



NEWSLETTER

An Entertainment Industry Organization

DON'T GIVE IT AWAY

Why it's in your interest to obtain a fair value for your sync license

by Joe Saba

The President's Corner

Welcome, friends!

The production music business is a unique sector of the music industry that continues to change and evolve. An increased demand for high quality music on a budget has provided the opportunity for music libraries to secure placements in an ever increasing number of films and television shows. At the same time, new technologies have helped improve the ability to collect a fair share of performance royalties.

I would like to take the opportunity to thank Randy Thornton and Hunter Williams from the Production Music Association for all of their work in organizing tonight's panel.

In addition, I would like to thank our panelists Joel Goodman, Garry Gross, Cassie Lord and Ron Mendelsohn for sharing their knowledge and insight into this area of the music business. I look forward to what is sure to be a fascinating discussion.

I hope you all have a great time tonight.

See you soon!

Jeremy Blietz
President, California Copyright Conference

[Disclaimer: The PMA in no way encourages discussion among its members regarding specific rates or pricing structures. We firmly believe each member company must act independently to set its own rates according to the demands of the marketplace.] A potential client asks you: 'How much to use your music?' Most of us take into account factors such as audience size, the kinds of media in which the music will be used, whether there is the possibility of performance royalties, etc. and arrive at a value that we believe to be fair to both the user and the library. However, for some libraries and composers, the answer to this question is either essentially – or in fact – “nothing”. The Production Music Association believes that significant undervaluation of music is harmful and does great damage to our community. It sends a message that our music isn't valuable. It hinders industry-wide growth and development. And in the long term, we believe it hurts the very composers and publishers who are underpricing in the first place. A Real World Example Some catalog holders – often small, new, or both – make the argument that it's OK to eliminate or drastically reduce a sync fee to get a foot in the door, to have a shot at performance royalties or because they hope to raise rates later. While they may get that initial deal, we believe that a provider who essentially gives their music away will be harming themselves over time.

Let's look at what happens when Library A grants Broadcaster B an annual blanket license for, say, \$5. Immediately, the library has devalued not only the worth of their catalog, but production music in general. The Price Isn't Right First of all, they have probably locked themselves into a minimal rate well into the future because we all know how difficult it is to get someone to pay for something they previously had for free. In addition (and no matter how optimistic Library A is), the fact of this rate will

likely not be confined to Broadcaster B, but will spread to any client referrals by Broadcaster B as well as travel with any producer or editor who works with Library A and leaves for another company. At best, getting to a fair value for their music is an extraordinary uphill battle; at worst, their prices may never recover. The existence of this rate also now has a direct impact on our community, because any other library wishing to license music to Broadcaster B now has to answer why they, too, won't give away their music for free. Once a user has taken advantage of someone selling their music short, that rate immediately becomes the new standard for that user. How Much for Your Reputation? Secondly, Library A has minimized the value not just of its music, but also its reputation compared to its competitors.

Rightly or wrongly, when someone offers something for free that others are charging for, the first response is often ‘What’s wrong with it?’ Perhaps it’s of poorer production quality or an old catalog that’s been repurposed? Maybe there’s a lack of good search tools or a great website? Also, if the upfront money is so small, users may worry about the long-term viability of a company – wondering ‘how can these guys stay in business?’ or ‘how are they going to constantly update their library with good material?’ Again, deservedly or not, users have certain expectations based partly on price, and a “super crazy discount” can have a definite negative impact on how your music is perceived. There’s a reason that successful libraries (many of them PMA members) are able to consistently charge a fair price for their work year after year. Most basically, they provide a level of musical quality and professional service for which users are willing to pay something of value. This in turn generates the revenue to invest back in their companies to create great new music and develop new services. All of which makes their clients happy and provides for their futures. And Look Where It Gets You In the End Finally, giving away the sync in order to capture some back end from ASCAP/BMI/SESAC may also turn out to be counter-productive, for two distinct reasons: First, once nominal sync fees become the norm for a broadcaster, it becomes in their interest to sign up as many catalogs as it can. Why wouldn’t, for example, a syndication producer want access to 100 companies’ works for \$100? At this point Library A may find itself crowded out of the back end performance by the sheer number of newcomers and be left with nothing up front and almost nothing on the back end. Also, in the long run, a minimal sync valuation provides broadcasters and others with ammunition for reducing performing rights fees. The broadcaster’s argument here goes something like this: if production music companies are comfortable with diminished sync, then clearly they’d be OK with diminished performance as well. It must not cost them anything to create the music, what with music creation software now installed for free on many computers. Of course, the PMA disagrees with this logic, but the argument has and will be used by broadcasters and others when negotiating with the PRO’s.

The Bigger Picture The last decade has been a remarkable time for the production music community. Our industry has gained enormous credibility, with many of the biggest names in the music business active in the library world. Production standards have skyrocketed (some discs feature 100-piece orchestras with 80 person choirs), raising the bar for everybody. And although the number of libraries has multiplied, so too have the number and kinds of customers for our music. Many, many libraries are doing very well, both creatively and economically. Our clients have come to understand that collectively we offer music of a very high standard and they are willing to pay reasonably for it. Giving away music for free places all these kinds of successes at risk. It shrinks the pie available to everyone, including yourself.

Remember that by placing real worth on your sync license, you are telling users your music has value, protecting your reputation and strengthening yourself and the production music community for the future. The PMA is committed to providing crucial leadership to protect the value of our work and create an even better future for our community. If you have thoughts on these issues, we’d love to hear from you. For more information, please visit our website at www.pmamusic.com or contact our Executive Director, Debra Krizman, at debra@pmamusic.com. Joseph Saba is a composer, co-owner of VideoHelper, Inc. and a founding member of the Production Music Association.

EPHEMERAL USE AND PRODUCTION MUSIC: JUST THE FACTS

In the production music business, we tend to take sync fees for granted; we assume that if a client wants to use our music, they need to pay a synchronization fee and obtain a proper license. Yet from time to time there are situations that arise where clients claim that they can use our music without a license due to something called “Ephemeral Use”. Can shows like “Good Morning America”, “Today” and “SNL” really use our music for free? This article will endeavor to shed some light on this oft misunderstood topic.

What is Ephemeral Use?

First let’s start with a definition of the word “ephemeral”, which according to most dictionaries simply means “temporary”, “momentary” or “short-lived”. According to U.S. copyright law, copyright owners retain the exclusive right to copy and exploit their work, however the law does allow for “temporary” use of copyrighted material without permission of the copyright owner under certain circumstances, hence the exemption known as “Ephemeral Recordings”. In the production music business, this means that there are situations where a broadcaster can legally use your music without having to pay a synchronization fee.

What are some examples of legal Ephemeral Use of music?

In broadcasting, Ephemeral Use usually applies to a live transmission (or “live tape delay”) such as a live newscast or sporting event where it would be impossible or unduly burdensome for the broadcaster to obtain the necessary music clearances. The classic textbook example: if a newscast is covering a local parade and the marching band happens to be performing a copyrighted song in the background, the broadcaster is not obligated to clear this music. Another example: if during a live televised sporting event a commercial song starts playing over the stadium public address system, the broadcaster is not obligated to clear this music. Of course, neither of these two examples is likely to pertain to production music.

More relevant to our industry is the fact that other live broadcasts such as morning news shows, late night talk shows, variety shows, telethons and awards shows will sometimes claim Ephemeral Use in lieu of paying a synchronization fee. Even though these shows are

generally recorded for later rebroadcast, the initial broadcast can legally be considered “live” and Ephemeral Use can apply if the broadcaster makes only one “copy” of the work, doesn’t distribute it to any other outside entities, and destroys the copy within six months. While it may often be difficult or impossible for libraries to collect synchronization fees for the initial broadcast of such programs, there is no question about the fact that once these programs are rebroadcast synchronization fees are due and payable to the library or appropriate rights holders. Indeed, since virtually all programs these days are sooner or later destined to be rebroadcast and/or repurposed for multiple platforms (TV, cable, web, mobile, etc.), it is hard to see how anyone could make a convincing argument for Ephemeral Use with regard to production music beyond perhaps the initial live broadcast.

What are some examples of questionable claims of Ephemeral Use of music?

The great majority of television and radio programs are prerecorded and therefore Ephemeral Use does not apply. Ephemeral Use is sometimes questionably claimed for productions such as newsmagazines and soap operas which are generally prerecorded and therefore not eligible under this exemption. Ephemeral Use also does not apply in the case of interstitial usages such as promos or commercials since these are obviously not live broadcasts.

In addition, Ephemeral Use is a “safe harbor” that applies only to broadcasters; the exemption does not apply to other entities (such as studios, production houses or individual producers) that do not have the right to “transmit to the public a performance or display of the work”[1]. For example, in the 1995 case of *Agee v. Paramount Communications Inc.*, the court ruled that Paramount’s music use in “Hard Copy” did not constitute Ephemeral Use since they were a program supplier and not a broadcaster [2]. This important distinction may in fact invalidate claims of Ephemeral Use in the case of certain live shows which incorporate pre-produced segments, bumpers or “pods” into their program since arguably the exemption is intended to shelter broadcasters only to the extent that they are acting as a “transmitting organization”; broadcasters are not necessarily covered when they are acting as a “producer” of prerecorded content. By way of example, if a live sportscast incorporates pre-produced segments profiling Olympic athletes, those segments may not necessarily be covered under the Ephemeral Recordings exemption. Needless to say, this is a highly nuanced “grey” area of copyright law which is subject to interpretation and you are well advised to obtain proper legal counsel before taking any action.

Does Ephemeral Use apply to radio broadcasters?

Yes. Similar to television, the Ephemeral Use provisions of the Copyright Act allow radio stations to utilize music in live broadcasts and make temporary copies of songs as needed to facilitate their broadcasts, provided that the above criteria are met. Practically speaking, however, Ephemeral Use in radio rarely applies to production music since the great majority of such music is used in productions that are prerecorded such as commercials, promos, PSA’s, programs and syndicated shows.

Are performing royalties paid for Ephemeral Use of music?

Yes. Whether or not a synchronization license is issued does not affect the payment of performance royalties. As long as the broadcaster reports the music usage to the PROs via cue sheets, the writer and publisher will be paid as usual.

In sum, the Ephemeral Recordings provision of the U.S. Copyright Act allows broadcasters to utilize music during a live broadcast, without permission of the copyright owner, as long as certain specific criteria are met. However this exemption applies only to the initial broadcast of a program; any reruns, rebroadcasts or repurposing of the original content are subject to normal synchronization fees. Finally, the exemption applies only to broadcasters (not to studios, production houses or other entities) and may not apply in cases where pre-produced content is incorporated into a live broadcast.

Ron Mendelsohn
July 18, 2012

Legal disclaimer: This blog has been established as a service for members and friends of the PMA. None of the information available in this blog should be viewed as a substitute for legal advice. Readers should consult with an attorney before invoking any of the benefits of, or making any claims regarding, the ephemeral recording provision and before taking any other action affecting their legal interests.

PANELIST BIOS

Joel Goodman

Owner, *Cue Music*

Joel Goodman is an Emmy-winning composer who has written music for over 100 films. His work has appeared at every major film festival in the world and includes scores to films and television programs that have received 4 Oscar nominations, 10 Emmy awards and over 20 Emmy nominations. Prior to scoring films, Joel composed music for advertising and produced records, including those for Chuck Mangione, Livingston Taylor and Carla Lother. In 1999, he founded the record label Museum Music and in 2002 co-founded the music licensing and publishing company MusicBox. Joel conducts university master classes in the US and Europe, is a regular panelist for such organizations as ASCAP, IFP, AFI and SCL amongst others, and serves on the board of the Production Music Association where he is the Chairman of the Performing Rights (PRO) Committee.

Gary Gross

Worldwide President, *Universal Publishing Production Music*

At the helm of Universal Publishing Production Music Gary Gross oversees all aspects of the Company's production music entities, managing more than 32 offices in cities across the world. UPPM is the preeminent supplier of high level production music and serves the burgeoning business that creates, produces, and licenses music for use in film/TV, advertising, broadcast and corporate clients. In 1997, Gary followed his passion for music and joined Killer Tracks, at the time a small "production music" company recently acquired by Bertelsmann Music Group, where he was quickly promoted through the roles of VP Marketing, VP/GM, SVP/GM to President of BMG Production Music in 2002. Under Gary's leadership, the business grew from a small operation to become one of the most healthy and vibrant segments of the entire music business. When Universal Music Publishing Group acquired BMG Music Publishing in May 2007, Gary joined the UMPG team as Worldwide President of Universal Publishing Production Music (UPPM) where he continues to exponentially grow this sector of the music business. Gary has also served as a board member on the PMA (Production Music Association) for the last 8 years.

Hunter Williams

Executive Director, *Production Music Association*

Hunter Williams is the recently appointed Executive Director of the Production Music Association. Prior to joining the PMA, Hunter Williams spent 20 years at SESAC, most recently in the position of Senior Vice President, Strategic Development/Distribution and Research Operations. During this time, Williams made great strides within the organization overseeing all royalty distribution operations, including the development of the company's distribution and survey methodologies, performance tracking across all applicable media, and the maintenance of the company's repertory and performance databases. He also oversaw the company's research and analysis division, which helped drive strategic development by identifying new business opportunities. Under Williams' leadership, SESAC pioneered the use of digital fingerprint and watermark technologies to track and pay royalties for performances on radio, television, and new media. Hunter can be contacted at Hunter@pmamusic.com.

Ron Mendelsohn

CEO & Co-Founder, *Megatrax*

Ron Mendelsohn is co-founder and CEO of Megatrax, a leading independent production music library and custom music house based in Los Angeles. Established in 1990, Megatrax has earned a reputation worldwide for high quality music coupled with unparalleled service and innovation. In addition to managing business operations at Megatrax, Ron is also an accomplished pianist and composer who has composed hundreds of cues for the Megatrax library and scored numerous film/TV projects ranging from promos to feature films. A graduate of Wesleyan University (CT), Ron attended film scoring programs at USC and UCLA and studied at the Royal Conservatory of Music in Liege (Belgium) on a grant from the Rotary Foundation. Ron is a founding member of the Production Music Association and has served on the PMA board since its inception. Ron is also a member of numerous other professional organizations including the SCL, Vistage and ASCAP.

Randy Thornton

Chairman, *Amphibious Zoo Music*

Chairman, *Production Music Association*

Randy Thornton is the Chairman of Amphibious Zoo Music, an in-demand contemporary production music library and custom scoring house utilized by Hollywood film studios and major television networks worldwide. Randy also serves as the current Chairman of the Production Music Association (PMA) and has over thirty years of celebrated industry experience. Randy Thornton co-founded Non-Stop Music in 1981 and became deeply entrenched in all areas of the music business including producing, performing, marketing, composing, finance, legal, sales, licensing, acquisitions and business administration. Non-Stop was acquired by the Warner Music Group in 2007, becoming the foundation for the Warner/Chappell Production Music operation. As Chief Executive Officer of Warner/Chappell Production Music, Randy became a worldwide leader in both original custom music and production music. His creativity, management experience, and love of music make him an invaluable part of Amphibious Zoo.