consider who will own the re-recording.

- Don't forget to include any rights you may need to the Composition name and/or the names of the composers or the recording artists.
- Acknowledgement of Ownership
 - Consider including a provision indicating that the Licensor will not own any right, title, or interest in the Commercials (except to the extent of the Composition and/or Master embodied therein).
- Arrangements/Editing
 - Clarify that the Licensee will have the right to edit and adapt the Composition and/or Master.
 - Clarify that the Licensee will have the right to edit and revise the Commercials.
- Public Performance
 - Remember that most publishers have licensed the public performance right to a performing rights organization like ASCAP, BMI, and SESAC.
 - Licensees may attempt to secure language that indicates that if the Licensee elects to use a Composition over media which do not have a license arrangement from a performing rights society or organization which has been licensed the performing rights to the Composition, the Licensor grants the licensee the right to publicly perform the Composition on said media without further compensation to licensor therefor.
 - Although most Licensee think about public performance licenses in the context of synchronization licenses, don't forget to secure the right to publicly perform the Master on the Internet (as there is a public performance right associated with such digital distribution).
- Representations and Warranties to Consider as Licensee:
 - Licensor has all rights and consents necessary to grant the license for the intended purpose.
 - The Composition and/or Master are original works.
 - The exercise by Licensee of the rights granted in the license does not and will not infringe upon the copyright or any other rights of any third party.

- Indemnification
 - Ask the Licensor to indemnify for breach or alleged breach of warranty or any infringement or claim of infringement of copyright or any other third party rights.
 - Licensors may seek to limit indemnification to amounts paid under the license.

- Limitation of Liability
 - Most licensors will attempt to limit their liability to the amount paid under the license. If the licensor will not move on this point, the Licensee should consider the extent to which the Licensee has adequate errors and omissions and other insurance coverage to protect the licensee in the event of a claim that exceeds the liability cap.

- Exclusivity
 - Remember that if your "Term" does not start until the first public airdate of the commercial, you will want your exclusivity provision to date back to date of the license, not the start date of the Term.

- Confidentiality
 - Ensuring confidentiality is often important to the advertiser that might want to make a considerable splash with a use of a particular song.

- Applicable Law
 - Provide for jurisdiction and venue.

- Force Majeure
 - Consider what will happen in the event the advertising does not run in light of pandemic-related media buy changes.

- Severability
 - Clarify that if any provision of the license is determined to be invalid by a court, such determination shall in no way affect the validity or enforceability of any other provision in the license.

- Binding nature
 - If an agent is entering into the agreement on behalf of a client, consider clarifying that it is agreed that all rights granted to the agency in the license shall also be given to the client
- Insurance
 - Particularly when dealing with smaller licensors, consider requesting that the licensor carry at least one to two million dollars in applicable errors and omissions and comprehensive general liability insurance coverage.
 - Be sure that agency and client are named as additional insureds on the coverage.
- Agent for Disclosed Principal
 - When an agency is entering into the license of behalf of a client, consider including a provision that indicates that in making the license, it is understood that the agency is acting as agent for and on behalf of the client as principal, and in that capacity may exercise any and all rights under the license.
- Assignment
 - When an agency is entering into the license on behalf of a client, considering including a provision that indicates that agency will have the right to assign the agreement to any successor agency.

Additional Music Use Considerations

- Rights beyond synchronization in a spot
 - Think about whether the advertiser might want to secure a right to digitally distribute the Composition and/or Master out-of-context from the commercial. For example, perhaps the advertiser wants the right to distribute a Master as a prize or a premium in connection with a sweepstakes or other promotion.
 - A mechanical license may be needed for such distribution. This is different from the master and synchronization licenses discussed above.
- Re-recording
 - When re-recording a song you run the risk that a label or performer might accuse you of creating an unauthorized "sound-alike." Take care to create an original sound recording that does not mirror or mimic an existing recording.

- It is advisable to obtain a written opinion of originality and non-infringement from a reputable third party musicologist when re-recording a song.
 - Consider ownership issues with respect to the re-recorded song.
- Commissioning a New Song
 - When hiring a third party to create a new musical work for you, consider ownership issues with respect to the copyright in the Composition and Master that is created.
 - Use a music house that has insurance.
 - Avoid "bad facts." Don't tell your music house to imitate a certain song and leave third party song titles out of your storyboards.
 - Consider public performing rights and the fact that certain public performance rights may be retained by the composer.
 - Consider hiring an experienced musicologist to provide an opinion that the Composition and/or Master is original and does not infringe upon the rights of any third party.
- Union Issues
 - If you commission a new work or a re-record, consider whether the musicians used are members of the American Federation of Musicians (AFM) or another union. If so, certain fees may be due (e.g. specific session fees).
 - Remember to separately bargain with artists that qualify as Principal Performers.
- Public Domain
 - Remember that just because a Composition is in the public domain, it does not mean that a particular Master recording of that Composition is also in the public domain.
 - Remember that just because a song is in the public domain within the United States, it does not necessarily mean that the song is also in the public domain in other countries or territories.

It is clear from this list that there is no shortage of complexities associated with the licensing of music for marketing purposes. However, if you enter into your music negotiations bearing in mind the items listed above, you should at least be on your way to producing a campaign that sings.