



SPLC Guide to Music Licensing for Broadcasting and Webcasting

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All of us are accustomed to listening to radio broadcasts free of charge — but for those doing the broadcasting, the music recordings they play come at a price. Students who work at a campus radio or television station, or who stream their shows over the Internet, need to be aware of the licensing schemes available and the steps they must take before they can play a song over the air or online. This guide describes the basics of music licensing for radio, television and Internet broadcasting. In this article, you will learn about the types of music licenses available, what these licenses cover and what the penalties are for failing to obtain the necessary licenses. The last section of the Guide describes when it is — and isn't — possible to make a "fair use" of music without paying a fee or obtaining the rights-holder's consent.

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Broadcasting Licenses

To begin with, the federal Copyright Act gives holders of copyrights in music the right to publicly perform their works and to control how others perform them.^[1] The Act defines a "public performance" as a performance that occurs in any place open to the public or that is transmitted or otherwise made available to many people. Thus, whenever a song is broadcast over the radio or on television it is being publicly performed and the station needs permission, typically in the form of a license, from the copyright owner (or a party who has negotiated with the copyright owner).

There are two types of rights involved in public performance of a musical work: the right to the musical work itself (the notes and lyrics that make up the underlying composition of the musical piece) and the right to the sound recording.^[2] If your radio or television station is only playing music over the air— not over the Internet—the only right you need to be concerned with is the right to the musical work.^[3] If your station plans on playing music on the Internet, you will also need to obtain a sound recording license through a group called SoundExchange, as discussed more fully below.

Although a station could try to negotiate with the copyright owner of each song, that would quickly become impractical. To facilitate negotiation, three organizations have developed relationships with thousands of copyright owners and can grant blanket licenses to use all the music in their catalogs. These companies are ASCAP, BMI and SESAC (collectively called "Performance Rights Organizations" or "PROs").^[4] Each company charges a fee for its licenses and the money collected is paid to the composers of the musical works used. With the exception of SESAC, the fees are negotiated and set by the Copyright Royalty Board. SESAC is a for-profit company and can negotiate individually for the rates it charges.

PRO Blanket Licenses and their Coverage

Nearly every performing artist is a member of either ASCAP, BMI or SESAC; however, each artist is only a member of one PRO. This means that if you are planning on using songs from many different artists in a broadcast, it is best to get licenses from all three of the PROs.^[5] Each organization's version of a blanket license is slightly different and is

described more fully below.

[ASCAP\[6\]](#)

ASCAP's blanket radio license for noncommercial, educational radio stations allows stations to play any or all of the music in ASCAP's repertoire over the air. Schools pay a rate based on the number of full-time students attending the institution. Although ASCAP does not post licenses on its Web site, schools can receive a copy of a license by filling out a form on the Web site. ASCAP also provides a separate television license. Two types of licenses are available to local stations: a Blanket License and a Per Program License. Both licenses provide full access to ASCAP's materials, but the Per Program License, which will generally be less expensive for most school programs, requires stations to report the amount of music content used. The fee paid is negotiated between ASCAP and the Television Music License Committee and is adjusted based on the Consumer Price Index and information about licensed stations throughout the country. Stations can switch from one license type to another twice in a calendar year.

ASCAP's radio and television licenses do not cover music performances via the Internet. Instead, ASCAP offers three different license types for "new media" performances. A license for non-interactive services, which is the one most likely to apply to a school station covers webcasts, streaming background music and previews or "samples" (excerpts lasting 60 seconds or less) of music. ASCAP has an online rate calculator that your station can use to calculate a license fee based on a rate schedule.[\[7\]](#)

[BMI\[8\]](#)

Like ASCAP, BMI has a blanket license for educational stations. Colleges and universities typically choose a licensing option through the company's Music Performance Agreement, and the license may be downloaded from BMI's Web site. BMI does not have a downloadable license for high schools available on its Web site, so high schools should contact a BMI representative to apply for a license.[\[9\]](#)

The Music Performance Agreement for colleges and universities includes licenses for live or recorded performances performed via the college's or university's Internet or Intranet sites, webcasts of campus radio station broadcasts, regular campus radio broadcasts, school-promoted musical attractions, music-on-hold and a variety of other types of performances. It offers two different licensing options. The "one-tier" option allows a school to make a single annual payment[\[10\]](#) and, in return, to receive a license to perform all music in BMI's library. Smaller schools may find BMI's "two-tier" option to be more attractive. This option consists of a two-part license fee: a smaller annual payment and a separate fee for any musical event on college premises promoted only by the college that costs \$1500 or more.

Both the one-tier and two-tier options require stations to provide BMI with performance lists (usually requested twice a year), as well as information about whether or not performances were transmitted over the Internet. BMI also asks stations to submit a form once a year to allow the company to identify college or university-affiliated Web sites that are using music.

If your school has a television station, it can add a cable television license to the radio license and BMI will charge an additional fee adjusted by the Consumer Price Index. BMI may also request that the station complete reporting forms or provide channel line-up lists.

BMI's music license does cover webcasts and other transmissions of campus radio station broadcasts on school Internet or Intranet sites. Nevertheless, the rights to the sound recordings still need to be obtained from SoundExchange (for more about SoundExchange, see below).

[SESAC\[11\]](#)

Like ASCAP and BMI, SESAC also offers a blanket broadcast license agreement, authorizing performance of all of the songs in SESAC's repertoire. SESAC is a private, for-profit company, meaning that its rates are not public and can be negotiated. Its license fees are calculated based on the size of the audience for which its music is being performed. Notably, SESAC offers an "All-Talk" amendment to stations that primarily feature news/talk and sports/talk programs. If your television or radio station is primarily talk-based and uses music only occasionally, this amendment, under which SESAC will reduce the fees required for you to use their music in your programming, may be useful.

SESAC also requires annual reporting from stations, which includes providing information about possible changes in the market audience. The Copyright Office regulates SESAC's non-commercial radio station fees. For stations that would like to stream over the Internet, an additional license—the SESAC Internet Performance License—is required.

SESAC's Internet Performance License authorizes the public performance of SESAC-affiliated music on Web sites that stream music or contain music videos, song previews or clips. License fees are calculated using either the station's Aggregate Tuning Hours (most applicable for school stations) or a formula based on a station's revenue times a multiplier.[\[12\]](#)

Sound Recording Licenses for Webcasting

If your station plans on playing music on the Internet, it will need to obtain the appropriate license from the PROs, as described above. Additionally, webcasters need to obtain a "sound recording license" from a group called SoundExchange.[\[13\]](#) While Congress has allowed traditional radio broadcasts that perform copyrighted sound recordings to be aired without having to obtain a separate sound recording license, two relatively recent pieces of legislation—the Digital Performance Right in Sound Recordings Act[\[14\]](#) and the Digital Millennium Copyright Act[\[15\]](#)—created separate performance rights in sound recordings for digital and satellite transmissions, including Internet transmissions.

This digital public performance right in sound recordings means that if your station is simulcasting a signal over the Internet or via satellite, it must pay performance royalties. SoundExchange is the only U.S. organization that collects and distributes these royalties and the U.S. Copyright Office has specifically designated it to collect and distribute royalties relating to webcasting. The royalties that SoundExchange collects are split, with 50 percent going to the copyright holder in the recording (usually the record company) and 50 percent going to the performers.

Since webcasting is relatively new, stations that want to webcast often forget to obtain a sound recording license from SoundExchange. Recently, however, SoundExchange has made an effort to reverse this trend by sending letters to broadcasters who were streaming without a license.[\[16\]](#) Additionally, the Federal Communications Commission ("FCC") has the power to fine stations that do not have the proper licenses. Thus, it is important to obtain a license from SoundExchange if your station plans to play music over the Internet.

SoundExchange has entered into a Webcasters Settlement Act, a series of settlement agreements that cover noncommercial educational webcasters such as schools. These agreements are negotiated annually so it is important that, in addition to getting the coverage in the first place, your school obtains a timely renewal of its license by filing a Notice of Election with SoundExchange. Although SoundExchange usually imposes a reporting requirement as a condition of the license, this requirement may be waived for educational stations that have fewer than 55,000 monthly Aggregate Tuning Hours.

Penalties for Broadcasting or Webcasting without a License

Acquiring all of the necessary licenses to broadcast or webcast can seem like a pain, but the consequences for being caught publicly performing music without a license are harsh. For instance, a station that publicly performs any copyrighted song without the proper licenses can be held liable for damages up to \$30,000 — or in extreme cases up to \$150,000 — for *each song* played without authorization.[\[17\]](#)

The FCC has made it clear in past decisions that it does not have a reduced fine scale when it comes to noncommercial broadcasters.[\[18\]](#) This means that even though your station may not be making a profit, it can be fined as much as commercial stations. For example, in 2009 the FCC fined a noncommercial radio station \$7,200 for failure to have its program lists available for public inspection. Around the same time, the FCC fined a college radio station \$7,000 for failure to file its annual license renewal application on time.[\[19\]](#) The FCC turned a deaf ear to stations that complained that they did not have the resources to pay the fines. In fact, the only way to get a fine reduced based on a showing of financial hardship is to provide the FCC with a financial statement showing that the institution as a whole (your school or college) cannot pay the fine. A statement of the radio or television station's budget is not sufficient. Furthermore, ignorance of the law is no excuse: it is *always* the music user's responsibility to make sure that he/she has obtained all proper copyright clearances for all works to be used *before* broadcasting.

Portions and Fair Use

So far, this guide has covered the licenses stations need to play music as well as the consequences for not complying with the rules. But what if your station doesn't use music very often in its broadcasts? What if, instead, you would like to use only a few seconds of a song every now and then, perhaps as an intro to a television or radio show, as a segue between two shows or as part of a show that reviews new music^[20] If you are only using a small portion of music, how much—if any—can you use without getting a license? In other words, how much is "fair use?"

Fair use is an exception to the general rule that copyrighted material cannot be used without consent and is an important principle for student broadcasters to understand. It allows limited portions of copyrighted material to be used for certain purposes—mainly teaching, research, criticism, news reporting or parody—without the user having to obtain prior authorization from the copyright owner. Traditionally, courts have used the following four factors to determine whether a use constitutes fair use: (1) The purpose and character of the use; (2) The nature of the copyrighted work; (3) How much of the original work is used; and (4) The effect of the use on the commercial value of the copyrighted work.^[21]

Unfortunately, these factors are far from clear-cut and there is no magic formula for determining whether fair use applies in a given situation. Fair use most commonly applies in situations where only a portion of a work is being used, where someone is commenting on the work in some manner and where the use is not of a type for which someone would generally obtain a license. In the music field, there is a well-established licensing scheme, meaning that courts may be less likely to find fair use when it is relatively easy—and practical—for the user to obtain a license.

Students and advisers frequently ask, for example, about a "30 second rule" or a "10 second rule" for fair use. These mythical rules supposedly allow use of music or video clips no longer than the specified time (30 seconds, 10 seconds or some other fixed limit) without the need to obtain a license. Unfortunately, there exist no such rules in copyright law. Although courts do consider the amount of the work used, this is only one of four factors courts consider in evaluating fair use. This means that even if the clip used amounts to only a few seconds, a court could still find that the other factors weigh against a finding of fair use. Additionally, the Supreme Court has stated that even if a use is minimal, it could still constitute infringement if it takes the "heart" of the work.^[22] This means that a clip of even a few seconds could be infringing if a court finds that the clip has captured the "heart" of the song.

If you want to use music in your broadcast without obtaining a license, don't rely on a "30 second" or "10 second" rule. While there are no hard-and-fast rules for fair use, there are some guidelines you can follow. For example, use of a small portion of music for the purpose of reviewing or commenting on that music or the artist is most likely going to be a fair use, especially if you haven't used the "heart" of the work—for example, the most well-known parts of a song. And while there really is no magic number for the length of your clip, using the shortest clip possible can reduce the chance that a court will find the use to be infringing. Finally, you can always contact the Student Press Law Center to discuss your situation if you are not sure whether your use will be considered a fair use.

Frequently Asked Questions about Licensing and Fair Use

What licenses are required for student broadcasters?

As described in more detail above, student broadcasters need to obtain licenses to use musical works from each of the three PROs—ASCAP, BMI, and SESAC. Student broadcasters who play music on the Internet also need a sound recording license from SoundExchange.

Our station is purely educational and nonprofit; do we still need a license?

Yes. In rare cases, there may be an exception for work that constitutes a "class project;" however, in order for the exception to apply, the work cannot be used or shown outside of a classroom setting. This exception therefore would not apply to campus radio and television stations that broadcast to the public or even to the general student body. Many of the licensing bodies have special licenses that apply to educational and/or non-profit stations. These are described in more detail above.

How much does a license cost?

The cost of a license usually depends on several variables, including the number of full-time students attending the school, the type of broadcasting used (for example, webcasting, background music, television, etc.) and the size of the

audience reached by the broadcast.

To take BMI as an example, your station must first multiply the number of full-time students attending the school by BMI's current base student fee, which at the time of this writing in November 2010, was \$0.324. If this number exceeds \$257.43, it constitutes the base fee; otherwise, BMI's minimum total base student fee of \$257.43 will apply. Now that you have the base fee, you must add fees for radio and television broadcasts. BMI's campus radio station fee is \$297.00 for FCC licensed stations and \$225.00 for Part 15 (unlicensed) radio stations. Additionally, BMI's cable television system fee is calculated by multiplying the number of full-time students by the Cable System Fee of \$0.0602. This means that a school of 1,000 full-time students with an FCC-licensed radio station and cable television station would pay \$681.20 for a BMI license (\$324 (base student fee) plus \$297 (radio fee) plus \$60.20 (television fee)).

Are there alternatives to paying for a license?

You may be able to use production music (also called "library music" or "stock music") for some purposes. Production music is recorded music that is produced and owned by production music companies and licensed to customers specifically for use in film, television, radio and other media. Unlike other types of music, production music can be licensed without seeking the composer's permission.

Additionally, some smaller production libraries do not charge their customers for licensing the music at all. Instead, customers can purchase a CD of music or sound effects whose content is licensed in perpetuity for them to use as often as they would like.

In appropriate circumstances, a student broadcaster's use of music can also be considered fair use. Fair use is described in more detail above, but it usually applies in situations where only a portion of the work is used, where the work is used for commentary or criticism and where the use is not of a type where someone would generally obtain a license. It is also important to remember that fair use is not a substitute for obtaining proper licensure and that fair use is the exception, not the rule, in copyright law.

I've heard that if I use less than 30 seconds of a copyrighted song in my broadcast, it's legal. Is this true?

No. Despite popular belief, there is no simple 30-second (or 10-second or five second, etc.) exception that allows for the use of copyrighted works without permission outside of the purely classroom setting.

Can I use a popular song solely as background music in a produced piece without obtaining a license?

No. This probably will not be considered fair use because the purpose of the use here would not be to aid in commentary or criticism of the song. Additionally, the nature of the work is artistic, which weighs against a fair use finding. The amount of the song taken would depend on how long you needed the background music, but in cases where you intend to use all or most of the song or the most famous part of a song, this factor would weigh against fair use. Finally, using the song as background music would arguably hurt the market for the work because there is a well-established market of PROs (discussed above) that sells the rights to play the song on air.

Can I use a popular song as intro/outro music or as a segue between segments?

Not without paying for it. You would not be using the piece to aid in commentary or criticism and you would not be transforming the work. The song is artistic, which weighs against fair use. The amount of the song taken may be small, but there is no automatic safe harbor for playing a short clip. And, most importantly, a well-established market of PROs exists to sell the rights to do exactly what you want to do here.

¹ David D. Oxenford and Robert J. Driscoll, "The Basics of Music Licensing in Digital Media," Davis Wright Tremaine LLP (March 10, 2010). The text of the Copyright Act can be found in 17 U.S.C. Sec. 101 et seq.

² "Copyrights Basics for Radio Stations & Webcasters," College Broadcasters, Inc., available at http://www.askcbi.org/?page_id=129 (last visited Sept. 27, 2010).

³ Historically, noncommercial radio stations licensed by the FCC have not needed to pay for sound recording rights; however, a new bill pending in Congress has proposed to require payment for these rights. More information on the bill, called the "Performance Rights Act," can be found here: <http://www.govtrack.us/congress/bill.xpd?bill=h111-848>.

⁴ David Oxenford, "Copyright Office Issues Letter in Support of Broadcast Performance Royalty - Suggests that Economic Comeback for Radio Makes

Royalty More Affordable," Broadcast Law Blog (June 8, 2010).

5 As a condition of granting a license, the PROs may impose additional regulations, such as limits on the number of songs by the same artist that can be played back-to-back or within a set time period.

6 Information in this section was taken from the Web site of The American Society of Composers, Authors and Publishers, available at <http://www.ascap.com> (last visited Oct. 28, 2010).

7 The "ASCAP RateCalc" is available by following this link: <https://www.ascap.com/weblicense/license.html>.

8 Information in this section was taken from the Web site of Broadcast Music, Inc., available at <http://www.bmi.com> (last visited Oct. 28, 2010).

9 Schools may contact BMI by phone at (888) 689-5264 or by email at glentgroup@bmi.com.

10 This payment is calculated by multiplying a set "Per Student" fee times the number of students enrolled full-time in the fall academic term.

11 Information in this section was taken from "Frequently Asked Questions," SESAC Licensing, available at <http://www.sesac.com/Licensing/FAQs.aspx> (last visited Sept. 27, 2010).

12 The Copyright Royalty Board defines Aggregate Tuning Hours as the total hours of programming that a station has transmitted during a specified period (usually a month) to all listeners within the United States from all channels and stations. SoundExchange's Web site provides the following example: If a station transmitted one hour of programming to 10 simultaneous listeners, the station's Aggregate Tuning Hours would be 10. Likewise, the station's Aggregate Tuning Hours would be 10 if one listener listened to a service for 10 hours.

13 For more information, please visit SoundExchange's Web site at www.soundexchange.com.

14 Pub. L. No. 104-39, 109 Stat. 336 (1995).

15 Pub. L. No. 105-304, 112 Stat. 2860 (1998).

16 See David Oxenford, "SoundExchange Sending Reminders to Broadcasters who are not Paying Royalties for Streaming Music Sound Recordings," Broadcast Law Blog (Mar. 23, 2010).

17 "Frequently Asked Questions: General Licensing," SESAC Licensing, available at <http://www.sesac.com/Licensing/FAQsGeneral.aspx> (last visited Dec. 10, 2010). Specifically, the Copyright Act provides that before final judgment, the copyright owner can elect to recover statutory damages ranging from \$750 to \$30,000, as the court considers just. If, however, the copyright owner can prove that there was willful infringement, the penalty can be increased up to \$150,000 per song played. On the other hand, if a court finds that the infringement was not done in bad faith, it has discretion to reduce the damages to a minimum of \$200 per song played. See 17 U.S.C. Sec. 504(c)(1)-(2).

18 For more information on FCC fines, see David Oxenford, "FCC Gives No Special Consideration to Noncommercial Broadcasters who Violate the Rules - Colleges Pay Attention to your Radio Station!" Broadcast Law Blog (Apr. 30, 2009).

19 *Board of Trustees, Davis & Elkins College*, Forfeiture Order DA 09-988 (F.C.C. 29 Apr. 2009).

20 One helpful case that looks at fair use in educational programming is *Higgins v. Detroit Educ. Television Found.*, 4 F.Supp. 2d 701 (E.D. Mich. 1998). There, a copyright owner sued an educational station for using 45 seconds of his song at the beginning and end of a show educating teens about street violence. The court found that the song's use in the show was educational and transformative and held that the use of the song was fair use. See also *Keep Thomson Governor Committee v. Citizens for Gallen Committee*, 457 F.Supp. 957 (D.N.H. 1978) (holding that defendants' use of plaintiff's commercial and music in their political ad was fair use).

21 For an example of how a court would analyze these factors, look at the Supreme Court's decision in *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

22 *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 565 (1985).

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