

## MUSIC MONEY AND SUCCESS (Seventh Edition)

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### Negotiating with an Advertising Agency for a Hit Song

"This will confirm our agreement pursuant to which (Publisher) grants to (Advertiser) the right, license, privilege, and authority to record, at its own expense, the copyrighted musical composition entitled (the Composition) and to use recordings of the Composition in commercials (the Commercials) advertising the products and/or services of Advertiser, subject to the applicable conditions contained herein."

When an agency commissions the writing of a new song for a commercial, it usually acquires all rights in the jingle for its client. The agreement for a hit song, however, is much less encompassing, as it is purely a license that permits the agency to do certain things during a specified period of time under certain conditions, with a termination of all rights after the agreement is over. (Table 9.1 shows some hit songs used in TV commercials.) The following sections explain the more important issues that occur during such negotiations.

TABLE 9.1 Hit Songs Used in TV Commercials

<i>Song Title</i>	<i>Product</i>	<i>Genre</i>
"Theme to a Summer Place"	Toyota	Movie Theme
"Take My Breath Away"	Gain Detergent	Pop Hit
"Old Time Rock n' Roll"	Guitar Hero	Classic Rock
"Peter Gunn Theme"	Chase	TV Theme
"The Odd Couple Theme"	Subway	TV Theme
"Work It"	iPod/iTunes	R&B/Hip Hop Hit
"Addams Family" Theme	M&Ms	TV Theme
"Purple Haze"	Pepsi	Classic Rock
"Let's Get Down"	Campbell's	Hip Hop Hit
"Rockin' Me Baby"	Wrangler	Classic Rock
"Blue Skies"	HP	Standard
"I Want to Be Free"	Coca Cola C2	Rock Hit
"Shaft"	Burger King	Movie Theme
"Taxman"	H&R Block	Classic Rock
"Tonight, Tonight"	Mountain Dew	Broadway Song
"Your Cheatin' Heart"	Pepsi Edge	Country Classic

“Hello Dolly”	Oscar Mayer	Broadway Song
“Pink Panther”	Heineken	Movie Theme
“Rhapsody in Blue”	United Airlines	Standard
“Soak up the Sun”	American Express	Pop Hit
“I’m a Soul Man”	Bic Razors	Soul Classic

Parties to the Agreement

In most cases, the advertising agency gets permission directly from the copyright owner of the hit song, which is usually the music publisher. Occasionally, the songwriter or music publisher has previously signed an administration, collection, or representation agreement, whereby a larger music publisher, law firm, manager, music industry agency, or other representative has been given the authority to negotiate licenses for the commercial exploitation of a particular hit song or catalogue of songs. In that case, the advertising agency will contract with the administrator, who is acting on behalf of the song’s original copyright owner.

Copyright Ownership

Ownership of the existing song is never transferred to the agency, as the agreement is merely a license of certain specified rights. On the other hand, if the agency creates new lyrics for the song, the agency will usually copyright the new material for its client, and the owner of the hit song will usually have no rights to the newly created lyrics.

Duration of License

The term of the commercial license is usually one year for a national campaign plus a number of options (normally one to three additional one-year options at the election of the advertising agency). As marketing campaigns take on many variations, however, the term requested by an agency can be for a day, a number of days, a week, a number of weeks, a month, a few months, a year, multiple years, or any combination thereof. For example, a license can be for a one-day test in one or two cities with options for up to three one-year periods on a national basis if the test results in positive consumer reaction; it can be for one month, as in the case of Christmas campaigns, or for a few days or a few weeks, as with Mother’s Day, Father’s Day, Fourth of July, Easter, Labor Day, Memorial Day, or Thanksgiving Day promotions. On occasion, agencies may request an extended period of time for internet vs. other media duration (for example, one year for television with an additional 120 days for internet usage).

Exclusivity Versus Nonexclusivity

Unless total advertising exclusivity is requested, the music publisher will not be restricted from licensing the song to other advertisers during the duration of the commercial agreement. The agency contract will, however, contain language prohibiting the use of the song in connection with commercials that promote competing or related products. For example, if a song is licensed for a car commercial, the same song may not be given to another automobile maker but can be simultaneously licensed for use in a commercial promoting soda, television sets, hamburgers, or dish detergent under a nonexclusive, noncompetitive product license. Some of these noncompetitive clauses are very broad and restrictive (e.g., restricting a song used in a pie commercial from any type of food product or for a song in a beer commercial being used in connection with any type of beverage), and some are very limited (e.g., restricting a song used in a perfume commercial from use in a campaign for another perfume, but not from ads for cosmetics). If the fee paid for the song is very low, there may be no restrictions at all.

If the campaign is a major one or if the identification of the hit song with the product is considered vital to the promotion, the agency may request total advertising exclusivity. Such exclusivity, however, is rare, because the additional fees payable to the music publisher and songwriter for taking the song entirely off the market are usually prohibitive. Fee quotes from \$250,000 to over \$750,000 are not unusual for one year of total exclusivity. An agency may also lose interest in a song if it discovers that the song is currently being used in another product campaign or has recently been so used. The same considerations come into play when a master recording of a song is being chosen.

### Number of Commercials

The agency contract will specify the number of commercials that will use the song (e.g., “one 30-second television and internet commercial, one 15-second television and internet commercial, and one 30-second radio commercial” including edits, versions and variations) or, if undetermined at the time the contract is signed, a maximum number (e.g., “one 60-second commercial with up to three 20-second edits, cutdowns, or lifts”).

### Payment of Fees

The initial fee is usually paid upon signing the agreement or within a short time, such as 10 days. Any option payments are paid upon the commencement of the option period or within a few days thereafter (e.g., “Within 10 days after the option is exercised or within five days after the option period commences”).

### Exercise of Options

The advertising contract will be structured so that the agency is the party that decides whether or not an option is picked up. This is accomplished by written notice prior to or by the last day of the current contract period (e.g., "in the event that the agency wants to extend the license agreement for an additional one-year period, it must notify the music publisher of its option exercise at least 10 days prior to the expiration of the current period of the term"). If the agency does not exercise such option rights, the license agreement expires and no further use of the commercial (other than the agency's right to submit the commercial for advertising industry award shows or other agreed-upon exceptions) may be made after the current period expires.

### Territory

The territory requested for a major advertising campaign is usually the United States of America, its territories, possessions, and commonwealths, but depending on the potential consumer base for the product, Canada may also be included for an additional fee. If the Internet is included as part of the media use, the territory for this one area will be listed as worldwide. If the product has a regional base, or the planned campaign is designed as a test, or the product is new and the campaign is in a limited introductory stage, the licensed territory may be only one city, one state, a number of cities or states, or any variation thereof. For example, the territory may only be for the city of Baltimore, for the state of Illinois, or for one identified shopping mall in Los Angeles or Atlanta. If the initial territory is limited but the product has national potential, the agency will usually require options for expanded territories. For example, a campaign may be tested in a number of geographically related cities or states (e.g., Los Angeles, San Diego, and San Francisco, or New York, New Jersey, and Pennsylvania) and, if successful, expanded into other regions (Phoenix, Seattle, and Las Vegas, or California, Washington, and Oregon). Or the territory may be defined as geographic areas covering no more than a certain percentage of the U.S. population (e.g., 10%, 20%, etc.) with options extending the commercial into areas covering a larger percentage (e.g., 30%, 50%, 75%, 100%). When a commercial finds consumer acceptance, the agency wants to be able to broadcast the commercial in areas other than those specified in the original license and the variations requested are numerous. Therefore, options for additional media and territories are prevalent in contracts for limited-market or test commercials.

At times, the use of a song in specific foreign countries or throughout the world will also be requested, but this usually occurs only in the case of internationally accepted products (such as Microsoft, Pepsi-Cola, McDonald's, Budweiser, or

Coca-Cola). The addition of foreign countries is usually handled on an option basis unless the agency and sponsor want to make a guaranteed up-front commitment. For example, an agency may license the hit song in the United States for one year with three one-year options and also have the right to extend the use into the United Kingdom for a set fee, into all of Europe for another fee, into Japan for a separate fee, into other selected countries for an additional fee, and for the entire world for yet another fee. There are usually time limits as to when these various options can be exercised by the agency, the specifics of which are subject to negotiation between the music publisher, songwriter, and advertising agency.

### Media

Television, Internet, and radio are the standard media requested, but depending on the thrust of the campaign, print uses (for example, lyrics of the composition used in magazine ads or on billboards) may also be included in the license. Additionally, with commercials being used on motion picture home videos, in motion picture theatres during previews, and on mobile phones, rights for home video, theater promos, mobile phones, may also be negotiated. Other areas that might be included are industrial (internal, sales conferences, showroom displays, in-store, jumbotrons and places of public assembly) as well as B-Roll usage and electronic press kits. Because some agencies also use the hit song as part of their in-store or internet promotions (reduced price CDs, downloads, or giveaways), extra monies may be paid to the music publisher and songwriter for such “point-of-sale non-record store outlet” promotions. For example, an agency may secure an option to distribute up to 50,000 downloads of the song used in the commercial for a one-month period at any time during the license term for either the U.S. statutory mechanical royalty rate or, if acceptable to the writer and music publisher, a reduced mechanical rate. Or there might be a promotion that offers free downloads to the consumer on a redemption basis, depending on whether or not a customer has a winning bottle cap or other instant winner code/number on the inside packaging of a product, among other ways, to win.

When an agency asks for a license for television use, a distinction is many times drawn among free over-the-air television, basic cable, and pay cable, with separate fees usually negotiated for each category. Additionally, certain advertising uses of music may be restricted to use in shopping malls, in-house training sessions, or at sales conventions, the fees for such uses being reduced accordingly. Print, cell phone, mobile device, Internet, and e-mail uses may also be requested. In addition, some agencies may request an option for “in-game” advertising whereby ads may be put into video games (similar to product placement licenses) or digitally inserted into online video games.

Because of the importance of music to certain advertising campaigns, a number of websites devoted to the product will feature the songs and recordings which have been or are being used in the actual commercials. One example is the Lincoln MKS official website which featured the songs "Under the Milky Way" performed by Sia, "Major Tom (Coming Home)" recorded by Shiny Toy Guns and Cat Power's version of David Bowie's "Space Oddity". All the commercials could be played on the site and there was information on each song and the artist. In addition, the site also featured a "making of" section which had performance clips as well as artist interviews.

### Foreign Countries

Because many songs have international appeal, a substantial number of commercial requests come from advertisers in countries outside the United States. Most of these requests pertain to English-speaking territories, but Germany, France, Italy, and Japan can also generate substantial income from such uses. In such cases, the writer or publisher's representative in the foreign country (the subpublisher) will often handle the negotiations after either consulting with or getting approval from the U.S. copyright owner. In the case of a change of lyrics or a foreign-language version being used, the U.S. publisher will virtually always have approval rights. On occasion, the U.S. publisher (on behalf of itself and the songwriters) will negotiate directly by means of e-mail, fax, or telephone with the foreign ad agency and bypass its local subpublisher, but this approach depends on the terms and conditions of the foreign subpublication agreement that controls the song. Because the foreign subpublisher many times is more familiar with what fees the market can bear in its territory than the U.S. publisher, who may be thousands of miles away, the actual negotiations are many times handled by the subpublisher, with either input or approval from the U.S. publisher. Performance royalties can also be earned since many foreign country performing right organizations (e.g., APRA in Australia, PRS in the United Kingdom, etc.) do pay writers and publishers for commercial uses.

### Restrictions on Songwriter/Recording Artists

When an agency pays a well-known writer/performer substantial monies for the use of a song, it may also request a prohibition on the licensing of any other song in the writer's catalogue in conjunction with a competing product during the term of the commercial license agreement. Such catalogue restriction clauses are not common and are totally negotiable, with any prohibition dependent on, among other things, the amount of compensation being paid, if the writer/artist's performance is being used in the commercial, and whether the writer/artist has control over the use of his or her songs and recordings, since in many cases a third-

party music publisher controls the songs and a record company controls the recordings of the writer/artist's performances of those songs.

#### Restrictions on First Broadcast Use by Another Product

Since agencies do pay substantial fees to use hit songs in commercials, some will request that the music publisher not license the song to another advertiser for use in a commercial for a product campaign that will be broadcast in advance of the initial airing of its television, Internet, or radio commercial. Such a request is understandable and may be acceptable, provided that the restriction does not encompass a substantial period of time, that the fee is large enough to compensate for possible loss of other advertising income, and that the publisher is not prohibited from entering into noncompeting product license agreements during the restricted period for commercials that will be broadcast after the expiration of the nonbroadcast period.

#### Lyric Changes or Instrumental Uses

If the lyrics of the hit song are to be revised by the agency to fit the theme of the commercial (e.g., "Fame" becoming "Shorts," and "Leave It to Beaver" becoming "Leave It to Cargo" for Old Navy, "Shaft" becoming "Shaq" for Burger King, and "I'm A Soul Man" becoming "I'm A Bic Man" for Bic razors), or if entirely new lyrics are to replace the original lyrics, the exact nature of the lyric revisions or new lyrics will always be specified in the license agreement so that no misunderstanding will arise between the agency and the music publisher or songwriter as to what was intended and agreed upon prior to the commercial's being on the air. If the composition will be used instrumentally and without the original lyrics, or both instrumentally and with new lyrics in separate commercials, that will also be indicated in the body of the contract. Specificity in this area cannot be overemphasized for the protection of all parties to the license agreement; the more concrete and exact a contract is, the less likely that there will be a lawsuit. It is also very common for a publisher to charge more for the commercial use of a song when a lyric is changed than when it is not.

#### Confidentiality Agreements

On occasion, the advertising agency will ask the music publisher to sign a confidentiality agreement before the agency sends the publisher copies of the storyboard or provides specifics as to the type of marketing campaign and the actual content of the commercial being planned. If such an arrangement is requested by the agency, it usually occurs immediately after a quote for the composition has been given by the publisher, but, in some cases, this arrangement may be requested when the agency contacts the music publisher to ask for the use

of a composition and explains the general nature of the use.

The confidentiality agreement can take many forms but, in most cases, it is a short document. In the agreement, the music publisher acknowledges that, in the course of the development, pre-production, production, or post-production of the commercial, the publisher may learn certain information relating to the products of the client, the advertising plans for the product, and the contents of the commercials relating to the advertised product. In this regard, the music publisher and its employees or affiliated companies agree not to disclose any portion of such information to any third parties without obtaining the prior written consent of either the advertising agency or the client.

Some of the guarantees that may be agreed to by the music publisher, if such a confidentiality agreement is requested or demanded by the advertising agency, are:

That it will not provide anyone with the storyboard, script, advertising copy or other elements used in the development or production of the commercial;

That it will not allow any third parties to view, exhibit, or inspect the commercial prior to the actual broadcast or commercial distribution of the commercial;

That it will not disclose the fee;

That it will not disclose the content of the advertising commercial prior to the initial broadcast or distribution date of the commercial; or

That it will not authorize the release of any promotional or publicity materials about the music publisher that mention the commercial or the services rendered by the music publisher in relation to the commercial.

### Performance Rights

The agreement for a hit song is similar to a television synchronization license in that the advertiser/client (like the producer of a television series) is given the right to include the composition in the commercial, with the broadcast or performance of that composition being conditioned on a radio or television station's having a valid performing right license from ASCAP, BMI, or some other person, firm, corporation, or association (including the music publisher) duly empowered to grant such rights on behalf of the copyright owners.

### Alternative Compensation Packages

A number of sponsors are also funding or contributing to the touring costs of major artists and, as a result, arrangements are many times made to include either concert footage or the artist's songs in advertising commercials for the sponsor's product. In these cases, the commercial licensing fees may be different from the standard advertising agreement since the fee for the use of a song or a performance is made in a different manner. This concept also appears in a number of other variations



where the writer-artist receives compensation (which may be non-monetary in the case of promotion benefits) that may not fit into the format of the traditional advertising commercial license agreement.

### Radio and TV Royalties for Advertising Music

Most music used in commercials is written specifically for the product being promoted. When the agency or sponsor has not bought out the broadcast rights for a jingle, performance royalties can be earned but are usually insignificant unless the advertising campaign lasts many years. Nonetheless, most of the large advertising agencies have had in-house music publishing divisions for many years, and there is a growing trend for even small agencies to set up music publishing companies to collect this source of income.

In the case of hit songs used in commercials, however, substantial monies can be made. All that is needed is information on the advertising field, experience with ASCAP and BMI commercial payments, and reasonableness in one's negotiating position with the agency or sponsor. A single phone call, e-mail, or fax handled correctly, can result in hundreds of thousands of dollars in immediate income, as well as additional dollars in performance royalties.

Extreme care is important when drawing up contracts of this kind as a badly drafted licensing agreement can prevent ASCAP or BMI from licensing the commercial. The ASCAP and BMI payment rules and regulations are very precise as to the reservation of performance rights, qualifying duration for payment, change of original lyrics, product information, voice-overs or written voice-over script details, MP3 submissions, Ad-ID or Competitrack Ad Codes, lead sheets, and the necessity of broadcast schedules.

### Conclusion

Whether one is writing original music and lyrics for an advertising agency, a production music house, or a music library, or has previously existing songs or scores used in a commercial, advertising can be a lucrative area for writers. For many, today's world of advertising music is not the "sell out" of years ago but rather another way of exploiting one's music.

## BOOK REVIEW

# Music Money and Success: The Insider's Guide to Making Money in the Music Business

REVIEWED BY ANDREW M. GOLDSMITH & HOWARD SIEGEL

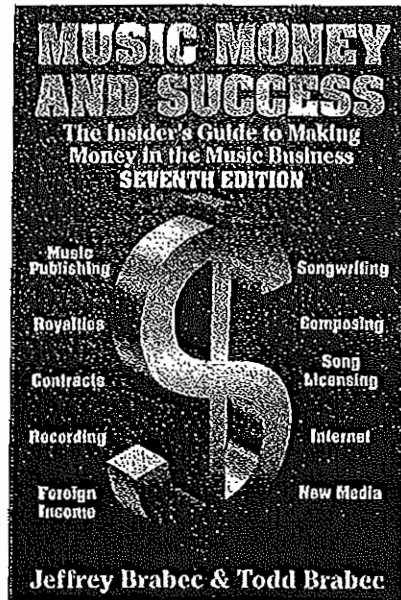
**M**usic Money and Success: The Insider's Guide to Making Money in the Music Business is essential reading for anyone seeking a career in the music industry. The seventh edition of this iconic and well-regarded treatise solidifies its place as the definitive resource for musicians, record producers, music publishers, industry executives, managers, agents, and music attorneys. Well-written, easy to read, thoroughly researched, and extremely detailed, the seventh edition should satiate industry veterans and aspiring novices alike, as well as everyone in between. The book's success lies with the authors' adept explanation of how to create and maintain success in the industry. Also, the book effectively describes, with some measure of success as the predicate, just how revenue flows from the industry's myriad sources down to the writer/artist.

The seventh edition was updated and revised to reflect important changes in the music business since the sixth edition was published in 2008. The seventh edition also features completely new content regarding relevant topics, including Internet karaoke sites; remix agreements; lyrics on merchandise; 360, 270, and 180 record deals; indie record net profit deals; indie film step deals; new media provisions in film contracts; radio and television payment schedules/royalties/bonus provisions; Broadway and Off-Broadway secondary performance market licensing; rates and royalties for streaming music websites; rates and royalties for on-demand music; and licensing for music in apps.

This new edition of *Music Money and Success* begins with a comprehensive and lengthy discussion of music publishing. This chapter provides background information on who publishers are, what publishers do, and how publishers acquire rights to music. It includes a section devoted to listing and explaining the important provisions of songwriter contracts, detailing how publishers work with writers to generate income. In a very thorough discussion, this section of the book walks the reader through every conceivable way in which an artist and publisher can successfully exploit music.

The seventh edition continues in the tradition of its predecessor editions by covering a variety of important, broad, music-related topics. For example, the Brabecs provide a valuable primer on copyright law. The copyright section proves helpful not only for those aspiring to a career in music, but also for those already in the industry in need of a quick refresher course and update. This section explains the principles of copyright law, its application to the music industry, and its practical implications for artists and industry executives alike.

The book also discusses the relationship between artists and record labels. The Brabecs, once again cutting to the chase, explain the "Most Important Points in Every Recording Contract." That section discusses both major label deals and indie record contracts. The seventh edition then shifts to a discussion of how artists and industry executives can use television, film, commercials, video games, and Broadway to generate income. These chapters provide an indispensable "how-to" for artists, artists' representatives, publishers, and record executives seeking to exploit music in these contexts. Next, the seventh edition contains a comprehensive chapter on how to take full advantage of all the facets of new media to generate income. Many readers may find this chapter to be the most pertinent and useful chapter in the book because of the increasing ubiquity of new media and the consequent dwindling revenue streams from more traditional sources. The book's final invaluable chapter, "Putting It All Together," reviews and integrates all of the topics covered by the authors, and facilitates the creation of an informed business plan to further readers' goals.



**Music Money and Success**  
*The Insider's Guide to Making Money  
in the Music Business, 7th Edition*  
By Jeffrey Brabec and Todd Brabec  
2011 • 512 pages • Paper

In sum, the Brabecs once again offer a remarkable and indispensable reference tool. The book is easy to understand and a pleasure to read. Above all, it is a uniquely compiled and comprehensively presented collection of invaluable topical material from which anyone involved, or aspiring to be involved, with the music business, and certainly those considering a career in music, will greatly benefit. The frequency with which one will find occasion to utilize this treatise suggests the wisdom of keeping *Music Money and Success* within arm's reach. ♦

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