

March 2011

# Clearing the Way: Acquiring Rights and Approvals for Music Use in Media Applications

John P. Strohm

Follow this and additional works at: <https://digitalcommons.law.uga.edu/jipl>



Part of the [Intellectual Property Law Commons](#)

## Recommended Citation

John P. Strohm, *Clearing the Way: Acquiring Rights and Approvals for Music Use in Media Applications*, 18 J. INTELL. PROP. L. 561 (2011).

Available at: <https://digitalcommons.law.uga.edu/jipl/vol18/iss2/10>

This Practice Point is brought to you for free and open access by Digital Commons @ Georgia Law. It has been accepted for inclusion in Journal of Intellectual Property Law by an authorized editor of Digital Commons @ Georgia Law. [Please share how you have benefited from this access](#) For more information, please contact [tstriepe@uga.edu](mailto:tstriepe@uga.edu).

# CLEARING THE WAY: ACQUIRING RIGHTS AND APPROVALS FOR MUSIC USE IN MEDIA APPLICATIONS

*John P. Strohm\**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	562
II.	THE HYPOTHETICAL.....	562
	A. SYNC LICENSE: CLEARING THE MUSICAL WORK.....	563
	B. MASTER RIGHTS: CLEARING THE SOUND RECORDING AND OTHER OPTIONS .....	564
	C. OTHER POINTS OF CAUTION .....	564
III.	THE OTHER SIDE .....	565

---

\* Entertainment and Intellectual Property attorney at Johnson, Barton, Proctor & Rose LLP in Birmingham, Alabama; Adjunct Professor of Law, Cumberland School of Law and University of Alabama School of Law.

## I. INTRODUCTION

The term “clearance,” when used with respect to copyrighted works, is a sort of catch-all. Typically, clearance means the process of obtaining the necessary rights and approvals for a specific use of a copyrighted work, often in the context of media placements. This Practice Point will focus on a specific category of clearance: clearing music rights for media applications, such as film, television, and video games.

To understand the process, one must first understand the specific copyrights involved in a music clearance. Typically there are three; in technical copyright terminology, they are: a non-dramatic musical work, a sound recording, and an audiovisual work. In common usage, they are a song, a record, and a movie. In most situations there are different rights-holders for each copyright—sometimes multiple parties for one or more of the works.

Once rights have been cleared, certain limited, non-exclusive rights in the musical work and the sound recording typically are incorporated into the audiovisual work by contract. Therefore, the owner or rights-holder of the audiovisual work is the licensee, whereas the owners or rights-holders of the musical work and sound recording are licensors. An audiovisual work such as a feature film or television program often incorporates various licensed rights, including (in addition to those mentioned) literary works (such as a script), characters, publicity rights, trademarks, and location rights.

This Practice Point will examine the clearance process from all sides of the transaction, from the point of view of the typical rights-holders. Typically the rights-holders for the sound recording and musical work control the transaction and, to a certain extent, the terms; however, the producer of the audiovisual work is almost always limited by available budget. Therefore, if a music publisher or record company desires to have its copyrighted work included in the audiovisual work, it must be willing to negotiate a license fee that falls within the available budget.

## II. THE HYPOTHETICAL

To illustrate the process, I have created a hypothetical example. An independent filmmaker wishes to use the original master recording of the Beatles’ song “Here Comes the Sun” over the end-credits of a film that has been provisionally accepted in a mid-level film festival. The budget for the film is modest: a total of \$10,000 has been set aside for music, and the amount remaining after clearing the Beatles song must cover six other pop songs and some incidental, composed soundtrack music. Nevertheless, the director considers having the song play over the end credits crucial to the story. Typically, the producers will engage a music supervisor to act on behalf of the

producers in both finding and obtaining rights to the music, often with the assistance of the production company's legal counsel.

The first step in the clearance process is for the film's production team to establish who the rights-holders are with respect to each copyright (i.e., the musical work *and* the sound recording, which rarely are owned or controlled by the same party, and rarely are owned or controlled by the actual writer or recording artist). For "Here Comes the Sun," the ownership is fairly simple: the musical work is owned and controlled by Harrisongs (the estate of the late George Harrison), and the original sound recording is owned and controlled by EMI Records.

#### A. SYNC LICENSE: CLEARING THE MUSICAL WORK

Since there is no compulsory license under United States copyright law for what is known as a "sync" license (or for the accompanying "master use" license), the film producers must contact the rightsholders directly (and separately) to negotiate a deal. The initial goal of the producers will be to get as broad a grant of (limited, non-exclusive) rights as they could conceivably need, which will mean the territory will be the world, the term will be perpetual (or, rather, for the life of the copyright), and the use, while limited in scope (full performance of the master over the end titles), will not be limited as to media (covering a theatre run plus cable television rights, DVD, and any medium to be devised in the future). Nevertheless, when the film's production team is working with a limited budget and is attempting to negotiate with a party with superior leverage, they must be flexible.

The film's producer will likely make a pitch directly to the administrator of the Harrison estate or to Harrisongs' publishing administrator (who will seek approval from the estate). The producer will personalize the pitch, emphasizing that it is a project with enormous artistic integrity and explaining why the song is consistent with the message of the film. Obviously, the estate does not need the exposure afforded by the film, so it is vitally important that the filmmaker convinces the administrator that it is a project worth facilitating.

It is unlikely that the estate (or any rights-holder) will grant *gratis* rights, because the film might become a runaway success and the rights-holders should have the opportunity to participate in any success. The parties might pursue creative ways to structure the license so that the producers are able to enter the film in festivals without paying exorbitant amounts to clear perpetual, worldwide rights. One such structure is what is known as a "festival license." A festival license is structured so that the initial term and territory are limited to what is necessary for the film to be shown at festivals. Additional optional terms are determined in the event the film obtains distribution or a theatrical run.

## B. MASTER RIGHTS: CLEARING THE SOUND RECORDING AND OTHER OPTIONS

Assuming (optimistically) that the producer is able to convince Harrisongs to enter into a sync agreement on terms that fall within the allotted budget, the next step will be attempting to clear master rights. Often, when the film or television producer enjoys favorable leverage (such as when the relevant rights-holders perceive a sync placement as a plumb promotional opportunity), the sync and master use rights (with respect to the musical work and sound recording) will be given as a single, “all-in” sum, and it is then assumed in common industry usage that the all-in sum is to be divided equally between the sync and master rights-holders. However, when the master is as sought-after as an original Beatles’ master, the rights-holder typically will not be interested in either matching a deal offered by the publishing rights holder or in negotiating a discounted price for a festival run. It is worth a try, of course, but famous 1960s masters are historically very difficult to clear. Therefore, it is often a compelling option for the filmmaker to work with another recording artist to create a new master.

Once the film producer has cleared the rights in the musical work, he will not need to obtain additional rights to direct a recording artist to create a new master, even if the master is a virtually identical sound-alike recording (assuming, however, that no elements of the original master or any other elements owned or controlled by a third party are used). The producer may wish to research existing sound recordings by lesser known artists, or even to engage an artist to create a work-for-hire recording so that the producer obtains all rights as the actual author of the recording (though the recording artist will often insist upon retaining rights for potentially lucrative future licensing opportunities). Typically, with a lesser-known recording artist it is simply a matter of agreeing upon a sum that will cover production costs and compensation. If the producer has spent \$7,000 on costs and fees to clear the song, then it becomes a question of who can produce a good-enough quality master of the song that will work in context for \$3,000.

## C. OTHER POINTS OF CAUTION

It is critical to be thorough in researching rights-holders, because often there will be multiple rights-holders with respect to a single copyright, particularly with respect to musical works. Musical works are often what are technically referred to as “joint works of authorship” because they are often collaborations among various songwriters. Additionally, writers may separately license or transfer certain rights (including administration rights) to the same or different publishers. Often, songwriters assign administration rights to a third-party publisher but retain approval rights over uses. If a licensor fails to obtain rights from a single rights-holder to a single copyright, it could pose a significant problem in completing a transaction such as a distribution deal (whereby the

company maintains an errors and omissions (E&O) insurance policy, so that both the provider and the company conduct extensive due diligence regarding rights clearances).

### III. THE OTHER SIDE

The clearance process from the other side of the transaction, i.e., from the perspective of the musical work or sound recording rights-holders, is much the same. It is becoming increasingly common for song and recording rights-holders to engage agents (who are sometimes music publishers, but not always) to “shop” their songs and recordings for sync opportunities, which can both be lucrative and have significant promotional value. This infrastructure potentially makes it easier for independent filmmakers and television producers to find and clear songs for their projects, because songs that are pitched typically are essentially “pre-cleared,” in that the rights-holders have made their agents aware of their sensitivities and of the sorts of projects in which they are willing to engage, and on what terms.

