

BZ/Brief

MUSIC IN ADVERTISING

Part II

After the basics: The Finer Points of Licensing Music

Our last *Brief* on using music in advertising covered the basics of this subject. There are, however, more sophisticated issues advertisers need to understand as well.

About Music Publishers

The most basic permission you need to use a popular song is from the publisher, who sometimes says no. Some reasons why are fairly obvious—the song has been licensed to a competing advertiser, the publisher is not able to permit a lyric change, the composers do not permit commercial use.

Less obvious is the case when your proposed territory is too small. If you have chosen a song that is very well-known and want to use it in only a 1-, 2-, or 3-state territory, the publisher can't charge too much. Your use may turn off a national advertiser, however, by associating the song with your product. So, the publisher often turns down local use. If your client is willing pay a big fee for your small territory, publishers will sometimes consider licensing to you.

Also, the publisher can find your project unsuitable. For example, one publisher would not allow the Organ Donors Society to use "I Left My Heart in San Francisco" for a national television ad because he didn't want this classic love song associated with death.

When the publisher says no, you have no recourse. Choose another song.

About Master Recordings

With the music publisher's license in hand, advertisers face a choice: to do their own recording or buy the master recording by a star performer.

Payments to record companies to buy the star recording—Louis Armstrong singing "What A Wonderful World," for instance, *do not cover* obligations created by union contracts. A re-use fee, covering musicians must be paid to the American Federation of Musicians.

More important, most agencies are unaware of two fees called for by the SAG contract, for any recordings made under the jurisdiction of AFTRA. 1) A requirement to enter into a negotiation with the principal performer(s) on the recording. There is no upper limit on this fee, so it will be whatever the negotiation produces. 2) Payment to the background singers (if any). These fees are *in addition to* the fee paid to the record company. Record companies are including increasingly tougher language in their contracts about the agency's union payment obligations.

Another issue of concern when using a master recording is the issue of privacy/publicity. Has the record company secured the rights from the star performer(s) to use their recording *in a commercial*? If not, the agency may want to consider obtaining separate rights from the performer(s). We recommend discussing this matter with your attorney.

Many ad agencies take the fee they would have paid the record company and the unions and hire the star to re-do the song. This method is often cheaper, and the star can do a recording especially arranged for a particular commercial.

About Making the Recording Yourself

Making your own recording presents one possible problem. Advertisers now must be aware of, and really careful about, what is known as a sound-alike.

More than one advertiser has tried an end-run around recording stars by hiring another vocalist to mimic their style and sound for a commercial. For a time, that was an acceptable practice. However, in 1989, Bette Midler won \$400,000 in court with an open-and-shut factual case against Ford and Young & Rubicam's copycat use of her hit, "Do You Want to Dance?." Subsequently, Tom Waits received a \$2.5 million judgment against Frito-Lay and its agency for another commercial imitation. Sound-alikes are now illegal and doing a sound-alike commercial can involve your company in a lawsuit.

About Exclusivity

Advertisers should always request product exclusivity—meaning that the music publisher agrees not to license the same song to someone else selling a product as *you define it* in your territory while you are on the air.

The broader the product definition you can place in the contract, the better (food is better than frozen food, which is better than frozen desserts). If you are only on the air in a small territory (one or a few states), exclusivity may be refused, or may not work out well. For instance, a publisher once sold the same song to different cookie companies: one in New York and one in Connecticut. Even when you ask for exclusivity for your product in the territory you have licensed, you must remember it is only for your product. Once, for instance, "As Time Goes By" turned up on national television simultaneously for both American Express and Citizen Brand Watches.

Trying to negotiate total exclusivity is not the way out, since it is e-n-o-r-m-o-u-s-l-y expensive. Make sure your clients understand the limitations of exclusivity.

A clear understanding of these finer points is essential to protect your agency and its clients.