

## **RIGHTS CLEARANCE**

The Independent Television Service and its staff cannot give you legal advice. However, we have created this chapter as an overview of many of the rights issues that often come up in the production of television programs. The following are the various areas of music, acquired footage and visual arts rights that this chapter will cover.

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### **General Information about Rights**

In this chapter we discuss many of the issues and requirements that Producers have to deal with when clearing material for distribution on public television and beyond. The ability to distribute a program anywhere requires the copyright holder of the program to have all the necessary rights cleared to use materials from third parties that make up the Producers program.

#### **What is Rights clearance?**

Simply put, it is the process of securing permission to use materials/elements of your program that were created and are owned by someone else. This permission is usually defined in an agreement between a copyright owner (or its representative) and a user of the copyright, and is referred to as a "license".

More specifically, however, it involves:

- 1) determining who owns the copyright to any given piece of material; negotiating permission to use that material in the territories, markets and media in which exhibition or distribution of your program is planned; and
- 2) in most cases paying the negotiated license fees to the copyright owners.

Every production presents a unique set of legal and business issues that should be addressed and resolved before you reach completion of your program. The clearance process should be undertaken before being committed to using specific elements of your program, in order to eliminate material that may be too expensive or that the copyright owners do not want used. For example, some musical compositions, while popular and in general use in areas such as radio broadcast or nightclub performance, are not available (at any price) in certain other media application. It is advisable that clearance issues be addressed as early as the planning stages of a project to assure the availability for their intended use and subsequent exploitation. The

unauthorized use of such material could result in an injunction blocking the distribution of the production, as well as other financial penalties.

### **Why does a Producer have to secure licenses for “copyrighted material” in the program?**

Pursuant to the U.S. Copyright Act, the owners of copyrighted material have the right to control how their material is used and the fees that will be paid for that use. This system of law makes it possible for composers, lyricists and recording artists, filmmakers, visual artists and many others to earn a living from their creations and requires that broadcasters and distributors ensure the protected material secure proper permission before broadcasting programs in which these materials form part of.

### **How do I know what rights to clear?**

You begin by identifying what elements of your program that are copyrighted. This might include music, footage, still photos, art work, performances and so forth.

Next you review where and how you want to distribute your program. This is becoming an ever expanding area with many new platforms emerging over the last couple of years. The traditional platforms for distribution for your program are public television, theatrical, DVD/Home Video, educational and international markets. Now you might also consider the web, video on demand, podcasts, or mobile phone platforms. Often these platforms are integrated together, for example Educational Distribution may include some form of video on demand. This has made negotiating rights more complicated and more expensive.

### **When should you clear rights?**

You probably won't clear all of your rights until you have your program fully locked. But you can usually begin to pursue rights as you become sure about what elements will absolutely be in the final program.

So you can approach this in a step by step basis. In fact you should have already begun to do research on rights in pre-production in the conception of the program and when you are creating your budget. An accurate estimate of your rights costs is vital since most likely your budget will restrict what rights you can afford to clear.

ITVS, distributors and broadcasters require that the producer sign an agreement warranting that all non-original material in the program is cleared. Also, to obtain the ITVS required Errors and Omission (E&O) insurance (see Chapter 4: *Insurance*, for more information), most if not all non-original material in the program must be cleared. Material not cleared may be excluded from the policy and any claim or action regarding the uncleared items will be the producer's responsibility. An E&O exclusion may cause PBS to reject a program for broadcast. Failure to secure rights for materials is a breach of your ITVS Production License Agreement.

## Use of Copyrighted Material

The use of any copyrighted material in your program requires that you obtain the right to use it unless you deem it “Fair Use” (see the section, *The Fair Use Doctrine*,) or are relying on the Public Television Compulsory License (keep reading for a discussion of the Compulsory License). Copyrighted material could include such works as acquired footage and film clips, pre-recorded music, published music including musical, photographs, literary works, original works of art, or reproductions of art work. Basically, just about anything you wish to include in your program that has been created and/or performed by someone else requires clearance.

### Public Television

#### Minimum Public Television Rights

To use the copyrighted works of others, you must obtain rights as required for public television. Licenses should begin with the date of first broadcast and should be made out in the name of the person or entity that will be the copyright holder of the final program. For public broadcasting, you must typically obtain the following:

- Public television’s standard is **six public broadcasting releases in four years** (a release being unlimited broadcasts within a seven-day period). The four-year period begins on the date of the first release. Public television used to require four public broadcasting releases in three years. PBS *may* still accept programs offering four releases over three years in certain limited cases - such as programs produced under some guild agreements, which still define the public broadcasting licensing period as “4 in 3.” If granting six releases over four years will have a serious impact on your budget please discuss this with your ITVS production liaison.
- One year of **off-air record rights**. This allows K–12 educational institutions to tape and use programs for educational purposes within one year after the airing of the program. Historically, public television required seven-day off-air school record rights. In the interest of providing educational value with their programming, PBS has firmly switched to the one-year policy. Some educational distributors feel that one year off-air record rights may compromise the potential sales of videotapes to schools. Others feel that a PTV broadcast with one-year off-air record rights can enhance educational sales. The ITVS Production License Agreement requires one year off-air rights due to CPB and PBS requirements. The net result of this change is that you will be obligated to clear the educational rights for your program and all elements in it in all cases in order to cover the one-year of off-air record rights.
- **Promotional Rights**. This is the right to incorporate the material in promotional spots, website, and other materials designed to promote viewing of the program. ITVS producers must also obtain the rights for ITVS and CPB to use the finished program for institutional promotion purposes.

Note: To preserve the possibility of future distribution, you may wish to simultaneously negotiate for additional uses beyond public broadcasting even if you are not contractually obligated to do so. Such uses may be: educational audio-visual for distributing the program to schools and

libraries; home video; foreign broadcast; semi-theatrical distribution (for audiences where an admission is charged); cable and commercial broadcast sales, and the right to use certain images, footage or music in promotional efforts on the Web or other forms of internet distribution (please see Chapter 13: *Distribution*, for further details). At a minimum, you may wish (or be required) to establish the availability and “step-up” rates for additional uses so the groundwork for future distribution is laid in advance.

### **Public Domain Material**

If a work is in the public domain, no clearance or fees are required. It is available for use by the public. Materials where the copyright has expired are in the public domain, as are materials authored by the U.S. Government (make sure that the author is the U.S. Government. Parties funded by the U.S. Government may acquire copyright in works created with such funds and may charge a fee).

It is important to make sure that the entire work is in the public domain. Works derived from the public domain may be protected by copyright. For example, sound recordings of public domain songs may be protected by copyright. Also a film may be public domain but the music in the sound track may be protected by copyright.

Please note that different countries may have varying durations of copyrights. Because of major changes made to copyright law in 1978, there are several different copyright terms in the United States. You should research thoroughly any material that you believe may be in the public domain.

In 1998, new legislation (“The Sonny Bono Copyright Term Extension Act”) was signed into law changing the duration of the copyright protection afforded creative works. This act extended the period of copyright protection by 20 years, bringing the United States into alignment with the countries of the European Union with regard to copyright duration. As a result, works which were once about to enter the public domain (for example, the first Mickey Mouse short “Steamboat Willie”) will remain private for another 20 years. As always, be careful when verifying that work is in the public domain.

Listed below are the basic rules of U.S. copyright duration. There are several exceptions to these rules, and they can be quite complicated. For a more detailed look, see *Circular 15a, “Duration of Copyright,”* which is included at the end of this section and online at [www.copyright.gov/circls/](http://www.copyright.gov/circls/).

- Works first published/copyrighted before 1906: Up to two consecutive terms of 28 years each (therefore works published before 1906 are, in 2002, almost always in the public domain).
- Works first published/copyrighted from 1906 through 1977: First term of 28 years. Works not renewed before the expiration fell into the public domain. Works renewed enjoy a second term of 67 years.
- Works created but not published, copyrighted nor in the public domain before January 1, 1978: The copyright term begins January 1, 1978 and generally lasts for the life of the author plus 70 years. These works remain under copyright until at least 2048.

- Works created January 1, 1978 and after (whether published or unpublished): the duration of the copyright term begins at creation and lasts for the life of the author plus 70 years. Anonymous works (works made under pseudonyms, and works made for hire) have a duration of copyright for a term of 95 years from the year of publication or 120 years from the year of creation, whichever expires first. Works created in 1978 or after will not go into public domain until 2048 at the earliest.

### **The Fair Use Doctrine**

“Fair use” is the right to use copyrighted material without the permission of the author. The purpose of the *Fair Use Doctrine* is to protect the right of the public to the free dissemination of information. Most issues of fair use involve news, documentary, or educational programs. Only rarely may purely entertainment programs use the *Fair Use Doctrine*.

Fair use is a loosely defined concept and one that has been subject to a variety of interpretations. Fair use is a legal defense - not a license. Be careful.

Section 107 of the Copyright Act enumerates four specific criteria that may be used to help determine whether use without permission of copyrighted material is fair use or copyright infringement. Keep in mind that these criteria are not exclusive and courts may consider factors other than those listed below:

“...Fair use of a copyrighted work...for purposes such as criticism, comment, news reporting, teaching...scholarship or research, is not an infringement of copyright...

...In determining whether the use made of a work in any particular case is a fair use, the factors to be considered include:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion in relation to the copyrighted work as a whole;
4. the effect of the use upon the potential market for or value of the copyrighted work.”

In determining whether or not your use of copyrighted material is permissible under fair use, it is necessary to consider all of the points listed above.

#### Fair Use Guidelines --Factors That You Should Consider

A court considers and weighs many factors, no one of which may be determinative. If you wish to use material under the *Fair Use Doctrine*, discuss it with the ITVS production department before finishing the program. We may advise you to either obtain clearance of the material from the copyright holder or get a fair use assessment (a written legal opinion) from an attorney. This can help you to assess the situation and avoid costly errors and adjustments later. Attorneys rarely

make this assessment without seeing the material in context in a rough cut. Since you may have to wait until your rough cut to get an opinion, it would be wise to have a back-up plan for replacement of the material in case the attorney does not deem it fair use. Remember, as the producer of your program, you are liable for any copyright infringement and its consequences.

- The closer a program is to a traditional historical documentary or biography and the shorter the excerpt, the more likely it is that the use will be considered fair.
- If you are using an excerpt purely to enhance production values and/or to entertain the audience, it is unlikely to be considered fair use. For example, using an excerpt from “Singing in the Rain” to spice up a documentary on weather might not be considered fair use. In contrast, if the documentary was on Gene Kelly or on the history of dance in film, an excerpt *might* legitimately be used under fair use.
- The use of a limited excerpt during a critique or review of the work is fair use.
- It may be unwise to rely on fair use to permit your use of a photograph since you can’t necessarily excerpt a photograph as you can a movie. In most cases, you will be using very close to 100% of the photo, certainly a substantial portion of the work (See #3 above under *Fair Use criteria that may be considered in a court proceeding*).
- The use of “key” scenes or particularly well-known clips should cause concern because your use may be seen as having an adverse impact on the market value of a copyrighted work.
- Acknowledging sources only demonstrates you are not attempting to plagiarize. It does not constitute fair use.
- If your use is permissible fair use and you feel that acknowledgment of the source of the material is appropriate and possible within the credits, it would be prudent to do so.
- “Actuality music” and fair use: Music captured inadvertently as part of recording a scene—for example people singing “We Shall Overcome” during footage from a protest march—and that is not used to increase the production value of your film, may be considered “actuality music” and allowed as fair use. This could be applicable in footage shot by you or as a part of acquired footage. To determine the use of actuality music as fair use, you should consider all of the Fair Use Guidelines outlined here.
- Engaging only in non-profit forms of distribution will not necessarily protect you in a fair use claim.
- Whether or not a work makes money for a producer does not necessarily by itself, preclude a claim of fair use. This was evidenced by the case in which rap musician Luther Campbell successfully defended a famous fair use claim on the Roy Orbison composition “Oh Pretty Woman,” citing parody as protected fair use, even though the endeavor was completely commercial.
- Parody is fair use.

While you should make fair use determinations prior to contacting the copyright holder, attempting to license rights, which you later claim as fair use, does not necessarily prejudice a

judge against you. Fair use decisions should be based on principle, not on availability or cost of acquiring rights.

### Section 118 Compulsory License for Non-Profit Producers Producing for Public Television

Section 118 of the Copyright Act gives public broadcasters and non-profit producers a compulsory or automatic license to use published, non-dramatic music and published, pictorial, graphic and sculptural works in programs transmitted by public broadcasting entities. This means that public broadcasters and non-profit producers do not need to negotiate or obtain permission to use such works in programs that will be aired on public television or radio only. \*However, since the compulsory license applies only to PTV broadcast rights with seven-day off-air recording by educational institutions and PBS requires one-year of off-air recording, you are obligated to clear the educational rights for elements in your program. See subsection, *Minimum Public Television Requirements* (page 3), for a discussion of the issues surrounding off-air record rights. Section 118 does not apply to ancillary uses such as commercial broadcast, audio-visual sales, foreign rights or festivals.

Non-profit producers are those who produce programs for public broadcasting, non-commercial educational broadcast stations, educational institutions, and governmental bodies. However, the term “non-profit producer” remains somewhat ambiguous. The language does not specify that you must be “tax exempt” or give a clear definition for “non-profit producer.” Thus, it is up to you as to whether or not you feel you could defend a “non-profit producer” status if challenged.

## **Music Rights**

Music rights and their relationship to public television can be confusing. This section will provide you with a general overview of the types of issues that you’ll be facing as you embark on the process of clearing the music for your show.

### **A Myth About Music**

Before we begin, we’d like to dismiss the commonly held belief that a music clip under 10-15 seconds can be used without clearing the rights. This is not true. The copyright owner owns the copyright at any length and the music needs to be cleared unless it is in the public domain or it is deemed fair use.

### **Overview of Music Licensing**

Music licensing is the process of licensing, or negotiating permission, to use an existing piece of music. The "license" is a document that is created to document the terms and conditions that are negotiated for the usage of the music.

### **What are some of the elements of music licenses?**

Some of the elements most commonly seen are:

1. Term of the license - that is, the term (time) that the music usage is allowed.
2. Geographical area covered by the license (usually "the world," but can be limited to specific geographical areas for projects like music for advertising, etc.)
3. Types of "performances" allowed - this refers to the type of performance or exhibition

of the film/tv production. Some licenses are specifically for films shown only at film festivals (a "festival license") and may be available on a low-cost or no-cost basis. Other licenses cover "commercial exhibition" which refers to commercial performances of the film at theatres, on television, etc.

4. Compensation (aka "license fees")
5. Screen credit. Screen credit for licensed music is usually placed at the end credits for a film, and includes the title, author(s), performers, publisher, record company or whoever owns the recording, and whom the arrangements for licensing are made through.

### **What licenses do I need for my television program?**

To license the use of pre-existing music for your film you will need to negotiate a Sync License (explained below) from the publisher. This will give you the right to re-record the song and then use it in your film. It does NOT however allow you to use any pre-existing recordings of that song. For this you must negotiate a separate Master Use License (explained below) with the record label or other entity that owns the sound recording rights and the artists and musicians that performed on that record.

### **What are some of the different types of licenses?**

Music generally has 2 copyrights that those licensing music need to be concerned with: The ownership of the music is one of the copyrights. Usually, music is owned either by the actual writer of the music or a music publisher. A music publisher is a company, which owns music and works to have that music, exploited (here meaning a beneficial use of the music for profit) and heard by as many as possible. The ownership of a particular sound recording of a piece of music is another copyright, usually owned by a record company or by the writer of the music. A license between a music user (such as a film/tv production company) and the owner of the music (again, usually a publisher) to use that music in a film/tv production is called a SYNC LICENSE or synchronization license. A license between a music user and the owner of a music recording to use that particular recording is called a MASTER LICENSE or master use license. Sometimes these licenses are combined into a single license called a "SYNC AND MASTER USE LICENSE" which covers both copyrights - this is usually done when the same person or company owns the publishing of the music and the master rights of the recording.

### **Types of Music Rights**

Synchronization Rights - The right to use the composition of the song in your program. Synchronization rights use the composition in "sync" with your picture. If you are using a musical composition you must obtain sync rights from the composer/songwriter or his/her publishing company. Whether you use a pre-existing recording or have the music performed and recorded, you must obtain sync rights. The copyright holder in the composition is generally not the record company (be wary of talking with record companies regarding sync rights unless you are sure that they are also the publisher of the music. They may attempt to charge you a fee even though they are not the publisher).

In some cases, pieces of music are held by two or more publishing companies that each control a certain percentage of the song (both will have to be paid). Be sure you have the correct title and

composer for the music you are using before beginning the clearance process. In addition, obtaining synchronization licenses may involve other parties that are not readily obvious. For instance, if you are attempting to use the traditional song “Do Lord,” while the traditional song itself is in the public domain and will not require licensing; the arrangement (done by a contemporary musician) may be a copyrighted work and requires a synchronization license. Technically, sync rights for music used in public television programs are covered under Section 118. This gives public television producers a compulsory license to use published, non-dramatic music; and published, pictorial, graphic and sculptural works in programs that will be aired on public television or radio only. However, Section 118 only provides for the PTV seven days of off-air recording. This means that in order to obtain the required PBS one-year of off-air record rights, you will have to get the educational rights for any music you use.

#### Master Use Rights - The right to use an existing recording in your program

This right is usually granted by the company that issued the recording. Since the record company often holds the copyright to the master recording (hence, “master use,” not to be confused with the rights to the composition).

Producers do not have to pay for the master use rights for U.S. public television according to Section 114 of the Copyright Law (don’t confuse this with Section 118, which pertains to sync rights). This only applies to U.S. public broadcasting. Any other form of distribution needs to be licensed from the copyright owner of the sound recording. If you decide to distribute your program in other markets as well, Section 114 will not protect you from paying any fee, but may protect you from paying a larger fee. If you use music from a published commercial recording and your show will be exploited outside of public television, you must also obtain a master use license.

This can be expensive. In order to pursue distribution outside of public television, you may find it more economical to pay musicians to record music according to your specifications or to compose original music. In addition, master use licenses may involve other parties that are not readily obvious. Again the song “Do Lord” contains background vocals provided by a union choir and instrumentation performed by a union orchestra. In addition to paying the record company that owns the master, you will be required to pay both the vocalists’ union and the orchestra’s union.

#### Performing Rights - The right to perform the music publicly

TV broadcast constitutes a public performance of any musical composition in your show, as does theatrical release. When your show is publicly exhibited, the exhibitor must pay to publicly perform the music in your show. The producer almost rarely has to pay for performing rights, but you should note who handles them (BMI/ASCAP or others). In the case of a public television broadcast, either PBS or the individual broadcasting stations will pay for the performing rights.

#### Dramatic Use Rights – The right to use the music in a “dramatic setting”

Music use is considered dramatic when it is an integral part of telling a story. Generally, the dramatic use of music also involves some type of staging. Operas, ballets and musicals are considered dramatic use of music and use of them in their entirety or substantial use requires the producer obtaining “grand” rights, including sync and performance rights. It is not considered

dramatic use if a performer simply sings a song from “West Side Story.” However, staging a musical number that advances a story line would be considered dramatic use.

### Obtaining Sync and Master Use Rights

So what does all this mean in terms of actually having to clear rights? For instance, assume that the music is not in the public domain and not covered by the Fair Use Doctrine. Chances are, you won’t have to worry about performing or dramatic use rights, and so we’ll concentrate on sync and master use.

### Obtaining Sync Rights

As mentioned earlier, sync rights for public television are covered under the Harry Fox agreement with PBS and the Section 118 Compulsory License.

### Harry Fox Agency and the Music Voluntary Agreement for PBS

The Harry Fox Agency was founded in 1927 by the National Music Publisher’s Association to act as an information source, clearinghouse and monitoring service for licensing musical copyrights. The agency provides mechanical licensing, collections and distribution for U.S. music publishers. Harry Fox Agency currently represents over half the music publishers in the country. Other agencies that do this include SESAC, AMRA, Copyright Management and Bug Music.

Harry Fox Agency has a voluntary rate agreement with PBS. Similar organizations such as SESAC (Society of European Stage Authors and Composers), AMRA (American Mechanical Rights Agency), MCS (Music Copyright Solutions) and Bug Music, each representing several hundred music publishers, also have voluntary rate agreements with PBS producers. These agreements include set rate schedules for use on public broadcasting. The rates depend on how the music is used and the year of original broadcast (e.g., the current rate with Harry Fox is \$121.61 per song for featured use, \$60.81 per song for background use).

As a producer for public television, you can invoke the voluntary rate agreement in which PBS will pay the agency the negotiated rate from a trust fund they maintain for this purpose. Furthermore, if invoking this agreement, you do not need to ask for public television rights from the agency - they prefer to deal with PBS directly.

A sticking point: the PBS Voluntary Rate Agreement (with the Harry Fox Agency and others) only allows for seven days of off-air record rights and PBS requires one year. The result of this is that you will need to clear the educational rights to your music even if you are relying on the Voluntary Rate Agreement for the public television rights to music in your program.

### Section 118 Compulsory License for Non-Profit Producers - Music

What happens if the publisher of your song is not represented by the Harry Fox Agency or another organization with a voluntary rate agreement? PBS can invoke Section 118 of the Copyright Law. CPB currently funds non-profit producers’ use of music under compulsory licensing and under PBS voluntary agreements. PBS administers the payments due to the music publishers subject to the compulsory license. A music cue sheet (filled out by you) is submitted to PBS by ITVS so that appropriate fees can be paid. However, as stated above, the compulsory

license only grants you rights to use the work for public broadcasting. You must clear educational rights for the copyrighted music yourself.

Note: Dramatic use of music and use of production library or “needledrop” music (which will be discussed later in this chapter) are not covered by this arrangement. See Music Cue Sheet instructions for definition of “dramatic use of music.”

#### What About Clearing Sync Rights For Markets Outside of Public Television?

You will need to clear sync rights for all other markets outside of public television. These markets include educational, theatrical, commercial broadcast and home video.

The Harry Fox Agency no longer offers sync licensing services, but there are a number of other agencies that still clear sync rights - SESAC, Bug Music, EMG (Even M. Greenspan) and MCS (Contact information located in Chapter 14: *Contacts*). These agencies have forms you can download from their websites and search engines for you to use when clearing sync rights for a particular song. They often require information such as type of usage, writer, publisher, summary of your production, a description of the scene where the music is used, air date, markets, territory, term, estimated number of copies to be sold, etc. in order to begin the process of clearing sync rights. In some cases the arranger/composer may control the synch rights themselves and may not be connected to any company. If this is the case, you have to contact them directly. ASCAP and BMI will forward mail regarding rights clearances to musicians that are registered with them.

Any large company will likely have its own License Agreement, and they will provide you with this agreement to outline your specific requests. In some cases, when obtaining synch licenses from smaller independent musicians, you may have to prepare the synchronization license agreement yourself (Please go to Chapter 6: *Sample Forms* for a sample Synchronization License Agreement).

If none of the aforementioned companies represent the publisher you are seeking, try calling the index departments of BMI, (212) 586-2000, or ASCAP, (212) 621-6000. Neither agency clears sync rights, but they may be able to provide information about whom to contact. If you cannot locate the owner after going through these searches, contact the ITVS production department.

#### **Obtaining Master Use Rights**

Fortunately, master use rights are a little simpler for public television. Master use rights for public television are covered under Section 114 of the Copyright Law. You do not need to be concerned with clearing the master use rights for public television use.

#### What About Clearing Master Use Rights For Markets Outside of Public Television?

Begin your search by looking at the LP, CD, Tape, etc. Usually there is a copyright with a record company name listed somewhere (e.g., © 1999, Telarc International). Start by calling the company listed. If they are not responsible for master use rights, they will most likely know who is. Typically, the rights holder will have a form that they will require you to fill out and return to them. If not, they will require a written request that outlines the licensing market, the term, the territory, the usage of the music, and the length of the piece that you will use.

Again, the larger companies will most likely prepare and present a Master Use License Agreement to you for your signature. However, it is possible that in dealing with a smaller independent company you will have to prepare and present the license agreement to them (see Chapter 6: *Sample Forms* for a sample *Master Use License Agreement*).

### **Obtaining Synchronization & Master Use Rights from the Same Place**

It is not unusual when dealing with undiscovered talent who compose original music and record their own sound recordings to find that they are not signed to a record company nor a publishing company, and that they own all rights in the materials. In a situation like this, the band may own and control their masters and their compositions. You must approach the band/performer directly. They may not have a license agreement so it would be useful for you to supply one (see Chapter 6: *Sample Forms*). Please consult an experienced attorney before signing, drafting and offering any agreement.

Sync vs. Master Use Chart

	Synchronization (Sync) Rights	Master Use Rights
What is it?	The Composition	The Recording
Who usually holds the rights?	The publishing company	The record company
Voluntary Rate Agreement covers what off-air rights?	seven-days of off-air	Not applicable
Who pays for PTV rights?	PBS pays Harry Fox using the Voluntary Rate Agreement or Producer has cleared as part of a larger bundle of rights.	No payment required per Section 114 of the Copyright Law.
What if the composition isn't represented by the Harry Fox Agency?	PBS will invoke the Compulsory License under Section 118 of the Copyright Law.	Not applicable

### **Foreign Rights**

Domestic publishers usually enter into foreign licensing or sub-publishing agreements with music publishers that operate outside of the U.S., although U.S. publishers often obtain Canadian rights when they obtain U.S. rights. Unlike in the U.S., most foreign territories have government-owned publishing organizations that collect and administer publishing.

### **Music as Part of Acquired Footage**

Here we get into some variations on a theme. There are many situations in which music may be included with stock footage or film clips. This music must also be cleared. Do not assume that you are getting the appropriate music rights when you acquire the footage. Sometimes, stock footage sources will not have cleared music rights and do not include them in their license agreement with you. You must identify the copyright holder of the music and obtain rights from the holders or their agents. Stock footage often comes with other problems (please see the subsection on *Acquired Footage* for further information).

## **Other Sources of Music**

### Needledrop

Music and effects that are included in production library collections can be licensed from the library or other source of the “needledrop” selection for a fee. Generally the license fees for needledrops are much less than the cost of a sync license or master use license - although needledrop may cost more than original music. Since royalties may need to be paid to ASCAP or BMI by stations broadcasting the program, note all pertinent information on your music cue sheet.

### Original Music

The best way to obtain music clearances is to have original music composed for your program. In addition to creating music that uniquely fits your program, it can be less difficult and costly than clearing rights to existing music.

Unless the composer(s), arranger(s) and musician(s) explicitly transfer the copyright in the composition and sound recording to you (it must be in writing), you are only licensing the music for use in your program. The composer(s) and the musician(s) may retain the copyright to the music and the recording; you license sync rights and master use for exploitation including public television. This is fairly common and, if done properly, will comply with your ITVS Production License Agreement. However, to keep the music unique to your project, you may wish to prohibit the music from being used elsewhere, like other television shows or motion pictures. Always use written agreements! A sample *Composer’s Agreement* is included in *Chapter 6: Sample Forms*. It asks for worldwide rights in perpetuity and copyright of the music. This agreement asks for the full/complete rights, which are not always available. With the help of a qualified entertainment attorney, the *Composer’s Agreement* can be revised as necessary or adapted to the *Standard Materials Release* to suit your needs. In any case you want to preserve the ability to distribute your program as you see fit without the need for additional payments.

Public Domain Music published more than 95 years ago falls in the public domain and requires no clearance. Just because a song was composed more than 95 years ago doesn’t mean that the arrangement or version or sound recording you are using is clear. Many older or traditional pieces of music can have updated or recent arrangements. For example, you use “The Star Spangled Banner” in your program. The song is more than 95 years old, but Jimi Hendrix did the arrangement and sound recording. The arrangement and sound recording are thus copyrighted and must be cleared.

## **Composed Music**

### What is a composing contract?

When a film or television production company hires a composer to write original music, an agreement called a composing contract or composing agreement is usually created. This document confirms the terms and conditions under which the composer is being hired to write the music. It is a legally binding agreement that covers the writing of the music, and the ownership and usage of the music going forward into the future. Since the time period covered can be many years, it's important that the document is complete and accurate.

### What are the two major types of composing contracts?

The two types seen most often are:

- PACKAGE DEAL - where the composer is paid a single fee for the entire job, and the composer is responsible for paying all expenses related to writing, recording, mixing and delivering the music to the production company.
- NON-PACKAGE DEAL (aka "CREATIVE FEE DEAL") - where the composer is paid a specific creative fee for writing the music, and the production company pays for the recording and mixing of the music.

### What are some of the elements of a composing contract?

Some of them are:

1. The "work" - that is, the music to be written.
2. The timetable or schedule for delivery of the music.
3. Payment for the work, which is usually divided up into 2 or 3 payments - One at the outset of the contract, one upon delivery and acceptance by the client, and sometimes an additional payment midway through the contract or at the beginning of the recording session.
4. Screen credit
5. Ownership of the final music
6. A statement certifying that the music to be written will be original, and not a copy of other music (this section is often called the "Certificate of Authorship").
7. If the production company owns the music, a listing of specific royalties to be paid to the composer for different types of sales (sheet music, videotape, licensing to third parties, etc.)

### **Who Are ASCAP and BMI?**

ASCAP and BMI are the two major performing rights societies in the U.S. These agencies administer performing rights, which are tied to the public exhibition of a musical composition. You probably won't have to deal with ASCAP or BMI directly as a producer; PBS or the individual stations airing your program will. However, for the purposes of the music cue sheets (which you will read about later on in this chapter) you should know which of these agencies represents the copyright holders to the music in your show. SESAC and other smaller agencies also administer performing rights.

### **Music Rights Information On-Line**

#### BMI & ASCAP

If you are having trouble locating information needed on the *Music Cue Sheet*, there may be help available on the Internet. Both BMI and ASCAP have databases available through their websites and can be used to research the writer and publisher of songs, as well as inform you as to who controls the performing rights, be it BMI or ASCAP.

#### ASCAP Website

www.ASCAP.com - click "ACE Title Search" which will allow you to search by title, writer, performer or publisher.

## BMI Website

www.BMI.com - from the home page click on the “Search” button, which will allow you to search by title, writer, publisher or artist.

## Bug Music

www.bugmusic.com

## Harry Fox Agency

www.harryfox.com

## SESAC

www.sesac.com

### **What Does Music Cost?**

This question cannot be easily answered. Sometimes you can get a low-fee or no-fee rate to clear a song or piece of footage for festival use with the condition that you pay a higher fee if the film/program is shown or distributed in other venues.

The fees paid or quoted for music clearances for ITVS documentaries and dramas have ranged all over the map: from freebies (where a musical artist felt some connection with the material in the program) to \$13,000 for one minute of a song for public television and home video rights only. There have also been cases where a songwriter may want to license a song to a filmmaker for a minimal fee, but the company that controls the publishing of that music may want to charge their usual fee (and has the final say so). The popularity of the material, the length of the license period, the markets in which you can distribute the work, the number of videotape copies or what you can charge, or even how well disposed the rights holder is to you or your work may all be factors in the price you pay for licensing rights. There are no rules on fees. Sometimes pleading “low budget” will help lower the fees, sometimes not.

Confused? It’s a normal reaction. There are music supervisors who clear music rights for a living and often assist in the selection of the music as well. Depending on your budget, you may want to consider hiring a music supervisor. With or without a music supervisor, the clearance process will take some time, typically a month or more for response to a single request. The general rule is the larger the publishing or record company, the longer the wait. Plan accordingly.

### **Music Cue Sheets**

#### What are music cue sheets and why are they important?

A music cue sheet is a document, usually prepared by the producer/distributor of a program, that lists all of the music contained in a production including the title, composer(s), publisher(s), performing rights affiliation, and use and timing of each musical cue. The cue sheet is used by all parties in the royalty distribution process to determine the amount of royalties to be paid for the public performance of the music contained in the program, and to whom those royalties are paid. More importantly, the information contained in the music cue sheet determines whether a performing rights fee must be paid to a society.

Accurate and complete music cue sheets are required for all programs. Since cue sheets must be delivered with the final program, the easiest time to prepare them is during post-production (creating cue sheets later can be an enormously frustrating and time-consuming task).

Please see the sample *Music Cue Sheet* and instructions on the following pages. If you have questions, please call the ITVS production department. A blank *Music Cue Sheet* is included in *Chapter 6: Sample Forms* and is available on disc from the ITVS production department.