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## At the Crossroads: The Intersection of Synchronization and Musician Advocacy

## AT THE CROSSROADS: THE INTERSECTION OF SYNCHRONIZATION LICENSING AND MUSICIAN ADVOCACY

Kaine Hampton\*

### I. INTRODUCTION

When you hear the immortal, politically conscious, but yet soulful song, *What's Going On*, Marvin Gaye is likely the first person you think of, not Chet Forest, the talented drummer heard in the background of the track.<sup>1</sup> Or when you hear the twenty-two prophetic lines of *Imagine*, you likely think of John Lennon's vocal chords rather than Klaus Voormann's bass guitar playing throughout the track.<sup>2</sup> The same goes for The Beach Boys' *Good Vibrations*, not many people recognize Larry Knechtel as the skillful organist fueling the track's instrumentals.<sup>3</sup>

Commonly, listeners do not identify musicians in a band other than the lead vocalist. Ironically, the job of the songwriters and band members are just as important as that of the lead vocalist.

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<sup>1</sup> See Richard Buskin, *Marvin Gaye 'What's Going On?'*, SOUND ON SOUND (July 2011), <http://www.soundonsound.com/sos/jul11/articles/classic-tracks-0711.htm>.

<sup>2</sup> *Klaus Voorman*, IMDB, <http://www.imdb.com/name/nm0903399/> (last visited Jan. 1, 2015).

<sup>3</sup> *The Beach Boys—Pet Sounds*, GENIUS, <http://genius.com/The-beach-boys-pet-sounds-credits-lyrics/> (last visited Jan. 2, 2015).

Fortunately for songwriters, their royalty compensation likely makes up for this lack of notoriety. Under United States law, licensors are required to compensate writers for the use of their compositions, but not the other musicians that participate in the recording session.<sup>4</sup> Like the writer, should a drummer receive royalty compensation every time the track is played on television? While copyright law does not require licensors to pay royalty fees to other musicians, union obligations require such payments through contractual new-use fees.

This paper examines the goals of U.S. copyright law and the American Federation of Musicians' ability to accomplish what the Copyright Act has declined to do. This analysis further explores the music-licensing paradigm and how new-use contractual obligations have increased financial pressure on licensees, which has affected the audience's experience. Lastly, this paper proposes reform to the current licensing landscape that would further promote musician advocacy and allow licensees greater access to musical content.

## II. THE GOVERNANCE OF THE COPYRIGHT ACT

The Copyright Act of 1976 (the "Act")<sup>5</sup> allows music users to license musical compositions from songwriters and music publishers. Under the Act, copyright owners are afforded the exclusive rights to perform or authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;

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<sup>4</sup> See AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 83 (4th ed. 1992) (explaining that songwriters receive music publishing income through several primary sources including: (1) public performance income; (2) mechanical reproduction income; (3) synchronization license income; and (4) international subpublishing).

<sup>5</sup> 17 U.S.C. § 101 (2010).

- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>6</sup>

Generally, copyright is defined as the exclusive right to copy a work. This exclusivity provision indicates that it is illegal for anyone other than the copyright owner to make a copy or perform a work without the permission of the owner. Copyright law essentially works to protect the interests of authors and allows for the useful sharing of science and art with the public.<sup>7</sup> Consequently, if authors are not compensated for the use of the works they create, few authors could “afford to devote sufficient efforts to fully exercise their talents.”<sup>8</sup> By providing a means through which “talented authors can earn a living by creating works of authorship, regardless of their economic background,” the Act allows for more works of authorship to be created<sup>9</sup> while “society benefits [because] more original works of authorship are created by a greater

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<sup>6</sup> 17 U.S.C. § 106 (2010).

<sup>7</sup> See *Copyright Basics*, COPYRIGHT 101, <http://copyright101.byu.edu/module1/page3.htm> (last visited Dec. 15, 2014).

<sup>8</sup> Kohn, *supra* note 4, at 349.

<sup>9</sup> Kohn, *supra* note 4, at 349.

number of talented individuals from a wide variety of backgrounds.”<sup>10</sup>

When a composer writes a song, they retain an ownership right in the composition. This copyright exists at the moment the work is fixed into a tangible form.<sup>11</sup> Thus, when a music user desires to use the composition, they must seek permission from the songwriter or the music publisher.<sup>12</sup> This permission is recorded in a licensing contract and its use is subject to certain terms and conditions in exchange for a fee. Because U.S. copyright law only requires licensing fees be paid to the songwriter and the owner of the recording, the other musicians that contribute to a track usually seek redress through a work for hire agreement.<sup>13</sup> While this work made for hire arrangement may not bear as much income for a musician as licensing does for songwriters, this is sometimes the only means for a musician to be paid for their contribution.

### III. NEW USE FEE AND SYNCHRONIZATION LICENSING

#### A. American Federation of Musicians’ New Use Fees: Creating a Royalty Where the Copyright Act Did Not

When using copyrighted property that was originally created pursuant to a union contract, music users obligate themselves to

<sup>10</sup> Kohn, *supra* note 4, at 349.

<sup>11</sup> See generally Kohn, *supra* note 4, at 348.

<sup>12</sup> See generally Sound Recording, *Common Music Licensing Terms*, ASCAP.COM, <http://www.ascap.com/licensing/termsdefined.aspx> (last visited Apr. 29, 2015) (detailing that the copyright in a song encompasses the words and music and is owned by the songwriter or music publisher).

<sup>13</sup> See generally Kohn, *supra* note 4, at 352 (describing a work made for hire as a work prepared by an employee within the scope of his employment or a work that is specially ordered in writing and falls within one of the categories enumerated in copyright law such as a contribution to a collective work).

conditions with that union. One of the more popular unions, the American Federation of Musicians (the “AFM”), is the largest organization in the world representing the interests of professional musicians. The AFM’s mission is to raise industry standards and place professional musicians in the foreground of the cultural landscape through “negotiating fair agreements, protecting ownership of recorded music,” lobbying legislators, and securing benefits such as health care and pension.<sup>14</sup>

In the television-broadcasting context, a common obligation owed to the AFM from music users is a new-use fee. A *new-use* of a tune is created when a sound recording that is included in an artist’s album is used in a medium that is not an album or cd.<sup>15</sup> In theory, this fee has created a royalty for musicians. Currently, a new-use fee is determined by the duration of the recording sessions and the number of musicians involved in the making of the song, which is recorded on a B-4 session report.<sup>16</sup> Thus, the bigger the band and the more time put into making the recording, the more expensive the new-use fee will be for music users.<sup>17</sup> For a song with a large band, such as Earth, Wind & Fire’s *September*, the new-use fee would be pricey. The AFM collects the lump sum and divides the fee amongst all of the musicians involved in the recording.

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<sup>14</sup> See *About AFM*, AFM.ORG, <http://www.afm.org/about> (last visited Jan. 6, 2015) (discussing the union’s mission to advocate on behalf of musicians).

<sup>15</sup> *New Use*, AFM.ORG, <http://www.afm.org/departments/electronic-media-services-division/new-use> (last visited Jan. 6, 2015) (defining new-use and identifying the way new-uses are monitored).

<sup>16</sup> See generally *Sound Recording Labor Agreement*, AMERICAN FEDERATION OF MUSICIANS, <http://www.afm.org/uploads/image/srlafinal.pdf> (Page 7, Paragraph 21) (last visited May 2, 2015) (explaining a new use is implicated when a phonograph record is used outside its original purpose); see also *Sound Recording Scales*, THE AMERICAN FEDERATION OF MUSICIANS LOCAL 47, [http://www.promusic47.org/scales/SRLA\\_Scale\\_Summary\\_2015\\_ext.pdf](http://www.promusic47.org/scales/SRLA_Scale_Summary_2015_ext.pdf) (last visited May 2, 2015) (detailing the more musicians used and the longer the original phonograph recording session, the more expensive the use of recording).

<sup>17</sup> *Id.*

In order to use a song in a television program, television broadcasters would be responsible for paying a new-use fee in addition to the synchronization-licensing fee owed to the songwriter.<sup>18</sup> Through synchronization licenses, broadcasters are able to synchronize music with an audiovisual work making this type of licensing a major source of income for writers and publishers while being a great expense for licensees. Therefore, paying the AFM's new-use fees can unduly burden television broadcasters.

### **B. Music Television: The Effect New-Use Fees have on the Audience Experience**

The importance of television and movie broadcasters having access to musical compositions is quite obvious. Could you imagine watching Rose and Jack fly from the bow of the Titanic, without hearing Céline Dion's *My Heart Will Go On*?<sup>19</sup> The music that plays in film and television broadcasts work in powerful unison with the actors and plot to evoke emotion from the audience. Some may argue that it is the ice cream in the sundae, rather than just the cherry on top.

Television networks such as BET, MTV, VH1, and CMT<sup>20</sup> engage in some of the heavier uses of music content, whether it is licensing music for their live performances during an award show, a musician's documentary, or the use of music in a television series. Because the collision of music and television happened on the airwaves of these stations, audiences expects these broadcasters to project the most popular and relevant musical compositions of the current era. Combining the audience's expectations with the

<sup>18</sup> Kohn, *supra* note 4, at 84 (a synchronization license is required for music that is embodied in motion pictures for theatrical distribution and television broadcasts).

<sup>19</sup> CÉLINE DION, *My Heart Will Go On*, on TITANIC: MUSIC FROM THE MOTION PICTURE (Columbia 1997).

<sup>20</sup> Also known as: (1) Black Entertainment Television ("BET"); (2) Music Television ("MTV"); (3) Video Hits 1 ("VH1"); and (4) Country Music Television ("CMT").

broadcaster's bottom line goals can easily conflict with the new-use obligation set forth by union contract.

With new-use fees and standard synchronization licensing fees at play, music users are forced to be more strategic in their musical selections. If television broadcasters are not prudent in their musical selections, musical composition licensing could far exceed the realized profit from a program. For example, over the course of the twelve episodes of MTV's second season of *Teen Wolf*, approximately 115 songs were used with about eight songs used per episode.<sup>21</sup> If all of these songs fall within AFM's new-use definition, this could raise the program's cost drastically. Because of this rising cost, it is not uncommon for music users to analyze the cost-benefit of licensing a musical selection in determining whether to use a particular composition. But with new-use fees joining this analysis, broadcasters are incentivized to license tracks that have small bands, less instruments, and recorded in minimal time. The applied pressure forces broadcasters' concerns to shift from delivering content that audiences enjoy to delivering content that is inexpensive. With one of the goals of copyright law being to share and promote creativity, overly expensive access to music can be a hurdle in achieving this goal.

#### IV. MOVING TOWARDS A VIABLE SOLUTION

##### A. Establishing an Accessible Digital Database of Recording Session Reports

Although the music industry has a history of being heavily influenced by emerging technology,<sup>22</sup> the industry's operations are

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<sup>21</sup> See *Music From Teen Wolf*, TUNE FIND, <http://www.tunefind.com/show/teen-wolf/season-2> (last visited May 1, 2015).

<sup>22</sup> See generally Nia Cross, *Technology vs. The Music Industry: Analysis of the Legal and Technological Implications of MP3 Technology on the Music Industry* (Spring 1999) (unpublished final paper for New Media Law course, Colum-

still archaic in some aspects. As a way to promote cost predictability for licensees, an accessible database of recording session reports should be established. Currently, no such database exists. Since session reports lay out how many musicians are a part of the recording and the length of a recording,<sup>23</sup> access to this information will allow licensees to budget music programming accordingly. Since the label is already responsible for maintaining this information and the AFM needs this information for enforcement purposes,<sup>24</sup> the cost of setting up this database can be shared between the union and the artists' music label. Establishing this level predictability will help create more transparency and a marriage between the music user and the union.

### **B. Setting a Maximum on New-Use Fees**

Another avenue to achieve cost-predictability is by placing a cap on new-use fees. If a maximum amount is set, regardless of the number of band members that participated in a recording session, licensees can proceed with some budgeting expectation. Setting a maximum fee would also lessen administrative costs for the AFM, as it would not have to allocate as many resources towards billing research as it does to date.

### **C. Creating a Royalty Scheme through Statute**

Alternatively, if the Act provided a royalty for musicians, there would be no need for new-use fees to serve as a royalty. Amending the Act to give participating musicians some ownership rights in the sound recording would ultimately allow the drummer

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bia Law School) (available at <http://cyber.law.harvard.edu/columbia/niapaper.pdf>).

<sup>23</sup> See *B-4 Session Report*, THE AMERICAN FEDERATION OF MUSICIANS LOCAL 47, <http://www.promusic47.org/forms/EMD/B-4.pdf> (last visited May 2, 2015).

<sup>24</sup> See generally *Sound Recordings*, AFM.ORG, <http://www.afm.org/departments/electronic-media-services-division/sound-recordings> (last visited Jan. 5, 2015) (discussing the union's mission to advocate on behalf of musicians).

and the organist a piece of the royalty pie. As with songwriters, the ownership percentage can be allocated proportionate to the musician's contribution. By adding a royalty scheme to the Act, it will create a viable solution for the licensees since they would incur licensing costs upfront when seeking permission to use the song. Overall, the costs would be significantly less because the musicians' proportional share is calculated in the licensing fee, rather than a set amount for every musician a part of the recording session. Creating a royalty for musicians also doubles as an effective remedy because it would allow musicians to collect a fee whenever their composition is used, as opposed to only when a new-use is formed.

## **V. CONCLUSION**

The goal of music users and musicians is not mutually exclusive. Essentially, both parties want to share creative work product with the general public. Where both music users and musicians are responsible for finding the most efficient means for this goal to be met, a new veil of predictability, or a revised legal framework, could create a happier marriage between musician advocates and television broadcasters.

