

# Not In Sync: Music Licensing in the Age of Influencer Advertising

## Labels and Publishers Zero in on Copyright Infringement in Social Media Advertising

**Sheenal Singh**, Senior Associate at MinterEllison and **John Fairbairn**, Partner at MinterEllison, comment on the unauthorised use of sound recordings on platforms.

Sony Music Entertainment (**Sony**) made headlines recently by filing back-to-back copyright infringement lawsuits in the US against the fitness apparel and social media marketing marvel, Gymshark, and the energy drinks brand, Bang Energy, for allegedly using sound recordings without a licence in a range of ads posted on platforms such as TikTok and Instagram.

These proceedings follow on from a similar lawsuit filed by Universal Music Group (**UMG**) against Bang Energy, alleging that it had infringed copyright in UMG-controlled sound recordings and musical works in a number of TikTok posts.

None of these lawsuits joined the social media or user-generated content (**UGC**) platforms (together, **Platforms**) on which the impugned content was posted, or individual users.

In this article, we take a brief look at those lawsuits, which indicate the boundaries of the arrangements between rightsholders and the Platforms, or at least what rightsholders are not prepared to tolerate, with respect to music use. In particular, while personal or non-commercial use of music on a number of major Platforms has become less controversial, the commercial exploitation of music in the age of influencer advertising has arisen as the latest area of conflict.

### The Age of Influencer Advertising

As the popularity of UGC and social media platforms continue to rise, they have become increasingly attractive to advertisers.

In addition to traditional advertising, these Platforms include an increasingly sophisticated do-it-yourself approach to content creation by a particular type of user, namely, the 'influencer'. Influencers are private individuals (and sometimes, organisations) who have cultivated a significant and active audience online, who are recruited to collaborate with brands to promote and endorse products and services in a range of ways. These include sponsored posts, stories and reels heavy with dancing and lip-syncing. They need not be famous, but they must have a following.

As a form of advertising, 'influencer' advertising largely relies on the currency of influence, the power of affect, relatability and shareability for maximum impact. The power of this form of advertising is that it is not as overt as traditional advertising, and it will often seek to appear as more organic - as if it was not in fact promotional in nature. Influencers have become prominent on a number of well-known Platforms, but most notably Instagram and TikTok.

Influencers' blurring of the lines between what is personal and what is promotional became a topic of

interest in Australia this year for other reasons. In particular, the Australian Association of National Advertisers introduced a stricter code of ethics to govern social media advertising.<sup>1</sup> Among other things, where influencers accept money or free products or services in exchange for promoting a brand, the code requires the influencer to make that clear and obvious to the audience (for example, by including '#ad' on a post).

Influencer content has not only broken away from traditional approaches to advertising and endorsements, but also traditional music licensing practices in advertising. There are well established practices for the licensing of the use of music in traditional audio visual advertising, which can be a lucrative source of licensing revenue for rightsholders, and ensures they can control the goods and services with which (sometimes even the persons with whom) their music is associated. However, the process is less established for influencer advertising. Typically, if music is to be included in an audio-visual ad, the relevant rights have to be licensed, including the right to synchronise (or 'sync') a sound recording and the underlying musical work, into a piece of advertising for the intended use. From an Australian perspective, at least with traditional media formats like television, it typically falls on the producers of the content to clear the sync right for the music embedded in the advertisement, whereas the broadcaster, at least with respect

<sup>1</sup> Sophie Aubrey, "So many are unethical": Influencers forced to face up to the rules of advertising" *Sydney Morning Herald* (1 May 2021) <<https://www.smh.com.au/lifestyle/life-and-relationships/so-many-are-unethical-influencers-forced-to-face-up-to-the-rules-of-advertising-20210428-p57n6d.html>>.

to the underlying works, typically obtains the necessary licence to exercise the right to communicate that music to the public.

Various Platforms and influencers seem to be challenging that paradigm. First, the creators of the content are decentralised, and the distinction between a content creator and a consumer is blurred. Second, while the Platform provides tools to allow non-professional users to create and upload content (including in some cases, providing tools to include music), those tools are also available to advertisers and influencers alike – at one level, many Platforms do not distinguish between these types of users.

There has long been a debate about the extent to which the owners of the Platforms can or should be responsible for copyright compliance with respect to what users share and post. From the rightsholders' perspective, they cannot feasibly license users on an individual basis, and so the owners of the Platforms are the logical licensee if they want their users to be free to share whatever content they like. However, Platforms have traditionally asserted that they do not control what their users share and so cannot be responsible if users use copyright material without a licence. Putting this debate to one side, it is clear that

adapting the traditional approach to music licensing in this environment has not been straightforward, and it becomes more difficult to allocate and police responsibility for clearing music rights with respect to UGC, particularly given that the way these Platforms are used by businesses and consumers continually evolves.

### Rightsholders and Platforms

While there were tensions initially, the relationship between music rightsholders and at least some Platforms has become more co-operative. By way of example, the likes of Facebook, YouTube and TikTok have taken up licences with a number of publishers, labels and collecting societies overtime following a number of compliance initiatives in different jurisdictions. Facebook (which owns Instagram) struck a series of licensing deals in 2017 and 2018 with UMG,<sup>2</sup> Sony/ATV Music Publishing,<sup>3</sup> the Warner Music Group (WVG)<sup>4</sup> and APRA AMCOS in Australia.<sup>5</sup> In the last year or so, TikTok also finalised licensing agreements (some reportedly being short-term in nature) with a number of rightsholders including the US National Music Publishers' Association,<sup>6</sup> Sony<sup>7</sup> and ICE<sup>8</sup> in Europe.

Relevant to the issues considered here, in mid-2020, TikTok restricted business accounts on its platform (i.e., accounts used for marketing,

advertising, sponsorships or publicity), so that they could only use a limited library of tracks already cleared for commercial use.<sup>9</sup> A larger suite of commercial tracks remained available to ordinary, 'personal' accounts.

Although the precise terms of these licences are not public (particularly the extent of sync components, if any) they may draw a distinction between commercial and non-commercial uses of the music licensed by several rightsholders to platforms like TikTok and Facebook/Instagram. Whatever non-commercial uses are licensed, or at least tolerated, the lawsuits indicate that rightsholders take a view that commercial uses are not covered, which is what the Sony and UMG lawsuits target. Further, these lawsuits indicate that rightsholders appear to be looking to the businesses behind the commercial uses in terms of enforcement, rather than the Platforms, at least in the first instance.

### The Lawsuits

Filed in April, July and August 2021 respectively, the UMG<sup>10</sup> and Sony lawsuits<sup>11</sup> follow the increased activity of the Recording Industry Association of America in policing copyright infringement on social media sites<sup>12</sup> and they broadly raise the same issues.

- 2 "Facebook and Universal Music Group strike unprecedented global agreement" *Universal Music* (21 December 2017) <<https://www.universalmusic.com/facebook-universal-music-group-strike-unprecedented-global-agreement/>>.
- 3 "Facebook and Sony/ATV Music Publishing Announce Licensing Agreement" *Variety* (8 January 2018) <<https://variety.com/2018/biz/news/facebook-and-sony-atv-music-publishing-announce-licensing-agreement-1202656832/>>.
- 4 "Facebook signs 'holistic' licensing deal with Warner Music Group" *Music Business Worldwide* (9 March 2018) <<https://www.musicbusinessworldwide.com/facebook-signs-global-licensing-deal-with-warner-music-group/>>.
- 5 Brynn Davies, "APRA AMCOS strikes landmark licensing deal with Facebook, songwriters to be remunerated for music usage" *The Music Network* (15 August 2018) <<https://themusicnetwork.com/apra-amcos-strikes-landmark-licensing-deal-with-facebook-songwriters-to-be-remunerated-for-music-usage/>> and "APRA AMCOS strikes a deal with Facebook for licensed music use on platform" *Media Week* (16 August 2018) <<https://www.mediaweek.com.au/apra-amcos-deal-facebook-licensed-music-on-platform/>>.
- 6 Murray Stassen, "TikTok inks global deal with music publishers (who previously threatened to sue it)" *Music Business Worldwide* (23 July 2020) <<https://www.musicbusinessworldwide.com/tiktok-inks-global-multi-year-deal-with-music-publishers/>> and "NMPA and TikTok announce global multi-year partnership agreement" *NMPA* (23 July 2020) <<https://www.nmpa.org/nmpa-and-tiktok-announce-global-multi-year-partnership-agreement/>>.
- 7 Andrew Hutchinson, "TikTok Announces New Agreement with Sony Music, Solidifying Music Industry Connection", *Social Media Today* (2 November 2020) <<https://www.socialmediatoday.com/news/tiktok-announces-new-agreement-with-sony-music-solidifying-music-industry/588232/>>.
- 8 Chris Cooke, "TikTok ends its beef with ICE, agrees licensing deal" *CMU* (27 November 2020) <<https://completemusicupdate.com/article/tiktok-ends-its-beef-with-ice-agrees-licensing-deal/>>.
- 9 Andrew Hutchinson, "TikTok Changes Rules on Music Usage by Businesses" *Social Media Today* (11 March 2020) <<https://www.socialmediatoday.com/news/tiktok-changes-rules-on-music-usage-by-businesses/577734/>> and TikTok, "How to elevate your videos with TikTok's Commercial Music Library" <<https://www.tiktokforbusinesseurope.com/resources/how-to-elevate-your-videos-with-tiktoks-commercial-music-library>> (accessed 21 September 2021).
- 10 *UMG Recordings, Inc. et al v. Vital Pharmaceuticals, Inc. et al* Case #:0:21-cv-60914 (United States District Court, Southern District of Florida, filed 28 April 2021).
- 11 *Sony Music Entertainment et al v Vital Pharmaceuticals, Inc et al* Case #:1:21-cv-22825 (United States District Court, Southern District of Florida, filed 3 August 2021); *Sony Music Entertainment et al v Gymshark Limited et al* Case #:2:21-cv-05731 (United States District Court, Central District of California, filed 15 July 2021).
- 12 Peter Suci, "Social Media's Latest Copyright Crackdown" *Forbes* (14 July 2020) <<https://www.forbes.com/sites/petersuci/2020/07/14/social-medias-latest-copyright-crackdown/?sh=7ef3fc281da9>>.

Importantly, the nature of influencer advertising, which is clearly commercial in nature, is a critical part of the complaints. Those complaints also turn on an argument that the platforms in question are not licensed, and do not license their users, with respect to the sync, reproduction and or distribution of that music for “commercial” or “non-personal” purposes. The two Sony proceedings only relate to alleged infringement of a number of popular commercial sound recordings, while the UMG proceeding concerns infringement of copyright in both the sound recording and underlying musical works.

In summary, based on publicly available information, at this stage the complaints:

1. Largely focus on commercial sound recordings allegedly used without a licence in hundreds of promotional posts featured on TikTok and or Instagram. The posts broadly fall into two categories: those created and posted by the defendants, and those created and posted by the influencers at the defendants’ request (which are then sometimes also reposted by the defendants on their own accounts);
2. Allege both direct and contributory or vicarious infringement of copyright by the defendants. On the latter, the rightsholders’ argument hones in on the extent to which the defendants assist with, cause and or have the ability and authority to control the promotional content created by the influencers (as well as benefit from them financially);
3. Assert the importance of influencer advertising to each of Gymshark and Bang Energy’s brand identity and success;
4. Rely on how influencer advertising works in conjunction with the particular functionalities of the platforms: it promotes a

cycle of sharing and at least in the case of TikTok, Sony argues that users are able to search for videos based on the songs contained in them (therefore, the brand can get the attention of users who would not otherwise be aware of those products); and

5. Importantly, rebut the argument that the platforms provide the use of those songs with a licence. In doing so, the rightsholders draw attention to:
  - (a) TikTok’s Terms of Service<sup>13</sup> which provides that: “NO RIGHTS ARE LICENSED WITH RESPECT TO SOUND RECORDINGS AND THE MUSICAL WORKS EMBODIED THEREIN THAT ARE MADE AVAILABLE FROM OR THROUGH THE SERVICE” (whatever the extent or application of TikTok’s reported music licensing deals, the starting point is that it appears to place the responsibility for music clearances on the user); and
  - (b) Instagram/Facebook’s Music Guidelines which state: “Use of music for commercial or non-personal purposes in particular is prohibited unless you have obtained appropriate licenses.”<sup>14</sup>

Amongst other things, UMG and Sony are seeking injunctive relief, as well as \$150,000 in statutory damages (or such other proper amount) per copyright work infringed.

### What Next?

At the time of writing this article, the defendants in the Sony lawsuits do not appear to have filed an answer to the complaints, while UMG and Bang Energy look to be heading towards a mediation (Bang Energy’s answer filed in that proceeding is not publicly available). If the lawsuits proceed to judgment, the US district courts will potentially have an opportunity

to consider, amongst other things, the underlying arrangements with respect to influencer advertising, the functionalities and terms of use of the platforms (particularly as they relate to secondary liability for copyright infringement), and, potentially, the terms of the platforms’ music licensing deals.

From an industry perspective, these proceedings reflect a desire by music rightsholders to prevent the unauthorised commercial exploitation, as opposed to personal uses, of their copyright, and to some extent, protect their ability to control how their music is used in a commercial context and the sync licensing revenue that they have historically received for the use of music in advertising.

With the interests of rightsholders, several online Platforms, brands and influencers potentially in conflict, it will be interesting to see where the boundaries between commercial and non-commercial use will be drawn, and the extent to which rightsholders can control the commercial use of their music on these platforms.

## Contributions & Comments

Contributions and Comments are sought from the members and non-members of CAMLA, including features, articles, and case notes. Suggestions and comments on the content and format of the Communications Law Bulletin are also welcomed.

Contributions in electronic format and comments should be forwarded to the editors of the Communications Law Bulletin at:  
**clbeditors@gmail.com**

<sup>13</sup> TikTok, “Terms of Service” <<https://www.tiktok.com/legal/terms-of-service?lang=en>> (accessed 15 September 2021).

<sup>14</sup> Facebook, “Music Guidelines” <[https://www.facebook.com/legal/music\\_guidelines](https://www.facebook.com/legal/music_guidelines)> (accessed 15 September 2021).