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BUSTED! The Top 10 Myths of Music Copyrights

Copyrights protect original creative materials such as musical compositions and recordings of performances of those compositions. Licensing is how you obtain or grant permission to use such copyrighted material. A "license" is just another term for "right" or "permission." Unfortunately, whether unlicensed performances, unauthorized arrangements of a composition, or unlicensed recordings, too many people are only too willing to take someone else's property without asking permission. Most often, this arises less from an overt, nefarious intention to steal than from an honest misbelief that creative property is somehow less valuable or less "property" than other types of property—especially if someone else's creative property is perceived as critical to your own successful project. While this attitude might be understandable—though no less uncondonable—when held by a member of the general public, it becomes particularly troublesome when this perspective is held by artists, agents, managers, presenters, and other denizens of the arts community who are supposed to cherish artistic integrity above all else.

In fact, a copyright is "owned property" just like all other types of property—cars, jewelry, boats, houses, coffee makers, etc. You cannot take and use someone else's music or recording any more than you are allowed to walk into an appliance store and walk out with a giant TV merely by leaving a "thank you" note on the counter. As both attorneys and artist managers, we deal with copyrights and licensing on a daily basis. Regardless of your own role in the performing arts industry, a basic understanding of how to protect and use copyrighted materials is critical to almost all relationships, performances, and projects. In no particular order, here's a list of the most commonly held, but incorrect, myths about music copyrights:

1 "So Long As I Am Not Making Any Money or Selling Anything, I Don't Have To Worry About Any of This!"

Many people incorrectly believe that they don't have to obtain a license or worry about copyright issues unless they are using a work "commercially", which they then conveniently self-define as "sales" or "making money." However,

"Commercial Use" is not limited to sales or making money, nor is it limited to for-profit organizations. Any use of copyrighted material that promotes an artist, performance, venue, presenter, product, or service is a "commercial use", including marketing, promotion, advertising, and even materials used for fund raising purposes. By contrast, "non-commercial" use is limited to study, reflection, inspiration, or archival purposes and does not involve any reproduction in any manner or medium that makes the material accessible to the public. The lack of commercial success or profit is not the touchstone of "non-commercial use." If it were otherwise, any business venture would be able to use creative material in any manner it wanted so long as they failed miserably.

2. "I Can Do Whatever I Want So Long As No One Objects"

Many people believe that if you send a licensing request to a publisher or copyright owner for permission to use music for a performance or project, and don't get an objection or any response after waiting a reasonable amount of time, or if you make a "good faith" attempt to find the owner of a copyright and are unable to locate them, you should just document your efforts, assume permission, and proceed with your plans. Others say that it is better to "ask forgiveness" rather than bother with the time and hassle of asking permission in the first place, especially when dealing with "non-commercial" or what they believe are projects that won't make any money. None of these assertions are correct. That's like arguing that you had permission to steal a car because you couldn't find the owner. Arguing that you only stole the car to drive people to your free performance doesn't help either. If you request a license, and don't get a response, assume the answer is "no" and select different music. Similarly, if you can't find the owner or publisher of music or a recording you want to use after a reasonable effort, select another work. "Silence" is never golden when it comes to licensing.

3. "Mailing My Music To Myself Is The Same As Copyright Registration"

Often called a "poor man's copyright", there is a popular belief that by mailing either a recording of your music or sheet music to yourself by registered or certified mail, and then not opening the envelope, you can produce the sealed envelope in court should anyone challenge the date when the music was created. Unfortunately, mailing music or anything else to yourself does not give you de facto copyright registration—it just gives you more mail. Copyright Registration only occurs through the US Copyright Office. However, more significantly, you do not need to register a work with the US Copyright Office in order to have an enforceable copyright. While copyright registration provides important enforcement tools, a creative work is considered "copyrighted" and, thus, protected, the moment it is fixed in any reproducible format. As such, neither a © symbol nor registration is required for a work to be protected by copyright. Conversely, just because material does not contain a © symbol, do not assume it is in the public domain or free to use!

4. "If I Paid For It, I Own It!"

Unless you are paying an employee on your payroll, payment does not automatically convey rights, ownership, or control. When a composer is commissioned to create a new work, the mere act of paying for the work to be composed, such as a commissioning fee, does not in and of itself convey any rights to the commissioner—other than the pleasure that comes with facilitating the act of creation. If the commissioner wants the right to perform or record the work, or the right to a world or local premiere, or wants a specific artist to be able to perform or record the work, such rights must be negotiated and specified in the commission agreement. Otherwise, all rights to the commissioned work are exclusively owned and controlled by the composer—including the rights to modify, amend, re-arrange, re-configure, re-orchestrate, and do anything else with the work the composer chooses. Similarly, just because you paid for or rented scores and parts, does not give you the right to perform the composer's music.

5. "If I Found It On The Internet, Its Public Domain"

Do not assume that material you find on the internet is copyright free or "public domain." Just because someone uploaded a video or audio clip (or any other creative material), does not mean they had the right to do or, even if they did, that you are free to copy and use it as you wish. Digital materials carry all of the same copyright laws and protections as their more traditional, hard copy counterparts. The Internet is publically accessible, but it is not public domain.

6. "Fair Use" Mean Any Use Which I Think Is Fair"

Just because you will not be making any money, really-really-really need it for a really-really-really great artistic concept, can't afford to pay for it, will be using it for a non-profit organization, need it for a children's education project, or give the author credit and attribution does not make your use of copyrighted material "Fair Use" or permissible. The legal doctrine of "Fair Use" allows you to use a small amount of a copyrighted material only for specific, limited purposes. There is no "minimum" amount of music, words, recordings, footage, or anything else that automatically constitutes fair use. Rather, "Fair Use" is a defense to a claim of copyright infringement and is determined on a case-by-case basis. If there is ever a dispute, it is a judge who gets to decide what is fair, not you.

7. "An ASCAP License Is All I Need To Perform Music"

It depends on how you define "perform." In order for music to be "performed" (either live or via a recording) in a public place, there needs to be a "performance license." While these licenses are most often obtained by the venue or presenter from one of the performance rights organizations (ASACP, BMI or SESAC), a license from ASCAP will only cover music controlled by ASCAP. A license from BMI will only cover music controlled by BMI, etc. However, in order to perform music "dramatically"—that is, to use a composition as an integral part of a story

or plot, or to interpret the composition through the use of movement, costumes, and props—you must obtain a "dramatic license." Most often, these licenses are obtained directly from the composer or publisher and, most often, are obtained by the author or producer of the dramatic work. In short, you will always need a performance license to "perform" music. Whether or not you also need to obtain a "dramatic license" depends on the context of how you are using the composition. These contextual distinctions can be articulated as follows: if you plan to stand and perform, you only need a performance license. If, on the other hand, your performance involves sets and costumes and you will be performing the composition to help tell a story, develop a character, or interpret the composition, you will need both a dramatic license as well as a performance license. In addition, if you plan to make an audio recording of your performance, you will need a "mechanical license." If you plan on making an audio-visual recording of your performance, you will need a "synchronization license." If you plan to permit a broadcast of your license, you will need a "broadcast license."

8. "I Don't Need Permission to Re-Arrange or Creatively Interpret Music I Already Have Permission To Use"

Whether you obtain a performance license, a dramatic license, a mechanical license (to make an audio recording) or a synchronization license (to make an audio-visual recording), you only obtain the right to use the work as written. While this includes the right to "interpret" the work to reflect your own style, artistry, expression, etc., it does not include the right to re-orchestrate or re-arrange a work in a manner that changes the fundamental nature of the work. For example, obtaining a performance license from ASCAP, BMI, or SESAC to perform a work written for a string quartet does not give you the right to "re-arrange" it for banjo, bagpipe, saxophone, and zither—as tempting as that may be! Similarly, obtaining a mechanical or synchronization license does not give you the right to change lyrics or adapt the melody of the work to create a new composition. If you want to make such changes, you need to obtain specific permission to do so, which means you should also be specific when requesting licenses and rights.

9. "Its Industry Standard For The Presenter To Obtain Performance Licenses"

Never presume that it is another party's responsibility to obtain necessary rights and licenses. It is everyone's responsibility. If an unlicensed song is performed at a venue, then the US Copyright Act allows all the parties involved in the performance—the venue/presenter, as well as the artist, the artist's agent or manager, the producer, the promoter, and anyone else involved in the performance—to be sued by the publisher or copyright owner. Stealing a song is like robbing a bank—the entire gang is arrested regardless of who broke open the safe, who drove the get-away car, or who simply served as look out; they all participated in the robbery. As a result, it is the legal responsibility of all parties to make sure that the proper licenses have been obtained for a performance,

including performance licenses from ASCAP, BMI, and SESAC. Which party actually obtains them and who bears the costs is a matter for negotiation.

10. "If A Composer Gives Me A Recording, Then I Can Use It"

Any time you want to use an existing recording of a composition, whether to put on your website, or as a soundtrack to a film or video, you will need to get a license from the composer (which often means contacting the composer's publisher) as well as a license from the owner of the recording (which is often a record label.) That's right, you may need to get two separate licenses! Why? Because copyright law creates a separate copyright in compositions and a separate copyright in the recording of a composition. If the composer owns both the composition and the recording, then you're in luck. Otherwise, you will need two separate licenses. However, just because a composer gives you a recording, doesn't necessarily means he or she wants you to anything other than listen to it.

When it comes to music licensing there are really only three basic rules:

(1) Always ask permission;
(2) Know who to ask; and
(3) Never assume

Just because you request a license doesn't mean it will be given. Except for mechanical licenses for previously released works, composers and publishers are free to be as arbitrary as they want when it comes to issuing licenses and setting licensing fees. There is no such thing as "industry standard." However, rather than be overwhelmed or, worse, ignoring the process altogether, keep in mind that, more often than not, you will be able to get the licenses you need provided you invest the necessary time and attention far enough in advance of your project or performance. Do not leave the licensing process to the last minute and do not assign this important task to a volunteer intern helping out at your office for the summer. Also, bear in mind that the same rules that may seem to thwart your ability to use the music you want also protect you when it comes to controlling the ability of other artists, producers, and venues to copy and perform works that you create and control.