

This book focuses on how the advancement of new technologies that allow content to reach global audiences instantly has made it more important than ever for entertainment professionals to familiarise themselves with internationally recognised standards for copyright ownership and licensing. It is intended to provide a practical approach incorporating specific advice and case law in respect of content owners and digital service providers, and also contains an overview of the broader structure of various licensing regimes.

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Published by

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INTERNATIONAL
ASSOCIATION OF
ENTERTAINMENT
LAWYERS

Licensing of Music – from BC to AD (Before the Change / After Digital)

Edited by Adrienn Karancsi & Jim Kendrick



IAEL 2014 – Licensing of Music – from BC to AD (Before the Change / After Digital)

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An Overview of Synchronization Licenses

Authors: Priscilla Mattison & Bernard Resnick



This article will highlight some of the customary practices and considerations in U.S. synchronization license negotiations.

>> Introduction to Synchronization Licenses

Music is an important part of audio-visual projects such as films, television programs, television or Internet advertisements, video games, and Internet websites. If music is written specifically for an audio-visual project, the contract between the producer of the project and the composer will probably specify that the producer owns all rights to that composition. However, in order to use an existing composition in an audio-visual project, the producer will need to get a license from the people or entities that own or control the rights to that composition (what we'll call the "owners"). That license, a "Synchronization License" or "Synchronization and Performing Rights License" (what we'll call a "synch license"), gives the producer the right to "synchronize" the composition with, or include it in timed relation to, the images in the audio-visual project. Uses of compositions in audio-visual projects are not subject to collective or statutory licensing schemes. Each use of an existing composition in an audio-visual project is subject to the approval of the owners, and to negotiation between the owners and the producer regarding the terms of the license.

Sometimes, a composition is used by itself in a film or television program, as when the characters in a television program sing a song onscreen. No existing recording of the composition is used. Only a synch license is required.

Other times, an existing recording of a composition is synched into an audio-visual project, as when the characters in a film dance to a recognizable hit record. In such a case, a second license is required – a “Master Use License”, which is granted to the producer of the audio-visual project by the owner of the master (sound) recording. As with a composition, each use of an existing recording in an audio-visual project is subject to the approval of the recording owners, and to negotiation between the owners and the producer regarding the terms of the license.

The musical composition is generally owned or controlled by one or more music publishers or administrators, or by the composers/songwriters themselves if they have not entered into music publishing or administration agreements. The sound recording is generally owned or controlled by a record label, or by the recording artist herself if she has not entered into a recording contract. In the case where both a recording and a composition are being licensed, and one person or entity owns or controls both the sound recording and the music publishing – for example, an “unsigned” artist who writes his own songs – the two licenses can be combined into a “Master Use and Synchronization License”. Synch licenses go hand in hand with master use licenses (at least when recordings as well as compositions are being licensed), but this chapter will focus on synch licenses and the issues which are more important to the composer/songwriter and music publisher / administrator. A separate chapter in this volume focuses on master use licenses.

Synch licenses are important both for songwriters/composers and music publishers or administrators, on the one hand, and for producers of audio-visual projects on the other hand. First, consider the former. Synch licenses can be significant sources of income and exposure for songwriters/composers and for music publishers / administrators. In an era when mechanical royalties have declined due to shrinking sales of audio-only recordings, synch licenses can be welcome and even vital sources of revenue. Also, if a composition is used within an audio-visual project such as a film, television show, or video game, it is likely that the producer of the audio-visual project will have an advertising, marketing and promotion budget available to

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promote sales of the project. This benefits the songwriter, publisher and administrator because the audio-visual project which has licensed the composition is, in effect, advertising the composition at the same time it advertises the project – especially if the composer and publishing entity receive prominent written credit within the project and in advertisements for the project, and if the recording embodying the composition is used in audio-visual ads for the project (such as a film trailer). Further, a “placement” in a successful audio-visual project can bolster the credibility of the songwriter/composer and publisher/administrator, thus paving the way for the owners to obtain additional synch licenses for that or other compositions.

Now consider the producers of audio-visual projects. Synch licenses are important to them for reasons of aesthetics; using the right music in the right way can enhance the emotional impact of the project. Also, the producer of the audio-visual project can select music designed to appeal to, and increase awareness of the project to, its target audience, capitalizing on the popularity of the performer and music and thereby raising the commercial value of the project. Further, a producer can choose to enter into a specific synch license for reasons of convenience – such as a cooperative publishing company with short turnaround time, a library of pre-cleared music, or a “one-stop-shop” artist/songwriter who owns her own masters and publishing and can give quick approvals.

>> How Synch License Deals Get Started

Synch license deals come about in various ways. Music supervisors for films, television shows, and advertisements seek out music for their projects through their networks of contacts, pre-cleared library sources, listings in tip sheets, and other methods. Music publishers “pitch” their signed writers’ music. Entertainment lawyers and other representatives may also solicit placements of their clients’ music. Synchronization placement specialists offer to represent songs, composers or catalogs to potential users. Independent artists may submit their own music to projects, using tip sheets and other publicly-available information. As suggested above, some synch license deals are made, at least in part, because of personal relationships. A music supervisor

“In the fast paced world of daily television shows, music supervisors may have to race to track down who owns the rights to a composition slated for inclusion in an upcoming show”

might reach out to trusted colleagues to search for the perfect composition to fit a project, often at the last minute and needing to be confident that the purported owner really does control the rights. In the fast-paced world of daily television shows, music supervisors may have to race to track down who owns the rights to a composition slated for inclusion in an upcoming show. To representatives of hit songs, it is common to receive dozens of last-minute requests for television synchronizations during the short window of time that a song is new and considered “hot”.

When both a composition and a recording embodying that composition are being licensed, the owners of the composition and the sound recording each negotiate separately with the producer regarding their respective properties. Generally, however, the license fees for the composition (the synch license) and the sound recording (the master use license) are equivalent. For example, if a television producer plans to license a song for a total budget of \$1,000, typically half of the license budget (\$500) is paid to the owner of the composition, and the other \$500 is paid to the owner of the master recording. If, as in many cases, there are multiple parties that own or control the composition – for example, where the composition was co-written by four songwriters, each of whom has her own publisher – then these parties customarily split the synchronization license fee based on their respective pro rata shares of the underlying musical composition.

The following is an overview of points to be considered when negotiating a synch license deal. This overview takes the perspective of a lawyer representing the owner of a composition. Often the lawyer will be asked to provide a “price quote” for a synch license. Before providing the quote, the lawyer should ask the following questions about the proposed use:

>> Preliminary Questions

Musical Selection: Which composition does the producer of the audio-visual project want to use? The title and composers should be identified so that the parties can be sure they are talking about the same composition.

Territory: What is the geographical territory covered by the license? Will the producer require rights for the whole world or universe, or a more limited territory? The owner might not be able to license the rights for certain territories.

Term: What is the desired length of time of the license? Will it be just for a few weeks or months, for example during the initial broadcast cycle of a short-run reality television program? Or does the producer seek a license for the entire length of copyright?

Exclusivity: Will the grant of synchronization rights in the music be exclusive or non-exclusive? In other words, may the owners seek placements of the composition in other audio-visual projects in the future?

Budget: What is the total budget of the project? What is the music budget?

Usage and Grant of Rights: The producer will generally need to have the rights to publicly perform, reproduce, and distribute the composition as contained in the audio-visual project, in addition to the right to synchronize the composition into the project. The lawyer will also want to know:

- How will the music be used in the project? If in a television or Internet ad, what is the ad for? If in a website, what kind of website is it? If in a film or television program, what is the scene in which the music will be used? A television or film music supervisor or other producer's representative will usually provide a short description of the scene in which the music will be used, and on request he or she might provide actual script excerpts or footage so that the owner knows exactly what will be seen on screen while the music plays. Regardless of the type of audio-visual project, the owner will want to make sure that the use of the music in the proposed context will enhance, not detract from, the stature of the composition. If in a film or television show, will the music be vocally performed by an actor on camera, performed visually by musicians in the background of the scene, or used as mere background to the action on screen, either with vocals or without? Does the producer want to change the lyrics? Will the music be used during the opening

or closing credits? Will the music be used during a particularly important scene which advances the plot forward or serves as a climax of the story? Will the title of the composition also be used as the title of the film or television program?

- Will the audio-visual project use the vocals of the recording, or will the vocals be removed or mixed at such a low volume that the viewer only hears the instrumental portion of the recording?
- How many times within the project will the composition be heard? What will the duration of each use be? Will the producer use the entire composition, or only a small portion of it, for example, up to 30 seconds?
- If the request is for a television program, does the producer wish to license the music for just one episode, or for an entire season, or for use within every episode of the program it produces, for many years to come?
- Will the music also be used in advertisements or trailers for the project? If so, what kind? For example, will the music be contained in television ads for a videogame? In the realm of film or television, an “in-context” use means that the music is used in the trailer or promo exactly as used in the project itself; an “out-of-context” use means that the music is used over a scene other than the one in which it is used in the film or television program itself. Does the producer want to use the music in a soundtrack? If so, will the producer guarantee to use the music in the soundtrack album or release it as a single?
- What kind of distribution will the audio-visual project have? For example, if the audio-visual project is a videogame, will the game be released on a physical format only? Will it be an Internet-based massive multiplayer game? If the audio-visual project is a film or television production, does the producer seek rights for worldwide television of all types, or for free television only? U.S. theatrical distribution? Ex-U.S. theatrical distribution? If a film, will it be released by a major or major independent film studio, or a smaller company? Does the producer seek rights for home video/DVD, downloads, and streaming? If so, the producer will likely want DVD, download and similar rights on a buy-out basis. Does the producer seek the broadest rights possible?

The answers to the above questions may “make or break” the deal, and at the least will inform the price quote.

>> Consideration

Once they reach the stage of negotiating exactly how much money or other consideration will be paid for the license, the parties can use their creativity in structuring a deal.

One possible deal type is a “flat fee” deal. In a flat fee deal, the producer of the audio-visual project pays the owner a one-time price at the inception of the license. A flat fee is appropriate when the distribution and term aspects of the license are fairly straightforward, such as when a producer wants to use a recording in a local television advertisement for a period of six months. A flat fee is also appropriate when a producer has the financial means to obtain the widest territory, longest term and most flexible license possible by making a one-time payment upfront. This is also the most desirable type of deal for the owner. The license fee can range from a couple of hundred dollars for a low-budget television show or film to hundreds of thousands of dollars for major motion pictures. Recent license fees for video games vary from \$1,000 to \$10,000. A national U.S. television advertising campaign generally ranges from \$50,000 - \$100,000 for 13 weeks. Use of a hit song in a promotional campaign on a cable television channel (and the affiliated website) recently paid \$2500 - \$3000 per week in synch license fees. Average recent synch license fees for weekly episodic television programs range from \$250 - \$2,000, and average Hollywood film prices vary from \$10,000 - \$40,000 for compositions contained in recordings by mid-level artists. Logic dictates that expanded rights and uses result in higher license fees. If the recording is to be used several times in the project, over opening or closing credits of a film, as the title of a film, or in out-of-context trailers, then the license fee would tend to be on the higher side. Generally speaking, the more notable the artist and the recording, the higher the price, and of course new hit songs command higher fees.

However, in some cases, the producer does not have a large enough budget to obtain such an array of rights. The project may be a low-budget independent film, a documentary, or just a production that has run out of money. In such

“Step deals are primarily used in films and television shows. Such an arrangement can be satisfactory if the owner is willing to take a leap of faith regarding the project”

instances, the parties may negotiate what is called a “step” deal. In a step deal, the producer usually pays the owner a modest upfront license fee, and promises to make a series of additional payments to the owner if and when certain sales or distribution milestones are achieved, such as the project earning a certain amount of box office gross revenue, or its distribution being expanded into a new territory or format or extended on a television network. Step deals are primarily used in films and television shows. Such an arrangement can be satisfactory if the owner is willing to take a leap of faith regarding the project, but particularly if the up-front fee and exposure make the deal worthwhile in any event.

In some cases, the producer cannot offer any money to the owner. Nevertheless, the owner might still elect to grant the license. Such a license is known as a “gratis” license. In such an instance, the owner may feel that the promotional value of being in the project will likely lead to other licenses and future revenue for this particular piece of music, and/or for the musical artist and composer. A gratis license might be granted for a project such as a low-budget independent film, low-budget television program, student film, or audio-visual project made for charitable purposes; or for a limited use such as “festival license”, which allows a producer to screen a film at a film festival in hopes of securing distribution.

Another possible payment arrangement is a “trade” deal. As in a gratis deal, no money changes hands. However, the producer might be able to offer something of value to the owner in exchange for the license – for example, footage from the project so that the owner can create a promotional, short-form music video for the song at little or no production expense.

Different types of payments are collected and paid in various ways. Generally, the synch license fee is paid up front, and is payable upon commercial release of the audio-visual project. In the instance that the license calls for a “step” payment or some other type of future or contingent compensation, the license agreement would control the frequency and method of payment of additional

compensation. In some territories, additional performance royalties stemming from the use of the composition within the audio-visual production are also collected by the local Performing Rights Organization (“PRO”), which in turn passes the performance royalty along to the composer/writer and publisher/administrator.

>> Other Important Legal Issues

The legal practitioner should also consider several other issues when drafting or reviewing the synch license. These include:

Credit: The owner’s attorney will want to ensure that correct and detailed credits are included in the credit portion of a film or television program, as verifiable credits are vital to the composer’s career and of promotional value to publishing companies. The producer’s attorney may seek to limit the producer’s obligations regarding credits and her liability for any breach of those obligations.

Remedies for Breach of Contract: What rights does the owner have if the producer fails to honor the terms and conditions of the license, and vice versa? Is the license terminated? Are the remedies limited to money damages in court, or can the owner enjoin the further distribution of the audio-visual project in a court of equity? The producer will seek to limit the owner’s remedies to money damages, and will almost always insist that the owner waive any right to enjoin distribution of the project.

Audit Rights: If the financial aspect of the license is based on a “step” arrangement, does the owner have the ability to retain an accountant to examine the financial books and records of the producer in order to verify whether or not money is owed? Who bears the cost of this audit, and where does it take place? Does the owner need to give advance warning in order to conduct the audit?

Venue and Jurisdiction: Most audio-visual projects are distributed in multiple nations. Therefore, it is essential to include dispute resolution, venue, jurisdiction and choice of law provisions in the license to ensure the swift and efficient resolution of any potential future disputes.

Taxes: Each party to the license should agree to pay its respective share of taxes due in connection with the consideration paid. In the situation where the parties are from different nations, the lawyer should be mindful of international tax treaties and the potential for “at source” income taxes which might be levied by the tax authorities.

Warranties and Representations: What if the owner does not hold the rights she claims to hold? The producer will want the owner to warrant that she controls the property being licensed, and to indemnify the producer in the event of any breach of such warranties.

Performance Rights: What about ensuring that performance royalties are paid? The owner of the composition will want to ensure that any performances of the audio-visual project on television or (outside the U.S.) in theaters generate appropriate performance royalties.

>> Conclusion

It is clear that synchronization licenses are an important part of today’s music business. Music is used widely in a variety of audio-visual projects. Today’s songwriters, composers, publishers and administrators rely on the fees generated by synch licenses more than ever before. The use of music in an appropriate project and pursuant to a well-negotiated synch license can bear fruit for many years, both because of the financial value of the synch license itself and because of the exposure gained from the placement. Because synch licenses are negotiated directly between the producers of audio-visual projects and the holders of the rights in the compositions, they can take many forms and result in diverse types and amounts of payment. Attorneys who are knowledgeable about the relevant issues can help their clients participate in successful collaborations.

An Overview of Master Use Licenses: Film and Television Uses

Authors: Bernard Resnick & Priscilla Mattison



This article will highlight some of the customary practices and considerations in U.S. film and television master use license negotiations.

>> Introduction to Master Use Licenses



Music is an important part of audio-visual projects such as films, television programs, television and Internet advertisements, video games, and Internet websites. If a recording is made specifically for an audio-visual project, the contract between the producer of the project and the performer will probably specify that the producer owns all rights to that recording. However, in order to use an *existing* recording in an audio-visual project, the producer will need to get a license from the person or entity that owns or controls the rights to that recording (what we'll call the "owner"). That license, a "Master Use License", gives the producer the right to "synchronize" the recording with, or include it in timed relation to, the images in the audio-visual project. Uses of recordings in audio-visual projects are not subject to collective or statutory licensing schemes. Each use of an existing recording in an audio-visual project is subject to the approval of the owner, and to negotiation between the owner and the producer regarding the terms of the license.

Each recording of music that is synched into an audio-visual project embodies a composition, and that composition must be licensed, too. A "Synchronization License" or "Synchronization and Performing Rights License" (what we'll call a "synch license") is a license granted to the

producer of a project by the owners of the underlying musical composition. As with a recording, each use of an existing composition in an audio-visual project is subject to the approval of the composition owners, and to negotiation between the owners and the producer regarding the terms of the license.

The sound recording is generally owned or controlled by a record label, or by the recording artist herself if she has not entered into a recording contract. The musical composition is generally owned or controlled by one or more music publishers or administrators, or by the composers/songwriters themselves if they have not entered into music publishing or administration agreements. In the case where one person or entity owns or controls both the sound recording and the music publishing – for example, an “unsigned” artist who writes his own songs – the two licenses can be combined into a “Master Use and Synchronization License”. Synch licenses go hand in hand with master use licenses, but this chapter will focus on master use licenses – specifically, for uses in films and television programs – and the issues which are more important to the recording artist and the record label. A separate chapter in this volume focuses on synch licenses.

Master use licenses are important both for recording artists and for labels, on the one hand, and for producers of films and television programs on the other hand. First, consider the former. Master use licenses can be significant sources of income and exposure for artists and labels. In an era of shrinking sales of audio-only recordings, and insufficient revenue from conditional ownership and streaming to make up the difference, master use licenses can be welcome and even vital sources of revenue. In particular, unlike sales of recordings, which often bring in small amounts of money on a delayed basis, master use licenses often bring in upfront lump sum payments (as discussed below), which can help the owners’ cash flow. Also, having a “placement” in a film or television program means that the artist and label can benefit from the promotion and marketing for that project, especially if the artist and label receive prominent written credit within the project and in advertisements for the project, and if the recording is used in audio-visual ads for the

project (such as a film trailer). Such promotion can lead to further sales or streams of the recording. Further, a placement in a successful film or television show can bolster the credibility of the artist and the label, thus paving the way for the owners to obtain additional master use licenses for that or other sound recordings.

Now consider the producers of films and television programs. Master use licenses are important to them for reasons of aesthetics; using the right music in the right way can enhance the emotional impact of the project. Also, the producer of the film or television program can select music designed to appeal to, and increase awareness of the project to, its target audience, capitalizing on the popularity of the performer and music and thereby raising the commercial value of the project. Further, a producer can choose to enter into a specific master use license for reasons of convenience – such as a cooperative label with short turnaround time, a library of pre-cleared music, or a “one-stop-shop” artist/songwriter who owns her own masters and publishing and can give quick approvals.

A recent example of the importance of a song placement to both owner and producer is the use of the original recording of the 1972 Badfinger song “Baby Blue” for the closing of the finale of the popular AMC cable television channel program, “Breaking Bad”. Using that track was the idea of the series creator, one which took some convincing of the music supervision team^[1] and which ultimately proved very popular with the program’s ardent audience. In the days just after the broadcast, digital sales of the song increased by 2981%, U.S. terrestrial radio spins increased by 1175%, and U.S. streams jumped by 20,000%.^[2]

In fact, over the past few decades master use licenses have become more important than ever before. Although most film production companies still hire composers to create and compose background “score” music for their films, many contemporary films also incorporate single song master recordings into the soundscape. Some contemporary productions rely on outside master recordings to serve as nearly the entire score for the film. Many U.S. television programs, including dramatic and comedy series, license current hit records performed by top artists, so that

“Given the short turnaround required for television programs, the parties involved need to have well-functioning relationships so that the music can be delivered and the rights cleared in time”

the television producers and networks can use the association with the artists to promote upcoming broadcasts. Use of current master recordings by original, independent artists has also been on the rise, with certain music supervisors excelling at finding and placing recordings by artists on the way up.

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>> How Master Use License Deals Get Started

Master use license deals come about in various ways. Music supervisors for films and television programs seek out music for their projects through their networks of contacts, pre-cleared library sources, listings in tip sheets, and other methods. Labels “pitch” their signed artists’ music, both to projects being developed by their affiliated film and television production companies, if they have them, and to outside producers. Entertainment lawyers and other representatives may also solicit placements of their clients’ music. Synchronization placement specialists offer to represent artists, labels or master catalogs to potential users. Independent artists may submit their own music to projects, using tip sheets and other publicly-available information. As suggested above, many deals to license master recordings come about because of relationships between professionals and executives who have worked together before: music supervisors, synch placement specialists, film company music department heads and entertainment law firms are all in regular communication with each other. A music supervisor might reach out to trusted colleagues to search for the perfect recording to fit a project, often at the last minute and needing to be confident that the purported owner really does control the rights. Given the short turnaround required for daily and many weekly television programs, the parties involved need to have well-functioning relationships so that the music can be delivered and the rights cleared in time to broadcast the program.

The owners of the sound recording and the composition each negotiate separately with the producer regarding their respective properties. Generally, however, the license fees for the sound recording (the master use license) and the composition (the synch license) are equivalent. For example, if a television producer plans to license a song for a total budget of \$1,000, typically half of the license budget (\$500) is paid to the owner of the master recording, and the other \$500 is paid to the owner(s) of the composition.

The following is an overview of points to be considered when negotiating a master use license deal. This overview takes the perspective of a lawyer representing the owner of a master recording. Often the lawyer will be asked to provide a “price quote” for a master use license. Before providing the quote, the lawyer should ask the following questions about the proposed use:

>> Preliminary Questions

[Note: Many of the preliminary questions that should be considered in a master use license deal are similar to those that should be considered in a synchronization deal for a musical composition. These are covered in detail in our article “An Overview of Synchronization Licenses” in this volume. Therefore we will consider below only that aspect of identifying the musical selection that is unique to master use licensing.]

Musical Selection: Which master recording does the producer of the film or television program want to use? Is the producer seeking to use the original master recording, or a re-recording or “sound-alike” recording? The title, composers and performers should be identified so that the parties can be sure they are talking about the same recording.

- Many companies create “sound-alike” master recordings for potential placements and licenses. Some sound-alikes are created specifically for the purpose of audio-visual master use license purposes, as the vocals are removed to make it easier to insert and mix the master recording underneath actors’ dialogue. Other sound-alike recordings are made by the original artist, after the expiration of the re-record restriction in the artist’s original recording contract. This allows the artist to offer a quality recording, but also retain all of the money generated by the master use license, rather than have to share it with the record company or even allow the record company to retain the master license fee to reduce the artist’s unrecouped royalty balance. In other situations, sound-alike recordings are made when the original master recording owner will not license the master or even make the original master recording available, for example some theme music from regular sports programming. Finally, some sound-alike recordings update the recording and mixing quality of the original recording. (However, practitioners are advised

to be mindful of advertising uses and right of publicity issues in sound-alike recordings. See, e.g., *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988.)

The answers to the above question and the other questions considered in our synchronization licensing article may “make or break” the deal, and at the least will inform the price quote.

>> Consideration

Once they reach the stage of negotiating exactly how much money or other consideration will be paid for the license, the parties can use their creativity in structuring a deal. This topic is also covered in detail in our synchronization licensing article elsewhere in this volume.

>> Other Important Legal Issues

The legal practitioner should also consider several other issues when drafting or reviewing the master use license. These include the legal issues discussed in our synchronization licensing article. In addition, master use licenses raise the question of new use payments, discussed below:

New Use Payments: What about union obligations? Normally, the owner of the master recording will expect the producer to make any payments required under union agreements to be paid to the musicians or producers on the recording in connection with a “new use” of the recording in a film or television program.

>> Conclusion

It is clear that master use licenses are an important part of today’s music business. Existing recordings are used widely in films and television programs. Today’s musical artists and labels rely on the fees generated by master use licenses more than ever before. The use of music in an appropriate project and pursuant to a well-negotiated master use license can bear fruit for many years, both because of the financial value of the license itself and because of the exposure

gained from the placement. Because master use licenses are negotiated directly between the producers of films and television programs and the holders of the rights in the sound recordings, they can take many forms and result in diverse types and amounts of payment. Attorneys who are knowledgeable about the relevant issues can help their clients participate in successful collaborations.

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- [1] *Steve Knopper, Why 'Breaking Bad' Chose Badfinger's 'Baby Blue' (Oct. 1, 2013)*
<<http://www.rollingstone.com/movies/news/why-breaking-bad-chose-badfingers-baby-blue-20131001>>
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