

CLEARANCE OF CONTENT FOR AUDIO-VISUAL PROJECTS,
INCLUDING FILM, TELEVISION, VIDEO, AND INTERNET USAGE

The following outline identifies the intellectual property rights and issues with regard to the clearances necessary to use specifically identified content in audio-visual projects, including film, television, video, and Internet usage.

- A. Exclusive Rights of Copyright Owner with respect to all Copyrightable Works:
1. Exclusive right to reproduce.
 2. Exclusive right to distribute.
 3. Exclusive right to display.
 4. Exclusive right to perform.
 5. Exclusive right to create derivative works (i.e. creating new works incorporating substantial parts of pre-existing work).
 6. Issue of content that is within the public domain.
- B. Intellectual Property Content to be Reviewed:
1. Music, including lyrics.
 2. Sound recordings.
 3. Films.
 4. Television shows.
 5. Videos.
 6. Text.
 7. Visuals, including:
 - (a) Photographs.
 - (b) Art.

- (c) Illustrations.
- (d) Designs.
- 8. Talent name and likeness uses.
- 9. Trademarks.

C. Questions to Explore with Party from Whom Seeking Rights (“Licensor”):

- 1. Authority of rights holder, Licensor.
- 2. Scope of Licensor’s rights with respect to granting a third party certain rights to use content, including:
 - (a) Scope of rights Licensor is authorized to grant with respect to uses, territory, media, and time.
 - (b) Any pre-existing limitations.
 - (c) Any pre-existing conflicting guarantees to third parties.
 - (d) Scope of uses and media rights granted to Licensor by its grantors.
 - (e) Duration of time and territory of Licensor’s rights granted to Licensor by its grantors.

D. Intellectual Properties to be Licensed and Identity of Rights Grantors Involved:

- 1. Music:
 - (a) Music publisher.
 - (b) Composer/lyricist.
 - (c) Print publisher with respect to musical notation and lyrics.
 - (d) Established third party industry representatives, including:
 - (i) The Harry Fox Agency.
 - (ii) Performing rights societies: BMI/ASCAP/SESAC, plus non-United States performing rights society.

(iii) Copyright Office.

2. Sound Recordings:

- (a) Record company.
- (b) Recording artist (manager/attorneys).
- (c) Session musicians.
- (d) Producer.
- (e) Unions; AFTRA; AF of M.
- (f) RIAA.

3. Television/film/videos:

- (a) Must determine if Licensor has authority to grant use rights with respect to all elements included within the audio-visual work, not all of which may have been created by or under the direction of the “owner”, but may have been licensed for use in the audio-visual work:
- (b) Studio/production company.
- (c) Talent/artists (agents, manager, attorneys).
- (d) Unions/guilds; WGA, DGA, SAG, AFTRA, and AF of M.
- (e) Composers/publishers of score.
- (f) Authors of underlying text/book.
- (g) Publishers of text/book and any authorizations to exploit text/book in other media.
- (h) Illustrators/other content suppliers.

4. Text:

- (a) Publisher.
- (b) Author.
- (c) Sublicensed publishers.

- (d) Unions: WGA (if text/book done for film or television).
- 5. Visuals (including Photographs, Art, Illustrations, and Designs):
 - (a) Photographers/artists/designers.
 - (b) “Publisher” of the images with regard to reproduction rights.
- 6. Name and likeness.
 - (a) Talent/artist (agent/manager/attorney).
 - (b) Exclusive rights holders based on services committed.
 - (c) Contractual restrictions on uses.
- 7. Trademarks, to the extent that the repurposing and republishing of any licensed intellectual property content is coupled with the trademark of Licensor, then need trademark license.

E. Scope of Use Rights Request with regard to use in an Audio-Visual Project:

- 1. Right to reproduce, distribute, perform, display, and to create derivative works.
- 2. Scope of defined media, including:
 - (a) Theatrical; free and cable television, pay-per-view, and home video.
 - (b) DVD (open source and/or dedicated hardware).
 - (c) Internet; portals/servers/caching/streaming/hyperlinking.
 - (d) Using content in packaging and text inserts.
 - (e) Using content in all media for marketing, promotion, publicity, distribution, advertising, and sale purposes.
- 3. Transmission modes, including over the Internet by way of cable, wireless, wired, and satellite.
- 4. Providing access to consumer:
 - (a) “Free” access on DVD.

- (b) “Paid-for” access on DVD by unlocking encrypted intellectual property on DVD on submission of key/payment.
- 5. Duration of rights.
- 6. Territorial scope of rights.
- 7. Issues of bundling and coupling.

F. Review of Compulsory/Voluntary Licenses with respect to Listed Intellectual Properties and their Uses:

- 1. Compulsory License: Right of non-owner to use as permitted by statute.
 - (a) Mechanical license for phonorecords, but applies to audio-only; does not apply to audio-visual projects.
 - (b) Certain basic cable transmissions.
 - (c) Digital audio-only transmissions:
 - (i) Performance or streaming of sound recording as distinct from a digital phonorecord delivery (or digital download)) of sound recordings.
 - (ii) Compulsory right does not apply to audio-visual products even though sound recordings embodied in same.
 - (iii) Compulsory only applies with regard to non-interactive and non-subscription (i.e. not on demand, rather a “webcast”) and must meet a series of specific technical requirements to qualify, even if non-interactive and non-subscription (see attached Schedules 1 and 2); and must file notice of intent to rely on compulsory right.
 - (d) Ephemeral recording (caching) for transmission from multiple servers.
- 2. Voluntary License: All uses not covered by compulsory license are subject to and require a voluntary license, necessitating specific negotiation with and permission of the owner or the authorized Licensor of the content. Uses requiring a voluntary license include, but are not limited to:
 - (a) Reproduction, distribution, display, and performance of music, sound recordings, film, television programs, and any other intellectual property.

- (b) Performance of music requires licenses from the performing rights societies, BMI, ASCAP, and SESAC (and international counterparts), to the extent that the music is performed/streamed, for example, over the Internet; rather than off the disc in the consumer's home not connected to the Internet, for which the music performance license is not needed.
- (c) Sound recording performance license in digital mode for interactive access or subscription (i.e. "on demand"); such access and use not subject to compulsory license and requires record company approval based on negotiations. Again, applies to a performance over the Internet, but not to performance in the consumer's home by playing media through hardware not connected to Internet.
- (d) Uploading content to servers for access by subscribers:
 - (i) Mechanical license for music.
 - (ii) Synchronization license for music if coupled with visuals.
 - (iii) License for sound recording.
 - (iv) License for other intellectual property content, including film, television, video, text/books, photographs (etc.), talent/artist's name and likeness, and trademarks.

SCHEDULE 1
REQUIREMENTS FOR LICENSE UNDER
DIGITAL PERFORMANCE SOUND RECORDING ACT

1. In 1995, an amendment to the United States Copyright Act was enacted, the Digital Performance Sound Recording Act (“DPSRA”), which provided a public performance right in the sound recording for the copyright owner for the first time in the United States (amending Section 106 and Section 114 of the Copyright Act). This grant applied, however, only in certain limited circumstances.
 - (a) Applies only to:
 - (i) Public performance by means of digital audio interactive and on-demand transmissions for which a voluntary license is required, and therefore, it is the exclusive right of the sound recording owner (i.e. the record company) to decide whether to issue a license permitting interactive transmissions.
 - (ii) Public performance by means of subscription non-interactive transmission – for which a compulsory blanket license applies, i.e., a voluntary license is not required from the sound recording owner; for example, DMX, Music Choice, CD Radio and XM Satellite. (This legislation fostered a debate on whether the DPSRA applied to Internet webcasters (see Schedule 2)).
 - (iii) DPSRA does not apply to digital broadcasters (i.e. transmissions by FCC licensed terrestrial broadcast stations), which are exempt from needing a public performance license (whether voluntary or compulsory) for sound recordings. There is an open issue on whether the DMCA applies to the simulcast of such stations’ programs over the Internet. The United States Copyright Office is to issue a ruling on this point by mid-October, 2000.
 - (b) Conditions to qualify for compulsory license:
 - (i) Must not exceed sound recording performance complement; i.e., over a three (3) hour period, cannot transmit: more than two (2) consecutive or three (3) total selections from one (1) sound recording; or more than four (4) songs, or three (3) in a row, from same artist.
 - (ii) Must transmit owner encoded copyright information with recordings.
 - (iii) Cannot publish a program guide.

2. DPSRA also covers music (as distinct from sound recordings) by providing that statutory mechanical royalties, i.e., the reproduction and distribution rights of music owners (publishers), apply to “Digital Phonorecord Deliveries” (DPDs) by any subscription service.

SCHEDULE 2

1998 DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA – SECTION 405)

1. In 1998, an amendment to the United States Copyright Act was enacted, the Digital Millennium Copyright Act (“DMCA”), which further amended Section 114 of the Copyright Act by granting a public performance license for digital transmission or streaming of music sound recordings by webcasters, i.e. playing or performing (as distinct from a digital download) of audio musical sound recordings over the Internet. This activity does not fall directly within the three (3) categories addressed by the DPSRA, and the DMCA amended the DPSRA to expand the statutory (compulsory) license for non-subscription transmission to include webcasting as a new category of eligible transmission, and therefore subject to a compulsory license. As such, the sound recording copyright owner cannot prevent the webcasting provided that all of the criteria required by the statute (see below) are satisfied by the webcaster and it has timely filed for a compulsory license.
2. The DMCA confirmed that a license, either compulsory or voluntary, was required, by providing that the sound recording copyright owners have the exclusive right to control on-line or Internet delivery of their sound recordings.
3. The statutory license applies, however, only to certain non-interactive subscription and non-subscription transmissions. “Interactive service” is defined in the DMCA to exclude transmission of songs specifically requested by and for a particular user, and programming that is specifically designed for a particular user.
4. To be eligible for the statutory license, a webcaster’s service and programming must meet several criteria. Services that do not meet the criteria need to obtain (i.e. negotiate) voluntary licenses directly from the recording companies or through the RIAA clearinghouse.
5. The eligibility criteria for the compulsory license includes the following:
 - (a) Programming must comply with limitations designed to assure the sound recording copyright owner that webcasting (which generally occurs as uninterrupted programming) does not displace sales. As a condition for eligibility:
 - (i) programming should comply with the “sound recording performance complement”, which is defined under current law (basically as provided in the DPSRA), to provide that over a three-hour period, a service should not intentionally program more than three songs or more than two in a row

from the same recording, or four songs or more than three in a row from the same recording artist or anthology;

- (ii) archived programs that, when accessed, always start in the same place and play in the same order should be at least five hours long, and should not be available for more than two weeks at a time;
 - (iii) continuous “looped” programs that always perform in the same order, but are accessed in a continuous play stream should be at least three hours long; and,
 - (iv) rebroadcasts of programs can be performed at scheduled times three times in a two-week period for programs of less than an hour and four times for programs of an hour or more.
- (b) The webcaster is not permitted to publish advance program guides or use other means to pre-announce when particular sound recordings will be played.
 - (c) The webcaster must use only sound recordings that are authorized for performance in the United States (e.g., do not play bootleg recordings).
 - (d) Within one year of enactment (i.e. by October 28, 1999), the webcaster must provide some means for the end user to identify the song, artist, and album title of the recording as it is being played.
 - (e) Any identification or technological protection information included in the sound recording must be passed through, as long as it does not impose substantial costs or burdens on the webcaster, or create any audible or visible effects for the end user.
 - (f) The webcaster must not deploy or support technological means to evade these requirements.
 - (g) To the extent it is technologically available, the webcaster must set transmissions so that receiving software will inhibit the end user from doing any direct digital copying of the transmitted data, and must not explicitly encourage home taping.