



MUSIC RIGHTS CLEARANCES AND PUBLIC MEDIA

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I. INTRODUCTION

In recent years, innovative technologies have generated new methods for distributing creative content. With the advent of digital distribution, audiences today increasingly demand access to content anywhere, anytime, anyhow, on demand. In this transformed media landscape, public broadcasters must act more broadly as public media in order to fulfill their public service purpose.

As public media continues to evolve from broadcast-only to multi-platform, various rights clearance obstacles impede public broadcasters in their efforts to meet the changing needs of their audiences and serve their educational and cultural mission. This paper will explore the rights clearance problems encountered by producers of public media when licensing musical content and propose some possible solutions that also have application for commercial media producers.

II. RIGHTS CLEARANCE OBSTACLES

Copyright law generally requires that public broadcasters and other media producers acquire all of the necessary distribution rights in the various creative elements, including music (compositions and recordings), visual works (such as photographs, paintings and film), literary works, and talent, that are contained in the television and radio programs, online content, and other materials they produce. Congress has long recognized the civic value, important educational mission, and limited resources of public broadcasters, and the Copyright Act of 1976 includes several provisions designed to benefit public broadcasting and its audience, including some that relate specifically to the use of music.¹ But these provisions were enacted at a time when distribution of public media content almost always meant over-the-air broadcast of full programs, and as a result they have only limited application to new technologies and distribution formats that public broadcasters must take advantage of in order to satisfy the demands of funders and fulfill their public service mission.² In spite of the original inspiration for these copyright law provisions, it remains extremely difficult, and often too expensive, for public broadcasters to acquire all the rights necessary to incorporate music into content intended for modern multi-media platforms.

One obstacle that public broadcasters continue to face when negotiating license terms and fees is the transactional inefficiency of negotiating a separate license for each copyrighted element contained in a program.³ While rights holders frequently are responsive to the requests of public broadcasters and agree to fair fees and broad rights packages that fit their needs, at other times rights holders are less responsive and receptive to their offers, sometimes because public broadcasters are unable to offer the same fees paid by commercial producers. In recent years especially, when consolidation and downsizing among the major music companies have led to smaller staffs managing larger catalogs, it has become even more difficult to obtain licenses on a timely basis. As a result of these challenges, public media producers sometimes forgo use of works that are perceived as too difficult or expensive to license, thus sacrificing a program's quality and impact while also reducing the rights holder's revenue.

Another challenge posed by the current licensing scheme is that most rights holders practice a media-focused approach to licensing. Typically, licenses describe rights with reference to the technical platforms used to deliver content. When producers do not need or cannot afford to pay for all-media distribution, they must negotiate a separate fee for use on each desired media platform. In the new digital era of convergence, where programs move from platform to platform in an environment of constantly changing media formats, this approach to licensing has led to inconsistent rights definitions and inefficient business practices.

III. SOLUTIONS

A system that eases the licensing process through the use of blanket licenses and standardized rights definitions would reduce transaction costs, promote access for media producers, and increase revenue for rights holders. Improved collective licensing arrangements might be achieved by means of marketplace solutions, statutory reform, or a combination of both approaches.

Mutually beneficial efficiencies in the licensing practices of public and commercial media producers and rights holders could be achieved, for example, under the present “opt-in” system by pursuing voluntary blanket license agreements between producers and rights holders. Additionally, it would make sense for producers and rights holders to establish a consistent and shared set of rights definitions that are not tied to particular technological formats for use when negotiating license terms and fees. Such definitions could be established or endorsed by entities such as collective rights organizations.

Inefficient and costly licensing practices could also be addressed by amending the Copyright Act, such as by updating the provisions that apply to public broadcasters or establishing an “opt-out” system for uses of creative content that serve an acknowledged public policy purpose.

A. MARKETPLACE SOLUTIONS

1. Blanket License Agreements

Inefficient and costly licensing practices compromise the ability of public broadcasters to gain access to value-adding musical works and maximize distribution of publicly-funded content. And when a producer foregoes use of a work because it is too difficult or expensive to license, the rights holder loses potential revenue. More widespread use of negotiated blanket license agreements that feature fair and predictable pricing models would benefit producers, increase revenues for record companies and music publishers, and reduce costs for all concerned.

Voluntary blanket license agreements between music rights holders and public broadcasters could take the form of industry-wide agreements, company-by-company or project-based agreements, or agreements administered through collective rights organizations.

Under an industry-wide agreement, all music rights holders would be able to opt into an agreement granting public broadcasters certain non-exclusive rights in their works. If this arrangement endeavored to establish fees, however, then it would likely raise antitrust concerns. In order to be feasible, an industry-wide agreement would have to refrain from setting fees or else secure some antitrust regulation or consent. A company-by-company agreement structure, whereby individual music publishers and record companies separately grant to public broadcasters certain rights in their respective repertoires for use generally or in particular projects, would avoid antitrust concerns.

Collective rights organizations that represent music rights holders can play a useful role in administering voluntary blanket licensing arrangements.⁴ For example, collective rights organizations could negotiate and approve a blanket agreement and then notify their affiliated rights holders of potential licensing opportunities and allow them to opt in to the proposed agreement. Eventually, the agreements can also be used with rights holders not affiliated with such collective rights organizations.⁵

There are several challenges that need to be addressed when negotiating voluntary blanket licenses that allow for the

use of a catalog of compositions or recordings for pre-approved purposes. Most notably, it may be difficult to establish a fixed pricing model in light of the customary practice of music publishers and record companies of negotiating fees based on the perceived unique value of particular works. One solution to this challenge would be to establish a simple tiered rate structure under which, for example, famous works would be assigned a premium price and other works would be subject to a lower rate. Comprehensive licensing arrangements also must address the contractual approval rights of some writers and artists, perhaps by identifying in advance those works within a catalog for which writer/artist approval is not required or otherwise arranging for their pre-approval of certain kinds of uses, such as for publicly-funded projects designed primarily to serve a non-commercial educational purpose. In an online environment where copyright owners have already effectively ceded some control over their work to audiences that increasingly assert the right to interact with the content they consume, it can be expected that over time writers and artists (and their lawyers) may become more willing to relinquish a degree of control over their content in order to increase their income.

2. Standardized Rights Definitions

Today most rights holders, including music publishers, record companies, and visual archives, base their licensing on the ever-changing technological platforms used to deliver content to viewers: broadcast, cable, internet, mobile devices, DVDs, etc. This has led to inconsistent rights definitions and inefficient business practices among producers and rights holders. Moreover, licenses that limit the rights granted to uses on specified delivery platforms do not acknowledge the rapid convergence among various forms of media best illustrated by the increasingly common practice of watching “television” programs on the Internet and mobile devices such as iPads.

In order to bypass the problems posed by technology-based licenses, commercial content producers often seek upfront unlimited distribution rights in the works embodied in their programs. This approach, however, is sometimes unavailable to public broadcasters unable to afford unlimited licenses that permit use in all media. For situations where “all rights” packages are unavailable or unaffordable, it would be helpful to establish a consistent and shared set of rights definitions. Reliance on a “common language” when negotiating license terms and fees, whether in individual or blanket licenses, would simplify transactions and reduce administrative costs for licensors and licensees. Updated criteria for describing rights and determining fees — perhaps based on the nature of the end-use rather than the particular delivery platform — might better serve the realities of a digital world.⁶

The expanded use of voluntary blanket license agreements that avoid technology-based rights definitions could lead to fair and predictable fees that take into account the special mission and economics of public broadcasting, and at the same time reduce costs and increase revenues for music publishers and record companies.

B. LEGISLATIVE SOLUTIONS

Outdated copyright laws and current licensing practices make it difficult for public broadcasters to produce the highest quality programming and distribute their archival and new content by any and all means to the broadest possible audience. While public broadcasters pursue marketplace solutions to complicated rights clearance problems, consideration must be given to a variety of statutory changes, ranging from narrow updates of the provisions that apply to public broadcasters to more substantial reforms.

Recent developments, including legislative activity relating to the use of “orphan works” for which no copyright owner can be found and the rejected settlement of the copyright infringement class action brought against Google by the American Authors Guild and the Association of American Publishers (the so-called “Google Books Settlement”), suggest some movement away from the traditional “opt-in” licensing system towards an “opt-out” approach that creates a presumption in favor of certain uses of creative content for publicly beneficial purposes.⁷

The Google Books Settlement would have accomplished several goals that mirror those proposed in this paper (e.g., make valuable copyrighted content more readily available to the public, avoid countless negotiations of individual license agreements, increase revenues for copyright owners). If the recent judicial rejection of the Google Books Settlement leads to a legislative response, thought should be given to addressing at the same time issues relating to public media and rights clearances. At a time when government funding of public broadcasting is uncertain, it is worth considering new ways to support its educational mission.

Given the difficulty of amending the Copyright Act, marketplace solutions aimed at developing efficient comprehensive licensing arrangements are likely to be more practical, at least in the short term.

IV. COMMERCIAL APPLICATIONS

Commercial producers face some of the same transactional inefficiencies, costs and delays that public broadcasters encounter in the course of obtaining individual licenses for works under an opt-in system. They also run into the challenge posed by inconsistent rights definitions when budget constraints restrict their ability or desire to obtain all-media distribution rights. Therefore, some of the solutions explored in this paper, including voluntary blanket license models and standardized rights definitions, could also be adapted for use in the commercial context. Adoption of widespread voluntary blanket license agreements using standardized rights definitions will reduce transaction costs faced by all parties and increase the revenues of rights holders.

V. CONCLUSION

Public broadcasters work to produce the highest quality programming and fulfill their public service mission. The special kinds of programs they produce, which frequently include many different pre-existing creative elements such as musical compositions and recordings, present complex and troublesome rights clearance challenges. Outdated copyright law provisions with only limited application to new technologies and distribution formats compromise the ability of public broadcasters to maximize distribution of content across multiple platforms, including new and emerging media. Inefficient rights licensing practices lead to substantial transaction costs for both producers and rights holders and limit the value and reach of publicly funded content.

There is a need for an improved legal framework and collective licensing system that will facilitate the use of music and other pre-existing creative elements in public media, including news and public affairs programs, documentaries, and artistic performances, and enable the distribution of such content as widely as possible for the public benefit. An expanded use of blanket license agreements could lead to fair and predictable fees that take into account the special mission and economics of public broadcasting, and at the same time improve transactional efficiencies, reduce costs, and even increase revenues for music publishers and record companies, which in turn will benefit songwriters and recording artists.

ENDNOTES

¹ As examples, Section 114(b) exempts public broadcasters from having to obtain licenses to use sound recordings in educational programs, and Section 118(d) provides a compulsory licensing scheme for non-dramatic musical compositions.

² Sections 114(b) and 118(d) both impose limits on a public broadcaster's distribution of programs produced in reliance on their terms, including a prohibition on the distribution of "copies" of programs such as by means of DVDs or digital downloads. While Section 114(b) does cover the online streaming of programs, it does not cover clearly all other uses of sound recordings on the websites of public broadcasters that continue to fulfill a valuable educational purpose that benefits the public long after the original television broadcast. Section 118(d) covers only "a transmission made by a noncommercial educational broadcast station" and thus excludes the distribution of copies of programs to schools or transmissions of programs via third party sites such as YouTube.

³ This problem is especially troublesome for producers of historical documentaries, which typically are filled with a variety of pre-existing copyrighted works: popular music (songs and recordings) for the soundtrack, pieces of news footage, film clips, photographs and other images, and more. For a typical one-hour documentary, it may be necessary to negotiate and enter into fifty or more separate license agreements from rights holders around the world. Consider the number of documentaries produced by and for all public broadcasters, encompassing many hundreds of licenses needed within sometimes tight budgets and production schedules, and it is clear that substantial transaction costs are incurred — by both producers and rights holders — in order to produce and distribute this kind of content.

⁴ For example, the British Broadcasting Corporation ("BBC") has voluntary blanket license agreements with collective organizations representing music rights holders: PRS for Music ("PRS") for rights in musical compositions; and Phonographic Performance Limited ("PPL") and Video Performance Limited ("VPL") for rights in recordings.

⁵ One alternative to a traditional blanket license agreement is an extended collective license ("ECL"). ECLs operate as a hybrid between compulsory licenses and traditional collective agreements and are used in several Nordic countries. These arrangements allow collective rights organizations that represent a substantial number of rights holders to incorporate into their license agreements works that are not represented by the organization but are of same nature as those represented by the organization.

⁶ The Association of Commercial Stock Image Licensors ("ACSIL"), a non-profit organization that includes many of the world's leading stock footage libraries, has developed a "Licensing Grid" that replaces the old system of technology-based licensing with a framework that flexibly takes into account a variety of relevant factors, including the project's intended audience, visibility in the marketplace, funding and production costs, and potential sources of revenues.

⁷ In furtherance of its non-commercial educational mission, public broadcasters produce many kinds of materials that incorporate pre-existing copyrighted works besides traditional "programs." For example, WGBH's educational non-broadcast services include *Teachers' Domain*, the first online digital library that tailors segments from national broadcasts for K-12 classroom use, and *Open Vault*, an online source of important WGBH-produced archival content (video excerpts, full interviews, searchable transcripts, and resource management tools) designed for individual and classroom learning.

