

Of Copyrights and Cowboys (Bull Riders, actually):

Everything is easy once you know how to do it. This applies to legal specialties as much as anything else. When I started working in the music industry more years ago than I like to admit, I finally discovered the answer to something that had bothered me growing up. I would watch the Grammys and be confused by the categories of “Record of the Year” and “Song of the Year”; sometimes the same “song” was nominated, but often different people were nominated. It made no sense.

Fast forward a few years and I finally discovered why. Song means just that, the song: the words and music, for which the songwriters receive the nod; Record is just short for recording (the recording is sometimes called a “master”), and the band that recorded the song gets that one.

Sounds simple now, but it belies the bane of those who need to secure licenses (called “clearing”) of music for audio-visual uses, e.g., TV, film, commercials, etc.: Two (2) different copyrights need to be cleared: one for the song and one for the master. To complicate things further, these two copyrights are frequently owned and controlled by entirely different people and/or companies. When it comes to clearing the song (the publishing license is called a synchronization, or “synch” license) you can find yourself having to wrangle 2, 3, 4 or more different publishers because songs often have more than one writer, and each writer may have their own publisher.

When clearing the two copyrights you will find that most often the record label (who owns the master) and the publisher(s) will agree to license on “most favored nations” terms (MFN) with each other. Unfortunately this means that if anyone decides its share is worth more, and then you are stuck paying everyone that higher rate.

One way around the MFN problem with an expensive song is to make use of “cover” or a re-record. One of my favorite things to tell a client is, you can use a song without having to use any particular recording of that song, but no matter what master you choose, you have to clear that one particular song. This explains why you sometimes hear a recognizable “hit” song, but an unfamiliar recording of that song: you can pay a lot less for a “cover” version of a hit song recorded by an unknown artist than you will have to pay for the synch license for that hit song. (A cover is technically a master recorded by someone other than the songwriter, but more commonly refers to a version by someone other than the artist who first recorded that song.) Of course “less” is sometimes a relative concept. One of my clients owns a cover of a hit song by a very well known artist and was offered \$100,000 for a movie trailer; the songwriter got more than triple that amount for the synch. For this reason some companies will simply hire a local band or studio musician to “re-record” the song and create their own cover specifically for that company’s purpose and use.

People always want to know if they can get around clearing music. One of my favorite things a client will say is some version of, “but, I’m only using a few seconds, what about the 8-second rule?” There is no 8-second rule; the only 8-second rule I know of is in Bull Riding, where to qualify a rider has to stay on the bull for at least 8-seconds.

So how did the mysterious 8-second rule find its way into the music business? The esoteric concept of Ephemeral Rights may have given rise to this wishful myth. Ephemeral Rights deals with uses where no copy is made and come into play most often with the few seconds of music you hear when a sports broadcast or live TV show goes to commercial. They get away with it because of another of my favorite sayings, “copyright is literal; it means the right to copy.” When you hear a few seconds of music as the Lakers go to commercial do you ever hear it again? No, because it is a live broadcast and no copy is made. No copy, no copyright. Actually, a copy is often made, but generally only for the allowable purpose of time-shifting. Time-shifting is making a copy to upload to a satellite so Letterman is on at 11:35pm both on the East coast and then again on the West coast. If CBS wants to rebroadcast that episode on a later date, it will have to clear the synch (no master is needed since Paul played it live, so CBS already controls the recording). Today even this “8-second” rule barely exists because due to the common practice of rebroadcasting and of posting episodes online the networks now generally clear the synch right away.

When you need to clear music for an audio-visual use you have choices: You can license a hit song; you can license the hit recording; you can license a cover or commission a re-record; you can license an unknown song; or, even license bits of music from a “production music library.”

The one choice you almost never have is not to actually clear the music. And when you clear music, remember you need to make sure to clear both copyrights, master and synch. Never trust that one person controls both copyrights. Always double check (even double check if you use library music). Remember, copyright infringement is a strict liability offense; you do not need to have intended to infringe in order to infringe.

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