Licensing: *the sequel*
Part 1 of 2

Suffolk University Law School
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COPYRIGHT CLEARANCE CENTER

present
The Intellectual Property Lecture Series
Licensing: *the sequel*

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KENNEALLY: I'm going to start with Patti Jones. Patti, welcome.

JONES: Thank you. Thank you. First, I'm really honored to be there. I always feel as though it's a blessing to be able to share what I've had to learn over the last 15 years of doing this work and representing artists.

KENNEALLY: Great. Well, we'll tell people about your –

JONES: And trying to tell the truth, the whole truth.

KENNEALLY: We will tell people. We have to swear everybody in, by the way, for this panel. Someone had brought a Bible, I hope, right?

I'll tell people a bit about your background, Patti. She represents – she's an attorney specializing in entertainment and intellectual property matters and represents a diverse roster of creative talent including songwriters, musical groups, producers and so forth. Her own critical biography on jazz blues artist Mose Allison, *One Man's Blues*, was published by Quartet Books. And she is an adjunct faculty member at New England Law School and co-chair of the New England Copyright Society of the USA.

And Patti, what I thought I would do – and we're going to continue this throughout the questioning with everybody else – is to go to the invitation for this program, which posed this question. It said, licensing has been the answer to so many copyright questions for so long, and yet it's 2010. Has anything happened to challenge that? Has the current environment only made licensing more important? And your response.

JONES: I just wanted to share some real statistics with you about the music industry, because that's really the – although I now represent filmmakers and authors, I come from music. I have a master's degree in music and I've really taken care of musicians basically for most

of my career. So I do want to talk about the dire situation in the music industry and then talk maybe about some hope.

As of April 2010, according to the International Federation of the Phonograph Industry, the global recording industry –

KENNEALLY: I think that's the problem right there. They're talking about the phonograph industry.

JONES: Right. Well, the problem here is that the recording music industries fell 53.8 percent from the year 2000. So we're now at 17 billion instead of 36.9 billion for recorded music. And the United States and Japan account for the big losses. The digital sales have not offset the physical sales, so where else do we go? If you can't sell records, where do you go?

The kids are going to touring. That's the next step. Touring does have some positive uptick, but this year, Live Nation reports that their income dropped this summer 26 percent. And Edison Research just reported that our demographic for selling records, which is ages 12 through 24, are now attending 57 percent less concerts than the year 2000. So we're on the decline, so where does licensing take over?

Licensing is still a viable area for recorded music and for publishers, so the licensing format would be in film, television, advertising, video games, and the newest platform is now going to be in branding goods and services with music, as you probably know. That's the only place for us left to go. So for us really, it's about sustainability and for developing new markets for the musicians.

KENNEALLY: So for the musicians then, this is the third leg of the stool. There's still a recording business for some point, and there's a concert business, again. But licensing now is critical to that and is supporting those others.

JONES: Licensing is now the format that breaks new acts as well. So if you had – and Lenora and I were just speaking earlier about an ad that ran on Volkswagen for a band called Kings of Leon, and Kings of Leon had been signed to a major label and put out many records until that one commercial and then everybody else knew about Kings of Leon. They came out of the indie closet and now they're a platform. Now they're an arena band. They're one of our biggest acts.

So for new artists, licensing is critical. In fact, you cannot just have a license for your song ex-U.S., outside the United States. You have to have U.S. licensing in order to get a major label to pay attention to you. The list includes the licensing at film, television or advertising for a new artist.

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KENNEALLY: So that's interesting. So the A&R people these days aren't just coming to hear whether they hear a single. They're coming to see whether they hear something that can be licensed.

JONES: They're already asking for the license to have taken place.

KENNEALLY: Ah. Right.

JONES: So how do the artists do it? They have to spend a lot of money that they may not have on marketing. They have to seek alternative means via the Internet and it just becomes a very – a higher barrier.

The interesting thing is that the licensing in the music industry used to be an afterthought of making money. Now, it is a critical element of making money, and especially with no records being sold and given the music's now essentially free.

KENNEALLY: Let's drill into that just a bit deeper. So as you represent artists of all types, what's the offer that you try to make when it comes to doing a licensing deal? How important is the band beyond its music, if you know what I'm asking?

JONES: Well, it's very tricky because most of the time for independent films, the independent filmmaker doesn't have a music budget to license the music at a reasonable rate, so you have to do a different kind of deal for them. It could be very tricky. You get a request for a bid and if you bid too high, you could kill the deal. If you bid too low, then you haven't done any justice to your client's bottom line.

So you have to do a lot of questioning who's in the film, what the budget is. And sometimes the film – the music supervisors are not giving you the entire picture. You have to develop personal relationships with a lot of these people in order to get to the truth, unfortunately.

KENNEALLY: Is that a difficult process?

JONES: Getting the truth?

KENNEALLY: Well, getting to the deal.

JONES: Yes. I think if they want the music enough, they will be up front. But I have – I tell the story about how I had a licensing opportunity for a client in an Anderson – the CNN guy. I'm sorry. Anderson Cooper. I had an opportunity for his music in a documentary and I thought CNN, this will be a television network that can pay a good fee for this use. And I put my number out there and when I heard back, it was too high and they had moved on. When I went back to my client and said I'm sorry, I put the number out that I thought that CNN could pay for it but it was too high and they've moved on, and I nearly lost my client because he wanted to be in that documentary. It was a documentary on Katrina and it was

very important, so he would have taken the license at whatever they were offering. So it can be tricky.

KENNEALLY: Yes. There's two things that I want to pursue. One is, can you tell us at all about the trend in the deals? Are we seeing prices flat, going down? What's the direction things are moving?

JONES: Well, I think Lenora can address that in the advertising sense, because we do have a saturated market now with respect to licensing. It's different than it used to be in terms of the average in fees. But I think across the board for film and – for film, at least for film and television, it's remained the same. I think it's in advertising that the numbers have shifted downward. But in film and television, you're going to get generally a standard rate.

KENNEALLY: OK. Now, you've been at this for a while and we spoke in the invitation about the bridge between the analog world and the digital world, and we'll talk about that notion with all the other panelists. And some have pointed out that in some ways, that's a one-way bridge. You kind of go across it and it burns behind you as you go. And others have said that it's a two-way and that the analog world remains. What's your view on that?

JONES: Well, as far as music is concerned, the traditional models are still very critical to our industry. The statistics on terrestrial radio you would think with all the options – according to Edison Research, 12- to 24-year-olds, 88 percent still discover new music through terrestrial radio. So radio is still important and that topped YouTube and all the social networks.

So the traditional models are not going anywhere. The CD sales are, but the traditional ways of discovering new music are still viable. I don't know if that answers. Radio is –

KENNEALLY: It does. So in other words, we don't want to leave behind that analog world quite so fast.

JONES: No, because although everything is going online and we do have to look to that for our clients with respect to wireless delivery and all digital delivery and formats, including the marketing. The marketing is just so critical now in terms of branding artists with products and services, but the viable markets are still in traditional – some of the traditional formats.

And especially around the world. The United States only accounts for one-fourth of recorded music sales and we need to be thinking – for our artists, we need to be thinking outside the United States in terms of revenue. And those markets are still viable to us, and if you go to Europe you might – or anywhere, in Australia or anywhere around the world, Japan – you might discover American artists that are far better-known there than they are here.

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KENNEALLY: And because the Internet allows for a two-way street – in other words, you can go out and find deals and the deals can come to you because someone might have found a song on YouTube – and we'll hear more about that with Lenora. Can you give us an idea of the share of that? Which is more common? Are you going out and searching out these deals or are the deals coming to you because they've identified a band that they really want to have?

JONES: The record business is not really – the recording industry is really not signing a whole lot of new acts, so when I have a client come to me, it's a development – it's a lot more development than I used to do than when I first started the job. My office is pretty well-known in the music business for finding talent and then getting it signed from Boston and from other places, but mainly from here. And that job used to include an agency and then I got to be the lawyer, because I'm not in New York or LA and the deals come to me.

But now, there's another layer. The layer is getting the artist's metrics to the point where I can even get the record guy in the room and then to the deal. So there's a whole level of work that has to be done in order to get to the place where the artist still – believe me, they still want to be signed to the record companies because they know that those distribution networks are global and that they still have the financial means to support them.

Remember that the artists don't have a lot of money. When some of them come to me, some of them are coming with investment money from friends and family and I have to go out and find marketing people. So in essence, my office works as quasi manager without really managing, just giving them the tools to be able to get to the next place so that we can get to the final destination.

It's really – it's one of the reasons why I like to say that the quality of the music is affected by what's happened in the digital world and I'd like to see a prequel. I'd like to see us go back to the headliner acts to get the music back to where it was, to give us quality in our choices. And unfortunately, without the people in positions at the record companies and at the publishers, we are going to suffer because they're the experts at refining and defining that quality music. They brought us the Rolling Stones. They brought us Led Zeppelin. They brought us the heritage acts. And currently, the big dispute in the music business is, where are our next heritage acts? We just have – what do we have? We have Justin Bieber. We have Miley Cyrus –

KENNEALLY: Give the boy some time. I think he's 16 years old.

JONES: They generally don't translate to the next place.

KENNEALLY: What would he be? A 17-year-old heritage act at some point?

JONES: Maybe. If he's lucky, right?

KENNEALLY: Well, thank you very much, Patti Jones.

And as Patti alluded to, we're going to move to Lenora Cushing, who is director of broadcast business affairs at Hill Holliday and has been in the advertising business for 25 years. She has extensive experience with licensing music and advertising from original music, parody lyrics and works of groups she's discovered on YouTube. Her roster of clients include major corporations such as McDonald's, Talbots, Royal Caribbean and Century 21. Lenora, welcome.

CUSHING: Thank you.

KENNEALLY: Let's stick with the basics, then, and get your perspective on the importance of licensing today and how it has changed over the last few years.

CUSHING: Well, I think as advertising has changed as we've gone from – reality TV has changed everything. It has changed what the advertising looks like, it's changed what the advertising sounds like. So when you go back even 10 years ago and advertisers were spending lots of money on the production end of things as well as the music that went along with it.

I'm presently at Hill Holliday. I had been at Arnold. I was at Arnold through the whole Volkswagen era, and Volkswagen did so much for music licensing. I think if you look at back in the '80s and the '90s, the late '80s and the '90s, you started seeing more and more advertisers were licensing major pieces of music. And it became – it was almost every ad you looked at, it didn't matter who the advertiser was, there was a licensed piece of music.

KENNEALLY: And Lenora, if I can push on this a bit. So when you say major, they were signing up these heritage acts that Patti was just referring to.

CUSHING: Yes, right. Well, and one of the very famous ones was the ta-da-da-da with Volkswagen and that was a totally unheard of band, a piece of music that was never heard of and suddenly it became a major selling piece. So that's what – everybody started looking at that ad and everybody then wanted their music to do what that one did. And so you started seeing some major acts who wanted to be part of advertising and then also some of the indie bands that were coming around at that point.

KENNEALLY: So but there has been a shift though, because there's not only the sea change in the industry that Patti was talking about where the recording business begins to decline and the importance of licensing rises in kind of a corresponding way. At the same time, there's been a shift in attitude among the artists about the whole notion of licensing their work.

CUSHING: Right. And back again, going back even 10 years, you had Bruce Springsteen, who would stand up at awards shows and say, don't sell out. So you had this whole group of bands and musicians who absolutely did not want their music used in advertising.

Then you had other ones who realized their music – they could make a lot of money if their piece was picked up. You had to pay a lot for the publishing if they happened to be the writer and also on the band side. They were making money from the publishing side as well as the master recording and you had people who – it was a great way to enhance their career.

So you had the ones who absolutely wouldn't sell out and the other ones who saw advertisers were spending hundreds of thousands of dollars – even into millions – for that piece of music for a 30-second ad. That's not true today.

KENNEALLY: Right. But the change in attitude has gone from sort of wrestling with this notion of selling out or not to recognizing this is an opportunity to be heard.

CUSHING: To be heard and to make money.

KENNEALLY: And to make money.

CUSHING: I think a lot of times it was – because you look at some of the songs that were used in advertising and it really – a lot of times there was a disconnect. If it came to car advertising, well, anything works because you're going to have your radio on in your car. So it makes sense that you're going to listen to whatever. But if you're listening to – if you're watching a – there was a Burger King ad that had "Reunited" with ketchup running down going onto a burger. Well, that's not really what that song was about, but hey, it was a good way for them to make a little extra money, so you know. So I think it all depended on where they were in their career.

KENNEALLY: Well, you talked about disconnect between the music and the advertising itself. Let's talk about an example you worked on, one that is a major disconnect, right? And that is Iggy Pop and –

CUSHING: Well, when we first got it, it was a disconnect, but it soon became a connect.

KENNEALLY: Good point. But let's remind people who Iggy Pop was. Or is. He's still around.

CUSHING: He still is.

KENNEALLY: God love him. Iggy Pop, the founder of a band called The Stooges, which was kind of the pre-punk band of the early 1970s. And I was looking into it before the program and I read on Wikipedia, so take it as it comes –

M: So it must be true.

KENNEALLY: That is – but nobody's correct it yet. That Iggy Pop, when he was going to name the band The Stooges, called Moe Howard, as in Moe, Larry, and Curly, and said,

did he mind – Moe – that they were going to call the band The Stooges? And apparently Moe's response before he hung up the phone was, just as long as you don't call them The Three Stooges, you can call them anything you want.

So you have Iggy Pop, The Stooges, punk band with a song called "Lust for Life." That ends up getting associated with Royal Caribbean Cruise Lines. Tell us the story.

CUSHING: Well, we had pitched the business and when we did our new business pitch, everything with the tagline was Lust for Life and they had the driving beat of the song and it all went along with the new business pitch and then it was, now let's get that piece of music.

Which was fine. I went after the publishing and the master recording, and David Bowie is also connected with it so you had to go through Iggy and David Bowie's people. And then the PR company for Royal Caribbean had found on – probably not online back then, but it wasn't that many years ago, so it was. It had just been used in the movie *Trainspotting* and it was used for heroin trips. And he – apparently, just before we licensed it, Iggy Pop had made the comment that "Lust for Life" was the theme song for heroin addicts.

So now we have just paid a lot of money for a piece of music that a whole campaign is resting on and you've got really bad PR. And it is, what do you do?

We actually got Iggy Pop to talk to a lot of people at Royal Caribbean and said he was misquoted, which I'm sure he wasn't, but –

(laughter)

KENNEALLY: But he made it sound believable.

CUSHING: He was able to say that wasn't exactly what he had meant. Well, and Royal Caribbean took a leap and they went out with that piece of music and the rest is history. You hear that song and you don't think of anything but Royal Caribbean. It was used in the *Rugrats* movie. They have a little boat in the water and they've got "Lust for Life" playing in the background. And it is now – yes, there will always be those who know what it's really saying and those who know what it's all about, but it really, totally changed and the average person, if they hear "Lust for Life," will automatically think Royal Caribbean. So it was a lot of money well-spent.

KENNEALLY: Right. We've been talking mostly about music and part of the songs, of course, are the lyrics. Where does that come into play in terms of what you're looking to license or how you may want to work with lyrics to rewrite your own?

CUSHING: I have been involved with parody lyrics. We had used Donna Summer, "She Works Hard for the Money," and we went back to her –

KENNEALLY: And the client was?

CUSHING: - and we used it for McDonald's where it was, you get more for your money. And we went to her with parody lyrics and she agreed to let us do that and then also came in and recorded it for us so you still had the same thing together.

But I have learned over – especially from "Lust for Life" – that if we are going to present a piece of music to our client, we better print out the words too, so when they're looking at it and hear the music up against the picture, they also know exactly what that song said.

So there are time when the word – a lot of times, you don't necessarily use the lyrics in the advertising. Sometimes you do, but you take a very – it's 30 seconds so that's not a whole lot of the music.

KENNEALLY: Right. And finally, Lenora, there's this relationship we were talking about with Patti between the creators of the music and those who wish to reuse it in some fashion. And you are looking for potential licensed works. Give us an example of one you've found that worked well for the company.

CUSHING: The most recent one was on YouTube, the song "Lucky" by a band called Lucky Twice, and it's a girl band from Sweden. And we just had some of the young kids – I'm dating myself – but some of the younger employees at the agency are just – that was checking out different YouTube songs or whatever and they found this piece that has a great driving beat and we licensed it for a Hanes ad.

It's funny because it was only – it was a test market and it was only in six cities in the U.S. and this piece had never been played in the U.S. except – it had never been played on the radio or hadn't ever made it over here, so we were able to license it for a very good price. But the hope is that it is going to be popular in the U.S.

Now, they will be going out in January, I believe, with it national, so it's gone from the six-city test market and then it will be, and hopefully for the band, they'll be able to get a little airplay in the U.S.

KENNEALLY: All right. I went and looked it up and it's interesting. That single was released in Spain in 2006, so the song's been around for a while, but it might get a second life, if you will, through this license.

CUSHING: And it hasn't had one, really, over here.

KENNEALLY: Right. And it's been a hit all over Europe and elsewhere. It is extremely catchy. It's the kind of song that only Swedish pop bands can really do. It's kind of ABBA, it think –

CUSHING: It totally is.

KENNEALLY: All right, well, Lenora Cushing, thank you.

END OF PRESENTATION