

BOOK REVIEW

THE ART OF MUSIC LICENSING

BY AL KOHN AND BOB KOHN
PRENTICE HALL LAW AND BUSINESS
963 PAGES

REVIEWED BY M. WILLIAM KRASILOVSKY*

Three quarters through this nearly one thousand page book, the authors carefully highlight a fundamental distinction:

[A] license is not a right—a right is a claim of ownership that allows you to exclude someone from doing something with respect to the subject of your property; a license is a permission or privilege to do something with respect to another's property that you would not otherwise have the privilege to do without the license.¹

This distinction underscores the main theme of *The Art of Music Licensing*: the role of the music publisher is that of enabler, one who oversees and promotes the permitted use of the copyright property of the publisher and the songwriter. Thus, in addition to collecting required license fees that will be shared with the songwriter, the music publisher performs a constructive and socially desirable function by assisting a user in the lawful use of music in all of its myriad forms. *The Art of Music Licensing*, geared to the music industry professional, further defines the role of the music publisher as one which is more akin to that of a music licensor. For instance, the very act of printing music is usually licensed in a manner similar to the licensing of synchronization rights to film and television producers, and to the licensing of mechanical rights of reproduction to record companies.

The licensing of music is the backbone of the entire music industry. Music is licensed for use in films, television, cable, video, records, sheet music and folios, advertising jingles, staged dramatic presentations, and, more recently, computer software, multi-media disks, and other new media. Together with suggested license forms, each of these forms of licensing is accurately presented in

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¹ AL KOHN & BOB KOHN, THE ART OF MUSIC LICENSING 750 (1992) (emphasis added).

detail in this important new volume which belongs on the desk of every music publisher.

However, *The Art of Music Licensing* is more than simply a book of forms. In presenting the history of the printing of music, the authors share a charming anecdote concerning George Gershwin's song "Swanee." While sheet music royalties on this important song earned George Gershwin his first baby grand piano, Gershwin's initial attempt to sell copies privately with his collaborator, Irving Caesar, failed. Fortunately for Gershwin, and for music lovers in general, Al Jolson heard the song played at a post-midnight party (with Gershwin on piano and fellow composer Buddy DeSylva on ukelele) and had the song put in his new show. The song became enormously popular and Max Dreyfus, who originally felt the song not "commercial" enough to sell sheet music, published the song.

The practical nature of this volume is aptly illustrated in a unique, essential, and long-awaited section that provides examples of license fees. In Chapter 19, easy-to-absorb examples explain why a TV synchronization fee is cheaper than a theatrical motion picture fee, and why, in each format, a background fee is less than a foreground fee. One example shows that the use of a song in a television program under a five-year, worldwide license costs \$750 - \$1,000 for background use and \$1,000 - \$1,200 for foreground use. This example also gives figures for the full life of copyright licenses, describes additional cost factors, and notes that video reproduction rights are negotiated as a separate item. Another example discusses license fees for songs used in videocassettes. The discussion notes that the music publisher's initial request for fees is in the range of ten cents per song per video unit sold. On the other side of the bargaining table, the film producer is recently, more likely to attempt a buy-out at a fixed fee of \$5,000 to \$10,000. Publishers, however, seek to avoid buy-outs. A possible area of compromise is a fixed fee "advance" for the first 20,000 units, which the authors consider "sufficient to cover a normal home video release of the motion picture."² There is also a valuable interview series of questions suggesting how to commence negotiations (usually by telephone) for a film synchronization license. Outlined are the essential questions needed to determine the significance of the usage. The answers to these questions will help determine the reasonable fee.

In addition to summarizing the myriad license fees, the authors devote a valuable chapter to discussing the legal issues and

² *Id.* at 932.

precedents of what some consider to be "old wine in new bottles": the making of videos from films licensed for production before the parties contemplated video manufacture. The ambiguities of that era's licensing language are highlighted. Reference to legal cases is helpful and not overly technical for the average licensing party without law school training. After all, the father-son team of authors consists of a veteran non-lawyer music business man who has served as arranger, foreign sub-publisher representative, and general music business executive for Warner-Chappell, and his attorney son, whose collaborative role does not overwhelm the father's layman approach.

Another valuable chapter, complete with suggested forms of licensing contracts, covers the area of sampling. Suggested negotiating gambits are given for both the use of the sound as well as the song itself (i.e., record master use and underlying song), the ultimate wisdom being either to get the license in advance of issuing the recording, or to recognize the substantial risk of being not only a civil infringer, but a criminal one as well. The authors suggest paying minimal license fees at a flat rate. In this suggestion, and throughout the book, the authors recognize the wisdom of poet Robert Frost who wrote, "Good fences make good neighbors." The music industry's good neighbors respect the good fences of decent fees and terms and honor the value of a song by acknowledging the debt owed by their new presentation. Furthermore, it is unfortunate that in most sampling cases, the intended user must be aware that an unfriendly electrified or barbed wire fence may also be insisted upon by those who have no desire to be neighborly. Other examples of license rates cover television and radio commercial jingles, corporate videogram uses, standard mechanical licenses to record companies, and various print music rights.

Included among the twenty topics covered in detail are rewarding chapters covering dramatic and "grand rights." The authors bravely attempt, and perhaps provide, an explanation of why the performing right societies of BMI and ASCAP have blanket licenses to hotels and some rare theaters for musical revues, even though both groups consider theatrical and other dramatic presentations to not only be outside their general licenses, but indeed, beyond their allotted functions under their consent decrees and membership contracts. These societies license music used on stage for revue purposes, but not for the two categories that qualify as dramatic works: those that are within "grand rights"—works originating in a dramatic musical work, opera, or ballet when not presented in merely concert form—and those that may have

originated as popular music but which are presented in dramatic fashion together with scenery, props, and all that is embodied in the phrase, attributed to Oscar Hammerstein, of "carrying the action forward."

The high cost of this book, \$95, may prohibit its purchase by not only the professionals it was intended for, but also by the class of people who simply find the cost excessive. However, one observer³ said the price of a college biology textbook is justified by the number of times it can be reused. The binding is intended to be cracked over a hundred times a year and therefore, the price per use is less than that of a juke box. Indeed, the authors believe that the life of the volume will extend beyond the year 2000, that they not only present suggested lists of current public domain songs for possible non-license use, but include a list of songs that will not even be in the public domain until the year 2000.

In addition to being an invaluable aid to its music publisher readers, this book will make the task of licensing comprehensible and rewarding to both the licensor and licensee. Hopefully, the ultimate achievement of books of this type will be to further the very purpose of copyright, as stated in the United States Constitution: "To promote the Progress of Science and useful Arts[.]"³ Too often, an ignorance of licensing procedures and fair market prices thwarts an opportunity to make constructive use of an appropriate piece of music. This forces secondary and inferior choices of music which ultimately affect the general audience. Culture, in its many forms, will be enhanced by an informed marketplace for the licensing of music.

³ U.S. CONST. art. I, § 8, cl. 8.