

CLEARING MUSIC FOR MULTIMEDIA PRODUCTS

By Ron Gertz

In the old days, consumers bought their favorite songs and recordings on records and cassettes and bought or rented their favorite movies on video tapes. In today's world of technological change, CD's, DCC's, CD-Rom's, CDI's and laser discs are replacing traditional entertainment formats.

The methods of delivering entertainment and educational, informative and promotional material are changing rapidly, but the fundamental legal framework for using music in products distributed in new formats remains the same. The music used in these new media is subject to federal copyright protection. The U.S. Copyright Act and copyright laws around the world require producers desiring to use protected musical material in their productions to secure proper permission to do so.

The right commonly required in order to use musical material in an audio/visual production may be divided into the following categories:

- **Public Performing Rights:** A music publisher has the right to control the playing, singing, dancing, reciting, acting out or broadcasting of a composition in public. However, there is a vast difference between the rights required to simply sing a song on a bare stage and the rights to dramatize or tell the story of a song using sets, costumes, props, animation and graphics. An explanation of "dramatic" and "non-dramatic" rights requires a separate discussion, but remember that the rights required and the complexity of their clearance will depend upon the way the song is to be performed. The U.S. Copyright Act currently does not allow record companies to control the public performance of their recordings. Therefore, a record may be performed in public without the permission of the record company.
- **Reproduction Rights:** A music publisher has the right to control the reproduction (recording) of a composition. In audio/visual production, these rights are referred to as synchronization rights because the protected material is recorded as part of a soundtrack in synchronization with visual images. Sync rights, as they are called, should not be confused with so-called mechanical rights, which historically have referred to the reproduction of music on audio-only records, CD's and tapes for distribution to the general public. Record companies also have the right to control the reproduction of their recordings. A license to reproduce a record in an audio/visual work generally is referred to as a master use license.
- **Distribution Rights:** This refers to the right to distribute lawfully manufactured copies to the public.
- **Adaptation Rights:** A copyright owner has the right to control the alteration or adaptation of musical compositions including arrangements, parodies, comedic uses, lyric changes and translations. If a composition is to be used in an adapted form, specific permission from the copyright owner may be required before exhibition or distribution. Some

copyright owners, while open to the use of their material as it was written originally, will not grant permission for any adaptations.

The way a song is performed or used and how it is distributed (CDI, CD-ROM, laser disc, in-house or public distribution, etc) will determine the applicability of these various rights and will significantly affect how these rights are negotiated and how much they will cost.

There is no established pattern for the fees that music publishers charge for audio/visual multimedia rights. They vary from composition to composition and from recording to recording. Fees must be computed separately for each project's specific rights and releasing requirements. However, in flat fee situations, the rate for a five-year license generally will be less than the fee for a license in perpetuity; a license for distribution rights for the U.S. and Canada generally will cost less than for worldwide rights.

Music publishers and record companies can charge whatever they think the market will bear. Every negotiation is unique. A background use of one song might be more expensive than an on-camera performance of another. Obscure songs may be more costly than famous ones, and new songs may be cheaper than old ones.

In situations where copies are made for distribution to the general public, music publishers generally require: 1) a fixed royalty per unit sold; 2) a pro-rata percentage of the wholesale sales price per unit sold; or 3) a combination of both. These royalty arrangements usually require that the producer or distributor account to the publishers quarterly or semi-annually. In addition, some publishers may seek fixing fees (one-time flat fee payments similar to synchronization fees), advances or both. The distinction between fixing fees and advances is that advances are recoupable out of royalties earned while fixing fees are not.

In non-theatrical, educational, corporate, motivational projects and entertainment programs using little music, it is common to work out arrangements similar to flat-fee licenses or buyouts, thereby avoiding costly accounting procedures. However, the up-front cost of such licenses may be financially burdensome.

Ron Gertz is chief executive of Music Reports, Inc., which handles the clearance of musical material for television and film producers and distributors, television broadcasters, cable programming services and non-entertainment corporations in a variety of negotiations and transactions with the music publishing and recording industries.